IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 96,235

ELVIA SORIANO and ANGEL SORIANO,

Petitioners,

vs.

B & B CASH GROCERY STORES, INC.
d/b/a U-SAVE SUPERMARKET,

Respondent.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT CASE NO. 98-01668

JURISDICTIONAL BRIEF OF PETITIONERS

SIMON & DONDERO, P.A.
SunTrust International Center
One S.E. Third Avenue
Suite 2110
Miami, FL 33131

BAMBI G. BLUM, P.A.
46 S.W 1st Street
Fourth Floor
Miami, FL 33131
305/371-3848

TABLE OF CONTENTS

BAMBI G. BLUM, P.A.
FOURTH FLOOR, 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

TABLE OF AUTHORITIES

PAGE

CASES

BAMBI G. BLUM, P.A.
FOURTH FLOOR, 46 SOUTHWEST FIRST STREET. MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

STATEMENT OF FACTS

Mrs. Soriano slipped and fell on a banana peel as she pushed her grocery cart towards the market exit. A store employee scraped the piece of banana peel off of Mrs. Soriano's shoe. Mrs. Soriano described the piece of peel as brown with very little yellow.[1] (Op. p. 1).

The Fourth District affirmed a directed verdict for the market, reasoning that Mrs. Soriano's case of constructive notice is premised upon an impermissible stacking of inferences because the brown color of the banana peel gives rise to equally likely inferences that the peel aged on the floor or that it was brown when it was dropped:

> The inference is just as likely in such a case that someone had purchased the brown banana and dropped it on the floor in that condition, or that someone brought the brown banana into the grocery store, as there was competent evidence that customers of the store would often eat food while in the store and drop debris on the floor.

(Op. p. 2). The Fourth District further held that, in order to submit Mrs. Soriano's case against the market to a jury, there must be -- aside from the brown color of the peel -- "additional

---

[1] She also described it as rotten and mushy. (T. Vol. III pp. 154, 179).

BAMBI G. BLUM, P.A.
FOURTH FLOOR. 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

evidence," "such as cart tracks, footprints, dirt or even grit," to establish that the peel was on the floor a sufficient length of time to charge the market with constructive notice. (Op. p. 2). Finding no such "additional" evidence, the court concluded that plaintiff did not and could not prove her case. (Op. p. 2).

The Fourth District also rejected Mrs. Soriano's argument that the store was liable for negligent method of operation. The store did not perform regular sweeps and, in fact, falsely filled out sweep reports showing that sweeps were conducted at two hour intervals, when they were not, and routinely filled in the reports after the week had ended. The court held:

> However, we decline Appellants' 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. See *Rowe* v. *Winn-Dixie Stores, Inc.*, **714** *So.* 2d 1180 (Fla. 1st DCA 1998)(court **found** that *Schapp* was not binding precedent); *Publix* ***Super*** *Market, Inc.* ***v. Sanchez,*** 700 So. 2d 405 (Fla. 3d DCA 1997), rev. *denied,* **717** *So.* 2d 537 (Fla. 1998). (Op. p. 2).

The Fourth District affirmed the directed verdict for the market on both of these grounds and this petition for discretionary review ensued.

BAMBI G. BLUM, P.A.
FOURTH FLOOR. 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

SUMMARY OF ARGUMENT

This Court and the Third District have previously held in supermarket slip and fall cases that the appearance of fruit or vegetables alone, which creates an inference that the substance existed on the floor long enough for the store keeper to have discovered it, although susceptible to an opposing inference, is sufficient to send the case to a jury on the issue of constructive notice. Moreover, the opinion below, imposing the additional evidentiary hurdle (i.e., proof of cart tracks, dirt or grit), expressly and directly conflicts with this authority as well.

Indeed, the identical case of Owens v. Publix Supermarkets, is presently pending before this Court on grounds that it expressly and directly conflicts with decisions from other district courts of appeal. If this Court should accept jurisdiction in Owens, it should likewise accept jurisdiction over this cause.

Additionally, the Fourth District declined to find the market liable on an alternative negligent method of operation theory, where injuries result from slipping on a foreign substance in a market setting. This holding also expressly and directly conflicts with decisions of another district court.

BAMBI G. BLUM, P.A.
FOURTH FLOOR. 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

ARGUMENT

a. The Owens decision is presently pending before this Court on jurisdiction.

