2019 IL App (1st) 182001-U

SIXTH DIVISION
October 18, 2019

No. 1-18-2001



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| RONALD POTEMPA and CARMON POTEMPA,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>BEACON INVESTMENT PROPERTIES, LLC, ACCESSO SERVICES, LLC f/k/a BEACON REAL ESTATE SERVICES, ABM ONSITE SERVICES — MIDWEST, INC., CROWN ENERGY SERVICES, INC., d/b/a ABLE ENGINEERING SERVICES,<br><br>Defendants<br><br>(ABM Onsite Services — Midwest, Inc., Defendant-Appellee). | ) | Appeal from the<br>Circuit Court of Cook County<br><br>No. 16 L 4873<br><br>Honorable John H. Ehrlich,<br>Judge, Presiding. |

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Mikva concurred in the judgment.
Justice Harris dissented in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly granted summary judgment in favor of defendant where plaintiffs failed to present any evidence that, as part of defendant's business, defendant created the condition which caused the fall; affirmed.

¶ 2 This appeal stems from the alleged negligence committed by defendant, ABM Onsite Services — Midwest, Inc. (ABM), that caused injury to plaintiffs, Ronald Potempa (Ronald) and

his wife Carmon Potempa (Carmon), after Ronald slipped and fell on a wet floor.[1] The court granted defendant's motion for summary judgment. Plaintiffs appeal, arguing that we should reverse the trial court's judgment because enough circumstantial evidence existed to create a genuine issue of material fact. We affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiffs' third amended complaint, the pleading at issue here, alleged that, on June 24, 2014, Ronald was an employee of Hyatt and worked on the 21st floor of the building located at 200 West Monroe Street in Chicago (building). The complaint alleged that, while in the process of using the men's restroom that day, Ronald slipped and fell on water that had unnaturally accumulated on the restroom floor. Plaintiffs' complaint contained claims against defendant, the company that provided janitorial services to the building, the property owners (Beacon Investment Properties, LLC, Accesso Partners, LLC, and Accesso Services, LLC f/k/a Beacon Real Estate Services), and the building maintenance provider (Crown Services, Inc. d/b/a Able Engineering Services). The complaint contained two counts against defendant, one on behalf of Ronald and one on behalf of his wife for loss of consortium.[2]

¶ 5 Specifically, count III of plaintiffs' complaint alleged that defendant was negligent in one or more of the following ways:

> "a. Failed to properly inspect, maintain and keep in good repair the restroom facility piping and plumbing to prevent and remedy leaks.
>
> b. Failed to properly and adequately inspect the restrooms, particularly the men's room on the 21st floor of the subject building to make sure it was clean and safe for

[1] Plaintiffs' third amended complaint contains claims for the injuries suffered by Ronald Potempa and claims for loss of consortium on behalf of his wife, Carmon Potempa. We generally refer to "plaintiffs" as a collective but refer to them individually by their first name when necessary.

[2] ABM is the only defendant remaining in this case and the only defendant in this appeal. The trial court granted the other defendants' motions for summary judgment.

building workers to use.

c. Caused or allowed water to leak and remain on the restroom floor."

Count IV of the complaint alleged a derivative cause of action for loss of consortium on behalf of Ronald's wife, Carmon.

¶ 6 Defendant filed a motion for summary judgment and attached a copy of the transcripts from the depositions of Ronald, Rodolfo Franco, the janitor/day porter employed by defendant, Elizabeth Radke, the assistant property manager for the building, and Daniel J. Robison, a licensed architect.

¶ 7 Rodolfo "Rudy" Franco testified at his deposition that, on the day of the incident, he was a day porter for defendant and one of his responsibilities was to maintain the men's restrooms at the building. He would start checking the men's restrooms at around 9:20 a.m., starting on the 23rd floor and working his way down each floor until he reached the 6th floor. He would finish his first check of the restrooms on these floors at around 11 a.m. and would check them a second time starting at 1:30 p.m. He spent about five to seven minutes in each restroom and would check to make sure it had toilet paper, paper towels, and soap. He would also clean up any paper towels or water on the floor. Franco's cart was supplied with toilet paper, paper towels, seat covers, bags, and a rag. His cart did not hold a mop. The mops were stored in closets on some of the floors.

