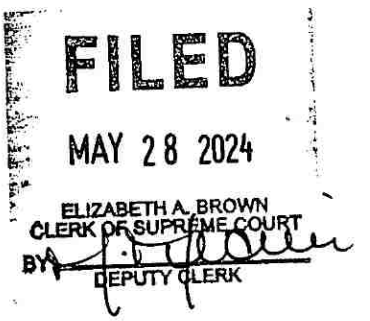
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHEILA BREAUX,
Appellant,
vs.
RADIOLOGY PARTNERS NEVADA LLC, A FOREIGN LIMITED-LIABILITY COMPANY, DBA RADIOLOGY PARTNERS LLC AND/OR DESERT RADIOLOGY; RADIOLOGY PARTNERS MANAGEMENT LLC, A FOREIGN LIMITED LIABILITY COMPANY, DBA RADIOLOGY PARTNERS LLC AND/OR DESERT RADIOLOGY; RADIOLOGY PARTNERS, INC, A FOREIGN CORPORATION, DBA RADIOLOGY PARTNERS LLC AND/OR DESERT RADIOLOGY; DESERT RADIOLOGY IMAGING, LLC, A FOREIGN LIMITED LIABILITY COMPANY, DBA RADIOLOGY PARTNERS LLC AND/OR DESERT RADIOLOGY,
Respondents.

No. 86861-COA



ORDER OF AFFIRMANCE

Sheila Breaux appeals from an order granting summary judgment and denying NRCP 56(d) relief in a negligence action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

In May 2019, Breaux, then 72 years old, had an ankle x-ray performed at a facility owned by respondents Radiology Partners Nevada LLC, Radiology Partners Management LLC, Radiology Partners, Inc, and Desert Radiology Imaging, LLC (together, Desert Radiology).[1] An employee of Desert Radiology instructed Breaux to remove her pants and shoes and

[1]We do not recount the facts except as necessary for our disposition.

put on a medical gown. Breaux kept on her socks, which did not have slip-resistant material on the bottom. Breaux then stepped onto the x-ray table by herself, using a step stool with one handle, and remained in a supine position for the duration of the x-ray procedure.

Following the procedure, the employee returned to the room, instructed Breaux to get dressed, and then promptly left the room without assisting her off the table. Breaux felt "unstable" after laying down during the procedure but when asked during the deposition she agreed that she did not ask for assistance. In getting off the table, Breaux stepped onto the same step stool with one handle and placed both feet on the stool. She then placed her right foot on the floor, and, with her left foot still on the step stool, slipped on the floor and fell, causing injuries to her sacral spine and right shoulder. Breaux left the facility without reporting the incident, although she did call to report it later that day.

In May 2021, Breaux filed a complaint against Desert Radiology alleging negligence, vicarious liability/respondeat superior, and negligent hiring, training, retention, and supervision. In January 2022, Breaux served Desert Radiology with her initial NRCP 16.1 disclosures but did not engage in any other discovery.

In April 2022, Breaux responded to Desert Radiology's first set of interrogatories, in which she stated in generalities "that [the] stool, floor, x-ray equipment, an employee and/or the policies and procedures of [respondents] caused her fall." A few months later, Desert Radiology deposed Breaux. During her deposition, Breaux testified that she did not ask for the employee's assistance to get off the table. Further, when asked if the "stool became unsteady or start[ed] to move" as she descended the x-ray table, or if the stool "slipped at all as [she stepped] onto it," she replied "no." Breaux testified during her deposition that when she stepped off the step stool with

her right foot and onto the floor, she "went flying across the floor." She also testified that she was not aware of any substance on the floor that caused her to slip and was able to clearly see where she was stepping.

In January 2023, Desert Radiology moved for summary judgment based on Breaux's interrogatory responses and deposition testimony. Desert Radiology argued that Breaux testified that there was nothing on the floor that caused her to fall, admitted that the step stool did not cause her to fall, and during her deposition agreed that she did not ask the employee for help off the table. Further, Desert Radiology argued that because Breaux could not identify the condition that caused her to fall, she could not establish a genuine dispute of material fact regarding Desert Radiology's alleged negligence.

Before Breaux responded to the summary judgment motion, the parties stipulated to extend discovery, with a new initial expert disclosure deadline on June 6, 2023, and a new close of discovery on October 4. Further, the parties stipulated that they had "not been dilatory in the discovery process" when seeking the extension.

