UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-3295

(Summary Calendar)

JOSEPHINE COCKRAN MONROE,

Plaintiff-Appellant,

VERSUS

WAL-MART, INC.,

Defendant-Appellee.

Appeal from the United States District Court
For the Middle District of Louisiana
CA 90 70 A M1

(March 23, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Plaintiff, Josephine Cockran Monroe, brought suit against Wal-Mart, Inc. ("Wal-Mart") to recover for injuries and medical expenses that she sustained when she slipped and fell in a Wal-Mart store in Baker, Louisiana.[1] The jury found Wal-Mart negligent, and assigned Wal-Mart 5% of the fault for Monroe's injuries. The

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] This lawsuit was originally filed in Louisiana state court, and was removed to federal district court, pursuant to 28 U.S.C. § 1441 (1988), on the basis of diversity of citizenship. *See id*. § 1332.

remaining 95% fault was assigned to Coca-Cola Co. ("Coca-Cola"), with whom Monroe had settled out of court.[2] The jury found that Monroe would be fully compensated by an award of $5,000 for medical expenses and $25,000 for other damages. The district court entered judgment against Wal-Mart for 5% of these amounts, or $1500. Monroe appeals, claiming that (A) the jury violated Louisiana law by failing to place upon Wal-Mart the primary duty for keeping its floors in a safe condition;[3] (B) the evidence did not support the jury's verdict as to the percentage of fault apportioned to Wal-Mart; and (C) the jury failed to award adequate damages.

I

A

Monroe argues that allocation to Wal-Mart of only 5% of the fault for her accident violated Louisiana law, because Louisiana law places upon a merchant the primary duty for keeping its floors safe. Under Article 9:2800.6 of the Louisiana Revised Statutes, a merchant owes a duty to its customers to keep its floors in a

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[2] Monroe slipped in a puddle of Coke which had been spilled by a Coca-Cola employee. Evidence at trial indicated that the Coca-Cola employee was guarding the spill when Monroe approached, but moved aside and allowed Monroe to step in the spill. *See* Supp. Record on Appeal, vol. II, at 155; *id*., vol. III, at 160.

[3] Monroe argues that, "in allocating only five (5%) percent of the fault to Wal-Mart, the jury failed to realize that it is the store owner who has the duty under the law to exercise reasonable care in maintaining their floors in a reasonably safe condition." Brief for Monroe at 1. Monroe clearly alleges a legal error))misallocation of the duty of reasonable care. Monroe does not contend that the jury disobeyed the instructions of the district court in reaching its verdict. Therefore, we construe her argument as a claim that the jury was improperly instructed on the law of joint tort liability.

reasonably safe condition. La. Rev. Stat. Ann. art. 9:2800.6 (West 1991). However, Article 9:2800.6 does not provide that the merchant's liability may not be reduced in a slip-and-fall case, to the extent that another party is at fault. *See id*.

Monroe relies upon *Truxillo v. Gentilly Medical Bldg., Inc.*, 225 So.2d 488 (La. App. 4 Cir. 1969), for the proposition that Wal-Mart's liability should not be diminished on account of Coca-Cola's negligence. Truxillo slipped and fell on a wet floor in a building owned by Gentilly. *See id*. at 489-90. The floor had just been mopped by an employee of Safeway Janitor Services, a cleaning contractor employed by Gentilly. *See id*. The trial court found Gentilly liable for Truxillo's injuries, and the Louisiana Court of Appeals affirmed:

> [A] person in charge of premises . . . owes to persons impliedly invited on to the premises the duty of reasonable and ordinary care, including keeping the premises in a reasonably safe condition or warning invitees of perils of which he should know in the exercise of reasonable care. Since the duty rested upon Gentilly, Gentilly cannot exculpate itself from liability for breach . . . by blaming its independent contractor Safeway for failure to fulfill Gentilly's obligation.

Id. at 491. According to Monroe, allocation to Wal-Mart of only 5% of the fault for her accident is contrary to *Truxillo*. Monroe argues that Wal-Mart, like Gentilly, cannot be exonerated because of the negligence of a third party.

We disagree with Monroe's argument, because *Truxillo* is distinguishable. In *Truxillo*, Safeway's conduct did not mitigate the fault of Gentilly, because either Gentilly or Safeway or both of them could have adopted measures to warn or protect persons in

the building against the risk of slipping on a wet floor. *See id*. at 490 ("Gentilly did not require and Safeway did not provide any planned system of protecting tenants and their patients [from] possible danger . . . ."). Here, Coca-Cola's negligence mitigated the fault of Wal-Mart. Evidence at trial indicated that the Coca-Cola employee who spilled the Coke was standing over the spill to guard it when Monroe approached. *See* Supp. Record on Appeal, vol. II, at 55. However, the Coca-Cola employee moved aside and allowed Monroe to step in the spill. *See id*., vol. III, at 160. Since the spill was being guarded until just before the accident, there was little that Wal-Mart could have done to prevent it. Any negligence on the part of Wal-Mart, in failing to guard the spill or to clean it up sooner,[4] contributed only slightly to the mishap. Therefore, Coca-Cola's conduct justified a reduction of Wal-Mart's liability.

