

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|---------------------------------------|---|-------------------------------|
| JUDI PRIEST, |) | Appeal from the Circuit Court |
| |) | of Kane County. |
| Plaintiff-Appellant, |) | |
| |) | |
| v. |) | No. 08-L-228 |
| |) | |
| MERLIN CORPORATION, d/b/a |) | |
| Merlin Mufflers, DANIEL F. STANDFORD, |) | |
| and CLS AUTOMOTIVE, INC., |) | Honorable |
| |) | Robert B. Spence, |
| Defendants-Appellees. |) | Judge, Presiding. |

JUSTICE SCHOSTOK delivered the judgment of the court.
President Justice Jorgensen and Justice McLaren concurred in the judgment.

ORDER

Held: The trial court properly granted defendants summary judgment: to the extent that plaintiff alleged premises liability, there was no evidence that defendants had notice of the allegedly dangerous condition; to the extent that plaintiff alleged negligence, there was no evidence that defendants unreasonably created the condition as plaintiff alleged in her complaint.

¶ 1 Plaintiff, Judi Priest, sued defendants, Merlin Corporation, d/b/a Merlin Mufflers, Daniel F. Standford, and CLS Automotive, Inc., for injuries sustained when she tripped on a floor mat while on defendants' premises. The trial court granted summary judgment for defendants, finding that

there was no genuine issue of fact as to whether defendants negligently placed the floor mat. Plaintiff timely appealed and now argues: (1) that the trial court erred in finding that there was no genuine issue of fact; and (2) that the trial court erred in refusing to consider, for purposes of plaintiff's response to defendant's motion for summary judgment, a recorded statement of a witness. For the reasons that follow, we affirm.

¶ 2

I. BACKGROUND

¶ 3 The complaint alleged that defendants owed plaintiff, a business invitee, a duty to maintain its premises in a reasonably safe condition. According to the complaint, defendants breached that duty when it "knowingly permitted, placed and stacked multiple area carpet pieces ('mats') on the floor which created a [*sic*] unreasonably dangerous condition." The complaint further alleged that defendants "installed the mats by the entrance during inclement weather to prevent customers from tracking water into the store" and that plaintiff "as a result of the negligence of Defendants tripped over the mats placed upon the floor."

¶ 4 Defendants moved for summary judgment, arguing that there was no genuine issue of fact as to whether any defect existed on the premises. Defendants further argued that, even if there was a defect in the mats, the defect was open and obvious, and moreover there was no evidence of any notice, actual or constructive, to defendants of the defect. In support of its motion, defendants attached depositions from four witnesses, including plaintiff, an affidavit from a witness who was not deposed, various photographs, and various medical records.

¶ 5 The depositions established, in relevant part, the following. According to plaintiff, she entered defendants' building and sat in a chair. She stood up and walked across the waiting room to get a magazine. On the way back to her chair, she tripped when her foot got caught on a "loop"

on a rug that was on the floor. She described the “loop” as being like a “mouse hole.” “[I]t was like somebody pushed [the rug] together and made a loop.” The “mouse hole” was facing her as she walked back to her chair, and it was about two to three inches high. She “saw the rug hooped up, and [she] didn’t want to hit it.” Her foot caught on it, and she fell.

¶ 6 Joshua Kies testified that he was at defendants’ business for 30 to 45 minutes before plaintiff arrived. He and a friend helped plaintiff out of her car and into the building. Kies saw plaintiff sit down and then get up to get a magazine. According to Kies, after plaintiff selected a magazine, she turned to walk back to her chair. Plaintiff was dragging her feet as she walked, and “she hit the corner of the carpet, and it came up with her.” He testified that he never saw a “roll” in the carpet. Kies was shown a transcript of a recorded statement that he had given about one month after the accident. The statement had been provided to plaintiff by defendants during discovery. The transcript shows that Kies stated:

“She got up to get a magazine, and she got the magazine and was walking back and there was just a little roll in the carpet and her foot didn’t pick up all the way off the ground so she kind of hit the edge of the carpet and tripped over and fell on her knee and that was about it.”

However, Kies insisted at the deposition that there was no roll in the carpet; rather, plaintiff picked up the rug when she was dragging her feet.

¶ 7 Carol Benjamin was present at defendants’ building prior to plaintiff’s arrival, and she was there when plaintiff fell. Benjamin walked across the mat before plaintiff did. She never saw anything unusual about the mat at any time. She did not see plaintiff fall; her attention went to plaintiff after she fell. The mats were not double stacked.

