IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

KRISTINA HAGSTRON, **Plaintiff,** **v.** **CONCORD MALL, LLC, a Delaware Limited Liability Company, ALLIED PROPERTIES, INC., a Delaware Corporation, and ENVIRONMENTAL CLEANING SOLUTIONS, INC., a Pennsylvania Corporation,** **Defendants.**	)	**C.A. No. N16C-04-083 FWW**

Submitted: February 9, 2017
Decided: April 17, 2017

Upon Defendants' Motion for Summary Judgment:
DENIED.

ORDER

Daniel L. McKenty, Esquire, Heckler & Frabizzio, 800 Delaware Avenue, Suite 200, P.O. Box 128, Wilmington, Delaware 19899; Attorney for Defendants Concord Mall, LLC and Allied Properties, Inc.

Susan List Hauske, Esquire, Tybout, Redfearn & Pell, 750 Shipyard Drive, Suite 400, P.O. Box 2092, Wilmington, Delaware 19899; Attorney for Defendant Environmental Cleaning Solutions, Inc.

James P. Hall, Esquire, Phillips, Goldman, McLaughlin & Hall, P.A., 1200 North Broom Street, Wilmington, Delaware 19806; Attorney for Plaintiff Kristina Hagstron.

WHARTON, J.

This 17th day of April, 2017, upon consideration of Concord Mall, LLC's, Allied Properties, Inc.'s, and Environmental Cleaning Solutions, Inc.'s ("Defendants") Motion for Summary Judgment and Kristina Hagstron's ("Plaintiff") Response, it appears to the Court that:

1. Plaintiff worked for Dakota Watch Company at a kiosk located inside Concord Mall ("Mall") in Wilmington, Delaware.[1] On May 5, 2015, Plaintiff arrived at the Mall for work at approximately 9:30 a.m.[2] The general public is able to access the Mall at 9:00 a.m. on weekdays.[3] However, stores do not open until 10:00 a.m.[4]

2. At approximately 9:50 a.m., an individual approached Plaintiff's kiosk and asked Plaintiff whether she had a box for a piece of jewelry that the individual had purchased.[5] Plaintiff did not have a box at her kiosk. As a result, Plaintiff decided to walk to a nearby jewelry store in the Mall to get one.[6]

3. As Plaintiff began to walk toward the jewelry store, Plaintiff allegedly slipped on water and fell to the ground.[7] Plaintiff alleges that she sustained a left metatarsal fracture as a result of the fall.[8]

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[1] Pl.'s Responding Br., D.I. 33, at ¶ 3.
[2] *Id.*
[3] Defs.' Mot. Summ. J., D.I. 30, at ¶ 4.
[4] *Id.*
[5] D.I. 33, at ¶ 3.
[6] *Id.*
[7] *Id.*
[8] D.I. 30, at Ex. A.

4. On April 11, 2016, Plaintiff filed a Complaint against Defendants. Plaintiff alleges, among other things, that Defendants were negligent by failing to properly and reasonably inspect the premises, by failing to warn Plaintiff of the defective condition, by failing to take reasonable measures to make the premises safe for invitees, and by failing to remedy the defective condition within a reasonable period of time after Defendants became, or should have become, aware of the defective condition.[9] Plaintiff argues that Defendants' negligence proximately caused Plaintiff to suffer a left metatarsal fracture.[10] Therefore, Plaintiff contends that she is entitled to damages.

5. On January 12, 2017, Defendants filed a Motion for Summary Judgment. Defendants argue that summary judgment is appropriate because Plaintiff has failed to provide any evidence proving that the floor was wet.[11] Moreover, Defendants argue that Plaintiff has failed to produce any evidence showing that Defendants had notice of the alleged wet floor.[12] Without such evidence, Defendants contend that Plaintiff cannot prove that Defendants had constructive knowledge of the alleged defective condition.[13]

6. On February 9, 2017, Plaintiff filed her Response to Defendants' Motion for Summary Judgment. Plaintiff contends that she has established that

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[9] Pl.'s Compl., D.I. 1, at ¶¶ 12–20.
[10] *Id.*
[11] D.I. 30, at ¶ 9.
[12] *Id.*
[13] *Id.*

there was an unsafe condition at the Mall when she fell.[14] Plaintiff explicitly testified that the floor was wet.[15] Plaintiff also observed maintenance personnel cleaning up the wet floor after the fall occurred.[16] Further, Plaintiff contends that there is genuine issue of material fact regarding whether Defendants should have been aware of the defective condition and whether they were negligent by failing to remedy that defective condition.[17] Specifically, Plaintiff argues that maintenance personnel begin working at 6:00 a.m. each day and were responsible for cleaning the Mall.[18] Thus, Plaintiff asserts there is an inference that maintenance personnel should have known about the defective condition.[19]

7. Superior Court Civil Rule 56(c) provides that summary judgment is appropriate when there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." When considering a motion for summary judgment, the Court's function is to examine the record to determine whether genuine issues of material fact exist "but not to decide such issues."[20] The moving party bears the initial burden of demonstrating that the undisputed facts support its claims or defenses.[21] If the moving party meets its

