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' REPLY BRIEF ON THE MERITS

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CERTIFICATE OF TYPE STYLE

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I.
STATEMENT OF THE CASE AND FACTS

In its restatement of the case and facts, the defendant purports to supply several "additions" to our initial statements of the case and facts. For the most part, however, the defendant's restatement simply rehashes our initial statements. The only true "additions" to our statements prove no more than what we conceded at the outset -- that we were unable to develop any evidence (1) of how long the grape had been on the floor, or (2) of any deficiencies in the defendant's regular floor maintenance procedures. The additional facts supplied by the defendant therefore add nothing of any relevance to the issue to be decided here -- and we stand by the adequacy of our initial statements.[1/]

II.
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.

[1/] At one point in its restatement, the defendant contends that we acknowledged in our motion for rehearing in the trial court that "this is not a constructive notice case" (respondent's brief, p. 7). Although the defendant does not thereafter parlay this observation into any type of waiver argument, we should address it nevertheless because it is misleading. Read in context, the statement from which the observation was drawn was to the effect that we were not contending that this was the type of constructive notice case which depended upon proof of how long the grape had been on the floor (R. 101-02). We did contend, however, that the defendant was on constructive notice of the grape because of the presence of three employees who had the same opportunity to observe the grape that Mrs. Markowitz had (R. 77-79).

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

In our initial brief, we argued that, viewed in the proper light, the evidence will permit a jury finding that the defendant's "method of operation" was negligent -- i. e., that the defendant failed to take reasonably prudent precautions to reduce, minimize, or eliminate a reasonably foreseeable risk that slip and fall hazards would occur in a heavily trafficked area of its facility. In the very first paragraph of its argument, the defendant reveals that it misunderstands our argument: " . . . 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 . . . ." (respondent's brief, pp. 10-11). Most respectfully, we asserted no such thing. Our position was, and is, that the evidence presents a question of *fact* on the issue of the defendant's negligence, a question which *cannot* be decided "as a matter of law." It is the defendant who must convince this Court that its "method of operation" was *not* negligent, *as a matter of law* -- and failing that, we are entitled to a quashal of the district court's decision.

Reduced to its essentials, it is the defendant's position that our theory of liability, negligent "method of operation," represents a "heightened standard of care" requiring "constant maintenance and supervision" which is applicable only in "place of amusement" cases or cases in which multiple prior similar incidents can be proven. We disagree with all of these assertions. First, we are not asking this Court to

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recognize a "heightened standard of care." That premises owners owe their invitees the *ordinary* duty of "reasonable care under the circumstances" is already thoroughly established. All that we have asked the Court to recognize is that, on the evidence in this case, a jury of reasonable persons could permissibly find that the defendant breached that perfectly ordinary standard of care.[2/]

Second, we are not asking the Court to impose a duty of "constant maintenance and supervision" on the defendant. We have *not* contended, as the defendant claims, that the defendant was required to establish an "ongoing patrol of every inch of the floor" (respondent's brief, p. 20). And we have *not* contended, as the defendant claims, that the defendant "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" (respondent's brief, p. 23).

Our contention is simply that, under the circumstances, and given the fact that residents of nursing homes are elderly, infirm in varying degrees, generally unable to take care of themselves adequately, and likely to spill food because of their

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[2/] The defendant asserts that we were required to "establish that defendant *owed a duty* to prevent its residents from carrying food from the dining room absent the assistance or supervision of staff . . . ." (respondent's brief, pp. 17-18; emphasis supplied). This is a misconception of the issue. The duty owed to an invitee is a general one, the duty of "reasonable care under the circumstances"; whether the defendant's "method of operation" was a breach of that general duty arises under the "breach of duty" element of the tort, not the duty element of the tort.

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diminished balance, strength, and equilibrium, a reasonably prudent nursing home operator would not have a policy permitting its residents to carry food from the dining room, unassisted, through perhaps the most heavily trafficked area in the entire facility. And there is expert testimony in the record establishing that the defendant's lax policy was contrary to prevailing standards in the industry -- testimony that the defendant has essentially ignored in its brief.[3/] 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 testimony cannot fairly be ignored in analysis of the question presented here.

