ORIGINAL

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 THE MERITS

MICHAEL V. HAMMOND, ESQUIRE
Florida Bar No. 0896690
RICHARD S. WOMBLE, ESQUIRE
Florida Bar No. 319538
Rissman, Weisberg, Barrett,
Hurt, Donahue & McLain, P.A.
201 East Pine Street, 15th Floor
Orlando, FL 32801
(407) 839-0120
Attorneys for Respondent,
PUBLIX SUPER MARKETS, INC.

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STATEMENT OF THE CASE AND FACTS

The Petitioners' Brief on the Merits does not clearly outline the facts relevant to this matter. Accordingly, the Respondent offers this concise review of the facts and procedural history of this case.

This case arose out of a slip and fall accident that occurred 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

concluding that, based on the evidence offered by petitioners, a jury finding in Petitioners' favor would have required the jury to impermissibly stack one inference on another when the Petitioners had not properly established the first inference to the exclusion of all other reasonable inferences. 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. This Court accepted jurisdiction in its order dated September 16, 1999.

SUMMARY OF ARGUMENT

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 the merits, 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.

This Court also has no jurisdiction to review separately any alleged errors by the trial court. Petitioners' brief appears to ask this court to address

specific decisions by the trial court as separate points of error.

It is clear from the Florida Constitution's grant of jurisdiction to this Court, and from the rules implementing that jurisdiction, that this court cannot engage in any such separate review of the trial court's decisions. Rather, this court has only jurisdiction to review any conflict between the Fifth District Court of Appeal's decision below and other district court decisions and other decisions of this Court

The Fifth District Court's en banc opinion below properly upheld the trial court's granting of a directed verdict in favor of Respondent. A directed verdict in a slip-and-fall case is proper when the Plaintiff does not adduce sufficient evidence to demonstrate that the Defendant had actual notice or constructive notice of the condition leading to the Plaintiff's injury. In this case, Petitioners did not pursue a claim of actual notice concerning the piece of banana on the floor. Further, Petitioners adduced inadequate evidence to demonstrate that Respondent had constructive notice. Petitioners' attempt to prove constructive notice based on the length of time the object was on the floor was insufficient because it required an impermissible stacking of inferences.

Petitioners' argument that Respondent had a "duty to warn" about the "foreseeability" of an unknown dangerous

condition, based on evidence of prior unrelated slip-and-fall accidents, was also inadequate. This is true because none of the prior incidents were even remotely similar to Petitioner's accident, and because that is simply not the law of Florida as announced by this Court's precedents. Additionally, the trial court properly refused Petitioners' request to conduct an in-court demonstration to show the length of time required for banana discoloration because Petitioners could not establish that the demonstrative aid would be an accurate representation of what actually occurred.

Therefore, Respondent cannot be liable for failing to correct the alleged dangerous condition or for failing to warn Petitioner of its existence, even when the evidence is viewed in a light most favorable to Petitioners. Accordingly, the Fifth District Court properly upheld the trial court's granting of a directed verdict for Respondent.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION UNDER ARTICLE V, SECTION (3)(B) 3 OF THE FLORIDA CONSTITUTION TO REVIEW AS SEPARATE POINTS OF ERROR THE ALLEGED ERRORS ENGAGED IN BY THE TRIAL COURT *AND* RAISED BY THE PETITIONERS IN THEIR BRIEF ON THE MERITS.

The first two points raised by the Petitioners' brief appear to ask this court to review directly decisions made by, or orders rendered by, the trial court in this case. This is improper. There is nothing in Article V Section 3 of the Florida Constitution that gives this Court authority to review decisions made by a trial court in a civil tort case.

Florida Rule of Appellate Procedure 9.030(a)(2) implements the authority granted by the constitution. That rule gives this court discretionary jurisdiction to review various decisions made by district courts of appeal, including those that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The alleged errors by the trial court do not fall within this jurisdiction.

This courts only authority to review decisions of trial courts is implemented by Rule 9.030(a)(2)(B). This rule deals with questions certified by a district court of appeal. Clearly this rule does not apply to this case.

Furthermore, the Petitioners' Brief on Jurisdiction, upon which this court based its decision to accept jurisdiction, argued only that this court should exercise jurisdiction to review any alleged conflict between the Fifth District Court's decision below and decisions of other district courts or of this court.

II. THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL PROPERLY UPHELD THE TRIAL COURT'S GRANTING OF A DIRECTED VERDICT IN FAVOR OF THE RESPONDENT BASED ON THE WELL RECOGNIZED RULE AGAINST THE IMPERMISSIBLE STACKING OF INFERENCES.

The Fifth District Court of Appeal's en banc opinion below properly upheld the trial court's granting of a directed verdict in favor of the Respondent. A directed verdict is proper when, viewing the evidence in a light most favorable to the non-moving party, no reasonable jury could return a verdict for the non-moving party. Miller v. City of Jacksonville, 603 So. 2d 1310, 1311 (Fla. 1st DCA 1992); Tuttle v. Miami Dolphins, Ltd., 551 so. 2d 477, 481 (Fla. 3d DCA 1988).

In slip and fall cases, Florida's appellate courts have held that a directed verdict is proper when the Plaintiff presents insufficient evidence to demonstrate that the Defendant had either actual notice or constructive notice of the condition leading to the Plaintiff's injury. Montsomerv v. Florida Jitney Jungle Stores, Inc., 281 So. 2d 302 (Fla. 1973), Food Fair Stores, Inc. v. Trussell, 131 So. 2d 730 (Fla. 1961), Silver Springs Moose Lodge No. 1199 v. Orman, 631 So. 2d 1119, 1121

(Fla. 5th DCA 1994); Walmart Stores, Inc. v. King, 592 So. 2d 705, 707 (Fla. 5th DCA 1991); Winn-Dixie Stores, Inc. v. Marcotte, 553 So. 2d 213, 215 (Fla. 5th DCA 1989) (holding that the trial court erred by denying Defendants' motion for directed verdict in slip and fall cases when Plaintiffs adduced no sufficient evidence demonstrating actual or constructive notice).

In addition, as early as 1960 this court clearly held that when plaintiffs attempt to prove constructive notice by circumstantial evidence they may not do so by stacking one inference on another. Specifically, in Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960) this court held:

> The sum of all these opinions is that in a civil case, a fact may be established by circumstantial evidence as effectively and as conclusively as it may be proved by direct positive evidence. **The limitation on the rule simply is that if a party to a civil action depends upon the inferences to be drawn from circumstantial evidence as proof of one fact, it cannot construct a further inference upon the initial inference in order to establish a further fact unless it can be found that the original, basic inference was established to the exclusion of all other reasonable inferences.**

Id. at 733 (emphasis added).

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. They also failed to offer any "additional evidence" that the peeling was dirty, walked on, or tracked through as required by this court's precedents and precedents of other district court's of appeal.

Petitioners also attempted to demonstrate constructive notice by introducing evidence of prior slip-and-fall accidents that were not similar in any manner to this accident, and by seeking to introduce demonstrative evidence that did not accurately reproduce the conditions present on Respondent's property. None of these means of proof are permissible.

Based on this evidence, the Fifth District Court of Appeal properly upheld the trial court's granting of a directed verdict. 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 requirement of finding 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," "overripe," "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 alone was evidence that the peel had been on the floor long enough to impute to the grocery store constructive knowledge of the condition. Id.

It is critical to note that the plaintiff in Bates did not present any evidence that the banana peel was dirty , walked on, or tracked through. This may have qualified as the "additional evidence" required by Montgomery and Trusell, and which the appellate court did not find in this case.

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, this court should uphold the decision of the court below. 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 are improper.

Most of the cases cited by the Petitioners' brief on the merits are consistent with the precedents of this court analyzed above and with the decision of the Fifth District Court of Appeal below. In nearly every one of those cases cited by the

Petitioners, which are not discussed in any detail by the Petitioners' brief, in which the court found "constructive notice" the claimant had adduced some "additional evidence" as required by this court's precedents. Furthermore, many of the cases cited in the Petitioners' brief entirely support the decision below because they find in favor of the premises owner and acknowledge the absence of any "additional evidence" required by this Court.

There are two clear examples of cases cited by the Petitioners' brief in which the deciding courts noted an absence of the "additional evidence" required by this Court. Those cases are Winn-Dixie Stores v. Marcotte, 553 So. 2d 213 (Fla. 5th DCA 1989), and Silver Springs Moose Lodge v. Orman, 631 So. 2d 1119 (Fla. 5th DCA 1994).

