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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

NICOLE TRACY HARRELL

VERSUS

WAL-MART STORES EAST, INC.

CIVIL ACTION

NUMBER 00-916-B-1

RULING ON MOTION FOR SUMMARY JUDGMENT

This matter is before the court on the motion of defendant Wal-Mart Stores, Inc. for summary judgment. Record document number 15. The motion is opposed.

Plaintiff Nicole Tracy Harrell filed suit in state court against defendant Wal-Mart Stores East, Inc. (Wal-Mart) alleging that she was severely injured as the result of a fall on November 26, 1999, in one of the defendant's stores. Specifically, the plaintiff alleged that she slipped "on an unknown foreign substance"[1] and was severely injured. Plaintiff alleged that she suffered contusions and a sprain, as well as severe injuries to her back and spine resulting in a lumbar diskectomy.

Defendant Wal-Mart removed the case to this court on the basis of diversity jurisdiction under 28 U.S.C. §1332(a). Defendant Wal-Mart now moves for summary judgment on the ground that the plaintiff cannot meet her burden of proof under state law. Specifically, the defendant asserted that the plaintiff cannot

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[1] Record document number 1, Petition for Damages, ¶6.

satisfy the requirement of LSA-R.S. 9:2800.6 that she prove Wal-Mart either created or had actual or constructive notice of the condition which caused the plaintiff's fall prior to its occurrence, and that Wal-Mart failed to exercise reasonable care.

In International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1263 (5th Cir. 1991) cert. denied, 502 U.S. 1059, 112 S.Ct. 936 (1992), the Fifth Circuit Court of Appeals summarized the procedural framework of summary judgment under Rule 56. Summary judgment is appropriate when the moving party, in a properly supported motion, demonstrates that there is "no genuine issue of material fact," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510 (1986), and that it is entitled to judgment in its favor as a matter of law. Fed.R.Civ.P. 56(c). Confronted with such a motion, the nonmoving party must direct the court's attention to evidence in the record which demonstrates that it can satisfy a "fair-minded jury" that it is entitled to verdict in its favor. Anderson, 477 U.S. at 252, 106 S.Ct. at 2512. This can be accomplished by tendering affidavits, depositions, and other materials which provided evidentiary support for its claim. The nonmoving party cannot rest on the allegations in its complaint. Fed.R.Civ.P. 56(e).

Where the moving party bears the burden of proof at trial, it must come forward with evidence which would "entitle it to a directed verdict if the evidence went uncontroverted at trial."

Golden Rule Ins. Co. v. Lease, 755 F.Supp. 948, 951 (D.Colo. 1991); cf. Anderson, 477 U.S. at 252, 106 S.Ct. at 2512 ("The judge's inquiry, therefore, unavoidably asks . . . 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.'").

The substantive law identifies which facts are material. Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir. 1994), cert. denied, 513 U.S. 871, 115 S.Ct. 195 (1994). In this case, the court must apply LSA-R.S. 9:2800.6. This statute provides, in subsection (B), as follows:

> In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as the result of an injury, death or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following:
>
> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.
>
> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.
>
> (3) The merchant failed to exercise reasonable care. In determining reasonable care, the absence of a written or verbal uniform clean up or safety procedure is insufficient, alone, to prove failure to exercise reasonable care.

Subsection C(1) provides as follows:

> "Constructive notice" means the claimant has proven that the condition existed for such a period of time that

> it would have been discovered if the merchant had exercised reasonable care. The presence of an employee of the merchant in the vicinity in which the condition exists does not, alone, constitute constructive notice, unless it is shown that the employee knew, or in the exercise of reasonable care should have known, of the condition.

Because constructive notice is defined to include a mandatory, temporal element, the plaintiff must come forward with positive evidence showing that the condition which caused her to fall existed for some period of time, and that such time was sufficient to place the merchant defendant on notice of its existence. White v. Wal-Mart Stores, Inc., 97-3093 (La. 9/9/97), 699 So.2d 1081. The defendant merchant does not have to make a positive showing of the absence of the existence of the condition prior to the fall. Id., at 1084.

Relying on a statement of uncontested facts derived almost exclusively from the plaintiff's deposition,[2] defendant Wal-Mart argued that the plaintiff cannot possibly meet her burden of proof under state law. According to the statement of uncontested facts, and confirmed by the plaintiff's own deposition,[3] she does not know whether there was anything on the floor that caused her to fall, did not feel her foot hit or step on anything, did not see what caused her to fall, and has no information suggesting what it was

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[2] Record document number 16, Statement of Uncontested Facts, Nos. 1-14.

