ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA07-236

October 31, 2007

KATHY CRIDER
APPELLANT

V.

JOHN OGLES
APPELLEE

AN APPEAL FROM PULASKI COUNTY CIRCUIT COURT
[CV2005-12765-2]

HON. CHRIS PIAZZA, JUDGE

AFFIRMED

On January 18, 2007, the Pulaski County Circuit Court granted appellee John Ogles's[1] motion for summary judgment on appellant Kathy Crider's claim against him for legal malpractice for failing to bring a personal-injury action within the limitations period. It concluded that appellant's claim would have been unsuccessful, as she could not prove that the owner of the premises where she tripped and fell knew or should have known that a railroad tie was lying in the middle of the parking lot. Appellant now contends that she was not required to make such a showing because she alleged that the parking lot was poorly lit. We affirm, holding that because Louisiana law required appellant to prove that the owner of the premises knew or should have known of the hazardous condition of the parking lot, and because she failed to present such evidence, appellant's legal-malpractice claim based on failure to timely file the lawsuit would not have succeeded.

[1]The Ogles Law Firm, P.A., was also named a defendant in the legal-malpractice suit. For the sake of simplicity, however, we will only refer to Ogles as appellee.

According to her complaint filed October 11, 2005, appellant was injured at a motel in Natchitoches, Louisiana, on September 29, 2003, when she tripped and fell over a railroad tie in the parking lot. She alleged that the accident was the result of inadequate lighting. She hired appellee to represent her, but appellee failed to file suit within the one-year statute of limitations for personal injuries under Louisiana law.

On October 26, 2006, appellee filed a motion for summary judgment, arguing that appellant could not have prevailed in the personal-injury lawsuit even if he had filed it. In support of the motion, he submitted the depositions of appellant and her husband, James Hall. According to appellant's deposition testimony, she and Hall arrived at the motel in Hall's commercial truck at 11:30 p.m. She did not see any lights in front of the motel's office or in the motel's parking lot. She stated that she exited the truck a few minutes after Hall parked the truck. When asked to describe the fall, appellant testified, "It happened so quick I'm really not sure myself." She stated that she had no memory between standing in the parking lot next to the truck and waking up on the ground. When discussing what could have caused her fall, appellant stated that Hall told her that it could have been because of a railroad tie that was part of a nearby flower bed. She noted that the flower bed was to the left of where she fell and that, had she looked to her left, she would have seen the flower bed.

In his deposition, Hall testified that, upon arriving at the motel, he exited the truck to get a room. After getting the room, he returned to the truck and heard appellant crying. He found appellant lying on the ground. When looking for what she could have possibly tripped over, he saw a piece of railroad tie in the parking lot. He did not check to determine if any railroad ties were missing from the flower bed, and he did not know how the railroad tie was placed on the ground.

In opposition to appellee's summary-judgment motion, appellant presented an

affidavit from Hall, wherein he stated that, while he did not see the accident, the only thing in the area that could have caused it was a railroad tie. He also stated that, while there was sufficient lighting to see the ground and the truck, the lighting was insufficient to see the railroad tie.

After a hearing held January 16, 2007, the court granted appellee's motion for summary judgment, finding that there was no evidence that the motel owner had any knowledge that the railroad tie was present. It also found that it was questionable whether appellee actually tripped over the railroad tie. The court entered an order concerning its ruling on January 18, 2007.

