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Supermarket Liability: Problems in Proving the Slip-and-Fall Case in Florida

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SUPERMARKET LIABILITY: PROBLEMS IN PROVING THE SLIP-AND-FALL CASE IN FLORIDA

The past decade has brought a noticeable increase in tort litigation involving Florida supermarkets. Some of this increase may be attributed to the growing concept of products liability,[1] but by far the greatest number of cases have arisen out of the slip-and-fall accident. These cases usually arise when an invitee shopping for his groceries slips on a "foreign" substance, such as a lettuce leaf or a green bean. The resulting fall produces the injuries for which action is brought.

A plaintiff injured in a slip-and-fall accident has several avenues available for establishing the supermarket's liability. A cursory view of these avenues would lead one to believe that recovery for injuries sustained is virtually assured. Further, absent contributory negligence, the injuries received would seem to merit compensation. Closer study, however, reveals that there are almost insurmountable burdens of proof blocking each avenue. These burdens and the practical problems in meeting them are the subject of this note. The emphasis will be on Florida law, but the decisions of other jurisdictions will be compared on many of the issues.

THE AVENUES OF PROOF

Generally, the duty of a supermarket owner is the same as that of any store or property owner, that is, a business-invitee may expect that the premises will be maintained in a reasonably safe condition.[2] Although this involves a positive duty, the supermarket owner is clearly not the insurer of his shoppers' safety.[3] He may be held liable only for breach of his duty to exercise reasonable care.[4]

With the rule of reasonable care as a foundation, the courts have held that the duty of a supermarket owner not only involves care that dangerous conditions are not created by him or his employees[5] and care that dangerous conditions once discovered are quickly remedied[6] but also, that reasonable inspections be made to discover dangerous conditions that may exist through no fault of the owner or his

1. See Note, *Products Liability: Doctrinal Problems and the Restatement's Answer*, 17 U. FLA. L. REV. 421, 430 (1964).

2. Matson v. Tip Top Grocery Co., Inc., 151 Fla. 247, 9 So. 2d 366 (1942).

3. See Frederich's Mkt., Inc. v. Knox, 66 So. 2d 251 (Fla. 1953).

4. See Matson v. Tip Top Grocery, Inc., 151 Fla. 247, 9 So. 2d 366 (1942).

5. See Pogue v. Great Atl. & Pac. Tea Co., 242 F.2d 575 (5th Cir. 1957); Food Fair Stores, Inc. v. Trusell, 131 So. 2d 730 (Fla. 1961).

6. See Berube v. Economy Grocery Stores Corp., 315 Mass. 89, 51 N.E.2d 777 (1943).

servants.[7] Conversely, the courts have held that a supermarket owner may be held liable *only* if he or his employees created the dangerous condition or if actual or constructive knowledge of the condition can be shown.[8]

In outline form, the avenues of proof in supermarket slip-and-fall cases are the following:

(1) that the owner or his employees or agents *created* the dangerous condition, or

(2) that the owner or his employees or agents had *actual notice* of the dangerous condition and sufficient time in which to remedy it, or

(3) that the condition existed long enough to have been discovered and remedied (*constructive notice*).

These are the same avenues of proof that govern the entire area of property-owner or occupier liability to business-invitees (of which the supermarket is but a particular instance).[9]

A Higher Degree of Care

The late Justice Terrell, in several noteworthy opinions, expressed the viewpoint that the supermarket is a unique store or business property necessitating different rules of conduct than other related enterprises. The first of his opinions occurs in a racetrack liability case, but the implications of his reasoning extend into the supermarket setting. Cases from other backgrounds are sometimes cited because of the similarity of the burden of proof with that in supermarket liability.

In *Wells v. Palm Beach Kennel Club*,[10] the plaintiff stepped on an empty bottle in an exit aisle of the racetrack and suffered injuries in the resulting fall. The defendant contended that the evidence failed to show a sufficient time had elapsed for the owners, in the exercise of reasonable care, to have found and removed the particular bottle in question. For the plaintiff to carry this burden of proof would have been a virtual impossibility. The court, however, felt that a higher degree of diligence rather than reasonable care, was required of such an establishment. Justice Terrell, speaking for the court, wrote: "[R]easonable care as applied to a race track requires a higher

7. See Jenkins v. Brackin, 171 So. 2d 589 (2d D.C.A. Fla. 1965).

8. Carls Mkts., Inc. v. Meyer, 69 So. 2d 789 (Fla. 1953).

9. See Messner v. Webb's City, Inc., 62 So. 2d 66 (Fla. 1952); F. W. Woolworth Co. v. Stevens, 154 So. 2d 201 (3d D.C.A. Fla. 1963); Pentecost v. Ansan Corp., 136 So. 2d 667 (3d D.C.A. Fla. 1962); City of Tampa v. Johnson, 114 So. 2d 807 (2d D.C.A. Fla. 1959).

10. 35 So. 2d 720 (Fla. 1948).

degree of diligence than it does when applied to a store, bank or such like place of business."[11] As a result, whether this higher degree of diligence was breached by the proprietors when they *allowed* the exit aisles to become bottle-littered was held to be a jury question. In effect, the burden of proof was lightened so that the plaintiff could reach the jury.

