**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1466

BILLIE A. PRITCHETT

VERSUS

DOLLAR GENERAL CORPORATION
AND JANE DOE

VGW by TMH
JJP
TMH

Judgment Rendered: May 6, 2011

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of Washington,
State of Louisiana
Trial Court No. 94714

Honorable Martin E. Coady, Judge Presiding

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Parro, J. concurs in result by TMH
Kuhn, J dissents & assigns reasons

BEFORE: WHIPPLE, PARRO, KUHN, PETTIGREW,
AND HIGGINBOTHAM, JJ.

**HIGGINBOTHAM, J.**

This is a "falling merchandise" case. Defendant appeals a judgment notwithstanding the verdict (JNOV), finding plaintiff free from fault and increasing the jury's medical expense and general damage awards. For the following reasons, we reverse in part, affirm in part, and render.

## BACKGROUND

On November 13, 2005, plaintiff, Ms. Billie A. Pritchett, was shopping for a disposable aluminum pan in the Dollar General store owned and operated by defendant, Dolgencorp, Inc.[1] (hereafter referred to as "Dollar General" or "the store"), in Bogalusa, Louisiana. Ms. Pritchett entered an aisle where two of the store's employees were using a ladder to move merchandise from a top shelf to a lower shelf. Seeing the employees, Ms. Pritchett inquired as to where she might locate a disposable aluminum pan. But she quickly realized that the pans she sought were located on a low shelf directly in front of the ladder where the two employees were working and close by where she was standing. Ms. Pritchett immediately reached around the employees and the ladder, bending over to retrieve the pan herself. She was injured when an unsecured music speaker suddenly, and without warning, fell approximately five feet off of the top shelf, directly onto her head and left shoulder area. Ms. Pritchett sustained head, neck, and shoulder injuries, as well as debilitating headaches; and over the next four years, she sought treatment from a variety of medical providers, including a hospital emergency room, an urgent care facility, her primary care physician, three different neurosurgeons, a neurologist, a chiropractor, physical therapists, and an orthopedic surgeon.

Ms. Pritchett brought suit against Dollar General, claiming that the store and/or the two store employees had negligently caused the speaker to fall on her head without any warning of the danger. Dollar General asserted that Ms. Pritchett either

[1] Dolgencorp, Inc. was improperly identified in the petition as Dollar General Corporation.

caused the speaker to fall from the middle of the top shelf when she suddenly reached around the employees to retrieve the pan off the bottom shelf, or she contributed to the incident by failing to wait for assistance after being instructed to allow one of the employees to retrieve the desired pan. Ms. Pritchett denied that she was asked to wait for assistance. No one actually saw the speaker fall or knew why it fell from the middle of the top shelf. It was undisputed that this was the only time that a speaker had ever fallen in the store. It was also undisputed that Dollar General employees were trained for general safety issues when restocking shelves, making sure that there was enough space for the products on the shelves and being attentive to customers during the process. After the incident at issue, the store's employees replaced the speaker in the middle of the top shelf.

The case proceeded to a two-day jury trial, after which, the jury returned a verdict finding Dollar General 60% at fault and Ms. Pritchett 40% at fault for causing Ms. Pritchett's injuries. The jury awarded Ms. Pritchett $30,000.00 in general damages ($10,000.00 for pain and suffering, $10,000.00 for mental anguish, and $10,000.00 for loss of enjoyment of life), and $10,000.00 in special damages for Ms. Pritchett's past medical expenses. After adjusting the $40,000.00 damage award to reflect the 40% fault assessed to Ms. Pritchett, she was awarded a total of $24,000.00. The trial judge signed a judgment rendered in accordance with the jury verdict.

Ms. Pritchett filed a timely motion for a JNOV and alternatively, a motion for new trial, on the issues of liability and damages. The trial judge granted the JNOV request on both issues. With respect to liability, the trial judge concluded that there was no evidence presented at trial of any fault on the part of Ms. Pritchett, and entered judgment assigning 100% fault for Ms. Pritchett's injuries to Dollar General. The trial judge increased the special damage award for past medical expenses to $13,606.30, and increased the general damage award to $60,000.00. The judgment granting the JNOV was silent as to Ms. Pritchett's alternative motion for new trial.

This appeal, taken by Dollar General, followed. Dollar General maintains that the trial judge erred in granting the JNOV, erred in modifying the jury's assessment of fault, and erred in increasing the general and special damage awards. Ms. Pritchett did not answer the appeal or file her own appeal.

