JOSEPH BROWN	*	**NO. 2018-CA-0913**
VERSUS	*	
		COURT OF APPEAL
JAZZ CASINO COMPANY, LLC	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2015-00549, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
* * * * * *
Judge Regina Bartholomew-Woods
* * * * * *
(Court composed of Judge Roland L. Belsome,
Judge Regina Bartholomew-Woods, Judge Dale N. Atkins)

BELSOME, J., DISSENTS WITH REASONS

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AFFIRMED
MAY 1, 2019

This matter arises from a slip and fall incident inside a casino and is controlled by La. R.S. 9:2800.6, the Louisiana Merchant Liability Statute. Appellee filed a motion for summary judgment. In accordance with La. C.C.P. art. 966 (B)(2), Appellant failed to file his opposition to Appellee's motion for summary judgment within fifteen (15) days prior to the hearing on said motion. The trial court, without considering Appellant's opposition, granted summary judgment in favor of Appellee, and dismissed Appellant's claims with prejudice. For the reasons that follow, we affirm the trial court's grant of summary judgment.

FACTUAL BACKGROUND

On January 20, 2014, Plaintiff-Appellant, Joseph Brown ("Appellant") visited Harrah's New Orleans Casino ("Harrah's"). Before leaving Harrah's, Appellant visited a men's restroom located near the main floor of the casino. After exiting the restroom, Appellant began descending a set of stairs, and slipped and fell down multiple steps. This incident was captured on surveillance video. When deposed, Appellant explained that he observed the restroom floor was wet and

soapy; and that once he fell, he noticed the back of his pants were wet. Appellant further explained that the janitor had been called to clean up the restrooms. As Appellant entered and exited the restroom, he recalled that the janitor was standing outside the restroom talking with another employee who had been standing at the top of the stairs holding an electric drill. Appellant further asserts that after he fell, the janitor, along with other casino employees, came to help him up. Appellant asserts that a problem with the water in the ladies' restroom necessitated that the water be shut off completely just before Appellant traversed the men's restroom then slipped and fell.

PROCEDURAL HISTORY

On January 20, 2015, Appellant filed a petition for damages against Defendant-Appellee, Jazz Casino ("Appellee"). Approximately, three (3) years later, on March 23, 2018, Appellee filed a motion for summary judgment, which was set for hearing on April 27, 2018. On April 20, 2018, a mere seven (7) days prior to the hearing, Appellant filed an opposition to Appellee's motion for summary judgment.[1] On April 23, 2018, Appellee filed a memorandum in reply. At the April 27th hearing, the trial court issued a judgment granting summary judgment in favor of Appellee, and dismissing, with prejudice, all of Appellant's claims. On May 8, 2018, Appellant filed a motion for rehearing, which the trial court denied on May 22, 2018. It is from both judgments that Appellant appeals.

[1]Appellant filed his opposition fewer than fifteen (15) days prior to the hearing on the motion for summary, in contravention of La. C.C.P. art. 966(B)(2), which requires that "[a]ny opposition to the motion and all documents in support of the opposition shall be filed and served in accordance with Article 1313 not less than fifteen days prior to the hearing on the motion."

LAW & DISCUSSION

Assignments of Error

In this appeal, Appellant raises two (2) assignments of error. Appellant's first assignment of error addresses whether the trial court erred in granting summary judgment in favor of Appellees and dismissing, with prejudice, all of Appellant's claims. Appellant's second assignment of error addresses whether the trial court erred when it denied his motion for rehearing.

Standard of Review

In determining whether the trial court erred in granting summary judgment, this Court has reasoned:

