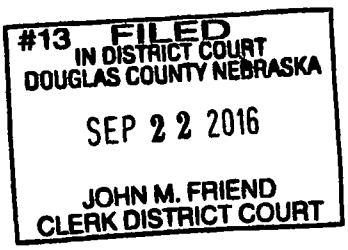
IN THE DISTRICT COURT OF DOUGL/

LAURA GLESS and DON CHRISTENSEN, Plaintiffs, Vs. DRITLEY PROPERTIES, L.L.C., and DR. PAUL DRITLEY d/b/a ELKHORN ANIMAL HOSPITAL, Defendants.	)	CASE NO. CI 14-8158 ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT



This matter comes before the Court on Defendants' Motion for Summary Judgment filed May 4, 2016. Hearing on Defendants' Motion was held on August 24, 2016 during which arguments were heard, evidence adduced, and the matter was taken under advisement.

Being fully advised in the premises, the Court finds and order as follow:

FACTS AND PROCEDURAL HISTORY

Plaintiffs Laura Gless and Don Christensen are individuals who at all times relevant to this action were resident of Omaha, Douglas County, Nebraska. (Compl.¶ 1 and 2). Dritley Properties, LLC is a Nebraska Limited Liability Company with its principle place of business in Douglas County, Nebraska and is the owner of the property on which Elkhorn Animal Hospital sits. (Compl.¶3). Dr. Paul Dritley is an individual residing in Douglas County, Nebraska and doing business as Elkhorn Animal Hospital in Elkhorn, Douglas County, Nebraska. (Comp.¶4).

This action arises out of an incident occurring on October 10, 2011 in which Plaintiff Laura Gless slipped and fell on water accumulated on the floor inside of the foyer of Elkhorn Animal Hospital. (Compl.¶7, 8 and 9). As a result, Plaintiff Gless alleges she sustained personal injuries. (Comp.¶9). Plaintiff Christensen alleges loss of consortium due to Gless's injuries. (Compl.¶18). Plaintiffs contend that Defendants' negligence is the sole and proximate cause of the personal injuries of Plaintiff Gless and that Defendant allegedly knew or should have known about the water accumulated on the floor. (Compl.¶11 through 13).

Based on the foregoing allegations, Plaintiffs filed this action on October 9, 2014 seeking judgment against Defendants for special damages, general damages, loss of consortium, and costs

of this action. (Compl.¶ 19 through 20). Thereafter, Defendants filed an answer and affirmative defenses on November 12, 2014.

Depositions of the Plaintiffs as well as Elkhorn Animal Hospital employees Heather Childress and Sandy Joint were taken. During his deposition, Don Christensen stated upon arriving at the animal hospital, he and Gless parked their vehicle and walked across the wet concrete parking lot towards the building's entrance. (Ex. 3, p. 27:4-5). Gless described the weather that morning as mist to light rain. (Ex. 2, p. 56:20). Christensen was carrying two cat crates. When Plaintiffs arrived at the door, Plaintiff Gless opened the building's exterior door holding it open so Christensen could enter with the two cat crates he was carrying. Christensen testified there was likely water on the soles of his shoes as he approached the building. (Ex. 3, p. 27:15-18). Christensen entered the foyer first and stepped onto a floor mat. He then moved aside as Gless stepped onto the floor mat. When Gless stepped off the floor mat and onto the tile floor, she immediately slipped. (Ex. 2, p. 65:22-66:4-17).

Gless testified she slipped on water on the foyer floor, but she did not see the water until after she fell. (Ex. 2, p. 69:11-71:7). Gless stated she did not know how much water was on the floor but that it was consisted with the type of moisture you would expect to see from people having walked through the foyer earlier. (Ex. 2, p. 74:22-75:1). Gless testified that she had no way of knowing how long the moisture was in the foyer area prior to her fall. (Ex. 2, p.75:14-19). Christensen did not see any moisture on the floor before Gless fell. (Ex. 3, p. 29:24-25). Christensen stated he didn't know where the moisture was located and he did not believe anyone spilled anything in the entryway. (Ex. 3, p. 40:19-21). Christensen described the moisture as the type you would expect to see from the bottom of people's feet and animal's feet. (Ex. 3, 41:2-20).

