CASES ON THE COURT'S CALENDAR ARE OWENS AND SURIANO AND PUBLIX SUPERMARKETS AND I UNDERSTAND, COUNSEL, THAT YOU HAVE ARRANGED A TIME. EACH PETITIONER WILL HAVE 8 MINUTES AND MR. HAMMOND WILL HAVE TWO. MR. MUSZYNSKI, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. GOOD MORNING. MY NAME IS BERNARD MUST I KNOW SKI. I AM HERE -- MUSZYNSKI, ON BEHALF OF MS. EVELYN OWENS AND HER HUSBAND. THIS IS A SLIP AND FALL CASE. HOWEVER THERE, IS A SOMEWHAT UNIQUE ASPECT OF THE CASE FROM MY VIEW, WHICH IS THE FACT THAT EVELYN OWENS WAS A PART-TIME EMPLOYEE OF PUBLIX SUPERMARKETS. HOWEVER, AT THE TIME OF THE SLIP AND FALL, SHE WAS IN THE CATEGORY AND STATUS OF AN INVITEE. SHE HAD CLOCKED OUT EARLIER IN THE AFTERNOON AND WAS DOING SOME SHOPPING WITH A FELLOW COEMPLOYEE, WHO SHE WAS GOING TO GIVE A RIDE HOME TO, AND SLIPPED AND FELL ON A SMALL PIECE OF DISCOLORED BANANA.

IN THIS CASE, IN ORDER TO ESTABLISH CONSTRUCTIVE NOTICE, ARE YOU SOLELY RELYING ON THE CONDITION OF THE PIECE OF BANANA?

WELL, YES, NOT AS TESTIFIED TO BY WITNESSES BUT, ALSO, BY WAY OF A DEMONSTRATION THAT I WANTED TO CONDUCT, AND THE COURT REFUSED ME ANY OPPORTUNITY TO DO THAT IN THE TRIAL COURT. ESSENTIALLY WHAT I AM SAYING IS YES, MA'AM.

SO WHAT WERE YOUABLE -- SO YOU HAD NO EVIDENCE INTRODUCED -- SO YOU WEREABLE -- SO YOU HAD NO EVIDENCE INTRODUCED AS TO PUBLIX WITH REGARD TO SLIP AND FALSE OF AN EMPLOYEE?

PUBLIX WILL SAY THEY INSPECT THE FLOORS CONSTANTLY, BUT ON THE INCIDENCE REPORT, I BELIEVE THE WORD WAS THAT THE FLOOR HAD BEEN SWEPT JUST A FEW MINUTES BEFORE, AND I BELIEVE IF I LOOKED AT OTHER INCIDENT REPORTS, IT WOULD PROBABLY REPORT THE SAME.

BUT YOU ARE SAYING THAT YOU CAN GET TO THE JURY ON NOTHING BUT THE COLOR, THE DISCOLORATION OF THE BANANA?

THAT IS A FACTOR IN MY CASE, JUSTICE SHAW. I HAD ANOTHER THEORY OF LIABILITY THAT HAS BEEN IGNORED SINCE THE VERY --

I THINK THAT IS WHAT JUSTICE PARIENTE WAS ASKING, AND I HAVE A PROBLEM WITH THAT, ALSO, WHETHER YOU -- THAT SEEMS TO BE A TREMENDOUS BURDEN ON STORES AND SO FORTH, THAT THEY HAVE TO OVERCOME THIS. OR THAT GETS THEM TO A JURY.

JUSTICE SHAW, IF PUBLIX HAD PAID THE MEDICAL BILLS FOR THIS WOMAN, SHE WOULDN'T HAVE COME TO SEE A LAWYER, AND WE WOULDN'T BE HERE TODAY. IT IS JUST THAT SIMPLE. THE SHOPPERS IN PUBLIX SHOULDN'T BE RESPONSIBLE FOR THEIR OWN INJURES, WHEN THEY GO INTO STORES TO SPEND THEIR HARD-EARNED MONEY AND FIND THEMSELVES IN THIS SITUATION. IT COULD HAVE BEEN A CAT AS TRAFFIC SITUATION, WHICH IT IT -- A CATASTROPHIC SITUATION, WHICH IT WAS NOT.

LET'S FOCUS ON THE COLOR OF THE BANANA. YOU ARE SAYING YOU DON'T NEED COLOR PLUS. JUST THAT, ALONE, WOULD GET YOU TO THE JURY.

YES, SIR.

THAT IS BECAUSE --

THE REASON I SAY IT IS BECAUSE OF THE FLORIDA STANDARD JURY INSTRUCTION 2.1, WHEN IT TALKS ABOUT INFERENCES, BECAUSE THEIR ARGUMENT HAS BEEN INFERENCE. ON AN INFERENCE YOU CAN'T DO THAT. I AGREE WITH THEM. BUT I DON'T AGREE WITH THEM THAT IT IS A QUESTION OF LAW FOR A TRIAL JUDGE TO DECIDE. I BELIEVE IT IS A ISSUE OF FACT FOR A JURY TO DECIDE. THAT WAS THE THEME OF MY BRIEF, AND IF YOU LOOK AT THE STANDARD JURY INSTRUCTION, YOU WILL SEE THAT THAT IS WHAT IT DOES. IT GIVES A LEVEL PLAYING FIELD.

HOW DOES THAT SHOW THE ELEMENT OF NEGLIGENCE? DO YOU AGREE THAT THE PLAINTIFF MUST SHOW NEGLIGENCE?

YES, SIR. YES, SIR.

HOW DOES THE FACT THAT A PIECE OF BANANA THAT IS ON THE FLOOR, BROWN, THAT SOMEBODY SLIPPED ON, WITHOUT MORE, SHOW NEGLIGENCE?

IT IS A INDICATOR IS THE ONLY THING I CAN SAY, JUSTICE. IT IS AN INDICATOR, AND IT SHOULD BE ENOUGH TO GO TO THE JURY, AND I SAY THAT, BECAUSE OF THE WORDING OF THE FLORIDA STANDARD JURY INSTRUCTION, BUT JUSTICE, I AM HERE ON ANOTHER ISSUE, TOO, AS TO WHAT THE DISTRICT COURT OF APPEAL DID WITH THIS CASE.

BUT BEFORE --

BEFORE YOU MOVE ON, JUSTICE QUINCE HAS TRIED TO ASK A QUESTION A TIME OR TWO.

ALTHOUGH YOU SAID THAT A CASE SHALL BE ABLE TO GO TO THE JURY JUST ON COLOR, YOU INDICATED, HOWEVER, THAT YOU WERE ARGUING COLOR PLUS THE FAILURE OF THE COURT TO ALLOW YOU TO DO A SDEMTRATION? IS THAT WHAT -- A DEMONSTRATION? IS THAT WHAT I HEARD YOU SAY?

JUSTICE, I FELT THAT I SHOULD HAVE HAD THE OPPORTUNITY TO DEMONSTRATE TO THE JURY HOW LONG IT MIGHT TAKE TO DISCOLOR A PIECE OF BANANA. THAT IS SOMETHING YOU CAN ARGUE ABOUT, ONCE YOU GET --

BUT IS THAT ISSUE BEFORE THE COURT NOW? AS I UNDERSTAND IT, THE TRIAL JUDGE, IN FACT, DID NOT ALLOW YOU TO DO THE DEMONSTRATION.

THAT'S CORRECT.

OKAY, AND THAT IS NOT AN ISSUE THAT PRESENTED IN THIS APPEAL.

I REFERRED TO THAT DIRECTLY IN MY BRIEF. I POINTED OUT THAT THIS WAS SOMETHING I WANTED TO DO BUT COULDN'T GET DONE, BECAUSE HE REFUSED THE OPPORTUNITY.

WAS IT PROFFERED?