## LAW AND ANALYSIS

Upon reviewing the record, we note initially that Ms. Pritchett moved for a JNOV, and in the alternative, she contemporaneously moved for a new trial. However, the judgment on appeal that granted the JNOV is silent as to the trial judge's ruling on the alternative motion for new trial. It is well settled that silence in a judgment as to any issue litigated is construed as a rejection of that issue. **Junot v. Morgan**, 01-0237 (La. App. 1st Cir. 2/20/02), 818 So.2d 152, 156. Thus, we conclude that the trial judge implicitly denied Ms. Pritchett's alternative motion for new trial.[2] On appeal, the parties have raised no contentions relating to the trial judge's implicit denial of the motion for new trial. Moreover, the denial of a motion for a new trial should not be reversed on appeal unless there has been an abuse of the trial judge's discretion. See LSA-C.C.P. arts. 1971-1973; **Broussard v. Stack**, 95-2508 (La. App. 1st Cir. 9/27/96), 680 So.2d 771, 781. New trials are not favored, especially when the jury verdict or judgment is supported by the record. **Id.** Because neither party has assigned error to the trial judge's implicit denial of the motion for new trial, we pretermit further discussion of that issue and limit our review to the propriety of the trial judge's granting of Ms. Pritchett's motion for a JNOV and

[2] We reject the line of cases out of the fifth circuit that remand to the trial court for a determination of the new trial issue when the trial court fails to address the alternative request for a new trial as required by LSA-C.C.P. art. 1811C(1), finding a lack of appellate jurisdiction while the new trial motion is pending. See **Petranick v. White Consolidated Indus.**, 03-483 (La. App. 5th Cir. 9/30/03), 857 So.2d 1232, 1233; **Eubanks v. Salmon**, 98-941 (La. App. 5th Cir. 1/5/99), 726 So.2d 430, 432. We conclude that in the interest of judicial economy and the parties' desire to have the litigation concluded, it is better to construe the trial judge's silence as an implicit denial of the alternative motion for new trial, especially when the parties are not complaining about the ruling on appeal. See **Trunk v. Medical Center of Louisiana at New Orleans**, 04-0181 (La. 10/19/04), 885 So.2d 534, 540. See also **Clark v. Matthews**, 04-848 (La. App. 5th Cir. 1/11/05), 891 So.2d 799, 803, writ denied, 05-0473 (La. 4/22/05), 899 So.2d 577, where the fifth circuit declined to remand for a ruling on a motion for new trial, citing the interests of the parties and the concept of judicial economy.

modification of the jury's verdict. See LSA-C.C.P. art. 1811C(3).

Standard of Review

A JNOV is a procedural device authorized by LSA-C.C.P. art. 1811 where the trial judge may correct a legally erroneous jury verdict by modifying the jury's finding of fault or damages, or both. See LSA-C.C.P. art. 1811F; **Doming v. K-Mart Corporation**, 540 So.2d 400, 402 (La. App. 1st Cir. 1989). Louisiana Code of Civil Procedure article 1811 controls the use of the JNOV procedure, but does not specify the grounds on which a trial judge may grant a JNOV. **Hoyt v. State Farm Mut. Auto. Ins. Co.**, 623 So.2d 651, 662 (La. App. 1st Cir.), writ denied, 629 So.2d 1179 (La. 1993). However, the jurisprudential standard to be used in reviewing a JNOV was set forth by the Louisiana Supreme Court in **Davis v. Wal-Mart Stores, Inc.**, 00-0445 (La. 11/28/00), 774 So.2d 84, 89, as follows:

> A JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable men could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. If there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. In making this determination, the court should not evaluate the credibility of the witnesses and all reasonable inferences or factual questions should be resolved in favor of the non-moving party.
>
> The standard of review for a JNOV on appeal is a two part inquiry. In reviewing a JNOV, the appellate court must first determine if the trial [judge] erred in granting the JNOV. This is done by using the aforementioned criteria just as the trial judge does in deciding whether or not to grant the motion. After determining that the trial [judge] correctly applied its standard of review as to the jury verdict, the appellate court reviews the JNOV using the manifest error standard of review. (Citations omitted.)

