UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

THERESA BRANDT,

Plaintiff,

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervenor Plaintiff,

v.

STARWOOD HOTELS AND RESORTS WORLDWIDE, INC., D/B/A SHERATON BELLE HARBOUR BEACH RESORT,

Defendant.
_____/

Case Number 02-10285-BC
Honorable David M. Lawson

OPINION AND ORDER REJECTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION, GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND DISMISSING BLUE CROSS/BLUE SHIELD OF MICHIGAN AS INTERVENING PLAINTIFF

The plaintiff, a Michigan resident, injured herself in a fall that occurred in the common area of a hotel in Florida owned by the defendant. She filed suit in this Court alleging negligence, with jurisdiction based on diversity of citizenship. The defendant filed a motion for summary judgment, which was addressed by Magistrate Judge Charles E. Binder pursuant to an order of reference for general case management under 28 U.S.C. § 636(b). On August 18, 2004, the magistrate judge filed a report recommending that the motion be granted and the case dismissed. The plaintiff filed timely objections to the recommendation, to which the defendant replied. The intervening plaintiff, Blue Cross/Blue Shield of Michigan, did not respond to the defendant's summary judgment motion or to the magistrate's report and recommendation. The Court agrees with the magistrate judge that Michigan law likely furnishes the rules

of decision for this case. However, the Court now finds that the magistrate judge engaged in fact finding, which is forbidden when adjudicating a summary judgment motion, and that when the facts are viewed in the light most favorable to the plaintiff, as is required, there are material issues that must be resolved at a trial. The Court, therefore, will reject the report and recommendation of the magistrate judge and deny the motion for summary judgment as to the principal plaintiff. The Court will adopt the report with respect to the intervening plaintiff because of the failure to file objections pursuant to 28 U.S.C. § 636(b)(1).

I.

In June 2001, the plaintiff, Theresa Brandt, attended a convention held by her union at the Sheraton Bal Harbour Beach Resort in Bal Harbour, Florida. The defendant, Starwood Hotel & Resorts, Worldwide, Inc., which is headquartered in New York, owned and operated the Sheraton Resort as well as many other hotels in Florida, Michigan, and throughout the country.

On June 27, 2001, the plaintiff decided to have dinner with a group of her colleagues away from the resort after convention activities concluded. At around 7:00 p.m., the group exited from the front entrance. One of the group tried to hail a cab, while the plaintiff followed with two other colleagues. The plaintiff slipped while descending some steps. Her left foot went forward and abruptly twisted, and she landed on her buttocks. The colleagues assisted the plaintiff back inside the hotel where she received care, and she was eventually taken by taxi to a local hospital. She alleges that she sustained severe injuries including a bone fracture in her left foot, ligament and nerve damage to her right knee, and "reflex sympathy of the right lower extremity." Am. Compl. ¶ 11.

A large permanent awning covers the entrance to the resort's lobby. Df. Mot. Summ. J. Ex. A, Pl. Dep. at 35. Under the awning, four steps lead from the entrance in front of the resort's main doors.

Pl. Response to Df. Mot. Summ. J. Ex 2, Diagram of Entrance. "Mud-set granite pavers," a type of tile, cover the stairs and a landing that extends from the bottom of the stairs to a curb, where visitors load and unload vehicles. *Ibid*. A brick and mortar paved roadway runs in front of the curb. There are handrails on each side of the steps.

The plaintiff believes that she slipped on "water or another liquid substance causing her to fall." Am. Compl. ¶ 8. However, she testified that she did not see the water before falling; rather, as she was sitting in the hotel lobby she discovered that her pant leg was wet and she saw water in the general vicinity of her fall. Df. Mot. Summ. J. Ex. A, Pl. Dep. at 99. The day's rain had left the entrance area under the awning wet according to one of the plaintiff's companions, Jeffery Flemming, Pl. Response to Mot. Summ. J. Ex. 3, Flemming Dep. at 8, and with puddles of water in the area according to another companion, Deborah Johnson. Df. Mot. Summ. J. Ex. D, Johnson Dep. at 14. The plaintiff stated that her pant leg was wet after falling. Df. Mot. Summ. J. Ex. A, Pl. Dep. at 60. However, a security officer's report written after the accident reads, "The guest sustained a [sic] abrasion to her right knee and twisted her left ankle. . . . An inspection of the front ramp revealed no water or obstacles which would cause the accident. The concrete was free of any cracks or holes." Df. Mot. Summ. J. Ex. B, Accident Report. Sharon Taylor, one of the plaintiff's companions that night, states "I did not witness Ms. Brandt fall nor did I observe anything unusual or out of the ordinary that may have caused her to fall." *Id*. Ex. C, Taylor Aff. Johnson and Flemming did not actually see what caused the plaintiff's fall. *Id*. Ex. D, Johnson Dep. at 8-9, 14; Pl. Response to Df. Mot. Summ. J. Ex. 3, Flemming Dep. at 8.