> An appellate court conducts a *de novo* review, applying the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Brown v. Amar Oil Co.*, 2011-1631, p. 2 (La. App. 1 Cir. 11/8/12), 110 So.3d 1089, 1090 (citing *Sanders v. Ashland Oil, Inc.*, [19]96-1751, p. 6 (La. App. 1 Cir. 6/20/97), 696 So.2d 1031, 1035). A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. *Collins v. Randall*, 2002-0209, p. 3 (La. App. 1 Cir. 12/20/02), 836 So.2d 352, 354. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. *King v. Allen Court Apartments II*, 2015-0858, p. 3 (La. App. 1 Cir. 12/23/15), 185 So.3d 835, 837, *writ denied*, 2016-0148 (La. 3/14/16), 189 So.3d 1069. This procedure is favored and shall be construed to accomplish these ends. *Id.*; *see also* La. C.C.P. Art. 966 A(2).
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> The initial burden of proof rests on the moving party. La. C.C.P. [a]rt. 966 D(1). However, if the mover will not bear the burden of proof at trial on the matter 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 that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. *King*, 2015-0858 at p. 3, 185 So.3d at 838. Thereafter, if the adverse party fails to provide factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. *Id.* It is only after the motion has been made and properly supported that the burden shifts to the non-moving party. *Brown*, 2011-1631 at p. 3, 110 So.3d at 1090-91; *Pugh v. St. Tammany Parish School Bd.*, 2007-1856, p. 3 (La. App. 1 Cir. 8/21/08), 994 So.2d 95, 98.
>
> A genuine issue is a triable issue. *Brown*, 2011-1631, p. 3, 110 So.3d at 1090-91. *Jones v. Stewart*, 2016-0329, p. 7 (La. App. 4 Cir. 10/5/16), 203 So.3d 384, 389, *writs denied*, 2016–1962, 2016-1967 (La. 12/16/16) ––– So.3d. ––––, ––––, 211 So.3d. 1169, 2016 WL 7638451, 2016 WL 7638388. More precisely, an issue is genuine if reasonable persons could disagree. *Id.* If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. *Id.* A fact is material when its existence or non-existence may be essential to the plaintiff's cause of action under the applicable theory of recovery. *Id.* Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. *Id.*; *King v. Illinois Nat. Ins. Co.*, [20]08-149, p. 6 (La. 4/3/09), 9 So.3d 780, 784. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of substantive law applicable to the case. *Brown*, 2011-1631 at p. 3,110 So. 3d at 1091; *Hall v. Our Lady of the Lake R.M.C.*, 2006-1425, p. 9 (La. App. 1 Cir. 6/20/07), 968 So.2d 179, 185.
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> In order to determine whether the trial court's grant of summary judgment was proper, this court must look to the applicable substantive law.

Alexander v. Hancock Bank, 2016-0662, pp. 2-4 (La. App. 4 Cir. 2/8/17), 212 So.3d 713, 715-16.

Applicability of La. R.S. 9:2800.6

This Court stated that the "jurisprudence has recognized that a casino is a merchant;" therefore, La. R.S. 9:2800.6, the Louisiana Merchant Liability Statute,[2] is the applicable substantive law. *Thomas v. Caesars Entm't Operating Co.*, Inc., 2012-1202, p. 3 (La. App. 4 Cir. 1/23/13), 106 So.3d 1279, 1281. Accordingly, 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." La. R.S. 9:2800.6(A); *Lewis v. Jazz Casino Co., L.L.C.*, 2017-0935, p. 7 (La. App. 4 Cir. 4/26/18); 245 So.3d 68, 73, *writ denied*, 2018-0757 (La. 9/21/18); 252 So.3d 877. Further, "[t]his duty 'includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.'" *Id.* Additionally, La. R.S. 9:2800.6 (B) provides three (3) elements that the claimant, herein Appellant, must satisfy:

> 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.

[2]The Louisiana Merchant Liability Statute "governs negligence claims brought against merchants for accidents caused by a condition existing on or in the merchant's premises." *Davis v. Cheema, Inc.*, 2014-1316, p. 6 (La. App. 4 Cir. 5/22/15), 171 So.3d 984, 988.

> (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. [emphasis added.]

Appellee asserts that the trial court did not err in granting summary judgment in its favor because Appellant is unable to satisfy his burden of proving the second element – that Appellee either created or had actual or constructive notice of the condition which caused the Appellant's injury. This Court, in contemplation of the second element, has reasoned:

> the statutory definition of "constructive notice" is clear and unambiguous. [*White v. Wal-Mart Stores, Inc.*, [19]97-0393, p. 4 (La. 9/9/97), 699 So.2d 1081, 1086.] "'Constructive notice means' the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care." La. R.S. 9:2800.9(C)(1). Thus, there is a "temporal" element included. *White*, [19]97-0393, p. 4, 699 So.2d at 1084. This element has two components. First, the plaintiff must show that the condition existed for "some time period" prior to the fall. *Id.*, [19]97-0393, p. 4, 699 So.2d at 1084-85. Second, the plaintiff must prove that this period of time was "sufficient to place the merchant defendant on notice" of the existence of the condition. *Id.*, [19]97-0393, p. 1, 699 So.2d at 1082.

Lewis, 2017-0935, p. 8; 245 So.3d at 74. Further, the Louisiana Supreme Court reasoned:

> [t]hough there is no bright line time period, a claimant must show that "the condition existed for such a period of time that the defendant merchant would have discovered its existence through the exercise o[f] ordinary care...." **Whether the period of time is sufficiently lengthy that a merchant should have discovered the condition is necessarily a fact question; however, there remains the prerequisite showing of some time period**. A claimant who simply shows that the condition existed without an additional showing the condition existed for some time before the fall has not carried the burden of proving constructive notice as

> mandated by the statute. Though the time period need not be specific in minutes or hours, constructive notice requires that the claimant prove the condition existed for some time period prior to the fall. This is not an impossible burden. *Kennedy v. Wal-Mart Stores, Inc.*, [19]98-1939 (La. 4/13/99), 733 So.2d 1188, 1190-91 (emphasis added.) (citing *White*, [19]97-0393, pp. 4-5, 699 So.2d at 1190-91).