Furthermore, *Truxillo* was decided eighteen years before passage of the current version of Article 2324 of the Louisiana Civil Code. La. Civ. Code Ann. art. 2324 (West Supp. 1992) Prior to 1987, Article 2324 provided that "[p]ersons whose concurring fault has caused injury, death or loss to another are . . . answerable, in solido." *See id*. art. 2324 note. However, that article was amended in 1987 to provide that, "except . . . as otherwise provided by law, . . . the liability for damages caused by two or more persons shall be a joint, divisible

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[4] Evidence at trial indicated that a Wal-Mart employee was called to clean up the Coke spill, and that he arrived shortly after Monroe fell. *See* Supp. Record on Appeal, vol. II, at 100-01, 153.

obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such

other person . . . ." *Id*. art. 2324(B) & note. In light of the factual distinctions between this case and *Truxillo*, and in light of Article 2324 of the Civil Code, we conclude that the district court properly instructed the jury that the fault for Monroe's accident could be divided between Wal-Mart and Coca-Cola. *See also* La. Civ. Code Ann. art. 1812(C)(2)(b) (West 1990) ("In cases to recover damages for injury, death, or loss, the court may submit to the jury special written questions inquiring as to . . . whether another person, whether party or not, other than the person suffering injury, death, or loss, was at fault, and, if so: . . . The degree of such fault, expressed in percentage."); *cf. Richard v. Dollar General Store*, 606 So.2d 831, 834-35 (La. App. 2 Cir.) (upholding jury verdict which assessed 25% of fault to plaintiff in slip-and-fall case, such that defendant store was only 75% liable), *writ denied*, 608 So.2d 197 (1992).

B

Monroe argues that the evidence does not support the jury's allocation of only 5% fault to Wal-Mart. In assessing the sufficiency of the evidence, our function is "`to ascertain whether there is a rational basis in the record for the jury's verdict; we are forbidden to usurp the function of the jury by weighing the conflicting evidence and inferences and then reaching our own conclusion.'" *Porter v. American Optical Corp*., 641 F.2d 1128, 1137 (5th Cir.) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc)), *cert. denied*, 454 U.S. 1109, 102 S. Ct. 686, 70 L. Ed. 2d 650 (1981). "`[I]t is the function of the jury as the

traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.'" *Id*.

We have reviewed the record thoroughly, and it reveals a rational basis for assigning Wal-Mart only 5% of the fault for Monroe's accident. Evidence in the record supports the conclusion that the spilled Coke was on the floor for only a few minutes before Monroe slipped on it. *See* Supp. Record on Appeal, vol. II, at 155; *id*., vol. III, at 82, 162. There is also evidence that a Wal-Mart employee was called to clean up the Coke spill, and that he arrived shortly after Monroe fell. *See id*., vol. II, at 100-01, 153. Furthermore, evidence indicates that the Coca-Cola employee who spilled the Coke was guarding the spill when Monroe arrived, and that Monroe slipped because the Coca-Cola employee stepped out of her way, allowing her to step in the spill. *See id*., vol. II, at 55; *id*., vol. III, at 160. In light of this evidence, it appears that there was little more that Wal-Mart could have done to prevent Monroe's accident, and that Coca-Cola's negligence was the predominant cause of her injuries. Therefore, there was a reasonable basis for the jury to apportion 95% of the fault for Monroe's accident to Coke, and only 5% to Wal-Mart.

C

Monroe also argues that the jury's award of only $5,000 for medical expenses is unsupported by the evidence, because she incurred $36,000 in medical costs which she attributes to her fall

in Wal-Mart.[5] The jury's damage award for medical expenses finds a rational basis in the evidence. Evidence adduced at trial indicated that Monroe's fall at Wal-Mart only temporarily aggravated an existing spinal condition. *See id*., vol. III, at 111, 134-35. The evidence also showed that some of Monroe's medical treatment, in particular a major operation on her back, was necessitated by a later aggravation of her spinal condition which occurred when she bent over to tie her shoe. *See id*. at 135-36; 2d Supp. Record at 16-18. Therefore, the jury could have reasonably found that only a part of Monroe's total medical expenses was attributable to the accident at Wal-Mart.[6]

II

For the foregoing reasons, we AFFIRM.

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[5] We construe Monroe's argument to assert that she should have been compensated for the entire $36,000 in medical expenses. Monroe does not argue, in the alternative, that if she was not entitled to be compensated for the full $36,000, then she was entitled to some other amount less than $36,000 but greater than $5,000. Therefore, we address only the question whether the evidence supported any award of damages for medical expenses that was less than $36,000.

[6] Furthermore, after a thorough review of the record, it does not appear that the jury's award of $25,000 for other damages, including pain and suffering, lacked evidentiary support.