DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO.: 3D23-362
L.T. CASE NO.: 2021-011128 CA 09

DANIEL VALDES,

Appellant

v.

VERONA AT DEERING BAY CONDOMINIUM ASSOCIATION, INC., FIRST SERVICE RESIDENTIAL FLORIDA, INC., JAMES HOFFORD and LISA AUSTIN,

Appellees

ANSWER BRIEF OF APPELLEES, VERONA AT DEERING BAY CONDOMINIUM ASSOCIATION, INC. and FIRST SERVICE RESIDENTIAL, INC.

On Appeal from the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida

---

Lissette Gonzalez, Esquire
COLE, SCOTT & KISSANE, P.A.
Counsel for Appellees
Cole, Scott & Kissane Building, Suite – 1400
9150 South Dadeland Boulevard
Miami, Florida 33156
Telephone: (305) 350-5368
Facsimile: (305) 373-2294
lissette.gonzalez@csklegal.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

INTRODUCTION

This appeal arises from the trial court's February 1, 2023 Order Denying Motion for Rehearing and February 1, 2023 Final Judgment for Appellees, VERONA AT DEERING BAY CONDOMINIUM ASSOCIATION, INC. and FIRST SERVICE RESIDENTIAL FLORIDA, INC.

In this Answer Brief, Appellant, DANIEL VALDES, will be referred to as "Mr. Valdes." Appellees will be referred to as "Deering Bay" and "First Service," respectively. Citations to the Record on Appeal and Supplemental Record on Appeal will be designated "(R. [page(s)] [document page(s)])" and "(SUPP. R. [page(s)] [document page(s)])."

STATEMENT OF FACTS

I. BACKGROUND

The underlying action arose from an alleged slip and fall on the Deering Bay property by Mr. Daniel Valdes on January 11, 2021. (R. 156-378). Mr. Valdes worked for the property management company, First Service Residential, as a Maintenance Supervisor for seven years. (SUPP. R. 203-324 at p. 24:22-24. Mr. Valdes left Verona at Deering Bay in 2019. *Id.* at p. 10:12-20.

On January 11, 2021, Mr. Valdes returned on a personal visit to see his friend and building resident, Edie Myerson. *Id.* at p. 41:1-8. During the

visit, Ms. Myerson asked Mr. Valdes to bring Christmas decorations down to her storage locker. *Id.* at p. 43:6-13. Mr. Valdes retrieved a luggage cart to carry the Christmas decorations and opened Ms. Myerson's storage locker; when he put down the decorations and left the storage locker with the cart, he stepped on a "puddle" and his leg travelled backward and his body hit the floor. *Id.* at pp. 50:21 – 51:13. Mr. Valdes testified that the luggage cart obscured his view of the puddle, so he did not see it ahead of time. *Id.* at p. 52:18-21. He also testified that a ruptured bottle within Unit 16's storage locker was the cause of the puddle, *Id.* at p. 58:13-22, but did not know how long the puddle was on the floor:

> Q. Do you know for how long the water was on the floor?
>
> A. No, I do not, but I -- I do not.

Id. at p. 58:10-12.

After Mr. Valdes fell, he alerted his wife, Maggie Valdes. (SUPP. R. 147-202 at pp. 12:25 – 13:3). Mrs. Valdes went downstairs to the scene and took photographs. *Id.* at p. 12:13-16. She did not remember the type of liquid on the floor or what the bottle looked like but did recall that the liquid emanated from a resident's storage locker. *Id.* at p. 13:2 – 14:8; *see also id* at p. 17:18-20.

While Mr. Valdes worked at Verona at Deering Bay, he testified that

the building had dedicated cleaning personnel on weekdays and weekends. (SUPP. R. 203-324 at p. 13:9-20.) According to him, these cleaners – Claudia Betancourt and Susana Castellanos – were "diligent," "excellent," and "very good." *Id.* at pp. 39:20 – 40:10. Mr. Valdes also testified that as a Maintenance Supervisor, the entire property was examined on a "daily basis for signs of danger, water, something hanging…." *Id.* at p. 33:6-14. He added that Verona at Deering Bay was kept in "pristine" condition and was known as the "cleanest and nicest building" in the community. *Id.* at p. 40:18-23.

