IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,244

PATRICIA MARKOWITZ and ROBERT MARKOWITZ, her husband,

Petitioners,

vs.

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.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' BRIEF ON THE MERITS

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I.
STATEMENT OF THE CASE

The petitioners, Patricia Markowitz and Robert Markowitz, were plaintiffs below in a negligence action against the respondent, Helen Homes of Kendall Corporation. Their initial complaint (R. 3) alleged that the defendant operated a nursing home/assisted living facility in which Mrs. Markowitz's elderly mother was a resident; that, while visiting her mother on June 29, 1995, Mrs. Markowitz slipped on a grape in the main area of the facility, near a nurse's station, and fell to the floor, causing her serious injuries; and that the defendant knew or should have known of this dangerous condition but negligently failed to correct it. Damages were sought for Mrs. Markowitz's personal injuries and for Mr. Markowitz's loss of consortium. The defendant answered, generally denying liability (R. 13).

Following extensive discovery (the pertinent details of which we will set out in our statement of the facts), the defendant moved for summary judgment (R. 44). The motion conceded that Mrs. Markowitz had slipped and fallen on a grape; that grapes were served to the facility's residents in the dining room; and that the grape was probably dropped on the floor by an elderly resident who was carrying food from the nearby dining room to his or her room. The motion did not challenge the sufficiency of the evidence to prove three elements of the alleged tort -- duty, proximate causation, and damages. It was limited solely to the "breach of duty" element of the tort. It contended that the plaintiffs could not prove that the defendant was negligent because there was no evidence that the defendant had actual knowledge of the presence of the grape, or that the grape had been on the floor for a sufficient

length of time to provide it with constructive notice of its presence.[1/]

The plaintiffs contended in response (R. 72) that three of the defendant's employees were engaged in a conversation in the immediate vicinity of the fall and therefore should have been aware of the presence of the grape, and that a material issue of fact was therefore presented on the issue of constructive notice. The plaintiffs also contended that the defendant's policy of permitting its elderly and infirm residents to carry food from the dining room to their rooms, without supervision, was, under the circumstances, an unreasonably dangerous "method of operation" which a jury could permissibly find to have been a negligent cause of Mrs. Markowitz's injuries, whether or not the defendant was on notice of the particular grape on which she slipped and fell. An affidavit of an expert nursing home/assisted living facility administrator was attached to the response to support both contentions (R. 81).

The trial court granted the defendant's motion, and entered a summary final judgment in the defendant's favor (R. 130). The plaintiffs then filed a timely motion for rehearing (R. 100). With the agreement of the defendant, the plaintiffs also filed an amended complaint which set forth their theory of the defendant's negligent "method of operation" with more specificity (R. 118, 119). The trial court thereafter entered an order stating that it had reconsidered the defendant's motion for summary

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[1/] As an additional ground, the motion asserted that "no facts have been developed providing any evidence that the maintenance procedures of the Defendant were the cause of [Mrs. Markowitz's] fall" (R. 45). Because we did not contend otherwise below, this assertion amounts to a non-issue at this point, so we will make no further mention of it.

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judgment in light of the expanded allegations of the amended complaint, but that the motion for rehearing was nevertheless denied (R. 131). A timely appeal followed (R. 126).

The District Court of Appeal, Third District, affirmed the defendant's judgment with a written opinion.[2/] *Markowitz v. Helen Homes of Kendall Corp.*, 736 So.2d 775 (Fla. 3d DCA 1999). It held that the evidence was insufficient to suggest either actual or constructive notice; and it rejected the plaintiffs' theory of negligent "method of operation" on the ground that there was no evidence proving a prior similar incident. This Court thereafter granted discretionary review.

II.
STATEMENT OF THE FACTS

Before we can state the facts, we must briefly address a procedural problem presented by the record on appeal. For some reason that remains unexplained, the depositions did not find their way into the record. However, both the defendant's motion for summary judgment and the plaintiffs' response to the motion contained lengthy recitations of the facts, derived from the depositions. We therefore proposed in the district court that the facts be taken from the motion and the response, and we offered to supplement the record with copies of the depositions if either the defendant or the court desired. In its answer brief, the defendant agreed that the facts were

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[2/] The district court's opinion recites that the appeal was taken from an order granting the defendant's motion for summary judgment and denying the plaintiffs' motion for summary judgment. This is inaccurate. The plaintiffs did not move for summary judgment below. The appeal was taken from the summary final judgment entered in the defendant's favor by the trial court.

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adequately collected in the motion and the response, and that supplementation of the record was unnecessary. The district court did not request supplementation thereafter, and the case was decided on the facts recited in the motion and the response. As support for the facts which follow, the Court is therefore referred to the facts as stated in the defendant's motion for summary judgment and the plaintiffs' response thereto -- at R. 44-57, 72-84.

After entering the front door of the facility, and to reach the elevators which would take her to the floor on which her elderly mother resided, Mrs. Markowitz was required to traverse a hallway in front of a nurses' station. The hallway was tiled, with a marble-type surface. The facility's dining room was nearby, and for residents to reach the elevators that would return them to their activities or rooms after eating, they were required to traverse the same hallway. The floor area in front of the nurses' station was therefore a heavily trafficked area -- perhaps the most heavily trafficked area in the facility, especially during mealtimes. Despite the fact that residents of the facility were elderly and infirm in varying degrees, the defendant permitted them to carry food from the dining room to their rooms after their meals.

