

Slipping Straight to the Jury Susan R. Miller Miami Daily Business Review

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It's astonishing how many Americans slip and fall on banana peels, collard greens and other hazards on the floors of grocery stores and other public establishments.

Perhaps the likelihood of such accidents has grown as shoppers increasingly are distracted by spiffy displays and an abundance of free food samples. Viewed this way, supermarket life is like a vaudeville act full of pratfalls -- but with groans of pain replacing the laughs.

That pain is two-sided, however, because a lot of these customers sue. Grocery stores around the country spend \$450 million annually to defend slip-and-fall claims, according to the Bedford, Texas-based National Floor Safety Institute. Nearly 60 percent of all general liability insurance claims filed against the nation's \$494 billion grocery store industry are for such complaints.

The average slip-and-fall claim nationwide is for \$3,900, while the cost to litigate a lawsuit has reached \$100,000, says Russ Kendzior, executive director of the institute.

Winning these cases generally has been difficult. Last month, however, the Florida Supreme Court dramatically changed the rules in ways that delighted the plaintiffs' bar and infuriated the defense bar and business groups.

In a unanimous ruling, the state's high court rewrote the rules, dramatically shifting the burden of proof away from the plaintiff and onto the shoulders of the defendant. Now, if a customer takes a tumble, it's up to the store to prove that it exercised reasonable care to keep its floors clean.

"Where a plaintiff slips and falls on a transitory foreign substance in a defendant's business premises, once the plaintiff establishes that he or she fell as a result of that transitory foreign substance, the burden shifts to the defendant to produce evidence that it exercised reasonable care under the circumstances," Justice Barbara Pariente wrote in the court's main opinion.

The ruling is likely to result in lawyers accepting more slip-and-fall cases, says Coral Gables, Fla., attorney Spencer Aronfeld. "Previously, the law stood between my client and justice," says Aronfeld, whose three-lawyer practice handles about one-third slip-and-fall cases. "Now, I won't have to fight the law to get my case to a jury."

But the ruling likely will set off a lobbying battle in Tallahassee, Fla., over legislation to protect the owners of premises. And it has strained the already tense relationship between the state high court on the one hand and the state's Republican leadership and business community on the other.

Defense lawyers call the ruling a dangerous precedent that will open the floodgates to frivolous lawsuits. The Florida Retail Federation, which represents 6,000 retailers statewide, has begun discussing legislative approaches to limiting the damage from the ruling.

"Legislation is the only thing you have left when the supreme court dumps you out the front door," complains Bill Herrle, the federation's vice president of government relations.

ROTTEN BANANAS

For nearly 30 years, many plaintiffs in Florida slip-and-fall lawsuits have failed to get their case before a jury because the burden was on them to prove that the property manager should have known the treacherous mess was on the floor and failed to clean it up. The courts have applied the so-called 15-minute rule: The plaintiff must prove that the substance on which they slipped was on the floor at least 15 minutes to get their day in court.

Judges applied demanding tests to determine whether the substance was on the floor for that magic interval. Was the offending banana brown and mushy? If so, was it brown before it hit the floor? Were there grocery cartwheel tracks or footprints running through the mess, indicating that it had been on the floor for a while?

For years, plaintiffs' lawyers argued that these were fact questions for juries to decide. But most trial and appellate courts in Florida took a different view. Thus, judges around the state typically discarded such cases like, well, rotten bananas.

But in its landmark 42-page opinion in two supermarket slip-and-fall suits that had been dismissed by lower courts, the state supreme court shifted the burden of proof to the defendant. No longer will judges be permitted to dismiss cases simply because a banana wasn't brown enough or a grape squishy enough.

Now it will be up to store owners to prove that they took reasonable care to ensure that their floors were free of hazards.

Defendants will have to present evidence such as inspection reports, surveillance video or testimony detailing the steps taken to ensure the floors are clean.

"Neither [plaintiff] was in any position to know the circumstances that placed the piece of banana on the floor prior to her fall; nor was either one of them in any position to prove that the piece of banana was on the floor because of the negligence of store employees," wrote Pariente.