¶ 8 Franco testified that during his inspections, if a restroom did not have water on the floor, he would not mop. If there was water on the floor of a restroom, or if there was a mess, he would use a dry mop to clean it up. If Franco had to use a wet mop to clean up a mess, he would wait there until it was dry and would tell people to use another restroom. He testified that he would wait about five minutes. Asked what he would do if the floor "still wasn't drying" and he was

called away to do something else, Franco responded, "[t]hat's a good question. Yeah. I think I've got to stay. I've got to wait there." Franco testified that he would not put a sign up in the restroom and then leave. Franco also testified that, if he had to clean up a lot of water in a restroom, he would use a machine, put up a "wet floor" sign, go to a different floor, and then come back. If there was a plumbing leak or clogged toilet, he would call the engineers, put a "[d]o not use" sign up, and wait for the engineer to come.

¶ 9 Franco testified that if management needed him to clean something, they would send him a "360 work order" and he would receive an email. The manager, assistant manager, or an engineer may also call him on the radio. Franco could not remember whether, on the date of the incident, he had mopped the men's restroom on the 23rd floor, whether anybody ever asked him to check the floor or to take care of any water in that restroom, or whether there was a water spill on the floor when he checked the restroom on the date of the accident.

¶ 10 Ronald testified at his deposition that, on the date of the incident, he worked in Information Technology at Hyatt Hotels Corporation. His office was located on either the 7th or 8th floor of the building and, on the morning of the incident, he had a meeting with someone on the 23rd floor. At about 11 a.m., he went to the men's restroom on that floor.

¶ 11 The restroom was empty when Ronald entered and he could not recall whether there was any debris or "obvious water" on the floor. Ronald noticed that the floor "was kind of shiny" and "looked presentable." Asked whether there was "anything different about the way it looked that day compared to when you were there in the past?" he answered, "No, I don't know." He testified that the floor "always looked shiny," and it "looked normal." In response to the question, "I'm talking about the floor being shiny, and you said no, it didn't look different from the other times, is that correct?" Ronald responded, "That's correct."

¶ 12 Ronald went into the handicapped stall and locked the door. As he turned around toward the toilet, his foot slipped, his back hit the toilet bowl, and he fell to the floor. When Ronald was sitting on the floor, he noticed that his pants were wet. He did not inspect what was on the floor and no water splashed when he fell. He testified that there was no puddle, "it was just wet," "it smelled like water," and it was a "clean, odorless fluid." Ronald used his hands to get up and testified that his "hands were wet from different areas." He did not know where the water came from, how long it had been on the floor, or what caused it to be there.

¶ 13 Before Ronald slipped, he did not notice anything different about the floor inside of the stall from the floor outside of the stall and nothing alerted him that the floor was wet. After he fell, he noticed the floor "looked shiny and it looked wet. After feeling my pants, it looked wet." When he was getting up from the floor, "it was wet all over the place," the floor looked "just like it looks after they've mopped," and it felt like a "sheen," or thin film of water, from mopping. Asked whether the floor looked like it was freshly mopped, he responded, "[i]t could be" and "I'm not a janitor or —I don't know."

¶ 14 There were no signs in the restroom that stated "wet floor," "just mopped," or "caution." Ronald did not see any janitors when he entered or exited the restroom and no one entered the restroom when he was in there.

¶ 15 Elizabeth Radke testified that, on the date of the incident, she was the assistant property manager for Accessso Services, the building's property manager. If Radke received a complaint about a janitorial issue, she informed defendant.

¶ 16 At about 12:36 p.m. on the day of the incident, Radke received a work order in Accesso's "360 work order system" from Jill Leahy, the tenant contact for Hyatt. The work order stated: " 'There is water on the floor in the Men's room on 23.' " Radke routed the work order to

defendant's "janitorial person." Thereafter, Radke received a telephone call from Franco, asking her " '[i]s this the correct bathroom? Because I don't see any water.' " Radke responded: " 'Can you double check, triple check just to make sure and check the ladies' on that floor as well?' " A few minutes later, Franco informed Radke that there was " '[s]till no water.' " At 12:57 p.m., Radke sent Leahy a note through the work order system, stating that " 'Rudy [Franco] is taking care of this, thanks!' " Radke then closed the work order.