According to Mr. Valdes, Deering Bay only had access to unit owners' storage lockers if that resident provided Deering Bay with a key. *Id.* at pp. 34:22 – 35:9. Mr. Valdes also testified that he never went into any resident's storage locker and that the state of the individual storage lockers was not the responsibility of First Service:

> Q. Did you ever walk by a locker and thought it looked particularly sloppy -- nothing was leaking, but it just looked sloppy? Did -- at that point, did you ever call a unit owner and say, "Your locker looks like a pig sty, come fix it?"
>
> A. What -- what -- what we were -- what we were supposed to do was anything out of the locker, we had the right to throw out. Anything in the locker was not our responsible. They could have -- they could have had -- you know -- they could have had everything upside-down in their locker -- that was -- that was not our problem.

Id. at pp. 37:12 – 35:13.

Indeed, pursuant to Section 5.8.2 of the Declaration of Condominium, Deering Bay and First Service are not responsible for what occurs in a resident's storage locker:

> 5.8.2. LIMITED COMMON ELEMENTS: Either the exclusive use or use in common with one or more other designated Units of the Limited Common Elements that may exist. Such elements include the garage parking space(s), terraces, verandas, entry areas, storage space(s)…. that are exterior to a Unit and are expressly required to be maintained by the Unit Owners.

(R. 156-378 at Exhibit 8).

In other words, a resident's own storage locker, as in the case of co-defendants below, James Hofford and Lisa Austin, is their own Limited Common Element and they are solely responsible for maintaining it and protecting their own personal possessions.

At the time of the underlying action, Claudia Betancourt and Susana Castellanos remained the cleaning personnel on the property, and Assistant Maintenance Supervisor, Esnel Suarez, substitutes on any day one of them cannot clean, according to the testimony of Maintenance Supervisor, Erik Rivera. (SUPP. R. 43-89 at p. 9:9-19). Ms. Castellanos testified that she cleans Verona at Deering Bay on weekends, including the storage area.

(SUPP. R. 90-111 at p. 7:11-24). She testified that she examines the storage lockers one or more times a day as she cleans. *Id.* at p. 7:11-24. Ms. Bentacourt cleans Verona at Deering Bay on weekdays and testified that she examines the storage lockers once or more times a day during her shift. (SUPP. 112-46 at pp. 8:17 – 9:5). Both Mr. Suarez and Ms. Bentacourt were on duty on January 11, 2020, the day of the subject incident. (R. 156-378 at Exhibit 7).

II. THE UNDERLYING ACTION

Mr. Valdes brought the underlying negligence action in May 11, 2021. (R. 20-25, 37-46, 47-48). Deering Bay and First Service answered the Complaint, denying all the substantive allegations and affirmatively alleging, in relevant part, that the action was barred by section 768.0755, Florida Statutes, because the subject incident was caused by a transitory foreign substance and Deering Bay had neither actual nor constructive knowledge of any dangerous condition at the time of the subject incident. (R. 32-36, 49-55, 74-90, 91-92).

After conducting discovery, on December 21, 2022, Deering Bay and First Service filed their Motion for Summary Judgment arguing the action was subject to section 768.0755 and because there was no evidence that Deering Bay had any actual or constructive knowledge of the alleged substance,

summary judgment in their favor was warranted as a matter of law. (R. 156-378). In response, Mr. Valdes filed his Response in Opposition to Deering Bay and First Service's Motion for Summary Final Judgment, as well as a Cross-Motion for Sanctions for Spoliation of Evidence. (R. 576-91). Mr. Valdes argued that circumstantial eivdence showed the puddle was present long enough that it should have been noticed, and that Deering Bay and First Service could not prove inspection of the area before the incident because there were no records or videos and the janitor could not recall that day. *Id.*

Deering Bay and First Service responded to the Cross-Motion, arguing they indeed preserved and produced the footage they had, which Mr. Valdes had since Mary 9, 2022, and that otherwise no video depicting the alleged incident existed, nor was there any claim that a housekeeper inspected the area on the date of the subject incident before the fall. (R. 596-659). Deering Bay and First Service argued:

