NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1503

GENIECE BILLIOT

VERSUS

BIG WHEELS TRAVEL CENTER &
CENTURY SURETY COMPANY

Judgment rendered March 25, 2011.

* * * * * *

Appealed from the
32nd Judicial District Court
in and for the Parish of Terrebonne, Louisiana
Trial Court No. 154,318
Honorable David W. Arceneaux, Judge

* * * * * *

DEXTER A. GARY
HOUMA, LA

ATTORNEY FOR
PLAINTIFF-APPELLANT
GENIECE BILLIOT

DAN BOUDREAUX
BATON ROUGE, LA

ATTORNEY FOR
INTERVENOR-APPELLANT
LIBERTY MUTUAL INS. CO.

CATHERINE S. GIERING
KEELY Y. SCOTT
BATON ROUGE, LA

ATTORNEYS FOR
DEFENDANT-APPELLEE
BIG WHEELS TRAVEL
CENTER

* * * * * *

BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

PETTIGREW, J.

Plaintiff-appellant, Geniece Billiot, appeals the trial court's judgment, granting a motion for summary judgment filed by defendants-appellees, Big Wheels Travel Center ("Big Wheels") and its insurer, Century Surety Insurance Company ("Century"), and dismissing her claims based on a finding that she failed to prove that the premises upon which she was injured contained an unreasonable risk of harm. For the reasons that follow, we affirm.

This action arises from a slip and fall accident on the premises of the defendant, Big Wheels, on November 24, 2007. Ms. Billiot alleges she injured her right arm when she slipped and fell on an access ramp while walking into Big Wheels. At all times pertinent hereto, Ms. Billiot was employed by ACE Transportation, Inc. ("ACE") and was working within the course and scope of her employment with ACE at the time of the alleged incident. Ms. Billiot filed suit against Big Wheels and Century, alleging fault on the part of Big Wheels in the following respects:

> 1) By neglecting a situation that they knew existed or should have known existed;
> 2) By failing to maintain their premises in a safe condition;
> 3) By failing to warn plaintiff of the unsafe condition;
> 4) By failing to prevent plaintiff from entering into what defendant knew or should have known was an unsafe area;
> 5) Other acts of negligence which were the cause of this accident and will be shown at the trial of this matter.

ACE's workers compensation insurer, Liberty Mutual Insurance Company ("Liberty Mutual"), intervened in the suit seeking a judgment in its favor for the amount of benefits it had already paid out to Ms. Billiot, $43,659.82 in medical expenses and $14,853.23 in indemnity benefits, and a judgment recognizing and confirming its right to offset any future disability payments and medical expenses that may be legally owed to Ms. Billiot.

In response to Ms. Billiot's claims, Big Wheels and Century filed a motion for summary judgment, asserting that there was no genuine issue as to any material fact and that they were entitled to summary judgment as a matter of law. In support thereof, Big Wheels and Century submitted two affidavits from Daniel LeBlanc, general manager of Big Wheels, a copy of Ms. Billiot's petition for damages, copies of photographs from Big

Wheels depicting the ramp where Ms. Billiot allegedly fell, and excerpts of Mr. LeBlanc's deposition. Ms. Billiot did not submit any opposition to the motion for summary judgment or present any evidence at the hearing before the trial court. Likewise, Liberty Mutual did not submit any evidence in opposition to the motion. Liberty Mutual did, however, object to the excerpts of Mr. LeBlanc's deposition being introduced into evidence at the hearing and instead offered Mr. LeBlanc's entire deposition into evidence.

Following a hearing on the motion for summary judgment, the trial court granted same, dismissing Ms. Billiot's suit with prejudice. The trial court noted as follows:

