NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 2073

LEVOLA EDWARDS

VERSUS

WAL-MART STORES, INC.

Judgment Rendered: MAY 2 8 2008

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 544,835

Honorable Timothy E. Kelley, Judge

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

Hughes, J. concurs

GUIDRY, J.

Levola Edwards, a Wal-Mart store patron who slipped and fell on a white, milk-like substance, appeals the judgment of the trial court granting a motion for summary judgment in favor of Wal-Mart Stores, Inc. (hereinafter "Wal-Mart") and dismissing her claim with prejudice. After reviewing the law and evidence, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 2, 2005, Ms. Edwards went to the Wal-Mart store near Cortana Mall in Baton Rouge, Louisiana, with her son, Rod Edwards. While shopping in the store, Ms. Edwards slipped and fell when the basket that she was pushing skidded in a white, milk-like substance on the floor of a shopping aisle, which was located near the front of the store and adjacent to the women's clothing department. Thereafter, Ms. Edwards filed a petition for damages, naming Wal-Mart as defendant.

On February 26, 2007, Wal-Mart filed a motion for summary judgment, particularly asserting that Ms. Edwards could not prove Wal-Mart's actual or constructive notice of the condition that allegedly caused her damages prior to her fall. Following a hearing on May 7, 2007, the trial court rendered judgment in favor of Wal-Mart, granting its motion for summary judgment and dismissing Ms. Edwards's action with prejudice. Ms. Edwards now appeals from this judgment.

DISCUSSION

An appellate court reviews the district court's decision to grant a motion for summary judgment de novo, using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. Boland v. West Feliciana Parish Police Jury, 03-1297, p. 4 (La. App. 1st Cir. 6/25/04), 878 So. 2d 808, 812, writ denied, 04-2286 (La. 11/24/04), 888 So. 2d 231. Summary judgment should be granted if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); Independent Fire Insurance Company v. Sunbeam Corporation, 99-2181, 99-2257, p. 7 (La. 2/29/00), 755 So. 2d 226, 230-231.

On a motion for summary judgment, the mover has the burden of establishing the absence of a genuine issue of material fact. However, if the movant will not bear the burden of proof at trial on the matter before the court, the movant's burden on the motion does not require it to negate all essential elements of the adverse party's claim, action, or defense, but rather to 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. La. C.C.P. art. 966(C)(2). Thereafter, if the adverse party fails to produce factual support sufficient to satisfy its evidentiary burden of proof at trial, there is no genuine issue of material fact and summary judgment must be granted. La. C.C.P. art. 966(C)(2); Boland, 03-1297 at p. 4, 878 So. 2d at 813.

Because Ms. Edwards would have the burden of proof at trial, the determination of whether summary judgment was properly granted turns on whether she failed to establish a prima facie case of premises liability under La. R.S. 9:2800.6, which provides, in pertinent part:

> 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.

Accordingly, Ms. Edwards had to establish, in addition to all the other elements of her cause of action, each of the three enumerated requirements set forth in La. R.S. 9:2800.6(B). White v. Wal-Mart Stores, Inc., 97-0393, p. 3 (La. 9/9/97), 699 So. 2d 1081, 1083-1084. In filing its motion for summary judgment, Wal-Mart specifically questioned Ms. Edwards's ability to establish the second element of La. R.S. 9:2800.6(B) regarding its actual or constructive notice of the condition which caused Ms. Edwards to fall.

To prove constructive notice, the claimant must show that the substance remained on the floor for such a period of time that the defendant would have discovered it by the exercise of ordinary care. White, 97-0393 at p. 7, 699 So. 2d at 1086. Louisiana Revised Statute 9:2800.6 does not allow for the inference of constructive notice absent some showing of this temporal element. Though there is no bright-line time period, a plaintiff must show that the condition existed for such a period of time. 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 plaintiff who simply

shows that the condition existed without an additional showing that the condition existed for some time before the fall 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 period of time prior to the fall. White, 97-0393 at pp. 4-5, 699 So. 2d at 1084-1085. Further, mere speculation or suggestion is not enough to meet the stringent burden imposed upon a plaintiff by La. R.S. 9:2800.6. Allen v. Wal-Mart Stores, Inc., 37,352, p. 5 (La. 6/25/03), 850 So. 2d 895, 898.

In the instant case, Ms. Edwards offered her deposition testimony, deposition testimony of her son, Rod Edwards, answers to interrogatories from Wal-Mart, a copy of the accident report, and photocopies of pictures taken by Wal-Mart of the location of the spill following Ms. Edwards's fall. In her deposition, Ms. Edwards clearly admitted that she did not see the substance that she slipped on and also did not see a Wal-Mart employee in the area. Mr. Edwards stated that at the time Ms. Edwards fell, he was approximately twelve to fifteen feet down the aisle from her and did not see the substance on the floor prior to her fall because the basket was blocking his view. However, after Ms. Edwards fell and Mr. Edwards got closer to the location of the accident, he noticed that the substance on the floor was "milky kind of ice cream type thing." When asked what he noticed about the substance on the floor, Mr. Edwards responded that it was "a milkish color" but "couldn't tell if it was like vanilla ice cream or ... milk" but it was "stretched out." Mr. Edwards further stated that the puddle was a few feet across and looked like it had come out of a shopping basket because there was a trail. However, he could not tell the direction of the trail because the puddle was smeared from the basket. Further, when asked if there was anything he could tell by looking at the substance or from what he was told as to how long it had been

there, Mr. Edwards responded, "[l]ike I said, I just can't. I just got down on my knees."

