NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 0939

SYLVIA JACKSON-SILVAN AND JAMES SILVAN

VERSUS

STATE FARM CASUALTY INSURANCE COMPANY AND TRAVIS'S GROCERY AND MARKET

Judgment Rendered: JAN 07 2015

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington
State of Louisiana
Case No. 103,756

The Honorable William J. Knight, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

THERIOT, J.

The plaintiffs-appellants, Silvia Jackson-Silvan and James Silvan, seek reversal of the district court's judgment, granting summary judgment in favor of the defendants-appellees, State Farm Fire and Casualty Insurance Company and their insured, Travis's Grocery and Market (Travis's), and dismissing the Silvan's petition for damages with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 5, 2011, Mrs. Silvan, while a customer at Travis's, fell and sustained injuries while in the store's check-out line. The incident was captured on the store's surveillance camera, which monitored the check-out line where Ms. Silvan fell.[1] The footage begins with a male customer in the check-out line purchasing groceries and placing them in his shopping cart. As the customer is doing this, a woman identified as Ms. Silvan approaches and stands behind the male customer. The male customer completes his purchase and pulls the cart through the check-out aisle. As Ms. Silvan approaches the counter and stands directly over where the shopping cart had previously been at rest, she slips and falls on her left side and left leg.

Several individuals approach Mrs. Silvan and assist her in standing. At this time, a store employee approaches and mops the area of the aisle where Mrs. Silvan fell. The cashier, Gladys Dillon, offers Mrs. Silvan a folding chair to sit in, but Mrs. Silvan does not accept the chair. Mrs. Silvan eventually purchases her groceries and leaves the store under her own power without assistance. After she has left the store, employees examine the area of the floor where Mrs. Silvan fell and once again mop the area and the

[1] The video footage is in color and without audio.

adjacent aisle. Several other individuals walk over the mopped area without incident.

The Silvans filed a petition for damages on February 16, 2012. In the petition, the Silvans claimed that Mrs. Silvan "slipped on a liquid substance, blood drippings from chicken, causing her to fall and hit the floor." The Silvans further claim in their petition that:

> [t]he store was transporting chicken in cases from the back of the store to the front. In doing so, blood dripped onto the store floor. The drippings in the particular area... remained there in excess of forty-five (45) minutes and had been traversed several times as the drippings had been mixed with dirt, footprints, and tracks from shopping carts.

The Silvans asserted that Travis's was strictly liable for allowing dangerous conditions to exist in the store, which posed an unreasonable risk of harm and caused injury to Mrs. Silvan.

The Silvans filed a motion for summary judgment on May 24, 2013, claiming that all the depositions, discovery, and pleadings in the record presented no genuine issue of material fact, entitling the Silvans to judgment in their favor. No memorandum, exhibits, or statements of uncontested facts accompanied the motion. Travis's filed their own motion for summary judgment on June 20, 2013, stating that the Silvans could not meet the essential elements of their claim against Travis's. Travis's submitted with their motion a memorandum in support and attached exhibits.

A hearing on both motions for summary judgment was held on August 30, 2013. The district court denied the Silvans' motion and granted summary judgment in favor of Travis's. The Silvans' petition was dismissed with prejudice. The Silvans timely appealed the district court's judgment.

ASSIGNMENTS OF ERROR

The Silvans' three assignments of error all relate to the issue of whether there was no genuine issue of material fact as to the negligence of Travis's in failing to maintain a premises free of unreasonable risk of harm, which foreseeably resulted in Mrs. Silvan's injury.

