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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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MELINDA ROAQUE,

Case No.2:22-CV-1979 JCM (BNW)

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Plaintiff(s),

ORDER

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v.

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WALMART, INC., et al.,

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Defendant(s).

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Presently before the court is defendant Walmart, Inc.'s motion for summary judgment. (ECF No. 13). Plaintiff Melinda Roaque filed a response (ECF No. 14), to which Walmart replied (ECF No. 15). The court grants in part and denies in part Walmart's motion for summary judgment.

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I. Background

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This is a slip-and-fall premises liability case removed to federal court based on diversity jurisdiction. (ECF No. 1). On February 2, 2021, Roaque fell while shopping at Walmart and subsequently filed this case, alleging that she slipped in a foreign substance that Walmart failed to remedy. (ECF No. 1-2). She brings claims for negligence; premises liability; negligence per se; and negligent hiring, training, and supervising. The parties do not dispute that Roaque fell at a Walmart store located in Las Vegas, but many other facts are contested. (*Compare* ECF No. 13, *with* ECF No. 14).

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II. Legal Standard

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Federal courts sitting in diversity apply the relevant state substantive law and federal procedural law unless state law conflicts with a valid federal statute or procedural rule. *E.g.*, *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 666 (9th Cir. 2003) (quoting *Erie R.R. v. Tompkins*,

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1 304 U.S. 64, 78 (1938)); *MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.*, 197 F.3d 1276, 1282 (9th
2 Cir. 1999). The standards governing summary judgment are procedural, not substantive. *See*
3 *Cortez v. Skol*, 776 F.3d 1046, 1054 n.8 (9th Cir. 2015) (citing *Knieval v. ESPN*, 393 F.3d 1068,
4 1073 (9th Cir. 2005)).

5 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
6 depositions, answers to interrogatories, and admissions on file, together with the affidavits (if any),
7 show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment
8 as a matter of law.” FED. R. CIV. P. 56(a). Information may be considered at the summary
9 judgment stage if it would be admissible at trial. *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir.
10 2003) (citing *Block v. Los Angeles*, 253 F.3d 410, 418–19 (9th Cir. 2001)). A principal purpose
11 of summary judgment is “to isolate and dispose of factually unsupported claims.” *Celotex Corp.*
12 *v. Catrett*, 477 U.S. 317, 323–24 (1986).

13 In judging evidence at the summary judgment stage, the court does not make credibility
14 determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most
15 favorable to the nonmoving party. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809
16 F.2d 626, 630–31 (9th Cir.1987).

17 When the non-moving party bears the burden of proof at trial, the moving party can meet
18 its burden on summary judgment in two ways: (1) by presenting evidence to negate an essential
19 element of the non-moving party’s case; or (2) by demonstrating that the non-moving party failed
20 to make a showing sufficient to establish an element essential to that party’s case on which that
21 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving
22 party fails to meet its initial burden, summary judgment must be denied, and the court need not
23 consider the non-moving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–
24 60 (1970).

25 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
26 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
27 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
28 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient

1 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
2 versions of the truth at trial.” *T.W. Elec. Serv., Inc.*, 809 F.2d at 630.

3 However, the nonmoving party cannot avoid summary judgment by relying solely on
4 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,
5 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
6 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
7 for trial. *See Celotex*, 477 U.S. at 324. If the nonmoving party’s evidence is merely colorable or
8 is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby,*
9 *Inc.*, 477 U.S. 242, 249–50 (1986).

10 **II. Discussion**

11 Roaque alleged negligence and premises liability as two separate claims. Walmart states
12 that her negligence claim is “based on premises liability” and treats the two as a single claim for
13 negligence. (*See* ECF No. 13, at 5–7). Roaque appears to agree, analyzing her negligence claims
14 based on the “theory” of premises liability. (ECF No. 14, at 6). The court therefore treats Roaque’s
15 first and second claims as a single claim for negligence based on premises liability.

16 A prima facie case for negligence requires the plaintiff to show that (1) the defendant owed
17 the plaintiff a duty of care, (2) the defendant breached said duty, (3) the breach caused the
18 plaintiff’s injury, and (4) the plaintiff was damaged. *Joynt v. Cal. Hotel & Casino*, 835 P.2d 799,
19 801 (Nev. 1992). In Nevada, a business owes a duty to its patrons “to keep the premises in a
20 reasonably safe condition for use.” *Sprague v. Lucky Stores, Inc.*, 849 P.2d 320, 322 (Nev. 1993).
21 This duty is triggered when there exists a temporary hazardous condition on the property, such as
22 a foreign substance on the floor. *Eldorado Club v. Graff*, 377 P.2d 174, 176 (Nev. 1962);
23 *Asmussen v. New Golden Hotel Co.*, 392 P.2d 49, 50 (Nev. 1964).

24 If the business’s agent or employee caused the temporary hazardous condition, then
25 “liability may be found upon ordinary agency principles; respondeat superior is applicable, and
26 notice is imputed to the defendant.” *Eldorado Club*, 377 P.2d at 175. But if a third party caused
27 the temporary hazardous condition, the business is only liable if it had actual or constructive notice
28 of the hazard and failed to remedy it. *FGA, Inc. v. Giglio*, 278 P.3d 490, 496 (Nev. 2012). The

1 business is charged with constructive notice of a hazardous condition if a reasonable inspection
2 would have revealed it. *Twardowski v. Westward Ho Motels, Inc.*, 86 Nev. 784, 787, 476 P.2d
3 946, 947–948 (1970).