The implications that the *Wells* opinion held for supermarket slip-and-fall cases were made clear in *Carl's Markets, Inc. v. De Feo.*[12] A husband and wife sued the defendant supermarket for injuries sustained by the wife when she had slipped on a string bean while shopping. The evidence showed the supermarket floor had been swept about fifteen minutes before the accident, that the defendant had no actual knowledge of the presence of the bean on the floor, and that there was no direct proof of the length of time the dangerous substance had remained on the defendant's floor. The plaintiff proved that the vegetable bins had been overfilled, and it was admitted that the bean might have been on the floor at least fifteen minutes during a busy time of the day. On this evidence the Florida Supreme Court affirmed a jury verdict for the plaintiff in a per curiam decision.

Justice Terrell's concurring opinion pointed out the differences between the old-time grocery, with its obvious perils and its untidy atmosphere that warned all to be on guard, and the modern self-service supermarket of today. He urged that "rules of conduct governing a business are not rules of statute that the legislature is expected to promulgate, they are rules of reason that emanate from the court and which the court is expected to keep current."[13] As an example of proper up-dating of a rule of conduct, the opinion cited *Wells* and drew the conclusion that "something more specific than the reasonable care rule must be imposed on the proprietor of the self serving grocery store."[14]

The *Wells* and *De Feo* opinions were used by the Fifth Circuit Court of Appeals in *Pogue v. Great Atlantic & Pacific Tea Company*[15] as the basis for "a new and different rule of care to be imposed on the proprietor of a modern, self-service grocery store."[16] In *Pogue* the plaintiff, a woman seventy years of age, entered the defendant's supermarket and headed toward an unused checkout counter. Halfway across the entrance aisle the plaintiff slipped, on lettuce and carrot tops, and fell. The plaintiff conceded that no evidence was available as

11. *Id.* at 721.
12. 55 So. 2d 182 (Fla. 1951).
13. *Id.* at 185.
14. *Ibid.*
15. 242 F.2d 575 (5th Cir. 1957).
16. *Id.* at 581.

to actual or constructive notice of the dangerous condition. She argued, however, that she could base her case on evidence tending to show that the storekeeper, *by his method of operation,* had created a dangerous condition that caused the presence of the foreign matter on the floor. The court reversed a summary judgment for the defendant largely because it interpreted the Florida law as tending toward greater storekeeper liability.

The Florida Supreme Court, in *Food Fair Stores, Inc. v. Trusell,*[17] corrected this "misinterpretation" of Florida law by the federal court. *Trusell* refuted the notion that Florida had moved toward more "storekeeper" liability. According to the court, the concept of a "higher degree of diligence," which had been expressed most clearly in *Wells,* had only been given a tentative acceptance in one avenue of proof — when the defendant is the creator of the dangerous condition; and even this limited acceptance is found only in dictum.[18] Since *Trusell,* the Florida courts have consistently applied the rule of reasonable care to all supermarket slip-and-fall cases. The results of this application will next be considered.

PROBLEMS IN PROOF

Preliminary Evidentiary Problems

The plaintiff, in a slip-and-fall case, must first establish that the slip and fall, in fact, was caused by the existence of a dangerous condition on the premises of the defendant. Three matters of proof, therefore, are (1) existence of the condition, (2) its dangerous nature, and (3) causation in fact. The proof of all three are necessary for recovery but are not alone sufficient to prove the whole case. After proof of these matters the plaintiff must follow one of the avenues of proof.[19]

Proof of these three essentials is severely hampered in most cases because of the lack of disinterested witnesses. Often, the plaintiff is the only witness to the fall or the object causing it.[20] When the plaintiff is able to find a witness to the fall, it is usually a husband or a wife who is naturally a party interested in the plaintiff's case. Moreover, a husband who has witnessed his wife's injury will often join in the suit.[21]

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17. 131 So. 2d 730 (Fla. 1961).

18. Carls Mkts., Inc. v. Meyer, 69 So. 2d 789 (Fla. 1953).

19. See Kroger Grocery & Bakery Co. v. Dempsey, 201 Ark. 71, 143 S.W.2d 564 (1940).

20. See Food Fair Stores of Florida, Inc. v. Patty, 109 So. 2d 5 (Fla. 1959); Carls Mkts., v. Leonard, 73 So. 2d 826 (Fla. 1954).

21. See Carls Mkts., Inc. v. De Feo, 55 So. 2d 182 (Fla. 1951); Grand Union Supermarkets, Inc. v. Griffin, 156 So. 2d 789 (3d D.C.A. Fla. 1963).

When the plaintiff seeks the aid of store employees in finding the object causing the fall, he is liable to find their eyesight poor.[22] And when an employee is called to testify, he is apt to be *certain* that no foreign matter was at or near the place of the mishap, even though disinterested witnesses may have testified otherwise.[23] In any event, the employees are probably the only ones who have carefully inspected the scene of the accident immediately following its occurrence. Other witnesses, shoppers not attuned to such details, normally have little knowledge of the conditions except at some vaguely-remembered time before or after the accident.

