

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2020 CA 0665

WILMA WYRICK AND WALTER WYRICK

VERSUS

GOLDEN NUGGET LAKE CHARLES, LLC D/B/A
GOLDEN NUGGET LAKE CHARLES

Judgment Rendered: DEC 30 2020

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 651132

The Honorable Richard "Chip" Moore, III, Judge Presiding

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Zachary R. Christiansen
New Orleans, Louisiana

Counsel for Plaintiffs/Appellants
Wilma Wyrick and Walter Wyrick

Kyle M. Beasley
Lake Charles, Louisiana

Counsel for Defendant/Appellee
Golden Nugget Lake Charles, LLC
d/b/a Golden Nugget Lake Charles

* * * * *

BEFORE: HIGGINBOTHAM, THERIOT, AND WOLFE, JJ.

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THERIOT, J.

In this premises liability suit, the plaintiffs appeal a summary judgment dismissing plaintiffs' claims against the defendant property owner with prejudice. For the reasons set forth herein, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Wilma Wyrick and her son, Walter Wyrick, filed a petition for damages against Golden Nugget Lake Charles, LLC d/b/a Golden Nugget Lake Charles ("Golden Nugget") on September 6, 2016, alleging that Wilma had been injured due to Golden Nugget's failure to exercise reasonable care and to keep its premises free from unreasonably dangerous conditions. The plaintiffs alleged that on September 8, 2015, Wilma was a guest at the Golden Nugget, along with Walter and his family. Wilma was using her own battery-powered scooter to move around the slot machine area. She stopped her scooter alongside the right front corner of slot machine number CC1305, swiveled her scooter chair around to face the machine, and proceeded to gamble while still seated on her scooter. After she finished playing, Wilma attempted to maneuver her scooter away from the slot machine, but ended up running into the corner of the slot machine base and cutting her left leg on the edge, which she alleged was "hazardously sharp." Wilma was initially taken by ambulance from the Golden Nugget to the hospital, and the injury to her leg ultimately required a skin graft and months of treatment with a wound care specialist and a dermatologist.

Golden Nugget filed a motion for summary judgment, arguing that the plaintiffs would be unable to carry their burden of proving all of the required elements of their claims under La. R.S. 9:2800.6 and the applicable jurisprudence. In support of its motion for summary judgment, Golden Nugget filed the depositions of Wilma, Walter, and William Allen Vermeulen, II, Golden Nugget's Director of Slot Operations, as well as Vermeulen's affidavit. Wilma and Walter

opposed the motion for summary judgment and filed Golden Nugget's Case Report and attached photographs of the slot machine base, photographs of Wilma's injuries, and the affidavit and curriculum vitae of forensic architect Mark E. Williams.¹

Wilma testified at her deposition that she never saw the sharp edge of the slot machine base, either before or after her accident. Although her granddaughter noticed it immediately after the accident and pointed it out, Wilma testified that she did not examine it. Although Wilma knew that her granddaughter took a picture of the slot machine base, she did not look at those pictures. Wilma could not say how or when the base's sharp edge came to be, i.e., whether the slot machine base was in its original condition or had been altered or damaged during its time at the casino. She likewise had no knowledge of whether Golden Nugget had any actual notice of the base's hazardous condition.

Walter testified that he did not know whether the slot machine base was delivered from the manufacturer assembled or built on site, nor did he know whether the base was in its original condition on the date of Wilma's accident or had been altered at some point. Although he had been to Golden Nugget before, he had never noticed the sharp edge of this slot machine base prior to Wilma's accident. Upon examining several slot machine bases at the Golden Nugget after Wilma's accident, Walter noticed that the other bases were smooth where the base that caused Wilma's injury was sharp.

Vermeulen, Golden Nugget's Director of Slot Operations, testified that his responsibilities include placement, upkeep, and maintenance of the slot machines, including the bases. He testified that Golden Nugget does not have a policy

¹ The plaintiffs' initial opposition to Golden Nugget's motion for summary judgment was untimely, and Golden Nugget objected to the untimely opposition in a reply memorandum. At the hearing on the motion for summary judgment, the trial court granted an unopposed motion to extend the pretrial scheduling deadlines without date, on the grounds that discovery was incomplete, and continued the hearing on Golden Nugget's motion for summary judgment. When the motion for summary judgment was reset for hearing after an opportunity for additional discovery, the plaintiffs filed a new opposition to the motion, which added Williams' affidavit in support of their opposition. Golden Nugget did not object to any of the documents filed by the plaintiffs.

