ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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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

BRIEF ON MERITS OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

Plaintiff, Elvia Soriano, asks this Court to review the district court's affirmance of a directed verdict in favor of B & B Grocery Stores ("B&B") in a suit for injuries she sustained in a slip and fall accident. The facts adduced in Plaintiff's case and viewed in a light most favorable to Plaintiff are as follows:

Mrs. Soriano was a frequent shopper at B & B. In fact, both of her sons had worked there. (Vol. 111, T.167). On the day of the accident, Sunday afternoon, Mrs. Soriano finished her shopping, and was heading to the store exit pushing a shopping cart filled with grocery bags, when she slipped and fell to the ground. (Vol. III, T.148-150, 168, 170). A store manager helped Mrs. Soriano to her feet, showed her that she had slipped on a banana and scraped it off the rubber sole of her shoe. (Vol. III, T.151, 153).

Mrs. Soriano observed that it was a piece of banana peel that was brown with very little yellow on it, (Vol. 111, T.151-152). She said that it looked like a rotten banana because of the condition of the peel.[1] (Vol. III, T.152, 181). Mrs. Soriano testified:

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[1] Mrs. Soriano did not see the banana and did not know how long it had been on the floor before she fell. (Vol. III, T.184).

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> Q. And after this fall, did you see like what -- I guess you would call it mush. I don't know how that translates. Mush from the banana on the bottom of your shoe?
> A. Yes.
>
> * * *
>
> Q. Yes, ma'am. Let's start over. Since you don't know how long the banana peel was on the floor before you fell, is it fair to say that you can't deny that the banana was brown with a little bit of yellow on it when it first hit the floor?
> A. I don't know. All I know is that it was rotten.

(Vol. 111, T.154, 179).

Jose Alvarez, the overall store manager for B & B, testified that this store sold only clean, nice, yellow bananas. They did not sell "darkened, browned out bananas", since customers generally do not like to buy brown bananas.[2] (Vol. II, T.147). Alvarez said that if a banana turned brown, he would take it off the produce stand. (Vol. II, T.167-168). Alvarez also said that he was familiar with how long it takes for bananas to turn brown, and testified that it takes from one to two days for the color to turn from yellow to brown. (Vol. II, T.168).

Alvarez agreed that it was not uncommon for customers to eat the store's fruit and other food while shopping and then drop some on the floor. (Vol. 11, T.164). Debris fell on the floor in this

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[2] Soriano testified that she thought this store sold both kinds of bananas. (Vol. 111, T.188).

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store all of the time. (Vol. II, T.134-135; Vol. IV, T.10-12). Manager Alvarez testified that he considers a banana on the floor a hazard, which is something he would want picked up "immediately." (Vol. II, T.146).

Alvarez testified that he instructed employees to look for debris and that B & B had "Daily Inspection Reports", which required them to check the store on an hourly basis for conditions like this banana to avoid accidents like Mrs. Soriano's. (Vol. II, T.135, 147).[3] These reports specified the times an employee should have inspected the store and required notation of any unsafe conditions in any area of the store, and notation of any corrective action taken. (Vol. II, T.138). Alvarez admitted that these reports were not completed hourly, nor even daily. The whole week's worth of reports were filled in on Saturday nights by the assistant manager on duty and then forwarded to B & B's main offices in Tampa. (Vol. II, T.139-140). All of the reports were routinely filled in identically, showing the inspections had been performed, and none indicated that any debris was found -- not even

[3] These reports actually required eight daily inspections at two hour intervals beginning at 8:00 a.m. and ending at 10:00 p.m. (App. 2).

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the report for the day of Mrs. Soriano's accident. (Vol. 11, T.142-143, 146).

Alvarez conceded that the information in the reports indicating that inspections were completed at the specified times was false. (Vol. 11, T.139). Alvarez testified that he knew all along that the inspection reports were not done properly and that they were being falsified. (Vol. 11, T.140). In fact, he said this was common knowledge in the management level of this store and in the company, and was done the same way at every other B & B store. (Vol. 11, T.140-141). No other records existed which showed when somebody actually went around and inspected the store, except for the falsified ones. (Vol. 11, T.144).

