SUPREME COURT

STATE OF LOUISIANA

DOCKET NO. _____

CORA ANN BALL AND ELWYN BALL
Plaintiffs/Respondent

VERSUS

PICCADILLY RESTAURANTS, LLC AND
AMERICAN HOME ASSURANCE COMPANY
Defendant and Carrier/Applicants

APPLICATION FOR WRIT OF CERTIORARI
FROM THE COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

ORIGINAL APPLICATION FOR WRITS OF CERTIORARI AND SUPERVISORY REVIEW ON BEHALF OF PICCADILLY RESTAURANTS, LLC AND AMERICAN HOME ASSURANCE COMPANY, APPLICANTS, SEEKING REVIEW OF A DECISION BY THE COURT OF APPEAL, FIRST CIRCUIT CIVIL ACTION NO. 2011-CA-1862 AFFIRMING A DECISION OF THE TWENTY SECOND JUDICIAL DISTRICT COURT DOCKET NO. 2009-11726 THE HONORABLE RAYMOND S. CHILDRESS, PRESIDING

A CIVIL PROCEEDING

Respectfully submitted,

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Attorneys for the Applicants,
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American Home Assurance Company

Exhibit E

SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO._____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

Cora Ann Ball, et al

VS.

Piccadilly Restaurant, LLC, et al

Applicant:_____

Have there been any other filings in this Court in this matter? ☐ Yes ☑ No

Are you seeking a Stay Order? No

Priority Treatment?____

If so you MUST complete & attach a Priority Form

LEAD COUNSEL/PRO SE LITIGANT INFORMATION

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Pleading being filed: ☐ In proper person, ☐ In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

☑ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other

☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court:_____ Docket No._____

Judge/Commissioner/Hearing Officer:_____ Ruling Date:_____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: 22 ND Judicial District Court Docket Number: 2009-11726

Judge and Section: Honorable Raymond S. Childress Date of Ruling/Judgment: June 13, 2011

APPELLATE COURT INFORMATION

Circuit: First Docket No. 2011-CA-1862 Action: Affirmed

Applicant in Appellate Court: Piccadilly Restaurants, LLC & American Home Assurance Filing Date: 11/10/11

Ruling Date: May 2, 2012 Panel of Judges: John Pettigrew, Page McClendon, Jewel Welch En Banc: ☐

REHEARING INFORMATION

Applicant: Piccadilly Rest., LLC & Am. Home Assur. Date Filed: 5/14/2012 Action on Rehearing: Denied

Ruling Date: May 24, 2012 Panel of Judges: John Pettigrew, Page McClendon, Jewel Welch En Banc: ☐

PRESENT STATUS

☐ Pre-Trial, Hearing/Trial Scheduled date:_____. ☐ Trial in Progress, ☑ Post Trial

Is there a stay now in effect?_____ Has this pleading been filed simultaneously in any other court?_____

If so, explain briefly_____

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

06/22/2012
DATE

SIGNATURE

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Revised 12-9-98

TABLE OF AUTHORITIES

STATEMENT OF THE CONSIDERATIONS REQUIRED BY RULE X, SECTION I(a) WARRANTING THE GRANTING OF WRITS

I. ERRONEOUS INTERPRETATION APPLICATION OR APPLICATION OF LAW

Applicants, Piccadilly Restaurants, LLC, and American Home Assurance Company, seek this Court's consideration under Rule X, Section 1(a)(4), as the decisions of the First Circuit Court of Appeal and Trial Court have erroneously interpreted and applied Louisiana Revised Statutes 9:2800.6 and jurisprudence interpreting Louisiana Revised Statutes 9:2800.6, which mandate that a Plaintiff must satisfy all elements of the statute in order to recover.

