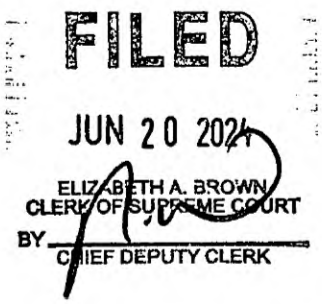
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ESTRELLITA POWELL-DEMISON, AN INDIVIDUAL,
Appellant,
vs.
CALIFORNIA HOTEL AND CASINO, A NEVADA CORPORATION, D/B/A SAM'S TOWN HOTEL AND GAMBLING HALL,
Respondent.

No. 86691-COA




*ORDER OF AFFIRMANCE*

Estrellita Powell-Demison appeals from a district court order granting a motion for summary judgment. Eighth Judicial District Court, Clark County; Nadia Krall, Judge.

In August 2018, Powell-Demison was a registered guest at a hotel operated by respondent California Hotel and Casino, d/b/a Sam's Town Hotel and Gambling Hall (Sam's Town) when she slipped and fell in her hotel room's bathtub.[1] After her fall, Sam's Town security officers filled out an incident report and took photos of the bathtub. Powell-Demison was treated at a local hospital, where she was diagnosed with an ankle fracture and lumbar strain.

In July 2020, Powell-Demison filed a civil complaint against Sam's Town alleging a single cause of action for ordinary negligence. Though Sam's Town's bathtub was equipped with handrails, Powell-Demison alleged that the tub was unusually slick or slippery because Sam's Town appeared to have recently refinished the bathtub or used improper refinishing materials. She claimed that Sam's Town was negligent for

[1]We recount the facts only as necessary for our disposition.

failing to provide a bathmat, friction strips, or a friction coating in the tub. Powell-Demison further alleged that Sam's Town failed to inspect the room for hazardous conditions and failed to warn her of a hazard.

After filing her complaint, Powell-Demison conducted no discovery during the 20-month discovery period; she served no written discovery requests, did not disclose an expert or conduct a site inspection, and did not depose any witnesses.[2] In October 2020, Sam's Town filed a motion for summary judgment, arguing that Powell-Demison lacked admissible evidence to establish duty and breach as a matter of law. It further argued that, in the absence of discovery or an expert witness, Powell-Demison could not establish that the bathtub constituted a hazardous condition or that Sam's Town had actual or constructive notice of the alleged hazard. Sam's Town attached Powell-Demison's discovery responses to its motion.

Two weeks later, on October 27, Powell-Demison disclosed an expert witness, who had also prepared a report. One day after disclosing her expert, Powell-Demison filed her opposition to Sam's Town's motion for summary judgment. Powell-Demison acknowledged that her expert report was "most likely" received by her counsel's office in March 2020 but was not timely produced due to an "oversight." She argued that Sam's Town breached its duty by failing to provide a rubber bathmat and by failing to

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[2]Sam's Town deposed Powell-Demison and served her with written discovery requests. In its request for admissions, Sam's Town asked Powell-Demison to admit that she had showered within the last five years, without injury, in a bathtub that (1) did not have a rubber mat, (2) did not have friction strips, and (3) did not have handrails, and for all three questions, Powell-Demison admitted that she had.

warn her about the hazard.[3] Powell-Demison also attached her expert's report.

In reply, Sam's Town asserted that Powell-Demison's expert should be excluded as untimely. It argued that the expert disclosure deadline expired on May 4, 2022, and discovery closed on August 4, 2022, yet Powell-Demison did not disclose her expert until October 27, 2022—more than five months late and two weeks *after* Sam's Town filed its summary judgment motion.

In April 2023, the district court entered its findings of fact, conclusions of law, and order granting Sam's Town's motion for summary judgment. The district court noted that Powell-Demison conducted no discovery, and it excluded her expert witness because the disclosure was untimely and the delay was neither substantially justified nor harmless.[4] In its findings of fact, the district court also referenced Powell-Demison's discovery responses wherein she admitted to having showered in the last five years without injury in bathtubs that lacked rubber mats, friction strips, or handrails. The district court further found that no genuine dispute of material fact existed because Powell-Demison did not demonstrate, through admissible evidence, that Sam's Town was negligent and because expert testimony was required to establish the duty of care under *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.* (*Daniel*), 98 Nev. 113, 642 P.2d

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[3]The only evidence Powell-Demison relied on in her opposition to establish that Sam's Town breached its duty were the allegations in her complaint, her deposition testimony that she "typically" showers using a bathmat because she does not "want to fall," and photos of the bathtub taken after she fell that did not show a bathmat in the tub.

[4]Powell-Demison does not challenge the district court's decision to exclude her expert and expert's report.

1086 (1982), as a "lay witness cannot opine on whether a slippery substance has sufficient resistance as to meet or fall below the applicable standard of care."

Powell-Demison filed a motion for reconsideration, asserting that the district court misapplied *Daniel* because expert testimony was not required to determine if Sam's Town was negligent for failing to provide a bathmat. The district court denied Powell-Demison's motion, and she timely appealed. On appeal, she argues that the district court erred in granting summary judgment and misapplied the summary judgment standard.

