IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

LOYAL BENSON RUSHING and PAULETTE RUSHING,	)	
Plaintiffs,	)	
VS..	)	No. 01-1033
WAL-MART STORES, INC.,	)	
Defendant.	)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This personal injury action was filed by the plaintiffs, Loyal Benson Rushing and Paulette Rushing, against Wal-Mart Stores, Inc., in the Circuit Court of Henderson County, Tennessee. Defendant subsequently removed the action to this Court pursuant to 28 U.S.C. § 1441, on the basis of diversity of citizenship. 28 U.S.C. § 1332. Plaintiffs allege that Mr. Rushing was injured when he slipped and fell while shopping at a Wal-Mart located in Lexington, Tennessee. Before the Court is defendant's motion for summary judgment. Plaintiffs have responded to the motion.[1]

[1] The motion for summary judgment was filed on November 5, 2001. Pursuant to Local Rule 7.2(a)(2) and Fed. R. Civ. P. 6(e), a response was due within 33 days. However, plaintiffs' response was not filed until December 31, 2001. Nevertheless, the Court has considered the response in ruling on the motion.

Motions for summary judgment are governed by Fed. R. Civ. P. 56. If no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Fed. R. Civ. P. 56(c). The moving party may support the motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must go beyond the pleadings and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see also Celotex Corp., 477 U.S. at 323.

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). However, the court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter but only to determine whether there is a genuine issue for trial. Id. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v.

S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

The proof in the record shows that on January 7, 2000, plaintiffs went to the Lexington Wal-Mart store to shop. After they had been in the store for five or six minutes, Mr. Rushing decided to go to the men's restroom. The restroom is located at the back of the store, down a hall that extends from the layaway department. Also in the hallway, between layaway and the door to the men's restroom, is a water fountain. Mr. Rushing walked down the hallway to the restroom at approximately 11:50 a.m., and as he walked by the water fountain, he allegedly slipped in some water that was on the floor, falling and injuring himself. Mr. Rushing did not see the water before he fell, but stated that there was "quite a bit," that seemed to be scattered about. His sleeve and the rear of his pants were wet when he got up. Mrs. Rushing was not with Mr. Rushing when he fell, but arrived on the scene later. She stated that the water was spread out near the water fountain when she got to the area.

Under Tennessee law, the proprietor of a place of business owes customers a duty "to exercise reasonable care to keep the premises in a reasonably safe and suitable condition, including the duty of removing or warning against a dangerous condition . . . if the circumstances of time and place are such that by the exercise of reasonable care the proprietor should have become aware of such condition." Simmons v. Sears, Roebuck & Co., 713 S.W.2d 640, 641 (Tenn. 1986) (quoting Allison v. Blount Nat'l Bank, 390 S.W.2d 716, 718 (Tenn. Ct. App. 1965)); see also Self v. Wal-Mart Stores, Inc., 885 F.2d 336, 338

(6th Cir. 1989). However, "[a] merchant is not an insurer of the safety of its customers, and it is not to be presumed that the proprietor of a store . . . is instantly aware of all that transpires within its establishment." Hardesty v. Service Merch. Co., 953 S.W.2d 678, 681 (Tenn. Ct. App. 1997); see also Self, 885 F.2d at 339.

Before a proprietor can be held liable for an alleged breach of the duty of care, it must be shown either that the proprietor created the dangerous condition, or that the proprietor had actual or constructive knowledge of its existence prior to the accident. Trebing v. Fleming Companies, Inc., 40 S.W.3d 42, 46 (Tenn. Ct. App. 2000); Ogle v. Winn-Dixie Greenville, Inc., 919 S.W.2d 45, 47 (Tenn. Ct. App. 1995); Chambliss v. Shoney's, Inc., 742 S.W.2d 271, 273 (Tenn. Ct. App. 1987); Jones v. Zayre, Inc., 600 S.W.2d 730, 732 (Tenn. Ct. App. 1980).

In this case, plaintiffs have not shown that Wal-Mart created the dangerous condition in question, or had actual notice that there was water on the floor before Mr. Rushing fell. Although Mrs. Rushing speculated that the water fountain may have been leaking, there is no evidence in the record supporting that supposition. Jane Williams, a Wal-Mart cleaning/ maintenance associate, checked the bathrooms and the hallway for spills at approximately 11:00 a.m., and stated that there was no water on the floor at that time.[2] Thus, there is no

[2] In arguing that Wal-Mart did have notice, plaintiff points out that Ms. Williams testified that a "comb" was always kept under the water fountain for safety, "in case there's water there, somebody could see it, and then call me and get the spill up." (Williams Dep. at 20.) While the type of "comb" referred to was not further explored or explained, the Court notes that Ms. Williams went on to state unequivocably that it was just a precautionary measure, and that there had never been any water under the fountain before.

evidence in the record that any Wal-Mart employee had actual knowledge, prior to Mr. Rushing's fall, that there was water on the floor in that area.

Constructive notice can be established by showing that the dangerous condition had "existed for such a length of time that the defendant, in the exercise of reasonable care, should have become aware of such condition." Trebing, 40 S.W.3d at 46 (citing Simmons, 713 S.W.2d at 641). Alternatively, a plaintiff can show constructive notice by proving that the defendant's method of operation created a hazardous situation that is foreseeably harmful to others. Id. (citing Hale v. Blue Boar Cafeteria Co., 1980 WL 150173, *4 (Tenn. Ct. App. Feb. 21, 1980)).

This is clearly not a case falling under the Blue Boar rule regarding a defendant's chosen method of operation. Thus, it is the plaintiffs' burden to present some evidence that the water had been on the floor long enough that the defendant's employees should reasonably have become aware of it. However, Mr. Rushing testified that he had no idea how long the water had been on the floor prior to his fall, nor how it got there. Rita Holmes, who was working in layaway, was busy with customers and neither saw nor heard the accident. No customers or other Wal-Mart employees witnessed the fall. Jane Williams saw no water on the floor when she checked the area approximately fifty minutes prior to the incident. As stated, there is no evidence that the water fountain was leaking, or that it had leaked in the past.

There is simply no evidence in the record suggesting that the water in which Mr.

Rushing allegedly fell had been on the floor for such a length of time that Wal-Mart's employees reasonably should have been aware of it. It is entirely possible that someone splashed water out of the fountain, or tracked water out of the bathroom, only a few minutes before. Therefore, plaintiffs have failed to establish that Wal-Mart had constructive notice of the condition which allegedly caused Mr. Rushing's fall.

Plaintiffs argues that summary judgment would be premature because discovery in this case is still ongoing. Plaintiffs state that there are still persons with potential knowledge of the incident who have yet to be deposed, and that there may be videotapes from a security camera which have not been provided by the defendant. However, the deadline for depositions and document production set out in the scheduling order has passed. No extensions of time have been requested, and no motions to compel have been filed.[3] Thus, the Court concludes that summary judgment would not be premature.

The Court finds that no genuine issue of material fact exists and that the defendant is entitled to judgment as a matter of law. Therefore, defendant Wal-Mart's motion for summary judgment is GRANTED. Judgment will be entered accordingly.

IT IS SO ORDERED.

[3] The scheduling order requires that a motion to compel be filed within 45 days of a discovery default or challenged response unless an extension of time is granted; otherwise, any objections are waived.

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JAMES D. TODD
UNITED STATES DISTRICT JUDGE

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DATE