**For Publication**

# IN THE SUPREME COURT OF THE VIRGIN ISLANDS

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| **SHIRLEY RYMER,** | ) | **S. Ct. Civ. No. 2017-0010** |
| Appellant/Plaintiff, | ) | Re: Super. Ct. Civ. No. 443/2011 (STT) |
| | ) | |
| v. | ) | |
| | ) | |
| **KMART CORPORATION,** | ) | |
| Appellee/Defendant. | ) | |

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Kathleen Y. Mackay

Argued: July 11, 2017
Filed: January 18, 2018

**BEFORE:** **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

**APPEARANCES:**

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## OPINION OF THE COURT

**HODGE, Chief Justice.**

Shirley Rymer appeals from a October 31, 2016 Superior Court order granting Kmart Corporation summary judgment for her slip-and-fall premises liability action. For the reasons explained below, we reverse the judgment of the Superior Court.

## I. BACKGROUND

Since this case was decided below on summary judgment, we rely upon the uncontested portions of Rymer's allegations on appeal. On August 13, 2009, Shirley Rymer slipped on a purple liquid on the floor and fell immediately upon entering the Tutu Park Kmart store. Rymer alleges that, as a result of the fall, she suffered various physical injuries—the most serious being damage to her knee—and accompanying emotional distress. After her fall, Rymer went immediately to the emergency room and, due to continued pain over several months, underwent an MRI, physical therapy, and minor surgery.

Prior to Rymer entering Kmart, another patron of the store, Savannah Gibbs, had purchased a bottle of grape soda. After paying for the soda, but before exiting Kmart, Gibbs unscrewed the bottle cap, and the grape soda promptly exploded out and onto the floor in front of the store's main entrance. Gibbs then stood in front of the spill to guard it while looking around for someone to help, and for something she could use to wipe-up the mess. While Gibbs' back was turned, Rymer entered the Kmart store and slipped on the grape soda puddle. According to Gibbs, the time between when she spilled the soda and when Rymer slipped on it was somewhere between forty-five seconds and three minutes.

The day after the incident, Dean Wheatley, a Kmart employee on the scene, completed a "Loss Prevention Statement Form," chronicling the following:

> I, Dean Wheatley, an employee of Kmart 3829, was pushing carts from outside to go into the store as I saw a lady on her knees. I ask [sic] her if she was alright, she said no. Away from the situation, a young lady opened a bottle of Welch [sic] grape soda, as the bottle opened the pressure of the soda spill [sic] on the floor. So I called the Assistant Store Manager and told him what happen [sic] to what I said. I called the Rangers security guard who accompanied me with the problem. I told him to get a chair for the woman as he did, then the Assistant Store Manager called loss control and they took over the problem from there.

(J.A. 45.) Nearly six years later, on June 30, 2015, Wheatley stated the following in his deposition:

> ATTORNEY: My question is, and I believe you answered this already, you did not see the spill on the floor when you had exited Kmart to pick up the shopping carts?
> WHEATLEY: No.
> ATTORNEY: Okay. You came back into Kmart and you saw the spill on the floor with the lady on her knee, correct?
> WHEATLEY: This is what I tell [sic] you from before, when I was pushing in the shopping carts, she was on the floor."

(J.A. 62-63.)

Kmart moved for summary judgment, claiming that Rymer failed to identify sufficient facts to raise a genuine dispute as to (1) whether Kmart had actual notice of the spill prior to her fall, and (2) whether the grape soda was on the floor for a long enough time to give Kmart constructive notice of the hazardous condition. Rymer responded, arguing that, in his Loss Prevention Statement, Wheatley stated that he observed Gibbs spill the soda and notified Kmart's assistant store manager *before* Rymer fell, giving Kmart actual notice. She also argued that, despite the short forty-five second to three-minute time frame, Kmart had sufficient time to gain constructive notice of the hazardous condition because the spill happened in a high-traffic area of the store and the liquid on the floor was a bright color. On October 31, 2016, the Superior Court of the Virgin Islands granted Kmart's motion for summary judgment, stating that "[i]t is unreasonable for a finder of fact to infer that Wheatley's statement in the Loss Prevention Statement meant that he saw the spill before Rymer fell when presented with Wheatley's own clarification of his meaning during his deposition." (J.A. 6, 11.) Accordingly, the Superior Court dismissed the matter with prejudice. On November 29, 2016, Rymer filed a timely notice of appeal with this Court. V.I.R. APP. P. 5(a)(1).

