ORAL ARGUMENT – 2-6-02
00-1261
WAL-MART V. REECE

JEWELL: The primary issue we have in this appeal is whether a slip and fall case evidence that a premises occupier's employee was in close proximity to a spill is by itself legally sufficient evidence to support a finding that the occupier had constructive knowledge of a spill. The court should hold that such evidence is not sufficient. Morever, because in this case there is no other evidence to show that Wal-Mart had actual or constructive knowledge of the spill on which Reece slipped, the court should reverse and render judgment in Wal-Mart's favor

I first want to sort of summarize what the holding of the CA was, and then explain why it's a problem to Texas jurisprudence. Essentially the court held that a plaintiff in a slip and fall case...

HANKINSON: Why isn't this an actual notice case instead of a constructive notice case?

JEWELL: Because there was no evidence presented at trial that anyone, Mr. Cloyd or anyone else, had actually seen this hazard before Lizzie Reece slipped on it.

HANKINSON: I thought the evidence was that he saw it right before she slipped and fell.

JEWELL: No. His testimony was, which was was uncontroverted, was that he had been standing in the line several feet away from her and that he did not see, didn't even know the spill was there until he had heard her fall, and then he turned around and saw her on the ground.

PHILLIPS: How close would he have been to this _____ and what's the furthest away he could have been when he walked?

JEWELL: Eight feet. He said he was 5 to 8 feet away from the accident when it happened.

PHILLIPS: She was walking roughly the same path he was walking and he had walked past it right?

JEWELL: Yeah.

PHILLIPS: So what's the furthest away he could have gone from it?

JEWELL: It's difficult to answer that question from the state of the record, because Reece's description of the spill was that she had sort of walked down the line and turned and stepped a few feet away from the line, and so it was sort of out of the path. And Mr. Cloyd had said that

when he saw the spill, he also acknowledged that it was sort of out of the snack bar line, although he didn't specify a number of feet.

ENOCH: How does the Texas SC determine as a matter of law this is no evidence supporting constructive notice?

JEWELL: I think the court can easily adhere to decades of premises liability law, which holds that to prove notice in a premises liability suit, the plaintiff has to show - can do one of three things: can show the premises occupier put it there; that they knew it was there; or that it had existed for so long that the occupier could have or should have discovered it and corrected it.

ENOCH: Well that's a constructive notice.

JEWELL: That third prong is the constructive notice.

ENOCH: How does the court conclude as a matter of law there is no evidence of constructive knowledge in this case?

JEWELL: Because to hold otherwise really is tantamount to strict liability. The fact that an employee happens to be standing in the vicinity of a spill when there is no other evidence of its origin or how long it's been there doesn't show that this Spill had been there for any amount of time. The hazard could have been created within a matter of seconds. In this case, Cloyd's presence in the snack bar.

ENOCH: Suppose the evidence is that I'm following an employee through this line and I pick up my material and I slip and fall, and I'm right behind an employee. And the argument I can make is, well the employee didn't see it. Well okay so you don't have actual notice. Is it reasonable to infer that it was there at least long enough for the employee to have seen, and had the employee been looking because the employee was immediately in front of the person who slipped, and this was on the floor they slipped on. That's reasonable.

JEWELL: I don't think that it is. Because I think it permits the jury to just speculate as to whether or not the premises owner really had a reasonable opportunity to inspect. So many conditions like this one are not easily seen without a deliberate search anyway.

ENOCH: If my evidence is that an employee actually walked down the hallway where I slipped, that's no evidence of constructive notice. The fact that he could have seen it had they been looking, there's no evidence. There has to be something more.

JEWELL: Yes. And that's consistent with a long line of cases which hold as I mentioned or discussed those three means by which notice can be proved. Those three means were discussed by this court in _____ v Kroger, and I think to hold otherwise would mark a drastic departure from all of those cases.

JEFFERSON: Does the fact that the store had a policy that each employee was supposed to be on guard for spills change that analysis?

JEWELL: Not on the notice issue. I think the store's policies as to what inspections they conduct and how often and so forth goes to the reasonable care part of the test and not the notice part.

JEFFERSON: But anytime an employee is on the floor and sees the spills, in fact the employees are supposed to be looking for anything that might pose an unreasonably dangerous condition, is that right?

JEWELL: They are supposed to take action when they see one. I don't think it's possible really for employees to be in a perpetual state of inspection. And I think the evidence in this case was that they tried to inspect every two hours. But the inspection procedures really in my view go to the reasonable care part of the test as opposed to the notice part.