Third, the theory of liability in issue here, negligent "method of operation," is simply not limited to "place of amusement" cases. The duty that a landowner owes to its invitees is a general duty -- to exercise reasonable care under the circumstances

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[3/] The defendant's only response to the expert's affidavit is that it contains an "impermissible legal conclusion," citing to *Town of Palm Beach v. Palm Beach County*, 460 So.2d 879 (Fla. 1984) (although largely a matter of semantics, an expert's opinion should be phrased in terms of departure from reasonable standards in relevant industry rather than directly utilizing the word "negligent"). Because an objection on this ground in the trial court would have allowed us to rephrase the expert's affidavit to meet the objection, the defendant's failure to object to the expert's affidavit on this ground in the trial court (or to raise this issue in the district court of appeal) precludes it from challenging the semantics of the affidavit here. *See, e. g., Wong v. Crown Equipment Corp.*, 676 So.2d 981 (Fla. 3d DCA), *review dismissed*, 683 So.2d 486 (Fla. 1996); *DeMendoza v. First Federal Savings & Loan Ass'n of the Palm Beaches*, 585 So.2d 453 (Fla. 4th DCA 1991); *Hutchinson v. Miller*, 548 So.2d 883 (Fla. 5th DCA 1989); *E. J. Associates, Inc. v. John E. & Aliese Price Foundation, Inc.*, 515 So.2d 763 (Fla. 2d DCA 1987); *Herold v. Computer Components International, Inc.*, 252 So.2d 576 (Fla. 4th DCA 1971); *Bernard Marko & Associates, Inc. v. Steele*, 230 So.2d 42 (Fla. 3d DCA 1970).

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to keep its premises in a reasonably safe condition for their intended use. The law does not establish one duty for "place of amusement" cases and another duty for places that are unamusing, like grocery stores and nursing homes. *All* landowners owe the same general duty of care to all their invitees, regardless of the nature of their various business pursuits. To be sure, the size of the crowd generated by the landowner's business activity may be a relevant consideration, but it is simply one of the "circumstances" to be considered in determining the quintessentially factual question of whether the landowner exercised "reasonable care under the circumstances." It is not a factor that defines the nature of the duty itself. And a simple hypothetical should make it clear that limiting the "method of operation" theory of liability to "place of amusement" cases alone would make no sense at all.

Assume for example that, to promote sales, a "Toys R Us" store handed out a can of silly string, an open container of soap bubble solution, and a bubble blower to all young children as they *entered* the store. Given the immaturity and proclivities of children, slip and fall hazards arising out of this policy would be foreseeable -- indeed, perfectly predictable. If a customer were then to slip and fall in a puddle of soap solution or on a pile of silly string that store employees did not immediately detect, would this Court hold that the plaintiff had no cause of action for the store's obviously negligent business practice absent actual or constructive notice of the puddle or pile itself? We think not. A negligent "method of operation" is a negligent "method of operation" wherever it occurs, so long as it creates a "foreseeable zone of risk" which could be minimized or eliminated by the simple exercise of reasonable

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care.[4/]

The instant case is not much different than our hypothetical. Just as children lack the mental maturity to safely carry such slip and fall hazards around "Toys R Us," the elderly residents of the defendant's nursing home lack the physical capability to safely carry similar slip and fall hazards through heavily trafficked areas of the facility. To permit them to carry food from the dining room to their rooms is simply to invite exactly the type of serious injury that occurred in this case; and it ought not be an absolute defense to the plaintiffs' negligence action that the defendant's nursing home was not a "place of amusement," or that the three employees who were located within inches and a few feet of where the food was dropped did not actually see it on the floor before the plaintiff encountered it with her shoe. The law plainly should make more sense than that.