> Defendants respectfully submit that surveillance footage of the alleged slip-and-fall did not, and does not exist. Thus, the hypothetical footage was not evidence which could prohibit or critically impair Plaintiff's ability to prove her prima facie case. As stated above, Plaintiff's contention that video footage could have captured whether a housekeeper came to clean the area on January 11, 2021 is meaningless. Defendants admit that the housekeeper who reported for duty on January 11, 2021 had not commenced her sweep of the storage locker by the time that Plaintiff fell. Indeed, Plaintiff deposed Claudia Bentacur, the housekeeper who reported for work on January 11, 2021. She said that she first went to the gym, lobby and elevator areas for cleaning. Depo of Bentacur, ¶11:16-25 and 13:11-13. While Ms. Bentacur testified that she went to the storage locker on January 11, 2021, she said that she was not specifically looking for spills and hazards on that particular visit.

Id.

On January 31, 2023, a hearing was held on the Motion for Summary Judgment, during which summary judgment was granted.[1] That same day, Ms. Valdes filed his Motion for Rehearing arguing rehearing was warranted because a condominium association is not a proper "business establishment" and therefore, section 768.0755 was not applicable and summary judgment was proper. (R. 660-65). On February 1, 2023, the trial court entered its Order Denying Motion for Rehearing, finding Mr. Valdes' Motion, which was filed just hours after the hearing on the Motion for

[1] A transcript from the hearing has not been made a part of the record on appeal. *See* Fla. R. App. P. 9.200(e).

Summary Judgment, merely reiterated the same arguments made during the hearing and raised nothing new. (R. 687-88).

On the same date, Final Judgment was entered for Deering Bay and First Service based on the granting of their Motion for Summary Judgment for the reasons stated on the record during the January 31, 2023 hearing. (R. 689-90). The instant appeal followed.

SUMMARY OF ARGUMENT

The trial court properly granted Deering Bay and First Service summary judgment in the underlying action and properly denied Mr. Valdes' Motion for Rehearing pursuant to section 768.0766, Florida Statutes. Florida's transitory substance statute requires actual or constructive knowledge of the transitory substance by the premises owner. Mr. Valdes produced no such evidence to substantiate the otherwise speculative claim and therefore failed to sustain his burden of proof. To be sure, no such evidence existed, and Deering Bay and First Service did not have any actual or constructive knowledge of the alleged condition. Summary judgment in favor of Deering Bay and First Service was therefore proper as a matter of law.

For the reasons more fully detailed herein, the trial court's February 1, 2023 Order Denying Motion for Rehearing and February 1, 2023 Final

Judgment should be affirmed in all respects.

STANDARD OF REVIEW

The standard of review of an order granting summary judgment is *de novo*. *Capotosto v. Fifth Third Bank*, 230 So. 3d 891, 892 (Fla. 4th DCA 2017). Likewise, the standard of review when interpreting a contract, including an insurance contract, is *de novo*. *Robles v. United Auto. Ins. Co.*, 333 So. 3d 735, 736 (Fla. 1st DCA 2021).

ARGUMENT

I. THE RECORD BROUGHT BY MR. VALDES IS INADEQUATE.

As a threshold issue, the record brought forward by Mr. Valdes is inadequate as the transcript from the January 31, 2023 hearing has not been filed and/or made a part of the record on appeal. Fla. R. App. P. 9.200 (e) (placing the ultimate burden of an adequate record being prepared and transmitted to the appellate court on the party seeking review).

Any inadequacy or hinderance in this Court's ability to review or conclude whether the trial court's decision was improper should result in an affirmance of the trial court's decision. As the Florida Supreme Court provided in *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979):

> Without a record of the trial proceedings, the appellate court can not *sic* properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal. The trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error.

Id. See also Tramontana v. Bank of N.Y. Mellon, 42 Fla. L. Weekly D2433 (Fla. 2d DCA Nov. 15, 2017) ("Fatally, there is no trial transcript. Without a transcript, and in the absence of fundamental error on its face, an appellate court will affirm a trial court's decision."); *1321 Whitfield, LLC v. Silverman*, 67 So. 3d 435, 437 (Fla. 2d DCA 2011) (affirming final judgment of foreclosure where, due to absence of hearing transcript, this court was unable to meaningfully review the trial court's findings).

