**Affirmed and Memorandum Opinion filed September 21, 2021.**


**In The**

# Fourteenth Court of Appeals

**NO. 14-20-00133-CV**

**MILAGRO DEL CARMEN MONTESINO AVILA, Appellant**

**V.**

**FIESTA MART, L.L.C., Appellee**

**On Appeal from the 164th District Court**
**Harris County, Texas**
**Trial Court Cause No. 2017-77339**

## MEMORANDUM OPINION

In this appeal from a summary judgment in a slip-and-fall case, we consider the following two issues: (1) whether the nonmovant raised a fact issue regarding the movant's knowledge of the dangerous condition, and (2) whether the trial court erred by disposing of a claim that was not specifically addressed in the motion for summary judgment. For the reasons given below, we conclude that the nonmovant failed to raise a fact issue, that the trial court erroneously disposed of the unaddressed claim, but that the trial court's error was harmless.

## BACKGROUND

While shopping in the bakery department of a grocery store owned by Fiesta, Avila slipped and fell after stepping on two green grapes. The fall resulted in injury to Avila's left knee, which required surgery to repair.

Avila filed an original petition against Fiesta, asserting a single cause of action for premises liability. Fiesta generally denied the allegation and filed a motion for summary judgment on no-evidence and traditional grounds. Both grounds focused on the knowledge element of the cause of action. In the no-evidence portion, Fiesta asserted that Avila had no evidence that Fiesta knew or should have known about the grapes on the floor. In the traditional portion, Fiesta argued that its own evidence conclusively showed that it lacked actual and constructive knowledge of the grapes.

Avila filed a response with evidence attached. Along with her response, Avila filed an amended petition that asserted a second cause of action. This cause of action was also labeled as a claim for premises liability, and it was based on "Fiesta's practice of displaying and selling grapes in bags that did not prevent customers from removing them."

The trial court granted Fiesta's motion (which was never amended to address the newly asserted cause of action) and rendered a final judgment that Avila take nothing. Avila now appeals from this judgment.

## FIESTA'S MOTION FOR SUMMARY JUDGMENT

The trial court did not specify whether it was granting Fiesta's motion for summary judgment on no-evidence grounds, on traditional grounds, or on both grounds. Absent a more specific ruling, we begin by considering the no-evidence grounds. *See Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017). Our review is de novo. *Id.*

The movant in a no-evidence motion for summary judgment has the initial burden of identifying one or more essential elements of the nonmovant's claim for which there is no evidence. *See* Tex. R. Civ. P. 166a(i). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to the element or elements specified in the motion. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

Fiesta correctly identified in its motion for summary judgment that there were four elements to the premises-defect claim that Avila had the burden of proving at trial: (1) the premises owner had actual or constructive knowledge of some condition on the premises; (2) the condition posed an unreasonable risk of harm; (3) the premises owner did not exercise reasonable care to reduce or eliminate the risk; and (4) the premises owner's failure to use such care proximately caused the invitee's injuries. *See Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992). Fiesta asserted that Avila had no evidence as to the first of these elements. Fiesta did not challenge whether there was any evidence to support the remaining three elements. The burden accordingly shifted to Avila to raise a genuine issue of material fact as to Fiesta's actual or constructive knowledge of the dangerous condition.

In deciding whether Avila satisfied her burden, we take as true all evidence favorable to her, indulging every reasonable inference and resolving any doubts in her favor because she is the nonmovant. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We may only conclude that Avila failed to satisfy her burden if (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

Avila did not contend or present any evidence that Fiesta had actual knowledge of the two green grapes on the floor. Instead, Avila argued that Fiesta had constructive knowledge of the grapes.

Constructive knowledge requires proof that the premises owner had a reasonable opportunity to discover the premises defect. *See Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 813 (Tex. 2002). What constitutes a reasonable opportunity will vary depending on the facts and circumstances presented. *Id.* at 816. For example, proximity evidence is often relevant to the analysis, as is the conspicuousness of the premises defect. *Id.* But in any case, temporal evidence is required: "There must be some proof of how long the hazard was there before liability can be imposed on the premises owner for failing to discover and rectify, or warn of, the dangerous condition." *Id.* at 816. This requirement is sometimes known as the "time-notice rule." *Id.*

The time-notice rule can be "harsh and demanding on plaintiffs." *See Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 938 (Tex. 1998). If a plaintiff does not have direct evidence of how long the premises defect existed, then the plaintiff must rely instead on circumstantial evidence to prove constructive notice, and the circumstantial evidence must establish that "it is more likely than not" that the dangerous condition existed long enough to give the premises owner a reasonable opportunity to discover the condition. *Id.* at 936. If the circumstantial evidence is "meager" and supports equally plausible but opposite inferences about whether the dangerous condition existed long enough for the premises owner to discover it, then the evidence is legally insufficient to raise a fact issue about constructive notice. *Id.*