Following Plaintiffs depositions, Defendants filed a Motion for Summary Judgment on May 4, 2016, pursuant to Neb. Rev. Stat. §25-1331 (Reissue 2008), asserting that there are no genuine issues of material fact and that Defendants are entitled to judgment as a matter of law. A hearing on Defendants motion was held and the matter was taken under advisement. At the hearing, Defendants offered the affidavits of two receptionists working at the Elkhorn Animal Hospital on the morning of Plaintiff Gless's fall. Neither of the receptionists saw any water on the floor before Gless's fall. (Ex. 5, Angela Chalupa affidavit, p. 4-5; Ex. 6, Sandy Joint affidavit, p. 4-5). Defendants also offered the deposition of Heather Childress, officer manager. Childress testified that she was in the front office and reception area that morning and walked past the foyer

door multiple times. She stated she did not see any water in the foyer area. (Ex. 4, p. 46:9-47:5). Ms. Childress testified that after Ms. Gless fell and she went to her aid, she observed water on the foyer floor that was consistent with water being tracked in by people or animals. (Ex. 4, p. 51:9-12).

The Defendant also offered affidavits of Johnny Anderson and Brad Warner. Both were patrons of the Elkhorn Animal Hospital that morning and arrived within thirty minutes of the Plaintiffs' arrival and did not observe any water or moisture on the foyer floor. (Ex. 7, p. 2).

STANDARD OF REVIEW

Summary Judgment is proper when the pleadings and evidence submitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, thus entitling the movant to judgment as a matter of law. *Peterson v. Homesight Indem. Co.*, 287 Neb. 48, 50, 840 N.W.2d 885, 888-89 (2013). It is the movant's burden to produce sufficient evidence to demonstrate that there are no genuine issues of material fact. *Selma DEV., LLC v. Great W. Bank,* 285 Neb. 37, 45, 825 N.W.2d 215, 222 (2013). After the movant makes a prima facie case by producing enough evidence to demonstrate it would be entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of material fact preventing judgment shifts to the party opposing the motion. *Id.*

On a Motion for Summary Judgment, the Court views the evidence in the light most favorable to the non-moving party and gives that party the benefit of all reasonable inferences deducible from the evidence. *Doe v. D. Fireman's Fund Ins. Co.*, 287 Neb. 486, 489, 843 N.W.2d 639, 642 (2014). In reviewing the motion, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Estate of Donahue ex rel. Brown v. W.E.L.-Life at Papillion, Inc.*, 19 Neb. App. 158, 162, 810 N.W.2d 418, 423 (2011).

ANALYSIS

In analyzing Defendants motion, the question currently before this Court is whether there's a genuine issue of material fact barring summary judgment. As a general rule, an owner or occupier is liable for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor establishes: (1) the owner or occupier either created the condition, and knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected a lawful visitor

such as the Plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the owner or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the lawful visitor. *Connolly v. City of Omaha*, 284 Neb. 131, 140-141, 816 N.W.2d 742, 753 (2012).

A Defendant is entitled to summary judgment if the evidence establishes, as a matter of law, that at least one element of the Plaintiff's cause of action cannot be established. *Boyle v. Welsh*, 256 Neb. 118, 125, 589 N.W.2d 118, 125 (1999). Here, Defendant argues that Plaintiff has failed to produce evidence satisfying the first element set out above. Because Plaintiff does not allege that Defendant created the condition at issue, this Court must next determine whether Plaintiff can establish that Defendant possessed either actual or constructive notice in order to satisfy the first element. *Id.* Here, Plaintiff has failed to adduce any evidence suggesting that Defendant had actual notice of the condition; thus, to avoid summary judgment, Plaintiff must be able to produce evidence demonstrating that Defendant had constructive notice.

As a rule, a Defendant is deemed to have constructive notice where the condition at issue was visible and apparent and it existed for a sufficient length of time prior to the accident to permit a Defendant's employees to discover and remedy it. *Chelberg v. Guitars and Cadillac's of Nebraska, Inc.*, 253 Neb. 830, 836, 572 N.W.2d 356, 360-61 (1998). Defendant points to portions of the Plaintiff's deposition including the following:

Q: I think I know the answer to this question, but I assume you have no idea how long that moisture had been in the foyer area before you arrived that morning?
A: No, I don't have any way of knowing that information.
Q: Okay. For all you know, it could have been tracked in by the customer that arrived just before you?
A: I have no way of knowing that.
(Ex. 2, 75:14-19).