YES, SIR. I ASKED TO DO IT. THE REASON I DID IT IS BECAUSE, AT THE BEGINNING OF THE TRIAL, THE TRIAL JUDGE GRANTED A MOTION IN LIMINE, WHICH PRECLUDED US FROM DOING A LOT OF THING, BUT MORE IMPORTANT THAN THAT, WHEN WE FILED THE NOTICE TO HAVE PUBLIX PRODUCE ALL OF THEIR RECORDS ABOUT SLIP AND FALLS, HE SUSTAINED THE OBJECTION TO IT, SO I WAS LEFT WITH JUST A LITTLE NARROW PICTURE, IF YOU WILL, OR A VIEW OF SLIP AND FALLS IN THE ST. CLOUD STORE. I WANTED TO HAVE THE WHOLE SPECTRUM. THAT WAS TO SUPPORT MY SECOND THEORY.

COUNSEL, YOU ARE REALLY NOT JUST RELYING UPON THE COLOR. I MEAN THE UNDERLYING PREMISE THAT YOU ARE DEALING WITH IS IT NOT, IS ONE OF CIRCUMSTANCES WITHIN THE POWER OF PROOF, THAT DIRECT THEMSELVES TO THE LENGTH OF TIME AND AN OBIN A PARTICULAR LOCATION, COLOR BEING JUST ONE OF THOSE. WOULD THAT NOT BE A MORE ACCURATE STATEMENT OF -- THAN JUST COLOR? IT IS NOT THE COLOR. IT IS CONDITION, AND THAT IS ONE OF THE ELEMENTS OF CONDITION. IS IT NOT?

YES, SIR. IT WOULD BE AN INDICATOR, FROM MY VIEW, THAT, AND TO THE JURY'S VAU, HOPEFULLY, IF YOU CAN GET TO IT, THAT THIS SUBSTANCE HAS BEEN THERE A WHILE, AND AT LEAST IT CAN BE ARGUED, WITHIN THE PARAMETER OF FLORIDA STANDARD JURY INSTRUCTION 2.1.

WOULD THE DISCOLORATION HAVE TO HAVE TAKEN PLACE ON THE FLOOR? OR COULD IT NOT HAVE TAKEN PLACE EARLIER?

JUSTICE, IT COULD HAVE HAPPENED ANY TIME. BUT IT IS AN INDICATOR. IT IS SOMETHING FOR THE JURY TO CONSIDER, AND I GO BACK TO 2.1, BECAUSE I THINK 2.1 COVERS IT. THIS IS THE INFERENCE ON AN INFERENCE RULE, FROM MY VIEW, WENT OUT THE DOOR MANY, MANY YEARS AGO, WHEN THE FLORIDA STANDARD JURY INSTRUCTIONS WERE ADOPTED BY THIS COURT. 1967, I BELIEVE. AND I THINK IT IS A MATTER OF BEING ABLE TO LET THE JURY DECIDE IT, BECAUSE THE JURY INSTRUCTION STATES THAT WE CAN.

HOW ABOUT ADDRESSING THAT FOR A MINUTE, REALIZING THAT YOU ALL HAVE SUCH LIMITED TIME HERE TO TALK ABOUT THIS IMPORTANT ISSUE. YOU HAVE MADE SOME RATHER SWEEPING STATEMENTS IN YOUR BRIEF THAT, REALLY, THE COURTS HAVE GONE WRONG FROM THE START, ABOUT IMPOSING THE BURDEN, SPECIFIC BURDEN, ON A CLAIMANT, REALLY, TO SUBMIT SPECIFIC PROOF ABOUT HOW LONG SOMETHING HAS BEEN AROUND, SO THAT WE GET TO THIS NOTICE ISSUE THAT, YOU KNOW, AS A COMPONENT OF THE CAUSE OF ACTION. WHAT ALTERNATIVE WOULD YOU OFFER US IN THAT REGARD? THAT IS INSOFAR AS THE WAY THAT WE HAVE STATED THE OBLIGATION OF A SHOP OWNER TO HAVE SAFE PREMISES FOR A CUSTOMER, AND THEN, WHEN THOSE ISSUES GET TO A JURY? CAN YOU ADDRESS THAT BRIEFLY?

JUSTICE I WILL TRY. I AM NOT SURE I REALLY UNDERSTAND THE QUESTION.

I AM VERY CONCERNED ABOUT THAT.

MY CONCERN, AND IT IS ALMOST IMPOSSIBLE FOR A PLAINTIFF WHO SLIPS AND FALLS IN A SUPERMARKET OR IN A PREMISE SUCH AS WE ARE TALKING ABOUT HERE TODAY TO TRY TO ESTABLISH HOW LONG THE SUBSTANCE IS THERE. IT IS A VERY RARE, UNIQUE CASE, AND I AM SAYING I DON'T THINK IT IS NECESSARY TO BE ACCOMPLISHED, THAT THAT DOES NOT HAVE TO BE ACCOMPLISHED, WITHIN THE PARAMETERS OF FLORIDA STANDARD JURY INSTRUCTION 2.1, WHICH DEALS WITH INFERENCES. IT SAYS THAT THE JURORS CAN MAKE INFERENCES AND DO WHAT THEY --

SO IS IT YOUR POSITION THAT, IF A PLAINTIFF CAN DEMONSTRATE THAT THERE IS A UNSAFE CONDITION THAT CAUSED INJURY TO THE PLR PLAINTIFF, THAT, THEN -- TO THE PLAINTIFF, THAT, THEN, UNDER THOSE INSTRUCTIONS, THAT CASE OUGHT TO GO TO A JURY?

YES. THAT IS WHAT I AM SAYING.

I KNOW YOU ONLY HAVE TWO MINUTES IN REBUTTAL. IF YOU WISH TO SAVE ANY TIME, YOU MAY. IF YOU WISH TO CONTINUE, YOU MAY.

ALL RIGHT. THANK YOU, SIR.

MAY IT PLEASE THE COURT. BANDY BLUM, FOR THE PETITIONER, MS. MONTGOMERY. I THINK WE SHOULD GO BACK AND TAKE A LOOK AT MONTGOMERY, BECAUSE THAT WAS A CASE WHERE THE COLLARD GREEN APPEARED AGED AND, ALSO, INVOLVED A SITUATION WHERE NOBODY HAD BEEN IN THE AISLES FOR 15 OR 20 MINUTES, AND OUR POSITION IS EITHER ONE OF THOSE FACTORS, AND ACCORDING TO THE COURT'S OPINION, EITHER ONE OF THOSE FACTORS WILL BE SUFFICIENT TO ESTABLISH A CASE OF CONSTRUCTIVE NOTICE.

LET ME ASK YOU THIS, THOUGH. WHAT THOSE CASES, FOOD FAIR VERSUS PATTY AND THE CASES THAT I HAVE TRIED, SLIP AND FALLS UNDER, MY ENTIRE CAREER, ALWAYS WERE TRYING TO DEAL WITH THE ISSUE OF WHETHER THERE WAS A SUFFICIENT BASIS IN THE EVIDENCE TO, THERE BE MORE THAN SPECULATION THAT WHATEVER SUBSTANCE WAS THERE SHOULD BE AT THE -- FOR THE ACCOUNT, IF YOU WILL, OF THE RETAIL ESTABLISHMENT. WHAT I HEAR MR. MUSZYNSKI SEARCHING FOR IS THAT, REALLY, THE ANALYSIS WAS WRONG, AND THAT, REALLY, THIS OUGHT TO BE DONE ON THE BASIS OF A REST IPSA -- OF A RES IPSA TYPE OF ANALYSIS, THAT IF THESE PEOPLE HAVE CONTROL OF THE SITUATION, THAT YOU GIVE RISE TO AN INSTANCE THAT, BUT FOR NEGLIGENCE OF THE PEOPLE THAT CONTROL THE PREMISES, THAT THE ACCIDENT WOULDN'T HAVE OCCURRED, BUT IF YOU GO IN THAT DIRECTION, DON'T WE HAVE TO SET ASIDE A WHOLE LOT OF PRECEDENT THAT HAD BEEN ESTABLISHED SINCE THE 1940s OR' 30s BY THIS COURT?

