ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,911
3d District No. 94-01737
Fla. Bar No. 765960

METROPOLITAN DADE COUNTY,
a political subdivision of
the State of Florida,

Petitioner,

vs.

ORLANDO REYES and BEATRIZ
REYES,

Respondents,
_____/

BRIEF OF RESPONDENTS ON THE MERITS

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and
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INTRODUCTION

For the convenience of the Court and counsel, "Plaintiffs" will employ the same party and record designations used by "the County." An appendix containing the County's brief filed in the district court is included herewith ("A"). All emphasis herein is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Plaintiffs accept the County's case and facts statement directed to the consortium claim notice issue, except in one particular. The County forgets that while Plaintiffs appealed the adverse directed verdict on Mrs. Reyes' consortium claim, the County never deigned to address the point in its answer brief in the district court (A.1-19).

Regarding the "invited error" issue, Plaintiffs would again direct this Court's attention to the County's brief in the district court. No such argument was made. As the County concedes, three days before oral argument the County "submitted a Notice of Supplemental Authority citing cases on the issue of invited error." (Merits Brief, at 5)

Plaintiffs must further respectfully disagree with the County's portrayal of just what transpired in the trial court in regard to this issue. Contrary to the County's assertion, Plaintiffs neither requested nor agreed that the trial court direct a verdict against them. They simply consented to

consideration of the County's motion for directed verdict at an earlier stage of the proceedings following a proffer of what the evidence would show. The trial court suggested this procedure, to which both parties agreed.

> THE COURT: If you want to stipulate to give me a proffer of what the testimony would be, then if you want to, you know, assuming this to be the case, he would be moving for a directed verdict. If by stipulation you want to present law to me now, I'll go ahead and rule. If that's all he's got, I would say if that's what he's got I wouldn't grant it. If you want to go through that process, maybe it will save time.
>
> (R.198)
>
> * * *
>
> THE COURT: Back on the record. I'm gathering you want me to accept the proffer and again rule as though the Plaintiff had presented his case in chief.
>
> Based upon the proffer that you all are going to file and the depositions of record themselves which constitute the proffer and based upon the testimony as reflected in the deposition, you're asking me to at this time rule as though this was the evidence presented by the Plaintiff and (sic) his case in chief and asking me to rule on the motion for directed verdict, correct?
>
> [COUNTY ATTORNEY]: Correct....
>
> (R.214)

SUMMARY OF THE ARGUMENT

The County has no standing in this case to rely upon Plaintiffs' failure to present separate notice of Mrs. Reyes' consortium claim where the County admittedly received timely notice of Mr. Reyes' primary claim and rejected it. Although a consortium claim may be brought separately, it remains derivative in that a consortium claimant must prove the very same elements of negligence against the sovereign tortfeasor, and is subject to the very same defenses available as against the primary claimant spouse. The County, having rejected Mr. Reyes' timely submitted claim (presumably upon a good faith determination that it had no liability for the incident in question), cannot hide behind the statutory notice provision to defeat Mrs. Reyes' derivative claim asserting the very same negligence.

As to the County's "invited error" argument, Plaintiffs neither requested nor agreed to the entry of an adverse directed verdict. They simply agreed to an accelerated determination of the County's motion on a proffer of what the evidence would show. In the district court, the County did not even raise the issue of "invited error" in its brief. A few days before oral argument, the County filed a "Notice of Supplemental Authority" which included cases on invited error. The district court quite rightly rejected the County's argument.

The order appealed should be affirmed.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ERR IN REINSTATING MRS. REYES' CONSORTIUM CLAIM.

Plaintiffs acknowledge this Court's prior holdings that the sovereign immunity statute must be strictly construed. Plaintiffs further acknowledge there is merit to the County's argument that since a consortium claim may stand alone, perhaps it too should be subject to the statute's notice requirements. This Court might also consider, however, that although a consortium claim may be brought separately, it remains derivative in the sense that the consortium claimant must establish the very same elements of negligence as against the sovereign tortfeasor, and is subject to the very same defenses that are available as against the claim of the primary spouse. See GATES v. FOLEY, 247 So.2d 40,45 (Fla. 1971).

