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| **CARL EDGEFIELD** | * | **NO. 2017-CA-1050** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **AUDUBON NATURE INSTITUTE, INC., AUDUBON COMMISSION AND SCOTTSDALE INSURANCE COMPANY** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
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**LOBRANO, J. DISSENTS AND ASSIGNS REASONS.**

I respectfully dissent. I would deny the Motion to Dismiss filed by the defendants/appellees, Audubon Nature Institute, Inc., Audubon Commissioners, and Scottsdale Insurance Company (collectively "Defendants") and find that, based on the record before me, this Court enjoys appellate jurisdiction to review the September 7, 2017 judgment, which granted Defendants' Motion for Summary Judgment ("September 7th Judgment") and dismissed the entirety of the case filed by the plaintiff/appellant, Carl Edgefield ("Plaintiff"). Defendants argue that the issues for consideration in this appeal should be limited to the September 26, 2017 order, which summarily denied Plaintiff's Motion for New Trial without a contradictory hearing ("September 26th Order"). I disagree.

In *Wiles v. Wiles*, 2015-1302, pp. 2-3 (La.App. 4 Cir. 5/18/16), 193 So.3d 397, 398, we stated:

> It is well established that the denial of a motion for new trial is an interlocutory and non-appealable judgment. *Habitat, Inc. v. Commons Condominiums, L.L.C.*, 11-1384, p. 6 (La.App. 4 Cir. 7/11/12), 97 So.3d 1126, 1131. However, our courts have consistently considered an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits, when, as here, it is clear from the appellant's brief that the intent is to appeal the merits of the case. *See Clotworthy v. Scaglione*, 11-1733, p. 3 (La.App. 4 Cir. 5/23/12), 95 So.3d 518, 520; *Lozier v. Estate of Elmer*, 10-0754, p. 4 (La.App. 5 Cir. 2/15/11), 64 So.3d 237, 239; *McKee v.*

> *Wal–Mart, Stores, Inc.*, 06-1672, p. 8 (La.App. 1 Cir. 6/8/07), 964 So.2d 1008, 1013.

A review of the record reveals that Plaintiff is appealing the September 7th Judgment for the following reasons.

The September 7th Judgment reads in pertinent part as follows:

> **JUDGMENT**
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> After considering the pleadings filed, the arguments of counsel, and the applicable law:
>
> IT IS ORDERED, ADJUDGED AND DECREED that Defendants, Audubon Nature Institute, Inc., The Audubon Commission and Scottsdale Insurance Company's Motion for Summary Judgment be and is hereby GRANTED, and all claims asserted by Plaintiff, Carl Edgefield against Audubon Nature Institute, Inc., the Audubon Commission and Scottsdale Insurance Company in the above- captioned matter are hereby DISMISSED, with prejudice.
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> …
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> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff, Carl Edgefield's Petition for Damages filed in this matter is hereby DISMISSED, with prejudice.
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> …
>
> JUDGMENT READ AND SIGNED, this 7th day of September, 2017, at New Orleans, Louisiana.

The September 26th Order reads as follows:

> **ORDER**
>
> Considering the foregoing Motion;
>
> IT IS ORDERED that the MOTION FOR NEW TRIAL is hereby set for hearing on the _____ day of _____, 2017 at _____ o'clock A.M.
>
> New Orleans, Louisiana, this 26th day of September 2017.

The order was stamped DENIED and signed by the district court judge.

In his Motion for Devolutive Appeal, Plaintiff moves to take "a devolutive appeal from the Judgment of the trial court rendered in this case" and "asks that he be granted an order of appeal to the Court of Appeal, Fourth Circuit."

Plaintiff's motion clearly states that he is appealing the **judgment** of the district court. On October 30, 2017, the district court granted Plaintiff's Devolutive Appeal, and the order signed by the district court judge, reads as follows:

**ORDER**

> Considering the foregoing Motion;
>
> IT IS ORDERED that the plaintiff, Carl Edgefield, is hereby granted a devolutive appeal.
>
> IT IS FURTHER ORDERED that no security is required of plaintiff for this Devolutive Appeal and that said Appeal is returnable to the Court of Appeal, Fourth Circuit, as provided by law.

The order, without specification, grants Plaintiff's devolutive appeal. I find that the district court judge granted the devolutive appeal from the judgment on the merits, as appeals can only be taken from final appealable judgments. The September 26th Order denying Plaintiff's Motion for a New Trial was not a final judgment, but interlocutory and non-appealable.

Additionally, in their Motion to Dismiss Appeal, Defendants argue that an appeal cannot be maintained as an attempt to appeal the final judgment on the record as Plaintiff has not shown his intention to appeal the September 7th Judgment. However, in his Reply, Plaintiff argues that he had appealed from **all** of the rulings and the judgment of the district court by his Motion for Devolutive Appeal. And, in his appellant brief, he was able to address those rulings and judgment of the district court, with which he disagreed, and wanted this Court to reverse.

The majority fails to address the Plaintiff's briefs as a whole. In his appellant brief, Plaintiff lists various "Issues presented for Review" as follows in pertinent part:

1. "Is an owner/operator of a restaurant who allows grease to escape from its grease traps unto its sidewalk liable to a delivery man invited unto its premises and slips in said grease?"

2. “Isn’t the owner/operator of the restaurant and its premises and the party in control of the grease clean out and the sidewalk and stairs leading to its kitchen responsible for keeping the sidewalk safe and free of grease?”

3. “Isn’t the legal criteria for defeating a ‘Motion for Summary Judgment’ a simple showing that there exist a question of material fact?”

The first two issues are directly related the part of Defendants’ Motion for Summary Judgment wherein Defendants argue that Plaintiff cannot prove any negligence on their part. Plaintiff argues that Defendants as “the owner is responsible for the unsafe condition of his premises that causes an injury.” Plaintiff particularly states on appeal:

> “The merchant created this condition by overflowing his grease trap which grease trap was under his exclusive control. The merchant by allowing his grease trap to overflow into the main sidewalk created an unreasonably dangerous walking surface. He failed to exercise reasonable care.”

