SIXTH DIVISION
October 13, 2017

No. 1-17-0678
2017 IL App (1st) 170678-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CARMEN BECERRA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14 L 006662
	)	
FAIR SHARE FINE FOODS INCORPORATED,	)	Honorable
	)	Janet Adams Brosnahan,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted summary judgment where no genuine issue of material fact existed regarding whether water leaked from a cooler in defendant's store or the adequacy of defendant grocery store's policies and procedures for cleaning and preventing spills; plaintiff forfeited any challenge to the circuit court's refusal to consider an incident report that it deemed hearsay, where plaintiff raised its argument based on the business records exception for the first time on appeal; affirmed.

¶ 2 Plaintiff Carmen Becerra appeals the trial court's order granting summary judgment in favor of defendant Fair Share Fine Foods Incorporated, and its subsequent order denying plaintiff's motion to reconsider. On appeal, plaintiff argues that summary judgment was improper because a genuine issue of material fact exists and the trial court erred when it did not

consider an incident report that it had deemed inadmissible hearsay. We find that the trial court's decisions were proper, and affirm.

¶ 3 BACKGROUND

¶ 4 This is a personal injury case that stems from plaintiff's slip and fall in defendant's grocery store, located at 6422 West 63rd Street. On June 23, 2014, plaintiff filed a single-count complaint against defendant, alleging that defendant negligently allowed water to leak onto the floor which caused plaintiff to fall, and resulted in her injury. Specifically, plaintiff's complaint alleged that defendant was negligent in one or more of the following ways:

> "(a) Improperly operated, managed, maintained and controlled said premises, and the passages, areaways and appurtenances thereof and thereat, so that as a direct result thereof, the [p]laintiff was injured;
>
> (b) Failed to provide a good, safe and proper place for the [p]laintiff to be, use, occupy and walk upon while on said premises;
>
> (c) Allowed and permitted a freezer to leak water upon the floor, in a shopping aisle, and to allow that water to remain there without removing it, in order that shoppers would not be in danger of falling;
>
> (d) Failed to remedy the unsafe, dangerous and hazardous condition upon the floor when it knew or should have known that same was in the use and need thereof;
>
> (e) Failed to inspect said premises to be certain same was in good, safe and proper condition; and/or
>
> (f) Failed to warn the [p]laintiff and others of the water upon the floor, in order to prevent any slip and fall incidents."

Thereafter, defendant filed its answer and affirmative defenses, denying all material allegations of plaintiff's complaint. The parties engaged in discovery, which included multiple depositions.

¶ 5 Plaintiff, whose first language is not English, testified at her deposition through the assistance of an interpreter. Plaintiff testified that on May 20, 2013, she walked to the defendant's store, which she often did as it was only five minutes from her house, in order to buy some tortillas, cauliflower, and waffles. Plaintiff stated that on that date, she had an incident in aisle nine of the store, which is where the milk and frozen foods are located. Specifically, the milk is located on the right side of the aisle in an open cooler and the frozen foods are on the left side in a freezer with doors. Plaintiff stated that after picking up the tortillas and cauliflower, she went to get waffles out of the frozen foods cooler, which was located in the middle of the aisle. Plaintiff testified that as she was walking through aisle nine, she "turned to see if the waffles were there, and that's where they were at, but at the time as I turned, that's when I slipped."

¶ 6 Plaintiff testified that she slipped on water, but that she did not know where it came from. Plaintiff stated "[t]here was just a puddle there because my whole hip was wet." She did not know how long the water had been there before she slipped, and did not know how big the puddle was. Plaintiff stated that the water was about one inch from the frozen foods cooler. She testified that she had not seen anyone mopping floors or anyone spill anything in the store. Plaintiff also did not see anyone clean up water in aisle nine, nor did she hear anyone complain that there was water on the floor in that aisle.

¶ 7 Plaintiff testified that her left foot slipped and she fell onto her butt in a seated position, and also hit her hand. Plaintiff stated that she fell on the left side of her body, specifically onto her left hand, with her left leg bent and her right leg extended. Plaintiff testified that no one told her that they saw her fall, but that the manager helped her get up. Plaintiff testified that she

thought the manager's last name was "Sheri." The manager and a male employee each grabbed an arm and helped her up. Plaintiff testified that she did not speak to the manager because she does not speak English. Also, although the male employee who helped her up spoke Spanish, plaintiff did not talk to him because he did not ask her any questions. Plaintiff testified that she had difficulty getting up because her left ankle was hurting a great deal. The manager and employee then took plaintiff to the office and shortly thereafter the ambulance arrived. Plaintiff testified that prior to leaving in the ambulance, someone from the store called her daughter, Maria Becerra, who then came to the store. Maria, who speaks English, spoke to the paramedics for plaintiff on their way to MacNeal Hospital. When asked in the deposition which parts of her body she told the paramedics were injured, plaintiff responded that she that she had told them, "my left leg with my hip and from my neck all the way down." Plaintiff clarified that it was through her daughter's translation that she conveyed this information.

¶ 8 While at MacNeal Hospital, an x-ray was taken of plaintiff's leg. When asked if any physician ever told her what was wrong with her, plaintiff stated, "He just told me that my leg, that they had taken [x]-rays, and they just told me I had a bruise on the inside, but it was nothing bad, and that I continued to have the strong pain. When I stepped I felt almost really weak. My foot and my ankle hurt a lot." Plaintiff was released from the hospital that same day, and was given crutches.