The rigorous standard of a JNOV is based upon the principle that "when there is a jury, the jury is the trier of fact." **Trunk v. Medical Center of Louisiana at New Orleans**, 04-0181 (La. 10/19/04), 885 So.2d 534, 537 (quoting **Scott v. Hospital Serv. Dist. No. 1 of St. Charles Parish**, 496 So.2d 270, 273 (La. 1986)).

Simply stated, if reasonable persons could have arrived at the same verdict given the evidence presented to the jury, then a JNOV is improper. **Cavalier v. State, ex rel. Dept. of Transp. and Development**, 08-0561 (La. App. 1st Cir. 9/12/08), 994 So.2d 635, 644. Further, if a trial judge determines a JNOV is warranted because reasonable persons could not differ in deciding that an award was abusively high or low, then the trial judge must determine the proper amount of damages. **Id.**

Thus, we must inquire whether the evidence overwhelmingly supports Ms. Pritchett's contention that there was no evidence of fault on her part and whether the damage awards were abusively low. If so, then the trial judge did not err in granting the JNOV, and we must conduct a review of the damage awards based on the trial judge's independent assessment of the damages. **Id.**, 994 So.2d at 645. If, however, reasonable jurors in the exercise of impartial judgment could reach the conclusion that Ms. Pritchett shared a portion of the fault for the injuries she sustained in the store, and that reasonable jurors could have awarded $10,000.00 for special damages and $30,000.00 for general damages, then the trial judge erred in granting the JNOV and modifying the jury's verdict, and the jury's verdict should be reinstated.

We perform our appellate review under the same rigorous standards that governed the trial judge's determination of whether a JNOV was warranted, without evaluating the credibility of witnesses; resolving all reasonable inferences or factual questions in favor of the non-moving party, Dollar General. For simplicity, we will analyze the liability and damage issues separately to determine if the trial judge properly granted the JNOV, assessed fault, and modified the damage awards.

Liability / Assessment of Fault

We first consider the trial judge's grant of the JNOV on the issue of liability. A merchant's duty to keep customers safe from harm caused by falling merchandise is set out under LSA-R.S. 9:2800.6A, which provides:

> 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.[3]

This duty encompasses the responsibility on the part of store employees to place the merchandise safely on the shelf in such a manner that the merchandise will not fall, as well as to replace safely on the shelf such merchandise as has been moved or removed. The employees have the additional responsibility to check the shelves periodically to ensure that the merchandise is in a safe position and does not present an unsafe condition. See **Smith v. Toys "R" Us, Inc.**, 98-2085 (La. 11/30/99), 754 So.2d 209, 215; **Mannina v. Wal-Mart Stores, Inc.**, 99-1102 (La. App. 5th Cir. 2/29/00), 757 So.2d 98, 102, writ denied, 00-0917 (La. 6/2/00), 763 So.2d 597. Essentially, this duty requires the merchant's employees to exercise "the degree of care which would lead to discovery of most hazards." **Matthews v. Schwegmann Giant Supermarkets, Inc.**, 559 So.2d 488 (La. 1990). This duty would naturally extend to store fixtures, such as music speakers, that have been placed on the top of shelves adjacent to a store's aisles in order to broadcast music while customers are shopping. Although evidence of adequate inspection and cleanup procedures may be part of the store's burden to exculpate itself from fault, evidence of the opposite is relevant as part of the customer's burden to prove negligence. See **Smith**, 754 So.2d at 212.

At trial, the burden is on the customer seeking to prove fault on the part of the merchant for having neglected the above-listed responsibilities. The supreme court clarified the plaintiff's burden in **Smith**, 754 So.2d at 212. Proof that an accident occurred does not fulfill the plaintiff's burden; the plaintiff must further prove that

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[3] In a "falling merchandise" case, the plaintiff is not held to the heightened burden of proof set forth in LSA-R.S. 9:2800.6B, which specifically refers to situations where a customer "falls" on a merchant's premises. **Smith v. Toys "R" Us, Inc.**, 98-2085 (La. 11/30/99), 754 So.2d 209, 212 n.2.

the merchant's negligence was a cause of the accident. **Id.**, 754 So.2d at 214. Thus, to prevail in a "falling merchandise" case, the customer must demonstrate that neither he nor she nor another customer caused the merchandise to fall *and* that the merchant's negligence was the cause of the accident. The customer must show that either a store employee or another customer placed the merchandise in an unsafe position on the shelf or otherwise caused the merchandise to be in such a precarious position that eventually, it does fall. Only when the customer has negated the first two possibilities *and* demonstrated the last, will he or she have proved the existence of an "unreasonably dangerous" condition on the merchant's premises. **Id.**, 754 So.2d at 215; **Mannina**, 757 So.2d at 103.