This exposes the principal reason why the district court did not err in reinstating Mrs. Reyes' consortium claim. In a case such as this, where the County is admittedly timely presented a claim in writing pursuant to §768.28(6), Fla.Stat., and rejects such claim (presumably upon a good faith determination that it has no liability for the incident in question), the County has no standing to assert the notice provision as an absolute defense to a derivative claim premised upon the same negligence visited upon the same claimant whose claim the County has already denied. Strictly construed or otherwise, legislation will be interpreted to make sense. THE

CITY OF ST. PETERSBURG v. SIEBOLD, 48 So.2d 291,294 (Fla. 1950)("The courts will not ascribe to the Legislature an intent to create absurd or harsh consequences, and so an interpretation avoiding absurdity is always preferred.")

The County cannot be permitted to avail itself of the utility of a provision it has already rejected for the sole purpose of defeating its liability. The County should further be precluded from asserting the consortium notice issue in this case given its utter failure to address same in its brief in the district court below.

II.
PLAINTIFFS DID NOT REQUEST THE TRIAL COURT TO DIRECT A VERDICT AGAINST THEM, AND THE COUNTY DID NOT TIMELY RAISE AND PRESERVE ANY ARGUMENT TO THE CONTRARY.

While assignments of error have been abrogated, parties are still required to clearly and affirmatively assert their respective contentions in the briefs. This, too, is a matter of "mandatory appellate procedure....carefully crafted to meet the objective of allocating judicial resources to provide for the fair and timely hearing, review, and resolution of each case." (County's Merits Brief, at 14). Plaintiffs agree with the County that "This Court must preserve and protect those procedures." (Id.) See also DENNY v. DENNY, 334 So.2d 300 (Fla. 1st DCA 1976)(appellee required to respond to points raised by appellant); AMERICAN BASEBALL CAP, INC. v. DUZINSKI, 308 So.2d 639 (Fla. 1st DCA 1975)(same); OGDEN ALLIED SERVICES v. PANESSO, 619 So.2d 1023,1024 (Fla. 1st DCA 1993)(rule permitting filing

of supplemental authorities requires significance of authorities to issues raised in the briefs; rule is "...not intended to permit a litigant to submit what amounts to an additional brief, under the guise of `supplemental authorities'; or to ambush an opponent by deliberately withholding significant case citations until just before oral argument.").

That the County never raised the "invited error" argument in its brief in the district court was no accident. A review of the complete hearing transcript in this cause clearly demonstrates that Plaintiffs, like the County, simply agreed to the trial court's suggestion that it consider the County's motion for directed verdict at an earlier stage of the proceedings. Plaintiffs did not request or consent to an adverse determination, only an accelerated one. This distinguishes the cases relied upon by the County wherein the appealing party actually asked the court to rule against it. The district court quite rightly rejected the County's (belated) "invited error" argument.

The County does not challenge the district court's determination on the merits that the evidence supported a prima facie case of negligence against the County.

CONCLUSION

For the foregoing reasons and upon the authorities cited, Plaintiffs respectfully urge this Court to find that the County, having been duly and timely notified of Mr. Reyes' claim, and having denied same, has no standing to rely upon a failure to

provide separate notice of Mrs. Reyes' consortium claim. Plaintiffs further urge the Court to reject the County's "invited error" argument as unpreserved and unsupported by the record. The order appealed should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing was Brief of Respondent mailed to the following counsel of record this 13th day of May, 1996.

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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 94-1737

ORLANDO REYES and
BEATRICE REYES,

Appellants,

vs.

METROPOLITAN DADE COUNTY,

Appellee.
_____/

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Plaintiff Orlando Reyes (Plaintiff) appeals the judgment of the trial court entering a directed verdict in favor of Metropolitan Dade County (County) in a premises liability action brought by Plaintiff and a derivative action brought by Plaintiff's wife. (R.222)

The County owns and operates the Turner Guilford Knight Correctional Center (Jail). As part of the regular operation of the Jail, food delivery trucks make deliveries at a loading dock platform adjacent to the kitchen. (R.117) It was Plaintiff's job, as the driver of one of these trucks, to deliver meats to the Jail kitchen. (R.77, 83)

On December 5, 1989, while making his delivery of meats to the kitchen, Plaintiff entered and exited the kitchen several times without incident. (R.176) Upon his last exit from the kitchen, however, Plaintiff slipped and fell in a "greasy" substance on the loading dock platform outside the kitchen door. (R.95) Plaintiff subsequently filed suit against the County, alleging that his injuries were due to the County's negligence. Furthermore, though her claim was not noticed in Plaintiff's pre-suit notice letters, Plaintiff's wife also filed suit derivatively, alleging loss of consortium.