YOU DO BUT I AM NOT SUGGESTING THAT. I SAY LET'S STICK WITH MONTGOMERY. I LIKE MONTGOMERY. I THINK IT IS A GREAT CASE, AND I THINK THE CASES THAT FOLLOW MONTGOMERY ARE CORRECT. WHAT MONTGOMERY SAYS IS THAT YOU CAN ESTABLISH THAT AN OFFENDING PIECE OF FOOD WAS ON THE FLOOR A SUFFICIENT LENGTH OF TIME TO CHARGE A STORE OWNER WITH CONSTRUCTIVE NOTICE, IF YOU CAN GET BY -- BUT YOU CAN'T ESTABLISH THAT BY THE COLOR OF A BANANA?

YOU CAN DO IT BY THE COLOR OF A BANANA, OR YOU CAN DO IT BY THE COLOR OF A COLLARED GREEN.

HOW DO I KNOW, SITTING THERE ON A JURY, WHAT COLOR THAT BANANA WAS WHEN IT HIT THE FLOOR?

IT DOESN'T MATTER. IT DOESN'T MATTER WHAT COLOR.

IT DOES, IF I AM GOING TO DO IT ON THE BASIS OF THE REASONABLE NOTICE OF THE STORE KEEPTORY REMOVE IT, AND I AM TRYING TO INFER THAT HE HAD PLENTY OF TIME, BECAUSE THE COLOR OF THE BANANA WAS BROWN.

THE CASES THAT HAVE FOLLOWED MONTGOMERY SAY THAT, IF YOU HAVE DIRECT EVIDENCE, SUCH AS THE CHROFER A BANANA, SUCH AS WATER ON THE FLOOR, SUCH AS A MASHED POTATO, THE FACT THAT THAT DIRECT EVIDENCE GIVES RISE TO TWO OPPOSITE BUT EQUALLY PLAUSIBLE REASONS, AND ONE ESTABLISH ES A CASE OF CONSTRUCTIVE NOTICE AND THE OTHER DOESN'T, IT THAT THAT IS SUFFICIENT TO SEND THE CASE TO A JURY. FOR EXAMPLE THE MASHED POTATO CASE. THERE WAS A MASHED POTATO SITTING ON THE FLOOR. WELL, THE ONLY EVIDENCE THERE WAS WAS THAT IT WAS GRITTY, DIRTY, GRIMEY AND GUNKY. WE REALIZE THAT THE PLAINTIFF, HERSELF, COULD ARE HAVE MASHED THIS POTATO WITH HER OWN SHOE OR HER OWN SHOPPING CART, BUT WE, ALSO, THINK THAT THIS POTATO COULD HAVE GOTTEN DIRTY, BECAUSE IT WAS ON THE FLOOR LONG ENOUGH FOR A MYRIAD OF SHOPTORIES COME BY AND STEP ON IT, THERE BY ESTABLISHING CONSTRUCTIVE NOTICE. IN THE CASE --

LET'S SAY THE COURT WOULD ADOPT YOUR POSITION THAT THAT WOULD GET YOU TO A JURY, BUT WOULDN'T THE PLAINTIFF BE ENTITLED TO A DISTRICT DIRECTED VERDICT -- TO A DIRECTED VERDICT, IF THAT IS ALL YOU PUT ON, THAT THERE WAS THIS DISCOLORED PIECE OF BANANA ON THE FLOOR THAT YOUR CLIENT SLIPPED ON? IF THAT IS AS FAR AS YOU WENT, WOULD THE PLAINTIFF BE ENTITLED TO A DIRECTED VERDICT AT THAT POINT?

NO. I DON'T THINK SO. I THINK THAT THAT WOULDN'T NECESSARILY BE THE CASE. I THINK THAT, YOU KNOW, IN MY CASE, I AM FORTUNATE BECAUSE I HAVE OTHER EVIDENCE. I HAVE EVIDENCE THAT THERE WERE NO ROUTINE SWEEPS.

HOW HAVE YOU CARRIED YOUR BURDEN, AT THAT POINT, THAT THE STORE WAS NEGATIVE?

-- NEGLIGENCEENT?

I THINK THAT THE PASSING OF TIME, THE AGING OF THE BANANA IN OUR CASE, WE HAVE TESTIMONY THAT THAT TAKES ONE TO TWO DAYS, GIVES SUFFICIENT RISE TO AN INFERENCE --

BUT DO WE KNOW THAT IT WAS ON THE FLOOR DURING THAT PERIOD OF TIME?

DO WE KNOW THAT IT AGED ON THE FLOOR?

YES.

NO. WE DON'T KNOW THAT IT AGED ON THE FLOOR. WE DON'T KNOW ANYTHING ABOUT THIS BANANA, OTHER THAN THE FACT THAT THERE IS CONFLICTING EVIDENCE AS TO WHETHER THE STORE SELLS JUST BROWN BANANAS OR SELLS YELLOW ONES TO THE MANAGERS OF THE STORE SAY THAT THEY SELL --

HOW DIFFERENT IS THIS FROM THE RES IPSA THAT JUSTICE WELLS SUGGESTED?

I THINK THAT IT IS NOT A STRICT LIABILITY CASE. IT WOULD BE WITH ALL THE FACTS AND CIRCUMSTANCES OF THIS BROWN BAN AND A -- THIS BROWN BANANA ON THE FLOOR, AND WITH ALL OF THE APPEARANCES --

ALL OF THE FACTS OR THE FACT?

THE FACT OF THE BROWN BANANA. THE FACT THAT THERE WAS TESTIMONY FROM THE MANAGER THAT THERE WAS AN INSPECTION WITH SOMEONE IN THE AREA, TEN MINUTES BEFORE THIS. IT WOULD HAVE BEEN NOTED IN THE ACCIDENT REPORT. I HAVE AS MUCH EVIDENCE AS THE COURT HAD IN MONTGOMERY TO SEND THE CASE TO THE JURY AND SURVIVE A DIRECTED VERDICT.

WHAT DOES IT SAY, THE RULE THERE, WHAT DOES IT SAY ABOUT THE CLARITY OF OUR RULES OF NEGLIGENCE, THE OBLIGATIONS OF STOREKEEPERS AND THE OBLIGATION OF AN INDIVIDUAL, PERHAPS, TO LOOK OUT FOR HIMSELF, THAT HERE WE ARE, THAT THE STATE'S HIGHEST COURT, TALKING ABOUT WHETHER A CASE GOES TO THE JURY, DEPENDING ON THE COLOR OF THE BANANA PEEL, THAT WAS ON THE STORE PREMISES AT THE TIME? I MEAN, ISN'T THERE SOMETHING INHERENTLY FLAWED WITH THE WAY THAT WE HAVE STATED THIS RULE OF LAW, WHEN WE ARE LOOKING AT THIS KIND OF AN ISSUE TO DETERMINE WHETHER OR NOT A CASE IS GOING TO GO TO A JURY?

YES, YOUR HONOR. THERE MUST BE SOMETHING INHERENTLY FLAWED.

BUT YOU SAID THAT YOU THOUGHT THE LAW AS IT PRESENTLY EXISTED WAS FINE AND THAT WE SHOULD CONTINUE, I PRESUME, WITH THIS STORE EXAMINATION.

WHAT I COULDN'T MAKE SENSE OUT OF IS THE REQUIREMENT FOR ADDITIONAL EVIDENCE. IF I HAVE A BROWN BANANA, AND I ADD A LITTLE DIRT AND I ADD A LITTLE GRIME AND I ADD A LITTLE GRIT, JUST AS THE FOURTH DISTRICT SAYS, HOW DO I ADD ANYMORE CERTAINTY TO THE INFERENCE UPON INFERENCE RULE, IF THE BROWN BANANA COULD HAVE COME FROM THE SHOE OF MRS. --

HOW ABOUT IF THAT BANANA PEEL COULD HAVE BEEN ON THE FLOOR ALL DAY AND SOMEBODY SLIPPED AND FELL ON THAT AND PERHAPS AN EMPLOYEE SAW AND SAID I WILL GET TO IT LATER AND AN EMPLOYEE DROPPED, FOR THAT MATTER, AND THE YELLOW BANANA PEEL DIDN'T DOESN'T GET TO THE JURY, BUT IF IT WAS -- DOESN'T GET TO THE JURY, BUT IF IT WAS A DARKER BANANA PEEL, THEN THAT DARKER BAN BAN A PEEL CASE GOES TO THE JURY, SO EXPLAIN TO ME BETWEEN THOSE TWO, WHEN WE DON'T KNOW, IN EITHER CASE, WHAT THE SCOOP IS.