[3] Record document number 17, memorandum in support, Exhibit B.

that caused her to fall. Even assuming there was something on the floor that caused her to fall, she had no idea how it got there, nor how long it may have been there before she fell. She has no information that an employee caused anything to be on the floor that may have caused her to fall.

Plaintiff opposed the motion with her own statement of contested facts,[4] a copy of the Report of Customer Incident,[5] a Customer Statement,[6] her own affidavit,[7] a list of claims by persons who allegedly slipped and fell at the same Wal-Mart Store during the three years prior to the plaintiff's accident,[8] the transcript of the recorded statement given by the plaintiff on December 9, 1999,[9] pages 56 and 57 from the plaintiff's deposition, pages 23 and 24 from the deposition of Donester Collins, Wal-Mart's answers to interrogatory numbers 11, 13, 14, and 15, and Wal-Mart's responses to request for production numbers 4-6. Additionally, the plaintiff asserted that discovery is not yet completed. Specifically, plaintiff has not deposed Will Ready, the person who prepared the Report of Customer Incident, and two Wal-Mart

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[4] Record document number 19.

[5] Record document number 18, Exhibit 1.

[6] Id., Exhibit 2.

[7] Id., Exhibit 3.

[8] Id., Exhibit 4.

[9] Id., Exhibit 5.

employees, Tammy Baggett and Pam Warren.

Insofar as the plaintiff argued that Wal-Mart's motion is premature, her argument is unconvincing. Rule 56(f), Federal Rules of Civil Procedure, provides as follows:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Plaintiff stated in her affidavit that she reported the incident to Wal-Mart employee Will Ready. Ready is the employee who prepared the Report of Customer Incident. Plaintiff asserted in her affidavit that she requested to take Ready's deposition on numerous occasions, but although Wal-Mart promised to produce him for a deposition it has not yet done so.[10] This statement is contradicted by the plaintiff's opposition memorandum, in which she asserted that counsel for Wal-Mart promised to produce Ready "as soon as they could locate him."[11] Plaintiff has offered no evidence that she made any independent efforts to locate Ready herself, and apparently the defendant has not been able to locate him either.

Regarding Wal-Mart employees Baggett and Warren, plaintiff's

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[10] Although the plaintiff stated that she made numerous requests to depose Ready, no evidence of such requests was submitted with her motion. Furthermore, it is highly unlikely that the plaintiff, personally, made these requests. More than likely, the requests were made by her attorney and so presumably there would be correspondence or other documentation of these requests.

[11] Record document number 18, opposition memorandum, p. 1.

affidavit does not mention either of them. Plaintiff's claim that Wal-Mart produced only those witnesses who are favorable--implying that other witnesses would offer testimony not favorable to Wal-Mart--is entirely unsupported. Plaintiff's statement in her memorandum that Baggett and Warren "may have information necessary to this case"[12] is nothing but speculation. Plaintiff's affidavit is not sufficient to support a continuance of the hearing on the defendant's motion.[13]

Plaintiff argued in her opposition memorandum that Wal-Mart employee Ready "determined that there was 'Coke' spilled on the floor at the time of the accident."[14] This characterization of the evidence is misleading. Ready wrote the word "Coke" in response to Item 11 on the form. That item asked for the "Name, address of manufacturer or supplier of product or machine in the accident." This is plainly not a statement by Ready that the plaintiff slipped in spilled Coca-Cola.

Nevertheless, assuming that the plaintiff did slip in a Coca-Cola spill, there is no evidence that a Wal-Mart employee either created it or had actual knowledge of it prior to the plaintiff's

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[12] Id.

[13] To obtain a continuance of a motion for summary judgment for discovery purposes, a party must set forth some statement to the court indicating why additional discovery is necessary and how it will create a genuine issue of material fact. Canady v. Bossier Parish School Board, 240 F.3d 437, 445 (5th Cir. 2001).