¶ 17 On the day of the incident, Radke never received a report regarding a leak or plumbing issue. Radke did not have any knowledge of any water on the floor in the 23rd floor men's restroom until the report about water in the men's restroom on the 23rd floor was generated in the work order system at 12:36 p.m. Radke testified that it was rare to receive a report of water on the floor of a men's restroom.

¶ 18 Defendant also attached to its motion for summary judgment a site inspection report prepared by Daniel Robinson, a licensed architect certified by the National Council of Architectural Registration Boards. According to Robinson's report, he performed a site inspection at the building on February 25, 2018. The men's restroom on the 23rd floor was not available for his inspection because it had been remodeled since the incident. Robinson therefore inspected the men's restroom on the 12th floor, as it had the same type of floor as the men's restroom where Ronald fell.

¶ 19 During Robinson's inspection, an ABM staff member mopped the floor and allowed it to dry using ABM's standard materials and methods. Robinson stated that the "[t]he floor appeared dry and felt dry to the touch in just over 6 minutes (6:05 minutes)." Based on Robinson's testing and analysis, he concluded that ABM's "inspection and maintenance of the bathrooms" at the building "were reasonable and in accordance with nationally recognized practices and

procedures." He further concluded that, if plaintiff "fell in front of the accessible toilet in the 23rd floor men's room, the fall was not due to the actions of ABM."

¶ 20 In defendant's motion for summary judgment, it argued that there was no evidence to create a genuine dispute about the fact that defendant's actions did not cause the water upon which Ronald slipped and fell to be placed on the floor in the men's restroom. Defendant also argued that it was undisputed that it did not have either actual or constructive notice of the presence of the water upon which Ronald slipped. Defendant pointed out that there was no evidence connecting defendant to the water in the restroom, arguing that Ronald testified that he did not know how the water got onto the restroom floor or how long it had been there and that he did not see any janitors on the 23rd floor before or after he fell. Defendant asserted that the facts showed that the day porter finished cleaning the restroom at around 9:20 a.m., which was 90 minutes before Ronald fell, and that when the day porter would wet mop a floor, his practice was to wait there until the floor was dry.

¶ 21 In plaintiffs' response to defendant's motion for summary judgment, they argued that the evidence showed that the "most likely source of the water on the floor was wet mopping" because the water upon which Ronald allegedly slipped was "a fine film, a sheen, consistent with the look of a recently mopped floor." Plaintiffs also argued that defendant's assertion that there was no actual or constructive notice is irrelevant because they need not show notice when there is some slight evidence that the condition was created by defendant as part of its business.

¶ 22 In defendant's reply in support of its motion for summary judgment, it asserted that there was no genuine dispute as to the material facts of this case, specifically that Franco was not present in the 23rd floor restroom for more than an hour before Ronald fell and that, had he mopped the floor that morning, it would have been dry less than seven minutes thereafter.

Defendant contended that there were no contrary facts disputing these facts in the record and plaintiffs' arguments were based on pure speculation and conjecture regarding what might have occurred.

¶ 23 The trial court granted defendant's motion for summary judgment "for the reasons stated in this court's oral ruling that there is no genuine issue of disputed fact with respect to plaintiffs' claims against that defendant." The record on appeal does not contain a transcript from the hearing on defendant's motion for summary judgment.[3]

¶ 24 ANALYSIS

¶ 25 On appeal, plaintiffs assert that the trial court erred when it granted summary judgment in favor of defendant. We disagree.

¶ 26 Summary judgment is appropriate only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2018). We construe these materials strictly against the movant and liberally as to the opponent. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. We review *de novo* a trial court's ruling on a motion for summary judgment. *Clark Investments, Inc. v. Airstream, Inc.*, 399 Ill. App. 3d 209, 213 (2010).

