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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CANDACE CUSTOMER, Plaintiff, v. OWEN OWNER and SPEEDY DONUTS, LLC., Defendants.	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS** Case No. CV2017-14680 Judge Gardner

Owen Owner ("Defendant"), owner and sole proprietor of Speedy Donuts, LLC. (the "Shop"), hereby submits this memorandum of law in support of his motion to dismiss the civil case brought against him by Candace Customer ("Plaintiff"). Plaintiff filed her complaint in this Court on October 18, 2017, seeking relief for the injuries she sustained on December 7, 2016, at approximately 10:15 a.m., while in the Shop. As Plaintiff's complaint failed to state a claim upon which relief can be granted, it should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

STATEMENT OF THE CASE

Plaintiff filed her complaint with this Court on October 18, 2017. In her initial complaint, Plaintiff sought relief for damages involving the injuries she sustained in the Shop on December

7, 2016, at approximately 10:15 a.m. Plaintiff claimed that there was negligence on the part of Defendant; however, the claim is unsupported, unsubstantiated, frivolous, and unfair. Plaintiff was thereafter served with an Answer by Defendant. After receiving the Answer, Plaintiff chose to pursue a trial by jury, which Defendant is now moving to dismiss in this manner.

STATEMENT OF FACTS

On the day of the accident, approximately ten inches of snow fell in Salt Lake County between midnight and 5:30 a.m. When defendant opened the Shop that morning at 8:00 a.m., realizing that the inclement weather would cause for a natural accumulation of moisture to form near the entrance of the Shop, he placed a large rug on the Shop's concrete floor, just outside of the covered doorway, for patrons to wipe their feet on as they walked in with snow on their shoes. Defendant did not shovel the snow off the Shop's sidewalk that morning, as he customarily shovels snow the night before.

At approximately 10:15 a.m., Plaintiff entered the Shop and purchased a dozen donuts. Plaintiff claims to not have seen the rug when she entered. After her purchase, Plaintiff made her way toward the exit of the Shop, whereupon she allegedly stepped in a puddle of snow and water[1] and slipped,[2] hitting the back of her head on the concrete floor. Plaintiff was taken to the hospital for her injuries and allegedly[3] received hospital bills totaling $10,500.00.

[1] The floor was no more wet than what one may reasonably expect given the weather conditions.

[2] It is uncertain whether Plaintiff actually slipped on the wet floor, or on her own wet shoes. Furthermore, Defendant and his counsel reason that if Plaintiff had actually slipped on the wet floor, her clothes, hands, and back would have gotten wet while she was lying on the floor. *Hudson v. J.H. Harvey Co*., 244 Ga. App. 479, 536 S.E.2d 172, 173 (2000). Plaintiff has not substantiated proof, nor made any allegation hitherto, that she got wet in this manner; therefore, casting a reasonable doubt as to the actual cause of her fall.

[3] Plaintiff has not substantiated the actual cost of her hospital bills. She has not made any medical bills or records available for review.

Defendant did not have a "Wet-Floor" sign near the wet floor; however, when Plaintiff first entered the Shop, Defendant yelled at her to watch out for the snow she tracked in. Therefore, Defendant took appropriate safety precautions to effectively make Plaintiff aware of the potential hazard.

Plaintiff filed a complaint against Defendant, claiming that he was negligent and breached his duty of reasonable care by (1)". . . not search[ing] dangers out and go[ing] to reasonable lengths to resolve [them] . . .";[4] (2) ". . . not having a sign warning of wet floors or mopping up the water";[5] and by ". . . failing to prevent the wet floors by shoveling the walk in front of the store . . .."[6] Plaintiff later claimed that her injuries were ". . . a direct result of Defendant's negligence . . .."[7]

QUESTIONS PRESENTED

1. Did Defendant fail to go through reasonable lengths to search out and prevent the danger of slipping and falling on tracked-in snow?
2. Did Defendant have a duty to place a "Wet-Floor" sign in the Shop? Was the rug an insufficient safety precaution?
3. Did Defendant have a duty to shovel the snow off the sidewalk? Would this have made any significant difference in regards to the amount of water accumulated on the Shop's floor?

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[4] Plaintiff Complaint ¶20

[5] *Id*. ¶21. However, Defendant and his counsel are compelled to disbelieve this claim based on the fact that Plaintiff's counsel provided no relevant codes, case law, or statutes to substantiate this allegation.

[6] *Id*. ¶22. In response to this allegation, Defendant and his counsel have no reason to believe that failing to shovel the snow was a breach of duty. Acting responsibly and in good faith, Defendant took the safety precaution of putting out a rug for customers to wipe the snow off their feet as they entered. There is no reason to believe that the rug was an insufficient safety precaution given the circumstances.