Therefore, Plaintiff is discussing in his brief the issues considered in Defendants’ Motion for Summary Judgment, namely the negligence of Defendants.

The third issue in Plaintiff’s brief is of particular importance in determining Plaintiff’s intention to appeal the judgment on the merits, and states as follows:

> 3. “Isn’t the legal criteria for defeating a ‘Motion for Summary Judgment’ a simple showing that there exist a question of material fact?”

In support of this issue, Plaintiff asked this Court “to grant him this appeal and give him a chance to present his evidence at a trial on the merits” and further stated that “Plaintiff did not have the benefit of a trial on the merits.… A motion for summary judgment should be denied when evidence is presented that creates an issue of material fact. At the Motion for Summary Judgment, Carl Edgefield’s deposition was placed in evidence wherein he said he slipped due to grease on his shoes.” Additionally, Plaintiff notes that evidence at the summary judgment hearing showed that “the cleanouts for the grease trap were in the middle of the

sidewalk that led to the porch steps." Plaintiff prays "that this Motion to Dismiss Appeal be denied and his appeal granted, and that the Summary Judgment be reversed and that he be granted a trial on the merits, which he did not ever have in this case."

I find that Plaintiff intended to appeal the merits of the case seeking the reversal of the September 7th Judgment, and, alternatively, requested that, at the least, he be afforded a contradictory hearing on his Motion for New Trial and that the September 26th Order be vacated. The issues for consideration in this appeal should not be limited to Plaintiff's Motion for New Trial.[1] Accordingly, I will consider the appeal from the judgment on the merits,[2] and I would reverse the September 7th Judgment finding that the district court erred in granting Defendants' Motion for Summary Judgment. I find that Plaintiff put forth sufficient contradictory facts to establish the existence of genuine issues of material fact and that Defendants failed to point out to the court the absence of factual support for Plaintiff's claim.

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[1] *See Seivers v. Epoch Well Logging, Inc.*, 2003-0282 (La. App. 1 Cir. 12/31/03), 868 So. 2d 732, *writ denied*, 2004-0314 (La. 4/2/04), 869 So. 2d 892 (where the court found that although employee lodged appeal from denial of new trial motion made following entry of summary judgment dismissing claims against employer, employee demonstrated intent not to acquiesce to summary judgment or to abandon appeal right by filing new trial motion, and appellate brief was intended to address both grant of summary judgment and denial of new trial motion); *Babineaux v. Univ. Med. Ctr. Found.*, 2015-292, p. 2 (La. App. 3 Cir. 5/27/15), 177 So.3d 1120, 1121 (where court found that plaintiff's appellate brief exhibited his intent to appeal the judgment on the merits, which granted summary judgment and dismissed his action).

[2] In *Wiles*, this Court cites *Lozier v. Estate of Elmer*, which states in pertinent part:

> [O]ur courts have held that appeals are favored in law, must be maintained whenever possible, and will not be dismissed for mere technicalities. Thus, an appeal from the order denying a new trial, rather than from the judgment from which the new trial is sought, is improper. However, when the motion for appeal refers to a specific judgment denying a motion for new trial, yet the appellant exhibits a clear intention to appeal instead the judgment on the merits, then the appeal should be considered. This view conforms to the mandate of LSA–C.C.P. art. 865 to construe every pleading so "as to do substantial justice." (citations omitted)

2010-754, p.4 (La. App. 5 Cir. 2/15/11), 64 So.3d 237, 239, *writ denied*, 2011-0529 (La. 4/25/11), 62 So.3d 93.

Plaintiff alleges that, on December 15, 2004, shortly before noon, as he was delivering a box of frozen seafood, he slipped on grease and fell while walking on painted wooden steps on the pathway to the kitchen of Defendants' golf course clubhouse restaurant. Defendants acknowledge that an underground grease trap covered by two large metal grates was located on the pathway leading to the kitchen and adjacent to the steps. The grease from the grease trap would periodically be sucked out of the grease trap by removing the grates from the grease trap then using a hose to pump the grease into a truck. Grease was also manually removed from the kitchen at night. Defendants' staff would walk down the steps from the kitchen onto the pathway and empty grease into containers in the parking lot. Every morning, Defendants' staff would hose down the pathway with hot water and a degreaser solution.

Plaintiff claims that he slipped due to grease on the pathway caused by Defendants' grease removal system, noting that the cement pathway near the grease trap was discolored with grease stains. When Plaintiff fell, the box he was carrying hit the ground and broke open, scattering smaller packages of frozen shrimp on the ground. Two men helped him to pick up the shrimp. Plaintiff then carried the box inside the kitchen. He did not know the names of the men who helped him or if they actually saw the fall. Within the year after the incident, Plaintiff was forced to evacuate for Hurricane Katrina and lived elsewhere while his house was repaired after sustaining eight feet of flood water.

On December 22, 2005, Plaintiff filed a Petition for Damages against Defendants. Plaintiff's initial attorney, Darryl Carimi, filed suit in this matter. Discovery revealed that the following three employees were working on the day of the incident: Lucinda Greenwood, the kitchen supervisor; Johnny Polk, kitchen

staff; and Royal Weber, kitchen staff.[3] In 2007, Defendants furnished answers to interrogatories, which included Mr. Polk's name, address, and telephone number as a former member of Defendants' kitchen staff during the time of Plaintiff's alleged fall. The provided address for Mr. Polk, however, was inaccurate. In her 2008 deposition, Ms. Greenwood stated that she believed Mr. Polk still resided in New Orleans. However, investigations in 2009, 2011, 2013, and 2014 were unsuccessful in locating Mr. Polk or Mr. Weber. The original discovery cutoff date was set for January 31, 2011, but was extended by a Joint Motion to Extend to April 30, 2011, June 30, 2013, and then to April 21, 2017.