The plaintiff filed her complaint in this Court on November 8, 2002, which was later amended on February 10, 2003. She includes several specifications of negligence grounded in the theory that the

defendant failed to inspect the entranceway to the hotel to remove water that made the steps slippery. The plaintiff contends that this hazard was the legal cause of her fall and resulting injuries. She seeks damages in excess of the jurisdictional minimum required in this Court.

On December 12, 2003, Blue Cross/Blue Shield of Michigan filed a motion for intervention and joinder in the action to assert a right to recover the expenses it allegedly had paid for a portion of the plaintiff's medical care. The Court granted the motion to intervene on February 9, 2004 and ordered that Blue Cross "participate in the trial of the action, all alternative dispute resolution proceedings, case evaluations, scheduling conferences, settlement conferences, and all conferences preparatory to trial, and shall be subject to all orders and directives of the Court." Order Granting Intervention.

The defendant filed its motion for summary judgment on February 27, 2004. Only Brandt filed a response to the motion. The magistrate judge held a hearing on the motion on April 29, 2004 and actually received evidence in the form of photographs of the accident scene that theretofore had not been part of the record. In his report, the magistrate judge determined that Michigan law applied to the dispute, he found that the plaintiff's description of the accident was inconsistent as to the precise location and cause of the fall, and, relying heavily on the photographs he received in evidence at the hearing, he held that the plaintiff did not establish sufficient evidence that her fall was caused by puddles of water or other dangerous condition of the premises.

The plaintiff filed timely objections to the recommendation, to which the defendant responded. The plaintiff asserts that Florida law ought to apply, under Florida statutory and common law a presumption of negligence arises from the accident on the premises, and that a fact issue presented by the record evidence precludes summary judgment. The defendant asserts that it is entitled to summary judgment under either

Florida or Michigan law, and that since the plaintiff could not describe the cause of her fall, her surmise that she slipped on water is insufficient to allow the case to go to trial on the causation issue. The defendant also argues that Michigan's so-called "open and obvious" rule requires judgment in its favor as a matter of law. Blue Cross has not objected to the magistrate judge's report and recommendation.

II.

As noted above, the magistrate judge recommended that the defendant's motion for summary judgment be granted and the matter be dismissed in its entirety. Under 28 U.S.C. § 636(b)(1)(C), if a party does not agree with a report and recommendation, the party must file specific objections in a timely fashion. The principal plaintiff filed such objections, but the intervening plaintiff has not been heard from. The intervening plaintiff's failure to file objections to the report and recommendation waives any further right to appeal. *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Likewise, the failure to object to the magistrate judge's report entitles the defendant to the relief it seeks as recommended by the magistrate judge. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985). The Court, therefore, will grant the defendant's motion for summary judgment against the intervening plaintiff and dismiss it from the case with prejudice.

III.

The remaining parties have raised a question as to whether Florida or Michigan law applies in this case. In diversity cases, a federal court must apply the substantive law of the forum state in which it sits. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). This prescription includes the forum state's choice-of-law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) ("The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state

courts. . . . It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws."); *Mill's Pride, Inc. v. Cont'l Ins. Co.*, 300 F.3d 701, 704 (6th Cir. 2002). Michigan's choice of law rules, therefore, must be used to resolve this dispute.