In Winn-Dixie Stores v. Marcotte, 553 So. 2d 213 (Fla. 5th DCA 1989), the Fifth District Court reviewed the circumstances under which a defendant can be liable in a premises liability case. In Marcotte, the court stated:

> An entity in the actual possession and control of a premises, such as a supermarket, to which members of the public are invited, is not an insurer of the safety of such persons, nor is the possessor strictly liable, or liable per se without fault, for injuries resulting to invitees from dangerous conditions on the premises; nevertheless, such a possessor basically has two legal duties to protect invitees from the harmful effects of dangerous premises conditions. First, such a premises possessor has a legal duty to ascertain that the premises are reasonably safe for invitees.. . . Secondly, the premises possessor has a second, entirely different, legal duty to use reasonable care to protect invitees from dangerous conditions of which the possessor has actual knowledge.

Id. at 214 (footnotes omitted).

In this case, the Petitioners never attempted to adduce any evidence to show that the Respondent had actual knowledge of any dangerous condition on its premises. In fact, all of the evidence adduced at trial established conclusively that none of the trial witnesses had any actual knowledge of the dangerous condition prior to the incident, including the Plaintiff herself.

Accordingly, this case must be analyzed as one involving the premises possessor's duty to use reasonable care to learn about the existence of a dangerous condition on its property. As indicated by Fifth District Court in Marcotte, "this legal duty is commonly conceptualized on the basis of 'constructive notice' . . . . " Id.

It has come to be a matter of black letter law Florida that a Plaintiff cannot recover in a "constructive notice" premises liability case in circumstances in which the Plaintiff is unable to establish the source of the dangerous condition on the premises or the length of time that dangerous condition existed. See eg, K-Mart Corporation v. Dwyer, 656 So. 2d 1340 (Fla. 5th DCA 1995); Silver Springs Moose Lodge v. Orman, 631 So. 2d 1119 (Fla. 5th DCA 1994); Walmart Stores, Inc. v. King, 592 So. 2d 705 (Fla. 5th DCA 1991) rev. denied, 602 So. 2d 942 (Fla. 1992); and Marcotte, 553 So. 2d 213 (Fla. 5th DCA 1989).

Furthermore, it is also a matter of black letter law that a Plaintiff cannot attempt to establish a "constructive notice" premises liability case by stacking an inference upon an

inference in an attempt to show constructive notice. See Montgomery v. Florida Jitney Jungle Stores, Inc., 281 so. 2d 302 (Fla. 1973), Food Fair Stores, Inc. v. Trusell, 131 So. 2d 730 (Fla. 1961), and Orman, 631 So. 2d 1119. In this case, the Petitioner first asked the jury to infer that the banana on which she fell came to be on the floor from some source within the Respondent's store. In addition, she asked the jury to infer that it had been on the floor for a sufficient amount of time to permit all of the "discoloration" present on the banana at the time of her fall to occur while the banana was on the floor. This is an impermissible stacking of inference on an inference in violation of Trusell, Montgomery, and Orman.

In Marcotte, the Fifth District Court properly reversed the trial court's denial of a supermarket's Motion for Directed Verdict and Motion for New Trial. In that case, the court noted that

> the customer produced no evidence that the supermarket's agents or employees caused the slippery substance to be on the supermarket floor or that they otherwise had actual knowledge of its existence before the accident. Neither did the customer produce evidence as to how or when the substance got on the floor or the length of time it was there before the accident.

Id. Marcotte, 553 So. 2d at 214.

After noting these facts, the Fifth District Court engaged in a discussion of how a premises possessor fulfills its legal duty to use reasonable care to discover the existence of a dangerous condition. The court stated that

> This legal duty is commonly conceptualized on the basis of "constructive notice" but that description is often misleading in this context. It is a distortion of sound negligence theory and a mischievous oversimplication to merely say that a premises possessor has "constructive notice" of dangerous conditions not created by the possessor or his agents and not actually known by them. Such oversimplification of the legal concept of "constructive notice" to a premises possessor can result in imposing strict liability on the possessor for all injuries resulting from every dangerous condition existing on every square foot of occupied premises at every moment of time.

Id. at 214-215

Based on this observation, the Court found that a duty of a premises possessor to discover dangerous conditions not created by itself or its agents is fulfilled if the premises possessor engages in a reasonable inspection to discover unknown dangerous conditions. After observing this, the Marcotte court concluded that

> Where, as here, there is no evidence the premises possessor had actual knowledge of the dangerous condition prior to the injury, and there is no evidence as to the length of time the dangerous condition existed prior to the injury, the premises possessor is entitled to a judgment as a matter of law and a jury is not authorized to speculate or arbitrarily impose strict liability based on the mere contention or general assertion that the premises possessor "should have known of" the dangerous condition.

