

**Affirmed and Opinion Filed April 11, 2018**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-17-00434-CV**

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**HERTICE STEPHENS, Appellant  
V.  
WAL-MART STORES TEXAS, LLC, Appellee**

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**On Appeal from the County Court at Law No. 4  
Dallas County, Texas  
Trial Court Cause No. CC-16-05851-D**

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**MEMORANDUM OPINION**

**Before Justices Francis, Evans, and Boatright  
Opinion by Justice Francis**

Hertice Stephens appeals a take-nothing summary judgment rendered against him in his suit for personal injuries against Wal-Mart Stores Texas, LLC. In a single issue, Stephens contends the trial court abused its discretion in denying his motion for continuance of the summary judgment hearing. We affirm the trial court's judgment.

On February 22, 2015, Stephens was in the parking lot of a Wal-Mart store when he slipped and fell in something that "looked like water/black ice/sleet." He filed suit against Wal-Mart almost two years later alleging negligence based on premises liability.

In response to discovery requests propounded by Wal-Mart, Stephens admitted (1) the incident occurred outside the store, (2) it was raining and/or sleeting at the time of the incident, (3) he was aware it was raining and/or sleeting at the time of the incident, (4) the water on the ground

was from precipitation alone, and (5) he slipped in rain water. Based on these admissions, Wal-Mart moved for summary judgment on the ground that the condition on their property of naturally forming water or ice did not constitute an unreasonably dangerous condition as a matter of law. *See Scott & White Mem'l Hosp. v. Fair*, 310 S.W.3d 411, 419 (Tex. 2010).

Stephens responded to the motion and requested a continuance saying he needed to depose Wal-Mart employees about the condition of the area where the fall occurred. He noted he received Wal-Mart's disclosure responses, which identified the relevant employees, approximately two months earlier. He argued the discovery was "not developed enough" for him to be able to argue against the motion and stated depositions had not been scheduled because of his attorney's litigation schedule and "the relatively short time the case ha[d] been on file."

At the hearing, Stephens's counsel argued he needed more time to conduct discovery "to see was there somebody out there when he fell to see what the condition was." He stated "the type of thing we would be searching for is basically discovery on their side to see what they knew, when they knew it, and that sort of thing." Counsel for Wal-Mart responded that Stephens had not identified any specific area of material discovery he needed and further discovery was irrelevant because his admissions established Wal-Mart's entitlement to summary judgment as a matter of law. The trial court denied Stephens's motion for continuance and granted Wal-Mart's motion for summary judgment.

In a single issue on appeal, Stephens contends the trial court abused its discretion in denying his motion for continuance. If a continuance is sought to pursue discovery, the motion must describe the evidence sought, explain its materiality, and show the requesting party has used diligence to obtain the evidence. *See Wal-Mart Stores Texas, LP v. Crosby*, 295 S.W.3d 346, 356

(Tex. App.—Dallas 2009, pet. denied). A trial court does not abuse its discretion by denying a motion for continuance that does not meet these requirements. *Id.*

Stephens contends that to properly respond to the motion for summary judgment, he needed to conduct discovery on the condition of the area in which the fall occurred. But neither Stephens's motion for continuance nor his brief on appeal explains how this evidence would be material to his case given his admissions regarding the cause of his fall. Stephens has not alleged his fall was caused by any condition or defect on the premises other than the presence of water or ice outside the store and he admitted the water he slipped in was caused by precipitation alone. A premises owner is generally not liable for injuries caused by the natural accumulation of precipitation on its property. *See Fair*, 310 S.W.3d at 417; *Callahan v. Vitesse Aviation Servs, LLC* 397 S.W.3d 342, 354 (Tex. App.—Dallas 2013, no pet.). Stephens does not identify any evidence he is seeking to discover that would make his case an exception to this rule.

Furthermore, Stephens fails to explain why he did not seek to take any depositions in the two months between the time Wal-Mart designated the relevant company employees and when the summary judgment hearing was conducted. Stephens merely makes an unsubstantiated reference to his counsel's "litigation schedule." Where a motion for continuance does not allege facts showing diligence in attempting to procure testimony, the denial of such motion is proper. *See J.C. Penney Co. v. Duran*, 479 S.W.2d 374, 380 (Tex. App.—San Antonio 1972, writ ref'd n.r.e.).

Based on the foregoing, we conclude the trial court did not abuse its discretion in denying Stephens's motion for continuance.

We affirm the trial court's judgment.

/Molly Francis/  
MOLLY FRANCIS  
JUSTICE

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

HERTICE STEPHENS, Appellant

No. 05-17-00434-CV      V.

WAL-MART STORES TEXAS, LLC,  
Appellee

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Opinion delivered by Justice Francis.

Justices Evans and Boatright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee WAL-MART STORES TEXAS, LLC recover its costs of this appeal from appellant HERTICE STEPHENS.

Judgment entered April 11, 2018.