

**In the
Supreme Court
State of North Dakota**

Jeffrey Wotzka,

Plaintiff/Appellant,

v.

Minndakota Limited Partnership, d/b/a Radisson Hotel Bismarck, 605
East Broadway Avenue, Bismarck, North Dakota,

Defendant/Appellee.

APPEAL FROM SUMMARY JUDGMENT
BURLEIGH COUNTY DISTRICT COURT
CASE NO. 08-2011-CV-01867

BRIEF OF APPELLEE

Kristi K. Warner (ND No. 05962)
BROWNSON & BALLOU, PLLP
225 South Sixth Street
Suite 4800
Minneapolis, Minnesota 55402
Tel: (612) 332-4020

*Attorneys for Defendant-Appellee Minndakota Limited Partnership, d/b/a Radisson Hotel
Bismarck, 605 East Broadway Avenue, Bismarck, North Dakota*

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STATEMENT OF THE ISSUE

Did the District Court Correctly Grant Summary Judgment To the Radisson Hotel Because It Neither Owed Nor Breached a Duty To Wotzka For the Open and Obvious Danger of Slipperiness In a Shower?

STATEMENT OF THE CASE

This is an appeal from dismissal on summary judgment of a negligence action, arising out of a slip and fall accident in a shower bathtub at the Radisson Hotel. (App. 38.) Jeffrey Wotzka (hereinafter “Wotzka”) filed this action against Minndakota Limited Partnership d/b/a Radisson Hotel, Bismarck (hereinafter “the Radisson”), on August 4, 2010. (App. 5-7.) In his complaint, Wotzka asserted a negligence claim against the Radisson, alleging he suffered injury when he slipped and fell while taking a shower in his hotel room on the evening of August 7, 2004. (App. 6, ¶ 2.) His only allegations were that the shower bathtub in the hotel room was “dangerously slippery” because there was “no non-skid strip, pad or mat in the shower, and no rail or bar or other safety device for [his] use as an aid to prevent the fall,” and that the soap he personally used in the shower “made the area extra slippery.” (App. 6, ¶ 2; Appellee App. 6, ¶ 13.) During his deposition, taken on February 10, 2012, Wotzka simply repeated these allegations as a basis for his claim against the Radisson. (Appellee App. 10.)

The Radisson moved for summary judgment, arguing that it owed no duty nor breached any such duty to Wotzka, as a matter of law with respect to an open and obvious slippery condition of the shower. On May 31, 2012, the Honorable Bruce B. Haskell, Burleigh County District Court, granted the Radisson’s motion for summary judgment in its entirety. (App. 38.) In so ruling, the Court specifically found that there were no genuine issues of material fact and that there was no “extra duty on the part of the hotel to warn or to take steps to prevent slips and

falls” by providing “non-skid strips or bars” or the like. (App. 35-36.) The Court also held that there was no evidence to suggest the Radisson breached any duty to Wotzka as “[t]here was no evidence that there was any defect or anything either in the structure of the tub or shower area.” (App. 35.) Finally, the District Court noted that the potential for danger in a shower is a matter of common knowledge and that Wotzka himself admitted “that he was knowledgeable about showers, that he was aware that there was a potential for danger, that he was in control of the amount of soap and water that was used” and “knew it could have been slippery and . . . dangerous.” (App. 35.)

Wotzka filed his Notice of Appeal on July 24, 2012. (App. 37.)

STATEMENT OF THE FACTS

This case arises out of a slip and fall accident that occurred while Wotzka was taking a shower in his room as a guest at the Radisson in Bismarck, North Dakota. (Appellee App. 15.) In his lawsuit against the Radisson, Wotzka alleged that the shower bathtub was in a “dangerous” condition because there was no skid mat or handrail, and because the soap made the area slippery. (App. 6, ¶ 2; Appellee App. 6, ¶ 13.) Wotzka claimed in his deposition that he “slipped on . . . the suds of the soap, because it appeared the soap was very slippery.” (Appellee App. 17, ll. 20-22.)

