

SUPREME COURT OF FLORIDA

EVELYN OWENS and JOHN J.
OWENS, her husband,
Petitioners,

CASE NO:95,667

5 DCA CASE NO: 98-00683

V.

PUBLIX SUPERMARKETS, INC.,
Respondent.

AMENDED PETITIONER'S INITIAL BRIEF ON MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

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PRELIMINARY STATEMENT

The petitioners were plaintiffs in a personal injury lawsuit in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida and were the appellants in the Fifth District Court of appeal. Respondent was the defendant in said personal injury lawsuit in the trial court and was Appellee in the Fifth District Court of appeal. In this brief the petitioners will be referred to as "Owens", "plaintiffs" or "appellants". Respondent will be referred to as "Publix", "defendant" or "appellees".

The following symbols are used in this brief:

"R." Record on appeal filed with District Court.

The "R." will be followed by the correct pagination.

"Tr." Transcript of the trial proceedings.

"Vol." Volume of the transcript of trial proceedings filed with District Court .

The "Tr." will be followed by the correct pagination and volume number.

STATEMENT OF THE FACTS AND THE CASE

On March 4, 1995, Evelyn Owens was a part time employee of Publix Super Markets, Inc.. Her full time employment was with the Osceola County School Board. Upon completion of her duties at Publix on that day, she "clocked out", however, before leaving, she decided to pick up a few things, that is, do some shopping before departing for home. (R.50)(Tr. 104 Vol.1)

In that she agreed to give a co-worker a ride home she was in the company of one Rosalina Toledo. While proceeding down an aisle and looking at the merchandise on the shelves she slipped and fell on what was later identified as a small part of a banana. (R.50) (Tr 92-92 Vol. 1) An independent witness, Jean Ross, was in close proximity to Evelyn Owens at the time of the slip and fall. She testified it was a small piece of slightly discolored banana. (Tr. 84, 92-94 vol. 1) By discovery requests, Publix admitted Mrs. Owens was an invitee at the time of her slip and fall.

(R.12) As a part time employee Evelyn Owens had no benefits other than her hourly pay rate.

Following the fall, Mrs. Owens was transported to the St. Cloud Hospital Emergency Room, where she was treated and released. She was physically unable to return to work, at Publix, as well as the school board for several weeks. She was

unable to work for Publix during the summer recess of the School Board as she had in prior years. She did not return to work for Publix. (Tr. 121 vol. 1)

On March 4, 1995, the date of the slip and fall, a "Notice of Injury" was prepared and filed by Publix with the Florida Department of Labor and Employment Security, Division of Workers Compensation. On March 21, 1995, "a Notice of Denial of Benefits" was sent to Evelyn Owens. Publix admitted by discovery Requests For Admissions that Workers Compensation Benefits were denied Evelyn Owens

(R.14).

In response to the original complaint, Publix filed its Answer and Affirmative Defenses on April 11, 1996, and requested Mediation. Plaintiff responded with a Motion for Relief from an Order of Referral to Mediation due to the conduct of the adjuster for Publix. (R.30). Publix is a self Insurer up to \$500,000.00 and adjusts claims with its own adjuster agents/employees, (R.45).The Original complaint was amended several times. On one occasion, to add John J. Owens, as a Plaintiff for his loss of consortium claim, to meet the requirements of FS 627.7403. Other amendments were made by reason of information obtained through discovery efforts during the course of the litigation. It was an arduous task to obtain information by

discovery procedures from Publix in that their attorneys objected to most of the pertinent discovery requests of Plaintiff, or made evasive responses (R.18, R.21 & R.25). Motions to compel were necessary and resulted in orders requiring Publix to comply with many of Plaintiff's discovery requests and to make better responses.

(R.28, 32 & 39).