RODRIGUEZ: Was the evidence in this case that the employee was off duty?

JEWELL: Yes.

RODRIGUEZ: And by off duty was he off the clock or just on break?

JEWELL: Well the evidence isn't really well developed in that regard, which kind of played into our position in the brief that Reece didn't really pursue this proximity theory at trial. But there was no proof presented as to whether he punched out, or what happened other than his testimony again which is uncontroverted that he was on his dinner break when he went into this snack bar. And of course I'm not sure that's critical to the outcome of the case, because the position you're advocating would really apply regardless of whether or not the employee would be on or off the clock. But I think it makes it a better case from Wal-Mart's perspective that in fact factually this employee was off duty at the time. Which raises a question, even if he had seen the spill when he walked down the aisle and had actual awareness of it, when he is off duty can his actual knowledge be imputed to the premises occupier under those circumstances? And I think that's a problem.

HANKINSON: Is it your view that in evaluating evidence of constructive notice that this is a singular inquiry in terms of the amount of time involved?

JEWELL: Yes. It is a function of time according to the case law.

HANKINSON: It's not a multi-faceted consideration that we actually look at the totality of the circumstances?

JEWELL: I would agree that other factors besides time come into play in examining really how much time must pass before premises occupier can be held liable. For example, you

might have a case where a person slips on an aisle. There's a witness who says that I'd been down that aisle 15 minutes ago and that spill was there, but I didn't tell anybody, and there's an employee at the other end of the aisle. And in that circumstance the plaintiff would argue that because there was an employee there that 15 minutes is a long enough time to him to have found the spill.

HANKINSON: In fact 5 minutes could be long enough under some circumstances.

JEWELL: Perhaps that would depend on the facts of the case.

HANKINSON: Exactly. So it is not just length of time that matters. And in fact what we're really looking at is whether or not there's been a reasonable opportunity on the part of the premises owner to find out about the dangerous condition?

JEWELL: But the problem with that is that there must be at least some indication of time.

HANKINSON: But again when you say it has to be some indication of time are you saying that the plaintiff has to prove how long it was on the floor?

JEWELL: Not precisely, but there has to be some sort of evidence which would indicate and allow the jury beyond speculation...

HANKINSON: But how would a plaintiff ever prove when something was spilled on the floor?

JEWELL: Easily. With a witness. And this has happened in the past where the witnesses would go down the aisle and say, I saw such and such 30 minutes ago or whatever. Or other type of evidence which would indicate that this spill was there...

HANKINSON: It seems to me that the length of time as a singular inquiry is meaningless without looking at the totality of the circumstances, which might mean where in the store the spill occurred, how close the employees were, how large the spill was, so how noticeable it would be, and various other considerations if we're actually going to look at that. Although time is a factor in terms of someone having had a reasonable opportunity to discover it, it surely cannot be that this is just a matter of watching the clock. Do you agree with that?

JEWELL: I agree that there are other factors at play. And I think the way to express the position that I am making is perhaps to say as a global proposition what the CA holds is that all the plaintiff has to show to give to a jury is that there was a hazard, that she fell in it, and that there was an employee standing hereby.

HANKINSON: You look at the CA's opinion and say all they looked at was proximity. But your brief goes another direction which says there should have been testimony about how long it was

on the floor and that's what matters under Texas law. So your is also a singular approach. That's why I'm curious as to whether you really mean that, or whether or not you really believe it is more of a totality of the circumstances with time being one of the factors.

JEWELL: My point is that time is the factor that really bears the most weight here. And that proximity evidence of it may be relevant. It is relevant to the extent that it shows that a lesser amount of time might be allowed or required before there can be a finding of notice.

ENOCH: If I prove the spill was on the floor before the employee walked up the aisle, and I prove that the employee walked up the aisle, have I met my burden to show constructive knowledge of the spill?

JEWELL: If there is some evidence that can show, like for instance, if the witness says I saw that spill there on the aisle, and then there was an employee that walked up while I was shopping and that employee stood there for 10 minutes or whatever and then walked away, I think that would do it.

ENOCH: My evidence is that the spill was on the floor before the employee walked up the aisle. My evidence is that the employee walked up the aisle. And the store's evidence is the employee didn't see the spill. Has the plaintiff met the burden with some evidence of constructive notice?

JEWELL: I don't think under that situation. No.

ENOCH: What is missing out of that evidence, as a matter of law issue, that would say as a matter of law there was no duty?