We further note that the required proof may be by direct or circumstantial evidence, either of which is sufficient to constitute a preponderance, when, taking the evidence as a whole, the proof shows that the fact or causation sought to be proved is more probable than not. **Smith**, 754 So.2d at 213. However, the inferences drawn from circumstantial evidence must cover all the necessary elements of negligence, and the plaintiff must still sustain the burden of proving that her injuries were more likely than not the result of the defendant's negligence. **Id.**, 754 So.2d at 213-214.

In this case, it was not actually store "merchandise" that fell on Ms. Pritchett; rather, it was an unsecured music speaker – a store "fixture" routinely used for playing music in the store – that unexpectedly fell from the top of the shelf and hit Ms. Pritchett's head and left shoulder. This factual scenario is similar to the facts of **Leonard v. Wal-Mart Stores, Inc.**, 97-2154 (La. App. 1st Cir. 11/6/98), 721 So.2d 1059, 1060, where a customer was injured when a previously unnoticed and unsecured metal-framed shelf sign fell down upon her face as she attempted to retrieve overhead merchandise from the shelves of the defendant's store. In **Leonard**, we pointed out that a store owner is not required to ensure against all possibilities of an accident occurring on the premises; nor is the store owner absolutely liable

whenever an accident happens. **Id.**, 721 So.2d at 1061. We also stated that while a customer has a protected interest in expecting the premises to be free of hazardous conditions, the customer has a duty to exercise reasonable care for her own safety. **Id.**, 721 So.2d at 1061-1062. Further, we declared that a customer who sees a potentially dangerous condition and fails to take reasonable precautions to avoid the danger may be found to have contributed to her own injuries. **Id.**, 721 So.2d at 1062. The facts in **Leonard** are distinguishable from the facts in this case, however, because in **Leonard** the customer was not asked to stay away from the area and the customer actually caused the improperly secured shelf sign to fall when she reached for some merchandise. Nevertheless, based on the finding that the unsecured sign constituted a hazardous condition from which the store owner failed to exculpate itself from fault, we found that the defendant store in **Leonard** was 100% responsible for the customer's injuries.

The jury in the case *sub judice* heard conflicting testimony about the actions of Ms. Pritchett and the store's employees once Ms. Pritchett entered the aisle where the employees were working. Ms. Pritchett denied that one of the employees asked her to wait for assistance. In contrast, the employee who was working on the floor next to the ladder, Ms. Cynthia Spears, testified at trial that she asked Ms. Pritchett to wait for assistance because she was restocking in the aisle with her co-worker on a ladder, but that Ms. Pritchett ignored her request and proceeded to retrieve the pan herself.[4] Ms. Spears also testified that Dollar General employees are trained to have a general awareness of their surroundings, including an attentiveness to the customers in the area, while restocking shelves. The employees' main focus when restocking is to ensure that the shelves have room for the merchandise. However, Dollar General

[4] Ms. Spears had no explanation as to why the incident report she filed on the day that Ms. Pritchett was injured did not reflect her admonition for Ms. Pritchett to wait for assistance. Nevertheless, at trial and in her deposition testimony, Ms. Spears clearly testified that she informed Ms. Pritchett that she would retrieve the pan and that Ms. Pritchett should wait for assistance.

employees were not specifically trained regarding falling-items hazards or inspections for falling-items hazards.

The jury was faced with credibility determinations regarding the conduct of Ms. Pritchett and the store's employees, as well as the causal relationship between the conduct and the damage. The factors to be considered when determining apportionment of fault include: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) how great a risk was created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any extenuating circumstances which might require the actor to proceed in haste without proper thought. **Junot**, 818 So.2d at 160.

In oral reasons given for granting the JNOV on liability, the trial judge found that even if the employee had asked Ms. Pritchett to wait for assistance, that admonition did "not constitute an appraisal" or a warning of the hazardous situation that may have been present. The trial judge concluded that the jury could not have found Ms. Pritchett to be at fault in any respect.[5] We disagree and find this to be error on the part of the trial judge. The evidence before the jury did not suggest the only conclusion was a total apportionment of fault to the store. The trial judge is not entitled to interfere with the jury's verdict simply because he believes another result would be correct. **Law v. State ex rel. through Dept. of Transp. and Development**, 03-1925 (La. App. 1st Cir. 11/17/04), 909 So.2d 1000, 1004, writs denied, 04-3154 and 04-3224 (La. 4/29/05), 901 So.2d 1062.