MEMORANDUM

I. STATEMENT OF THE CASE:

This matter arises out of the Merchant Liability Statute, Louisiana Revised Statutes 9:2800.6. On July 26, 2008, at approximately 3:00 p.m., Cora Ann Ball, went to the Piccadilly Restaurant located in Slidell, Louisiana. Upon entering the restaurant, Ms. Ball encountered a "wet floor" sign.[1] Ms. Ball walked around the sign and over the floor mat closest to the service counter. Ms. Ball testified that when she stepped onto the mat it buckled, causing her to slip and fall.[2] After she fell, Ms. Ball stated that she saw a "green slimy substance" under the mat.[3]

Willie Morgan, Sr. was the assistant manager at Piccadilly on the date of Ms. Ball's accident.[4] Mr. Morgan testified that there were two safety mats placed on the floor in front of the drink machine.[5] He described the mats as being carpeted on the top with a rubber bottom and small balls or beads for traction, and added that the mats could not easily be pushed.[6]

Mr. Morgan recalled that at approximately 2:45 p.m. on July 26, 2008, he cleaned up a spilled drink near these mats.[7] Mr. Morgan testified that he cleaned the spill himself and that he rolled both of the mats back in order to clean underneath them.[8] When Mr. Morgan flipped the mats over, he did not see any "green slimy substance" or any other food substance.[9] He swept up the ice with a broom and a dust

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[1] R. p. 355, l. 22-27.

[2] R. p. 356, l. 15-17.

[3] R. p. 360, l. 1-4.

[4] R. p. 324, l. 5-7.

[5] R. p. 416, l. 29-30.

[6] R. p. 418, l. 3-6.

[7] R. p. 419, l. 30-31.

[8] R. p. 420, l. 9-11.

[9] R. p. 420, l. 21-26.

pan and then mopped up the remaining spill.[10] Mr. Morgan then placed a "wet floor" sign in the area he mopped.[11] After learning that Ms. Ball had fallen, Mr. Morgan approached her as she was on the ground. Mr. Morgan testified that he did not notice any "green slimy substance" at that time.[12]

After her fall, Ms. Ball went to the hospital for medical treatment for injuries sustained from the fall. The hospital record from this visit simply states that Ms. Ball "slipped on wet rug" and made no mention of a "green slimy substance."[13] On July 30, 2008, Ms. Ball went to Dr. Brian Fong for further treatment of her injuries. However, again there was no mention any "green slimy substance" under the mat in Dr. Fong's reports.[14] Ms. Ball also sought treatment with Dr. Edward Frolich, an expert in hypertension, cardiovascular, and internal medicine. Dr. Frolich testified that although this accident may have exacerbated her hypertension, he did not believe that there was a causal relationship as claimed by the plaintiff.[15] Therefore, Ms. Ball failed to meet her burden of proof by preponderance of the evidence.

Plaintiffs, Cora Ann Ball and Elwyn Ball, filed a Petition for Damages against Capital City Cornichon Corp, incorrectly named as the owner and operator of the restaurant in which Plaintiff allegedly fell ("Piccadilly") and their insurance carrier, American Home Assurance Company, ("American Home"), in the Twenty-Second Judicial District Court, Parish of St. Tammany, on March 26, 2009.

Trial was conducted on March 17, 2011, before the Honorable Raymond Childress. At the trial of this matter, the only evidence offered to counter the testimony of Mr. Morgan was the deposition testimony of Gail Conerly. The trial court admitted,

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[10] R. p. 325, l. 6-9.

[11] R. p. 420, l. 7-17.

[12] R. p. 423, l. 9-12.

[13] R. 393, p. l. 22-30; p.394, l. 23-32; p. 395, l. 1-10; Plaintiff's Exhibit 7.4.

[14] R. p. 392. l. 2-28; Defendant's Exhibit 23.

[15] Plaintiff's Exhibits 10, Deposition of Dr. Edward Frolich, p. 39, l. 6-20.

in spite of objections from Piccadilly, this deposition testimony based solely on the statement by the plaintiff's attorney that Ms. Conerly was "unavailable" for trial. Accordingly, Defendants were prejudiced in that they were deprived of an opportunity to cross-examine Ms. Conerly at trial. Judge Childress ultimately found in favor of Ms. Ball and issued written reasons for judgment on May 31, 2011, stating that Ms. Ball established sufficient facts to assess Piccadilly with liability for her damages under LSA-R.S. 9:2800.6.

