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A NEW SPIN ON CONSTRUCTIVE NOTICE

If you are a property owner or a store owner, should you be liable to a person who slips on a foreign substance without any proof of (a) who is responsible for it being there or (b) how long it's been there? What if the only proof the Plaintiff has is you should have known about the condition because your employee was right next to it?

In a recent Texas Supreme Court case, *Wal-Mart Stores, Inc. v. Spates*, the Texas Supreme Court held that a store owner cannot necessarily be held liable for constructive notice of a dangerous condition just because an employee is nearby *without* any evidence of how and when the spill or hazard came to be there.

In *Spates*, Spates sued Wal-Mart when she slipped and fell on plastic rings (the ones used to hold six-packs of soda) that were on the floor. She claimed that a Wal-Mart employee was only 3-5 feet away from her when she fell and that no one else – except for she and the employee – had been on the aisle in the 30 to 45 seconds before she fell. The Court held that this was insufficient evidence to hold Wal-Mart liable for constructive notice of the plastic rings. Instead, the Court used a test that balanced proximity, conspicuity, and longevity to determine whether a store owner has knowledge of the allegedly dangerous condition.

The Texas Supreme Court used the following test:

1. Was the condition conspicuous? Was the alleged hazardous condition a dark liquid on a white floor? If so, a jury may find that an owner needs less time to discover this dangerous condition because it is arguably obvious.
2. Was the dangerous condition hard to see? For example, plastic rings on a white floor might be more difficult to see. If the answer is yes, then a jury may be more likely to find that a store owner had knowledge *if* an employee was near the condition (proximity) for a significant period of time (longevity).

Here are the four (4) things that we think are important about this case:

1. Anytime you are presented with this type of claim, ask yourself the following questions:
 - (a) Was there an employee near the dangerous condition?
 - (b) What proof does the Plaintiff have as to how long the condition existed?
 - (c) How conspicuous was the condition in relation to its surroundings?

2. When confronted with this type of claim, a detailed statement from the Plaintiff is going to be critical. Make them answer the hard questions. Have them describe the area where they fell. How conspicuous was the condition? Make them tell you if there were any employees near the scene where they fell. What evidence does the Plaintiff have as to how long the condition existed?
3. This case essentially raises the burden of proof for a Plaintiff in a premises liability case. Defendants should take advantage of the Court's reasoning. If it appears that a Plaintiff cannot present evidence on any of these three (3) areas (conspicuousness, proximity, and longevity), then a store owner/Defendant should seriously consider filing a No-Evidence Motion for Summary Judgment.
4. Employees should be reminded that they should constantly be on the lookout for any dangerous condition. Spills, fallen products, or other hazards need to be identified and corrected as quickly as possible. Failure to do so, even under the Court's recent ruling, could increase exposure for a landowner/Defendant.

If you have questions about the Court's opinion in the *Spates* case, or if you have questions about premises liability in Texas, please feel free to call us.

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