In 2014, Mr. Carimi fell ill, and the law firm of Kiefer & Kiefer was substituted as counsel of record on October 28, 2014. For approximately three years, little discovery took place by the parties. On March 22, 2017, the district court granted Plaintiff counsel's *ex parte* Motion to Withdraw as counsel. On April 19, 2017, Defendants filed their Motion for Summary Judgment. On June 22, 2017, the hearing on the Motion for Summary Judgment was scheduled for August 18, 2017 ("August 18th Hearing"). On August 3, 2017, Mr. Carimi filed a Motion to Enroll as counsel and a Memorandum in Opposition to the Motion for Summary Judgment with attachments.

Mr. Carimi realized shortly after becoming counsel, which was only fifteen days before the August 18th Hearing, that interim counsel had not located Mr. Polk or Mr. Weber. Mr. Carimi immediately hired private investigators to try to locate the missing witnesses. But only one of the two male kitchen worker witnesses, Mr. Weber, was found before the August 18th Hearing. However, he did not remember the incident. Mr. Polk could not be found in time for August 18th Hearing. On

[3] Parties were able to locate Ms. Greenwood during the discovery phase of litigation, but not the two men.

September 7, 2017, the district court granted summary judgment in Defendants' favor, dismissing all of Plaintiff's claims with prejudice.

Mr. Polk was located immediately after the August 18th Hearing and provided collaborating evidence as follows: (1) he witnessed the accident; (2) he saw grease on the ground where Plaintiff fell; (3) he told Ms. Greenwood that the fall had occurred;[4] (4) he notes that Defendants had problems with grease on the sidewalk before Plaintiff's accident; and (5) he states that the grease on the sidewalk made Plaintiff slip. Plaintiff filed a Motion for New Trial and, on September 26, 2017, the district court summarily denied Plaintiff's Motion for New Trial without a contradictory hearing.

Plaintiff now appeals the September 7th Judgment, which dismissed his case, and, alternatively, Plaintiff appeals the denial of his Motion for New Trial requesting that the September 26th Order be vacate and he be afforded a contradictory hearing on his Motion for New Trial. I find that the district court erred in granting Defendants' Motion for Summary Judgment and would reverse the September 7th Judgment thereby rendering a review of the September 26th Order moot.

Defendants submitted the following evidence in support of their summary judgment motion: 1) portions of Plaintiff's deposition; 2) Plaintiff's interrogatories; 3) portions of Ms. Greenwood's deposition; and 4) portions of the deposition of Jan Greco, one of Defendants' managers. Plaintiff filed the following evidence in opposition to Defendants' Motion for Summary Judgment: (1) Plaintiff's deposition testimony and affidavit; (2) the affidavit of C. Ray Murray, an attorney working on Plaintiff's worker's compensation case, who personally viewed the grease discolored pathway to the kitchen; and (3) Ms.

[4] In her deposition, Lucinda Greenwood testified that no one told her of Plaintiff's fall on December 15, 2004.

Greenwood's deposition testimony, where she testified that while walking on Defendants' pathway to the kitchen one would have to walk over the grease trap or walk around the grease trap.

An appellate court's review of a summary judgment is *de novo* based on the evidence presented to the district court, using the same criteria used by the court in deciding whether summary judgment should be granted. *Lewis v. Jazz Casino Co., L.L.C.*, 2017-0935, p.5 (La. App. 4 Cir. 4/26/18), 245 So.3d 68, 72. A motion for summary judgment is properly granted if the pleadings, memorandum, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art 966 (A)(3); *Daniel v. Clarion Inn & Suites*, 2016-0760, p. 3 (La. App. 4 Cir. 2/22/17), 214 So.3d 38, 40.

> "The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law."

La. C.C.P. art. 966 (D)(1).

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. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La.7/5/94), 639 So.2d 730, 751. 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 and substantive law; 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. *Id.*

The applicable substantive law in this case is set forth in Louisiana's Merchant Liability Statute, La. R.S. 9:2800.6, which governs merchant liability for slip, trip, and fall cases. La. R.S. 9:2800.6 states in pertinent part:

> A. A merchant[5] 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.

Plaintiff asserts that he slipped on grease as a result of Defendants' grease removal process and grease trap, which Defendants had negligently maintained and placed on the pathway to the kitchen. In their Motion for Summary Judgment, Defendants claim that Plaintiff cannot show that Defendants created this condition or had actual or constructive notice of the condition. Defendants focused their argument on the notice requirement as opposed to the creation of the condition requirement and on whether the incident actually occurred as set forth by Plaintiff.

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[5] La. R.S. 9:2800.6(C)(2) defines "merchant" as one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. Defendants' establishment is a restaurant, which provides foods and services, and clearly falls within the definition of "merchant under La R.S. 9:2800.6(C)(2). It is undisputed that Defendants fall within the definition of merchant.

Plaintiff opposed the summary judgment by claiming that Defendants created the hazardous condition.

Thus, the three relevant questions in the case *sub judice* are: 1) whether Plaintiff set forth sufficient evidence that a reasonable jury could find that Plaintiff slipped on grease that was the result of Defendants' grease removal process and underground grease trap; 2) whether evidence that Defendants placed the underground grease trap on the pathway, and maintained the grease trap and pathway is sufficient to establish that Defendants created the condition which caused the alleged damage under La. R.S. 9:2800.6(B)(2); and 3) whether it is a question of fact for a trier of fact to decide if the created condition presented an unreasonable risk of harm that was reasonably foreseeable and if the Defendants failed to exercise reasonable care. Because I answer all these questions in the affirmative, I would reverse the September 7th Judgment and remand the case to the district court.

The first question is whether Plaintiff has put forth sufficient evidence that a reasonable jury could find that the incident occurred as set forth by Plaintiff. [6] Defendants dispute whether Plaintiff actually slipped and fell. Plaintiff, in his deposition, testifies that in his capacity as a deliveryman, he was delivering seafood to Defendants' restaurant, where he slipped on a greasy substance and fell.