Fourth, the theory of liability in issue here, negligent "method of operation,"

[4/] In this connection, we commend to the Court Judge Lawrence's dissenting opinion in *Rowe v. Winn Dixie Stores, Inc.*, 714 So.2d 1180 (Fla. 1st DCA 1998), *review denied*, 731 So.2d 650 (Fla. 1999). The majority's error in *Rowe* was explained in our initial brief (at p. 13, n. 4), so we will not replow that ground here. Also in this connection, we do not agree with the defendant's assertion that the Fourth District recently rejected the "method of operation" theory of liability in *Soriano v. B & B Cash Grocery Stores, Inc.*, 24 Fla. L. Weekly D1116 (May 5, 1999), *review granted*, ___ So.2d ___ (Fla. Oct. 19, 1999). As we read that decision, the district court concluded that the evidence was insufficient to support a verdict based on that theory of liability. That the "method of operation" theory is alive and well in the Fourth District is illustrated by its more recent decision in *Murphy v. Boca Raton Hotel & Club, Limited Partnership*, 24 Fla. L. Weekly D2571 (Fla. 4th DCA Nov. 17, 1999), in which it concluded that the resort's failure to remove browning palm fronds from trees on its premises would support a finding of liability for negligence where a palm frond fell on and injured an invitee.

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is simply not limited to cases in which "recurring or ongoing problems" represented by "prior similar incidents" have been demonstrated, as the defendant contends. To be sure, some of the numerous "method of operation" cases cited in our initial brief involve the factual circumstance of "prior similar incidents," but the prior incidents were not a factor upon which the existence of the duty turned; instead, they served as no more than proof of foreseeability in those cases. But as we explained in our initial brief, proof of "prior similar incidents" is not a *prerequisite* to a finding of foreseeability. An incident can 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. And this Court said precisely that in *Springtree Properties, Inc. v. Hammond*, 692 So.2d 164 (Fla. 1997) -- a decision that the defendant has simply ignored in its brief.

This proposition is neither novel nor new:

> The error into which the District Court fell was the *subjective* application of the *objective* test of foreseeability as pronounced in the Cone case. The language in question was intended to convey the notion that foreseeability depends in part on whether the *type* of negligent act involved in a particular case has so frequently previously resulted in the *same type* of injury or harm that "in the field of human experience" the same *type* of result may be expected again. The test was not intended to, nor do we think it does, imply that a plaintiff, in order to recover in a negligence action, must prove that the *particular* causative act had frequently occurred before, and that it had frequently resulted in the same *particular* injury to the plaintiff. Yet this is the application which was given to the

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> rule in the quoted portion of the District Court of Appeal's opinion. Without resorting to extreme example, a moment's reflection will bring to mind many circumstances where the application of such rule would preclude recovery by a plaintiff, even though the injury might be readily foreseeable.

Pinkerton-Hays Lumber Co. v. Pope, 127 So.2d 441, 442-43 (Fla. 1961).

To the same effect is *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So.2d 520, 522-23 (Fla. 1980):

> . . . The question whether the harm that occurs was within the [foreseeable] scope of the risk created by the defendant's conduct may be answered in a number of ways.
>
> First, the legislature may specify the type of harm for which a tortfeasor is liable. *See Vining v. Avis Rent-A-Car*, above; *Concord Florida, Inc. v. Lewin*, 341 So.2d 242 (Fla. 3d DCA 1976)[,] *cert. denied*[,] 348 So.2d 946 (Fla. 1977). Second, it may be shown that the particular defendant had actual knowledge [because of "prior similar incidents"] that the same type of harm has resulted in the past from the same type of negligent conduct. *See Homan v. County of Dade*, 248 So.2d 235 (Fla. 3d DCA 1971). Finally, there is the type of harm that has so frequently resulted from the same type of negligence that "'in the field of human experience' the same *type* of result may be expected again." *Pinkerton-Hays Lumber Co. v. Pope*, 127 So.2d 441, 443 (Fla. 1961) (emphasis in original).

Most respectfully, proof of "prior similar incidents" is simply not a prerequisite to proof of a negligent "method of operation"; if a slip and fall incident is foreseeable as a matter of common sense or common human experience (as we think all slip and fall incidents indisputably are), then a slip and fall incident caused by a negligent "method of operation" is actionable, whether preceded by a "prior similar incident"

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or not. Landowners simply do not get "one free slip and fall" before their duty to exercise reasonable care for the safety of their invitees arises, as the defendant appears to be suggesting here.[5/]

