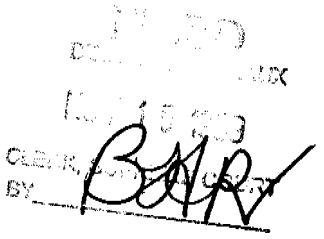
ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT



CASE NO. 96,235

ELVIRA SORIANO, ET AL.

PETITIONERS,

VS.

B & B CASH GROCERY STORES, INC., ET AL.

RESPONDENT.

BRIEF OF AMICUS CURIAE THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

As its Statement of the Case and Facts, the Academy adopts the relevant portions of the opinion of the district court of appeal, and Petitioner's statement of the facts.

SUMMARY OF THE ARGUMENT

The constitution of this state mandates that the access of citizens to their courts is of paramount importance in our system of government. This access is to be liberally allowed and may not be subordinated to considerations of procedure and convenience. In the face of these constitutional imperatives, both the trial court and the district court of appeal engaged in improper fact finding to support their use of the "inference on an inference" analysis. This court should reject that analysis and secure to litigants in this state the right to have a jury resolve these facts surrounding the issue of constructive notice.

The Respondent had actual knowledge of an ongoing dangerous condition on its premises; instituted procedures to deal with that condition; then ignored its own procedures. This caused foreseeable injury to a customer. The lower courts applied a rule which irrationally exempts supermarkets from the possibility of being found legally liable under a negligent method of operation theory. No rational basis exists to exempt

supermarkets from the operation of this theory, when the courts have applied it to jai alai frontons, cruise ships, **nursing** homes, and business supply stores. To do so restricts constitutionally protected access to the courts for no good reason.

The **lower** courts were confronted with a situation in which a party to a lawsuit fraudulently manufactured evidence which went to the heart of its defense on plaintiff's constructive notice theory. Neither court commented on or disapproved this outrageous attempted subversion of the administration of justice in this state. In fact, those courts directed and upheld the direction of a verdict against the innocent party, allowing the malfeasor to escape unpunished. This sets an awful example for future premises owners. They may calculate that, since there is no penalty for practicing fraud on the courts, falsifying documents **is** worth a try. This should be condemned in the strongest terms.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL'S ACTION FAILS TO GIVE **PLAINTIFFS** THE BENEFIT OF REASONABLE INFERENCES **WHICH ESTABLISH** THEIR CLAIMS, AND SANCTIONS INVASION OF THE JURY'S FUNCTION

A. INTRODUCTION.

As established in Petitioner's brief, but for the trial court's directed verdict, the jury would have considered the following direct evidence:

1. Respondent sold only clean, yellow bananas to the consuming public;

2. Respondent removed brown bananas from its display bins;

3. In the opinion of Respondent's manager, it took one or two days for a yellow banana to turn brown;

4. Respondent's manager had instructed his employees to look for debris on the floor;

5. Respondent had a formal policy of periodic inspection of its premises which was not followed;

6. Respondent had no record of sweeping at any time in the area where the accident occurred on the day of the accident;

7. Respondent's incident report did not describe the color of the banana on which Petitioner slipped; and,

8. There was no report of an employee of Respondent being in the area shortly before the accident – a fact which would have been included in the report had it occurred.

Based on this direct evidence, a reasonable jury could have inferred that, if Respondent sold only yellow bananas and Petitioner fell on a piece of banana peel that was brown with very little yellow and looked "rotten", that the peel had been on the floor one or two days to achieve that condition. This is more than ample constructive notice to Respondent of a dangerous condition on its premises.

In the face of this evidence, the trial court took the case away from the jury by directing a verdict, relying on the discredited "inference on an inference" cases. *Bates v. Winn-Dixie Supermarkets, Inc.*, 182 So.2d 309 (Fla. 2DCA 1966), *cert. den.*, 188 So.2d 183 (Fla. 1966).[1] In approving the trial court's action, the district court of appeal sanctioned the trial court's invasion of the jury's prerogative as the fact finder. This action directly contravenes the constitutional imperative that juries – not judges – resolve factual issues of litigants in this state. The Academy requests that this court reverse the

[1] See Judge Sharp's persuasive dissent in Owens *v. Publix Supermarkets, Inc.*, 729 So.2d 449, 450 (Fla. 5DCA 1999).

district court of appeal's action and uphold the constitutional guarantee that litigants in this state shall have the widest possible opportunity to have their disputes resolved by juries of their peers.

B. THE DISTRICT COURT OF APPEAL'S DECISION DEVIATES FROM TRADITIONAL **ACCESS** TO COURTS PROVISIONS OF THE FLORIDA CONSTITUTION AND THE ORGANIC LAW OF THIS STATE.

Article 1, Section 20 of the Florida Constitution's Declaration of Rights sets forth the rights of citizens in this state to have access to their courts:

> The courts shall be open to every person for redress of any injury, and justice **shall** be administered without sale, denial or delay.