Mrs. Markowitz entered the facility around 1:00 p.m., at the end of the lunch hour, and at a time when residents were leaving the dining room. While walking down the hallway toward the elevators, she slipped and fell on a grape. For purposes of its motion for summary judgment, the defendant conceded that the grape had probably been dropped by an elderly resident who had been eating lunch in the dining room, and who had been carrying food from the dining room toward the elevators,

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en route to his or her room.

Three of the defendant's employees were in the immediate vicinity of Mrs. Markowitz's fall, engaged in conversation. Two of them were behind the counter of the nurses' station. One of them was standing in the hallway itself. Although this employee had her back to the area in which Mrs. Markowitz slipped and fell, she was so close to the grape that Mrs. Markowitz actually grabbed onto her in an effort to prevent her fall. Each of these employees denied knowledge of the presence of the grape, and the plaintiffs were unable to develop any evidence of how long the grape had been on the floor before Mrs. Markowitz slipped on it.[3/]

The record contains the affidavit of Stephen M. Wittenberg, who possesses a Masters Degree in Health Care Administration and who currently serves as a co-administrator of a nursing home facility in South Florida. Mr. Wittenberg stated that he was familiar with the standards pertaining to proper administration of nursing homes and assisted living facilities; that he had reviewed the depositions and the photographs of the area in which Mrs. Markowitz fell; and that, in his opinion, the defendant failed to exercise reasonable care in the following respects:

> a. It is not reasonable to allow residents to remove food from the dining area. Residents of facilities like this should either eat in the dining area or the food should be brought to their room by an employee. Allowing residents to move through the facility with food created an unnecessary and unreasonable hazard which directly caused the Plaintiff's injury. The risk was foreseeable to Defendant,

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[3/] The plaintiffs were also unable to develop any evidence of deficiencies in the defendant's regular floor maintenance procedures. *See* footnote 1, *supra*.

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since it is well known that elderly people in facilities like the Defendant's are likely to spill food because of their diminished balance, strength and equilibrium.

b. Defendant was negligent in failing to immediately notice that food had been spilled. The uncontroverted evidence is that there were three employees on duty at the nurses' station in the immediate area where the Plaintiff fell. They should have seen one of their residents spill the food, and should have picked it up before the Plaintiff fell on it. This is especially true since the resident had to have passed the nurses' station with the food in going from the dining room to the elevators. Given that the faculty [sic] allows residents (improperly) to carry food through this very busy area, the staff should have been instructed to watch the residents when they do so. Had the staff been so trained, or if so trained, had they complied with that training, the spilled food would have been picked up immediately before anyone would have had an opportunity to slip and fall.

c. Defendant was negligent in not having an aide accompany residents going from the dining room to their rooms with food.

(R. 81-83). And it was on these facts that the district court concluded that the defendant was entitled to judgment as a matter of law.

III.
ISSUE ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED ON THE ISSUE OF THE DEFENDANT'S NEGLIGENCE, AND THAT THE DEFENDANT WAS THEREFORE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

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IV.
SUMMARY OF THE ARGUMENT

Our argument will be sufficiently brief that a summary of it would amount to little more than mere repetition, at the Court's expense. Suffice it to say that we will demonstrate that the district court erred in concluding that the defendant was entitled to judgment as a matter of law. It erred in affirming the defendant's summary final judgment because the evidence was sufficient to present a jury question on both of the plaintiffs' theories of liability. On the evidence adduced, a jury could permissibly find (1) that the defendant's "method of operation" was negligent, and (2) that the defendant was on constructive notice of the grape and negligently failed to remove it. And, respectfully requesting the Court's indulgence in the brevity of this summary, we turn directly to the merits.

V.
ARGUMENT

THE DISTRICT COURT ERRED IN DETERMINING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED ON THE ISSUE OF THE DEFENDANT'S NEGLIGENCE, AND THAT THE DEFENDANT WAS THEREFORE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

It is axiomatic, of course, that it was the defendant's burden below to disprove our allegations of negligence, and to disprove them *conclusively*; that we are entitled to have the evidence viewed in a light most favorable to the plaintiffs here, with all conflicts resolved and all reasonable inferences drawn in their favor; and that, because negligence cases are not ordinarily proper subjects for summary disposition,

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all doubts must be resolved in our favor here. *See Moore v. Morris*, 475 So.2d 666 (Fla. 1985); *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla. 1977); *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966); *Visingardi v. Tirone*, 193 So.2d 601 (Fla. 1966); *Gonzalez v. B & B Cash Grocery Stores, Inc.*, 692 So.2d 297 (Fla. 4th DCA 1997). These points are too well settled to belabor.

It is our position that the evidence, viewed in the proper light, will permit a jury finding of negligence on two independent grounds: (1) that the defendant's policy of permitting its elderly residents to carry food from the dining room to their rooms, through heavily trafficked areas of the facility and without assistance or supervision, presented a foreseeable and unreasonable risk of creating slip and fall hazards that could cause harm to others; and (2) that the defendant was on constructive notice of the particular grape on which Mrs. Markowitz slipped and fell because three of its employees were in the immediate vicinity -- and one was standing within inches of the grape -- at a time when residents were leaving the dining room with food in their hands and returning to their rooms, and the employees unreasonably failed to detect the grape and remove it from the floor. We will elaborate upon each of these positions in turn.