Id. at 215

In Silver Ssrinss Moose Lodse v. Orman, 631 So. 2d 1119 (Fla. 5th DCA 1994), the Fifth District Court again reversed a trial court's denial of Motions for Directed Verdict and a Motion for Judgment Notwithstanding the Verdict based on the same

impermissible stacking of inferences presented by this **case.** Specifically, the Orman court noted that:

> No evidence was introduced as to how the substance got onto the floor or how long it had been there prior to Orman's fall. Further, there were **no smudges, streaks, tracks or foot prints in or around the liquid** evidencing it **was** there for a sufficient period of time for the Moose Lodge to be charged with constructive knowledge of a potentially dangerous condition. Thus, as in Marcotte, because there was no evidence of actual or constructive knowledge, the trial court should have granted the Defendant's Motion for Directed Verdict.

Id. at 1121

In Orman the Plaintiffs argued that the jury could infer that the water on the floor had come from a dripping umbrella used by one of the other people attending the bingo game. They also argued that, based on that inference, the jury could infer that the water had been on the floor for about an hour because the building had been open for approximately an hour.

In response, the Fifth District Court observed that the multiple inferences would "then enable the jury to conclude that the dangerous condition existed for a sufficient length of time before the accident to charge the Moose Lodge with constructive notice thereof." Id. at 1121. However, the Orman court concluded that this would be an impermissible stacking of inference upon inference based on the this Court's decision in Food Fair Stores, Inc. v. Trussell, 131 So. 2d 730 (Fla. 1961).

Relying on Trussell and Montgomery, the Marcotte court and the Orman court concluded that the claimants in those case had failed to adduce any "additional evidence" sufficient to establish the length of time the dangerous condition had existed,

which would have given the premises owners in those case "constructive notice." Accordingly, as with Marcotte and Orman the evidence adduced by the Petitioners in the case presently before this Court would require an impermissible stacking of inference upon inference in order for the jury to reach a conclusion that the Respondent could have had constructive notice of any dangerous condition.

There are several examples of cases cited by the Petitioners' brief in which the appellate courts properly found the existence of "constructive notice" because the "additional evidence" required by this Court was present in the record. In Altman v. Publix, 579 So. 2d 351 (Fla. 3d DCA 1991) the court agreed with the plaintiff's contention that the record evidence offered was sufficient to create a question of fact concerning "constructive notice." This was true because the court found the required "additional evidence" in the record. Specifically, the plaintiff had testified that "the floor was very **dirty and oily;** that cigarette butts and candy wrappers littered the floor; and that **grocery cart tracks and footprints traversed the dirty area** where she fell." Id. at 352 (emphasis added).

In Gonzalez v Tallahassee Medical Center, Inc., 629 So, 2d 945 (Fla. 1st DCA 1993) the "additional evidence" found by the court was the fact that several witnesses had been in continuous sight of the dangerous condition, spilled liquid, for roughly fifteen minutes to an hour but had not seen the spill occur. The court concluded that from this evidence the jury could properly

conclude that the dangerous condition had been created before those witnesses arrived and had therefore been present a sufficient length of time to create "constructive notice."

In Newalk v. Florida Supermarkets, Inc., 610 So. 2d 528 (Fla. 3d DCA 1992), the "additional evidence" was testimony that the oil spots on the floor **"appeared old."** Id. at 529 (emphasis added). Arguably, this is sufficient evidence of the length of time the condition existed because oil cannot get an "old" appearance while it is in its container.

In Ress v. X-Tra Super Food Centers. Inc., 616 So. 2d 110 (Fla. 4th DCA 1993), the "additional evidence" **was** the plaintiff's testimony that the substance on which she fell "looked like sauerkraut and it was **'gunky, dirty and wet and black."'** She also testified that the store sold hot dogs and that sauerkraut was available as a condiment for those hot dogs. Id.

In Thoma v. Cracker Barrel Old Country Store, Inc., 649 So. 2d 277 (Fla. 1st DCA 1995), the "additional evidence," as in Gonzalez, was the fact that at least two witnesses had been in continuous sight of the dangerous condition, spilled liquid, for roughly fifteen minutes to half an hour but had not seen the spill occur. The Thoma court relied on the Gonzalez decision to conclude that from this evidence the jury could properly conclude that the dangerous condition had been created before those witnesses arrived and had therefore been present a sufficient length of time to create "constructive notice."