Appellants filed a Motion for Suspensive Appeal and proposed Order on June 21, 2011, with the trial court, requesting a return date and amount of suspensive appeal bond.[16] Said request was filed with the Twenty-Second Judicial District Court for the Parish of St. Tammany, where this claim was filed and where the trial took place before the Honorable Raymond S. Childress, Judge. The Order was signed, on June 23, 2011, providing a return date in accordance with law and setting the amount of the suspensive appeal bond.[17] The suspensive appeal bond was posted timely, on July 11, 2011.[18] The Notice of Appeal Charges was mailed on July 25, 2011, and charges were timely paid.[19] The First Circuit Court of Appeal affirmed the trial court's ruling on May 25, 2012.[20] Applicants seek this Honorable Court's review of the appellate court's decision affirming the lower court's Judgment finding that Ms. Ball established sufficient facts to assess Piccadilly with liability for her damages under LSA-R.S. 9:2800.6.

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[16] Record, p.283-285.

[17] Record, p.285.

[18] Record, pp. 289-293.

[19] Record, p.287.

[20] See Appendix, at Tab 3.

II. ASSIGNMENT OF ERRORS

1. The First Circuit of Appeal erred by not performing a de novo review of the trial court record, where the trial court committed legal error which interdicted the fact finding process.
2. The First Circuit of Appeal erred in affirming the Trial Court's ruling finding that Piccadilly caused or created the hazard or had actual or constructive notice or failed to exercise reasonable care as required by LSA-R.S. 9:2800.6.
3. The First Circuit of Appeal erred in affirming the Trial Court's action in admitting Gail Conerly's deposition without any evidence that she was unavailable for trial; and,
4. The First Circuit of Appeal erred in affirming the Trial Court's ruling by finding that Ms. Ball's elevated blood pressure was related to this accident.

III. SUMMARY OF THE ARGUMENT

An independent de novo review by the appellate court is proper only where one or more trial court legal errors interdict the fact finding process and the record is otherwise complete.[21] The First Circuit Court of Appeal applied the manifestly erroneous standard of review to the trial court's causation determination, and in reviewing the admission of evidence, applied the abuse of discretion standard. However, where one or more legal errors interdicts the trial court's fact finding, the Appellate Court should perform a *de novo* review of the record and render judgment based on a preponderance of the evidence.[22] The trial court's fact finding process was interdicted in the present case by the admission of the deposition of Gail Conerly.

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[21] S.J. v. Lafayette Parish School Bd., 2009-2195 (La. 7/6/10), 41 So.3d 1119, 1128.

[22] Ferrell v. Fireman's Fund Ins. Co., 94-1252 (La.2/20/95), 650 So.2d 742, 747, rev'd in part, on other grounds, 96-3028 (La.7/1/97); 696 So.2d 569, reh'g denied, 96-3028 (La.9/19/97); 698 So.2d 1388.

Alternatively, plaintiff failed to satisfy her burden of proof under LSA-R.S. 9:2800.6. The undisputed evidence establishes that Piccadilly placed rubberized, carpeted safety mats near the areas prone to spills and promptly cleaned spills when they occurred. Further, the assistant manager, Willie Morgan Sr., testified that he cleaned a spilled drink in the area just before Ms. Ball fell, stating that he rolled the safety mats back and mopped underneath them prior to placing a "wet floor" sign in the area. Although Ms. Ball claims she observed a "green slimy substance" underneath the safety mat when she fell, she failed to prove how long the alleged "green slimy substance" was present underneath the safety mat prior to her fall and whether Piccadilly had knowledge of the substance.

Additionally, the trial court wrongfully allowed Ms. Ball to introduce the deposition testimony of Gail Conerly to impeach Mr. Morgan's testimony as there was no evidence that she was unavailable for trial.

Further, Ms. Ball failed to establish that her elevated blood pressure was caused by the accident at issue as Ms. Ball had a prior history of high blood pressure and no evidence was issued that could fairly link this condition to the fall.

A. The First Circuit Court of Appeal erred in application of the standard of review.

Whether a plaintiff has carried his or her burden of proof and whether testimony is credible are questions of fact to be determined by the trier of fact.[23] Such determinations of the trial court are subject to the manifest error standard of review.[24] Under the manifest error rule, the Appellate Court's role is not to "decide whether the factual findings are right or wrong, but whether they are reasonable."[25] Thus, the Appellate Court may not set aside a trial's findings of fact unless those findings are

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[23] Cutno v. Gainey's Concrete Prod., 2006 CA 1582 (La. App. 1 Cir.05/04/07), 961 So.2d 486 (citing Roberts v. Thibodaux Healthcare Center, 2005 CA 0774 (La. App. 1 Cir. 03/24/06), 934 So.2d 84, 91).

