ORIGINAL

SUPREME COURT OF FLORIDA

EVELYN OWENS and JOHN J. OWENS, **her husband,**
Petitioners,

CASE NO:95,667

5 DCA CASE NO: **98-00683**

V.

PUBLIX **SUPERMARKETS,** INC.,
Respondent.

_____/

AMENDED PETITIONERS INITIAL BRIEF ON **MERITS**

B.C. **Muszynski, Esquire**
Florida Bar No. 0057680
1005 W. **Emmett Street**
Kissimmee, Florida 34741
(407) 847-2999
Attorney for **Petitioners**

TABLE OF CONTENTS

CERTIFICATE OF TYPE SIZE AND STYLE

This is to certify that the size and style of type used in this brief is Times New Roman 14.

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The petitioners were plaintiffs in a personal injury lawsuit in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida and were the appellants in the Fifth District Court of appeal. Respondent was the defendant in said personal injury lawsuit in the trial court and was Appellee in the Fifth District Court of appeal. In this brief the petitioners will be referred to as "Owens", "plaintiffs" or "appellants". Respondent will be referred to as "Publix", "defendant" or "appellees".

The following symbols are used in this brief:

"R." Record on appeal filed with District Court.

The "R." will be followed by the correct pagination.

"Tr." Transcript of the trial proceedings.

"Vol." Volume of the transcript of trial proceedings filed with District Court.

The "Tr." will be followed by the correct pagination and volume number.

STATEMENT OF THE FACTS AND THE CASE

On March 4,1995, Evelyn Owens was a part time employee of Publix Super Markets, Inc.. Her full time employment was with the Osceola County School Board. Upon completion of her duties at Publix on that day, she "clocked out", however, before leaving, she decided to pick up a few things, that is, do some shopping before departing for home. (R.50)(Tr. 104 Vol.1)

In that she agreed to give a co-worker a ride home she was in the company of one Rosalina Toledo. While proceeding down an aisle and looking at the merchandise on the shelves she slipped and fell on what was later identified as a small part of a banana. (R.50) (Tr 92-92 Vol. 1) An independent witness, Jean Ross, was in close proximity to Evelyn Owens at the time of the slip and fall. She testified it was a small piece of slightly discolored banana. (Tr. 84, 92-94 vol. 1) By discovery requests, Publix admitted Mrs. Owens was an invitee at the time of her slip and fall. (R.12) As a part time employee Evelyn Owens had no benefits other than her hourly pay rate.

Following the fall, Mrs. Owens was transported to the St. Cloud Hospital Emergency Room, where she was treated and released. She was physically unable to return to work, at Publix, as well as the school board for several weeks. She was

unable to work for Publix during the summer recess of the School Board as she had in prior years. She did not return to work for Publix. (Tr. 121 vol. 1)

On March 4,1995, the date of the slip and fall, a "Notice of Injury" was prepared and filed by Publix with the Florida Department of Labor and Employment Security, Division of Workers Compensation. On March 21,1995, "a Notice of Denial of Benefits" was sent to Evelyn Owens. Publix admitted by discovery Requests For Admissions that Workers Compensation Benefits were denied Evelyn Owens (R.14).

In response to the original complaint, Publix filed its Answer and Affirmative Defenses on April 11, 1996, and requested Mediation. Plaintiff responded with a Motion for Relief from an Order of Referral to Mediation due to the conduct of the adjuster for Publix. (R.30). Publix is a self Insurer up to $500,000.00 and adjusts claims with its own adjuster agents/employees, (R.45). The Original complaint was amended several times. On one occasion, to add John J. Owens, as a Plaintiff for his loss of consortium claim, to meet the requirements of FS 627.7403. Other amendments were made by reason of information obtained through discovery efforts during the course of the litigation. It was an arduous task to obtain information by discovery procedures from Publix in that their attorneys objected to most of the pertinent discovery requests of Plaintiff, or made evasive responses (R. 18, R.21 &

R.25). Motions to compel were necessary and resulted in orders requiring Publix to comply with many of Plaintiff's discovery requests and to make better responses. (R.28, 32 & 39).

Notwithstanding the admissions of Publix that Evelyn Owens was an Invitee (R.25) and that Workers Compensation Benefits had been Denied (R.13), Publix filed a Motion for Summary Judgement, on September 11,1996, contending that " there was no genuine issue of material fact in that Plaintiffs injuries occurred during the course and scope of her employment." (R.35) On hearing on November 18, 1996, the court denied the motion. (R.63), and noted that said conduct might be Bad Faith. (R.147).

On September 17,1996, Plaintiff, Evelyn Owens, filed a Motion to amend the complaint to add the derivative consortium claim of her husband and to add a count for "Bad Faith" predicated on the conduct of Publix, including the denial of Workers Compensation Benefits to Evelyn Owens and thereafter seeking a Summary Judgement upon Workers Compensation Immunity. (R.37) The court allowed the amendment as to the consortium claim, however the amendment to allow a claim for "Bad Faith" was denied. (R.47).

On May 22, 1997, the court allowed Evelyn Owens to again amend her complaint. (R.47). It is The First Amended Complaint that the cause proceeded to trial. The First Amended Complaint is attached to the Motion to Amend Complaint (R.65).

In the First Amended Complaint, Evelyn Owens, alleged in paragraphs 4 & 5 her two (2) theories of liability of Publix for her injuries. Simply stated, the length of time the substance was on the floor as well as foreseeability and failure to warn. (R.65).

Publix filed its answer and affirmative Defenses to the First Amended Complaint on June 5, 1997. (R.68). Publix once again raised the defense of Workers Compensation Immunity notwithstanding the court had previously rejected that defense. (R.69)

On August 6, 1997, pursuant to Order of Court Publix filed Supplemental Answers to Interrogatories, whereby answers regarding prior incidents were expanded upon, revealing that Publix had experienced an average of one or more slip and falls per month at the St. Cloud Store for the period of time reflected in the answer. (R.77).

On August 1, 1997, Evelyn Owens filed a Motion to Strike the affirmative Defense of Workers Compensation Immunity. (R.70). That Motion was Granted by the Court on September 16, 1997.