This Court has pending before it on briefs on jurisdiction the case of Owens v. Publix Supermarkets, Inc., Supreme Court Case No. 95,667. The Fourth District's opinion in the instant case expressly states that Owens "applied Bates in circumstances almost identical to those presented in this case" and relies in significant part upon Owens for its holding.[2] In the event this Court accepts jurisdiction in Owens, it should likewise accept jurisdiction over this cause.

b. The decision below expressly and directly conflicts with decisions of thia Court and the Third District which hold that equally reasonable competing inferences create a jury question.

The court below directed a verdict for the market because the equal opposing inferences to be drawn from the color of the banana peel alone violated the rule against stacking inferences and held that additional proof of dirt or cart tracks was required to get the case to a jury. This holding expressly and directly conflicts with cases the opinion itself invites the reader to "Compare":

---

[2] Bates v. Winn-Dixie Supermarkets, Inc., 182 So. 2d 309 (Fla. 2d DCA), cert. denied, 188 So. 2d 813 (Fla. 1966) and Owens v. Publix Supermarkets, Inc., 729 So. 2d 449 (Fla. 5th DCA 1999)(en banc).

BAMBI G. BLUM, P.A.
FOURTH FLOOR. 46 SOUTHWEST FIRST STREET. MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

Teate v. Winn-Dixie Stores, Inc., 524 So. 2d 1060 (Fla. 3d DCA), rev. denied, 534 So. 2d 402 (Fla. 1988); Carnina v. Parliament Ins. Co., 417 So. 2d 1093 (Fla. 3d DCA 1982); Zayre Corp. v. Brvant, 528 So. 2d 516 (Fla. 3d DCA 1988) and Winn-Dixie Stores, Inc. v. Guenther, 395 So. 2d 244 Fla. 3d DCA 1981).

In Teate, the plaintiff slipped on frozen peas and described them as having water on the floor around the peas. Teate attributed the water to thawing. The market said it was a result of "permafrost" or ice crystals on the bag of peas that instantly melted when it hit the floor. The Third District opined:

> The resolution of this issue did not require the jury to build one inference on another as Winn-Dixie contends. *Food Fair* Stores, *Inc.* v. *Trusell*, 131 So.2d 730 (Fla.1961); *Voelker v. Combined Ins. Co. of America*, 73 So.2d 403 (Fla.1954); *Publix Super Markets, Inc. v. Schmidt, 509* So.2d 977 (Fla. 4th DCA 1987); *Gaidymowicz v. Winn-Dixie Stores, Inc.*, 371 So.2d 212 (Fla. 3d DCA 1979). Since it was established that there was some water on the floor, it was completely within the jury's province to decide why the water was there. Camina v. *Parliament Ins. Co.*, 417 So.2d 1093 (Fla. 3d DCA 1982); *Grizzard*, 330 So.2d at 769. The jury needed to draw only one inference from direct evidence to reach a decision as to the defendant's constructive notice of the condition. See *Montgomery v. Florida Jitney Jungle Stores, Inc.*, 281 So.2d 302 (Fla.1973); *Camina*, at 1094. It was entitled to believe Teate and to select the inference that it did, Consequently, it was error to set aside the verdict.

BAMBI G. BLUM, P.A.
FOURTH FLOOR. 46 SOUTHWEST FIRST STREET. MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

,524So. 2d at 1061 (emphasis supplied).

Likewise, in Camina, the Third District's entire holding is:

> We reverse the trial court's order directing a verdict for the defendant upon a holding that notwithstanding the plaintiff's inability to elicit direct testimony as to the length of time that the thawed ice cream upon which she slipped and fell had been on the floor of the entranceway to the defendant's store, an area which a storekeeper has a duty to maintain with the exercise of ordinary and reasonable care, ***Burmeister*** *v.* ***American Motorists*** *Insurance* ***Co.,*** **403** So.2d 541 (Fla. 4th DA 1981); circumstantial evidence is sufficient to show that a dangerous condition existed for such a length of time so as to charge the storeowner with constructive notice, *Schmidt* v. ***Bowl*** *American Florida, Inc., 358* So.2d 1385 (Fla. 4th DCA 1978); *Winn Dixie Stores, Inc.* v. *Williams,* 264 So.2d *862* (Fla. 3d DCA 1972); and the evidence here that, ***inter*** *alia,* the ice cream was thawed, dirty and splattered, althoush susceptible of the inference that the plaintiff's slis and fall had created the condition, was equally susceptible of the inference that the condition existed beforehand, ***Montgomery*** v. ***Florida*** *Jitney Jungle* ***Stores,*** *Inc.,* 281 So.2d 302 (Fla.1973); ***Burmeister*** v ***American Motorists*** *Insurance Co.,* ***supra; Grizzard*** *v.* ***Colonial Stores,*** *Inc.,* *330* So.2d 768 (Fla. 1st **DCA 1976); *Lee v.*** *Southland* ***Corporation,*** *253* So.2d ***268*** (Fla. 2d DCA 1971), so as to make the issue of the defendant's constructive notice of the condition one to be resolved by a jury, ***Montgomery*** *v. Florida Jitney Jungle* ***Stores,*** *Xnc.* **, *supra.***

BAMBI G. BLUM, P.A.
FOURTH FLOOR. 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3846

417 So. 2d at 1094 (emphasis supplied).[3]

Similarly, in Colon v. Outback Steakhouse of Florida. Inc., 721 So. 2d 769 (Fla. 3d DCA 1998), the Third District opined:

> Outback argued below and on this appeal that the final summary judgment was entirely proper on the issue of its constructive notice of the mashed potato on the floor where the only reasonable inference to be drawn from its appearance is that Ms. Colon herself mashed and dirtied it when she stepped on it. We disagree. We believe that an equally compelling inference from the dirty appearance of the sotato is that it had gone undetected on the floor for a sufficient period of time to place Outback on constructive notice. Given these competing inferences as to Outback's constructive notice of the hazardous condition of its sremises as alleged, we conclude that summary judgment in this cause was error.

In Zavre, the Third District once again found adequate circumstantial evidence to submit a case to a jury where plaintiff slipped and fell on a "black darkened" unidentified substance with grocery cart tracks running through it. The court found this evidence, and the store's failure to have a provision for regular inspections of the aisles prior to the fall, was sufficient

---

[3] In Montgomery, plaintiff's evidence was that the collard leaf she slipped on was wilted and dirty and that there were no other shoppers in the vicinity of her fall for 15 minutes prior to her accident, a fact which was disputed. Soriano submits that this case conflicts with Montgomery as well.

BAMBI G. BLUM. P.A.
FOURTH FLOOR. 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

evidence upon which a jury could have reasonably imputed constructive notice to the defendant. See Winn-Dixie Stores, Inc. v. Guenther, 395 So. 2d 244 (Fla. 3d DCA 1981).

The instant case expressly and directly conflicts with these Third District decisions. All of these cases involve various opposing inferences to be drawn from the appearance of the substance, yet each case went to a jury for resolution. This case is no different and furthermore involves lack of routine sweeps, just as in Zavre. Moreover, the Third District holdings cited above expressly reject that dirt, grit, mush, or cart tracks -- the "additional evidence" required by the Fourth District -- makes any difference because it is equally inferable that these conditions were caused by the plaintiff's own shoe or shopping cart as it is that these conditions were created by other shoppers. It would be equally inferable in this case from any cart tracks, footprints or dirt that Mrs. Soriano herself ran over the offending banana with her own cart or that her own shoe caused the dirt, footprint or grit seconds before her fall, as it is that these conditions were created 15-20 minutes before by the soles or wheels of other shoppers.[4] The "additional evidence" required by the court below

[4] Mrs. Soriano testified that she was pushing her cart ahead of her when she slipped, and in fact, held onto the cart as she

BAMBI G. BLUM. P.A.
FOURTH FLOOR, 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 . TEL. (305) 371-3848

is equally susceptible of opposing inferences, adds no more certainty to the case for constructive notice nor deference to the inference upon inference rule and cannot be reconciled with Teate, Colon, Camina, Zayre and Guenther.

c. The holding below rejecting negligent method of operation theory expressly and directly conflicts with other decisions.

The Fourth District's additional holding that negligent method of operation theory should not be applied as an alternative to requiring constructive notice where injuries result from slipping on a foreign substance in a supermarket, conflicts with the Third District Court of Appeal's decision in Publix Supermarket v. Sanchez, 700 So. 2d 405 (Fla. 3d DCA 1997), rev. denied, 717 So. 2d 537 (Fla. 1998), which applied this theory of liability in a supermarket slip and fall case. See also Markowitz v. Helen Homes, 1999 Fla. App. Lexis 9084 (Fla. 3d DCA July 7, 1999).