While this evidence may establish that there, in fact, was a substance on the floor, it does not establish that the condition existed for some period of time before Ms. Edwards fell. Ms. Edwards asserts that the photographs of the substance show that there were several basket tracks running through the substance, and that some parts of the substance had dried, indicating that the substance was on the floor for a period of time. However, the copies of the photographs attached to Ms. Edwards's opposition memorandum are photocopies and due to the quality, do not provide this court with any insight into the condition of the substance on the floor or the length of time that it was present prior to Ms. Edwards's fall.

Additionally, Ms. Edwards asserts that the affidavit of Mr. Edwards executed on April 27, 2007, which was subsequent to his December 8, 2006 deposition, establishes that the substance was on the floor for a period of time. However, the trial court determined that the affidavit was contradictory to Mr. Edwards's deposition testimony and therefore excluded it. From our review of the record in this matter, we agree. In his affidavit, executed after Wal-Mart filed its motion for summary judgment, Mr. Edwards stated that "the concentrated area had dried around the edges and some of the drops appeared to have dried." Mr. Edwards was given several opportunities to identify the substance in his deposition and was specifically asked if there was anything that he noticed about it that would indicate how long it had been on the floor. Mr. Edwards responded, "I can't." As such, the affidavit is clearly contradictory to Mr. Edwards's deposition testimony, and Mr. Edwards offered no explanation for the inconsistency, other than that counsel for Wal-Mart should have asked a more specific question during the deposition. Accordingly, like the trial court, we decline to consider Mr. Edwards's contradictory affidavit in determining whether Ms. Edwards met her burden on the

motion for summary judgment. See Wheelock v. Winn-Dixie Louisiana, Inc., 01-1584, p. 6 (La. App. 1st Cir. 6/21/02), 822 So. 2d 94, 97; Douglas v. Hillhaven Rest Home, Inc., 97-0596, p. 6 (La. App. 1st Cir. 4/8/98), 709 So. 2d 1079, 1083, writ denied, 98-1793 (La. 10/30/98), 727 So. 2d 1161. Absent this affidavit, and as stated above, Ms. Edwards has not presented any evidence that the condition existed for some period of time such that Wal-Mart had constructive notice of the condition as required by La. R.S. 9:2800.6(B)(2). See also La. R.S. 9:2800.6(C)(1).

However, Ms. Edwards asserts that constructive notice is established by the presence of the Wal-Mart employee in the women's clothing department adjacent to where she fell. The only testimony regarding this employee came from Mr. Edwards, who stated in his deposition that "from where the lady was, it should have been very noticeable because it was obvious[ly] noticeable from where she was." However, the record is devoid of any evidence that would support this speculation by Mr. Edwards. Mr. Edwards could not identify precisely how close the Wal-Mart employee was to the location where Ms. Edwards fell, and there is no evidence that the employee either saw the substance prior to Ms. Edwards's fall, or that the employee was in a position to see the substance.[1] Louisiana Revised Statute 9:2800.6(C)(1) provides that the presence of an employee of the merchant in the vicinity in which the condition exists does not, alone, constitute constructive notice.

[1] According to Mr. Edwards's deposition testimony, Ms. Edwards was in the aisle between Mr. Edwards and the Wal-Mart employee, with the Wal-Mart employee at some point behind Ms. Edwards. Mr. Edwards indicated that when he looked down the aisle to call out to his mother, he could see the employee's face behind his mother. However, Mr. Edwards was not able to specifically identify the employee's distance or location from the site of Ms. Edwards's fall, other than to indicate that she was in the area. Mr. Edwards did state in his affidavit that the employee was a "few feet" from the location of the spill, and gave specific directions as far as the location of the employee. However, like the statements regarding the condition of the substance on the floor, we find Mr. Edwards's affidavit testimony on this issue to be contradictory and further supports our decision not to consider the contradictory affidavit on appeal.

Therefore, for the foregoing reasons, we find that Ms. Edwards did not carry her burden of proving Wal-Mart's constructive notice of the condition. Because Ms. Edwards failed to prove an essential element of her cause of action under La. R.S. 9:2800.6, the trial court was correct in granting summary judgment in favor of Wal-Mart and dismissing Ms. Edwards's claim with prejudice.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court, granting summary judgment in favor of Wal-Mart and dismissing Ms. Edwards's claim with prejudice. All costs of this appeal are to be borne by the appellant, Levola Edwards.

AFFIRMED.