¶ 27 To recover damages based on a negligence claim, plaintiffs must allege and prove that defendant owed a duty to plaintiffs, defendant breached that duty, and the breach was a proximate cause of plaintiffs' injuries. *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d

[3] We note that plaintiffs, as the appellants, have the burden to support their claim of error with a sufficiently complete record of the trial court's proceedings and, in the absence of a complete record, we presume the trial court entered the order in conformity with the law. *Teton, Tack & Feed, LLC v. Jimenez*, 2016 IL App (1st) 150584, ¶ 19. Further, we review the trial court's judgment, not the reasoning, and may affirm on any grounds in the record. *US Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 18.

881, 885 (2009). Although a plaintiff is not required to prove his case at the summary judgment stage, he is required to present evidentiary facts to support each element of the cause of action. *Strutz v. Vicere*, 389 Ill. App. 3d 676, 678 (2009).

¶ 28 To establish negligence in a slip and fall case involving a liquid substance on the floor, as here, a plaintiff "need only bring forth facts that [his] fall was caused by a liquid substance on the floor attributable to defendants." *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919, ¶ 21. Specifically, "[l]iability on the part of the defendants may arise if (1) one or more of defendants is directly responsible for the liquid substance on the floor or (2) the defendants had actual or constructive notice of the liquid substance on the floor." *Id.*

¶ 29 Plaintiffs do not argue on appeal that defendant had actual or constructive notice of the wet floor. Instead, they assert that they need not show actual or constructive notice if the unsafe condition, *i.e.*, the wet restroom floor, related to defendant's business and there was some "slight" evidence that defendant caused the condition. Plaintiffs argue that the trial court erred when it granted summary judgment because circumstantial evidence existed that created a question of fact as to whether Franco mopped the floor shortly before the accident and left the floor wet without leaving a sign, which caused Ronald to slip and fall.

¶ 30 It is well-settled that a plaintiff may establish proximate cause via circumstantial evidence. *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶ 35. "Circumstantial evidence is the proof of certain facts and circumstances from which a fact finder may infer other connected facts that usually and reasonably flow according to the common experience of mankind." *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 397-98 (2000). Circumstantial evidence is sufficient to establish a fact necessary to a claim only when it shows the probability of the existence of the

fact. *Id.* at 398. Specifically, "[t]he circumstantial facts must be of such a nature and so related as to make the conclusion reached the more probable, as opposed to possible, one." *Id.*

¶ 31 Here, plaintiffs have not presented sufficient circumstantial evidence to establish that defendant, through its employee Franco, failed to maintain the 23rd floor men's restroom in a safe manner or that defendant, through its employee Franco, caused water to accumulate on the floor of the restroom. The depositions of Ronald and Franco do not establish the probability of the inference that plaintiffs seek to draw—*i.e.*, that Franco had recently wet mopped the floor of the 23rd floor restroom and left before it was dry. Contrary to plaintiffs' assertions, Franco's routine daily inspections of the men's restrooms did not include wet mopping. In fact, Franco testified that he did not usually wet mop the floors during his inspections and did not carry a mop with him, as there was no mop on his cart. If Franco did have to wet mop, he would wait to leave until it was dry. Plaintiffs offered no facts to suggest that Franco did not follow these procedures on the day before Ronald's fall.

¶ 32 Further, Ronald testified that when he entered the restroom, he noticed the floor looked shiny and "presentable," but could not recall whether there was any "obvious water" on the floor. Ronald also explained that the floor always looked shiny, and thus when Ronald entered the restroom it looked the same as it always did. Moreover, the work order that Radke received regarding a report of "water on the floor" in the restroom was placed after Ronald fell and there was no evidence of any work order about water before his fall. Accordingly, the testimony does not contain any facts from which one could infer that, on the morning of Ronald's accident, Franco wet mopped the 23rd floor of the men's restroom and left before it was dry.