¶ 9 Plaintiff's daughter Maria also testified via deposition. At the time of the deposition, she stated that she was 26 years old with two children, and living in an apartment with her mother (plaintiff), her father, two brothers, and a sister. Maria testified that on the day of her mother's fall, a Hispanic male from the store called her, informing her of the accident. When she arrived at the store, Maria stated that plaintiff was in the office with the manager and the paramedics.

Maria testified that when she saw plaintiff, she was crying a lot but she was able to talk to her. Maria stated that the paramedics were asking her what happened, so she translated on plaintiff's behalf. Specifically, Maria stated that plaintiff told her that she had slipped on water by the refrigerator and that her lower back and ankle hurt. When asked if she had ever seen water coming from that cooler, Maria stated that she had on one occasion approximately three months after plaintiff's fall. Maria further testified that she did not fill out any paperwork while at the store, including any incident or accident reports.

¶ 10 Shari Fahy testified at her deposition that on the date of plaintiff's fall, she was a manager at defendant's store and had been for 14 years[1]. Fahy testified that she did not see plaintiff fall, but that someone had come up to her and told her plaintiff fell. Fahy testified that she did not know what plaintiff fell on, that there was nothing on the floor besides plaintiff, and that the floor was dry. Fahy stated that because the floor was dry, there were no wet floor warning signs out. When asked how she remembered the floor was dry, she responded, "[b]ecause I walked over there I looked on the floor and there was nothing there." Fahy did not remember if plaintiff had any water on her clothes. Fahy stated that plaintiff did not tell her anything and she did not know if plaintiff was hurt. Further, Fahy testified that she filled out an incident report, but did not ask plaintiff to fill out a statement. Fahy stated that she filled out the incident report because that is her job. Also, she testified that there is a written protocol requiring her to fill out an incident report.

¶ 11 When asked if the floors had ever been waxed or polished, Fahy stated that they were by the company that defendant hired. Fahy testified that there is no written policy for cleaning up spills, but "[w]henever you see a spill, you clean it up." When asked if she knew when the last

[1] Fahy specifically testified that she had worked at the store for 21 years, but only 14 years for Fair Share. The other seven years she worked for the predecessor store, Shop and Save.

time the floor was looked at in aisle nine, Fahy replied that, "[w]hen everybody walks down the aisle, I mean, when I walk around I look." She stated that employees walk around the store "all the time."

¶ 12 A copy of the report created by Fahy is included in the record on appeal. The report is handwritten on a piece of plain paper. The report includes the following information: the date, plaintiff's name, address, and phone number, Fahy's signature, plaintiff's signature, and a brief description of the incident. The description states: "Water on floor By the milk Isle [*sic*] 9 slipped on Left side (Leg + Elbow and Butt) Called Ambulance."

¶ 13 Vito Salamone, Sr. gave a deposition wherein he testified that that he is the owner of the store at issue in addition to a number of other businesses, and that as store owner, he is responsible for making orders and managing the managers. Vito Sr. stated that he was not at the store on the date of plaintiff's fall, and that he learned of the incident from Fahy's notes. When asked if there was an accident report filed, Vito Sr. stated:

> "The girls take -- when somebody comes to the service desk and says I fell the girl takes a name or whatever happened and the procedure is you want us to call an ambulance, you know? If they say yes we call the ambulance, if they say no it's no."

Vito Sr. also testified that the protocol at the store whenever someone falls is to "go to the office and make a report." Vito Sr. clarified that these reports are handwritten, rather than typed. Vito Sr. testified that he was unaware of the coolers having any leaks but he stated that "maybe the milk could be a little bit wet sometimes because of the condensation but nothing to speak of." However, he estimated that this only occurred when over 90 degrees outside. He also testified that the freezers are inspected once a month by a man named Omar, whom Vito Sr. referred to as "my refrigeration guy." Vito Sr. testified that Omar inspects the whole store and "comes once a

month for maintenance." When asked if the store had a regular schedule for its employees to walk up and down the aisles to look for spills, Vito Sr. responded, "[t]hey [go] up and down all day long []." He also stated that employees were specifically trained to look for spills and "[w]hen they see a spill of course they've got to clean it up."

¶ 14 Vito Salamone, Jr., Vito Sr.'s son, testified at his deposition that he is a manager at defendant's store, and has worked for his family business nearly all his life. Vito Jr. stated that he was not working at the store on the day of plaintiff's fall. As a manager, Vito Jr. stated he is responsible for "maintaining the store[,] customer service[,] stuff like that." When asked what the store cleanliness inspection procedure or policy was, Vito Jr. responded:

> "Well, we do have, you know, managers in place. They're told to walk around, you know, every 10 minutes or so. If there is a spill or they do notice there is some kind of water on the floor, they are told to tell a stock boy but stay around the area and warn people until someone can come around and clean it.
>
> And once it's cleaned, they are told to use a dry mop, you know, not too wet, not wet at all, you know, just -- and then put up the signs, the plastic signs that say caution, slip and fall, you know, whatever the sign says.
>
> But each one of the stock boys are trained [] to keep their eyes out for any kind of messes. It's one of their main jobs."

