SUPREME COURT OF FLORIDA

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

V.

PUBLIX SUPERMARKETS, INC.,
Respondent.

CASE NO: 95567

5 DCA CASE NO: 98-00683

PETITIONER'S JURISDICTIONAL BRIEF

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

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

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. In that she agreed to give a co-worker a ride home she was in the company of one Rosalina Toledo.

While they were proceeding down an aisle and looking at the merchandise on the shelves Evelyn Owens slipped and fell on what was later identified as a small part of a banana. 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. By discovery requests, Publix admitted Mrs. Owens was an invitee at the time of her slip and fall. 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.

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.

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 of Publix, prior to suit being filed. Publix is a self Insurer up to $500,000.00 and adjusts claims with its own adjuster agents/employees.

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 get information from Publix in that their attorneys objected to most of the pertinent discovery requests of Plaintiff, or made evasive responses. Motions to compel were necessary and resulted in orders requiring Publix to comply with many of Plaintiff's discovery requests.

Notwithstanding the admissions of Publixthat Evelyn Owens was an Invitee and that Workers Compensation Benefits had been denied. 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." On hearing on November 18, 1996, the court denied the motion. and commented that said conduct might be Bad Faith.

On September 17, 1996, Plaintiff, Evelyn Owens, filed a Motion to amend the complaint to add her husband's derivative consortium claim and to add a count for "Bad Faith" predicated on the actions of Publix in denying Workers Compensation Benefits to Evelyn Owens and thereafter seeking a Summary Judgement upon Workers Compensation Immunity. The court allowed the amendment as to the consortium claim, however the amendment to allow a claim for "Bad Faith" was denied.

On May 22, 1997, the court allowed Evelyn Owens to again amend her complaint. It is this amended complaint that the cause proceeded to trial.

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

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

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 one or more slip and falls per month at the St. Cloud Store.

On August 1, 1997, Evelyn Owens filed a Motion to Strike the affirmative Defense of Workers Compensation Immunity which 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. In that stipulation Publix refused to stipulate to the scope of employment of Evelyn Owens at the time of her injury.

The case came on for jury trial on Tuesday, January 21, 1998. On that morning Publix presented a Motion in Limine far the first time. Among other requests, Publix sought to exclude any evidence relating to the spurious Workers Compensation Defense; then existing Sexual Discrimination suits brought against Publix by employees and the fact that Evelyn Owens' lawyer was formerly a Circuit Court Judge. Publix also filed an objection to the Notice to Produce At Trial served January 13, 1998, and filed by Evelyn Owens on January 21, 1998. The Notice to Produce At Trial related to prior incidents in the subject store and the total number of slip and fall incidents. In its objection, among the grounds asserted by Publix was, that the Notice to Produce at trial was "unduly burdensome". Publix essentially was allowed to ignore the Notice to Produce at trial which by Rule has the force and effect of a Subpoena. At trial, a representative of Publix testified that such information was available at corporate headquarters and stored on computers.

A jury was selected and sworn. Evidence was presented on

January 21, 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 received a notice on January 21, 1998, that she was a member of the class and was entitled to an award from Publix. The request was Denied.

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

At the conclusion of Plaintiffs' case, the court granted a Motion for a directed Verdict in favor of Publix . Thereafter a Final Judgement was entered on February 10, 1998, in favor of Publix. 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 Appeals. That Court in its panel decision reversed the decision of the trial court.

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. 9.331(d) which included the 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).

A Re-Hearing En Banc was Granted by the Fifth District Court of Appeals on March 12, 1999. The other Motions of Publix were denied.

Owens timely filed her Motion for Rehearing which was Denied by Order filed April 22, 1999. Thereafter Owens timely filed her Notice to Invoke discretionary jurisdiction by this Honorable Court.