A. A jury could permissibly find that the defendant's "method of operation" was negligent.

Our first contention will be constructed upon thoroughly settled principles of Florida law. We will begin with the general, and proceed to the specific. The overarching principle -- the long-settled general rule that *all* persons whose endeavors

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create a foreseeable risk of harm to others owe a duty of reasonable care toward the persons who may be harmed -- was recently reiterated by this Court as follows:

> . . . Foreseeability clearly is crucial in defining the scope of the general duty placed on every person to avoid negligent acts or omissions. Florida, like other jurisdictions, recognizes that a legal duty will arise whenever a human endeavor creates a generalized and foreseeable risk of harming others. As we have stated:
>
> > Where a defendant's conduct creates a *foreseeable zone of risk*, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.
>
> *Kaisner [v. Kolb]*, 543 So.2d [732,] at 735 [(Fla. 1989)]. . . . Thus, as the risk grows greater, so does the duty, because the risk to be perceived defines the duty that must be undertaken. . . .
>
> The statute books and case law, in other words, are not required to catalogue and expressly proscribe every conceivable risk in order for it to give rise to a duty of care. Rather, each defendant who creates a risk is required to exercise prudent foresight whenever others may be injured as a result. This requirement of reasonable, general foresight is the core of the duty element. For these reasons, duty exists as a matter of law and is not a factual question for the jury to decide: Duty is the standard of conduct given to the jury for gauging the defendant's factual conduct. As a corollary, the trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant.

McCain v. Florida Power Corp., 593 So.2d 500, 503 (Fla. 1992). *Accord Kitchen v. K-Mart Corp.*, 697 So.2d 1200 (Fla. 1997); *Stevens v. Jefferson*, 436 So.2d 33, 35

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(Fla. 1983); *Green Springs, Inc. v. Calvera*, 239 So.2d 264, 265-66 (Fla. 1970); *Carter v. Livesay Window Co.*, 73 So.2d 411, 413 (Fla. 1954); *Smith v. Hinkley*, 98 Fla. 132, 123 So. 564, 566 (1929); *Heaven v. Pender*, 11 Q.B.D. 503 (1883).

And in the more specific context presented here, because Mrs. Markowitz was indisputably an "invitee" on the defendant's premises, the defendant indisputably owed her a duty to exercise reasonable care for her safety, including the duty to keep its premises in a reasonably safe condition for their intended use. *See Hall v. Billy Jack's, Inc.*, 458 So.2d 760 (Fla. 1984); *Everett v. Restaurant & Catering Corp.*, 738 So.2d 1015 (Fla. 2d DCA 1999); *Nichols v. Home Depot, Inc.*, 541 So.2d 639 (Fla. 3d DCA 1989); *Budet v. K-Mart Corp.*, 491 So.2d 1248 (Fla. 2d DCA 1986); *Gunlock v. Gill Hotels Co., Inc.*, 622 So.2d 163 (Fla. 4th DCA 1993); *Kolosky v. Winn-Dixie Stores, Inc.*, 472 So.2d 891 (Fla. 4th DCA 1985), *review denied*, 482 So.2d 350 (Fla. 1986).

This general duty of reasonable care under the circumstances is not limited merely to detecting dangerous conditions on the premises *after* they occur and then correcting them; it plainly requires that actions be taken to reduce, minimize, or eliminate *foreseeable* risks *before* they manifest themselves as particular dangerous conditions on the premises. *See, e. g., Springtree Properties, Inc. v. Hammond*, 692 So.2d 164 (Fla. 1997) (restaurant's duty of care can include providing barriers in anticipation of cars jumping curb); *Everett v. Restaurant & Catering Corp., supra* (restaurant's duty of care includes anticipating injury from negligently-placed menu board); *U.S. Security Services Corp. v. Ramada Inn, Inc.*, 665 So.2d 268 (Fla. 3d

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DCA) (hotel's duty of care includes providing adequate security to prevent foreseeable criminal attacks), *review denied*, 675 So.2d 121 (Fla. 1996); *Nichols v. Home Depot, Inc.*, 541 So.2d 639 (Fla. 3d DCA 1989) (store owner's duty of care includes taking precautions to minimize possibility of use of store's ladders by customers); *Fontana v. Wilson World Maingate Condominium*, 717 So.2d 199 (Fla. 5th DCA 1998) (hotel's duty of care includes conducting regular inspections of its furnishings to detect wear and tear); *Maher v. Best Western Inn, Route 50*, 717 So.2d 97 (Fla. 5th DCA 1998) (innkeeper's duty of care includes taking precautions to protect guests from dogs permitted on the premises); *Wal-Mart Stores, Inc. v. Rogers*, 714 So.2d 577 (Fla. 1st DCA 1998) (store owner's duty of care includes stacking goods so as to minimize risk of falling on customers); *Budet v. K-Mart Corp.*, 491 So.2d 1248 (Fla. 2d DCA 1986) (store owner's duty of care includes taking precautions to minimize risk of customer's unauthorized use of unwieldy, oversized garden carts).

