IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,244

PATRICIA MARKOWITZ and
ROBERT MARKOWITZ, her husband,

Petitioners,

v.

HELEN HOMES OF KENDALL CORPORATION, a
Florida corporation, a/k/a KENDALL HEALTH CARE PROPERTIES,
fictitious name, d/b/a THE PALACE LIVING FACILITY,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ANGELA C. FLOWERS
Kubicki Draper
25 West Flagler Street
City National Bank Building
Penthouse Suite
Miami, Florida 33130
Telephone No.: (305) 982-6636

Counsel for Respondent

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

PAGE

STATEMENT OF THE CASE AND FACTS[1]

Helen Homes of Kendall Corporation, defendant below, submits this brief in support of the Third District's decision affirming the summary final judgment entered in favor of defendant in this slip and fall action. This case involves a grape on the floor of a hallway that had been recently cleaned. Plaintiffs, Patricia and Robert Markowitz, failed to present any evidence below to establish either an unreasonably dangerous method of operation or constructive notice of a dangerous substance on the floor.

Defendant submits the following additions to the statement of the facts for the Court's consideration.

A. Evidence of method of operation.

As plaintiffs concede, "plaintiffs were unable to develop any evidence of deficiencies in the defendant's regular floor maintenance procedures." [Petitioners' Brief on the Merits at 2, 5]. Rather, plaintiffs asserted below that the "method of operation," i.e. allowing residents the freedom to carry food back to their rooms following meals, is an unreasonably dangerous method of operation.

According to the depositions of defendant's employees, including the nursing

---

[1] Citations to the opinion of the Third District Court of Appeal shall be designated as [App.] in reference to the Petitioners' Appendix.

supervisor, two certified nursing assistants, the housekeeper, and building supervisor, the defendant had assigned a housekeeper to the first floor of the defendant's premises to clean the common areas on a continuous basis. [R. 46]. Each day in the morning, a meeting would be held between the building supervisor, certified nursing assistants, and housekeepers, to discuss any specific problems that needed to be addressed, and to enforce the cleaning practice at the facility. [R. 46]. All employees were to clean up any substances found on the floor, or to notify the housekeeper to clean it up. [R. 46].

The building supervisor and the housekeeper testified that certain heavily traveled common areas would be swept and cleaned at the time the residents were eating breakfast and dinner so as not to interfere with travel in the common areas and walkways. [R. 46]. This included the hallway in front of the nurse's station where plaintiff fell. [R. 47]. The housekeeper testified that, on the day of this incident, she had cleaned and swept the area in front of the nurse's station while the residents were dining in the cafeteria a short distance away. [R. 47].

B. <u>Circumstances surrounding the slip and fall</u>.

As plaintiffs concede, "plaintiffs were unable to develop any evidence of how long the grape had been on the floor before Mrs. Markowitz slipped on it." [Petitioners' Brief on the Merits at 5].

After meals, residents of this adult congregational living facility were permitted to carry food from the dining area to their rooms. [R. 74]. As one employee testified, it is their home and they are permitted to carry food with them back to their rooms. [R. 75]. There was no evidence of any prior falls from food spills. [R. 46, 56].

Mrs. Markowitz's mother had been a resident of defendant's facility for three years at the time of the incident. [R. 45]. Mrs. Markowitz entered the building and was walking past the nurse's station toward the elevator when she slipped and fell. [R. 48].

The accident occurred around the time lunch was finishing. [R. 47]. Three of the defendant's employees had returned to their duties, and were in the area of the nurse's station at the time of the plaintiff's fall. [R. 47]. More specifically, a nurse's aide was behind the counter of the nursing station doing filing work, and the nursing supervisor was sitting behind the counter speaking to that aide. [R. 47]. Another nurse's aide was standing on the outside of the nurse's station, in front of the counter, talking with these co-employees. [R. 48]. There was affirmative testimony that, at the time of the incident, her back was to the area of the hallway where the plaintiff fell. [R. 48, 49, 77].

All of these employees had previously been working in the dining room, and had just returned to the nurse's station prior to plaintiff's fall. [R. 48]. They traversed

the same area where plaintiff fell, but did not see a grape. [R. 48, 49].