Plaintiff entered into evidence his testimony that he had complained to the officers of the Jail on more than one occasion about "filth" on the loading dock platform. (R.88) Plaintiff also testified, however, that he did not remember ever before seeing grease on the loading dock platform. (R.101) Plaintiff further testified that he did not see the greasy liquid on the platform on the day of his fall. (R.95) Rather, the "filth" Plaintiff complained of consisted of "lettuce leaves", "pieces of tomato" (R.96), or other "pieces of things". (R.97) Also, pursuant to the County's motion in limine, the court also excluded an inmate's written statement, "I took out the trash", as inadmissible hearsay. (R.194)

At the close of Plaintiff's case, the County moved for a directed verdict as to both claims. (R.198) Based on the evidence before it, the trial court granted the County's motion. (R.222)

SUMMARY OF ARGUMENT

The trial court correctly directed a verdict in favor of the County. Plaintiff failed to enter into evidence facts to support any reasonable inference that Plaintiff's fall was caused by the County's negligence.

The inmate's statement may not be used to show that the County had actual notice of the greasy substance. The exclusion of the inmate's statement was proper because the statement was hearsay, and fell under no exception to the rule against hearsay. Indeed, even if it had been admitted, the statement would not have permitted a jury to lawfully conclude that the County was on actual notice of the presence of the greasy substance, because that conclusion would have been based on an impermissible stacking of inferences.

Neither did Plaintiff place the County on actual notice of the presence of the greasy substance with his complaint on the day of his fall about the dirty condition of the loading dock, because the greasy substance was not the condition of which Plaintiff complained. Indeed, Plaintiff testified that he did not see the greasy substance when he entered the kitchen only moments before he fell. The County was therefore not negligent in failing to protect Plaintiff from the greasy substance because the County had no actual notice of it.

Plaintiff failed to establish a jury question whether the County was on constructive notice of the greasy substance on the day he fell. Plaintiff's warnings about "filth" on the loading dock platform on prior occasions did not include the greasy substance. The recurring condition of which Plaintiff complained in the past was not the presence of grease, but the presence of litter and debris which played no part in his accident.

Plaintiff was also unable to enter into evidence facts to support any reasonable inference that the greasy substance had been on the platform long enough for the County to have discovered it through the exercise of reasonable care. Although Plaintiff testified

to the size of the accumulation of greasy liquid, its size alone is not sufficiently probative of the length of time the greasy liquid was there to permit a jury to lawfully conclude that there was constructive notice. Similarly, although Plaintiff testified that there were stains on the loading dock platform, this testimony was not accompanied by any evidence whatsoever that the greasy substance was the source of the stains. Therefore, any conclusion that the County was on constructive notice of the presence of the greasy liquid is based on speculation, and an impermissible stacking of inferences.

Thus, the trial court was correct in granting the County's motion for a directed verdict and affirm the judgment in favor of the County.

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED THE COUNTY'S MOTION FOR A DIRECTED VERDICT BECAUSE PLAINTIFF FAILED TO PRESENT EVIDENCE SUFFICIENT TO PERMIT ANY REASONABLE INFERENCE THAT THE COUNTY WAS ON ACTUAL NOTICE OF THE GREASY SUBSTANCE ON THE LOADING DOCK PLATFORM WHERE PLAINTIFF SLIPPED AND FELL.

The decision of the trial court to grant the County's motion for a directed verdict should be affirmed because Plaintiff failed to enter into evidence facts sufficient to support any reasonable inferences that the County negligently failed to protect Plaintiff from a hazard on its premises. As this Court stated in Woods v. Winn Dixie Stores, 621 So. 2d 710 (Fla. 3d DCA, 1993), "to sustain judgment pursuant to a directed verdict, the record must conclusively show an absence of fact, or any [reasonable] inference from fact that would support the jury's verdict in favor of the non-moving party." Id. at 711. To attach liability to a premises owner for injuries to an invitee, a plaintiff must show that the premises owner had actual or constructive notice of the dangerous condition causing the injuries. Harshbarger v. Miami Herald, 294 So. 2d 41, 42 (Fla. 3d DCA, 1974). To