In this case, it was the role of the jury, not the trial judge, to accept or reject the testimony of the various witnesses. See **Id.**, 909 So.2d at 1005. By giving weight and credibility to the employee's testimony regarding the admonition or caution

[5] It was undisputed that Ms. Pritchett did not brush up against the ladder or either of the store's employees while reaching for the pan.

given to Ms. Pritchett to wait for assistance, reasonable and fair-minded jurors exercising impartial judgment could have found that the evidence reasonably supported an assessment of fault on the part of Ms. Pritchett, because she failed to take reasonable precautions to avoid a potentially dangerous situation where employees were restocking shelves while using a ladder. Without evaluating the credibility of the witnesses and resolving all reasonable inferences in favor of the store, which opposed the JNOV, we conclude that there was substantial evidence that reasonable jurors, in the exercise of impartial judgment, could have arrived at the verdict finding Ms. Pritchett 40% at fault for failing to take reasonable precautions to avoid the potentially hazardous area and Dollar General 60% at fault for the store's admitted lack of or inadequate inspection procedures to ensure that items would not fall from the top shelves due to precarious or unstable positions. See **Davis**, 774 So.2d at 89. Thus, we cannot say that the jury's verdict is one that reasonable jurors could not have rendered.

Furthermore, the jury's findings of fact are subject to the manifest error standard of review, and the same standard of review applies to the fact finder's apportionment of fault percentages. **Lapeyrouse v. Wal-Mart Stores, Inc.**, 98-547 (La. App. 5th Cir. 12/16/98), 725 So.2d 61, 65, writ denied, 99-0140 (La. 3/12/99), 739 So.2d 209. A court of appeal may not set aside the jury's findings of fact in the absence of manifest error or unless the findings are clearly wrong. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Additionally, "where two permissible views of the evidence exist, the [fact finder's] choice between them cannot be manifestly erroneous or clearly wrong." **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 883 (La. 1993).

Therefore, we find that the trial judge erred in granting Ms. Pritchett's motion for a JNOV on the liability/assessment of fault issue and substituting his assessment of fault for that of the jury, when the jury's findings were not clearly wrong given the

evidence. Because we find the trial judge erred in granting the JNOV regarding the liability/assessment of fault issue, we must reverse that finding and reinstate the jury's verdict as to apportionment of fault.

Damages

Next, we examine the trial judge's granting of the JNOV on the issue of damages. The trial judge granted Ms. Pritchett's motion for a JNOV, increased the special damage award for medical expenses from $10,000.00 to $13,606.30, and increased the general damage award from $30,000.00 to $60,000.00. Dollar General contends the trial judge erred in increasing these awards because the jury's awards were not inadequate.

On review of a JNOV award of higher quantum, the appellate court employs the same criteria as the trial judge. If reasonable persons, in the exercise of impartial judgment, could reach differing opinions on whether the award was abusively low, then the trial judge erred in granting the JNOV and the jury's damage award should be reinstated. **Junot**, 818 So.2d at 160. On the other hand, if reasonable persons could not disagree, then the trial judge properly granted the JNOV and we should review the damage award based on the trial judge's independent *de novo* assessment of damages under the abuse of discretion standard. **Id.**, 818 So.2d at 161. This determination is made with consideration to the individual circumstances of the injured plaintiff. After an analysis of the facts and circumstances peculiar to the particular case and plaintiff, an appellate court may conclude that the award is inadequate or too great. **Lapeyrouse**, 725 So.2d at 66. Only then is a resort to prior awards appropriate, and then for the purpose of determining the highest or lowest point which is reasonably within that discretion. **Id.**

The medical evidence here shows that Ms. Pritchett has bulging cervical discs, which may require a two-level anterior cervical fusion surgery at some point in the future in order to alleviate her chronic pain. The evidence presented at trial clearly

revealed that Ms. Pritchett, who was 67-years-old at the time of the incident and 72-years-old at the time of trial, had a pre-existing degenerative condition in her neck. However, until the speaker fell on her head and shoulder at the store, Ms. Pritchett was not suffering with chronic neck pain. After she was injured in the store, the evidence shows that Ms. Pritchett consistently underwent conservative treatment for chronic cervical pain for four years, up to the time of trial.

After an exhaustive review of the medical evidence, we conclude that the trial judge properly granted Ms. Pritchett's motion for a JNOV for the purpose of increasing the general damage award. We find that reasonable and impartial jurors in this case could not differ as to the fact that the $30,000.00 general damage award was abusively low, especially in light of the lengthy extent of Ms. Pritchett's chronic neck and shoulder pain and ongoing treatment that was well-documented in the record. We therefore find that the trial judge did not abuse his great discretion in awarding Ms. Pritchett $60,000.00 in general damages for her injuries, considering the type of injuries she sustained, her testimony and the medical testimony regarding the subjective but credible nature of many of her complaints, and the length of time she has been suffering with chronic pain since the incident at the Dollar General store. Accordingly, Dollar General's assignment of error regarding general damages is without merit.

Furthermore, the record reveals that the $10,000.00 for special damages awarded by the jury was not equivalent to the actual amount of Ms. Pritchett's past medical expenses that totaled $13,606.30. When claims for accrued medical expenses are supported by medical bills, these expenses should be awarded unless there is contradictory evidence or reasonable suspicion that the bills are unrelated to the accident or injuries at issue. **Mack v. Wiley**, 07-2344 (La. App. 1st Cir. 5/2/08), 991 So.2d 479, 489, writ denied, 08-1181 (La. 9/19/08), 992 So.2d 932. The medical bills submitted by Ms. Pritchett were admitted into evidence without objection, and

there was no evidence showing the bills were not related to the injuries sustained by Ms. Pritchett as a result of the falling speaker incident. Thus, we find no error in the trial judge's grant of a JNOV for the purpose of increasing the special damage award to equal the amount of Ms. Pritchett's documented past medical expenses. This assignment of error also lacks merit.

## CONCLUSION

For the above and foregoing reasons, the portion of the trial judge's judgment granting Ms. Pritchett's motion for a JNOV on the assessment of fault percentages is hereby reversed, and the jury's assessment of fault percentages of 40% to Ms. Pritchett and 60% to the store is hereby reinstated. In all other respects, the judgment of the trial judge granting a JNOV in favor of Ms. Pritchett and increasing the special damage award to $13,606.30 and increasing the general damage award to $60,000.00, as well as the implicit denial of the alternative motion for new trial, is hereby affirmed.

Accordingly, it is hereby ordered, adjudged, and decreed that there be judgment in favor of plaintiff, Billie A. Pritchett, and against defendant, Dolgencorp, Inc., in the total amount of $44,163.78, reflecting the jury's 40% assessment of fault to plaintiff, plus all interest thereon from the date that plaintiff's petition was filed until paid, and for all trial court costs. All costs of this appeal are to be equally divided between the parties.

**REVERSED IN PART, AFFIRMED IN PART, AND RENDERED.**

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| **BILLIE A. PRITCHETT** | **FIRST CIRCUIT** |
| **VERSUS** | **COURT OF APPEAL** |
| **DOLLAR GENERAL CORPORATION AND JANE DOE** | **STATE OF LOUISIANA** |
| | **2010 CA 1466** |

KUHN, J., dissenting in part.

I disagree with that portion of the majority's opinion, which reverses the trial court's grant of JNOV on the apportionment of fault. The record is devoid of any evidence to support a finding of causation.

Cherrise Lefevre, the employee on the ladder whose statement was admitted into evidence, offered nothing to support a finding that plaintiff in any respect caused the accident. Cynthia Spears, the assistant manager who was positioned at the bottom of the ladder, stated that she "asked [plaintiff] … to just wait, just a second because we were in that area working and asked her if she would wait a minute and I would get her the pan she needed, and before I realized, she had come in, kind of reached in front of me to get the pan she needed and that's when the accident happened."

As the majority correctly notes, Spears expressly testified that she did not believe that plaintiff caused the speaker to fall. And the record is devoid of any evidence that plaintiff either touched the ladder or either of the employees so as to allow a reasonable inference that her actions set the events in place that permitted the speaker to fall. Additionally, Spears testified that she did not warn plaintiff that there was a speaker on the shelf. As such, any duty that may have been established by Spears' request to get the pan for

plaintiff did not encompass the likelihood that a speaker (as opposed to product) would fall on her.

For these reasons, I would affirm the trial court's grant of JNOV on apportionment of fault finding no fault on the part of Ms. Pritchett. Accordingly, I dissent.