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

REPLY BRIEF ON MERITS 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(s)

CASES

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

THE LOWER COURT ABUSED ITS DISCRETION IN DIRECTING A VERDICT IN FAVOR OF THE DEFENDANT.

Factual issues exist on constructive notice.

B & B argues that its directed verdict is proper because Mrs. Soriano "offered no evidence as to the color of the banana when it was dropped to the ground." (Answer Brief p. 8). B & B also argues that Soriano did not present any evidence, aside from the color of the banana, which suggested how long the banana remained on the store floor undetected. B & B is wrong on both counts. These arguments patently ignore B & B's own manager's direct testimony that this store did not sell brown bananas because customers generally did not like to buy them, that when he found brown bananas in the produce stand he removed them, that it takes one to two days for the yellow bananas, like the ones this store sold, to turn brown like the one Mrs. Soriano slipped on,[1] and that there was no routine for sweeping and inspecting this store. (Vol. 11, T.135-138, 159, 147, 167, 168).[2]

---

[1] Mrs. Soriano slipped on both peel and banana. (Vol. 111, T.151, 54, 179, 181). She described its condition as "brown, with very little yellow", "mush" and "rotten." (Vol. 111, T.151-152, 154).

[2] Mr. Alvarez's testimony factually distinguishes this case from Bates v. Winn-Dixie Supermarkets, Inc., 182 So. 2d 309 (Fla. 2d DCA), cert. denied, 188 So. 2d 813 (Fla. 1966).

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

B & B's manager's direct testimony was Mrs. Soriano's case of constructive **notice** based on circumstantial evidence, i.e., that the banana was yellow when it fell to the ground and aged on the floor for a period of time long enough **to** put B & B on constructive notice of its presence. It plainly is not more reasonable to assume from the manager's testimony that the banana was already brown when it fell to the ground. The most that can be said about the evidence here *is* that there are equally reasonable competing inferences which should be resolved **by** a jury.[3]

Food Fair Stores, Inc. **v,** Trusell's, **131** ***So.*** 2d 730 (Fla. 1961), holding that a plaintiff shall not construct one inference upon another to prove constructive notice unless the plaintiff **has** justified the initial inference to the exclusion **of** all other reasonable inferences is not implicated in this case. Trusell did not involve inferences regarding the passage of **time** or aging to **be** drawn from the appearance of the offending lettuce leaf in order to establish a case of constructive notice. Trusell focused on inferences regarding the creator **of** the hazard, i.e., whether store

[3] The only evidence which supports that the banana was already brown when it fell is Mrs. Soriano's testimony that she thought this store sold brown bananas also, a fact which B & B's manager denied. (Vol. **111, p.** 188).

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

employees or someone else dropped the lettuce. Trusell is factually and legally distinguishable.

Schaap v. Publix Supermarkets, Inc., 579 So. 2d 831 (Fla. 1st DCA 1991), likewise did not involve any inference of aging or passage of time to be drawn from the appearance of the offending substance. This case and Schaas are not analogous either.

To the contrary, the issue here is not who dropped the banana or even where it came from, but rather what the evidence was concerning how long the banana remained on the floor and whether that time was sufficient to impose constructive notice of it upon B & B (which case law holds is about 15 minutes). See Initial Brief pp. 12-13. Mrs. Soriano's evidence was sufficient to create a jury question on this point.

B & B's brief denies that constructive notice can ever be established by the appearance of the offending substance alone, and in so doing mischaracterizes the Third District's holdings in Teate v. Winn-Dixie Stores, Inc., 524 So. 2d 1060 (Fla. 2d DCA), rev. denied, 534 So, 2d 408 (Fla. 1988), Camina v. Parliament Ins. Co., 417 So. 2d 1093 (Fla. 3d DCA 1982), Colon v. Outback Steakhouse of Florida, Inc., 721 So. 2d 769 (Fla. 3d DCA 1998), Zayre Corp. v. Bryant, 528 So. 2d 516 (Fla. 3d DCA 1988) and Winn-Dixie Stores, Inc. v. Guenther, 395 So. 2d 244 (Fla. 3d DCA 1981). There was no

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

"additional evidence" such as the Fourth District required in this case. In all of the decisions, the Third District ruled it could be inferred from the appearance of the substance alone that it remained on the store floor long enough to establish constructive notice where there were equally reasonable competing inferences. Teate involved competing inferences to be drawn from the fact that water surrounded the frozen peas -- the peas were treated in permafrost, which melted instantaneously or the peas thawed with the passage of time. The point in Camina is that it was equally inferable from the thawed, dirty and splattered ice cream that its condition was owing to the passage of time as created instantaneously by plaintiff's slip and fall. The court made the same observations regarding the mashed and dirty condition of the potato in Colon. Similarly, it is equally inferable from the color of the banana in this case that it aged on the floor or was dropped that way.[4]

The Third District allows a jury to decide which inference to credit. The Fourth District did not. There is no reasonable basis upon which these district court decisions can be reconciled. And,

---

[4] Contrary to B & B's arguments, there was proof that this banana was smeared or run through. (Vol. III , T.151, 153, 154).