Wotzka’s date of birth is December 4, 1950. (Appellee App. 13, ll. 23-25.) Wotzka testified in his deposition that over the course of his lifetime, he had showered approximately once a day. (Appellee App. 22, ll. 23-25; 23, ll. 1-3.) Wotzka had also taken multiple showers at non-residential locations, such as hotels and gyms. (Appellee App. 23, ll. 4-13.) He also admitted that in his lifetime of experience with showers, he was generally aware that showers are wet and soap is slippery. (Appellee App. 25, ll. 22-25; Appellee App. 26, ll. 1-4.) Wotzka similarly

indicated that he was aware that non-residential showers varied and that he had nevertheless been able to shower without incident at such sites before his accident in 2004. (Appellee App. 23, ll. 14-23; 24, ll. 6-15.) Finally, Wotzka testified that he knew he needed to exercise caution while showering. (Appellee App. 25, ll. 6-10; 27, ll. 9-13.) He specifically testified as follows:

Q: Are you aware generally that water tends to make surfaces slippery?

A: I would -- yes, I would think that water would make a tub slippery.

(Appellee App. 25, ll. 22-25.)

Q: And you know that soap makes wet surfaces slippery, correct?

A: I would think that soap would make wet surfaces slippery.

(Appellee App. 26, ll. 1-4.)

Q: And so you knew that while you were showering, and while the water was on, you needed to exercise caution; is that correct?

A: Well, I would have to exercise caution, yes.

(Appellee App. 27, ll. 9-13.)

Wotzka further testified that he was in control of the amount of soap and water he used during his shower, and was additionally aware that the shower would be wet as long as he left the water running, as follows:

Q: During your shower at the Radisson, you were able to control whether or not you used the soap they provided, correct?

A: It was -- yes.

Q: And you were able to control how much soap you used?

A: Yes.

Q: And you were able to control how long you left the water on and running --

A: Yes.

Q: -- right?

And you also were able to control how long you were in the shower?

A: Yes.

(Appellee App. 26, ll. 5-18.)

Q: You are familiar with the idea that as you shower, the water will drain, but the surface will be wet as long as you have water running?

A: Yes, I understand that.

(Appellee App. 27, ll. 5-8.)

Wotzka additionally conceded that there were no foreign substances on the floor of the shower at the time of his fall. (Appellee App. 18, ll. 4-7; 29-33.) Indeed, pictures taken by Wotzka's wife immediately after the slip demonstrate both the cleanliness and good repair of the shower. (Appellee App. 19, ll. 16-23; 29-33.)

STATEMENT OF THE STANDARD OF REVIEW

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits . . . if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Brown v. Montana-Dakota Util., Co., 2011 ND 38, ¶ 3, 794 N.W.2d 741, 743 (quotations omitted).

Summary judgment is appropriate “[w]hen a party fails to establish the existence of a factual dispute on an essential element of his claim, on which he will bear the burden of proof at trial.” Fish v. Dockter, 2003 ND 185, ¶ 7, 671 N.W.2d 819, 822 (citations omitted).

With regard to summary judgment on appeal, the Supreme Court of North Dakota has stated:

On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Brown, 2011 ND 38, ¶ 3, 794 N.W.2d at 743 (quotations omitted).

Actionable negligence consists of a duty, breach, and an injury that was proximately caused by the breach. Iglehart v. Iglehart, 2003 ND 154, ¶ 11, 670 N.W.2d 343, 347 (citations

omitted). Although negligence actions are typically not appropriate for summary judgment, the existence of a duty is generally a preliminary question of law for the court. Id. If no duty exists on the part of the alleged tortfeasor, there is no actionable negligence. Diegel v. City of W. Fargo, 546 N.W.2d 367, 370 (N.D. 1996) (citations omitted). Further, “negligence never is presumed merely from proof of [an] accident, but must be affirmatively established.” Haga v. Cook, 145 N.W.2d 888, 891 (N.D. 1966) (citations omitted).