Commenting on this provision contained in **the** pre-1968 form of the Florida Constitution, this court observed:

> The dominant principles proclaimed in the **(Declaration** of Rights) are paramount insuperable commands to all governmental officers, tribunals, boards, commissions or other agencies or functionaries, who exercise delegated power or authority or duty, whether under the form of law or ordinances or resolutions, substantive or procedural, or not, and whether state, county, district, municipal or other nature or character, and whether legislative, executive, judicial, administrative, municipal, ministerial or other nature or character. ***State V.*** *Woodruf,* 184 *So.* 81, 84 (Fla. 1938).

The trial court and the district court of appeal in this case disregarded those bedrock considerations in refusing to allow Petitioner to have her case heard by a jury.

The constitutional prohibition of interference with the access to courts applies equally to a trial court's direction of a verdict. In *Cadore* v. *Karp,* 91 So.2d 806 (Fla. 1957), this court observed that a verdict for a defendant should never be directed unless there is no evidence whatever adduced that would support a verdict for the plaintiff. Even if the evidence is conflicting, or will admit of different reasonable inferences, the case should be submitted to a jury [91 So.2d 807].

Contrary to the positions taken by the trial court and the district court of appeal, what was involved here were conflicting inferences which might have been drawn from direct evidence, not the discredited "inference on an inference" analysis employed by the district court of appeal in its opinion. In reaching its decision, the district court of appeal ignored this court's injunction that, in determining whether error was committed in directing a verdict, a reviewing court must give due consideration to ..." the organic right of trial by jury. Otherwise fundamental principles may be subordinated to procedure or convenience.'' *New England* Mutual *Life Insurance*

Company *v. Huckins*, 173 So. 696, 700 (Fla. 1937). In engaging in the "inference on inference" analysis, the district court of appeal lost sight of this fundamental principle and elevated semantics over substance.

In determining the propriety of a directed verdict for a defendant, the evidence must be considered in a light most favorable to the plaintiff, disregarding conflicts in evidence and indulging every reasonable inference deducible from the evidence in plaintiff's favor. *Rodi v. Florida Greyhound Lines, Inc.*, 62 So.2d 355 (Fla. 1952). In this case, the district court of appeal so far departed from that principle that it accepted testimony unfavorable to the petitioner's position, while failing to mention testimony from the respondent's manager which conflicted with that evidence and supported the constructive notice case that petitioner was making to the jury. While accepting petitioner's acknowledgment that the store sold brown bananas,[2] the court attempted to minimize the testimony of Respondent's manager that his store sold only clean, nice, yellow bananas, not "darkened, browned out bananas" (Vol. 11, T-147). Clearly, under this court's decisional authority, it is improper for a trial court or a district court of appeal to

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[2] *Soriano v. B & B Cash* **Grocery Stores**, *Inc., d/b/a U-Save* **Supermarket**, ___ **So.2d** ___ (Fla. 4DCA **1998)**; 24 Fla. L. **Weekly** D1116, **at** D1117 (opinion filed **May** 5, 1999).

engage in that kind of fact finding to justify giving or affirming a directed verdict.

Finally, the principle of free access to the courts implies that this right must be free of unreasonable burdens and restrictions. Further, any restrictions thus placed must be construed liberally in favor of the constitutional right. *G.B.B. Investments, Inc. v. Hinterkopf, 343* So.2d 899 (Fla. 3DCA 1977). We allow juries in this state to resolve disputed issues of fact in highly complicated cases involving medical malpractice and products liability, among others. Surely a liberal interpretation in favor of the constitutional right to access to the courts will allow juries to resolve the issues whether the browness of the banana peel is sufficient to afford constructive notice of a dangerous condition on a premises.

Clearly in this case, both the trial court and the district court of appeal failed to secure petitioner's constitutional right to a jury trial when this record and the decisional authority of this court established her right to be heard. Any time an individual is denied a constitutional right by the courts is of concern. However, the broader implications of this decision, coupled with the decision in Owens v. *Public Supermarkets,* Inc., 729 So.2d 449 (Fla. 5DCA 1999), are of major concern for any litigant in this state seeking redress for an

11. WHEN A PLAINTIFF ESTABLISHES EVIDENCE TO SUPPORT A RECOGNIZED CAUSE OF ACTION ACCESS TO THE COURT IS DENIED WHEN A VERDICT IS DIRECTED

A. INTRODUCTION.

The Petitioner here established the following direct evidence on her negligent method of operation theory of recovery:

1. Respondent was aware of customers eating fruit and dropping some on the floor while shopping;

2. Respondent considered that to be a hazard;

3. Respondent had a policy of requiring eight daily inspections of the premises at two hour intervals;

4. No employee was specifically assigned to sweep the floor at specified times;

5. Respondent had daily inspection reports which were not completed in the prescribed fashion, and, in fact, were falsified by Respondent's employees; and,

6. This falsification was common knowledge of the store's management and was a business practice of the grocery chain.

This evidence, if believed by a jury, establishes recognition by Respondent of ongoing hazardous conditions on its premises; institution of procedures to correct those conditions; a failure to comply with those procedures; an injury to a

customer as a foreseeable result of those failures. On these facts, establishing a classic case of negligent method of operation, the trial judge directed a verdict for the Respondent which the district court of appeal approved, declining Petitioner's "...invitation to apply such theory as an alternative to requiring actual or constructive notice where injuries result from slipping on a foreign substance in a market setting" *[Soriano, p. 1117, f.n. 1, supra]*.