The nature of the foreign substance itself makes the proof of these preliminary matters difficult – green beans, lettuce leaves, carrot tops, and pieces of spinach are highly movable objects. It is not nearly as difficult to prove the existence and dangerous nature of a rotten tree[24] or of a rusted manhole cover[25] as it is to prove that water and vegetable leaves existed and created a dangerous condition on the floor of the defendant's supermarket. Even if the evidence sufficiently proved that a generally dangerous condition existed on the floor, the court could require proof that the condition existed at the particular spot of the plaintiff's fall and was the cause of it.[26]

As long as the condition complained of is food particles or other foreign substances the courts, it would be fair to say, have little difficulty in finding them to be dangerous. It must be noted, however, that the plaintiff can prove too much by testifying to the dangerous nature of the condition that caused the slip and fall. In *Carl's Market v. Leonard*[27] the plaintiff slipped and fell on a piece of wax paper in the defendant's food market. She admitted on the witness stand that the floor was terrazzo "which is very slippery on something like that [piece of wax paper]."[28] Instead of considering this statement merely as proof of the dangerous nature of the condition, the court found contributory negligence on the basis of it.

Creation of the Dangerous Condition

A case-by-case approach will best illustrate the particular problems in proving supermarket liability within each of the three avenues of proof. The starting point for discussion of the first avenue, creation of the dangerous condition, is *Wells v. Palm Beach Kennel Club*.[29]

22. See Messner v. Webb's City, Inc. 62 So. 2d 66 (Fla. 1952).
23. See Carls Mkts., Inc. v. Meyer, 69 So. 2d 789 (Fla. 1953).
24. City of Jacksonville v. Foster, 41 So. 2d 548 (Fla. 1949).
25. City of Tampa v. Johnson, 114 So. 2d 807 (2d D.C.A. Fla. 1959).
26. Haley v. Harvey Bldg., Inc., 168 So. 2d 330 (2d D.C.A. Fla. 1964).
27. 73 So. 2d 826 (Fla. 1954).
28. *Id.* at 827.
29. 35 So. 2d 720 (Fla. 1948).

In *Wells* the plaintiff proved only what he himself was able, as a business-invitee on the defendant's racetrack premises, to witness — that the exit aisles were littered with bottles, that the defendant sold beverages in bottles, and that patrons were permitted to set the empty bottles anywhere they pleased. The proof, in effect, was of the defendant's standard operating procedures. The Florida Supreme Court found this sufficient to take the case to the jury on the issue of negligence.

The *Wells* decision is revealing for another reason. We may note the matters on which proof was not required. No evidence was introduced to prove either constructive or actual notice of the bottle which caused the slip and fall. No evidence was introduced to prove that the defendant or one of his employees was the person who placed the particular bottle in the exit aisle nor that they had, at anytime, placed bottles in the aisle. These matters would undoubtedly have been impossible of proof had they been required.

On closely analogous facts, but this time in a supermarket setting, the Florida Supreme Court apparently required the proof of one or more of these impossibilities in *Marks v. Carl's Markets, Inc.*[30] The court affirmed a directed verdict for the defendant in a per curiam decision; the facts are stated in a dissenting opinion:[31]

> The record discloses that appellee's place of business was a very attractive supermarket, that at the time plaintiff was hurt, there was a "special" on green beans, that the bean bin was overloaded, that it was difficult to take beans from the bin, without dropping some on the floor, and that beans were in fact repeatedly dropped on the floor, and not restored to the bin. There was testimony that the floor had not been swept for more than an hour at the time plaintiff slipped on the bean and fell.

Clearly, negligent operating procedures were shown, but questions of negligence were not permitted to go to the jury.

The federal court, as mentioned above, was not as slow to apply the *Wells* reasoning to Florida supermarkets.[32] The "uncontroverted facts" of *Pogue* do not vary from the pattern outlined in *Wells* and *Marks* although the details differ.[33]

> Fresh vegetables, including lettuce and carrots were not packaged, and pieces of such vegetables frequently broke off in the baskets and remained there after the purchases had been re-

30. 62 So. 2d 739 (Fla. 1953).
31. *Id.* at 740.
32. Pogue v. Great Atl. & Pac. Tea Co., 242 F.2d 575 (5th Cir. 1957).
33. *Id.* at 577. (Emphasis added.)

> moved [at the checkout counter] . . . . As they were pushed [often by employees of the defendant] out into the main entrance aisle, the baskets often bumped into and against other baskets which had accumulated there. The bumping together of the baskets frequently caused pieces of vegetables remaining therein to fall onto the floor of the main entrance aisle. As a result of the *customary operations of the defendant*, the aisle was often littered with such pieces of vegetables.

The court held that the evidence was relevant to the issue of negligence under an expanded definition of creation of a dangerous condition. The *Wells* definition of duty was applied to the supermarket situation.

