**Reversed and Rendered and Opinion filed November 1, 2001.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-00-00199-CV**

**WAL-MART STORES, INC., Appellant**

**V.**

**ETHEL McGROUGH, Appellee**

**On Appeal from the County Civil Court at Law No. 2**
**Harris County, Texas**
**Trial Court Cause No. 681,792**

## O P I N I O N

In this premise liability case, Wal-Mart Stores, Inc. ("Wal-Mart") appeals a judgment in favor of Ethel McGrough on the ground that the evidence was legally and factually insufficient to establish that Wal-Mart had actual or constructive notice of the spill that caused McGrough to slip and fall. We reverse and render a take-nothing judgment.

### Background

After slipping and falling in a Wal-Mart store, McGrough filed a premise liability suit against Wal-Mart. At trial, a jury found Wal-Mart liable and awarded McGrough damages of $5,000 for physical pain and $384 for lost wages.

## Standard of Review

In conducting a no-evidence review, we view the evidence in a light that supports the finding of the disputed fact and disregard all contrary evidence and inferences. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 502 (Tex. 2001). If more than a scintilla of evidence exists to support the finding, the evidence is legally sufficient. *Id.*[1]

To prevail on a premise liability claim, a plaintiff must prove: (1) actual or constructive knowledge by the owner or occupier of a condition on the premises; (2) that the condition posed an unreasonable risk of harm; (3) that the owner or occupier did not exercise reasonable care to reduce or eliminate the risk; and (4) that the owner or occupier's failure to use such care proximately caused the plaintiff's injury. *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 99 (Tex. 2000). In a slip-and-fall case, the knowledge element can be established if the plaintiff shows that: (1) the defendant put the foreign substance on the floor; (2) the defendant knew that it was on the floor and negligently failed to remove it; or (3) the foreign substance was on the floor so long that it should have been discovered and removed in the exercise of ordinary care. *Keetch v. Kroger Co.*, 845 S.W.2d 262, 265 (Tex. 1992). However, when circumstantial evidence is relied upon to prove constructive knowledge, the evidence must show that it is more likely than not that the dangerous condition existed long enough to give the owner a reasonable opportunity to discover the condition. *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998). It is not sufficient to merely prove that the hazard could *possibly* have been there long enough to hold the owner responsible for noticing it.[2]

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[1] Because we sustain Wal-Mart's legal sufficiency challenge, we do not address its factual sufficiency challenge.

[2] *Id.* at 937-38 (holding that dirt in macaroni salad lying on a heavily-traveled aisle was insufficient to prove the length of time it had been on the floor because such evidence "can no more support the inference that it accumulated dirt over a long period of time than it can support the opposite inference that the macaroni had just been dropped on the floor," and finding that the presence of footprints or cart tracks in the macaroni equally supports the inference that the tracks had been there for a long time as it supports the opposite inference that the tracks were of recent origin); *compare Wal-Mart Stores, Inc. v. Reece*, 32 S.W.3d 339, 343-44 (Tex. App.—Waco 2000, pet. granted)

**Sufficiency Review**

In this case, because McGrough acknowledges that there is no evidence that Wal-Mart had actual knowledge of the spill which caused her to fall, we confine our consideration to evidence of constructive knowledge. In that regard, Wal-Mart asserts that the circumstantial evidence relied upon by McGrough to show that the substance was on the floor long enough to give Wal-Mart a reasonable opportunity to discover it does not support any such inference.

The evidence McGrough relies upon to show constructive knowledge is that: (1) there was dirt in the fluid on her pants; (2) there was a foot print in the spill which did not belong to her or her husband; (3) the spill was on a very long aisle, and she and her husband did not see another customer in the aisle; and (4) the store was about to close and was uncrowded, making it unlikely that the substance had been spilled, stepped in by another customer, and then slipped in by McGrough within a few minutes.

The mere presence of dirt in the spilled substance on McGrough's pants is not probative of whether the dirt got on the floor, if at all, before or after the spill, or whether the dirt got on her pants as part of the spilled substance or from another source, and thus whether the spill was recent. The fact that the footprint belonged to someone else who had departed the long aisle before the McGroughs arrived there supports an inference that the spill had been on the floor long enough for someone to walk the length of the aisle. However, there is no authority imposing on a store constructive notice of a spill that is on the floor for only that

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(holding evidence insufficient to establish constructive knowledge where the record contained no evidence of the length of time a spill was on the floor, but noting that constructive knowledge can be shown if the dangerous condition was in sufficient proximity to an employee that it should have been discovered and removed in the exercise of ordinary care); *with Wal-Mart Stores, Inc. v.Garcia*, 30 S.W.3d 19, 23 (Tex. App.—San Antonio 2000, no pet.) (holding that Wal-Mart had constructive knowledge that a jalapeno had been on the floor because service personnel were in close proximity to it); *M. Rivas Enters., Inc. v. Gaytan*, 24S.W.3d 402, 405 (Tex. App. —Corpus Christi 2000, pet. denied) (holding that constructive knowledge of the spill was proved by evidence that plaintiff saw water coming from iceboxes and the store owner not only knew of the ice machine's leak, but had placed towels on the floor to soak up the water); *Wal-Mart Stores, Inc. v. Tinsley*, 998 S.W.2d 664, 669 (Tex. App.—Texarkana 1999, pet. denied) (finding constructive knowledge of the large puddle in which the plaintiff fell because the length of time required for such a puddle to form was sufficient time for Wal-Mart employees to discover and eliminate it).

length of time unless an employee is shown to be, or is supposed to be, nearby.[3] On the contrary, holding a store owner responsible for inspecting for and removing substances on the floor within only a few minutes would be tantamount to imposing strict liability, not a duty of ordinary care.[4] Lastly, the fact that few people were in the store at the time McGrough fell suggests that correspondingly fewer would have been at any location within the store relative to a time at which it was more crowded. However, it is not probative of where in the store any of the customers who were there had been shopping and thus of any greater or lesser likelihood that any of them had been on McGrough's aisle recently than at any other location within the store. Therefore, that fact does not support any inference regarding the length of time the spill was on the floor.

Because the circumstantial evidence McGrough presented thus supported only an inference that the spill had been on the floor a few minutes, it failed to demonstrate that it was more likely than not that the substance had been there long enough to give Wal-Mart a reasonable opportunity to discover it. There is thus no evidence that Wal-Mart had constructive notice of the spill. Accordingly, Wal-Mart's issue is sustained, the judgment of the trial court is reversed, and judgment is rendered that McGrough take-nothing against Wal-Mart.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 1, 2001.

Panel consists of Chief Justice Brister and Justices Edelman and Seymore.

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[3] McGrough has not argued that she slipped in an area of the store that, by its nature, should have been frequently inspected by store employees, as might be the case in a produce or fast food area.

[4] Wal-Mart's manager testified that the aisle was inspected for potential hazards no more than thirty minutes before McGrough fell.