defeat a premises owner's motion for a directed verdict, therefore, an injured plaintiff must enter into evidence facts sufficient to permit reasonable inferences that would allow a jury to lawfully conclude that the premises owner had actual or constructive notice of the dangerous condition. The record in the case at bar demonstrates that Plaintiff did not enter into evidence facts sufficient to support any reasonable inferences that would permit a jury to lawfully find that the County was on either actual or constructive notice of the presence of the alleged greasy liquid on the loading platform. A premises owner may be liable for a plaintiff's injuries if a judge or jury finds that a premises owner exercising reasonable care would have rectified a dangerous condition of which it had actual notice. Gaidymowicz v. Winn Dixie Stores, 371 So. 2d 212, 214 (Fla. 3d DCA, 1979). Actual notice of a dangerous condition may be shown by testimony that an owner or his agent was warned of a dangerous condition in sufficient time to remedy it. Id. Additionally, if a plaintiff can show that the act or omission of an agent or employee of a premises owner created the dangerous condition, the premises owner may be liable for plaintiff's injuries. Food Fair Stores of Florida v. Patty 109 So. 2d 5, 6 (Fla. 1959).

In the case at bar, Plaintiff has failed to enter into evidence facts sufficient to support any reasonable inference as to who created the greasy liquid, how it was created, or that anyone warned the County about the presence of the greasy liquid. Accordingly, this Court should find that the County had no actual notice of the presence of the greasy liquid.

A. The trial court was correct to exclude the inmate's statement, "I took out the trash" because it was inadmissible hearsay, and because even had it been admitted, the statement would not permit a jury to lawfully conclude that the County had actual notice of the greasy substance because to so conclude would require an impermissible stacking of inferences.

The trial court correctly excluded the inmate's statement as inadmissible hearsay, because the inmate's statement does not qualify under any of the hearsay exceptions codified in the Florida Statutes. Additionally, the statement is irrelevant because it is based on speculation.

The inmate's statement is not, contrary to Plaintiff's contention, admissible into evidence as an admission of an agent or employee of a party under 90.803(18)(d), because the inmate is not an agent or employee of the County. This is not a case where a declarant has undertaken a voluntary association with a party, as was the case in Metropolitan Dade County v. Yearby, 580 So. 2d 186 (Fla. 3d DCA, 1991). In Yearby, a County employee investigating a traffic accident included a statement in an accident report indicating that the County had been notified of a stop sign that had been knocked down "several days" previously. Id. At issue in the case was whether the statement was inadmissible hearsay. Id. at 187-88.

The Yearby Court held that the statement was admissible into evidence. Id. at 188. This Court reasoned that since the author of the statement was an employee of a party, the hearsay statement was admissible as an admission of a party through its employee under 90.803(18)(d). This Court noted further the policy underlying the exception; "that a party can hardly complain that he had no opportunity to cross-examine

himself at the time the admissions were made, and therefore the fundamental reason for excluding . . . hearsay evidence is not present." Id.

This rationale for the exception for admissions of party-opponents and their agents and employees was further explicated by this Court in Dinton v. Brewer, 420 So. 2d 932 (Fla. 3d DCA, 1982). In Dinton, this Court noted that a party should not be able to object that he is unworthy of credence unless he is under oath Id. at 935.

Thus, the 18(d) exception exists because there is no utility perceived in allowing a party to cross-examine itself or to insist that it be placed under oath. The rationale for the exception therefore presumes the existence of shared interests or identity between the declarant and the party-opponent, one that is wholly lacking in the instant case.

In the instant case, in contrast to Yearby, the declarant at issue is an inmate of a County prison, not an employee of the County as was the case in Yearby. 580 So. 2d at 188. To admit the inmate's statement would undercut the rationale behind the exception for admissions by parties and their agents or employees, because there is no apparent shared interest or identity between the inmate and the County.

By incarcerating the inmate, the County forced him into a relationship with the County regardless of his wishes. Given the restrictions placed on him in prison, it is likely that the inmate would feel that his interests diverged from those of the County ~~at least~~ somewhat. Furthermore, he could have outright hostility towards the County. Given this warden-inmate relationship between the County and the inmate, the trial court was correct in holding that the inmate's statement was not admissible as the admission of the agent or employee of a party-opponent.

