CAUSE NO. 2006-61172

Cortina	§	**IN THE DISTRICT COURT OF**
	§	
v.	§	**HARRIS COUNTY, T E X A S**
	§	
The Kroger Co., et al.	§	**157th JUDICIAL DISTRICT**

Order Granting Motion for Summary Judgment

Defendants Kroger and Dennis Siprian moved for a no evidence motion for summary judgment under rule 166a(i). For the reasons stated, the motion is granted.

Plaintiff alleges she slipped and fell on a liquid substance at a Kroger. To prove such a case, plaintiff must establish:

- Actual or constructive knowledge of some condition on the premises by the owner;
- That the condition posed an unreasonable risk of harm;
- That the owner did not exercise reasonable care to reduce or eliminate the risk; and
- That the owner's failure to use such care proximately caused the plaintiff's injury.

See Wal-Mart Stores v. Reece, 81 S.W.3d 812, 814 (Tex. 2000); *Wal-Mart Stores v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998).

Plaintiff attempts to establish actual knowledge through the deposition testimony of defendant Siprian, the assistant manager of the store in question. According to his testimony, Siprian spoke a witness to the fall, Ms. Doyle, who allegedly told him that there was water on the floor. The issue is whether he spoke to her before or after the fall, or both. Plaintiff relies on the following deposition exchange:

Q: You spoke with Ms. Doyle at the scene?

A: Yeah, at the scene.

Q: And you're aware that Ms. Doyle told you that she saw a wet substance—

A: Right.

Q: --prior to [plaintiff] being injured?

A: Right.

Siprian deposition, p. 28, lines 18-22. The question and answer exchange is ambiguous. Plaintiff argues that it means that Ms. Doyle reported the water on the floor to Siprian before the fall. Kroger argues that it means that Ms. Doyle merely saw the water prior to the fall. Other portions of the deposition,[1] however, make it clear that Siprian talked to Ms. Doyle for the first time after the accident. For example Kroger directs the court to the following question, not cited by plaintiff:

Q: She all—you're also aware that she indicated to you that she reported that wet spot on the floor prior to [plaintiff] being injured?

A: That's not true.

Siprian deposition p. 28, line 23 to p. 29, line 2. *See also* Siprian deposition p. 29, line 24; p. 47, lines 8-14; p. 109, lines 8-13; p. 110, line 19-p. 111, line 23.[2]

The question before the court is whether an ambiguous portion of the deposition of an interested party, later clarified, is sufficient evidence to survive a no evidence motion for summary judgment. There is little Texas authority on the point.

[1] In response to the no evidence motion for summary judgment, plaintiff attached the entire Siprian deposition. As a result, the entire testimony is before the court as summary judgment evidence.

[2] It is not at all clear that the question and answer can be read two ways. Since the phrase "prior to [plaintiff] being injured" appears closest to and adjacent to the phrase "she saw a wet substance," the response in all probability supports Kroger's interpretation, *i.e.*, Ms. Doyle saw a wet substance prior to the injury, but not that she reported it prior to the injury.

In general, once a no evidence motion for summary judgment is filed, the respondent must produce "summary judgment evidence raising a genuine issue of material fact." TEX. R. CIV. P. 166a(i). The amount of evidence required to defeat a no evidence motion for summary judgment parallels the standard for directed verdict and the no evidence standard on appeal of jury trials. *Barraza v. Eureka Co*., 25 S.W.3d 225, 231 (Tex. App.—El Paso 2000, pet. denied). Thus, if the respondent bring forth more than a scintilla of evidence, the motion should be denied. *Id*.; *Morgan v. Anthony*, 27 S.W.3d 928 (Tex. 2000). Less than a scintilla of evidence exists if the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *Kindred v. Con/Chem, Inc*., 650 S.W.2d 61, 63 (Tex. 1983). More than a scintilla of evidence exists when the evidence "rises to the level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119 (1998).

Thus, the question presented is whether testimony that can be read two different ways is more than a scintilla. The answer is no. In this no evidence motion, plaintiff bears the burden of proof. An ambiguous response is, in effect, no response.

Plaintiff argues in post hearing brief that "responses to equivocal interrogatories yield equivocal evidence that raises an issue of fact and will not support summary judgment," citing *Parker v. Yen*, 823 S.W.2d 359 (Tex. App.—Dallas 1992, no writ). Plaintiff's reliance on *Parker*, however, is misplaced. Indeed, if anything, *Parker* supports Kroger's arguments. *Parker* involved a traditional motion for summary judgment, and therefore the movant had the burden of proof. There, the movant/defendant offered portions of plaintiff's interrogatory answers to establish lack of proximate cause. The court held that an equivocal response would not support a summary judgment. The current case, however, is a no evidence motion, and

hence the burden is on plaintiff. Just as the defendant in *Parker* could not rely on equivocal evidence to satisfy his burden, the plaintiff here similarly cannot sustain her burden with equivocal or ambiguous evidence.

The rule appears to be the same in federal court. If there is a plausible explanation for the discrepancies in a party's testimony, the court considering a summary judgment motion should not disregard the later testimony because of an earlier account that was ambiguous, confusing or simply incomplete. *Jeffreys v. City of New York***,** 426 F.3d 549 (2d. Cir. 2005), *citing*, *Langman Fabrics v. Graff Californiawear, Inc.,* 160 F.3d 106, 112 (2d Cir.1998).

For the reasons stated herein, and for the reasons given in defendants' motion, the motion for summary judgment is granted.

Signed October 16, 2007.

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Hon. Randy Wilson