On August 12, 1997, the court entered an Order setting the action for jury trial during a trial period in January 1998. A Joint Pretrial Stipulation was filed on January 15, 1998. (R.80). In that stipulation Publix would not stipulate to the scope of employment of Evelyn Owens at the time of her injury (R. 126). Publix did so notwithstanding its prior admissions and court rulings on that issue.

The case came on for jury trial on Tuesday, January 20, 1998. On that morning Publix presented a Motion in Limine for the first time. (R. 133). Among other requests, Publix sought to exclude any evidence relating to the spurious Workers Compensation Defense; the Sexual Discrimination suits brought against Publix by employees; the fact that evelyn Owens' lawyer was formerly a Circuit Court Judge (R. 134). Publix also filed an objection to the Notice to Produce At Trial served January 13, 1998, and filed by Evelyn Owens on January 20, 1998. (R. 136). The Notice to Produce At Trial related to prior incidents in the subject store and the total number of slip and fall incidents reported to Publix. (R. 137). In its objection, among the grounds asserted by Publix was, that the Notice to Produce at trial was

"unduly burdensome" (R. 136). Publix essentially ignored the Notice to Produce at trial which by Rule has the force and effect of a subpoena.

A jury was selected and sworn and evidence was presented on January 20, 1998. On the second day of trial Evelyn Owens requested the court reconsider the Motion in Limine as to the sexual discrimination law suit against Publix for the reason that Evelyn Owens had received a notice on January 20, 1998, that she was a member of the class and was entitled to an award from Publix (Tr.3 vol. 2). The request was Denied (Tr.4 vol. 2).

Before presenting testimony that morning, Evelyn Owens also requested the court allow a demonstration using a fresh banana to demonstrate to the jury the length of time it would take to cause a small piece of peeled banana to discolor. (Tr.12 vol. 2). The request was denied.

At the conclusion of Plaintiffs' case, the court granted a defense motion for a Directed Verdict in favor of Publix (R. 139 Tr. 79-88 vol. 2). Thereafter a Final Judgement was entered on February 10, 1998, in favor of Publix (R. 137). The Motion of Publix to assess attorney fees was Denied by the court, The request of Publix to assess costs was Granted.

A Notice of Appeal was timely filed by Evelyn Owens with the Fifth District Court of Appeal. That Court in its panel decision reversed the decision of the trial court and remanded for trial.

In addition to a Motion for Rehearing and Clarification, and a Motion for Certification, Publix also filed a Motion for the extraordinary relief of a Rehearing En Banc pursuant to Fla. R. App. P. 9.33 l(d) which included a required statement of counsel to wit:

> "I express a belief based upon a reasoned and studied professional judgement that the panel decision is of an exceptional importance"(emphasis added).

Thereafter a Re-Hearing En Banc was Granted by the Fifth District Court of Appeals on March 12, 1999 which reversed the panel Decision, The other Motions of Publix were denied.

Petitioners timely filed their Motion for Rehearing which was Denied by Order filed April 22, 1999. A timely Notice to Invoke discretionary jurisdiction by this Honorable Court was filed by petitioners. This Honorable Court accepted jurisdiction on September 16, 1999.

SUMMARY OF THE ARGUMENT

Evelyn Owens suffered personal injuries in a slip and fall incident at a Publix Store located in St. Cloud, Florida. Although a part time employee she had previously "clocked out" and was shopping when the slip and fall occurred.

By way of discovery, Publix admitted Evelyn Owens was an invitee and that Publix had denied Workers Compensation benefits to her. Notwithstanding, Publix raised as a defense, Workers Compensation Immunity, by Motion For Summary Judgement. The motion was denied. Publix again raised the same defense in response to the First Amended Complaint of Evelyn Owens. That affirmative defense was stricken on motion of Evelyn Owens prior to trial.

The morning of the first day of trial, Publix filed a Motion in Limine which the court granted. By that ruling Evelyn Owens was precluded from presenting evidence of Publix raising the Workers Compensation Immunity defense as well as other evidentiary matters and limiting voire dire examination The court also sustained the Objection of Publix to a Notice to Produce at Trial filed by Evelyn Owens of information dealing with all "slip and fall" incidents experienced in all Publix stores.

During the trial Evelyn Owens requested the opportunity to conduct a demonstration to show the jury how much time was required to cause a small piece of peeled banana to discolor. The request was denied. This would have corroborated

testimony of an eyewitness to the occurrence and the characters of the substance upon which Evelyn Owens slipped and fell.

Because of the Pre-Trial ruling evidence obtained by discovery only was introduced at trial by Evelyn Owens of prior slip and fall incidents. For the period of time given, in answers to interrogatories this equated to one or more a slip and falls a month.

At the close of Evelyn Owens' case, the court granted the Motion of Publix for a directed verdict although counsel for Evelyn Owens requested that the court reserve ruling on said motion.

Evelyn Owens, submits that the trial court erred when it granted the Motion of Publix for Directed Verdict. The trial court accepted the "inference on an inference" argument of Publix. The trial court on the one hand excluded relevant evidence by its rulings and thereafter agreed with Publix that the evidence the court allowed to be presented was insufficent to go to the jury.

The Trial court further erred when it ignored the second theory of liability alleged by Owens of "foreseeability" and a "failure to warn" of a dangerous condition, predicated upon the number of slip and falls experienced at the St. Cloud Store obtained by way of discovery,,

It is the position of Owens that the Fifth District Court of Appeal erred in two respects. Initially, the panel decision of the court failed to consider the second theory of liability of "foreseeability" and "failure to warn". Secondly, and the more serious error, was the granting of a rehearing en banc when there was no basis in the motion, the record or in fact. That court apparently granted a rehearing en banc solely upon the certification of the attorney for Publix that the case was one of great importance.

Petitioners Owens look to this court to correct the designated errors as well as to clarify the law of Florida regarding the "inference on an inference" theory relied upon by Publix.

It is the position of Petitioners Owens that such an argument should be made to the jury as apposed to being applied by the trial court or appellate court, to reverse a trial court or by an appellate court en banc to reverse a panel decision.