And in the even more specific context presented here, the duty owed to invitees is not limited merely to detecting slip and fall hazards *after* they occur and then correcting them; it plainly requires reasonably prudent precautions to reduce, minimize, or eliminate foreseeable risks of slip and fall hazards *before* they appear on the business owner's floor. *See, e. g., Wells v. Palm Beach Kennel Club*, 160 Fla. 502, 35 So.2d 720 (1948) (where defendant dog track was selling bottled drinks, its duty of care included providing trash receptacles for empty bottles); *Mabrey v. Carnival Cruise Lines, Inc.*, 438 So.2d 937 (Fla. 3d DCA 1983) (given that ship's

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deck was prone to accumulations of moisture, shipowner's duty of care included minimizing risk by applying non-skid coating); *Nance v. Winn Dixie Stores, Inc.*, 436 So.2d 1075 (Fla. 3d DCA 1983) (given recurring nature of cash register receipts on floor, store owner's duty of care included taking precautions to prevent the hazard), *review denied*, 447 So.2d 889 (Fla. 1984); *Bennett v. Mattison*, 382 So.2d 873 (Fla. 1st DCA 1980) (given recurring nature of wet and slippery hallway, apartment owner's duty of care included conducting regular maintenance); *Fazio v. Dania Jai-Alai Palace, Inc.*, 473 So.2d 1345 (Fla. 4th DCA 1985) (jai-alai fronton's duty of care included conducting regular maintenance of recurring slip and fall hazards); *Firth v. Marhoefer*, 406 So.2d 521 (Fla. 4th DCA 1981) (given recurring nature of wet elevator floor, apartment owner's duty of care included taking precautions to minimize hazard); *Winn-Dixie Stores, Inc. v. Burse*, 229 So.2d 266 (Fla. 4th DCA 1969) (given fact that plastic six-pack container tops accumulated on beer shelf, store owner's duty of care included providing suitable trash receptacle in vicinity), *cert. denied*, 237 So.2d 180 (Fla. 1970). *See also Schaap v. Publix Supermarkets, Inc.*, 579 So.2d 831 (Fla. 1st DCA 1991) (recognizing that proof of notice of particular hazard is not required where proof of a negligent "method of operation" is available).

In short, it is not necessary to prove actual or constructive notice of the particular slip and fall hazard in every slip and fall case. An alternative plainly exists. Evidence from which a jury could find that the defendant's "method of operation" is unreasonably dangerous -- i.e., that the defendant failed to take reasonably prudent precautions to reduce, minimize, or eliminate a reasonably foreseeable risk that slip

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and fall hazards will occur -- is sufficient to present a jury question on the issue of a defendant's negligence. And recently, the Third District said precisely that:

> The plaintiff correctly states that Florida law does provide that a plaintiff may recover damages in a slip and fall case, regardless of notice, based on the method of operation if the plaintiff can prove 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 Supermarket, Inc. v. Sanchez, 700 So.2d 405, 406 (Fla. 3d DCA 1997), *review denied*, 717 So.2d 537 (Fla. 1998).[4/]

[4/] A brief digression is in order here. In *Rowe v. Winn-Dixie Stores, Inc.*, 714 So.2d 1180 (Fla. 1st DCA 1998), *review denied*, 731 So.2d 650 (Fla. 1999), a divided panel of the First District recently disagreed with the Third District's conclusion in *Sanchez* that the "method of operation" theory of liability was available in supermarket slip and fall cases, concluding instead that the theory was limited to "place of amusement" slip and fall cases. We respectfully submit that the Third District's recognition of the theory was correct. In *Rowe*, the majority plainly misread *Carls Markets v. Meyer*, 69 So.2d 789 (Fla. 1953), and apparently overlooked many of the decisions cited *supra*. In *Carls Markets*, a supermarket slip and fall case, the plaintiff had pled *both* theories of liability -- negligent "method of operation" and actual and constructive notice. The defendant unsuccessfully sought a jury instruction on the notice issue. The trial court charged the jury on the negligent "method of operation" theory, and then elaborated by explaining that proof of notice was unnecessary. Following a favorable verdict for the plaintiff, the defendant sought a new trial (*not* a judgment in its favor) for the omitted instruction. Relying on this Court's earlier "place of amusement" case, the plaintiff contended that the notice instruction was unnecessary.

This Court disagreed. It stated that "the underlying principle in that case [the "place of amusement" case] would be common to this one" (69 So.2d at 791) *if* the plaintiff had not pled both theories of liability in the complaint, but because both

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More recently still, the First District decided a "method of operation" case which is, in our judgment, legally indistinguishable from the instant case. In *Ochlockonee Banks Restaurant, Inc. v. Colvin*, 700 So.2d 1229 (Fla. 1st DCA 1997), the plaintiff was dancing in the defendant's saloon and slipped and fell in a puddle that appeared to come from a beer bottle which had been knocked from the railing immediately surrounding the dance floor. She was unable to prove actual or constructive notice of the presence of the puddle. Nevertheless, she proved that the defendant permitted patrons to leave their drinks unattended on the railing while they were on the dance floor. The defendant contended on appeal that, absent proof of actual or constructive notice of the puddle, it was entitled to judgment in its favor as a matter of law.

