IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ERMA BROWN,	)	
	)	
Plaintiff	)	
	)	C.A. No. 10C-06-180 RRC
v.	)	
	)	
DOVER DOWNS, INC,	)	
	)	
Defendant	)	
	)	
	)	
	)	

Submitted: August 22, 2011
Decided: August 30, 2011

Upon Defendant Dover Downs, Inc.'s Motion for Summary Judgment.
GRANTED.

MEMORANDUM OPINION

Philip T. Edwards, Esquire and Lauren A. Pisapia Cirrinicione, Esquire, Murphy & Landon, Wilmington, Delaware, Attorneys for Plaintiff Erma Brown.

Daniel L. McKenty, Esquire and Michael J. Logullo, Esquire, Heckler & Frabizzio, Wilmington, Delaware, Attorneys for Defendant Dover Downs, Inc.

COOCH, R. J.

I. Introduction

This motion for summary judgment arises from injuries sustained by Plaintiff Erma Brown ("Plaintiff") when she fell while getting into a bathtub in the bathroom of her room at Defendant Dover Downs, Inc. ("Defendant"); at the time of this incident, Plaintiff was a guest, and thereby a business invitee, of Defendant, a Delaware hotel and casino. Although Defendant adhered to a policy of providing bathmats for each of its rooms, there was apparently no such bathmat in Plaintiff's room. Thus, the crux of Plaintiff's claim of negligence is that Defendant owed her a duty to provide a bathmat for her room's bathtub, and that Defendant's failure to provide a bathmat was the cause of her instant injuries.

The question of whether an innkeeper owes a legal duty to its guests to provide a bathmat appears to be one of first impression in Delaware. Nonetheless, a review of cases from other jurisdictions reveals that the overwhelming majority rule is that no such duty exists. The underlying rationale of the majority rule, take together with the truism that "the risks inherent in bathing or showering are open, apparent, and obvious to anyone who has ever taken a bath or shower,"[1] is persuasive to this Court. Consequently, this Court joins the majority of jurisdictions and holds that Defendant did not owe Plaintiff a legal duty to provide a bathmat. Given that the existence of a duty is a necessary element of a negligence claim, it follows that Plaintiff is precluded recovering from Defendant. In turn, there are no remaining genuine issues of material fact with respect to Plaintiff's claim. Accordingly, Defendant's motion for summary judgment is **GRANTED.**

II. Facts and Procedural History

The facts of this case, as set forth in Plaintiff's complaint, are quite straightforward and are not contested or contradicted by Defendant's motion for summary judgment. Plaintiff is a resident of the State of New Jersey; she was a guest of Defendant on September 9, 2009.[2] As Plaintiff was entering the shower in her hotel room, she slipped and fell; Plaintiff's complaint alleges that she remained in the bathtub for several hours, until a hotel maid entered the room and called an ambulance.[3] According to Plaintiff, the bathtub did not contain any

[1] *See Jones v. Abner*, 335 S.W.3d 471, 476 (Ky. Ct. App. 2011).
[2] *See* Complaint at ¶¶ 4-5.
[3] *Id.* ¶ 6.

bathmat or other non-slip finish.[4] Defendant's representative acknowledged that, on the date of the incident, Defendant maintained a policy of providing rubber bathmats for its rooms' showers.[5]

III. Contentions of the Parties

A. Defendant's Contentions

Defendant argues in support of its motion that the majority of courts that have considered this issue have determined that an innkeeper does not owe a duty to provide a bathmat for use by guests.[6] Defendant further notes that the majority of courts have held that the inherently slippery nature of a wet bathtub is an "open and obvious" condition, of which an innkeeper defendant has no duty to warn or otherwise address.[7] Defendant cites the case of *Brault v. Dunfey Hotel Corporation*,[8] a case from the United States District Court of the Eastern District of Pennsylvania, which provides a very thorough overview of nationwide cases addressing this issue; it is Defendant's position that, consistent with the majority view articulated and analyzed in *Brault*, this Court should hold that Defendant had no duty to provide guests a bathmat or otherwise warn guests of the inherently slippery nature of a wet bathtub. To the extent Plaintiff invokes Defendant's policy of providing bathmats to establish Defendant's negligence, Defendant asserts that its voluntary provision of bathmats is merely a "courtesy and extra safety precaution" and does not establish or engender a legal duty to provide such mats.[9] Finally, Defendant argues that there is no evidence that a bathmat would have prevented Plaintiff's fall.[10]