ARGUMENT

POINTS ON APPEAL

POINT I

THE TRIAL COURT ERRED BY GRANTING MOTION OF DEFENDANT FOR DIRECTED VERDICT AT THE CLOSE OF PLAINTIFFS CASE

POINT II

THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE SECOND THEORY OF LIABILITY OF PLAINTIFF OF "FORESEEABILITY" AND "FAILURE TO WARN" OF A DANGEROUS CONDITION

The power to direct a verdict in a slip and fall case should be exercised with caution, and it should never be granted unless the evidence is of such a nature that under no view which the jury might lawfully take of it, favorable to the adverse party, could a verdict for the latter be upheld. Mar-low v. Food Fair Stores of Florida, Inc., 284 So. 2d 490 (Fla. 3rd DCA 1973) and cases cited therein.

Without a doubt, the most devastating discretionary decision a trial judge can make in the course of a jury trial with reference to a Plaintiff is the granting of a defense motion for directed verdict. Devastating for the reason that neither the same perceptions of the trial, the same momentum of the trial, the same jury, nor the same approach to the evidence can ever be acquired again by the Plaintiff, What was then

present as to all aspects of the trial is lost forever. Devastating also to the Plaintiff by being denied access to the jury as well as and the time and expense involved,

Without question, the most reasonable, prudent and fair discretionary decision for a trial judge to make in such an instance is to reserve ruling on a defense motion for directed verdict. This avoids the time and expense and judicial labor of an appeal and retrial, if ordered.

If a case before a trial court is as weak as may be perceived by the trial judge, the jury will usually have the same perception and return a defense verdict, and relieve the trial judge of a post trial decision of the motion. If the trial judge in this case had reserved ruling and a defense verdict rendered, Evelyn Owens would have had her "day in court" and a jury of her peers would have told her, by their verdict, that she had no case. That did not occur. Had that occurred this court would not have this matter under consideration. This position was well stated in the opinion of Guiterrez v. L. Plumbing. Inc., 516 So. 2d 87 (Fla. 3rd DCA 1987), wherein the court stated as follows:

> "....Trial judges who are inclined to grant directed verdict at conclusion of case should instead reserve ruling thereon, allow jury to return verdict, and thereafter rule on motion, so that if case is reversed on appeal trial judge's ruling results in reinstatement of jury verdict rather than remand for unnecessary new trial."

Evelyn Owens further contends the trial judge erroneously precluded admissible evidence, and/or overlooked the evidence or failed to consider the evidence and all reasonable inferences there from in the light most favorable to Plaintiff. The record evidence is that Evelyn Owens slipped on a small piece of discolored banana. Had the demonstration requested to be conducted by Evelyn Owens been allowed; that demonstration would have shown to the jury the length of time required to cause a small piece of peeled banana to become slightly discolored. However, Evelyn Owens' complaint did not rely solely upon the length of time the slightly discolored banana was on the floor.

Among the arrows in the quiver of liability in the complaint of Evelyn Owens was that Publix failed to warn of a dangerous condition of which Publix had notice by reason of the number of slip and fall occurrences in its store(s). Limited information of this nature was actually introduced into evidence and Evelyn Owens believes there would have been more of this type information available to introduce into evidence had the Notice to Produce at Trial been complied with by Publix and/or required by the court. The court erroneously sustained the objection of Publix to the Notice to Produce at trial. Publix was essentially allowed to ignore the Notice.

As this court is well aware the law of Florida is such that, in order to recover for injuries received in a slip and fall occurrence, a Plaintiff must show either that the storekeeper had actual notice of the condition or that the dangerous condition existed for such a length of time, that in the exercise of ordinary care the storekeeper should have known it. K-Mart Corporation v. Dwyer, 656 So. 2d 134 (Fla. 5th DCA 1995), Thomas v. Cracker Barrel Old Country Store, 649 So. 2d 277, (Fla. 1st DCA 1995), Gonzalez v. Tallahassee Medical Center, 629 So. 2d 945, (Fla. 1st DCA 1993), Winn-Dixie Stores. Inc. v. Marcotte, 553 So. 2d 213, (Fla. 5th DCA 1989), Carls Markets, Inc. v. Mever, 69 So. 2d 789, (Fla. 1953).

It is equally well known that constructive knowledge of the dangerous condition may be proven by circumstantial evidence. Thomas v. Cracker Barrel Old Country Store, Supra; Silver Springs Moose Lodge v. Orman, 63 1 So. 2d 1119, (Fla. 5th DCA 1994); Woods v. Winn-Dixie Stores. Inc., 621 So. 2d 7 10, (Fla. 5th DCA 1993); Gonzalez v. Tallahassee Medical Center, Supra; Altman v. Publix Supermarkets. Inc., 579 So.2d 351 (Fla. 3rd DCA 1991); Nance v. Winn-Dixie Stores, Inc., 436 So 2d 1075, (Fla. 3rd DCA 1983).

A plaintiff, in a negligence action may use evidence of occurrence or non occurrence of prior or subsequent accidents to prove notice of a dangerous character of a condition. Nance v. Winn-Dixie Stores. Inc., supra, (and cases cited therein), as

well as to "foreseeability" of the dangerous condition and the "failure to warn". See Nance v. Winn-Dixie Stores, Inc., supra and Pearce v. Publix Supermarkets, 675 So. 2d 710, (Fla. 3rd DCA 1996) and cases cited therein and Liberty Mutual Insurance Company v. Kimmel, 465 So. 2d 606, (Fla. 3rd DCA 1985).

It is also of significance that, Fla. Std. Jury Inst. (Civ.) 3.5 (f) page 3 reflects a note on its use that, " The final segment of 3.5 (f) marked with an astrix *, is inapplicable when plaintiff does not proceed on a theory of defendant's failure to warn."

The allegations of the complaint and evidence at trial was also directed to "foreseeability" and a "failure to warn", not only as to the length of time the substance was on the floor and constructive Notice to Publix.