[6] The U.S. Fifth Circuit Court of Appeals recently decided *Deshotel v. Wal-Mart Louisiana, L.L.C.*, 850 F.3d 742 (5th Cir. 03/08/2017) under Louisiana's Merchant Liability Statute and addressed this question. The plaintiff, a store patron, brought negligence action against Wal-Mart, alleging that she slipped and fell on water that had allegedly leaked onto the floor from a negligently maintained roof. The parties had different versions of events regarding the cause of the plaintiff's fall. Wal-Mart argued that plaintiff could not establish where she fell and that even though the store had roof leaks, they were in discrete locations—only under faultily installed skylights—and had been mended before the accident. The court held that at the summary judgment stage, a court must decide only whether the plaintiff's account was plausible enough that a reasonable jury could believe it. "Because there are disputes of material fact, a jury could so believe. . . .The only inference left for the jury would be to conclude that the 'small drops of water' stemmed from the generally leaky roof. There is no direct evidence on this point, but the summary-judgment standard requires that we construe inferences in favor of the nonmoving party, and it is no great logical leap to conclude that a generally leaky roof on a rainy day may have been the cause of otherwise unexplained water on the floor." The court concluded that a reasonable jury could find that the leaking roof caused the plaintiff's fall, and that was enough for her to survive summary judgment. *Deshotel*, 850 F.3d at 745-47.

He further states that he told someone at Defendants' establishment that he had fallen. Conversely, both Ms. Greenwood and Ms. Greco, in their depositions, deny hearing about or being informed of Plaintiff's fall. Ms. Greenwood denies having any knowledge of Plaintiff's fall and states that if she did have knowledge that he had fallen, she would have, as per protocol, called Ms. Greco, or whichever manager was on duty, and they would have had to call First Response.[7]

A review of the record reveals that Ms. Greenwood's testimony regarding the cleaning and degreasing procedure that allegedly occurred every morning establishes that Defendants were aware of the possibility of the grease trap and grease removal procedure creating a hazardous condition. In her inconsistent testimony, Ms. Greenwood reported that, after the grease was pumped out of the underground grease trap, no one had to go out and clean the area because "they didn't spill no grease on the hose." Later in her deposition, when again asked about the cleaning procedures, Ms. Greenwood states that it was done "[e]very morning… It was done not every morning. It was done in the morning when they come in they would have to hose off the porch and then the evening time." She further states that every evening and morning this process was completed using a water hose, hot water, and degreasing solution.

It would be odd for Defendants to have continued to implement the procedure of degreasing the grease trap and pathway every morning if there was no

[7] In support of their position, Defendants note that an accident report was not filed on the day of the accident and that it was procedure to have had filed a report. While Plaintiff's testimony is self-serving, this Court has not automatically disregarded all self-serving testimony on summary judgment. *Weddborn v. Doe*, 2015-1088, p. 4 (La. App. 4 Cir. 5/4/16), 194 So.3d 80, 84 ("While we acknowledge that those affidavits are self-serving, we find that they are sufficient to create an issue of material fact...."); *Smith v. Treadaway*, 2013-0131, p.8 (La. App. 4 Cir. 11/27/13), 129 So. 3d 825, 830 (where this Court held that the plaintiff has presented sufficient evidence and testimony to carry her burden of proof at trial, finding that there are genuine issues of material fact that preclude granting the motion for summary judgment, specifically "[t]he question of cause in fact of the accident is a question of factual dispute made apparent by Mr. Treadaway's deposition testimony that both parties cited and attached to the motion for summary judgment").

concern that the grease trap and grease removal procedure would accumulate grease which could transfer to the pathway and lead to potential slips and falls or hazardous greasy conditions. There is no direct evidence on this point, but the summary judgment standard requires that inferences are construed in favor of the opposing party, *Lewis*, 2017-0935, p.6, 245 So.3d at 72, and a reasonable juror could conclude that a grease trap, which is a reservoir for grease or grease-like, viscous substances, located on the pathway to the kitchen, may have been the cause of the Plaintiff's slip and fall during his delivery to the kitchen. A reasonable juror could infer that Defendants were aware of the grease trap's hazardous condition and conclude that the grease trap, especially taking into consideration its use and location, caused the Plaintiff's fall. That is enough for Plaintiff to oppose a summary judgment on this point, as it creates a genuine issue of material fact. *See Thomas v. Caesars Entm't Operating Co.*, 2012-1202, p. 4 (La. App. 4 Cir. 1/23/13), 106 So.3d 1279, 1282, *writ denied*, 2013-0546 (La. 4/5/13), 110 So.3d 590, and *writ denied*, 2013-0462 (La. 4/5/13), 110 So.3d 593.

The second question is whether Defendants' purportedly negligent maintenance and placement of the grease trap, maintenance of the pathway, and grease removal process could qualify as creation of a condition under the Louisiana Merchant Liability Statute.[8] Under La. R.S. 9:2800.6(B)(2), "there must be proof that the merchant is directly responsible for the spill or other hazardous

[8] In *Deshotel*, Wal-Mart filed a Motion for Summary Judgment, arguing that the plaintiff could not prove that Wal-Mart created the condition or that it had actual or constructive notice of the wet floor. The United States District Court for the Western District of Louisiana granted Wal-Mart's summary judgment, and denied reconsideration. On appeal, the key issue was whether negligent maintenance can qualify as a "creation" of a hazard under Louisiana's Merchant Liability Statute. The Fifth Circuit focused on whether Wal-Mart "created" the hazardous condition, and concluded that a defendant "creates" a hazardous condition when it is "directly responsible." The court addressed this question and found that there was sufficient evidence that Wal-Mart created the hazardous condition (the wet floors) by failing to maintain its roof. The court explained, "[t]he ordinary meaning of "creation" admits of creation both through direct action—pounding holes into the roof with hammers—and failure to act—e.g., a failure to fix a known leaky roof, leading to the creation of the hazardous puddles on the floor." *Deshotel*, 850 F.3d at 747-48. Similarly, in the case *sub judice*, creation arises both through direct action—dropping grease or placing a grease trap on a travelled pathway —and failure to act—e.g., a failure to properly maintain and/or inspect the grease trap and pathway.