B. Plaintiff's Contentions

Plaintiff invokes the general proposition that a landowner owes a duty to business invitees to make the premises reasonably safe and to warn of any

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[4] *Id.* ¶ 7.
[5] Pltf.'s Opp'n. to Mot. for Summ. J. Ex. 1 (Q. "On September 9, 2009, Dover Downs had a policy which required that a rubber mat be supplied in every guest bathroom [] which contained a bathtub?" A. "Yes.").
[6] Def.'s Mot. for Summ. J. at 3.
[7] *Id.*
[8] 1988 WL 96814 (E.D. Pa. 1988).
[9] *Id.*
[10] *Id.* at 4.

concealed or latent dangers.[11] Plaintiff asserts that Defendant "should have expected plaintiff would fail to protect herself from the danger posed by the slippery bathtub because [Defendant] failed to provide her with the very thing she needed to protect herself from the danger, which was a bathmat."[12]

Plaintiff further argues that the reasonableness of an innkeeper's failure to place a bathmat "is a question that triggers material issues of fact that must be determined by the jury."[13] Plaintiff contends that Defendant's policy of placing a bathmat in its bathrooms establishes a "subjective recognition" on the part of Defendant that its bathtubs posed an unreasonable risk of harm to business invitees in the absence of a bathmat.[14]

With respect to Defendant's articulation of the majority view regarding the lack of an innkeeper's tort duty to provide bathmats, Plaintiff argues that Defendant is proposing a "stricter" standard to the innkeeper/gust relationship; Plaintiff asserts that the "open and obvious" characterization of the danger is relevant only to Plaintiff's comparative negligence, a factual issue for the jury, and not to the existence, *vel non*, of Defendant's duty in tort to provide a bathmat.[15] According to Plaintiff, "[t]here is a clear issue of fact as to whether [Defendant] was obligated to provide [a] bathmat to [Plaintiff]."[16]

IV. Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, 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."[17] The moving party bears the burden of demonstrating that no material issues of fact are in dispute and that it is entitled to judgment as a matter of law.[18]

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[11] Pltf.'s Opp'n. to Mot. for Summ. J. at 1.
[12] *Id.* at 2.
[13] *Id.* at 3.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 7.
[17] Super. Ct. Civ. R. 56(c).
[18] *Sterling v. Beneficial Nat'l Bank, N.A.*, Del. Super., C.A. No. 91C-12-005, Ridgely, P.J. (Apr. 13, 1994) (Mem. Op.).

Once the non-moving party has been afforded the opportunity to show a genuine issue of material fact in dispute, the burden returns to the moving party to demonstrate the absence of such disputes.[19] Disputes regarding immaterial issues of fact will not preclude summary judgment;[20] if the disputed facts could have no bearing on the analysis or resolution of the parties' claims, then any such disputed facts are immaterial.[21]

The Court must view the record in a light most favorable to the non-moving party.[22] However, the opposing party may not merely assert the existence of a disputed issue of fact; the opponent of a motion for summary judgment "must do more than simply show that there is some metaphysical doubt as to material facts."[23]

A prerequisite for liability in tort is the existence of a legal duty to the plaintiff.[24] The existence of a duty is entirely a question of law for the Court "to be determined by reference to the body of statutes, rules, principles and precedents which make up the law."[25] As previously stated by this Court, "[n]eedless to say, if the defendant establishes that it owed no duty to the plaintiff, *ipso jure,* it has established that it is entitled to summary judgment as a matter of law."[26]

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[19] Super. Ct. Civ. R. 56(e); *Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1060 (Del. 1986).

[20] *Brzoska v. Olson*, 668 A.2d 1355, 1365 (Del. 1995) (citing *State Farm Mut. Auto. Co. v. Mundorf*, 659 A.2d 215, 217 (Del. 1995)).

[21] *See, e.g.*, *Mundorf*, 659 A.2d at 217 (holding that the factual dispute as to whether a policyholder received a contractually required renewal premium notice could have no effect on the resolution of the case because the insurer was nonetheless required by law to send a termination notice; accordingly, the dispute was deemed immaterial as a matter of law.)

[22] *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. Ct. 1989).

[23] *Brzoska*, 668 A.2d at 1364 (quoting *Matsushita Elec. Ind.Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

[24] *See, e.g., Fritz v. Yeager*, 790 A.2d 469, 471 (Del. 2002) ("In order to be held liable in negligence, a defendant must have been under a legal obligation-a duty-to protect the plaintiff from the risk of harm which caused his injuries.") (citation omitted).