[24] Johnson v. Cox Communications, 2003-0060 (La. App. 4 Cir. 05/14/03), 848 So.2d 48, 55-56.

[25] Cutno, 961 So.2d at 490; citing Lizana v. Gulf Coast Pain Inst., 2003 CA 1672 (La. App. 1 Cir. 05/14/04), 879 So.2d 763, 765.

clearly wrong in light of the record reviewed in its entirety.[26] Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong.[27]

Generally, the trial court is granted broad discretion on its evidentiary rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion.[28] However, where one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent de novo review of the record and determine a preponderance of the evidence.[29] A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial.[30] Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights.[31] When such a prejudicial error of law skews the trial court's finding of a material issue of fact and causes it to pretermit other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts de novo.[32]

The admission of Ms. Conerly's deposition was not harmless error. A case with similar facts to the one at instance is *Morrison v. J.A. Jones Construction Company, Inc.*, 88-CA-0577, 537 So.2d 360, (La. App. 4 Cir. 1988). In *Morrison*, appellant argued that the trial judge erred in allowing the deposition of a security guard. Appellants complained that there was not a proper showing of unavailability. The First Circuit found that the admissibility of the deposition was harmless causing

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[26] Weeks v. Buffington Corp., 28,507 CA (La. App. 2 Cir. 08/21/96), 679 So.2d 946, 951 (citing Rosell v. ESCO, 549 So.2d 840 (La. 1989)).

[27] Rosell v. ESCO, 549 So.2d 840, 844 (La.1989).

[28] Belle Pass Terminal, Inc. v. Jolin, Inc., 92-1544 (La.App. 1Cir.3/11/94), 634 So.2d 466, 476-77, writ denied, 94-0906 (La.6/17/94), 638 So.2d 1094.

[29] Ferrell v. Fireman's Fund Ins. Co., 94-1252 (La.2/20/95), 650 So.2d 742, 747, rev'd in part, on other grounds, 96-3028 (La.7/1/97); 696 So.2d 569, reh'g denied, 96-3028 (La.9/19/97); 698 So.2d 1388.

[30] Lasha v. Olin Corp., 625 So.2d 1002, 1006 (La.1993).

[31] Id.

[32] Id.

no prejudice or disadvantage to any party. **The court reasoned that the security guard's testimony was merely cumulative, corroborated plaintiff's testimony of water on the floor of the restroom, without shedding any light on the source of water or the negligence of any party.** (Emphasis added.)

Gail Conerly's deposition was not cumulative and did not corroborate any parties' testimony. Moreover, the deposition was used to impeach Appellant's only witness.

Error has been defined as harmless when it is trivial, formal, merely academic and not prejudicial to the substantive outcome of the case. Clearly, the trial court admission of Gail Conerly's deposition was not harmless error. Appellants were not afforded the opportunity to cross-examiner her and the trial court was unable to observe her demeanor to determine her credibility. In light of the Appellees' extensive use of this deposition testimony to impeach Mr. Morgan, the Appellants were improperly and substantially prejudiced by its admission at trial.

The trial court committed legal error, which interdicted the fact finding process, in admitting the deposition of Gail Conerly, on Plaintiff's unproven assertion that she was unavailable for trial. La. C.E. art. 803 provides, "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected," and, "when the ruling is one admitting evidence, a timely objection or motion to admonish the jury to limit or disregard appears of record, stating the specific ground of objection." Applicant was deprived the right to judgment in its favor based on the face of the law, requiring plaintiff's to prove their case under LSA-R.S. 9:2800.6. Furthermore, Applicant timely objected to admission of Gail Connerly's deposition into evidence.[33] Thus, admission constituted legal error.

The proper inquiry for determining whether a party was prejudiced by a trial court's alleged erroneous ruling is whether the error, when compared to the entire record, had a substantial effect on the outcome of the case.[34] That legal error was prejudicial because admission of the deposition materially affected the trial court's

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[33] R. p. 316, l. 1-20.