[7] *Id*. ¶23. As will be later addressed, alleging that Defendant's actions were the *direct* cause of Plaintiff's injuries is a fraudulent misrepresentation of law, and should be dismissed along with the whole complaint, pursuant to Fed. R. Civ. P. 9(b). For the purposes of the argument, it is assumed that Plaintiff's claim that her injuries were ". . . a direct result of Defendant's negligence . . ." translates to "Defendant's negligence was the direct cause of Plaintiff's injuries"; therefore, Plaintiff's allegation will be referred to as such.

4. Was Defendant negligent? If so, was this negligence the *direct* cause of Plaintiff's injuries?

ARGUMENT

Defendant took reasonable precautions to prevent customers from slipping and falling on the wet floor, as is made clear by the five-year precedent, wherein no such injuries have occurred, of putting a rug out for customers to wipe the snow off their feet during the winter. Defendant took appropriate safety precautions by putting the rug out and by verbally warning customers of the hazard. Plaintiff was made aware, or should have reasonably been aware, of the potentially hazardous conditions; and she assumed all the reasonable risks involved with entering.

A. Defendant went through reasonable and appropriate lengths to ensure the safety of the customers (i.e., business invitees) who entered.

Defendant's safety precautions were more than sufficient for a reasonable person to be warned of and protected from the potential hazard. Considering the context of the situation, Defendant did not need to do more than simply control the accumulation of moisture, via a rug or any other similar efficacious method.

In *Carlson v. U.S.,* 90 F. Supp. 159 (N.D. Ill. 1950), the plaintiff sustained injuries when she entered the defendant post office on a rainy day, wiped her feet on a mat on the floor just inside the front door, and, as she stepped off the mat, fell when her foot slipped on the wet terrazzo floor of the vestibule of the post office. The plaintiff claimed that the mat was of insufficient size, and that the floor of the vestibule was allowed to remain in a wet and dangerous condition. This is similar to Plaintiff's allegation that Defendant did not go through reasonable and appropriate lengths to ensure her safety. However, continuing with *Carlson*, the court reasoned that the mat was placed inside the door so that persons entering the post office could wipe their feet on it, and although it was small, it was sufficient for its intended purpose; and the mere fact that the floor of

the vestibule was wet on a rainy day was insufficient to establish negligence on the part of the post office, since such a holding would require building owners to have a mopper stationed at the door on rainy days. Reasoning thusly, and having determined that the defendant took appropriate safety precautions, the court dismissed the plaintiff's complaint.

In *Lohan v. Walgreens Co*., 140 Ill. App. 3d 171, 94 Ill. Dec. 680, 488 N.E.2d 679 (1st Dist. 1986), the court noted that a store owner has no liability for injuries resulting from natural accumulations of substances such as ice, snow, or water, nor does the owner have a duty to continuously remove the tracks left by customers who have walked through such natural accumulations. In the case of Defendant, he did more than what was required of him to prevent clients from being injured in the aforementioned manner; and the accumulation of water in the Shop was natural but controlled, and clients entering the Shop received a warning which was more than sufficient to impress the potential danger upon their minds. Therefore, Defendant is not liable for injuries resulting from the natural accumulation of snow and ice in the Shop.

B. Defendant did not have a legal duty to place a "Wet-Floor" sign, as there are no codes or regulations which establish such a duty. Furthermore, the placement of the rug was a sufficient safety precaution, as it, among many other more obvious factors, clearly warned customers and Plaintiff of the potential safety hazard.

Defendant was ". . . under no duty to protect [Plaintiff] against dangers that [we]re known to [her] or [we]re so obvious and apparent . . . that [Plaintiff was] reasonably . . . expected to discover them and protect . . . herself against them . . .." [8] This demonstrates that Defendant was not endued to prevent the slipping hazard, as he had no duty to protect Plaintiff against a danger so obvious and apparent. The situation may have been different if Defendant had neglected to

[8] *Rayburn v. J.C. Penney Outlet Store*, 3 Ohio App. 3d 463, 445 N.E.2d 1167 (10th Dist. Franklin County 1982)

address a hazard that a customer would not be reasonably expected to know; such as if a stump of wood had been hidden beneath the rug and caused people to trip and fall.

According to the court in *Wilson v. Gorski's Food Fair*, 196 Ill. App. 3d 612, 143 Ill. Dec. 477, 554 N.E.2d 412 (1st Dist. 1990), the defendant store was not liable for the injuries sustained by the plaintiff patron in a slip-and-fall accident on a rainy day after crossing a mat placed by the defendant in the entryway of the premises, since the defendant was not under a duty to take other safety precautions against the natural accumulation of water created by tracked-in moisture. Likewise, with Defendant in this case, he was not under a duty to take other safety precautions—which includes placing a "Wet-Floor" sign—against the natural accumulation of water in the Shop.