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

This court has appellate jurisdiction over "all appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d); *see also* 4 V.I.C. § 32(a) (granting this Court jurisdiction over "all appeals arising from final judgments, final decrees or final orders of the Superior Court"). Because the Superior Court's October 31, 2016 order granting Kmart summary judgment on Rymer's claim is a final order, this Court has jurisdiction over this appeal. *Allen v. HOVENSA, L.L.C.*, 59 V.I. 430, 434 (V.I. 2013). This Court exercises plenary review over the Superior Court's grant of summary judgment, and applies the same test the Superior Court should apply when deciding that motion. *Joseph v. Daily News Publ'g Co.*, 57 V.I. 566, 581 (V.I. 2012).

### B. Summary Judgment

A summary judgment movant is entitled to judgment as a matter of law if the movant can demonstrate the absence of a triable issue of material fact in the record. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379-80 (V.I. 2014). A drastic remedy, a court should only grant summary judgment when the "pleadings, the discovery and disclosure materials on file, and any affidavits, show there is no genuine issue as to any material fact." *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008). Once the moving party has identified the portions of the record that demonstrate no issue of material fact, "the burden shifts to the non-moving party to present affirmative evidence from which a jury might reasonably return a verdict in his favor." *Chapman v. Cornwall*, 58 V.I. 431, 436 (V.I. 2013) (internal citations and quotation marks omitted). The non-moving party "may not rest upon mere allegations, [but] must present actual evidence showing

a genuine issue for trial." *Williams*, 50 V.I. at 194. Further, the reviewing court must consider the record evidence in the light most favorable to the non-moving party. *Machado*, 61 V.I. at 379.

### C. Premises Liability

Premises liability actions in the Virgin Islands follow the same four-factor test as traditional negligence claims: "(1) a legal duty of care to the plaintiff, (2) a breach of that duty of care by the defendant (3) constituting the factual and legal cause of (4) damages to the plaintiff." *Machado*, 61 V.I. at 380. Given the subjective nature of this test, "this 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 by a single judge at summary judgment." *Id*. at 399. Here, whether Kmart had actual notice of the grape soda spill before Rymer fell turns on whether Wheatley's Loss Prevention Statement and deposition are in conflict, and their meaning. Additionally, if Kmart did not have actual notice of the spill, whether Kmart had constructive notice of the hazardous condition depends on whether Kmart should have known about a bright-colored spill lasting forty-five seconds to three-minutes at the front of the store. We will address each matter in turn.

*i. Actual Notice*

In the context of this slip-and-fall premises liability negligence action, Kmart will have had actual notice "if it is shown that an employee created or was aware of the hazard" before Rymer fell. *Martin v. Wal-Mart Stores, Inc.*, 183 F.3d 770, 772 (8th Cir. 1999); *see also Felix v. GMS*, 501 Fed. Appx. 131, 135 (3d Cir. 2012) ("Actual notice exists if the store had been warned about the condition of the liquid on the floor beforehand."). When considering a summary judgment motion, a trial judge may not weigh the credibility of evidence or witnesses. *Brodhurst v. Frazier*, 57 V.I. 365, 397 (V.I. 2012); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)

("[T]he trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying [the relevant] evidentiary standard could reasonably find for either the plaintiff or the defendant."). Accordingly, "if a credibility determination is necessary as to the existence of a material fact, a grant of summary judgment would be improper." *Brodhurst*, 57 V.I. at 397.

Here, the Superior Court improperly weighed the evidence against Rymer—the non-moving party—when it determined that Wheatley's deposition testimony was a *clarification* of his Loss Prevention Statement, rather than a contradiction of it.[1] It is a well-established rule of summary judgment that, where there are conflicting pieces of evidence in the record, a court "cannot independently weigh the evidence to resolve the conflict [and] must accept as true the evidence that is most favorable to the non-moving party," so long as it is "supported by proper proofs." *United Corp. v. Tutu Park, Ltd.*, 55 V.I. 702, 707, 719 (V.I. 2012).