Alvarez admitted that the store was not checked or swept hourly. (Vol. II, T.135-138). Alvarez testified that no one was specifically assigned the duty to sweep the floor at any certain time on any day. (Vol. 11, T.136). He also testified as follows:

> Q. How often was the floor actually swept, sir?
> A. Well, it depends on the amount of help we had that day. Sometimes we could do it ten, fifteen times in a day, Sometimes we did it three, four, five, six times. It is a situation where people call in sick. You don't have enough help that day. <u>It is not an every day thing</u>. (Vol. 11, T.137).[4]

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[4] On cross examination, Alvarez said that, as an average, the floor was swept every three to four hours. (Vol. II, T.159).

Thus, sweeping was done randomly, whenever someone, generally a bag boy, was available and had the time to do it. (Vol. 11, T.136-137, 159) According to Alvarez, Sunday afternoons were busy times at this store. (Vol 11, **T.161).** On **a** typical Sunday there were two bag boys stationed up front helping five cashiers. (Vol. II, T.161; Vol. IV, T.19). Alvarez testified that there was no store record which showed when someone might have swept or inspected this store on the Sunday Mrs. Soriano fell. (Vol. 11, T.170).[5]

Clay Boney, the assistant manager on duty, filled out an accident report for Mrs. Soriano's injury. (Vol. II, T.136, 149). Boney was required to list all of the things in the report that were important. (Vol. 11, T.145; Vol. IV, T.5). Manager Alvarez did not know why somebody for the supermarket did not describe the color of the banana in the report. He thought this was important information. (Vol. 11, T.169). Alvarez also said that if a store employee had been in that area shortly before and did not see a banana, this should have been included in the accident report as well. (Vol. II, T.147). No such fact was included in the report. (App. **3).**

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[5] Alvarez was not on duty the day of Mrs. Soriano's accident. (Vol. 11, **T.136).**

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Mrs. Soriano brought suit against B & B for a fractured kneecap she sustained from her slip and fall in the grocery store on the theories that the store had constructive notice of the presence of the banana peel for a sufficient length of time to impose liability for her injuries and that the store engaged in a negligent method of operation. At the close of the Plaintiff's case, the lower court granted a directed verdict for B & B.

The Fourth District affirmed the 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.

Soriano v. B & B Cash Grocery Stores, Inc., 24 Fla. L. Weekly D1116 (Fla. 4th DCA 1999).[6] The Fourth District further held that, in

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[6] Soriano has included this opinion in an appendix to this brief. (App. 1).

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 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. Finding no such "additional" evidence, the court concluded that plaintiff did not and could not prove her case.

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 ***Schaap*** 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).

The Fourth District affirmed the directed verdict for the market on both of these grounds. This Court accepted discretionary review.

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SUMMARY OF ARGUMENT

Mrs. Soriano had the misfortune of slipping on a brown banana peel in Broward County. Had she slipped in Dade County, she still would have been seriously injured, but she would have had her day in court against B&B on both of her theories of liability: constructive notice and negligent method of operation.

This Court held in Montsomerv v. Florida Jitney Junqle Stores, 281 So. 2d 302 (Fla. 1973), that where circumstantial evidence is susceptible of competing inferences on the issue of constructive notice, the case should be decided by a jury. There was circumstantial evidence in this case from which it could be inferred that the banana peel remained on the floor long enough for B&B to have discovered it, no different in character than the evidence deemed sufficient by this Court in Montsomerv.

The courts below erected a roadblock to recovery consisting of "dirt" or "grit", erroneously believing that such "additional evidence" was necessary to satisfy the inference upon inference rule. However, it would be equally inferable in this case from any evidence of 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, mush or grit seconds before her fall, as it is that these conditions were created 15-20 minutes

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before by the soles or wheels of other shoppers. Decisions from the Third District expose the "additional evidence" requirement as pure fiction, and adhere to the rule in Montsomerv.

Mrs. Soriano's **case** has also fallen victim to a strict application of the negligent method of operation theory, described and applied by this Court to places of public amusement in Wells v. Palm Beach Kennel Club, 35 So. 2d 720 (Fla. 1948). Mrs. Soriano submits that the applicability of this doctrine should not rest upon the distinction between 10 lanes of greyhounds and 10 aisles of groceries, but rather upon the foreseeability of people eating and dropping things in traveled areas and a method of operation so careless so as to be an invitation to injury. Application of this doctrine here is particularly appropriate because, to the extent that Mrs. Soriano has been hindered in proving constructive knowledge by demonstrating the precise time the last inspection or sweep **was** performed, it is solely because the store follows no maintenance schedule and falsifies its records. B & B should not be permitted to escape liability by virtue of its own misconduct.