THAT'S TRUE, AND IF YOU HAVE A BROWN PEEL AND IT GOT EVEN BROWNER, HOW WOULD YOU KNOW ON THAT BASIS? I THINK YOU ARE RIGHT. IT IS NOT CLEAR. AND I THINK THAT IS WHY YOU HAVE BAITS, OWENS AND SORIANO ON THE ONE HAND AND YOU HAVE THE EVIDENCE THAT HAS OCCURRED AND NOBODY IS COUNTING GRAINS AND GRIT, THAT WE SHOULD LET A JURY DECIDE WITH WHETHER THERE IS LIABILITY OR NOT.

JUSTICE QUINCE HAS A QUESTION ACHT.

SO ONCE THE JURY DECIDES, WHETHER THEY DECIDE THAT, YES, THIS DOES SHOW THAT THE STORE HAD CONSTRUCTIVE KNOWLEDGE OR THEY DECIDE THAT, NO, THIS DOES NOT DEMONSTRATE THAT THE STORE HAD CONSTRUCTIVE KNOWLEDGE, THEN YOU WOULD NEVER -- THAT IS NEVER CHALLENGEABLE BY EITHER PARTY, UNDER THIS THEORY. IF THERE ARE EQUAL INFERENCES THERE. CORRECT ?

RIGHT.

SO WHATEVER THE JURY DECIDES, THAT IS THE END OF IT. THERE IS NEVER ANY --

IT WOULD BE A JURY ISSUE. AND IF YOU TAKE A LOOK AT THE INFERENCE UPON INFERENCE RULE AND YOU TAKE A LOOK AT THE TRUCELL CASE AND WHERE THAT INFERENCE UPON INFERENCE RULE HAS APPLIED, IT APPLIED IN THE CASE WHERE THE APPEARANCE OF THE LETTUCE WAS NEVER AT ISSUE.

SO YOU DON'T THINK THERE WAS INFERENCE UPON INFERENCE IN THIS CASE. WE ARE TALKING ABOUT THE ACTUAL FACT OF THE CONDITION OF THE BANANA AND WHETHER THE JURY DECIDES, ONE WAY OR ANOTHER. YOU HAVE, IN ANSWER TO JUSTICE ANSTEAD'S QUESTION, THOUGH, IF YOU COULD WRITE THE LAW TO MAKE STORE OWNER LIABILITY SORT OF MORE OF AN EVEN AREA OF THE LAW, BECAUSE I AM SURE IF WE HAVE ALL READ ALL OF THE CASES OF THE LAST 30 YEARS, IT IS ANYTHING BUT THAT, HOW WOULD YOU STATE THE LAW?

I THINK THE LAW SHOULD BE, IF YOU CAN -- IF YOU HAVE DIRECT EVIDENCE, SUCH AS A WILTED OR DIRTY LETTUCE LEAVE OR, AS IN MONTGOMERY, THEY RECOGNIZE THE WINN-DIXIE VERSUS BURIES CASE, WHERE YOU HAVE A BEER TOP THAT IS FILTHY AND SCUFFED, IF YOU HAVE SOME PIECE OF DIRECT EVIDENCE FROM WHICH YOU CAN DRAW A CONCLUSION THAT THERE WAS AGING, AND AGING OCCURRED ON THE FLOOR, NO MATTER WHO DROPPED THE OFFENDING SUBSTANCE, THEN I THINK YOU HAVE ENOUGH EVIDENCE TO GET TO AN INJURY, AND I THINK THAT THE INFERENCE UPON INFERENCE CASE, LET ME JUST BACKTRACK, THE FACT THAT THE SKIN OF THE BANANA IS BROWN GIVES RISE TO THAT INFERENCE, IN AND OF ITSELF. THERE IS NO OTHER FRUIT OR VEGETABLE THAT YOU CAN DROP ON THE FLOOR ALREADY IN A BROWN COLOR, AND THAT IS THE DIFFERENCE BETWEEN BANANAS AND LETTUCE LEAVES. ORDINARILY WHEN YOU DROP A FRESH LETTUCE LEAVE, IT IS NOT ALREADY BROWN, SO WE HAVE GOT THE INFERENCE OF AGING, JUST FROM THE COLOR OF THE PEEL, ITSELF, WHICH IS WHY THE FOURTH DISTRICT FELT THAT, GEE, MAYBE WE SHOULD PUT A LITTLE DIRT AND GRIT IN THE RECIPE AND SEE IF WE CAN SHORE UP THE CASE.

THANK YOU VERY MUCH. YOUR TIME HAS EXPIRED.

THANK YOU.

MR. HAMMOND, I THINK I EARLIER INDICATED THAT YOU HAD TWO MINUTES. I MEANT THAT THEY WOULD HAVE TWO MINUTES AFTER YOUR RESPONSE IN REBUTTAL.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. I THINK IT IS IMPORTANT TO A FULL APPRECIATION OF THE EXTENT TO WHICH THE PETITIONERS ARE ASKING THE COURT TO EXTEND THE EXISTING STATE OF THE LAW, TO CONSIDER WHERE WE ARE RIGHT NOW AND HOW WE GOT THERE. THE BEGINNING POINT OF PREMISE LIABILITY IS THAT AN OWNER OR POSSESS OR OF PROPERTY HAS A DUTY TO A BUSINESS INVITEE TO WARN ABOUT KNOWN DANGERS. THAT IS THEY HAD ACTUAL KNOWLEDGE.

IS THAT REALLY A CORRECT STATEMENT OF WHAT THEIR DUTY IS? DON'T THEY HAVE A BROADER DUTY TO PROVIDE SAFE PREMISES TO A CUSTOMER?

YES, YOUR HONOR. I WASN'T FINISHED.

IF WE HAVE A CASE WHERE THERE IS A HUGE SIGN IN FRONT OF THE MERCHANT'S STORE, AND IT SAYS PLEASE, PLEASE PLEASE COME IN HERE AND BUY MY BANANAS, I MEAN, IT IS JUST PLEADING WITH SOMEBODY TO COME OFF THE STREET TO BUY THEIR BANANAS, AND THEN THAT PERSON STEPS IN THE DOOR AND THEY FALL DOWN AND BREAK THEIR LEG ON A BANANA PEEL, WHY SHOULDN'T THAT PERSON'S CASE, IF THERE IS AN OBLIGATION ON THE PART OF THE MERCHANT TO PROVIDE A SAFE PREMISES, FOR THAT CUSTOMER THAT HAS, NOW, READ THOSE SIGNS AND COME INTO THE STORE, THAT THE EXPRESS FINANCIAL INVITATION OF THE MERCHANT, AND THEN FALSE AND BREAKS THEIR LEG ON A BANANA PEEL, YOU WOULD AGREE, I ASSUME, THAT A BANANA PEEL ON A FLOOR IS NOT A SAFE CONDITION. IS THAT -- NOW, WHY SHOULDN'T A CASE LIKE THAT GO TO THE JURY? THAT IS THAT THE JURY, THEN, CAN, AFTER LISTENING TO THE TESTIMONY FROM THE MERCHANT, WHO SAYS, LOOK, WE HAVE GOT CAMERAS. WE HAVE GOT EMPLOYEES. WE SWEEP UP EVERY ONE MINUTE. OKAY. AND THE ONLY WAY THAT BANANA PEEL COULD HAVE GOTTEN THERE WAS NOT THROUGH OUR NEGLECT BUT THROUGH SOMEBODY JUST DOING IT JUST INSTANT BEFORE, YOU KNOW, THAT CUSTOMER CAME IN THERE, AND SO YOU CAN'T FIND US NEGATIVE, BECAUSE WE DID EVERYTHING A REASONABLE PERSON WOULD DO, BUT WHY SHOULDN'T THAT CASE GO TO THE JURY AND IT NOT TURN ON WHETHER OR NOT THE BANANA PEEL IS A LITTLE DARKER OR A LITTLE LIGHTER? WHY SHOULDN'T THAT CASE GO TO THE JURY FOR THE JURY TO DETERMINE WHETHER OR NOT THAT PREMISE THAT THE MERCHANT INVITED THE CUSTOMER TO COME IN AND THE CUSTOMER FELL ON THE BANANA PEEL, WAS SAFE, AND WHETHER THAT SAFE PREMISES WAS PROVIDED BY REASONABLE ACTING MERCHANT OR NOT? WHY SHOULDN'T THAT CASE GO TO THE JURY?