Accordingly, to the extent Mr. Valdes purports to argue that the trial court's conclusion was incorrect or otherwise inadequate (which, as detailed below, Deering Bay and First Service vehemently disagree with), the record brought forward by Mr. Valdes is inadequate for this Court to conclude that the trial court's decision was improper or not supported by the evidence as the transcript from the January 31, 2023 proceeding on the Motion for Summary Judgment has not been made a part of the underlying record

and/or a part of the record now before this Court. Based on the foregoing and other settled authority on the issue, any inadequacy or hinderance in this Court's ability to review or conclude that the trial court's decision was improper should result in an affirmance of the trial court's decision.

II. SUMMARY JUDGMENT IN FAVOR OF DEERING BAY AND FIRST SERVICE WAS PROPER AS A MATTER OF LAW BASED ON FLORIDA'S TRANSITORY SUBSTANCE STATUTE.

Summary judgment is appropriate where the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510 (a). On April 29, 2021, the Florida Supreme Court issued an opinion *In Re: Amendments to Florida Rule of Civil Procedure 1.510*, SC20-1490 (Fla. 2021), effective May 1, 2021. In adopting the federal summary judgment standard, Florida now adheres to the summary judgment standard as set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), or what is referred to as the *Celotex* trilogy. Pursuant to the *Celotex* trilogy, a party seeking summary judgment can satisfy its initial burden in one of the following ways: "[I]f the non-moving party must prove *X* to prevail [at trial], the moving party at summary judgment can either produce evidence that *X* is not so *or* point out that the non-moving party lack the evidence to prove

X." *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018) (emphasis added). To be clear, a party seeking summary judgment, "… need not set forth evidence when the non-movant bears the burden of persuasion at trial." *Wease v. Ocwen Loan Servicing*, *L.L.C.*, 915 F.3d 897, 997 (5th Cir. 2019).

Genuine disputes are those in which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *In re Amends. to Fla. R. of Civ. P. 1.510*, 309 So. 3d 192, 194 (Fla. 2020) (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id*.; *see also Ibarra v. Ross Dress for Less, Inc*., 350 So. 3d 465, 467 (Fla. 3d DCA 2022). The Florida Supreme Court has emphasized that one "of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses*." In re Amends. to Fla. R. of Civ. P. 1.510*, 309 So. 3d 192, 194 (Fla. 2020) (quoting *Celotex*, 477 U.S. at 327). Under the new summary judgment rule, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

As such, when contesting a motion for summary judgment, the nonmoving party is required to "go beyond the pleadings" to establish that there is a "genuine issue for trial." *Id.* at 324 (citation and internal quotation marks omitted). "Mere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005) (per curiam) (*citing Bald Mountain Park, Ltd. v. Oliver*, 863 F.2d 1560, 1563 (11th Cir. 1989)). Moreover, "[a] mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990) (*citing Anderson*, 477 U.S. at 252).

To sustain a cause of action for negligence, in general, "the burden of proof is on the Plaintiff to establish that: (1) the defendant had a duty to protect the plaintiff; (2) the defendant breached that duty; and (3) the defendant's breach was the proximate cause of the plaintiff's injuries and resulting damages." *See Cooper Hotel Servs., Inc. v. MacFarland*, 662 So. 2d 710, 712 (Fla. 2d DCA 1995). A property owner owes two duties to its business invitees: 1) to warn of concealed dangers which are or should be known to the owner and which are unknown to the invitee and cannot be discovered through the exercise of due care; and 2) to use ordinary care to

maintain its premises in a reasonably safe condition. *Rocamonde v. Marshalls of Ma, Inc*., 56 So. 3d 863, 865 (Fla. 3d DCA 2011); *Westchester Exxon v. Valdes*, 524 So. 2d 452, 455 (Fla. 3d DCA 1988).

