IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

Caroline Koger Plaintiff	:	Case No. 2017-CV-0462
vs	:	Judge Roger E. Binette
Wal-Mart Stores, etc., et al. Defendant(s)	: ::::	**JUDGMENT ENTRY**

This matter is before this Court on *Defendant's Motion For Summary Judgment* ("*Summary Judgment Motion*") (filed on or about July 13, 2018).

This Court has reviewed and carefully considered the *Summary Judgment Motion* and accompanying Brief in Support; *Plaintiff's Memorandum Contra Defendant's Motion For Summary Judgment Instanter* (filed on or about August 3, 2018); *Defendant's Reply In Support Of Motion For Summary Judgment* (filed on or about August 17, 2018); the record, including but not limited to, the Deposition of Caroline Koger (Koger Depo.), and applicable law.

This Court **FINDS** and **HOLDS**:

1. Caroline Koger ("Plaintiff") filed this personal injury action against several Wal-Mart Defendants (collectively referred to here as "Defendant"). Plaintiff's claim arises from an incident on September 4, 2015 when she slipped and fell in water on the floor of the restroom at the Wal-Mart store in Perkins Township;

2. Plaintiff, a resident of Baltimore, Maryland, travelled to Buffalo, New York for a funeral. A friend advised that she was taking Plaintiff for a surprise trip to Cedar Point. After Plaintiff and her travelling companions arrived in the area, they went to Wal-Mart shopping. Plaintiff had to use the restroom;

3. Plaintiff entered the ladies restroom. Plaintiff proceeded to the area of the last sink (in a row of sinks along the right side of the wall), where several toilet stalls began. Plaintiff slipped and fell in water on the floor, injuring her left knee;

4. There was no sign or cone warning of any water on wet floor. Plaintiff got a portion of her pants wet as a result of the fall. Plaintiff discovered that the toilet in the second stall had overflowed. Plaintiff, with assistance from another lady, was able to make it to the fourth and largest stall. Plaintiff also testified that there was water dropping off from the sink;

5. Plaintiff testified at deposition she did not know how long the toilet had overflowed; how long the floor had been wet or who caused the toilet to overflow or water to drop from the sink;

6. Defendant moves for summary judgment arguing that Plaintiff cannot establish a prima facie case because Plaintiff cannot establish that Defendant had actual or constructive notice of the standing water or that Defendant created this condition;

7. Summary Judgment may not be awarded unless the evidence demonstrates that: a) there is no genuine issue as to any material fact to be litigated; b) the moving party is entitled to judgment as a matter of law, and c) reasonable minds can come to but one conclusion, and after reviewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the party against whom the motion for Summary Judgment is made. *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 3d 317, 327; *Vahalia v. Hall* (1997), 77 Ohio St. 3d 421, 429-30. All inferences are to be drawn in the light most favorable to the non-moving party and any doubt is to be resolved in favor of the non-moving party. *Viock v. Stowe Woodard Co.* (1983), 12 Ohio App. 3d 7, 12;

8. The parties agree upon and state the correct legal standards. In order to establish a negligence cause of action, Plaintiff must show the existence of a duty, a breach of duty, and an injury proximately resulting therefrom. *Jeffers v. Olexo* (1989), 43 Ohio St. 3d 140; *Menifee v. Ohio Welding Products* (1984), 15 Ohio St. 3d 75. A shopkeeper owes a business invitee a duty of ordinary care in maintaining the premises in a reasonably safe

condition so that its customers are not exposed unreasonably to unnecessary danger. *Paschal v. Rite Aid Pharmacy* (1985), 18 Ohio St. 3d 203 ;

9. In order to establish liability for slipping and falling on a substance on the floor, the Plaintiff must demonstrate that either 1) the owner put the substance of the floor; 2) that the owner had actual knowledge of the substance's presence but failed to remove it or to warn the invitee, or 3) the owner had constructive notice of the substance being present for sufficient time to remove it or warn of its presence. *Anaple v. The Standard Oil Co.* (1955), 162 Ohio St. 537, paragraph one of the syllabus; *Johnson v. Wagner Provisions Co.* (1943), 141 Ohio St. 584, paragraph three of the syllabus; *Troknya v. Wild Wings, Inc.* 2016-Ohio-7700, ¶. 13;

10. The factual record is rather meager. Defendant points to Plaintiff's deposition testimony to show that Plaintiff cannot establish who is responsible for the toilet overflowing or who caused water to drop from the sink. Moreover, Plaintiff testified at deposition that she does not know how long the toilet overflowed or how long the floor had been wet;

11. Defendant met its initial summary judgment burden by pointing to the factual record to show that Plaintiff could not establish a prima facie case. In response, Plaintiff points to circumstantial evidence in an effort to show constructive notice;

12. Plaintiff relies heavily on *Wesley v. McDonald's Restaurants of Ohio* Hamilton App. No. C-920233 June 2, 1993 (unrep.). *Wesley* is factually distinguishable. In *Wesley*, the First District reversed the Trial Court's granting of summary judgment for the restaurant. The facts in *Wesley* were that Plaintiff fell in a pool of water outside the restroom door; there were wet foot tracks from the door of the restroom toward the area where Plaintiff fell. There was testimony from an accompanying friend that she saw water coming out from underneath the bathroom door. When this friend went into the bathroom, there was water from the toilet to the sink all the way over to the garbage cans, coming out the door. There was water all over the floor approximately two inches deep. The water coming from under the restroom door covered an area of about a foot and a half outward from the door and as wide as the door;

13. As Defendant points out, this case is much more analogous to a subsequent decision of the First District, affirming summary judgment for the premises owner. *Merritt v. Big D & LuLu, Inc.* 2009-Ohio-5972. Similarly, here this Court cannot find that given the limited location of the water and lack of any evidence how deep the water was, that it existed for substantially long enough time that Defendant had constructive notice. Here, as in *Merritt*, the water was confined to the bathroom. Unlike *Wesley* the water did not come under the bathroom door and out into the main part of the store where an employee should see it. There is no evidence here how long the water was present; that there were any tracks or footprints; there's no evidence how deep the water was; and the area where the water was located was in fairly small area. Plaintiff managed to still use the fourth toilet stall and did not testify that there was standing water as she proceeded from the point of her fall to that stall;

14. This Court also found two appellate cases, while not directly on point but analogous, instructive. *Bohland v. Carrols Corp.* 2001-Ohio-1963; *Barnes v. University Hospitals of Cleveland* Cuyahoga App. No. 66799 July 21, 1994 (unrep.);

15. Plaintiff has failed to cite to anything of evidentiary quality to demonstrate that a genuine issue of material fact exists. Plaintiff cannot establish that Defendant had constructive knowledge of the standing water sufficiently long enough that it could remove it or warn of the hazard.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that based on the foregoing, *Defendant's Motion For Summary Judgment* (filed on or about July 13, 2018) is found well taken and **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff's claims against Defendants are **DISMISSED** with Prejudice. Costs to Plaintiff.

IT IS SO ORDERED.

Journalized 09/24/2018	/s/ RSBott 9/24/18
Signed 2018 Sep 24 AM 11 29	