IN THE SUPREME COURT OF TEXAS

NO. 03-0408

BROOKSHIRE GROCERY COMPANY,
D/B/A BROOKSHIRE FOOD STORES, PETITIONER

V.

MARY FRANCIS TAYLOR, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

JUSTICE O'NEILL, joined by JUSTICE MEDINA, dissenting.

The Court concludes Brookshire could be liable for injury caused by an individual ice cube on an unmatted tile floor next to a drink dispenser, but as a matter of law cannot be liable for the manner of display that regularly caused ice to fall there. While I agree with the Court that Taylor presented no evidence Brookshire knew that the particular cube upon which Taylor slipped was on the floor and thus liability could not be imposed on that basis, I believe Taylor presented some evidence from which a jury could reasonably conclude that the manner in which the drink dispenser was set up caused ice to fall on the unprotected tile floor on a regular basis, creating a recurring dangerous condition of which Brookshire was aware. Because the Court concludes otherwise, I respectfully dissent.

Generally, in a premises liability case, the store owner must have knowledge of the dangerous condition itself, and not just the situation that creates a dangerous condition. *City of San Antonio v. Rodriguez,* 931 S.W.2d 535, 536-37 (Tex. 1996) (per curiam). However, in *Corbin v. Safeway Stores, Inc*., we acknowledged that in a slip-and-fall case, the dangerous condition may be defined more broadly than the particular substance on the floor. 648 S.W.2d 292, 296 (Tex. 1983). For example, a display may qualify as a dangerous condition when the manner of the display itself creates an unreasonable risk of injury. *Id.*

In *Corbin*, Safeway displayed grapes in a slanted bin over a tile floor. Safeway acknowledged that it was fully aware of the manner in which the grapes were displayed and the potential risk to customers of grapes falling to the floor. *Id*. at 296. We held that this was some evidence from which a jury could conclude that the condition in which Safeway maintained its display posed an unreasonable risk of foreseeable harm for which Safeway could be held liable. *Id.* at 297. In *Corbin*, it was the manner of the display, rather than an individual grape on the floor, that constituted a dangerous condition and exposed Safeway to liability. *Id.* at 296. We reiterated nearly a decade later that the knowledge requirement was met in *Corbin* because "Safeway did not have to know that a particular grape was on the floor at a particular time because it knew that the grapes would be on the floor due to the nature of the display." *Keetch v. Kroger Co.*, 845 S.W.2d 262, 265 (Tex. 1992).

Since *Corbin*, we have elaborated on displays as dangerous conditions, holding that "the mere fact that a store has a customer sampling display cannot, without more, be evidence of a condition on the premises that poses an unreasonable risk of harm." *H.E. Butt Grocery Co. v.*

Resendez, 988 S.W.2d 218, 219 (Tex. 1999) (per curiam). The Court relies upon this language from *Resendez* to support its conclusion that, as a matter of law, the soft-drink display here was not an unreasonably dangerous condition. And in an attempt to distinguish this case from *Corbin,* the Court concludes there is no evidence to suggest that Brookshire's drink dispenser was situated in such a way that ice on the floor was a greater danger than one would ordinarily encounter with such displays. I disagree.

The circumstances before the Court in *Resendez* differ from those presented here, which are more closely analogous to the *Corbin* situation. The display in *Resendez* contained a bowl filled with loose grapes for customers to sample. *Id*. at 218. The bowl was level, recessed approximately five inches below the table's surface, and had a three-inch railing surrounding its edges. *Id.* The entire produce section had a non-skid surface, floor mats were in place around the table on which the grapes were displayed, and there were warning cones near the display. *Id*. at 219. Concluding the plaintiff had presented no evidence that the manner of display created an unreasonable risk to customers of grapes falling on the floor, we rendered judgment that Resendez take nothing. *Id*.

In the present case, on the other hand, Taylor presented evidence from which a jury could conclude that the manner in which the drink display was arranged frequently caused ice to fall on the exposed tile floor, creating a dangerous condition of which Brookshire was aware. The assistant store manager, Dewayne Jenkins, described the drink dispenser arrangement at the store. Beneath the dispenser was a mat which, when facing the machine, extended beyond the dispenser's left edge but, to the right, only lined up with the edge of the machine. In other words, the drink dispenser was not centered on the mat, extending only to the edge on the right side. Beyond the drink dispenser

to the right was the deli section, which had two mats placed in front of the display counter from end to end. There was a significant gap between the drink and deli areas where the tile floor was unmatted and exposed; this was the area where Taylor slipped and fell on melted ice. Jenkins testified that the mat underlying the dispenser could have been wider so that it would have been harder for ice to "bounce" over to the exposed floor, and acknowledged that "a piece of ice didn't have to go very far at all to wind up on this area that was tile." Jenkins also testified that a mat could have been placed over the exposed area to keep people from slipping when ice migrated there. Finally, Sharon White, a deli clerk, testified that ice or water fell in the unprotected tile area on a regular basis, and that water on a tile floor poses a danger to customers. Unlike the plaintiff in *Resendez*, Taylor did present evidence that the drink dispenser was set up in a manner that presented an unreasonable risk of ice falling on the unprotected tile floor. In my view, as in *Corbin*, a reasonable jury could infer from this evidence that Brookshire had knowledge of a dangerous condition that posed an unreasonable risk of harm.

In a case with similar facts, *National Convenience Stores, Inc. v. Erevia,* the court of appeals held that a barrel-type cold drink display was an unreasonably dangerous condition. 73 S.W.3d 518, 522-23 (Tex. App.— Houston [1st Dist.] 2002, pet. denied). In *Erevia*, the store manager testified there was a heightened concern about water and ice around the self-service display, and that company policy suggested mats should be placed around the barrels. *Id*. at 523. Following our decision in *Corbin*, the court of appeals held that ice falling from barrels was a common problem and, because the store did not follow suggested safety precautions, the store owner had constructive knowledge of a dangerous condition. *Id*.

The Court claims our decision in *Rodriguez* supports the conclusion that the display in this case could not be a dangerous condition. 931 S.W.2d at 536-37. There, Rodriguez sued the City of San Antonio for injuries he sustained when he slipped in a wet spot on the floor while playing basketball. The wet spot resulted from a leak in the roof. The City admitted it knew the roof leaked, but denied any knowledge of water on the floor at the time Rodriguez slipped. We reversed a verdict in Rodriguez's favor based on a defective jury charge that erroneously implied the City had a duty to repair the roof. *Id*. at 536. However, we held that the premises owner did have a duty "to prevent the water that leaked through the roof from causing a dangerous condition." *Id*. Although the jury should have been instructed that the alleged dangerous condition was the water on the floor rather than the leaky roof, we held that knowledge of the leaky roof was evidence from which a jury might infer that the person in charge knew there would be water on the floor. *Id*. at 537.

Like the defendant in *Rodriguez*, Brookshire may not have been able to prevent ice from falling on the floor, but it had a duty to customers to prevent the ice that did fall from causing a dangerous condition. *Id*. at 536. Given the evidence that Brookshire was aware ice falling on the exposed tile floor was a continuous problem but did not provide additional matting or warning signs to make the area safe, a question of fact exists as to whether Brookshire had constructive knowledge of an unreasonably dangerous condition. Accordingly, the case should be remanded for trial. Because the Court renders judgment in Brookshire's favor as a matter of law, I respectfully dissent.

Harriet O'Neill
Justice

OPINION DELIVERED: December 1, 2006.