POINT III

THE DISTRICT COURT OF APPEAL FIFTH DISTRICT, ERRED BY GRANTING TO PUBLIX A REHEARING EN BANC THEREBY REVERSING THE PANEL DECISION OF THAT COURT

POINT IV

THE DISTRICT COURT OF APPEAL FIFTH DISTRICT, ERRED BY FAILING TO CONSIDER SECOND THEORY OF LIABILITY OF PLAINTIFFS OF "FORESEEABILITY" AND "FAILURE TO WARN" OF A DANEGEROUS CONDITION.

Petitioners submit that the En Banc Rehearing decision of the Fifth District Court of Appeals in this case not only conflicts with decisions of other district courts legal principles discussed but also conflicts with decisions of other districts and the Supreme Court regarding the authority of a District Court to rehear a case en banc.

In the reverse of the foregoing and in that a rehearing en banc is an extraordinary proceeding, petitioner initially presents what they consider is the authority of a district court to rehear a case en banc.

It is without question, and not arguable that the simple desire of an attorney to have the entire district court rehear a case which has been decided contrary to his client's interest cannot be the basis of such authority. Finnv vs. State. 420 So. 2d 639, (Fla. 3 DCA 1982), Nielson v. City of Sarasota 117 So. 2d 731. (Fla. 1960).

Further, a Motion for Rehearing, standing alone, as opposed to a Motion for Rehearing En Banc, which merely reargues the merits of the case are inappropriate. Seslow v. Seslow 625 So. 2d 1248 (Fla. 4th DCA 1993). Elliott v. Elliott, 648 So. 2d 135 (Fla. 4th DCA 1994). The Motion filed by respondent for Rehearing En Banc merely re argued the case and should not have been considered by the District Court of Appeal.

The en banc jurisdiction of a District Court of appeal must be based upon the criteria set forth is Nielson and Finney supra. As stated in Nielson the conflict jurisdiction does not convey to an en banc panel the authority to whimsically select cases for review in order to satisfy some notion that the case would be of such importance as to justify the interest or attention of the full court. To do so would convert the full court into a "court of selected errors" and will result in confusion and uncertainty in the judicial system.

Petitioner suggests that the en banc decision of the Fifth District is nothing more than a "whimsical selection" of a panel decision for review in order to satisfy some notion that the case would be of such importance as to justify the interest or attention of the full court. Litigants often suffer adverse results under the best circumstances, that is how our system sometimes functions, however, an adverse result should not provide the opportunity to circumvent the traditional and long

established procedures designed to provide uniformly and stability to the judicial system of our state.

As to the other point raised herein, other district courts have considered the condition of the substance alleged to have caused the slip and fall as bearing on the critical time span during which the dangerous condition had existed. Woods v. Winn Dixie Stores. Inc.. 621 So. 2d 710 (Fla 3rd DCA 1993) (dirt, scuffing or tracts in unidentified substance); Ress v. X-Tra Super Food Centers, Inc., 6 16 So 2d 110 (Fla 4th DCA 1993). (looked like sauerkraut and it was gunky, dirty and wet and black); Newalk v. Florida Supermarkets, Inc., 610 So. 2d 528 (Fla. 3rd DCA 1992) (oil spots on the floor appeared old); Winn Dixie Stores v. Williams, 264 So. 2d 862 (Fla. 3d DCA 1972) (sticky, dusty and dirty substance); Washington v. Pick -N- Pay Supermarkets. Inc., 453 So. 2d 508 (Fla 4th DCA 1984) (collard greens looked old and nasty); Marlow v. Food Fair Stores. Inc., 284 So 2d 490 (Fla. 3rd DCA 1973) (black looking piece of rotten banana) to mention a few.

All the cases cited as well as the instant case rely upon circumstantial evidence regarding the critical time span during which the dangerous condition existed. The principles expounded by the en banc rehearing decision regarding circumstantial evidence can as easily be applied to each of the above cited cases as well as any other case involving a similar slip and fall. The principles announced in the en banc

opinion can be "whimsically" applied to any such case to attain the same conclusion as reached by the en banc opinion.

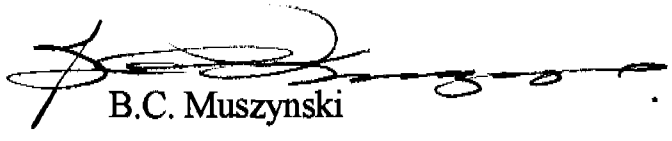
Perhaps for that reason alone, this court may wish to establish the parameters that will guide all the District Courts of Appeals as well as future litigants under similar factual circumstances, thereby making property owners, such as Publix, responsible for such occurrences and not a circumstance whereby members of the public must "enter and shop at their own risk" as the en banc panel decision has created and fosters.

Petitioners submit that the Fifth District en banc rehearing decision in the instant case was rendered without appropriate authority and otherwise conflicts with the principles of law announced in the above styled cases, and therefore the en banc rehearing decision of the Fifth District Court of Appeal should be quashed, vacated or set aside and held for naught to be substimed with a decision of this court which stabilizes and clarifies the law of this state regarding the issues presented herein

CONCLUSION

Based upon the foregoing arguments and authorities cited herein, Petitioners request this court reverse the En Banc rehearing decision of the Fifth District Court of Appeal, reinstate the panel decision of that court as well as correct the other errors cited herein which having occured in the appellate and trial courts.

Respectfully submitted



B.C. Muszynski

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: Richard Womble, Esq., 201 East Pine Street, 15th Floor, Orlando, Florida 32801-2729 and Michael Hammond, Esq., 201 East Pine Street, 15th Floor, Orlando, Florida 32801-2729, this 21st day of October, 1999 by U.S. Mail.

B.C. Muszynski, Esq.
1005 W. Emmett Street
Kissimmee, FL 34741
(407) 847-2999
Attorney for Petitioners

ORIGINAL

SUPREME COURT OF FLORIDA

EVELYN OWENS and JOHN J. OWENS, her husband,
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V.

