

Home > Store Video Is Key To Slip-Fall Suit Settlement

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# Store Video Is Key To Slip-Fall Suit Settlement

Footage contradicts Wal-Mart manager's insistence that floor was dry

By Kathleen Baydala Joyner | **Contact** | **All Articles**

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Decatur solo Aaron Marks said the settlement was "multiple times" his client's medical damages. Photo by John Disney/Daily Report

Store surveillance video showing employees cleaning up water near a drinking fountain shortly after a woman fell gave Decatur solo Aaron Marks the leverage he needed to secure a significant premises liability settlement with Wal-Mart.

Marks said he and Andrew Lynch, another solo attorney who assisted in the case, used the store footage during depositions they took of Wal-Mart employees working near the scene, including an assistant manager who insisted there was no water on the floor when Marks' client slipped and fell.

While watching the first hour of the video, leading up to the fall, the assistant manager "was basically

saying there were safety sweeps going on the whole time. Every time someone passed by, we'd ask her what was happening, and she'd say a safety sweep," Marks said. "So, Andrew and I said, 'OK. Let's get her to commit to that and establish that Wal-Mart should have seen the water when my client fell. And it worked perfectly."

While watching the second half of the video, after Marks' client fell, the assistant manager began to backpedal, said Marks.

"We saw her start to clean up the water. We asked her what she's doing and instead of being, like, 'I'm cleaning water,' she started saying basically she doesn't know," he recalled.

Marks would not reveal the amount of the settlement reached with Wal-Mart Stores East, a Wal-Mart subsidiary, on Sept. 9 because he signed a confidentiality agreement.

"The settlement achieved was multiple times [the client's] medical damages," was all he would reveal.

According to a demand letter that Marks sent in March to Wal-Mart's attorney, Howard Lessinger of McLain & Merritt, Marks' client incurred nearly \$241,000 in bills from medical providers. Lessinger did not respond to requests for comment. Wal-Mart spokesman Dan Fogelman would not respond to the *Daily Report's* questions but did issue a written statement: "We take the safety of the customers in our store very seriously and, while this was an unfortunate incident, we are pleased to have been able to resolve the issue with the family."

The video and depositions weren't the only twists in the case that lingered for more than 2½ years but settled in mediation in one day. Thomas W. Tobin of Henning Mediation & Arbitration Service handled the mediation.

Lien Le, 41, a naturalized American citizen born and raised in Vietnam, worked at her husband's nail salon located inside a Walmart in Kennesaw. She suffered back injuries on March 21, 2011, after slipping on water leaking from a nearby fountain as she was returning to the salon from the women's restroom at the front of the store.

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October 2, 2013

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"She essentially did the splits," Marks said.

Following her fall, Le experienced pain and burning sensations in her back, bladder problems, numbness and weakness that necessitated treatment by chiropractors, a spine specialist and orthopedic doctors. Le received a series of epidural steroid injections and eventually underwent back surgery to fuse lumbar discs. Still, she was unable to resume work because she can't bend over, lift moderately heavy objects or squat to pick up items, Marks said.

Le originally was represented by the firm Morgan & Morgan, which notified Wal-Mart of her claim. On March 24, 2011, Wal-Mart's claims administrator sent a letter requesting indemnification from the claim based on the lease Le's husband signed with Wal-Mart for his nail salon. The claims denial letter prompted Morgan & Morgan to drop representation of Le. Months later, Le hired Marks after receiving a series of referrals from other attorneys she contacted.

Marks, who has been practicing law for five years and started his solo practice three years ago, took the case in the fall of 2011 despite his perception of Wal-Mart being an intimidating legal opponent.

"What got me angry about the case is that my client played by the rules," he said. Despite her limited English proficiency and service industry job, "she was never on welfare, never had any kind of assistance, never used our social cushion, and, up until the day she fell at Walmart, she was doing everything expected of her. She was not someone looking for a check. She was just looking to be put back in the place she was before and looking to help her husband with his business."

Marks said he knew right away that the indemnification clause in Le's husband's lease was not enforceable, and Wal-Mart did not seek to enforce it in court.

Marks filed the original complaint against Wal-Mart in Cobb County State Court in October 2011. The complaint eventually was amended to add Le's husband because of their loss of consortium claim and to have Le listed as an invitee of Wal-Mart rather than a licensee.

While Marks said there is case law that would support his view that Le was an invitee despite her working in rented space, he felt it necessary to change her status in the complaint because the duty a landlord has to an invitee to keep the premises safe is greater.

Shortly after the complaint was filed, Wal-Mart tried to remove the case from state court and instead have it heard in federal court. Marks said he was told by Wal-Mart representatives during mediation that Wal-Mart was more familiar, and thus more comfortable, with federal court.

Nevertheless, Marks prevailed in April 2012 in having the case remanded back to Cobb State Court by replacing a John Doe co-defendant with a named Wal-Mart employee. But not without a fight. Senior U.S. District Court Judge Robert Vining Jr. wrote in his order that the dispute over whether the employee was indeed a citizen of Georgia, as contended by Marks, or a citizen of Mississippi, as argued by Wal-Mart, "may be a moot point and a waste of judicial resources" because Marks could have easily substituted the employee in question for another named defendant who definitely was a Georgia citizen.

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While the suit was pending, Marks sent a demand letter to Lessinger estimating that the case was worth \$10 million and proposing settling it for \$6 million.

"Wal-Mart associates, possibly distracted by other responsibilities, neglected to either warn Ms. Le of the dangerous substance on the floor, and/or neglected to remove the water from the floor before Ms. Le fell," the letter stated.

"Ms. Le's pain and impairment will likely never recede, and in fact only increase as she ages," the letter continued. "Even with the conservative costs of \$240,671.07 in special damages, a jury is likely to award Ms. Le an even more significant amount in general damages for her past, present and future pain and suffering, permanent impairment, and for having to endure and suffer the risk and pain of future back surgery."

The letter also warned Lessinger that Le would pursue punitive damages if Wal-Mart did not agree to the settlement offer. Wal-Mart refused the offer and the case began to move toward trial.

Cobb State Court Judge Maria Golick recommended both parties try mediation, which Marks said his clients welcomed.

"My client has two boys, 10 and 5. She and her husband, they own a house but are barely hanging on because she can't work anymore and he lost his business [because of the lawsuit]," said Marks. "If we had gone to trial and lost, it would have ruined them."

Marks said with the settlement money, the Les hope to restart their nail salon somewhere else.

The case is *Le v. Wal-Mart Stores East*, No. 2011A-4164-2.

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