

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 96,235

ELVIA SORIANO and ANGEL
SORIANO,

Petitioners/Plaintiffs,

vs.

B & B CASH GROCERY STORES, INC.,
d/b/a U-SAVE SUPERMARKET

Respondent/Defendant.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Authorities	ii
Statement of the Case and Facts	1
Summary of Argument	5
Argument	7
I. THE FOURTH DISTRICT COURT PROPERLY AFFIRMED THE TRIAL COURT'S DIRECTED VERDICT FOR RESPONDENT BECAUSE PETITIONERS PRODUCED NO EVIDENCE DEMONSTRATING THAT RESPONDENT HAD ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION LEADING TO PETITIONER'S INJURY.	
II. THE FOURTH DISTRICT COURT PROPERLY AFFIRMED THE TRIAL COURT'S DIRECTED VERDICT FOR RESPONDENT BECAUSE PETITIONERS DID NOT ALLEGE A NEGLIGENT METHOD OF OPERATION, AND FURTHER, PRODUCED NO EVIDENCE DEMONSTRATING NEGLIGENCE IN THE OPERATION OF THE STORE LEADING TO PETITIONER'S INJURY.	
Conclusion	29
Certificate of Font Size	30
Certificate of Service	30

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Bates v. Winn-Dixie Supermarkets, Inc.,</u> 182 So. 2d 309 (Fla. 2d DCA 1966)	11, 12
<u>Camina v. Parliament Insurance Company,</u> 417 So. 2d 1093 (Fla. 3d DCA 1982)	19
<u>Colon v. Outback Steakhouse of Florida,</u> 721 So. 2d 769 (Fla. 3d DCA 1998)	19
<u>Food Fair Stores, Inc. v. Trussell,</u> 131 So. 2d 730 (Fla. 1961)	8, 9, 12
<u>Gonzalez v. B & B Cash Grocery Stores,</u> 692 So. 2d 297 (Fla. 4th DCA 1997)	16, 17, 18
<u>Little v. Publix Supermarkets, Inc.,</u> 234 So. 2d 132 (Fla. 4th DCA 1970)	14, 15
<u>Marlowe v. Food Fair Stores of Florida, Inc.,</u> 284 So. 2d 490 (Fla. 3d DCA 1973)	16, 17, 18
<u>Miller v. City of Jacksonville,</u> 603 So. 2d 1310 (Fla. 1st DCA 1992)	7
<u>Montgomery v. Florida Jitney Jungle Stores, Inc.,</u> 281 So. 2d 302 (Fla. 1973)	9, 10
<u>Nielson v. City of Sarasota,</u> 117 So. 2d 731 (Fla. 1960)	12
<u>Publix Super Market v. Sanchez,</u> 700 So. 2d 405 (Fla. 3d DCA 1997)	21, 24
<u>Rowe v. Winn-Dixie Stores,</u> 714 So. 2d 1180 (Fla. 1st DCA 1998)	23
<u>Schaap v. Publix Supermarkets, Inc.,</u> 579 So. 2d 831 (Fla. 1st DCA 1991)	12, 13, 14, 23, 24
<u>School Board of Broward County v. Beharrie,</u> 695 So. 2d 437 (Fla. 4th DCA 1997)	12

<u>Silver Springs Moose Lodge No. 1199 v. Orman,</u> 631 So. 2d 1119 (Fla. 5th DCA 1994)	7
<u>Teate v. Winn-Dixie Stores, Inc.,</u> 524 So. 2d 1060 (Fla. 3d DCA 1988)	19
<u>Tuttle v. Miami Dolphins, Ltd.,</u> 551 So. 2d 477 (Fla. 3d DCA 1988)	7
<u>Wal-Mart Stores, Inc. v. King,</u> 592 So. 2d 705 (Fla. 5th DCA 1991)	7
<u>Winn-Dixie Stores, Inc. v. Guenther,</u> 395 So. 2d 244 (Fla. 5th DCA 1981)	19
<u>Winn-Dixie Stores, Inc. v. Marcotte,</u> 553 So. 2d 213 (Fla. 5th DCA 1989)	7
<u>Zayre Corporation v. Bryant,</u> 528 So. 2d 516 (Fla. 3d DCA 1988)	19

STATEMENT OF THE CASE AND FACTS

This case arose out of a slip and fall accident that occurred at Respondent's store in Palm Beach County, Florida on June 7, 1992. (R. 2). Petitioners, Elvia Soriano and Angel Soriano, claim that Mrs. Soriano was shopping at the store and stepped on a piece of banana, which caused her to fall to the ground. (R. 2). Petitioners sued for negligence, alleging that Respondent had either actual or constructive notice of the piece of banana on the floor. (R. 2). Petitioner, Angel Soriano, alleged a loss of consortium as a result of his wife's injuries. (R. 3).

