NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 2033

GOLDEN JONES

VERSUS

LOUISIANA CASINO CRUISES, INC.
D/B/A CASINO ROUGE

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 508,898, Division "C"
Honorable William A. Morvant, Judge Presiding

JUDGE DAVID S. GORBATY

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BEFORE: McKAY, GORBATY, AND CANNIZZARO, JJ.[1]

Judgment rendered JUN - 8 2007

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[1] The Honorable James F. McKay, III, Judge, the Honorable David S. Gorbaty, Judge, and the Honorable Leon A. Cannizzaro, Jr., Judge, all members of the Fourth Circuit Court of Appeal, are serving as judges *ad hoc* by special appointment of the Louisiana Supreme Court.

In this appeal, plaintiff argues that the defendant's motion for summary judgment was improperly granted. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

This lawsuit arises out of an accident that occurred on the premises of Casino Rouge, where plaintiff allegedly slipped on a wet substance on the floor in one of the restrooms on October 30, 2002. Louisiana Casino Cruises, Inc., d/b/a Casino Rouge ("Casino Rouge"), filed a motion for summary judgment. The court granted the motion and dismissed plaintiff's claims with prejudice, specifically holding that plaintiff failed to create a genuine issue of material fact as to defendant's actual or constructive knowledge of the condition, as well as its failure to exercise reasonable care. Plaintiff subsequently filed this appeal.

DISCUSSION

In *Independent Fire Insurance Co. v. Sunbeam Corp.*, 99-2181, 99-2257, p. 7 (La.2/29/00), 755 So.2d 226, 230-31, the Louisiana Supreme Court discussed the standard of review of a summary judgment as follows:

> Our review of a grant or denial of a motion for summary judgment is *de novo*. *Schroeder v. Board of Sup'rs of Louisiana State University*, 591 So.2d 342 (La.1991). A motion for summary judgment will be granted "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). This article was amended in 1996 to provide that "summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action...." La. C.C.P. art. 966(A)(2). In 1997, the article was further amended to specifically alter the burden of proof in summary judgment proceedings as follows: The burden of proof remains with the movant. Thereafter, if the adverse party fails to produce factual support 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." La. C.C.P. art. 966(C)(2).

In his second assignment of error, plaintiff asserts that the trial court erred in applying La. R.S. 9:2800.6 to the slip and fall that occurred on appellee's premises. His argument is based upon his interpretation of the

statutory definition of "merchants" and upon analogy from case law holding that the statute does not apply to schools, hospitals, or nursing homes.

R.S. 9:2800.6 provides, in pertinent part:

> 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.
> 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.

R.S. 9:2800.6 has been applied to slip and falls at casinos and casino vessels throughout Louisiana. See *Neal v. Players Lake Charles, L.L.C.,* 01-0244 (La. App. 3 Cir. 6/6/01), 787 So.2d 1213; *Harrison v. Horseshoe Entertainment,* 36,294 (La. App. 2 Cir. 8/14/02), 823 So.2d 1124. We find that it should also apply in the instant case. A casino sells entertainment

and goods in an integrated commercial setting and as such falls under the category of "merchant."

Plaintiff contends that general maritime law should apply here. The issue of whether or not general maritime law applies to injuries aboard Louisiana riverboat casinos after the advent of dockside gaming has been directly addressed in *Hertz v. Treasure Chest Casino, L.L.C.*, 274 F. Supp.2d 795 (E.D. La. 2003). In that case, the court held that since the Treasure Chest casino was required by law to remain dockside and was not permitted to navigate while engaged in gaming, the riverboat casino was not considered a vessel in navigation, for purposes of Jones Act seaman status. As in *Hertz,* the Casino Rouge is permanently docked and no longer considered a vessel in navigation. Thus, a slip and fall in the restroom has no substantial relationship to traditional maritime activity. As such, general maritime law does not apply. This assignment of error has no merit.

Appellant's third assignment of error asserts that even if 9:2800.6 does apply, the trial court erred in finding that plaintiff failed to meet his burden of constructive notice. Specifically, appellant argues that the trial court ignored the case law providing that when a defendant knows of a hazard but fails to take reasonable protective measures or does not enforce protective measures it has already provided, then it is charged with constructive notice. Plaintiff contends that defendant cannot prove it took reasonable protective measures to avoid injury to guests. The claim of periodic clean-ups recorded in the Restroom Cleaning Schedule is wholly unreliable, according to plaintiff. Furthermore, the caution signs defendant asserts were in place were not actually there, plaintiff alleges. According to plaintiff, defendant's failure to maintain the signs constitutes negligence.

The clear and unambiguous language of 9:2800.6 defines constructive notice as requiring plaintiff to prove a temporal element: that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care. In *White v. Wal-Mart Stores, Inc.,* 97-0393 (La. 9/9/97), 699 So.2d 1081, the Louisiana Supreme Court held, "The statute does not allow for the inference of

constructive notice absent some showing of this temporal element. The claimant must make a positive showing of the existence of the condition prior to the fall." *Id.* at 1084.

In the instant case, plaintiff did not see the substance on the floor prior to his fall. He could not identify the substance, and did not know how it came to be on the floor. Significantly, he could not offer any evidence as to how long the substance was on the floor before he fell. Plaintiff has provided absolutely no evidence of any time period prior to his fall that the condition existed. He has failed to satisfy his burden of proving that appellee had constructive notice of the substance on the floor. This assignment of error lacks merit.

Plaintiff's next assignment of error avers that the trial court erred in failing to consider if hourly clean-ups were adequate, and as such a disputed material issue of fact.

As discussed above, the failure of plaintiff to establish the essential element of constructive notice is fatal to his claim. As a result, the court need not consider the reasonableness of appellee's preventive measures, such as cleaning the restroom every hour. We find no merit to this assignment of error.

In plaintiff's first assignment of error, he contends that the trial court impermissibly weighed and evaluated the quality of the evidence in deciding the motion for summary judgment. Specifically, plaintiff takes issue with the trial court's finding that "Darlene Duncan's affidavit fails to show how she would have personal knowledge as to the events that existed on October 30, 2002, the date that Mr. Jones slipped and fell."

Duncan was employed as a janitor at Casino Rouge from November 2003 through December 31, 2003. At times, she was responsible for cleaning the public restrooms on the boat. In her affidavit, she stated that finding alcohol and vomit on the floors of the restrooms was common and a real problem. She also testified that the janitors would fill out the times on the Restroom Cleaning Schedule in advance, regardless of when they actually arrived, and how long they actually stayed. She also stated that

she did not recall ever seeing a sign advising, "CAUTION. FLOOR MAY BE WET."

Duncan did not work at the Casino Rouge at the time of plaintiff's accident. Her vague statements as to the condition of the restrooms thirteen months after the accident do not satisfy the constructive notice requirements of a temporal element as outlined by the Supreme Court in *White.* Her testimony is irrelevant and immaterial, since it does not address the restroom conditions on the day of plaintiff's accident. We find that the trial court properly weighed the evidence, and agree with his assessment of Duncan's affidavit. This assignment of error is also without merit.

CONCLUSION

Accordingly, for the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED