OA 02-07-2000

SUPREME COURT OF **FLORIDA**

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

V.

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

_____/

CASE NO:95,667

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

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PETITIONER'S REPLY BRIEF ON **MERITS**

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SUMMARY OF REBUTTAL ARGUMENT

Briefly stated, Petitioners rebuttal position is that this court has juridiction for two reasons. Initially, the District Court clearly exceeded its authority by conducting a rehearing en banc contrary to the criteria established in Nielson v. City of Sarasota. 117 So. 2d 731 (Fla. 1960) and Finny v. State, 420 So. 2d 639 (Fla 3d DCA 1982). Secondly, it is inconsistent for Publix to question the jurisdiction of this court after having certified to the district court that the panel decision is of "exceptional importance" in the motion of Publix for rehearing en banc. Of note also, is the lack of any argument by Publix in its Brief On The Merits to support the authority of its position regarding the criteria required in order for the district court to conduct a rehearing en banc.

Publix, as a premises owner operating 600 or more stores in a number of states, by experience of operating that number of stores, would necessarily have greater knowledge of a dangerous condition, such as the potential of an unknown foreign substance upon a floor than would a shopper. For that reason, a warning should be required or in the alternative Publix should be subject to strict liability for such occurrences.

REBUTTAL ARGUMENT

POINT I

JURISDICTION OF THE FLORIDA SUPREME COURT

Without question, this Court has jurisdiction pursuant to Fla. R. App. P. 9.030 (a) (A) (iv) & (v). The En Banc decision of the District Court of Appeals, Fifth District, conflicts with the decision of the Florida Supreme Court as to when a district court has authority to grant a re-hearing en banc as articulated in Nielson v. City of Sarasota, 117 So. 2d 731 (Fla 1960). See also, Finny v. State 420 So. 2d 639, (Fla 3d DCA. 1982). The Nielson case is one that also addresses and from Petitioners view, resolves the "inference on an inference" issue raised in the trial court in this case as well as in the district court of appeal by the lawyers for Publix. That aspect of the Nielson case will be discussed later where appropriate in this rebuttal argument.

This case was "certified" by the same lawyers for Publix to be one of "exceptional importance". The District court must have agreed with that certification. This court has jurisdiction to determine a cause pursuant to sub paragraph (v) of the above cited rule to pass upon a question certified to be of

"great public importance". It is the position of Petitioners, that by reason of granting the Motion for Re Hearing En Banc, which included the required certification of counsel, the district court of appeal must have considered the question to be one of great public importance. This is supported by the fact that, all other motions of Publix were denied by the district court of appeal, Had the district court stated the reasons for granting the rehearing en banc in accordance with Nielson and Finny. supra, this court, as well as all others concerned, would have been fully apprised of the basis for the reversal of the panel decision of that court.

Further, the Order of this court accepting jurisdiction required that briefs on the "merits" be filed. The word "merits", as a legal term, is regarded as referring to the strict legal rights of the parties. Mink v. Keim, 266 App. Div. 184, 41 N.Y.S. 2d 769,771. As defined in Black's Law Dictionary, Seventh Addition, 1999, the word "merits" relates to the substantive considerations to be taken into account in deciding a case as opposed to extraneous or technical points, especially of procedure. A brief on the merits, necessarily includes arguments as to errors of the trial court, as well as those of the panel and en banc decisions of the district court of appeal. From Petitioners view it would be inappropriate to limit the issues and the scope of the appeal as suggest by Publix in its Brief on the Merits. To attempt

to do otherwise would require this court to make a decision on less than all the facts and issues relating to the substantive rights of the parties.

POINT II

EN BANC OPINION OF DITRICT COURT OF APPEAL

POINT III

FORESEEABILITY AND DUTY TO WARN

It is interesting to note that in its brief, Publix fails to address the position of Petitioners that the district court of appeal had no authority to grant the Motion of Publix for Re Hearing En Banc. Nielson and Finny., supra, sets forth the criteria that must be met in order to consider a re hearing en banc. The legal and factual criteria were not present in this case, nor was it addressed in the en banc opinion of the district court. The legal and factual basis for granting the Motion of Publix for Re Hearing En Banc, is absent in all respects. It appears that the only basis for the en banc re hearing opinion is the certification of the attorney for Publix and what appears to be the dissatisfaction of the dissenting judge in the panel opinion, in that he became the author of the en banc opinion which reversed the the three judge panel decision.

Petitioners, Owens, contend that there exists a misconception of the law regarding the "inference on an inference" principle or issue generated in this case at the trial level, as well as at all levels in the appellate process. That misconception trancends this case into other cases as well. Petitioners contend that the "inference on an inference" issue is a factual matter to be argued to the jury and addressed by the jury and not be decided as a question of law. The former method of resolution is a fair approach for all parties and will provide a more uniform resolution of that issue. If considered a question of law, there will be as many views of that issue as there are judges who may have the opportunity to consider whether there exists an improper inference of fact.

Initially, the "inference on an inference" concept, admittedly deals with factual matters. Questions of fact are usually matters to be decided by the jury after appropriate instruction by the court. In this regard, the Nielson case, supra, at page 733 states as follows, to wit:

> "... The rule in civil cases is that a fact may be proved by circumstantial evidence if the inference of the fact preponderates over other interference's." (emphasis added)

The word "preponderate" has as its definition, " to be of greater weight; to be of greater power, importance, quality, etc., predominate; prevail". New Illustrated

Websters Dictionary of the English Language, 1992. "Preponderance of evidence" is defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it. Blacks Law Dictionary. Fifth Addition 1979.

In addition to the foregoing, the Florida Standard Jury Instructions deal with considering and weighing the evidence including the matter of an inference of fact. Florida Standard Jury Instruction 2.1, Introductory Instruction, states in part as follows, to wit:

> "Members of the jury, I shall now instruct you on the law that you must follow in reaching your verdict.... In reaching your verdict, you should consider and weight the evidence. decide the disputed issues of fact, and apply the law on which I shall instruct you, to the facts as you find them from the evidence.
> ....
>
> In determining the facts you may draw reasonable inferences from the evidence. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts shown by the [illegible] in [illegible] case. But you should not speculate on any matters outside the evidence," [illegible]asis supplied)

Allowing the jury to resolve the matter of inference's in accordance with this instruction, and all other appropriate instructions, will provide a fair and uniform resolution of this type case. Jurors usually are very perceptive of what the facts are and usually give the relevant evidence the weight it deserves. In this case the trial court should have allowed the case to go to the jury and should have denied or reserved ruling on the motion of Publix for a directed verdict. The Nielson case and Florida standard Jury Instruction 2.1 make it abundantly clear that the matter of inferences is for the jury to decide.

Publix asserts that to allow Petitioners view of the issues to prevail would be to impose strict liability upon premises owners such as Publix. Considering that the year 2000 is up on us, that view has merit as hereinafter suggested. It is axiomatic that, the law is flexible and as time goes on and conditions change, the law also changes or evolves to accommodate those changes due to the passage of time. For example, the Florida Standard Jury Instructions were approved by this court in January 1967 after many years of different, individually drawn and composed instructions, by the numerous individual and different trial judges and lawyers throughout the state. It was, from Petitioners view, a change prompted by a change in times. More people, more cases, more lawyers and the need for

uniformity and fairness as well as the more efficient use of a trial courts time and effort.

Other examples of how the law has changed or evolved are the many and varied programs initiated by this and other courts of the state, such as Mediation Procedures, Witness Management Programs, Uniform Pretrial Orders, Collection of Child Support, Collection of Bad Checks, and Uniform Sentencing Guide Lines, to mention only a few.

When the law of slip and falls as exists today was formulated, most premises owners such as Publix were "sole proprietors" or "mom and pop" operators who could be literally wiped out by a claim for personal injury due to a slip and fall occurrence. In this day and age, of jet aircraft, space flights, organ transplants, computers, sophisticated insurers, and chain store operators such as Publix which engages in business in many states, with 600 or more stores, why not impose strict liability and make such an occurrence a cost of doing business? To do so protects the public from an unwarranted loss or expense associated with an injury for which there now exists little or no chance of recovery.

A multi state business owned by a close corporation such as Publix which generates millions of dollars of revenue per day can surely afford the cost of such an

occurrence. From their own information, by way of discovery, such occurrences equaled approximately one per month in the store in question. The total number of such occurrences for all stores remains a mystery due to the ruling of the trial court.

As an alternative to strict liability, Petitioners suggestion would be to require the posting of a warning, such as required for the owner of a dog which may have propensities to attack a person. Florida Statue 767.04 requires the posting of a warning which must include the words " "Bad Doe" .Absent such a warning, the dog owner is strictly liable for the injury. It is Petitioners view that to allow the present state of the law to continue will require the public to continue to "shop at their own risk". In the instant case, it was fortunate that Evelyn Owens did not suffer a catastrophic injury. The "Bad Dog" of Publix is the real potential of a slip and fall for which an injured person has little chance for compensation and for which a warning is warranted. Had a severe injury occurred, under the present state of the law, Evelyn Owens and others like her, take their chances as to what may be offered to compensate them for such injuries. Hardly fair or just in this day and time.

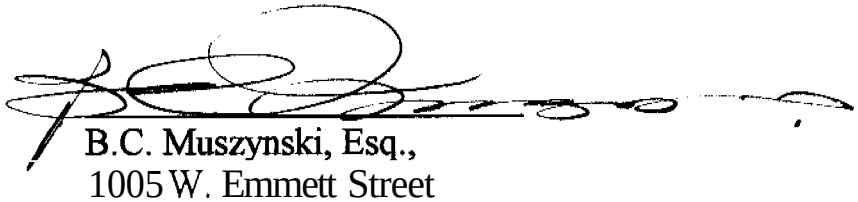
If the law is as Publix says it is and/or would like it to be, then its time for a change. Petitioners suggestion is to at least require a warning. Absent an

appropriate warning, Publix should be subject to strict liability for such an occurrence. Of course, another alternative is for Publix to insure as to any loss due to such events. However, Publix chooses to be a self insurer and for that reason routinely denies such claims with impunity. That potential cost of doing business by Publix is now borne by the shopping public.

CONCLUSION

Petitioners contend that upon the foregoing this court should reverse the En Banc opinion of the district court of appeal, reinstate the panel decision, clarify the law as to inferences of fact and establish changes to the law regarding slip and fall incidents from that which presently exists to a fair and equitable law with due regard for the substantive rights of Petitioners and others like them who suffer a personal injury by reason of a slip and fall at Publix or other similar multi state chain store operators.

Respectfully Submitted



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Financial Affidavit **was mailed** to Michael Hammond, Esq., 201 E. Pine Street, 15th Floor, Orlando, Florida **32801**, and Richard Womble, Esq., 201 E. Pine Street, 15th Floor, Orlando Florida **32801** on this 19th day of November, 1999.

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