The district court disagreed:

> Were this a case where liability was based solely on constructive notice of an unknown liquid on the dance floor, appellant's argument concerning an inappropriate finding of liability would be persuasive. [Citations omitted]. There was no evidence which would indicate how long the liquid was allegedly on the floor and little or no testimony concerning the frequency of spills. There was,

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theories had been pled, the defendant was entitled to an instruction on the notice theory. Most respectfully, given this Court's rather explicit statement that the "method of operation" theory "would be common" to the supermarket slip and fall case before it, there was no justification for the First District's conclusion that this Court "declined to extend" the rule in "place of amusement" cases to supermarket slip and fall cases in *Carls Markets v. Meyer*. *Sanchez's* recognition of the theory in supermarket slip and fall cases is plainly correct -- and in any event, the instant case is not a supermarket slip and fall case, so the First District's misreading of *Carls Markets* in *Rowe* ought to have no bearing on the issue presented in this appeal.

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> however, testimony concerning the fact that there was liquid on the floor (although this issue was disputed) and that the liquid appeared to come from an overturned beer bottle. Under these circumstances, the jury could have determined that appellant's negligence consisted of allowing a dangerous condition to exist by allowing people to place their drinks on the railing immediately adjacent to the dance floor. The trial court, therefore, properly denied the defendant's motion for a directed verdict on the issue of liability.

700 So.2d at 1230.

A similar "dangerous condition" was permitted by the defendant in the instant case. It is a matter of common sense, we think, that residents of nursing homes are elderly, infirm in varying degrees (many requiring walkers to ambulate), and generally unable to take care of themselves -- else they would not be there in the first place. As the plaintiffs' expert attested, "it is well known that elderly people in facilities like the Defendant's are likely to spill food because of their diminished balance, strength and equilibrium." To allow them to carry food from the dining room after meals, through perhaps the most heavily trafficked area in the entire facility and over a marble-type surface, is simply to invite a rash of slip and fall hazards. And the scope of the risk, of course, was not merely that able-bodied visitors to the facility, like Mrs. Markowitz, would be exposed to such hazards; the risk of injury was substantially greater than that, since most of the persons to be exposed to such hazards would be the elderly and infirm residents themselves, for whom a slip and fall hazard would present far more danger. Most respectfully, the risk that dangerous slip and fall hazards would be created by the defendant's lax

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policy was plainly foreseeable under the circumstances.

Indeed, the defendant did not contend otherwise in its motion for summary judgment, which was directed solely to the absence of evidence proving actual or constructive notice of the particular grape on which Mrs. Markowitz slipped and fell. In fact, the motion for summary judgment all but conceded the foreseeability of the incident, because it went to great lengths to demonstrate that the defendant was *acutely* conscious of the risk -- *so* conscious of the risk that it "had assigned a housekeeper to the first floor of the . . . premises, to clean the common areas on a continuous basis"; it held a morning meeting each day "to enforce the cleaning practice at the facility, and that all employees should make a point to clean up any substances that are found on the floor or may have been spilled on the floor, or to notify the housekeeper to clean it up"; and "all of [its] employees were instructed to constantly keep on alert regarding any . . . foreign substance on the floor, and if they noticed this, that it should be cleaned up" (R. 46, 54).

Nevertheless, the district court affirmed the defendant's summary final judgment on the ground that Mrs. Markowitz's slip and fall was unforeseeable as a matter of law because there was no record evidence of prior similar incidents:

> . . . [T]he Markowitzes are unable to establish that the nursing home's method of operation is negligent. . . . There is 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.

Markowitz, supra, 736 So.2d at 776.

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In our judgment, the district court committed three different errors in disposing of our "method of operation" theory on this ground -- two procedural and one substantive. First, because it was the defendant's burden to demonstrate the absence of any material issue of fact, it was the defendant's burden to prove affirmatively that there had been *no* prior similar incidents; it did not do so, and it was not our burden to prove otherwise.[5/] The absence of evidence on the point was therefore merely that -- an absence of evidence. It was not a ground on which the district court could legitimately declare that the defendant had shouldered its burden of conclusively demonstrating the absence of any material issue of fact.

Second, the district court simply had no authority to affirm the summary judgment on this ground. Because Rule 1.510(c), Fla. R. Civ. P. requires that a motion for summary judgment "state with particularity the grounds upon which it is based and the substantial matters of law to be argued," and because the defendant's motion did not state this ground, we were not required to meet it with evidence of prior similar incidents -- and the trial court therefore had no authority to consider it.[6/]

[5/] The only thing the defendant offered on this point was that *Mrs. Markowitz* had not been involved in any prior similar incidents: "It is uncontroverted in the depositions of the Plaintiff, that she had never experienced any prior falls on the Defendant's premises, nor had she ever seen any food or other foreign substance on the floor at the facility, or in the area where she fell, in the three years she had visited her mother, once a week, prior to the incident" (R. 45-46). The defendant also asserted that there was "no evidence" showing that any of its residents had previously dropped food on the floor (R. 56). We take it to be obvious that these things are not *proof* that there had never been any prior similar slip and fall incidents in the defendant's facility.

[6/] *See City of Cooper City v. Sunshine Wireless Co., Inc.*, 654 So.2d 283 (Fla. 4th DCA 1996); *Lee v. Treasure Island Marina, Inc.*, 620 So.2d 1295 (Fla. 1st DCA

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The "right for the wrong reason" rule has its place in the appellate process, to be sure. *See Dade County School Board v. Radio Station WQBA*, 731So.2d 638 (Fla. 1999). But to apply it as the district court did here, to a factual issue that was not placed in issue by the defendant's motion for summary judgment and to which we were therefore never required to respond with evidence, violates fundamental notions of due process.