[14] Record document number 18, opposition memorandum, p. 4 and Exhibit 1.

fall. Regarding Wal-Mart's constructive knowledge of the Coca-Cola spill, plaintiff speculated that "[i]f the spill looked old, or had spread, or had hard ice present in the spill area, then a determination can be made about the age of the spill and the liability of the defendant."[15] Such speculation is not sufficient to create a disputed issue of material fact regarding Wal-Mart's constructive notice of the assumed spill.

Furthermore, the plaintiff's speculation about any spill is contradicted by her own recorded statement. She was asked specifically whether there was something on the floor. She answered "No."[16] She went on to tell the interviewer that she went back to the store three days later and observed in the area she fell "my black heel mark on the floor where I slipped."[17] She believed that there was a "very high resolution of wax that they put on the floor," and concluded that "I think I just slipped on that."[18] In other words, on December 8, 1999--barely two weeks after the accident--the plaintiff thought wax on the floor caused her to slip.

As noted previously, the plaintiff stated in her deposition that she did not feel her foot hit anything or step on anything, or

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[15] Id., p. 4.

[16] Id., Exhibit 5, p. 2.

[17] Id.

[18] Id.

slide out from under her.[19] Plaintiff did mention that she went back to the store four days later when she saw heel marks on the floor in the area where she fell, but she did not claim in her deposition that the fall was caused by wax on the floor.[20] Plaintiff now asserts in her affidavit that she fell as the result of a "slippery substance" on the floor,[21] and she also claims that "the shopper in front of her also slipped on the substance."[22]

These statements in the plaintiff's affidavit cannot be used to create a genuine dispute of material fact regarding the cause for the plaintiff's fall nor Wal-Mart's constructive notice of a dangerous substance on the floor. Plaintiff cannot without explanation contradict her sworn deposition testimony by submitting an affidavit offering another version of the incident.[23] But even if she could contradict her deposition testimony, the contradictory information in the affidavit simply does not even tend to show that the defendant had actual or constructive notice of the unidentified

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[19] Record document number 17, memorandum in support, Exhibit B, p. 59.

[20] Id., pp. 65-66.

[21] Record document number 18, opposition memorandum, Exhibit 3, ¶8.

[22] Id., ¶9.

[23] A nonmoving party may not manufacture a dispute of material fact to defeat summary judgment by using an affidavit that impeaches, without explanation, sworn testimony. S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 495-96 (5th Cir. 1996); Doe v. Dallas Ind. School Dist., 220 F.3d 380, 386 (5th Cir. 2000), cert. denied, ___ U.S. ___, 121 S.Ct. 766 (2001).

"slippery substance." [24]

As argued by the defendant, there is simply a complete absence of any evidence which could be used to satisfy the plaintiff's burden of proof under state law. She has no evidence of any condition which presented an unreasonable risk of harm to her. She has no evidence that Wal-Mart created the condition or had actual or constructive notice of the condition before she fell. Plaintiff has not shown that there is a genuine dispute as to these, or any other, material facts. Defendant Wal-Mart is entitled to summary judgment in its favor.

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[24] In ruling on a motion for summary judgment, factual controversies must be resolved in favor of the non-moving party, but only when there is an actual controversy, i.e., when both parties have submitted evidence of contradictory facts. In the absence of proof, the court does not assume that the non-moving party could or would prove the necessary facts. Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994); see, Lujan v. National Wildlife Federation, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188 (1990) (resolving actual disputes of material fact in favor of non-moving party "is a world apart from 'assuming' that general averments embrace the 'specific facts' needed to sustain the complaint").

It is undisputed that the plaintiff observed a shopper in front of her who looked "like she was going to slip," "like she was going to catch herself," or "just kind of jerked backwards." Record document number 17, memorandum in support, Exhibit B, pp. 58-59. Yet, the plaintiff did not observe any substance on the floor. Because the plaintiff's attention was directed to the shopper walking in front of her who almost slipped, a fairminded jury could readily and reasonably conclude that if there was any substance on the floor which might cause her to fall the plaintiff would have--or at least should have--seen it if she was exercising reasonable care.

In this case, the "critical evidence [of a substance on the floor] is so weak or tenuous...that it could not support a judgment in favor of the [plaintiff]." Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993).

Accordingly, the motion of defendant Wal-Mart Stores, Inc. for summary judgment is granted. Judgment will be rendered dismissing the plaintiff's claims.

Baton Rouge, Louisiana, July 20, 2001.

STEPHEN C. RIEDLINGER
UNITED STATES MAGISTRATE JUDGE