**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 0850

LILLY EDWARDS

VERSUS

DOLGENCORP, LLC[1] AND
XYZ INSURANCE COMPANY

**Judgment rendered December 23, 2015.**

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C629474
Honorable William A. Morvant, Judge

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**BEFORE: PETTIGREW, HIGGINBOTHAM, AND CRAIN, JJ.**

[1] The original petition for damages incorrectly named the defendant Dolgencorp, LLC. The correct name was provided in the answer filed by DG Louisiana, LLC, following which the petition was formally amended to reflect DG Louisiana, LLC as the correct defendant.

**PETTIGREW, J.**

This is an action for damages based on La. C.C. arts. 2315 (general negligence) and 2317 (custodial liability), and La. R.S. 9:2800.6 (premise liability statute). The plaintiff, Lilly Edwards, appeals a summary judgment granted in favor of the defendant, DG Louisiana, LLC (Dollar General), which owns and operates the Dollar General store where Ms. Edwards allegedly slipped or tripped and fell, sustaining injuries for which she is seeking damages. The district court found Ms. Edwards would be unable to prove Dollar General had knowledge of the hazardous condition that caused her to fall, a prerequisite to the imposition of liability on Dollar General, and granted summary judgment. After a *de novo* review, we also find that no genuine issues of material fact are in dispute and Dollar General is entitled to judgment as a matter of law, because the plaintiff did not present sufficient evidence to factually support a necessary element of her cause of action -- that the defendant either created the allegedly hazardous condition or had actual or constructive knowledge that such condition existed. Accordingly, we affirm the judgment of the district court.

## FACTUAL AND PROCEDURAL BACKGROUND

According to her petition, on or about November 11, 2013, while shopping at the Dollar General store on Airline Highway in Baton Rouge, Ms. Edwards tripped on "an uncommonly dangerously placed box." Later, in deposition testimony, Ms. Edwards clarified that the item she tripped on was a brown poster board with "flaps on each side" and was a little larger in size than the more common white poster boards. The poster boards were being offered for sale in the store, and according to Ms. Edwards, the one she tripped on was on the floor of the school supply aisle. There were other poster boards leaning in an upright position against the store shelving behind them. Also, according to Ms. Edwards' claims, apparently at least one of the poster boards had fallen across the aisle, where it lay at the time Ms. Edwards "turned the corner" into the aisle, tripped on the poster board on the floor, and fell to the ground, resulting in alleged injuries to her knee.

Discovery ensued, consisting of interrogatories and the answers thereto by the parties, as well as the taking of the depositions of Ms. Edwards and Domonique Joseph, a Dollar General employee who was present on the date of this incident. Approximately one month later, the defendant filed the motion for summary judgment that was ultimately granted and forms the basis of this appeal. Following the rendering of the summary judgment, Ms. Edwards filed a motion for new trial, which was denied. A motion to reconsider the motion for new trial was also denied. This appeal by Ms. Edwards followed.

## APPLICABLE LAW

### Summary Judgment

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. **Berard v. L-3 Communications Vertex Aerospace, LLC**, 2009-1202 (La. App. 1 Cir. 2/12/10), 35 So.3d 334, 339-340, writ denied, 2010-0715 (La. 6/4/10), 38 So.3d 302. The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of nondomestic civil actions. La. C.C.P. art. 966(A)(2). Its purpose is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. **Hines v. Garrett**, 2004-0806 (La. 6/25/04), 876 So.2d 764, 769. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to

establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966(C)(2); **Janney v. Pearce**, 2009-2103 (La. App. 1 Cir. 5/7/10), 40 So.3d 285, 288-289, writ denied, 2010-1356 (La. 9/24/10), 45 So.3d 1078.

In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. Because the applicable substantive law determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Clark v. J-H-J Inc.**, 2013-0432 (La. App. 1 Cir. 11/1/13), 136 So.3d 815, 817, writ denied, 2013-2780 (La. 2/14/14), 132 So.3d 964.

A genuine issue is a triable issue. More precisely, an issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 751. A fact is material when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. *Id.* Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. **King v. Illinois National Insurance Company**, 2008-1491 (La. 4/3/09), 9 So.3d 780, 784.

**Premise/Merchant Liability**

The relevant duty and burden of proof in a negligence case against a merchant is set forth in La. R.S. 9:2800.6:

> 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.

C. Definitions:

(1) "Constructive notice" means the claimant has proven that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care. The presence of an employee of the merchant in the vicinity in which the condition exists does not, alone, constitute constructive notice, unless it is shown that the employee knew, or in the exercise of reasonable care should have known, of the condition.

(2) "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. For purposes of this Section, a merchant includes an innkeeper with respect to those areas or aspects of the premises which are similar to those of a merchant, including but not limited to shops, restaurants, and lobby areas of or within the hotel, motel, or inn.

D. Nothing herein shall affect any liability which a merchant may have under Civil Code Arts. 660, 667, 669, 2317, 2322, or 2695.