WELL, BECAUSE OF THE SECOND ASPECT OF PREMISES LIABILITY LAW, WHICH IS CONSTRUCTIVE NOTICE, THAT IS IMPUTED KNOWLEDGE, A LEGAL FICTION CREATED BY THE COURTS, THAT THAT KNOWLEDGE EXISTS, EVEN THOUGH THE PREMISE OWNER DIDN'T HAVE ACTUAL KNOWLEDGE. NOW, IF WE ARE GOING TO IMPUTE THAT CONSTRUCTIVE NOTICE OF A DANGEROUS CONDITION, WHAT IS THE DANGEROUS --

LET ME COME BACK TO THE RULE THAT I AM TRYING TO DETERMINE WHETHER IT IS A CORRECT STATEMENT. THE RULE THAT IT IS THE MERCHANT'S OBLIGATION TO PROVIDE A SAFE PREMISES. IS THAT THE RULE THAT APPLIES?

YES. THERE IS AN OBLIGATION TO PROVIDE A SAFE PREMISES.

IF THERE IS AN UNSAFE CONDITION ON THE FLOOR OF THE PREMISES, ISN'T THAT EVIDENCE THAT THE MERCHANT HAS VIOLATED THEIR DUTY?

NOT NECESSARILY. BECAUSE THE FACT THAT A DANGEROUS CONDITION EXISTS DOES NOT MEAN THAT THE PREMISE OWNER HAD AN OPPORTUNITY TO CORRECT IT. IF IT HADN'T BEEN THERE A

SUFFICIENT LENGTH OF TIME --

ISN'T THAT WHAT THE PREMISE OWNER IS GOING TO PUT ON EVIDENCE ABOUT TO THE JURY?

YES. EXACTLY. THAT IS EXACTLY WHAT THIS CASE IS ABOUT. WHAT IS THE EVIDENCE OF LENGTH OF TIME THAT A DANGEROUS CONDITION EXISTED ON THE FLOOR?

WHAT OTHER AREA OF THE LAW DO WE MICROMANAGE, TO THE EXTENT THAT WE GET DOWN TO THIS RULE THAT YOU HAVE GOT TO MAKE AN EXPLICIT SHOWING, NOT ONLY NOT ONLY OF A DANGEROUS -- NOT ONLY OF A DANGEROUS CONDITION ON THE FLOOR OF THE MERCHANT'S PREMISES, BUT YOU, ALSO, HAVE TO CARRY THIS BURDEN OF PROOF, TO DEMONSTRATE THAT IT HAS BEEN DOWN THERE ON THE FLOOR FOR SO LONG THAT A REASONABLE MERCHANT WOULD HAVE SEEN IT AND PICKED IT UP AND CLEANED IT? WHAT OTHER AREA OF THE LAW DO WE GET THAT SPECIFIC ABOUT A REQUIREMENT ON THE PART OF A PLAINTIFF, ONCE THE PLAINTIFF HAS DEMONSTRATED THAT THERE IS A UNSAFE CONDITION ON THE FLOOR?

I DON'T KNOW THAT I CAN GIVE ANY SPECIFIC EXAMPLES TO THAT QUESTION. THE CRUX OF THE DECISION TO BE MADE TODAY, HOWEVER, IS SUPPOSE, CONCEDING THAT THE PREMISES OWNER HAS A DUTY TO MAINTAIN A SAFE PREMISES, IT CAN ONLY DO SO --

YOU AGREE WITH THAT, DON'T YOU?

YES, BUT IT CAN ONLY DO SO, IF IT KNOWS OF AN UNSAFE CONDITION.

BUT YOU ARE GETTING TO THE OBLIGATION THAT THE BREACH OF THE DUTY IS A FAILURE TO WARN.

CORRECT. CORRECT!

LET ME TAKE MY FOLLOW JUSTICE ANSTEAD'S REASONING A LITTLE BIT FURTHER, THOUGH, AND EXPLORE THE SITUATION IN THE GROCERY STORE, WHERE RATHER THAN SLIPPING ON THE BANANA, THAT THE MERCHANT PUT THE BANANA CRATES UP ABOVE THE BANANA BIN, AND THE CUSTOMER IS STANDING THERE AND LOOKING AT THE BANANAS, AND THE CRATE FALLS OFF AND HITS HIM IN THE HEAD AND BREAKS HIS NECK? NOW, I WOULD HAVE A PRETTY GOOD CASE, THERE, OF PLEADING RES IPSA, WOULD I NOT? BECAUSE THE STORE MANAGER HAD CONTROL OF THE CRATE. BUT FOR NEGATIVE STORING OF THAT CRATE, THE CRATE WOULDN'T NORMALLY BE EXPECTED TO FALL AND HIT A CUSTOMER IN THE HEAD? ISN'T THAT --

I DON'T KNOW THAT THAT WOULD BE A CASE OF RES IPSA, OF THE MATTER SPEAKING FOR ITSELF.

YOU DON'T THINK THAT I COULD ESTABLISH RES IPSA ON A DOCTRINE AND GET AN INFERENCE THAT, BUT FOR NEGLIGENCE THIS WOULDN'T HAVE OCCURRED?

YOU MIGHT BE ABLE TO SAY BUT FOR NEGLIGENCE, BUT, BUT FOR WHOSE NEGLIGENCE?

AREN'T THERE A LOT OF FALLING OBCASES THAT RES IPSA'S BEEN A DOCTRINE THAT HAS BEEN ACCEPTED?

I DON'T KNOW IF I COULD CHARACTERIZE IT AS A LOT.

THERE ARE SOME.

THERE ARE SOME.

SO WHAT IS THE DIFFERENCE? WHY WOULDN'T IT BE A BETTER WAY TO GO ABOUT THIS, TO SAY, I DON'T CARE -- TO SAY, OKAY, THE PUBLIX HAS CONTROL OF THE PREMISES, AND THERE IS IN

OBTHAT THIS PERSON FELL ON. AND -- THERE IS SOME OBJECT THAT THIS PERSON FELL ON, AND SO WE ARE GOING TO GIVE AN INFERENCE, BUT WE ARE GOING TO SAY THAT, BUT FOR NEGLIGENCE, THAT THE CONDITION WOULDN'T HAVE EXISTED THAT WOULD HAVE RESULTED IN THIS PERSON FALLING, AND THAT WAY WE WOULD CLEAR UP THIS WHOLE AREA, AND WE WOULD REQUIRE THERE TO BE PROOF THAT THERE WAS A FOREIGN SUBSTANCE ON THE FLOOR AND THAT, THEN, THAT WOULD -- AND THAT THERE WAS AN INJURY, AND THAT WOULD GIVE RISE TO AN INFERENCE OF NEGLIGENCE? NOW, THEY COULD COME AND ESTABLISH THAT THEY SWEPT THAT PLACE EVERY FIVE MINUTES, AND ARGUE TO THE JURY THAT, UNDER THOSE CONDITIONS IT WASN'T NEGATIVE? WHY ISN'T THAT A SOUNDER VIEW?