Mrs. Soriano is entitled to her day in court.

ARGUMENT

I. THE LOWER COURT ABUSED ITS DISCRETION IN AFFIRMING A DIRECTED VERDICT IN FAVOR OF THE DEFENDANT

a. Applicable principles of law.

The principles of law for imposing liability on a business for a patron's slip and fall are as follows:

> To recover for injuries incurred in a slip-and-fall case, the plaintiff must generally prove that the owner of the premises had actual or constructive notice of the dangerous condition. Brooks v. *Phillip* Watts Enters., Inc., 560 So.2d 339, 341 (Fla. 1st DCA 1990), rev. *den.*, 567 So.2d 435 (Fla. 1990). Constructive knowledge may be inferred from either 1) the amount of time a substance has been on the floor, or 2) the fact that the condition occurred with such frequency that the owner should have known of its existence. *Brooks, supra*, at 342. The owner of the store may also be held liable where an agent or employee of the store negligently caused the dangerous condition to exist. *Publix Supermarkets v. Schmidt*, 509 So.2d 977 (Fla. 4th DCA 1987). In addition, the method of operation of the owner may be so inherently dangerous that while the owner did not actually create the specific condition which caused the fall, they still may be held liable. *Wells* v. Palm Beach *Kennel Club*, 160 Fla. 502, 35 So.2d 720 (Fla. 1948).

Schaap v. Publix Supermarkets, Inc., 579 So. 2d 831, 833 (Fla. 1st DCA 1991).

Mrs. Soriano's suit against B&B alleged constructive knowledge based on the length time the banana remained on the floor and also alleged negligent method of operation. Mrs. Soriano's case of

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constructive notice was based upon circumstantial evidence, i.e., "evidence leading to an inference that a substance has been on the floor for a sufficient length of time" such that a defendant, in the exercise of reasonable care, should have known of the condition. Gonzalez v. B & B Cash Grocery Stores, 692 So. 2d 297, 298 (Fla. 4th DCA 1997).

b. Standard of review.

Competing inferences justify submitting a cause to the jury:

> In discussing inferences in circumstantial evidence cases, our supreme court in *Voelker v. Combined Insurance Co. of America, 73 So.* 2d 403, 406 (Fla. 1954), enunciated these basic principles:
>
> If the circumstances established by the evidence be susceptible of a reasonable inference or inferences which could authorize recovery and are also capable of an equally reasonable inference, or inferences, contra, a jury question is presented....

Gonzalez v. B & B Cash Grocery Stores, 692 So. 2d 297, 298 (Fla. 4th DCA 1997).

Moreover,

> The power to direct a verdict in a slip and fall case should be exercised with caution, and it should never be granted unless the evidence is of such a nature that under no view which the jury might lawfully take of it, favorable to the adverse party, could a verdict for the latter be upheld. Little v. *Publix* Markets, *Inc.,* Fla.App. 1970, 234

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So.2d 132; ***First Gulf Beach Bank & Trust Company v.*** Alvarez, Fla.App. 1969, 227 So.2d 745.

Marlowe v. Food Fair Stores of Florida, Inc., 284 So. 2d 490 (Fla. 3d DCA 1973), cert. denied, 291 so. 2d 205 (Fla. 1974).

Both the trial court and the Fourth District court failed to apply these principles in concluding that there was insufficient circumstantial evidence of constructive notice in this case to submit to a jury.

c. Soriano presented case of circumstantial evidence for jury.

Abundant case law holds that a jury question is presented on the issue of constructive notice based on inferences of aging time drawn from the appearance of the offending substance.

This Court reversed the district court decision, directing a verdict for defendant, in Montsomerv v. Florida Jitnev Jungle Stores, Inc., 281 So. 2d 302 (Fla. 1973), where plaintiff slipped on a collard leaf in the defendant's grocery store. The primary evidence establishing the span of time the leaf had been on the floor was Mr. Montgomery's testimony that the leaf was old, wilted and dirty looking. There **was** also evidence that the plaintiff and her husband had been in the area where plaintiff fell for 15 minutes; no other shoppers were there; and no one swept the floor during that period. There **was** also evidence that store employees

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had inspected and swept the area just before plaintiff entered the produce aisle, and saw no collard leaves.