condition." *Ross v. Schwegmann Giant Super Markets, Inc.*, 98-1036, p.5 (La. App. 1 Cir. 5/14/99), 734 So.2d 910, 913, *writ denied sub nom. Ross v. Schwegmann Giant Supermarkets, Inc.*, 99-1741 (La. 10/1/99), 748 So. 2d 444; *see Savoie v. Sw. Louisiana Hosp. Ass'n*, 2003-982, p.5 (La. App. 3 Cir. 2/25/04), 866 So.2d 1078, 1081 (where court found that merchant "created" hazard where plaintiff had slipped on wax-like substance on floor, and merchant was responsible for cleaning floor)*; see also Held v. Home Depot, U.S.A.*, 2016-1252, p. 3 (La. App. 1 Cir. 6/2/17), 2017 WL 2399018; *see also Guillory v. The Chimes*, 2017-0479, p. 5 (La. App. 1 Cir. 12/21/17), 240 So.3d 193, 196; *Cf. Diaz v. Schwegmann Giant Supermarkets, Inc.*, 88-0237 (La.App. 4 Cir. 10/27/88), 533 So.2d 1034, 1037. Direct responsibility can be shown in one of two ways: either through evidence that the defendant or defendant's employees actually created the hazard, *Ross*, 98-1036, p.5, 734 So.2d at 913, or evidence that the defendant was responsible for maintaining the area where the condition was evident. *See Savoie*, 2003-982, p.5, 866 So.2d at 1081. Therefore, maintenance is actually enough for creation. S*ee id.*

A review of the evidence submitted for the Motion for Summary Judgment, specifically the deposition testimonies of Ms. Greenwood and Ms. Greco, reveals Defendants' employees were responsible for maintaining the grease trap and the pathway. Both establish that Defendants were responsible for the removal of grease and the degreasing and maintenance of the grease trap and pathway. Accordingly, evidence that Defendants placed the grease trap on the pathway, removed grease by way of the pathway, and maintained the grease trap and pathway on which the alleged hazard occurred is enough to qualify as a created condition under La. R.S. 9:2800(B)(2).[9] Therefore, I find that Plaintiff met his

[9] *See Robinson v. Meaux*, 2009-374 (La. App. 3 Cir. 11/4/09), 23 So. 3d 1025, 1028 (where court found that there were numerous issues of material fact in dispute in a slip and fall suit, involving

burden, at this summary judgment stage, that Defendants created the condition, satisfying La. R.S. 9:2800.6 (B)(2).[10]

Defendants argue that Plaintiff does not have any evidence to suggest that Defendants knew or should have known of the alleged condition. The argument is unpersuasive. When a defendant creates a condition, a plaintiff is not required to prove that a defendant had notice or constructive notice of the possible condition; thus, the requirement under La. R.S. 9:2800.6 (B)(2) does not apply. *See Davis v. Cheema, Inc.*, 2014-1316, p.17 (La. App. 4 Cir. 5/22/15), 171 So.3d 984, 993. Defendants failed to "point out to the court the absence of factual support" for Plaintiff's claim with respect to La. R.S. 9:2800.6 (B)(2). La. C.C.P. art. 966(D)(1).

The third question is whether it is a question of fact for a trier of fact to decide if the created condition presented an unreasonable risk of harm that was reasonably foreseeable and if the Defendants failed to exercise reasonable care. Under a merchant slip and fall case, the normal negligence rules under La. C.C. art. 2315 are applied during the analysis of a case. The inquiry in negligence claims generally is divided into the following four elements: (1) Duty; (2) Breach of Duty; (3) Causation; and (4) Damages. Louisiana courts have adopted a duty-risk analysis to aid them in determining whether to impose liability under the general negligence principles of La. C.C. art. 2315.[11] Additionally, Louisiana's Merchant Liability Statute, La. R.S. 9:2800.6, which governs merchant liability for slip, trip,

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a grease trap at the alleged accident location, which precluded the defendant's dismissal via summary judgment).

[10] By reversing the September 7th Judgment, I am not determining that Defendants created the condition; however, I find that a jury should be allowed to make that determination.

[11] For liability to attach under a duty-risk analysis, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care; (2) the defendant's conduct failed to conform to the appropriate standard of care; (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries; (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries; and (5) the plaintiff was damaged. *Brewer v. J.B. Hunt Transport, Inc.*, 2009-1408, p. 14 (La.3/16/10), 35 So.3d 230, 240.

and fall cases, sets forth the relevant duty of a merchant and the manner in which a merchant can breach that duty.

With respect to duty, a plaintiff must prove that a defendant had a duty to conform his or her conduct to a specific standard of care and such a duty was owed by a defendant to a plaintiff. *Brewer v. J.B. Hunt Transport, Inc.*, 2009-1408, p.14 (La.3/16/10), 35 So.3d 230, 240. At times a duty is set forth in a fact specific manner such that the duty element and breach of duty element merge into one creating a mixed question of law and fact. I find that under Louisiana's Merchant Liability Statute, the duty and breach elements should not be merged to produce a mixed question of law and fact as to duty and its breach. Whether a duty is owed is a question of law; whether a defendant failed to conform his conduct to the appropriate standard of care and has breached a duty owed is usually a question of fact. *Waters v. Oliver*, 2016-1262, p. 6 (La. App. 4 Cir. 6/22/17), 223 So.3d 37, 43; *see Bastian v. Rosenthal*, 2017-0284, p.5 (La. App. 4 Cir. 12/20/17), 234 So.3d 1022, 1025.