At trial, Petitioners did not introduce any evidence attempting to prove actual notice. (Vol. II-IV). Rather, Petitioners proceeded forward only on a claim of constructive notice by introducing testimony from Mrs. Soriano that the piece of banana that caused her to fall was "brown with very little yellow." (Vol. III, T.152). Petitioners also called Jose Alvarez, a former manager of the store in which Mrs. Soriano fell, as a witness. (Vol. II, T.132).

Mr. Alvarez testified that employees were trained to keep the floor clean and to be on the look out for any potentially dangerous debris in the store. (Vol. II, T.154). If employees who were walking in the store saw any substance on the floor that could present a problem, they were trained not to leave the place

where the object was located until another employee came by who could retrieve materials necessary to clean the spill. (Vol. II, T.155). Mr. Alvarez also stated that the store was cleaned and swept as often as could be done. (Vol. II, T.155).

The number of times the store was actually swept in a day depended on the number of employees working that day. (Vol. II, T.137). Sometimes the store would be swept as many as 10 to 15 times a day, while other times it was swept 3 to 6 times a day. (Vol. II, T.137). On average, the store was swept every three to four hours. (Vol. II, T.171). Mr. Alvarez admitted that the store was not swept at the same time everyday, but was swept as many times as was feasible. (Vol. II, T.136).

Mr. Alvarez also testified that daily inspection reports were filled out as an administrative requirement to remind employees to check the store at regular intervals. (Vol. II, T.135). He felt that filling out the daily inspection reports when an inspection was done was a waste of time because it required time away from performing more productive tasks. (Vol. II, T.152). Accordingly, the inspection reports for the week were filled out at one time at the end of the week rather than at the time the inspections were done. (Vol. II, T.152). The fact that the sweep sheets were not filled out on the day of the accident had no bearing on whether cleaning and inspection of the floor was done on the day of the accident. (Vol. II, T.165).

At trial, Petitioner admitted that she did not know whether the object she slipped on was a banana or just a banana peel. (Vol. III, T.179). Petitioner also testified that she did not know how long the banana peel had been on the floor before she stepped on it. (Vol. III, T.179). Finally, Petitioner did not know how the banana peel got on the floor or what color the banana peel was when it first fell to the floor. (Vol. III, T.184-185).

At the conclusion of Petitioner's case-in-chief, Respondent moved for a directed verdict. (Vol. IV, T.75). After hearing arguments, and conducting its own additional research, the trial court granted a Directed Verdict in favor of Respondent. The court concluded that, based on the evidence offered by petitioners, a jury finding in petitioners' favor would have required the jury to impermissibly stack one inference on another when the Petitioners had not properly established the first inference (that the banana was not brown when it originally reached the floor) to the exclusion of all other reasonable inferences. (Vol. IV, T.87-89).

Petitioners appealed the trial court's final judgment. On appeal to the Fourth District Court of Appeal the Petitioners argued that the trial court erred in its decision regarding the impermissible stacking of inferences. In addition, for the first time, Petitioners argued that the trial court's directed verdict was error because they believed they had stated a claim for

"negligent operation." Petitioners made this claim based on the former B & B manager's testimony that the store's "sweep sheets" had not been filled out on the day of the incident, despite his further testimony that this had no bearing on whether the floor had been properly inspected and swept that day. The Fourth District Court rejected both assertions made by Petitioners and filed its panel opinion affirming the trial court's directed verdict on May 5, 1999.

On May 18, 1999 Petitioners filed a Motion for Rehearing, Motion for Certification, and Motion for Rehearing En Banc. The Fourth District Court of Appeal denied the joint motions on July 6, 1999.

SUMMARY OF ARGUMENT

The Fourth District Court properly affirmed the trial court's directed verdict. A directed verdict in a slip and fall case is proper when the plaintiff does not produce sufficient evidence to demonstrate that the defendant had actual notice or constructive notice of the condition leading to the plaintiff's injury. In this case, Petitioners offered no evidence to support a claim of actual notice concerning the piece of banana on the floor that caused Petitioner to fall. Further, Petitioners offered inadequate evidence to demonstrate that Respondent had constructive notice.

Petitioners attempted to prove that Respondent had constructive notice of the piece of banana on the floor by introducing testimony that the piece of banana was brown and yellow. To conclude that the discoloration meant that the banana had been on the floor a sufficient length of time for Respondent to have constructive notice of its presence would require the inference that the piece of banana was not discolored when it originally fell onto the floor. Because this original inference could not be established to the reasonable exclusion of other inferences, the second inference (that the banana was on the floor a sufficient length of time for constructive notice) cannot be stacked upon the first inference. Petitioners' only evidence attempting to prove constructive notice therefore involved

impermissible stacking of inferences. Because of this, the trial court's decision to grant a directed verdict in favor of Respondent was proper.

Petitioners also incorrectly assert that a claim of negligent method of operation created a jury issue sufficient to preclude a directed verdict at trial. Petitioners, however, did not make a claim for negligent method of operation prior to trial. Even assuming such a claim had been adequately pled, the evidence at trial was insufficient to allow the case to go to the jury. In order to establish a claim for negligent method of operation, Petitioners were required to prove that the particular operation was being conducted in a negligent manner and that the condition of the floor was created as a result. Petitioners presented testimony only that employees at the store did not correctly follow corporate policy regarding reporting requirements for periodic inspections. Petitioners presented no evidence that the failure to fill out the inspection reports at the time the inspections were done led to the banana on the floor which resulted in the accident. Therefore, the trial court properly granted Respondent's Motion for Directed Verdict at the close of Petitioners' case.

ARGUMENT

I. THE FOURTH DISTRICT COURT PROPERLY AFFIRMED THE TRIAL COURT'S DIRECTED VERDICT FOR RESPONDENT BECAUSE PETITIONERS PRODUCED NO EVIDENCE DEMONSTRATING THAT RESPONDENT HAD ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION LEADING TO PETITIONER'S INJURY.

A directed verdict is proper when, viewing the evidence in a light most favorable to the nonmoving party, no reasonable jury could return a verdict for the nonmoving party. Miller v. City of Jacksonville, 603 So. 2d 1310, 1311 (Fla. 1st DCA 1992); Tuttle v. Miami Dolphins, Ltd., 551 So. 2d 477, 481 (Fla. 3d DCA 1988). In slip and fall cases, appellate courts have held that a directed verdict is proper when the plaintiff presents insufficient evidence to demonstrate that the defendant had either actual notice or constructive notice of the condition leading to the plaintiff's injury. Silver Springs Moose Lodge No. 1199 v. Orman, 631 So. 2d 1119, 1121 (Fla. 5th DCA 1994); Wal-Mart Stores, Inc. v. King, 592 So. 2d 705, 707 (Fla. 5th DCA 1991); Winn-Dixie Stores, Inc. v. Marcotte, 553 So. 2d 213, 215 (Fla. 5th DCA 1989) (all holding that the trial courts erred by denying defendants' motions for directed verdict in slip and fall cases when plaintiffs produced no sufficient evidence demonstrating actual or constructive notice).

In this case, the trial court properly granted Respondent's Motion for Directed Verdict regarding lack of notice for two reasons. First, Petitioners did not pursue a claim of actual notice at trial. Second, a directed verdict was proper because Petitioners produced insufficient evidence to demonstrate that Respondent had constructive notice of the piece of banana on which Petitioner slipped and fell.

Petitioners attempted to establish that Respondent had constructive notice of the banana on which Petitioner slipped by impermissibly stacking inferences, which this Court specifically prohibited in Food Fair Stores, Inc. v. Trussell, 131 So. 2d 730 (Fla. 1961). Appellants introduced evidence that the banana was "brown with very little yellow" when Petitioner slipped on it. Petitioners sought to use the banana's discoloration as evidence that the banana had been on the floor a sufficient amount of time for Respondent to have constructive notice of its presence. However, Petitioners offered no evidence as to the color of the banana when it was dropped on the ground. Petitioners also offered no additional evidence to attempt to prove constructive notice of the dangerous condition.

In Food Fair Stores, Inc. v. Trussell, 131 So. 2d 730 (Fla. 1961), this Court held that a plaintiff shall not construct one inference upon another to prove constructive

notice unless the plaintiff has justified the initial inference to the exclusion of all other reasonable inferences. Trussell, 131 So. 2d at 733. In Trussell, a grocery store customer slipped on a piece of lettuce at the store. Id. at 731. The customer sued the grocery store for negligence. At trial, the customer presented no evidence about how the lettuce happened to be on the floor, who placed it there, or how long it had been there. Id. at 731. The customer's only evidence regarding constructive notice was a grocery store employee's affidavit that sometimes loose vegetable leaves would fall out of grocery carts onto the floor when the store's bagboys were stacking empty carts. Id. at 732.

This Court held that the customer's evidence was insufficient to prove that the grocery store had constructive notice of the lettuce on the floor, explaining that a jury could only find liability if it inferred that "the loose leaves dropped from a buggy being pushed by an employee, that the leaf on the floor in this particular situation created a hazardous condition and that this condition was the proximate cause of Mrs. Trussell's injury." Id. at 733. Furthermore, this Court stated:

It is apparent that a jury could not reach a conclusion imposing liability of the petitioner without indulging in the prohibited mental gymnastics of constructing one inference upon another inference in a situation where,

admittedly, the initial inference was not justified to the exclusion of all other reasonable inferences. . . .

Id. at 733. (emphasis added).