¶ 8 Stanford, the owner of CLS Automotive, testified that he leased floor mats from an independent company and that the mats were changed once a week. There were three to five mats out on the day of the incident. There were usually two where customers sat, one behind the counter, one in front of the counter, and one in front of the door. He saw the mats prior to plaintiff's fall and the mats were not touching each other. Stanford came to see plaintiff after she fell. At that time, the mats were not moved or rolled up; they were lying flat.

¶ 9 Shawn Robertson, defendants' employee, stated in an affidavit that, on the day of the incident, he had been in and out of the waiting area many times. He had observed the floor mats prior to plaintiff's fall. The mats were properly placed and completely flat on the floor with no ridges, ripples, or other abnormalities. He observed the mats after plaintiff's fall and they were in the same location and condition as they had been prior to plaintiff's fall.

¶ 10 Plaintiff filed a response to defendant's motion for summary judgment, arguing that there was a genuine issue of fact as to whether there was a defect in the mat. In support, plaintiff attached a transcript of a recorded statement provided by Kies. Plaintiff also argued that she was not required to establish that defendants had notice of the defect, because defendants created the hazard.

¶ 11 Thereafter, defendants moved to strike the "unsworn and unverified recorded statement" of Kies, arguing that the statement was hearsay and, further, that it could not be considered an admission because Kies was not a party. The trial court granted defendant's motion.

¶ 12 Following a hearing, the trial court granting summary judgment for defendants, stating as follows:

“There is no evidence whatsoever here that the floor mats were installed negligently. There’s one witness, and that happens to be the Plaintiff, who says there may have been a little roll in the floor mat.

I’m not seeing that this—that there is a genuine issue of material fact here. I think even with that evidence, I still don’t think that the Defendant is negligent in this case by their placing of the floor mats, and I’m going to grant the motion.”

¶ 13 Plaintiff timely appealed.

¶ 14

II. ANALYSIS

¶ 15 Plaintiff argues that the trial court erred in granting summary judgment for defendants, because there is a genuine issue of fact as to whether there was a “defect” in the mat. Specifically, plaintiff maintains that her testimony about the loop in the mat is sufficient to create a genuine issue of fact. Plaintiff also argues that she is not required to establish that defendants had notice of the defect, because defendants placed the hazard that caused plaintiff’s injuries. In addition, plaintiff argues that the court erred in striking from plaintiff’s response to the motion the transcript of Kies’ recorded statement.

¶ 16 In response, defendants argue that summary judgment was proper under either a premises liability theory or a negligence theory. Defendants maintain that it is uncontradicted that defendants had no notice of any alleged defect; thus there can be no premises liability case. Defendants further maintain that, regardless of whether plaintiff saw a “loop” in the mat, plaintiff has failed to put forth any evidence of defendants’ negligent placement or use of the mats; thus there can be no negligence case. Finally, defendants argue that the court properly struck the transcript of Kies’ recorded statement.

¶ 17 Summary judgment is appropriate where “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2008). “ ‘A defendant moving for summary judgment bears the initial burden of coming forward with competent evidentiary material, which if uncontradicted, entitles him to judgment as a matter of law.’ [Citation.] A defendant does not need to prove its case or disprove its opponent’s case in order to prevail on its motion. A plaintiff, however, ‘must come forth with some evidence that arguably would entitle him to recover at trial’ in order to survive such a motion.” *Caburnay v. Norwegian American Hosp.*, 2011 IL App (1st) 101740, ¶ 30. A reviewing court’s function is to determine whether a genuine issue of fact was raised and, if none was raised, whether judgment as a matter of law was proper. *American Family Mutual Insurance Co. v. Page*, 366 Ill. App. 3d 1112, 1115 (2006). The entry of summary judgment is subject to *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 18 We note that plaintiff’s complaint did not expressly state whether she is bringing a cause of action under a premises liability theory or a negligence theory. Defendants argue that it is entitled to summary judgment under either theory. We agree with defendants. We need not determine the propriety of the trial court’s striking of Kies’ recorded statement, because even if we considered the statement, we would still affirm.