This Court held:

> Since there was a conflict in the evidence, the trial court properly submitted the matter to the jury.

Id at 303.

Similarly, in Ramev v. Winn Dixie Montgomery, Inc., 710 So. 2d 191 (Fla. 1st DCA 1998), the court held:

> The trial court concluded that Ramey's testimony that the butter on the supermarket floor had lumps in it and had partly melted constituted sufficient evidence to submit the question to the jury. The court found the fact that the butter had melted indicated it had been on the floor for a period of time. Winn Dixie correctly asserts that Ramey did not testify that some of the butter had melted. Nevertheless, it appears partial melting reasonably could be inferred from testimony that there were some chunks of butter on the floor. The scattered chunks of butter could reasonably be regarded by a finder of fact as an indicator that a sufficient period of time had passed to put Winn Dixie on notice of the condition of the substance on the floor. Therefore, we affirm the trial court's ruling that sufficient evidence was presented from which the jury could determine the existence of negligence on the part of Winn Dixie.

In Washinqton v. Pic-N-Pay Supermarket, Inc., 453 So. 2d 508 (Fla. 4th DCA 1984), the Fourth District held that a directed verdict should not have been granted for the store owner, based primarily on plaintiff's testimony that she slipped on "[s]ome old

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nasty collard green leaves . . . looked like they had been there for quite awhile." Id. at 509.

In Ress v. X-tra Super Food Centers, Inc., 616 So. 2d 110 (Fla. 4th DCA 1993), the plaintiff slipped and fell on sauerkraut. The primary circumstantial evidence of the aging process the sauerkraut underwent on the floor of the store was plaintiff's testimony that it was "gunky, dirty and wet and black." Id. The court's opinion notes that other matters of record showed that the sauerkraut had been on the floor for at least five minutes, a time which case law holds is too short to establish constructive notice. See Montsomerv v. Florida Jitney Junqle Stores, Inc., 281 So. 2d 302 (Fla. 1973); Marlowe v. Food Fair Stores of Florida, Inc., 284 So. 2d 490 (Fla. 3d DCA 1973), cert. denied, 291 So. 2d 205 (Fla. 1994). Nevertheless, the Fourth District held that summary judgment in favor of the defendant storeowner had been improperly granted,

There is likewise a jury question in this case as to whether the dangerous condition on the floor existed a sufficient length of time to charge B & B with constructive knowledge. There was evidence that this store sold only yellow bananas. The store manager said that customers often ate the store's fruit while shopping and dropped it on the floor. Mrs. Soriano slipped on a

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brown, mushy, rotten banana peel. The store manager said it takes one to two days for a yellow banana, like the ones B & B sells, to turn brown. It is readily inferable from the foregoing, that this banana sat on the floor undetected for at least a day before this accident.

This inference is furthermore bolstered by the facts that the store was busy on Sunday afternoons, understaffed by bag boys who were available to sweep, that the store's inspections and sweeps were random -- based on availability of these employees and "not an everyday thing." Furthermore, the accident report, prepared by Clay Boney, the manager on duty, did not indicate that this area had recently been inspected, which it should have if this was the case.

> Evidence that no inspection had been made during a particular period of time prior to an accident may warrant an inference that the dangerous condition existed long enough so that the exercise of reasonable care would have resulted in discovery.

Schmidt v. Bowl America Florida, Inc., 358 So. 2d 1385, 1386 (Fla. 4th DCA 1978). See Jenkins v. Brackin, 171 So. 2d 589 (Fla. 2d DCA 1965)(evidence that no inspection had been made during a particular period of time may warrant an inference that the dangerous condition existed long enough so that the exercise of reasonable

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care would have resulted in discovery). This inference is warranted in this case.

The rule which should have applied here, but was not, is the following:

> If the circumstances established by the evidence be susceptible of a reasonable inference or inferences which would authorize recovery and are also capable of an equally reasonable inference, or inferences, contra, a jury question is presented.

Gonzalez v. B & B Cash Grocery Stores, 692 So. 2d at 298. Mrs. Soriano respectfully submits that the lower court abused its discretion in concluding that no inference in accordance with logic reason, or human experience could support recovery in this case.

d. *Bates* and Owens misapplied -- decision below flawed.

