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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 95,667

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

Petitioners/Plaintiffs,

vs.

PUBLIX SUPER MARKETS, INC.,

Respondent/Defendant.

_____/

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

This case arose out of a slip and fall accident occurring at Respondent's (Publix or Respondent) store in Osceola County, Florida on March 4, 1995. Petitioner claimed that while shopping at the store she stepped on a piece of banana, which caused her to fall. Petitioner sued Publix alleging that it had either actual or constructive knowledge of the piece of banana on the floor. Petitioner later Amended her Complaint to add a consortium claim for Petitioner, John Owens.

At trial, Petitioners abandoned their theory of actual notice. Petitioners presented evidence of only constructive notice by introducing evidence that the piece of banana was slightly brown. Petitioners also presented evidence concerning nine other unconnected and factually dissimilar slip and fall incidents that occurred in the eighteen months prior to Petitioner's accident.

At the conclusion of the Petitioners' case in chief, Publix moved for a directed verdict because Petitioners had presented no evidence that Respondent had actual or constructive knowledge of the piece of banana on the floor in its store. The trial court granted Respondent's motion. The trial court entered Final Judgment in favor of Publix on February 10, 1998.

Petitioners appealed the final judgment. The Fifth District Court issued its panel opinion on December 4, 1998. Respondent filed a Motion for Rehearing and Clarification, Motion for Certification, and Motion for Rehearing En Banc. The Fifth

District Court of Appeal granted only the Motion for Rehearing En Banc and on March 12, 1999 issued and filed its en banc opinion affirming the trial court's directed verdict in favor of Publix.

On March 26, 1999 Petitioners served but did not file their Motion for Rehearing of the en banc opinion. That motion was filed untimely on March 29, 1999. On April 22, 1999 the Fifth District Court of Appeal denied Petitioners' untimely motion. On May 19, 1999 Petitioners filed their untimely notice to invoke the discretionary jurisdiction of this court with the clerk of lower court, in an untimely attempt to seek appellate review of the Fifth District Court of Appeal's en banc opinion rendered on March 12, 1999

SUMMARY OF ARGUMENT

Florida Rule of Appellate Procedure 9.330(a) requires that any motion for rehearing must be filed, not served, within 15 days of the order or opinion to be reviewed. Petitioners' motion for rehearing of the Fifth District Court of Appeal's en banc opinion was not filed within fifteen days as required by the rule. Because of this the rendition of the en banc opinion was not suspended under Florida Rule of Appellate Procedure 9.020(h). Because rendition of the order below was not suspended by the untimely filing of the Petitioners' motion for rehearing, the en banc opinion is deemed rendered on March 12, 1999, the date it was filed with the clerk of the district court. Accordingly the Petitioners' notice to invoke the discretionary jurisdiction of

this court was not timely filed and this court has no jurisdiction to consider this matter.

The Fifth district Court's decision to grant Respondent's Motion for Rehearing En Banc was correct. This issue does not technically fall within this court's discretionary conflict jurisdiction because the reasons for the lower court's decision to grant the motion do not appear on the face of the opinion. Nevertheless, because the Petitioners raised the issue in their brief on jurisdiction, Respondent will address the matter briefly only in the argument summary.

Florida Rule of Appellate Procedure 9.330(a) requires that a motion for rehearing "shall state with particularity the points of law or fact that the court has overlooked or misapprehended." This is precisely what respondent's motion did. Florida Rule of Appellate Procedure 9.331(d) provides that "a party may move for an en banc rehearing solely on the grounds that the case is of exceptional importance or that such consideration is necessary to maintain uniformity in the court's decisions." Respondent's Motion for Rehearing En Banc asserted the requisite exceptional importance. The Fifth district Court, in its discretion, granted the motion and revised its opinion. This presents no conflict for this court to review.

The Fifth District Court's <u>en banc</u> opinion below does not conflict with any precedent of this court or any precedent of any other district court of appeal. In fact, the <u>en banc</u> opinion was necessitated by the incorrect view of the law reached by the

panel opinion that would have resulted in conflicting opinions. Accordingly, this court has no jurisdiction to consider this matter.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION OVER THIS MATTER BECAUSE THE PETITIONER'S NOTICE TO INVOKE DISCRETIONARY JURISDICTION WAS NOT TIMELY FILED.

