

No. 1-13-3384

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

JANE DELANEY and MICHAEL DELANEY,) Appeal from the Circuit Court
) of Cook County.
 Plaintiffs-Appellants,)
)
)
)
 v.) No. 10 L 12413
)
)
 DOMINICK'S FINER FOODS, LLC, and)
 TOM O'DETTE,) Honorable
) Kathy M. Flanagan,
 Defendants-Appellees.) Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

Held: The trial court properly granted summary judgment for Dominick's Finer Foods, where there was insufficient evidence to create a genuine issue of material fact that the plaintiff's fall was attributable to any defect in the floor mat at the entrance to the Dominick's store.

¶ 1 The plaintiffs, Jane Delaney and her husband, Michael Delaney, brought suit against the defendants, Dominick's Finer Foods, and its manager, Tom O'Dette, for injuries they sustained

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when Jane tripped and fell on a mat located near the entrance of a Dominick's store (Dominick's). The trial court granted summary judgment in favor of the defendants under section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2010)), and the plaintiffs now appeal, challenging only the allowance of summary judgment as to Dominick's. For the reasons that follow, we affirm.

¶ 2 About 6:46 a.m. on October 21, 2010, Jane Delaney (hereinafter "plaintiff") entered the Dominick's through the south entrance to get coffee at a Starbucks counter located inside the store. After purchasing her coffee, the plaintiff was returning towards Dominick's south entrance on her way out of the store, when she tripped and fell while walking across a utility mat with a rubber backing. The mat was placed in front of one of two side by side entrance and exit doors. The mat extended forward from the door on the right, which was the "entrance" door, and was as wide as that door. There was no mat in front of the door on the left side, which was the exit door. To the left of the doorway was a shopping cart display with a metal safety bar across the front of it. In order to reach the exit door, the plaintiff stepped onto the mat from its right side and walked across to the left door. As the plaintiff proceeded across the mat, the mat "grabbed" her left foot, causing her to lunge forward towards the shopping cart display, striking her forehead and lip on the metal safety bar. She landed on the floor, sustaining injury to her knee. The second-amended complaint (complaint) sought damages on behalf of the plaintiff and also Mike Delaney, based upon loss of consortium, against Dominick's, O'Dette, and a third party which was subsequently dismissed pursuant to settlement. The complaint alleged negligence on the part of Dominick's in that it, *inter alia*, failed to secure the mat at the doorway, failed to provide the plaintiff with safe egress from the store, and placed the mat on the floor with a buckle in it. The complaint also charged O'Dette with permitting a "rain mat" to be placed near the doors

when there was no inclement weather, and using rain mats that were likely to buckle and cause a tripping hazard in high traffic areas.

¶ 3 Dominick's and O'Dette filed a joint motion for summary judgment, arguing that no evidence existed to support the plaintiff's claim that they had placed a mat with a buckle in it on the floor. They contended that, while a photograph taken of the mat by a Dominick's employee, Betty Lubas, allegedly depicted a buckle, this photograph was taken after the plaintiff's fall. The defendants further pointed to the plaintiff's own testimony that she never noticed a buckle or other defect at the time of her fall, and to footage from Dominick's surveillance camera which allegedly revealed that the buckle was caused by the plaintiff's shoe as she fell. They further argued that there was no evidence this particular mat was "likely to buckle" or that the shopping carts were negligently placed.

¶ 4 In her response to the defendants' motion, the plaintiff's arguments were directed solely to issue of summary judgment against Dominick's. The plaintiff disputed Dominick's claim that it did not negligently place the floor mat on the ground and asserted that there is evidence that the mat placed in the south entryway was rippled for a significant amount of time, and that this "permanent rippling created a tripping hazard in the mat." The plaintiff relied primarily upon the affidavit of Scott Leopold, a structural and professional engineer, and upon the surveillance and photographic evidence of the mat and the fall.