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

there should be no discrimination against bananas based upon the color *of* their skins.

Negligent method of operation.

To begin with, negligent method of operation was pled, argued and determined adversely to Mrs. Soriano below. Soriano's complaint alleges in pertinent part:

> 5. At all times material hereto, the Defendant, B&B **CASH** GROCERY **STORES,** owed a duty to maintain the premises in a reasonably safe condition and to give timely notice *of* perils that are known or should be known **by** the landowner to business invitees who were lawfully upon its premises.
>
> 6. The Defendant, B&B **CASH GROCERY STORES,** maintained and allowed an unreasonably dangerous condition to exist on the premises, **to** wit: a banana peel was left on the floor of Defendant's store in **a** condition which indicated it had been there for an extended period of time and Defendant failed to either remove the banana peel or warn business invitees of the existence of this dangerous condition which caused plaintiff **to** fall on Defendant's property and sustain serious injury.
>
> 7. That Defendant, B&B **CASH GROCERY STORES,** breached its duty **of** care **by:**
> A. Failing **to** use reasonable and ordinary care to maintain the premises in a reasonably safe condition. (R. 1-3).

B & B cannot seriously assert that it had no notice that Soriano's claim was predicated on allegations that B & B's maintenance of its supermarket was negligent.

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

The trial court plainly **considered,** but rejected, **a** negligent method of operation theory on the ground that Soriano failed to meet her burden of proof, and that **this** case is indistinguishable from Publix Supermarket, Inc. v. Sanchez, 700 So.2d 405 (Fla. **3d** DCA 1997), rev. denied, 717 So. 2d 537 (Fla. 1998). (Vol. **IV** p. *88).*

While B & B denies that the Third District applies negligent method of operation theory in the supermarket setting, the First District recognized that there is indeed a conflict between the First and Third Districts on this point:

> 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.

Rowe v. Winn-Dixie Stores, **Inc.,** 714 So. 2d 1180 (Fla. 1st DCA 1998), rev. denied, 731 So. 2d 650 (Fla. 1999).

The evidence below not only established falsification of records, but that B & B did not actually conduct routine sweeps and

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

inspections. Sweeps were done depending on availability of employees and "was not an everyday thing". (Vol. II, **T.136-137).** **B** & B also failed to follow management's directive for hourly inspections, eight daily sweeps, two hours apart and performed half or less than half of those sweeps on an average day. (Vol. II, T.135-138, 147, 159). This **had** nothing to **do** with whether B & B filled in false reports at the end of the week because it was a waste of time. The actions of B & B prove a negligent **method** of operation.

In contrast, Sanchez' operation **of** the demonstration table was not inherently negligent, notwithstanding the market's policy prohibiting debris on the floor. Publix Super Market v. Sanchez, 700 So. 2d 405 (Fla. 3d DCA 1997). This case and 'Sanchez are factually distinguishable. Mrs. Soriano is not suing **B** & B for falsifying its records, she is suing B & B for **not** maintaining its floors in a safe condition. Plainly, if routine sweeps **had** been done, instead of perhaps every **four** to five hours, someone should have seen the banana and picked it up.

CONCLUSION

WHEREFORE, based on the foregoing reasoning and authorities, Mrs. Soriano respectfully requests that the directed verdict for B

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

& B be reversed and her case submitted to the jury on her claims of constructive notice and/or negligent method of operation.

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 33131
305/371-3848

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

CERTIFICATE OF TYPE SIZE AND STYLE

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

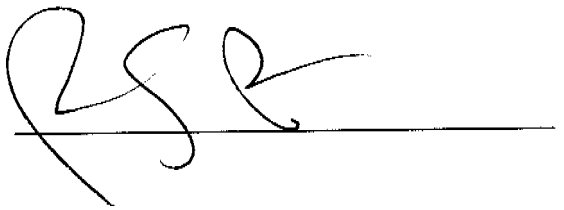
BAMBI G. BLUM

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief on Merits of Petitioners was furnished by mail this 17th day of December, 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 Respondent



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