Lewis, 2017-0935, pp. 8-9; 245 So.3d at 74.

A motion for summary judgment, which, in the instant matter, is based on La. R.S. 9:2800.6, Louisiana's Merchant Liability Statute, turns on whether the parties satisfied their respective burdens of proof. This Court has explained that once the burden of proof has been shifted to the plaintiff, here Appellant, "[t]he plaintiff may not satisfy this burden by resting on mere allegations or by filing self-serving conclusory affidavits which merely restate those allegations. The mere fact that the plaintiff contests a fact in her allegations is not sufficient to raise a genuine issue concerning those facts." *Hardison v. Byrne*, 2015-0111, p. 9 (La. App. 4 Cir. 12/9/15), 182 So.3d 1110, 1116, *Sims-Gale v. Cox Commc'ns of New Orleans*, 2004-0952, p. 5 (La. App. 4 Cir. 4/20/05), 905 So.2d 311, 314, *quoting Guichard v. Super Fresh/Sav-A-Center, Inc.*, 1997-1573, pp. 4-5 (La. App. 4 Cir. 2/4/98), 707 So.2d 1013, 1015. In fact, in *Sims-Gale*, this Court demanded that the non-moving party "produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial." 2004-0952, 905 So.2d at 313. Further, the Louisiana Supreme Court has explained that "[o]nce the motion for summary judgment has been properly supported by the moving party, the failure of the nonmoving party to produce evidence of a material factual

dispute mandates the granting of the motion." *Reynolds v. Bordelon,* 2014-2371, p. 4 (La. 6/30/15), 172 So.3d 607.

Appellee argues that Appellant failed to show either that a spill occurred or that a foreign substance can be seen in the area where Appellant slipped and fell. Specifically, Appellee asserts that the surveillance footage[3] shows that "140 people walked up the same stairs and 145 people walked down the same stairs, walking directly over or adjacent to the accident site" without slipping and falling. Appellee further asserts that Appellant had no problems ascending the stairs before he subsequently slipped and fell while descending the stairs. Appellee emphasizes that Appellant did not see a substance on the stairs, but assumed that the floor was wet after he slipped because his pants were wet. Appellee summarizes that Appellant did not know what he slipped on or how long the condition was present prior to his slip and fall. In further support of its position, Appellee relies on *White*, in which the Louisiana Supreme Court enunciates that "the claimant must come forward with **positive evidence** showing that the damage-causing condition existed for some period of time, and that such time was sufficient to place the merchant defendant on notice of its existence." (emphasis added.) *White*, 1997-0393, p. 1; 699 So.2d at 1082. Here, Appellant only speculates that there was a substance on the floor, what the substances was, that the substance caused his fall, and that Appellee had constructive notice of the substance. There is no scintilla of evidence, other than Appellant's self-serving testimony in his deposition and a

[3] The surveillance footage was recorded between 8:20 p.m. (20:20) and 9:00 p.m. (21:00).

hearsay statement of a casino janitor, to meet his burden of proving the second prong. Because of that fact alone, we pretermit discussion of the other two elements and find that Appellant fails to meet his burden of proof in satisfying the requirements of La. R.S. 9:2800.6 (B). Accordingly, we find that the trial court did not err in granting summary judgment in favor of Appellee.

Louisiana Code of Civil Procedure Article 966(B)(2)

Implicit in his first assignment of error, Appellant argues that the trial court erroneously excluded his memorandum in opposition to the motion for summary judgment, as well as the exhibits thereto. La. C.C.P. art. 966 (B)(2) states that "[a]ny opposition to the motion and all documents in support of the opposition shall be filed and served in accordance with Article 1313 not less than fifteen days prior to the hearing on the motion." In the present case, during the hearing on the motion for summary judgment, the trial court reproached Appellant for failing to comply with the aforesaid mandate when he untimely filed his opposition to the summary judgment motion. Appellant filed his opposition to Appellee's motion for summary judgment on April 20, 2018, only seven (7) days prior to the hearing on the motion for summary judgment that took place on April 27, 2018.