Vito Jr. stated that these policies and procedures are not written down and are conveyed to the employees verbally. Vito Jr. further testified that prior to May 20, 2013, he had never observed or learned about the coolers leaking in aisle nine. He also stated that he has never known the coolers in that aisle to need repair. When asked what the protocol was when someone is injured in the store, Vito Jr. stated:

> "Well, I mean, it's not like it's a -- you know, a set thing. But when someone falls or injures themselves, they're supposed to tell a manager obviously. And then once the manager is notified, she asks what happened and she's supposed to make an incident report, like she did, and give them a copy and keep a copy for the store's records.
>
> Depending if they hurt themselves badly, you know, obviously contact, you know, the ambulance or something like that if something happened like that. But just assess the situation as the manager sees fit."

¶ 15 James Manchen, Jr., a stock boy at defendant's store, also gave deposition testimony in this case. He testified that the store has 10 aisles and is about half the size of a Jewel grocery store. He stated his responsibilities as a stock boy required him to "[f]ace the shelves; keep the store clean; unload the trucks when they come; help people to their cars if they need it." Manchen stated that it is part of his responsibility to walk through the store's 10 aisles to make sure they are clean, and that he does this "[a]ll day." Manchen estimated that he would walk through every aisle in the store once an hour and he would visit aisle 9 between 10 and 12 times per shift. Manchen testified that he was trained how to handle a spill by his manager Steve. When there is a spill, the stock boys are to "grab the mop, grab the 'slippery when wet' sign and paper towels. Go mop up. Dry up the spot with paper towels." Manchen stated that whether he would use a wet or dry mop depended on what the spill was. Manchen also testified that when he is on duty, there are either four or five other stock boys also working. Manchen stated that he has never seen the coolers or freezers leak, and that he has never responded to a spill in aisle nine during his over two years of employment at defendant's store.

¶ 16 In addition to the aforementioned deponents, there is evidence in the record that Francis Kohler, who according to defendant's brief works in the deli of the store, also testified at a

deposition. However, the record on appeal only contains one page from Kohler's deposition that was attached as an exhibit to plaintiff's motion to reconsider the grant of summary judgment. Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005) requires that "[c]ourt reporting personnel who transcribe a report of proceedings shall certify to its accuracy." The one-page excerpt from Kohler's testimony does not bear a court reporter's certification. Thus, we are unable to determine the accuracy of the contents of Kohler's purported transcript excerpt, and do not consider it in reaching our decision in this appeal.

¶ 17 On August 5, 2016, defendant filed a motion for summary judgment, arguing that no genuine issue of material fact existed because plaintiff testified that she did not know how the water came to be on the floor, she did not know how big the puddle was, she did not know how long the water was on the floor, or if anyone had complained that there was water on the floor; thus, defendant argued that plaintiff could not prove the basic elements of her negligence claim. Defendant also argued that even if there actually was water on the floor, plaintiff could not show that defendant ever had actual or constructive notice that it was there.

¶ 18 Plaintiff filed her response on September 23, 2016, asserting that the water upon which she fell was on defendant's floor through defendant's own negligence, and therefore, a triable issue of fact existed. Plaintiff contended that even the slightest proof that a foreign substance was related to defendant's business was sufficient. Plaintiff also argued that defendant had constructive notice of the water on the floor in aisle nine because Vito Sr. testified that the "milk cooler tended to condense and leak when temperatures were high."

¶ 19 Defendant filed its reply in support for its motion for summary judgment on October 14, 2016, and pointed out that plaintiff's summary of Vito Sr.'s testimony was inaccurate. Specifically, defendant asserted that Vito Sr. actually testified that the milk itself, not the cooler,

could be wet with condensation when it was hot outside and he never stated that the coolers leaked water. Defendant also emphasized that Vito Sr.'s testimony was about the milk side of the aisle, which was opposite the freezer side where plaintiff fell. Defendant further argued that there was no evidence that defendant's employees did anything in aisle nine that would or could have placed water on the floor.

¶ 20 On November 9, 2016, the court granted defendant's motion for summary judgment in a written order[2]. The court stated there was no evidence that defendant had actual notice of water on the floor in aisle nine. The court noted that defendant did not have a written policy in place that its employees were violating and plaintiff failed to establish that the patrol of defendant's aisles was inadequate. Further, the court found that, "[w]ithout additional evidence as to how long the water had been on the floor, the evidence is insufficient to create an issue of fact as to constructive notice."

¶ 21 On December 7, 2016, plaintiff filed her motion to reconsider the court's granting of summary judgment, arguing both that the court erred in its application of the law and that newly discovered evidence existed. Specifically, plaintiff contended that when her daughter Maria visited defendant's store three months after her fall, her daughter took a video on her cell phone showing water leaking in the same spot plaintiff fell. Plaintiff attached an affidavit from Maria to her motion. Maria's affidavit stated that on August 17, 2013, she "personally took video of the refrigerator leaks at the subject Fair Share Fine Foods, Inc." Maria further attested that she took the video on her phone, and that she did it out of her own volition "to help illustrate that the subject refrigerator does leak and that the leaks had left marks on the store tile." Plaintiff's motion asserted that she did not know about Maria's video until after the summary judgment

[2] In plaintiff's opening brief, she states that "[a] hearing was held on November 9, 2016, wherein summary judgment was granted in favor of [d]efendant." However, the record on appeal does not contain a transcript of any hearing on that date, thus we only look to the court's written order.

motion was granted, and that defendant had not requested to take Maria's deposition. As to the second basis for her motion to reconsider, plaintiff argued misapplication of the law, specifically that the trial court failed to take into consideration Fahy's incident report, which reflected that plaintiff slipped and fell on water in aisle nine. Plaintiff asserted that this fact alone was enough to defeat summary judgment. Plaintiff further argued that a store should not be able to benefit from having no formal policies and procedures for cleaning, inspection, and maintenance.