In the present case, Wotzka has the burden of proving that the Radisson owed him a duty, that the Radisson affirmatively breached that duty, and that his alleged injuries were proximately caused by that breach. To do so, Wotzka was required to submit to the District Court, “competent admissible evidence” to raise an issue of material fact concerning the essential elements of his claim to defeat the Radisson’s motion for summary judgment. Anderson v. Meyer Broad. Co., 2001 ND 125, ¶ 14, 630 N.W.2d 46, 50 (quotations omitted). Wotzka failed to do so in this case.

The Radisson, therefore, requests that this Court affirm the dismissal of Wotzka’s claims against the Radisson.

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Wotzka’s claims on summary judgment. First, the subject accident occurred in a hotel shower. As the District Court properly held, courts routinely conclude that hotels do not owe guests a duty with regard to slipping on water or soap in a shower because showers, by their very nature, are wet and likely to become slippery. See Dille v. Renaissance Hotel Mgmt. Co., LLC, No. 4:10CV1983 TIA, 2012 WL 2396666, slip op. at *3 (E.D. Mo. June 25, 2012) (Appellee App. 37-40); Churchwell v. Red Roof Inns, Inc., 97APE08-1125, 1998 WL 134329, at * 3 (Ohio Ct. App. Mar. 24, 1998) (Appellee App. 34-36.); Kutz v.

Koury Corp., 377 S.E.2d 811, 813-14 (N.C. Ct. App. 1989); LaBart v. Hotel Vendome Corp., 213 F. Supp. 958, 959 (D. Mass. 1963).

Second, Wotzka admitted that he saw the water in the Radisson shower prior to his fall. Wotzka also indicated that he knew he needed to exercise caution while taking a shower. He had taken approximately a shower a day throughout his lifetime and was aware of the necessity to use care while showering at the Radisson. Further, Wotzka admitted that he was in exclusive control of the length of time of his shower, and thus, the amount of water in the shower, as well as his use of soap.

Finally, the record contains no evidence that the Radisson breached any duty owed Wotzka. See Reid v. Ehr, 174 N.W. 71 (N.D. 1919) (holding that a hotel owner must use ordinary care with respect to the appliances and amenities used by his guests). As the District Court properly noted, no evidence suggested that there was any foreign substance or structural impurity in the shower such that a defect existed. See Fast v. State, 2004 ND 111, ¶ 12, 680 N.W.2d 265, 270. Thus, the District Court properly granted summary judgment on all of Wotzka's claims in favor of the Radisson.

ARGUMENT

I. The District Court Properly Followed Courts Across the Nation In Holding That It is a Matter of Common Knowledge That There Will Be Water and Soap In a Shower, Such That Wotzka Would, as a Matter of Law, Recognize a Need To Exercise Care.

The District Court correctly determined that the potential for slippery conditions in a shower bathtub is a matter of common knowledge. This finding follows the reasoning of courts across the nation. Specifically, the Court of Appeals of North Carolina stated in 1989 that “[i]t is common knowledge that bathtub surfaces, especially when water and soap are added, are

slippery and that care should be taken when one bathes or showers.” Kutz, 377 S.E.2d at 813. In Kutz, a hotel guest slipped in the shower while rinsing soap from his body. Id. at 812. The guest filed a personal injury action against the hotel, alleging that the hotel was negligent because only half of the bathtub surface was covered in non-slip strips. Id. In affirming the trial court’s directed verdict in favor of the hotel, the appellate court explained that “common sense tells us all that bathtubs are slippery and care should be taken when one is in a bathtub.” Id. at 814.

Similarly, in Churchwell, a motel guest fell and sustained injuries while taking a shower in his room. Churchwell, 1998 WL 134329, at * 1 (Appellee App. 34-36.) In his complaint, the guest alleged that the motel breached its duty of ordinary care by “failing to provide skid strips, hand-holds, or grab bars” Id. The court rejected this argument, holding that the “slippery condition” of the bathtub was open and obvious and that “[i]t is common knowledge that a bathtub surface becomes slippery when water and soap are applied. ‘This fact is known to every person who has ever taken a bath.’” Churchwell, 1998 WL 134329, at * 3 (quotations omitted) (Appellee App. 34-36.)