In any event, quite apart from the fact that the defendant's motion for summary judgment did not even challenge the foreseeability of the incident, the district court's conclusion was legally erroneous. Indeed, it was the same error that the Third District had previously committed in *Molinares v. El Centro Gallego, Inc.*, 545 So.2d 387 (Fla. 3d DCA), *review denied*, 557 So.2d 866 (Fla. 1989), in which it had announced a *per se* rule of unforeseeability where no prior similar incidents could be proven. This Court explicitly disapproved that aspect of *Molinares* in *Springtree Properties, Inc. v. Hammond*, 692 So.2d 164 (Fla. 1997), announcing in no uncertain terms that the absence of a history of prior similar incidents was *not* dispositive of the issue of foreseeability – that an incident could be foreseeable as a matter of fact for any number of reasons, like common sense, common human experience, the experience of others similarly situated, the judgment of experts on the method of operation utilized by the defendant, and the like. *See also Palm Beach Board of County Commissioners v. Salas*, 511 So.2d 544 (Fla. 1987); *McCain v. Florida*

1993); *Spinner v. Wainer*, 430 So.2d 595 (Fla. 4th DCA 1983); *City of Brooksville v. Hernando County*, 424 So.2d 846 (Fla. 5th DCA 1982). *Cf. Loranger v. State, Department of Transportation*, 448 So.2d 1036 (Fla. 4th DCA 1984).

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Power Corp., 593 So.2d 500 (Fla. 1992). And the Fourth District more recently reached the same common sense conclusion, that proof of prior similar incidents was not a prerequisite to a factual finding of foreseeability, in *City of Coral Springs v. Rippe*, 24 Fla. L. Weekly D1987 (Fla. 4th DCA Aug. 25, 1999). With all due respect to the district court, its conclusion that Mrs. Markowitz's slip and fall was unforeseeable as a matter of law was both procedurally and legally indefensible.

The question that remains is whether a court can declare the defendant's "method of operation" *non-negligent* as a matter of law, as the trial court did. We think not. As the Third District put the point in *Nichols v. Home Depot, Inc.*, 541 So.2d 639, 641-42 (Fla. 3d DCA 1989), quoting this Court's decision in *Orlando Executive Park v. Robbins*, 433 So.2d 491, 493 (Fla. 1983):

> The general principle is thoroughly settled. What is and what is not reasonable care under the circumstances is, as a general rule, simply undeterminable as a matter of law. Rather, "it is 'peculiarly a jury function to determine what precautions are reasonably required in the exercise of a particular duty of due care.'" . . .

Accord Weis-Patterson Lumber Co. v. King, 131 Fla. 342, 177 So. 313 (1937); *Williams v. Office of Security & Intelligence, Inc.*, 509 So.2d 1282 (Fla. 3d DCA), *review denied*, 518 So.2d 1277 (Fla. 1987); *Ten Associates v. McCutchen*, 398 So.2d 860 (Fla. 3d DCA), *review denied*, 411 So.2d 384 (Fla. 1981); *Holley v. Mt. Zion Terrace Apts., Inc.*, 382 So.2d 98 (Fla. 3d DCA 1980); *Maher v. Best Western Inn, Route 50*, 717 So.2d 97 (Fla. 5th DCA 1998); *English v. Florida State Board of Regents*, 403 So.2d 439 (Fla. 2d DCA 1981); *Acme Electric, Inc. v. Travis*, 218 So.2d

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788 (Fla. 1st DCA), *cert. denied*, 225 So.2d 917 (Fla. 1969).[7/]

In other words, unless this Court is prepared to hold that *all* reasonable persons would conclude that the defendant exercised reasonable care for its invitees' safety on the facts in this case, then a jury question was clearly presented on the issue of the defendant's negligence, and summary judgment on the issue was just as clearly precluded. We believe that reasonable persons could at least differ on the question, which is all that we need to show to demonstrate that the issue cannot be decided as a matter of law. Surely a jury of reasonable persons could permissibly conclude that the defendant's lax policy created a "foreseeable zone of risk," and that the defendant was therefore negligent in failing to reduce, minimize, or eliminate that substantial risk by prohibiting the practice, or by providing for close supervision of residents carrying food from the dining room to the elevators, or by having aides deliver food to the residents' rooms upon request -- or any of a number of things which a prudent nursing home operator might do to ensure that the risk of food on the floor was minimized as much as possible.

In this connection, we remind the Court that an expert nursing home

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[7/] It is arguable that the Third District overlooked this settled general principle in *Publix Supermarket, Inc. v. Sanchez*, 700 So.2d 405 (Fla. 3d DCA 1997), *review denied*, 717 So.2d 537 (Fla. 1998), when it decided that the supermarket's "method of operation" -- providing food samples at an unattended demonstration table -- was non-negligent conduct as a matter of law. In any event, whether the principle was overlooked or not, we take it that the facts presented in the instant case are far removed from the long-accepted and perfectly ordinary supermarket "method of operation" at issue in *Sanchez* -- and that the conclusion reached in *Sanchez* therefore could not even arguably be dispositive of the quite different question presented here.