Subsequent to the incident, a member of the fire rescue team found what appeared to be a squashed or crushed purple grape on the bottom of plaintiff's shoe. [R. 49]. The grape was considered to be the reason plaintiff fell. [R. 49]. It was admitted for purposes of summary judgment that the grape was probably dropped on the floor by a resident who was bringing fruit back to their room. [R. 49].

In her deposition, plaintiff was asked what she slipped on, and how long the grape was on the floor. [R. 49]. With regard to this, she testified as follows:

> Q. While you were waiting there for fire rescue did you know why you slipped?
>
> A. They told me. I mean, I knew I slipped on something. And the rescue -- one of the rescue people, one of the emergency people, looked at my shoe and said, you know, "This is what you slipped on."
>
> Q. And he showed you your shoe?
>
> A. Uh-huh.
>
> Q. What did you see?
>
> A. I couldn't tell whether -- it looked like smooshed grapes or jam or whatever.
>
> Q. What color was it?
>
> A. Kind of purpley. Not green grape, but purpley grape

like.

***

Q. You obviously didn't see it before you slipped on it, right?

A. No.

Q. When you were walking was there anything that would have obscured your ability to see that on the floor, that you can think of?

A. No.

Q. Do you know how long it was there?

A. No.

Q. Do you know who put it there?

A. No.

***

Q. Other than seeing this -- what appears to be possibly a squashed grape on your shoe, did you see any of it on the floor?

A. No.

Q. Did you see anything else on the floor.

A. Just me.

Q. So you saw nothing on the floor while you were sitting there waiting for fire rescue, right?

A. Didn't look. Couldn't move.

[R. 49-51 (Deposition of Patricia Markowitz pages 23, 24, and 25)].

C. Summary judgment.

Defendant moved for summary judgment on plaintiffs' original complaint. [R. 3-6, 44-57]. The original complaint alleged that Mrs. Markowitz slipped and fell as a result of a slippery substance on the floor that created an unsafe condition of which defendant knew or should have known. [R. 4]. Plaintiffs further alleged that defendant had a duty to safely maintain the floors of its premises. [R. 5]. Defendant's motion for summary judgment demonstrated that there was no evidence to suggest that defendant knew that a slippery substance was on the floor, no evidence of how long the condition existed, and no evidence of prior similar falls. [R. 45-51]. In addition, defendant demonstrated that a regular floor maintenance plan was in effect. [R. 45-47].

Plaintiffs replied asserting, for the first time, that their theory was one of "negligence in failure to prohibit residents from carrying food throughout the facility." [R. 74]. Specifically, plaintiffs argued that the elderly residents could not be trusted to remove food from the dining area. [R. 76]. Thus, plaintiffs alleged it was defendant's policy that created a condition in which it was more likely that dangerous foreign substances would be spilled onto the floor. [R. 76]. Plaintiffs filed the

affidavit of an expert in health care administration in support of their position. [R. 81]. Finally, plaintiffs asserted that defendant was negligent in failing to observe the foreign substance on the floor. [R. 77].

After a hearing, the trial court entered summary final judgment for defendant. [R. 130]. Plaintiffs filed a motion for rehearing. [R. 100-06]. Therein, plaintiffs acknowledged that this is not a constructive notice case. [R. 102]. Plaintiffs asked the court to rehear the motion to permit a full discussion of whether summary judgment should be granted on a finding of lack of a dangerous condition. [R. 103]. Plaintiff, thus, argued the "method of operation" cases to the court. [R. 103-06]. Plaintiffs took the position that:

> The fact that Plaintiff in this case did not establish how long the grape was on the floor, the fact that there had been no previous slip and fall of this nature at The Palace, and the fact that Defendant had a policy of cleaning the floors with a certain frequency, are all irrelevant to the issue underlying this case . . . .

[R. 105]. Plaintiffs were permitted to file an amended complaint asserting operational negligence "to conform to Plaintiffs' view of the evidence elicited in discovery, and to allow the Court to consider such an Amended Complaint in determining Defendant's Motion for Summary Judgment." [R. 118, 119-25]. Following a hearing, the motion for rehearing addressed to the final summary judgment was denied. [R.