The record before us contains two conflicting statements taken six years apart, the first indicating that Kmart had actual notice of the hazardous condition before Rymer fell, and the other indicating the opposite. While it may be possible to reasonably interpret the Loss Prevention Statement in two ways—(1) Wheatley saw the spill and reported it to the assistant manager before Rymer fell, or (2) Wheatley saw Rymer on her knees after she fell, realized what had happened, and then reported it to the assistant manager—that assessment and resolution of the meaning and weight of the evidence belongs with a jury. *See Williams*, 50 V.I. at 200 ("[I]t is for the jury, not

[1] While we recognize that this conclusion is an understandable interpretation of the facts, when the non-moving party has produced evidence demonstrating the existence of a factual conflict, the Superior Court cannot lend greater credence to an alternative interpretation that resolves the conflict at the summary judgment stage. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

the court, to analyze all of the possibilities presented by the evidence and make the determination as to which is most likely the truth."). Similarly, whether Wheatley's second statement was a clarification of, or a contradiction to his first statement, is a factual judgment reserved for the jury. *See Anthony v. FirstBank V.I.*, 58 V.I. 224, 233-35 (V.I. 2013) (reversing a grant of summary judgment where the "Superior Court engaged in weighing the evidence to determine a material fact rather than present the disputed fact to a finder-of-fact at trial"); *Lane v. Celotex Corp.*, 782 F.2d 1526, 1533 (11th Cir. 1986) ("While some statements in [a witness'] deposition might be difficult to square with his affidavit, these conflicts present questions of credibility which require jury resolution.").

The Superior Court relied on the opinion of the Supreme Court of the United States in *Moore v. Chesapeake & Ohio Railway Co.*, 340 U.S. 573 (1951) to support its conclusion that "it is unreasonable for a fact finder to infer that Wheatley's statement in the Loss Prevention Statement meant that he saw the spill before Rymer fell[.]" (J.A. 6.) In *Moore*, the Supreme Court stated, "[w]e do not think that this isolated portion of the . . . testimony relied upon by petitioner permits an inference of negligence when placed in its setting of uncontradicted and unequivocal testimony at variance with such an inference." 340 U.S. at 576-77.[2] The context of *Moore*, however, was not summary judgment, since that case arose after a full trial where all of the evidence had been received before the sufficiency of the evidence issue arose. *Id.* at 573-74. Additionally, Wheatley's Loss Prevention Statement is not an isolated portion of otherwise

[2] In *Moore*, the U.S. Supreme Court interpreted a federal statute. The present case, however, involves a question of Virgin Islands common law, of which the Virgin Islands Supreme Court is the ultimate arbiter. U.S. Supreme Court decisions, while persuasive, are not binding on matters of Virgin Islands local law. *See Better Bldg. Maint. of the Virgin Islands, Inc. v. Lee*, 60 V.I. 740, 756 n. 9 (V.I. 2014).

uncontradicted and unequivocal testimony at trial, but is a pre-litigation document. Indeed, it is one of two potentially opposing statements, and, if anything, carries more weight as the statement most contemporaneous with its subject matter. Nevertheless, that value judgement in this case falls with neither this Court nor the Superior Court, but with the jury. *See Lane*, 782 F.2d at 1528 ("The [trial] court must not 'assess[] the probative value of any evidence presented to it, for this would be an unwarranted extension of the summary judgment device.") (quoting *Gauck v. Meleski*, 346 F.2d 433, 436 (5th Cir. 1965)). Furthermore, where the record contains conflicting evidence, the trial court must accept the non-moving party's interpretation of the evidence as true at the summary judgment stage. *Machado*, 61 V.I. at 379. Here, however, the Superior Court did just the opposite: it weighed the conflicting evidence *against* Rymer and in favor of the moving party, Kmart. Because the Superior Court improperly drew the conclusion that Wheatley's second statement was in fact a *clarification* of the first, and because the Superior Court improperly weighed Wheatley's statements against Rymer, we reverse the judgment based upon the Superior Court's erroneous grant of summary judgment to Kmart on this issue. *See Anthony*, 58 V.I. at 233 (holding that the Superior Court improperly accepted the moving party's interpretation of an evidentiary disparity, rather than drawing inferences in the light most favorable to the non-moving party).

