

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RADHIA HAJ-MABROUK, *et al.*

v.

WAL-MART STORES EAST, LLP, *et al.*

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Civil No. JFM-08-1740

MEMORANDUM

Plaintiff Radhia Haj-Nabrouk, individually and as parent and next friend of Lofti Haj-Mabrouk, has brought suit against defendants Wal-Mart Stores East, LLP and Wal-Mart Stores, Inc. for negligence stemming from a slip-and-fall incident in a Wal-Mart store.¹ Now pending is defendant Wal-Mart Stores, Inc.'s motion for summary judgment. The issues have been fully briefed and no oral hearing is necessary. Defendant's motion will be granted.

I.

On August 7, 2005, plaintiff Radhia Haj-Nabrouk ("Mrs. Haj-Nabrouk"), her husband Moez Haj-Nabrouk ("Mr. Haj-Nabrouk"), and the couple's daughter visited Wal-Mart Store Number 1674 in Hagerstown, Maryland, to purchase groceries.² After entering the store, Mrs. Haj-Nabrouk, then eight months pregnant, was walking down the store's main aisle toward a clothing rack when she slipped and fell backward. The legs of the clothing rack hit Mrs. Haj-

¹Haj-Mabrouk initially filed suit in the Circuit Court for Washington County, Maryland. The case was removed to this court on July 3, 2008. This court has diversity jurisdiction under 28 U.S.C. § 1332.

²The facts are viewed in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Nabrouk when she fell. After the fall, Mrs. Haj-Nabrouk's clothes were wet, and she noticed a large wet area with dirt in it. She saw many footprints throughout the wet area, which she described as "more than" those made by her or her husband. Her husband, who had been pushing a cart several feet in front of her with their daughter, described the area, which he saw after her fall, as about three feet wide with a "black stain" or dirt in it. He saw footprints and track marks from cart wheels through and around the wet area. Prior to the fall, neither Mr. Haj-Nabrouk nor Mrs. Haj-Nabrouk saw any substance on the floor, and they do not know how or when the substance got there. After the fall, Mrs. Haj-Nabrouk was taken to Washington County Hospital where she delivered her child, Lofti, via emergency C-section.

A video recording from the store's surveillance system captured the area immediately above the site of the spill and the fall, but not the actual spill or fall. This recording was submitted as evidence, and neither party disputes its accuracy. Near the beginning of the video, which starts approximately six minutes before plaintiff's fall, Wal-Mart Assistant Manager Bradley Leydig walks from the front of the store toward the area of the fall and moves a motorized cart located near the site of the fall. He slightly bumps the motorized cart into a non-motorized cart. After the cart is moved, in the span of the four minutes before plaintiff's fall, at least thirty customers and several Wal-Mart employees walk or push carts near the area of the fall. Mr. Leydig appears again in the video before plaintiff's fall, but in a different area of the store. Shortly before plaintiff's fall, another customer appears to slip in the same area where plaintiff soon falls, but this customer regains balance. Two seconds after plaintiff appears on the video, her fall occurs off-screen; the video captures only her feet at the bottom of the screen as she falls.

II.

A motion for summary judgment should be granted when the record establishes that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The substantive law of the cause of action determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine and summary judgment is inappropriate “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* In analyzing whether a genuine issue of material fact exists, the evidence and reasonable inferences from that evidence must be viewed in the light most favorable to the nonmoving party. *Id.* at 255. The court does not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). However, “[i]t is the ‘affirmative obligation of the trial judge to prevent factually unsupported claims and defenses from proceeding to trial.’” *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 526 (4th Cir. 2003) (quoting *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993)).

Under Maryland law, a business proprietor owes a duty to its invitees “to exercise ordinary care to keep the premises in a reasonably safe condition, and will be liable for injuries sustained in consequence of a failure to do so.” *Rawls v. Hochschild, Kohn & Co.*, 113 A.2d 405, 407 (Md. 1955).³ However, it is well-established that a “store operator . . . is not the

³The Maryland Court of Appeals has adopted the following formulation for the duty a private landowner owes to its invitees:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees,

insurer of the invitee's safety," and "the burden is upon the customer to show that the proprietor created the dangerous condition or had actual or constructive knowledge of its existence' prior to the invitee's injury." *Maans v. Giant of Maryland, L.L.C.*, 871 A.2d 627, 631 (Md. Ct. Spec. App. 2005) (quoting *Lexington Mkt. Auth. v. Zappala*, 197 A.2d 147, 148 (Md. 1964)).

To show that the proprietor created the condition, the plaintiff must show how the condition was brought to the place of injury. *See Myers v. TGI Friday's, Inc.*, No. JFM-07-333, 2007 WL 4097498, at *5 (D. Md. Nov. 9, 2007) (unpublished). If the plaintiff cannot provide evidence that the proprietor caused the condition, the plaintiff must show that the proprietor had actual or constructive knowledge of the condition. *See id.*

When constructive notice is alleged, "[w]hether there has been sufficient time for a business proprietor to discover, cure, or clean up a dangerous condition depends on the circumstances surrounding the fall." *Rehn v. Westfield Am.*, 837 A.2d 981, 984 (Md. Ct. Spec. App. 2003). To establish constructive knowledge, "it is necessary for the plaintiff to show how long the dangerous condition has existed." *Joseph v. Bozzuto Mgmt. Co.*, 918 A.2d 1230, 1236 (Md. Ct. Spec. App. 2007); *see also Moulden v. Greenbelt Consumer Servs., Inc.*, 210 A.2d 724, 726 (Md. 1965) (affirming directed verdict in defendant's favor in part because there was no evidence as to when the string bean on which plaintiff slipped had appeared on the floor); *Lexington Mkt. Auth.*, 197 A.2d at 148 (finding that plaintiff had not made a case of constructive

and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965); *see Maans v. Giant of Maryland, L.L.C.*, 871 A.2d 627, 630-31 (Md. Ct. Spec. App. 2005).

notice because the oil or grease on which plaintiff slipped “may have leaked . . . only a few moments before she [slipped]”); *Rawls v. Hochschild, Kohn & Co.*, 113 A.2d 401, 410 (Md. 1955) (affirming judgment in favor of defendant because, “even assuming that there was some water on the stairway before plaintiff fell, there was no evidence to indicate how it had been brought there or how long it had been there”).

III.

Wal-Mart asserts that plaintiffs have failed to establish a prima facie case of negligence because there is no evidence that Wal-Mart created the allegedly negligent condition, Wal-Mart knew of the condition prior to the accident, or the condition had remained on the floor for a length of time such that Wal-Mart was on constructive notice of the condition. I will address each in turn.

1. *Caused by Proprietor*

In an attempt to show that the spill was caused by a Wal-Mart employee, plaintiffs assert that “[c]areful review of the video tape shows that from the time Mr. Leydig moves the motorized cart until the time of the fall, there are no customers seen in the area carrying anything that might have caused the spill.” (Pls.’ Response to Def.’s Mot. for Summ. J. [“Pls.’ Response”] 7.) But any assertion that the spill occurred when Mr. Leydig moved the cart is pure speculation and not supported by the video or any other evidence. Nothing in the video indicates that the move of the motorized cart might have caused the spill, as the spill is located off-camera. Even construing the video in the light most favorable to plaintiffs, no reasonable juror could find that the video provides any indication of who caused the spill or when the spill occurred.

2. *Actual Knowledge*

Plaintiffs argue, based on the video, that only two reasonable inferences can be drawn as to the cause of the spill: either Mr. Leydig caused the spill when he moved the motorized cart (a purely speculative argument discussed above), or the spill already existed when Mr. Leydig moved the cart and Mr. Leydig simply ignored the spill, such that Mr. Leydig was on actual notice of the spill. (Pls.' Response 8.) However, this latter assertion is too speculative to support an argument that Wal-Mart was on actual notice of the spill. The video provides no evidence on this point, and is wholly unhelpful in making this determination.

3. *Constructive Knowledge*

Plaintiffs argue that it is reasonable to infer from the footprints, track marks, and dirt from shoes in the wet area on the floor, that the spill was present for a length of time sufficient for Wal-Mart to be on constructive notice. However, as plaintiffs themselves state and as confirmed by the video, the spill and the fall occurred in what is referred to by Wal-Mart employees as "action alley" because of the high-traffic nature of the aisle. As noted above, the video shows at least thirty customers walking through the area, some wheeling store carts, in the four minutes preceding plaintiff's fall. Footprints and wheel tracks could accumulate quickly given this environment, and are thus not helpful in determining how long the spill was on the floor.

Plaintiffs are correct that about fifteen seconds before plaintiff's fall, another customer appears to slip in the same area as plaintiff. A reasonable jury could assume that the spill existed at that time. However, fifteen seconds is hardly sufficient time to establish constructive knowledge. Because plaintiffs present no credible evidence as to "how long the dangerous condition ha[d] existed," *Joseph*, 918 A.2d at 1236, this claim fails as a matter of law. *See*

Moulden, 210 A.2d at 726 (quoting *Orum v. Safeway Stores, Inc.*, 138 A.2d 665, 666 (D.C. 1958)) (“There being no evidence as to how long the bean had been on the floor, and it being possible that another customer may have dropped it just before appellant stepped on it, any finding by a jury that the employees of the store saw the bean or should have seen it in time to remove it or warn appellant, would rest on pure conjecture and not on reasonable inference.”).

Plaintiffs also claim that constructive notice can be inferred because several Wal-Mart employees walked by the area prior to the fall, close enough to see the spill had they been inspecting the floors as they are trained. As recognized by plaintiffs, these employees “never looked at the floor.” (Pls.’ Response 10 n.5.) Plaintiffs argue that had the employees done so, they would have seen the spill. Plaintiffs point to Wal-Mart’s policy of requiring employees to keep an eye out for spills as they walk through the aisles. According to plaintiffs, the “fact that employees were required to inspect the floor whenever they moved about the store is relevant to the issue of constructive notice.” (Pls.’ Response 12 n.8.)

I disagree. Maryland courts have long held that it would be unreasonable to impose a duty on proprietors to continuously inspect their premises. See *Lexington Mkt. Auth.*, 197 A.2d at 148 (finding that “it would be unreasonable to hold that it is [the proprietor’s] duty to continuously inspect and sand down any and all leakage as soon as it occurs, even if we assume that periodic inspections are necessary”); *Moulden*, 210 A.2d at 726 (stating that it would be “unreasonable to hold that it is [a proprietor’s] duty to conduct a continuous inspection tour of the store”). Moreover, it would be impossible to infer, without engaging in pure speculation, that the spill even existed when the employees walked by or that they could have seen the spill.⁴

⁴I note that the employees captured in the surveillance video in the minutes prior to the fall walked *near* the aisle where the accident occurred, but no employee is shown actually

The evidence presented by plaintiff as to Wal-Mart's negligence "is, in sum, no more than mere surmise, which is insufficient as a matter of law to raise a triable issue." *Ronk v. Corner Kick, Inc.*, 850 F. Supp. 369, 371 (D. Md. 1994). "A mere surmise that there may have been negligence will not justify the court in permitting the case to go to the jury." *Moulden*, 210 A.2d at 726.

Because no reasonable jury could find that Wal-Mart created the condition or had actual or constructive knowledge of its existence, defendant's motion for summary judgment will be granted. A separate order implementing this ruling follows.

June 30, 2009

/s/ _____
J. Frederick Motz
United States District Judge

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Civil No. JFM-08-1740

ORDER

For the reasons stated in the accompanying Memorandum, it is, this 30th day of June
2009,

ORDERED:

1. Defendant's motion for summary judgment is granted; and
2. Judgment is entered in favor of defendants against plaintiffs.

/s/

J. Frederick Motz
United States District Judge