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APPENDIX TO PETITIONER'S INITIAL BRIEF ON MERITS

B.C. Muszynski, Esquire
Florida Bar No. 0057680
1005 W. Emmett Street
Kissimmee, Florida 3474 1
(407) 847-2999
Attorney for Petitioners

INDEX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT
JULY TERM 1998

EVELYN OWENS and
JOHN J. OWENS, her husband,

Appellants/Cross-Appellees,

v.

CASE NO. 98-683

PUBLIX SUPERMARKETS, INC.,

Appellee/Cross-Appellant.

_____/

Opinion filed December 4, 1998

Appeal from the Circuit Court
for Orange County,
Ted P. Coleman, Judge,

B.C. Muszynski, Kissimmee,
for Appellants/Cross-Appellees.

Richard S. Womble and Gregory D. Prysock,
of Rissman, Weisberg, Barrett, Hurt,
Donahue & McLain, P.A., Orlando,
for Appellee/Cross-Appellant.

SHARP, W., J.

Owens appeals from a final judgment which denied her any recovery from Publix Super Markets, Inc. in a slip and fall case, based on a directed verdict. At trial, Owens had the burden of coining forward with evidence to establish either that Publix had actual notice of a dangerous

condition (in this case a piece of banana on the floor), or constructive knowledge of it based upon length of time the condition existed, which caused her to slip and fall.'

Unable to prove that Publix had actual knowledge of the presence of the banana, Owens sought to offer proof of the condition of the banana (it was slightly discolored) to meet this burden of establishing that it had been on the floor a sufficiently long period of time to charge Publix with constructive knowledge of its presence. The trial court relied on *Bates v. Winn-Dixie Supermarket, Inc.*, 182 So.2d 309 (Fla. 2d DCA 1966), where a similar argument had been made by a plaintiff-customer who had tripped on a black, discolored banana peel. The *Bates* court said such argument would require the jury to "tack" an impermissible inference on an inference.

> [T]o infer from the color and condition of the peeling alone that it had been there a sufficient length of time to permit discovery, we would have to infer that the banana peel was not already black and deteriorated when it reached defendant's floor.

The Florida Supreme Court in *Montgomery v. Florida Jitney Jungle Stores. Inc.*, 281 So.2d 302 (Fla. 1973) held that the slip and fall plaintiff had established sufficient evidence to get the case to the jury, based, at least in part on the fact that a collard leaf on which the plaintiffslipped was old, wilted and dirty looking, as cvidcncc it had been abandoned on the floor a long enough time to infer constructive knowledge or negligence on the par-t of the store owner. As a matter of logic, we have difficulty distinguishing between this case and *Montgomery*, concerning the ability to use the deteriorntcd nature of the food item on the floor to establish passage of time since it was abandoned there. From personal experience with such items, collard greens deteriorate much more slowly than

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[1] *Carls Markets, Inc. v. Meyer*, 69 So. 2d 789 (Fla. 1953); *K-Mart Corp. v. Dwyer*, 656 So. 2d 1340 (Fla. 5th DCA 1995); *Thoma v. Cracker Barrel Old Country Store*, 649 So. 2d 277 (Fla. 1st DCA 1995); *Winn-Dixie Stores. Inc. v. Marcotte*, 553 So. 2d 2 13 (Fla. 5th DCA 1989).

do peeled bits of banana, but even so, bananas do not turn brown faster than the time stores are held lo be charged with constructive notice.

Further, it appears the Florida Supreme Court in *Montgomery* rejected the rationale of *Bates,* (piling impermissible inference on inference) as well as the rationale set forth by the First District in *Florida Jitney Jungle Stores. Inc. v. Montgomery,* 267 So.2d *32,* (Fla. *1st* DCA 1972). In *Montgomery,* the first district said:

> The fact that Mr. Montgomery testified that...there were other wilted leaves lying on the floor does not change the result in this case, for to let it do so would be to engage in 'mental gymnastics. The color and condition of the collard leaves does not alone show that they had been dropped on the floor by an employee nor that they had been there a sufficient length of time to permit discovery by store employees.

267 So.2d at 33.

Although there were other bits ofcircumstantial evidence in *Montgomery* to establish a span of time the leaf had been on the floor, the supreme court conoludcd it was sufficient in that case, and expressly approved considering the age and deteriorated condition of the item on the floor, which had caused the fall.

In sum, we conclude that a directed verdict in this case should not have been granted. In *Ress v. X-tra Super Food Centers, Inc.,* 6 16 So.2d 1 10 (Fla. 4th DCA 1993), the court held that a summary judgment in favor of the store owner defendant had been improperly granted in a slip and fall case. The primary circumstantial evidence to show the abandoned sauerkraut on the floor on which the plaintiff slipped and had been there a substantial time was its aged condition -- "gunky, dirty and wet and black." And in *Washington* v. *Pic-N-Pay Supermarket, Inc. 453* So.2d 508 (Fla. 4th DCA 1984), the court similarly held that a directed verdict in that case should not have been

granted for the store owner, based largely on the condition of the collard green leaves on which the plaintiff had slipped -- "old, nasty, collard green leaves...looked like they had been there for quite awhile."

A directed verdict in a slip and fall case should not be granted unless the evidence is of such a nature that under *no* view which the jury might take of it, favorable to the adverse party (here the plaintiff) could a verdict for the latter be upheld. *Marlowe v. Food Fair Stores of Florida, Inc.*, 284 So.2d 490 (Fla. 3d DCA 1973); *Little v. Publix Supermarkets, Inc.*, 234 So.2d 132 (Fla. 4th DCA 1970). In this case, the deteriorated condition of the food item which allegedly caused the plaintiff's fall was sufficient lo establish it had been on the floor a long enough time to charge Publix with constructive notice of its presence.

REVERSED.

DAUKSCH, J., concurs specially with opinion.

HARRIS, J., dissents with opinion.

DAUKSCH, J., concurring specially.

I concur with the result but am not experienced enough, regretfully, to know the diverse rates of deterioration of green leafy vegetable substances versus yellow-skinned fruit substances. In the interest of judicial economy and in order to aid in the expeditious rendering of the decision in this case, I have declined to undertake a study.

HARRIS, J., dissenting. Case No: 98-683

I respectfully dissent.