¶ 22 Defendant responded to plaintiff's motion on January 20, 2017, arguing that plaintiff's allegedly newly discovered evidence should not be considered because plaintiff failed to show that due diligence was used in uncovering the video. Defendant points out that the deposition of plaintiff's daughter Maria was taken on April 30, 2015, and the video was never mentioned once. Defendant asserts that, in fact, Maria struggled to describe the premises during her deposition and that "one would think that she would have said I have a video[] of what I saw[,] let me show you." Defendant also argued the newly discovered evidence should not be allowed because it was not from the date of the incident and does not depict what plaintiff claims it depicts. Regarding the court's application of the law, defendant contended that the court did not err. Defendant specifically pointed out that plaintiff's contention that defendant's lack of written procedures was against public policy, but failed to cite any case law as support. Additionally, defendant argued that the information in the incident report had to come from plaintiff or her daughter because Fahy testified that she never saw water on the floor, which conflicts with the contents of the report. Defendant asserted that the court should not have taken into consideration the unsworn contents of the report over Fahy's sworn deposition testimony.

¶ 23 On February 3, 2017, plaintiff filed her reply in support of her motion to reconsider, arguing that the answers to interrogatories and any depositions were handled by plaintiff's prior

counsel. Plaintiff argued that a review of all the deposition transcripts and interrogatories shows that plaintiff's prior counsel was not aware that plaintiff's daughter Maria had taken a video, especially because prior counsel did not list Maria as a witness in plaintiff's Rule 213 disclosures. Additionally, plaintiff reiterated that a genuine issue of material fact existed because a jury could conclude that the alleged water was on the floor due to defendant's business operations.

¶ 24 On February 23, 2017, the court conducted a hearing on plaintiff's motion to reconsider. The parties rested on their briefs and did not conduct argument. In handing down its ruling, the court stated:

> "The plaintiff argues two reasons that I should reconsider and reverse myself. One is misapplication of the law and two is new evidence. I'll deal with those in that order. I will just say, generally and briefly, that I don't believe I misapplied the law in my original ruling. And the only specific comment I want to make about the arguments raised by plaintiff in that regard is plaintiff complains that I didn't refer to the incident report which was attached as an exhibit. And let me just say that I didn't refer to that because it's inadmissible evidence, it's hearsay and in a motion for summary judgment only admissible evidence is considered."

The court also determined that it could not find that the allegedly newly discovered video could not have been discovered prior to its ruling on the motion for summary judgment. The court went so far as to state that even if the video was presented prior to the summary judgment ruling, the court still would have granted summary judgment because "the video has very little probative value," specifically because "it doesn't show that the freezer was leaking on the date of the fall."

¶ 25 Plaintiff filed her timely notice of appeal on March 13, 2017.

¶ 26 ANALYSIS

¶ 27 Plaintiff raises the following three arguments on appeal: (1) a genuine issue of material fact exists surrounding water leaking from a freezer onto the floor on defendant's premises; (2) a genuine issue of material fact exists regarding the reasonableness of defendant's policies, procedures, and maintenance schedules for cleaning and preventing spills; and (3) the circuit court erred when it deemed an incident report filled out by defendant's employee to be inadmissible hearsay. We will address each in turn.

¶ 28 Issue of Fact Regarding Allegedly Leaking Freezer

¶ 29 Plaintiff first contends that the trial court erred when it granted summary judgment in defendant's favor because a genuine issue of material fact exists as to the water that allegedly leaked from a freezer onto the floor in aisle nine of defendant's store.

¶ 30 "[S]ummary judgment is proper only 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." *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49 (citing 735 ILCS 5/2-1005(c) (West 2012)). The court is required to strictly construe the pleadings, depositions, admissions, and affidavits against the movant, and liberally in favor of the opposing party. *Id.* When examining an appeal from a summary judgment ruling, we conduct a *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 31 "To recover damages based on negligence, plaintiff must allege and prove that defendant owed a duty to plaintiff, that defendant breached that duty, and that the breach was a proximate cause of plaintiff's injuries." *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 885 (2009). Specifically, in order to hold a business liable for a slip and fall caused by the presence

of a substance on the floor, a plaintiff must show that either the substance was placed there through the negligence of the business owner or his employees, or if a third party was responsible for the substance that the business owner or its employees had actual or constructive notice of it. *Olinger v. Great Atlantic & Pacific Tea Co.*, 21 Ill. 2d 469, 474 (1961).

¶ 32 There is no dispute that defendant owed plaintiff, a business invitee, a duty of reasonable care. Plaintiff's complaint, however, alleges that defendant breached said duty to maintain its premises in a reasonably safe condition for use by invitees when, *inter alia*, it allowed a freezer to leak water upon the floor, allowed that water to remain on the floor without removing it, failed to inspect the premises, and failed to warn plaintiff the water was present. Defendant argues that plaintiff cannot prove the basic elements of her claim because she is unable to show that the alleged water was on the floor due to defendant's negligence, or that defendant knew or should have known that water was present on the floor.

¶ 33 We note that "[a]lthough plaintiff is not required to prove [her] case at the summary judgment stage, [she] must present evidentiary facts to support the elements of [her] cause of action." *Richardson*, 387 Ill. App. 3d at 886. Here, we find that plaintiff has failed to present sufficient evidentiary facts to establish defendant's negligence, thus summary judgment was appropriate.