There is an additional reason for the result in *Pogue*, a reason that illuminates another problem in proving supermarket liability in Florida. The defendant argued that there was not sufficient circumstantial evidence to justify submission of the case to the jury. This contention was based upon the often-followed Florida rule that, in order for circumstantial evidence to be submitted to the jury, one inference must outweigh all other reasonable inferences from such evidence.[34] Holding that the rule was merely procedural, the court refused to apply it. Instead, the court felt that fair-minded men could draw the favorable inference in this instance and, therefore, submitted the evidence to a jury.

Circumstantial evidence plays a large part in each of the avenues of proof, but plaintiffs attempting to prove the defendant's creation of a dangerous condition are particularly dependent on this type of evidence. Short of seeing the defendant place a particular bean on the floor, there is usually little direct evidence that the particular bean or lettuce leaf arrived at its resting place through the acts of the defendant or his employees. From the evidence presented, the inference can always be drawn that the bean did not come from the defendant's bins or that, even if it did, a person not under the control or in the employ of the defendant was solely responsible for its present position. In such a situation, only a Solomon could determine when one inference outweighs all other reasonable ones. The Florida courts, however, stand ready to make this determination. Two Florida cases illustrate the courts' application of the rules regarding circumstantial evidence.

The plaintiff, in *Food Fair Stores of Florida, Inc. v. Moroni*,[35] sought to prove that the dangerous condition was created by the defendant's employees. The slip and fall was caused by a piece of wet

34. King v. Weis-Patterson Lumber Co., 124 Fla. 272, 168 So. 858 (1936).
35. 113 So. 2d 275 (2d D.C.A. Fla. 1959).

spinach, which was on the floor by the dairy stall some distance from the vegetable bins. The evidence showed the operating procedures of the store in detail. The court summarized the evidence as follows: vegetables were washed and trimmed in the rear of the store; they were then hurriedly carted through the store aisles, past the dairy stall, in open containers on four wheeled, flat-bed trucks; ice was supplied to the bins in like manner in any available container; wilted vegetables were returned to the rear of the store, retrimmed, and then returned to the bin; the route of these operations was directly over the spot of the fall; there were standing instructions that the floor be swept every hour; and when vegetables were sold they were immediately packaged in a paper bag and sealed by stapling in the immediate area of the bin. On this evidence, the court ruled that the jury could properly infer the defendant's employees had created the dangerous condition. Presumably, the court found the evidence was capable of producing an initial inference that would outweigh all other reasonable inferences.

In *Food Fair Stores, Inc. v. Trusell*,[36] the question presented was whether "statements contained in an affidavit filed in opposition to a motion for a summary judgment constituted admissable circumstantial evidence which would have justified a jury inference of negligence."[37] The district court had held that the following statements warranted reversal of a summary judgment entered for the defendant in the trial court:[38]

> [B]agboys would take the unloaded shopping buggies from the "checkout" counter and stack them between the "checkout" counter and the drug department. Further, that the bagboys were supposed to empty the buggies of paper, debris, loose particles of vegetables or greens before stacking the buggies. Further, that in the course of work, the bagboys would not always accomplish this, and that sometimes loose leaves would fall from the buggies to the floor, being shaken loose by the stacking process.

The supreme court held that the statement was not relevant to the issue of negligence and, therefore, would not have been admissible at trial. According to the court, the evidence was purely speculative and "inadequate to produce an inference that outweighs all contrary or opposing inferences."[39] Then the court added a comment that seems curious at best. It found the evidence insufficient in that it

36. 131 So. 2d 730 (Fla. 1961).
37. *Id.* at 731.
38. *Id.* at 732.
39. *Id.* at 733.

"does not even purport to be descriptive of a consistent, established course of conduct by employees of the store."[40] Whether the statements in *Moroni* do describe a "consistent, established course of conduct by employees of the store" is not immediately clear. The evidence in *Moroni* seemingly has a greater particularity than the statements in *Trusell*, but query: Could not this difference be due to the nature of the respective operations? In other words, did not the plaintiff "prove" all that he possibly could in each instance?

Actual Notice of the Dangerous Condition

Actual notice, the second distinct avenue of proof open to the injured plaintiff, is proved by evidence that the defendant or his employees were aware of the dangerous condition in time to remedy it.

Direct evidence of actual notice is usually in the form of an admission by an employee or the defendant that he had, prior to the accident, noticed the dangerous condition. Such an admission has been held admissable as an exception to the hearsay rule in Florida.[41]

When direct evidence of notice is introduced, the plaintiff still must prove that the notice was received in time for remedial steps to have been taken. The period of time itself, the capacity of the noticing person,[42] whether a bagboy or cashier, and the extent of the efforts by this person to remedy the condition[43] have a bearing on this matter of proof.

Because of the difficulty in obtaining the necessary admissions, circumstantial evidence is usually relied upon to prove actual notice. The use of circumstantial evidence in Florida, of course, again introduces the problem of weighing conflicting inferences. For this reason alone it is not surprising that there are no such cases reported in Florida. In other jurisdictions, however, cases concerning the proof of actual notice through circumstantial evidence are reported, and three are discussed below.