The Fourth District's conclusion based on 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)[7], that plaintiff's case of constructive notice against defendant is premised upon an impermissible stacking of inferences is flawed. The court reasoned that the brown color of the banana peel gives rise to the equally likely inferences that the peel aged on the floor or that it was

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[7] Owens is presently pending before this Court.

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brown when it was dropped, Thus, the court held that, in order to submit the case against the store owner to the jury, there had to have been -- aside from the brown color of the peel -- "additional evidence", such as cart tracks, footprints, dirt or grit, to establish that the peel was on the floor a sufficient length of time to charge the defendant with constructive knowledge. The court's opinion added this evidentiary hurdle for plaintiffs who slip and fall on brown bananas in order to satisfy the inference upon inference rule.

To begin with, there were "additional facts" in this case not present in Bates and Owens. The only fact adduced in Bates and Owens, which showed how long the banana had been on the floor, was the description of the peel as "brown", "old", "nasty" and "over ripe."

Mrs. Soriano described the banana as "brown", "rotten" and "mushy." There was additional direct testimony from, store management that this store did not sell brown bananas, only yellow ones, because customers generally do not like to eat brown bananas. He said they removed brown bananas from the produce stand. There was also direct testimony that customers often eat the store's produce while shopping and drop the debris on the floor. There was furthermore direct testimony that it takes approximately 1 - 2 days

for yellow bananas (like the store sells and customers like to eat) to turn brown. The store had no regular sweeps or inspections to ensure the floor was free of debris. Sweeps were not "an everyday thing" and depended on how busy the store was and how many bag boys were available to sweep. Soriano's accident occurred in a check out aisle, near the store exit, on a busy Sunday afternoon, when only two bag boys were on duty helping five cashiers. It was readily inferable from these facts that the yellow peel was left undetected until it ripened into the brown banana peel Mrs. Soriano slipped upon. There is no need for prohibited "mental gymnastics" in this case.

Assuming, arguendo, that the color of the banana is the only fact here, the logic of the Fourth District's opinion is furthermore flawed because it is equally inferable from any "additional evidence" of cart tracks, footprints or dirt that plaintiff 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 other shoppers.[8] The "additional evidence"

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[8] Mrs. Soriano testified that she was pushing her cart ahead of her when she slipped, and in fact, held onto the cart as she fell to the ground. (T.149-50, 170).

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required by the court is equally susceptible of opposing inferences and falls within its own proscription against stacking inferences.

The decisions in Ress, 616 So. 2d 110 and Washinston 453 So. 2d 508, involving dirt, "gunk" and grit, cannot be squared with the "inference upon inference" rule applied by the same court in the instant case, when the dirt, gunk or grit could have just as likely come from the bottom of the plaintiff's shoe when he/she slipped on it or from his/her shopping cart than from the soles or wheels of other store patrons. There cannot be any meaningful distinction drawn between "mash" and "mush" or "gunky", "nasty" and "rotten." Neither Washinston nor Ress engage in analysis of who, or how many individuals made the cart tracks or footprints, quantify dirt or count grains of grit when deeming the issue of constructive notice sufficient for jury resolution. The court's opinion that a store patron who has the misfortune of slipping on a brown banana peel, instead of collard greens or sauerkraut, must also prove that there was dirt, grit, footprints or cart tracks, or else never have her day in court, adds no more certainty to the case for constructive notice nor deference to the inference upon inference rule. The

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distinction between the instant case, and Washington and Ress is contrived.[9]

e. **Second and Third District cases apply correct analysis.**

This was precisely the point made by the Third District Court of Appeal in Colon v. Outback Steakhouse of Florida. Inc., 721 So. 2d 769 (Fla. 3d DCA 1998). The sole evidence concerning the mashed potato plaintiff slipped and fell upon **was** that it was "dirty" and "mushy." 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 comwellins inference from the dirty awwearance of the potato is that it had gone undetected on the floor for a sufficient weriod of time to place Outback on constructive notice. Given these competing inferences as to Outback's constructive notice of the hazardous condition of its premises as alleged, we conclude that summary judgment in this cause was **error.**

[9] If there were "other" additional circumstances which proved that the aging of the food items occurred in the floor in Washington and Ress, they were not significant enough to be specified in this Court's opinions. Comware Montsomerv v. Florida Jitney Jungle Stores, Inc., 281 So. 2d 302 (Fla. 1973).