¶ 34 Plaintiff testified that she slipped on water, but did not know where it came from. She also testified that she did not know how long the water had been there, and did not know how big the puddle was. Plaintiff stated that the water was about one inch from the frozen foods freezer. She testified that she had not seen anyone mopping floors or anyone spill anything in the store. Plaintiff also did not see anyone clean up water in aisle nine, nor did she hear anyone complain that there was water on the floor in that aisle.

¶ 35 Contrary to plaintiff's testimony, defendant's store manager Fahy testified at her deposition that she did not know why plaintiff fell because there was nothing on the floor and the floor was dry. Fahy specifically stated that she knew the floor was dry because when she walked over and looked at the floor, "there was nothing there." Fahy also testified that although there is no written policy for cleaning up spills, the rule is that "[w]henever you see a spill, you clean it up," and that store employees walk around the store "all the time."

¶ 36 Similar to Fahy, Vito Sr. testified that his employees go "up and down [the aisles] all day long." Vito Sr. testified, like Fahy, that employees are taught to clean up spills when they see them. Regarding whether there was water on the floor, Vito Sr. stated that the freezer in question does not leak, but that "maybe the milk could be a little bit wet sometimes because of the condensation but nothing to speak of." Vito Sr. testified that such condensation would occur when it's 90 degrees[3] and over. Vito Sr. explained that the freezers are inspected once a month by his refrigeration repairman, who does the freezers' maintenance.

¶ 37 Vito Jr. testified that prior to May 20, 2013, he had never observed or learned about any leaks from the coolers in aisle nine. He also stated that he had never known the coolers in that aisle to need repair. Vito Jr. testified that the stock boys are trained to keep an eye out for messes, and in fact, that doing so is one of their main jobs. Vito Jr. also stated that the managers walk around the store "every 10 minutes or so." He stated that if a spill is noticed, then a stock boy is to stay near the spill and warn people until someone can come clean up. Vito Jr. testified that the store's policies are conveyed verbally, and are not written down.

¶ 38 Manchen, a stock boy at defendant's store, also gave testimony similar to the foregoing. He stated that it is part of his responsibility to walk through the store's 10 aisles to make sure they are clear, and that he does this "all day." Specifically, Manchen stated that he would walk

[3] The record does not contain any evidence of the outside temperature on the day of plaintiff's fall.

through each aisle once an hour, he would visit aisle 9 between 10 and 12 times per shift, and he had been trained to clean up spills by his manager. Manchen testified that in the two years he had been working at defendant's store, he had never seen the coolers or freezers leak, and that he had never responded to a spill in aisle nine.

¶ 39 Plaintiff argues that even though no one else saw plaintiff fall, a genuine issue of material fact exists, and cites *Donoho v. O'Connell's Inc.*, 13 Ill. 2d 113 (1958), for support. In *Donoho*, the plaintiff brought suit as a result of the injuries she suffered after slipping and falling in the defendant's restaurant. *Id.* at 115-16. No one besides the plaintiff witnessed her fall. *Id.* at 116. The plaintiff testified that when she went to leave the restaurant, her foot came into contact with something and she fell. *Id.* She also testified that when she could not get up, a counter boy helped her up and sat her in a chair, and that she then observed a piece of partly smashed grilled onion lying on the floor in the area she had been. *Id.* The plaintiff also noticed a grease smear on the floor of the restaurant and there was also a smear on the sole of her shoe. *Id.* The defendant's night manager, counter man, and bus boy all testified on the defendant's behalf. *Id.* at 117. They all testified that they did not see the plaintiff fall, did not seen any onion rings, other debris, food particles, or moisture on the floor. *Id.* Additionally, the employee who waited on the plaintiff testified that the floors were swept every hour and mopped three times daily. *Id.* That employee also stated that he had seen the bus boy sweep the floor 15 minutes prior to the plaintiff's fall. *Id.* The bus boy testified that if there is anything left on the table after he removes the dishes, then he uses a wet towel to brush whatever is left onto a tray. *Id.*

¶ 40 In reaching its decision, the *Donoho* court stated "in addition to the fact that the substance on the floor was a product sold or related to defendant's operations, the plaintiff offers some further evidence, direct or circumstantial, however slight, such as the location of the substance or

the business practices of the defendant, from which it could be inferred that it was more likely that defendant or his servants, rather than a customer, dropped the substance on the premises, courts have generally allowed the negligence issue to go to the jury, without requiring defendant's knowledge or constructive notice." *Id.* at 122. The court recognized that the bus boy's practice of clearing tables could allow food particles to drop to the floor. *Id.* at 124. The court also acknowledged that the proof of the smear on the plaintiff's shoe was corroborative of her story. *Id.* at 125. Ultimately, the court found that the onion ring that the plaintiff apparently slipped on was related to the defendant's operations; therefore, the issue of negligence should have been submitted to the jury. *Id.* at 124-25.

¶ 41 Plaintiff asserts that here, like in *Donoho,* no one witnessed plaintiff's fall except her. Plaintiff also contends that there is no evidence that plaintiff placed the water there herself, thus it is more probable that the water resulted from defendant's business operations. Defendant responds that *Donoho* is distinguishable because there is no evidence that any of defendant's employees placed the water on the floor or was doing any activity with water in the area of aisle nine that would have allowed it to get on the floor.

