**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 93-3504**
**Summary Calendar**

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**EARL J. BOURGEOIS, III,**

**Plaintiff-Appellant,**

**VERSUS**

**UNITED STATES OF AMERICA,**

**Defendant-Appellee,**

**VERSUS**

**INSURANCE COMPANY OF NORTH AMERICA,**

**Intervenor-Appellant,**

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**INSURANCE COMPANY OF NORTH AMERICA,**

**Plaintiff-Appellant,**

**VERSUS**

**UNITED STATES OF AMERICA,**

**Defendant-Appellee.**

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**Appeals from the United States District Court**
**for the Eastern District of Louisiana**
**(CA-92-1373-H-4 c/w CA-92-3623-H-4)**

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**(April 8, 1994)**

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."

This appeal concerns the proverbial banana peel. Earl J. Bourgeois, III, and the Insurance Company of North America challenge an adverse summary judgment by the district court. We **REVERSE**.

I.

Bourgeois alleged that, while exiting an automobile in the parking lot of the post office in Slidell, Louisiana, he slipped on a banana peel and fell. After exhausting his administrative remedies under the Federal Tort Claims Act, Bourgeois filed suit against the United States for injuries resulting from his slip and fall. The Insurance Company of North America (ICNA), which had paid workers' compensation benefits to Bourgeois for injuries arising out of that incident, later brought a separate suit against the United States, and intervened in Bourgeois' action. The cases were consolidated, and the United States awarded summary judgment.

II.

Bourgeois and ICNA challenge the summary judgment, rendered from the bench:

> ... I am prepared to hold; and I think that judicial efficiency would dictate that I do, and if the Court of Appeals wants to disagree with it, fine. I am prepare[d] to hold, and I do now hold that a banana peel in the parking lot of a post office is not a dangerous condition reasonably anticipated in the activity of running a post office. And that therefore the government does not owe a customer of the post office who slips on a banana peel in the post office parking lot, absent some proof by the plaintiff that a government employee put it there, or that the government knew

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Pursuant to that Rule, the court has determined that this opinion should not be published.

> it was there and took no steps to remove it. And we don't have any evidence of either of those ....
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> The issue is a very narrow one and it's not an easy one to call, it[']s a very close question. But if the test is one of reasonableness, and I say again, perhaps in slightly different words, it is the operator of a post office facility with a parking lot, the government is not charged with having to anticipate that somebody ... will enter that parking lot, throw a banana peel there. End of my story.
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> And I have no Louisiana case guidance on it. I know you can cite some case law that approaches it, but its quite clear that the earlier cases that deal with what we might call true merchants, the super store cases and markets, etcetera. We have people who are distracted and looking at shelving and looking at matters on display, etcetera, distracted from looking down, etcetera, the heightened duty that comes from the operation of such a facility. Where you invite people not to look, and invite people to be distracted, and where you invite people to pull things off the shelf, you invite them to drop things from the shelf, and so forth. Its quite clear to me that none of the rationale of those cases have any application to this situation. Again, I say its a very close call but I make the call.

Needless to say, we review freely a summary judgment, which is proper if there are no material fact issues and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The government supports the judgment, for the most part, by asserting that the district court refused properly to apply the "merchant" standard of care to the post office.[2] Bourgeois and ICNA do not challenge this; they agree that the standard of care owed Bourgeois is defined by reasonableness. Instead, they contend

[2] Much attention was devoted in the district court to whether the "merchant" standard of care, La. Rev. Stat. Ann. § 9:2800.6 (West 1991), in either its pre-1990 or post-1990 version, applies to a post office.

that the district court erred in not applying a presumption of negligence to the post office. This presumption, established in ***Kavlich v. Kramer***, 315 So.2d 282, 285 (La. 1975), applies to non-merchants and merchants, *see* ***LeBlanc v. Alton Ochsner Medical Found.***, 563 So.2d 312, 315-16 (La. App. 1990), and arises when a plaintiff presents a *prima facie* slip and fall case, *i.e.*, when a plaintiff shows that he was injured after slipping and falling as a result of a foreign substance on the floor. ***Id.*** at 315; *see also* ***Dupor v. Schwegman Bros. Giant Super Mkts., Inc.***, 400 So.2d 239, 240-41 (La. App.) (applying presumption to parking lot), *writ denied*, 406 So.2d 611 (La. 1981).

