

LEONOR MERCEDES PALERMO,	)	
	)	
Plaintiff,	)	CIVIL NO. SX-08-CV-599
	)	
v.	)	ACTION FOR DAMAGES
	)	
WORLD FRESH MARKET, LLC, a/k/a PUEBLO,	)	
	)	
Defendant.	)	
	)	

MOLLOY, Robert A., Judge.

I. FACTUAL BACKGROUND

This slip-and-fall case arises from an incident that occurred at Pueblo Supermarket, a grocery store located in Golden Rock, Christiansted, St. Croix, United States Virgin Islands.

and owned by the Defendant, World Fresh Market, LLC (“WFM”). On September 1, 2008, Plaintiff Leonor Mercedes Palermo (“Palermo”) and her friend, Valentina Geronimo De La Cruz (“De la Cruz”), were shopping in Pueblo Supermarket. Palermo alleges that, while shopping, she slipped on a pool of water and fell in the grocery aisle, sustaining injuries. After her fall, Palermo’s clothes were wet with water.

Prior to this incident, the roof to the Pueblo grocery store was compromised causing it to leak water whenever it rained. WFM knew about this condition since at least August 20, 2008. Instead of closing off the entire aisle, WFM employees placed an ice cooler to catch the water leaking from the roof and placed yellow “wet floor” signs around the cooler. The parties dispute that there were “wet floor” signs on the floor near where Palermo fell.

II. LEGAL STANDARD

Summary judgment motions are governed by Virgin Islands Rule of Civil Procedure 56, which allows a court to grant summary judgment when the movant shows no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. V.I. R. Civ. P. 56(a); *Rymer v. Kmart Corp.*, 68 V.I. 571, 575-76 (2018). A genuine factual dispute exists “if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Greene v. V.I. Water and Power Co.*, 65 V.I. 67, 73 (Super. Ct. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotation marks omitted)).

The movant must support the motion by “identify[ing] those portions of the record that demonstrate the absence of a genuine issue of material fact.” *Rymer*, 68 V.I. at 575-76. If the movant does so, “the burden shifts to the non-moving party to present ‘affirmative

evidence' from which a jury might reasonably return a verdict in his favor." *Id.* However, "[i]f a moving party fails to carry its initial burden of production, the non-moving party has no obligation to produce anything, even if the non-moving party would have the ultimate burden of persuasion of trial." *United Corp. v. Hamed*, 64 V.I. 297, 309-10 (2016) (citation and internal quotation marks omitted). In order to survive a motion for summary judgment, the non-moving party's evidence "must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance [however,] the Court may not itself weigh the evidence." *Rymer*, 68 V.I. at 576 (2018) (citing *Williams v. United Corp.*, 50 V.I. 191, 194 (2008)).

In all instances, "[s]ummary judgment is a drastic remedy, and should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact that must be decided by a jury." *Hamed*, 64 V.I. at 309. The Court's role in deciding a motion for summary judgment is not to determine truth, but rather to determine whether a factual dispute exists to warrant a trial on the merits. *See Brodhurst v. Frazier*, 57 V.I. 365, 373-74 (2012). If such a factual dispute exists, the Court must deny summary judgment. *Rymer*, 68 V.I. at 583.

III. DISCUSSION

WFM contends that it is entitled to summary judgment on Palermo's negligence claim primarily for two reasons: (1) there is no evidence that WFM had actual or constructive notice that there was water on the floor; and (2) Palermo is not entitled to recover any damages because any dangerous condition was "open and obvious."

To establish a claim of negligence, a plaintiff must establish the following elements: (1) the defendant owed the plaintiff a legal duty; (2) the defendant breached that duty; and (3) the defendant's negligence caused the plaintiff's injury. *Rymer*, 68 V.I. at 576; *see also Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (2014) (explaining why the traditional elements of negligence – duty, breach, cause and harm – constitute the soundest common law rule for the Virgin Islands). Because of the subjective nature of this test, the Supreme Court's "jurisprudence has consistently favored – wherever possible – the adjudication of negligence cases by a jury, a preference codified by the Legislature in 5 V.I.C. § 1451(a), instead of a single judge at summary judgment." *Rymer*, 68 V.I. at 576.

A. Notice

WFM contends that there is no evidence in the record that it had notice that the floor was wet. With regards to a negligence claim based on premises liability, "a possessor of land is subject to liability for physical harm caused to its business invitees by a [dangerous] condition on the land only if it knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees." *Bynoe v. CULUSVI, Inc.*, Civil No. SX-15-CV-503, 2016 V.I. LEXIS 32, *4-5 (V.I. Super. Ct. Apr. 1, 2016) (citing *Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 529 (2013)). "The mere existence of a dangerous condition or the happening of an accident on a business premises is not evidence of a breach of duty of care nor does it raise a presumption of negligence." *Bynoe*, 2016 V.I. LEXIS 32, at *4-5 (citing *David v. Pueblo Supermarket of St. Thomas*, 740 F.2d, 233 (3d Cir. 1984)).