In *Hewitt v. Katz Drug Co.*[44] the plaintiff proved that an hour before the accident the defendant's manager told an employee to clean up the aisle in which the plaintiff fell. The court felt that the jury could properly infer it was the presence of the dangerous condition on the floor that motivated the manager's action.

In *Smith v. Manning's, Inc.*,[45] the plaintiff testified that the floor

40. *Ibid.*
41. Montgomery Ward & Co. v. Rosenquist, 112 So. 2d 885 (2d D.C.A. Fla. 1959).
42. Bader v. Great Atl. & Pac. Tea Co., 112 N.J.L. 241, 169 Atl. 687 (1934).
43. Winsby v. Kirtell, 10 Cal. App. 2d 61, 50 P.2d 1075 (1935).
44. 199 S.W.2d 872 (Mo. App. 1947).
45. 13 Wash. 2d 573, 126 P.2d 44 (1942).

where she fell was littered with matches and cigarette butts. None of the employees could say that the floor was swept on the morning of the accident. In holding that the defendant had notice, the court pointed out that at the time of the accident one of the employees was in the aisle where plaintiff fell, and was responsible for keeping the aisle clean. Further, the court noted that it must have taken considerable time for the refuse to accumulate on the floor.

The courts have not always found circumstancial evidence of actual notice sufficient. In *Morris v. King Cole Stores, Inc.*[46] the plaintiff proved that an employee, only minutes before the accident, passed over the spot where the plaintiff fell. The court rejected the plaintiff's argument that actual notice could be inferred because the employee could reasonably have been expected to see the dangerous condition.

The case above is one of the comparatively few cases dealing explicitly with the sufficiency of circumstantial evidence of actual notice. Because of the similarity of such evidence to that which is necessary for proof of constructive notice, the courts tend to discuss evidence of actual and constructive notice together. Many of the cases discussed in the following section, therefore, have application to actual as well as to constructive notice.

Constructive Notice of the Dangerous Condition

The proof of constructive notice is the proof of a time factor. The plaintiff must show that the dangerous condition existed for a period of time sufficient for it to have been discovered and remedied. The sufficiency of the time period depends on many elements. The Maryland Court of Appeals enumerated the following circumstances that should be considered:[47]

(1) the nature of the danger,
(2) the number of persons likely to be affected by it,
(3) the diligence required to discover or prevent it,
(4) the opportunity and means of knowledge,
(5) the foresight which a man of ordinary care and prudence would be expected to exercise under the circumstances,
(6) the foreseeable consequences of the conditions.

A different list was suggested by the Minnesota Supreme Court:[48]

46. 132 Conn. 489, 45 A.2d 710 (1946).
47. Moore v. American Stores Co., 169 Md. 541, 182 Atl. 436 (1936).
48. Hubbard v. Montgomery Ward & Co., 221 Minn. 133, 21 N.W.2d 229 (1945).

(1) the nature of the business,
(2) the size of the store,
(3) the number of customers,
(4) the nature of the dangerous substance,
(5) the location of the substance.

Although there may be disagreement as to which factors will determine a sufficient length of time, the courts have agreed that an extremely short period of time, such as not more than four minutes,[49] will not qualify as constructive notice. On the other hand, periods such as two hours,[50] one hour,[51] and twelve to thirty minutes,[52] have been held sufficient. Most courts have held that the question of sufficiency should be left to the jury.[53]

Generally, many types of evidence have been offered in proof or disproof of the time factor. Several distinct types are: evidence of the actions of store employees,[54] evidence of the physical appearance of the dangerous condition itself,[55] and evidence of prior witnessing of the condition[56] or of prior accidents.[57] These categories of evidence and others have met with varied acceptance. In Florida, particularly, there is uncertainty as to which type of evidence or which combination of evidence is necessary to prove the time factor.

The Florida Supreme Court decision in *Miami Shores Village v. Lingler*[58] indicates that evidence of the physical appearance of the condition is admissible as proof of constructive notice. The case did not arise in a supermarket setting, however. The plaintiff, while walking on a city sidewalk, had tripped over dangerously-exposed reinforcing rods of a concrete parking bumper. In his suit against the city, the plaintiff showed that the bumper was discolored and weathered. The court held this evidence a sufficient basis for the