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In Camina v. Parliament Ins. Co., 417 So. 2d 1093 (Fla. 3d DCA 1982), 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. although susceptible of the inference that the plaintiff's slip 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, Inc., supra.***

In Zavre Corp. v. Bryant,, 528 So. 2d 516 (Fla. 3d DCA 1988), 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 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).

In Teate v. Winn-Dixie Stores, Inc., 524 So. 2d 1060 (Fla. 2d DCA), rev. denied, 534 So. 2d 408 (Fla. 1988), 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 iurv 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.

Id. at 1061 (emphasis supplied).

All of these cases involve various opposing inferences to be drawn from the appearance of the substance, and each case went to **a** jury for resolution. Significantly, Camina, Guenther and Teate rely upon this Court's opinion in Montsomerv v. Florida Jitnev Jungle Stores, Inc., **281 So.** 2d 302 (Fla. 1973). This case is no different and furthermore involves lack of routine sweeps, just as in Zayre.

Mrs. Soriano was entitled to have a jury determine her case against B&B.

f. Negligent method of operation.

Regardless of what B&B knew or should have known, Mrs. Soriano should have been permitted to submit her case of negligent method of operation to a jury. The directed verdict for B & B should be reversed on the alternative ground that evidence abounds which

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shows that B & B's "method" of maintaining its floors is an invitation to injury.

To establish negligence based on a theory of method of operation, the plaintiff must prove:

> 1. Either the method of operation is inherently dangerous, or the particular operation is being conducted in a negligent manner; and
>
> 2. The condition of the floor was created as a result of the negligent method of operation.

Schaap v. Publix Supermarkets, Inc., 579 So. 2d 831, 834 (Fla. 1st DCA 1991).

Here, it is beyond question that B & B's method of keeping its grocery store clean was being conducted in a negligent manner and that B & B failed to adopt a method of operation sufficient to protect its patrons from the known danger presented by the circumstances. The testimony of the store managers was that debris fell on the floor all of the time and presented a hazard to customers. This was the reason that B & B had Daily Inspection Reports requiring store employees to inspect the store during designated intervals, report what kind of debris is found and report whatever corrective action is taken. Apart from the general instruction to employees to "keep their eyes open" for debris, B & B's employees did not routinely inspect this store, nor did they

routinely sweep it. Sweeps were done haphazardly and randomly, based on how many employees were present and available. According to Alvarez, the amount of sweeps drastically varied and "was not an everyday thing."

Moreover, B & B falsified the Daily Inspection Reports to show they checked the store hourly, when they admittedly did not. This practice was common knowledge at management level in the company, and at other B & B stores.

Where, as here, debris fell on the grocery store floor regularly, and the store ignored requirements for keeping its floors clean, falsified its inspection records and cleaned and/or inspected whenever it felt like it, it takes no leap of faith to foresee that customers will slip on debris on the floor and injure themselves.

There is no question that the facts here fit the doctrine, the only question is whether the doctrine fits the facts.

This Court applied the negligent method of operation doctrine in Wells v. Palm Beach Kennel Club, 35 So. 2d 720 (Fla. 1948). There, plaintiff slipped and fell on an empty bottle in the aisle of the kennel club grandstand. This Court rejected the argument that in order to impose liability, the plaintiff had to prove

defendant's actual or constructive notice of the presence of the bottle:

> It is true that such a rule has been imposed on stores, banks, shops and other business places of that character, but we think a different rule applies to a place of amusement like a race track where patrons go by the thousands on invitation of the proprietors, and are permitted to purchase and drink bottled beverages of different kinds and set the empty bottles anywhere they may find space to place them. It is charged that the day that plaintiff was injured was the last day of the racing season, that the crowd was large and that many patrons were directed to sit in the exit aisles, permitted to drink from bottles and deposit the empty bottles anywhere they could find space for them.
>
> Places of amusement where large crowds congregate are required to keep their premises in reasonably safe condition commensurate with the business conducted. If the owner fails in this, and such failure is the proximate result of injury to one lawfully on the premises, compensatory damages may be recovered if the one injured is not at fault. *J. G. Christopher Co. v. Russell, 63* Fla. 191, 58 so. 45, text 47. One operating a place of amusement like a race course where others are invited is charged with a continuous duty to look after the safety of his patrons. Both sanitary and physical safety of its patrons require that receptacles be provided for bottles and that they be so placed.
>
> We do not mean to imply that they are insurers of the safety of their patrons, but we do say that reasonable care as applied to a race track requires a higher degree of diligence

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> than it does when applied to a store, bank or such like place of business. . . .