[34] Jennings v. Ryan's Family Steakhouse, 2007-0372, (La.App. 1 Cir. 2007), 984 So.2d 31.

ultimate ruling in favor of the Plaintiff. The deposition of Gail Conerly was the only evidence submitted to support Plaintiff's claim that Applicant breached the duty under LSA-R.S. 9:2800.6, owed to Plaintiff as a customer. Therefore, under Ferrell, the First Circuit should have performed a de novo review of the trial court record and rendered an opinion based on the preponderance of the evidence.

B. **The First Circuit of Appeal erred in affirming the Trial Court's holding that Piccadilly caused or created the hazard or had actual or constructive notice as required by LSA-R.S. 9:2800.6 and/or Piccadilly failed to exercise reasonable care.**

In order to recover damages resulting from a slip-and-fall on a merchant's premises a plaintiff must prove that:

(1) The condition created an unreasonable risk of harm to the Claimant and that the 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. LSA-R.S. 9:2800.6

In order to prove constructive notice under the statute, the plaintiff must make a positive showing of the existence of the condition prior to the fall and a defendant merchant does not have to make a positive showing of the absence of the existence of the condition prior to the fall.[35] In Babin, the plaintiff slipped and fell on some boxes of plastic toothpicks that had fallen on the merchant's floor.[36] The plaintiff admitted in his deposition that he did not know how the toothpick boxes got on the floor, nor did he know how long they had been on the floor before he fell.[37] The defendant merchant argued that the plaintiff could not prove it had constructive notice of the condition, an essential element of his claim under LSA-R.S. 9:2800.6, because he failed to demonstrate that the condition existed for such a period of time that it would have

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[35] Babin v. Winn-Dixie, 00-0078 (La. 06/30/00), 764 So.2d 37.

[36] Id.

[37] Id.

been discovered if the merchant had exercised reasonable care.[38] In support, the defendant merchant submitted the affidavits of two employees: one stating that the employee "last observed the floor at the location of the plaintiffs alleged accident approximately 10 minutes prior to the incident" and one stating that the employee performed a regular zone check inspection twenty minutes prior to plaintiffs accident.[39] Neither employee observed any boxes of toothpicks on the floor.[40] Although the plaintiff could show there was a possibility the boxes had been on the floor for some period of time, and that Winn-Dixie's employees were negligent in failing to observe them, the Louisiana Supreme Court stated that such "speculation falls far short of the factual support required to establish that plaintiff will be able to satisfy his evidentiary burden of proof at trial."[41] The Court explained that:

> [t]he 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. A defendant merchant does not have to make a positive showing of the absence of the existence of the condition prior to the fall.[42]

At trial, Ms. Ball testified that she stepped on a mat and it buckled causing her to fall.[43] Ms. Ball claims she saw a "green slimy substance" that could have been okra, spinach or beans under the safety mat.[44] However, Ms. Ball did not state that she noticed the area was wet from a spilled drink.[45] Thus, there is no connection between the prior spilled drink, of which Piccadilly had notice and the "green slimy substance" Ms. Ball noticed under the safety mat. Furthermore, Mr. Morgan testified that when

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[38] Id.

[39] Id.

[40] Id.

[41] Id.

[42] Id.

[43] R. p. 356, l. 15-17.

[44] R. p. 330, l. 1-4.

[45] R. p. 367, l. 27-30.

he flipped the safety mats over to clean the spilled drink, he did not notice any "green slimy substance" or any other food substance.[46] Just as the Winn-Dixie employees in Babin stated that they had no knowledge of the toothpicks on the floor prior to the plaintiff's fall, the Piccadilly employee here testified that he had no knowledge of a "green slimy substance" or any other food substance underneath the safety mat that Ms. Ball claims caused her fall.

Also like the plaintiff in Babin, where no evidence was offered that the toothpicks were present for some time period prior to his fall, there was no evidence in the instant matter establishing when the "green slimy substance" appeared. Because Ms. Ball failed to introduce any evidence as to how long the "green slimy substance" was present, there was no evidence to support her contention that the Piccadilly employees must have seen the green substance. Ms. Ball failed to establish that Piccadilly created or had actual or constructive notice of a green slimy substance under the safety mat as required under the statute.