Even assuming, however, that this Court finds that the court below erred in excluding the inmate's statement "I took out the trash" from evidence, this Court should hold that the exclusion of the statement was harmless error. The inmate's statement itself would not permit a jury to lawfully find for the Plaintiff in the instant case, because to do so would require an impermissible stacking of inferences.

The Florida Supreme Court addressed the general rule against stacking inferences upon inferences in Voelker v. Combined Ins. Co. of America, 73 So. 2d 403 (Fla. 1954). In Voelker, the court provided only a narrow exception to the rule: an inference may be permissibly deduced from another only if the base inference is so certain that "no contrary reasonable inference may be indulged." Id. at 407. The court reasoned that permitting this narrow exception to the rule served the purpose behind the rule, which is to "protect litigants from verdicts or judgments based upon speculation." Id.

This rule against stacking inferences was further explained by this Court in Gaidymowicz v. Winn-Dixie Stores, supra. In that case, this Court stated that "[i]n order to use one inference as the basis for another inference . . . the first . . . inference must outweigh all reasonable inferences to the contrary." 371 So. 2d at 214.

In the case at bar, Plaintiff's use of the inmate's statement violates the rule against stacking inferences. The inference Plaintiff wishes this Court to draw, that the inmate taking out the trash created the accumulation of greasy liquid on the loading dock platform, is impermissibly deduced from the speculative base inference that the trash contained the greasy substance.

The base inference that the trash contained a greasy substance is not sufficiently compelling that other reasonable inferences may not be entertained as to how the greasy substance got there. For example, the greasy substance could have come from the goods of another vendor. The substance could also have come from another truck driver's spilt cup of coffee, or even from Plaintiff's own boxes of meat. Indeed, the inmate did not even indicate by his statement that he had spilled any trash in the first place.

Because the inference that the greasy substance came from the trash is not more likely than any other reasonable inference as to how the substance came to be on the loading platform, Plaintiff's use of the inmate's statement represents an impermissible stacking of inferences. Thus, the inmate's statement would not permit a jury to lawfully conclude that the County had actual knowledge of the greasy substance.

B. Plaintiff's complaint of December 5, 1989 that the loading platform was filthy failed to place the County on actual notice of the greasy substance because the condition Plaintiff complained of was not what caused his fall.

The complaint Plaintiff made to Jail officials on December 5, 1989 did not place the County on actual notice of the existence of the greasy substance because the "filthy" condition Plaintiff complained of was not the condition which actually caused his fall.

This Court made a similar distinction in another slip-and-fall case in which a plaintiff challenged a summary judgment in favor of a hospital where he fell and was injured. Calvache v. Jackson Memorial Hospital, 588 So. 2d 28 (Fla. 3d DCA, 1991). In Calvache, the plaintiff slipped on a "clear liquid" in a hallway where defendant's employees had waxed the floors. Id. at 30. At issue in the case was whether the act of waxing the

floors where the plaintiff slipped made the employees' responsibility for the dangerous condition an issue for the jury which would preclude summary judgment. Id. This Court held that it did not. Id.

In finding the summary judgment for the defendant proper, this Court noted that "[t]he dangerous condition in this case was not the waxed hallway which . . . the plaintiff and others were able to traverse without incident." Id. Rather, "[t]he dangerous condition . . . was . . . the clear liquid in the waxed hallway upon which the plaintiff slipped and fell." Id. The result of this distinction between the "wax" and the "clear liquid" was that the presence of wax on the floor could not be said to have caused the plaintiff's injuries. Id.

In the case at bar, there is a similar distinction between the condition Plaintiff complained of and the dangerous condition in which Plaintiff fell. It is true that Plaintiff complained to the Jail officials about the "filthy" condition of the loading dock on December 5, 1989, the day of the accident. (R.91) However, Plaintiff complained that the filthy condition consisted of "lettuce leaves", "pieces of tomato" (R.96), or other "pieces of things" (R.97) on the loading dock platform which he, like the plaintiff in Calvache, was able to traverse without incident. (R.95) Plaintiff never complained of a greasy substance on the loading dock platform. (R.95, 101)

In point of fact, the evidence received by the trial court indicates that the greasy substance was not there when Plaintiff walked into the kitchen to make his delivery only moments before. As this Court stated in Gaidymowicz, a premises owner who "[does] not

have a sufficient opportunity to correct the dangerous condition . . . could not be liable on the basis of actual notice." 371 So. 2d at 214.