49. Shea v. First Nat'l Stores, Inc., 63 R.I. 85, 7 A.2d 196 (1939).
50. Dillon v. Wallace, 148 Cal. App. 2d 447, 306 P.2d 1044 (1957).
51. White v. Mugar, 280 Mass. 73, 181 N.E. 725 (1932).
52. Hale v. Safeway Stores, Inc., 129 Cal. App. 2d 124, 276 P.2d 118 (1954).
53. See Danisan v. Cardinal Grocery Stores, Inc., 155 Cal. App. 2d 833, 318 P.2d 681 (1957); F. W. Woolworth Co. v. Peet, 132 Colo. 11, 284 P.2d 659 (1955).
54. *E.g.*, Jenkins v. Brackin, 171 So. 2d 589 (2d D.C.A. Fla. 1965); F. W. Woolworth Co. v. Stevens, 154 So. 2d 201 (3d D.C.A. Fla. 1963); Taylor v. J. M. McDonald Co., 156 Neb. 437, 56 N.W.2d 610 (1953).
55. See Smail v. Jordan Marsh Co., 309 Mass. 386, 35 N.E.2d 221 (1941); Messner v. Red Owl Stores, 238 Minn. 441, 57 N.W.2d 659 (1953).
56. *E.g.*, Haley v. Harvey Bldg., Inc., 168 So. 2d 330 (2d D.C.A. Fla. 1964); White v. Mugar, 280 Mass. 73, 181 N.E. 725 (1932); Bader v. Great Atl. & Pac. Tea Co., 112 N.J.L. 241, 169 Atl. 687 (1934).
57. *E.g.*, Carls Mkts., Inc. v. Meyer, 69 So. 2d 789 (Fla. 1953); Moore v. American Stores Co., 169 Md. 541, 182 Atl. 436 (1936).
58. 157 So. 2d 716 (Fla. 1963).

jury's finding of constructive notice. An earlier case[59] in which evidence of the decayed condition of a tree was deemed sufficient to establish constructive notice of its dangerous condition was relied upon by the court.

These cases, while analogous in certain respects, cannot be deemed conclusive on the sufficiency of similar evidence in a supermarket slip-and-fall case. It must be noted that there was no question of "ownership" of the condition in these cases as there is in the supermarket context. In supermarket cases it is when ownership of the dangerous object *cannot* be proved that the plaintiff must rely on constructive notice. Therefore, the mere showing of discoloration or weathering may not raise as strong a favorable inference as it would in cases such as *Lingler*.

The courts of other jurisdictions have considered the issue of what inferences may properly be drawn from the condition of the foreign matter itself. There seems to be no generally accepted majority position. Some cases are included as illustrations of the reasoning and facts involved in the decisions.

In two Alabama cases,[60] evidence that a lettuce leaf was dirty, crumpled, and mashed was held to be sufficient for a jury's determination of constructive notice. A Connecticut court ruled the same on testimony by the plaintiff that there was present on the floor "a lot of sort of crushed strawberries" and "it looked like lettuce leaves, all spread out, kind of dirty . . . as though several people stepped on it before."[61] A Massachusetts opinion held that "dirty and grimy" squash shavings and seeds, which covered about a foot of floor area, could properly be found to have existed long enough to constitute constructive notice.[62]

On the other hand, testimony by the plaintiff that a vegetable leaf was dirty was held not to be sufficient in a Georgia case.[63] Even the combination of dirtiness and dryness was not enough for the Connecticut court in a case involving the skin of a frankfurter in a store where frankfurters were sold.[64] And, in an Ohio decision, evidence that a banana peel was dark in color and contained grit from the floor was insufficient because it is a "matter of common knowledge" that bananas are often black when pulled off the bunch.[65] The

59. City of Jacksonville v. Foster, 41 So. 2d 548 (Fla. 1949).

60. Great Atl. & Pac. Tea Co. v. Weems, 266 Ala. 415, 96 So. 2d 741 (1957); Great Atl. & Pac. Tea Co. v. Popkins, 260 Ala. 97, 69 So. 2d 274 (1953).

61. Morris v. King Cole Stores, Inc., 132 Conn. 489, 45 A.2d 710 (1946).

62. Berube v. Economy Grocery Stores Corp., 315 Mass. 89, 51 N.E.2d 777 (1943).

63. Miscally v. Colonial Stores, Inc., 68 Ga. App. 729, 23 S.E.2d 860 (1943).

64. Edwards v. F. W. Woolworth Co., 129 Conn. 245, 27 A.2d 163 (1943).

65. Zerbe v. City of Springfield, 381 Ohio L. Abs. 487, 60 N.E.2d 793 (1943).

flattened and gritty appearance of the banana peel was of no aid, the court said, because it could have been caused by the plaintiff's fall or by another person only moments before. Finally, in a Minnesota case, the court commented that the natural deteriorated condition alone was not sufficient, but that the result may have been different if the object had been pressed down, dirty, or torn.[66]

It is obvious that, in the absence of a Florida case on point, a plaintiff in this state would hesitate to base his proof of constructive notice of the dangerous condition solely on the physical condition of the foreign substance itself. On the other hand, a plaintiff could draw some encouragement from *Lingler* as well as the fact that the Florida appellate courts have not ruled as a matter of law that such evidence is insufficient.

What other evidence has been held sufficient for the jury on the issue of constructive notice? One of the few Florida cases to deal explicitly with the sufficiency of the evidence of constructive notice in the supermarket context is *Jenkins v. Brackin*.[67] There, the plaintiff slipped on a string bean on the floor of the defendant's store. The evidence revealed that the plaintiff and her husband were the only customers in the store at the time of the accident and that there had been no other customers in the store during the fifteen or twenty minutes preceding the plaintiff's fall. The only others in the store were the defendant-owner, an employee behind the meat counter, and a fourteen-year-old helper whose job it was to sweep the floor when it was dirty. The evidence revealed a conflict as to the time of the accident, yet the trial court granted a summary judgment for the defendant.

