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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION**

MARILYN BICKLER, Personal)
Representative of the Estate)
OF MICHAEL BICKLER, Deceased,)
Plaintiff,)
vs.)
HOME DEPOT, U.S.A., INC.,)
a Delaware corporation,)
Defendant.)

No. 03:10-cv-01029-HU

**MEMORANDUM OPINION & ORDER
ON MOTION FOR SUMMARY JUDGMENT**

Robert D. Dames, Jr.
Pacwest Center
1211 S.W. Fifth Avenue, Suite 1100
Portland, OR 97204

Attorney for Plaintiff

Joshua S. Baker
Dennis G. Woods
Scheer & Zehnder LLP
720 S.W. Washington, St., Suite 315
Portland, OR 97205

Attorneys for Defendant

1 HUBEL, Magistrate Judge:

2 This matter is before the court on the defendant's motion for
3 summary judgment. The facts of the case are straightforward and
4 undisputed. On August 7, 2008, Michael Bickler was shopping for
5 carpet at a Home Depot store in Hillsboro, Oregon. A store
6 employee was assisting him, answering questions and showing Bickler
7 some carpet samples. Bickler asked the employee if the store had
8 any commercial-grade carpeting. She indicated they did, and
9 directed his attention to some carpet samples above Bickler's eye
10 level. Bickler took a step at about a 45-degree angle, and tripped
11 over one end of a 12-foot-long roll of carpet that was in the
12 aisle. He fell, injuring his shoulder and hip. He brings this
13 action against Home Depot to recover for his injuries, claiming
14 Home Depot was negligent in failing to warn business invitees of
15 the presence of the carpet over which he fell. He claims the
16 carpet in the aisle represented an unreasonable risk of harm to
17 Home Depot's business invitees, including himself, and Home Depot
18 negligently failed to protect him from that harm. See Dkt. 17,
19 Amended Complaint.

20 Bickler originally filed the case in Multnomah County Circuit
21 Court. Home Depot removed the case to this court on the basis of
22 diversity jurisdiction. See Dkt. #1. It is well-settled that "[a]
23 federal court sitting in diversity applies the substantive law of
24 the forum state, . . . as it believes the highest court of the
25 state would apply it." *Konecranes, Inc. v. Scott Sinclair*, 340
26 F. Supp. 2d 1126, 1129-30 (D. Or. Jan. 5, 2004) (Panner, J.)
27 (emphasis, citations omitted); see *Gasperini v. Center for*
28 *Humanities, Inc.*, 518 U.S. 415, 427, 116 S. Ct. 2211, 2219, 135

1 L. Ed. 2d 659 (1996) ("Under the *Erie* doctrine, federal courts
2 sitting in diversity apply state substantive law and federal
3 procedural law."). Thus, the court will apply Oregon substantive
4 law to the issues raised by the parties.

5 The parties' arguments evidence their agreement that at the
6 time of the accident, Bickler was a business invitee of Home Depot.
7 See *Cain v. Bovis Lend Lease, Inc.*, ___ F. Supp. 2d ___, 2011 WL
8 4072028, at *16-17 (D. Or. Sept. 13, 2011) ("A business visitor is
9 a person who is invited to enter or remain on land for a purpose
10 directly or indirectly connected with business dealings with the
11 possessor of the land.") (quoting *Walsh v. C & K Market, Inc.*, 171
12 Or. App. 536, 539-40, 16 P.3d 1179, 1181-82 (2000), in turn quoting
13 *Restatement (Second) of Torts* § 332 (1974)).