regarding inspection or preventive maintenance of the slot machine bases, and no employee is specifically tasked with inspecting the bases. However, Vermeulen explained that staff is on site 24/7, “regularly walking their sections, reviewing, looking at machines,” and “[s]afety belongs to everybody.” Vermeulen testified that prior to Wilma’s accident, he was not aware of any reports of damage, needed repairs, or sharp edges in reference to the slot machine base that caused Wilma’s injury. Further, he testified that Wilma was the first casino patron to claim injury as a result of a sharp edge on a slot machine base. Vermeulen testified that the slot machine base that caused Wilma’s injury was the same base used on all of the other slot machines at Golden Nugget. The bases had been manufactured by VSR Industries and delivered on pallets to the casino prior to its opening. Once received at the casino, the pallets were broken down and the bases were arranged on the casino floor. Although some assembly of the bases was required once they arrived at the casino, Vermeulen was uncertain whether this assembly work was performed by Golden Nugget employees or by the construction crew working at the casino. This assembly work involved bolting and screwing end plates and metal bullnoses onto the bases. Once assembled and put in place on the casino floor, the base that caused Wilma’s injury had not been altered, disassembled, or moved, although Vermeulen testified that it had been rotated ninety degrees in place.

Williams’ affidavit, offered by the plaintiffs in opposition to the motion for summary judgment, states that as a forensic architect, he provides technical investigations, analysis, reports, and testimony for the resolution of litigation involving personal injury (slip, trip, and fall incidents) and other architectural issues. He is often called upon to analyze, interpret, and apply various relevant industry standards for furniture, fixtures, and equipment in commercial properties. Williams inspected the slot machine base that caused Wilma’s injuries, although he later determined that the base identified to him by Golden Nugget for inspection

was not the correct one. Williams explained that the base cabinets at Golden Nugget consist of a sheet metal skeleton with a black powder coated metal skin on the countertop and opposite front sides. Multiple back-to-back cabinets are joined together with screws for a bank of slot machines, and the exposed skeleton at each end is faced with a sheet metal end cap. The opposing sides of each countertop form a 2 ¼" diameter black bullnose facing the player, and a 2 ¼" black bullnose trim piece is also attached to the countertop at each end cap. Williams examined multiple base cabinets on both sides of the bank of slot machines where Wilma was playing and observed and documented multiple instances of misaligned bullnose trim and exposed edges of sheet metal. Williams also reviewed photographs taken by Walter of the slot machine base that caused Wilma's injuries and noted that they showed "a misaligned bullnose trim, raised above the countertop at the right side end cap." Williams explained that the hazard associated with misaligned joints and exposed sharp edges in architectural casework and furniture, fixtures, and equipment has been well known for many years. Williams concluded that Wilma was injured because the bullnose trim at the end cap was misaligned, causing the unfinished edges of the sheet metal countertop and bullnose to be exposed. He further concluded that any reasonable inspection of the slot machine base by Golden Nugget would have identified the hazard created by the sharp edge, and proper alignment of the bullnose trim would have prevented Wilma's injury.

After a hearing on the motion for summary judgment and taking the matter under advisement, the trial court found that the plaintiffs did not make a positive showing that Golden Nugget either created or had actual or constructive knowledge of the unreasonably dangerous condition. As such, the trial court granted summary judgment in favor of Golden Nugget and dismissed the plaintiffs'

claims with prejudice. The plaintiffs appealed, arguing that a genuine issue of material fact existed and that the trial court erred in granting summary judgment.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. *M/V Resources LLC v. Louisiana Hardwood Products LLC*, 16-0758, p. 8 (La.App. 1 Cir. 7/26/17), 225 So.3d 1104, 1109, *writ denied*, 17-1748 (La. 12/5/17), 231 So.3d 624. A motion for summary judgment is properly granted if the motion, memorandum, and supporting documents 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(A)(3). Factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing a motion for summary judgment, and all doubt must be resolved in the opponent's favor. *Willis v. Medders*, 00-2507, p. 2 (La. 12/8/00), 775 So.2d 1049, 1050 (per curiam).

In determining whether summary judgment is appropriate, appellate courts review evidence de novo under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *M/V Resources LLC*, 16-0758 at p. 9, 225 So.3d at 1109. A summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time. La. C.C.P. art. 966(F).

On a motion for summary judgment, the burden of proof is on the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support

sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1).

In ruling on a motion for summary judgment, the court'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. *Clark v. J-H-J Inc.*, 13-0432, pp. 3-4 (La.App. 1 Cir. 11/1/13), 136 So.3d 815, 817, *writ denied*, 13-2780 (La. 2/14/14), 132 So.3d 964. 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. *Nash v. Rouse's Enterprises, LLC*, 15-1101, p. 3 (La.App. 1 Cir. 2/26/16), 191 So.3d 599, 600-01.