¶ 33 Moreover, although Franco testified that he did not generally wet mop the floors during his inspections, even if he had wet mopped the 23rd floor restroom on the morning of the

incident, plaintiffs have not presented any evidence from which one could infer that Franco's mopping would have caused the wet floor upon which Ronald slipped. Franco testified that he started checking the men's restrooms on the 23rd floor at 9:20 a.m. and would work his way down to the 6th floor, completing his inspections on the 6th floor at 11 a.m., the same time plaintiff entered the 23rd floor restroom and about 90 minutes after Franco was there. Franco also testified that, when he would wet mop a floor, he would wait there until the floor was dry and Ronald testified that he did not see any janitors before he entered. Plaintiffs offered no evidence to contradict that Franco did not follow these routine procedures the morning before Ronald's fall. Further, the licensed architect's report attached to defendant's motion for summary judgment concluded that, after replicating defendant's mopping procedures, the restroom floor would have been dry to the touch in just over six minutes.

¶ 34 Accordingly, the undisputed evidence established that, even if Franco had wet mopped the 23rd floor men's restroom on the morning before Ronald fell, Franco would have done so around 9:20 a.m. and the floor would have been dry well before Ronald entered it at 11 a.m. Thus, contrary to plaintiffs' assertion, the circumstantial evidence does not support the inference that, shortly before Ronald entered the restroom at 11 a.m., Franco wet mopped the floor and left before it was dry. There are therefore no facts to connect defendant to the liquid substance on the floor.

¶ 35 Defendant asserts that the facts of this case are similar to those involved in *Ishoo* and that we should affirm summary judgment as the court did there. 2012 IL App (1st) 110919, ¶ 21. We agree.

¶ 36 In *Ishoo*, the plaintiff brought a negligence action against the defendants after she slipped and fell in a shopping mall. *Id.* ¶ 1. The plaintiff's complaint alleged that the defendants were

negligent when they failed to maintain the walkways free of slip hazards, remove a slippery substance or water from the common walkway, and warn or post signs regarding the slippery substance. *Id.* ¶ 4. In the plaintiff's interrogatories, she stated that her fall was "caused by what 'appeared to be oil or similar substance on the floor near the escalator.' " *Id.* ¶ 6. At her deposition, the plaintiff stated that the substance upon which she fell smelled like a type of cleaning solution, such as Windex, but that she did not see a cleaning cart or any bottles of cleaning liquid in the area. *Id.* ¶¶ 7-8. The plaintiff further testified that, although she did not know where the liquid came from, she knew that the janitorial staff were " 'constantly' " cleaning the escalators by spraying Windex and squeegeeing it. *Id.* ¶ 8. After the plaintiff fell, neither the public safety officer who searched the area where she fell, nor the housekeeping manager were able to find a liquid substance on the floor. *Id.* ¶¶ 12-13. Further, the spill log did not contain an entry for the area where the plaintiff fell. *Id.* ¶ 15. The trial court granted summary judgment in favor of the defendants. ¶ 17.

¶ 37 On appeal, the plaintiff argued that summary judgment was improper because the circumstantial evidence created an inference that before she fell, a janitor cleaned the escalator with cleaning solution and then squeegeed the excess solution onto the floor. *Id.* ¶ 19. The defendants argued that the plaintiff's claims were entirely based on speculation and she did not know why she fell. *Id.* ¶ 20. This court agreed and affirmed summary judgment. *Id.* ¶ 30. The court framed the issue as "whether there is any evidence that directly proves, or gives rise to a reasonable inference, that the presence of the liquid substance on the floor is tied to one or more of the defendants." *Id.* ¶ 21. In reaching its decision, the court recognized that the plaintiff consistently testified that she stepped on a liquid substance on the mall floor, which caused her to slip and fall, but ultimately determined that no facts existed to connect the defendants to the

presence of the liquid substance on the floor. *Id.* ¶¶ 23-24. The court found that the plaintiff did not present any facts to support the proposed inference that the janitor cleaned the escalator between 3 and 3:30 p.m. with cleaning solution and then squeegeed the liquid onto the floor, as there was testimony that the escalator was not cleaned until after 9 p.m. when the mall was closed. *Id.* ¶¶ 24-25. The court concluded that, "[w]ithout facts that the housekeeping staff were responsible for the liquid substance on the floor, no facts support the plaintiff's claim of negligence against the defendants." *Id.* ¶ 25.