INSUFFICIENT EVIDENCE

The two slip-and-fall cases which formed the basis for the supreme court's ruling were typical. In both cases, female grocery shoppers slipped on pieces of banana and injured themselves. Both filed negligence lawsuits and managed to get their cases before a jury. However, before jurors were able to deliberate, the judges in the two cases ruled in favor of the defendants, issuing directed verdicts.

Evelyn Owens slipped and injured her back in 1995 while shopping at a Publix store in St. Cloud, Fla. She sued in Orange Circuit Court, and her case was tried before a jury in 1998.

During the trial, a witness described the banana Owens slipped on as "kind of mushed." But at the conclusion of the trial, Judge Ted Coleman ruled that Owens failed to prove that the banana turned brown on the floor rather than on the display shelf, and thus that there was insufficient evidence to show that the store management knew the banana was on the floor. In December 1998, the 4th District Court of Appeal in West Palm Beach agreed.

In the second case, Elvia Soriano was leaving a U-Save market in Okeechobee, Fla., when she allegedly slipped on a piece of banana and fractured her kneecap. A store manager helped her up and scraped the banana off her shoe. Soriano described it as "brown with very little yellow on it." She sued in Palm Beach Circuit Court in 1996.

During the trial, the store's manager gave testimony supporting the plaintiff's argument that the banana had been on the floor long enough to turn brown. He said his store sold only "clean, nice, yellow bananas." He also admitted that store records did not show exactly when the floor had been cleaned that day.

Despite this, at the close of the trial, Judge Moses Baker ordered a directed verdict in favor of the defendant, reasoning that the banana might have been brown before it fell on the floor.

In May 1999, the 4th DCA upheld that ruling. The court said that the circumstantial evidence presented by the plaintiff would require the "impermissible stacking of inferences" to establish that the store's management knew the banana had fallen and did nothing to clean it up. Moreover, the court noted, that there were no telltale signs, such as "cart tracks, foot prints, dirt or even grit," that the banana was on the floor for very long.

FRUITFUL ARGUMENTS

The high court consolidated Owens v. Publix and Soriano v. B&B Cash Grocery Store and heard the cases in February of last year.

During oral arguments, the justices engaged in detailed discussions with the lawyers for both sides on the specifics of spoiled and mashed produce. They discussed the various degrees of rotteness of bananas and collard greens, and whether one could infer how long the substances had been on the floor by how black they were.

The justices also fretted over whether a store owner who took every precaution to keep the floor clean should be held liable if something fell and someone immediately slipped on it.

Lawyers supporting the plaintiffs' position argued that those were issues for juries to decide. "Juries -- not judges -- resolve factual issues of litigants," wrote Joseph Williams, a partner at Troutman Williams Irvin Green & Helms in Winter Park, Fla., in his amicus brief filed on behalf of the Academy of Florida Trial Lawyers.

Lawyers for the plaintiffs also pointed to cases supporting the proposition that liability could be inferred from circumstantial evidence -- for instance, that the offending banana was brown.

The justices ultimately agreed that such evidence could be used to establish that the property manager should have known of the hazard and done something about it.

"If the aging occurred on the floor, this would provide circumstantial evidence of constructive notice; that is, that it was on the floor a sufficient period of time so that the defendant knew or should have known of its existence," Pariente wrote. "The mere fact that there may be alternative explanations inconsistent with the deterioration occurring on the floor does not render the circumstantial evidence of constructive knowledge fatally deficient."

While he agreed with his colleagues that evidence of the "deteriorated condition of a banana" provides a sufficient basis for the cases before them to go to a jury, Justice Major B. Harding, in a concurring opinion, questioned whether they might have gone too far by essentially rewriting Florida's slip-and-fall law.

Chief Justice Charles Wells expressed his own reservations, noting in a concurring opinion that the store owner's duty to maintain the premises in a reasonably safe condition "should be central to the legal doctrine in these cases -- not the store owner's constructive knowledge of an unsafe condition," Wells wrote.

The high court ruling means that both Owens and Soriano will get the chance to retry their cases and present their evidence to a jury.

Bambi Blum, a solo Miami appellate lawyer who argued before the high court on behalf of the plaintiffs, says the supreme court's new guidelines "are a lot clearer and the burden of proof allocation is fair."