In addition, Defendant points to portions of Christensen's deposition in indicating he did not know how long the moisture was present on the floor and was unable to identify a specific location where the moisture was located.

Q: I assume, like Laura, you don't believe that anyone had spilled anything in the entryway?
A: No.
Q: There wasn't a big puddle of water, was there?
A: No.

Q: Okay. It was the trace amounts of moisture that you would expect to see form the bottom of people's feet?
Objection to form.
A: And animal's feet.
Q: Okay. Have you seen people walk in areas before where they were - - where the bottom of their feet were wet or the bottom of their shoes were wet - -
A: Yeah.
Q: - - and leave a small trace of moisture behind?
A: Yes.
Q: And is that, essentially, what you observed on the morning of October 10, 2011?
A: Yes.
(Ex. 3, 41:2-20).

Accordingly, Defendant argues that Plaintiff cannot prove that Defendant had constructive notice.

In *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003), Lorrainna Herrera, customer brought a slip and fall suit against a grocery store after she slipped on a wet floor in the store's restroom. In moving for summary judgment, the store offered Herrera's deposition which she admitted she did not know how long the water had been on the floor. Based on this uncontroverted evidence, the Nebraska Supreme Court reversed the Nebraska Court of Appeals and concluded that no reasonable inference could be drawn as to whether the water had been on the floor long enough for it to be discovered and remedied. Without such evidence, Herrera could not establish that the store know of the condition or should have known of the condition, thus entitling the store to judgment as a matter of law. *Id.* at 124, 655 N.W.2d at 383. In another similar case, *Richardson v. Ames Ave. Corp.*, 247 Neb. 128, 528 N.W.2d 212 (1995), the Plaintiff slipped on liquid soap in a grocery store isle, but could not produce evidence indicating how long the spill had been there or how the spill was created. On appeal, the Nebraska Supreme Court reversed and remanded the case, instructing that it should be dismissed because the Plaintiff failed to produce evidence establishing that Defendant was negligent *Id.* at 135-136, N.W.2d at 217-218.

Here, similar to both *Herrera* and *Richardson*, Plaintiff admitted that she did not know how long the water had been on the floor or where it had come from.

Nevertheless, Plaintiff argues that Defendant did have constructive notice because on the day of the incidence, inclement weather, including rain and mist had been present prior to the Plaintiff's slip and fall. Despite these assertions, the fact remains that the Plaintiff has failed to present evidence from which one could infer how long the water had been on the floor in the exact

location where Plaintiff's slip and fall took place. The evidence presented shows that an individual had arrived within thirty minutes prior to Plaintiff's slip and fall. Further, Christensen testified that he could have had moisture on his shoes when he stepped into the foyer. The mere presence of precipitation outside does not shed any light on whether the condition at issue existed for a sufficient length of time prior to the incident to permit Defendant's employees to discover and remedy it. Absent evidence to support an inference of the possessor's actual or constructive knowledge of the hazardous condition at issue, a jury is not allowed to speculate as to the possessor's negligence. *Range v. Abbot Sports Complex*, 269 Neb. 281, 286, 691 N.W.2d 525, 529 (2005).

Based on the foregoing, Defendants have established that Plaintiffs have failed to produce evidence indicating how long the water at issue had been on the floor prior to Plaintiff Gless's slip and fall. There is only speculation as to where the water had come from. Consequently, the burden shifted to Plaintiffs to produce evidence that Defendants did in fact know of the condition or should have known of the condition. Plaintiffs have failed to meet this burden. As a result, Defendants cannot as a matter of law be held liable for Plaintiff's injuries. Accordingly, this Court finds that there is no genuine issue of material fact, thus entitling Defendants to judgment as a matter of law.

IT IS THEREFORE ORDRED, ADJUDGED AND DECREED that Defendant Dritley Properties, LLC and Dr. Paul Dritley doing business as Elkhorn Animal Hospital's Motion for Summary Judgment is granted and Plaintiffs Laura Gless and Don Christensen's complaint is dismissed with prejudice.

DATED this 21st day of September, 2016.

BY THE COURT:

SHELLY R. STRATMAN
DISTRICT COURT JUDGE

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