The Louisiana Supreme Court, in *Buggage v. Volks Constructors*, 2006-175, p. 1 (La. 5/5/06), 928 So.2d 536, 536,[4] and *Guillory v. Chapman*, 2010-1370 (La. 9/24/10), 44 So.3d 272, elucidated that the time limitation, specifically that "[a]ny opposition to the motion [for summary judgment] . . . *shall* be filed . . . not less

[4] In *Buggage*, the Louisiana Supreme Court opined that "affidavits not timely filed can be ruled inadmissible and properly excluded by the trial court." *Id.*

than fifteen days prior to the hearing on the motion," established by La. C.C.P. art. 966 (B)(2) is mandatory [emphasis added]. Further, the Louisiana Supreme Court "recognized that it is within the trial court's discretion whether or not it chooses to consider an untimely filed opposition and supporting affidavit on summary judgment." *Guillory*, 2010-1370, 44 So.3d 272.[5] This Court, guided by the aforementioned jurisprudence, reasoned that the "consideration of an untimely filed opposition rests with the discretion of the trial court." *Cambrie Celeste LLC v. Starboard Mgmt., LLC*, 2016-1318, pp. 17-18 (La. App. 4 Cir. 11/6/17), 231 So.3d 79, 88, *writ denied*, 2017-2041 (La. 2/2/18), 235 So.3d 1110.

To further demonstrate La. C.C.P. art. 966(B)(2)'s mandatory language, the Louisiana Supreme Court in *Newsome v. Homer Mem'l Med. Ctr.*, held that

> the trial court abused its discretion in granting the motion for continuance[6] solely in order to allow plaintiff's expert's affidavit to be filed in compliance with the eight-day limit contained in Article 966.[7] The lower courts are reversed and the matter is remanded to the trial court, which is ordered to conduct a hearing on defendants' motion for summary judgment based on the pleadings, depositions, answers to interrogatories, and admissions on file . . . , together with any affidavits served at least eight days prior to that date."

2010-0564, p. 3 (La. 4/9/10), 32 So.3d 800, 802-03.

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[5] In *Guillory*, the Louisiana Supreme Court reversed an appellate court and held that "the trial court did not abuse its discretion by deciding to follow the mandatory language of La. C.C.P. art. 966(B) as to timing." *Id.*

[6] The trial court granted a continuance after expressing concern that denying the continuance would punish the plaintiff for counsel's failure to satisfy the requirements of La. C.C.P. art. 966.

[7] In 2010, when the Louisiana Supreme Court decided *Newsome*, La. C.C.P. art. 966 mandated that any opposition to a motion for summary judgment be filed eight (8) days prior to the hearing on the motion.

Although appellate courts, such as this Court, exercise *de novo* review of summary judgment, they are prohibited from utilizing *de novo* review to overcome the mandatory time limitations established by La. C.C.P. art. 966 (B)(2) and consider untimely filed affidavits and oppositions to summary judgment or other documents in the record. Pursuant to La. C.C.P. art. 966 (D)(2), in pertinent part, "[t]he court may consider *only* those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made [emphasis added]." Here, because Appellant failed to comply with the time limitation mandated by La. C.C.P. 966 (B)(2), the trial court did not err in excluding Appellant's opposition to Appellee's motion for summary judgment. Further, this Court cannot look to other documents contained in the record to evaluate whether the trial court erred in granting summary judgment in favor of Appellee and dismissing, with prejudice, all Appellant's claims.

Second Assignment of Error

In his second assignment of error, Appellant argues that the trial court erred when it denied his motion for rehearing. After the trial court granted Appellee's motion for summary judgment, Appellant filed a motion for rehearing, which the trial court denied. Similarly, in *Bridgewater v. New Orleans Reg'l Transit Auth.,* the trial court granted summary judgment and the opposing party filed a motion for rehearing, which the trial court treated as a motion for new trial. 2015-922, p.3 (La. App. 4 Cir. 3/9/16), 190 So.3d 408, 411; *Landry v. Usie*, 2017-839, pp. 2-3 (La. App. 3 Cir. 10/18/17); 229 So.3d 1012, 1014. The Louisiana Supreme Court, in

Guillory v. Lee, explained that La. C.C.P. art. 1972 "provides that a new trial shall be granted '[w]hen the verdict or judgment appears clearly contrary to the law and the evidence.' This Court recently stated that the jurisprudence interpreting article 1972 recognizes the trial court's discretion in determining whether the evidence is contrary to the law and evidence." 2009-0075, p. 38 (La. 6/26/09); 16 So.3d 1104, 1131; *Martin v. Heritage Manor South Nursing Home,* 2000-1023, p. 3 (La. 4/3/01), 784 So.2d 627, 630. The Louisiana Supreme Court has also explained that "[t]he applicable standard of review in ruling on a motion for new trial is whether the trial court abused its discretion." *Campbell v. Tork, Inc.*, 2003-1341, p. 4 (La. 2/20/04); 870 So.2d 968, 971. In the instant matter, we find that the trial court did not abuse its discretion in denying Appellant's motion for rehearing. Further, as discussed above, the trial court's judgment granting summary judgment in favor of Appellee was not contrary to applicable law. Thus, Appellant's second assignment of error lacks merit.

CONCLUSION

For the aforementioned reasons, we affirm the trial court's judgment granting summary judgment in favor of Appellee and dismissing, with prejudice, all of Appellant's claims.

AFFIRMED