JEWELL: I think there would have to be some evidence which allows the jury to - well there's got to be some evidence of a showing of the passage of time. And it may be a small amount of time, or maybe it's not a small amount of time.

ENOCH: Does that go to the opportunity to clean up the mess, or there should have been opportunity or 2 or 3 employees to walk the aisle? Which part of the time is your concern?

JEWELL: Well I think the time really goes to both the opportunity to discover the hazard and an opportunity to warn or correct it. But in the scenario that you're presenting if there is some evidence that the employee had been there for at least some amount of time, and then the plaintiff fell, I think that's good enough to give to the jury. But without it we're just speculating.

JEFFERSON: What if the employees were just leaving a meeting at the back of the store, and there are 15 that walked down the aisle, and all 15 go by. Would that be some evidence of constructive knowledge on the part of the premises occupier _____? Fifteen walk directly by the spill, then the plaintiff comes along afterwards and falls in the spill. In that situation would there

be constructive knowledge on the part of the store, or does it require more time?

JEWELL: I still think there has to be some indication of time because if the spill had just been created before they all come out of the room, even though there is 15 of them that had passed the way, there still has to be some indication of the amount of time. Otherwise, what the court would have to hold is that in addition to the three means of proving notice, we would add a fourth means that being that there was an employee somewhere around this spill.

HANKINSON: What difference does time make in that scenario? I don't understand that. So if 15 get to walk by, and then it's like a free dog bite, you get an extra 30 minutes after that? I don't understand how time plays into the scenario that Justice Jefferson just set out.

JEWELL: I think the reason is because the possibility exist that someone just came along and created that hazard. Let's say a second before the employees come out of the room, they walk by it, it takes 5 to 10 seconds, and then the plaintiff comes along right behind them and then falls. And I don't think that's sufficient to justify a finding of constructive notice without having - I know there are employees that go by, but as I said I do think there's a problem with the idea that they are in a perpetual inspection and that there must be some passage of time or some indication of time...

HANKINSON: I don't understand the significance of time in that circumstance. What difference does it make?

JEWELL: I'm not sure I can...

HANKINSON: The purpose of even looking at time is whether or not there is a reasonable opportunity to discover it. I mean that's what's really the key and not the time. But judging that in connection with a reasonable opportunity language that is part of the previous decisions of this court. So if you have 15 people going up and down the aisle before the plaintiff comes through why wasn't there a reasonable opportunity to discover it and have someone stand by and caution? I mean I'm having a hard time figuring out how length of time becomes that big a factor.

JEWELL: Well it has to be the critical factor because that's the statement of the law. I suppose if it's a matter of degree as to how many -15 or 20 people whatever walked by - they knew there was a problem there. But I still think that in terms of the time issue and giving an opportunity to conduct an inspection to find something that may not be easily detectable without a deliberate search requires more than just what might be hypothetically a matter of seconds.

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RESPONDENT

O'NEILL: Mr. Lee. Are you relying solely on proximity to establish constructive notice?

LEE: No. But certainly the proximity evidence is by far the strongest of the

evidence in this case.

O'NEILL: What else besides proximity?

LEE: There is additionally evidence in this case that the snack bar area is much more prone to spills than is the rest of the store. And that makes some sense because it's a self service kind of deal. And one of the four factors that the Waco court pulls out of the previous cases is what's the likelihood of the hazard manifesting itself on the premises. We've got a little bit of additional evidence that this party of the premises of the Wal-Mart store was particularly prone to these kind of hazards. And at the end of the day that's probably make weight. But it is there in the record.

O'NEILL: But other than that general statement really it's proximity that we're looking at?

LEE: It's proximity that we win or lose on.

O'NEILL: And if you say that proximity alone is sufficient to establish constructive notice, then aren't we applying a strict liability standard?

LEE: No. I do not think that is the case.

O'NEILL: And why not?

LEE: If it were a strict liability standard we would not be concerned with notice at all. Rather we would just be concerned with did an injury occur, did the injury proximately cause damages. The negligence component of a slip and fall case is always going to be there as long as you're asking the jury did the defendant have actual or constructive knowledge.

O'NEILL: Well but isn't yours just a shade of the same thing? Yours is just if there's an employee within a certain area, and that's I guess undefined, but if there's an employee anywhere within the area of the spill it's strict liability?

