NOT DESIGNATED FOR PUBLICATION

MARY STERLING AND JERRY STERLING	*	**NO. 2007-CA-0455**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
NEW ORLEANS CENTRE MALL	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2005-4395, DIVISION "E-7"
Honorable Madeleine Landrieu, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr., and Judge Leon A. Cannizzaro, Jr.)
CANNIZZARO, J., CONCURS IN THE RESULT WITH REASONS

Janet L. Moulton
JANET L. MOULTON AND ASSOCIATES
3422 Cleary Avenue
Suite E
Metairie, LA 70002
COUNSEL FOR PLAINTIFFS/APPELLANTS

SEPTEMBER 19, 2007

John Shea Dixon
Michael P. Mentz
HAILEY McNAMARA HALL LARMANN & PAPALE, L.L.P.
One Galleria Boulevard, Suite 1400
P. O. Box 8288
Metairie, LA 70011-8288
COUNSEL FOR DEFENDANT/APPELLEE

AFFIRMED

Plaintiffs, Mary Sterling and her husband, Jerry Sterling, appeal the trial court's judgment, which granted a summary judgment in favor of defendant, the New Orleans Centre Mall.[1] For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 4, 2005, Plaintiffs brought the present suit for damages against the New Orleans Centre. Specifically, the Plaintiffs' petition alleges, in pertinent part:

> III.
>
> On or about May 5, 2004, [Plaintiff] was walking toward the down escalator in the New Orleans Centre Mall, on the same floor as the Lord and Taylor store and was in the mall area outside the store approaching the down escalator when she slipped and fell on a slimy, gooey substance, falling forward onto her knees and hands causing severe and disabling injuries.
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> IV.
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> The incident was caused through no fault of petitioners…but caused by the gross and wanton negligence of New Orleans Centre Mall in the following particulars, but not exclusively;
>
> 1. Failure to keep the premises free and clear of foreign substances that were unreasonably hazardous;
> 2. Failure to have proper inspection procedures with regard to foreign substances;
> 3. Failure to prevent slip and fall hazards;

[1] As indicated in the pleadings, the New Orleans Centre was incorrectly named. The proper party defendant is Dominion/N.O. Centre, L.L.C. For ease of reference however, this Court will refer to defendant as "the New Orleans Centre".

4. Failure to perform periodic inspections for slip and fall hazards;
5. Failure to manage the immovable property as a prudent custodian;
6. Failure to act as a reasonable and prudent custodian of the premises, all of which acts constitute negligence under the laws of the State of Louisiana and the ordinances of the Parish of Orleans.

In response to these allegations, the New Orleans Centre filed an answer, which denied the Plaintiffs' claims. Thereafter, on March 22, 2006, the New Orleans Centre moved for summary judgment, alleging "that there is no genuine issue of material fact, and that plaintiffs have no factual support sufficient to carry essential elements of their claim in that (1) the defendants did not have knowledge or constructive notice of the allegedly hazardous condition; and, (2) the condition complained of did not pose an unreasonable risk of harm." In support of this motion, the New Orleans Centre submitted, as exhibits, the following: (A) Plaintiff's petition for damages; (B) the deposition of Mary Sterling; (C) the deposition of Patricia Angell; (D) exhibit 1 from the deposition of Pat Angell; (E) Polaroid photos; (F) McClintock's incident report; (G) the Floor Patrol Log; (H) the Security Services Contract; (I) the New Orleans Centre Security Zone Assignment Log; (J) the Daily Activity Log; (K) the New Orleans Centre Daily Security Incidents Reports; (L) the Janitorial Service Agreement.

Plaintiff objected to the motion for summary judgment by filing a memorandum to the New Orleans Centre's motion arguing that summary judgment is inappropriate because there are too many factual issues for the court to consider, namely whether or not the New Orleans Centre had reasonable procedures to check for slip and fall hazards. The attached exhibits included: (1) the affidavit of Mary

Sterling (2) the deposition of Mary Sterling; (2) the deposition of Patricia Angell; (3) the corporate deposition; and (4) the Janitorial Contract.

