2015 IL App (1st) 140067-U

FIFTH DIVISION
March 31, 2015

No. 1-14-0067

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
VIRGINIA JAHRKE,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11 L 13203
	)	
CAPITAL FITNESS, INC.,	)	
	)	Honorable
Defendant-Appellee.	)	William E. Gomolinski,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer concurred in the judgment.
Justice Gordon specially concurred.

ORDER

¶ 1 *Held*: The circuit court entered summary judgment in favor of defendant fitness club on the plaintiff's personal injury claim where plaintiff slipped and fell in defendant's locker room. The appellate court reversed, holding: (1) the fitness club's incident report and the statements of employees therein should not be excluded as hearsay; (2) the plaintiff's deposition testimony that wetness on the locker room floor "looked like" water was not a judicial admission that the plaintiff slipped on water; and (3) a genuine issue of material fact existed regarding the defendant's notice of a dangerous condition regularly created by another member of the fitness club.

¶ 2 Plaintiff Virginia Jahrke (Jahrke) appeals an order of the circuit court of Cook County granting summary judgment to defendant Capital Fitness, Inc. (Capital) in a personal injury action. On appeal, Jahrke contends the circuit court: (1) should have considered an incident report prepared after Jahrke was injured in Capital's locker room; (2) should not have considered her testimony that "[i]t looked only like water" and "it was wetness" as judicial admissions; and (3) erred in granting summary judgment to Capital. For the following reasons, we reverse the judgment of the circuit court and remand the case for further proceedings.

¶ 3 BACKGROUND

¶ 4 On December 7, 2011, Jahrke filed a complaint in the circuit court of Cook County against Capital and XSport Fitness, Inc. (XSport). The complaint alleged XSport, or in the alternative Capital, owned a health club at 4677 North Elston Avenue in Chicago, and had the duty to maintain the premises in a reasonably safe condition for those lawfully on the premises. XSport or Capital allegedly failed to properly maintain the locker room floor or warn that the floor was unreasonably slippery, causing Jahrke to slip, fall, and sustain personal injuries.

¶ 5 On February 1, 2012, XSport and Capital filed an answer and affirmative defenses. The answer denied that XSport owned, operated, managed or maintained the premises at issue. The first affirmative defense alleged Jahrke waived all claims for injuries against the defendants by executing a membership agreement. The second affirmative defense alleged Jahrke was contributorily negligent.

¶ 6 On March 15, 2013, XSport and Capital filed a motion for summary judgment. The motion asserted that XSport had no relationship with the health club at issue. The motion also asserted Jahrke had signed a membership and personal training agreement with an exculpatory clause holding Capital harmless for claims of loss or injury arising out of the negligence of

Capital or anyone else at the facility, specifically including claims of slipping and falling while in the facility or any facility operated by Capital. XSport and Capital supported their motion with a copy of the membership agreement and portions of Jahrke's deposition testimony stating she was a member of the Capital facility and signed the membership and personal training agreement. XSport also attached an affidavit denying involvement in the ownership or operation of the facility.

¶ 7 On April 13, 2013, Jahrke filed her response to the motion for summary judgment. Jahrke argued that Illinois courts have limited the scope of exculpatory clauses in releases to ordinary negligence and allowed claims of willful and wanton conduct to proceed. Jahrke also attached a motion for leave to file an amended complaint alleging willful and wanton conduct.

¶ 8 The record on appeal indicates Jahrke also filed her motion for leave to file an amended complaint alleging willful and wanton conduct on April 11, 2013. The motion for leave to file an amended complaint contained the following allegations. Youseff Azmani (Azmani) was the operations manager at the Capital facility at the time of Jahrke's injury. A woman named Martina Flores was the female porter on duty at the time of the injury. Azmani completed an incident report following Jahrke's injury which stated in part: "Martina the porter said that another woman had just finished showering and had hair product as well as water on the floor in that area. This woman does this every day apparently and we will be talking to her upon her next visit." Based on these allegations, Jahrke's motion asserted: (1) Capital had knowledge of a dangerous condition on the premises; and (2) whether conduct amounts to willful and wanton negligence is generally a question for the jury. Jahrke attached the proposed amended complaint, Azmani's discovery deposition, and a copy of the incident report to her motion.