LEE: No. If the hazard occurs in proximity to an employee, that is some evidence of constructive notice. If it were a higher standard than what we are advocating, the mere fact I can place an employee near the spill would get me to constructive notice as a matter of law. All we're saying is, that it is evidence of constructive notice. The same way that how long the spill has been on the floor can be evidence of constructive notice.

ENOCH: But going back to the question that I asked Mr. Jewell isn't there really a couple of inquires? It's not just proximity. It's not just time. It's a function of time in proximity, and if all you have is evidence of proximity is that sufficient as a question to establish some evidence of constructive knowledge if there is no evidence of the other component - time?

LEE: Let me make two points in answer to that question. Because my knee jerk reaction is to say, yes it is. But we can easily construct a hypothetical where no it isn't. As a general rule - the Waco court sets down four different kinds of factors to look at. One is time; one's proximity; one is size of the hazard; and one is a tendency towards the hazard in the area. That's not a bad way to think about it. Those are 4 kinds of evidence which in any given case may create a fact issue on constructive knowledge. Now in some other case they may not. In our case, we have constructive notice because we know due to the physical layout of the snack bar, due to where the people are, where Cloyd is and where Ms. Reece is at various points in time, we know that Cloyd could have discovered the spill. We know that because he saw it after the accident.

We can infer that he could have prevented the accident because it's so easy for him to do. All he's got to do is what he's trained to do, which is turn around to Ms. Reece and say, Ma'am you need to stop because there's a spill there and stay with it until it's cleaned up. And that's the significance of the training evidence.

OWEN: What if it's in the produce section and the produce person is working in front of the bananas and five feet behind there's a grape that someone slips on? He said I didn't see the grape. I was putting up the bananas. And we don't have any evidence of when the grape fell, how long it had been there. Is that enough to get to the jury that he could have turned around, he could have seen the grape, he could have picked it up?

LEE: But he did not.

OWEN: But he did not. And he said I never actually saw it until after she slipped on it.

LEE: Yes, I think so, although that really pushes the - I'm troubled with that a little bit. But I think so - actually let me backtrack a little bit on that. I'm reconsidering as I'm working on the answer here. The question in your hypothetical would ultimately be, is it a reasonable conclusion from the evidence that is before the jury that the premises owner or his employee should have had notice of the hazard. And your facts may be stated sufficiently strongly so it's not a reasonable conclusion for the jury to draw. And in that case, that may be a summary judgment on constructive notice for the manufacturer.

I was thinking about working that kind of hypothetical this morning, and it occurred to me that if you've got a Wal-Mart that's got a latent structural defect in the roof, they don't know about that, and somebody is coming through the check-out line at the same time that a steel girder breaks lose from the roof, drops down on the patron, that's clearly a case where the premises owner wins on lack of constructive knowledge despite the fact that there is proximity. Because the cash register person sees the girder falling from the roof and he/she is right next to it but they cannot do anything about it. And that would be an example of a situation where the plaintiff doesn't get to the jury despite the fact that the plaintiff can at least in a loose sense show proximity.

OWEN: I guess I'm just trying to see what the difference is. We don't know when the grape got there. We don't know when the water got there. There are other people in the area. So we just don't know how long the spill has been there and was there reasonable opportunity for this employee who was in proximity to have a chance to _____.

LEE: And our position is that due to the fact that he walks right by it that yes the jury can reasonably conclude he could have done something about it. And in fact, he was trained to do something about that precise...

PHILLIPS: If he was 20-25 feet away probably this would be a no evidence case.

LEE: Yes.

O'NEILL: And would you agree it was 5-8 ft away?

LEE: My recollection - there was something in the record that it was something less than 3 ft. But I cannot now recall what that is.

PHILLIPS: It's really a matter of inches is your argument. I want you to reconstruct the record and send us a letter about why it's _____.

HANKINSON: But the testimony is that he did not actually see it.

LEE: That is correct. He did not.

HECHT: And is there testimony about whether it existed as he passed by?

LEE: There is no direct testimony on that one way or the other.

HECHT: It seems like that would be crucial, too.

LEE: I don't believe so, because I think that given the fact that you have the employee who is testifying, you know unfolding the narrative of here's what happened in the accident, I was right there all of the time, I walked by the puddle, I think it is a reasonable deduction from that that you didn't have the skill immediately prior to when Stephen Cloyd shows up, otherwise, he would have said something about it. But it doesn't make a difference because the testimony does show he could have noticed it, and he could have done something about it...