*ii. Constructive Notice*

Turning to the Superior Court's holding that the record did not contain a factual dispute as to whether Kmart had constructive notice of the hazardous condition, we find the conclusion is also erroneous and we accordingly reverse the judgment on this basis. To establish sufficient evidence of constructive notice, a plaintiff must demonstrate that "the [dangerous] condition existed long enough before the injury that the possessor should have discovered it in the exercise of reasonable care." *Perez v. Ritz-Carlton*, 59 V.I. 522, 530 (V.I. 2013). If the owner of a business

has taken reasonable measures to protect customers from foreseeable harm on its premises, it cannot be liable to customers injured there. *See id*. at 534. Here, the question is whether Rymer identified sufficient facts that, if accepted by the jury, would support a finding that Kmart had constructive notice of the grape soda spill before she fell.

The consensus across jurisdictions is that a non-recurring hazardous condition lasting only a matter of minutes, *without more*, does not create the presumption of constructive notice. *See, e.g., Hose v. Winn-Dixie Montgomery, Inc.*, 658 So.2d 403, 405 (Ala. 1995) (finding no evidence of constructive notice and affirming a grant of summary judgment to a grocery store where "murky" liquid leaked onto an aisle floor "only minutes" before claimant's accident); *All American Quality Foods, Inc. v. Smith*, 797 S.E.2d 259, 262 (Ga. Ct. App. 2017) (holding that six-to-seven minutes was insufficient time to find that a store should have discovered and removed a pink liquid on an aisle floor prior to claimant's fall); *Schulz v. Kroger Co.*, 963 N.E.2d 1141, 1145 (Ind. Ct. App. 2012) (finding no issue of material fact that a store did not have constructive notice where a clear liquid existed on the ground in the back of a store for only five-to-ten minutes prior to customer's injury); *Tkach v. Golub Corp*. 696 N.Y.S.2d 289, 290 (N.Y. App. Div. 1999) (concluding that customer's evidence that chicken grease was on a grocery store floor near a self-service display case for five minutes prior to her fall was insufficient to overcome summary judgment); *Murray v. Chick-fil-A, Inc.*, 626 Fed. Appx. 515, 518 (5th Cir. 2015) (finding patron's evidence that a puddle existed on a fast food restaurant's bathroom floor for only "a few minutes" before she slipped and fell was "insufficient to impart constructive notice") (applying Texas law) (unreported).

Rymer rightly asserts, however, that while temporal evidence is a necessary "basis upon which the factfinder can reasonably assess the opportunity the premises owner had to discover the

dangerous condition," the significance of its duration at summary judgment is subject to mitigating contextual factors like color, size, location, and proximity to employees. *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 816 (Tex. 2002). In *Reece*, the Texas Supreme Court noted that,

> [w]hat constitutes a reasonable time for a premises owner to discover a dangerous condition will, of course, vary depending upon the facts and circumstances presented. And proximity evidence will often be relevant to the analysis. Thus, if the dangerous condition is conspicuous as, for example, a large puddle of dark liquid on a light floor would likely be, then an employee's proximity to the condition might shorten the time in which a jury could find the premises owner should reasonably have discovered it.

*Id*.

Specifically, Rymer contends that the location of the spill—between Kmart's checkout stations and main entrance—is a high-traffic area and, since the grape soda was a conspicuous purple color, a Kmart employee should have taken notice of it within the forty-five second to three-minute period it was on the floor. Indeed, other courts have held that such factors, if established, support the presumption of constructive notice, despite a hazard's short duration. *See, e.g.*, *Courville v. Target Corp. of Minn.*, 232 Fed. Appx. 389, 391 (5th Cir. 2007) (per curiam) (unpublished) (explaining that "[b]ecause the hazard was in a high traffic area, it is arguable that only a very short period of time would be necessary to discover the hazard") (applying Louisiana law); *Gibson v. United States*, 671 F.2d 204, 206 (6th Cir. 1982) ("Some factors to be considered in determining if there has been a reasonable time lapse for a proprietor of a business establishment to be chargeable with constructive notice of a [dangerous] condition . . . are the nature of the business, the size of the store, the number of customers, the nature of the dangerous substance, its location, and the foreseeable consequences.") (applying Tennessee law); *Moss v. Nat'l Super Markets, Inc.*, 781 S.W.2d 784, 785–86 (Mo. 1989) (explaining that "evidence show[ing] that employees of the store were regularly in the area in which the accident occurred" can mitigate a

