SECOND DIVISION
September 30, 2008

No. 1-07-1664

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

SABAH KAWASH, Plaintiff-Appellant, v. DOMINICK'S FINER FOODS, INC., Defendant and Third-Party Plaintiff-Appellee (C.E. Korsgard Company and Armstrong World Industries, Third-Party Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County No. 04 L 4903 Honorable Jennifer Duncan-Brice, Judge Presiding.

ORDER

Plaintiff Sabah Kawash filed a two-count action against defendant Dominick's Finer Foods, Inc., (Dominick's) for injuries she sustained when she slipped and fell in Dominick's's grocery store on a snowy day. Plaintiff alleged Dominick's was negligent for allowing water to create an unnatural accumulation on the floor of the store and for installing an excessively slippery floor material. The court granted summary judgment to Dominick's on the first count on the basis that a landowner has no liability for a

floor to dry and clean it.

In December 2005, plaintiff filed a two-count amended complaint alleging Dominick's negligence proximately caused the injuries she suffered as a result of the fall. Count I alleged that Dominick's was negligent in permitting liquid substances to accumulate and remain on the floor and causing a dangerous condition of wet floor. Count II alleged Dominick's was negligent in selecting, installing and maintaining a floor made of tile that was not slip-resistant and would become excessively slippery and dangerous when wet. On January 20, 2006, the court granted Dominick's motion for summary judgment on count I, finding that the case clearly involved tracked-in water, a natural accumulation for which a landlord has no liability, and that plaintiff failed to allege sufficient facts to permit a trier of fact to find an unnatural accumulation of water or snow was the cause of her injuries.

In July 2005, Dominick's identified the tile on which plaintiff slipped as slip resistant tile manufactured by Azrock. In September 2005, an attorney for Dominick's went to the now closed store and removed three tiles from the area of the store in which plaintiff fell. On September 20, 2005, Dominick's sent plaintiff one of the tiles, as well as a chain of evidence memo regarding the tile. In January 2006, Dominick's provided plaintiff with documents from its files, consisting of work orders and letters between Dominick's and C.E. Korsgard Company (Korsgard), the installer of the tile, for the installation of the flooring in the store showing that initially, both slip resistant tiles manufactured by Azrock and tiles manufactured by Armstrong World Industries, Inc.

Flurry Cortina Complement Vinyl Composition Tile and had never been used, installed or waxed. Based on the results of slip resistance testing performed by Professor Mikolajczyk using a horizontal pull slipmeter, Ludwig determined that the average slip resistance for the sample tile did not meet the minimum coefficient of friction (COF) value recommended for accessible routes[1] by the Americans with Disabilities Act (ADA), the Illinois Accessibility Code (IAC) or the Occupational Safety and Health Administration (OSHA). The ADA, IAC and OSHA recommended values had been developed using either a James testing machine or an NBS-Brungaber machine. It was Ludwig's opinion that Dominick's knowing failure to install and/or maintain a sufficiently slip resistant walking surface caused plaintiff's slip and its resultant injuries.

On November 2, 2006, Korsgard submitted its answers to interrogatories propounded by Dominick's acknowledging that it sold and installed the tile in the store in 2001. It identified Armstrong as the tile manufacturer, stating that Dominick's selected Armstrong Vinyl Composition tile for the store, and attached its entire file regarding the tile installation, including work orders and letters. These documents are essentially duplicates of the documents plaintiff received from Dominick's in January 2006. Subsequently, on November 9, 2006, Korsgard submitted its answers to interrogatories and response to request for production propounded by Armstrong. Attached were invoices from Florstar, a tile distributor, showing that Korsgard received

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[1] Per the IAC and ADA, accessible routes are continuous, unobstructed paths connecting all accessible features and spaces of a building or facility.

dangerous. In March 2007, plaintiff filed a motion for reconsideration of the court's order barring Ludwig's testimony and for time to perform additional discovery to determine what the Korsgard documents meant and for testing of an Armstrong tile. On May 11, 2007, the court denied plaintiff's motion to reconsider its barring of Ludwig's testimony. It also granted Dominick's motion for summary judgment. The court dismissed the matter with prejudice and made the order final and appealable.