IT COMES BACK TO THE POINT THAT YOU MADE A MOMENT AGO, THAT, WITHOUT THE NOTICE OF THE DANGEROUS CONDITION AND AN OPPORTUNITY TO CORRECT IT, THERE HAS BEEN NO BREACH OF THE DUTY TOY MAINTAIN A SAFE CONDITION, AND THE ABSOLUTE ESSENTIAL ELEMENT OF THESE CASES IS THAT, WITHOUT THE ADDITIONAL EVIDENCE THAT MARK ON THE AND TRUCELL AND NEILSON TALK ABOUT, AND THERE IS NO EVIDENCE OF THE LENGTH OF TIME THAT THE DANGEROUS CONDITION EXISTED ON THE FLOOR. IT IS NOT ENOUGH TO SAY A COLLARED GREEN IS BROWN OR A BANANA IS BROWN. YOU HAVE TO SHOW THAT IT WAS ON THE FLOOR FOR A PARTICULAR AMOUNT OF TIME, AND THAT IS WHY THE CASES HAVE ACQUIRED THIS ADDITIONAL EVIDENCE LIKE DIRT IN THE MATERIAL, TRACK PRINTS THROUGH IT, FOOTPRINTS THROUGH T EVEN MONTGOMERY LISTED FIVE ELEMENTS OF ADDITIONAL EVIDENCE BESIDES THE COLOR?

GOING BACK TO THAT ADDITIONAL EVIDENCE AS THE REQUIREMENT, WHY ISN'T IT LOGICAL, AS MS. BLUM SAID, WHY, IF THERE IS FOOTPRINTS IN THIS WATER AND NOW THERE ARE FOOTPRINTS THAT, THAT DIDN'T HAPTHEN THE FALL? ISN'T THAT --

I DON'T KNOW IF THAT IS WHAT THE PROBLEM IS. THAT IS NOT THE PROBLEM IN THIS CASE. THAT IS NOT THE CASE THAT WE HAVE BEFORE US TODAY. THAT WASN'T THE PARTICULAR CASE.

SPEAKING OF THE EVIDENCE IN THE SUREIAN-CASE, HOW DOES PUBLIX -- I GUESS IT IS B AND B, I GUESS, IN THE SUREIAN-CASE.

YES, YOUR HONOR.

THERE IS -- IN THE SUREIAN-CASE. -- IN THE SURE I AND-CASE.

YES -- IN THE SURIANO CASE.

YES, YOUR HONOR.

AND THE STORE MANAGER SAID THAT NO ONE WAS ASSIGNED TO SWEEP THE FLOOR AT A CERTAIN TIME OF DAY AND THAT ALL OF THE DAILY INSPECTION REPORTS WERE COMPLETED AT ONE TIME, AND THAT IN FACT, THEREFORE, HE WAS AWARE THE INSPECTION REPORTS WERE BEING FALSIFIED. NOW, YOU HAVE GOT A SITUATION, THEN, WHERE THE PLAINTIFF, WHO IS COMING IN TO SHOP IN YOUR PREMISE, AS AN INVITEE, WHO IS -- HAS A SHOPPING CART AND IS LOOKING AT ALL OF THE BEAUTIFUL DISPLACE THAT ARE ON THE SHELVES, NOT LOOKING DOWN TO SEE WHAT IS GOING ON ON THE FLOOR, HAS A RIGHT TO RELY ON THAT THE SUPERMARKET IS GOING TO REGULARLY INSPECT ITS FLOORS? NOW, FOLLOWING UP, THEREFORE, WITH WHAT JUSTICE WELLS SAYS, BECAUSE IN A SITUATION THE BURDEN, THEN, SHIFTS TO THE STORE MANAGER, TO SAY, YES, WE, IN FACT, DID SWEEP OUR FLOORS AT A REASONABLE -- AT EVERY FIVE MINUTES OR WHATEVER IT IS OR WE HAVE SOMEBODY, BECAUSE WE RECOGNIZE THAT, IF YOU HAVE GOT A BANANA ON THE FLOOR THAT IS HIGHLY DANGEROUS, AND IT IS LIKELY THAT IF A CUSTOMER FALLS ON THAT OR SLIPS ON IT, THAT THAT PERSON WILL FALL, SO WHY SHOULDN'T, FIRST OF ALL, I GUESS, TWO THINGS, ONE THE FACT THAT PUBLIX OR B AND B HAS NO EVIDENCE THAT IT SWEPT THE FLOORS ON A REGULAR BASIS, BE ENOUGH IN THE SURIANO CASE

TO GO TO THE JURY, WITHOUT CHANGING ANY BURDENS? SO THAT IS NUMBER ONE, AND NUMBER TWO, WHY WOULDN'T THAT BE MUCH MORE REASONABLE TO ALLOW THE STORE MANAGER OF THE STORE TO SAY WE ACTED REASONABLY, BECAUSE WE DO ASSIGN SOMEBODY TO GO AND TO CHECK THE FLOORS, AND IN FACT WE CHECKED THESE FLOORS MINUTES BEFORE, LIKE, I GUESS IN THE PUBLIX CASE THERE WAS EVIDENCE THAT THAT HAD HAPPENED, AND WHY AREN'T THOSE BOTH REASONABLE THINGS, IN THIS DAY AND AGE?

THE ANSWER TO WHAT I BELIEVE YOUR FIRST QUESTION IS, WHY ISN'T SOME EVIDENCE OF ROUTINE INSPECTION OR THE ABSENCE OF ROUTINE INSPECTION ENOUGH?

THE LACK OF ROUTINE INSPECTIONS?

CORRECT. CORRECT. BECAUSE EVEN IF THERE HAD BEEN A ROUTINE INSPECTION, IF THE DANGEROUS CONDITION HADN'T BEEN THERE LONG ENOUGH, THERE WOULD HAVE BEEN NOTHING FOR THE INSPECTION TO FIND, SO YOU ARE, IN FACT, ASKING THE JURY TO MAKE A DECISION, BASED ON EVIDENCE THAT IS PREJUDICIAL, AND NOT PROBATIVE, BECAUSE --

SO THEREFORE SHOWING THAT AN AREA WASN'T INSPECTED FOR 15 MINUTES, UNDER YOUR VIEW, WOULDN'T BE ENOUGH TO GO TO THE JURY.

NOT NECESSARILY, BECAUSE I THINK THE CASES DO SAY THAT, IF YOU HAVE GOT A DANGEROUS CONDITION ON THE FLOOR AND IT HAS BEEN THERE A SUFFICIENT AMOUNT OF TIME, AND YOU, ALSO, HAVE EVIDENCE THAT THERE HASN'T BEEN AN INSPECTION, THEN THAT CERTAINLY IS ENOUGH, BUT YOU HAVE TO TAKE THOSE THINGS TOGETHER. TOUGH TO SAY THERE HASN'T BEEN AN INSPECTION WITHIN THE LAST 15 OR 20 MINUTES, AND THEREFORE THAT MEANS THAT THE CONDITION HAS BEEN THERE LONG ENOUGH, BUT THAT IS NOT THE CASE IN SURIANO. THERE IS NO EVIDENCE THAT THERE WAS NOT AN INSPECTION. THERE SIMPLY ISN'T ANY EVIDENCE THAT THERE WAS AN INSPECTION.

BECAUSE B AND B TOOK RECORDS AND FALSIFIED THE RECORDS.

I DON'T KNOW IF IT IS COMPLETELY ACCURATE TO SAY THAT THEY FALSIFIED RECORDS. I THINK THE TESTIMONY IS THAT THEY FILLED OUT THE SWEEP SHEETS ONCE A WEEK, IT TO REFLECT WHAT HAD BEEN DONE. I AM NOT TRYING TO DEFEND THAT ACTION.

HOW WOULD A PLAINTIFF -- THAT IS THE PROBLEM, THOUGH. HOW DOES A PLAINTIFF, THEN, WHO IS NOT IN THE STORE ON A REGULAR BASIS, IF THERE ARE NO RECORDS THAT ARE KEPT TO SHOW IF, IN FACT, THE FLOOR WAS INSPECTED, HOW ARE THEY EVER GOING TO PROVE CONSTRUCTIVE NOTICE WITH A FOREIGN SUBSTANCE THAT MAYBE COULD HAVE GOTEN THAT WAY BEFORE IT GOT ON THE FLOOR OR AFTER IT GOT ON THE PLOOR?