Thus, following the rationale of Calvache, Plaintiff did not warn the County about the presence of the greasy substance on the loading platform. The condition of which Plaintiff warned was not the dangerous condition which caused his fall. Because Plaintiff has not entered into evidence any facts showing that the County learned of the greasy spill from any source other than he, there was no jury question as to whether the County was on actual notice of the presence of the greasy spill, and that the trial court was correct in directing a verdict for the County.

II. PLAINTIFF FAILED TO ENTER INTO EVIDENCE FACTS WHICH WOULD PERMIT A JURY TO REASONABLY CONCLUDE THAT THE COUNTY HAD CONSTRUCTIVE NOTICE OF THE PRESENCE OF THE GREASY SUBSTANCE EITHER BY VIRTUE OF PLAINTIFF'S COMPLAINTS ABOUT THE RECURRING "FILTHY" CONDITION OF THE PLATFORM OR BY EVIDENCE AS TO HOW LONG THE GREASY SUBSTANCE HAD BEEN ON THE PLATFORM.

Plaintiff failed to enter into evidence facts that would permit a jury to lawfully conclude that the County was on constructive notice of the presence of the greasy substance. Constructive notice may be shown by facts showing or tending to show that "the dangerous condition existed for such a length of time that the defendant should have discovered it, or that the condition occurred with such regularity that its recurrence was foreseeable." Kitsopolous v. Mathers Bridge Restaurant, 627 So. 2d 68, 69 (Fla. 5th DCA, 1993). Because Plaintiff did not enter into evidence facts that would permit a jury to reasonably conclude that the presence of the greasy substance was a recurring condition, or that the greasy substance had been on the platform long enough for the

County to have discovered it through the exercise of reasonable care, there was no jury question as to whether the County was on constructive notice of the presence of the greasy substance. The complaints Plaintiff made to County employees regarding the recurring "filthy" condition of the loading dock platform did not place the County on constructive notice of the presence of the greasy substance. (R.88) Although it is true that constructive notice may be established through a showing that a "condition occurred with regularity and was therefore foreseeable", cases finding constructive notice through a recurring condition typically involve a recurring condition of the same type or nature as the dangerous condition causing the injury.

In Kitsopolous, for instance, a waterfront restaurant was sued for injuries caused to a customer by a loose plank on the restaurant's dock. 627 So. 2d at 68. In that case, the restaurant defended against the suit in part on the grounds that it had no notice that the particular plank which caused the injuries was loose or would soon become loose. Id. at 69. A maintenance worker testified, however, that "[other] boards on the dock came loose 'pretty frequently.'" Id. at 68. Additional testimony indicated that complaints about loose boards were "constant." Id.

At issue in the case was whether the restaurant was on notice of the particular loose plank causing the plaintiff's injuries. Id. at 69. The court held that the restaurant was on notice of the loose plank. Id. Although the plaintiff was "unable to show how the particular board became loose or how long it been in a loose condition, [he] could show that [the restaurant] had received numerous complaints about loose boards on the dock and frequently had to repair them." Id. Whether the restaurant had constructive notice of

the dangerous condition, the court said, was therefore a jury question. Id. In the instant case, by contrast, Plaintiff failed to adduce any evidence that the County was on notice of the presence of the greasy substance on the loading dock platform. Although Plaintiff testified that he had complained in the past to Jail officers that the dock was "filthy" (R.88), he further testified that he did not remember ever before seeing grease on the loading dock platform, either on the day he fell or on any day before that. (R.95) Unlike the recurring loose planks of Kitsopolous, the recurring condition of "filth" Plaintiff complained of could not have been the same kind of condition which caused his fall. Thus, the County was not on constructive notice of the greasy substance.

Plaintiff failed to enter into evidence facts sufficient to permit a jury to reasonably infer that the County was on constructive notice of the greasy substance, because the evidence fails to establish or permit any reasonable inference as to how long the greasy substance had been there. As this Court stated in Maryland Maintenance Service v. Palmieri, 559 So. 2d 74 (Fla. 3d DCA, 1990), constructive notice is shown when evidence is presented that a dangerous condition has existed for a sufficient length of time that a premises owner exercising reasonable care would have known that the dangerous condition existed. Id. at 76.