[14] D.I. 33, at ¶ 3, ¶ 7.
[15] *Id.*
[16] *Id.*
[17] *Id.* at ¶ 8.
[18] *Id.*
[19] *Id.*
[20] *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 99 (Del. 1992).
[21] *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979).

burden, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact to be resolved by the ultimate fact-finder.[22]

8. A business invitee who brings a negligence action for personal injuries sustained while on a business' premises must prove the following three elements: "(1) there was an unsafe condition in the defendant's store (2) which caused the injuries complained of, and (3) 'of which the storekeeper had actual notice or which could have been discovered by such reasonable inspection as other reasonably prudent storekeepers would regard as necessary.'"[23] However, given that Defendants have filed this motion for summary judgment, it is their initial burden to show that no genuine issues of material fact exist.

9. After reviewing the evidence and drawing all reasonable inferences in Plaintiff's favor, the Court finds that Defendants have not met their initial burden. With respect to the first element, a genuine issue of material fact exists as to whether the floor was wet in the Mall at the time of the incident. Plaintiff testified

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[22] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995). *See also Nichols v. Gaming Entm't (Del.), LLC*, 2012 WL 2344991, at *1 (Del. Super. June 18, 2012) ("Negligence is never presumed from the mere fact that a plaintiff has suffered an injury. However, generally speaking, issues of negligence are not susceptible of summary adjudication. It is only when the moving party establishes the absence of a genuine issue of any material fact respecting negligence that summary judgment may be entered."); *Upshur v. Bodie's Dairy Mkt.*, 2003 WL 21999598, at *3 (Del. Super. Jan. 22, 2003) ("Summary judgment is rare in a negligence case, because the moving party must demonstrate 'not only that there are no conflicts in the factual contentions of the parties but that, also, the only reasonable inferences to be drawn from the uncontested facts are adverse to the plaintiff.'" (quoting *Watson v. Shellhorn & Hill, Inc.*, 221 A.2d 506, 508 (Del. 1966))).

[23] *Balzereit v. Hocker's SuperThrift, Inc.*, 2012 WL 3550495, at *1 (Del. Super. July 24, 2012) (quoting *Hazel v. Del. Supermarkets, Inc.*, 953 A.2d 705, 709 (Del. 2008)).

that she slipped and fell as she approached the jewelry store.[24] After Plaintiff fell, she noticed that the floor was wet.[25] Moreover, Plaintiff testified that, after she reported the incident to Mall security, she saw maintenance personnel cleaning up the area where she fell.[26] From this testimony, a reasonable juror could conclude that there was actually water on the floor. While Defendants attempt to undermine Plaintiff's testimony by pointing to the fact that Plaintiff's dress was not wet after she fell,[27] it is entirely possible for Plaintiff to have fallen without her dress becoming wet.

10. Genuine issues of material fact also exist with regard to actual and constructive notice. Plaintiff has shown that Defendant Environmental Cleaning Solutions was contracted to clean the Mall beginning at 6:00 a.m. each day.[28] Plaintiff testified that she saw maintenance personnel "[a] few times" throughout her shift.[29] Plaintiff testified that, when she saw maintenance personnel, they were "monitoring the area, working on landscape, [or] getting coffee."[30] With this evidence, a reasonable juror could conclude that Defendant Environmental Cleaning Solutions knew, or should have known, about the defective condition on the floor because it was specifically contracted to monitor the Mall and clean-up

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[24] D.I. 30, at Ex. C.
[25] *Id.*
[26] D.I. 33, at A-13.
[27] D.I. 30, at ¶ 5.
[28] D.I. 33, at A-4.
[29] *Id.* at A-3.
[30] *Id.* at A-2.

any spills. Also, how long any water might have been on the floor is a question of fact that should be resolved by the jury.[31]

THEREFORE, Defendants' Motion for Summary Judgment is hereby **DENIED**.

IT IS SO ORDERED.

Ferris W. Wharton, J.

[31] *Argentieri v. Apple Am. Grp., LLC*, 2013 WL 4607431, at *3 (Del. Super. Aug. 27, 2013) (citing *Upshur*, 2003 WL 21999598, at *3). Defendants also argue in passing that they owed no duty to Plaintiff because the alleged danger was "open and obvious." *See* D.I. 30, at ¶ 8. Delaware courts have found that an "open and obvious danger" is "a danger [that] is so apparent that the invitee can reasonably be expected to notice it and protect against it, [because] the condition itself constitutes adequate warning." *See, e.g., Jones v. Clyde Spinelli, LLC*, 2016 WL 3752409, at *2 (Del. Super. July 8, 2016) (quoting *Niblett v. Pennsylvania R. Co.*, 158 A.2d 580, 582 (Del. Super. 1960)). Unless it is "very clear" that the condition was open and obvious or, alternatively, that it was not, "whether a dangerous condition exists and whether the danger was apparent to the plaintiff are questions for the jury." *Id.* Here, it is unclear from the evidence whether the water on the floor was open and obvious to Plaintiff. Therefore, this issue should likewise be resolved by a jury.