In the present case, Wotzka acted just as the hotel guests in Kutz and Churchwell. Like the hotel guests in those cases, Wotzka slipped and fell while in his hotel shower. See Kutz, 377 S.E.2d at 812; Churchwell, 1998 WL 134329, at * 1 (Appellee App. 34-36.) Wotzka also used soap during his shower, as had the guest in Kutz. See Kutz, 377 S.E.2d at 812. As the District Court noted in its dismissal of Wotzka’s claims, Wotzka was further aware that showers are wet and slippery and that soap makes wet surfaces slippery, confirming the principal announced in Churchwell that “[i]t is common knowledge that a bathtub surface becomes slippery when water and soap are applied.” See Churchwell, 1998 WL 134329, at * 3 (Appellee App. 34-36.)

Further, Wotzka was equally aware of the inherent risks of slipperiness in showers, and specifically knew he must exercise caution while using the shower at the Radisson. The record shows that Wotzka knew showers at hotels varied from those at his home and therefore knew he needed to exercise caution. Prior to his 2004 accident, Wotzka was able to shower without incident at every location he visited despite variations between showers. The District Court therefore properly held, as in Kutz and Churchwell, that it is a matter of common knowledge that shower and bathtub surfaces become slippery when wet. See Kutz, 377 S.E.2d at 813; Churchwell, 1998 WL 134329, at * 3 (Appellee App. 34-36.)

Because the District Court held that it is “common knowledge” that showers, bathtubs and soap are slippery such that a potential for danger exists, it likewise properly determined that there is no duty on the part of hotel to take extra steps to protect guests in the shower bathtub context. See id. As such, the Radisson owed Wotzka no extra duty with regard to the shower bathtub, and the Radisson respectfully requests that this Court affirm the District Court’s dismissal of Wotzka’s claims against it.

II. The District Court Properly Held That the Radisson Had No Duty To Protect Wotzka From Water and Soap On the Shower Floor, Or Take Extra Steps To Protect Wotzka From the Obvious Danger of a Shower.

After determining that the slippery nature of a shower was a matter of common knowledge of which Wotzka was aware, the District Court properly determined that the Radisson owed no duties to take any extra steps, such as providing non-skid strips or bars, to protect guests from the obvious danger of a shower.

North Dakota does not allow a plaintiff to recover where he fully appreciates a known and obvious risk. Kittock v. Anderson, 203 N.W.2d 522, 524-25 (N.D. 1973). Courts likewise recognizes that certain activities carry with them inherent risks. Filler v. Stenvick, 56 N.W.2d

798, 801-02 (N.D. 1953) (holding that ruts or gouges in the surface of an ice rink are inherent risks in the sport of skating of which everyone is aware). Further, a person must also “give his surroundings the attention which a standard reasonable person would consider necessary under the circumstances,” and “must use such senses as he has to discover what is readily apparent.” Collette v. Clausen, 2003 ND 129, ¶ 29, 667 N.W.2d 617, 626 (citations omitted).

In Kittock, a farm worker brought suit against his employer for injuries he suffered when he slipped and fell in jumping from the rear end of a grain truck, which he regularly swept out in the course of his employment. Kittock, 203 N.W.2d at 523-24. As he had done on several prior occasions, he got into the truck by stepping onto a tire, then onto a ledge and then swinging himself over the edge of the box. Id. at 524. On this particular day, however, he lost his footing and fell to the ground. Id.

The farm worker argued that his employer was negligent in that it should have provided him with a ladder. Id. The court rejected the farm worker’s arguments, noting that even assuming negligence, the farm worker, a practiced farm hand, was fully aware of the danger involved in his method of getting in and out of the grain truck. Id. at 524-25. He also admitted that he knew he had to be careful getting in and out of the box, and that he was aware of the danger of slipping. Id. at 525. Thus, the court held that reasonable persons could draw but one conclusion from the evidence as a matter of law: the farm worker was aware of the risks of his actions, fully appreciated the risk, and placed himself in danger despite the obviousness of the danger. Id.