OWEN: But he doesn't say it was there when he walked by. He just says I walked by the place where later I saw the spill. That's not the same as saying the spill was there when I walked by. I mean we do have other people in the area.

LEE: Actually I think what the evidence reflects is the snack bar is either empty or

almost entirely empty with the exception of Robby Jenkins whose behind the counter and doesn't see anything at any point in time even after the fall has occurred.

PHILLIPS: He was 5 to 8 ft when she actually fell?

LEE: Yes. I believe that's the case. I think the testimony...

PHILLIPS: Doesn't that physically exclude the possibility that somebody spilled it after he walked by and before she came, because they would have seen this?

LEE: I think that's a reasonable deduction...

PHILLIPS: It's a phantom spiller. My question is are you going to put people on notice off-duty employees who are walking around to scan up to a 280 ft radius of where they are and notice things?

LEE: And I think the answer to that question is the way the law should be in Texas, yes, you are going to say there is a jury question as to notice if the evidence is strong enough. You're going to end up like any other negligent situation with a case-to-case kind of examination of circumstances. Some cases are going to have time and very little proximity. And that may be good enough. Some cases like mine have no time but at least what I think of as being a real high degree of proximity. Some cases may have a hazard that is sufficiently striking. That is you don't need much with regard to either time or proximity, although that's harder for me to imagine, but that's at least one of the scenarios that the Waco court is contemplating.

JEFFERSON: How many people were in the area? You said Jenkins, Cloyd and Recce. Where were they?

LEE: Robbie Jenkins is behind the counter. She's operating the snack bar. Steven Cloyd is going through the snack bar in the process of getting his lunch or dinner as the case may be. Lizzie Reece is going through the snack bar getting a chili dog immediately behind Steven Cloyd. There is some testimony, and it's in conflict, that there may be somebody else sitting in the snack bar. There is other testimony that there's no one else in the snack bar. All of which is reasonable. The presence or absence of other people is not the sort of thing you would expect witnesses to be testifying about with a high degree of precision if it doesn't play any role in what unfolded.

Whether or not you get to the jury on constructive notice it ends up then we think to be a mix of concerns. But there is no logical reason to privilege the concern about time such that it controls every other possible evidence of constructive knowledge. And that's what Wal-Mart is asking you to do in the position that they are taking. What they are saying is if the plaintiff cannot prove how long the hazard has been on the floor, the plaintiff loses. Period.

RODRIGUEZ: As a part of time how do we get to the proprietor had a reasonable opportunity to discover the condition?

LEE: Because he has an employee who walks by it, who could have stopped the accident from happening and, in fact, was trained to stop the accident from happening.

OWEN: But it's clear liquid on the floor. And I thought there was some testimony that it wasn't immediately observable. I can see if it was coca cola on a white floor it might be a different story.

LEE: It is plain that it was hard to see. But just because the hazard is hard to see does not mean that a jury can't conclude that it should have been seen.

HECHT: I suppose if time should be elevated to the single concern, that's your argument, neither should proximity?

LEE: My argument is not that proximity always wins, or that you have to prove to be a proximity. My argument runs exactly the same way as the Waco court's argument. And that is there are four general classes of evidence that conceivably could show constructive notice and you can rely on any one of them if you want. You can rely on a mix of them. Sometimes you are going to get to the jury. Sometimes your evidence may be so weak that you're not going to get to the jury, but you don't have to have any one particular type of evidence such as time.

I think the real genesis of what we're seeing in the slip and fall cases, and there is a definite emerging set of cases in Texas that are going two different directions. There are cases like the Reece case where the appellate courts, and obviously the juries took considerations of proximity and size of hazard and that type of thing into consideration, and the appellate courts are weighing those factors when determining whether there's any evidence of actual knowledge. There are other cases that are coming out: the Rosa case from San Antonio is one of them. There's a Corpus Christi case that I was just looking at last night. There is another one - the Corpus Christi case is not published, which are saying as a matter of law are saying what Wal-Mart wants to hear. As a matter of law if you cannot put time on the hazard, you lose plaintiff. So it is a question of some significance in this relatively small area of litigation. We think that a more flexible kind of approach analytically makes a whole lot more sense than the sort of mechanical application of some of the very extreme language pulled out of Gonzalez that Wal-Mart suggest to you. It seems to us that it is a more real world kind of approach to acknowledge that time is not the only factor with regard to whether the premises owner should have known. There are other factors.