A merchant, under La. R.S. 9:2800.6 (A), has a duty to exercise reasonable care to keep its passageways in a reasonably safe condition and free of hazardous conditions which reasonably might give rise to damage. Whether a merchant has a duty owed to a merchant is considered a question of law for the courts and thus, appropriate for a summary judgment if a duty is in question. Defendants did not raise an issue as to the duty of a merchant in their summary judgment motion.[12]

With respect to the breach of a duty, a plaintiff must prove that a defendant breached its duty when a defendant's conduct failed to conform to the appropriate standard of care. *Brewer,* 2009-1408, p.14, 35 So.3d at 240. "Generally, breach of a duty is the failure to exercise reasonable care under the circumstances." *Washington v. Gusman*, 2015-0177, p. 16 (La. App. 4

[12] *See* discussion *supra* note 5.

Cir. 10/14/15), 183 So.3d 510, 525, *decision clarified on reh'g* (Dec. 16, 2015), *writ not considered*, 2016-0118 (La. 3/4/16), 188 So.3d 1054. In the case *sub judice*, La. R.S. 9:2800.6 (B) sets forth the manner in which a merchant can breach its duty as a merchant to exercise reasonable care to keep its passageways in a reasonably safe condition free of any hazardous conditions which reasonably might give rise to damage. A merchant breaches its duty by creating a condition that presents a reasonably, foreseeable unreasonable risk of harm to others and by failing to exercise reasonable care. La. R.S. 9:2800.6(B). Thus, Plaintiff has the burden of proof showing that Defendants breached their duty of care and failed to exercise reasonable care because the grease trap and/or grease on Defendants' pathway presented an unreasonable risk of harm to Plaintiff and that risk of harm was reasonably foreseeable.

In *Broussard v. State ex rel. Office of State Bldgs.*, 2012-1238, pp.11-12 (La. 4/5/13), 113 So.3d 175, 184, the Louisiana Supreme Court held that whether a condition is unreasonably dangerous is a question of fact, and the fact-finder utilizes the risk-utility balancing test to determine which risks are unreasonable and whether those risks pose an open and obvious hazard.

The *Broussard* court explained:

> In order to avoid further overlap between the jury's role as fact-finder and the judge's role as lawgiver, we find the analytic framework for evaluating an unreasonable risk of harm is properly classified as a determination of whether a defendant breached a duty owed, rather than a determination of whether a duty is owed *ab initio.* It is axiomatic that the issue of whether a duty is owed is a question of law, and the issue of whether a defendant has breached a duty owed is a question of fact. *E.g., Brewer v. J.B. Hunt Transp., Inc.*, 09-1408, p. 14 (La. 3/16/10), 35 So.3d 230, 240 (citing *Mundy v. Dep't of Health and Human Res.*, 620 So.2d 811, 813 (La. 1993)). **The judge decides the former, and the fact-finder—judge or jury—decides the latter.** "In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of 'no liability' or 'no breach of duty.' " *Pitre* [*v. Louisiana Tech University* ], 95–1466 at p. 22 [ (La.

> 5/10/96) ], 673 So.2d [585] at 596 (Lemmon, J., concurring). Because the determination of whether a defect is unreasonably dangerous necessarily involves a myriad of factual considerations, varying from case to case, *Reed* [*v. Wal-Mart Stores, Inc.*], 97–1174 at p. 4 [ (La.3/4/98) ], 708 So.2d [362] at 364, the cost-benefit analysis employed by the fact-finder in making this determination is more properly associated with the breach, rather than the duty, element of our duty-risk analysis.[footnote omitted] *See* Maraist, et. al., *Answering a Fool*, 70 La. L.Rev. at 1120 ("[O]ne might persuasively argue that the cost-benefit analysis used to determine whether a risk is reasonable or unreasonable is the heart of the breach decision and is one that should be conducted by the fact-finder, rather than by the court...."). Thus, while a defendant only has a duty to protect against unreasonable risks that are not obvious or apparent, the fact-finder, employing a risk-utility balancing test, determines which risks are unreasonable and whether those risks pose an open and obvious hazard. In other words, the fact-finder determines whether defendant has breached a duty to keep its property in a reasonably safe condition by failing to discover, obviate, or warn of a defect that presents an unreasonable risk of harm.

2012-1238 at pp. 11-13, 113 So.3d at 185 (emphasis added).

In *Broussard*, the Louisiana Supreme Court considered, on review of a judgment following a jury trial, whether an elevator stopped between floors was an "unreasonably dangerous" condition. *Id.*, 2012-1238, pp. 1–2, 113 So.3d at 179. The Supreme Court explained that a condition is not unreasonably dangerous if it is an open and obvious hazard. *Id.*, 2012-1238, p. 11, 113 So.3d at 184. "In order for a hazard to be considered open and obvious, this Court has consistently stated that the hazard should be one that is open and obvious to all, i.e., everyone who may potentially encounter it." *Id.*, 2012-1238, p. 10, 113 So.3d at 184. "The open and obvious inquiry thus focuses on the global knowledge of everyone who encounters the defective thing or dangerous condition, not the victim's actual or potentially ascertainable knowledge." *Id.*, 2012-1238, p. 18, 113 So.3d at 188. The global knowledge requirement distinguishes risks that are "open and obvious to all" from "assumption of risk" by a particular plaintiff. *Id.*, 2012-1238, p. 18, 113 So.3d at 188–89.