Michigan's conflict of laws rules for tort cases have undergone a transformation in recent years. Although Michigan, like several other States, formerly followed the rule of *lex loci delicti*, meaning that the locus of the tortious act determined the rules of decision for the case, the State supreme court made clear in *Sutherland v. Kennington Truck Serv., Ltd.*, 454 Mich. 274, 562 N.W.2d 466 (1997), that it no longer follows the traditional rule. Rather, it utilizes a modified law-of-the-forum, or *lex fori*, approach, described as follows:

> [W]e will apply Michigan law unless a "rational reason" to do so otherwise exists. In determining whether a rational reason to displace Michigan law exists, we undertake a two-step analysis. First, we must determine if any foreign state has an interest in having its law applied. If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. If a foreign state does have an interest in having its law applied, we must then determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests.

Id. at 286, 562 N.W.2d at 471.

The plaintiff argues that Florida has an interest in having its law applied because Florida is the place of the wrong, and due to its heavy reliance on tourism Florida has an interest in uniform application of its law to manage the liability of large hotel operators, like the defendant, to encourage business in Florida. Florida has demonstrated this interest, the plaintiff contends, by enacting statutory regulations specifying the rights of business invitees and landowners regarding claims of negligence involving "transitory foreign substances." *See* Fla. Stat. Ann. § 768.0710.

The magistrate judge based his recommendation that Michigan law should apply on two state court of appeals cases that he found were "on all fours with the instant action": *Palmer v. Cendant Corp.*, No. 234006, 2002 WL 31105278 (Mich. Ct. App. Sept. 20, 2002) (unpublished); *Gandolfi v. Marriott Int'l, Inc.*, No. 212727, 2000 WL 33521049 (Mich. Ct. App. Mar. 28, 2000) (unpublished). R&R at 9. He found that Florida may have an interest in encouraging business, but that this interest is insufficient to overcome the presumption for the application of Michigan law, because Michigan has a substantial interest in applying its law when a Michigan resident files a complaint in a Michigan court.

The Court does not agree that the two cases cited by the magistrate judge are persuasive or even helpful since they are unpublished decisions that are accorded no precedential value by Michigan courts, *see* Mich. Ct. R. 7.215(C)(1) (stating that "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis"), and a choice of law issue was neither raised nor discussed in either of those cases. Nonetheless, the Court believes that Michigan courts would apply Michigan law in this dispute since Michigan's "balancing approach most frequently favors using the forum's (Michigan's) law." *Hall v. General Motors Corp.*, 229 Mich. App. 580, 585, 582 N.W.2d 866, 868 (1998). Florida's interest in protecting a foreign tourist is no greater than Michigan's interest in applying its law to its own citizens. The interest of seeing that Michigan law uniformly applies in Michigan courts is especially acute when the business entity against which liability is sought operates a hostelry within this State as well as in the foreign jurisdiction. The Court, therefore, agrees with the magistrate judge that Michigan's conflicts of laws rules favor the application of Michigan law as the rules of decision in this matter.

IV.

The defendant contends that it is entitled to summary judgment. "When there is a motion for summary judgment in a diversity case, the provisions of Rule 56 control its determination." *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453, 459-60 (6th Cir. 1986); see 17A James Wm. Moore et al., Moore's Federal Practice § 124.05 (3d ed. 2003). A motion for summary judgment under Federal Rule of Civil Procedure 56 presumes the absence of a genuine issue of material fact for trial. The court must view the evidence and draw all reasonable inferences in favor of the non-moving party, and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

A fact is "material" if its resolution affects the outcome of the lawsuit. *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001). "Materiality" is determined by the substantive law claim. *Boyd v. Baeppler*, 215 F.3d 594, 599 (6th Cir. 2000). An issue is "genuine" if a "reasonable jury could return a verdict for the nonmoving party." *Henson v. Nat'l Aeronautics & Space Admin.*, 14 F.3d 1143, 1148 (6th Cir. 1994) (quoting *Anderson*, 477 U.S. at 248). Irrelevant or unnecessary factual disputes do not create genuine issues of material fact. *St. Francis Health Care Ctr. v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000). When the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," there is no genuine issue of material fact. *Simmons-Harris v. Zelman*, 234 F.3d 945, 951 (6th Cir. 2000). Thus, a factual dispute which "is merely colorable or is not significantly probative" will not defeat a motion for summary judgment which is properly supported. *Kraft v. United States*, 991 F.2d 292, 296 (6th Cir. 1993); *see also Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. BVR Liquidating, Inc.*, 190 F.3d 768, 772 (6th Cir. 1999).