SUMMARY OF THE ARGUMENT

This, Honorable Court has discretionary jurisdiction to review any decision of a district court of appeal that expressly and directly conflicts with another court of appeal or the supreme court on a question of law. Article 5, Section 3 (b)(3). Florida Constitution. The absence of authority to rehear en banc and a discussion of the legal principles which the district court of appeal applied supplies sufficient basis for a petition for conflict review. Nielson v. City of Sarasota 117 So 2d 731 (Fla. 19601 Finney v. State, Fla. App., 420 So.2d 639 and Ford Motor Company v. Kikis, 401 So. 2d. (Fla 1981). The conducting and the granting of a motion for rehearing en banc and the legal principles discussed by and in the opinion conflicts with (1) decisions that hold that for a district court to rehear a case en banc the district court must recognize a conflict which properly activates its authority to do so, rather than the desire of an attarney to

have the entire court rehear a case which has been decided contrary to his client's interests, and (2) decisions that hold that the appearance, quality and character of a foreign substance on the floor of a premises in sufficient evidence to allow a case to go to the jury for consideration to determine liability of the premises owner.

ARGUMENT

POINT ON APPEAL

THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE EN BANC DECISION RENDERED BY THE FIFTH DISTRICT IN THE INSTANT CASE.

By reason of Article V Section 3 (b) (3), of the Florida Constitution this court has the discretionary jurisdiction to review decisions of the district courts of appeals that expressly and directly conflict with a decision of another district court of appeal or that of the supreme court on the same question of law, However, it is not necessary that a district court explicitly identify conflicting district court or supreme court decision in its opinion to create "express" conflict. A discussion of legal principles which a district court of appeal expounds supplies sufficient basis for conflict review. Ford Motor Company v. Kilis. 401 So.2d. 1341 (Fla. 1981).

Petitioner submits that the En Banc Rehearing decision of the Fifth District 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. **Finny** vs. State, 420 So. 2d 639, (**Fla.** 3 DCA 19821, Nielson v. City of Sarasota 117 So. 2d 731. (**Fla.** 19601.

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

The en **banc** jurisdiction of a district court must be based upon the criteria set forth is Nielson and Finnev **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 first 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., 616 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); Washinston 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 case is of such importance that this court may wish to exercise its discretionary jurisdiction so as to establish the parameters that will guide the district courts 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 "**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, thereby granting this court discretionary jurisdiction to review the en **banc** rehearing decision of the Fifth District Court of Appeal.

CONCLUSION

Based upon the foregoing arguments and authorities cited herein, this court has discretionary jurisdiction to review the en banc rehearing decision of the Fifth District Court of Appeal

Respectfully submitted

B.C. Muszynski

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: Richard Wombley, Esq., and Gregory Prysock, Esq., 201 East Pine Street, 15th Floor, Orlando, FL 32801, this 26th day of May, 1999.

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

SUPREME COURT OF FLORIDA

CASE NO:

5 DCA CASE NO: 98-00683

EVELYN OWENS and HOHN J. OWENS, her husband,
Petitioners,

V.

PUBLIX SUPERMARKETS, INC.,
Respondent.

APPENDIX TO PETITIONER'S JURISDICTIONAL BRIEF

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

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

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 appeliee'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 liabiiity 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. 1961). 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 *Patty,* 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 fall, 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 bad 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. Pit-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. 1911), 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.

B. C. MUSZYNSKI
ATTORNEY AND COUNSELLOR AT LAW

126 EAST JEFFERSON STREET
ORLANDO. FLORIDA
(407) 843-4310
(407) 649-3038 FAX

RETIRED CIRCUIT JUDGE
9TH CIRCUIT OF FLORIDA
1968-1990

REPLY TO
1005 WEST EMMETT STREET
KISSIMMEE, FLORIDA 34741
(407) 847-2999
(407) 847-8985 FAX

95567

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MAY 27 1999
CLERK, SUPREME COURT
By

May 26, 1999

Hon. Sid J. White, Clerk
The Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1927

Attn: Filing Clerk

Re: Owen v. Publix
5DCA Case No: 98-00683
FSC Case No:

Dear Mr. White:

Enclosed herewith for filing is the original and five copies of Petitioners Jurisdictional Brief. I was advised by telephone on May 25th, that a case number had yet to be assigned, thus that information is absent.

Please call if there is any question in this regard.

Sincerely,

B.C. Muszynski

BCM/mdj
Enclosures as stated

CERTIFICATE OF TYPE SIZE AND STYLE

This is to certify that the size and style of type used in **this brief is courier 10 cpi.**