¶ 5 In her deposition, the plaintiff testified that she had shopped at the Dominick's at issue for approximately 18 years, and that she typically went to the Starbucks counter every morning to get coffee before going to work. On the morning of the accident, she entered the store through the south doors as she always did, and proceeded directly to the Starbucks counter. The plaintiff testified that she did not experience any problems with the mat before her accident, and that,

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prior to her fall, she did not notice any buckles, ripples, tears, or problems of any kind with the floor mat. After getting her coffee, she proceeded back to the south door to exit the store in the same way she entered. She was wearing sunglasses and pointed shoes with a very low heel. According to the plaintiff, after she stepped onto the entrance mat, she felt "something grab her left foot," causing her to fall forward to the ground. At that point in her deposition, the plaintiff was shown still photographs depicting the progression of the accident, made from footage obtained from Dominick's surveillance camera. The footage was taken from an overhead camera placed some distance in front of the doorway, in which the entire doorway, shopping cart display, and floor mat are visible. After viewing the still photographs, the plaintiff acknowledged one frame depicting her entering the mat, with the front of her right foot stepping flat onto the mat's surface. She then gave the following testimony:

"Q. Do you know what happened to cause you to fall forward like this?

A. As I stated before, I felt my foot catch on the rug. And I felt like – I felt like a grabbing, that the rug grabbed my foot.

Q. And when you keep saying "foot" in that answer, are you only talking about your left foot?

A. Yes, I am.

Q. What part of your left foot caught on the rug?

A. The front part.

Q. The toe, is that what you're saying, or what are you saying?

A. The front part of my foot. I don't know if it was the toe specifically, but it was the front part of my foot.

Q. And do you know what part of the mat you're saying your left foot caught on?

A. I'm not sure."

¶ 6 While viewing the frame showing her right foot entering the mat, the plaintiff was asked to identify any buckles or ripples she could see from the photograph. The plaintiff then identified and circled seven alleged ripples along the "outer edge" of the right side of the mat, on either side of her right foot. The plaintiff denied seeing any of these ripples at the time of her fall, however. Further, she denied knowledge of any alleged condition on the mat that caused her to fall. The plaintiff acknowledged that that minutes after the fall, she stood up and went to look in a mirror, fearing that her teeth had been knocked out. She did not report the cause of her fall to anyone until she was in the emergency room.

¶ 7 The plaintiff was asked whether she knew of any other Dominick's employees who were aware of any buckle or ripple in the mat prior to her fall. In response, she testified that she returned to the Starbucks a couple of weeks after the accident and spoke to "Michelle," a barista at the counter. According to the plaintiff, Michelle claimed to have overheard a Dominick's employee "chastising" the store's morning utility clerk, who was mentally disabled, about how he had placed the rug down incorrectly that morning.

¶ 8 Shortly after her fall, the plaintiff was assisted by Betty Lubas, a file maintenance clerk at Dominick's, who noticed her crouched on the floor and bleeding from her mouth. Lubas testified that she had not seen the plaintiff fall and did not know where or how she fell. When Lubas saw the plaintiff on the ground, she called out to nearby employees to obtain paper towels, ice, and a chair for her. Although the plaintiff initially declined Lubas's offer to call paramedics, an ambulance was subsequently called which transported the plaintiff to the hospital.

¶ 9 Lubas indicated that she took a couple of pictures on her cell phone of the mat and of plaintiff's lip, because that had been the protocol at Dominick's when there was an injury. Lubas testified that she could not recall whether there were any buckles, ripples, or curls on the mat at the time. However, one of Lubas's photographs, taken at close range of the mat after the accident, depicts one large ripple along the outer right edge of the mat.