The sole issue on appeal is whether the circuit court properly granted appellee's motion for summary judgment on appellant's legal-malpractice claim. Summary judgment should be granted only when there are clearly no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *O'Marra v. Mackool*, 361 Ark. 32, 204 S.W.3d 49 (2005); *Riverdale Dev. Co. v. Ruffin Bldg. Sys. Inc.*, 356 Ark. 90, 146 S.W.3d 852 (2004). The burden of sustaining a motion for summary judgment is the responsibility of the moving party. *O'Marra*, *supra*; *Pugh v. Griggs*, 327 Ark. 577, 940 S.W.2d 445 (1997). Once the moving party has established a prima facie entitlement to summary judgment, the nonmoving party must meet proof with proof and demonstrate the existence of a material issue of fact. *O'Marra*, *supra*; *Pugh*, *supra*. We determine if summary judgment was appropriate based on whether the evidence presented by the moving party in support of its motion leaves a material fact unanswered, viewing the evidence in the light most favorable to the nonmoving party, resolving all doubts and inferences against the moving party. *O'Marra*, *supra*; *George v. Jefferson Hosp. Ass'n Inc.*, 337 Ark. 206, 987 S.W.2d 710 (1999); *Adams v. Arthur*, 333 Ark. 53, 969 S.W.2d 598 (1998). Our review is not limited to the pleadings, but also focuses on the affidavits and

other documents filed by the parties. *Hisaw v. State Farm Mut. Auto Ins. Co.*, 353 Ark. 668, 122 S.W.3d 1 (2003); *Brown v. Wyatt*, 89 Ark. App. 306, 202 S.W.3d 555 (2005). After reviewing the undisputed facts, we will reverse a grant of summary judgment if, under the evidence, reasonable men might reach different conclusions from those undisputed facts. *Hisaw*, *supra*; *Brown*, *supra*.

The supreme court explained the necessary proof for a legal-malpractice claim in *Nash v. Hendricks*, 369 Ark. 60, 68, ___ S.W.3d ____ (2007) (citations omitted):

> An attorney is negligent if he or she fails to exercise reasonable diligence and skill on behalf of a client. To prevail on a claim of attorney malpractice, a plaintiff must prove that the attorney's conduct fell below the generally accepted standard of practice and that such conduct proximately caused the plaintiff damages. To prove damages and proximate cause, the plaintiff must show that, but for the alleged negligence of the attorney, the result in the underlying action would have been different. In this respect, a plaintiff must prove a case within a case, as he or she must prove the merits of the underlying case as part of the proof of the malpractice case. An attorney is not liable to a client when, acting in good faith, he or she makes mere errors of judgment. Moreover, an attorney is not, as a matter of law, liable for a mistaken opinion on a point of law that has not been settled by a court of the highest jurisdiction and on which reasonable attorneys may differ.

Here, the circuit court granted summary judgment because it found that appellant could not prove that the result of her claim would have been different had appellee filed her claim in Louisiana court. With these standards in mind, we must also determine whether appellant could have established negligence under Louisiana law.[2]

To prevail in the typical slip-and-fall case against a merchant under Louisiana law, a plaintiff must establish the traditional elements of duty, breach, causation, and damages, as well as the elements of proof under La. Rev. Stat. Ann. § 9:2800.6 (1997). *See Davis v. M&E Food Mart, Inc*, 829 So. 2d 1194 (La. Ct. App. 2002). Section 9:2800.6 provides in pertinent part:

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[2]There is no real discussion in the parties' briefs as to whether Arkansas or Louisiana law would apply here. Both appear to agree that we should apply Louisiana negligence law. We agree, and we do so.

> 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:
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> (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.

A merchant is "one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business" and includes within that definition "an innkeeper with respect to those areas or aspects of the premises which are similar to those of a merchant." La. Rev. Stat. Ann. § 9:2800.6(C)(2). The statute defines constructive notice as "[proof] that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care." La. Rev. Stat. Ann. § 9:2800.6(C)(1). A party cannot prevail under § 9:2800:6 if he or she is unable to establish the length of time a foreign substance or item remained on the ground before the accident. *See Terry v. Wal-Mart Stores, Inc.*, 780 So. 2d 1251 (La. Ct. App. 2001).

Appellant argues that § 9:2800.6 is inapplicable if she can show that her accident was the result of the "direct and simultaneous negligence of an employee of the defendant." In support, she cites *Crooks v. National Union Fire Ins. Co.*, 620 So. 2d 421 (La. Ct. App. 1993), where a store customer tripped and fell after a store employee pulled a vacuum hose in her path. The jury found in favor of the store after being instructed on the law found in

§ 9:2800.6. The Louisiana Court of Appeals reversed, finding that the general rules of negligence were applicable to that case, as the accident occurred due to a specific act of a store employee and not solely a result of a condition found on the premises.