Article V, section 2 (a) of the Florida Constitution gives to this court the authority to promulgate procedural rules to govern all actions in Florida courts. Pursuant to that authority this court has promulgated the Florida Rules of Appellate Procedure. Florida Rule of Appellate Procedure 9.120(b) states:

> [t]he jurisdiction of the supreme court described in rule 9.030(a)(2)(A), [including discretionary conflict jurisdiction] shall be invoked by filinq 2 copies of a notice . . . with the clerk of the district court of appeal within 30 days of rendition of the order to be reviewed."

Fla. R. ADD. P. 9.120(b). (emphasis added)

This court's records indicate that the Petitioners' Notice to Invoke Discretionary Jurisdiction was filed with the clerk of the Fifth District Court of Appeal on May 19, 1999. The record establishes that the en banc opinion of Fifth District Court was rendered when filed on March 12, 1999 because the Petitioners' Motion for Rehearing in the Fifth District Court of Appeal was not timely filed. Accordingly, the Petitioners' notice to invoke this court's jurisdiction was not filed within 30 days of rendition of the lower court's order.

It is **a** matter of settled law in Florida that the time for initiating an appeal, including invoking this court's discretionary review, is jurisdictional. See, eq. State v. District Court of Appeal, Third District, 555 So. 2d 360 (Fla. 1990) and Tyler v. state, 22 Fla. L. Weekly D2659 (Fla 2d DCA 1997). Therefore, this court has no jurisdiction to decide this matter.

The Fifth District Court of Appeal issued and filed its en banc opinion below on March 12, 1999. A copy of this opinion is included in the appendix to the Petitioners' brief on jurisdiction. Petitioners served a Motion for Rehearing on March 26, 1999. (See appendix to Respondent's brief). However, that motion was not filed with the clerk of the Fifth District Court of Appeal until March 29, 1999. (See order denying Petitioners' motion in appendix to Respondent's brief).

Florida Rule of Appellate procedure 9.330(a) states that "[a] motion for rehearing . . . may be filed within 15 days of an order or within such other time set by the court." Fla. R. App. P 9.330(a). Accordingly any motion for rehearing had to have been filed with the Fifth District Court Clerk no later than March 27, 1999. Petitioners' motion was filed two days late. Respondent filed a reply to Petitioners' motion arguing that the motion was not timely. (See appendix to Respondent's brief). The Fifth District Court denied the Petitioners' motion for rehearing.

Furthermore, because it was not timely filed, the Petitioners' motion for rehearing did not operate to suspend the

rendition of the Fifth District Court of Appeal's en banc opinion. Florida Rule of Appellate Procedure 9.020(h) states:

> An order is rendered when a signed, written order is filed with the clerk of the lower tribunal. However, unless another applicable rule of procedure specifically provides to the contrary, if a final order has been entered and there has been filed in the lower tribunal an authorized and timely motion for . . . rehearing . . . the following exceptions apply:
>
> (1) If such a motion or motions have been filed, the final order shall not be deemed rendered . . . until the filing of a signed, written order disposing of all such motions between such parties.

Fla. R. App. P. 9.020(h) (emphasis added). Because the Petitioners' motion for rehearing was not timely filed with the court below, the Fifth District Court's en banc opinion was deemed rendered when filed on March 12, 1999. Accordingly, the Petitioners' Notice to Invoke the Discretionary Jurisdiction of this court, filed with the Fifth District Court of Appeal on May 15, 1999, was not timely filed.

Florida appellate cases have clearly held that a motion to review a final order, if not timely filed, does not suspend or toll the rendition of the final order. In Denard v. State, 410 So. 2d 976 (Fla. 5th DCA 1982), the court held that "[s]ince the motion for new trial was not timely, it was insufficient to delay rendition for purpose of filing a notice of appeal." Id. at 977. The court stated further that it had "no jurisdiction to hear th[e] appeal and the judges order purporting to delay rendition of the judgment and sentence until disposition of the motion for

new trial is ineffective to accomplish that purpose and to vest this court with jurisdiction." Id.