In their Brief on the Merits, Petitioners refer to Montgomery v. Florida Jitney Jungle Stores, Inc., 281 So. 2d 302 (Fla. 1973), to support their contention that this Court should reverse the Fourth District Court. However, as Petitioners acknowledge in their own Brief, the evidence presented in Montgomery differs significantly from the evidence presented in this case. In Montgomery, the slip-and-fall plaintiff submitted evidence that she and her husband had been in the area of the fall for fifteen minutes prior to the fall, that no other shoppers were in the area where the plaintiff fell, that no store employees swept the floor during that time, that two store employees were in the area where the plaintiff fell, that the floor was wet in the area where the plaintiff fell, and that the piece of collard green upon which the plaintiff fell was "old, wilted and dirty looking". Montgomery, 281 So. 2d at 303. The plaintiff in Montgomery presented enough circumstantial evidence, **in addition** to the collard green's discolored appearance, for the trial court to submit the case to the jury. Id. at 306.

In the case now before this Court, Petitioners presented evidence only that Petitioner fell on a discolored piece of banana. Petitioners presented no additional evidence, like the

plaintiff in Montgomery submitted, that would tend to exclude a number of varying reasonable inferences regarding the length of time the banana had been on the floor or whether any of Respondent's employees knew about the banana's existence. Based upon the evidence presented by Petitioners, a jury could still reasonably conclude that the banana had been dropped to the floor mere seconds before Petitioner slipped on it.

In Bates v. Winn-Dixie Supermarkets, Inc., 182 So. 2d 309 (Fla. 2d DCA 1966), the Second District Court of Appeal addressed the exact factual scenario that this Court is now reviewing. In that case, a grocery store customer slipped and fell on a "dark, overripe, black, old, and nasty looking" banana peel. Bates, 182 So. 2d at 310. In his negligence action against the grocery store, the customer argued that the color of the banana peel was evidence that the peel had been on the ground long enough to impute to the grocery store constructive notice of the condition. Id.

The appellate court rejected the customer's argument because it involved impermissible stacking of inferences. The Bates court stated, "to infer from the color and condition of the peeling alone that it had been there a sufficient length of time to permit discovery, we would have to infer that the banana peel was not already black and deteriorated when it reached defendant's floor." Id. at 311. Because the first inference could not be established to the exclusion of all other reasonable

inferences, the Second District Court held that the color of the banana could not be used to demonstrate that the grocery store had constructive notice of its presence. Id. at 310-11. The appellate court affirmed the summary judgment granted in favor of the grocery store because:

It is apparent that a jury could not reach a conclusion imposing liability of the petitioner without indulging in the prohibited mental gymnastics of constructing one inference upon another where, admittedly, the initial inference was not justified to the exclusion of all other reasonable inferences.

Id. (quoting Food Fair Stores, Inc. v. Trussell, 131 So. 2d 730, 733 (Fla. 1961)); see also Nielson v. City of Sarasota, 117 So. 2d 731, 733 (Fla. 1960); School Board of Broward County v. Beharrie, 695 So. 2d 437, 438 (Fla. 4th DCA 1997)).

The facts in this case are practically identical to those in Bates. Specifically, Petitioners in this case attempted to prove that Respondent had constructive notice of the piece of banana on the floor by introducing testimony that the piece of banana was "brown with very little yellow". To infer that the discoloration meant that the banana had been on the floor a sufficient length of time for Respondent to have constructive notice of its presence would require the inference that the piece of banana was not "brown with very little yellow" when it originally fell onto the floor.

This original inference could not be established to the reasonable exclusion of the possibility that the banana was

already brown when it dropped on the floor. In fact, it is just as likely that the banana was discarded by someone for the very reason that it was discolored. The Bates court made it clear that this kind of inference-stacking is not sufficient evidence to demonstrate constructive notice on the part of Respondent. Therefore, the Fourth District Court properly affirmed the trial court's directed verdict for Respondent.

In addition to Bates, other courts have addressed improper stacking of inferences in slip and fall cases. In Schaap v. Publix Supermarkets, Inc., 579 So.2d 831 (Fla. 1st DCA 1991), a customer sued Publix for negligence, claiming that she slipped on a cookie given out to children in the store by the bakery department. The trial court granted summary judgment in favor of Publix, finding that there was insufficient evidence to establish a connection to the cookie program and the fall. Id. at 834.

The evidence in the record at the time of the summary judgment was that Publix had a program to distribute cookies to children under 12 accompanied by an adult. Id. at 833. Additionally, the plaintiff testified in deposition that she did not see anything prior to her accident, but after the fall she saw something on her shoe that appeared to be a cookie. Id. at 832. The assistant manager of Publix also saw cookie on the floor when he went to the spot where the plaintiff indicated the accident happened, which he admitted may have come from the store bakery. Id. at 833.

On appeal, the First District Court affirmed the summary judgment granted in favor of Publix. The appellate court stated the plaintiff's impermissible theory as follows:

Appellants argue that since cookies were distributed to children, and children may have eaten and dropped cookies throughout the store, a jury would be justified in inferring that a child received a cookie from the cookie program at or around 6:00 p.m. on February 19; that a child dropped part of his cookie in the area where Mrs. Schaap slipped and fell; the cookie debris Mr. Curry found was part of a Publix cookie distributed to a child via the cookie program; the part of the cookie debris found by Mr. Curry was part of the cookie debris stuck to Mrs. Schaap's heel; the cookie stuck to Mrs. Schaap's heel had created a hazardous condition; and the hazardous condition was the proximate cause of Mrs. Schaap's injury.

Id. at 834. The First District Court held that a jury could not reach a conclusion imposing liability on Publix without indulging in the prohibited "mental gymnastics" of constructing one inference upon another inference when the first inference was not established to the exclusion of all other reasonable inferences.

Id. at 834-835.

The string of inferences in the case now before this Court is analogous to the plaintiff's impermissible theory in Schaap. Petitioners argue that because Respondent sold bananas, and customers may have eaten and dropped items throughout the store, a jury would be justified in inferring that a customer took a banana from the produce section sometime before the time Petitioner was checking out of the store; that a customer dropped part of the banana in the area where Petitioner slipped and fell;

that the banana debris the assistant manager found was part of a banana Respondent sold in its produce section; that the banana debris stuck to Petitioner's shoe had created a hazardous condition; and the hazardous condition was the proximate cause of Petitioner's injury. As the First District Court stated in Schaap, because the initial inference could not be established to the exclusion of all other reasonable inferences, a jury could not impose liability upon Respondent as a matter of law.

Respondent acknowledges that stacking of inferences is permissible in certain situations regarding slip and fall claims. The Fourth District Court addressed such a situation in Little v. Publix Supermarkets, Inc., 234 So.2d 132 (Fla. 4th DCA 1970). In that case, a customer sued Publix after she slipped and fell on a clear liquid in one of the aisles. Id. at 133. Testimony at trial indicated that the plaintiff stood at the front of the aisle for 15-20 minutes talking with another woman prior to her fall and did not observe anyone else in the area, or hear any breaks or spills. Id. The trial court granted a directed verdict for Publix based upon the assertion that there was no evidence to prove actual notice or to infer constructive notice. Id.

On appeal, the Fourth District Court reversed the directed verdict in favor of Publix, finding that "an inference may be founded upon an inference **when no contrary reasonable inference**

may be indulged." Id. at 134 (emphasis added). Based upon the plaintiff's testimony concerning the length of time she was in the aisle alone, a reasonable inference could be drawn that the liquid must have been on the floor at least 15-20 minutes, creating an issue that should have been submitted to the jury. Id.

Little differs significantly from this case. In Little, the initial inference (the length of time the liquid was on the floor) could be established to the exclusion of all other reasonable inferences based on the evidence presented at trial. It was therefore permissible to stack a second inference (Publix should have known about the liquid on the floor) upon this first inference.

In the case now under consideration, the initial inference cannot be established to the exclusion of all other reasonable inferences. Petitioners produced no evidence at trial about the condition of the peel when it first dropped to the floor. Further, Petitioner admitted that she did not see the peel prior to the accident, did not know where it had come from, and did not know how long it had been on the floor.

Petitioners therefore cannot establish their first inference (that the banana was not brown when it reached the floor) to the exclusion of all other reasonable inferences. It is just as likely that the banana was discarded by someone because it was

already brown. As the Fourth District Court held in Little, a second inference may be founded upon a first inference only when no contrary reasonable inference may be indulged. Because it is a reasonable inference that the peel was brown when it was dropped on the floor, it is impermissible for Petitioners to attempt to stack a second inference (that the condition of the peel indicates a sufficient length of time for constructive notice) upon the first inference.

In their Brief on the Merits, Petitioners cite Gonzalez v. B & B Cash Grocery Stores, 692 So.2d 297 (Fla. 4th DCA 1997) and Marlowe v. Food Fair Stores of Florida, Inc., 284 So.2d 490 (Fla. 3d DCA 1973) to support their contention that the directed verdict should be reversed. Petitioners claim that in those cases the Fourth District Court and the Third District Court held that circumstantial evidence may be used to demonstrate the length of time a substance may have been on the floor, leading to an inference of constructive notice. Petitioners analogize those cases to this case and argue that the evidence of the condition of the banana peel alone was sufficient to create an issue for the jury.

The distinguishing factor in those cases was specifically noted in Gonzalez, however, when the Fourth District Court of Appeal stated:

If a jury determines, based on the evidence presented, that the substance was wax, ***it will not have to engage***

in sheer speculation to determine the length of time that the condition existed. Because it is undisputed that the floors were waxed the night before the incident, the jury could reasonably conclude that the condition existed for at least several hours and thus that defendant was negligent in not discovering the slippery condition through inspection before the store opened in the morning.