¶ 42 We agree with defendant, and find that *Donoho* differs from this case. Here, there has been no evidence presented that would lead this court to determine that the alleged water upon which plaintiff slipped was on the floor as a result of defendant's business operations. There is no evidence anyone recently mopped that aisle, or that anyone had spilled anything in that aisle. Additionally, unlike *Donoho*, where it was the defendant's practice to wipe down the tables after clearing the dishes, there is no similar practice here that would have resulted in a puddle on the floor. All of defendant's employees that gave testimony were in agreement that the coolers did not leak. Fahy specifically testified that the floor was dry. Vito Sr. testified that maybe some

condensation formed on the milk when it was 90 degrees outside. However, this testimony does not create a question of fact because there is no testimony regarding what the temperature was that day or how milk condensation would have formed a puddle on the floor across the aisle, since plaintiff testified that she was close to the frozen foods cooler, not the milk cooler, when she slipped and fell. This case also differs from *Donoho* because in that case, the plaintiff's testimony that she slipped on a grilled onion was corroborated by the grease stain on the bottom of her shoe that was observed at the hospital. Here, there is no such similar testimony. In addition to there not being any evidence that the alleged water on the floor was a result of defendant's business operations, there is also nothing in the record that would make it more likely that defendant, rather than a customer, spilled water on the floor in aisle nine.

¶ 43 Plaintiff also cites to *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, as support for her claims. In *Newsom-Bogan*, the plaintiff sued after she slipped and fell in one of the defendant's restaurants and the trial court granted summary judgment. *Id.* ¶ 1. The plaintiff fell near the trash receptacle after she stepped from the carpeting to the tile floor where her foot slipped, causing her to fall sideways. *Id.* ¶ 5. Plaintiff testified that she attempted to get up from the floor but could not because her hands were greasy and she was unable to brace herself. *Id.* The plaintiff testified she assumed it was grease she had slipped on. *Id.* The defendant's assistant manager testified that she was notified of the plaintiff's fall, but that when she looked in the area of the fall, did not observe anything on the floor. *Id.* ¶ 7. The assistant manager also testified that the defendant's training manual requires the most senior manager to walk through the restaurant every 15 minutes to make sure everything is up to par. *Id.* ¶ 7. The plaintiff submitted an affidavit attached to her response to the defendant's summary judgment motion in which she attested that she had been in the restaurant for 20

minutes prior to her fall and did not observe any employees do a walk-through. *Id.* ¶ 9. The court in *Newsom-Bogan* determined that summary judgment was improper because the plaintiff's testimony was sufficient to create a triable issue of fact as to constructive notice and the cause of her fall. *Id.* ¶ 25.

¶ 44 Plaintiff argues that this case is similar to *Newsom-Bogan* because like the plaintiff there who testified that she had grease all over her hands after trying to get off the floor, plaintiff here also testified that her hip area was wet, which should be enough to create a triable issue of fact. Defendant responds that this case is unlike *Newsom-Bogan* because defendant did not have a policy that required them to walk through the aisles every so many minutes.

¶ 45 We find *Newsom-Bogan* unlike the case at bar because the primary reason for the court's holding was that a triable issue as to constructive notice existed, specifically because the defendant's written manual was sufficient to create a duty to inspect every 15 minutes and the plaintiff testified she was there for 20 minutes, but did not see anyone perform an inspection. Thus, the plaintiff's testimony created a question of fact regarding constructive notice. Here, no such manual or time-based policy existed. The stock boys were simply required to walk around the store "all day" and check for messes. Manchen testified that he estimated that he would walk through every aisle in the store once per hour, which meant he would visit aisle 9 between 10-12 times per shift. However, there was no requirement (written or verbal) that he inspect each aisle every hour. If there had been such a requirement, and plaintiff testified that she was in an aisle for over an hour and did not see anyone inspect it, then this case would be similar to *Newsom-Bogan*, and perhaps summary judgment would not have been proper.

¶ 46 The final case plaintiff cites in support of her argument is *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789 (1999). In *Wiegman*, the plaintiff fell near the pool area

of the defendant's hotel. *Id.* at 792. On appeal, the court affirmed the denial of the defendant's motion for a directed verdict and judgment notwithstanding the verdict. *Id.* at 805. The court reasoned that the motions were properly denied because the plaintiff's testimony established that she slipped rather than tripped, two witnesses testified that the floor all around the plaintiff was wet, and the plaintiff testified that her dress was wet. *Id.* at 798.

¶ 47 Defendant argues that *Wiegman* is distinguishable because, here, there are no witnesses to any water being on the floor in aisle nine. Additionally, defendant asserts that there are no witnesses that testified how long the water was on the floor, thus there is no evidence of notice to defendant. We agree with defendant's contentions, and find *Wiegman* inapposite. Here, plaintiff testified that she did not know where the water came from. Thus, even assuming water was present, there is no evidence as to how it got there or how long it had been there. Specifically, plaintiff testified that the water she saw was approximately one inch from the frozen foods cooler but she did not know where it came from. She did not see anyone mopping and she did not see anyone spill anything. Thus, the evidence that was present in *Wiegman* to create a question for the jury is simply not present here.

¶ 48 Ultimately, plaintiff has failed to present evidentiary facts to support her negligence cause of action. There is no evidence that any water was on the floor due to defendant's own negligence. Similarly, there is no evidence that defendant had actual or constructive notice of any water on the floor. As a result, no genuine issue of material fact exists.