[25] *Id.* ("Whether a duty exists 'is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined only by the court.'") (citations omitted).

[26] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. Ct. 2005); *see also Kananen v. Alfred I. DuPont Inst. of Nemours Found.*, 796 A.2d 1, 4 (Del. Super. Ct. 2000) ("If the court finds that the defendant owes no duty of care to the plaintiff, the defendant is entitled to summary judgment as a matter of law.") (citations omitted).

V. Discussion

A. Introduction

The singular issue for this Court to determine is whether Defendant, as an innkeeper, owed a duty to Plaintiff, its business invitee, to place a bathmat in her room's bathtub. This is apparently a question of first impression in Delaware; consequently, this Court has undertaken a review of cases from other jurisdictions which have addressed this issue.

B. This Court Adopts the Majority View, Under Which Defendant Did Not Owe Plaintiff a Duty to Place a Bathmat in Her Hotel Room's Bathtub.

1. General Parameters of an Innkeeper's Duty in Tort to its Guests.

As relevant to this case, Delaware's tort duty to affirmatively act is guided by the Restatement (Second) of Torts.[27] With respect to innkeepers, the Restatement (Second) of Torts § 314A(1)-(2) obligates innkeepers "to protect [their guests] against unreasonable risk of physical harm."[28] Consequently, the operative inquiry is whether the inherently slippery nature of a wet bathtub surface presents an "unreasonable" risk of harm, thereby obligating Defendant to affirmatively act to protect to Plaintiff.

2. There is No Duty in Tort for an Innkeeper to Provide a Bathmat for its Guests' Hotel Rooms' Bathtub Surfaces.

Defendant cites a number of cases from other jurisdictions which have analyzed the instant issue. The most comprehensive such case appears to be

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[27] *See, e.g., Reidel v. ICI Americas, Inc.*, 968 A.2d 17, 20 (Del. 2009) ("Generally, to determine whether one party owed another a duty of care, we follow the guidance of the Restatement (Second) of Torts.") (citations omitted).

[28] *See also Britt v. Campbell & Bru-Bre*, 1987 WL 28318, at *2 (Del. Super.) ("An innkeeper is under a duty to its guests to take reasonable action to protect them against reasonable harm.") (citing RESTATEMENT (SECOND) OF TORTS 314A.).

Brault v. Dunfey Hotel Corporation,[29] a 1988 case from the United States District Court for the Eastern District of Pennsylvania. In *Brault*, the plaintiff, a 14 year old girl, slipped while in the shower at the Tobacco Valley Inn in Windsor, Connecticut; she testified that, as she stepped into the bathtub, she observed some "brownish-gray" strips in the bottom of the bathtub.[30] The plaintiff testified that she believed these strips were present to prevent someone from slipping while in the shower, and that she believed she was safe because of the strips;[31] ultimately, however, it was revealed that these "strips" were simply stains in the bottom of the bathtub.[32] Given that the incident occurred in Connecticut, Connecticut law controlled the extent of the defendant's duty; this issue had not been addressed by the Connecticut courts, thereby requiring the District Court to "predict" Connecticut law on this issue.[33]

The *Brault* Court noted the "dearth" of case law pertaining to slip and fall accidents in bathtubs.[34] Nonetheless, the Court undertook a thorough review of the most relevant cases from Ohio, New Mexico, Florida, Massachusetts, Indiana, New Jersey, New York, Washington, Colorado, Hawaii, and several federal courts.[35] Based on its review and analysis of these cases, the *Brault* Court stated:

> In summary, a majority of courts hold innkeepers not negligent in failing to supply bathmats, non-skid strips, or other bathroom safety devices. The majority of courts charge guests with reasonable use of their senses to keep a lookout for open and obvious conditions in bathrooms. Likewise, courts expect guests to possess common-sense knowledge of everyday facts, e.g., that water is slippery on tub or shower surfaces.
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> In contrast, where there is a foreign substance, such as wax or cleaning material present in a slip and fall case, courts allow the jury to determine whether the specific factual situation constitutes negligence on the part of the defendant. Expert witnesses may

[29] 1988 WL 96814 (E.D. Pa. 1988), *aff'd at* 870 A.2d 650 (3d Cir. 1989).
[30] *Id.* at *2.
[31] *Id.*
[32] *Id.* at *3.
[33] *Id.* at *5 ("Connecticut law controls substantive questions of law in this case. The parties have not cited any Connecticut decisions concerning the potential liability of a hotel for an invitee who sustains an injury while using the hotel's bathtub. Furthermore, this Court has not found any Connecticut decisions directly on point.").
[34] *Id.*
[35] *Id.* at *6-9.