Following oral argument on the motion, the trial court rendered the judgment at issue on May 19, 2006, dismissing Mary Sterling's suit with prejudice. Plaintiffs now appeal this final judgment. The New Orleans Centre filed an answer to appeal seeking: 1) that the trial court judgment be modified only in respect to the case being dismissed under the merchant liability statute, La. R.S. 9:2800.6; (2) or alternately, that its motion to dismiss for failure to pay appellate costs in a timely manner be granted, and the entire matter dismissed with prejudice; and (3) costs of the trial court proceedings, these appellate proceedings, and attorney's fees. For the following reasons, we hereby affirm the judgment of the trial court, which granted the New Orleans Centre's motion for summary judgment. We also deny the New Orleans Centre's request that the judgment be modified and dismissed under La. R.S. 9:2800.6. We further deny the New Orleans Centre's motion to dismiss for failure to pay appellate costs as well as costs and attorney's fees.

STANDARD OF REVIEW

Appellate courts review the grant or denial of a motion for summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Independent Fire Ins. Co. v. Sunbeam Corp*., 99-2181, p. 7 (La. 2/29/00), 755 So.2d 226, 230. A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable

theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Id.*

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2). Summary judgments are favored, and the summary judgment procedure shall be construed to accomplish those ends. *Id.* La. C.C.P. art. 966(C)(2) provides that where, as in the instant case, the party moving for summary judgment will not bear the burden of proof at trial, his burden does not require him to negate all essential elements of the adverse party's claim, 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. Thereafter, if the adverse party fails to produce factual support sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial, there is no genuine issue of material fact, and the movant is entitled to summary judgment as a matter of law.

DISCUSSION

The issue before us is whether Plaintiffs produced factual support to establish merchant liability under La. R.S. 9:2800.6, or otherwise, whether Plaintiffs produced factual support to establish a negligence claim under the standards of general tort liability. In the matter before us, the trial court has provided extensive and well-written reasons for judgment, which we hereby agree

with and adopt as our own. Specifically, the reasons for judgment state, in pertinent part:

> This suit arises out of a fall, which Mary Sterling suffered while walking at lunchtime on the third floor of the New Orleans Centre Shopping Mall. (Footnote omitted). Ms. Sterling allegedly slipped on a substance which was on the floor between the entrance to the *Lord and Taylor* department store and the third-floor escalators. She filed this suit against the New Orleans Centre based upon merchant liability pursuant to La. R.S. 9:2800.6 and based upon land-owner liability pursuant to La. C.C. art. 2315, [sic] and 2317.
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> The question on the present motion for summary judgment then is two-fold. This Court must first determine whether R.S. 9:2800.6 applies to the dispute and if so, whether as a matter of law the New Orleans Centre is entitled to a summary judgment. Secondly, should this Court determine R.S. 9:2800.6 does not apply to this action, then this Court must determine whether summary judgment is warranted pursuant to the standards of general tort liability.
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> *** * ***
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> **MERCHANT LIABILITY UNDER LA. R.S. 9:2800.6**
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> Normally, the owner of a building remains liable for the condition of the building and for any resulting injuries arising therefrom. (La. C.C. arts. 660, 2317, 2322 and 2695.) The Louisiana legislature has provided a more specific burden however, which must be met when seeking reparation against a merchant. That legislation is found in La. R.S. 9:2800.6 and provides as follows:
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> **§2800.6 Burden of proof in claims against merchants**
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> 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.
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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, 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.

(2) "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. For purposes of this Section, a merchant includes an innkeeper with respect to those areas or aspects of the premises which are similar to those of a merchant, including but not limited to shops, restaurants, and lobby areas of or within the hotel, motel, or inn.

D. Nothing herein shall affect any liability which a merchant may have under Civil Code Arts. 660, 667, 669, 2317, 2322, or 2695.