On appeal, the plaintiff argued that the time of the accident was a material fact and therefore summary judgment was improper because a reasonable inference could be made as to the length of time the bean was on the floor. The basis for this contention was an affidavit of the fourteen-year-old helper, which stated that he did not work on the day of the accident from noon until 4:00 p.m. and that after his return at 4:00 p.m. he did not sweep the floor nor did he see anyone else sweep it until after the accident.

The appellate court reversed the lower court and emphasized that proof of constructive notice, like any fact, may be proved by circumstantial evidence. Further, the court said:[68]

> [T]he rule imposing liability on a proprietor of a public building, on the basis of constructive notice, creates a duty of making reasonable inspections of the portions of his premises

66. Messner v. Red Owl Stores, 238 Minn. 411, 57 N.W.2d 659 (1953).
67. 171 So. 2d 589 (2d D.C.A. Fla. 1965).
68. *Id.* at 591.

> that are open to his customers. It follows then that evidence that no inspection had been made during a particular period of time prior to an accident may warrant an inference that the dangerous condition existed long enough so that the exercise of reasonable care would have resulted in discovery.

Finally, the court enumerated the evidence it found sufficient to warrant a jury's determination whether a reasonable time had elapsed. This included the fact that there was a period of fifteen to twenty minutes prior to the accident during which the defendant had not inspected the area of the fall, the affidavit of the helper, the dispute over the time of the accident, and the fact that the store was small but had three employees on the premises.

In *F. W. Woolworth Company v. Stevens*[69] the plaintiff fell on a soapbubble solution in the defendant's store. The plaintiff testified she had been in the store fifteen or twenty minutes before the accident. During this time, as she slowly progressed down the aisle, there were no customers between her and the place of the accident. The defendant claimed the area of the accident was clean five minutes before the accident. Although not pointing out the avenue of proof to which this evidence related, the court affirmed a jury verdict for the plaintiff.

Other Florida decisions dealing with the proof of actual or constructive notice are even less helpful.[70] The courts often content themselves with an unrevealing holding that the decision in *Food Fair Stores of Florida, Inc. v. Patty*[71] controls because there is "no evidence" as to actual or constructive notice. *Patty* stands for the proposition that in supermarket slip-and-fall cases the burden is on the plaintiff to prove the facts necessary to satisfy one of the avenues of proof. The overworking of this decision as precedent is uninstructive to future plaintiffs and accentuates the difficulty in proving a slip-and-fall case.

Other jurisdictions have been more revealing in this respect. In *Hale v. Safeway Stores, Inc.*,[72] because employees were instructed to pick up fruit and vegetables in the aisles, the defendant was held to have been aware of the danger to customers from the presence of these objects on the floor. The evidence further showed that the place where the plaintiff fell was swept twelve to thirty minutes before

69. 154 So. 2d 201 (3d D.C.A. Fla. 1963).

70. See, *e.g.*, Grand Union Supermarkets, Inc. v. Griffin, 165 So. 2d 789 (3d D.C.A. Fla. 1963); Sammons v. Food Fair Stores of Fla., Inc., 118 So. 2d 231 (2d D.C.A. Fla. 1960); Food Fair Stores of Fla., Inc. v. Vallarelli, 101 So. 2d 161 (3d D.C.A. Fla. 1958).

71. 109 So. 2d 5 (Fla. 1959).

72. 129 Cal. App. 2d 124, 276 P.2d 118 (1954).

the accident. On this evidence, the California court held that a jury question was presented on the issue of constructive notice.

Similar evidence was held to create a jury question in *Dillon v. Wallace*,[73] another California case. In *Dillon*, there had been no inspection for two hours before the accident even though the defendant knew that shoppers put loose vegetables in their carts, and that these often fell to the floor.

The defendant is sometimes able to counter the plaintiff's evidence with strong evidence of his own. In *Sattler v. Great Atlantic & Pacific Tea Co.*,[74] the plaintiff showed that the debris on the floor was a "withered" mustard leaf. The defendant, however, proved that the cleaning methods used on the premises would make it impossible for vegetable matter to remain on the floor for more than a minute or two, thus rebutting any inference of negligence.

Prior witnessing of the dangerous condition by third persons has often been introduced as evidence of constructive notice. In *White v. Mugar*,[75] a Massachusetts decision, the evidence indicated that the dangerous condition, which resulted in injury to plaintiff's mother, was seen one hour before the accident by the plaintiff. The court recognized it was conceivable that two different dangers were involved, but held that a jury was not bound to accept that inference.

Proof of constructive notice, more so than the other two avenues of proof, is a hodgepodge of miscellaneous items of evidence strung together through good fortune and necessity. Whatever the plaintiff overhears as she recovers from her fall, she introduces into evidence. If the banana is black, that too goes into the case. The manager asks if any of his stockboys swept the aisle – if one did, at almost anytime, it is introduced into evidence. From these items and others, which an imaginative mind can relate to constructive notice, the jury must determine whether a sufficient time has been proven.