short duration); *Hale v. Kroger Ltd. P'ship*, 28 So. 3d 772, 781 (Ala. Civ. App. 2009) ("[T]he size of the spill can be a factor in assessing whether a reasonable storekeeper should have discovered the hazard in time to protect the patrons of the store"); *Combs v. First Nat'l Supermarkets, Inc.*, 663 N.E.2d 669, 671 (Ohio Ct. App. 1995) (noting that a fifteen-minute delay involving a clear liquid was sufficient where it occurred "on the main aisle of a grocery food store"); *Goodson v. Southland Corp.*, 454 S.W.2d 823, 828 (Tex. Ct. App. 1970) ("What amounts to a sufficient time to warrant . . . constructive notice depends on the circumstances in each particular case; it involves the nature of the danger, the number of persons likely to be affected by it, [and] the diligence required to discover or prevent it[.]"); *Banks v. Colonial Stores, Inc.*, 161 S.E.2d 366, 369 (Ga. Ct. App. 1968) (explaining that evidence that an employee was within ten feet of spilled green beans was sufficient to establish constructive notice, notwithstanding a short, five-minute spill duration).

While we recognize that the record before this Court is scant, it nevertheless evinces that Rymer presented more than a scintilla of evidence that, if proven, could mitigate the short three-minute duration of the grape soda spill. Unlike cases where a hazardous condition existed unnoticed in an aisle until someone slipped, here, the grape soda exploded out of the bottle in a manner likely to attract attention at its inception. Additionally, as Rymer asserts, the accident occurred in a common area where Kmart's management and workers traverse frequently, suggesting that the spill was readily discoverable to employees exercising reasonable care. *See Courville*, 232 Fed. Appx. at 391-92 (finding a factual question as to whether a store had constructive notice of a spill that "existed at least immediately" before customer slipped when the spill happened in a high traffic area between the checkout line and snack bar). Moreover, the record here indicates that Gibbs stood by the spill, actively attempting to attract the attention of a Kmart worker who could help her clean-up the bright purple mess. Finally, according to Wheatley's Loss

Prevention Statement, he called upon a security guard after he saw Rymer on her knees, and the security guard readily brought Rymer a chair, suggesting that the guard was in the vicinity of the spill and could have discovered it. *See Romeo v. Harrah's Atlantic City Propco, LLC*, 168 F.Supp.3d. 726, 732 (D.N.J. 2016) (finding a genuine issue of material fact as to whether a casino had constructive notice of a spill lasting four minutes in a common area, where video surveillance showed that an employee was in the area of the spill but failed to discover it).

Absent from this record is evidence—such as video surveillance footage, photographs, measurements, or a policy manual—affirmatively establishing that a Kmart employee was or should have been stationed in the area of the spill when it happened, or that the Kmart cashiers should or could have seen the spill from their nearby stations. We find, however, that Rymer has nonetheless identified mitigating factors that, taken in the light most favorable to her, establish a genuine issue of material fact of whether Kmart could or should have become aware of the hazardous condition before Rymer fell, despite its brief existence. *See Reece*, 81 S.W.3d at 816. Indeed, the spill's explosive nature, bright color, location near Kmart's entrance, proximity to employees, and the fact that Gibbs stayed by the spill and eagerly solicited help, are all mitigating factors that distinguish this case from others where the only constructive notice factor is the hazard's duration. Whether these factors are sufficient to overcome the spill's short duration and establish that Kmart had constructive notice is a balancing of the evidence that belongs with the jury, not the Superior Court at summary judgment. *Williams*, 50 V.I. at 194-95 ("[T]o survive 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 [and,] [i]mportantly, in our analysis, this Court may not itself weigh the evidence[.]"). Therefore, we reverse the Superior Court's grant of summary judgment to Kmart on the issue of constructive notice.

## III. CONCLUSION

For the foregoing reasons, we conclude that Rymer was able to present evidence of a factual dispute regarding whether Kmart had actual and constructive notice of the dangerous condition leading to Rymer's injury. Therefore, we reverse the Superior Court's judgment dismissing the action with prejudice based upon its erroneous grant of summary judgment to Kmart and remand for further proceedings.

**Dated this 18th day of January 2018.** **BY THE COURT:**

/s/ Rhys S. Hodge
**RHYS S. HODGE**
**Chief Justice**

**ATTEST:**

**VERONICA J. HANDY, ESQ.**
**Clerk of the Court**