Notwithstanding the admissions of Publix that Evelyn Owens was an Invitee (R.25) and that Workers Compensation Benefits had been Denied (R.13), Publix filed a Motion for Summary Judgement, on September 11, 1996, contending that "there was no genuine issue of material fact in that Plaintiffs injuries occurred during the course and scope of her employment." (R.35) On hearing on November 18, 1996, the court denied the motion. (R.63), and noted that said conduct might be Bad

Faith. (R.147).

On September 17, 1996, Plaintiff, Evelyn Owens, filed a Motion to amend the complaint to add the derivative consortium claim of her husband and to add a count for "Bad Faith" predicated on the conduct of Publix, including the denial of Workers

Compensation Benefits to Evelyn Owens and thereafter seeking a Summary Judgement upon Workers Compensation Immunity. (R.37) The court allowed the

amendment as to the consortium claim, however the amendment to allow a claim for

"Bad Faith" was denied. (R.47).

On May 22, 1997, the court allowed Evelyn Owens to again amend her complaint.

(R.47). It is The First Amended Complaint that the cause proceeded to trial. The

First Amended Complaint is attached to the Motion to Amend Complaint (R.65).

In the First Amended Complaint, Evelyn Owens, alleged in paragraphs 4 & 5 her

two (2) theories of liability of Publix for her injuries. Simply stated, the length of

time the substance was on the floor as well as foreseeability and failure to warn.

(R.65).

Publix filed its answer and affirmative Defenses to the First Amended Complaint on

June 5, 1997. (R.68). Publix once again raised the defense of Workers

Compensation Immunity notwithstanding the court had previously rejected that

defense. (R.69)

On August 6, 1997, pursuant to Order of Court Publix filed Supplemental Answers

to Interrogatories, whereby answers regarding prior incidents were expanded upon,

revealing that Publix had experienced an average of one or more slip and falls per month at the St. Cloud Store for the period of time reflected in the answer. (R.77).

On August 1, 1997, Evelyn Owens filed a Motion to Strike the affirmative Defense of Workers Compensation Immunity. (R.70). That Motion was Granted by the

Court on September 16, 1997.

On August 12, 1997, the court entered an Order setting the action for jury trial during a trial period in January 1998. A Joint Pretrial Stipulation was filed on January 15, 1998. (R.80). In that stipulation Publix would not stipulate to the scope of employment of Evelyn Owens at the time of her injury (R.126). Publix did so notwithstanding its prior admissions and court rulings on that issue.

The case came on for jury trial on Tuesday, January 20, 1998. On that morning Publix presented a Motion in Limine for the first time. (R.133). Among other requests, Publix sought to exclude any evidence relating to the spurious Workers Compensation Defense; the Sexual Discrimination suits brought against Publix by employees; the fact that Evelyn Owens' lawyer was formerly a Circuit Court Judge (R.134). Publix also filed an objection to the Notice to Produce At Trial served January 13, 1998, and filed by Evelyn Owens on January 20, 1998. (R.136). The

Notice to Produce At Trial related to prior incidents in the subject store and the total number of slip and fall incidents reported to Publix. (R.137). In its objection, among the grounds asserted by Publix was, that the Notice to Produce at trial was "unduly burdensome" (R.136). Publix essentially ignored the Notice to Produce at trial which by Rule has the force and effect of a subpoena.

A jury was selected and sworn and evidence was presented on January 20, 1998. On the second day of trial Evelyn Owens requested the court reconsider the Motion in Limine as to the sexual discrimination law suit against Publix for the reason that Evelyn Owens had received a notice on January 20, 1998, that she was a member of the class and was entitled to an award from Publix (Tr.3 vol. 2). The request was Denied (Tr.4 vol. 2).

Before presenting testimony that morning, Evelyn Owens also requested the court allow a demonstration using a fresh banana to demonstrate to the jury the length of time it would take to cause a small piece of peeled banana to discolor. (Tr.12 vol. 2). The request was denied.