¶ 38 *Ishoo* recognized that a plaintiff's case may not be based on conjecture, which is pertinent here because plaintiffs' theory that Franco was called back to the 23rd floor and wet mopped the men's restroom floor minutes before Ronald entered is not based on any evidence in the record—direct or circumstantial. It is based entirely on speculation.

¶ 39 Like the plaintiff in *Ishoo*, Ronald unequivocally testified that he did not see any janitors before he entered the restroom and there was no evidence that he saw any cleaning carts, mops, bottles of cleaning solution, or any signs in the area where he fell. Further, like in *Ishoo*, where the testimony established that the escalators were not cleaned until after the mall was closed, Franco testified that he would have cleaned the restroom 90 minutes before Ronald entered it, no one requested him to "mop up any water" that day, if he had to mop up water on the floor of a restroom he would use a dry mop, and that, when he would wet mop a restroom floor, he would wait there until it was dry. In addition, the only work order about any water in the restroom was generated after Ronald fell and Radke testified that the first time she became aware of any water in the restroom was when she received that work order. Accordingly, similar to *Ishoo*, the facts do not support the inference, as plaintiffs' claim, that Franco was called back to the 23rd floor restroom before 11 a.m. to wet mop the floor, that he did so, and that he left before it was dry.

¶ 40 Plaintiffs assert that *Ishoo* is distinguishable because, there, numerous other reasonable explanations existed regarding the source of the liquid on the floor, such that the circumstantial evidence was not suggestive of the janitorial services as the source. However, plaintiffs ignore the lack of any facts connecting defendant to the liquid upon which Ronald slipped. As previously discussed, plaintiffs' suggestion that Franco had wet mopped the floor minutes before Ronald entered is not supported by the facts. Rather, as in *Ishoo*, the liquid upon which Franco slipped could have come from a number of other sources. We find persuasive defendant's contention that the liquid could have come from condensation or water drippage, a spill from the sink or toilet itself, a man missing the toilet while urinating, or a previous user causing a spill or cleaning up a spill in a haphazard manner. Further, it is also possible that Ronald's clothes were wet after he fell because he caused water to spill out of the toilet when he hit the toilet during his fall. Ronald admitted that he did not know where the water came from and he did not notice that the floor was wet before he slipped. There is no evidence upon which one could reasonably infer that the liquid that caused Ronald to fall was placed there by defendant. Simply put, the inference that plaintiffs ask this court to draw is no more probable, as opposed to possible, than any of the alternative sources. As such, plaintiffs have failed to present any evidence, including circumstantial, to support their negligence claim.

¶ 41 To support plaintiffs' argument that the trial court erred when it granted defendant's motion for summary judgment, they cite *Donoho v. O'Connell*, 13 Ill. 2d 113, 122 (1958). In *Donoho*, the plaintiff fell in the defendant's restaurant after she rose to exit, took a few steps, and came into contact "with something" that caused her to slip and fall. *Id.* at 116. The plaintiff testified that, after she fell, she observed a piece of smashed onion ring on the floor near the stand-up table in the area where she had been. *Id.* None of the defendants' employees who

testified stated that they saw any onion rings or other debris on the floor. *Id.* at 117. However, the employee who waited on the plaintiff testified that the floors were swept every hour and mopped three times a day, and that he saw the bus boy sweep about 15 minutes before the plaintiff fell. *Id.* The bus boy testified that, if there was anything on the tables after he removed the dishes, he cleaned it off with a wet towel and brushed it into the tray. *Id.* The jury found in favor of the plaintiff but the appellate court reversed. *Id.* at 118.

