

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

HELEN D. JORDAN,) CIVIL ACTION NO. 3:98CV00115
Plaintiff,)
v.) MEMORANDUM OPINION
FOOD LION, INC.,)
Defendant.) JUDGE JAMES H. MICHAEL, JR.

On November 9, 2000, the presiding United States Magistrate Judge issued a Report and Recommendation, wherein he recommended that the court deny the defendant's motion for summary judgment. The defendant filed timely objections. Because genuine disputes of material fact exist in the case, the defendant's objections shall be overruled, the Magistrate Judge's recommendation shall be accepted, and the defendant's motion for summary judgment shall be denied.

I.

Between 6:00 and 7:00 p.m. on October 17, 1995, the plaintiff and her friend entered a Food Lion store in Albemarle County, Virginia. The plaintiff procured a shopping cart, proceeded through the various store aisles, and placed items in the bottom of the cart, thus obstructing her view of the floor. Upon entering the produce section of the store, the plaintiff slipped and sustained injuries to her knee. After the fall, the plaintiff saw a puddle of clear water on the floor. In the middle of the puddle sat a clump of crushed ice. The ice and water were two feet from a display table on which apple cider containers were stuck into

crushed ice. The ice was packed in a mounded fashion, sloping from the center of the display table toward the table's edges. There were no mats or rugs around the display.

Neither the plaintiff nor her friend saw the puddle and ice before the fall. At the time of the fall, the floor was white and shiny, and the store's fluorescent lights were bright. The defendant's customer service manager stated the puddle was approximately two feet in diameter, and that the ice clump was approximately the size of a woman's hand.

Prior to the accident, the manager had sent an employee to sweep and spot mop the entire store at 5:30 p.m. The manager saw the employee return to the front of the store and put his mop and water away at approximately 6:30 p.m., but does not know whether the employee actually swept and mopped as instructed. The employee testified he has no recollection "whatsoever" of sweeping and mopping the store—let alone sweeping and mopping the place where the plaintiff fell—on the day in question.

The plaintiff filed suit against the defendant in the Circuit Court of Richmond, Virginia, on September 17, 1998, alleging the defendant's negligence caused her fall. The case was removed to the federal district court for the Eastern District of Virginia, and then transferred to this court. The court referred the case to the Magistrate Judge for findings of fact and a recommended disposition of dispositive motions. *See* Fed. R. Civ. P. 72(b); 28 U.S.C.A. § 636(b)(1)(B) (West 1993 & Supp. 2000). Following discovery, the defendant moved for summary judgment. The Magistrate Judge reported genuine disputes of fact as to whether the defendant was on constructive notice of the hazard, and whether the plaintiff was contributorily negligent. The defendant filed timely objections, which are now before the court and ripe for disposition.

II.

The court reviews *de novo* those portions of the report or specified proposed findings or recommendations to which objection was made. See Fed. R. Civ. P. 72(b). Summary judgment may be granted only if “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The court draws all facts and inferences in the light most favorable to the plaintiff. See *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 227 (4th Cir. 2000).¹

The Supreme Court of Virginia recited the well-settled rules applicable to slip-and-fall cases in *Winn-Dixie Stores, Inc. v. Parker*, 396 S.E.2d 649 (Va. 1990):

The [store owner] owed the [customer] the duty to exercise ordinary care toward her as its invitee upon its premises. In carrying out this duty it was required to have the premises in a reasonably safe condition for her visit; to remove, within a reasonable time, foreign objects from its floors which it may have placed there or which it knew, or should have known, that other persons had placed there; to warn the [customer] of the unsafe condition if it was unknown to her, but was, or should have been, known to the [store owner].

Id. at 650 (quoting *Colonial Stores, Inc. v. Pulley*, 125 S.E.2d 188, 190 (Va. 1962)). Under this standard of care, the plaintiff need not prove the defendant had *actual* notice of the hazardous object on the floor. See *Austin v. Shoney’s, Inc.*, 486 S.E.2d 285, 288 (Va. 1997);

¹ For example, although the defendant objects to the factual finding that the items were placed in the bottom of the cart in a way that obscured the plaintiff’s view of the floor, the plaintiff testified that her cart was “basically full” of items, and that “the bottom [of the cart] was covered.” A reasonable inference can, and therefore, must be drawn in the plaintiff’s favor that the items blocked her view. Whether the items did or did not block her view is a genuine dispute of fact to be resolved at trial.

Memco Stores, Inc. v. Yeatman, 348 S.E.2d 228, 231 (Va. 1986). The defendant may be liable if it was on *constructive* notice of the hazard:

If an ordinarily prudent person, given the facts and circumstances [the store owner] knew or should have known, could have foreseen the risk of danger resulting from such circumstances, [the store owner] had a duty to exercise reasonable care to avoid the genesis of the danger.

Memco, 348 S.E.2d at 231.

It is undisputed that the defendant did not have actual notice of the ice on the floor, but the plaintiff contends the defendant was on constructive notice. The question of whether the defendant was on constructive notice depends on whether there is sufficient evidence that “the hazardous condition was affirmatively created by the property owner.” *Austin*, 486 S.E.2d at 288. If the store owner affirmatively created the hazardous condition, constructive notice is imputed to the store owner. *See id.*

Here, there is sufficient evidence that the defendant affirmatively created the hazardous condition. The defendant located an apple cider display two feet away from where the plaintiff fell. Ice was placed on the display in a mound sloping towards the floor, and the defendant placed no absorbent mats or rugs on the floor around the display to avoid the danger of spills. Ice and water on the floor where the plaintiff was invited to walk were the cause of her fall. A jury reasonably could conclude that the defendant “positioned the [ice] on the [apple cider] display in such a manner that the [ice] could and did fall in the aisle,” *Memco*, 348 S.E.2d at 231, that the defendant should have foreseen the risk of harm created by its conduct, and that the defendant accordingly breached its duty to exercise reasonable care to avoid the genesis of the danger.

