

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
2 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the
3 17th day of March, two thousand twenty-six.
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5 Present:

6 DEBRA ANN LIVINGSTON,
7 *Chief Judge,*
8 ROBERT D. SACK,
9 RAYMOND J. LOHIER, JR.,
10 *Circuit Judges,*

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13 ARACELIS MARQUEZ,

14 *Plaintiff-Appellant,*

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17 v.

25-1122

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19 WAL-MART STORES EAST, LP,

20 *Defendant-Appellee.*
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24 For Plaintiff-Appellant:

MITCHELL DRANOW, HARMON, LINDER, & ROGOWSKY,
ESQS., Sea Cliff, NY.

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27 For Defendant-Appellee:

PATRICIA A. O'CONNOR, O'CONNOR & O'CONNOR,
ESQS., Northport, NY.

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30 Appeal from a judgment of the United States District Court for the Eastern District of New
31 York (Lindsay, *M.J.*).

1 N.Y.2d 325, 333, 441 N.Y.S.2d 644, 424 N.E.2d 531 (1981)). To show a “breach of duty” in a
2 slip-and-fall case, “a plaintiff is required to show that the defendant created the condition which
3 caused the accident or that the defendant had actual or constructive notice of the condition.”
4 *Hartley v. Waldbaum, Inc.*, 69 A.D.3d 902, 903, 893 N.Y.S.2d 272 (2d Dep’t 2010). “To prove
5 liability based on constructive notice, the danger must have been ‘visible and apparent and it must
6 exist for a sufficient length of time prior to the accident to permit [the defendant] to discover and
7 remedy it.’” *Nussbaum v. Metro-North Commuter R.R.*, 603 F. App’x 10, 12 (2d Cir. 2015)
8 (summary order) (quoting *Lemonda v. Sutton*, 268 A.D.2d 383, 384, 702 N.Y.S.2d 275 (1st Dep’t
9 2000)). If the plaintiff seeks also to raise a “failure to inspect” theory, the plaintiff must adduce
10 evidence showing that a reasonable inspection would have revealed the dangerous condition. *See*
11 *Bogery v. United States*, No. 17-CV-6996, 2018 WL 4265901, at *8 (S.D.N.Y. Sept. 6, 2018).
12 The “adequacy of . . . inspections” is “usually . . . a question for the jury.” *Wynn ex rel. Wynn v.*
13 *T.R.I.P. Redevelopment Assocs.*, 296 A.D.2d 176, 181, 745 N.Y.S.2d 97 (3d Dep’t 2002).

14 Walmart first argues that the liquid on the milk aisle floor did not “exist for a sufficient
15 length of time prior to the accident to permit [Walmart] to discover and remedy it.” *See*
16 *Nussbaum*, 603 F. App’x at 12 (citation omitted). However, the video evidence adduced by
17 Walmart precludes us from resolving this factual dispute as a matter of law. New York courts
18 have held that as little as five minutes can be sufficient for a defendant to discover and remedy a
19 hazard, depending on the circumstances. *See, e.g., Deluna-Cole v. Tonali, Inc.*, 303 A.D.2d 186,
20 187, 754 N.Y.S.2d 643 (1st Dep’t 2003). Here, the video evidence could be determined to show
21 multiple shoppers look at the floor briefly in the near hour preceding the accident. Indeed, one
22 customer appears to notice something on the floor and to gesture to other customers to avoid the
23 area, while a young girl may be seen sliding in the vicinity of the liquid. In such circumstances,

1 the jury could conclude that the liquid in the aisle was present for a sufficient length of time to
2 support a finding of constructive notice.

3 Walmart’s second argument fares no better than its first. Walmart contends that Marquez
4 has failed to provide evidence regarding the reasonableness of Walmart’s inspections of the milk
5 cooler aisle. But the video again suggests that for over 60 minutes preceding the accident, no
6 Walmart employee inspected the milk aisle to the left of the refrigeration bunker. Although four
7 Walmart employees are captured in the footage, they walk past the milk cooler on the opposite
8 side, which does not provide visibility into the aisle at issue, and do not appear to conduct an
9 inspection. Moreover, the assistant manager of the Walmart store testified that she was not aware
10 of any regular inspections that occurred at the store. *See App’x 61-62.* “Under the law, it is for
11 a jury to decide, based on the assembled circumstances, whether an inspection gap of such or
12 greater length was reasonable[.]” *Cuello v. Target Corp.*, No. 22-CV-2013, 2023 WL 4763234,
13 at *9 (S.D.N.Y. July 26, 2023). Accordingly, we conclude that triable issues of fact remain.

14 * * *

15 We have considered Walmart’s remaining arguments and find them to be without merit.
16 Accordingly, we **REVERSE** the judgment of the district court and **REMAND** the case for further
17 proceedings consistent with this order.

18 FOR THE COURT:
19 Catherine O’Hagan Wolfe, Clerk