Thus, generally, a merchant owes a duty to its patrons to exercise reasonable care to keep its floors in a reasonably safe condition and to keep the store free of hazardous conditions. See **Thompson v. Winn-Dixie Montgomery, Inc.**, 2015-0477 at p. 4, 2015 WL 5972562 (La. 10/14/15), ___ So.3d ___.

**ANALYSIS**

Accordingly, in order to prove that her fall was caused by Dollar General's breach of this duty, Ms. Edwards had the burden to prove that the poster board presented an unreasonable risk of harm, that Dollar General either created or had actual or constructive notice of the poster board on the floor of the aisle, and that Dollar General failed to exercise reasonable care.

As the mover in this case, Dollar General does not bear the ultimate burden of proof at trial. Therefore, for purposes of summary judgment, Dollar General had the initial burden of pointing out the absence of factual support for one or more essential elements of Ms. Edwards' cause of action. Dollar General posited that Ms. Edwards had not shown, and would be unable to show, that the allegedly hazardous condition, i.e., the poster board laying across the aisle floor, was created by Dollar General, or that Dollar General knew or should have known that the poster board had fallen onto the aisle floor and presented an unreasonable risk of harm.

In support thereof, Dollar General submitted the deposition testimony of Ms. Edwards wherein she affirmatively stated that she did not think the store employees knew that there was a poster board laying across the aisle on the floor, until after she fell and told them so. She further testified that she did not know how the poster board got on the floor, and she did not know how long the poster board had been on the floor. She did not have any information regarding how the poster board ended up on the floor, or how long it had been there; and she did not have any information to suggest that any employee of the store had placed or caused the poster board to be on the floor. Ms. Edwards also testified that the poster board on which she tripped was being offered for sale and appeared to be brand new, not dented, or otherwise damaged.

Based on this testimony, Dollar General urged Ms. Edwards lacked factual support for and would be unable to meet her burden at trial of proving that: Dollar General employees either created the hazard (i.e., placed the poster board across the aisle on the floor); or that it had actual notice that there was a poster board across the aisle on the floor; or that the poster board had been on the floor across the aisle for some period of time prior to her fall, such that Dollar General employees should have discovered it in the exercise of reasonable care, and had constructive notice of the alleged hazardous condition.

The burden then shifted to Ms. Edwards to produce factual evidence sufficient to establish that she would be able to prove that requisite element at trial. The record before us does not contain the opposition memorandum filed by Ms. Edwards in response

to Dollar General's motion. However, the record does contain a reply memorandum filed by Dollar General that makes specific reference to plaintiff's "Opposition Memorandum." The transcript of the hearing on the motion for summary judgment also references an opposition memorandum filed by Ms. Edwards. The district court noted that in that memorandum, Ms. Edwards sought time for additional discovery. The transcript also reveals there were no attachments to that memorandum and that Ms. Edwards presented no evidence in connection therewith.

After a *de novo* review of the record, we find there is no genuine issue of material fact in dispute, and Dollar General is entitled to judgment as a matter of law. Based upon Ms. Edwards' own testimony, she does not know how the poster board got on the floor; thus, she cannot prove Dollar General created the hazardous condition. Ms. Edwards could not state how long the poster board had been on the floor, or that the store employees had any knowledge that the poster board was on the floor across the aisle. In fact, she testified that she believed the employees did not know the poster board was on the floor until after she fell and told them about it. Thus, through her own testimony, Ms. Edwards established that she had no factual support and would not be able to prove the requisite elements of her cause of action necessary to impose liability on Dollar General under La. R.S. 9:2800.6 for her fall and any resulting injuries. Accordingly, summary judgment was proper.

We also find no merit to Ms. Edwards' argument that summary judgment was premature because she was not afforded an adequate opportunity for discovery. The record reveals that her petition was filed on April 1, 2014. The parties promptly engaged in discovery; both parties propounded and answered interrogatories. Additionally, the depositions of Ms. Edwards and Dollar General's employee, Ms. Joseph, were taken on October 14, 2014. The motion for summary judgment was filed one month later, and the hearing thereon was not held until February 2, 2015. Contrary to Ms. Edwards' complaints, as noted by the district court, from the time the motion for summary judgment was filed until the date of the hearing, approximately three months later, Ms. Edwards made no attempts at additional discovery. Moreover, despite alleging she

needed additional time to locate and depose additional employee witnesses, the district court also noted the absence of any specifically named individual(s) Ms. Edwards intended to depose, or any explanation for why that person(s) was still not identified or located. Our review of the record confirms the observations of the district court and supports our conclusion that Ms. Edwards was given ample opportunity to conduct the adequate discovery contemplated by La. C.C.P. art. 966(C)(1).

**CONCLUSION**

For all the foregoing reasons, summary judgment is proper, and the February 18, 2015 judgment granted in favor of Dollar General, dismissing Ms. Edwards' case with prejudice, is hereby affirmed. Costs of this appeal are assessed to Lilly Edwards.

**AFFIRMED.**