*Summary judgment was appropriate because Powell-Demison could not establish duty or breach as a matter of law*

Powell-Demison first argues that the district court improperly granted summary judgment because it misapplied *Daniel* when it found that expert testimony was required for the jury to determine if Sam's Town was negligent for failing to provide a bathmat. Sam's Town responds that the district court properly found that expert testimony was required to determine whether the bathtub was a hazard or whether the friction level of the bathtub fell below the industry standard of care.

This court reviews a district court's order granting summary judgment do novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine dispute of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* Though all evidence must be viewed in a light most favorable to the nonmoving party when deciding a summary judgment motion, *id.*, general allegations and conclusory statements do not create genuine issues of material fact, nor can the nonmoving party "build a case on the gossamer threads of whimsy, speculation, and conjecture," *id.* at 732, 121 P.3d at 1031

(quoting *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)).

To prevail on an ordinary negligence claim, a plaintiff must demonstrate that "(1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff suffered damages." *DeBoer v. Sr. Bridges of Sparks Fam. Hosp., Inc.*, 128 Nev. 406, 412, 282 P.3d 727, 732 (2012). Summary judgment is proper when the defendant negates at least one element of negligence as a matter of law. *Harrington v. Syufy Enters.*, 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997). A landowner owes "a duty of reasonable care to entrants for risks that exist on the landowner's property." *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 775, 291 P.3d 150, 152 (2012); *see also Asmussen v. New Golden Hotel Co.*, 80 Nev. 260, 262, 392 P.2d 49, 49 (1964) ("[A] proprietor owes his invited guests a duty to keep the premises in a reasonable safe condition for use–the duty of ordinary care."). This includes a duty to avoid unreasonably unsafe or hazardous conditions on the property. *Asmussen*, 80 Nev. at 262, 392 P.2d at 49. However, a premises owner "is not an insurer of the safety of a person on the premises, and, in the absence of negligence, no liability lies." *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993).

In *Daniel*, the Nevada Supreme Court concluded that determining the appropriate standard of care will require expert testimony "unless the conduct involved is within the common knowledge of laypersons. Where . . . the service rendered does not involve esoteric knowledge or uncertainty that calls for the professional's judgment, it is not beyond the knowledge of the jury to determine the adequacy of the performance." 98 Nev. at 115, 642 P.2d at 1087 (citation omitted).

In this case, Powell-Demison alleged that the bathtub in her hotel room appeared to have been refinished improperly, rendering the surface extraordinarily slick and hazardous. According to Powell-Demison, Sam's Town breached its duty of care to provide a reasonably safe environment by failing to provide a rubber bathmat, friction strips, or friction coating. However, her allegations fundamentally turn on whether the bathtub, in fact, constituted a hazardous condition because a bathmat, friction strips, and friction coating are remedial measures to mitigate that hazard.

We conclude that the district court correctly applied *Daniel* when it found that expert testimony was needed to determine if the bathtub had sufficient friction resistance or whether it constituted a hazardous condition necessitating remedial measures. Friction coefficiency requires expert testimony. *See, e.g., Levine v. Remolif*, 80 Nev. 168, 171, 390 P.2d 718, 719 (1964). Similarly, an analysis of whether Sam's Town used appropriate refinishing materials would likewise require expert testimony, as this is not within the common knowledge of laypersons. *Daniel*, 98 Nev. at 115, 642 P.2d at 1087.

Because Powell-Demison did not timely disclose an expert, she could not provide expert testimony to establish that Sam's Town's bathtub was a hazardous or unsafe condition. As a result, her allegation that the bathtub was unreasonably dangerous or hazardous rested entirely on speculation, and a party may not rely on "whimsy, speculation, and conjecture" to oppose summary judgment. *Collins*, 99 Nev. at 302, 662 P.2d at 621 (internal quotation marks omitted). Therefore, because Powell-Demison could not establish that the bathtub constituted a hazardous condition as a matter of law, she further could not establish that Sam's Town breached its duty by failing to mitigate the alleged hazard. *See Leavins v.*

*Nayan Corp.*, 810 S.E.2d 324, 328-29 (Ga. Ct. App. 2018) (affirming summary judgment in a hotel's favor when the guest offered no expert testimony that the bathtub was unreasonably dangerous or in violation of any applicable safety code); *Schantz v. Wild Rose Emmetsburg, LLC*, No. 19-0509, 2020 WL 375941, at *4 (Iowa App. Jan. 23, 2020) ("While [the plaintiff] noted there was not a grab bar, bath mat, or nonskid strips on the tub surface, there was no testimony connecting a duty by [the hotel] to have those items . . . . [E]vidence of the standard related to required safety devices was not in this record. Jurors are not experts on all negligence questions.").