Likewise, there was no evidence offered that Piccadilly failed to use reasonable care in cleaning the spilled drink or failed to timely notice a "green slimy substance" under the safety mat. The record shows that Mr. Morgan mopped up the spilled drink and placed a "wet floor" sign in the area. Louisiana jurisprudence has specifically found that mopped floors do not create an unreasonable risk of harm when the appropriate signage is used to warn patrons of the condition of the floor.[47] The plaintiff has offered no evidence that Piccadilly had knowledge of the "green slimy substance" or failed to exercise reasonable care as required under the statute.

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[46] R. p. 420, l. 21-26.

[47] Rowell v. Hollywood Casino Shreveport, 43,306 CA (La. App. 2 Cir. 09/24/08), 996 So.2d 476; Lee v. Ryan's Family Steak House, Inc., 06-1400 (La. App. 1 Cir. 5/4/07), 960 So.2d 1042, writ denied, 07-1577 (La. 10/12/07), 965 So.2d 405.

C. The First Circuit of Appeal erred in affirming the Trial Court's action in admitting Gail Conerly's deposition without any evidence that she was unavailable for trial.

Appellant respectfully submits that the Trial Court abused its discretion when it admitted into evidence the transcript of Gail Conerly's deposition when no evidence was offered to support the attorney's statement in that she was unavailable for trial.

According to Louisiana Code of Civil Procedure Article 1432:

> A deposition to perpetuate testimony taken under Articles 1429 through 1431 may be used in any action involving the same subject matter subsequently brought in any court of this state, in accordance with the provisions of Article 1450.

Article 1450 provides, in pertinent part, that:

> (3) the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
> (a) That the witness is unavailable;
>
> (b) That the witness resides at a distance greater than one hundred miles from the place of trial or hearing or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or
>
> (c) Upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Louisiana courts have refused to admit a deposition into evidence where the attorney merely states in open court that the witness was not able to attend trial without offering any other evidence to the court that the witness unavailable to testify.[48] In Broussard, the Third Circuit specifically noted that an attorney's unsworn statement that he believed that the witness was too ill to testify was not evidence.[49]

In the instant matter, the appellees listed Ms. Conerly as a witness and reserved their right to use her deposition at trial should she be unavailable.[50] Counsel for Appellee represented to the trial court that he tried to call Ms. Conerly after her deposition at the telephone number she provided, and her number had been

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[48] See e.g., Broussard v. Coleman, 479 So. 2d 1016 (La. App. 3 Cir. 1985).

[49] Id. at 1018.

[50] R. p. 66.

disconnected. Counsel for Appellee also represented to the trial court that he personally went to Ms. Conerly's residence and saw that all of her furniture was gone and the residence was being painted. Counsel for Appellee stated that there was no reason to issue a subpoena if there was no one at the residence.[51] Then counsel for the appellee offered Gail Conerly's deposition into evidence and counsel for the appellants timely objected. Counsel for the appellees argued that the witness was "unavailable." He did not argue that she resided a distance greater than one hundred miles from the place of trial or that she was out of state. Moreover, Counsel for Appellant did not argue that upon application and notice that any exceptional circumstances existed to make it desirable to allow the deposition to be used. The appellees had approximately three months to obtain evidence that Gail Conerly was unavailable for trial. However, the only evidence that Ms. Conerly was unavailable was the attorney's statement in open court. Just as the statement by the attorney, Broussard was insufficient to establish that the witness was unavailable for trial, it is likewise insufficient in this case. Counsel for the appellees offered no other evidence to support his statement that Gail Conerly was unavailable for trial. Consequently, the trial court erred in admitting the deposition of Gail Conerly. In light of the appellees' extensive use of this deposition testimony to impeach Mr. Morgan, the Appellant was improperly and substantially prejudiced by its admission in the proceeding below.

D. **The First Circuit of Appeal erred in affirming the Trial Court's ruling by finding that Ms. Ball's elevated blood pressure was related to her accident.**

The trial court's finding that Ms. Ball established a causal relationship between the accident and her elevated blood pressure is not support by the record. The test for determining the causal relationship between the accident and subsequent injury is whether the plaintiff proved through medical testimony that it is more probable than not the subsequent injuries were caused by the accident.[52] The burden of proving both

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[51] R. p.317, l. 14-29.