Whether a defect presents an unreasonable risk of harm is a "matter wed to the facts," *Broussard*, 2012-1238, p.9, 113 So.3d at 183, and necessarily must be resolved on a case-by-case basis. *Massery v. Rouses Enterprises, L.L.C.*, 2016-0121, p. 7 (La. App. 4 Cir. 6/29/16), 196 So.3d 757, 762. The Supreme Court, in three cases subsequent to *Broussard*, held that absent any material factual issue, the summary judgment procedure can be used to determine whether a defect is open and obvious and, therefore, does not present an unreasonable risk of harm. *Cox v. Baker Distrib. Co., L.L.C.*, 51,587, p. 6 (La. App. 2 Cir. 9/27/17), 244 So. 3d 681, 684, *writ denied*, 2017-1834 (La. 1/9/18), 231 So. 3d 649; s*ee Bufkin v. Felipe's Louisiana, LLC*, 2014-0288 (La. 10/15/14), 171 So.3d 851 (where court found summary judgment for defendant was proper where its dumpster on the street was obvious and apparent, thus reasonably safe to injured pedestrian whose vision was obstructed); *Rodriguez v. Dolgencorp, LLC*, 2014-1725 (La. 11/14/14), 152 So.3d 871 (where court found summary judgment for defendant was proper where plaintiff tripped on shopping cart in the grocery store—"a situation so open and obvious" the plaintiff could have easily avoided any harm through the exercise of ordinary care); *Allen v. Lockwood*, 2014-1724 (La. 02/13/15), 156 So.3d 650, 651 (where court found summary judgment for defendant was proper where an unpaved, grassy parking area was deemed as obvious and apparent to anyone who encountered it, and the plaintiff failed to produce any evidence of how the alleged defect caused the accident). Given these three Supreme Court cases following *Broussard*, it is evident that summary judgment may be proper based on the open and obvious doctrine in an appropriate case. *Jones v. Stewart*, 2016-0329, p. 18 (La. App. 4 Cir. 10/5/16), 203 So.3d 384, 395, *writ denied*, 2016-1967 (La. 12/16/16), 211 So. 3d 1169, and *writ denied*, 2016-1962 (La. 12/16/16), 212 So. 3d 1174, and *writ denied*, 2016-1968 (La. 12/16/16), 212 So.3d 1175. I find, given the

evidence presented in Defendants' Motion for Summary Judgement and Plaintiff's Opposition, this is not an appropriate case.

In the case *sub judice*, the condition of the grease trap on the pathway and potential greasy pathways were not open and obvious. The alleged greasy condition of the grease trap or the grease trap's nature was not open and obvious, as there is no evidence that the greasy condition of the grease trap and pathway was open and obvious to Plaintiff.[13] *Broussard*, 2012-1238, p. 18, 113 So.3d at 188–89. Therefore, *Broussard's* open and obvious doctrine does not apply to the case at hand, *Jones*, 2016-0329, p. 18 (La. App. 4 Cir. 10/5/16), 203 So.3d at 395, and the appropriate analysis is one of unreasonable risk, which is reserved for the trier of fact. *See Broussard*, 2012-1238, p.12, 113 So.3d at 185.[14] After reviewing the record, I find that a reasonable jury could find that the grease trap, which purpose is to hold greasy, viscous substances accumulated during Defendants'

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[13] The courts have held that even despite the presence of an open and obvious condition various "case-specific factual issues" may preclude summary judgment. *Jimenez v. Omni Royal Orleans Hotel*, 2010-1647, pp. 11-12 (La.App. 4 Cir. 5/18/11), 66 So.3d 528, 534–35. In *Jimenez*, this Court explained this category of cases:

> There are other decisions which suggest that simply because a condition may be open and obvious it does not necessarily result in a consequential finding that the defendant did not create an unreasonable risk of harm. Thus, the Louisiana Supreme Court, while acknowledging the dangerousness of bundled electric cables placed in a pedestrian passageway at the Chalmette Crawfish Festival as well as a pedestrian's duty to observe conditions as obvious to a visitor as to a landowner, found that case-specific factual issues precluded summary judgment. *See Hutchinson v. Knights of Columbus, Council No. 5747*, 03–1533, p. 9 (La.2/20/03), 866 So.2d 228, 235. *See also Warren v. Kenny*, 10–1580 (La.App. 4 Cir. 4/27/11), 64 So.3d 841 (in which we reversed the trial court's summary judgment dismissing a tenant's claims against her landlord whose ladder and railings giving access to laundry equipment were held to be open and obvious; we remanded because of genuine issues of material fact, observing that at trial a "substantial" portion of fault might be attributed to the tenant who chose to use that laundry equipment, knowing it was in a precarious situation, i.e., "an open and obvious danger").

2010-1647, pp. 11-12, 66 So.3d at 534–35.

[14] The Louisiana Supreme Court has stated that the determination of whether a defect presents an unreasonable risk of harm is question of fact and is determined on a case by case basis. *See Brooks v. State ex. rel. Dep't of Transp. and Dev.*, 2010-1908, p. 4 (La.7/1/11), 74 So.3d 187, 190 ("Whether the DOTD breached its duty, that is, whether the shoulder was in an unreasonably dangerous condition, is a question of fact and will depend on the facts and circumstances of each case.").

operations and through their restaurant, and the grease removal and cleaning procedure presented an unreasonable risk of harm in being located on a well-travelled pathway that must be walked on or around to gain access to the kitchen.[15]

In *Tomlinson*, this Court found that the plaintiff had "submitted sufficient evidence from which a jury or other trier of fact may reasonably infer that [the defendant's] failure to routinely and properly maintain the floors in a safe condition caused [the plaintiff] to slip and fall. Additionally, because the manner in which the interior floors were kept is material to a determination of whether they posed an unreasonable risk of harm, [this Court also found] that… summary judgment is precluded." *Tomlinson v. Landmark American Ins. Co.*, 2015-0276, p. 20 (La. App. 4 Cir. 3/23/16), 192 So.3d 153, 165. Similarly, in the case *sub judice*, the manner in which the grease trap and pathway were kept is material to a determination of whether they posed an unreasonable risk of harm; thus, precluding summary judgment.[16]

Accordingly, I would reverse the September 7th Judgment granting Defendants' Motion for Summary Judgment and remand the matter to the district court, thereby rendering a review of the Motion for New Trial moot.

I briefly address the September 26th Order denying Plaintiff's request for a new summary judgment hearing in light of newly discovered evidence as to the

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[15] The Louisiana Supreme Court in *Sistler v. Liberty Mutual Insurance Co.*, 558 So.2d 1106 (La.1990), upheld that the district court's finding that an one inch difference in elevation at the entrance of a restaurant was an unreasonably dangerous condition that caused a patron of the restaurant to fall. *Cline v. Cheema*, 2011-1029 (La. App. 4 Cir. 2/22/12), 85 So.3d 260, 267, *writ denied*, 2012-0666 (La. 5/4/12), 88 So.3d 465.