¶ 9 On April 26, 2013, the circuit court granted Jahrke leave to file her amended complaint

instanter. Count I of the amended complaint repeated the allegations of the original complaint and sounded in ordinary negligence. Count II of the amended complaint alleged the "defendant," with conscious disregard for the safety of others, allowed members to enter the changing area from the shower area without drying off and thereby drip water and hair products on the floor of the changing area. Jahrke alleged the "defendant" knew or should have known this condition created a hazard to persons walking in the changing area of the locker room. Jahrke alleged she slipped, fell, and sustained injuries as the result of the foregoing willful and wanton conduct.

¶ 10 On May 14, 2013, XSport and Capital filed a motion to dismiss count II of Jahrke's amended complaint, pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). XSport and Capital argued Jahrke failed to adequately plead facts supporting a bare assertion of willful and wanton conduct.

¶ 11 On June 3, 2013, the circuit court entered an order granting summary judgment to XSport on both counts of Jahrke's amended complaint. The circuit court also granted summary judgment in favor of Capital on count I of the amended complaint. The circuit court further granted Capital's motion to dismiss count II of the amended complaint, but granted Jahrke 21 days to file an amended complaint against Capital alleging willful and wanton conduct.

¶ 12 On June 24, 2013, Jahrke filed her second amended complaint (the operative complaint in this appeal) against Capitol, asserting a claim of willful and wanton conduct. The second amended complaint alleged that Capital, through its employee Martina Flores, was aware that another female member of the facility created a puddle of water and hair products daily by entering the locker room from the shower area without drying her hair. The second amended complaint also alleged that Capital knew of the hazard, allowed such conduct to continue, and did nothing to prevent the member's conduct, with conscious disregard for the safety of persons

on the premises.

¶ 13 On July 25, 2013, Capital filed a motion to dismiss the second amended complaint pursuant to section 2-615 of the Code. On August 1, 2013, the circuit court denied the motion to dismiss.

¶ 14 On September 20, 2013, Capital filed a motion for summary judgment on Jahrke's second amended complaint. Capital's motion relied upon Jahrke's deposition testimony. Jahrke testified that on August 29, 2011, when she arrived at the health club for her usual Monday 10 a.m. to 11 a.m. training session, she entered the women's locker room to store her purse and noticed no water or other wet condition on the floor. After completing her training session, she reentered the locker room. The areas by the sinks, sauna, and between the two rows of lockers were dry. Jahrke opened her locker, changed her shirt and spent approximately 10 minutes examining her grocery list. Jahrke then commenced leaving the locker room through the same route by which she had entered. Jahrke was the only person in the area.

¶ 15 Jahrke testified she slipped and fell as she turned 90 degrees to walk down a corridor to exit the locker room. Immediately after she fell, Jahrke observed wetness on the floor. Jahrke was asked whether the wetness had any color; she responded "it was just shiny wet." Jahrke was asked whether the wetness appeared to be anything other than water; Jahrke answered: "It looked like only water." In response to a subsequent question, Jahrke testified: "All I know it was wetness."

¶ 16 Jahrke further testified that after she fell, she observed a porter holding a mop halfway up a corridor, but she could not say how long after she fell that she first observed the porter. Jahrke subsequently learned the porter's name was Martina. Jahrke typically observed the porter mopping the locker room floor, but had not observed the porter on August 29, 2011, prior to her

fall.

¶ 17 On October 18, 2013, Jahrke filed a response to the motion for summary judgment. Jahrke's response relied on Azmani's deposition testimony. Azmani, Capital's operations manager on the date of Jahrke's injury, testified the locker rooms were cleaned daily by porters whose shifts commenced at 5 or 6 a.m. Azmani would inspect both locker rooms between 8:15 and 8:45 a.m. during his morning walk-through. He would have the female porter check the women's locker room to ensure the room was empty before he inspected it. Azmani also testified regarding locker room checklists the porters were required to complete, addressing the cleaning of toilets and air vents, the mopping of floors, checking that lighting was functioning, and more. He, the woman at the front desk, or the general manager was required to do a "walk of pride" at the top of each hour, and the porters were required to check the locker rooms on the half-hour.

¶ 18 Regarding the incident at issue, Azmani recalled Jahrke stating she had fallen in the locker room and had slipped on water. Azmani testified he inspected the locker room after Jahrke left the premises—approximately five minutes after she fell—and did not observe any water upon which Jahrke may have slipped. He did not know whether Martina had been mopping prior to the incident. Azmani did not observe a mop bucket or floor signs. Azmani also testified he was sure Martina had mopped the floor that morning because keeping the locker room clean was on Martina's checklist. Azmani additionally testified he generally communicated with Martina through a woman named Jasmine because Martina was not completely fluent in English and he was not fluent in Spanish "by any means."