The fact that there is undisputed evidence that the floor had been waxed the night before the incident ***distinguishes this case from other cases involving a foreign substance where the plaintiff was unable to establish by any direct evidence or reasonable inference from the evidence either the identity of the substance or how long the dangerous condition had existed.***

Gonzalez, 692 So.2d at 299 (emphasis added).

In Marlowe, the appellate court noted that an employee of the store testified that he did not see anyone in the area in the hour and a half between when he last swept the area and the time when the customer fell. Marlowe, 284 So.2d at 493. The Third District Court felt that this period of time was sufficient for a jury to reasonably conclude that the store should be charged with constructive notice. Id. In Gonzalez, the Fourth District Court determined that the undisputed time between when the wax was applied and when the customer fell also allowed for a reasonable finding of constructive notice. Gonzalez, 692 So.2d at 299.

In this case, Petitioners produced no evidence whatsoever at trial concerning the length of time the banana peel was on the floor. Petitioners assert in their Brief on the Merits that testimony from the former store manager about the length of time

it takes a banana to turn brown is circumstantial evidence that the banana was on the floor for at least a day. Based upon the lack of any other evidence produced by Petitioners, however, it is just as likely that the banana peel was dropped almost instantaneously before Petitioner slipped on it. Petitioners' reliance on Gonzalez and Marlowe is therefore misplaced because those cases are distinguishable from cases in which the plaintiff is unable to establish by direct evidence or reasonable inference how long the dangerous condition existed, as in the case now before this Court.

This case is also distinguishable from cases in which plaintiffs did produce some "additional evidence" of constructive notice, as required by this Court's precedents. In certain cases involving slip-and-fall accidents, courts have allowed plaintiffs to prove constructive notice by introducing additional evidence that tended to show that the plaintiffs had slipped on substances that had been on the ground for extended periods of time. Petitioners produced no such evidence in this case.

In Teate v. Winn-Dixie Stores, Inc., 524 So. 2d 1060 (Fla. 3d DCA 1988), the additional evidence was the **water on the floor** around the peas. The Plaintiff did not testify only that there were thawed, previously frozen, peas on the floor. Rather, he testified that there was water around the thawing peas. If the

peas had thawed somewhere other than the floor and then dropped to the floor, there would be no water around them.

In Camina v. Parliament Insurance Company, 417 So. 2d 1093 (Fla. 3d DCA 1982), the additional evidence was the **dirt in the thawed ice cream**. In Colon v. Outback Steakhouse of Florida, 721 So. 2d 769 (Fla. 3d DCA 1998), the additional evidence was the **dirt in the mashed potato**. In Zayre Corporation v. Bryant, 528 So. 2d 516 (Fla. 3d DCA 1988), the additional evidence was the **"'black darkened' grocery cart tire tracks" running through the clear liquid on the floor**. In Winn-Dixie Stores, Inc., v. Guenther, 395 So. 2d 244 (Fla. 3d DCA 1981), the additional evidence was that **the liquid on the floor "appeared dirty and had scuff marks and several grocery cart tracks" running through it**.

In this case, Petitioners presented no additional evidence that would tend to prove that the piece of banana upon which Petitioner slipped had been on the floor for an extended period of time. Petitioners produced no evidence that the offending piece of banana was dirty, or smeared across the floor, or run through with footprints and track marks. The only evidence Petitioner presented to suggest that the banana had been on the floor a sufficient amount of time to demonstrate Respondent's constructive notice was that the piece of banana was "brown with very little yellow." As discussed above, to infer solely from the banana's color that it had been lying on the floor for an

extended period of time would be to indulge in the very type of "mental gymnastics" that this Court prohibited in Trussell.

Even when viewing the facts in a light most favorable to Petitioners, Petitioners produced absolutely no evidence, other than improper inference-stacking, that would tend to prove that Respondent had constructive notice of the piece of banana upon which Petitioner slipped. Based upon the complete absence of evidence regarding constructive notice, no reasonable jury could have returned a verdict holding Respondent liable for Petitioner's injuries based on constructive notice. Therefore, the Fourth District Court correctly upheld the trial court's Directed Verdict for Respondent based on the claim of constructive notice.

II. THE FOURTH DISTRICT COURT PROPERLY AFFIRMED THE TRIAL COURT'S DIRECTED VERDICT FOR RESPONDENT BECAUSE PETITIONERS DID NOT ALLEGE A NEGLIGENT METHOD OF OPERATION, AND FURTHER, PRODUCED NO EVIDENCE DEMONSTRATING NEGLIGENCE IN THE OPERATION OF THE STORE LEADING TO PETITIONER'S INJURY.

The Fourth District Court properly affirmed the trial court's Directed Verdict for Respondent based upon Petitioners' claim of negligent method of operation. Petitioners raised this issue on appeal even though it was not pled in the complaint. Further, even if the Petitioners could have maintained such a claim at trial to present to the jury, Petitioners did not produce evidence as a matter of law sufficient to allow a reasonable jury to decide the claim.

Respondent acknowledges that Florida appellate courts have recognized the existence of an "operational negligence" theory in certain limited circumstances. This theory may be available if a 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 Super Market, Inc. v. Sanchez, 700 So.2d 405 (Fla. 3d DCA 1997).¹ In their Complaint, however, Petitioners asserted only that Respondent was negligent in the following manner:

A. Failing to use reasonable and ordinary care to maintain the premises in a reasonably safe condition.

B. Failing to give timely notice of a peril which Defendant knew of or in the exercise of reasonable care should have known would create a dangerous condition.

C. Failing to correct a peril which Defendant in the exercise of reasonable care knew or should have known would create a dangerous condition.

D. Failing to warn of a peril which Defendant knew or in the exercise of reasonable care should have known would create a dangerous condition.

(R. 1-3).

Further, Respondent propounded an interrogatory to Petitioners asking them to "describe in detail each act or omission on the part of Defendant you contend constituted negligence that was a contributing legal cause of the accident in question." Petitioners responded:

A banana peel was left on the floor of Defendant's store in a condition which indicated it had been there for an extended period of time and Defendant failed to either remove the banana peel or warn customers of the existence fo [sic] this dnagerous [sic] condition which me [sic] to fall and become injured.

¹ As discussed further below, even the Sanchez court did not directly adopt this theory. Rather, it simply acknowledged that other appellate courts had discussed it.

At the conclusion of Petitioners' case-in-chief, during arguments on Respondent's Motion for Directed Verdict, the trial court even acknowledged the apparent lack of a claim for negligent method of operation when it stated:

I also take into consideration that this -- that it doesn't appear to be -- it might be -- a Method of Operations case. If you analyze it from that standpoint, still you fail to carry your burden. It doesn't appear to me as though that is what you intended because there is not a whole lot of evidence on that type of issue.

(Vol. IV, T.88).

Petitioners never sought leave to amend their Complaint to add a claim that Respondent's method of operation was being conducted in a negligent manner and that the banana came to be on the floor as a result of the negligent method of operation. Petitioners also never made any such assertions in their Answers to Interrogatories. Therefore, there was no jury issue created concerning a negligent method of operation because the Petitioners did not properly plead that issue or allege it prior to trial.

Even assuming that Petitioners had adequately pled a claim for negligent method of operation, Petitioners cannot assert this claim against a grocery store. Rowe v. Winn-Dixie Stores, 714 So. 2d 1180 (Fla. 1st DCA 1998). Florida courts have applied an operational negligence theory to grocery stores in only one case: Schaap v. Publix Supermarkets, 579 So. 2d 831 (Fla. 1st DCA 1991). However, the First District Court later receded from its

opinion in Schaap. See Rowe, 714 So. 2d at 1180-81. In Rowe, the First District Court explained that the Schaap decision was not binding precedent:

While one member of the appellate panel in Schaap would have applied the doctrine, another member of the panel concurred in result only and the third member of the panel dissented. Because a concurrence in result only expresses agreement with the ultimate decision but not the opinion, . . . there was no majority in Schaap and the case does not stand as precedent for the individual views expressed in the separate opinions.

Rowe, 714 So. 2d at 1181.

In their Brief on the Merits, Petitioners inaccurately state that the Third District Court applied the operational negligence theory in Publix Super Market, Inc. v. Sanchez, 700 So.2d 405 (Fla. 3d DCA 1997). In truth, the court in Sanchez refused to apply the operational negligence theory to grocery stores in slip-and-fall cases. The Sanchez court merely acknowledged that the First District Court had applied the theory in Schaap v. Publix Supermarkets, 579 So. 2d 831 (Fla. 1st DCA 1991), which is not binding precedent. Therefore, no existing Florida case law supports Petitioners' claim of negligent method of operation against Respondent, a grocery store.

Even assuming that Petitioners had adequately pled a claim for negligent method of operation and further assuming that Petitioners could assert such a claim against a grocery store, the evidence at trial was insufficient to warrant denial of Respondent's Motion for Directed Verdict. Petitioners adduced

evidence which demonstrated that Respondent's employees at the store did not follow company procedure regarding filling out daily inspection reports. Such evidence is not sufficient for a claim of negligent method of operation.

The Third District Court discussed the issue of failure to follow company policy in Sanchez. Interestingly, Petitioners cited that case in their Brief on the Merits but did not discuss the appellate court's holding in this regard, in which the court actually refused to apply the operational negligence theory to grocery stores. In Sanchez, a customer slipped and fell on a piece of cake on the floor near a demonstration table where small pieces of cake were available for customers to sample. Sanchez, 700 So.2d at 406. The demonstration table was not manned by an employee. Id. A Publix assistant manager testified that Publix store policy required that demonstration tables be manned at all times. Id. The trial court denied Publix' Motion for Directed Verdict and the jury returned a verdict in favor of the plaintiff. Id.