At the conclusion of Plaintiffs' case, the court granted a defense motion for a Directed Verdict in favor of Publix (R.139 Tr. 79-88 vol. 2). Thereafter a Final

Judgement was entered on February 10, 1998, in favor of Publix (R.137). The Motion of Publix to assess attorney fees was Denied by the court. The request of Publix to assess costs was Granted.

A Notice of Appeal was timely filed by Evelyn Owens with the Fifth District Court of Appeal. That Court in its panel decision reversed the decision of the trial court and remanded for trial.

In addition to a Motion for Rehearing and Clarification, and a Motion for Certification, Publix also filed a Motion for the extraordinary relief of a Rehearing En Banc pursuant to Fla. R. App. P. 9.331(d) which included a required statement of counsel to wit:

“ I express a belief based upon a reasoned and studied professional judgement that the panel decision is of an exceptional importance”(emphasis added).

Thereafter a Re-Hearing En Banc was Granted by the Fifth District Court of Appeals on March 12, 1999 which reversed the panel Decision. The other Motions of Publix were denied.

Petitioners timely filed their Motion for Rehearing which was Denied by Order filed April 22, 1999. A timely Notice to Invoke discretionary jurisdiction by this

Honorable Court was filed by petitioners. This Honorable Court accepted jurisdiction on September 16, 1999.

SUMMARY OF THE ARGUMENT

Evelyn Owens suffered personal injuries in a slip and fall incident at a Publix Store located in St. Cloud, Florida. Although a part time employee she had previously "clocked out" and was shopping when the slip and fall occurred.

By way of discovery, Publix admitted Evelyn Owens was an invitee and that Publix had denied Workers Compensation benefits to her. Notwithstanding, Publix raised as a defense, Workers Compensation Immunity, by Motion For Summary Judgement. The motion was denied. Publix again raised the same defense in response to the First Amended Complaint of Evelyn Owens. That affirmative defense was stricken on motion of Evelyn Owens prior to trial.

The morning of the first day of trial, Publix filed a Motion in Limine which the court granted. By that ruling Evelyn Owens was precluded from presenting evidence of

Publix raising the Workers Compensation Immunity defense as well as other evidentiary matters and limiting voir dire examination. The court also sustained the

Objection of Publix to a Notice to Produce at Trial filed by Evelyn Owens of information dealing with all "slip and fall" incidents experienced in all Publix stores.

During the trial Evelyn Owens requested the opportunity to conduct a demonstration

to show the jury how much time was required to cause a small piece of peeled

banana to discolor. The request was denied. This would have corroborated

testimony of an eyewitness to the occurrence and the characters of the substance

upon which Evelyn Owens slipped and fell.

Because of the Pre-Trial ruling evidence obtained by discovery only was introduced

at trial by Evelyn Owens of prior slip and fall incidents. For the period of time

given, in answers to interrogatories this equated to one or more a slip and falls a

month.

At the close of Evelyn Owens' case, the court granted the Motion of Publix for a directed verdict although counsel for Evelyn Owens requested that the court reserve

ruling on said motion.

Evelyn Owens, submits that the trial court erred when it granted the Motion of

Publix for Directed Verdict. The trial court accepted the "inference on an inference" argument of Publix. The trial court on the one hand excluded relevant evidence by its rulings and thereafter agreed with Publix that the evidence the court allowed to be presented was insufficient to go to the jury.

The Trial court further erred when it ignored the second theory of liability alleged by Owens of "foreseeability" and a "failure to warn" of a dangerous condition, predicated upon the number of slip and falls experienced at the St. Cloud Store obtained by way of discovery..

It is the position of Owens that the Fifth District Court of Appeal erred in two respects. Initially, the panel decision of the court failed to consider the second theory of liability of "foreseeability" and "failure to warn". Secondly, and the more serious error, was the granting of a rehearing en banc when there was no basis in the motion, the record or in fact. That court apparently granted a rehearing en banc solely upon the certification of the attorney for Publix that the case was one of great importance.