Now courts can close their eyes to those other factors and say time is the only thing that matters and that's why we have courts that declare the law. But that doesn't have any relationship with what really happens out in the real world. It is more complicated than that. And there are going to be some cases, and I submit that this one is one of them, where the plaintiff cannot show time, but still should be able to get to the jury. And if the jury finds for the plaintiff, the

plaintiff ought to be able to hold on to that verdict.

We are going to ask that the Waco CA be affirmed.

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JEWELL: In answer to the question about how many people were in the snack bar, Lizzie Reece herself testified that there were three other, or at least two other customers in the snack bar, because those were the individuals that helped her up when she fell. Mr. Cloyd testified that he came to her aid, and she refused his help. But we do know that there were other people in the snack bar besides Cloyd and Lizzie Reece. Other customers.

O'NEILL: After the accident?

JEWELL: Well during. The other customers who were in there had already been in there.

O'NEILL: Is that the testimony or does she just say two people helped me up? They could have come in there and seen her slip and fall. Are we stretching the record a bit? We can read from that that they were there beforehand?

JEWELL: I think that's the only reasonable inference that can be made in her testimony when the court reads it.

O'NEILL: That two people who helped her afterwards had to have been there before?

JEWELL: Yes.

ENOCH: But it's not a reasonable inference that the puddle was on the floor when Mr. Cloyd walked by?

JEWELL: That's right.

OWEN: Your argument doesn't rise or fall whether the puddle was actually there. Is that correct?

JEWELL: At which time?

OWEN: When the employee walked by?

JEWELL: No. With respect to the proximity issue being this sole factor here, I think clearly it is, although the CA had discussed a couple of other factors. I don't think they measure up

when the court looks at them under closer scrutiny. The issue about how employees under Wal-Mart policy are supposed to correct hazards when they see them really only applies when they know that hazards are there and the evidence is undisputed here that no one knew about this, particularly Cloyd did not know about this. And so that wouldn't even apply with this circumstance.

Second, the CA concludes that together with proximity and Wal-Mart's policy the potential frequency of spills in the snack bar justifies a conclusion of notice. And I think that is wrong because the frequency of the creation of hazards is an issue that again goes to the reasonable care part of the test. And I think an analogous situation would be the court's holding in the CMH Holmes case where it discusses and analyzes a step platform that deteriorates over time. And because there is some knowledge here on Wal-Mart's part that hazards can come into being at some point whether it be once or month or once a day really goes to the frequency of inspections or the reasonableness of inspections as opposed to the notice issue per se.

And so that ground really can't support a notice issue here. And as I heard I think it's clear that this case really rises and falls on the proximity issue at least in the terms of the CA.

O'NEILL: If we're looking at the issue is opportunity to notice the spill.

JEWELL: And again I heard counsel say repeatedly that Cloyd could have discovered this spill, and I think the phrase could have is somewhat loose here. Because the question is by a preponderance should the employee have discovered this spill? And I don't think under the evidence in this case with him being...

O'NEILL: Let's look at opportunity to discover because that's the operative word as I understand. Was there an opportunity for the employer to discover? And the cases have said a certain amount of time will afford an opportunity constructively, or it will create a fact issue. If the standard is opportunity to discover whether he actually did or not, then why wouldn't being within 3 feet of it be an opportunity to discover sufficient to go to the jury?

JEWELL: Again, I think that does lessen the burden somewhat on the plaintiffs because as I mentioned merely showing an opportunity to discover only proves that an employee could have seen it. And really it's true if Cloyd had turned around and looked for the spill potentially that's true he could have seen it, but that's not enough to give to the jury...

O'NEILL: Then aren't you then equating actual knowledge with opportunity?

JEWELL: No, not at all. The evidence in this case I don't think can support any inference that under a reasonable care that Cloyd should have discovered this spill considering the fact of how much time had passed, and there really was no evidence of anything other than a matter of seconds, but also the fact as we've mentioned before that he was on his break.

O'NEILL: What if he had stepped over it and didn't see it?

JEWELL: I'm not sure that makes a difference either. And in fact, I have cited the court in a letter I filed this morning to a few additional citations of some cases which have discussed this very issue. And in one of them, HEB v. Moore, the Corpus Christi CA reversed a jury verdict discussing this very issue where a plaintiff slipped and fell one to two feet from a manager of the store. And the CA held that that was insufficient to establish the constructive notice element. And there are other cases also in the letter. Those were not in our brief, and so I want the court to be aware of those cases as well, that the court's ruling here should it agree with the regular CA would significantly change those cases and a long line of others.