The plaintiff produced an mechanical engineer, Richard A. Fauth, who reported that it takes between 143 and 284 minutes for a quantity of crushed ice taken from the defendant's ice machine to melt so as to leave a two-foot puddle of water and a handful of ice remaining. A reasonable jury could find that the defendant should have discovered the ice during that period of time, especially since an employee was deployed to sweep and mop the floor around the same time that the plaintiff fell. The court recognizes that Mr. Fauth's testimony is the subject of a yet-undecided motion *in limine*. Without herein expressing any view on the merits of that motion, the court finds that even if his testimony ultimately is excluded, the other evidence described above is sufficient to establish that the defendant affirmatively created, and thus was on constructive notice of, the hazardous ice and water.

The defendant objects that this case is more analogous to *Winn-Dixie* than to *Memco*. The court disagrees. Although the *Winn-Dixie* court rejected the theory that negligence could be proved simply by "the means used to exhibit commodities for sale," 396 S.E.2d at 651 n.3 (quoting *Thomason v. Great Atlantic & Pac. Tea Co.*, 413 F.2d 51, 53 (4th Cir. 1969)), it did not reject the proposition that negligence could be proven when a defendant acts affirmatively to make a display foreseeably dangerous. Such was the case in *Memco*, in which the defendant's affirmative act of positioning a plant on a store furniture display caused a foreseeable hazard of which the store should have been aware. See 348 S.E.2d at 231. As in *Memco*, a reasonable jury in this case could find that the defendant's affirmative act of positioning the ice on the apple cider display in a downward-sloping fashion caused a foreseeable hazard of which the defendant should have been aware, and which it failed to avoid by not placing mats or rugs under the display.

Winn-Dixie is further distinguishable because in that case there was a “likelihood that the [hazard] found its way to the [floor] . . . as a result of some action taken by another customer.” 396 S.E.2d at 651. In this case, the likelihood is that ice fell off the apple cider display and melted as a result of the *defendant’s* action of placing the ice on the display in a manner that foreseeably could and did result in the ice falling to the floor.² Evidence of such a conclusion includes the manner the ice was placed on the display, the proximity of the display to the location of the ice on the floor, and the fact that the ice on the floor was crushed ice, like the ice on the display table. The instant case also is distinguishable from *Winn-Dixie* because, in that case, it was undisputed that the store’s employee swept the spot where the plaintiff fell two minutes or less before the fall. Here, the employee who was assigned the task of sweeping the store does not remember sweeping or mopping on the day in question, and the manager who told him to do so does not know whether the employee actually swept and mopped the store, let alone whether he swept and mopped the spot where the plaintiff fell.

The defendant next contends that the Magistrate Judge erred by finding that the plaintiff was not contributorily negligent. A plaintiff is contributorily negligent as a matter of law when, despite lacking actual knowledge of a defect, the defect was open and obvious and, by the exercise of ordinary care, the defect could have and should have been seen. See *West v. City of Portsmouth*, 232 S.E.2d 763, 765 (Va. 1977). “Whether a danger is open and obvious is usually a jury question.” *O’Brien v. Everfast, Inc.*, 491 S.E.2d 712, 715 (Va.

² Again, the court notes that for purposes of this motion, all facts and inferences must be drawn in the light most favorable to the party opposing the motion.

1997). Evidence exists in the record that the items in the bottom of the plaintiff's shopping cart blocked her view of the floor, that neither she nor her companion saw the puddle and ice prior to her fall, and that the water was clear and thus hard to see against the "white and shiny" floor under the bright fluorescent lights. Because sufficient evidence exists from which a reasonable juror could find that the water and ice spill was not open and obvious, the defendant's objection on this ground shall be overruled.

III.

There are genuine disputes of fact as to whether the defendant was on constructive notice of a foreseeable hazard that caused the plaintiff to slip and fall, and whether the plaintiff was contributorily negligent for her fall. Accordingly, the court shall accept the Magistrate Judge's recommendation, overrule the defendant's objections, and deny the defendant's motion for summary judgment.

An appropriate Order this day shall issue.

ENTERED: _____
Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
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HELEN D. JORDAN,) CIVIL ACTION NO. 3:98CV00115
Plaintiff,)
v.) ORDER
FOOD LION, INC.,)
Defendant.) JUDGE JAMES H. MICHAEL, JR.

By order dated May 20, 1999, the above-captioned case was referred to the presiding United States Magistrate Judge for findings of fact and a recommended disposition of dispositive motions. The defendant filed a motion for summary judgment on September 7, 2000. In his Report and Recommendation of November 9, 2000, the Magistrate Judge recommended that the court deny the defendant's motion. The defendant filed timely objections. Upon consideration thereof, and for the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The decision recommended in the Magistrate Judge's Report and Recommendation, filed November 9, 2000, shall be, and it hereby is, ACCEPTED;
2. The defendant's objections, filed November 20, 2000, shall be, and they hereby are, OVERRULED;
3. The defendant's motion for summary judgment, filed September 7, 2000, shall be, and it hereby is, DENIED.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____
Senior United States District Judge

Date