STANDARD OF REVIEW

The motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine factual dispute. *Dickerson v. Piccadilly Restaurants, Inc.,* 1999-2633, p. 3 (La. App. 1 Cir. 12/22/00), 785 So.2d 842, 844. The mover has the burden of affirmatively showing the absence of a genuine issue of material fact and any doubt on this score should be resolved against granting the motion. *Id.* A motion for summary judgment should be granted if the pleadings, deposition, answers to interrogatories, admissions on file and affidavits show that there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

However, when a motion for summary judgment is made and supported, an adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. *Id.* In effect, after the mover files sufficient documentation to support the motion for summary judgment, the burden shifts to the opponent to prove material facts are at issue. *Id.* Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can be seen only in light of the substantive law applicable to the case. *Id.* Summary judgment is subject to de novo review on appeal, using the same standards applicable to the trial court's

determination of the issues. *Vanner v. Lakewood Quarters Retirement Community,* 2012-1828, p.4 (La. App. 1 Cir. 6/7/13), 120 So.3d 752, 755.

DISCUSSION

Louisiana Revised Statutes 9:2800.6(B) governs the plaintiff's burden of proof in a "slip-and-fall" case:

> 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.

The deposition of Travis Thomas, owner and operator of Travis's, was submitted on the motions for summary judgment. He testified that Mrs. Silvan had been a long-time customer at his store. His store buys fresh chicken in bulk, which arrives packaged in cardboard boxes. Chicken leg quarters are often removed from these boxes and packaged in bags to be sold at the store. When the chicken is delivered to the store, it is kept on ice to maintain freshness. The chicken is sometimes kept in bags, which are kept closed with twist ties. Mr. Thomas explained that sometimes loose pieces of ice may remain in these bags, and they could leak if turned upside down. He therefore instructs his employees to routinely check the floor for leaked water from the bags, and provides bags to the customers to put the chicken

in to prevent further leakage. If employees find liquid on the floor, they are instructed to mop it up.

Mr. Thomas also testified that if a customer wishes to buy an entire box of iced chicken, an employee will carry the box from the back of the store to the front and meet the customer, and melted water can leak from the box along the way. The employees are instructed to mop up any leakage from the boxes as they are carried from the rear of the store to the front. Aside from the employees routinely checking for and cleaning spills, no cleaning log or cleaning procedure manual is kept at the store. The store does, however, post signs to warn customers of wet floors. He testified that shortly after Ms. Silvan fell, he examined the area on the floor where she had slipped, and it was dry; however, he knew that one of his employees had mopped the area after she had fallen.

The deposition of Mrs. Silvan was also submitted on the motions for summary judgment. She testified that she had shopped at Travis's for about forty years prior to her accident on July 5, 2011. On the day of the accident, she had been shopping at the store for about forty-five minutes prior to her slip and fall. On the day of her accident and on other prior occasions, Mrs. Silvan remembered seeing what she called "drippings" on the store floor, especially near where the fresh chicken is located. She claimed that no bags were available for customers to put pieces of chicken in.

The deposition of cashier Gladys Dillon was also submitted on the motions for summary judgment. She testified that the customer who checked out before Mrs. Silvan (whom she knew only as "Mr. Hill") had purchased leg quarters, as well as a shopping basket full of other groceries. She testified that the large boxes of chicken are never brought through the check-out line. She was aware that for several years prior to the accident, the store

had been posting signs near the chicken that indicated to customers that they are to place chicken pieces in plastic bags provided by the store. She testified that the check-out counter often gets wet from the chicken, but she often wipes the counter clean to prevent liquid from spilling onto the aisle floor.

Ms. Dillon testified she did not know if there were plastic bags available to the customers at the time of the accident, or if the store had run out. On the date of the accident, she had not seen any employees mopping the floors, but she did not indicate that there was anything on the floors for them to mop.

In considering these three depositions along with the video surveillance, it is apparent that Mrs. Silvan slipped on liquid that leaked from Mr. Hill's shopping cart moments after he moved the cart away from the checkout counter. The spill was not caused by an employee of Travis's, and there wasn't adequate opportunity for an employee of Travis's to clean the spill before Mrs. Silvan slipped. Ms. Dillon, the employee closest to the incident at the time it happened, testified:

> When [Mrs. Silvan] fell, [Mr. Hill] ahead of her had bought groceries. You know, he had bought some leg quarters, but she was like right in line right behind him and I didn't have time to go out there to see if anything was on the floor or nothing and she just checked out right directly behind him.