Petitioners Owens look to this court to correct the designated errors as well as to clarify the law of Florida regarding the "inference on an inference" theory relied

upon by Publix.

It is the position of Petitioners Owens that such an argument should be made to the jury as apposed to being applied by the trial court or appellate court, to reverse a trial court or by an appellate court en banc to reverse a panel decision.

ARGUMENT

POINTS ON APPEAL

POINT I

**THE TRIAL COURT ERRED BY GRANTING MOTION OF
DEFENDANT FOR DIRECTED VERDICT AT THE CLOSE
OF PLAINTIFFS CASE**

POINT II

THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE

**SECOND THEORY OF LIABILITY OF PLAINTIFF OF
"FORESEEABILITY" AND "FAILURE TO WARN" OF A
DANGEROUS CONDITION**

The power to direct a verdict in a slip and fall case should be exercised with caution, and it should never be granted unless the evidence is of such a nature that under no view which the jury might lawfully take of it, favorable to the adverse party, could a verdict for the latter be upheld. Marlow v. Food Fair Stores of Florida, Inc., 284 So. 2d 490 (Fla. 3rd DCA 1973) and cases cited therein.

Without a doubt, the most devastating discretionary decision a trial judge can make in the course of a jury trial with reference to a Plaintiff is the granting of a defense motion for directed verdict. Devastating for the reason that neither the same perceptions of the trial, the same momentum of the trial, the same jury, nor the same approach to the evidence can ever be acquired again by the Plaintiff. What was then present as to all aspects of the trial is lost forever. Devastating also to the Plaintiff by being denied access to the jury as well as and the time and expense involved.

Without question, the most reasonable, prudent and fair discretionary decision for a trial judge to make in such an instance is to reserve ruling on a defense motion for directed verdict. This avoids the time and expense and judicial labor of an appeal

and retrial, if ordered.

If a case before a trial court is as weak as may be perceived by the trial judge, the jury will usually have the same perception and return a defense verdict, and relieve the trial judge of a post trial decision of the motion. If the trial judge in this case had reserved ruling and a defense verdict rendered, Evelyn Owens would have had her "day in court" and a jury of her peers would have told her, by their verdict, that she had no case. That did not occur. Had that occurred this court would not have this matter under consideration. This position was well stated in the opinion of Guitierrez v. L. Plumbing, Inc., 516 So. 2d 87 (Fla. 3rd DCA 1987), wherein the

court stated as follows:

"....Trial judges who are inclined to grant directed verdict at conclusion of case should instead reserve ruling thereon, allow jury to return verdict, and thereafter rule on motion, so that if case is reversed on appeal trial judge's ruling results in reinstatement of jury verdict rather than remand for unnecessary new trial."

Evelyn Owens further contends the trial judge erroneously precluded admissible evidence, and/or overlooked the evidence or failed to consider the evidence and all reasonable inferences there from in the light most favorable to Plaintiff. The record evidence is that Evelyn Owens slipped on a small piece of discolored banana. Had the demonstration requested to be conducted by Evelyn Owens been allowed; that

demonstration would have shown to the jury the length of time required to cause a small piece of peeled banana to become slightly discolored. However, Evelyn Owens' complaint did not rely solely upon the length of time the slightly discolored banana was on the floor.

Among the arrows in the quiver of liability in the complaint of Evelyn Owens was that Publix failed to warn of a dangerous condition of which Publix had notice by reason of the number of slip and fall occurrences in its store(s). Limited information of this nature was actually introduced into evidence and Evelyn Owens believes there would have been more of this type information available to introduce into evidence had the Notice to Produce at Trial been complied with by Publix and/or required by the court. The court erroneously sustained the objection of Publix to the Notice to Produce at trial. Publix was essentially allowed to ignore the Notice.