> provide the necessary evidence in such cases. A minority of courts have considered the following as jury issues: defendant's awareness of a slippery condition as unreasonable risk of harm, absence of a rubber mat as evidence of defendant's negligence, and determining of the foreseeability that a guest would use a towel bar for support.[36]

Accordingly, the *Brault* Court held that Connecticut would align itself with this majority view that the defendant did not owe the plaintiff a duty to supply a bathmat and, in turn, granted a directed verdict for the defendant.[37]

More recently, in 1998, the Court of Appeals of Ohio similarly confirmed that the majority view does not impose a duty on innkeeper's to install a bathmat:

> Appellants have failed to establish that a bathtub, unequipped with skid strips, hand-holds, or grab bars, is a hazard which would forseeably and likely result in injury to its guests. *Annotation, Liability of Hotel or Motel Operator for Injury or Death of Guest or Privy Resulting from Condition in Plumbing or Bathroom of Room or Suite* (1979), 93 A.L.R.3d 253*,* discusses cases in which hotel or motel guests have slipped in showers or bathtubs where there were no bathmats. Under these similar circumstances, the weight of authority is that the hotel and motel operator is not liable, the courts usually concluding that the slippery condition was sufficiently open and obvious to preclude the injured guest's recovery.
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> Even if it were assumed that the absence of certain safety devices created a condition which was dangerous, there is no duty resting upon a defendant to warn a plaintiff of a condition which is open and obvious to anyone using ordinary diligence. It is common knowledge that a bathtub surface becomes slippery when water and soap are applied. "This fact is known to every person who has ever taken a bath." The risks apparent in bathing are open, apparent, and obvious. An owner or occupier of land owes no duty to warn invitees entering the property of an open and obvious danger on its property. The rationale is that an open and obvious danger itself serves as a warning and that the owner or occupier may reasonably expect that persons entering the premises will

[36] *Id.* at *9.
[37] *Id.*

> discover those dangers and take appropriate measures to protect themselves.[38]

The most recent case on point located by this Court is *Jones v. Abner*,[39] a 2011 case from the Court of Appeals of Kentucky. In *Jones*, the plaintiff was a guest in the "Lil' Abner" Motel; she slipped while entering the tub and struck her head against the end of the bathtub.[40] The plaintiff filed suit against the motel, claiming that the condition of the bathtub was unreasonably dangerous; specifically, the plaintiff alleged that the bathtub was slippery due to the methods used to clean it, and that this was exacerbated by the motel's failure to install non-slippage devices in the bathtub.[41] The Court of Appeals affirmed the trial court's grant of summary judgment for defendant, stating:

> We further note that the risks inherent in bathing or showering are open, apparent, and obvious to anyone who has ever taken a bath or shower. Because of this, we decline to assume, as a matter of law, that motels or hotels have an automatic duty to provide precautions against such conditions. **Appellant seems to assume that a bathtub that is not equipped with safety strips or hand-**

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[38] *Churchwell v. Red Roof Inns, Inc.*, 1998 WL 134329, at *3 (Ohio Ct. App. 1998) (citations omitted); *see also Coyle v. Beryl's Motor Hotel*, 171 N.E.2d 355, 358 (Ohio Ct. App. 1961) ("The dearth of cases on the question of falling in showers or tubs is astounding. There is almost a paucity of precedent. The scarcity of adjudicated cases indicates to us that the trend in the law is against the theory seeking to hold an innkeeper responsible who provides paying guests with a place to bathe."); *Kerr-Morris v. Equitable Real Estate Investment Management, Inc.*, 736 N.E.2d 552, 555 (Ohio Ct. App. 1999) ("Somewhat surprisingly, the issue of falls in hotel showers has not received much attention in Ohio courts, at least on the appellate level. The cases that have addressed the issue have held either that the hotels had no duty to place safety devices, such as nonslip strips, in the showers, or that the risks of slipping in the showers were open and obvious.") (citations omitted). Notably, in *Kerr-Morris*, the Court found that the defendant hotel's placement of non-strip slips in the hotel shower and apparent failure to replace those strips that had worn away made the case distinguishable from *Churchwell* and concluded that a genuine issue of material fact existed as to whether the hotel breached a duty to maintain the non-strip slips. *Id. Cf. Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1, 4 (Tex. 1996) (affirming the trial court's determination that the defendant motel did not and should not have known of a dangerous condition in the shower, that the plaintiff's claim that the defendant motel was negligent for failing to install safety devices was, "at best, an allegation of the *breach element* of her premises claim," and that the defendant "cannot breach a duty that it does not owe, and it does not owe a duty to correct a defect of which it is not, and should not be, aware.").