A few days later, Breaux filed her opposition to Desert Radiology's summary judgment motion and requested relief under NRCP 56(d).[2] Breaux argued that summary judgment was not appropriate because

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[2]NRCP 56(d) states that:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) defer considering the motion or deny it;
>
> (2) allow time to obtain affidavits or declarations or to take discovery; or
>
> (3) issue any other appropriate order.

there were genuine disputes of material fact regarding whether the conditions of the floor or the step stool constituted dangerous conditions for which Desert Radiology owed a duty to protect her from.[3] Additionally, she argued that the district court should continue the hearing on the motion for summary judgment under NRCP 56(d) because discovery remained open, and additional discovery would support her negligence claims against Desert Radiology.

Breaux included two declarations to support her opposition and request for NRCP 56(d) relief—one from herself, and one from her attorney. In her declaration, Breaux stated that when her right foot touched the floor, it "began to slip or slid uncontrollably . . . [and] the stool . . . also slid." Additionally, she stated that the "stool slid during or shortly after [she] placed [her] right foot on the floor." Breaux also stated that, after she fell, the step stool was "laying on top of [her] body," and that there was no anti-skid or anti-slip material under the step stool. Breaux's attorney's declaration stated that further discovery pursuant to NRCP 56(d) would yield facts related to liability, including whether the floor or step stool constituted a dangerous condition.

On or about the same day that Breaux filed her opposition, she also served Desert Radiology with a first set of interrogatories, a request for production of documents, and correspondence regarding potential depositions Breaux intended to pursue. Based on the record, it is unclear whether Desert Radiology responded to this discovery.

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[3]We note that the terms "hazardous condition" and "dangerous condition" are used interchangeably in Nevada jurisprudence. *See, e.g., FGA, Inc. v. Giglio*, 128 Nev. 271, 281, 278 P.3d 490, 496 (2012). For purposes of this order, we use the term dangerous condition.

At the hearing on the summary judgment motion, the district court asked Breaux if she needed "to have evidence that this was a dangerous condition," and, specifically, if she "need[ed] an expert to state that" the stool and/or the floor were dangerous conditions. In response, Breaux noted that the expert deadlines had not yet passed but acknowledged that expert testimony would be necessary "to the extent you need to create a duty." Desert Radiology argued that even if further discovery occurred, Breaux would not be able to establish a duty, because there were no facts to support that a dangerous condition existed at Desert Radiology's facility at the time of her visit.

The district court ultimately entered an order granting summary judgment and denying Breaux's request for NRCP 56(d) relief. The district court found that Breaux admitted that there was nothing on the floor which caused her to fall, did not ask for help descending from the x-ray table, and did not blame the step stool for her fall. Additionally, the district court found that because Breaux did not retain an expert to opine about "coefficient friction issues" or the "potential angle of descent issues," which would have been necessary to support the existence of a dangerous condition, summary judgment was appropriate because there were no "issues of fact regarding whether a dangerous condition existed in [Desert Radiology's] premises." Further, because Breaux did not identify a specific expert that she intended to retain in either of the declarations submitted and failed to conduct any discovery before Desert Radiology moved for summary judgment, the district court denied NRCP 56(d) relief. This appeal followed.

On appeal, Breaux argues that the district court erred in granting summary judgment because: (1) there were genuine disputes of material fact remaining; (2) the district court erroneously adjudicated genuine disputes of material fact; (3) the district court erroneously

determined an expert was required to opine on duty; (4) the district court erroneously found Desert Radiology owed no duty to Breaux in the first instance; and (5) the order was clearly erroneous or not supported by substantial evidence. Additionally, Breaux argues that the district court erred denying her NRCP 56(d) relief because in her declaration she identified additional discovery sought that would create genuine disputes of material fact, such as the "unreasonable physical dimensions of the stool" and the "unreasonable slickness or slipperiness of the floor."

Desert Radiology responds that the district court properly granted summary judgment because Breaux did not present any evidence that established a genuine dispute of material fact as to the existence of any condition that would support her negligence claims against Desert Radiology. Additionally, Desert Radiology argues that the district court properly denied Breaux's request for NRCP 56(d) relief because Breaux was dilatory in pursing discovery and did not specifically state in her declaration that she retained, or intended to retain, an expert to opine about any dangerous conditions required to support her negligence claims.