Jurisprudence has recognized that a casino is a merchant for purposes of the Louisiana Merchant Liability Statute, La. R.S. 9:2800.6, which governs negligence claims brought against merchants for accidents caused by a condition existing on or in the merchant's premises. See *Degree v. Galliano Truck Plaza, LLP*, 2018-0663, pp. 4-5 (La.App. 1 Cir. 1/10/19), 271 So.3d 315, 318; see also *Lewis v. Jazz Casino Co., L.L.C.*, 17-0935, pp. 6-7 (La. App. 4 Cir. 4/26/18), 245 So.3d 68, 73, *writ denied*, 18-0757 (La. 9/21/18), 252 So.3d 877. Under the Louisiana Merchant Liability Statute, 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. La. R.S. 9:2800.6(A).

Merchants are not insurers of their patrons' safety, and a customer is under a duty to use ordinary care to avoid injury. *Cusimano v. Wal-Mart Stores, Inc.*, 04-0248, p. 7 (La.App. 1 Cir. 2/11/05), 906 So.2d 484, 488. A merchant is not absolutely liable every time an accident happens. *Leonard v. Wal-Mart Stores, Inc.*, 97-2154, p. 4 (La.App. 1 Cir. 11/6/98), 721 So.2d 1059, 1061. Thus, 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.

La. R.S. 9:2800.6(B)

Under this heavy burden of proof, if any one of these elements cannot be established, the claimant's entire action will fail. *Adams on Behalf of D.K. v. Wal-Mart Stores, Inc. Store #542, 18-1706*, p. 4 (La.App. 1 Cir. 9/27/19), 286 So.3d 452, 454.

Neither party has offered any evidence to show that Golden Nugget had actual notice of the hazardous condition of the slot machine base. Constructive notice under the Louisiana Merchant Liability Statute means that 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. La. R.S. 9:2800.6(C)(1). Whether the period of time is sufficiently lengthy that a merchant should have discovered the condition is necessarily a fact question; however, there remains the prerequisite showing of some time period. A claimant who simply shows that the condition existed without an additional showing that the condition existed for some time before the injury has not carried the burden of proving constructive notice as mandated by the statute. Though the time period need not be specific in minutes or

hours, constructive notice requires that the claimant prove the condition existed for some time period prior to the claimant's injury. *Adams*, 18-1706 at p. 5, 286 So.3d at 455. Neither actual nor constructive notice to the merchant is required if the merchant created the injury-causing condition. *Davis v. Cheema, Inc.*, 14-1316, p. 17 (La.App. 4 Cir. 5/22/15), 171 So.3d 984, 993.

After reviewing the evidence offered in support of and in opposition to the motion for summary judgment, we conclude that genuine issues of material fact remain as to whether Golden Nugget created the hazardous condition, as well as whether Golden Nugget had constructive notice of the hazardous condition. Vermeulen testified that the sheet metal end cap and bullnose trim would have been attached to the base cabinet after it was delivered to the Golden Nugget. Vermeulen could not say for certain who assembled the base cabinet and attached the end cap and bullnose trim, but he acknowledged that it could have been Golden Nugget employees. As such, the evidence before the court on summary judgment reveals that a genuine issue of material fact exists as to the issue of whether Golden Nugget created the condition that caused Wilma's injury. Further, Vermeulen testified that once the slot machine base was assembled and placed on the casino floor before the casino opened for business, it was not moved, altered, or disassembled before Wilma's injury, although it was rotated ninety degrees at some point. He further testified that there had been no reports of damage to the base. In addition, while Williams testified that exposed edges are a well-known hazard and that any reasonable inspection of the bases by Golden Nugget would have revealed the hazard, Vermeulen testified that no employee was tasked with inspecting the slot machine bases. This evidence constitutes a positive showing that a genuine issue of material fact exists as to whether the condition existed for such a period of time that it would have been discovered if Golden Nugget had exercised reasonable care. Because the plaintiffs have demonstrated that genuine

issues of material fact exist as to whether Golden Nugget created or had constructive notice of the hazardous condition on its property, summary judgment dismissing the plaintiffs' claims was inappropriate.

CONCLUSION

The December 4, 2019 judgment of the trial court, which granted summary judgment in favor of Golden Nugget Lake Charles, LLC d/b/a Golden Nugget Lake Charles and dismissed the petition of Wilma Wyrick and Walter Wyrick, is reversed, and this matter is remanded to the trial court for further proceedings. Costs of this appeal are assessed to defendant, Golden Nugget Lake Charles, LLC d/b/a Golden Nugget Lake Charles.

REVERSED AND REMANDED.