Moreover, North Dakota recognizes that certain activities carry with them inherent risks. In Filler, the Supreme Court of North Dakota affirmed the lower court’s grant of judgment notwithstanding the verdict in favor of the defendants on a negligence claim. Filler, 56 N.W.2d at 798. The plaintiff in Filler, the guardian of a thirteen-year-old boy who broke his leg after his

skate became lodged in a crack in the ice of an outdoor skating rink, alleged that the skating rink owners negligently failed to maintain the rink in a safe condition and “knew or should have known [of] the condition” of the rink. Id. at 799. The Court, however, determined that the “plaintiff’s fall and injury was caused solely by the crack in the ice,” and further that:

It is well known, even to skaters of limited experience, that the surface of an ice rink becomes rutted, gouged and grooved in a short time. The surface of an ice skating rink is subject to the continuous, grueling punishment by the vigorous action of sharp, steel blades. These conditions are inherent in the sport of skating and are known to everyone participating therein.

Id. at 801.

With respect to the hotel shower specifically, courts in other jurisdictions, as well as the District Court below, have held that since conditions in showers are well known and obvious, hotels have no extra duty to guests to provide non-skid strips or bars in a hotel shower. In Churchwell, the court determined that no duty on the part of the motel existed with respect to the guest and his shower because the “slippery condition” of the bathtub was open and obvious. Churchwell, 1998 WL 134329, at * 3 (Appellee App. 34-36.) Moreover, the court noted that the guest failed to identify any statutory or common law duty “that would have required [the motel] to install grab bars, skid strips, or hand-holds in the bathtub.” Id.

Courts in Massachusetts have reached a similar conclusion. In LaBart v. Hotel Vendome Corp., 213 F. Supp. 958, 958 (D. Mass. 1963), a guest of a hotel slipped and fell while taking a shower in her room. The guest alleged that the hotel was negligent in failing to provide a bathmat in the “smooth and shiny” hotel tub. Id. The court rejected this argument, and granted summary judgment in favor of the hotel, holding that:

Even if it be assumed that the absence of a bath mat created a condition which was dangerous to a person situated as was the plaintiff in the instant case, the Massachusetts decisions make it clear that there is no duty resting upon defendant

to warn plaintiff of a condition which was open and obvious to anyone using ordinary diligence.

Id. at 959 (citations omitted).

Most recently, in Dille v. Renaissance Hotel Mgmt. Co., No. 4:10CV1983 TIA, 2012 WL 2396666, at *1 (E.D. Mo. June 25, 2012) (Appellee App. 37-40), a hotel guest slipped and fell in a bathtub at a hotel, and then sued the hotel, alleging the hotel was negligent “in failing to place grab bars in the bathtub; failing to place anti-slip measures inside the bathtub; and failing to warn guests of the slippery conditions.” Id. at *2 (Appellee App. 37-40.) The District Court for the Eastern District of Missouri noted that courts hold in bathroom slip-and-fall cases that “plaintiffs must be charged with the knowledge that bathtubs are slippery when wet.” Id. at *3 (Appellee App. 37-40.) The court granted the hotel’s motion for summary judgment, holding that “because the potential danger created when a bathtub becomes wet is not hidden or difficult to ascertain, there is no duty, as a matter of law, to provide precautions against such conditions.” Id. (Appellee App. 37-40.)

In the present case, as the District Court accurately concluded, the Radisson had no duty to provide extra protection to Wotzka for a wet and soapy shower floor, which is Wotzka’s only allegation in this case. Such an allegation is directly contrary to the holdings of courts across the country. See id.

Further, Wotzka has a lifetime of experience with showers and admitted he knew showers were wet and slippery, such that he fully appreciated the obvious risk. See Kittock, 203 N.W.2d at 524. Wotzka also knew he needed to exercise caution while showering. See generally id. Even more telling is that Wotzka admitted that he was aware water was accumulating while he showered and that he was in control of the amount of water and soap he used, indicating, as the

District Court observed, that the condition of the shower was open and obvious. See LaBart, 213 F. Supp. at 959. Thus, summary judgment in favor of the Radisson was proper as reasonable persons could draw but one conclusion from the evidence: the Radisson had no duty to protect Wotzka from the known and obvious hazard posed by the shower bathtub as a matter of law.