The issue in this case is whether a small piece of banana, slightly discolored, found on the floor near where a woman slipped and fell is sufficient in and of itself to send the issue of whether Publix had constructive knowledge of the presence of the banana fragment to the jury. The majority recognizes that to permit an inference that the color of the banana fragment would show that it had been on the floor for a sufficient period of time that Publix should have discovered it requires stacking an inference on an inference; the majority simply finds that the supreme court in *Montgomery v. Florida Jitney Jungle Stores, Inc.*, 281 So. 2d 302 (Fla. 1973), permits such stacking.

To justify the inference approved by the majarity, you would have to assume that the aging of the banana fragment occurred on the floor of the market and not in the store's fruit bin or in the hands of some child being pushed in a cart up and down the aisles as the parents shopped. Although the majority acknowledges that there are "other bits of circumstantial evidence in Montgomery to establish the span of time the leaf had been on the floor," it totally ignores the significance of such other evidence. Such other "bits of circumstantial evidence" were:

(1) Plaintiff and her husband had been in the area of the fall for fifteen minutes prior to the accident;

(2) No other shoppers were around the area where she fell;

(3) No one swept the floor during that period;

(4) During this period, two store employees were in the area;

(5) Not only was the leaf wilted but it was also "dirty looking."

This testimony indicates that if the plaintiffs testimony is believed, the leaf was on the floor for at least 15 minutes and that it was, or should have been, observed by two of the store's employees. The supreme court approved the holdings of other slip and fall cases that if something is on the floor for 15 -20 minutes, the store may be charged with such knowledge. In our case, there were simply no "other bits of circumstantial evidence" to permit plaintiff to withstand a motion for directed verdict.

The supreme court in Montgomery acknowledged that there is no liability unless sufficient proof of knowledge, actual or constructive, is shown. The court stated:

> There are a number of Florida cases holding that a store owner is not liable for injuries sustained by customers who slipped and fell as a result of a foreign substance on the floor, when the customers cannot prove how the foreign substance got on the floor, or who put it there, or how long it had been there. In each of these cases, however, when the facts are carefully analyzed, there is no proof, either direct or circumstantial that would give rise to an inference that the foreign substance had been on the floor for a sufficient length of time to charge the store owner with constructive knowledge of its presence.

Id. at 306.

I submit that *Bates v. Winn-Dixie Supermarkets, Inc., 182 So.* 2d 309 (Fla. 2d DCA 1966), has made a better analysis of the law based on the evidence presented herein. The majority has made Publix a virtual insurer of its customers,

DISTRICT COURT OF APPEAL
FIFTH DISTRICT

CASE NO: 98-00683
L.T. CASE NO: CI 96-0481
OSCEOLA COUNTY

EVELYN OWENS, and JOHN J. OWENS, her husband,

Appellants/Plaintiffs,

vs.

PUBLIX SUPERMARKETS, INC.,

Appellee/Defendant.

MOTION FOR REHEARING EN BANC

Appellee, PUBLIX SUPERMARKETS, INC., pursuant to Florida Rule of Appellate Procedure, 9.33 l(d), requests Rehearing En Banc of this Court's December 4, 1998 Order and as grounds states:

1. This case is of exceptional importance because it reduces the minimum requirement a plaintiff must prove to charge a premises owner with constructive notice of a dangerous condition. As stated by Judge Harris in the dissenting opinion in this case, "[t]he majority has made Publix a virtual insurer of its customers." Given the number of negligence claims brought against landowners, this decision regarding the minimum threshold necessary to establish constructive notice will significantly impact the frequency and type of claims brought against premises owners throughout the state of Florida.

2. This Court concluded that a directed verdict was improper because the color of the banana alone was sufficient to charge Publix with constructive notice, Such an opinion allows claimants to pursue actions against premises owners without the necessity of any other circumstantial evidence to at least establish this inference to the reasonable exclusion of other inferences. It therefore allows claimants to impermissibly stack a second inference (because of the color of the item the premises owner should have known of its existence) upon a first inference (the item was not that color when it was placed on the floor). The decision in the present case effectively makes premises owners "virtual insurers" of those on the premises.

WHEREFORE, Appellee, respectfully requests En Banc Rehearing of this Court's December 4, 1998 Order reversing the trial court's Order directing a verdict in favor of Defendant.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

RICHARD S. WOMBLE, ESQ.
Florida Bar No. 319538
GREGORY D. PRYSOCK, ESQ.
Florida Bar No. 0062420
Rissman, Weisberg, Barrett, Hurt,
Donahue & McLain, P.A.
201 E. Pine St., 15th Flr.
Orlando, Florida 3280 1
(407) 839-0 120
Attorneys for Appellee

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 19th day of December, 1998, B. C. Muszynski, Esq., Weinberger & Tinsley, P.A., 1005 W. Emmett Street, P.O. Box 450157, Kissimmee, FL 34745-0157.

RICHARD S. WOMBLE, ESQ.
Florida Bar No. 319538
~~GREGORY D. PRYSOCK, ESQ.~~
Florida Bar No. 0062420
Rissman, Weisberg, Barrett, Hurt,
Donahue & McLain, P.A.
201 E. Pine St., 15th Flr.
Orlando, Florida 32801
(407) 839-0120
Attorneys for Appellee

RS W/GDP/Isa

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT
JANUARY TERM 1999

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

EVELYN OWENS and
JOHN J. OWENS, her husband,

Appellants/Cross-Appellees,

v. CASE NO. 98-683

PUBLIX SUPERMARKETS, INC.,

Appellee/Cross-Appellant.

Opinion filed March 12, 1999

Appeal from the Circuit
Court for Orange County,
Ted P. Coleman, Judge.

B. C. Muszynski, Kissimmee, for
Appellants/Cross-Appellees.

Richard S. Womble and Gregory D. Prysock, of
Rissman, Weisberg, Barrett, Hurt, Donahue &
McLain, P.A., Orlando, for Appellee/Cross-Appellant.

ON MOTION FOR REHEARING EN BANC

HARRIS, J.

