Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-058

SEPTEMBER TERM, 2020

Rebecca Parker* v. University of Vermont Medical Center	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 739-8-17 Cncv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

In this slip-and-fall negligence action, plaintiff appeals from the civil division's grant of summary judgment to defendant, the University of Vermont Medical Center (the hospital). We affirm.

The material undisputed facts in this case are as follows. On August 19, 2014, plaintiff went to the hospital to visit her ailing mother. At approximately 1:00 in the afternoon, she slipped on puddle of water and fell, injuring herself, after entering a women's bathroom near the hospital's emergency room. The incident was reported to a hospital security officer, who filed a report. Plaintiff was examined and treated at the hospital before being released with diagnoses of lower-leg muscle strain and contusion to the left knee.

On August 14, 2017, plaintiff filed a complaint against the hospital, asserting a single count of negligence based on premises liability. In response to plaintiff's discovery requests, the hospital produced a document indicating that at the time of the accident the bathroom in question was scheduled to be cleaned, including wet-mopped, daily at 7:30 a.m. and 1:10 p.m. The hospital also stated that it had no contact information for its former security officer who filled out the incident report and that, despite its best efforts, it was unable to identify the individual responsible for cleaning the bathroom over three years earlier.

In January 2020, the civil division granted the hospital's motion for summary judgment, which plaintiff opposed. The court ruled that plaintiff failed to demonstrate that it could prove any of the elements of its negligence action. "We review a trial court's decision on a motion for summary judgment without deference, using the same standard as the trial court." Bernasconi v. City of Barre, 2019 VT 6, ¶ 10, 209 Vt. 419. "Summary judgment is appropriate when, construing the facts in the light most favorable to the nonmoving party and resolving reasonable doubts and

inferences in the nonmoving party's favor, there are no genuine issues of material fact and judgment is appropriate as a matter of law." Id. (citing V.R.C.P. 56(a)).

According to plaintiff, a dispute of material fact as to whether the hospital breached its duty to maintain a reasonably safe premises was established by presumptions—absent hospital records demonstrating that the bathroom in question was properly maintained and viewing the known facts most favorably to her—that the water on the bathroom's floor existed long enough to give the hospital constructive notice of the danger to those using the bathroom and that the hospital did not maintain the bathroom in a reasonable manner to protect potentially vulnerable users. Plaintiff cites the near impossibility of proving constructive notice without such records, the absence of which plaintiff refers to as "akin to spoliation of evidence." We find no merit to this argument.

"To establish negligence in a premises-liability case, as in any other negligence action, the plaintiff must show that the defendant owed the plaintiff a legal duty, the defendant breached that duty, the plaintiff suffered actual injury, and there is a causal link between the breach and injury." Id. ¶ 11. "The plaintiff bears the burden of producing evidence sufficient for a reasonable jury to conclude that the defendant's negligent action or omission caused the plaintiff harm." Id. "While causation is ordinarily a question for the jury, where a reasonable jury could not find that the defendant caused the plaintiff harm, a court must award judgment as a matter of law." Id. ¶ 12; see also Collins v. Thomas, 2007 VT 92, ¶ 8, 182 Vt. 250 ("Although proximate cause ordinarily is characterized as a jury issue, it may be decided as a matter of law where the proof is so clear that reasonable minds . . . would construe the facts and circumstances one way." (quotations omitted)).

The hospital did not bear the burden of persuasion at trial as to the elements of plaintiff's negligence claim. Accordingly, as the moving party seeking summary judgment, it could satisfy its burden of production by showing that the plaintiff would not be able to produce evidence to support the elements of her claim. See Ross v. Times Mirror, Inc., 164 Vt. 13, 18 (1995). The burden would then shift to plaintiff "to persuade the court that there is a triable issue of fact." Id. In this case, although the hospital plainly had a duty to properly maintain its bathrooms under a reasonable standard of care considering all the circumstances, see Demag v. Better Power Equip., Inc., 2014 VT 78, ¶ 26, 197 Vt. 176 (stating general standard of care for both licensees and invitees with respect to premises liability), plaintiff cannot meet the other elements of its negligence claim. Because plaintiff failed to demonstrate that she could produce evidence of how long the water had been on the bathroom floor or when the hospital had become aware of the water on the bathroom floor, she cannot satisfy her burden of proving that the hospital breached its duty, even assuming without deciding that the hospital owed a duty to plaintiff, and thereby proximately caused her fall. See, e.g., Bernasconi, 2019 VT 6, ¶¶ 12-14 (upholding grant of summary judgment for defendant where plaintiff would be unable to satisfy his burden of proving proximate cause because he could not demonstrate he would be able to offer evidence as to how long hole in which plaintiff fell had existed or how long defendant had been aware of hole); Maciejko v. Lunenberg Fire Dist. No. 2, 171 Vt. 542, 543 (2000) (mem.) (concluding that plaintiffs failed to prove defendant caused sewage in their basement where they did not show how long obstruction in sewage line had