¶ 19 Azmani further testified that after the incident, he discussed the matter with Jasmine and whoever had been working at the front desk. Azmani testified:

> "And Jasmine told me that there was this woman—another member—with

> really long hair—and this was a discussion that I had had with her and Martina at one point because Martina wasn't happy—that when this lady would shower, she wouldn't dry her hair out or ring [sic] her hair out and then she would go and create a puddle on the floor that Martina had mopped and then Martina would have to do it again.
>
> That was the speculation on where the water came from. But like I said, there was no water there. That was just part of the discussion. I remember that."[1]

Azmani acknowledged that if a member used hairspray or gel that was "gooped" somewhere, staff employees would warn the member using the product that he or she was creating a hazard. Azmani had not seen Martina since he stepped down from his position at the Capital facility and he did not know of Martina's whereabouts.

¶ 20 Jahrke also relied upon the incident report Azmani prepared after her injury, which stated:

> "[G]ina was in the locker room getting her things out of her locker and went to leave and slipped on the floor, giving her what appeared to be a broken wrist. [H]er wrist was wrapped and stabilized until [EMS] arrived. [S]he was transported to [S]wedish in ambulance 47. [M]artina the porter said that another woman had just finished showering and had hair product as well as water on the floor in that area. [T]his woman does this every day apparently and we will be talking to her upon her next visit."

In his deposition, Azmani testified he created the incident report "just like he did for every thing." Azmani also testified he always had printed incident reports he would put on his

[1] Azmani was not asked who speculated regarding the source of the wetness.

clipboard and enter information while talking to the individuals involved, if they remained at the scene of the incident. According to Azmani, he would gather information, including any contact information for relevant individuals, complete the incident report form, enter the data into a computer and submit the report by means of the computer. The handwritten forms would be submitted to the corporate office weekly, using a delivery service.

¶ 21 On November 8, 2013, Capital filed a reply in support of the motion for summary judgment. Capital asserted that Jahrke's testimony established the floor was dry 10 minutes before the incident and therefore, her testimony that she slipped on water when she retraced her route was insufficient to support an inference of willful and wanton conduct as a matter of law.

¶ 22 On December 3, 2013, following a hearing on the matter, the circuit court entered an order granting summary judgment in favor of Capital on count II of Jahrke's first amended complaint. On January 2, 2013, Jahrke filed a notice of appeal to this court.

¶ 23 ANALYSIS

¶ 24 On appeal, Jahrke argues the circuit court: (1) should have considered an incident report prepared after Jahrke was injured in Capital's locker room; (2) should not have considered her testimony that "[i]t looked only like water" and "it was wetness" as judicial admissions; and (3) erred in granting summary judgment to Capital, based on the evidence.[2] "[S]ummary judgment

[2] Although neither party challenges our jurisdiction, this court has the duty to consider the issue and dismiss the appeal where our jurisdiction is lacking. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011); *In re Marriage of Mardjetko*, 369 Ill. App. 3d 934, 935 (2007). We note that the December 3, 2013, order refers to count II of the first amended complaint, rather than the second amended complaint. When an amended pleading is filed, the earlier pleading for most purposes is in effect abandoned and withdrawn.

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 2000)). The court strictly construes the pleadings, depositions, admissions, and affidavits against the movant and liberally in favor of the opponent. *Id*. We review the circuit court's decision *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co*., 154 Ill. 2d 90, 102 (1992). *De novo* consideration means we perform the same analysis that a trial judge would perform. *American Service Insurance Co. v. Iousoupov*, 2014 IL App (1st) 133771. ¶ 30.

¶ 25 The Incident Report

¶ 26 Jahrke first argues the incident report prepared by Azmani should be considered as a business record, rather than excluded as hearsay. Illinois Rule of Evidence 803(6) (Ill. R. Evid. 803(6) (eff. Apr. 26, 2012)) provides in pertinent part:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *

Pritza v. Village of Lansing, 405 Ill. App. 3d 634, 638-39 (2010) (citing *Pfaff v. Chrysler Corp*., 155 Ill. 2d 35, 61 (1992), *overruled on other grounds, ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526 (2010)). A review of the transcript of proceedings, however, indicates the circuit court ruled on the motion for summary judgment upon Jahrke's second amended complaint. The circuit court's oral pronouncement controls. See *Doe v. Northwestern Memorial Hospital*, 2014 IL App (1st) 140212, ¶ 32. Accordingly, this court has jurisdiction to consider the appeal.