131]. The order provides: "By agreement of the parties, the Court has allowed the Complaint to be amended to conform to the evidence so that Defendant's Motion for Summary Judgment could be considered on its merits without regard to any procedural or pleading issues." [R. 131].

On appeal, the Third District found (1) that there was "no evidence in the record to support the Markowitzes' contention that because three nurses were in the vicinity of the fall they saw or should have seen the grape," (2) that there was "no evidence to suggest that the grape was on the floor for a length of time that would place the nursing home on reasonable notice of its existence," (3) that plaintiffs were "unable to establish that the nursing home's method of operation is negligent," and (4) that there was "no evidence of a previous instance where a grape or other food substance was on the floor and resulted in injury to a resident or visitor so as to put the nursing home on notice that they should be looking for food." [App. 2].

Following issuance of the Third District's decision, plaintiffs filed the notice to invoke discretionary review.

SUMMARY OF THE ARGUMENT

Summary judgment was properly entered for defendant in this slip and fall case. A premises owner cannot be held liable for injuries resulting to invitees from a dangerous condition on the premises without a finding of fault. Plaintiffs presented

absolutely no evidence from which a jury could find that the defendant was negligent. Specifically, defendant neither did nor failed to do anything to cause plaintiff to slip and fall.

The doctrine of negligent "method of operation" has no application to this case. Liability for negligent operation has been limited to situations involving inherently dangerous operations, or operations conducted in a negligent manner as determined by prior recurring dangerous conditions. Once a negligent method of operation is established, there is a heightened duty of care. Plaintiffs' attempts to expand this doctrine to cover any situation in which it can be said that there is a general risk of slip and fall must fail. Absent an inherently dangerous operation or a history of prior slip and fall incidents, the ordinary duty rules apply. Nor can expert testimony establish a negligent method of operation. Absent evidence of prior incidents, an expert opinion stating that a method of operation is negligent is nothing more than an unsupported legal conclusion.

Alternatively, plaintiffs ask this Court to expand the law of slip and fall liability by creating a new standard of constructive notice. Recognizing the absence of any evidence of how long the grape was on the floor and the affirmative evidence of defendant's regular floor maintenance procedures, plaintiffs would impose a heightened duty anytime an agent of the property owner is in the vicinity of a slip and

fall incident. In essence, plaintiffs seek to have defendant declared an insurer of the safety of all invitees by requiring that anything less than constant surveillance of the floor would result in liability. This is not the law. If a property owner takes reasonable steps to maintain its premises, and does not become aware of a dangerous condition, by actual or constructive knowledge, then there is no fault on the part of the property owner.

ARGUMENT

THE DISTRICT COURT PROPERLY HELD THAT PLAINTIFFS WERE UNABLE TO ESTABLISH ANY NEGLIGENCE ON THE PART OF DEFENDANT AND THAT DEFENDANT, THEREFORE, WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The simple facts, taken in a light most favorable to plaintiffs, are that Mrs. Markowitz slipped on a grape that was dropped by a resident who was, with the permission of defendant, carrying fruit from the dining area at the conclusion of the lunch hour in a place where numerous members of defendant's staff were either currently located or had recently passed without noticing anything on the floor, following a recent cleaning of the floor. On these facts, plaintiffs have conceded that there is no evidence of deficiencies in the defendant's regular floor maintenance procedures, and no evidence of how long the grape was on the floor. Rather, plaintiffs assert that the "method of operation" (i.e. allowing residents the freedom to carry food

back to their rooms following meals), created an unreasonably dangerous condition as a matter of law, and that the defendant is charged with constructive notice, because it had a duty to constantly monitor the floor and should have had actual notice of the condition the instant the grape fell. It is defendant's position that well established principles of law, as set forth below, conclusively establish that plaintiffs cannot prove their allegations of negligence based upon the facts developed in this case.