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administrator attested on the record, in essence, that industry standards required one or more of these things, and that the defendant's lax policy was contrary to prevailing standards in the industry. Because a departure from industry standards, customs and practices, and the care exercised by others similarly situated is admissible as "evidence of negligence," this expert opinion cannot lightly be ignored in analysis of the question presented here (as it apparently was below). *See, e. g., Seaboard Air Line Railroad Co. v. Watson*, 94 Fla. 571, 113 So. 716 (1927); *Nesbitt v. Community Health of South Dade, Inc.*, 467 So.2d 711 (Fla. 3d DCA 1985); *Stambor v. One Hundred Seventy-Second Collins Corp.*, 465 So.2d 1296 (Fla. 3d DCA), *review denied*, 476 So.2d 675 (Fla. 1985); *Lockwood v. Baptist Regional Health Services, Inc.*, 541 So.2d 731 (Fla. 1st DCA 1989); *Seaboard Coast Line Railroad Co. v. Clark*, 491 So.2d 1196 (Fla. 4th DCA 1986); *St. Louis-San Francisco Railway Co. v. White*, 369 So.2d 1007 (Fla. 1st DCA), *cert. denied*, 378 So.2d 349 (Fla. 1979). *Cf. Marks v. Delcastillo*, 386 So.2d 1259, 1263-64 n. 8 (Fla. 3d DCA 1980) (jury is justified in concluding that a defendant should have taken the same precautions taken by others similarly situated), *review denied*, 397 So.2d 778 (Fla. 1981).

Indeed, in ignoring the expert's affidavit and declaring that "the Markowitzes are unable to establish that the nursing home's method of operation is negligent" (736 So.2d at 776), it would appear that the district court also ignored a long line of authority requiring that this expert's affidavit be given its due. It has long been the law in this state that expert opinions (unless they can legitimately be declared speculative or conjectural or they amount to mere legal conclusions rather than proof

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of facts) are *direct* evidence sufficient to present a *prima facie* case on the factual issue to which the opinion is addressed, like negligence or causation, and that courts may *not* direct verdicts or grant summary judgments against plaintiffs when such evidence is in the record. *See, e. g., Wale v. Barnes*, 278 So.2d 601 (Fla. 1973); *Golden Hills Turf & Country Club, Inc. v. Buchanan*, 273 So.2d 375 (Fla. 1973); *Cromarty v. Ford Motor Co.*, 341 So.2d 507 (Fla. 1976); *LaBarbera v. Millan Builders, Inc.*, 191 So.2d 619 (Fla. 1st DCA 1966); *Gifford v. Galaxie Homes of Tampa, Inc.*, 223 So.2d 108 (Fla. 2d DCA), *cert. denied*, 229 So.2d 869 (Fla. 1969); *Zack v. Centro Espanol Hospital, Inc.*, 319 So.2d 34 (Fla. 2d DCA 1975); *Bryant v. First Realty Investment Corp.*, 396 So.2d 1223 (Fla. 4th DCA 1981). The district court plainly violated that settled principle in this case as well.

In short and in sum, the district court erred in multiple respects in concluding that no reasonable jury could find that the defendant's "method of operation" was negligent. That theory of liability was plainly available to the plaintiffs on the facts in this case, whether or not the plaintiffs could prove actual or constructive notice of the particular grape on which Mrs. Markowitz slipped and fell -- and we respectfully submit that this aspect of the district court's decision should be quashed.

B. A jury could permissibly find that the defendant was on constructive notice of the grape and negligently failed to remove it.

For our second contention, we remind the Court that Mrs. Markowitz's fall occurred at the end of the lunch hour, at a time when residents were leaving the dining room and traversing the hallway, en route to their activities or rooms. Given

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the defendant's lax policy of permitting these elderly and infirm residents to carry food with them from the dining room across a marble-type floor, this was plainly a time requiring heightened awareness on the part of the defendant's employees of the risk that food might be dropped in the hallway -- especially since the hallway was being traversed not merely by able-bodied visitors, but also by elderly and infirm residents for whom a slip and fall hazard would pose a particularly serious risk. We also remind the Court that, at the time of Mrs. Markowitz's fall, three of the defendant's employees were engaged in a conversation in the immediate vicinity, and that one of them was standing within inches of where the grape had fallen on the floor, with her back to the hallway, ignoring the risk. Just as the grape was there to be seen by Mrs. Markowitz, it was there to be seen by any one of the three employees, and certainly by the employee at whose feet it had been dropped.

Given the heightened awareness required by the nature of the risk, we believe that a jury of reasonable persons could permissibly conclude that, whether the grape was actually seen or not, at least one of these employees *should have* been observing the passage of the residents traversing the hallway after the lunch hour and *should have* seen the grape when it fell, and that the defendant was therefore on at least constructive notice of the presence of the grape at the time Mrs. Markowitz slipped and fell. The defendant's employees owed Mrs. Markowitz the duty of reasonable care under the circumstances. They were not free to ignore what, in the exercise of reasonable care, they plainly *should have* anticipated and seen under the circumstances, and we therefore believe that a jury question was presented on the notice

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issue as well.

