JOSEPHINE GREGOIRE	*	**NO. 2001-CA-0719**
VERSUS	*	**COURT OF APPEAL**
FAMILY DOLLAR STORES OF BOGALUSA, LA., INC., F/K/A FAMILY DOLLAR STORES, INC.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-7919, DIVISION "E-9"
Honorable Gerald P. Fedoroff, Judge
* * * * * *

Charles R. Jones
Judge
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Max N. Tobias, Jr.)

TOBIAS, J., CONCURS

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AFFIRMED

Defendant/Appellant, Family Dollar Stores of Louisiana, Inc., appeals the district court's judgment awarding Plaintiff/Appellee, Josephine Gregoire, $49,999 in damages for a slip and fall that occurred at the Family Dollar Store on April 6, 1999. We affirm.

Facts

On April 6, 1999, Ms. Gregoire entered the Family Dollar Store in Jefferson, Louisiana (hereinafter "Family Dollar") to shop. As Ms. Gregoire proceeded down an aisle, she noticed a cone on the floor to the right of her situated next to a pole. After an unidentified person indicated that the floor was dry, Ms. Gregoire continued down the aisle onto the left side of the pole. Ms. Gregoire slipped on *Dawn* liquid soap that had spilled on the floor. Ms. Gregoire fell striking her left knee on the floor. Family Dollar, however, disputes that Ms. Gregoire fell and that she struck the floor. Medical records indicate that Ms. Gregoire suffered injuries to her lower back, neck, forearms, hands, wrist and both knees. She saw Chiropractor Dr. Michael Haydel the day after the accident and was treated for thirteen

months thereafter. Ms. Gregoire suffered from a previous knee injury due to a 1997 automobile accident.

Procedural History

Ms. Gregoire filed a Petition for Damages against Family Dollar in Civil District Court for the Parish of Orleans. The parties stipulated that Ms. Gregoire's damages were less than $50,000 and a judgment was rendered in favor of Ms. Gregoire in the amount of $49,999. It is from this judgment that Family Dollar appeals.

LSA-R.S. 9:2800.6
Burden of proof in claims against merchants

In separate assignments of error, Family Dollar argues that the district court was manifestly erroneous in finding that Ms. Gregoire met her burden of proof under LSA-R.S. 9:2800.6 and that the district court erred in failing to determine that Family Dollar met its duty to exercise reasonable care. We find that the issues regarding burden of proof and reasonable care fall within the scope of LSA-R.S. 9:2800.6 and we will address these two issues as one.

LSA-R.S. 9:2800.6 provides that:

> A. A merchant owes a duty to persons who use his premises to *exercise reasonable care* to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a

> reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
>
> B. In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, *the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following:*
>
> *(1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.*
>
> *(2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.*
>
> *(3) The merchant failed to exercise reasonable care. In determining reasonable care, the absence of a written or verbal uniform cleanup or safety procedure is insufficient, alone, to prove failure to exercise reasonable care.*(emphasis added)

In order for this Court to conclude that the district court erred in finding that Ms. Gregoire met her burden of proof under LSA-R.S. 9:2800.6, we have to find that the record supports that: (1) Family Dollar did not present a foreseeable unreasonable risk of harm, (2) that Family Dollar did not create or have notice of the liquid on the floor prior to Ms. Gregoire's fall, and (3) that Family Dollar did not fail to exercise reasonable care. For the reasons stated below, we do not find as such.

Unreasonable risk of harm

Family Dollar argues that Ms. Gregoire did not establish that the condition of the floor did not create an unreasonable risk of harm. It maintains that Ms. Gregoire did not prove at trial that there was a substance on the floor and that her own testimony supports this contention because she testified that she only saw a substance on some "totes" that were located on the shelf.

At trial, Tammy McFarland Jones, the manager of Family Dollar on April 6, 1999, testified that it was apparent that someone came into the store and intentionally squeezed *Dawn* liquid detergent on the counter, the totes and the floor.

Ms. Gregoire's eyewitness, Melissa Williams, could not recall at trial whether she saw that the *Dawn* was on the floor. However, an earlier deposition taken from Ms. Williams and offered into evidence at trial revealed that she had testified to the fact that the *Dawn* was on the floor.

The testimony at trial strongly suggests that there was indeed something on the floor and that Ms. Gregoire slipped on whatever it was. In accordance with LSA. R.S. 9:2800.6, Family Dollar created an unreasonable risk of harm by allowing the dish detergent to drip onto the floor. It further created an unreasonable risk of harm by not thoroughly cleaning the area in which the spill occurred or for leaving the area wet and potentially unsafe.

Although Ms. Jones testified that she believed that the liquid detergent on the floor was an act of vandals, Family Dollar could reasonably foresee that cleaning up the spill could be dangerous for passersby, otherwise, Ms. Jones would not have set a cone out to indicate that there was an obstruction in the aisle.