¶ 42 Our supreme court reversed the appellate court and reinstated the jury's verdict, finding that the plaintiff presented circumstantial evidence from which it could be reasonably inferred that it was more likely that the onion ring was on the floor through defendant's actions, not a customer. *Id.* at 124-25. The court noted that the plaintiff presented evidence that the onion ring was "located beside the stand-up table cleared by the bus boy, that under the bus boy's practice of clearing up the tables food particles could drop to the floor, and testimony that after the bus boy cleared the stand-up table, no one else ate there or was in that area for some 15 minutes before plaintiff fell." *Id.*

¶ 43 We find *Donoho* distinguishable and are unpersuaded by plaintiffs' reliance on it. Unlike *Donoho*, which included testimony that the bus boy swept the floors just before the plaintiff fell, Franco testified that he inspected the 23rd floor men's restroom at around 9:20 a.m., which was about 90 minutes before Ronald entered it, that he did not even have a mop with him when he inspected it, and that wet mopping was not part of his usual inspection routine. The only evidence that Franco or Radke received a call regarding water in the restroom was from the work order system showing that, after Ronald fell, Franco was assigned to check a report of "water on the floor." Additionally, unlike the plaintiff in *Donoho*, plaintiffs here do not know the probable source of the water upon which Ronald fell. The court in *Donoho* found pertinent that, although

it was possible that another customer could have been the source of the onion ring on the floor, the evidence made it more probable that the defendant's employee dropped it. *Id.* at 125. Here, plaintiffs have not presented any evidence making it more probable that defendant was the source of the water upon which Ronald slipped. As such, we find *Donoho* distinguishable and not persuasive.

¶ 44 CONCLUSION

¶ 45 In sum, we affirm the trial court's decision granting defendant's motion for summary judgment.

¶ 46 Affirmed.

¶ 47 JUSTICE HARRIS, dissenting,

¶ 48 I disagree with the majority's determination because questions of material fact exist precluding the entry of summary judgment. First, a question of fact exists as to whether Franco mopped the 23rd floor men's bathroom prior to the accident. Franco testified that his routine was to inspect the men's bathrooms on each floor twice a day, spending five to seven minutes on each floor. At his deposition, Franco was asked, "Do you know if there was a spill of water on the floor on [June] 24, 2014, when you went through on your check of the bathrooms?" He answered, "Honestly, I don't remember." He acknowledged that he could not say whether he had mopped the floor of the men's room on the 23rd floor before the accident. There is no record of whether Franco had mopped the floor prior to Ronald's fall because he testified that if he did wet-mop the floor, he did not have to document what he did.

¶ 49 A question of fact also exists concerning whether any water on the floor when Ronald fell was due to Franco's conduct. Defendants argue that even if Franco had mopped the floor of the 23rd floor bathroom, he would have done so at 9:20 a.m. because he testified that he began his

daily inspections with the bathroom on the 23rd floor at 9:20 a.m., and finished his first round by 11 a.m. Franco further stated that if he had to mop the floors and the floor was wet, he would wait five minutes or so for it to dry. If the floor was really wet, he would put up a sign preventing use of the bathroom for the time being. Defendant's argument, however, depends on the truth of Franco's statements and relies on the fact that Franco actually followed this routine on June 24, 2014. There is no record of Franco's routine that day because he did not have to document what time he was in each of the bathrooms. As a result, a finding that defendants, through Franco, did not create the condition causing Ronald to fall relies on a finding that Franco is a credible witness.

¶ 50 The record, however, reveals that Franco's credibility is an issue. Radke testified that on June 24, 2014, she received a work order from Hyatt concerning the 23rd floor men's bathroom. The order stated, "Assigned to Rudy Franco." Radke testified that she spoke to Franco and asked him to check for water. He reported that he did not see any water. Radke wrote back to Hyatt that "Rudy is taking care of this, thanks!" and she marked the status of the work order as closed. She stated that "[i]t was [Franco] that went to go check." At his deposition, Franco was asked about this work order. Shown the entry by Radke he was asked, "[N]obody ever sent you up to take care of any water on the floor of the men's bathroom of the 23rd floor on June 24, 2014?" Franco answered, "Yes, correct." He was asked, "this was never sent to you, and you did not do anything that is referenced on here?" Franco answered, "Uhn-uhn. No."

¶ 51 This exchange raises an issue of Franco's credibility that could affect how the factfinder views the remainder of his testimony. At the summary judgment stage, however, the trial court cannot make credibility determinations or weigh the evidence. *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 31 (2005). For these reasons, I respectfully dissent.