existed). Plaintiff cannot avoid summary judgment by speculating that the hospital failed either to maintain the bathroom according to its schedule or to clean an obvious hazard. See Bernasconi, 2019 VT 6, ¶ 15 (stating that evidence supporting "only conjecture, surmise, or suspicion that [defendant's] negligence caused plaintiff's injury . . . is legally insufficient" (quotation omitted)).

In plaintiff's view, the hospital's failure to produce records demonstrating that the bathroom was cleaned at a certain time or to locate its former security officer or identify the person who was responsible for cleaning the bathroom in question more than three years earlier is akin to spoliation of evidence. But plaintiff cites neither any legal basis for the hospital to keep such records nor any evidence of spoliation. See Blanchard v. Goodyear Tire & Rubber, 2011 VT 85, ¶ 18, 190 Vt. 577 (mem.).

Finally, we reject plaintiff's brief argument that we should adopt in this case our reasoning in Forcier v. Grand Union Stores, Inc., 128 Vt. 389 (1970), and Malaney v. Hannaford Bros. Co., 2004 VT 76, 177 Vt. 123, two slip-and-fall cases involving self-service operations in grocery stores. In Forcier, the plaintiff was injured after slipping on a banana peel in the produce section of a grocery store. We concluded that where the record was devoid of any evidence that the defendant took any precautions by way of inspections and sweeping the floor to avoid hazards created by debris on the floor near self-service operations, the plaintiff had made out a prima facie case of negligence and it was for the jury to determine whether the defendant had constructive notice of the hazard that resulted in the plaintiff's injury. Forcier, 128 Vt. at 394-95. In Malaney, the plaintiff was injured after slipping on grapes that had fallen to the floor next to a grape display at a grocery store. In reversing a jury verdict based on an erroneous trial court instruction, we reiterated with respect to premises-liability cases involving self-service operations, that defendants have a burden of production to demonstrate they had taken reasonable steps to address a known hazard of debris falling to the floor from self-service displays. Malaney, 2004 VT 76, ¶¶ 21-23. We emphasized, however, that defendants' burden in such cases was one of production only, and that the ultimate burden of proving negligence remained with plaintiffs. Id. ¶ 23.

We need not consider here whether Demag, in which we abolished distinctions between licensees and invitees with respect to the standard of care in premises liability cases, 2014 VT 78, ¶ 26, effectively overruled Forcier and Malaney. We note, however, as we stated in Malaney, that the question for the jury in such cases is "simply whether defendant had taken reasonable steps to protect its customers" from a "foreseeable hazard," given all the circumstances. 2004 VT 76, ¶ 24; cf. Demag, 2014 VT 78, ¶ 26 (adopting standard for defendants in premises liability cases with respect to both licensees and invitees as "reasonable care in all the circumstances" (quotation omitted)).

This case, of course, does not involve a retail establishment with self-service operations. Thus, the circumstances and reasoning set forth in Forcier and Melaney are not particularly helpful to our analysis here. In Forcier, as noted, the defendant made no showing that it had taken any precautions to deal with a known hazard, given its self-service operations. In Malaney, the defendant did not appeal the trial court's denial of its motion for a directed verdict based on the plaintiff's failure to show how long the hazard had existed. Here, as explained above, plaintiff

failed to demonstrate that she could produce any evidence to support the elements of breach of duty and causation with respect to her premises-liability claim.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice