

being struck on the head and neck by merchandise that fell from a high storage shelf. He filed suit for damages against Lowe's in the Circuit Court of Wise County, Virginia. Lowe's removed the action to this court, where jurisdiction exists pursuant to diversity of citizenship and amount in controversy.¹ Following discovery, Lowe's filed the present motion for summary judgment, in which it contends that it is entitled to judgment as a matter of law because of the insufficiency of proof of its liability for the accident. The parties have briefed the issues and this opinion memorializes the court's decision made at the conclusion of the summary judgment hearing.

II

The facts of the case, either undisputed or where disputed, recited in the light most favorable to the nonmovant on the summary judgment record,² are as follows.

On the morning of April 26, 1999, the plaintiff Yates visited a Lowe's store in Wise, Virginia, accompanied by his wife and daughter. They shopped inside the store for about an hour, then pulled their van to the back of the store to load several pieces of tin roofing that they had purchased. The storage yard behind Lowe's is open to

¹ See 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2001).

² The parties have submitted deposition transcripts and photographs of the accident scene.

store customers who either can self-load their purchases or request the assistance of a Lowe's employee.

Yates was assisted by Barry Johnson, a yard loader employed by Lowe's, who directed him to the outdoor location where the tin roofing was stored. Four sets of cantilevers, or metal arms, projected from the side of a building to produce four levels, or "shelves," upon which building materials were stacked. The boxes of roofing were located on the second shelf, and boxes of siding were shelved on all of the levels, including the highest set of shelves, which was approximately twelve to fourteen feet above ground. (Altizer Dep. at 36-37.)

Due to the heavy rain that morning, Yates' wife and daughter remained in the van while Yates and Johnson loaded the tin roofing into the back of the van, which was parked parallel to the building. They were standing approximately five to eight feet from the front of the shelves. (Johnson Dep. at 15.) As they were carrying a piece of roofing to the back of the van,³ Yates felt an impact on the crown of his head and a second impact across his neck. He felt a pop in his neck and was knocked forward.

³ Yates' recollection (Yates Dep. at 65-66) is contradicted by the testimony of Johnson who stated: "[W]e didn't have anything in our hands at that time. We were just standing- ." (Johnson Dep. at 12-13.)

(Yates Dep. at 67.) Yates believes he was struck by two, maybe three, boxes.⁴ (Yates Dep. at 86.) His memory is foggy as to the events occurring after the impact.

Johnson testified that the materials fell from one of the top two shelves. (Johnson Dep. at 15-17.) A box of siding is twelve feet long and ten inches wide, containing twenty pieces of siding. (Mullins Dep. at 19.) Johnson described the impact as follows: “[I]t’s a long box. The end of it is what caught him. It didn’t hit him, you know, flat on the head It kind of turned and . . . it didn’t come down and smash him flat on the head. It kind of just grazed off the . . . side or back of his head.” (Johnson Dep. at 20.)

Yates next recalls being seated on a stack of materials located to the left of the shelves next to the fence. Mrs. Yates did not witness the accident, but she heard the commotion, exited the van, and asked Johnson to get help. A rescue squad arrived within minutes and EMTs placed Yates on a back board and immobilized his neck. They drove him to Norton Community Hospital, where doctors took X rays. Mrs. Yates left the hospital soon after her husband was admitted and returned to the scene of the accident to take photographs. She has submitted an affidavit stating that the

⁴ Johnson testified that only one box fell. (Johnson Dep. at 17, 30.) The photographs indicate that there were four boxes on the ground following the accident. Johnson could not recollect how many of those boxes were there prior to the accident (Johnson Dep. at 17.) He suggested that a couple of the boxes may have been empty.

seven photos in the summary judgment record accurately depict the manner in which the vinyl siding and other materials were stored at the time her husband was injured.

Yates didn't pay any attention to the manner in which the materials were stacked because of the pouring rain that morning. (Yates Dep. at 110.) He stated in his deposition: "I don't have any knowledge of what caused the boxes to fall. I have a couple of ideas that are more than - just conjecture but, no, I don't have any idea what caused them to fall." (Yates Dep. at 112.) Johnson also had "no idea" why the boxes fell. (Johnson Dep. at 36.) Both men stated that the process of unshelving the tin roofing did not cause the shelves to move. (Yates Dep. at 113, Johnson Dep. at 19.) The only other person Yates recalls seeing in the yard that morning was a Lowe's worker on a tow motor, who was working inside the building. Yates speculates that the worker may have contributed in some way to the boxes falling, or that the boxes were rain-soaked, which may have resulted in the accident. (Yates Dep. at 113-114.)

David Altizer, Lowe's manager, admitted that the unevenness of the boxes was cause for concern. (Altizer Dep. at 18, 36.) Lowe's employees are trained to stack things neatly, with heavier and larger boxes on the bottom and smaller, lighter merchandise on top. Materials are usually banded together, and the employees are instructed to re-band any materials before returning them to the shelves. There was no written policy in place regarding strapping the boxes, but employees were requested

to do so for safety reasons.⁵ (Altizer Dep. at 16.) The photographs show that the boxes located on the top shelf were not banded.

Neither Mark Mullins, the assistant manager, nor Altizer was aware of the condition of the merchandise immediately prior to the accident and Altizer could not confirm that the boxes were placed on the shelf by a Lowe's employee. (Altizer Dep. at 45-46, Mullins Dep. at 40.) Steve Baker, another Lowe's employee working in the yard on the day of the accident, testified that he didn't know if the boxes of siding were originally placed on the top shelf without a band on them. He also didn't remember whether he had helped any customers remove the boxes of siding within a week of the accident. (Baker Dep. at 22.) Johnson testified that he had never observed customers removing products from the top shelf on their own because a forklift was needed for the job. (Johnson Dep. at 32.) Baker agreed that a customer would require assistance to retrieve materials from the highest shelf. (Baker Dep. at 24-25.) However, Johnson later stated that he would have no way of knowing whether a customer had attempted to retrieve merchandise from the top shelf. (Johnson Dep. at 36.) There are ladders in the yard that are occasionally used by customers despite protective chains and

⁵ When questioned why employees are requested to strap the boxes of vinyl siding, Altizer replied that "the main reason is when you go to pick it up with a fork truck, it's free ease of picking it up. . . ." (Altizer Dep. at 16.) He stated that loose boxes can fall to the ground when being moved. In response to a later question concerning the unevenness of boxes on an upper cantilever shelf, Altizer responded that unstable stacks have "the opportunity to come down." (Altizer Dep. at 18.)

warning signs that the ladders are for employee use only. (Baker Dep. at 26.) The ladders are tall enough to reach the height of the top shelf.

Johnson testified that managers walked through the yard at intervals during the day and pointed out things that needed to be fixed. Altizer said there were no procedures in place to ensure that materials were stacked properly, but that it was good operating practice to visit areas of the store for customer safety. (Altizer Dep. at 15.) Mullins was unaware of any customer reports of problems due to the manner in which the boxes of siding were stacked. (Mullins Dep. at 41.) At the time of the accident, the only warning signs in the yard cautioned customers of the dangerous power equipment on the premises; there were no signs relating to the potential instability of stacked merchandise. Now, signs are posted asking customers not to cut bands. (Altizer Dep. at 18-19.)

III

Under the Federal Rules of Civil Procedure, summary judgment is appropriate if “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The movant bears the initial burden to identify “those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317,

323 (1986). The nonmovant must then “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). In considering the motion, the court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is a drastic remedy that effectively terminates plaintiff’s action; therefore, courts should act with caution in granting the motion. *See id.*

IV

The parties are agreed that Virginia substantive law applies to this case.⁶ Under such law, a store owner has a duty to exercise ordinary care toward an invitee, maintain the premises in a reasonably safe condition, and warn customers of unsafe conditions that are known, or should be known, to the store owner. *See Winn-Dixie Stores, Inc. v. Parker*, 396 S.E.2d 649, 650 (Va. 1990). When there is no evidence that the store owner actually created a dangerous condition on its premises, the plaintiff may instead prove breach of the duty by showing that the defendant had actual *or* constructive notice of the hazard that allegedly resulted in the plaintiff’s injury. *See Memco Stores*,

⁶ A federal court exercising diversity jurisdiction must apply the law of the state in which it sits. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

Inc. v. Yeatman, 348 S.E.2d 228, 231 (Va. 1986). “If an ordinarily prudent person, given the facts and circumstances [the store] knew or should have known, could have foreseen the risk of danger resulting from such circumstances, [the store] had a duty to exercise reasonable care to avoid the genesis of the danger.” *Id.* On this issue of foreseeability, the Supreme Court of Virginia has also noted, “If an occurrence is one that could not reasonably have been expected the defendant is not liable. Foreseeableness or reasonable anticipation of the consequences of an act is determinative of defendant’s negligence.”” *Holcombe v. Nationsbank Fin. Servs.*, 450 S.E.2d 158, 160 (Va. 1994) (quoting *Montgomery Ward & Co. v. Young*, 79 S.E.2d 858, 860 (Va. 1954)).