In order to show that a defendant breached its duty of care, a plaintiff must show that the defendant had either actual or constructive notice of the dangerous condition. *Machado*, 61 V.I. at 392. A plaintiff can show actual notice by demonstrating that the landowner had been warned about the dangerous nature of the condition on the property beforehand. *Bynoe*, 2016 V.I. LEXIS 32, at *4. Constructive notice, on the other hand, “can exist if the dangerous condition persisted over a long enough period of time that the owner should have become aware of it through the exercise of reasonable case.” *Id.* (internal quotations omitted).

There is no evidence in the record that demonstrates that WFM had actual notice that water was on the floor of the aisle at the time Palermo fell.¹ There is also insufficient evidence for a reasonable jury to conclude that the water was on the floor “long enough before the injury that [WFM] should have discovered it in the exercise of reasonable care.” *Rymer*, 68 V.I. at 576. While Palermo did testify at her deposition that there was a store employee pricing items in the same grocery aisle where she fell, there is no evidence for a reasonable jury to conclude that that employee was in the aisle for a period long enough to discover that water was on the floor. *See Rymer*, 68 V.I. at 576 (opining that if a non-recurring hazardous condition lasts minutes, without indication that the condition exists and injury is not foreseeable, there is no presumption of constructive notice); *see also Bowman v. Wal-Mart Stores E., LP*, Civil No. 14-3182, 2015 U.S. Dist. LEXIS 16436 (E.D. Pa. Feb. 10, 2015)

¹ Palermo argues that WFM did in fact have knowledge of water on the floor. Palermo cites to the deposition testimony of WFM’s corporate designee, the deposition testimony of De La Cruz, and her own deposition testimony to establish that there was water on the floor. However, neither of these individuals testified that they saw water on the floor *prior* to Palermo falling. These individuals simply testified that they saw water on the floor after the fall.

(finding constructive notice of a dangerous condition may not be established before five minutes but may be established after nineteen minutes). An employee's mere proximity to a dangerous condition without temporal evidence as to how long the dangerous condition existed is insufficient to establish constructive knowledge. *See Coward v. H.E.B., Inc.*, No. 01-13-00773-CV, 2014 Tex. App. LEXIS 7637, at *16-17 (Tex. Ct. App. July 15, 2014) (finding that employees steps away from the accident aisle did not support conclusion that defendants had constructive knowledge, because there was no temporal evidence of the water on the floor) (citing *Wal-Mart Stores, Inc. v. Spates*, 186 S.W.3d 566, 567-68 (Tx. 2006)).

However, Palermo argues that WFM knew that the roof was damaged and that it leaked water when it rained. Thus, Palermo argues, because WFM had knowledge that the roof leaked water when it rained, WFM had knowledge of a dangerous condition that caused her injuries. While, technically, the leaky roof was not the dangerous condition that caused Palermo's injuries, her argument does implicate the "recurring condition" rule established in *Perez v. Ritz-Carlton (Virgin Islands) Inc.*, 59 V.I. 522 (2013). Under the "recurring condition" rule "a plaintiff can establish that a possessor of land had constructive notice of a dangerous condition by introducing evidence that it had actual knowledge of a recurring dangerous condition." *Id.* at 535. Here, Palermo contends that WFM had constructive notice of the water on the floor because WFM had actual knowledge of a recurring dangerous condition caused by water leaking from the roof to the floor when it rains. The record in this case demonstrates that on August 20, 2008, WFM employees became aware that the roof of the grocery store leaked water on the floor in the grocery aisle after it rained. Patterson Dep. 84: 1-12 (Feb. 5, 2013). WFM then had employees place a cooler under the leak to catch the

water. Nakhleh Dep. 114: 11-23; 121: 18-25 (Aug. 21, 2012). WFM also placed yellow “wet floor” signs around the cooler. *Id.* Palermo testified during her deposition that it had rained on the same she went to the grocery store. Palermo Dep. 41: 9-11; 44: 10-11. Finally, Palermo’s friend, De La Cruz, who was shopping with her in the grocery store a few steps in front of her, testified during her deposition that Palermo’s clothes was soaked with water after her fall. De La Cruz Dep. 17:7-12 (Feb. 6, 2013).

Accordingly, viewing this evidence in a light most favorable to Palermo, a reasonable jury could conclude that WFM had notice of a recurring dangerous condition caused by water leaking on the floor from the roof whenever it rained.² *See Perez*, 59 V.I. at 536 (opining that hotel owner had notice of a recurring dangerous condition caused by leaves and other debris accumulating on the stairs and the pathway whenever it rains, and therefore this evidence is sufficient to present a question of fact regarding constructive notice that a jury must resolve.”); *see also Tameru v. W-Franklin, L.P.*, 350 F. App’x. 737, 740 (3d Cir. 2009) (“Weather conditions can . . . support an inference of actual or constructive notice of a hazardous condition when coupled with evidence that the defendant had knowledge of both the weather condition at the time of the accident and the fact that the weather condition created hazards on the premises.”) (cited with approval in *Perez*, 59 V.I. at 536); *City of San Antonio v. Rodriguez*, 931 S.W.2d 535, 537 (Tx. 1996) (opining that although city employees did not