However, in order to establish a negligence claim against a premises owner for liability arising from a slip and fall on a transitory foreign substance in a business establishment, one must satisfy the requirements of section 768.0755, Florida Statutes, which provides:

> (1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person *must prove* that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:
>
> (a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or
>
> (b) The condition occurred with regularity and was therefore foreseeable.

Id. *See also Encarnacion v. Lifemark Hosps. of Fla*., 211 So. 3d 275, 277-78 (Fla. 3d DCA 2017) ("A negligence claim has four elements…A premises owner owes a business invitee a duty to exercise reasonable care to maintain their premises in a safe condition…***However, where a business invitee slips and falls on a 'transitory substance' in a business***

establishment,…proof of the breach element of the claim against an owner of the establishment is statutorily constrained by § 768.0755, Fla. Stat. (2013).") (emphasis added).

Viewing the record in the light most favorable to Mr. Valdes, it is clear that he would not be able to establish his negligence claim. In the Complaint, Mr. Valdes alleged the various ways in which, according to him, Deering Bay and First Service breached their duty of care:

> 14. Defendants breached the duties they owed to the Plaintiff by committing one or more of the following negligent acts and/or omissions:
>
> a. Failed to maintain its premises in a reasonably safe manner by knowingly allowing the substance to exist on the floor where it presented a latent danger to Plaintiff;
>
> b. Failed to maintain its premises in a reasonably safe manner by negligently allowing the substance to exist on the floor where it presented a latent danger to Plaintiff;
>
> c. Failed to properly inspect its floor and discover and remove the substance before it injured Plaintiff;
>
> d. Failed to warn Plaintiff of the latent danger presented by the substance on its floor;
> e. Failed to place a cone or otherwise cordon off the area where the substance was on the floor;
>
> f. Failed to properly and appropriately remove the substance from the floor;

> g. Failed to ensure the proper design, redesign, construction, and/or permitting on the premises;
>
> h. Failed to ensure compliance with industry standards, relevant and applicable codes;
>
> i. Failed to provide the use of appropriate visual cues and hazard markings alerting Plaintiff of the hazard; and
>
> j. Conducted its operation of the premises in a negligent manner by allowing the foregoing breaches to occur (collectively "the negligent conditions").

(R. 37-46 at ¶ 14).

However, the record contains no facts or evidence to support those allegations. In fact, the only available evidence established quite the opposite – that neither Deering Bay or First Service had reason to know of the alleged foreign substance on the ground as Mr. Valdes himself was not even aware of the alleged substance before he slipped or the duration of time in which it existed on the floor.

Section 768.0755 is clear that the burden is on plaintiffs to come forward with admissible evidence to prove actual or constructive notice by a defendant. Stated differently, a defendant has no burden to *disprove* it did not have actual or constructive notice. As section 768.0755 states (and case law has repeatedly re-affirmed), "If a person slips and falls on a transitory foreign substance in a business establishment, **the injured person must**

prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it." (emphasis added). Mr. Valdes wholly failed to sustain that burden here.

The "mere presence of water on the floor is not enough to establish constructive notice . . . ." *Delgado v. Laundromax, Inc.*, 65 So. 3d 1087, 1090 (Fla. 3d DCA 2011). Instead, "[t]he record must contain additional facts in support of liability" upon which the plaintiff could rely in opposition to a defendant's motion for summary judgment. *Id*. Despite prior attempts by many plaintiffs to argue such, a defendant does not owe a duty to invitees to "constantly patrol and supervise the area where the incident occurred." *Wilson-Greene v. City of Miami*, 208 So. 3d 1271 (Fla. 3d DCA 2017) (rejecting the plaintiff's argument that the defendant owed such a duty in a transitory substance case). Summary judgment is proper where, as here, after conducting ample discovery, a plaintiff has no evidence to support his allegations. *See Lago v. Costco Wholesale Corp.*, 233 So. 3d 1248, 1250 (Fla. 3d DCA 2017) (affirming summary judgment in favor of defendant where plaintiff offered no evidence to support allegations of constructive notice but argued summary judgment was premature "on the notice issue based solely on [plaintiff]'s deposition.").