The party bringing the summary judgment motion has the initial burden of informing the district court of the basis for its motion and identifying portions of the record that demonstrate the absence of a genuine dispute over material facts. *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002). The party opposing the motion then may not "rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact" but must make an affirmative showing with proper evidence in order to defeat the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). A party opposing a motion for summary judgment must designate specific facts in affidavits, depositions, or other factual material showing "evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. If the non-moving party, after sufficient opportunity for discovery, is unable to meet his or her burden of proof, summary judgment is clearly proper. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Napier v. Madison County, Ky.*, 238 F.3d 739, 741-42 (6th Cir. 2001).

The party who bears the burden of proof must present a jury question as to each element of the claim. *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000). Failure to prove an essential element of a claim renders all other facts immaterial for summary judgment purposes. *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 895 (6th Cir. 1991). However, "[a] court may not resolve disputed issues of fact in ruling on a summary judgment motion. If a question of fact remains, the motion for summary judgment should be denied and the case should proceed to trial." *Felix v. Young*, 536 F.2d 1126, 1130 (6th Cir. 1976) (citations omitted).

To establish a landowner's liability under Michigan's common law of premises liability, a plaintiff must prove that: (1) the defendant landowner owed a duty to the plaintiff; (2) the defendant breached the

duty by some act or omission; (3) the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) the plaintiff suffered damages. *See Schultz v. Consumers Power Co.*, 443 Mich. 445, 449; 506 N.W.2d 175 (1993). A landowner's duty to a person coming onto the land depends on the status of that person. *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 596-97, 614 N.W.2d 88, 91 (2000) (outlining the various degrees of responsibility a landowner has to trespassers, licensees, and invitees, respectively).

In this case, the parties agree that the plaintiff was an invitee. Under Michigan law, a landowner owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v. Ameritech Corp.*, 464 Mich. 512, 516, 629 N.W.2d 384, 386 (2001). This duty includes the obligation to inspect the premises and make any necessary repairs or warn of discovered hazards. *Stitt*, 462 Mich. at 597; 614 N.W.2d at 92. However, this duty does not extend to conditions that would not permit a prudent landowner to anticipate an unreasonable risk or to dangers so obvious that an invitee can be expected to discover them himself. *Williams v Cunningham Drug Stores, Inc.*, 429 Mich. 495, 500; 418 N.W.2d 381, 383 (1988); *Ellsworth v. Hotel Corp. of America*, 236 Mich. App. 185, 195, 600 N.W.2d 129, 135 (1999). Similarly, an landowner must warn an invitee of hidden defects, but he is not required to eliminate or warn of open and obvious dangers unless he should anticipate the harm despite the invitee's knowledge of it. *Riddle v. McLouth Steel Products Corp.*, 440 Mich. 85, 90-96, 485 N.W.2d 676, 679-681 (1992). "The test for an open and obvious danger is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Abke v.*

Vandenberg, 239 Mich. App. 359, 361-362, 608 N.W.2d 73, 75 (2000) (quoting *Novotney v. Burger King Corp.*, 198 Mich. App. 470, 474-475; 499 N.W.2d 379, 381 (1993) (on remand)).

An landowner's liability may arise from active negligence or through an unreasonable act or omission such as the failure to inspect the premises for dangerous conditions caused by others. *Clark v. K-Mart Corp.*, 465 Mich. 416, 419; 634 N.W.2d 347 (2001). For instance, Michigan courts have consistently adhered to the rule that "a storekeeper [must] provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have had knowledge of it." *Serinto v. Borman Food Stores*, 380 Mich. 637, 640-641, 158 N.W.2d 485 (1968); *see also Hulett v. Great Atlantic & Pacific Tea Co.*, 299 Mich. 59, 68, 299 N.W. 807 (1941).

The defendant argues that the plaintiff has come forth with no direct evidence that she fell on a foreign object and has not shown that a defect in the premises existed or that the defendant acted negligently. The defendant asserts that without any testimony that anyone saw water accumulation on the ground where the fall occurred, it is inappropriate to infer from the fact that the plaintiff's pants were wet after the accident that a puddle existed or that it was present for an amount of time in which the defendant should have discovered it. The magistrate judge agreed with this argument and found that the plaintiff's testimony about the fall was inconsistent both internally and with the photographs that he received in evidence at the summary judgment hearing.