When all is said and done, there is really only one, very narrow question before the Court in this sub-issue on appeal. Is the Court prepared to hold that the defendant's lax policy -- permitting its elderly, infirm nursing home residents to carry food from the dining room through heavily trafficked areas of the facility over a marble-type floor -- is *not* negligent *as a matter of law*? If it is prepared to record that proposition for posterity in the Southern Reporter, then we cannot prevail on this sub-issue. But before it can record that proposition for posterity, it must grapple with and explain away the following settled proposition of Florida law:

> 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

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[5/] Besides, as we pointed out in our initial brief, the foreseeability of the incident in suit was spread all over the record in this case. It was also all but conceded by the defendant, since the defendant did not move for summary judgment on this ground. And because the defendant did not move for summary judgment on this ground, neither the trial court nor the district court had any authority to dispose of the case summarily on this ground. The defendant misunderstands our argument on this point when it contends that, because we asserted a negligent "method of operation" theory below, we "are wrong in [our] contention that the trial and appellate court were precluded from entering summary judgment on the issue of negligent operation" (respondent's brief, p. 15). We made no such contention. Our quarrel was with the district court's decision to affirm 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 -- a ground which is nowhere asserted in the defendant's motion for summary judgment.

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> precautions are reasonably required in the exercise of a particular duty of due care'" . . .

Nichols v. Home Depot, Inc., 541 So.2d 639, 641-42 (Fla. 3d DCA 1989), quoting *Orlando Executive Park v. Robbins*, 433 So.2d 491, 493 (Fla. 1983).

On the facts in the instant case, we respectfully submit that this "thoroughly settled" "general principle" should control. Whether the defendant's "method of operation" was or was not negligent is simply undeterminable as a matter of law. A jury should be permitted to determine that quintessentially factual question, as the plaintiffs' constitutional right to a jury trial of the facts plainly requires -- and we respectfully submit once again that this aspect of the district court's decision should be quashed. *See Hernandez v. Motrico, Inc.*, 370 So.2d 836, 838 (Fla. 3d DCA 1979); *Easton-Babcock & Assocs., Inc. v. Fernandez*, 706 So.2d 916, 919 (Fla. 3d DCA 1998).

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

Reduced to its essentials, the defendant's argument is 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. The two decisions upon which we have relied -- *Greenleaf v. Amerada Hess Corp.*, 626 So.2d 263 (Fla. 4th DCA 1993), and *Thoma v. Cracker Barrel Old Country Store, Inc.*, 649 So.2d 277 (Fla. 1st DCA 1995) -- say what they say, and we leave a reading of them to the Court. We are confident that they cannot be distinguished from the instant case

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on the ground that they involved puddles rather than grapes -- because, clearly, the nature of the slip and fall hazard, its size, and its discernability are simply facts to be assessed by the finder-of-fact in determining whether the defendant exercised reasonable care under all the circumstances.

We also remain convinced that, if Mrs. Markowitz can be found comparatively negligent for failing to detect the grape at her feet, as she most certainly can be under the present state of the law, then a finder-of-fact ought to be able to make the same common sense finding with respect to the employee of the defendant who failed to detect the grape at *her* feet.[6/] The law does not *require* that all similarly-situated persons be treated alike, but it ought to strive for logic, consistency, and even-handedness whenever it can -- and where the means of knowledge of a slip and fall hazard are *identical* to both the plaintiff and the defendant, it makes no sense to us at all that ignorance can amount to culpability on the part of the plaintiff, but amounts to an absolute defense to the defendant. To this aspect of our argument, the defendant has devoted no response at all. We therefore respectfully submit once again that this aspect of the district court's decision should be quashed as well.

[6/] To make the point another way, assume that the defendant's employee had taken a step or two, slipped and fell on the grape, and then sued the person who dropped the grape (or the defendant, if it had failed to obtain the requisite workers' compensation coverage). In such a case, a jury could certainly return a finding of comparative negligence against her. If a jury could find her negligent for failing to detect the grape in that case, it ought to be able to find her negligent for failing to detect the grape in this case -- and the fact that it was Mrs. Markowitz who fell in this case, rather than the employee whom she grabbed in an effort to prevent her fall, should not be dispositive of the issue of the employee's negligence.

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III.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 7th day of January, 2000, to Angela C. Flowers, Esq., Kubicki Draper, P.A., City National Bank Bldg., PH, 25 West Flagler Street, Miami, FL 33130.

Respectfully submitted,

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