Although the owner of a commercial establishment has an affirmative duty to keep the premises in a safe condition, he is not the insurer of the safety of his patrons and is not liable every time an accident happens. *Ward v. ITT Specialty Risk Services, Inc.,* 31,990, p. 3-4 (La. App. 2 Cir. 6/16/99), 739 So.2d 251, 254, writ denied, 1999-2690 (La. 11/24/99), 750 So.2d 987.

In its reasons for judgment, the district court cites the Silvans' misplaced emphasis on the store's practice of selling fresh chicken in bags

and boxes that can leak as the cause of her injury rather than the actions of a customer whom Travis's cannot control. We agree with the district court that the Silvans' evidence of the store practices do not prove any of the elements of La. R.S. 9:2800.6(B). The hazardous condition which injured Mrs. Silvan was not reasonably foreseeable by Travis's since it occurred before any store employee could take preventive measures. Since Mr. Hill created the condition only moments before Mrs. Silvan slipped, Travis's did not have constructive notice of the hazardous condition. Finally, Travis's exercised as reasonable care as could be expected by constantly having employees scan and mop the floors for spills that are visible and apparent. Although Travis's did not have an established cleanup safety procedure, Mr. Thomas sufficiently described what his employees customarily do to prevent hazardous condition on the store floor.

The district court cited *Ross v. Schwegmann Giant Supermarkets, Inc.*, 1998-1036 (La. App. 1 Cir. 5/14/99), 734 So. 2d 910, 913, writ denied, 1999-1741 (La. 10/1/99), 748 So.2d 444, in support of its opinion that the merchant and not a patron must directly create the hazardous condition to be liable under La. R.S. 9:2800.6(B). We agree with the district court's comparison of *Schwegmann* to the instant case. In *Schwegmann,* the plaintiff slipped and fell after stepping on crab salad that had been dropped on the store floor. *Id.* at 911. It could not be determined by the evidence in that case who dropped the crab salad on the floor, but it was generally known that customers had been sampling the crab salad throughout the day. *Id.* at 912-13. This Court found that the plaintiff did not present evidence to prove that the store had actual or constructive knowledge of the hazardous condition, and therefore the plaintiff failed to meet her burden of proof on summary judgment. *Id.* at 913. This court stated:

> Because constructive notice is plainly defined to include a temporal element, we find that where a claimant is relying upon constructive notice under La. R.S. 9:2800.6(B), 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.

Id. at 913 (quoting *White v. Wal-Mart Stores, Inc.*, 1997-0393, p.1 (La. 9/9/97), 699 So. 2d 1081, 1082)

This point is made more strongly in the instant case. From the video footage, it is clear that Mr. Hill, and not a store employee, caused the spill. Both Mr. Hill and Mrs. Silvan were standing directly above the spill, apparently unaware that the spill had occurred since neither person alerted an employee. Mere moments after Mr. Hill had moved out of the check-out aisle, Mrs. Silvan stepped forward and slipped. The record establishes that an employee of Travis's could not have known of the spill in time to clean it prior to Mrs. Silvan stepping unto the liquid substance on the floor.

CONCLUSION

The Defendants presented irrefutable evidence that they did not have actual or constructive notice of a hazardous condition in the store. Therefore, the Sivans failed to carry their burden of proving negligence on the part of Travis's under La. R.S. 9:2800.6(B). The district court correctly denied the Silvans' motion for summary judgment and correctly granted Travis's motion for summary judgment.

DECREE

The judgment of the district court denying the motion for summary judgment of Sylvia Jackson-Silvan and James Silvan, granting the motion for summary judgment of State Farm Fire and Casualty Insurance Company and its insured, Travis's Grocery and Market, and dismissing the Silvans'

petition for damages is affirmed. All costs of this appeal shall be assessed to the appellants, Sylvia Jackson-Silvan and James Silvan.

AFFIRMED.