Plaintiff presented no direct evidence below as to how long the greasy substance existed. When asked whether he had "any personal knowledge how long the grease was on the floor prior [to his fall]", Plaintiff said, "no." (R.155)

As this Court noted in Newalk v. Florida Supermarkets, 610 So. 2d 528 (Fla. 3d DCA, 1993), constructive notice may be shown by circumstantial evidence, as well as

direct evidence. 610 So. 2d at 529. In the instant case, although Plaintiff testified regarding the size of the area covered by the greasy substance and the presence of stains on the loading dock (R.154), this testimony was not sufficient to permit a jury to lawfully infer the length of time the greasy substance was present. The County was therefore not on constructive notice of the presence of the greasy liquid.

Plaintiff's reliance on Erickson v. Carnival Cruise Lines, 20 Fla. L. Weekly D 418 (Fla. 3d DCA, 1995) for the proposition that the physical size of a dangerous condition is circumstantial evidence of how long a dangerous condition was present is misplaced. In Erickson, a cruise ship passenger slipped and fell in a puddle of water that was "three to five feet in diameter." Id. A critical supplement to this testimony, however, was evidence that the cause of the puddle was a small leak in the ceiling from which water "trickled down the wall and onto the floor." Id. This Court concluded that when viewed in light of the puddle's apparent source, testimony regarding the size of the puddle was sufficient to present a jury question as to the length of time the puddle existed. Id. This Court explained that the jury could have made the reasonable inference that the puddle was created slowly over time, and had thus been there long enough to establish constructive notice. Id.

In the instant case, by contrast, Plaintiff testified only that the greasy substance was "all around the door," giving no testimony as to the source of the greasy substance. (R.154) Thus, any inference from this testimony that the greasy substance existed for a protracted length of time is predicated on the sheer speculation that the greasy substance was created slowly over time, and is therefore an impermissible stacking of inferences.

Indeed, Plaintiff indicated that he did not see the greasy substance when he had entered the kitchen just a few minutes prior to exiting and falling. (R.95)

Similarly, Plaintiff's testimony that there were "stains" on the loading dock (R.154) does not permit a reasonable inference that the greasy substance had existed for a length of time sufficient to place the County on constructive notice of its existence. Plaintiff's reliance on Newalk v. Florida Supermarkets, 610 So. 2d 528 (Fla. 3d DCA, 1992) for the proposition that spots or stains are circumstantial evidence showing constructive notice of a dangerous condition is misplaced.

In Newalk, a woman slipped on a greasy substance in a supermarket checkout line. Id. at 529. A witness testified that there were "oil spots" on the floor in the area that "appeared old." Id. At issue in the case was whether the testimony about the spots was admissible as circumstantial evidence to show constructive notice. Id. This Court held that it was, and characterized the testimony about the nature and age of the spots as "at least some evidence indicating the . . . spots were present for a sufficient length of time for the owners in their exercise of reasonable care to have acted to remedy the condition." Id.

In the instant case, by contrast, Plaintiff presented no evidence of the nature of the substance creating the stains he saw. Thus, inferring from the existence of stains on the loading dock that the County was on constructive notice of the greasy substance is another impermissible stacking of inferences. Plaintiff has not shown that the base inference, that the stains were a result of the greasy substance, is an inference that is more likely than any other inference regarding the source of the stains, as required by Gaidymowicz and Voelker, supra. The stains could have come from any type of liquid

substance transported across the loading dock platform, greasy or not greasy; even one originating from within Plaintiff's delivery truck. The base inference Plaintiff wishes to make is based on speculation. Plaintiff's own testimony reveals that he did not see the greasy substance at all when he entered the kitchen just prior to exiting and falling down. (R.95)

CONCLUSION

Plaintiff has failed to enter into evidence facts to support any reasonable inference as to who or what the source of the greasy liquid was, how it got onto the loading dock platform, how long it was there before Plaintiff slipped and fell, or that the County was responsible for the greasy liquid. Without any such inferences, no conclusion that the County's negligence caused Plaintiff's injuries may be made. Because Plaintiff's appeal is thus without merit, his wife's derivative claim is as well. Accordingly, this Court should affirm the decision of the trial court and uphold the directed verdict in favor of the County.

Respectfully submitted,

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Evan Grob
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Florida Bar No. 699373

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 22 day of June, 1995, mailed to: Arnold R. Ginsberg, Esquire, 410 Concord Building, 66 West Flagler Street, Miami, Florida 33130.

Assistant County Attorney