11. THIS COURT DOES NOT HAVE JURISDICTION OVER THIS MATTER BECAUSE THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY CONFLICT WITH *ANY* OPINION OF THIS COURT OR *ANY* OPINION OF *ANY* OTHER DISTRICT COURT OF APPEAL SUFFICIENT TO GIVE THIS COURT CONFLICT JURISDICTION UNDER ARTICLE V, SECTION (3)(B) 3 OF THE FLORIDA CONSTITUTION.

The Fifth District Court of Appeal's en banc opinion below does not conflict with any opinion of this court or any other district court of appeal. At trial, Petitioners tried to establish that Respondent had constructive notice of the banana on which Petitioner slipped by impermissibly stacking one inference on another without conclusively establishing the underlying inference to the exclusion of all others.

Specifically, Petitioner offered evidence that the banana was slightly discolored when she slipped on it. Petitioners sought to use the banana's discoloration as evidence that the banana had been on the floor a sufficient amount of time for Respondent to have constructive notice of its presence. However, Petitioners offered no evidence concerning the color of the banana when it was dropped on the floor.

Rather than conflicting with any precedent of this court, the opinion below distinguishes and explains the precedents of this court and other district courts of appeal. For example, the opinion specifically acknowledges this court's precedent in Montgomery v. Florida Jitney Jungle Stores, Inc., 281 so. 2d 302

(Fla. 1973). In Montgomery this court outlined five points of circumstantial evidence, in addition to the discoloration of the food item at issue, in order to conclude that the premises owner in that case had constructive notice.

This finding of additional evidence was necessitated by this court's own prior precedent of Food Fair Stores, Inc. v. Trusell, 131 So. 2d 730 (Fla. 1961). In Trusell this court stated

> 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. . . .

Id. at 733. (emphasis added)

The Fifth District Court also considered precedents of other district courts to reach its conclusion. Specifically, in Bates v. Winn-Dixie Supermarkets, Inc., 182 So. 2d 309 (Fla. 2d DCA 1966) the Second District Court considered a virtually identical factual situation. In Bates, a grocery store customer slipped and fell on a "dark, over ripe, black, old, and nasty looking" banana peel. Id. at 310. In his negligence action against the grocery store, the customer argued that the color of the banana peel was evidence that the peel had been on the floor long enough to impute to the grocery store constructive knowledge of the condition. Id.

The Second District Court rejected the customer's argument because it involved an impermissible stacking of inferences. Because the first inference could not be established to the

exclusion of all other reasonable inferences, the court held that the color of the banana could not be used to demonstrate that the premises owner had constructive knowledge of its presence.

The Second District Court affirmed the trial court's summary judgment in favor the premises owner because it was "not permitted to indulge in constructing one inference upon another." Id. at 310. The Bates court specifically relied on this court's precedents in Montgomery and Trusell to reach its conclusion. Specifically, that court stated

> 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 defendants' floor. This is the type of "mental gymnastics" prohibited by the Trusell decision, since the latter inference, under the circumstances, is not to the exclusion of all other reasonable inferences.

Id. at 311. (citations omitted).

Because the facts of the case now before this court are virtually identical to the facts of Bates, and because the Bates court so carefully followed this courts Precedent in Trusell, the opinion of the court below could not be in conflict with any precedent of this court or any other district court of appeal. Simply because this court's opinion in Montgomery distinguishes and expands on the rule outlined in Trusell does not mean that either Bates or the opinion below conflict with any other opinions.

CONCLUSION

This court should decline to accept jurisdiction in this case because the Petitioners' Notice to Invoke Discretionary Jurisdiction was not timely filed. Furthermore, this court should decline to accept jurisdiction in this case because the decision of the Fifth District Court of Appeal below does not conflict with any precedent of this court or any other district court of appeal. The court below properly concluded that the directed verdict by the trial court was proper and affirmed the trial court judgment. The Fifth District Court of Appeal specifically relied on established precedents of this court to reach its conclusion. Accordingly, there could be no conflict.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, to the best of my knowledge, this brief is printed in 12 point Courier type and that the type does not exceed 10 characters per inch.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 18th day of June, 1999, to B. C. Muszynski, Esq., Weinberger & Tinsley, P.A., 1005 West Emmett Street, P.O. Box 450157, Kissimmee, FL 34745-0157.

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