> (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness *** unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness, but not including in criminal cases medical records." Ill. R. Evid. 803(6) (eff. Apr. 26, 2012).

" 'The rationale underlying the admissibility of business records is the recognition that businesses are motivated to keep routinely accurate records and that they are unlikely to falsify records kept in the ordinary course of business and upon which they depend.' " *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560, ¶ 184 (quoting *People v. Virgin*, 302 Ill. App. 3d 438, 450 (1998)). "[T]he adoption of the Illinois Rules of Evidence relating to the admission of business records did not make any substantive changes to the requirements under Illinois Supreme Court Rule 236 (Ill. S. Ct. R. 236 (eff. Aug. 1, 1992))." *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 99 (and cases cited therein). "Therefore, case law developed under Rule 236 continues to be relevant to our review of this issue." *Id.*

¶ 27 Generally, the party tendering the record need only lay a foundation for the admission of the record by establishing the record was made in the regular course of business and at or near the time of the transaction. See *Solis v. BASF Corp.*, 2012 IL App (1st) 110875, ¶ 85; *In re*

Estate of Weiland, 338 Ill. App. 3d 585, 600 (2003). "Any person familiar with the business and its mode of operation may provide testimony establishing the foundational requirements of a business record." *Solis*, 2012 IL App (1st) 110875, ¶ 85.

¶ 28 When a proper foundation exists, incident reports can be admissible under the business records exception to the hearsay rule in certain limited circumstances. See, *e.g.*, *Taluzek v. Illinois Central Gulf R.R. Co.*, 255 Ill. App. 3d 72, 85 (1993); *Amos v. Norfolk & Western Ry. Co.*, 191 Ill. App. 3d 637, 646 (1989). As the *Amos* court observed:

> "[T]he United States Supreme Court decision in *Palmer v. Hoffman* (1943), 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645, *** held that admission of such reports was improper because accident reports are prepared in anticipation of future litigation rather than in the ordinary course of business, and the motivation in their preparation may affect their trustworthiness. However, in *Poltrock v. Chicago and North Western Transportation Co*. (1986), 151 Ill. App. 3d 250, 502 N.E.2d 1200, it was held that this rule does not apply where the report is sought to be admitted *against* the party who prepared it. Where the report is damaging to the party who prepared it, as here, there is no reason to question its trustworthiness. As in *Poltrock*, the summaries of defendant's employees' statements were properly admitted under the business records exception to the hearsay rule." *Id*. at 645-46.

Jahrke seeks to admit the incident report here against Capital, the party that prepared it, on the basis that the employees' statements therein are damaging to Capital. Accordingly, the incident report is admissible if there is a proper foundation for its admission. See *id*.

¶ 29 In this case, Azmani's deposition testimony established that he prepared the incident report shortly after Jahrke's fall. Moreover, as we are required to liberally construe Azmani's

deposition testimony (*Mashal*, 2012 IL 112341, ¶ 49), the testimony established that such incident reports were kept by Azmani in the ordinary course of Capital's business. Accordingly, the record contains a proper foundation for considering the incident as a business record. *Solis*, 2012 IL App (1st) 110875, ¶ 85; *Estate of Weiland*, 338 Ill. App. 3d at 600.

¶ 30 Capital, however, argues the statements contained within the incident report constitute multiple hearsay and thus cannot be considered. Rule 805 of the Illinois Rules of Evidence provides that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Ill. R. Evid. 805 (eff. Jan. 1, 2011). "Therefore, pursuant to Rule 805 of the Illinois Rules of Evidence, when a business record contains hearsay statements within the record, the hearsay statements within the record must also be admissible under an exception to the hearsay rule." *Holland*, 2013 IL App (5th) 110560, ¶ 184.

¶ 31 In this case, the statements of Capital employees are contained in the incident report. "A statement by an employee is admissible against the employer as a party admission if it is made during the existence of the employment relationship and concerns matters within the scope of the employment." *Holland*, 2013 IL App (5th) 110560, ¶ 185. "In addition, statements made by a party's agent about a matter within the scope of his or her agency and made by virtue of the agent's authority are party-opponent admissions." *Id.* "Generally, an employee's knowledge of a dangerous condition or spilled substance on the premises is considered sufficient to impute notice to a defendant employer, because an employee has a responsibility either to correct the unsafe condition or clean the spilled substance from the floor, or report the problem to her superiors." *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1065-66 (2001). An employee's statement concerning her prior knowledge of the condition or spill thus falls within

the scope of her employment. *Id*. at 1066. Where "the statements at issue were made by the defendant's employee during the employment relationship about a matter within the scope of employment, the statements fall within the party admission exception to the hearsay rule." *Id*. Thus, the employees' statements in the incident are party admissions, not multiple hearsay. Accordingly, we will consider the statements in the incident report in determining whether a triable issue of fact exists precluding summary judgment in this case. [3]

¶ 32 Jahrke's Deposition Statements

¶ 33 Jahrke next contends statements in her deposition testimony regarding the wetness she observed after her fall should not be treated as judicial admissions that she slipped only on water. Judicial admissions are defined as "deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998) (citing *Hansen v. Ruby Construction Co*., 155 Ill. App. 3d 475, 480 (1987)). "[I]f a fact is judicially admitted, the adverse party has no need to submit any evidence on that point." *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶ 102. A party "cannot create a factual dispute by contradicting a previously made judicial admission" in a motion for summary judgment or at trial. *Burns v. Michelotti*, 237 Ill. App. 3d 923, 932 (1992); see also *Estate of Rennick*, 181 Ill. 2d at 406. In contrast to judicial admissions, which conclusively bind a party, evidentiary admissions may be contradicted or explained. *Id*.

¶ 34 In this case, Jahrke testified at her deposition that immediately after she fell, she observed

[3] It may be inferred from the record on appeal that Martina's statements were provided to Azmani through a third employee acting as an interpreter. Insofar as the interpreter was also employed by Capital and no question was raised regarding the accuracy of the interpretation, our analysis in this appeal is unaffected by the interpretation of Jasmine's statements.

wetness on the floor. Jahrke was asked whether the wetness had any color and she responded: "it was just shiny wet." Jahrke was also asked whether the wetness appeared to be anything other than water and she answered: "It looked like only water." In response to a subsequent question, Jahrke testified: "All I know it was wetness." None of these statements constitute clear, unequivocal statements that she slipped upon water. Rather, Jahrke only admitted the wetness "looked like" water, leaving an issue of material fact on the issue. Jahrke's simple observation of the wetness does not make the chemical composition of the wetness a concrete fact within Jahrke's knowledge. *Estate of Rennick*, 181 Ill. 2d at 406. Accordingly, these statements shall not be considered judicial admissions as we consider the ultimate issue of whether the circuit court erred in granting summary judgment in favor of Capital.[4]

¶ 35 Willful and Wanton Conduct

¶ 36 Turning to the merits, we consider whether a genuine issue of material fact exists

[4] In addition, "[a] pattern or practice of a particular type of spill is not necessary. What is needed is a pattern of dangerous conditions which were not attended to within a reasonable period of time. If the dangerous condition is part of a pattern of conduct or a recurring incident, this may establish liability." (Internal quotation marks omitted.) *Culli v. Marathon Petroleum Co.*, 862 F.2d 119, 126 (7th Cir. 1988) (quoting *Perminas v. Montgomery Ward & Co.*, 16 Ill. App. 3d 445, 450, *rev'd on other grounds*, 60 Ill. 2d 469 (1975)). In this case, the incident report raises not only the issue of whether Martina witnessed and failed to promptly remediate a puddle in the locker room shortly before Jahrke slipped and was injured, but also whether Capital was aware of the apparently daily creation of a puddle in the locker room, but failed to take action to prevent the creation of the puddles.

regarding Jahrke's claim of willful and wanton conduct. At the outset, we observe that under Illinois law, a separate and independent tort of willful and wanton conduct does not exist. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 235 (2010). Illinois law regards willful and wanton conduct as an aggravated form of negligence. *Id.* "Willful and wanton misconduct encompasses a range of misconduct, covering the area between negligence and intentional wrongdoing, sharing many characteristics with acts of ordinary negligence." *Drakeford v. University of Chicago Hospitals*, 2013 IL App (1st) 111366, ¶ 10. Willful and wanton conduct is defined as a course of action that shows an utter indifference to or conscious disregard for the safety or property of others. *Pfister v. Shusta*, 167 Ill. 2d 417, 421 (1995). Willful and wanton misconduct also may be proven where there is a " 'failure, after knowledge of impending danger, to exercise ordinary care to prevent' the danger, or a 'failure to discover the danger through *** carelessness when it could have been discovered by the exercise of ordinary care.' " *Ziarko*, 161 Ill. 2d at 274 (quoting *Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946)).

