

Case No. 16-20614

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

SANDRA BANKS,

Plaintiff-Appellant,

v.

WAL-MART STORES TEXAS, L.L.C.; WAL-MART STORES INCORPORATED  
Defendant-Appellees

Appeal from the United States District Court  
for the Southern District of Texas  
Houston Division

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**APPELLANT SANDRA BANKS'S REPLY BRIEF**

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*(No additional authorities cited.)*

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue 1: Whether there is a fact issue as to Wal-mart's notice of the tripping hazard because Wal-mart's employee failed to properly conduct his 7:00 a.m. inspection 40 minutes before the accident.

Issue 2: Whether there is a fact issue as to Wal-mart's notice of the tripping hazard because Wal-mart's and Williams' credibility is called into question by Wal-mart failing to save material video evidence which would definitively show:

- (i) if Williams properly performed the 7:00 a.m. inspection; and
- (ii) if the bumper were knocked out of place after the 7:00 a.m. inspection.

## SUMMARY OF THE ARGUMENT

### *This is a negligent inspection case, not a time/notice case*

In PLAINTIFF'S RESPONSE TO WAL-MART STORES TEXAS, LLC'S TRADITIONAL MOTION FOR SUMMARY JUDGMENT, Banks argued that Williams negligently conducted his 7:00 a.m. inspection by failing to notice that the bumper was out of place. ROA.178. Banks supported this inference of negligent inspection with (i) the testimony of Williams where he admits conducting the inspection at 7:00 a.m. but did not notice the bumper sticking out – ROA.190 (lines 12 thru 21), (ii) nothing happened after his 7:00 a.m. inspection to explain the bumper being out of place after his inspection – ROA.188 (lines 5 thru 11) and (iii) the potential and probability of the bumper being knocked out of place the night before via carts, pallets or cleaning machines. ROA.189 (lines 1 thru 25). *See also*, ROA. 234 (Lines 17 thru 25), ROA.235 (lines 1 thru 25) & ROA.238 (lines 12 thru 21).

This negligent inspection argument renders the “*time/notice*” analysis 100% irrelevant. Yet Wal-mart and the District Court wrongly focus on the “*time/notice*” analysis creating an irrelevant strawman argument. Instead, the District Court should have properly found that a reasonable mind could circumstantially conclude that the bumper was likely knocked out of place before the 7:00 a.m. inspection and therefore should have been noticed when Williams claimed to inspect the area at 7:00 a.m.

Williams' "see versus notice" testimony is ambiguous and lacks credibility. Therefore, Williams' testimony does not establish lack of notice as a matter of law. The District Court should have so found, but wrongly did not.

**The bumper was likely knocked out of place before the 7:00 a.m. inspection**

The District Court should have properly found that a reasonable mind could circumstantially conclude that Williams' testimony shows that nothing happened between (i) Williams' 7:00 a.m. inspection and (ii) the 7:40 a.m. accident to explain the bumper being out of place. ROA.246 & 188. Therefore, the bumper was probably out of place at 7:00 a.m. and should have been noticed at inspection regardless of how long it had been out of place before the inspection. This evidence and these inferences Wal-mart and the District Court wrongly ignore and never fairly address.

**Failing to save material evidence undermines credibility regardless of spoliation sanction**

Wal-mart's failure to save material video evidence between the 7:00 a.m. inspection and the 7:40 a.m. accident undermines Wal-mart's and Williams's credibility to the point where a reasonable mind could circumstantially conclude that Wal-mart negligently inspected the area before the accident or is lying when it claims the bumper was properly in place at the 7:00 a.m. inspection. Just because Banks is

not entitled to a spoliation judicial sanction does not prevent a reasonable mind from recognizing the obvious<sup>1</sup> and circumstantially concluding that Wal-mart's conduct undermines Wal-mart's and Williams' credibility. Wal-mart's failure to save material video evidence could very well cause a jury to reject every word from Wal-mart's mouth including the mouth of its employee, Mr. Williams.

**Standard of Review**

Though Wal-mart and the District Court correctly state the standard of review, Wal-mart never addresses the fundamental problem with the conduct of the District Court as previously stated:

**The District Court's Error Over Notice**

The District Court committed error by viewing the evidence on notice in the light most favorable to Wal-mart. The District Court incorrectly resolved factual disputes and drew inferences in favor of Wal-mart. This Court should apply the correct standard of review and hold there is a genuine factual dispute over Wal-mart's notice and remand the case for jury trial.

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<sup>1</sup> Pun intended.

## ARGUMENT

**Issue 1: Wal-mart and the District Court miss the point:**

**This case is a negligent inspection case, not a post-inspection/time-notice case. On this record, a jury could reasonably conclude that Wal-mart should have known about the out of place bumper at 7:00 a.m. when Williams inspected the area at the 7:00 a.m. inspection 40 minutes before the accident**

**Issue 2: Wal-mart and the District Court miss the point:**

**This case is not a spoliation case giving rise to judicial sanction. Instead, this case is about a jury circumstantially concluding that Wal-mart and Williams are wrong or lying about the bumper not being out of place at the 7:00 a.m. inspection based on Wal-mart failing to save video from the claimed 7:00 a.m. inspection to the time of the accident at 7:40 a.m.**

Banks has previously set out relevant facts and discussed inferences that can reasonably be drawn based on this record. Banks has argued her position in the summary above. Therefore, Banks makes no additional argument here other than to say: This record is sufficient for a reasonable mind to conclude that Wal-mart should have discovered the tripping hazard at 7:00 a.m. when Williams conducted his inspection because the bumper had likely been knocked out of place the night before. Banks presented this evidence in her response. ROA.184 thru 190. The District Court should have denied Wal-mart's motion for summary judgment on the grounds that the notice element has been satisfied.



## CONCLUSION

For the foregoing reasons, Banks respectfully requests this Court to reverse the final judgment of the Honorable United States District Judge Sim Lake, hold that there is a genuine factual dispute over notice and remand the case for jury trial on the merits.

Respectfully submitted,

/s/ e-signed by scot g. dollinger ⑦

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## CERTIFICATE OF SERVICE

I, Scot G. Dollinger, certify that today, the 27<sup>th</sup> day of December, 2016, a copy of APPELLANT SANDRA BANKS'S REPLY BRIEF was served on John A. Ramirez, Attorney, BUSH & RAMIREZ, PLLC, by using the electronic filing system of the U.S. Court of Appeals for the Fifth Circuit. The official email for opposing counsel in the electronic system is believed to be [jramirez.atty@bushramirez.com](mailto:jramirez.atty@bushramirez.com). This appeal is based solely on the official electronic record transmitted by the clerk of the district court electronically to all counsel consisting of 410 pages. There are no hearing transcripts relevant to this appeal and none were ordered. As of this date, there is no supplemental record. There was no trial and therefore no trial exhibits are part of this appeal. As well, an electronic courtesy version of APPELLANT SANDRA BANKS'S REPLY BRIEF was this date contemporaneously e-mailed to counsel for Appellees at [jramirez.atty@bushramirez.com](mailto:jramirez.atty@bushramirez.com).

/s/ e-signed by scot g. dollinger ⑦  
Scot G. Dollinger

**CERTIFICATE OF COMPLIANCE WITH RULE 32 (A)**

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Dated: November 8, 2016