IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40378
Summary Calendar

DUANE LINUS ROMERO, SR., DARLENE ROMERO and LINUS DUANE ROMERO, SR., as the Administrator of the Estate of his Minor Children, LINUS DUANE ROMERO, JR., BRIDGET ROMERO and HOPE ROMERO,

Plaintiff-Appellant,

versus

K-MART CORPORATION, d/b/a K-MART DISCOUNT STORE NO. 7061,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(6:93-CV-292)

(January 5, 1995)

Before JOLLY, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Linus Romero and his family appeal the judgment of the district court denying their motion for a new trial on the basis of the court's failure to give proffered jury instructions on strict

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

liability at trial. For the following reasons, the judgment of the district court is affirmed.

BACKGROUND

Linus Romero and his family (collectively "Romero") filed suit against the K-mart Corporation ("K-mart") to recover damages resulting from Linus Romero's slip and fall on April 5, 1992 in a K-mart store in New Iberia, Louisiana. The slip and fall was caused by motor oil on the floor of the store's automotive department.

A jury trial was held on November 18, 1993. Although the court instructed the jury on Louisiana's law of negligence, the court refused, despite Romero's request, to instruct the jury on Louisiana's law on strict liability. The jury returned a verdict for K-mart. Romero filed a motion for a new trial based on the court's failure to give the proffered jury instructions. The district court denied the motion. It found that the jury instructions were not warranted by the facts and that the request for the jury instructions was untimely. Romero appeals the judgment of the district court.

DISCUSSION

Romero slipped and fell in K-mart's automotive section. Motor oil was found on the soles of his shoes and an open container of motor oil was located on a shelf in the vicinity of the fall. He alleged in his complaint that a K-mart employee escorted him through the area where he slipped and that the store was negligent in permitting the oil to collect and remain on the automotive

department's floor. Such carelessness and negligence by the store breached its duty to him to provide and maintain safe passageways for its customers. Having been injured as a result of K-mart's breach of this duty, Romero sued to recover damages. Shortly before trial, Romero asserted during the pre-trial proceedings that he also intended to pursue a strict liability claim pursuant to La. Civ. Code art. 2317. Upon objection by K-mart, the district court denied Romero's request for jury instructions on strict liability. The case was tried on the negligence claim with the jury rendering a judgment for K-mart.

In order to have a jury instructed on a possible theory of the case, the instruction must be legally correct, the theory must be supported by the evidence, and the desired instruction must be brought to the court's attention in a timely manner. Pierce v. Ramsey Winch Co., 753 F.2d 416, 425 n.10 (5th Cir. 1985). A decision not to give a jury instruction will not be reversed absent an abuse of discretion. Jackson v. Taylor, 912 F.2d 795, 798 (5th Cir. 1990).

In order to recover under strict liability, a thing which allegedly caused damages must be under the custody of the defendant, the thing must have a defect or a vice, and the defect or vice must cause the damages. Loescher v. Parr, 324 So.2d 441 (La. Ct. App. 1976). A defect is some condition that inheres in the thing as one of its qualities that creates an unreasonable risk of harm to others. Crane v. Exxon Corp., USA, 613 So.2d 214, 219 (La. Ct. App. 1992).

Slip and fall cases are usually litigated as accidents caused by a hazardous condition <u>on</u> the premises or <u>in</u> the premises. <u>See e.g.</u>, <u>Edwards v. K & B Inc.</u>, 641 So.2d 1040 (La. Ct. App. 1994); <u>Choyce v. Sisters of Incarnate Word</u>, 642 So.2d 287 (La. Ct. App. 1994); <u>Tobin v. Wal-Mart</u>, 575 So.2d 946 (La. Ct. App. 1991). If the hazardous condition was <u>in</u> the premises then instructions on strict liability and negligence are warranted; if the hazardous condition is <u>on</u> the premises then an instruction only on negligence is warranted. <u>Edwards v. K & B Inc.</u>, 641 So.2d 1040, 1044 (La. Ct. App. 1994).

The merchant's duty in a slip and fall case, is to keep his aisles, passageways, and floors in a reasonably safe condition. La. Rev. Stat. § 9:2800.6.[1] If a hazardous condition arises that

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[1]The pertinent provisions of La. Rev. Stat. § 9:2800.6 are as follows:

> A. A merchant owes a duty to person who uses 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.
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> 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, and in addition to all other elements of his cause of action, that:
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>> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable;

causes a slip and fall, the merchant has the duty of proving that it was exercising reasonable care through the existence of adequate clean-up procedures. Courville v. Piggly Wiggly Bunkie Co., 614 So.2d 1366 (La. Ct. App. 1993). In this case, the motor oil would have been a hazardous condition on the premises warranting instructions only on negligence and on La. Rev. Stat. § 9:2800.6, which were the instructions given to the jury, see Marshall v. A & P Food Co. of Tallulah, 587 So.2d 103, 107 (La. Ct. App. 1991).

The only case brought to our attention that seems to hold that a jury instruction on strict liability was warranted under these circumstances is the unpublished opinion, LeBlanc v. K-mart Corporation, 1993 WL 262645 (E.D. La. July 2, 1993).[2] In LeBlanc, the plaintiff had slipped and fallen in a puddle of a petroleum-based cleaning product that had spilled from a bottle on a shelf. After a bench trial, the trial court found the defendant had failed to meet its burden of proof in establishing the existence of clean-

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> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence; and
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> (3) The merchant failed to exercise reasonable care.

[2]Romero has also cited Schexnider v. Winn Dixie Louisiana, Inc., 490 So.2d 1095 (La. Ct. App. 1986), as support for the proposition that strict liability is a possible theory of recovery for a slip and fall caused by leakage from a bottle. The court in that case did not address whether these facts could support liability under La. Civ. Code art. 2317, it simply stated that there was no evidence that would support the argument and summarily dismissed plaintiff's arguments. Id. at 1097.

up procedures for spills, pursuant to its duty under La. Rev. Stat. § 9:2800.6. Without any citation to authority, the court also found that the defendant was liable under La. Civ. Code art. 2317 because the bottle was broken and therefore defective. Id. at 3. The Fifth Circuit, in another unpublished opinion, affirmed the district court judgment on the grounds that K-mart had failed to establish clean-up procedure. LeBlanc v. K-mart, 93-3503 at 3 (5th Cir. March 3, 1994). The opinion did not mention strict liability.

Our research has found no Louisiana Supreme Court or intermediate appellate court case that definitively confirms or contradicts the analysis of 2317 in the LeBlanc lower court's decision. The closest case we have found is Touissant v. Guide, 414 So.2d 850 (La. Ct. App. 1989). In this case, the plaintiff's home had been destroyed by a fire which had originated from a neighbor's home. The plaintiff sued his neighbor under La. Civ. Code art. 2317 on the theory that the fire was a defect in the home. The court found that the fire was not a defect because it was not a quality of the house, but was an extraneous force. Id. at 852. It held that La. Civ. Code art. 2317 was inapplicable unless the fire had been caused by some quality of the house. Id. Similarly, it can be argued that the puncture in the can is not a quality of the can, but was caused by some extraneous force, i.e., the K-mart employee or a customer who had punctured the oil can. Thus, liability would not lie unless some quality of the can caused the puncture.

Given the nature of the evidence presented in this case and the absence of controlling Louisiana cases supporting appellant's position, we cannot say that the district court abused its discretion in not giving the jury instructions on strict liability.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.