Furthermore, Plaintiff had actual[9] and constructive[10] knowledge that, under the weather conditions, a trafficked area such as the Shop's entrance would be wet due to the tracked in moisture, for ". . . it [is] a matter of common knowledge that some water would normally be present at a place where shoppers continually pass in and out during rainy [or snowy] weather."[11] Therefore, Defendant did not have a duty to place a sign warning of the wet floor, due to (1) there not being any codes or regulations which establish such a duty; (2) it being common knowledge that the entrance of a building is likely to be wet when customers are continuously trafficking it during snowy or rainy weather; and (3) it being reasonable that placing the rug on the floor and giving customers loud verbal warnings as they entered was a sufficient safety precaution.

[9] Actual knowledge includes only the information of which the person whose knowledge is at issue is consciously aware. Plaintiff was, beyond any reasonable doubt, consciously aware of the weather conditions. A related concept is "personal knowledge," which is defined by Black's Law Dictionary (10th ed., 2014) as "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said."

[10] In addition, *Id.* defines "constructive knowledge" as "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person."

[11] Comparative Negligence, Contributory Negligence and Assumption of Risk in Action Against Owner of Store, Office, or Similar Place of Business by Invitee Falling on Tracked-In Water or Snow, 83 A.L.R.5th 589, 7a

Consequently, considering that it was obvious that the floor would be wet, Plaintiff failed to take reasonable preventative measures for her personal safety despite understanding the hazard she would be placing herself in.[12]

Moreover, Plaintiff was a regular visitor and therefore ". . . should have been familiar with the position of [and reason for] the [rug] . . . having entered [the Shop] regularly . . ." and probably over the course of a few years. In other words, Defendant's practice of putting a rug at the entrance of the Shop during the winter for the past five years set a precedent with which Plaintiff, due to her regular visits to the Shop, should have been familiar; thus, Plaintiff should have anticipated that seeing the rug near the entrance during winter probably meant that the floor was wet and posed a reasonable hazard of slipping.

In conclusion, placing a "Wet-Floor" sign in the Shop would have done little to further warn Plaintiff of something that she already knew or should have known, which she was nonetheless made fully aware of by Defendant. It is clear that Plaintiff is responsible for her own injuries due to her negligent failure to take reasonable personal safety precautions during a situation that so obviously and notoriously posed a potential safety hazard.

C. Defendant did not specifically have the duty to shovel the snow off the sidewalk, but only had the implied duty to take proper safety precautions. Whether he shoveled the snow or not would not have made a significant difference in regards to the amount of water accumulated in the Shop.

By entering Defendant's Shop on a day it had snowed, and by possessing knowledge of the tracked-in moisture in the Shop because of the inclement weather conditions, Plaintiff assumed the risk of the hazardous conditions and had as much knowledge of the conditions as did

[12] DeVeau v. U.S., 833 F. Supp. 139, 145 (N.D.N.Y. 1993)

Defendant. Furthermore, an image of the outside of the Shop, attached hereto as Exhibit A, clearly shows that, due to the narrowness of the sidewalk separating the Shop from the road, it would have made no difference whether Defendant had shoveled his portion of the sidewalk, because customers would have nonetheless had to step on the still-snowy portions of the sidewalk and road to get into the Shop; therefore, tracking snow into the Shop regardless. Plaintiff had ample opportunity to notice that she would have to step in snow in order to get into the Shop, and therefore assumed the risk of slipping when she entered it.

In Cook v. Arrington, 183 Ga. App. 384, 358 S.E.2d 869 (1987), the court held that if an invitee knows of the condition or hazard involved when entering a building during inclement weather, there is no duty on the part of the proprietor to warn the invitee, nor is there liability resulting for injury because the invitee has as much knowledge as the proprietor does. Due to it being common knowledge that when people enter any building in rainy or snowy conditions, moisture is tracked in, Plaintiff had just as much knowledge as Defendant of the hazard and therefore assumed the risk of injury when she entered. Because of each party's equal knowledge of the situation, Defendant was under no special duty to shovel the snow, and therefore fulfilled his implied duty to take proper safety precautions when he did so in the manners heretofore described.

D. Defendant was not negligent and he most definitely was not the *direct* cause of Plaintiff's injuries.

Defendant was not negligent on the grounds that there existed no duty for him to *negligently* breach. This affirmation is supported by the arguments heretofore made. Furthermore, the lack of legal causation in Plaintiff's allegations against Defendant immediately disqualifies her negligence claim.