> In this case, the affidavits ... by Mr. LeBlanc details [sic] his efforts as well as photographs taken of the property in question, and I have the benefit of his deposition offered by the opponents to the motion for summary judgment as well.
>
> In this case, the plaintiff will have the burden at trial of showing all the elements necessary to prevail on a cause of action of the sort described in this petition. And one of those elements is that the plaintiff will bear the burden of proving a vice or defect existed in the property where Ms. Billiot apparently slipped and fell. And the plaintiffs will have the burden of proving that the defect was an unreasonable risk of harm to Ms. Billiot.
>
> In this particular case, there has been no evidence offered of any vice or defect in that property but for the fact that rain would fall on the area where Ms. Billiot allegedly slipped and fell. And the court is assuming for purposes of this summary judgment that rain did in fact fall at that location on that date.
>
> The problem that the plaintiffs have is that rain on a walkway is not a vice or defect. That is well settled. And ordinarily does not present an unreasonable risk of harm to a plaintiff like Ms. Billiot.
>
> In this particular case, I have no evidence that there was something wrong, inherently wrong, with the walkway; that is, perhaps in its composition or its design. I have no evidence to suggest that from the plaintiff or the intervenor.
>
> I have, on the other hand, the documentary evidence offered by the mover indicating that there was no problem, no vice, no defect in this property. And the only suggestion is that there might have been rainfall, that the property was wet. While that might have presented a risk of harm to the plaintiff, under Louisiana law, and in this case there is no genuine issue of material fact but that that fact did not present an unreasonable risk of harm to Ms. Billiot.
>
> Based on everything that's been offered in this case, I have no alternative [but] to reluctantly grant the motion for summary judgment. The case is dismissed in its entirety and all costs are assessed against Ms. Billiot and the intervenor in solido.

The trial court signed a judgment in accordance with these findings on February 2, 2010. It is from this judgment that Liberty Mutual has appealed, assigning the following specifications of error:

> 1. The trial court erred when it granted the motion for summary judgment when there existed genuine issues of material fact concerning the slip and fall incident.
>
> 2. The trial court erred when it granted the motion for summary judgment based on Louisiana Civil Code Article 2317.1 and a lack of evidence of defective design when the allegation of the plaintiff and plaintiff in intervention never allege defective design and are actually governed by Louisiana Revised Statute 9:2800.6.

Big Wheels and Century answered the appeal, seeking damages and attorney fees for the filing of a frivolous appeal.

Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Boudreaux v. Vankerkhove**, 2007-2555, p. 5 (La. App. 1 Cir. 8/11/08), 993 So.2d 725, 729-730. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. **Ernest v. Petroleum Service Corp.**, 2002-2482, p. 3 (La. App. 1 Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 2003-3439 (La. 2/20/04), 866 So.2d 830. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B).

When a motion for summary judgment is made and supported as provided by law, an adverse party may not rest on the mere allegations or denials of his pleading. His response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, will be rendered against him. La. Code Civ. P. art. 967; **Robles v. ExxonMobile**, 2002-0854, p. 4 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

We have thoroughly reviewed the evidence in the record and agree with the trial court's conclusion that summary judgment was warranted in this case. The arguments made by Liberty Mutual on appeal are without merit. Liberty Mutual failed to bear its burden of producing evidence that there were genuine issues of material fact remaining as to any of the issues relative to Ms. Billiot's claim against Big Wheels and Century. Accordingly, summary judgment was appropriate.

Regarding the answer to the appeal by Big Wheels and Century, the imposition of damages for a frivolous appeal is regulated by La. Code Civ. P. art. 2164.[1] Courts have been very reluctant to grant damages under this article, as it is penal in nature and must be strictly construed. **Bracken v. Payne and Keller Co., Inc.**, 2006-0865, p. 12 (La. App. 1 Cir. 9/5/07), 970 So.2d 582, 591-592. Even when an appeal lacks serious legal merit, damages for a frivolous appeal will not be awarded unless it is clear that the appeal was taken solely for the purpose of delay or that appellant is not serious in the position he advocates. **Cajun Constructors, Inc. v. Fleming Const. Co., Inc.**, 2005-2003, p. 18 (La. App. 1 Cir. 11/15/06), 951 So.2d 208, 220, writ denied, 2007-0420 (La. 4/5/07), 954 So.2d 146. Although we have determined that this appeal lacks merit, we cannot say that Liberty Mutual did not seriously believe the position it advocated or that this appeal was taken solely for purposes of delay. Therefore, damages for frivolous appeal are not warranted.

For the above and foregoing reasons, we affirm the trial court's judgment in accordance with Uniform Rules--Courts of Appeal, Rule 2-16.1B and assess all appeal costs against Liberty Mutual Insurance Company.

AFFIRMED.

---

[1] Article 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, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.