[39] 335 S.W.3d 471 (Ky. Ct. App. 2011).

[40] *Id.* at 473.

[41] *Id.* at 473-74.

> **holds is an inherently dangerous condition, but she failed to produce evidence of any type of industry standard, statutory law, or common-law rule that could arguably reflect a duty on the part of Appellee to equip motel bathtubs with such safety devices.** The owner of a motel or hotel has "the duty to exercise that degree of care generally used by ordinarily careful, prudent hotel operators in circumstances similar to those proven in the case, to provide reasonably safe accommodations," but he is not an insurer of a guest's safety. Appellant simply did not provide the trial court with anything of substance to meet this burden.[42]

Similarly, the American Law Reports ("ALR") annotation *Liability of Hotel or Motel Operator for Injury or Death of Guest or Privy Resulting From Condition in Plumbing or Bathroom of Room or Suite* supports this Court's interpretation of the majority view. This annotation discusses six cases which superficially appear to contravene the majority view and hold that an innkeeper may be held liable, under appropriate circumstances, for the failure to provide a bathmat: [43] *Wells v. Howard*,[44] *Fritts v. Collins*,[45] *S.A. Lynch Corp. v. Green*,[46] *Lincoln Operating Co. v. Gillis*, [47] *Gray v. Holiday Inns, Inc.*,[48] and *Conner v. Motel 6, Inc.*[49] Of these six cases, the *Wells* decision appears to be the only decision that is directly contrary to the majority rule now adopted by this Court; the *Wells* case specifically rejected the reasoning adopted by the Ohio Courts in *Coyle v. Beryl's Motor Hotel* (described *supra*), and held that the failure to provide a bathmat in the motel shower or warn of the danger of slipping raised factual issues that were susceptible to more than one inference, thereby precluding a directed verdict in favor of the defendant motel.[50]

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[42] *Id.* at 476-77 (emphasis added).
[43] Annotation, *Liability of Hotel or Motel Operator for Injury or Death of Guest or Privy Resulting From Condition in Plumbing or Bathroom of Room or Suite*, 93 A.L.R. 3d 253, § VI(c) (1979).
[44] 439 P.2d 997 (Colo. 1968).
[45] 144 So.2d 850 (Fla. Dist. Ct. App. 1962).
[46] 109 S.E.2d 615 (Ga. Ct. App. 1959).
[47] 114 N.E.2d 873 (Ind. 1953).
[48] 762 So.2d 1172 (La. Ct. App. 2000).
[49] 521 So.2d 1248 (La. Ct. App. 1988).
[50] *Wells*, 439 P.2d at 999 ("We must agree that the facts of [Coyle v. Beryl's Motor Hotel] are almost identical to those in the instant case and that the basis of negligence is likewise almost identical. We have examined that case carefully. As a result, we reject its rationale which led to affirmance of the lower court's directed verdict for the defendants therein.").

The remaining five cases cited in the ALR are factually distinguishable from the instant case. In *Fritts*, the Plaintiff also slipped while in the shower at a motel.[51] The District Court of Appeals of Florida reversed the trial court's grant of judgment notwithstanding of the verdict for defendant; the District Court of Appeal held that the defendant's use of an invisible cleaning surface on the surface of the bathtub that allegedly caused the plaintiff's fall precluded the trial court's grant of judgment notwithstanding of the verdict.[52] Likewise, in *S.A. Lynch Corporation*, the Court of Appeals of Georgia affirmed the trial court's overruling of the defendant motel's demurrer; in this case, the plaintiff slipped and fell while in the defendant motel's shower, but the plaintiff alleged that the defendant permitted a slippery "soap-like scum" to remain in the bottom of the bathtub at the time the room was rented to her.[53] The final case involving a slippery substance in the bathtub was *Lincoln Operating Corporation*; in this case, the Supreme Court of Indiana similarly affirmed a jury verdict for the plaintiff, who was injured after slipped and fell in the bathtub while a guest at the Lincoln Hotel, but the plaintiff's complaint specifically alleged the existence of a "slippery soaplike scum" on the floor of the bathtub.[54]

On a similar note, in *Gray v. Holiday Inns*, the Court of Appeal of Louisiana affirmed a jury verdict in favor of the plaintiff, a guest at the Holiday Inn who was injured in the shower when "the water temperature suddenly increased" and she slipped while quickly backing away from the water; this water temperature increase was apparently due to renovation construction of the interior of defendant's motel rooms.[55] The *Gray* Court based its holding on its conclusion that fact that the defendant "failed to take reasonable steps during the construction project to guard or warn against the water hazard and further failed to take adequate measures to reduce the likelihood that a guest might slip and fall when reacting to the noted hazard."[56] Thus, the dangerous condition created by the renovations and the fluctuating water temperature was a necessary element to the success of the plaintiff's claim.