¶ 10 Dawn Drzynkowski, the head bookkeeper at Dominick's, testified that, on the day of the accident, she was in charge of the store because the manager was on vacation. Drzynkowski was not yet at work when the plaintiff fell and did not arrive until about 7 or 7:30 a.m., after she had been transported to the hospital. Drzynkowski prepared an incident report for the occurrence based in large part upon information provided by Lubas, as there were no employees or customers who claimed to have witnessed the accident. Drzynkowski's incident report stated that the weather that day was dry and that the floor around where the accident happened was in "good condition – new mat on the floor." According to Drzynkowski, she had observed the mat when she arrived at work and had not ordered that it be removed, although it was eventually removed some time that day. The incident report further indicated that the plaintiff had repeatedly apologized to Lubas and stated that she had "tripped on mat." Drzynkowski testified that floor mats in the store were usually put down either by the store manager or by an assigned clerk, and that they would not be allowed on the floor in a rippled or buckled condition, as this could create a tripping hazard.

¶ 11 Tom O'Dette, Dominick's manager, testified that the floor mat at the south entrance had been purchased by Dominick's and stored flat for months prior to being used, in order to prevent edges from becoming creased or rippled. According to O'Dette, it was his job to inspect the floor mats for quality, and to straighten them out or remove them if they were not laying flat and in

good condition. O'Dette testified that he had inspected the mat at the south entrance when it was initially put down, and found that it was brand new with no creases on it. O'Dette also testified that both the surface of the mat and the border surrounding it were flat.

¶ 12 Hernan Reyes testified that he regularly cleaned the Dominick's at night, including the areas around and under the floor mats. Reyes indicated that, in order to clean, he would lift the mats, fold them over, and walk over the folded portion. He denied that anyone at Dominick's ever instructed him not to fold the mats.

¶ 13 According to Leopold's affidavit, he undertook a comprehensive review of the legal record in this case, including the video surveillance, photographs, and incident reports of the accident. He further stated that, on March 27, 2013, he personally inspected the entrance mat at issue. According to Leopold, the ripple shown in Lubas's photograph on the day of the occurrence "depicts permanent rippling which continued to exist" at the time of his inspection, and that the "root cause of the Plaintiff's fall was the tripping hazard created by the rippled edge of the mat." Leopold further gave the opinion that "rippling of the mat edge did not occur spontaneously over a period of hours" while the mat was in place, but that, "given the quantity and magnitude of ripples in the edges of the mat, it is more likely than not that rippling was evident at least one week before the occurrence."

¶ 14 The trial court granted summary judgment to defendants, finding, in relevant part, that even accepting Leopold's statement that there were ripples or buckles on the edge of the mat, the plaintiff failed to provide any proof that her fall was caused by any of these ripples or buckles. The plaintiff's motion for reconsideration was denied, and this appeal followed.

¶ 15 On appeal, the plaintiff argues that the court erred in finding that there was no causal nexus between her fall and the alleged ripple or buckle in the mat. She contends that her own

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testimony, along with Leopold's affidavit, Lubas's photograph, the video surveillance, the incident report, and other evidence, reveal questions of fact as to the causation of her injury. We disagree.

¶ 16 Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005 (West 2010); *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1 (2008). In ruling on a motion for summary judgment, we construe the facts strictly against the movant and liberally in favor of the nonmovant. *Id.* It is essential that the party opposing summary judgment present a sufficient factual basis on which to arguably attain a judgment if the matter proceeded to trial. *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256, 665 N.E.2d 1246 (1996). In considering an appeal from the allowance of summary judgment, we employ a *de novo* standard of review. *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292, 757 N.E.2d 481 (2001).

¶ 17 In order to prove allegations of negligence, a plaintiff must prove that a defective condition created by the defendant was the proximate cause of her injury. *Young v. Bryco Arms*, 213 Ill. 2d 433, 446, 821 N.E.2d 1078 (2004). It is insufficient to show merely that a defect existed; rather, the defect must have factually and legally lead to the alleged harm. *Id.* The mere presence of a floor mat on which an invitee falls is not, standing alone, evidence of negligence. *Brett v. F.W. Woolworth Co.*, 8 Ill. App. 3d 334, 336-37, 290 N.E.2d 712 (1972); *Gentry v. Shop 'n Save Warehouse Foods, Inc.*, 708 F. Supp. 2d 733, 739 (C.D. Ill. 2010).

