UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3503
Summary Calendar

RUTH LeBLANC and SAMUEL LeBLANC,

Plaintiffs-Appellees,

versus

KMART CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 92 2828 L 5)

(March 3, 1994)

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Cast in judgment after a bench trial in a personal injury suit brought under section 9:2800.6 of the Louisiana Revised Statutes,[1]

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[*]Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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] La. R.S. 9:2800.6 provides in pertinent part:

> A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles,

KMart Corporation appeals. We affirm.

Background

On August 16, 1991, about 9:30 a.m., Ruth LeBlanc turned into an aisle in the Housewares Department of a KMart store and slipped and fell. The floor was covered by a barely visible opaque, oily substance. A KMart manager discovered a broken bottle of "Goo-Gone," a petroleum-based cleaning product, on a nearby shelf.

The housewares aisle had not been inspected since 6:00 a.m. when the night cleaning crew departed. Although the managers conducted a "walk-through" of the store prior to its opening at 9:00 a.m., none walked down this particular aisle. Maria Boudreaux, a worker in the adjacent Toy Department, passed the aisle several times but did not notice the spill. From the time of the opening until the time of the accident Boudreaux was engaged in conversation with the store manager.

The store manager explained that KMart has no established procedures for scheduled periodic inspections. Instead, employees are instructed to be on the lookout for spills and to clean them up as soon as possible. The spilled Goo-Gone unfortunately escaped detection. Mrs. LeBlanc, aged 64, suffered a fracture of her left kneecap requiring its surgical removal. She spent several months in a wheelchair. After physical therapy, the doctor discovered a small bone fragment lodged in her knee which will prevent her from

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> 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.

regaining the full use of her left leg.

The district court found KMart liable under La. R.S. 9:2800.6 and awarded Mrs. LeBlanc damages for pain and suffering, loss of enjoyment of life, physical disability, and medical expenses.[2] KMart timely appealed.

Analysis

KMart assigns three points of error on appeal. It first argues that Mrs. LeBlanc failed to satisfy La. R.S. 9:2800.6 which requires proof that: (1) the condition presented an unreasonable and foreseeable risk of harm; (2) the merchant created or had actual or constructive notice of the condition; and (3) the merchant failed to exercise reasonable care.[3] We hold that the district court did not clearly err in finding that Mrs. LeBlanc met her burden.

Mrs. LeBlanc testified that as she turned into the housewares aisle she immediately lost her footing. She was surrounded by a slippery layer of Goo-Gone. The presence of this substance on the floor presented an unreasonable and foreseeable risk of harm to Mrs. LeBlanc and other KMart shoppers. A patron in a self-service store, preoccupied with shopping, reasonably may assume that the aisles are clear for passage.[4] It is a given that merchandise

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[2] KMart has not appealed the award to Mr. LeBlanc for loss of consortium.

[3] La. R.S. 9:2800.6; see also **Oalmann v. K-Mart Corp.**, 1993 WL 539873 (La.App., Dec. 30, 1993); **Saucier v. Kugler, Inc.**, 628 So.2d 1309 (La.App. 1993).

[4] **Perez v. Wal-Mart Stores, Inc.**, 608 So.2d 1006 (La. 1992); **Kimble v. Wal-Mart Stores, Inc.**, 539 So.2d 1212 (La. 1989).

displays in successful stores such as appellant's are designed to draw the shoppers' attention away from everything else, including the floor.

KMart possessed constructive notice of this condition. Constructive notice is presumed when a condition "existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care."[5] In this case, the housewares aisle went unattended for several hours. Although Ms. Boudreaux worked nearby, her primary focus was on the Toy Department. The managers, in conducting their walk-through, did not inspect the aisle. Thus from 6:00 a.m. until the time of the accident KMart took no steps to ensure its customers' safety. The evidence sufficiently warrants imputation of constructive notice.[6]

Sufficient evidence also demonstrates that KMart failed to exercise reasonable care. "The merchant's duty of care requires that reasonable protective measures, including periodic inspections, are undertaken to ensure that the premises are kept free from [hazardous] substances."[7] KMart took no such measures. The aisle in question was last inspected at 6:00 a.m.; from that time safety checks were left entirely to the discretion of the employees. "The failure of [KMart] to have in place a uniform,

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[5] La. R.S. 9:2800.6(C)(1).

[6] See e.g., **Perez**; **Parker v. Winn-Dixie Louisiana, Inc.**, 615 So.2d 378 (La.App. 1993).

[7] **Saucier**, 628 So.2d at 1312; **Hall v. Petro of Texas, Inc.**, 580 So.2d 420, 422 (La.App.), writ denied, 584 So.2d 682 (La. 1991); see also **Gonzales v. Winn-Dixie Louisiana, Inc.**, 326 So.2d 486 (La. 1976); **Kavlich v. Kramer**, 315 So.2d 282 (La. 1975).

mandatory, non-discretionary, clean-up and safety procedure reveals a lack of reasonable care on its part."[8]

KMart next charges that Mrs. LeBlanc failed to establish causation, asserting that failure to adduce medical testimony linking her accident with her injuries is a fatal defect as a matter of law. We do not agree. The Louisiana Supreme Court[9] recently made clear that proof by a preponderance of the evidence -- direct or circumstantial -- suffices to satisfy causation. "While expert medical testimony is sometimes essential, . . . as a general rule, whether the defendant's fault was a cause in fact of a plaintiff's personal injury or damage may be proved by other . . . evidence."[10] Mrs. LeBlanc produced such evidence.

KMart's final challenge is to the award of damages to Mrs. LeBlanc for permanent disability. Much discretion must be left to the trier-of-fact in assessing damages, however, as same necessarily depends on the facts and circumstances of each case.[11] We will not disturb the assessment made by the court in this case.

AFFIRMED.

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[8] **Saucier**, 628 So.2d at 1313; see also **Oalmann**; **Richard v. Dollar General Store**, 606 So.2d 831 (La.App.), writ denied, 608 So.2d 197 (La. 1992).

[9] Jurisdiction is based on diversity. As an **Erie** court we are to apply the substantive law of Louisiana.

[10] **Lasha v. Olin Corp.**, 625 So.2d 1002, 1005 (La. 1993); see also **Jordan v. Travelers Ins. Co.**, 245 So.2d 151 (La. 1971); **Oalmann**.

[11] La. Civ. Code art. 2324.1; **Jordan**; **Cobb v. Wal-Mart Stores, Inc.**, 624 So.2d 5 (La.App. 1993).