"The purpose of a motion for summary judgment is to determine if there be sufficient evidence to justify a trial upon the issues made by the pleadings." Connolly v. Sebeco, Inc., 89 So. 2d 482, 484 (Fla. 1956). Summary judgment is properly entered where the facts reveal no legal exposure to the defendant.

> A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact. But once he tenders competent evidence to support his motion, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist.

Buitrago v. Rohr, 672 So. 2d 646, 648 (Fla. 4th DCA 1996), quoting, Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979). Accordingly, summary judgment was properly entered for defendant.

A. Defendant's method of operation was not negligent as a matter of law.

Plaintiffs urge this Court to impose liability based upon the defendant's practice of allowing residents of the assisted living facility to carry fruit back to their rooms following meals. Despite the fact that there was no evidence of any prior food spills caused by this procedure, plaintiffs claim that this constituted an unreasonably dangerous method of operation. As set forth below, defendant asserts that the doctrine of negligent operation should not be applied to its facility as a matter of law. Liability for negligent operation requires either an inherently dangerous activity or a showing of a recurring or ongoing problem that, because of the nature of defendant's business, imposes constructive notice of the condition that caused the plaintiff's injury based upon knowledge of prior dangerous conditions.

This Court first recognized the "method of operation" basis for liability in slip and fall cases in Wells v. Palm Beach Kennel Club, 35 So. 2d 720 (Fla. 1948). The imposition of a higher degree of diligence was imposed upon places of amusement, thus requiring a continuous duty to look after the safety of its patrons. The imposition of this duty was held to be commensurate with the business conducted, i.e. a business that invited large crowds to congregate in a place of amusement where food and drink are served in large quantity. Id. at 721.

Subsequent cases have described the "method of operation" basis for liability as requiring a showing that:

> 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.

Publix Super Market, Inc. v. Sanchez, 700 So. 2d 405 (Fla. 3d DCA 1997), rev. denied, 717 So. 2d 537 (Fla. 1998); Schaap v. Publix Supermarkets, Inc., 579 So. 2d 831 (Fla. 1st DCA 1991).

The imposition of slip and fall liability on the basis that the "method of operation" requires constant maintenance and supervision has been limited to places of amusement. See Wells, 35 So. 2d at 721 (race track); Ochlockonee Banks Restaurant, Inc. v. Colvin, 700 So. 2d 1229 (Fla. 1st DCA 1997) (dance hall/saloon); Fazio v. Dania Jai-Alai Palace, Inc., 473 So. 2d 1345 (Fla. 4th DCA 1985) (Jai-Alai Fronton).

The other cases cited by plaintiffs for this point are not, in fact, operational negligence cases, but evaluate liability under traditional concepts of notice and negligent maintenance in light of recurring or ongoing problems. Compare Mabrey v. Carnival Cruise Lines, Inc., 438 So. 2d 937 (Fla. 3d DCA 1983) (actual knowledge

evidenced by posting of "slippery when wet" sign and evidence of negligent maintenance); Nance v. Winn Dixie Stores, Inc., 436 So. 2d 1075 (Fla. 3d DCA 1983), rev. denied, 447 So. 2d 889 (Fla. 1984) (evidence of prior accidents indicating notice of ongoing problem); Firth v. Marhoefer, 406 So. 2d 521 (Fla. 4th DCA 1981) (recurring problem imposed duty to take reasonable preventative measures); Bennett v. Mattison, 382 So. 2d 873 (Fla. 1st DCA 1980) (evidence of actual notice and negligent maintenance); Winn-Dixie Stores, Inc. v. Burse, 229 So. 2d 266 (Fla. 4th DCA 1969), cert. denied, 237 So. 2d 180 (Fla. 1970) (lack of inspection for an hour and a half of area known for ongoing dangerous condition). These cases impose a duty to regularly maintain the premises, usually through a routine inspection program, or to correct a known dangerous condition, such as a slippery surface. As noted earlier, defendant had in place a routine inspection and maintenance program with which plaintiffs could not find any fault.

The district court properly disposed of plaintiffs' method of operation argument on the ground that there was no heightened duty because the activity involved was not inherently dangerous and there was no evidence of prior similar slip and fall incidents so as to put defendant on notice that it should be looking for food. The three errors asserted by plaintiffs are baseless.