As this court is well aware the law of Florida is such that, in order to recover for injuries received in a slip and fall occurrence, a Plaintiff must show either that the storekeeper had actual notice of the condition or that the dangerous condition

existed for such a length of time, that in the exercise of ordinary care the storekeeper should have known it. K-Mart Corporation v. Dwyer, 656 So. 2d 134 (Fla. 5th DCA 1995), Thomas v. Cracker Barrel Old Country Store, 649 So. 2d 277, (Fla. 1st DCA 1995), Gonzalez v. Tallahassee Medical Center, 629 So. 2d 945, (Fla. 1st DCA 1993), Winn-Dixie Stores, Inc. v. Marcotte, 553 So. 2d 213, (Fla. 5th DCA 1989), Carls Markets, Inc. v. Meyer, 69 So. 2d 789, (Fla. 1953).

It is equally well known that constructive knowledge of the dangerous condition may be proven by circumstantial evidence. Thomas v. Cracker Barrel Old Country Store, Supra; Silver Springs Moose Lodge v. Orman, 631 So. 2d 1119, (Fla. 5th DCA 1994); Woods v. Winn-Dixie Stores, Inc., 621 So. 2d 710, (Fla. 5th DCA 1993); Gonzalez v. Tallahassee Medical Center, Supra; Altman v. Publix Supermarkets, Inc., 579 So.2d 351 (Fla. 3rd DCA 1991); Nance v. Winn-Dixie Stores, Inc., 436 So 2d 1075, (Fla. 3rd DCA 1983).

A plaintiff, in a negligence action may use evidence of occurrence or non occurrence of prior or subsequent accidents to prove notice of a dangerous character of a condition. Nance v. Winn-Dixie Stores, Inc., supra, (and cases cited therein), as well as to "foreseeability" of the dangerous condition and the "failure to warn". See

Nance v. Winn-Dixie Stores, Inc., supra and Pearce v. Publix Supermarkets, 675 So. 2d 710, (Fla. 3rd DCA 1996) and cases cited therein and Liberty Mutual Insurance Company v. Kimmel, 465 So. 2d 606, (Fla. 3rd DCA 1985).

It is also of significance that, Fla. Std. Jury Inst. (Civ.) 3.5 (f) page 3 reflects a note on its use that, "The final segment of 3.5 (f) marked with an astrix *, is inapplicable when plaintiff does not proceed on a theory of defendant's failure to warn."

The allegations of the complaint and evidence at trial was also directed to “foreseeability” and a “failure to warn”, not only as to the length of time the substance was on the floor and constructive Notice to Publix.

POINT III

THE DISTRICT COURT OF APPEAL FIFTH DISTRICT, ERRED BY GRANTING TO PUBLIX A REHEARING EN BANC THEREBY REVERSING THE PANEL DECISION OF THAT COURT

POINT IV

THE DISTRICT COURT OF APPEAL FIFTH DISTRICT, ERRED BY FAILING TO CONSIDER SECOND THEORY OF LIABILITY OF PLAINTIFFS OF "FORESEEABILITY" AND "FAILURE TO WARN" OF A DANEGEROUS CONDITION.

Petitioners submit that the En Banc Rehearing decision of the Fifth District Court of Appeals in this case not only conflicts with decisions of other district courts legal principles discussed but also conflicts with decisions of other districts and the Supreme Court regarding the authority of a District Court to rehear a case en banc. In the reverse of the foregoing and in that a rehearing en banc is an extraordinary proceeding, petitioner initially presents what they consider is the authority of a district court to rehear a case en banc.

It is without question , and not arguable that the simple desire of an attorney to have the entire district court rehear a case which has been decided contrary to his client's interest cannot be the basis of such authority. Finny vs. State, 420 So. 2d 639, (Fla.

3 DCA 1982), *Nielson v. City of Sarasota* 117 So. 2d 731, (Fla. 1960).

Further, a Motion for Rehearing, standing alone, as opposed to a Motion for Rehearing En Banc, which merely reargues the merits of the case are inappropriate. *Seslow v. Seslow* 625 So. 2d 1248 (Fla. 4th DCA 1993). *Elliott v. Elliott*, 648 So. 2d 135 (Fla. 4th DCA 1994). The Motion filed by respondent for Rehearing En Banc merely re argued the case and should not have been considered by the District Court of Appeal.

The en banc jurisdiction of a District Court of appeal must be based upon the criteria set forth in *Nielson and Finney supra*. As stated in *Nielson* the conflict jurisdiction does not convey to an en banc panel the authority to whimsically select cases for review in order to satisfy some notion that the case would be of such importance as to justify the interest or attention of the full court. To do so would convert the full court into a "court of selected errors" and will result in confusion and uncertainty in the judicial system.

Petitioner suggests that the en banc decision of the Fifth District is nothing more than a "whimsical selection" of a panel decision for review in order to satisfy some notion that the case would be of such importance as to justify the interest or

attention of the full court. Litigants often suffer adverse results under the best circumstances, that is how our system sometimes functions, however, an adverse result should not provide the opportunity to circumvent the traditional and long established procedures designed to provide uniformity and stability to the judicial system of our state.

As to the other point raised herein, other district courts have considered the condition of the substance alleged to have caused the slip and fall as bearing on the critical time span during which the dangerous condition had existed. Woods v. Winn Dixie Stores, Inc., 621 So. 2d 710 (Fla 3rd DCA 1993) (dirt, scuffing or tracks in unidentified substance); Ress v. X-Tra Super Food Centers, Inc., 616 So 2d 110 (Fla 4th DCA 1993). (looked like sauerkraut and it was gunky, dirty and wet and black); Newalk v. Florida Supermarkets, Inc., 610 So. 2d 528 (Fla. 3rd DCA 1992) (oil spots on the floor appeared old); Winn Dixie Stores v. Williams, 264 So. 2d 862 (Fla. 3d DCA 1972) (sticky, dusty and dirty substance); Washington v. Pick-N-Pay Supermarkets, Inc., 453 So. 2d 508 (Fla 4th DCA 1984) (collard greens looked old and nasty); Marlow v. Food Fair Stores, Inc., 284 So 2d 490 (Fla. 3rd DCA 1973) (black looking piece of rotten banana) to mention a few.

All the cases cited as well as the instant case rely upon circumstantial evidence regarding the critical time span during which the dangerous condition existed. The principles expounded by the en banc rehearing decision regarding circumstantial evidence can as easily be applied to each of the above cited cases as well as any other case involving a similar slip and fall. The principles announced in the en banc opinion can be "whimsically" applied to any such case to attain the same conclusion as reached by the en banc opinion.

Perhaps for that reason alone, this court may wish to establish the parameters that will guide all the District Courts of Appeals as well as future litigants under similar factual circumstances, thereby making property owners, such as Publix, responsible for such occurrences and not a circumstance whereby members of the public must "enter and shop at their own risk" as the en banc panel decision has created and fosters.

Petitioners submit that the Fifth District en banc rehearing decision in the instant case was rendered without appropriate authority and otherwise conflicts with the principles of law announced in the above styled cases, and therefore the en banc rehearing decision of the Fifth District Court of Appeal should be quashed, vacated

or set aside and held for naught to be substituted with a decision of this court which stabilizes and clarifies the law of this state regarding the issues presented herein.

CONCLUSION

Based upon the foregoing arguments and authorities cited herein, Petitioners request this court reverse the En Banc rehearing decision of the Fifth District Court of Appeal, reinstate the panel decision of that court as well as correct the other errors cited herein which having occurred in the appellate and trial courts.

Respectfully submitted

B.C. Muszynski

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: Richard Womble, Esq., 201 East Pine Street, 15th Floor, Orlando, Florida 32801-2729 and Michael Hammond, Esq., 201 East Pine Street, 15th Floor, Orlando, Florida 32801-2729, this ____ day of October, 1999 by U.S. Mail.

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