[52] Mart v. Hill, 505 So.2d 1120 (La. 1987); Villavaso v. State Farm Mut. Auto. Ins. Co., 424 So.2d 536 (La. App. 4 Cir. 1982).(Emphasis added.).

existence of injuries and causal connection between them and accident rests with plaintiff and such proof must be shown to a legal certainty and by a reasonable preponderance of the evidence, and a mere possibility is insufficient.[53]

In the instant matter, Dr. Edward Frolich testified that Ball told him that the first time she experienced hypertension was after the accident.[54] However, Ball acknowledged under oath at trial that she had been treated for hypertension for a number of years by Dr. Christy Graves and had a history of taking medication to control this condition.

Dr. Frolich testified that it was possible that Ball's episodes of elevated pressure were exacerbated after her alleged accident, they were not caused by the accident. Dr. Frolich was specifically asked whether he believed Ms. Ball's hypertension was caused by the accident, but he was unwilling and/or unable to give an opinion as to this level of certainty.[55] Therefore, Ms. Ball failed to carry her burden of proving that her hypertension was caused by the accident. Accordingly, the appellees' medical special damages award should be reduced by $14,645.04 as she has failed to properly support her expenses for treatment related to her hypertension as required by law.

V. CONCLUSION AND PRAYER FOR RELIEF

Applicants submit that this Honorable Court should review the decision of the First Circuit Court of Appeal which affirmed the trial court's Judgment holding that Ms. Ball established facts sufficient to assess Piccadilly with liability under LSA-R.S. 9:2800.6, and after reviewing the decision thereof, issue an order reversing the decision and order the Trial Court.

Based on all the evidence presented, as well as the arguments cited above, the Applicants contend that Gail Conerly's deposition should not have been admitted into evidence without any evidence that she was unavailable for trial.

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[53] Stevens v. Gulf Am. Fire & Cas. Co., 317 So.2d 199 (La. App. 1 Cir. 1975).

[54] Plaintiff's Exhibit 10, Deposition of Dr. Edward Frolich, p. 13, l. 5-9.

[55] Id., p. 39, l. 6-20.

Base on all the evidence presented, as well as the arguments cited above, the Applicants contend that Ms. Ball's elevated blood pressure was unrelated to her accident.

Applicants respectfully pray that this Honorable Court reverse the appellate court's and lower court's Judgment on these issues and in their favor based on the law, evidence, and argument noted above.

Respectfully submitted,

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Attorneys for the Applicants,
Piccadilly Restaurants, LLC and
American Home Assurance Company

VERIFICATION

STATE OF LOUISIANA
PARISH OF ST. TAMMANY

BEFORE ME, the undersigned Notary Public, in and for the above Parish and State, did now personally come and appear John J. Rabalais, Esq., who being first duly sworn, deposed that:

A. He is the counsel for Piccadilly Restaurants, LLC and American Home Assurance Company applicants in the above and foregoing writ application, he has read same, and all the allegations of fact contained therein are true and correct to the best of his knowledge, information and belief; and

B. He does hereby certify that a copy of the above and foregoing Application for Writs of Certiorari has been mailed to the Clerk of Court, Court of Appeal, First Circuit, State of Louisiana, P.O. Box 4408, Baton Rouge, Louisiana 70821, telephone: (225) 382-3000; the Clerk of Court and Honorable Raymond S. Childress, P.O. Box 608, Franklinton, Louisiana 70438; Attorney John Perry, Attorney for Cora Ann Ball and Elwyn Ball 103 Smart Place, Suite 1, Slidell, LA 70458, telephone: (985) 639-0207 and Attorney Denise D. Lindsey, Attorney for Cora Ann Ball and Elwyn Ball, 303 Military Road, Suite 3, Slidell, LA 70461, telephone: (985) 643-4860 by placing same properly addressed in the U.S. Mail with sufficient postage to insure delivery.

John J. Rabalais, Esq.
Attorney for Applicants
Piccadilly Restaurants, LLC and
American Home Assurance Company

SWORN TO AND SUBSCRIBED
before me this 22nd day
of June, 2012.

Edward E. Thompson, ESQ.
BAR NO. 28838