¶ 19 To maintain a premises liability claim, plaintiff must establish that defendants knew about a condition on its premises causing an unreasonable risk of harm to its customers, or that defendants would have discovered the condition by the exercise of reasonable care. See *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976); Restatement (Second) of Torts § 343 (1965). Notice, either

actual or constructive, is an essential element of a premises liability claim. Here, plaintiff's complaint did not expressly allege notice, and plaintiff does not assert that there is a genuine issue of fact concerning notice. Rather, plaintiff argues that she is not required to show notice because defendants created the hazard that caused plaintiff's injury. See *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712, 715 (1998) (“[A] plaintiff does not need to prove actual or constructive notice when she can show the substance was placed on the premises through the defendant's negligence.”). Whether defendants were negligent, however, is addressed below. Here, we find that there is no genuine issue as to whether defendants had notice of any allegedly dangerous condition. No one had ever complained about the placement of the mats, and there was never any other incident with regard to injury. The mats were changed weekly. Thus, to the extent that plaintiff's complaint raised a premises liability claim, summary judgment for defendants was proper.

¶ 20 To prevail in a negligence action, plaintiff must prove that defendants owed her a duty, that defendants breached that duty, and that plaintiff's injury proximately resulted from that breach. *Caburnay*, 2011 IL App (1st) 101740, ¶ 46. The existence of a duty is a question of law. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). However, whether a defendant breached the duty and whether the breach was a proximate cause of the plaintiff's injury are questions of fact for the jury to decide, provided there is a genuine issue of material fact regarding those issues. *Marshall*, 222 Ill. 2d at 430; *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995).

¶ 21 As an initial matter, we note that, contrary to plaintiff's argument, the trial court did not find that there was no genuine issue of fact concerning the presence of the “loop” in the carpet. Indeed, the court acknowledged plaintiff's testimony “that there may have been a little roll in the floor mat” and expressly stated that, “*even with that evidence*, I still don't think that the Defendant is negligent

in this case by their placing of the floor mats.” (Emphasis added.) The court held: “There is no evidence whatsoever here that the floor mats were installed negligently.” Thus, the court’s ruling was not premised on an absence of a genuine issue of fact concerning what caused plaintiff’s fall (*i.e.*, the loop in the mat); rather, it was premised on the absence of a genuine issue of fact concerning whether defendants’ negligence caused the loop. We agree with the court (and plaintiff) that plaintiff’s testimony about the loop was sufficient to create a genuine issue of fact as to the loop’s role in plaintiff’s fall. However, we also agree with the court that there was absolutely no evidence that the mat was negligently installed.¹

¶ 22 In support of its ruling, the trial court found *Gentry v. Shop ‘N Save Warehouse Foods, Inc.*, 708 F. Supp. 2d 733 (2010), to be particularly persuasive. There, an 84-year-old woman fell after her toe caught on a floor mat. There was testimony that a “ripple” was observed in the mat after the fall. The court applied Illinois law and noted that the plaintiffs need not establish that the defendant had notice of any alleged defect in the floor mat if the plaintiffs could establish that the mat was negligently placed by the defendant. In determining that the plaintiffs failed to do so, the court noted

¹Based on this conclusion, plaintiff’s argument concerning the admissibility of Kies’ recorded statement becomes a moot point. According to plaintiff, “[T]he statement establishes that the Defendant tripped over a defective rug which caused her injuries. This is the central issue in this matter.” As noted, contrary to plaintiff’s claim, it is evident that the court accepted plaintiff’s testimony concerning the loop in the mat and that its grant of summary judgment for defendants was instead based on the absence of any evidence that the mat was installed negligently. Thus, even if we were to find that Kies’ statement was erroneously stricken, the outcome of the case would not change.

that “the Plaintiffs’ allegations of negligence are very generalized. There is no specific act of alleged wrongdoing or unreasonable behavior, leaving it unclear of how the Defendant breached their duty.” *Gentry*, 708 F. Supp. 2d at 738. The court distinguished the case from cases where the evidence supported a finding of negligent placement. See *Wind v. Hy-Vee Food Stores, Inc.*, 272 Ill. App. 3d 149, 157 (1995) (the evidence established that the mats were poorly maintained and in poor condition, and further that, although the defendant had a practice of taping down the mats, the mats were not taped down on the day of the accident). The court held that, although the plaintiffs had generally alleged that the mats were negligently placed, they failed to elaborate on this conclusory allegation. Here, as in *Gentry*, although plaintiff generally alleged that defendants breached their duty when they “knowingly permitted, placed and stacked multiple area carpet pieces (‘mats’) on the floor which created a [*sic*] unreasonably dangerous condition,” plaintiff failed to put forth any evidence to support this allegation or elaborate on how defendants’ actions created an “unreasonably dangerous condition.”

¶ 23

III. CONCLUSION

¶ 24 In light of the foregoing, the judgment of the circuit court of Kane County is affirmed.

¶ 25 Affirmed.