Lowe’s argues that because the plaintiff cannot produce any evidence that authoritatively identifies the cause of the accident or suggests that the store employees had any knowledge of a potentially dangerous condition, any verdict would be based entirely on speculation and conjecture. It relies on Virginia case law holding that in order to recover, a negligence plaintiff must show how and why the accident happened. *See Winn-Dixie Stores, Inc. v. Parker*, 396 S.E.2d at 651; *Pepsi-Cola Bottling Co. v. Yeatts*, 151 S.E.2d 400, 402 (Va. 1966); *Colonial Stores, Inc. v. Pulley*, 125 S.E.2d 188, 190 (Va. 1962); *Murphy v. J.L. Saunders, Inc.*, 121 S.E.2d 375, 377-78 (Va. 1961). Lowe’s points out that none of the witnesses noticed the positioning of the

boxes before Yates was struck. Furthermore, no evidence is available to show exactly why the boxes fell from the shelves. Thus, the defendant argues, Yates cannot meet his burden and summary judgment should be granted in its favor.

Although the question is not free from doubt, I find that the more recent case of *O'Brien v. Everfast, Inc.*, 491 S.E.2d 712 (Va. 1997), is analogous to the present controversy and provides a better basis for the court's decision. In that case, O'Brien was shopping at a fabric store operated by Everfast when she was injured by a bolt of fabric that slid from the table against which it had been placed. *See id.* at 713. The trial court set aside a verdict for O'Brien and entered judgment for Everfast. In support of its decision, it stated:

There is no [] evidence of who placed the bolt of cloth in a position to fall and strike the plaintiff, of the instrumentality which caused it to fall, how long the condition existed, that an employee had sufficient opportunity to observe, appreciate and correct the condition. There is no evidence upon which negligence of the defendant could have been determined without guesswork or speculation.

Id. at 714.

In reviewing that decision, the Virginia Supreme Court stated that "absence of evidence as to what caused the bolt of fabric to fall would not preclude the jury from finding that O'Brien's injury resulted from Everfast's negligence." *Id.* Evidence in the case showed that the salesperson had been instructed not to lean bolts of fabric against

the cutting tables and that the bolts were in her plain view at the time the accident occurred. *See id.* at 714. Based on that information, the court held that a jury could have concluded that the salesperson had actual or constructive knowledge of the danger and was negligent in permitting the condition to continue. *See id.* at 714-15.

The analysis supplied in *O'Brien* is applicable to the facts of this case. Lowe's employee Barry Johnson was present at the scene of the accident when Yates was struck by the falling materials and the stacked boxes were in his plain view. He was in a position to notice that the boxes were not banded and could have warned the plaintiff of any potential hazard due to the stacking or storage of the overhead merchandise. The jury could reasonably infer that a foreseeable injury would result from the haphazard manner in which the unbanded boxes were stored and therefore find that Lowe's was negligent when its employee failed to warn the plaintiff of the dangerous situation created by the unstrapped materials that were in his plain view.⁷

Accordingly, I find that there exists a genuine issue of material fact for resolution by the jury. Summary judgment is not appropriate and this case will proceed to trial.

⁷ Lowe's argues that the fact that it had a policy of banding the merchandise in question is inadmissible pursuant to the Virginia evidentiary rule excluding a party's safety rules in order to show negligence. *See Hottle v. Beech Aircraft Corp.*, 47 F.3d 106, 110 (4th Cir. 1995). Regardless of the admissibility of Lowe's policy, however, the fact that the stacked boxes that fell on the plaintiff were unbanded is certainly evidence of foreseeable danger to customers, and thus proper for the jury to consider in determining whether Lowe's exercised due care.

V

For the reasons set forth above, it is **ORDERED** that the defendant's motion for summary judgment (Doc. No. 16) is denied.

ENTER: October 15, 2001

United States District Judge