The Court does not believe that the magistrate judge should have received evidence at the motion hearing and that the photographs of the scene were not properly considered. Those photographs were not

part of the record in the case, that is, they were not part of "the pleadings, depositions, answers to interrogatories, . . . admissions on file [or] the affidavits," Fed. R. Civ. P. 56(c), that may be considered in a motion for summary judgment. The photographs were offered "in evidence" at oral argument based on the unsworn statements of counsel. Unsworn statements and unverified documents may not be used to support or defeat a motion for summary judgment under Rule 56. *See Moore v. Holbrook*, 2 F.3d 697, 698-99 (6th Cir 1993) (holding that affidavits supporting a summary judgment motion must: "(1) be made on personal knowledge; (2) set forth facts as would be admissible in evidence; and (3) show that the affiant is competent to testify on the matters contained in the affidavit," and that "sworn or certified copies of all documents referred to in an affidavit must also be attached to the affidavit. This court has ruled that documents submitted in support of a motion for summary judgment must satisfy the requirements of Rule 56(e); otherwise, they must be disregarded"); *Cacevic v. City of Hazel Park*, 226 F.3d 483, 489 (6th Cir. 2000) (stating that "[a]ppellants contend that their attorney's unverified memorandum opposing the motion for summary judgment complies with the Rule 56(f) affidavit requirement. It does not. . . . An unsworn memorandum opposing a party's motion for summary judgment is not an affidavit") (quoting *Radich v. Goode*, 886 F.2d 1391, 1394 (3d Cir.1989)). The magistrate judge evaluated the testimony of the plaintiff against the depiction of the scene in the photographs and engaged in weighing the evidence and finding facts. That function, however, is reserved for the fact finder at trial.

The Court finds that the record presents a disputed issue on the element of causation. Under Michigan law, the causation element consists of two parts: "(1) cause in fact, and (2) legal cause, also known as 'proximate cause.'" *Skinner v. Square D Co.*, 445 Mich. 153, 162-163, 516 N.W.2d 475 (1994). A plaintiff demonstrates cause in fact by "showing that 'but for' the defendant's actions [or

omissions], the plaintiff's injury would not have occurred." *Id*. at 163. A showing of proximate cause "involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Ibid*. The plaintiff can meet her burden of proof, including demonstrating causation by "establish[ing] a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support." *Id*. at 160 (citation omitted); *see also Wilson v*. *Alpena County Road Com'n*, 263 Mich. App. 141, 143, 687 N.W.2d 380 (2004).

The defendant identifies evidence in the record showing that its negligence did not cause the accident. Such evidence includes the security officer's report, referenced earlier, and the testimony of Jeff Flemming, who stated:

> Q. You didn't observe any slipperiness, though, when you walked out there?
> A. Not that I recall.

Df. Mot. Summ. J. Ex. E, Flemming Dep. at 9-11.

However, the plaintiff offers sufficient evidence that "but for" the slippery entranceway surface, the accident would not have occurred. The plaintiff states:

> Q. . . . you don't remember falling?
> A. It happened so fast that I was on – I fell, and they were coming over to assist me.
> Q. So you don't remember feeling yourself beginning to fall?
> A. I - - my body reacted to the slip and fall.
> Q. What do you mean by that?
> A. Well, when you - - when I stepped down, my foot started to slip forward, and my body reacted trying to prevent me from falling.

Df. Mot. Summ. J. Ex. A, Pl. Dep. at 40.

> Q. Was it when your left foot twisted that you spun around and struck your right knee?

A. When I – my foot slipped and twisted, it was like a simultaneous thing. I just – it spun me around.

Id. at 42-43.

Q. Okay. Why did you slip?
A. I don't know. Until I found – sitting in the lobby, I could see small spots of water on the steps.

Id. at 43.

Q. . . . So the area where it was – that was cobblestone, you didn't – couldn't see any liquid?
A. I couldn't see it from where I was at.
Q. Okay. Did you ever see it?
A. Did I ever see –
Q. The liquid.
A. I felt the water on my pants.
Q. Okay. Did you ever see the liquid?
A. No.