The factual predicate for the presumption existed; once it arose, it could be rebutted by showing that "the premises owner took reasonable steps to fulfill its two-fold duty to discover and correct dangerous conditions reasonably anticipated in its business activity." ***LeBlanc***, 563 So.2d at 316 (citation omitted); *see also* ***Ford v. Sears, Roebuck & Co.***, 552 So.2d 497, 499 (La. App. 1989) ("An occupier of premises has the duty to exercise reasonable or ordinary care for the safety of invitees commensurate with the particular circumstances involved. The occupier thus owes a duty to avoid reasonably foreseeable dangers to his invitee ....") (discussing parking lots).

The district court failed to apply the presumption in favor of Bourgeois; in fact, it placed the burden of proof on him to show either that a post office employee left the peel on the premises or that the post office was aware of the peel. The appropriate

question, however, was whether the post office took reasonable measures to discover and correct dangerous conditions that might reasonably be anticipated to occur -- a matter on which it had the burden of proof. *See* ***LeBlanc***, 563 So.2d at 315.

The district court held, instead, "that a banana peel in the parking lot of a post office is not a dangerous condition reasonably anticipated in the activity of running a post office." If this ruling were correct as a matter of law, then summary judgment was appropriate, for there would be no resulting duty to keep the parking lot free of debris. But, despite the intuitive appeal of the holding, there is no law to support it, and there was a material fact issue as to whether the presence of debris, such as a banana peel, could be reasonably anticipated in the parking lot. Specifically, the post office's janitor stated in a deposition that he had found, among other things, "discarded food and baby diapers" in the parking lot, and that beer bottles and cans were often found there. In light of this testimony, the district court was premature in concluding, as a matter of law, that the post office could not reasonably anticipate the presence of a banana peel in its parking lot.[3]

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[3] Assuming that the post office could reasonably anticipate the presence of debris similar to a banana peel in its parking lot, summary judgment might still be appropriate if, as a matter of law, reasonable procedures were followed by the post office to discover such debris. *See* ***LeBlanc***, 563 So.2d at 315 ("the business establishment must show that it exercised reasonable care for the safety of its patrons. This showing includes evidence of the *enforcement* of reasonable protective measures, including periodic inspections ...") (emphasis added). In this court, the government makes a conclusory statement, without citation to the record, that such procedures existed. On the other hand, Bourgeois and ICNA

III.

For the foregoing reasons, the judgment is **REVERSED**, and the cases **REMANDED** to the district court for additional proceedings.

**REVERSED and REMANDED.**

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contend, with citations to the record, that those procedures may not have been followed that day because some of the personnel who inspected the lot were not at work that day, one could not recall if he checked the lot on the day in question, and a third (the janitor) stated that he would not go out and check the lot if it were raining hard (it was raining that day). Given that the government bears the burden of proof on this issue, and provides us with no record cites or substantial discussion, we will not sustain summary judgment on such sketchy information, particularly when the reasonableness of conduct is usually a question for the trier of fact. *See* ***Lindsey v. Sears Roebuck & Co.***, No. 93-7540, slip. op. 3209, 3211 (5th Cir. Jan. 28, 1994) (citing ***Gauck v. Meleski***, 346 F.2d 433, 437 (5th Cir. 1965)).

Along this line, we note that the government failed to provide record citations for any factual assertions in its brief. We caution that such a failure may have untoward consequences. *See* ***Moore v. FDIC***, 993 F.2d 106, 107 (5th Cir. 1993) (per curiam). In addition, our review of the record discloses that it failed likewise to provide citations for the factual assertions contained in its motion for summary judgment.