¶ 49 Issue of Fact Regarding Defendant's Policies and Procedures

¶ 50 Plaintiff also argues that a genuine issue of material fact exists surrounding the reasonableness of defendant's policies, procedures, and maintenance schedules for cleaning and preventing spills. Plaintiff asserts that the trial court's rejection of this argument is problematic

because it favors the position of not having written policies and procedures for cleaning spills over having them. Defendant responds that plaintiff has failed to set forth any testimony that would indicate that defendant's policies were inadequate or unreasonable.

¶ 51 In its November 9, 2016, order that granted defendant's motion for summary judgment, the trial court determined that unlike Wendy's, the defendant in *Newsom-Bogan*, "Fair Share did not have a written policy in place that its employees were violating, and [p]laintiff did not establish that Fair Share's patrol of its aisles was inadequate." We agree with the trial court's conclusion, and find that no issue of fact regarding the sufficiency of defendant's spill clean-up policies exists.

¶ 52 Plaintiff cites to a federal case, *Peterson v. Wal-Mart Stores, Inc.*, 241 F. 3d 603 (2001), and numerous foreign cases in support of her argument. The "use of foreign decisions as persuasive authority is appropriate where Illinois authority on point is lacking or absent." *Rhone v. First American Title Insurance Co.*, 401 Ill. App. 3d 802, 812 (2010). Although plaintiff stresses that there is a dearth of Illinois law on this subject, we disagree, and decline to rely on foreign cases.

¶ 53 In *Peterson*, the plaintiff slipped and fell on the contents of a broken bottle of lotion in one of the defendant's stores, and injured his knee. *Id.* at 604. Two of the defendant's employees testified that they had walked down the aisle where the plaintiff fell just minutes before the fall, and did not see any sign of spillage. *Id.* Conversely, the plaintiff testified that he had been in the aisle for 10 minutes, and had not seen any employees or heard any sounds of breaking. *Id.* The trial court granted summary judgment, finding that ten minutes are too few to give a storeowner constructive notice of a hidden danger on the premises. *Id.* On appeal, however, the court reversed, acknowledging that there is no duty of continuous inspection, but

also holding that "neither is there any flat rule in Illinois that ten minutes is always too short a period for a duty of inspection and clean up to arise." *Id.* at 605.

¶ 54 Plaintiff asserts that this case mirrors *Peterson* because defendant's employees' testimony that the managers and stock boys are required to patrol the store for messes all day raises the presumption that they were careless in not having noticed any water leaking from the freezer in aisle nine. We find plaintiff's argument unconvincing because unlike *Peterson* where there was a broken bottle of lotion near where the plaintiff fell, there is no evidence here of where the water came from. Plaintiff testified she did not know where it came from. Defendants' employees testified that they never saw the freezer at issue leaking. Thus, we disagree that any presumption regarding defendant's alleged carelessness or negligence was raised where there is no evidence of the cause of the water or how long it had been there.

¶ 55 We find *Hresil v. Sears, Roebuck & Co.*, 82 Ill. App. 3d 1000 (1980), to be relevant here. In that case, the plaintiff brought suit after slipping and falling on a foreign substance in one of the defendant's department stores. *Id.* at 1000. The trial court granted a directed verdict in the defendant's favor and the plaintiff appealed, arguing that evidence existed that showed the defendant should have known of the presence of the substance. *Id.* at 1002. Specifically, the plaintiff pointed to her own testimony that for the 10 minutes prior to her fall there was no other customer present in the same department as her, thus the plaintiff contended that whether 10 minutes is sufficient time to give the defendant constructive notice was a question of fact for the jury. *Id.* The *Hresil* court ultimately found that, as a matter of law, ten minutes was an insufficient time period to give constructive notice of the presence of substance because the fall occurred at a time when there were few shoppers in the store and the salespersons were located near the store exits. *Id.* The court explained, "[t]o charge the store with constructive notice of

the presence of the substance would place upon the store the unfair requirement of the constant patrolling of its aisles." *Id.*

¶ 56 In light of *Hresil*, we find that deeming defendant's spill management policy inadequate would result in a similarly unfair requirement. Plaintiff argues as if defendant did not possess any policies or procedures for handling a spill. This is simply untrue. Defendant had policies and procedures that its employees were required to follow regarding mess and spill inspection and clean-up. We find no reason why the policies to which defendant's witnesses testified would not be sufficient or reasonable given that defendant's store is smaller-scale, and only contains 10 aisles. Vito Sr., Vito Jr., Fahy, and Manchen all testified that employees are required to walk-through the aisles "all the time" or "all day." Additionally, the stock boys are trained how to clean up a spill and what to do if they notice a spill but do not have a mop on hand. There is no evidence of how long the water was present or how long plaintiff was in the aisle before she fell, thus it would be impossible to determine whether defendant breached its own policy requiring the stock boys to walk through the aisles all the time. Further, plaintiff makes much of the fact that defendant did not have a written policy. However, plaintiff has not presented, and we have not found, any case that requires a business to write down its spill clean-up and maintenance policies.

¶ 57 Ultimately, the lack of evidentiary facts is fatal to plaintiff's case. She cannot explain how the water got on the floor and she cannot establish how long it was present. Our finding that defendant's policies were adequate, coupled with the lack of evidence showing that defendant had constructive notice of the water, results in our determination that no genuine issue of material fact exists.

