SUPREME COURT OF LOUISIANA

98-C-2085

SARA K. SMITH, ET AL.

versus

TOYS "R" US, INC. ET AL.

TRAYLOR, Justice, dissenting.

Under La. Rev. Stat 9:2800.6(A), a plaintiff alleging injury due to falling merchandise must establish that a premises hazard existed to prove the fault of the store owner. The majority states, "proof that an accident occurred does not fulfill the plaintiff's burden in a falling merchandise case. The plaintiff must further prove that the merchant's negligence was a cause of the accident." The majority limited its determination to three possibilities: (1) that Plaintiff caused the toy to fall, (2) another customer caused the toy to fall, or (3) an employee or customer placed the toy in an unsafe position so that it eventually fell. Without any discussion, the majority dismissed the first two possibilities because the trial judge "ruled out" these possibilities.

The majority's conclusion that Plaintiff proved no customer "in the area" could have knocked the toy from the shelf is a facile assumption not based on the record. Plaintiff stated that no other customer was in the immediate area, but also conceded that she did not pay attention to whether there were other customers in the vicinity: "I was not aware of anyone else. I was really into what I was reading. . . [but] saw one lady passing by." From Plaintiff's testimony, I gather that the other customer was walking down the aisle when the accident occurred and was at the scene *immediately* after the toy fell. Plaintiff told the lady the falling toy "really hurt" and the customer responded, "I bet it did," and kept walking. As I read the evidence in the record, there was at least one customer in the area at the time of the accident. However, she produced no one at trial to testify to the accident. Furthermore, she failed to rule out possibilities that the majority failed to consider: that a customer, even one in the next aisle or one further down the aisle, could have pushed or shifted the displayed toys and caused the toy to fall. This is a very likely possibility which was argued by the Defendant but not discussed by the majority.

I would find, as did the court of appeal, that Plaintiff, did not establish a premises hazard. The simple fact that the toy fell does not suffice as evidence of a hazardous condition. The trial

judge and the majority of this court leap from a finding that a toy fell and struck Plaintiff to a finding of sufficient proof of a hazardous condition. The trial court did not find a hazardous condition and committed legal error in awarding Plaintiff damages under the Statute.

Finally, the majority errs in its recitation of facts in stating that Plaintiff sought immediate medical attention for her injuries. Slip Op. at 9. The record clearly indicates that she completed her accident report and then took the time to finish her shopping on the day of the accident. She did not seek medical attention until the following day.

For these reasons, I dissent and would affirm the findings of the court of appeal.