Other Matters of Proof

The issue of proximate causation presents no unique problems in supermarket slip-and-fall cases.[76] The defendant, of course, usually affirmatively pleads contributory negligence. The courts have generally reasoned it is not contributory negligence to fail to look for danger where none is reasonably to be expected.[77] Given the spotless atmosphere of the modern supermarket, the plaintiff is not required

73. 148 Cal. App. 2d 447, 306 P.2d 1044 (1957).
74. 18 F.R.D. 271 (D.C. La. 1955).
75. 280 Mass. 73, 181 N.E. 725 (1932).
76. *Cf.* Goldsmith v. Mills, 130 Cal. App. 2d 493, 279 P.2d 51 (1955); Great Atl. & Pac. Tea Co. v. Popkins, 260 Ala. 97, 69 So. 2d 274 (1953).
77. See First Fed. Sav. & Loan Ass'n of Miami v. Wylie, 46 So. 2d 396 (1950).

to watch his every step. He has been required, however, to notice display boxes[78] and to take some precautions to ascertain the condition of the floor when leaving the meat counter.[79]

CONCLUSION

There can be no doubt that recovery in a supermarket slip-and-fall case is a sometime thing. The avenues to recovery are blockaded at some points, poorly lighted at others, and virtually nonexistent at still others.

Why should these burdens be placed upon the plaintiff who is injured in a supermarket? The answers are not satisfactory. We cannot assume that most slip-and-fall cases are fraudulent. Nor can we believe that most shoppers are careless. Most certainly, we cannot proclaim that the burden of proof must be what it is because the supermarket is just another piece of business property.

It is precisely because the supermarket is not just another business property that so many slip-and-fall cases occur on its premises. And it is this same reason that largely accounts for the extreme difficulty in proving a supermarket slip-and-fall case. Very few, if any, of the other business properties combine the following:

(1) hard and comparatively slick floors,
(2) push carts,
(3) the same weekly, predominantly female, clientele,
(4) eye-catching displays,
(5) large numbers of small and potentially hazardous items in open bins,
(6) almost continuous replenishment of products,
(7) customer unassisted handling of products,
(8) relatively high volume of persons on property each day,
(9) well-defined shopping flow,
(10) high proportion of part-time help, and other features that distinguish the modern self-service supermarket.

Would it not be logical to provide specially for the supermarket situation?

We have already discussed the viewpoint that supermarkets should be treated separately and that a higher degree of diligence on the part of supermarket owners should be required. Whether this higher degree of diligence should remain within the reasonable care rule of supermarket liability is a semantic question with which we need

78. Frederich's Mkt., Inc. v. Knox, 66 So. 2d 251 (Fla. 1953).
79. Carls Mkts. v. Leonard, 73 So. 2d 826 (Fla. 1954).

not be concerned. Motivating those who advocate a higher-degree-of-diligence test is undoubtedly the desire to have a more responsible supermarket and to compensate those, who through no fault of their own, are injured on a supermarket's premises. The argument is made that the law has lagged behind in defining the duties of a supermarket owner; and, as a result, valid claims are being denied recovery.

From our study, the law governing supermarket liability can be criticized for its inconsistency, reliance on chance modes of proof, and frequent denial of relief without jury consideration. The existing law would seem to prefer that a sizable number of valid claims are denied relief than to allow even the possibility that an unjust claim would sneak through. A rethinking of supermarket liability is certainly desirable.

Two other solutions to the slip-and-fall problem might be a Shoppers' Compensation Statute or Plan, analogous to Workmen's Compensation, or a Shoppers' Safety Commission modeled after industrial safety commissions. Both solutions have advantages. The Compensation Statute would provide some recovery for all injured shoppers while the Safety Commission could do much to eliminate the causes of the slip and fall. Both have drawbacks, as well, not the least of which is their novelty.

A more likely solution to the current situation is to shift some of the burden of proof to the defendant. If this were done, supermarket liability would exist when an injury resulted from a dangerous condition on the premises *unless* the supermarket should show that it did not create the dangerous condition *and* that the condition did not exist for a sufficient period of time to have been discovered and remedied. In effect, proof of the existence of the dangerous condition and proximate causation of plaintiff's injuries would raise a rebuttable presumption of negligence on the part of the supermarket owner or his employees.

Several advantages would result from placing some of the burden of proof on the defendant. First, more slip-and-fall cases will be permitted to reach the jury where the feelings of the public will be expressed. Second, the burden of proof as to each issue will be upon the party most capable of producing relevant evidence. Third, with this in mind, supermarkets will undoubtedly keep better records of inspections and operating procedures and will probably seek ways of improving both. Fourth, more of the risk of loss is placed upon the one better able to bear it, the supermarket.

The defendant will not be presumed into liability if the burden of proof is shifted. In virtually all cases, unless the defendant's operating procedures, including inspection, are clearly negligent, the supermarket should be able at least to reach the jury.