Throughout these proceedings, there has never been any challenge to the fact

that defendant presented competent evidence that there were no prior similar slip and fall incidents in defendant's facility. For the first time, plaintiffs suggest in Petitioners' Brief on the Merits at 17 that defendant did not establish the absence of prior similar slip and falls. As the Court will recall, plaintiffs have requested appellate review in this matter on the facts as taken from defendant's motion for summary judgment and plaintiffs' response, rather than supplementing the record with the actual evidentiary material. As stated in defendant's motion for summary judgment, there were no prior falls occasioned by a substance on the floor.[2] Accordingly, plaintiffs are estopped from any belated attempt to challenge the facts asserted in the motion for summary judgment.

Second, plaintiffs are wrong in their contention that the trial and appellate courts were precluded from entering summary judgment on the issue of negligent operation. Plaintiffs explicitly sought to have their negligent operation theory considered on summary judgment by requesting leave to amend their complaint to assert the theory and moving for rehearing of the summary judgment motion to address that specific issue. Plaintiffs invited the trial court to consider this issue, and the trial

---

[2] If plaintiffs were to supplement the record, the deposition of defendant's building supervisor would reveal that she testified there were no incidents of slip and falls as the result of a substance on the floor during the four years that she worked at the facility.

court did so "By agreement of the parties . . . so that Defendant's Motion for Summary Judgment could be considered on its merits without regard to any procedural or pleading issues." [R. 131]. Again, plaintiffs are estopped from asserting that the relief they requested now constitutes reversible error.

Finally, the district court's decision is substantively correct. In the first instance, operational negligence is only applicable to places of amusement which have been identified as warranting a heightened standard of care. Second, if the doctrine were to be extended beyond places of amusement, there must exist evidence of an inherently dangerous activity or prior similar incidents arising from the method of operation. As the court stated when the plaintiff sought to extend the doctrine to grocery stores in Sanchez:

> 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 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.

700 So. 2d at 407.

In Sanchez, the court held, as a matter of law, that the method of operation (i.e. the operation of a demonstration table with food samples) was not inherently

dangerous and that the demonstration table was not being operated in a negligent manner (i.e. defendant did not ignore actual or constructive knowledge). Likewise, the First District refused to expand the doctrine of operational negligence to supermarkets in Rowe v. Winn-Dixie Stores, Inc., 714 So. 2d 1180 (Fla. 1st DCA 1998), rev. denied, 731 So. 2d 650 (Fla. 1999). In Rowe, the court reasoned that the doctrine should not be extended beyond places of amusement. Id. at 1180; see also Schaap, 579 So. 2d at 834 (rejecting plaintiff's suggestion that providing food samples required the exercise of a heightened standard of care). The first district also refused to expand the doctrine of operational negligence in Soriano v. B & B Cash Grocery Stores, Inc., 24 Fla. L. Weekly D1116 (Fla. 4th DCA 1999) (declining to apply the theory of operational negligence as an alternative to require actual or constructive notice where injuries result from slipping on a foreign substance).

Contrary to plaintiffs' assertions, there is no issue of foreseeability in this case.[3] Assuming that a premises owner owes a duty to guard against the foreseeable danger of slip and falls where food substances may be present, the issue is whether defendant satisfied the duty imposed by law. Unless plaintiffs can establish that defendant owed a duty to prevent its residents from carrying food from the dining room absent the

[3] Thus, the numerous "foreseeability" cases cited by plaintiffs need not be debated.

assistance or supervision of staff, defendant fulfilled the ordinary duties of a premises owner by having in place routine inspection and maintenance procedures designed to discover any hazardous conditions within a reasonable period of time. Thus, the district court, by its holding, did not declare that defendant owed no duty. The district court merely followed the well-established law in slip and fall situations that liability must be based on actual or constructive notice.

