

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>JOSEPH C. ABBOTT,</b>	)	
	)	<b>Civil Action No. 7:00CV00783</b>
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b><u>MEMORANDUM OPINION</u></b>
	)	
<b>THE KROGER COMPANY,</b>	)	
	)	<b>By: Samuel G. Wilson</b>
<b>Defendant.</b>	)	<b>Chief United States District Judge</b>

Plaintiff Joseph C. Abbott (“Abbott”) brings this negligence action for monetary damages against the defendant, The Kroger Company (“Kroger”), for personal injuries that he allegedly sustained from a slip and fall at the Kroger of Lakeside grocery store in Salem, Virginia. Abbott maintains that Kroger was negligent in allowing a spill of a translucent liquid to remain on the store’s floor. That spill allegedly caused Abbott to slip and fall, resulting in injuries to his neck and back. Pursuant to this court’s diversity jurisdiction, Kroger removed this action from the Circuit Court for the City of Roanoke, Virginia. This matter is before the court on Kroger’s motion for summary judgment. Finding that Abbott cannot make out a *prima facie* case of negligence, the court grants Kroger’s motion for summary judgment.

**I.**

On the morning of September 8, 1998, Abbott and his daughter, Beverly, went to the Kroger of Lakeside grocery store in Salem, Virginia. After retrieving the products that they needed, Abbot and his daughter proceeded toward the checkout counters. As he crossed the main checkout aisle to get to the checkout counters, Abbott slipped on a spill of a translucent liquid that was on the store’s floor. Abbott slid as he attempted to regain his footing but ultimately fell into a cigarette display and onto the floor. According to the incident report filled

out by Randy Hawley, the store's co-manager, with Abbott's assistance, Abbott's slip and fall occurred at 7:50 a.m.

Bracing himself against the checkout counter's conveyor belt, Abbott returned to his feet and was able to observe the substance that caused him to slip and fall. Abbott described the substance as a puddle of "a translucent liquid with a green tint." (J. Abbott Dep. at 39.) He also stated that the spill was approximately a foot and a half to two feet in diameter. Abbott further recalled that the spill contained foot tracks and a large skid mark that likely resulted from his attempt to regain his footing before he fell. In addition, Abbott and his daughter stated that they did not see the spill before Abbott slipped on it. Finally, Abbott and his daughter both stated that they did not know how the translucent liquid got on the store's floor, who was responsible for it being on the store's floor, or how long it had been on the store's floor before Abbott slipped on it.

The parties agree that the spill that Abbott slipped on was not the only spill in the store that morning. At approximately 7:45 a.m., Hawley heard an announcement over the store's public address system that there was a spill in the Beauty Aids aisle. After hearing the announcement, Hawley personally went to clean up that spill. When Hawley arrived at the Beauty Aids aisle, he saw a two to three inch spill of a clear substance that he assumed to be shampoo. Hawley did not find the container from which the spill originated. As he was cleaning up the spill, the public address system summoned Hawley to the front of the store. Hawley finished cleaning up the spill and then proceeded to the front of the store where he saw the spill that Abbott slipped on and learned about Abbott's slip and fall. Hawley stated that the spill that Abbott slipped on was the same color as the spill that he just cleaned up in the Beauty Aids aisle. (Hawley Dep. at 46.) With Abbott's assistance, Hawley filled out an incident report, after which

Abbott and his daughter left the store.

## II.

Abbott alleges that Kroger was negligent in allowing the spill of the translucent liquid to remain on the store's floor. Kroger moves for summary judgment, maintaining that Abbott has failed to establish the existence of an element essential to his *prima facie* case, namely, that Kroger had actual or constructive notice of the spill. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The standard of care applicable to slip and fall cases is well-established in Virginia. The Supreme Court of Virginia has established that:

[A store is] required to have the premises in a reasonably safe condition for [the customer's] 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 [him or] her, but was, or should have been, known to the [store].