¶ 58 Incident Report

¶ 59 Plaintiff argues that the trial court erred in failing to consider the incident report because it falls under the business records exception to the hearsay rule. When delivering its decision on the motion to reconsider, the trial court specifically stated that it "didn't refer to [the report] because it's inadmissible evidence, it's hearsay and in a motion for summary judgment only admissible evidence is considered."

¶ 60 "Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted in court and is generally inadmissible unless it falls within a hearsay exception." *Rowe v. State Bank of Lombard*, 247 Ill. App. 3d 686, 697 (1993). Even if hearsay is admissible, "hearsay within hearsay" is inadmissible unless each part of the statement(s) fits within an exception to the hearsay rule. Ill. R. Evid. 805 (eff. Jan. 1, 2011). For example, Illinois Supreme Court Rule 236(a) (eff. Aug. 1, 1992) allows for a "business records" exception to the hearsay rule. Additionally, "[r]elevant admissions of a party *** are admissible when offered by the opponent as an exception to the hearsay rule." (Internal quotation marks omitted.) *Zaragoza v. Ebenroth*, 331 Ill. App. 3d 139, 142 (2002).

¶ 61 Defendant argues that plaintiff has forfeited any argument related to the business records exception because she raises that argument for the first time on appeal. Additionally, defendant asserts that plaintiff never argued the statement contained in the incident report was an admission against defendant or that the proper foundation was laid for the statement as an admission.

¶ 62 Illinois courts have consistently recognized that "a party who does not raise an issue in the trial courts forfeits the issue and may not raise it for the first time on appeal." *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 695 (2010) (citing *In re Marriage of Culp*, 399 Ill. App. 3d 542, 550 (2010) and *Enterprise Recovery Systems, Inc. v. Salmeron*, 401 Ill. App. 3d 65, 76 (2010)). Our review of the record shows that plaintiff, indeed,

forfeited any argument related to the incident report being deemed a business record and the statements therein deemed an admission. In plaintiff's response to defendant's motion for summary judgment, plaintiff argued that the incident report created a question of fact regarding the water that plaintiff allegedly slipped on because Fahy wrote "water on floor by the milk isle [*sic*] 9." However, plaintiff's response did not mention considering the report as a business record or the statements contained therein as an admission.

¶ 63 Likewise, in plaintiff's motion to reconsider the court's grant of summary judgment, plaintiff argued that the trial court failed to consider all of the evidence before it, namely, the incident report. Plaintiff did not argue that the incident report should have been considered as a business record. Plaintiff did, however, state "the[c]ourt does not make any mention of the admission by [defendant] that the [p]laintiff slipped and fell on water in [a]isle 9." Although plaintiff uses the word "admission," she does not explain or attempt to argue how the report could be construed as an admission in the legal sense. We do not find that merely using the word "admission" preserved plaintiff's right to argue on appeal that the incident report itself is a business record and the statements contained therein are admissions against defendant. Further, plaintiff's reply in support of her motion to reconsider lacked any mention of the incident report as a business record, and did not argue the statements therein are admissions. Further still, plaintiff's attorney did not orally raise any argument regarding the incident report at the February 23, 2017, hearing on her motion to reconsider. Finally, and perhaps most importantly, plaintiff never attempted to lay the foundation for introduction of the report as a business record, nor did she attempt to lay the foundation for the statement contained therein. We find this especially problematic where the information contained in the incident report is contrary to what Fahy, its preparer, testified to at her deposition. Other problems arise regarding the fact that plaintiff's

ability to speak English is limited, thus it is unclear how reference to the body parts that plaintiff purportedly injured would be reflected in the incident report when there is no testimony that plaintiff herself, or with the assistance of her daughter Maria, ever conveyed her injuries to Fahy. As a result, plaintiff has forfeited this issue and we do not consider its merits.

¶ 64 As a final matter, we find it pertinent to note that even if plaintiff had raised this issue in the court below, which she did not, we would still find that plaintiff forfeited our review due to her failure to submit any legal authority in support of her position. The only case plaintiff cites as support for her business records exception argument is *Jahrke v. Capital Fitness, Inc.*, 2015 IL App (1st) 140067-U, an unpublished order pursuant to Illinois Supreme Court Rule 23(b) (eff. Jul. 1, 2011). Rule 23(e)(1) provides that "[a]n order entered under subpart (b) *** of this rule is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." Ill. S. Ct. R. 23(e)(1) (eff. Jul. 1, 2011). Here, plaintiff has not argued that the aforementioned exceptions to nonprecedential Rule 23 orders are applicable, thus we do not consider *Jahrke* as precedent.

¶ 65 Because *Jahrke* has no precedential value, plaintiff has essentially failed to support her argument regarding the admissibility of the incident report with any actual authority. It is well-settled that "a party forfeits review of an issue by failing to support its argument with citation to authorities." *International Union of Operating Engineers Local 965 v. Illinois Labor Relations Board, State Panel*, 2015 IL App (4th) 140352, ¶ 20. Plaintiff has failed to cite any authority that this court is able to consider in support of her contention, thus her arguments are forfeited.

¶ 66 CONCLUSION

¶ 67 Based on the foregoing, we find that the trial court properly granted summary judgment in defendant's favor because no genuine issue of material fact existed and plaintiff forfeited her

argument that the incident report fell under the business records exception to the hearsay rule when she failed to raise such an argument in the trial court, and failed to cite authority to support her position on appeal. We therefore affirm the trial court's decision.

¶ 68 Affirmed.