"This court reviews a grant of summary judgment de novo." *Abbott v. City of Henderson,* 140 Nev., Adv. Op. 3, 542 P.3d 10, 12 (2024). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Moreover, this court reviews whether Desert Radiology owed Breaux a duty of care de novo. *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 777-78, 291 P.3d 150, 153-54 (2012). A motion for summary judgment shall be granted if the moving party shows that, construing all the facts in the light most favorable to the moving party, there is no genuine

dispute of material fact, such that the movant is entitled to a judgment as a matter of law. NRCP 56(a); *Wood*, 121 Nev. at 731, 121 P.3d at 1031.

To prevail on her claim of ordinary negligence, Breaux must show that Desert Radiology owed her a duty of care, *Foster*, 128 Nev. at 777, 291 P.3d at 153, which is a question of law to be decided by the court, *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 296, 255 P.3d 238, 244 (2011). A business owes its patrons a duty of reasonable care to keep the premises safe. *Foster*, 128 Nev. at 775, 291 P.3d at 152. If the owner has acted within the standard of ordinary care, they cannot be held liable for an accident such as a slip and fall on its property. *Rodriguez v. PNS Stores, Inc.*, No. 2:19-CV-244 JCM (VCF), 2020 WL 13535368, at *2-3 (D. Nev. May 15, 2020) (Order); *see also Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 323 (1992) ("An accident occurring on the premises does not of itself establish negligence."). "Accordingly, a business owner is only liable for accidents stemming from its own unreasonable—and therefore negligent—conduct, not for any and all accidents occurring on its premises." *Rodriguez*, 2020 WL 13535368, at *2 (interpreting *Sprague*, 109 Nev. at 250, 849 P.2d at 322-23).

Nevada courts ordinarily impose liability on business owners for accidents involving dangerous conditions, such as trash, debris, or liquid. *See Foster*, 128 Nev. at 781, 291 P.3d at 156. "Where an alleged harm involves conduct that is not 'within the common knowledge of laypersons,' the applicable standard of care 'must be determined by expert testimony.'" *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 195, 444 P.3d 436, 439 (2019) (quoting *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982)).

For example, in *Rodriguez*, the plaintiff slipped and fell on a waxed floor, and "expressly denied seeing any 'liquid,' 'trash,' or 'debris' on

the floor." 2020 WL 13535368, at *4. The plaintiff did not retain an expert on causation, and solely relied on her own testimony to argue that a genuine dispute of material fact existed as to whether the defendant excessively waxed the floor and therefore breached its duty to maintain its premises in a reasonably safe condition. *Id.* The defendant moved for summary judgment, and the United States District Court for the District of Nevada found that, even taking all the plaintiff's allegations as true, her "verbal characterization[s] of the floor" were "insufficient to establish a genuine dispute of material fact." *Id.* at *6. Relying on Nevada Supreme Court jurisprudence, the district court found that "in order to create a genuine [dispute] of material fact," the plaintiff "should have set forth specific, competent evidence showing that [the defendant] applied an excessive amount of wax or was otherwise negligent." *Id.*

Here, it is undisputed that Breaux did not disclose an expert to opine about either the slipperiness of the floor or the condition of the step stool. As Breaux conceded that there was no trash, debris, or liquid on the floor that caused her to fall, she needed an expert to establish that the floor constituted a dangerous condition when dry, because a lay person does not have the knowledge of the proper "slipperiness" of a floor under these circumstances. *See Boesiger*, 135 Nev. at 195, 444 P.3d at 439; *Rodriguez*, 2020 WL 13535368, at *5. Moreover, Breaux has not provided any evidence that Desert Radiology knew or should have known about any dangerous conditions, aside from her own declaration stating the same.[4] Therefore, the

[4]While we recognize the parties' arguments regarding any potential conflicting testimony, we note that the district court did not make any findings in its order regarding the credibility of Breaux's declaration, and therefore, we need not reach such issue on appeal. *See Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557 n.6, 170 P.3d 508, 512 n.6 (2007).

district court did not err in granting Desert Radiology's motion for summary judgment because Breaux failed to raise any genuine disputes of material fact supporting the existence of a dangerous condition for which Desert Radiology owed Breaux a duty to address thereby giving rise to negligence.