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[51] *Fritts*, 144 So.2d at 851.
[52] *Id.* ("While, in Florida there may not be a recovery for a party who, without explanation, slips down on a floor, a jury question is present when the evidence shows there was invisible substance on the floor which caused the party to fall.").
[53] *S.A. Lynch Corp.*, 109 S.E.2d at 617.
[54] *Lincoln Operating Co.*, 114 N.E.2d at 874.
[55] *Gray*, 762 So.2d at 1173.
[56] *Id.* at 1175.

Finally, although the case of *Conner v. Motel 6* was described in the ALR annotation, together with the foregoing five cases, its holding appears inapposite to the instant issue. In *Conner*, the plaintiff slipped while in the shower at Motel 6, and he brought a strict liability claim against Motel 6 and the manufacturer of the shower stall.[57] The jury found that Motel 6 was not strictly liable, that the manufacturer was not liable, and that Motel 6 was liable in negligence, though Motel 6's liability was determined to be 40%, as compared to the plaintiff's 60% fault.[58] On appeal, the Court of Appeal affirmed the jury's determination that Motel 6 was not strictly liable and affirmed the jury's apportionment of fault between Plaintiff and Motel 6.[59] Thus, *Conner* is distinguishable.

In short, the overwhelming majority of courts that have considered this issue have held that innkeepers do not owe their guests a duty to install bathmats; it is similarly telling that Plaintiff has cited no case law to rebut those cases cited by Defendant which reveal the majority view that the instant issue is a legal question of duty, rather than a factual question of negligence or comparative negligence.[60] The singular case holding to the contrary of the majority view is *Wells, supra*; all other cases noted by ALR are distinguishable in that there was an additional factor contributing to the plaintiff's fall, such as a slippery "scum" in the bathtub or an unsafe fluctuation in water temperature.[61]

This Court finds the rationale of the majority of cases that have addressed the instant issue to be persuasive.[62] Accordingly, this Court holds

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[57] *Conner*, 521 So.2d at 1249.

[58] *Id.*

[59] *Id.* at 1254-55.

[60] *See also* 40A Am.Jur. *Hotels, Motels, Etc.* § 93 ("The inherent smoothness of floor tiles in a hotel bathroom is not an actionable defect. A guest who slipped and fell while stepping out of a shower and onto a bath mat may not recover, absent a showing that either the floor or mat [was] defective or deviated from relevant standards.") (citations omitted).

[61] *See also Gillentine v. Econo Lodge*, 1998 WL 350575, at *5 (Oh. Ct. App. 1998) (The [plaintiffs] cite *Lincoln Operating Co. v. Gillis*, in arguing that the issue of whether the tub was a dangerous condition should have been decided by a jury. However, this case is distinguishable from the *Lincoln* case because in *Lincoln,* there was evidence of a foreign substance on the tub floor that created a genuine issue of whether the tub had been a dangerous condition. In this case, however, [the plaintiff] testified at his deposition that he had not noticed a foreign substance on the tub floor."); *supra* text accompanying note 36.

[62] *See supra* notes 36, 38-39.

that an innkeeper does not owe a duty to its guests to install a bathmat in the shower stall.[63]

The Court notes that Plaintiff has proffered an expert with experience and training in the hospitality and lodging industry, Gary K. Vallen, Ed.D., to testify regarding the standard of care applicable to Defendant with respect to the inspection, upkeep, and use of a bathmat in the instant bathtub.[64] In essence, it is Dr. Vallen's opinion that Defendant breached its standard of care by failing to inspect Plaintiff's hotel room for the presence of a bathtub prior to Plaintiff's arrival, and by failing to provide a bathmat despite its own policies to the contrary.[65] However, Dr. Vallen's opinions regarding the standard of care with respect to bathmats are irrelevant if Defendant did not owe a duty to provide a bathmat in the first instance.[66] Dr. Vallen's opinions cannot create the necessary duty; to the contrary, experts may not testify as to the applicable law, and expert testimony and opinion on the existence of a legal duty would "impinge" on an area that is "exclusively within the province of the trial judge."[67] While experts may of course establish the applicable standards of care, "[e]xperts are insufficient to create duties, as duties are to be established only by the Court."[68]