¶ 18 In this case, the plaintiff argues that Leopold's affidavit proves that the right edge of the rug contained "permanent rippling" which predated her fall by at "least one week," and that this

rippling constituted "the root cause" of her fall. She contends that proof of buckling is also shown by Lubas's cell phone picture taken after the occurrence.

¶ 19 In light of the plaintiff's heavy reliance upon Leopold's affidavit, we are constrained to point out that the document is not only unsigned, but purports to advance conclusions as to the "physical cause" of the occurrence without providing any factual support. As such, it violates Illinois Supreme Court Rule 191 (effective Jan. 4, 2013). See *Robidoux v. Oliphant*, 201 Ill. 2d 324, 775 N.E.2d 987 (2002). Specifically, Leopold fails to articulate the basis for his conclusion that the tripping hazard created by the alleged ripple was the "root" cause of the plaintiff's fall. An expert's bare, ultimate conclusions are insufficient to create an issue of fact for trial. *Id.* at 336, citing *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir.1993)

¶ 20 Assuming, for purposes of summary judgment, that the right outer edge of the mat did contain rippling, the plaintiff has failed to provide evidence that her fall was caused by this rippling or by any other alleged defect in the mat. There were no witnesses claiming to have observed her fall or the condition of the mat prior to or during her accident. Despite assertions to the contrary in her brief, the plaintiff never testified that she fell as a result of a ripple or buckle. Rather, she stated simply and clearly that her left foot was "grabbed" by the mat, later adding "like skiing." Neither the incident report nor the medical records the day of the accident contain any mention of a buckle, ripple, or other defect in the surface of the mat. The plaintiff has failed to direct us to any substantive evidence that her fall could be attributed to negligence on the part of the defendant.

¶ 21 The video surveillance and still photographs similarly fail to create an issue of fact as to the cause of the fall. There, the plaintiff is shown initially stepping onto the right side of the mat with the pointed toe of her right foot lying flat on the mat's surface, a fact that she corroborated

in her own testimony. In the next frame, the plaintiff is heading across the width of the mat, and steps down onto the center of the mat with her left foot, at which point she appears propelled forward into the safety rail of the shopping cart display, and then falls to the ground. Again, assuming that there were ripples along the right edge, there is no indication that the plaintiff tripped on them or that her left foot made any contact with them. Instead, the video supports her testimony that her left foot, stepping down in the middle of the mat and well beyond the rippled edge, was somehow grabbed by the mat, precipitating her fall.

¶ 22 The plaintiff also points to her testimony that, about two weeks after her injury, she had a conversation with Starbucks employee Michelle who claimed to have overheard a Dominick's employee reprimanding a utility clerk for "not putting the rug down correctly." We reject the plaintiff's reliance on this alleged statement, which, aside from being hearsay, is far too vague to shed any further light on the issue before us.

¶ 23 The plaintiff cites the case of *Caburnay v. Norwegian America Hospital*, 2011 IL App (1st) 101740, as being dispositive of this case, but that case is readily distinguishable. There, as here, the plaintiff fell on a rubber-backed fabric mat, and testified that he had not seen a flap, ripple, or other defect in the mat prior to his fall. Unlike this case, however, the plaintiff "categorically" and unequivocally testified that the sole of his left shoe got caught in a fold in the mat, that he felt this fold with his left foot, and that this fold caused him to trip backwards. *Id.* The court accordingly determined that the plaintiff raised a question of fact sufficient to withstand summary judgment. In this case, we find no evidence that she tripped on a ripple or buckle in the mat, or that she perceived a ripple or buckle at any time. Accordingly, her reliance on *Caburnay* is misplaced.

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¶ 24 For the foregoing reasons, we affirm the circuit court's decision that there is no genuine issue of material fact as to the proximate cause of the plaintiff's injury, and that summary judgment for Dominick's was therefore proper. We need not reach the plaintiff's alternative argument that the trial court erred in basing summary judgment on the fact that Dominick's lacked notice of the defective condition of the mat.

¶ 25 Affirmed.