

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BEVERLY A. AHALT,)	
)	
Plaintiff)	
)	
v.)	Docket No. 00-148-P-DMC
)	
WAL-MART STORES, INC.,)	
)	
Defendant)	

ORDER ON EVIDENTIARY ISSUE

The parties raised in their respective final pretrial memoranda a disputed issue concerning the application of Fed. R. Evid. 407 to this case. Plaintiff’s Pretrial Memorandum (Docket No. 17) at 2-5; Defendant Wal-Mart Stores, Inc.’s Pretrial Memorandum (Docket No. 19) at [2]-[3]. At the final pretrial conference, I directed counsel to file supplemental briefs addressing this issue no later than November 7, 2000, Report of Final Pretrial Conference and Order (Docket No. 21) at 2, and they have now done so. I will treat the matter as if a motion *in limine* to exclude the evidence at issue had been filed.

The evidence at issue concerns the placement, at the direction of the manager of the Wal-Mart store in which the plaintiff fell, of one or two mats at the site of her fall immediately after the fall. The plaintiff contends that water dripping off shopping carts collected at that location on a rainy day had accumulated on the floor and caused her to fall. She seeks to present evidence concerning the subsequent placement of the mats to show that the water was a recurring condition about which the defendant knew or should have known before the fall; that yellow “caution cones” placed at the site

were an insufficient safeguard; and that the amount of water on the floor at the time she fell was “substantial and more significant than Defendant Wal-Mart will admit to.” Plaintiff’s Pretrial Memorandum at 3-4. The defendant responds that evidence that the mats were placed at the site following the fall is evidence concerning subsequent remedial measures that is barred by Rule 407.¹ Defendant Wal-Mart Stores, Inc.’s Pretrial Memorandum at [2]-[3].

The rule itself provides:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Fed. R. Evid. 407. The plaintiff does not propose to offer this evidence to prove ownership, control or feasibility of precautionary measures or for purposes of impeachment. The listing of exceptions in the second sentence of the rule is not exclusive; such evidence has been admitted for other purposes. 23 C. Wright & K. Graham, *Federal Practice & Procedure* § 5290 (1980) (“Wright & Graham”).

Under Maine law,

[a] plaintiff does not have to prove that the store owner had actual notice of the specific condition giving rise to the injury if the plaintiff can establish that the store owner was aware of the risk of a recurrence of a hazardous condition of the premises. In those circumstances, a store owner may be chargeable with constructive notice of the existence of the specific condition at issue.

¹ The plaintiff argues in her supplemental memorandum that, “[t]o the extent Defendant raises the defense that Beverly Ahalt did not slip on water, then the fact that Defendant put down mats in the area where she fell cannot be considered as a subsequent remedial measure with regard to the Plaintiff’s accident.” Supplement to Plaintiff’s Pretrial Memorandum Briefing of Subsequent [sic] Remedial Measures Issue (“Plaintiff’s Supplement”) (Docket No. 22) at 1. The defendant is not required to choose between the defenses that the plaintiff did not slip on water and other defenses that arise only if water was present on the floor in order to avoid admission of the fact that it subsequently put mats on the floor. So long as the plaintiff contends that she slipped in water, the defendant can defend on alternative theories without incurring such a penalty merely because one of those alternatives is that the water was not involved in the fall. So long as the plaintiff claims that the water was a cause of her fall, the Rule 407 issue is properly before the court for resolution.

Dumont v. Shaw's Supermarkets, Inc., 664 A.2d 846, 848 (Me. 1995). Here, the plaintiff suggests that, because the store employees who have been deposed deny knowledge of any water on the floor at the site of the plaintiff's fall before the fall, she may have to rely on a recurring condition theory and must be allowed to present evidence of the use of the mats after her fall because that use "is clearly relevant to the issue of whether Defendant knew the condition to be a recurring one." Plaintiff's Supplement at 3. However, the placement of mats at the site of the plaintiff's fall immediately after her fall is just as consistent, if not more so, with a first discovery of water at that location as it is with knowledge by the defendant that water collecting at that location during a rainstorm was a recurring condition. The plaintiff is not entitled to admission of this evidence on this basis.

The plaintiff's second contention, that the safety cones present at the site of the plaintiff's fall were an insufficient safeguard, is an inference that may be drawn from the plaintiff's fall itself.² The placement of the mats shortly thereafter is not the only evidence available to the plaintiff to support this theory. More important, the inference that the cones were an insufficient safeguard goes directly to the negligence of the defendant, and accordingly the evidence concerning the mats, if offered for this purpose, is clearly barred by Rule 407.

The plaintiff's final asserted reason for admitting the evidence is that "the condition of the floor at the time of Plaintiff's fall is vigorously contested," because the defendant's employees have testified that the amount of water on the floor at the time of her fall was small enough to have been cleaned up with a paper towel, an amount that "was not sufficient to justify mats being placed down." Plaintiff's Supplement at 3. She contends that use of this evidence on this point is justified by the defendant's failure to take photographs of the floor following her fall or its loss of any photographs that might have been taken. *Id.* at 3-4. The defendant responds that this argument, like the plaintiff's

² The presence of the cones also allows the inference that the defendant had notice of the presence of water or some other hazardous
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other two arguments, is “merely a subterfuge to prove Wal-Mart’s negligence or culpability.” Defendant Wal-Mart Stores, Inc.’s Pretrial Memorandum at [3]. *See also* Defendant’s Supplement to Pretrial Memorandum Regarding Subsequent Remedial Measures Issue (Docket No. 23) at [1], [3].

Proof of prior conditions is a recognized exception to the strictures of Rule 407. *Wright & Graham* § 5290 at 149. However, whether the defendant took steps to create evidence of those conditions or subsequently destroyed evidence of those conditions is not a relevant consideration for purposes of Rule 407. *Id.* at 150-51. More important for consideration of the plaintiff’s argument on this point is her failure to suggest that an amount of water that could be removed with a paper towel would not be sufficient to cause her fall. Only if that were the case would evidence that mats were used, presumably to cover or to absorb an amount of water significantly more than that which the defendant’s employees assertedly testified was present, become relevant to the point which the plaintiff contends would be addressed by the evidence at issue. While this is a close question, I conclude that the danger that the jury would interpret the use of the mat or mats by the defendant as evidence of negligence or culpability with respect to the plaintiff’s fall, despite the use of a limiting instruction, outweighs any value that the plaintiff has demonstrated that such evidence would have to show the condition of the floor when the plaintiff fell.

Accordingly, based on the showing made, the plaintiff may not offer evidence that the defendant placed a mat or mats at the site of the plaintiff’s fall immediately after her fall or that the defendant has had a mat at that location since the plaintiff’s fall.

Dated this 28th day of November 2000.

David M. Cohen

condition at the site before the plaintiff’s fall.

United States Magistrate Judge

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