Similarly, with respect to Plaintiff's contention that Defendant's policy of providing bathmats establishes its tort duty to so provide the bathmats, the Supreme Court of Delaware has indicated that Delaware's tort

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[63] Given the facts of this case, this Court need not reach the issue of whether, and to what extent, additional facts, such as a slippery substance in the shower stall or an unsafe fluctuation in water temperature, would affect an innkeeper's tort duty.

[64] Pltf.'s Opp'n. to Mot. for Summ. J. Ex. 3. Defendant has expressed its intention to file a motion in limine to exclude Dr. Vallen's testimony on the issue of causation of Plaintiff's injuries. *See* Def.'s Reply Br. at 7 ("Defendant will be filing a motion in limine to exclude [Dr. Vallen] from giving an opinion on causation.").

[65] *Id.*

[66] Similarly, Plaintiff's contention that "[t]he issue in this case is *whether Defendant breached its duty* to [Plaintiff] to provide a bathmat" a question Plaintiff asserts "is an issue of fact, which must be decided by the jury," presupposes the existence of a duty to provide a bathmat. Thus, while Plaintiff's statement that questions of breach of duty are generally factual issues to be determined by the jury, this is beside the point, because the existence of a duty is a threshold requirement for a negligence claim.

[67] *Itek Corp. v. Chicago Aerial Indus., Inc.*, 274 A.2d 141, 143 (Del. 1971); *see also Kuczynski v. McLaughlin*, 835 A.2d 150, 155 (Del. Super. Ct. 2003) ("[Plaintiff's maritime expert's opinions, likewise, have no place in the Court's consideration of [the existence of the defendant's duty to the plaintiff].").

[68] *Roberts v. Delmarva Power & Light Co.*, 2 A.3d 131, 137 (Del. Super. Ct. 2009).

duty affirmatively to act is guided by the Restatement (Second) of Torts.[69] In relevant part, Restatement (Second) of Torts § 314A(1)-(2) obligates innkeeper's "to protect [their guests] against unreasonable risk of physical harm." Although Defendant's policy of providing bathmats was apparently a laudable effort to be cautious and obviate certain risks to its guests, this does not convert the inherent slipperiness of a wet shower into an "unreasonable risk of physical harm."[70] Notwithstanding Plaintiff's contention that a bathtub poses an unreasonable risk of harm,[71] as discussed *supra,* the dangers of a wet

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[69] *See, e.g., Reidel v. ICI Americas, Inc.*, 968 A.2d 17, 20 (Del. 2009) ("Generally, to determine whether one party owed another a duty of care, we follow the guidance of the Restatement (Second) of Torts.") (citations omitted).

[70] *See Coyle*, 171 N.E.2d at 358 ("It might be helpful, particularly to parents of little boys, to declare bathing to be a dangerous task; by so doing, a hated chore would be surrounded with an aura of adventure, so fraught with danger that you could not keep men under 10 years of age out of bath tubs. We feel this is neither practical nor the law.").

[71] Notably, Plaintiff also asserted that her age should be a relevant factor in the Court's determination of whether the bathtub was unreasonably dangerous and, in turn, whether a duty existed. Pltf.'s Opp'n. to Mot. for Summ. J. at 3 ("This unreasonable risk of harm was especially applicable to Mrs. Brown, who is an elderly woman, and was at the greatest risk of harm posed by the slippery surface bathtub."). Indeed, during oral argument, Plaintiff asserted that Defendant's alleged marketing to an elderly clientele should militate in favor of finding that Defendant owed Plaintiff a duty to provide a bathmat. *See* Transcript of Oral Argument of August 22, 2011 at 17-18 ("[Defendant] is marketing to elderly people who then come in and go to the casino. . .so this is a known fact to them. They know they have people who may be unstable, who may need extra help in the bathtubs. . . ."). Significantly, however, upon questioning by this Court, Plaintiff stated that, if Defendant catered to a younger clientele, the duty analysis may be different. *Id.* at 18 (Q. "Suppose we had the same facts but we had a hotel that catered mostly to young people, would there be a different outcome [] in that scenario, hypothetically?" A. "Hypothetically, there may be, because a hotel catering to young people would have a different set of circumstances to consider."). The Court does not find the alleged elderly age of the clientele to which Defendant caters to be a relevant factor in assessing the existence of a duty herein; as previously stated by this Court, "[t]he court's role, therefore, when determining whether a duty exists is first to study the relationship between the parties and then to determine, based upon statutory and/or common law principles, whether the relationship is of a nature or character that the law will impose a duty upon one party to act for the benefit of another." *Higgins v. Walls*, 901 A.2d 122, 136 (Del. Super. Ct. 2005). As stated, this Court has already considered the relevant statutory and common law principles on the issue of a duty to provide a bathmat, and has concluded that the surface of a bathtub, even when wet, is not unreasonably dangerous and does not give rise to a duty of an innkeeper to provide bathmats to its guests. The applicability of this rationale is not contingent on the age of the putative plaintiff, as the inherent danger of a slippery, wet surface applies equally to children,