VERY SIMPLY, BY FINDING SUFFICIENT EVIDENCE TO COMPLY WITH THE RULES IN NELSON VERSUS SARASOTA, JITNEY JUNGLE STORES, TRUCELL, TO SHOW HOW LONG THIS FOOD HAS BEEN ON THE FLOOR. THAT IS WHY THIS ADDITIONAL EVIDENCE WAS ON THE FLOOR. IT IS NOT ENOUGH TO SAY THE BANANA WAS BROWN. YOU HAVE TO SAY IT WAS BROWN ON THE FLOOR FOR A CERTAIN PERIOD OF TIME.

ON A POLICY QUESTION, WHY CAN'T YOU SAY IT WAS A BURDEN OF RISK SORT OF ANALYSIS, MORE APPROPRIATE FOR THE RISK AND THE ENSURING AGAINST AN INJURY OCCURRING ON A PREMISE, THAT A RETAILER INVITES SOMEONE TO COME IN, TO PLACE THAT -- THE BURDEN OF THAT RISK ON THE RETAILER, RATHER THAN ON THE CONSUMER, WHO, IN MOST INSTANCES, IS UNINSURED AGAINST THAT TYPE OF RISK, PERHAPS FROM MEDICAL INSURANCE WOULD BE, AND THAT THE ANALYSIS THAT WE, REALLY, SHOULD BE LOOKING AT IS AN ANALYSIS THAT WOULD TAKE INTO CONSIDERATION WHERE THE BURDEN OF THAT RISK OUGHT TO FALL?

I DON'T DISAGREE WITH YOU ONE BIT. THE BURDEN OF THE RISK OUGHT TO FALL ON THE PREMISE OWNER, BUT THAT IS NOT THE SAME AS SAYING THAT THE BURDEN TO ENSURE FALSE ON THE PREMISE OWNER, AND THAT IS THE REASON THAT ALL OF THOSE CASES, LIKE MONTGOMERY AND MARCOTT HAS SHOWN THAT PREMISE OWNERS HAVE A DUTY TO WARN ABOUT KNOWN DANGERS AND THAT THEY ARE NOT INSURORS, BECAUSE THEY CAN'T ENSURE. THEY CAN'T PROVIDE INSURANCE THAT AT ANY MOMENT IN TIME THERE IS NOT GOING TO BE AN ACCIDENT OCCUR ON THEIR PREMISES?

IT IS A DUTY TO WARN. IT IS A DUTY NOT TO HAVE DANGEROUS CONDITIONS ON OONS PREMISE.

I AGREE, BUT HOW DOES ONE CORRECT THOSE CONDITIONS, UNLESS ONE KNOWS OF IT?

ISN'T THAT WHERE THE BURDEN SHIFTING COMES IN FOR THE STORE OWNER TO SHOW, IT IS NOT STRICT LIABILITY, AND IT IS NOT AN INSURANCE ISSUE, TO SHOW THAT THEY DID ALL THAT WAS REASONABLY REQUIRED, WHICH IS THEY INSPECTED ON A REGULAR BASIS? AND IF THEY CAN'T SHOW THAT, THEN, AND YOU HAVE GOT A CONDITION, YOU HAVE GOT A SUBSTANCE THAT IS DANGEROUS FOR IT TO BE ON THE FLOOR, THEN THE STORE OWNER IS NOT ABLE TO ESCAPE LIABILITY?

WELL, I THINK THAT SHIFTS THE BURDEN TOO SOON, YOUR HONOR. THAT IS THE PROBLEM. BANANA FALLS ON THE FLOOR. THE BURDEN MEET IMMEDIATELY SHIFTS TO THE DEFENDANT, TO -- THE BURDEN IMMEDIATELY SHIFTS TO THE DEFENDANT TO PROVE THAT IT HADN'T BEEN THERE LONG ENOUGH OR WAS THERE LONG ENOUGH. THEY INSPECTED THE FLOOR 15 MINUTES AGO? THAT SHIFTS THE BURDEN TOO SOON. HOW LONG ARE YOU SUPPOSED TO BE AWARE OF IT?

MS. BLUM SAID IT IS DISCOLORED. IT WAS MUSHY AND IN ONE CASE IT WAS MUSHY AND WHATEVER ELSE IT WAS LOOKING AND ONE OF THE OTHER --

GUNKY, I THINK IT SAID.

GUNKY. AND THEREFORE THAT IS EVIDENCE OF ITS CONDITION THEN, THEN THERE IS TWO COMPETING INFERENCES. ONE IS IT HAD BEEN SOMEPLACE ELSE FOR THE TIME PERIOD BEFORE THE PLAINTIFF FELL, OR IT WAS ON THE FLOOR? THOSE ARE THE TWO COMPETING INFERENCES.

BUT IT IS NOT JUST TWO COMPETING INFERENCES. IT IS PUTTING ONE INFERENCE ON ANOTHER, WITHOUT ESTABLISHING THE FIRST INFERENCE.

YOU HAD SAID -- WHAT ARE THE TWO INFERENCES?

THE FIRST INFERENCE IS THAT THE BANANA WAS NOT CLEAN, WAS NOT YELLOW WHEN IT FELL.

WHAT IF WE START WITH YOU HAVE GOT THE BANANA. IT IS DIRTY. IT IS GUNKY. IT IS -- THAT IS A DIRECT FACT. ONE INFERENCE IS THAT IT WAS, AGAIN, I GUESS WHAT THEY SAID IN THE OWENS CASE, IF AN INFANT CHEWED IT UP AND ATE IT AND BOUND IT AND THEN THREW ON THE FLOOR AND IT GOT -- THAT IS IMMEDIATELY PRECEDING THE FALL. THE OTHER INFERENCE IS IT GOT ON THE FLOOR LOOKING OKAY AND IT YELLOWED -- IT BOUND ON THE FLOOR. -- IT BROWNED ON THE FLOOR. AREN'T THOSE THE TWO COMPETING INFERENCES?

I DON'T AGREE.

ISN'T THAT WHAT THE THIRD DISTRICT SAID IN TETE? YOU WEREN'T STEECKING INFERENCE ON INFERENCE, THAT THIS HAS -- YOU WEREN'T STACKING INFERENCE ON INFERENCE, WHERE THIS HAS GOTTEN LIKE IN THE VOLKER INCIDENT, YOU DON'T KNOW THIS IS HOW THE PERSON DIED, BUT HERE YOU HAVE GOT SOMETHING ON THE FLOOR IN A DARKENED CONDITION, AND IT IS A REASONABLE INFERENCE THAT IT GOT THAT WAY ON THE FLOOR.

IT IS STACKING A SECOND INFERENCE ON THE FIRST. IT IS STACKING THAT IT HAS BEEN THERE -- YOU ARE INFERRING THAT IT HAS BEEN THERE A SUFFICIENT LENGTH OF TIME TO GIVE THE PREMISE OWNER NEATIES, SO THAT IT WOULD HAVE THE -- NOTICE, SO THAT IT WOULD HAVE THE OPPORTUNITY TO CORRECT THE CONDITION, AND THE SECOND INFERENCE THAT IT IS BROWN, BECAUSE YOU HAVEN'T PROVEN THAT FIRST INFERENCE, TO THE SECLUSION OF ALL OTHER REASONABLE INFERENCES, THAT IT WASN'T ALREADY REASONABLY BOWN BROUN WHEN IT FELL, TAN -- REASONABLY BROWN WHEN IT FELL. IT IS VERY IMPORTANT TO MAKE THE DISTINCTION THAT THESE CASES MAKE. JUST ABOUT IN EVERY INSTANCE IN WHICH LIABILITY IS FOUND, CASES WHERE IT HAS GONE TO THE JURY, THERE WAS ADDITIONAL EVIDENCE. IT WASN'T JUST A BROWN COLLARD GREEN. IT WAS A BROWN COLLARD GREEN THAT HAD A GROCERY CART TRACK THROUGH IT, SO THE GROCERY CART TRACK IMPLIED THE INFERENCE THAT IT WAS ON THE FLOOR A SUFFICIENT AMOUNT OF TIME TO CORRECT IT.