B. THERE IS NO CONSTITUTIONAL BASIS FOR APPLYING THE NEGLIGENT METHOD OF OPERATION THEORY DIFFERENTLY TO DIFFERENT BUSINESSES

The Academy respectfully submits the authority which carves out supermarkets from that universe of premises owners whose negligent method of operation will subject them to liability does not comport with logic or reason. If a premises owner has foreknowledge that its operations create a hazardous condition on its premises where injury is foreseeable; institutes procedures to ensure its customers' safety; ignores those procedures; and fails to take an action to correct the dangerous condition, the owner should not be exempted from liability simply because of the type of business involved. The analysis employed in the negligent method of operation is similar to the analysis used in cases where a premises owner creates a defect on the premises by causing a condition which

creates foreseeable risk of harm. When a plaintiff proves that to be the case, as here, that plaintiff should be allowed to submit the dispute to a jury.

The same access to court considerations set forth under Point I, above, apply to the negligent method of operation cause of action. For the reasons set forth above, injured persons in this state should not be denied the opportunity to obtain redress for negligently inflicted injury because of artificial limits placed on a cause of action. This violates the principles enunciated in State v. *Woodruf*, (*supra*). When a commercial retailer recognizes a safety hazard by adopting procedures to ensure its customer safety, then fails to apply its own procedures where it is foreseeable that injury will occur from that default, this is garden variety negligence which any plaintiff should be allowed to submit to the jury.

111. THE LOWER COURTS' LACK OF CONCERN ABOUT RESPONDENT'S FALSIFICATION OF DOCUMENTS IS ALSO TROUBLING

The evidence in this case was that Respondent falsified its inspection reports with the knowledge of Respondent's management. This is troubling because the primary purpose of those reports is to allow a defendant such as Respondent to rebut a claim of constructive notice of a dangerous condition by an injured customer. Here, the agent of the management testified truthfully about those reports, and that was an additional element upon which a jury could have relied to make a finding of notice. However, we have a defendant who was admittedly using falsified evidence to defend a claim being made against it. The Respondent was manufacturing evidence in aid of an attempt to practice a fraud on the court. Apparently this attempted subversion of the administration of justice in this state did not concern either the trial court or the district court of appeal.

This is surprising in light of recent pronouncements concerning the trial courts' inherent power which includes entering a default against the guilty party when these type of actions occur in the course of the litigation process. *Figgie International, Inc. v. Alderman, 698* So.2d 563 (Fla. 3DCA *1997)* (willful discovery violations including destruction of relevant

documents and presentation of false testimony merited the sanction of default judgment). *Tramel v. Bass,* **672** So.2d 78 (Fla. 1DCA 1996) (deleting highly prejudicial evidence from video tape regarding circumstances of injury deemed to be a fraud upon the court, meriting default judgment).

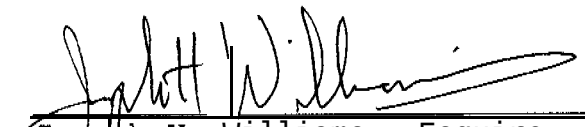
Here, the documents in question were apparently prepared before suit in this case was instituted, but were also apparently discovered by Petitioner's attorney during the discovery process at which time it was discovered the documents had been falsified. In addition to the other impairments in Petitioner's constitutional rights to access to courts this could have been an additional basis for the trial court to allow this question to be decided by a jury. At minimum this action should be censured in the strongest terms as a subversion of the administration of justice in this state.

CONCLUSION

The Academy would respectfully request that this court reverse the district court of appeal's decision and put to rest once and for all the *inference on an inference!' device as a means of restricting access to the courts by Florida's citizens. Similarly, the Academy would request that the court modify the negligent method of operation rule which exempts supermarkets

from its operation in circumstances such as the facts of this case. Finally, the Academy would request that this court at least deplore this Respondent's use of falsified evidence in a legal proceeding before the courts of this state.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished by U.S. Mail to: **BAMBI** G. **BLOOM,** Esquire, 46 S.W. First Street, Fourth Floor, Miami, Florida 33130; and **RICHARD S. WOMBLE,** Esquire, Rissman, Weisberg, Barrett, Hurt, Donahue & McLain, P.A., 201 East Pine Street, Orlando, Florida 32801-2729, this 12th day of November, 1999.

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