Id. at 99. The plaintiff's statement that her foot "started to slip forward" in a place that she later determined was wet shows more than supposition that the surface was slippery; the statement connects a slippery surface to the plaintiff's accident. *Id*. at 40; *see Vella v*. *Hyatt Corp.*, 166 F. Supp. 2d 1193, 1199 (E.D. Mich. 2001) (finding that plaintiff's statement that ground "was slippery, very slippery whatever it was" demonstrated causation in a slip and fall claim). Her discovery of water on her pant leg after the fall and observance of water on the steps near where she fell provides circumstantial evidence that water caused the slip. *Ibid*. (finding that plaintiff's discoveries after fall that "her stockings 'seemed like kind of soaked' and that the floor was wet 'because it made a funny noise'" demonstrated causation in a slip and fall claim). Evidence of a fully developed puddle is not required to demonstrate an issue of fact that water may have caused the fall. Deborah Johnson's account of the fall supports the plaintiff's assertion that the accident

was caused by a slippery surface, though she characterizes her statement as speculative and cannot verify the existence of water in the area of the fall. Johnson states:

> A. . . . I know there were water puddles because of the rain that had been falling periodically throughout. I know that I did look later and noticed that I felt it was a little bit kind of a wavy area where you step down, but don't, once again, don't know where she stepped, don't know what she experienced.
> Q. Sure. As we sit here today, you don't know whether there was any water in the area where she fell?
> A. No, I cannot speak to that. All I know is that it didn't seem to me to be a misstep because of the speed in which she simply went down. Normally if someone steps wrong, there's that hesitation, a bobbling. She just dropped. I mean, just dropped right out of sight. I saw her just go straight down. It just shocked me how fast she went down.

Df. Mot. Summ. J. Ex. D, Johnson Dep. at 14.

The plaintiff also offers evidence supporting logical sequences of cause and effect between the slippery surface and the defendant's negligence. One of the plaintiff's theories of negligence is that the defendant failed to inspect the entranceway and clear away rain water that fell during the afternoon. Flemming's and Johnson's statements provide evidence that rain water remained in the entranceway when the fall occurred. In addition, the national weather records for a nearby city show that 1.31 inches of water fell during the accident day and the day preceding the day of the accident. Pl. Response to Df. Mot. for Summ. J. Ex. 8, Rainfall Records. Also, the evidence of water in the area and the witnesses' description of the accident support a theory that the defendant failed to detect a hazard that it should have discovered and failed to eliminate the hazard or take reasonable measures to alleviate it.

The plaintiff's claims are distinguishable from the line of cases cited by the defendant characterized by *Stefan v. White*, 76 Mich. App. 654, 660, 257 N.W.2d 206 (1977). In those cases, the plaintiffs

failed to provide any evidence that negligence caused them injury. For example, in *Stefan*, the plaintiff admitted that she did not know what caused her fall. She stated:

> Q (Mr. Wendt, Counsel for defendant.) What did (you) trip on if anything?
> A Well, I don't recall what I tripped over. Q Tell me what you recall that day?
> A I don't recollect anything?
> Q You have no recollection?
> A Yeah, I was down, that's all I can say.
> Q I just want to know what you recollect.
> A I don't know what happened. I just went down.
> Q You fell?
> A I fell (Indicating).
> Q Did you feel yourself trip?
> A I didn't feel nothing.
> Q But you fell and you didn't feel yourself slip?
> A No.
> Q Or trip?
> A No, not at all.
> Q You were walking toward the doorway, going toward the doorway at the time you fell?
> A Yeah, I took a step and the next thing I knew I was just going straight out.
> Q And you were just walking?
> A Yes.
> Q When you got to the stairs down you fell? A Yes.
> Q Do you know what you tripped over if anything?
> A Nothing. I just went down that fast.

Id. at 657, 257 N.W.2d at 207-208. After the accident, her husband discovered a metal strip coming out of the floor where she slipped and supposed that it caused her fall. *Id*. at 658, 257 N.W.2d at 208. The Michigan appellate court affirmed the summary judgment for the defendant because the plaintiff's conjecture was insufficient to a show a causal relationship between the defendant's metal strip and the plaintiff's fall. Here, in contrast, there is circumstantial evidence from which a reasonable jury could infer cause in fact and proximate cause. *See Vella*, 166 F. Supp. 2d at 1199 (rejecting the defendant's contention that *Stefan* applied for similar reasons).