Moreover, the assertion that the expert affidavit proved a prima facie case is inaccurate. In general, negligent method of operation liability is based upon a finding that a condition occurred with such frequency that the premises owner should have known of its existence. See Publix Super Market, Inc. v. Sanchez, 700 So. 2d at 405; see also Wells v. Palm Beach Kennel Club, 35 So. 2d at 720. In this case, plaintiffs do not claim to have presented any facts to support the elements of a negligent method of operation claim, but rely solely on the expert affidavit. The affidavit fails to create a question of fact under the doctrine of operational negligence because the law simply does not impose liability for a single incident that is not inherently dangerous. Moreover, the statement that an unreasonably dangerous condition existed is not only an impermissible legal conclusion,[4] but also fails to satisfy the elements of a negligent

---

[4] See Town of Palm Beach v. Palm Beach County, 460 So. 2d 879 (Fla. 1984) (it is not the function of an expert witness to draw legal conclusions).

method of operation claim. It is the absence of facts to support plaintiffs' negligent method of operation claim that required the entry of summary judgment in favor of defendant.

B. There is no evidence to support a finding that defendant was on constructive notice or should have had actual notice that a grape had fallen to the floor.

None of the case law cited by plaintiffs supports their contention that: defendant was required to be on a heightened awareness, to anticipate that food may be dropped by residents leaving the dining area, and address this risk by constant observance of the residents as they passed through the hallway after lunch to have actually seen the grape when it fell. This is not a description of "reasonable care." Rather, plaintiffs are describing what an "insurer of safety" might be required to do.

Traditional concepts of constructive notice apply to this case. The district court ruled that "there was no evidence to suggest that the grape was on the floor for a length of time that would place the nursing home on reasonable notice of its existence." [App. 2]. Plaintiffs concede this fact. [Petitioners' Brief on the Merits at 5]. The district court also found that there was no evidence that simply "because three nurses were in the vicinity of the fall they saw or should have seen the grape." [App. 2]. In response, plaintiffs argue for a new rule to hold the property owner liable as an insurer of the premises.

To the extent that plaintiffs' argument asserts that defendant's method of operation should have included an ongoing patrol of every inch of the floor, defendant would adopt the arguments in opposition to the negligent operation claim presented above. There was no evidence of a recurring problem with slip and falls in this case, and no inherently dangerous condition that would give rise to a heightened standard of care.

The district court properly affirmed the summary judgment as there was simply no evidence in this case to present a question of constructive notice to a jury. Contrary to plaintiffs' assertions, the outcome in this case would not have been different had the action arose in another district. Both the Greenleaf and Thoma cases cited by plaintiffs are constructive notice cases that apply the well-established rule that: "Notice of a dangerous condition may be established by circumstantial evidence, such as evidence leading to an inference that a substance has been on the floor for a sufficient length of time such that in the exercise of reasonable care the condition should have become known to the premises owner." Thoma v. Cracker Barrel Old Country Store, Inc., 649 So. 2d 277, 278 (Fla. 1st DCA 1995); see also Greenleaf v. Amerada Hess Corp., 626 So. 2d 263 (Fla. 4th DCA 1993).

In the instant case, plaintiffs seek to draw an impermissible inference that merely because the employees were standing in the immediate vicinity, notice should

be attributed to them.[5] An employee's vicinity, standing alone, has never been held to establish constructive notice. Rather, numerous cases have held that the near or recent presence of an employee of the defendant, without more, is insufficient to establish a basis for finding constructive notice. See Miller v. Big C Trading, Inc., 641 So. 2d 911 (Fla. 3d DCA), rev. denied, 650 So. 2d 990 (Fla. 1994); Hamideh v. K-Mart Corp., 648 So. 2d 824 (Fla. 3d DCA), rev. denied, 659 So. 2d 271 (Fla. 1995); Winn-Dixie Stores, Inc. v. Mazzie, 707 So. 2d 927 (Fla. 5th DCA 1998), rev. denied, 725 So. 2d 1109 (Fla. 1999), and cases cited therein.