In addition, even assuming *arguendo* that expert testimony was not required, summary judgment was still appropriate because Powell-Demison did not conduct *any* discovery and, as a result, could not show a genuine dispute of material fact through admissible evidence. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. As noted above, in her complaint Powell-Demison alleged that Sam's Town recently refinished the tub and/or did not use proper refinishing materials and failed to inspect her hotel room for hazardous conditions. Without written discovery requests to Sam's Town, Powell-Demison could not show that the bathtub was refinished or, if it was, when it was refinished and what materials were used. Similarly, Powell-Demison had no evidence with regard to how often Sam's Town inspected the room, the results of any inspections, or when the last inspection occurred.

Powell-Demison's argument that a slippery bathtub should have a bathmat is insufficient to establish a hazardous condition or that Sam's Town had an obligation to remediate the alleged hazard. There was nothing visible in the bathtub that caused Powell-Demison's fall, and no witnesses other than Powell-Demison herself could testify that the bathtub was

unusually slippery. Thus, "other than by implication, the record shows no identified defendant caused the bathtub/shower to be slippery." *Schantz*, No. 19-0509, 2020 WL 375941, at *3. Therefore, notwithstanding the absence of expert testimony, Powell-Demison's failure to conduct discovery precluded her from establishing duty and breach as a matter of law, and summary judgment was appropriate.[5]

*The district court properly applied the summary judgment standard*

As noted above, summary judgment is appropriate if the pleadings and all other evidence on file demonstrate that no genuine dispute of material fact exists, and all evidence must be viewed in a light most favorable to the nonmoving party. *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

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[5]Powell-Demison also alleged that Sam's Town was negligent for failing to warn her of a potential hazard and that Sam's Town had actual notice because it created the hazardous condition. As to Sam's Town's duty to warn, the slipperiness of a wet bathtub is generally considered an open and obvious condition. *Dickerson v. Guest Servs. Co. of Va.*, 653 S.E.2d 699, 700-01 (Ga. 2007) ("[E]veryone knows wet surfaces can become slippery."); *Dempsey v. Alamo Hotels, Inc.*, 418 P.2d 58, 62 (N.M. 1966) ("[I]t is common knowledge that a smooth enamel or porcelain surface becomes slippery when water is applied to the surface."). Property owners have no duty to warn of open and obvious conditions. *Harrington v. Syufy Enters.*, 113 Nev. 246, 250, 931 P.2d 1378, 1381 (1997) (stating that the "obvious danger rule" obviates a duty to warn).

As to Powell-Demison's notice argument, actual notice is imputed when a landowner or employee creates a hazardous condition. *See Wagon Wheel Saloon & Gambling Hall, Inc. v. Mavrogan*, 78 Nev. 126, 129, 369 P.2d 688, 690 (1962). However, for the reasons set forth above, Powell-Demison cannot establish through admissible evidence that the bathtub was a hazardous condition or that Sam's Town created the alleged hazard. Without discovery, there was no genuine dispute of material fact that Sam's Town knew or should have known about any alleged hazard in the exercise of ordinary care. *Asmussen*, 80 Nev. at 262, 392 P.2d at 49.

Powell-Demison first contends that the district court imposed a higher burden on her because it granted summary judgment after she could not demonstrate that Sam's Town was negligent, rather than only requiring her to show a genuine dispute of material fact. But Powell-Demison's assertion takes the district court's findings out of context—the district court found that there was no genuine dispute of material fact for multiple reasons, *including* that Powell-Demison could not establish Sam's Town was negligent through admissible evidence. Because Powell-Demison could not establish duty and breach as a matter of law, the district court did not impose a higher burden by finding that there was no genuine dispute of material fact on this basis.

Second, Powell-Demison argues that the district court improperly relied on her discovery responses admitting that in the last five years, she showered without injury in bathtubs that lacked rubber mats, friction strips, or handrails. Powell-Demison contends this created a negative inference and concerned her credibility, which is improper when deciding summary judgment. However, she does not establish how the district court's factual references to her own discovery admissions created a negative inference or otherwise concerned her credibility, and we decline to further consider her argument. *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).

Finally, Powell-Demison asserts that the district court ignored evidence in her favor, namely photographs and other evidence showing the absence of a bathmat. Assuming there was no bathmat in Sam's Town's bathroom, there was still no genuine dispute of material fact with regard to duty and breach; Sam's Town had no obligation to provide a bathmat unless

Powell-Demison could establish that the tub constituted a hazardous condition which, in the absence of any discovery or expert testimony, she could not do as a matter of law for the reasons explained above.[6]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Nadia Krall, District Judge
Burris & Thomas, LLC
Ivie McNeill Wyatt Purcell & Diggs
Eighth District Court Clerk

[6]Powell-Demison also argues that the district court erred in denying her motion for reconsideration. The district court's denial of a motion for reconsideration is reviewed for an abuse of discretion. *See AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). Powell-Demison's reconsideration motion argued that the district court misapplied *Daniel* but, in this case, expert testimony was required to establish that the bathtub constituted a hazardous condition requiring remedial measures, such as a bathmat. Therefore, the district court did not abuse its discretion in denying reconsideration.

Insofar as Powell-Demison has raised other issues which are not specifically raised or address in this order, we have considered the same and conclude that they do not present a basis for relief.