SUPREME COURT OF LOUISIANA

No. 97-C-0393

DIANE M. WHITE

VERSUS

WAL-MART STORES, INC.

CALOGERO, Chief Justice, dissenting.

I dissent for several reasons. First, I disagree with the majority's interpretation of the definition of "constructive notice." Second, I find no manifest error in the finding of the trial court that Wal-Mart had constructive notice of the spill. And finally, in my opinion the majority errs in overruling *Welch v. Winn-Dixie, Louisiana, Inc.*, 94-2331 (La. 5/22/95), 655 So.2d 309.

Among other requirements of proof, under La. R.S. 9:2800.6, plaintiff must show that the merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence. Under the statute, "constructive notice" means "the condition existed for such a **period of time** that it would have been discovered if the merchant had exercised reasonable care." (emphasis added).

In my view, the majority employs an overly strict interpretation of the phrase “period of time” to construe plaintiff’s burden to be essentially to show exactly when the substance fell onto or was placed on the floor. This interpretation places a nearly impossible burden on plaintiff, and such a burden cannot possibly be sustained without an eye witness. Certainly the legislature did not mean to require every plaintiff to present an eye witness in order to sustain his burden of proof.

As the majority states, the statute is clear and unambiguous. The statute does not on its face require plaintiff to prove how long the substance was on the floor; rather,

the statute only requires the plaintiff to show that the substance was on the floor long enough "that it would have been discovered if the merchant had exercised reasonable care." Certainly, a factfinder could reach this conclusion from facts which do not include direct evidence of when the substance was placed on the floor. In the instant case, there was no manifest error in the trial court's conclusion that the liquid had been on the floor long enough for it to have been discovered had defendant Wal-Mart exercised reasonable care. The record supports this conclusion. Plaintiff testified that there were no obstructions between employee Robinson and the area where the fall occurred. Employee Robinson testified that all employees were responsible for safety in the store. Since there were no obstructions of the spill area and since employee Robinson was admittedly responsible for safety throughout the store, the trial court could have reasonably concluded that the spill had been on the ground "long enough" in that possibly from the moment it occurred, it should have been discovered had the merchant exercised reasonable care. Thus, while the trial court did not determine that the spill had been on the ground "x" number of minutes, it did in fact conclude that the spill had been on the floor for such period of time that it would have been discovered had the merchant exercised reasonable care.

The majority opinion disputes this conclusion by noting that plaintiff herself failed to see the liquid spill, and thus it is an unsupported assumption to conclude that employee Robinson should have noticed the spill. However, Robinson was an employee of the store who had the admitted responsibility for store safety and who, according to testimony in the record, had an unobstructed view of the area of the spill. On the other hand, plaintiff was a grandmother whose attention was obviously drawn to the shelf of merchandise as she assisted her grandchildren in selecting a snack. Her primary purpose was to examine the shelf of merchandise to make a selection, and not

to inspect the floor as she walked. This duty of inspection was owed to plaintiff by the merchant who had a duty to act reasonably to provide a safe premises.

I also disagree with the majority's overruling of this Court's decision in Welch v. Winn-Dixie, Louisiana, Inc., *supra*. The majority describes *Welch's* "fatal flaw" as "no showing of any period of time as required by the statute." Sl. Op. at 5. However, just as in the instant case, there were sufficient facts in the *Welch* record from which the jury could conclude that the cooking oil was on the floor for a long enough period of time that it would have been discovered had the merchant exercised reasonable care. The jury might not have concluded that the oil was on the floor for a specific number of minutes prior to the fall, but the jury did evidently conclude that the cooking oil was on the floor long enough to sustain plaintiff's burden of proof. The facts supporting this conclusion included that there was no dispute that there was oil on the floor; that by its nature cooking oil was difficult to see on the grocery store floor, thus requiring special care; and testimony that oil occasionally leaked out of the bottles. The jury could have concluded that because of the hazardous nature of cooking oil, its difficulty to see on the floor, and the merchant's prior notice that oil occasionally leaked, that any period of time was sufficient because had the merchant exercised the care that was reasonable considering these facts, the spill would have been discovered.

In discussing the definition of "constructive notice", the majority states "[t]hough the time period need not be specific in minutes or hours, constructive notice requires that the claimant prove the condition existed for some time period prior to the fall. This is not an impossible burden." The majority then cites four cases in support: *Treadaway v Shoney's, Inc*., 93-1688 (La. App. 4 Cir. 2/25/94), 633 So.2d 841; *Oalmann v. K-Mart Corp*., 630 So.2d 911, 913 (La. App. 4th Cir. 1993), *writ denied*, 94-C-244 (La. 3-18-94), 634 So.2d 859*; Saucier v. Kugler,* 628 So.2d 1309 (La. App. 3rd Cir. 1993)*;*

and *Cobb v. Wal-Mart Stores, Inc.*, 624 So.2d 5 (La. App. 5th Cir. 1993). However, as shown below, in not one of these cases was there an eye witness or any other testimony as to when the substance was spilled on the floor. And further, in none of these cases did the claimant prove the condition existed for a certain time period prior to the fall. Rather, the jury or trial court was allowed to infer from a set of facts, similar to the facts in this case and in *Welch*, that the substance was on the floor for a long enough period of time that it would have been discovered had the merchant exercised reasonable care.

In *Treadaway v Shoney's, Inc*., *supra*, the issue of constructive notice was not even raised. Instead, plaintiff testified that she fell on a wet floor. Her testimony was corroborated by a witness who entered the restaurant after plaintiff fell. There was testimony that a store employee had just finished wet-mopping the area and removed the "wet floor" signs, thus leading to the conclusion that the defendant created the hazard. There was no discussion about proof of constructive notice because in this case, plaintiff bore her burden of proof by showing that the merchant had created the hazard.

In *Oalmann v. K-Mart Corp*., *supra*, the court found constructive notice based on a "totality of the circumstances" which did not include evidence establishing precisely how long the floor was wet prior to plaintiff's fall. These circumstances included the defendant's admission on the accident report that it was raining (although this admission cannot support notice of the spill prior to the fall since the accident report was presumably not completed until after the fall), and the foreseeability that the entrance floor would become wet on a rainy day because of the constant influx of customers.[1] As in *Welch* and in the case at bar, there was no direct evidence in this

[1]The factor of foreseeability was also present in *Welch* where the record contained evidence of knowledge of prior cooking oil leakage

case that the substance was on the floor for any length of time prior to the fall.

In *Saucier v. Kugler, supra,* the only evidence of defendant's constructive notice was its knowledge that lemons would occasionally roll off the shelf and onto the floor.[2] There was absolutely no evidence of when the lemon on which plaintiff slipped fell onto the floor. And in *Cobb v. Wal-Mart Stores, Inc., supra,* the finding of constructive notice was not based on how long the substance had been on the floor, but rather the fact that the popcorn on which plaintiff slipped was four to five feet from the pharmacy counter where at least two employees had a clear view of the aisle. So, too, in this instant case, the finding of constructive notice is reasonable where the record provides support that store employee Robinson had an unobstructed view of the spill area, plus admitted that store safety was part of her responsibility.

As these cases illustrate, it is simply impractical and unnecessary for plaintiff to make a positive showing of the existence of the condition for some particular time period prior to the fall. Rather, it is sufficient that the record contain enough facts from which a factfinder can reasonably conclude that the substance was on the floor long enough for it to have been discovered by the merchant if the merchant had exercised reasonable care.

Accordingly, I dissent.

---

[2]Likewise, in *Welch*, the record contained testimony and photographs showing that bottles of cooking oil occasionally leaked onto the floor.