Further, regarding Breaux's other allegations of negligence against Desert Radiology, she failed to produce any evidence that Desert Radiology owed a duty to assist her off the x-ray table or provide her with skid-resistant socks. Although Breaux appears to argue that these failures also constituted dangerous conditions, she offers no legal support for her position. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

Nevertheless, we recognize that even where summary judgment may be appropriate, the district court may defer its consideration of the motion and allow the parties to engage in additional discovery if the nonmoving party "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." NRCP 56(d). Where a party requesting a continuance under NRCP 56(d) "has no 'dilatory motive,' it is an abuse of discretion to deny such a continuance at an early stage in the proceedings." *Sciarratta v. Foremost Ins. Co.*, 137 Nev. 327, 333, 491 P.3d 7, 12 (2021). Indeed, Nevada courts are reluctant to deny NRCP 56(d) relief in this circumstance. *See, e.g., Harrison v. Falcon Prods., Inc.*, 103 Nev. 558, 560, 746 P.2d 642, 642-43 (1987) (reversing summary judgment and the denial of a motion for continuance where the complaint was filed only two years prior, and the party was not dilatory in conducting discovery). However, where a party has conducted no discovery, the supreme court has held a continuance may be denied for lack of diligence, even where

only one year has passed since the complaint was filed. *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 669-70, 262 P.3d 705, 714 (2011) (affirming the district court's denial of a continuance because the plaintiff "produced only a single document, conducted no depositions, and did not serve [the defendant] with a single request for production, request for admission, or interrogatory").

Here, it is undisputed that Breaux failed to pursue any discovery between January 2022, when she filed her initial disclosures, and February 2023, after the motion for summary judgment was filed, when she sent Desert Radiology her first set of interrogatories and requests for production. Although discovery was still open, Breaux's lack of discovery is analogous to that of *Francis*. Therefore, we cannot conclude that the district court abused its discretion in finding that Breaux was dilatory, particularly here, where 21 months had passed since the date of filing of the complaint, and she only served her first set of interrogatories and first request to produce documents after Desert Radiology filed for summary judgment.

Breaux's conduct is particularly problematic because she failed to demonstrate "what facts might be obtained, in addition to the records, depositions, and affidavits already on file, that [are] essential to justify [her] opposition" when seeking the continuance. *Bakerink v. Orthopaedic Assocs.*, 94 Nev. 428, 431, 581 P.2d 9, 11 (1978). And Breaux had the burden to "clearly enunciate how [this future] discovery might alter the district court's determination" on the motion for summary judgment, including by showing how the continuation will enable the party to rebut the "showing of an absence of a genuine [dispute] of [material] fact." *Sciarratta*, 137 Nev. at 334, 491 P.3d at 13. Here, Breaux testified that there was no substance on the floor that caused her to slip. Therefore, to establish that the floor was unreasonably slippery, she had to provide expert testimony to that effect

because a layperson does not have knowledge regarding the proper level of slipperiness of a dry floor to constitute a dangerous condition. Arguably, Breaux also had to provide expert testimony to determine whether the step stool was properly maintained or also constituted a dangerous condition. *See Boesiger*, 135 Nev. at 195, 444 P.3d at 439. Yet, Breaux failed to identify any expert she either had or intended to retain to support her claim that a dangerous condition existed at the Desert Radiology facility. Further, Breaux failed to identify any other discovery she anticipated would support any duty on the part of Desert Radiology, such as to assist her off the table or provide her with anti-skid socks.

Thus, as the declarations Breaux submitted failed to state with specificity that she retained or intended to retain an expert to opine about any alleged dangerous conditions, and she did not "clearly enunciate" how additional discovery would allow her to oppose the motion for summary judgment on other grounds, we cannot conclude that the district court abused its discretion in finding that Breaux was dilatory in pursuing discovery and that her declaration lacked the requisite specificity to support a continuance of the summary judgment motion under NRCP 56(d).[5] *See Sciarratta*, 137 Nev. at 333-34, 491 P.3d at 13. Therefore, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

[5]Insofar as Breaux raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Hon. Timothy C. Williams, District Judge
Janet Trost, Settlement Judge
V3 Law, LLC
Law Offices of Eric R. Larsen
Law Office of Annalisa Grant
Eighth District Court Clerk