If this case had arisen across the county line, in Broward County, we believe that this contention would have prevailed. In *Greenleaf v. Amerada Hess Corp.*, 626 So.2d 263, 263 (Fla. 4th DCA 1993), in an opinion written by Justice Pariente, a gas station customer slipped and fell in a puddle of oil that "was only five to six feet from the glass door of the mart where [the defendant's] employee could potentially see the spill . . . ." Summary judgment was entered against the plaintiff because, as in the instant case, she was unable to prove actual knowledge of the existence of the spill, or that the spill had been on the ground long enough to provide constructive notice. The Fourth District reversed, holding *inter alia* that "the fact that an employee may be able to see the location of a puddle from his or her workplace has been held to be some circumstantial evidence of constructive knowledge of the condition's existence." *Id.* at 264.

Unfortunately, the Third District explicitly disagreed with this statement in *Miller v. Big C Trading, Inc.*, 641 So.2d 911, 911 (Fla. 3d DCA), *review denied*, 650 So.2d 990 (Fla. 1994):

> . . . In reaching this conclusion [that the presence of employees "nearby" when the slip and fall occurred cannot serve as proof of constructive notice], we disagree with the statement in *Greenleaf v. Amerada Hess Corp.*, 626 So.2d 263, 264 (Fla. 4th DCA 1993) . . . :
>
> > the fact that an employee may be able to see the location of a puddle from his or her workplace has been held to be some circumstantial evidence of constructive knowledge of the condition's existence.

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In the instant case, three of the defendant's employees were engaged in a conversation in the immediate vicinity of the fall, and one of them was standing within inches of the grape on which Mrs. Markowitz slipped and fell. Relying upon *Greenleaf*, we urged the district court to hold that, because the grape was just as open to visual observation by the defendant's three employees as it was to Mrs. Markowitz at the time of her fall, a fact question was presented on the issue of constructive notice.

The district court rejected our reliance upon *Greenleaf* and relied on *Miller* instead:

> We affirm the entry of Final Summary Judgment because the Markowitzes are unable to prove that the nursing home had actual or constructive knowledge of the spilt grape. See Miller v. Big C Trading, Inc., 641 So.2d 911 (Fla. 3d DCA 1994) . . . . There is 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. . . .

736 So.2d at 776. In effect, the district court concluded that ignorance is a defense in a slip and fall case, even where the circumstances are such that, in the exercise of reasonable care, the defendant should not have been ignorant. That makes no sense to us.

It would also have made no sense to the First District, which has aligned itself with the Fourth:

> . . . The area of the fall was in clear view of Cracker Barrel employees, since they traversed it regularly on their way in and out of the kitchen. If a jury were to believe Thoma's

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> description of the liquid as covering an area 1 foot by 2 feet, it might also be convinced that Cracker Barrel employees, in the exercise of due diligence, should have noticed the liquid before the accident. . . .

Thoma v. Cracker Barrel Old Country Store, Inc., 649 So.2d 277, 278-79 (Fla. 1st DCA 1995).

The question that remains is which of these conflicting authorities is correct. We respectfully submit that there is only one sensible answer to that question, especially when the broader context in which it arises is examined. When a *plaintiff*, like Mrs. Markowitz, fails to see a slip and fall hazard which is there to be seen, constructive notice of the hazard to the plaintiff is simply taken for granted, and a fact question is nearly *always* presented on the issue of whether the plaintiff was a contributing negligent cause of his or her own injuries. *See, e. g., Chambers v. Southern Wholesale, Inc.*, 92 So.2d 188 (Fla. 1956); *Metropolitan Dade County v. Yelvington*, 392 So.2d 911 (Fla. 3d DCA), *review denied*, 389 So.2d 1113 (Fla. 1980); *Pittman v. Volusia County*, 380 So.2d 1192 (Fla. 5th DCA 1980); *Bryant v. Florida Inland Theatres, Inc.*, 274 So.2d 249 (Fla. 2d DCA 1973); *Landry v. Sterling Apts., Inc.*, 231 So.2d 225 (Fla. 4th DCA 1969), *cert. denied*, 238 So.2d 107 (Fla. 1970); *Maas Bros., Inc. v. Bishop*, 204 So.2d 16 (Fla. 2d DCA 1967).

Why should the rule be any different when the slip and fall hazard is there to be seen by two employees of the defendant standing within feet of the hazard, and by a third employee of the defendant standing within inches of it? The rule plainly should *not* be different, because the means of knowledge of the hazard are *identical*

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to both the plaintiff and the defendant in that circumstance. Surely the law should make more sense than it presently does in the Third District -- and we respectfully urge the Court to resolve the conflict in favor of Justice Pariente's far more sensible resolution of this frequently recurring question, and to quash this aspect of the district court's decision as well.

VI.
CONCLUSION

It is respectfully submitted that a jury question was presented on the issue of the defendant's negligence in at least two respects, and that the district court therefore erred in affirming the defendant's summary final judgment. And even if only one of our two theories of liability presents a jury question, the result should be the same. The district court's decision should be quashed, and the cause should be remanded to the district court with directions to reverse the defendant's judgment and to remand the cause for further proceedings.

Respectfully submitted,

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By: Joel D. Eaton
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 22nd day of November, 1999, to Angela C. Flowers, Esq., Kubicki Draper, P.A., City National Bank Bldg., PH, 25 West Flagler Street, Miami, FL 33130.

By: Joel D. Eaton
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