14 Oregon law is clear regarding the duty of care owed by the
15 possessor of land to a business invitee. One in possession of
16 premises "not only has the duty to warn [an invitee] of latent
17 dangers, but also has an affirmative duty to protect an invitee
18 against those dangers in the condition of the premises of which he
19 knows or should have known by the exercise of reasonable care."
20 *Rich v. Tite-Knot Pine Mill*, 245 Or. 185, 192, 421 P.2d 370, 374
21 (1966); accord *Cain, supra*, 2011 WL 4072028, at *17 (citing *Rich*).
22 This standard, however, does not require a store owner to warn its
23 customers of every possible risk of harm on the premises. Rather,
24 liability arises "'only for conditions that create an unreasonable
25 risk of harm to the invitee.'" *Hagler v Coastal Farm Holdings,*
26 *Inc.*, 244 Or. App. 675, 681, 260 P.3d 764, 767 (2011) (quoting
27 *Glorioso v. Ness*, 191 Or. App. 637, 643, 83 P.3d 914, 916-17
28 (2004); additional citation omitted). Thus, to paraphrase the

1 *Hagler* court, the issue in the present case is whether, viewing the
2 record in the light most favorable to Bickler, see Fed. R. Civ. P.
3 56(c)(2); *In re Oracle Corp. Securities Litigation*, 627 F.3d 376,
4 387 (9th Cir. 2010); a reasonable trier of fact could find that the
5 12-foot roll of carpet in the aisle presented an unreasonable risk
6 of harm to Bickler. See *Hagler*, 244 Or. App. at 681, 260 P.3d at
7 767; *Andrews v. R.W. Hays Co.*, 166 Or. App. 494, 503, 998 P.2d 774,
8 779 (2000) (“[P]roperty owners and occupiers of business premises
9 are ‘liable to invitees only for conditions that create an
10 unreasonable risk of harm to the invitee.’”) (quoting *Jensen v.*
11 *Kacy’s Markets, Inc.*, 91 Or. App. 285, 288, 754 P.2d 624, 625
12 (1988), in turn citing *Woolston v. Wells*, 297 Or. 548, 558, 687
13 P.2d 144, 150 (1984)).

14 “A storekeeper owes to customers the duty to exercise ordinary
15 care to keep the aisles and passageways of his or her establishment
16 in a reasonably safe condition so as not to unnecessarily expose
17 customers to dangers from objects protruding into the aisles.”
18 *Gregory v. Kmart Corp.*, No. CV-05-1936-AA, 2007 WL 3408018, at *2
19 (D. Or. Nov. 15, 2007) (Aiken, J.) (citing *Bryant v. Sherm’s*
20 *Thunderbird Market*, 268 Or. 591, 596, 522 P.2d 1383, 1386 (1974);
21 *Miller v. Safeway Stores, Inc.*, 219 Or. 139, 153, 246 P.2d 647,
22 649-50 (1959)). A storekeeper is not liable “for injury to a
23 customer resulting from a danger which is open and obvious.”
24 *Gregory*, 2007 WL 3408018, at *2 (citing 40 A.L.R. 5th 135). A
25 hazard is “open and obvious” if the customer knew or should have
26 known of the hazard and appreciated the danger caused by it. *Id.*

27 However, “when merchandising methods compel the attention of
28 the customer away from careful lookout to the floor, the proprietor

1 of the store owes a greater duty to protect the movement of the
2 customers' feet." *Miller v. Safeway Stores, Inc.*, 219 Or. 139,
3 153-54, 346 P.2d 647, 650 (1959) (citation omitted). The facts in
4 the present case indicate Bickler was in the carpet department for
5 five to ten minutes before he fell. Dkt. #24-1, Depo. of Michael
6 Jon Bickler dated April 20, 2011, p. 19. At the time of the fall,
7 his attention had been directed by a Home Depot employee to carpet
8 samples at or above his eye level, requiring him to look upward.
9 Drawing all justifiable inferences in Bickler's favor, I find it is
10 possible that a jury reasonably could render a verdict in his
11 favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52,
12 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986) (inquiry on summary
13 judgment essentially is "whether the evidence presents a sufficient
14 disagreement to require submission to a jury or whether it is so
15 one-sided that one party must prevail as a matter of law").

16 Accordingly, Home Depot's motion for summary judgment is
17 **denied.**

18 IT IS SO ORDERED.

19 Dated this 7th day of December, 2011.

20 /s/ Dennis J. Hubel

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22 Dennis James Hubel
23 Unites States Magistrate Judge
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