In Miller v. Big C Trading, Inc., which also involved a grape with no evidence of the length of time it had been on the floor, plaintiff argued that the location of two store employees nearby "gives rise to an inference that they should have known and were therefore on constructive notice of the grape's presence before the accident." 641 So. 2d at 911. The Third District upheld a summary judgment for defendant and rejected plaintiff's claim as totally speculative. Id. ("since there is no indication as to how long the grape was there, there can be nothing but speculation to support the claim that the employees could, let alone should, have seen it in time to remove it").

---

[5] As the facts establish, two of the nurses, including the one that plaintiff grabbed at as she fell, had their backs to the area that plaintiff was traversing and the other nurse was seated behind the nurses' desk unable to view the floor as she conversed with her fellow employees.

Plaintiffs misplace reliance on the statement in Greenleaf that the fact an employee may be able to see a dangerous condition is some circumstantial evidence of constructive knowledge.[6] However, this general statement must be read in the context of the facts existing in Greenleaf. In addition to the near presence of defendant's employees, there existed traditional indicia of constructive notice, including the facts that: (1) plaintiff slipped in a large spill of oil, (2) there was a lack of inspection for spills, and (3) there was evidence of insufficient maintenance procedures. 626 So. 2d at 264.

In addition, the Thoma decision included evidence that: (1) the puddle covered an area one foot by two feet, (2) the passage of more than 30 minutes occurred during which the plaintiff or another witness had a clear view of the dangerous spot and did not see the spill occur, giving rise to an inference regarding the length of time the dangerous condition was present without detection, and (3) employees passed the area regularly carrying beverage pitchers. 649 So. 2d at 278-79.

In the instant case, plaintiffs do not assert that there was any evidence other than the location of the employees to establish constructive notice. Not only is there no

---

[6] The Winn-Dixie Stores, Inc. v. Guenther, 395 So.2d 244 (Fla. 3d DCA 1981), case cited by Greenleaf for this proposition involved a liquid spill, which made a puddle about three feet long, appeared dirty, and had scuff marks and several grocery cart marks running through it.

evidence of any constructive notice, there is affirmative evidence that the floors of defendant's premises were routinely inspected by housekeeping, and in fact, had recently been cleaned prior to the fall. All of defendant's employees were instructed to constantly keep on alert regarding any foreign substance on the floor. Three of defendant's employees had recently traversed the floor and not seen any foreign substance. The two employees behind the counter, and the third facing them, did not have an opportunity to see the floor at the moment plaintiff fell.

For defendant to "immediately" discover the grape on the floor, the defendant's employees would literally need to follow each of the residents as they left the dining area to make sure that they did not drop any food, and actually post employees all along the hallway from the dining room to the elevator, to observe whether a resident dropped any food on the way to the elevator. Again, this is not the law.

The rule in Florida is that a premises owner will not be held liable if the record fails to show either how the condition was created, the length of time the condition existed before the accident, or that the land owner was responsible for the condition. Gaidymowicz v. Winn Dixie Stores, Inc. 371 So. 2d 212 (Fla. 3d DCA 1979). The evidence in this case shows without question that defendant had no knowledge that the grape was on the floor prior to plaintiff's fall, nor is there any evidence indicating that the grape was on the floor for a long enough period of time so that defendant should

have been aware of it. Accordingly, summary judgment was properly entered on plaintiffs' constructive notice theory.

CONCLUSION

Based upon the foregoing facts and legal authorities, Respondents, HELEN HOMES OF KENDALL CORPORATION, respectfully requests that the lower tribunal's ruling be affirmed.

KUBICKI DRAPER
Attorneys for Respondent
25 West Flagler Street
Penthouse
Miami, Florida 33130
Tel: 305-982-6636
Fax: 305-374-7846

By: Angela C. Flowers
ANGELA C. FLOWERS
Florida Bar No. 510408

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits was mailed this 17 day of December 1999 to counsel on the service list below.

Angela C. Flowers
ANGELA C. FLOWERS

SERVICE LIST

Joel Eaton, Esq.
Podhurst, Orseck, Josefsberg,
Eaton, Meadow, Olin & Perwin, P.A.
City National Bank Building
Suite 800
25 W. Flagler St.
Miami, FL 33130
Counsel for Petitioners
Attorneys for Petitioners