ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 96,235

ELVIA SORIANO and ANGEL SORIANO,

Petitioners/Plaintiffs,

vs.

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

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 that occurred at Respondent's (B & B or Respondent) store. Petitioner claimed that while shopping at the store she stepped on a piece of banana, which caused her to fall. Petitioner sued B & B alleging that it had either actual or constructive knowledge of the piece of banana on the floor. Petitioner, Angel Soriano, also alleged loss of consortium.

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 "brown with very little yellow."

At the conclusion of the Petitioners' case in chief, Respondent 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.

Petitioners appealed the final judgment. On appeal to the Fourth District Court of Appeal the Petitioners argued that the trial court erred in its decision regarding the impermissible stacking of inferences. In addition, for the first time,

Petitioners argued that the trial court's directed verdict was error because they believed they had stated a claim for "negligent operation." This claim was made based on testimony of a former B & B manager who had testified that the store's "sweep sheets" had not been filled out on the day of the incident but that this had no bearing on whether the floor had been properly inspected and swept that day. The Fourth District Court rejected both assertions made by Petitioners and filed its panel opinion affirming the trial court's directed verdict on May 5, 1999.

On May 18, 1999 Petitioners filed a Motion for Rehearing, Motion for Certification, and Motion for Rehearing En Banc. The Fourth District Court of Appeal denied the joint motions on July 6, 1999. On July 23, 1999 the Fourth District Court issued its Mandate to the trial court because the Petitioners failed to move for a stay of the mandate. On July 29, 1999 the Petitioners filed their Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

The Fourth District Court's decision to affirm the trial court's directed verdict was correct. The Fourth District Court's opinion below does not conflict with any precedent of this court or any precedent of any other district court of appeal. Accordingly, this court has no jurisdiction to consider this matter.

ARGUMENT

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

The Fourth District Court of Appeal's 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 "brown with very little yellow" when she slipped on it. Petitioners sought to use the banana's discoloration alone 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.

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, in Montgomery v. Florida Jitney Jungle Stores, Inc., 281 So. 2d 302 (Fla. 1973) 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 a 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), which was cited by and specifically relied on by the Fourth District Court's opinion. 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 Fourth 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 appel1ate court did not find in this case.

The Second District Court rejected the customer's argument in Bates because it involved an impermissible stacking of inferences. Because the first inference, that the peeling was not already brown when it fell on the floor, could not be established to the exclusion of all other reasonable inferences, the court held that the color of the banana peel alone 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.

Furthermore, the petitioners attempts to demonstrate a conflict between the decision below and decisions of the Third District Court of Appeal are misplaced. In every one of those cases relied on by the petitioners the claimant had adduced some "additional evidence" as required by this court's precedents. In fact, the court below actually cited most of those cases as examples of cases in which this "additional evidence" had been adduced. Because of this, the opinion below does not conflict with these Third District Court opinions

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 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 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 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.**

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

Petitioners' attempt to demonstrate a conflict between Third District Court opinions and the decision below based on the theory of "negligent operation" simply mis-states and misapplies the rules outlined in those cases. Petitioners' brief asserts that Publix Super Market v. Sanchez, 700 So. 2d 405 (Fla. 3d DCA 1997) "applied this theory of liability." In fact, the Sanchez court did nothing more than acknowledge that one other published opinion in Florida mentions the theory. The Sanchez court then determined that it did not apply in that case.

Specifically, the Sanchez court simply referenced the First District case of Schaap v. Publix Supermarkets, Inc., 579 So. 2d 831 (Fla. 1st DCA 1991). In that case, which had no precedential majority opinion that could result in a conflict,[1] the judge that authored the opinion, in which a single other judge concurred in result only, noted a personal opinion. That opinion was that a plaintiff can sometimes state a claim of negligence in a slip-and-fall case, in the absence of actual or constructive notice, if they can prove that (1) either the method of operation is inherently dangerous, or the particular operation was conducted in a negligent manner; and (2) the condition on the floor was created as a result of the negligent method of operation.

After observing this, the Sanchez court specifically declined to accept the plaintiff's theory that the cake give away demonstration table in that case was operated in a negligent manner. It did not "apply" the theory at all. Rather it rejected the theory. Accordingly, neither Schaap nor Sanchez create any conflict with the decision below.

As stated by the Sanchez court, the plaintiff in that case wanted to argue that because the store had not followed its policy of keeping the floor clean, it should be liable. The Sanchez court rejected this notion. Specifically it stated

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[1] See Rowe v. Winn-Dixie Stores, Inc., 714 So. 2d 1180 (Fla. 1st DCA 1998) Persuasively, this opinion concerning the precedential value of Schaap is offered by another panel of the same district court of appeal.

> If we were to accept the plaintiff's argument, we would be holding that grocery stores are liable whenever a customer slips and falls on any substance on the floor, regardless of notice, since grocery stores normally have either store or corporate policies which do not allow foreign substances to be on the floors. Moreover, the plaintiff's argument would also require us to ignore case law which requires either actual or constructive notice in slip-and-fall cases involving transitory, foreign substances.

Id. at 407

It is clear from this quotation that the Petitioners' claim that Respondents' act of not always filling out "sweep sheets" on the day "sweeps" were conducted does not constitute a valid claim under the theory of "negligent operation." The other cases cited by the Petitioners are equally unpersuasive. they simply decline to apply the theory or question whether it ever existed in the first place.

CONCLUSION

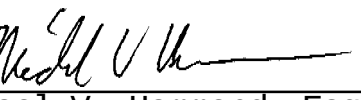
This court should decline to accept jurisdiction in this case because the decision of the Fourth District Court of Appeal below does not conflict with any precedent of this court or any other district court of appeal. The court below properly concluded that the directed verdict by the trial court was proper and affirmed the trial court judgment. The Fourth 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 limited computer knowledge and based on representations made to me by more informed computer professionals, 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 27th day of August, 1999, to Bambi G. Blum, Esquire, 46 Southwest 1st Street, Fourth Floor, Miami, FL 33130 .



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