First, it is interesting to note the language in the concluding paragraph which directs that liability imposed pursuant to R.S. 9:2800.6 does not affect liability resulting from limitations of ownership, offenses and quasi offenses. Still, this caveat speaks to the liability of a "merchant," (presumably a "merchant" as defined by the statute at issue). Therefore, this Court must first determine whether the New Orleans Centre is a "merchant" before applying this statutory burden.

In this connection, the Plaintiff contends the New Orleans Centre is not a merchant and cites Katsanis v. State Farm General Insurance Co, 615 So.2d 1114 (La. App. 5 Cir. 1993) in support of her position. The defense of course disagrees, citing Trejos v. Greater Lakeside Corporation, 05-CA-483 (La. App. 5 Cir. 1/17/06); 921 So.2d 1037.

The Plaintiff in Trejos, *supra* slipped in a puddle of water on the floor of the food court inside of Lakeside Mall, in Metairie, Louisiana. Although the court there applied the statutory burden of R.S. 9:2800.6 when assessing liability, it offered neither discussion nor explanation as to why Lakeside fell under the definition of "merchant" pursuant to the statute. There is no analysis for this Court to follow; there is merely an assumption that R.S. 9:2800.6 should apply. Further, in Trejos, the review on appeal was from a default judgment, such that the discussion was strictly whether the plaintiff established a prima facie case with competent evidence. Finally, the facts there can be distinguished from the facts before this Court. Ms. Sterling's fall did not occur in the food court (where "foods" are sold), but in a common area in the mall.

On the other hand, Katsanis, *supra*, involved a slip and fall in an icy parking lot of the Winn Dixie Market Place in Kenner, Louisiana. There, the Fifth Circuit opined that R.S.9:2800.6 "…clearly applies only to store owners." The Court went on to state that it would not extend [R.S. 9:2800.6] to apply to landowners, as "the standard for determination of liability of the Market Place as landowner…is based upon the concept of fault under Article 2315 and 2316 of the Louisiana Civil Code."

While it is convenient for the defense to rely on Trejos in its contention that the New Orleans Center is a "merchant" under R.S. 9:2800.6, such a finding here would be porous under these facts. The accident occurred in the common area of a mall. That area cannot be attributable to the control or maintenance of an individual merchant (other than the owner of the property) and accordingly, these facts are more analogous to the facts in Katsanis, as that fall occurred outside in a parking lot. Noting the statute's categorical reference to "innkeepers" and "lobby areas of a hotel, motel or inn" as "merchants," this Court opines that the Louisiana Legislature could have included in that list, common areas of malls or shopping centers." It did not do so. With this in mind, I am compelled to adhere to principles of statutory interpretation. More specifically, statutes which limit liability must be strictly construed. Monteville v. Terrebonne Parish Consolidated Government, 567 So.2d 1097 (La. 1990).

Therefore, after a review of the cases cited, and upon application to these facts of the definition of "merchant" found in R.S. 9:2800.6 C(2), this Court cannot conclude that the New Orleans Centre is a "merchant" as contemplated by the statute.[2]

[2] An additional case relied upon by the defense is Weber v. Ray Brandt Nissan, Inc., 2004-0004 (La. App. 4 Cir. 8/18/04); 880 So. 2d 999. There, the plaintiff sued Ray Brandt Nissan (clearly a "merchant") for allegedly creating a hazardous condition while displaying an automobile on the floor of a mall. Again, the facts at hand are distinguishable because fault is not alleged against a merchant, but rather it is alleged against the mall owner.

This Court now turns to the second inquiry: whether a summary judgment is appropriate under a duty-risk approach. The duty-risk analysis requires proof by the plaintiff of five separate elements: (1) that there was a duty owed by the New Orleans Centre to the plaintiff; (2) that there was a breach of that duty; (3) that the substandard conduct was a cause in fact of the plaintiff's injuries; (4) that the defendant's substandard conduct was a legal cause of the plaintiff's injuries and (5) that there were actual damages.