¶ 37 "Whether certain conduct rises to the level of willful and wanton misconduct depends upon the facts of each case." *Id.* ¶ 11; see *Ziarko*, 161 Ill. 2d at 275-76 ("Under the facts of one case, willful and wanton misconduct may be only degrees more than ordinary negligence, while under the facts of another case, willful and wanton acts may be only degrees less than intentional wrongdoing."). "The party doing the wanton act or failing to act 'must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury.' " *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 122-23 (2010) (quoting *Bartolucci v. Falleti*, 382 Ill. 168, 174, 46 N.E.2d 980, 983 (1943)). The determination of this issue is generally a question of fact for the jury to decide. *Oelze*, 401 Ill. App. 3d at 123.

¶ 38 For example, in *Oelze*, the plaintiff was injured while playing tennis when she ran into the curtain at the back of a tennis court and caught her foot in a rope exercise ladder lying behind the curtain. *Id*. at 112-13. The circuit court granted summary judgment to the defendant tennis club on the plaintiff's claim of willful and wanton misconduct. *Id*. at 116. On appeal, the appellate court reversed, agreeing with the plaintiff's assertion that a question of fact was created regarding whether the defendant "showed a conscious indifference in its actions by (a) continually storing *** equipment in a place it knew posed a hidden tripping hazard and/or (b) its [employee's] specific actions in putting/placing/throwing the rope ladder in the dangerous area or allowing it to drop on the ground in the dangerous area given his knowledge of the latent danger generally existing." *Id*. at 123. The *Oelze* court also stated it was "clear that defendant and its employees were very conscious of the danger caused by objects on the floor of the walkway closely behind the curtain." *Id*.

¶ 39 In this case, the materials submitted in opposition to summary judgment included the incident report. As previously noted, the incident report and Martina's statements therein are properly considered in opposition to the motion for summary judgment. As was noted, an employee's knowledge of a dangerous condition or spilled substance on the premises is considered sufficient to impute notice to a defendant employer. *Pavlik*, 323 Ill. App. 3d at 1065-66. Given the record on appeal, there is an issue of fact regarding whether Capital had notice "that another woman had just finished showering and had hair product as well as water on the floor in that area" and that this other woman "does this every day apparently," but never attempted to prevent the other woman from creating this allegedly dangerous condition. Therefore, we conclude there is a genuine issue of material fact regarding whether Capital engaged in willful and wanton conduct in this case. *Ziarko*, 161 Ill. 2d at 274; *Oelze*, 401 Ill.

App. 3d at 123. Thus, we also conclude the circuit court erred in granting Capital's motion for summary judgment.

¶ 40 CONCLUSION

¶ 41 For all of the aforementioned reasons, the judgment of the circuit court is reversed and the case is remanded to the circuit court for further proceedings consistent with this order.

¶ 42 Reversed and remanded.

¶ 43 JUSTICE GORDON, specially concurring:

¶ 44 I agree with the result of the majority but I must respectfully write separately as to its analysis. The majority writes in ¶ 27 concerning the admissibility of a business record that "generally, the party tendering the record need only lay a foundation for the admission of the record by establishing the record was made in the regular course of business and at or near the time of the transaction," citing *Solis v. BASF Corp.*, 2012 IL App (1st) 110875, ¶ 85.

¶ 45 However, Illinois Supreme Court Rule 236 states that the foundation to be made requires not only that the record was made in the regular course of business, but also that "it was the regular course of the business to make [the document]." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992). The adoption of the Illinois Rules of Evidence relating to the admission of business records did not change the two requirements for the admissibility of a business record. However, the case at bar concerns the granting of a summary judgment, and the incident report prepared by defendant's employee is part of plaintiff's response to defendant's motion for summary judgment and must be considered by the trial court because the employees' statements therein are damaging to Capital and are party-opponent admissions. The discussion on how to lay a proper foundation for the admissibility of the document as a business record in the majority decision is not only incorrect, it is not needed in the analysis of this case.