[16] Furthermore, the record reveals that Defendants failed to warn invited guests of a dangerous condition. Defendants offered no evidence in their support. The cost of posting signs and warning displays noting the grease trap's location would have been minimal. Thus, I find that a reasonable juror could conclude that Defendants' did not exercise reasonable care in order to prevent the unreasonable condition. *See Sistler*, 558 So.2d at 1114 (where the Court found that: defendant-restaurant had a duty to attract visitor's attention to the premises; placement of warning signs in the entranceway or placement of yellow highlighting should have been used; and failure to take such precautions caused unreasonably dangerous conditions.) Therefore, the district court's granting of summary judgment was also improper in this respect.

location of Mr. Polk and as to the fact that Mr. Polk witnessed the incident. I find it unsettling that Plaintiff's attorney was not given the professional courtesy of additional time to oppose the summary judgment taking into consideration the circumstances in this case, especially the fact that Plaintiff attorney enrolled as counsel fifteen days before the August 18th Hearing. A district court's summary denial of a motion for a new summary judgment hearing alleging newly discovered evidence after a granting of a motion for summary judgment that dismisses a case in its entirety is quite different from a district court's summary denial of a motion of a new trial alleging newly discovered evidence after a recent trial on the merits. The former deprives litigants of their day in court and denies them a trial on the merits.[17]

> This Court in *Lopez v. Wal–Mart Stores, Inc.* stated:
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> > Although Louisiana Code of Civil Procedure art.1976 provides that a "[n]otice of the motion for new trial **and of the time and place assigned for hearing** thereon must be served upon the opposing party ...," a jurisprudential exception has developed whereby a motion for new trial may be summarily denied in the absence of a clear showing in the motion of facts or law reasonably calculated to change the outcome or reasonably believed to have denied the applicant a fair trial. *Sonnier v. Liberty Mutual Ins. Co.*, 258 La. 813, 248 So.2d 299 (1971); *Allen v. Noble Drilling, Inc.*, 93–2383, p. 6 (La.App. 4th Cir. 05/26/94), 637 So.2d 1302. While Justice Summers' dissent in

[17] The summary denial of a motion for new trial pertaining to a recent denial of a motion for summary judgment does not deprive a litigant a trial on the merits as does the summary denial of a motion for new trial pertaining to a recent grant of a motion for summary judgment that dismisses a litigant's case in its entirety. Discovery issues in summary judgment cases are usually dealt with through a request for a continuance of the summary judgment hearing. However, any pleading showing a need for additional discovery, such as a motion for new trial, is allowed. This Court has held that "in the appropriate factual context, a court can 'be receptive to an argument that discovery has been hindered by some circumstance beyond the [opponent's] control.' " *Roadrunner Transportation Systems v. Brown*, 2017-0040, p.13 (La.App. 4 Cir. 5/10/17), 219 So.3d 1265, 1274 (quoting *Bourgeois v. Curry*, 2005-0211, p. 10 (La. App. 4 Cir. 12/14/05), 921 So.2d 1001, 1008). "This court, however, cautioned that the need for additional time to conduct discovery based on such a hindering circumstance should be documented in the record; the need should be 'expressed in a motion to continue, motion to compel, or other pleading.'" *Id.* Plaintiff expressed his intentions to obtain additional time to find Mr. Polk at the August 18th Hearing and by his filing of a Motion for New Trial immediately after the hearing. *See Leake & Andersson, LLP v. SIA Ins. Co. (Risk Retention Grp.)*, 2003-1600, pp. 3-4 (La. App. 4 Cir. 3/3/04), 868 So.2d 967, 969 (citing *Doe v. ABC Corp.*, 2000-1905, pp. 10-11 (La. App. 4 Cir. 6/27/01), 790 So.2d 136, 143)("Although the language of article 966 does not grant a party the absolute right to delay a decision on a motion for summary judgment until all discovery is complete, the law does require that the parties be given a fair opportunity to present their case").

> *Sonnier* seems to represent a more reasoned interpretation of the current Code of Civil Procedure articles, we are nonetheless bound by the prior rulings. Thus, to be entitled to a hearing on her motion for new trial, Ms. Lopez would have to make a clear showing as set forth in *Sonnier* and its progeny.

94-2059 (La. App. 4 Cir. 8/13/97), 700 So. 2d 215, 220, *writ denied,* 97-2522 (La. 12/19/97), 706 So. 2d 457 (emphasis in original).

The Louisiana Supreme Court in *Sonnier v. Liberty Mut. Ins. Co.* noted the policy behind the judicially-created exception to the mandatory motion for a new trial hearing as follows:

> To require the court and lawyers to use up otherwise productive hours away from the office or away from other pressing litigation to rehash a trial recently conducted to a conclusion, in the absence of a clear showing in the motion of facts or law reasonably calculated to change the outcome or reasonably believed to have denied the applicant a fair trial, would be to compound unnecessarily delays which already plague the administration of justice.

258 La. 813, 824, 248 So.2d 299, 303(1971).

La.C.C.P. art. 1973 provides that a new trial may be granted in any case if there is good ground and necessitates an examination of the facts and circumstances in this case. When the district judge is convinced by his examination of the facts that the denial of a new summary judgment hearing would result in a miscarriage of justice, a new hearing should be ordered. *Warren v. Shelter Mut. Ins. Co.*, 2016-1647, pp.14-15 (La. 10/18/17), 233 So.3d 568, 579; *Hardy v. Kidder,* 292 So.2d 575, 579 (La.1973). Recognizing that although our jurisprudence holds that district courts have discretion regarding the determination whether to grant a new summary judgment hearing, in the case *sub judice*, the district court should holding a proper contradictory hearing when an appellate record is necessary for a sufficient review. A proper application of La. C.C.P. art. 1973 necessitates a careful examination of the facts and circumstances to prevent the miscarriage of justice.