The threshold issue is whether the New Orleans Centre owed the plaintiff a duty to keep the passageways and floors free from hazardous conditions. In deciding whether to impose a duty in a particular case, the court must make a policy decision in light of the unique facts and circumstances presented. Meany v. Meany, 94-0251 (La. 7/5/94); 639 So.2d 229, 233. In this regard, it is elementary that a property owner such as the New Orleans Centre has a duty to provide a clean and safe area for its customers to traverse while shopping at the mall. As the area where the fall allegedly occurred is within the custody and control of the New Orleans Centre, then it is responsible for the damage occasioned by the neglect of care of that property. (La. C.C. art. 2317).

The next inquiry is not quite so simple. Ms. Sterling alleges she slipped on a substance on the floor. This Court must determine whether the presence of that substance on the floor was a breach of a legal duty imposed on the New Orleans Centre to protect Ms. Sterling against the particular risk involved. In this connection, the testimony is uncontradicted that the substance in which plaintiff slipped was a clear substance. That being so, this Court must then decide whether it was reasonable for New Orleans Centre not to have noticed the substance, or not to have cleaned it up prior to Ms. Sterling's slip. The key to absolving a defendant of liability is not the plaintiff's subjective awareness of the risk, but the determination that the defendant did not act unreasonably as to the plaintiff. This determination of "unreasonable risk of harm" encompasses a myriad of considerations, including a finding of whether an owner in the exercise of reasonable care would have or could have known of the dangerous condition. McAdams v. Willis Knighton Medical Center, (La. App. 2 Cir. 12/19/03); 862 So.2d 1186, *writ denied*.

Thus, in applying the standard of reasonableness to New Orleans Centre's knowledge of the condition of the floor, this Court has considered the facts as presented in this motion. First, Ms. Sterling was unable to demonstrate the nature of the substance, its origin or how it came to be on the floor.[3] Second, she did not produce any maintenance logs or testimony of any other witness which would

[3] The only evidence presented in this regard is Ms. Sterling's testimony that the substance was "sticky."

> indicate the New Orleans Centre was informed of the spill by another customer. And third, there is no evidence that the spill was particularly noticeable or in the vicinity of some source of water or other liquid which would implicate the principle of constructive notice of the hazard. Finally, the evidence shows that Ms. Sterling passed the area of the spill a few times while exercising at the mall before she slipped. At no time prior to the slip did she notice the substance on the floor. These facts are undisputed.
>
> Hence, the New Orleans Centre's failure to observe and clean the area simply does not amount to a breach of its duty to Ms. Sterling. To impose liability under these facts would be to impose a burden of strict liability, which is more than that which is required under the Civil Code (C.C.arts. 2315, 2317). No further inquiry into the duty-risk analysis is necessary.
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> There being no genuine issue of material fact as to whether the New Orleans Centre breached its duty of care to Ms. Sterling under these facts, the motion for summary judgment is granted in favor of the Defendants….

Upon our review of the record, we agree with the trial court that there is no genuine issue of material fact as to whether the New Orleans Centre breached its duty of care to Plaintiff, Ms. Sterling. Accordingly, we hereby affirm the trial court judgment, which granted the motion for summary judgment filed by the New Orleans Centre.

In its answer, the New Orleans Centre seeks costs of the trial court proceedings, these appellate proceedings, and attorney's fees.

La. C.C.P. art. 2164 provides:

> The appellate court shall render any judgment, which is just, legal, and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as its judgment may be considered equitable.

Since La. C.C.P. art. 2164 is penal in nature it must be strictly construed. *Alombro v. Alfortish,* 02-1081, p. 11, (La. App. 5 Cir. 4/29/03) 845 So.2d 1162, 1170.

Appeals are always favored and unless the appeal is unquestionably frivolous, damages will not be granted. *Tillmon v. Thrasher Waterproofing*, 00-0395, p. 8, (La.App. 4 Cir. 3/28/01), 786 So.2d 131, 137. Under these facts, we do not find the New Orleans Centre's request that Plaintiffs be ordered to pay all legal costs in the trial court and in this appeal, as well as its reasonable attorney fees, is warranted.

AFFIRMED