IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

JANET MCDONALD, DAVID MCDONALD, her husband, and SAMANTHA MCDONALD, a minor by and through her next of friend JANET MCDONALD	)	C. A. No. 00C-09-005WLW
Plaintiffs,	)	
5.	)	
WAL-MART STORES, INC.	)	
Defendant.	)	

Submitted: December 28, 2001
Decided: January 18, 2002

ORDER

On Defendant Wal-Mart's Motion for
Summary Judgment. Denied.

Jennifer L. Gioia, Esquire, of MacAnanny & Gioia, Dover, Delaware, for the Plaintiffs.

Donald M. Ransom, Esquire and Thomas P. Leff, Esquire, of Casarino, Christman & Shalk, Wilmington, Delaware, for the Defendant.

WITHAM, J.

Upon consideration of defendant Wal-Mart's ("Wal-Mart's") motion for summary judgment, and the response of plaintiffs, Janet McDonald, David McDonald and Samantha McDonald ("the McDonalds"), it appears to the Court that summary judgment should not be granted in this matter. There are genuine issues of material fact and further inquiry into these facts is necessary; therefore,

Wal-Mart is not entitled to judgment as a matter of law.

Claims of the parties

Viewing the facts in the light most favorable to the McDonalds, and accepting their well-pleaded allegations as true, it appears that this case arises out of an occurrence on September 9, 1998, at the Wal-Mart store in Dover, where the McDonalds were customers and business invitees. Janet McDonald was pregnant with Samantha McDonald, and was shopping in the infant's department when she fell on a plastic jar of apple juice in the store aisle and was injured. David McDonald suffered a loss of consortium. Samantha was subjected to physical distress and also suffered injuries at the time.

Wal-Mart moves for summary judgment on the basis that there is no evidence of negligence because the McDonalds cannot show Wal-Mart should have known of the dangerous condition alleged herein. Wal-Mart states that the McDonalds have not answered discovery which was served on September 6, 2001, and no depositions have been taken; therefore, no evidence exists to establish negligence here. Wal-Mart argues that:

> the mere fact that a bottle may have been on the floor and plaintiff fell does not establish negligence on the part of the defendant. Absent some evidence that defendant knew or in the exercise of reasonable care should have known of this allegedly dangerous condition, a finder of fact could not make a finding of negligence here.

Summary Judgment Standard

Superior Court Rule 56(c) provides that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] The burden is on the moving party to show, with

[1] Super. Ct. Civ. R. 56.

reasonable certainty, that no genuine issue of material fact exists and judgment as a matter of law is permitted.[2] When considering a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party.[3] Further, if the record indicates that a material fact is disputed, or if further inquiry into the facts is necessary, summary judgment is not appropriate. "So also must such judgment be denied if there is a . . . dispute as to the inferences which might be drawn therefrom."[4]

Discussion

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[2] *See Celotex Corp. v. Cattret*, 477 U.S. 317 (1986); *Martin v. Nealis Motors, Inc.*, Del. Supr., 247 A.2d 831 (1968).

[3] *McCall v. Villa Pizza, Inc.*, Del. Supr., 636 A.2d 912 (1994).

[4] *Schagrin v. Wilmington Med. Ctr., Inc.*, Del. Super., 304 A.2d 61, 63 (1973) (citing *Vanaman v. Milford Mem'l Hosp., Inc.*, Del. Supr., 272 A.2d 718 (1970)).

There is obviously a dispute as to the material fact of whether or not Wal-Mart knew, or should have known, about the alleged hazard here. The McDonalds may prevail on their negligence claim if they show that Wal-Mart breached its duty to act reasonably to protect them. The McDonalds "must establish that there was a dangerous or defective condition on the [floor] that caused [Janet McDonald] to fall and that [Wal-Mart] should have known about the condition and corrected it."[5]

Contrary to Wal-Mart's contention that there is no evidence on the issue of constructive knowledge, Janet McDonald will testify as to this issue. She will describe the bottle of apple juice which she alleges was on the floor and purportedly was the cause of her injuries. In other words, the McDonalds will present "evidence as to how noticeable the [bottle] was" and whether or not it was reasonable for Wal-Mart not to be aware of its presence.[6]

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[5] *Collier v. Acme Markets*, Del. Supr., No. 122, 1995, 1995 WL 715862 at *1, Berger, J. (Nov. 16, 1995) (ORDER).

[6] *Id.* (finding that either the noticeability of the hazard or the length of time the hazard was present may be evidence from which to infer constructive notice on the behalf of the business, and

where there was no evidence as to how noticeable the slippery substance was or how long it was on the sidewalk, proprietor was entitled to summary judgment).

> It is, of course, true that a plaintiff may establish the negligence of the defendant by proof of circumstances from which an inference of negligence follows as a natural or very probable conclusion from the facts proven. Such a conclusion, however, must be the only reasonable inference possible from the admitted circumstances.[7]

Conclusion

For this reason, Wal-Mart cannot allege, as it has in its motion, that there is no evidence to show that Wal-Mart "in the exercise of reasonable care should have known of an alleged dangerous condition." Whether the evidence is of the necessary weight to establish liability, is a question for the finder of fact.

For the foregoing reasons, Wal-Mart's motions for summary judgment is hereby ***denied.***

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution
File

[7] *Wilson v. Derrickson*, Del. Supr., 175 A.2d 400, 401 (1961).