Avila argues that she satisfied the time-notice rule. She refers to a surveillance video in Fiesta's bakery department, which supposedly captured the eighty-six minutes immediately preceding her slip and fall. According to Avila, the video does

not depict any food being dropped, thrown, or spit on the floor. And based on that omission, Avila argues that the video permits a reasonable inference that the two green grapes must have been on the floor before the video began, which was long enough before her slip and fall for the grapes to be discovered by Fiesta.

The video does not support Avila's argument. The surveillance camera from the bakery department recorded in black and white, and its resolution was low. Also, as Avila admits in her own reply brief, "the video does not reflect the grapes." Without a visual capture of the grapes, a factfinder could not reasonably infer that the grapes fell to the floor before the video began because the evidence permits an equally plausible but opposite inference that the grapes fell at some later point closer in time to Avila's slip and fall but the grapes were too small and inconspicuous to be captured by the surveillance camera. Thus, the video does not establish that "it is more likely than not" that the grapes were on the floor long enough for them to be discovered by Fiesta. *Cf. Cox v. H.E.B. Grocery, L.P.*, No. 03-13-00714-CV, 2014 WL 4362884, at *3 (Tex. App.—Austin Aug. 27, 2014, no pet.) (mem. op.) ("Because there is no video image at any time of the peach piece on the floor, the video is no evidence of how long the piece of peach was on the floor. Therefore, the assertion that the dangerous condition had to exist before the video evidence began is merely speculative, and the video is legally insufficient to constitute competent summary judgment proof of how long the piece of peach was on the floor.").[1]

[1] There is a separate problem with the video. Avila asserted that the video was roughly eighty-six minutes in length, beginning at 8:00 p.m. on the night of the incident, and ending at around 9:26 p.m., which was just after the slip and fall. But the video that was supplied to our court—which was the original attached to Avila's summary-judgment response—is only about sixteen minutes in length, beginning at around 8:10 p.m. and ending at around 8:26 p.m., which is a full hour before the slip and fall. Neither side has addressed this discrepancy, which would have been Avila's burden to correct. In any event, Avila's admission that the full video does not depict the grapes is dispositive in light of the meager circumstantial evidence.

Avila also refers to testimonial evidence that Fiesta understood the dangers of fallen grapes, and that certain employees were expected (but failed) to patrol the grocery store every hour in search of such dangers. At most, this evidence establishes the possibility that Fiesta failed to exercise reasonable care. It does not establish when the grapes became a premises defect and what opportunity Fiesta had to make the premises safe. Accordingly, this evidence does not raise a fact issue regarding Fiesta's constructive knowledge. *See Castro v. H.E.B. Grocery Co.*, No. 14-18-00277-CV, 2019 WL 2518481, at *6 (Tex. App.—Houston [14th Dist.] June 18, 2019, no pet.) (mem. op.) (concluding that similar evidence related to whether the premises owner exercised reasonable care, not whether the premises owner knew or should have known about the dangerous condition).

Because Avila did not produce any evidence of Fiesta's actual or constructive knowledge, we conclude that the trial court correctly granted Fiesta's motion for summary judgment on no-evidence grounds.

**UNADDRESSED CLAIM**

Fiesta's motion for summary judgment did not address Avila's other claim that Fiesta had created an unreasonable risk of harm by displaying and packaging grapes in bags that could be opened in the store. Avila asserted that claim for the first time in an amended petition that was filed after Fiesta had already moved for summary judgment, and Fiesta never amended its motion in response to Avila's amended petition. Because Fiesta's motion did not expressly address that other claim, Avila argues that the trial court reversibly erred by disposing of it in the final summary judgment.

Avila correctly recognizes that a trial court errs when it grants a summary judgment on a claim not addressed in the motion for summary judgment. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). But any such error is

subject to Rule 44.1 of the Texas Rules of Appellate Procedure, which provides in pertinent part that the judgment cannot be reversed unless the error probably caused the rendition of an improper judgment. Under this rule, any error in granting a summary judgment on an unaddressed claim "is harmless when the omitted cause of action is precluded as a matter of law by other grounds raised in the case." *See G&H Towing Co. v. Magee*, 347 S.W.3d 293, 298 (Tex. 2011) (per curiam).

Fiesta invokes this harmless-error rule by arguing that Avila's packaging claim is subject to the same analysis as her premises-defect claim, which was adequately covered by the no-evidence motion for summary judgment. We agree.

Avila labeled her packaging claim as a "cause of action for premises liability." The term "premises liability" can encompass either a theory of negligent activity or a theory of a premises defect. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997). The former category of negligent activity describes a malfeasance theory based on affirmative and contemporaneous conduct by the owner that caused the injury, whereas the latter category of a premises defect describes a nonfeasance theory based on the owner's failure to make the property safe. *See Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 388 (Tex. 2016). If a plaintiff alleges an injury arising from a physical condition on the property but does not allege an injury as a result of some contemporaneous activity, then the claim sounds in premises defect. *Id.*

Avila did not expressly categorize her packaging claim as either a negligent-activity claim or as a premises-defect claim, but the nature of her cause of action is as a premises defect. She did not allege in her packaging claim that she was injured as a contemporaneous result of Fiesta's negligence. Rather, she alleged that she was injured in a slip and fall because Fiesta's choice of packaging permitted another customer to "remove the grapes and drop, throw, or spit them on the floor."

Even though the fallen grapes must have resulted from some activity at some point in time, the same could be said of almost every artificial condition upon which a premises-liability claim is based. *See United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 472 (Tex. 2017). Nevertheless, courts have declined to eliminate the distinction between negligent-activity claims and premises-defect claims, and we likewise decline to do so here. *Id.* Indeed, "slip/trip-and-fall cases have consistently been treated as premises defect causes of action." *Id.*

We conclude that Avila's packaging claim was just a reiteration of her premises-defect claim. This conclusion means that the packaging claim was effectively covered by Fiesta's no-evidence motion for summary judgment, and that Avila had the burden of producing more than a scintilla of evidence as to Fiesta's actual or constructive knowledge of the grapes on the floor. Because Avila did not satisfy that burden, as we explained in the previous section of this opinion, we further conclude that any error in the disposition of the unaddressed packaging claim was harmless. *See Bridgestone Lakes Cmty. Improvement Ass'n, Inc. v. Bridgestone Lakes Dev. Co.*, 489 S.W.3d 118, 123 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) ("When the summary-judgment movant fails to amend its motion after the nonmovant amends [her] petition, the summary judgment can still be affirmed if . . . the amended petition essentially reiterates previously pleaded causes of action.").

Avila counters that she did not need to produce evidence that Fiesta knew or should have known about the grapes on the floor, even if Fiesta had expressly addressed her packaging claim in its motion for summary judgment. As authority for that proposition, Avila relies exclusively on *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292 (Tex. 1983). In that slip-and-fall case, which also involved grapes on the floor, the Texas Supreme Court held that the plaintiff was not required to show

that the premises owner knew or should have known about the dangerous condition where the claim was based on the owner's failure to protect its customers from the known and unusually high risks of a self-service display of goods. *Id.* at 295.

*Corbin* is distinguishable on the facts. The plaintiff there slipped and fell directly in front of a self-service bin of grapes. *Id.* at 294. The bin was open and slanted, there was no mat or floor covering in front of it, and the premises owner admitted that the absence of an anti-slip surface in front of such a display was a violation of store policy that created an unusually high risk of injury. *Id.* at 296. By contrast, Avila did not slip and fall in front of Fiesta's bin of grapes. Instead, her slip and fall occurred in Fiesta's bakery department, and Avila has not cited to any comparable evidence showing that Fiesta admitted that the absence of a mat or floor covering in the bakery department created an unusually high risk of injury.

We conclude that the dangerous condition in Avila's premises-defect claim was the presence of two green grapes on the floor of the bakery department, not the manner in which Fiesta chose to display and package its grapes in the produce department. *See Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406, 408 (Tex. 2006) (characterizing *Corbin* as "an exceptional case" and stating that the dangerous condition for which a premises owner may be liable is ordinarily "the condition at the time and place injury occurs, not some antecedent situation that produced the condition"); *cf. Castro v. H.E.B. Grocery Co.*, No. 14-18-00277-CV, 2019 WL 2518481, at *5 (Tex. App.—Houston [14th Dist.] June 18, 2019, no pet.) (mem. op.) ("The alleged dangerous condition here is the lettuce leaf on the floor, not some antecedent situation such as the lettuce display."). Because *Corbin* does not apply to this situation, Avila was still required to produce evidence of Fiesta's actual or constructive knowledge, and her failure to do so precludes her cause of action, even though it was not specifically addressed in the motion for summary judgment.

## CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Hassan and Poissant.