Id at 721.[10]

The Third District court has applied the negligent method of operation theory espoused in Wells to supermarket slip and fall cases. The Third District applied negligent method of operation theory to a supermarket slip and fall case in Publix Supermarket. Inc. v. Sanchez, 700 So. 2d 405 (Fla. 3d DCA 1997), rev. denied, 717 so. 2d 537 (Fla. 1998), but nevertheless found no liability on the facts. See Garcia v. Xtra Super Food Centers, Inc., 684 So. 2d 236 (Fla. 3d DCA 1996) (Schwartz, J., dissenting).[11]

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[10] The District Courts have applied the operational negligence doctrine to a hotel, see 194th Street Hotel Corporation v. Hopf, 383 So. 2d 739 (Fla. 3d DCA 1980)(despite no evidence of actual or constructive notice of wetness on floor, there was ample evidence that defendant negligently maintained its premises so as to require that the liability issue be submitted to the jury); a cruise ship, see Mabrev v. Carnival Cruise Lines, Inc., 438 So. 2d 937 (Fla. 3d DCA 1983)(holding actual or constructive knowledge irrelevant "in cases not involving transitory, foreign substances, (i.e., the typical banana peel case), if ample evidence of negligent maintenance can be shown); and jai alai frontons, see Fazio v. Dania Jai-Alai Palace, Inc., 473 so. 2d 1345 (Fla. 4th DCA 1985)(evidence that it was common for fronton aisles to be littered with food and drinks, that witnesses who frequented the fronton had never seen porters inspecting the aisles, that there were no formal procedures for constant maintenance and supervision to keep the aisles free of substances and materials which made the aisles dangerous, makes out jury case).

[11] See also Markowitz v. Helen Homes Corp., 736 So. 2d 775 (Fla. 3d DCA 1999) (no evidence to suggest that nursing home's

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Mrs. Soriano should not have been precluded from asserting negligent method of operation as an alternative theory of liability in this case. In this day and age where supermarkets are often as big as frontons and have as many, if not more aisles than race tracks have lanes, and food is carried, eaten and dropped throughout the store as shoppers shop, there is no reason for distinguishing between places of amusement and supermarkets. Mrs. Soriano respectfully submits that the Third District's application of the negligent method of operation theory where the facts support it is the better rule.

The First District court applied this doctrine in Schaap v. Publix Supermarkets, Inc., 579 So. 2d 831 (Fla. 1st DCA 1991), but later receded from this position in Rowe v. Winn-Dixie Stores, 714 so. 2d 1180 (Fla. 1st DCA), rev. denied, 731 So. 2d 650 (Fla. 1999), based upon the following analysis, adopted by the court below:

> In *Wells* the Florida Supreme Court announced a special rule for slip and fall cases involving

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method of operation was negligent so as to impose liability for invitee's slip and fall on a grape); Fosel v. Staples The Office Superstore, Inc., 23 Fla. L. Weekly D2047 (Fla. 2d DCA 1998) (Fogel fell while pushing a shopping cart on protruding strip of material between two floor surfaces, court held if Fogel had been able to prove improper maintenance which caused offending condition, this would have been the equivalent of actual notice by Staples).

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places of amusement where large crowds are invited to congregate. Imposing a higher duty of care upon the owners and operators of those establishments, the court indicated that such places of amusement have a continuous duty to look after the safety of their patrons, so that liability may be predicated on a negligent method of operation even without notice or knowledge of a dangerous condition. But the supreme court has declined to extend the special rule announced in *Wells* to slip and fall cases involving other business establishments, such as supermarkets. See *Food Fair Stores v. Trusell*, 131 So. 2d 730 (Fla. 1961); *Patty; Carl's Markets v. Meyer, 69 So.* 2d 789 (Fla. 1953).