We grant the appellee's Motion for Rehearing *En Banc* filed with this court on December 21, 1998. We withdraw our previous opinion released December 4, 1998, and substitute this opinion. We deny appellee's Motion for Rehearing and Clarification. We also deny appellee's Motion for Certification.

The question in this case is whether a plaintiff who fell in a supermarket can get to the jury by merely showing that she fell on a "slightly discolored" banana fragment lying on the floor, The trial court granted a directed verdict for the defendant because the evidence was insufficient to show that defendant had any knowledge, actual or constructive, that the banana fragment was there.

The supreme court in Montgomery *v.* Florida Jitney Jungle *Stores,* Inc., 281 So. 2d 302 (Fla. 1973), established that there is no owner liability in situations such as this unless sufficient proof of knowledge of the dangerous condition, actual or constructive, is shown. The court stated:

> There are a number of Florida cases holding that a store owner is not liable for injuries sustained by customers who slipped and fell as a result of a foreign substance on the floor, when the customers cannot prove how the foreign substance got on the floor, or who put it there, or how long it had been there. In each of these cases, however, when the facts are carefully analyzed, there is no proof, either direct or circumstantial that would give rise to an inference that the foreign substance had been on the floor for a sufficient length of time to charge the store owner with constructive knowledge of its presence.

Id. at 306.

Does the fact that a piece of discolored banana is found on the floor give 'rise to an inference that the banana fragment had been there long enough to give this critical constructive knowledge? The answer is that it depends on the other circumstances of the case. In Montgomery the plaintiff was able to present additional circumstances to establish the span of time the leaf had been on the floor. These additional circumstances were:

(1) Plaintiff and her husband had been in the area of the fall for fifteen minutes prior to the accident;

(2) No other shoppers were around the area where she fell;

(3) No one swept the floor during that period;

(4) During this period, two store employees were in the area;

(5) 'Not only was the leaf wilted but it was also "dirty looking,"

This testimony indicates that if the plaintiff is believed, the leaf was on the floor for at least 15 minutes and that it was, or should have been, observed by two of the store's employees. The supreme court approved the holdings of other slip and fall cases holding that if something is on the floor for 15 -20 minutes, the store may be charged with such knowledge. Montgomery is consistent with those cases. But in this case, there was simply no additional circumstantial evidence to raise an inference of constructive knowledge which would permit plaintiff to withstand a motion for directed verdict.

In Bates v. *Winn-Dixie* Supermarkets, Inc., 182 So. 2d 309 (Fla. 2d DCA 1966), the court was asked by plaintiff to infer that the banana peel had been on the floor long enough to give constructive knowledge because the peel was "dark," "over ripe," "black," "old," and "nasty looking." The court refused stating:

> We are not permitted to indulge in constructing one inference upon another. Food *Fair Stores, Inc. v. Trusell,* 131 So. 2d 730 (Fla. 1961). There the Florida Supreme Court stated, at page 733:
>
> > "* . *It is apparent that a jury could not reach a conclusion imposing liability of the petitioner without indulging in the prohibited mental gymnastics of constructing one inference upon another inference in a situation where, admittedly, the initial inference was not justified to the exclusion of all other reasonable inferences. . * * "

> In the instant case, to infer from the color and condition of the peeling alone that it had been there a sufficient length of time to permit discovery, we would first have to infer that the banana peel was not already black and deteriorated when it reached defendant's floor. This is the type of "mental gymnastics" prohibited by the *Trusell* decision, *supra,* since the latter inference, under the circumstances, is not to the exclusion of all other reasonable inferences.

Id. at 310-11.

To justify the inference sought by plaintiff herein, we would have to assume that the aging of the banana fragment occurred on the floor of the market and not in the store's fruit bin from which it was taken by a customer and a portion given to an infant being pushed in a shopping cart who dropped it on the floor shortly before plaintiff came along. Although either possibility exists, since it is plaintiffs obligation, in order to show constructive knowledge, to prove that the aging occurred on the floor, the directed verdict was proper.

AFFIRMED.

GRIFFIN, C.J., COBB, GOSHORN, PETERSON, THOMPSON and ANTOON, JJ., concur.
SHARP, W., J., DISSENTS, WITH OPINION, IN WHICH DAUKSCH, J., concurs.

SHARP, W., J., dissenting.

In my view, the trial court erred in directing a verdict for appellee, Publix, because there was sufficient evidence adduced at trial to support a finding by the jury that the piece of banana which caused the appellant, Owens, to slip and fall in the store, had been lying on the floor a sufficiently long time to charge Publix with constructive notice of its presence. The majority opinion ignores precedent in this state and elsewhere, and embraces the impermissible inference on an inference rationale, which was abandoned twenty years ago. I submit this is a great leap in the wrong direction.

Owen's theory of liability in this case turned solely on the theory that the offending piece of banana had been on the floor of the supermarket a sufficiently long time that Publix in its capacity as owner-operator of the store, should have discovered it and cleaned it up, and that failure to do so under the circumstances constituted negligence on its part.[1] Although Owens did not see the substance on which she slipped and fell, another customer in the store, Mrs. Alma Jean Ross, testified she was next to Owens in the chips and bread aisle when Owens fell. She stayed with her until the ambulance came, and she saw the substance that had caused the fall.

Ross testified she observed no one in the aisle where the fall occurred when she entered the store. The piece of banana was discolored, kind of mushed, and squashed down. When asked if it was discolored, she said: "Very much, uh-huh. It wasn't black but it was dark." The squashed part was darker, the color of wood. She surmised "it had been there a bit."

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[1] *Carls Markets, Inc.* v. Meyer, 69 So.2d 789 (Fla. *1953); K-Mart Corp. v. Dwyer, 656* So.2d 1340 (Fla. 5th DCA 1995); *Thoma v. Cracker Barrel Old Country Store, Inc., 649* So.2d 277 (Fla. 1st DCA 1995); *Winn-Dixie Stores, Inc. v. Marcotte, 553* So.2d 213 (Fla. 5th DCA 1989).