bathtub surface are an unavoidable result of the intended use of a bathtub and shower stall, and any such risks are also open and obvious.[72] Moreover, the Supreme Court of Delaware has recently observed that a defendant's efforts to take some affirmative action that is beyond that which the duty in tort requires does not give rise to a voluntary assumption of a heightened duty in tort.[73]

Consequently, this Court concludes that Defendant did not owe a duty to Plaintiff to provide a bathmat for her hotel room's bathtub surface; it necessarily follows that Plaintiff cannot recover from Defendant based on

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adults, and elderly adults. It is true, as far as it goes, that "duty derives from the relationship between the parties and the foreseeable risk of harm that is implicated by the relationship." *Kuczynski*, 835 A.2d at 155. However, although Plaintiff seems to contend that her elderly age heightened the instant risk of harm, thereby making her injuries somewhat more foreseeable, this one factor, even if accepted as true, does not overcome the rationale underlying the majority rule that there is no such duty and, further, that the danger is open and obvious to the ordinary person, see *infra* note 72.

[72] *See, e.g., Gillis*, 114 N.E.2d at 876 ("While it is a matter of common experience that water makes an enamel or porcelain tub more slippery than a dry tub, it is also a matter of common experience that millions of people take baths in such tubs without ever falling or injuring themselves. It is also a matter of common experience that wet soap acts as a lubricant and makes a wet bathtub much more slippery than water alone."); Coyle, 171 N.E.2d at 358 ("We all realize that a baked enamel surface on a steel or cast iron foundation which is covered with running water and possibly soap is a surface that has limited traction and makes slipping an ever present possibility. His fact is known to every person who has ever taken a bath."); *Jones*, 335 S.W.3d at 476 ("We further note that the risks inherent in bathing or showering are open, apparent, and obvious to anyone who has ever taken a bath or shower.") (citation omitted); *Kutz v. Koury Corp.*, 377 S.E.2d 811, 813-14 (N.C. Ct. App. 1989) ("It is common knowledge that bathtub surfaces, especially when water and soap are added, are slippery and that care should be taken when one bathes or showers. . . .The bathtub here was not so unnecessarily dangerous so as to give rise to a claim of negligence."); *Gillentine*, 1998 WL at *6 ("However, "[i]t is common knowledge that a bathtub surface becomes slippery when water and soap are applied." The proposition that the potential dangers of bathing are open and obvious assumes the fact of a wet tub surface. Econo Lodge was not required to warn the [the plaintiffs] about the possibility of slipping and falling in the wet tub absent an additional danger that was not open or obvious. . . .[The plaintiffs] failed to create a genuine issue as to whether the condition of the tub had presented an additional danger that made it unusually dangerous and that was not open and obvious.") (citation omitted).

[73] *Cash v. East Coast Property Mgmt.*, 7 A.3d 484, *4 (Del. 2010) (holding that, in the context of a continuing snow storm, defendants had no duty to remove the snow until the end of the storm; "[t]hus, even if the defendants' policy was to remove snow and ice during a storm, that, without more, does not constitute the voluntary assumption of a legal duty.") (citations omitted).

Defendant's failure to provide a bathmat to her hotel room's bathtub surface.[74] Given this Court's holding that Defendant did not owe Plaintiff the relevant duty, Defendant is entitled, as a matter of law, to summary judgment in its favor.[75]

VI. Conclusion

For the reasons stated above, Defendant's motion for summary judgment is **GRANTED.**

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Richard R. Cooch

oc: Prothonotary

[74] *See supra* note 24.
[75] *See supra* note 26.