Although the third district recently applied the operational negligence doctrine to a 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 supreme court precedent, as cited above, suggests that the doctrine does not apply in this context, and *Schaap,* upon which the third district relied, is not authority for a contrary view. While one member of the appellate panel in *Schaap* would have applied the doctrine, another member of the panel concurred in the result only and the third member of the panel dissented. Because a concurrence in result only expresses agreement with the ultimate decision but not the opinion, see Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the*

> *Florida Supreme Court,* 18 Nova L. Rev. 1151, 1175 (1994), there was no majority opinion in *Schaap* and the case does not **stand** as precedent for the individual views expressed in the separate opinions. See also, Greene v. Massey, 384 So. 2d 24 (Fla. 1980).

(citation omitted).

The dissenter in Schaap cited Arizona authority which observed that the key to the application of the mode of operation rule is the reasonable anticipation of patrons' carelessness under the circumstances:

> It is easily foreseeable that appellee's patrons could spill soft drinks while carrying them through the store. It does not appear that appellee restricted the consumption of soft drinks to certain areas in the store, and apparently sold the drinks so its patrons could enjoy them while shopping. Among the established facts is a statement by the store manager in his written report of the accident and the "floor was wet from a spill . . . soft drink probably."

Schaan v, Publix Supermarkets, Inc., 579 So. 2d 831, 835-836 (Fla. 1st DCA 1991).

Here, the store manager acknowledged that people frequently ate the store's produce while shopping and dropped debris on the store floor regularly. Foreseeability is not an issue in this case, which distinguishes it from Sanchez, a case which recognizes the applicability of the doctrine to supermarkets, but declined to

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apply it to the facts. In Sanchez, the Third District found that Publix's program of giving out food samples was not inherently dangerous and that its demonstration table was not being operated in a negligent manner simply because it was not manned by an employee as Publix's corporate policy required.

This case does not involve the mere matter of failing to follow corporate policy of two hour sweeps and honest reporting of compliance. Here, the grocery store, recognizing that shoppers eat while shopping and that debris regularly falls to its floors creating hazards, failed to implement any policy or method at all which ensured that its floors were routinely swept and kept clean. It was therefore entirely foreseeable that debris would accumulate and remain on the floor, creating the precise hazard at issue in this case.

This Court's decisions in Food Fair v. Trusell, 131 So. 2d 730 (Fla. 1961) and Carl's Markets v. Meyer, 69 So. 2d 789 (1953), suggesting that the public amusement rule is applicable only to a situation where the creator of the dangerous condition would necessarily know about it and therefore is held responsible for his own creation (but not in a situation where a third party created the hazard and liability is predicated on active or constructive knowledge), does not foreclose its application here as an

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alternative theory of liability. Wells did not require that the hazard, i.e., debris and empty bottles, be left on the floor by racetrack employees. The Court held that these dangerous obstacles were creations of the defendant because it sold the food and drink and did not provide adequate receptacles, facts of which it was on notice.

Here, B&B knew that shoppers ate its produce and food while shopping and that debris fell on the floor all of the time. Yet they had no practice of inspecting or sweeping their store, other than a general "keep your eyes open" instruction to employees and random sweeps based on how many employees showed up for work and who was available to sweep. Indeed, B&B was required to conduct frequent inspections, and falsified its records to indicate that such inspections had been completed when, in fact, they were not. And, to the extent that Mrs. Soriano was hindered in proof of constructive notice, being unable to demonstrate the precise time the last inspection or sweep was performed, it is solely because B&B follows no maintenance schedule and falsifies its records. No more compelling facts exist for imposing liability for negligent method of operation than these.

The directed verdict in favor of B&B should be reversed.

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CONCLUSION

WHEREFORE, based on the foregoing reasoning and authorities, Mrs. Soriano respectfully requests that the directed verdict for B&B be reversed and her case submitted to the jury on her claims of constructive notice and/or negligent method of operation.

Respectfully submitted,

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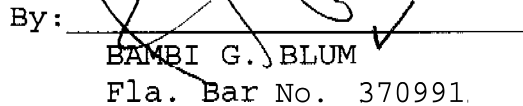

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Florida Rule of Appellate Procedure 9.210(a)(2), undersigned counsel certifies that the Brief on Merits of Petitioners, Elvia Soriano and Angel Soriano, is printed in 12-point Courier type.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on Merits of Petitioners was furnished by mail this 12th day of November, 1999 to:

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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. 98-1668

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., 692 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. 196 1); 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 D681 (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

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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 1981)(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 831 (Fla. 1st DCA 1991)(a defendant may be liable for negligence where the plaintiff proves either that the method of operation 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., 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).

WARNER and GROSS, JJ., concur.

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