In Washington v. Pic-N-Pay Supermarkets, Inc., 453 So. 2d 508 (Fla. 4th DCA 1984), the "additional evidence" was the plaintiff's testimony that she slipped **on** some "**old nasty collard green leaves**" and that they **"looked like they had been there for quite awhile."** Id. at 509 (emphasis added).

In Winn Dixie Stores, Inc. v. Williams, 264 So. 2d 862 (Fla. 3d DCA 1972), the "additional evidence" was testimony of several witnesses that the "substance on the floor through which plaintiff fell was **sticky, dusty and dirty."** Id. at 863 (emphasis added).

In Woods v. Winn Dixie Stores, Inc., 621 so. 2d 710 (Fla. 3d DCA 1993), the "additional evidence" was the plaintiff's testimony that the substance on which she fell was "**very dirty," "trampled,** " and "containing **skid marks, scuff marks."** Id. at 711 (emphasis added).

In addition to the cases cited by the Petitioners' brief, Respondent has found several other cases in which courts have found the presence of the "additional evidence" required by this Court's precedents. In Teate v. Winn-Dixie Stores, Inc., 524 So. 2d 1060 (Fla. 3d DCA 1988), the "additional evidence" was the **water on the floor** around the peas. The Plaintiff didn't testify only that there were thawed, previously frozen, peas on the floor. Rather, he testified that there was water around the thawing peas. If the peas had thawed somewhere other than the floor and then dropped to the floor there would be no water around them.

In Colon v. Outback Steakhouse of Florida, 721 So, 2d 769 (Fla. 3d DCA 1998), the "additional evidence" was the **dirt in the mashed potato.** In Zayre Corporation v. Bryant, 528 So. 2d 516 (Fla. 3d DCA 1988), the "additional evidence" was the **"'black darkened' grocery cart tire tracks" running through the clear liquid on the floor.** In Camina v. Parliament Insurance Company, 417 so. 2d 1093 (Fla. 3d DCA 1982), the "additional evidence" **was** the **dirt in the thawed ice cream.** In Winn-Dixie Stores, Inc., v. Guenther, 395 So. 2d 244 (Fla. 3d DCA 1981), the "additional evidence" was that **the liquid on the floor "appeared dirty and had scuff marks and several grocery cart tracks" running through it.**

The "additional evidence" required by this Court's precedents is essential to the just adjudication of premises liability case. Respondent acknowledges that the facts needed to show constructive notice can be demonstrated by circumstantial evidence. However, acknowledging the permissibility of circumstantial evidence is not the same as opening the flood gates to allow juries to entertain any speculation that may arise from that evidence.

That is precisely why this Court has always closely guarded the type of inferences at which a jury can arrive from circumstantial evidence. That is precisely why juries cannot be allowed to stack one inference on another unless a plaintiff has established the underlying inference to the exclusion of all other reasonable inferences. If this rule is not preserved then

juries will be able to find liability on nothing more than a whim and property owners will be subjected to what is essentially strict liability.

This is exactly the danger about which the Fifth District Court of Appeal warned in Marcotte when it stated:

> **An entity in the actual possession and control of a premises,** such as a supermarket, to which members of the public are invited, **is not an insurer of the safety of such persons, nor is the possessor strictly liable, or liable per se without fault . . . .**

Id. at 214 (emphasis added and footnotes omitted). If the rule against inferences on inferences is not maintained, premises owners will find themselves on a slippery slope to strict liability for all dangerous conditions on their property, both known and unknown. The policy reasons for the rule against inferences on inferences are clear from this Court's precedents and will be discussed further in Respondent's final argument below.

III. THE FIFTH DISTRICT COURT OF APPEAL'S DECISION BELOW PROPERLY FOLLOWED THIS COURT'S PRECEDENT AND THE COURT BELOW WAS NOT REQUIRED TO CONSIDER THE PETITIONERS' ARGUMENT THAT RESPONDENT HAD A DUTY TO WARN ABOUT SOME "FORESEEABLE" DANGEROUS CONDITION.

It is black letter law in Florida that **a** Property owner owes a duty to its business invitee only to warn of known dangers. This is the "actual notice" discussed in so many premises liability case.