Contrary to appellant's argument, however, appellant is not alleging a specific act of negligence. Rather, she is alleging that her accident occurred because of a lack of lighting on the premises. Inadequate lighting is a condition of the premises, not a specific act of negligence that would render the provisions of § 9:2800.6 inapplicable. *See also Riolo v. National Tea Co.*, 726 So. 2d 515 (La. Ct. App. 1999) (applying § 9:2800.6(B) when the plaintiff alleged that the hazardous condition was caused by plastic bags littering the parking lot).

Next, appellant relies on *Bostwick v. M.A.P.P. Industries, Inc.*, 707 So. 2d 441 (La. Ct. App. 1997), for the proposition that inadequate lighting may be a defective condition which causes a fall for which an owner may be liable. However, the testimony there showed that the fall resulted from stairs breaking under the victim's foot. While the victim testified that the stairway was not lighted, that condition was insignificant compared with other evidence in that case.[3] *Bostwick* is distinguishable from the instant case.

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[3]The court summarized the victim's testimony as follows:

> Here, plaintiff testified that as he stepped on the first stair it "gave way" beneath him causing his fall down the first half-flight of stairs. He testified that he tried to catch himself, but that there was no handrail to grab. It was about 5:30 P.M. and there was no light in the stairwell. When plaintiff tried to regain his balance and stand on the landing, he was dizzy and his feet got tangled in clear plastic sheeting that had blown off the window, causing him to fall down the second half-flight of stairs. Robert Anderson, a civil engineer, testified as an expert for plaintiff. He stated that the stairs were in extremely poor condition. They differed significantly in height variation, violating local code ordinances. The lighting was poor and there was no handrail. He acknowledged that they were some of the worst stairs that he had inspected. The defense produced no expert regarding the condition of the stairs.

Bostwick, 707 So. 2d at 446.

Finally, appellant compares the instant case to *Simmons v. King*, 833 So. 2d 1148 (La. Ct. App. 2002), which also involved a person tripping and falling over a railroad tie. In that case, however, the railroad tie had been intentionally bolted to the asphalt. The court applied La. Civ. Code Ann. art. 2317.1 (1997), which governs "Damage caused by ruin, vice, or defect in things."[4] A defect under art. 2317.1 "is a flaw or condition of relative permanence in the thing as one of its qualities." *Dauzat v. Thompson Constr. Co., Inc.*, 839 So. 2d 319, 322-23 (La. Ct. App. 2003). A temporary condition may be a hazard, but it does not constitute a defect as contemplated by that statute. *Id.*; *see also Mitchell v. Travelers Ins. Co.*, 464 So. 2d 404 (La. Ct. App. 1985) (stating that rice on the floor of a store does not render a premises defective for the purposes of art. 2317.1). In addition, Louisiana law distinguishes between a hazardous condition "on" the premises, warranting application of § 9:2800.6, as opposed to a defect "in" the premises, making art. 2317 applicable. *See Coleman v. Wal-Mart Stores, Inc.*, 721 So. 2d 1068 (La. Ct. App. 1998).

A railroad tie in the middle of a parking lot would be a hazardous condition "on" the premises, not a defective premise. In addition, defective lighting is not a "flaw or condition of relative permanence." *Simmons* and art. 2317.1 are inapplicable here.

We hold that the provisions of § 9:2800.6 would have been applicable to appellant's claim had appellee filed her lawsuit. Under the provisions of that statute, appellant would have been required to show, among other things, that the motel knew of the hazardous condition in the parking lot or that it would have discovered the hazardous condition had it

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[4]The provision reads:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

exercised reasonable care. Because appellant has presented no evidence regarding how long the railroad tie was on the ground in a hazardous condition, she could not meet her burden of proof under Louisiana law. Thus, the circuit court properly granted appellee motion for summary judgment. Accordingly, we affirm.

Affirmed.

HART and BIRD, JJ., agree.