IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-2176
Summary Calendar

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MAURINE ODOM,

Plaintiff-Appellant,

versus

WAL-MART STORES, INC.,

Defendant-Appellee,

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Appeal from the United States District Court for the
Southern District of Texas
(CA H 92 2271)

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(August 2, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.[*]

PER CURIAM:

Plaintiff-appellant, Maurine Odom (Odom), brought this slip-and-fall suit against defendant-appellant, Wal-Mart Stores, Inc. (Wal-Mart). The district court granted summary judgment in favor of Wal-Mart, and Odom appeals. We reverse and remand.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

Odom alleges that while shopping at a Wal-Mart store in Houston, Texas, on September 17, 1990, she slipped on a liquid substance and fell, injuring her right shoulder, arm, and knee. She also claims that, after falling, she noticed the floor was wet and streaked with water as if recently mopped, and that a Wal-Mart employee, upon arriving at the scene of the accident, remarked "I guess they didn't get it all."[1] The parties agree that there were no signs warning of wet or slippery conditions in the vicinity of the accident. On June 19, 1992, Odom filed this action against Wal-Mart in Texas state court, and Wal-Mart had the case removed to federal district court based upon diversity of citizenship. On February 1, 1993, the district court granted Wal-Mart's motion for summary judgment and entered a take nothing judgment. Odom brings this appeal. Finding that Odom's affidavit raises a genuine issue of material fact, we reverse the district court's decision and remand the case for further proceedings.

Discussion

This Court reviews a grant of summary judgement *de novo*. *Exxon Corporation v. Burglin*, 4 F.3d 1294, 1297 (5th Cir. 1993). Summary judgment is only appropriate when "there is no genuine

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[1] Odom has been unable to identify the employee responsible for this statement although the record appears to indicate she has made several attempts to do so. For the purposes of summary judgment, however, we must assume that the facts set forth in her affidavit are correct. The declarant's reliability and Odom's credibility are properly matters for the jury rather than the court. *See, e.g., Albertson's, Inc. v. Mungia*, 602 S.W.2d 359, 360-61 (Tex. Civ. App.sQCorpus Christi 1980, no writ) (finding sufficient evidence of an employee's spontaneous statement where slip-and-fall plaintiff could only identify the employee as a young, blond girl).

issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). As the party moving for summary judgment, Wal-Mart carries the initial burden of pointing out the respects in which there is an absence of evidence to support the nonmovant's case. *Burglin*, 4 F.3d at 1297; *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986). After consulting the applicable substantive law to determine what facts and issues are material, we review the evidence in a light most favorable to the nonmovant relating to those issues. *Burglin*, 4 F.3d at 1297. If Odom, as the nonmoving party, brings forth appropriate summary judgment evidence in support of allegations essential to her claim, a genuine issue is presented and summary judgment must be denied. *Id.*; *Celotex Corp.*, 106 S.Ct. at 2555.

In this diversity case, Texas law applies and under it Odom is Wal-Mart's invitee. *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983). To recover from Wal-Mart, Odom bears the burden of proving that (1) Wal-Mart had actual or constructive knowledge of some condition on its premises; (2) the condition posed an unreasonable risk of harm; (3) Wal-Mart failed to exercise reasonable care to reduce or eliminate the risk; and (4) its failure to use reasonable care proximately caused her injuries. *Keetch v. Kroger Company*, 845 S.W.2d 262, 264 (Tex. 1992); *Corbin*, 648 S.W.2d at 296. The district court ruled that Odom produced no evidence sufficient to prove that there was any foreign substance on the floor or, if there was such a substance, that it had been there long enough to give Wal-Mart constructive knowledge of the

dangerous condition. We disagree.

In response to Wal-Mart's motion for summary judgment, Odom properly filed her affidavit stating that she fell when her feet skidded on a liquid substance on the floor, that when and where she fell the floor was wet and streaked with water as if recently mopped, and that as store employees were assisting her to get up one of them said "I guess they didn't get it all" in such a way as to appear to be "referring to the fact that whatever was on the floor had not been completely mopped up before I slipped and fell." In the absence of conclusive evidence to the contrary, these affidavit statements are sufficient, albeit perhaps barely, to create a reasonable inference that at least one employee knew the floor was wet or slippery and that Wal-Mart failed to warn its patrons of the possible hazard. *See H.E.B. Food Stores v. Slaughter*, 484 S.W.2d 794 (Tex. Civ. App.SQCorpus Christi 1972, writ dism'd w.o.j.); *see also Albertson's, Inc. v. Mungia*, 602 S.W.2d 359 (Tex. App.SQCorpus Christi 1980, no writ).

In *Slaughter*, the plaintiff alleged that she slipped and fell on grapes lying in dirt-streaked puddles of water that "looked like they had been swept through." *Slaughter*, 484 S.W.2d at 796. After falling, she heard a store employee say: "She fell on those grapes." *Id*. at 797. The court ruled that the spontaneous statement "reasonably infer[red] that defendant's employees knew that the loose grapes were on the floor a sufficient length of time, so that such grapes should have been removed in the exercise of ordinary care." *Id*. The *Slaughter* court also noted that the streaks in the water could support a reasonable inference that "the

wet condition of the floor was known to at least the one employee who attempted to sweep up the water." *Id*. Similarly, in *Mungia* the plaintiff alleged that after falling she heard a store employee call to another: "Hey, would you come over here, and would you get the mop and come mop here. There is water there on the floor. There is going to be some more people falling down here." *Mungia*, 602 S.W.2d at 361. The *Mungia* court noted that this statement "create[d] a reasonable inference that the water had been on the floor long enough to constitute notice of the existence to defendant." *Id*. at 362.

In granting summary judgment, the district court entirely disregarded the statements in Odom's affidavits concerning the condition of the floor and simply accepted Wal-Mart's assertion that its witnesses did not observe any liquid on the floor or on Odom's shoes or clothing. The court also stated that the employee's *res gestae* remark only tended to show that:

> "[An employee] tried to clean it up, if there was anything there, . . . but it's hard to infer reasonably [sic] negligence from the cleaning up of something that we don't know were [sic] reasonably slippery, unreasonably dangerous at the time. . . . It may have been Prell shampoo that had been there before, and they may have cleaned that up perfectly and it ended up streaked water on the floor, which is not dangerous."[2]

Rather than viewing the evidence in a light most favorable to the nonmovant, the court ignored two reasonable inferences: (1) A Wal-Mart employee attempted but failed to clean up whatever liquid had been spilled, or (2) the employee successfully cleaned up

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[2] The district court seems to have believed that, as a matter of law, mop water left standing in the aisle of a shopping center is never dangerous. We disagree.

whatever had been spilled, but left the aisle slippery because it was wet and streaked with mop water, and failed to post any warning of the wet floor. Since both of these inferences are consistent with the statements in Odom's affidavit that she slipped on a liquid substance and that "the floor was wet and streaked with water," it is irrelevant at this stage whether the "liquid substance" was the material being mopped up or the left over mop water. In either case, Odom, as nonmovant, brought forth summary judgment evidence in support of her allegations which, if believed by a jury, would support a finding that Wal-Mart had actual or constructive knowledge of a potentially dangerous condition. Thus, a genuine issue of fact was presented and summary judgment was improper. *Burglin*, 4 F.3d at 1297.

We recognize that this is a close case and that Odom's evidence, although sufficient to forestall summary judgment, is only barely so. Nevertheless, we ultimately conclude that it does fall on that side of the line, albeit by the thinnest of margins.

Conclusion

We accordingly reverse the district court's grant of summary judgment and remand the case for further proceedings.

REVERSED and REMANDED