She noted in her briefs to the high court that Florida's lower courts had "erected a roadblock to recovery" by insisting that evidence of dirt or grime on the floor was necessary to prove the case.

Getting a slip-and-fall case to court had become an exercise in the absurd, Blum said in an interview. "How many grains of sand or dirt do you need on a piece of lettuce to say it's been there long enough to get to a jury?"

But Spencer Silverglate, a corporate defense attorney and partner at Clarke Silverglate Campbell Williams & Montgomery in Miami, contends that last month's ruling undermines the fundamental principle that plaintiffs bear the burden of proving negligence. Under the new standard, he argues, there is a presumption of negligence.

Doug McIntosh, a partner at McIntosh Sawran Peltz & Cartaya in Fort Lauderdale who represents insurance companies, says the ruling will increase litigation and exposure for premises and property owners throughout the state. "This is just another example of shifting financial responsibility to those that the judicial system perceives can afford to pay," he says.

As a result, McIntosh predicts, more defendants will settle rather than risk going before a jury.

GREATER VIGILANCE

The ruling almost certainly means that managers of grocery stores and other public establishments will have to be more vigilant about floor safety. Experts say they'll also have to develop better methods of documenting their safety efforts, in order to convince judges and juries that they've taken every precaution to ensure the safety of their customers.

Kendzior, of the National Floor Safety Institute, suggests that the supermarket industry has not been as attentive to the problem as it should have been because it has held the upper hand in court.

Grocery stores currently spend \$1.5 billion each year to maintain their floors, he says. Despite the high cost of floor maintenance and of resolving slip-and-fall claims, the industry has regarded this as the price of doing business and has "done little" to address prevention, he says.

"Because they have a history of winning these types of accidents, that's how they have chosen to address the problem," he says.

Robert "Rooney" Gleason III, vice president of Gleason Group in Johnstown, Pa., says the Florida Supreme Court's ruling creates a "golden opportunity" for his firm, which handles risk management for nearly 450 supermarkets across the country.

He says his company has developed a computerized floor monitoring system that automates the inspection and cleaning process, ensuring regular floor inspections and full documentation. One advantage, he says, is that store managers and employees can't falsify the records.

Placing the burden of proof on the defendant "will prevent premises owners or operators from benefiting from their absence of record-keeping and it will increase the incentive for them to take protective measures to prevent foreseeable risks," Pariente wrote in the opinion.

"As both of the cases on review demonstrate, because a plaintiff is often unable to establish when the area was last maintained, the defendant benefits from its own lack of record keeping," she wrote.

Defense lawyers say measures like this may be necessary. "We are going to have to make sure our clients do what they need to, to show [that injuries] weren't the fault of the store," says Bill Ricker, an insurance defense lawyer who is of counsel at Akerman Senterfitt in Fort Lauderdale. "They will have to spend more money to make sure they clean the floor. And that will cost [customers] higher prices."

WISHES IT HAD COME SOONER

Aronfeld says he only wishes the supreme court decision had come sooner. Earlier this year, he lost a case when Miami-Dade Circuit Judge Barbara Levenson granted a directed verdict in favor of South Miami Hospital. His client allegedly had slipped and fallen at the hospital and suffered nerve damage to her foot; she claimed that the floor had been overly waxed.

Levenson justified her ruling by saying that the plaintiff failed to prove that the wax had been on the floor long enough for hospital officials to know it was there and that it created a hazard.

"Had this law been in effect, we would have gotten to a jury and gotten a verdict in our favor," Aronfeld says.

David Singer, a partner at Singer Farbman and Associates in Hollywood, Fla., says his firm, which now turns down nine out of 10 slip-and-fall cases, also will accept more of those cases as a result of the ruling, because "proof will be easier." But Singer still doesn't think winning will be easy. "You're still going to need to find negligence on the part of the store owner," he says.

Michael Hammond, a senior associate at Rissman Weisberg Barrett Hurt Donahue & McLain in Orlando who represented Publix in its appeal before the supreme court, also predicts that more slip-and-fall cases will be filed -- and it will be tough for defendants to avoid facing a jury.

"The real significant difference," he says, "is that you're never going to get a directed verdict anymore."