² The Court recognizes that employees of WFM testified during their depositions that the roof would leak only after days of heavy rain, Coppin Dep. 24: 7-24, and that Palermo testified that it had rained “a little” on the day that she fell. Palermo Dep. 41: 9-11. But the evidence clearly established that the roof would leak after it rained. Thus, whether there was a sufficient amount of rainfall on the day Palermo to cause the roof to leak water onto the floor is a question of fact for the jury to decide. *See Perez*, 59 V.I. at 536-37 (rejecting argument that summary judgment should be granted because there was no testimony on the amount of rainfall on the date of the incident).

have actual knowledge of a wet spot on the basketball court causing plaintiff to fall, it was for a jury to decide whether the city was negligent because there was sufficient evidence that city employees knew of the leaks in the roof and knew it had been raining and that “[d]epending on the position of the leaks above the floor and the amount of rain, the jury might have inferred that the person in charge [of the recreation center] knew that there would be water on the floor.”). A reasonable jury could also conclude that the roof was leaking water on the day Palermo fell based on the evidence that it rained on that day, an ice cooler was placed in the aisle to catch water, and store employees placed “wet floor signs” on the floor around the cooler. Thus, WFM’s motion for summary judgment based on lack of notice must fail.

B. Open and Obvious Condition

WFM further argues that, because it placed warning signs near the cooler to warn customers that the floor was wet, this “fulfill[ed] [its] duty to warn an invitee of a dangerous condition.” Def.’s Memo. of Law in Support of Summ. J. at 6. According to WFM, “[a] cooler or a bucket in the middle of the floor should provide the patron with notice that the floor is wet, making the danger open and obvious” and thus WFM “should not have to bear the burden of Palermo’s own negligence in not seeing or heeding the warning given by WFM.” *Id.* at 7. Palermo contends, however, that she did not see any “wet floor” signs prior to her fall. Palermo Dep. 48:14-18. This places a material fact at issue, however, and even if it were uncontroverted that warning signs were placed in the aisle where Palermo fell, that would not warrant a finding of summary judgment in WFM’s favor.

WFM's arguments on this issue fails to recognize that the Virgin Islands is a comparative negligence jurisdiction and that a plaintiff's negligence must be compared to the negligence of the defendant. Section 1451(a) of Title 5 of the Virgin Islands Code provides:

In any action based upon the negligence to recover for injury to person or property, the contributory negligence of a plaintiff shall not bar a recovery, but the damages shall be diminished by the trier of fact in proportion to the amount of negligence attributable to the plaintiff. The burden of proving contributory negligence shall be on the defendant. If such claimant is found by the trier of fact to be more at fault than the defendant, or, in the case of multiple defendants, more at fault than the combined fault of the defendants, the claimant may not recover.

5 V.I.C. § 1451(a).

Thus, based on section 1451(a), WFM's "open and obvious" defense cannot serve as a basis to award summary judgment in its favor. This type of evidence must be presented to a jury to apportion fault, if appropriate, between Palermo's alleged negligent acts and any finding of negligence attributable to WFM. *See e.g., Machado*, 61 V.I. at 397 ("We conclude that maintaining implied assumption of risk as a complete defense to negligence conflicts with the Legislature's unambiguous directive in 5 V.I.C. § 1151(a) that the plaintiff's fault shall not bar a recovery, but the damages shall be diminished by the trier of fact in proportion to the amount of negligence attributable to the plaintiff.") (internal quotations omitted). Because a plaintiff's contributory negligence is a question for the jury, it would be inappropriate to award summary judgment on that basis.

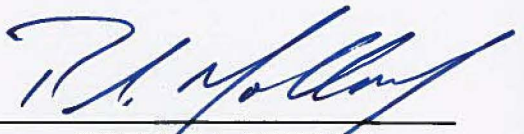
IV. CONCLUSION

For the reasons stated above, the Court concludes that based on the "recurring condition" rule, there is sufficient evidence in the record for a reasonable jury to conclude

that WFM had constructive notice of the dangerous condition that caused Palermo's injuries. The Court also concludes that any evidence pertaining to whether the dangerous condition was "open and obvious" is an issue of fact for the jury to decide. Thus, WFM's motion for summary judgment will be denied.

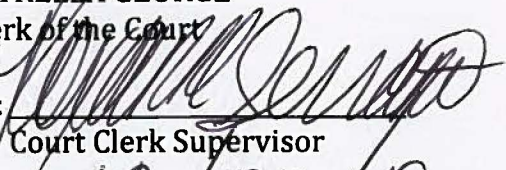
An appropriate order follows.

Dated: December 28, 2018

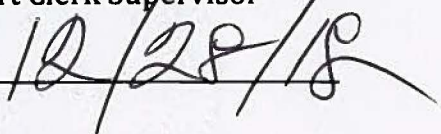


ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Clerk of the Court

By: 

Court Clerk Supervisor

Dated: 

12/28/18