On appeal, the Third District Court addressed the plaintiff's theory that the particular demonstration table was being operated in a negligent manner because it was not manned at the time of the accident as required by the company's policy. The appellate court disagreed with the plaintiff's claim that

Publix could be liable *simply because it failed to follow one of its own corporate policies*. Id. at 407. It reasoned:

If we were to accept the plaintiff's argument, we would be holding that grocery stores are liable whenever a customer slips and falls on any substance on the floor, regardless of notice, since grocery stores normally have either store or corporate policies which do not allow foreign substance to be on floors.

Id. For this reason, the Third District Court reversed the jury verdict in favor of the plaintiff and remanded for entry of judgment in favor of Publix. Id.

The facts of this case are analogous to those in Sanchez. The former store manager, Jose Alvarez, testified that daily inspection reports were supposed to be filled out at regular intervals according to company policy. He also said that this policy was not always followed at the store where the accident occurred. He felt that filling out the inspection reports was an unnecessary administrative requirement that took time away from more important managerial tasks. Because of this, the reports were often completed on Saturday for the preceding week and then sent to the corporate office.

Mr. Alvarez also testified, however, that the time at which the inspection reports were filled out had no bearing on whether periodic cleaning and inspecting was done at the store. The number of times a day the store was swept by an employee depended on how busy the store was and how many employees were on duty. Mr. Alvarez stated that the store was swept on average every

three to four hours, but sometimes as often as 10 to 15 times in one day. Additionally, employees were constantly walking through the store and had been trained to clean up any potential hazards they saw. Further, the managers periodically "walked the store" while on duty to make sure there were no potential hazards to customers.

The employees at the store admittedly may not have followed company policy regarding filling out daily inspection reports at the time of the accident. Petitioners assert that not strictly adhering to company policy regarding times of inspections is sufficient to permit a claim of negligent method of operation. As the Third District Court stated in Sanchez, however, such a theory would make stores liable in almost any situation because a policy usually exists at stores which does not allow foreign substances to be on the floor. The appellate court in Sanchez therefore reversed the jury verdict in favor of the plaintiff with instructions to enter a directed verdict for the store. Using the rationale in Sanchez, the trial court would have committed reversible error if it had not granted Respondent's Motion for Directed Verdict on this issue.

Furthermore, Petitioners have not offered any evidence regarding the second element in a claim for negligent method of operation; that the condition of the floor was created as a result of the negligent method of operation. The only pertinent evidence presented by Petitioners concerning store operation was

elicited through Mr. Alvarez. He indicated that store policy was not followed regarding filling out daily inspection reports. Petitioner presented no evidence that the failure to fill out these reports in a timely manner resulted in the banana peel being on the floor. In fact, Mr. Alvarez was not even working on the day of the accident and had no knowledge about the daily inspection reports from that day or when periodic cleaning and inspecting of the store was done on that day.

Petitioners did not properly make a claim for negligent method of operation in the trial court. Therefore, it is improper for them to now assert such a claim on appeal. Even assuming such a claim had been adequately pled, the evidence at trial was insufficient to allow the claim to go to the jury. Petitioners simply presented testimony that employees at the subject store did not correctly follow corporate policy regarding reporting requirements for periodic inspections. Petitioners presented no evidence that the failure to fill out the inspection reports at the time the inspections were done caused the condition of the floor that resulted in the accident. Accordingly, the trial court properly granted Respondent's Motion for Directed Verdict at the close of Petitioners' case.

CONCLUSION

A directed verdict is proper when no reasonable view of the evidence could result in a verdict for the nonmoving party. In this case, Petitioners produced no evidence showing that Respondent had actual or constructive notice of the piece of banana on which Petitioner slipped. Petitioners' only attempt to produce such evidence involved impermissible stacking of inferences. In addition, Petitioners did not properly pursue a claim for negligent method of operation. Even assuming that such a claim had been made, no evidence was produced at trial sufficient to create a jury issue as to negligent method of operation.

For these reasons, Respondent respectfully requests this Court to affirm the Fourth District Court's ruling upholding the trial court's grant of Directed Verdict for Respondent.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, to the best of my limited computer knowledge and based on representations made to me by more informed computer professionals, this brief is printed in 12 point Courier type and that the type does not exceed 10 characters per inch.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 7th day of December, 1999, to Bambi G. Blum, Esquire, 46 Southwest 1st Street, Fourth Floor, Miami, FL 33130, and Simon & Dondero, P.A., SunTrust International Center, One S.E. 3rd Avenue, Suite 2110, Miami, FL 33131.

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