In Rowe v. Winn-Dixie Stores, Inc., 714 So. 2d 1180 (Fla. 1st DCA 1998), rev. denied, 1998 Fla. Lexis 604 (1999), a case in keeping with the court's decision below, the First District recognized that a conflict on this point indeed exists:

> Although the third district recently applied the operational negligence doctrine to a

---

fell to the ground. (T.149-50, 170).

BAMBI G. BLUM. RA.
FOURTH FLOOR. 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 . TEL. (305) 371-3848

supermarket in the slip and fall case of *Publix* Supermarket v. ***Sanchez,*** 700 So.2d 405 (Fla. 3d DCA 1997), the court nevertheless found no liability on facts which are closely analogous to those in the present case. And in approving the operational negligence doctrine in ***Sanchez*** the third district apparently failed to give proper effect to the supreme court's prior rulings, as well as this court's decision in ***Schaap v. Publix Supermarkets,*** 579 So.2d 831 (Fla. 1st DCA 1991.

The lines of conflict have been drawn and are ripe for resolution by this Court.

CONCLUSION

WHEREFORE, Petitioners respectfully request this Court to accept jurisdiction over this cause.

Respectfully submitted,

SIMON & DONDERO, P.A.
SunTrust International Center
One S.E. Third Avenue
Suite 2110
Miami, FL 33131

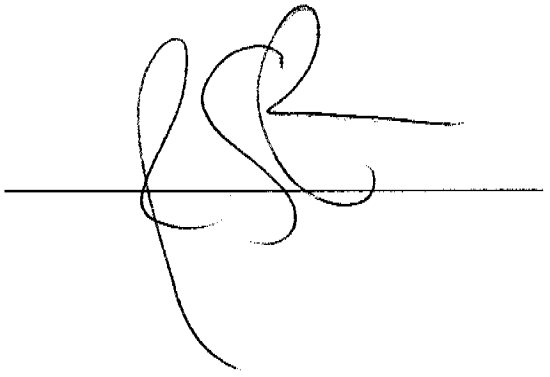
BAMBI G. BLUM, P.A.
46 S.W. 1st Street
Fourth Floor
Miami, FL 33130
305/371-3848

By: _____
BAMBI G. BLUM
Fla. Bar No. 370991

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Petitioners was furnished by mail this 2nd day of August, 1999 to:

Richard S. Womble, Esq.
Gregory D. Prysock, Esq.
Rissman, Weisberg, Barrett,
Hurt, Donahue & McLain, P.A.
201 E. Pine Street, 15th Floor
Orlando, FL 32801
407/839-0120
Attorneys for Appellee



BAMBI G. BLUM, P.A.
FOURTH FLOOR, 46 SOUTHWEST FIRST STREET, MIAMI, FLORIDA 33130-1610 • TEL. (305) 371-3848

Appendix

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1999

ELVIA SORIANO and **ANGEL SORIANO,**

Appellants,

v.

B & B CASH GROCERY STORES, INC. d/b/a U-SAVE SUPERMARKET,

Appellee.

CASE NO. 981668

Opinion filed May 5, 1999

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Moses Baker, Judge; L.T. Case No. CL 96-004827 AD.

Simon & Dondero, P.A. and Bambi G. Blum of Bambi G. Blum, P.A., Miami, for appellants.

Richard S. Womble and Gregory D. Prysock of Rissman, Weisberg, Barrett, Hurt, Donahue & McLain, P.A., Orlando, for appellee.

STONE, C.J.

We affirm a final judgment entered on a directed verdict for the defendant/supermarket ("B & B"). Mrs. Soriano slipped and fell as she pushed her grocery cart towards the market exit doors. The store employee who helped Mrs. Soriano to her feet took a piece of a banana peel off her shoe. Mrs. Soriano described the piece of peel as being brown with very little yellow in color.

The store manager testified that the store tried not to sell brown bananas, as customers generally do not like to buy bananas after they turn brown. Mrs. Soriano acknowledged, however, that the store did sell brown bananas with skin like the piece on which she slipped.