In the instant action, Mr. Valdes testified as follows with regard to the length of time he opined the liquid had been on the floor:

> MR. VALDES: My opinion, that liquid was there for – for the weekend at least.
>
> DEFENSE COUNSEL: What makes you say that?...
>
> MR. VALDES: You -- you -- it looked – you -- you got -- you got a bottle of clear leaking drops out of the bottom of it. It does -- it takes time for those drops to make that big of a puddle.
>
> DEFENSE COUNSEL: Now -- okay. So your -- your – your estimation is that the -- the puddle had been there all weekend?
>
> MR. VALDES: At least. My opinion, at least it was there more than 24 hours.

(SUPP. R. 203-324 at pp. 68:22 – 69:1).

Ms. Valdes devised this opinion based on several inferences, including the following:

> MR. VALDES: Liquid -- liquid is -- finds the path of least resistance, so the puddle where it puddled or -- or it -- it comes out and where it comes out, you'll see a -- the residue where it was. So if you have little puddle where it used to be -- you know -- it -- path of least resistance, I believe. That's the common sense.

Id. at p. 68:17-21.

He then opined that the liquid was on the floor for a while because there were footprints in the puddle; however, when challenged on the identity of the

footprints, Mr. Valdes conceded that the footprints could have been his own from stepping in the puddle. *Id.* at p. 69:16-20).

Mr. Valdes' testimony was merely self-serving and conclusory, whereas Mr. James Hofford, the owner of the unit where the spill was located, was much better placed to determine how much liquid emanated from the bottle and for what estimated length of time because he was the one who used the bottle and put it away, and later picked up and studied the bottle after being alerted that it leaked. Mr. Hofford testified as follows:

> Q. All right. Okay. Were you ever notified after January -- on or after January 11th, 2021, that there was a leak coming from your storage unit?
>
> A. I can't tell you exactly the date it may have been, you know, date in reference. But I received a call from Eric who is the building superintendent. I immediately went downstairs. The leak was props – less than a foot, extending out from the cage door. It was entirely symmetrical just like a leak would look like. **I cleaned it up and disposed of the container because there was a small crack. The container was still probably three quarters full.** It had not leaked out entirely. **And I don't know how long that leak had been going but I can tell you in defense of the Association, Eric is probably as good as anyone I've ever seen in helping maintain that building premise. And I suspect that he saw that happening literally at the time that it was, you know, occurring and we cleaned it up immediately.**
>
> Q.: Do you know what caused the container- the breach of the container or the leak of the container?

> A.: No, it seemed like there was a crack at the bottom that went unnoticed. It may have been when I put it down. But, again, it was still about two thirds full when we got it, so.
>
> Q.: And when you picked it up, was there like -- was it a drip, drip, drip or was there just like a fluid on the bottom or was it pouring out? I guess describe how you would describe the leak.
>
> A.: The bottom was wet obviously because it had been leaking. But it did not pour out. In fact, it barely dripped out. So, I was able to just take it, put in the towel and remove it and dispose of it.

(SUPP. R. 4-42 at pp. 15:6 – 16:17) (emphasis added).

Mr. Valdes described why he believed Deering Bay and First Service were not negligent as follows:

> MR. VALDES: I think they're liable because there was -- I fell on clearly a liquid that was there and someone should have looked out or cleaned that up or not let it happen in the first place. Because of the fact that I fell, I have legal -- I have medical expenses that -- that are -- that are -- they have a - have a -- a definite impact on my life and I'm -- I've been through pain and suffering because of – of that situation.
>
> Q. Do you expect that a representative of the Association and -- and FirstService would be in the storage locker 24/7 watching out for any leaks and spills?
>
> A. No.

> Q. How often do you think that FirstService -- a representative of the Association or FirstService should have been patrolling the storage locker?
>
> A. Personally, I think on a daily basis whenever it's done.

SUPP. R. 203-324 at pp. 106:10 – 107:8.

The record evidence established, however, that a housekeeper was indeed in the storage locker area on the day of the subject incident, and every day before and after within that four-day period. (R. 156-378 at Exhibit 7). Contrary to Mr. Valdes' characterization, there was no evidence of a failure to meet inspection standards. There was also no evidence that any other residents or guests had any issues with the allegedly wet floor.