On June 8, 2007, plaintiff timely filed a notice of appeal from the court's orders granting summary judgment to Dominick's on count I, granting summary judgment to Dominick's on count II, granting Dominick's motion to bar Ludwig's testimony and denying plaintiff's motion to reconsider barring that testimony.

Analysis

Summary Judgment on Unnatural Accumulation Count

In count I, plaintiff alleged Dominick's was liable for her injuries because it failed to remove water from and keep dry the area in which she slipped. The court granted summary judgment to Dominick's on this issue, finding that the water in the area was a natural accumulation for which Dominick's was not liable. A drastic means of disposing of litigation, a motion for summary judgment is granted only when "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." *Axen v. Ockerlund Construction Co.*, 281 Ill. App. 3d 224, 229, 666 N.E.2d 693, 696 (1996), quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489

facts to permit a trier of fact to find that Dominick's was responsible for an unnatural accumulation of water, ice or snow which caused her injuries. *Tzakis*, 356 Ill. App. 3d at 745, 826 N.E.2d at 992; *Stypinski.,* 214 Ill. App. 3d at 716, 574 N.E.2d at 718. Based on our review of the record, we find plaintiff did not support her burden to show Dominick's created an unnatural accumulation.

The evidence shows four inches of snow fell several days prior to plaintiff's accident; the ground outside the store was still wet and/or snow covered at the time of the accident; the snow was melting; customers were tracking residual snow and water into the store, leaving tracks and wet spots; plaintiff slipped on water at the front of the store but did not see the water before she slipped; she saw no puddles or other accumulations of water on the floor; Dominick's employees periodically mopped the floor in an attempt to keep it dry; no one was dry mopping the area where plaintiff fell at the time she fell or right before she fell because plaintiff only saw a manager in the area at the time; and, not until after plaintiff fell, did she see an employee take up a mop.

Clearly, plaintiff slipped on water tracked into the store by customers from outside the store, a natural accumulation of water which Dominick's had no duty to remove (*Stypinski* , 214 Ill. App. 3d at 716, 574 N.E.2d at 718). Although plaintiff asserts there is a material question of fact regarding whether Dominick's mopping aggravated the natural accumulation, there is absolutely no evidence of this in the record. Accordingly, there is no question of fact regarding whether Dominick's created

Ill.2d 166, 176, 685 N.E.2d 871, 876 (1997). Here, it is uncontested that Ludwig's credentials are sufficient to qualify him as an expert.

Putting aside the *Frye* issues, the question before the court was whether Professor Mikolajczyk performed his slip resistance testing under conditions similar to that existing at the time of plaintiff's accident. The admissibility of an experiment, such as Professor Mikolajczyk's slip resistance testing, depends on whether the conditions of the experiment are substantially similar to the actual circumstances of the case. *Halleck v. Coastal Building Maintenance Co.*, 269 Ill. App. 3d 887, 896, 647 N.E.2d 618, 626 (1995). Although the conditions need not be identical, experiments may not be admitted as evidence unless they duplicate "the essential conditions existing at the time of the accident which gave rise to the litigation." *Ford v. City of Chicago,* 132 Ill. App. 3d 408, 416, 476 N.E.2d 1232, 1239 (1985). The admissibility of experimental evidence is in the trial court's discretion and we will not reverse the court's decision barring such evidence absent an abuse of that discretion. *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 799, 721 N.E.2d 614, 623 (1999); *Halleck*, 269 Ill. App. 3d at 896, 647 N.E.2d at 626. As the proponent of experimental evidence, plaintiff has to show that the essential conditions of the experiment were the same as those at the time of her accident. *First Midwest Trust Co. v. Rogers*, 296 Ill. App. 3d 416, 426-27, 701 N.E.2d 1107, 1113 (1998), abrogated on other grounds by *Donaldson v. Central Illinois Public Service Co.,* 199 Ill. 2d 63, 767 N.E.2d 314 (2002). The court did not err in finding she failed to do so.