Nor does the "open-and-obvious" rule mandate summary judgment in this case. A danger is open and obvious if an average person would have discovered it upon casual inspection. *Novotney*, 198 Mich. App. at 475, 499 N.W.2d at 381. There remains a question of fact whether an average person would have discovered accumulated water upon casual inspection; the plaintiff described two different textures on the adjoining floor surfaces and testified that puddles were visible on only one of the surfaces. Df. Mot. Summ. J. Ex. A, Pl. Dep. at 99. The plaintiff stated that she could not see water on a surface area where she fell. She said:

> Q. Okay. Would it be fair to say that if this area was wet, you would have been able to see it at the time?
> A. No. I don't think that I would have been able to see it.
> Q. Okay. Why?
> A. Because it all blended. It blended in.
> Q. Okay. So these areas of wetness couldn't be observed by somebody that was looking at them?
> A. I didn't see any.
> Q. Okay. Well, from the area – you had mentioned to me that you were sitting in the lobby area ten feet inside the lobby and you could see –
> A. On the cement –
> Q. – the cement outside and it looked wet to you.
> A. It was dark, small dark puddles.
> Q. Okay. And it appeared to be wet to you?
> A. I took it as a liquid.
> Q. Okay. But you don't know?
> A. No.
> Q. Okay. Are you suggesting you could tell from inside sitting on the sofa but couldn't tell from outside?
> A. There were two different textures. Where I was – where I saw the puddles it was cement. The cobblestone I – yeah, you could not tell.
> Q. Oh, okay. So the area where it was – that was cobblestone, you didn't – couldn't see any liquid?
>
> A. I couldn't see it from where I was at.
> Q. Okay. Did you ever see it?
> A. Did I ever see –

Q. The liquid.
A. I felt the water on my pants.
Q. Okay. Did you ever see the liquid?
A. No.
Q. Did anybody ever tell you that they saw liquid?
A. The question was – nobody ever said anything.

Id. at 98-99. Construed favorably towards the plaintiff, this testimony supports a finding that a reasonable person could not see water on the surface, but could see water on the adjoining surface. There is a fact question as to whether the defective condition of the premises was "obvious," and summary judgment therefore is precluded.

Even if the presence of standing water was open and obvious, there remains a question of whether the hazard presented by that condition in the main entryway of a busy hotel was an unreasonable risk. In *Bertrand v. Alan Ford, Inc.*, 449 Mich. 606, 537 N.W.2d 185 (1995), the Michigan Supreme Court endorsed the concept embodied in the Restatement of Torts 2d that an obvious defect in premises may subject a landowner to liability if "the possessor should anticipate the harm despite such knowledge or obviousness." *Id*. at 610, 537 N.W.2d at 186 (quoting Restatement (Second) Torts § 343A(1), at 218). The Court explained:

> [I]f the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care *and is for the jury to decide*.

Id. at 611, 537 N.W.2d at 187 (emphasis added).

The Court finds, therefore, that the plaintiff has offered sufficient evidence to create a material question of fact on the element of causation and whether the defendant breached its duty to detect and

remediate a dangerous condition on its premises. The magistrate judge improperly made factual findings in the course of arriving at his conclusions to the contrary.

V.

There are fact questions that preclude the entry of summary judgment against the principal plaintiff in this case. However, the intervening plaintiff has failed to contest the defendant's motion for summary judgment or object to the magistrate judge's report and recommendation that the matter be dismissed.

Accordingly, it is **ORDERED** that the report and recommendation of the magistrate judge is **REJECTED IN PART AND ADOPTED IN PART**.

It is further **ORDERED** that the defendant's motion for summary judgment [dkt # 27] is **GRANTED IN PART AND DENIED IN PART**.

It is further **ORDERED** that the complaint by the intervening plaintiff Blue Cross/Blue Shield of Michigan is **DISMISSED WITH PREJUDICE**.

It appears that there are no further pending motions and the matter is now ready for trial. Therefore, the order of reference for pretrial management has been fulfilled. Counsel for the parties shall appear for a status conference before the Court on **January 13, 2005 at 2 p.m.** to discuss further proceedings in this matter.

_____/s/_____
DAVID M. LAWSON
United States District Judge

Dated: December 14, 2004

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