

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

**JAMIE C. MICKALOWSKI and JOHN)
MICKALOWSKI)**

Plaintiffs,)

v.)

No. 10-2926-STA-cgc

**OFFICE DEPOT, INC. and BLUE CHIP)
INVESTMENTS f/k/a BLUE CHIP)
INVESTMENTS PARTNERSHIP,)**

Defendants.)

**ORDER ADOPTING REPORT AND RECOMMENDATION AND DENYING
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Before the Court is Defendant Office Depot, Inc.’s (“Defendant”) Motion for Summary Judgment (D.E. # 40), filed on April 5, 2012. Plaintiffs filed a Response (D.E. # 46-47) on April 30, 2012, and Defendant filed a Reply (D.E. # 49) on May 18, 2012. The Court referred the Motion to the Magistrate Judge for Report and Recommendation (“R&R”) on May 31, 2012. (D.E. # 51.) The Magistrate Judge issued an R&R recommending that the Court deny Defendant’s Motion on July 27, 2012. (D.E. # 59.) Neither party has filed objections to the Report. For the reasons set forth below, the Magistrate Judge’s Report is **ADOPTED**, and Defendant’s Motion is **DENIED**.

BACKGROUND

This personal injury case arises from Plaintiff Jamie Mickalowski's ("Mrs. Mickalowski") slip and fall outside Defendant's retail location in Germantown, Tennessee, a suburb of Memphis, in January of 2010. (Compl. ¶ 6.) Plaintiffs initially filed their Complaint in Shelby County Circuit Court on December 8, 2010, but Defendant removed the case to this Court on December 22, 2010 on the basis of diversity jurisdiction. (D.E. # 1.) Although both Defendant and Defendant Blue Chip Investments ("Blue Chip") filed Motions for Summary Judgment, Blue Chip and Plaintiffs filed a Notice of Settlement on July 23, 2012. (D.E. # 56.) Thus, the remaining parties to the case are Plaintiffs and Defendant.

According to the R&R, the parties were required to file objections with the court by August 10, 2012. Both parties have filed motions since the R&R issued on July 27. For example, Plaintiffs filed a Motion for a Protective Order (D.E. # 62) and a Motion to Compel (D.E. # 70), and Defendant filed a Motion to Exclude the Opinion Testimony of Russell Kendzior (D.E. # 61). All of these Motions are currently pending before the Magistrate Judge. Notably, neither party moved to extend the deadline to file objections to the R&R.

ANALYSIS

Although neither party has filed objections to the R&R, the Court is obligated to review the Magistrate Judge's recommendations to determine whether it will "accept, reject, or modify [them] in whole or in part."¹ After reviewing the R&R and other documents filed in the case *de novo*, the Court concludes that the Magistrate Judge correctly recommended denying Defendant's Motion. The Magistrate Judge correctly noted that several issues of fact remain in the case, including whether Mrs. Mickalowski undertook a greater risk than an ordinarily prudent person

¹ 28 U.S.C. § 636(b)(1)(C).

would take under the circumstances, whether Mrs. Mickalowski proceeded with sufficient caution given the weather conditions, and the exact conditions outside the Office Depot when Mrs. Mickalowski fell, especially regarding the extent of the shoveling and sweeping of snow to clear the path. Moreover, the presence and application of comparative fault are circumstances for the factfinder to consider and determine.² The Court finds that a number of disputed factual issues remain, and Tennessee law generally mandates submission of questions of comparative fault to a jury. Therefore, the Court **ADOPTS** the Magistrate Judge's Report and **DENIES** Defendant's Motion for Summary Judgment.

CONCLUSION

For the reasons set forth above, this Court **ADOPTS** the Magistrate Judge's Report and Recommendation. Defendant's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

Date: August 16, 2012.

² *Timmons v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 307 S.W.3d 735, 745 (Tenn. Ct. App. 2009).