It is well established that in a slip and fall action of this type, the plaintiff must generally prove that the owner of the premises had actual or constructive knowledge of the causative condition. See Gonzalez v. B & B Cash Grocery Stores. Inc.32 So. 2d 297, 298 (Fla. 4th DCA 1997). Constructive knowledge may be inferred from the amount of time a substance has been on the floor. See id.. However, an inference of the existence of an essential fact to be drawn from circumstantial evidence cannot be made the basis of a further inference, unless it can be said that the initial inference was established to the exclusion of any other reasonable inference. See Food Fair Stores. Inc. v. Trusell, 131 So. 2d 730, 733 (Fla. 1961); Publix Super Markets, Inc. v. Schmidt, 509 So. 2d 977,978 (Fla. 4th DCA 1987).

In Bates v. Winn-Dixie Supermarkets, Inc., 182 So. 2d 309 (Fla. 2d DCA 1966), the plaintiff slipped on a banana peel which he described as "dark," "overripe," "black," "old," and "nasty looking." The appellate court affirmed a summary judgment in favor of the supermarket, finding

> [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 first have to infer that the banana peel was not already black and deteriorated when it reached,. the defendants' 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 311.

In Owens v. Publix Supermarkets. Inc., 24 Fla. L. Weekly D68 1 (Fla. 5th DCA March 12; 1999), the Fifth DCA, in an en banc decision, applied Bates in circumstances almost identical to those presented in this case. In Owens, the appellate court upheld a directed verdict, concluding that

the color and condition of the banana peel alone was insufficient to charge the supermarket with constructive knowledge. The court further stated that in order to show constructive knowledge, the plaintiff had the obligation to prove that the aging occurred on the floor.

We conclude that the circumstantial evidence in this case required the impermissible stacking of inferences to establish constructive notice, As such, we cannot infer, as Appellant contends, that the supermarket only sells yellow bananas, that it must have been yellow when it reached the floor, and that it sat on the floor until it turned brown. The inference is just as likely in such a case that someone had purchased the brown banana **and** dropped it on the floor in that condition, or that someone brought the brown banana into the grocery store, as there was competent evidence that customers of the store would often eat food while in the store and drop debris on the floor.

Moreover, there was no additional evidence to establish that the banana peel was on the floor for any length of time, such as cart tracks, foot prints, dirt, or even grit. See Montgomery v. Florida Jitney Jungle Stores. Inc., 281 So. 2d 302 (Fla. 1973)(additional evidence that leaf was "dirty looking" and no other shoppers were in the area for fifteen minutes prior to the accident); Teate v. Winn-Dixie Stores, Inc., 524 So, 2d 1060 (Fla. 3d DCA 1988)(amount of water around thawing frozen peas). Compare Zayre Corp. v. Bryant, 528 So. 2d 516 (Fla. 3d DCA 1988)(liquid with cart tracks running through it); Camina v. Parliament Ins. Co., 417 So. 2d 1093 (Fla. 3d DCA 1982)(thawed dirty ice cream); Winn-Dixie Stores. Inc. v. Guenther, 395 So. 2d 244 (Fla. 3d DCA 198 1)(puddle with scuff marks and tracks); with Broz v. Winn Dixie Stores. Inc., 546 So. 2d 83 (Fla. 3d DCA 1989)(no evidence to indicate that the grape had been on the floor for any length of time). Absent additional evidence, we cannot infer that the foreign substance had been on the floor for a sufficient length of time to charge B & B with constructive knowledge.

We also reject Sorianos' argument on appeal that sufficient evidence existed to support a verdict based on negligent method of operation. See generally, Schapp v. Publix Supermarkets, Inc., 579 So. 2d 83 1 (Fla. 1st DCA 1991)(a defendant may be liable for negligence where the plaintiffproves either that the method ofoperation is inherently dangerous, or the particular operation is being conducted in a negligent manner resulting in the condition). Here, there was evidence that B & B employees had failed to timely fill out inspection reports and sweep on a regular basis. However, we decline Appellants' 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. See Rowe v. Winn-Dixie Stores, Inc., 7 14 So. 2d 1180 (Fla. 1st DCA 1998)(court found that Schapp was not binding precedent); Publix Super Market. Inc. v. Sanchez, 700 So. 2d 405 (Fla. 3d DCA 1997), rev. denied, 717 So. 2d 537 (Fla. 1998).

WARNER and GROSS, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.