LET ME ASK YOU THIS QUESTION, IF I MAY. WOULD YOU AGREE WITH THE STATEMENT THAT A PREMISE OWNER OWES TO THE PUBLIC A SAFE PLACE TO SHOP?

YES.

YOU WOULD AGREE WITH THAT PREMISE.

YES.

WELL, AND, LET'S SAY A CUSTOMER COMES IN AND FALSE BECAUSE OF AN IMMEDIATE UNSAFE CONDITION.

HAPPENED ONLY SECONDS BEFORE.

A CONDITION THAT WAS CREATED ONLY SECONDS BEFORE? IS THAT YOUR ANALOGY?

THE BANANA ON THE FLOOR IS UNSAFE. IS THERE A SHIFTING OF BURDENS AT THIS POINT? HAS A DUTY BEEN VIOLATED AT THIS POINT?

I DON'T BELIEVE SO. BECAUSE THE DUTY IS TO CORRECT THE DANGEROUS CONDITION. AND THE LAW HAS ALWAYS GIVEN PREMISE OWNERS A REASONABLE AMOUNT OF TIME TO BECOME AWARE OF THE CONDITION.

THAT IS A DIFFERENT ISSUE, A REASONABLE AMOUNT OF TIME TO CORRECT IT, BUT FOR THE PURPOSE OF MY QUESTION, YOU WOULD AGREE THAT A DUTY HAS BEEN VIOLATED AT THAT POINT?

I WOULDN'T AGREE.

I BEG YOUR PARDON? YOU ASK DID I AGREE THAT THE PREMISE OWNER HAD A DUTY TOY MAINTAIN A SAFE PREMISE. YES, I AGREE WITH. THAT I DO NOT AGREE THAT, IF A BANANA FALSE ON THE FLOOR AND A PATRON COMES AROUND THE CORNER THREE SECONDS LATER AND SLIPS ON IT, THAT THE DUTY HAS BEEN BREACHED, BECAUSE THERE WAS NEVER AN OPPORTUNITY TO FIX IT?

HOW DOES THE CUSTOMER KNOW THOSE CIRCUMSTANCES, THOUGH? IN OTHER WORDS AREN'T WE, BY THIS PROCEDURE THAT WE HAVE GONE THROUGH, NOW, FOR YEARS, REALLY PUT A BURDEN ON THE CUSTOMER? CUSTOMER, IF YOU CAN'T FIND OUT HOW THAT BAN PAN A GOT ON THE FLOOR AND WHETHER OR NOT IT WAS THE STORE THAT DID IT OR IF THE STORE KNEW THAT THE BANANA WAS ON THE FLOOR, HOW DOES A CUSTOMER THAT STEPS IN OFF THE STREET AND FALSE DOWN LIKE THAT SUPPOSED TO -- AND FALLS DOWN LIKE THAT SUPPOSED TO FIND OUT ALL THIS STUFF?

I DON'T AGREE THAT THE BURDEN IS ON THE WAS KUS TOMER. LET'S GO TO THE START -- CUSTOMER. LET'S GO TO THE STARTING POINT, WHERE WE HAVE CREATED A LIE, ESSENTIALLY, WHERE THE CUSTOMER KNOWS OF A CONDITION THAT IT HASN'T BEEN NOTICED OF BECAUSE IT HASN'T BEEN THERE LONG ENOUGH, SO THE BURDEN HAS SHIFTED TO THE PREMISE OWNER.

WHY SHOULDN'T THE PREMISE OWNER CREATE A SAFE PLACE FOR THE SHOPER? WHY SHOULDN'T WE CREATE AN INFERENCE RULE THAT, IF THERE IS TO BE AN UNSAFE CONDITION THERE, THAT THERE ARE TWO PERMISSIBLE INFERENCES. ONE IS THAT THE SHOP KEEPER VIOLATED HIS DUTY AND THAT WAS NEGLIGENCE, AND THE OTHER IS THAT THE SHOP KEEPER WAS NOT NEGATIVE, AND LET THE JURY DECIDE WHICH WAY IT GOES, DEPENDING UPON IF THE SHOP KEEPER PRESENTS EVIDENCE ABOUT THEIR RULES AND WHAT THEY DID THAT DAY ABOUT SWEEPING AND HOW THEY OBSERVE AND EVERYTHING, SO THAT THEY DID EVERYTHING THAT A REASONABLE SHOP KEEPER COULD DO? THERE FOR THEY ARE NOT RESPONSIBLE IN THAT CIRCUMSTANCE?

IT IS A RESPONDENT'S POSITION THAT THAT IS NOT GOOD PUBLIC POLICY, BECAUSE IT IS CLOSER TO ENSURING THE CONDITION OF THE PREMISES, RATHER THAN -- ALL OF NEGLIGENCE IS A REASONABLE STANDARD.

HOW WOULD THAT BE ENSURING, IF A JURY CAME TO THE CONCLUSION THAT I HAVE LISTENED TO WHAT THIS EVIDENCE IS, AND MY GOSH, THIS IS THE BEST SHOP KEEPER I HAVE EVER SEEN! THEY HAVE DONE EVERYTHING, AND ALL THE JUDGE HAS TOLD US IS THAT ALL THEY HAVE THE OBLIGATION TO DO IS TO BE A REASONABLE SHOP KEEPER, AND THEY HAVE PROVEN TO US THAT THEY ARE A REASONABLE SHOP KEEPER, AND UNDER THE INSTRUCTIONS, WE CAN'T HOLD THEM LIABLE, IF THEY WERE A REASONABLE SHOP KEEPER?

ALL OF NEGLIGENCE LAW IS A REASONABLE STANDARD, AND IT WOULD NOT BE REASONABLE TO REQUIRE PREMISE OWNER TO ENSURE THE CONDITION OF THE PROPERTY, SO THAT THERE IS NEVER A DANGEROUS CONDITION THERE, AND THE REASONABLENESS COMES INTO ALLOWING THE PREMISE OWNER SUFFICIENT AMOUNT OF TIME TO KNOW ABOUT THE DANGEROUS CONDITION AND CORRECT IT. THAT IS WHAT MAKES HIM A REASONABLE MAN.

THANK YOU, MR. HAMMOND. YOUR TIME HAS EXPIRED.

THANK YOU.

REBUTTAL.

MS. BLUM ADVISES THAT SHE IS NOT GOING TO SAY ANYTHING BY WAY OF REBUTTAL. THE PRESENT-DAY OBLIGATION OF PREMISE OWNERS WAS FORMULATED MANY, MANY YEARS AGO, AND THE COURTS HAVE STRUGGLED WITH WHAT TO DO WITH THIS PREMISE LIABILITY SITUATION, AS IS DEMONSTRATED BY THE MYRIAD OF CASES THAT WE SEE, SOME OF WHICH WERE MENTIONED HERE TODAY. THE ISSUES I BELIEVE TO BE CONSIDERED IN BOTH THESE CASES IS WHO HAS THE GREATER KNOWLEDGE OF A DANGEROUS CONDITION? PUBLIX OR MRS. OWEN OR B AND B OR MRS. SURIANO? I THINK THE ANSWER IS PRETTY OBVIOUS. MY ANSWER, FROM MY POINT OF VIEW, WOULD BE IMPOSEING STRICT LIABILITY OR REQUIRE THE POSTING OF A WARNING OR OR PUBLIX CAN INSURE AGAINST THE LOSS. I WOULD, AGAIN, DIRECT YOUR ATTENTION TO THE FLORIDA STANDARD JURY INSTRUCTION 2.1, THAT DEALS WITH INFERENCES, AND THEN FLORIDA STANDARD JURY INSTRUCTION 3.5, PAGE 3, WHICH DEALS WITH WHO HAS THE GREATER KNOWLEDGE, AND BEFORE I FORGET, THANK YOU VERY MUCH FOR HAVING ME HERE. THANK YOU.

THANK YOU, COUNSEL.