In granting a directed verdict for Publix, the trial court (as well as the majority opinion in this appeal) relied on *Bates v. Winn-Dixie Supermarket,* Inc., 182 So.2d 309 (Fla. 2d DCA 1966). There an argument similar to the one put forward by Owens in this case was made by a plaintiff-customer who had tripped on a black, discolored banana peel in the store. The court said such an argument would require the jury to "tack" an impermissible inference on an inference.

> [T]o infer from the color and condition of the peeling alone that it had been there a sufficient length of time to permit discovery, we would have to infer that the banana peel was not already black and deteriorated when it reached defendant's floor.

Bates, 182 So.2d at 3 10. In other words, reliance on the aged appearance of the food item on the floor was not a sufficient basis to infer it had been there any time at all.

In support of this inference-on-an-inference rationale, the *Bates* court cited *Food Fair Stores, Inc.* v. *Trusell,* 13 1 So.2d 730 (Fla. 196 1). In that case there was no evidence about who dropped the offending piece of lettuce, and no evidence concerning the age or dirty condition of the lettuce. Thus the court affirmed a summary judgment for the defendant store. This case clearly does not support the inference-on-an-inference rationale articulated in *Bates.*

In the *Trusell* case, Justice Thornal cited to a prior case in which he had written the majority opinion, *Food Fair Stores of Florida,* Inc. v. Patty, 109 So.2d 5 (Fla. 1959). There he explained that in slip and fall cases in a supermarket, a plaintiff can establish negligence in one of two ways. First, by proving that an employee or agent of the store dropped the food item on the floor, *i.e.,* direct negligence. In such cases, the length of time it remained on the floor is immaterial. Second, if dropped by a person who was not an employee, by proving it had remained on the floor a sufficient length of time that the owner-store operator should have noticed it and cleaned it up; *i.e.,*

constructive negligence. However, in Putty, as in *Trusell,* there was no evidence proffered as to who had dropped the green bean on the floor of the store which caused the fail, or how long it had been there. No testimony dealt with its aged appearance or the like.

However, in *Montgomery v. Florida Jitney Jungle Stores, Inc.,* 281 So.2d 302 (Fla. 1973), the Florida Supreme Court again addressed the constructive notice issue. Part of the evidence proffered by the plaintiff in that case was that a collard leaf that had caused the plaintiff to fall in the store was old, wilted and dirty looking. The court could have embraced the Bates' impermissible inference-on-an-inference logic but significantly, it did not, The First District had used that premise in its opinion, but the supreme court reversed. *Florida Jitney Jungle Stores, Inc. v. Montgomery, 267* So.2d 32 (Fla. 1st DCA 1972), *quashed by* 281 So.2d 302 (Fla. 1973). The first district noted:

> The fact that Mr. Montgomery testified that...there were other wilted leaves lying on the floor does not change the result in this case, for to let it do so would be to engage in 'mental gymnastics.' The color and condition of the collard leaves does not alone show that they had been dropped on the floor by an employee nor that they had been there a sufficient length of time to permit discovery by store employees.

267 So.2d at 33.

There were other bits ofcircumstantial evidence in *Montgomery* to establish the span of time the leaf had been on the floor, and the supreme court concluded the evidence was sufficient to go to the jury on constructive notice. However, the court, in fact, expressly approved consideration of the age and deteriorated condition of the item on the floor as part of that proof. I agree with the majority opinion that the court in *Montgomery* was not faced with the question in this case of whether the aged condition of the food item was sufficient, *standing alone,* to create a jury issue on constructive notice. But neither should *Montgomery* be cited for the proposition that there has got to be *more*

than the aged or dirty condition of the item on the floor to defeat a directed verdict or summary judgment motion.

Other cases have addressed that issue, however, and reached the conclusion that the aged food item or its deteriorated condition can constitute enough to create a jury issue on constructive notice. In *Ress v. X-tra Super* Food *Centers,* Inc., 616 So.2d 110 (Fla. 4th DCA 1993), the court held that a summary judgment in favor of the store owner defendant had been improperly granted in a slip and fall case. The primary circumstantial evidence to show that abandoned sauerkraut on the floor on which the plaintiff slipped had been there a substantial time was its aged condition -- "gunky, dirty and wet and black." And in *Washington v. Pic-N-Pay Supermarket, Inc. 453* So.2d 508 (Fla. 4th DCA 1984), the court similarly held that a directed verdict should not have been granted for the store owner, based largely on the condition of the collard green leaves on which the plaintiff had slipped -- "old, nasty, collard green leaves...looked like they had been there for quite awhile."

More recently, the Third District in *Colon v. Outback Steakhouse of Florida, 72* 1 So.2d 769 (Fla. 3d DCA 1998) reversed a summary judgment for a restaurant in a lawsuit brought by a patron who had slipped and fallen on a mashed potato lying on the floor of the restaurant. The primary, if not sole evidence supporting constructive notice on the part of the restaurant, was the fact that the potato was mashed and had a dirty appearance. The court ruled that created an issue of fact sufficient to go to the jury.

Courts in otherjurisdictions have reached a similar result. In *Morris v. King Cole Stores,* 132 Conn. 489, 45 A.2d 710 (Conn. 1946), a slip and fall case in a supermarket, the only evidence available to establish constructive notice was the condition of the food items on the floor, which had caused the patron to fall. He fell on a lot of crushed strawberries and lettuce leaves, "all spread out,

and kind of dirty," which looked like several people had previously stepped on them. That case cited ***Anjou v. Boston Elevated Railway*** Co., 208 Mass. 273, 94 N.E. 386 (Mass. 191 1), where a banana peel caused a fall. The constructive notice proof came from the condition of the banana peel – dry, gritty, trampled flat, and black in color.

In Great Atlantic and Pacific Tea Co. v. Popkins, 260 Ala. 97, 69 So.2d 274 (Ala. 1953), a customer in the store slipped on a lettuce leaf, The condition of the leaf was described as "very dirty, all bruised up," "dirty and ragged looking," looking as though it had been skidded about, "dirty and soiled." The court concluded that based solely on that evidence, "the jury could find from that condition that it had been on the floor long enough to have raised a duty on the defendant to discover and remove it." 69 So.2d at 276.

I submit that should have been the result in this case.

DAUKSCH, J., concurs.