4 Walmart argues that Roaque has not produced any evidence that Walmart either caused the
5 alleged foreign substance to be on the floor or had actual notice of it prior to Roaque’s fall. (ECF
6 No. 13, at 6). But Roaque provides the court with still images appearing to show a Walmart
7 employee¹ pointing at a spot on the floor in the store, wiping that same spot with a towel under her
8 foot, and Roaque falling on that same spot a few moments later. (Pl.’s Exs. 2–5, ECF Nos. 14-2,
9 14-3, 14-4, 14-5). Roaque argues that, even if Walmart did not cause the spill, there is sufficient
10 evidence to create a dispute of fact as to whether Walmart had actual notice of the spill and then
11 failed to adequately remedy it. The court agrees.

12 Walmart argues that summary judgment is appropriate because the still images show its
13 employee *cleaning up* a spill; therefore, Roaque’s later fall must have been caused by a different,
14 unrelated spill that it had no notice of. (ECF No. 15, at 4). Walmart also argues that its theory is
15 supported by surveillance footage showing several people walking through the same area, before
16 Roaque fell, without acknowledging or slipping on any spills. (*Id.*). Walmart has not provided
17 the court with this surveillance footage, nor has Walmart provided the court with evidence that
18 another spill occurred after the first one.

19 Although one of the still images appears to show a Walmart employee cleaning the floor,
20 it is a dispute of fact whether the floor was cleaned properly. (Pl.’s Ex. 4, ECF No. 14-4). Roaque
21 argues that “Walmart should have known that wiping up a spill with [one’s] foot could leave
22 residue on the floor, latent to view by its customers.” (ECF No. 14, at 6). A reasonable jury could
23 find that Walmart breached its duty of care by negligently cleaning a spill on the floor that later
24 caused Roaque to slip and fall. Summary judgment is therefore not appropriate on Roaque’s
25 negligence claim.

26 Regarding Roaque’s third claim for negligence per se—negligence and negligence per se
27 are not separate causes of action but “are in reality only one cause of action.” *Cervantes v. Health*

28 ¹ Walmart does not dispute that the person in the still images is its employee.

1 *Plan of Nevada, Inc.*, 263 P.3d 261, 264 n.4 (Nev. 2011). “Negligence per se is only a method of
2 establishing the duty and breach elements of a negligence claim.” *Id.* The court accordingly finds
3 that Roaque’s third claim for negligence per se must be dismissed for not being a cognizable claim.
4 Walmart argues that Roaque has not presented any evidence to establish negligence per se, and
5 Roaque agrees. (ECF No. 13, at 7–8; ECF No. 14, at 10). The court therefore also finds that
6 Roaque’s general negligence claim is not entitled to a negligence per se theory of liability, under
7 LR 7-2(d).

8 Finally, the court addresses Roaque’s fourth claim for negligent hiring, training, and
9 supervision. An employer “has a duty to use reasonable care in the training, supervision, and
10 retention of its employees to make sure that the employees are fit for their positions.” *Freeman*
11 *Expositions, LLC v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 520 P.3d 803, 811 (Nev. 2022)
12 (cleaned up) (citations omitted). To establish a claim for negligent training or supervision, a
13 plaintiff must show: (1) that the defendant owed a duty of care to her, (2) the defendant breached
14 that duty by not using reasonable care in training and supervising its employees to ensure that they
15 are fit for their positions, (3) causation, and (4) damages. *Id.* 812–13 (citations omitted); *Hall v.*
16 *SSF, Inc.*, 930 P.2d 94, 99 (Nev. 1996).

17 Walmart avers that Roaque has not presented any evidence that it was negligent in training
18 and supervising its employees. (ECF No. 13, at 8). The court agrees with Walmart. As Roaque
19 points out in her response, Walmart employees are trained to “carry orange absorbent pads in their
20 pockets” to clean up any spills they encounter, to place caution cones around perceived hazards,
21 and to “never leave the area once a hazard is identified.” (ECF No. 18, at 8). Roaque has presented
22 no evidence, and cited no legal authority, that Walmart negligently supervised or trained its
23 employees.

24 The gravamen of a negligent training claim is whether the employer (in this case, Walmart)
25 caused the plaintiff’s injuries by negligently managing its employees. *Freeman Expositions, LLC*,
26 520 P.3d 803 at 812. “An employee’s wrongful behavior *does not in and of itself* give rise to a
27 claim for negligent training and supervision.” *Okeke v. Biomat USA, Inc.*, 927 F. Supp. 2d 1021,
28 1028 (D. Nev. 2013) (emphasis added). “[T]here must also be evidence that the employer was

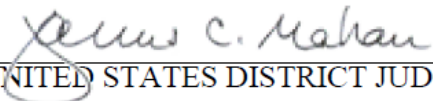
1 negligent in ensuring [the employee's] fitness for the position.” *Borenstein v. Animal Found.*, 526
2 F. Supp. 3d 820, 839 (D. Nev. 2021). The court therefore grants summary judgment in favor of
3 Walmart on Roaque’s final claim for negligent training and supervision.

4 **III. Conclusion**

5 Accordingly,

6 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant Walmart, Inc.’s
7 motion for summary judgment (ECF No. 13) is GRANTED in part and DENIED in part. Summary
8 judgment is GRANTED in favor of Walmart, Inc. on plaintiff Melinda Roaque’s fourth claim for
9 negligent hiring, training, and supervision ONLY. The court DISMISSES Roaque’s third claim
10 for negligence per se. The case proceeds on Roaque’s remaining claim for negligence based on
11 premises liability.

12 DATED June 5, 2024.

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16 UNITED STATES DISTRICT JUDGE
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