III. The District Court Correctly Held That the Radisson Did Not Breach Any Duty To Wotzka as the Shower Was Clean and Free Of Foreign Substances and Defects.

In North Dakota, hotels are not held to any higher standard and must exercise ordinary care with respect to its guests. Reid, 174 N.W. at 71 (holding that a hotel must use ordinary care with respect to amenities used by guests). As a matter of law, the Radisson owed no heightened duty to Wotzka to protect him from a known and obvious hazard of water and/or soap on the floor of the hotel shower. Courts across the country, as well as the Burleigh County District Court, have held that hotels have no extra duty to install bath mats or protective devices in rented rooms due to the known as well as open and obvious nature of the risk posed by water and soap in a shower.

As the District Court correctly noted, the Radisson satisfied its duty of ordinary care with respect to Wotzka. See generally Reid, 174 N.W. 71. Wotzka presented no evidence to indicate that there was any defect with respect to the shower in his hotel room. See Fast, 2004 ND 111, ¶ 12, 680 N.W.2d at 270 (holding that state's removal of snow from a sidewalk did not create an unreasonably dangerous condition where plaintiff failed to allege existence of a design defect with respect to the sidewalk). Photographs taken by Wotzka's wife immediately after his accident indicate that the shower was clean, free of foreign substances, and free of surface defects.

Simply put, the Radisson exercised ordinary care with respect to its premises and Wotzka's use of his hotel room shower. As the District Court observed, water and soap are ordinary risks associated with showers and bathtubs, which is routinely recognized by courts across the country. In addition, Wotzka admitted that he observed the water in the shower and was in control of both the amount of water and amount of soap used. Wotzka also had independent knowledge that he needed to exercise caution while showering. Thus, the District Court correctly held that the Radisson owed no duty to Wotzka with respect to the obvious danger posed by the shower bathtub and moreover, did not breach any such duty.

CONCLUSION

For the foregoing reasons, the Radisson respectfully requests that the Supreme Court of North Dakota affirm the District Court's grant of summary judgment in favor of the Radisson and dismissal of all Wotzka's claims against it with prejudice.

BROWNSON & BALLOU, PLLP

Dated: October 18, 2012

By: Kristi K. Warner
Kristi K. Warner, Esq. (ND Lic. 05962)
225 South Sixth Street
Suite 4800
Minneapolis, MN 55402
(612) 332-4020
(612) 332-4025 FAX
Attorneys for Minndakota Limited Partnership,
d/b/a Radisson Hotel Bismarck

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Defendant/Appellee, in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, including words in the table of contents, table of authorities, signature block, certificate of compliance, and certificate of service totals 4,749.

Dated this 18th day of October, 2012

By:

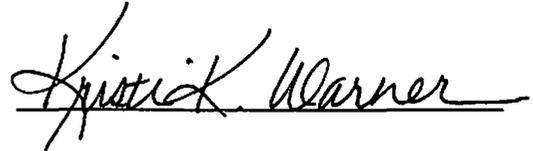
Kristi K. Warner, Esq. (ND Lic. 05962)
225 South Sixth Street
Suite 4800
Minneapolis, MN 55402

CERTIFICATE OF SERVICE

I hereby certify that I completed service of a true and correct copy of the Brief of Appellee and accompanying Appendix, via U.S. Mail, on this 16th day of October, 2012, on:

Michael R. Hoffman
Attorney at Law
P.O. Box 1056
Bismarck, ND 58502-1056

and that I further caused seven bound copies, one original copy, and one electronic copy of the same to be served on the North Dakota Supreme Court on this 16th day of October, 2012.

A handwritten signature in cursive script that reads "Kristi K. Warner". The signature is written in black ink and is positioned above a horizontal line.

Kristi K. Warner