From this requirement of actual notice Florida courts have created the legal fiction of "constructive notice." This was done to protect business invitees from actual, existing dangerous conditions about which a property owner does not have knowledge but that have existed for a sufficient length of time that a reasonable property owner should have had knowledge.

Now the Petitioners appear to be specifically inviting this court to proceed down the path to strict liability against premises owners. They do this by arguing that a property owner should have a "duty to warn" a business invitee about the "foreseeability" of a certain type of dangerous condition even though no actual dangerous condition exists.

Presumably this duty would be met by the property owner placing signs throughout its premises to say: "Warning, it is foreseeable that food can fall to the floor. Please watch for that possibility." Such a rule would fly on the face of all established tort law. Would all dog owners then have to display a sign that says: "Warning, it is foreseeable that a dog could bite a person. Please watch for that possibility."

Respondent acknowledges that at least one case cited by Petitioners' brief could be read to imply such a rule. In Nance v. Winn dixie Stores, Inc., 436 So. 2d 1075 (Fla. 3d DCA 1983), the court stated: "[i]t is for the jury to decide whether cash register tapes on the floor of a supermarket is an ongoing problem, and thus, a foreseeable danger of which appellee has

constructive notice." In fact this is simply a misstatement of the law of constructive notice by the Third District Court.

Constructive notice properly involves imputing knowledge to a premises owner concerning a real, actual but unknown dangerous condition that exists in time. It does not involve imputing knowledge about the likelihood that a dangerous condition may exist in the future. Such a rule would make property owners strictly liable for any unknown dangerous condition that may arise on their property. This is simply bad public policy.

Petitioners also cite Liberty Mutual Insurance Company v. Kimmel, 465 So. 2d 606 (Fla. 3d DCA 1985), for the proposition that a plaintiff should be allowed to adduce additional evidence concerning prior falls on a premises in order to show "constructive notice" to a property owner. In Kimmel the court upheld a trial court's decision to allow testimony of previous trips over an uneven place in a walkway on the owners property. Specifically, the court stated: "[w]e find no abuse of discretion by the trial court in permitting the introduction of these reports to establish notice before the accident of the dangerous condition of the walkway, or afterwards, **as the condition remained the same.**" Id. at 607 (emphasis added).

It is clear from this quotation that the case involved a permanent, continuing condition. Accordingly, evidence of previous accidents would show notice to the property owner concerning **a** dangerous condition. However, in cases such as the one now before the Court, which involve transient conditions,

prior accidents would not be proper evidence to show notice of a dangerous condition.

When a condition is permanent prior accidents demonstrate an actual condition existing at the time of a subsequent accident. When a condition is transient, or short lived, evidence of it merely invites improper speculation concerning the possibility that it might have occurred again at a subsequent time to cause some other accident.

CONCLUSION

This court should affirm decision of the Fifth District Court of Appeal below because it properly followed this Court's precedents concerning the rule against impermissible stacking of inferences. If any conflict does exist in Florida law it is caused by other district courts of appeal failing to follow this Court's clear precedents. If that is the case, this Court should overrule those other cases and affirm the decision below. Public policy simply argues against the adoption of any rule that moves toward the possibility of strict liability against property owners for dangerous conditions about which they have no knowledge or about which they could not reasonably be imputed to have knowledge.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, to the best of my knowledge and based on assertions made by the computer personnel in my office, this brief is printed in 12 point Courier type, a font that is not proportionately spaced, and that the type does not exceed 10 characters per inch.

Michael V. Hammond, Esquire
Florida Bar No. 0896690
RICHARD S. WOMBLE, Esquire
Florida Bar No. 319538
Rissman, Weisberg, Barrett, Hurt, Donahue & McLain, P.A.
201 E. Pine St., 15th Floor
Orlando, Florida 32801
(407) 839-0120
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 1st day of November, 1999, to B. C. Muszynski, Esq., Weinberger & Tinsley, P.A., 1005 West Emmett Street, P.O. Box 450157, Kissimmee, FL 34745-0157.

Michael V. Hammond, Esquire
Florida Bar No. 0896690
RICHARD S. WOMBLE, Esquire
Florida Bar No. 319538
Rissman, Weisberg, Barrett, Hurt, Donahue & McLain, P.A.
201 E. Pine St., 15th Floor
Orlando, Florida 32801
(407) 839-0120
Attorneys for Respondent

MVH