Florstar showing that Florstar sold Korsgard hundreds of cases of Armstrong vinyl tile "imperial texture", including 440 cases of tile with style number "51899031." There is, therefore, evidenc to support the court's finding that Korsgard received and installed Armstrong tile, not Azrock tile, in the store. Further, the tile on which plaintiff slipped had been in place for years. It had undoubtedly been trodden on, dirtied, spilled on, cleaned, waxed throughout those years. The tile Professor Mikolajczyk tested was brand new, had never been installed, let alone waxed and wettened. It was not in the same condition as the tile on which plaintiff slipped.

Any evidence comparing the slip resistance of a tile which may or may not be of the same type, brand and condition as the tile on which plaintiff slipped is entirely speculative. Without, at a minimum, some proof that the tiles were made by the same manufacturer and are of the same composition, there was no basis for Ludwig to conclude what the COF of the tile on which plaintiff slipped was, let alone that its slip resistance was inadequate. An expert's opinions cannot be based on pure conjecture or speculation. *Yassin by Yassin v. Certified Grocers of Illinois, Inc.,* 150 Ill. App. 3d 1052, 1064, 502 N.E.2d 315, 324 (1986). Plaintiff did not meet her burden to show the essential conditions of the slip resistance experiment were the same as those at the time of her accident. Given the lack of proof that Professor Mikolajczyk tested the same type and brand of tile under conditions similar to that in which the accident occurred, Ludwig's testimony and opinions based on that testing are speculative and the court did not abuse its discretion in barring his testimony on this basis.

reconsider and asserted it on the basis that plaintiff required additional time to review new information: the documents Korsgard attached to its November 2, 2006, and November 9, 2006, answers to interrogatories, *i.e.*, after Ludwig gave his report. Plaintiff alleged the Korsgard documents constituted new information warranting not only reconsideration of the barring of Ludwig but also granting of additional time to investigate the documents. However, the evidence shows the materials presented by Korsgard in November 2006 were not new. Plaintiff had already received most of the same materials as part of a series of documents provided by Dominick's in January 2006.[2] Plaintiff had ample time to review those documents prior to preparation of Ludwig's September 2006 report and her failure to do so or to discover that she had the documents and that they necessitated further investigation shows a lack of due diligence. The only documents that were new after Ludwig issued his report were the Florstar invoices showing delivery of the Armstrong tiles. However, plaintiff knew about these documents more than two weeks before Dominick's filed its motion to bar Ludwig

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[2] Arguably, plaintiff had also received the same documents a year before Ludwig's report, in November 2005. Dominick's asserts that Korsgard provided plaintiff with copies of the documents attached to Korsgard's November 2006 answers to interrogatories as early as November 2005. A November 21, 2005, letter from plaintiff's counsel to Professor Mikolajczyk shows Korsgard did provide documents to plaintiff in November 2005 pursuant to a subpoena. Counsel had enclosed the documents for Professor Mikolajczyk's review. Those subpoenaed documents are not included in the record, so we cannot compare them to the documents submitted by Korsgard in November 2006 after Ludwig wrote his report. However, Korsgard stated in its November 2006 answers to interrogatories that the documents it had attached constituted Korsgard's entire file on the Dominick's tile installation. The documents, are, therefore arguably the same.

another and, therefore, the Board did not specify a value or testing method for determining the COF of an accessible route. Accordingly, it is clear that although the horizontal pull slipmeter provides a generally accepted and reliable COF value, that value cannot be compared to values generated with other testing devices and, if one intends to compare COF values, those comparable values must all have been generated by the same machine or machines. Therefore, because the need for additional testing was not new information, the court properly denied the motion to reconsider its barring of Ludwig on this basis and, similarly, plaintiff's motion for additional discovery made on that basis.

The speculative nature of Ludwig's testimony is a sufficient basis on which to bar his testimony. Therefore, we need not address plaintiff's arguments that the court erred in barring Ludwig's testimony on the basis of the *Frye* test.

For the reasons stated above, we affirm the decision of the circuit court.

Affirmed.

KARNEZIS, P.J., with HOFFMAN and SOUTH, J.J., concurring.