Appeals Board Utah Labor Commission ("ABULC"), Case No. 10-0099,[13] discusses the case of *Taunie Thompson v. Jordan Valley Hospital* (2012), wherein the plaintiff demanded recovery for injuries she sustained from slipping on a wet floor at Jordan Valley Hospital ("Hospital"). When the plaintiff made mention that the wet floor was what caused her to slip and was therefore the Hospital's responsibility, the Court found that she had not met the test for legal causation that is applicable to her claim. In this case, the plaintiff slipped on a wet floor made unnaturally wet due to some malfunction in the Hospital's piping system; however, the Court nonetheless found that the wet floor was not the legal cause of her injuries.

It is reasonable, therefore, that because Plaintiff allegedly slipped on a puddle of water, which developed due to the natural accumulation of water resulting from the weather conditions, she has even less legal causation to bring a claim against Defendant than the plaintiff did in the aforementioned case.[14]

In another case brought to the ABULC, Case No. 06-0547,[15] the issue of legal causation was further discussed in *Jaime M. Hemming v. IHC North Ogden* (2007). Here, the plaintiff argued that her accident at her place of employment, IHC, was ". . . caused by an allegedly dangerous wet floor," and that, therefore, "no consideration need be given to the nature or intensity of her accident." i.e., the plaintiff ". . . t[ook] the position that any event arising from an unsafe working condition automatically satisfies the requirement of legal causation." The Appeals Board concluded that the plaintiff's work was not the legal cause of her injury. The plaintiff in this case seemed to adhere to Judge William Andrews' notion of "*direct* cause" when she took the position

[13] 2012 UT Wrk. Comp. LEXIS 99

[14] Any issue regarding Plaintiff's business-invitee status is irrelevant in this regard and cannot be used to refute the argument presented, as the argument made here is exclusively pertinent to the topic of legal causation.

[15] 2007 UT Wrk. Comp. LEXIS 60

that *any* injury arising from an unsafe working condition automatically constitutes direct or legal cause. This notion is generally not used by courts today; therefore, Plaintiff's allegation to direct cause is unsupported, outdated, and obsolete.

Judge Andrews presented the notion of direct causation as his dissenting opinion in the famous case of *Palsgraf v. Long Island Rail Co.*, 162 N.E. 99 (N.Y. 1928). In this case, the plaintiff passenger was standing on a platform of the railroad after buying a ticket. A train stopped at the station, and a man ran forward to catch it. When he attempted to board the train in haste, he dropped a package containing fireworks. As a result, the plaintiff was injured from the subsequent explosion and sought to hold the railroad liable for negligence.

In *Palsgraf*, Judge Andrews argued that the defendant had a duty to "protect society from unnecessary danger, not to protect A, B, or C alone." According to Andrews,

> [E]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others . . .. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside of what would generally be thought the danger zone.

Andrews' position parallels that of the aforementioned direct causation. Under direct causation, a defendant is liable for all consequences of his negligent acts, no matter how unforeseeable those consequences may be, so long as they flow directly from his actions.

However, Judge Benjamin Cardozo, Chief Judge of the New York Court of Appeals and author of the majority opinion in *Palsgraf*, held that the defendant was not liable. The Court reasoned that the defendant's conduct did not create an unreasonable risk of harm to the plaintiff and that the injury she sustained was not a foreseeable one. "Proof of negligence in the air," the court said, "will not do." The wrong relationship to the passenger holding the package did not extend to the plaintiff. According to the Cardozo rule, which is generally followed today, "[a] wrong is defined in terms of the natural and probable, at least when unintentional."

Reasoning thusly, it is clear that Defendant's actions were not the direct cause of Plaintiff's injuries; furthermore, Plaintiff has also failed to prove that Defendant's actions were the *legal* cause of her injuries. In order to determine legal cause, the "but-for" test is used. Under this test, if Plaintiff's injuries would not have occurred *but for* Defendant's negligence, Defendant would be deemed the legal cause Plaintiff's injuries.[16] Because of all the ways in which Plaintiff could have prevented her own injuries, and all the many other reasons outlined herein this document, it is impossible to place the legal causation of her injuries on Defendant.

CONCLUSION

In conclusion, due to the evident and obvious nature of the potentially injurious situation caused by tracked-in moisture, Defendant was under no duty to go through the same lengths he would have gone through in a circumstance where customers would have no way of knowing of the potential hazard.

WHEREFORE, Defendant respectfully request that Plaintiff's Complaint be dismissed with prejudice and upon the merits, that Plaintiff takes nothing, and that Defendant be awarded attorney's fees and costs incurred in defending this action, and for such other and further relief as the Court may deem necessary, just and proper under the circumstances.

DATED: this 26th day of June, 2018

Altiorem Legal Services, PLLC

/s/ Saul Goodman
Saul Goodman, Esq.,
Attorney for Defendant

[16] Restat. 2nd of Torts § 432

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2018, I caused a true copy of the foregoing document to be served in the manner indicated below, to the following:

□ U.S. Postal Service □ Hand Delivery □ E-mail Attachment □ Electronic Filing

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Exhibit A