Notice

This Court further agrees with the district court's finding that Family Dollar had notice of the spill or perhaps created a dangerous situation by attempting to clean up the spill. Ms. Jones testified at trial that a cashier told her that there was a spill. She testified that she cleaned up the spill once with water and a second time with carpet fresh and water. Ms. Jones also testified that she placed one cone in every intersecting aisle that led to the spill, thus totaling three cones. She further testified that approximately twenty minutes later, she was told that a customer had fallen.

The statute is clear. To prove constructive notice, the claimant must show that the substance remained on the floor for such a period of time that the defendant merchant would have discovered its existence through the exercise of ordinary care. *White v. Wal-Mart Stores, Inc*., 97-0393 (La. 9/9/1997), 699 So.2d 1081. In *White*, unlike the instant case, the plaintiff presented absolutely no evidence that the liquid was on the floor for any

length of time. This complete lack of evidence falls far short of carrying the burden of proving that the liquid had been on the floor for such a period of time that the defendant should have discovered its existence. *Id*.

The trial testimony makes it unmistakable that the spill existed prior to Ms. Gregoire falling. Ms. Jones' testimony further makes it clear that Ms. Gregoire fell some twenty minutes after Ms. Jones cleaned the spill. This is enough evidence to support the district court's conclusion that Family Dollar had knowledge sufficient to meet the requirements of LSA-R.S 9:2800.6(B)(2).

Reasonable Care

Family Dollar argues that it acted reasonably in cleaning up the spill and marking the area in which the spill occurred thereby fulfilling its duty to patrons. It further argues that Ms. Jones' testimony that she did indeed clean up helped to support this argument.

Ms. Gregoire maintains that the floor was not properly cleaned and that her attempt to walk around what she thought was the area of danger was precautionary. She testified at trial that when she saw the cone at first she did not move. Then two unidentified women, who were shopping, answered in the negative when she questioned whether the floor was wet. Ms. Gregoire further testified at trial that she moved to her left to avoid the cone

and that her leg slipped from under her.

The district court found that although Family Dollar admitted that there was a spill, Ms. Gregoire proved that they failed to properly clean up the spill and erect adequate warning signs to place the customers on notice. Ms. Gregoire slipped on something and was injured, thus Family Dollar cannot be exculpated from liability. This argument lacks merit.

Comparative Fault

Family Dollar argues that Ms. Gregoire was adequately warned that there was a spill on the aisle and that despite the fact that she suffered from previous injuries she chose to proceed down the aisle at her own risk.

Ms. Gregoire insists that she took all precautions by walking up the left side of the aisle and asking a passerby if the aisle was dry. She further testified at trial that the cone was placed in the aisle where the spill occurred some 20 feet from the spill area, which was corroborated by Ms. Jones' testimony.

In assessing the nature of the conduct of the parties, various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger,

(2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. And, of course, as evidenced by concepts such as last clear chance, the relationship between the fault/negligent conduct and the harm to the plaintiff are considerations in determining the relative fault of the parties. *Medice v. Delchamps Inc*., 96-1868, (La.App. 4 Cir. 4/30/97), 694 So. 2d 528.

In *Medice* we reversed the district court's allocation of fault in an action brought by a grocery store customer who slipped on the floor as result of a procedure to strip built up wax. We allocated fault at 60% to the store and 40% to the customer; concluding that while cones which were placed on the floor gave enough warning to create some comparative fault on the part of the customer, the store made no attempt to actually bar access to the wet area of floor, and could have avoided any inconvenience by stripping wax build-up when the store was closed.

The *Medice* case is distinguishable. In *Medice*, *supra,* the district court found that the placing of the cones was enough warning to support some fault on the plaintiff's part, and we agreed, albeit lowering the percentage of fault. In this case, the district court found the presence of a

cone some twenty feet from the hazard was not enough warning to support any fault on Ms. Gregoire's part. Ms. Gregoire testified that she saw only the single cone, which the manager admitted was placed some twenty feet away from the spill. The district court apparently found Ms. Gregoire's testimony credible. We conclude that the factual finding that Ms. Gregoire was free from fault is not manifestly erroneous.

The fact that no one saw Ms. Gregoire fall is a meritless argument. Ms. Gregoire did suffer from injuries as a result of being in Family Dollar and her medical reports indicate that a knee replacement was recommended prior to the accident, and now is needed even more so. The district court estimated the knee replacement at $20,000, thus the judgment of $49,999 shall remain.

Decree

For the reasons stated herein, we find no manifest error by the district court in its assessment of fault and therefore we affirm the district court's judgment in favor of Ms. Gregoire in the amount of $49,999.

AFFIRME

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