

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

HUBERT JOHNSON,)	
)	
Plaintiff,)	Civil Action No. 7:01cv00986
)	
v.)	<u>Memorandum Opinion</u>
)	
WAL-MART STORES, INC.)	By: Samuel G. Wilson
)	Chief United States District Judge
Defendant.)	
)	

Plaintiff Hubert Johnson (“Johnson”) brings this suit against Wal-Mart Stores, Inc. (“Wal-Mart”) alleging that Wal-Mart negligently failed to inspect, failed to warn and failed to maintain in a reasonable safe condition a frozen foods counter that caused Johnson to trip and fall. The court has jurisdiction pursuant to 28 U.S.C. § 1332. The case is before the court on Wal-Mart’s motion for summary judgment on the grounds that Johnson cannot establish a prima facie case of negligence. For the reasons that follow, the court will grant Wal-Mart’s motion for summary judgment.

I.

On January 18, 2000, Johnson entered the Wal-Mart store in Covington, Virginia to purchase groceries. Johnson approached a frozen foods cooler to get a can of grape juice. When Johnson bent over and reached into the cooler for the juice, he unknowingly slipped his foot into what he described as a “little black slot” or a gap between the “kick plates” that lined the bottom edge of the cooler. As he turned to walk away, Johnson’s foot remained caught in the “slot” allegedly causing him to fall and injure himself.

There is no evidence as to how or why the slot or gap in the cooler existed. Johnson,

however, speculates that “whoever contracted the work to put them in there didn’t finish the job.” There is no evidence regarding the design or construction of the cooler or whether any pieces were missing from the cooler. Other than Johnson, there were no witnesses to the incident. Johnson has not produced opinions from any experts nor has he disclosed that an expert witness would testify at trial.

II.

Federal Rule of Civil Procedure 56 “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Mere assertions as to an essential element are not enough to survive summary judgment. See Abcor Corp. v. AM International, Inc., 916 F.2d 924, 929 (4th Cir. 1990). To avoid summary judgment, a party bearing the burden of proof must produce not “merely colorable” but “significantly probative” evidence. Id. at 930 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)). “In most cases, issues of negligence are not susceptible to summary judgment. However, where a plaintiff fails to state specific facts and produce concrete evidence to support [his] claim, a defendant may be entitled to that relief.” Griffin v. Wal-Mart, 1995 U.S. Dist. LEXIS 6507, at *2 (E.D. Va. April 10, 1995) (unpublished) (citing Vaughn v. Huff, 41 S.E.2d 482 (Va. 1947)).

Since this is a diversity action, Virginia law governs the scope of liability. In Virginia, a store owner is not considered an insurer of the customer’s safety; however, a store owner must exercise a reasonable degree of care to make his premises safe for invitees. Winn-Dixie Stores,

Inc. v. Parker, 396 S.E.2d 649 (Va. 1990); Colonial Stores Inc. v. Pulley, 125 S.E.2d 188 (Va. 1962). In a negligence action the plaintiff has the burden to prove how and why the accident happened. See Hoffner v. Kreh, 313 S.E.2d 656, 658 (Va. 1984).

Negligence cannot be presumed from the mere happening of an accident. The burden is on the plaintiff who alleges negligence to produce evidence of preponderating weight from which the jury can find that the defendant was guilty of negligence which was a proximate cause of the accident. The evidence produced must prove more than a probability of negligence and any inferences therefrom must be based on facts, not on presumptions. It is incumbent on the plaintiff who alleges negligence to show why and how the accident happened, and if that is left to conjecture, guess or random judgment, he cannot recover.

Id. (quoting Weddle v. Draper, 130 S.E.2d 462, 465 (Va. 1963)).

To establish a prima facie case of negligence, Johnson must produce evidence that: (1) Wal-Mart owed him a duty; (2) the cooler constituted an unsafe condition; (3) the unsafe condition proximately caused the accident to happen; (4) Wal-Mart had actual or constructive notice of the defect and failed to correct the problem within a reasonable period of time or to notify Johnson; and (5) Johnson suffered damages. See Griffin, 1995 U.S. Dist. LEXIS 6597 at *5-6 (citing Colonial Stores, 125 S.E.2d at 190).

The court finds that Johnson has not produced probative evidence that the cooler constituted an unsafe condition. The burden of proof is on Johnson to show that Wal-Mart “deviated from the standard of care, either by failing to observe applicable trade customs and building code provisions or by some other defalcation.” Morrison-Knudsen Co., Inc. v. Wingate, 492 S.E.2d 122, 124 (Va. 1997). Johnson has not produced an expert opinion to show that there was a defect in the design or construction of the cooler or that the cooler constituted an unsafe condition. Although the court does not hold that an expert opinion is necessary for Johnson to

overcome summary judgment, more evidence is necessary to support Johnson's allegation. Johnson primarily relies on his personal opinion that the cooler was installed improperly. Johnson's personal opinion alone, however, does not establish that an unsafe condition existed at the time of the accident. See Griffin 1995 U.S. Dist. LEXIS 6507 at *6. Furthermore, Johnson's opinion is mere speculation—Johnson has no specific knowledge regarding these types of coolers and he does not know if any pieces were missing. Johnson relies heavily on the fact of the accident itself to establish that the cooler was in an unsafe condition. However, the mere happening of an accident, without more, is not proof of negligence. Id. at *9 (citing Parker, 396 S.E.2d at 650-51). Without additional evidence, a reasonable jury could not find that the gaps in the cooler kick plate constituted an unsafe condition or that Wal-Mart had actual or constructive notice of the alleged unsafe condition. Accordingly, the court will grant Wal-Mart's motion for summary judgment.

III.

In summary, the court finds that Johnson cannot make a prima facie showing of the necessary elements to establish Wal-Mart's negligence. Therefore, the court will grant Wal-Mart's motion for summary judgment. The court will enter an appropriate order this day.

ENTER: This _____ day of May, 2002.

CHIEF UNITED STATES DISTRICT JUDGE

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

HUBERT JOHNSON,)	
)	
Plaintiff,)	Civil Action No. 7:01cv00986
)	
v.)	<u>FINAL ORDER</u>
)	
WAL-MART STORES, INC.)	By: Samuel G. Wilson
)	Chief United States District Judge
Defendant.)	
)	

In accordance with the Memorandum Opinion entered this day, it is **ORDERED** and **ADJUDGED** that Wal-Mart Stores, Inc.'s motion for summary judgment is **GRANTED**. The court orders this matter stricken from the active docket of the court.

ENTER: This _____ day of May, 2002.

CHIEF UNITED STATES DISTRICT JUDGE