Colonial Stores, Inc. v. Pulley, 203 Va. 535, 537, 125 S.E.2d 188, 190 (1962), quoted in Winn-Dixie Stores v. Parker, 240 Va. 180, 182, 396 S.E.2d 649, 650 (1990). Under this standard, the plaintiff does not have to prove that the defendant had actual notice of the dangerous condition on the floor. Instead, it is sufficient for the plaintiff to prove that the defendant had constructive notice of that condition. See Memco Stores, Inc. v. Yeatman, 232 Va. 50, 55, 348 S.E.2d 228, 231 (1986). Constructive notice may be shown by evidence that the dangerous condition was noticeable and had existed for a sufficient length of time to charge the store with notice of it. See Grim v. Rahe, Inc., 246 Va. 239, 242, 434 S.E.2d 888, 890 (1993) (citing Pulley, 203 Va. at 537, 125 S.E.2d at 190).

Applying that standard here, the court concludes that Abbott's claim cannot survive Kroger's motion for summary judgment. Because he has adduced no evidence that Kroger had

actual notice of the spill that he slipped on, Abbott must prove that Kroger had constructive notice of the spill.<sup>1</sup> Abbott, however, has no evidence that shows how the spill got on the store's floor or who was responsible for it being there. More importantly, Abbott has no evidence that shows the length of time that the spill had been on the store's floor before he slipped on it. Thus, he cannot demonstrate that the spill had existed for a sufficient length of time to charge Kroger with notice of it. "It is just as logical to assume that [the spill] was placed on the floor an instant before [Abbott slipped on] it as it is to infer that it had been there long enough that [Kroger] should, in the exercise of reasonable care, have known about it." Pulley, 203 Va. at 537-38, 125 S.E.2d at 190, quoted in Winn-Dixie, 240 Va. at 184, 396 S.E.2d at 651. Based on the evidence, imposing a duty upon Kroger to discover and clean up the spill—even though the spill may have been placed on the store's floor an instant before Abbott slipped on it—would improperly make Kroger an insurer of its customers' safety. See Franconia Assocs. v. Clark, 250 Va. 444, 446, 463 S.E.2d 670, 672 (1995) (stating that a business is not an insurer of its invitees' safety); Pulley, 203 Va. at 538, 125 S.E.2d at 190 (same). Consequently, the court concludes that Abbott has failed to make out a *prima facie* case of negligence against Kroger because he cannot show that Kroger had actual or constructive notice of the spill that Abbott slipped on.

Finally, the court rejects Abbott's argument that, because Hawley did not find the container from which the spill in the Beauty Aids aisle originated, Kroger was negligent in failing to warn its customers about the *possibility* of other spills. The possibility of spills is ever-present in a grocery store. However, under Virginia law, Kroger cannot be negligent unless it had actual

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<sup>1</sup> Likewise, there is no evidence that any of Kroger's employees caused the spill of the translucent liquid that Abbot slipped on to be on the store's floor.

or constructive notice of a dangerous condition *and* failed either to remove it within a reasonable time or to warn customers of its presence. See Ashby v. Faison & Assocs., Inc., 247 Va. 166, 170, 440 S.E.2d 603, 605 (1994); Winn-Dixie, 240 Va. at 184, 396 S.E.2d at 651. Thus, Virginia law limits liability exposure for failing to warn to those situations where the store had actual or constructive notice of the dangerous condition's presence, as opposed to those situations where the mere possibility of a dangerous condition's presence exists. See, e.g., Johnson v. Lion, 1996 WL 623228, at \*1 (4th Cir. Oct. 29, 1996) (per curiam) (affirming the district court's granting of summary judgment to grocery store because the plaintiff failed to prove that the store had actual or constructive notice of the dangerous condition, despite an internal memorandum revealing that the store knew of the potential hazard of grapes on the floor). Accordingly, the court concludes that Kroger was not negligent as a matter of law for failing to warn Abbott and its other customers about the possibility of other spills in the store.

### **III.**

For the reasons stated, the court grants Kroger's motion for summary judgment. An appropriate order will be entered this day.

**ENTER** this 5th day of April, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE

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