Mr. Valdes failed to provide any evidence that could aid in establishing his negligence claim. He did not present any evidence or testimony of any employees or agents who were aware of the alleged foreign substance on the floor prior to his fall or who knew how long it existed on the floor. In fact, there was no evidence with which to support the contention that Deering Bay and/or First Service had any actual knowledge of the alleged foreign substance on the floor.

Mr. Valdes similarly failed to present any evidence or testimony that Deering Bay and/or First Service had constructive knowledge of the substance. Constructive knowledge of a dangerous condition on a property

may be proven by circumstantial evidence. *Freeman v. BellSouth Telecommunications, Inc.*, 954 So. 2d 45, 46-47 (Fla. 1st DCA 2007). A defendant may have constructive notice of a dangerous condition if that condition is shown to have existed before the injury occurred for a sufficient length of time that the defendant should have known of it, or if the condition occurred with regularity such that it was foreseeable. *See id.; Cisneros v. Costco Wholesale Corp.*, 754 So. 2d 819, 821 (Fla. 3d DCA 2000), § 768.0755, Fla. Stat.

"Negligence, however, may not be inferred from the mere happening of an accident alone. ***Circumstantial evidence will not support a jury inference if the evidence is purely speculative and, therefore, inadequate to produce an inference that outweighs all contrary or opposing inferences***." *Winn Dixie Stores v. White*, 675 So. 2d 702, 703 (Fla. 4th DCA 1996) (emphasis added) (internal citations omitted) ("In order to find Winn Dixie liable in the instant case, the jury would have to necessarily infer that there was a dangerous condition at the situs of the fall and that Winn Dixie had actual or constructive knowledge thereof. Such inferences could not be properly drawn from the evidence adduced. Rather, they could only be drawn from speculation and conjecture."); *see also Broz v. Winn-Dixie Stores, Inc.*, 546 So. 2d 83 (Fla. 3d DCA 1989) (affirming the

trial court's entry of summary judgment in favor of Winn-Dixie in a slip and fall action because there was no evidence as to the length of time the grape was on the floor; "Without this or similar information a jury verdict would be sheer speculation.").

In *Encarnacion v. Lifemark Hosps. of Fla.*, 211 So. 3d 275 (Fla. 3d DCA 2017), this Court affirmed summary judgment in favor of the appellee hospital in a slip and fall case because there was no evidence that the foreign substance on the floor on which the invitee fell was known to the hospital or was there long enough that it should have been known. This Court found:

> In the absence of evidence of actual knowledge, it was incumbent on the plaintiff to come forward with circumstantial evidence that [the defendant], in the exercise of ordinary caution, should have known of the condition. In this case, however, the answers to interrogatories and depositions do not establish how long the substance had been on the floor…
>
> Parenthetically, we note Ms. Encarnacion's belated testimony that the substance on the floor was "oily," "dirty" and "dark," even if true, as we must assume for our purposes here, is insufficient to create a jury issue. For such testimony to create a jury issue, the testimony must be accompanied by a "plus," namely some additional fact or facts from which a jury can reasonably conclude that the substance was on the floor long enough to have become discolored without assuming other facts, such as the substance, in its original condition, was not "oily," "dirty" and "dark."

Id. at 278. This Court also found that the hospital housekeeping service, "had ***no duty to constantly patrol or supervise the area*** where the accident occurred." *Id*. at 279 (emphasis added).

Similarly, in *Delgado v. Laundromax, Inc*., 65 So. 3d 1087 (Fla. 3d DCA 2011), this Court also affirmed summary judgment in favor of the defendant in another slip and fall case where the plaintiff failed to produce any evidence that the defendant had any actual or constructive notice of the water on which she allegedly slipped. The only evidence the plaintiff offered was that the floor was wet and she slipped and fell, which was insufficient without more. *Id*. at 1090. This Court found:

> [The plaintiff] testified she did not: (1) know where the water came from; (2) see water anywhere else other than where she slipped; (3) know how long the water was on the floor before she slipped; or (4) know of anyone at Laundromax who knew the water was on the floor before she walked in. Further, there is no evidence in the record that it was raining or that it had recently rained, or that any of the facility's washers, sinks, or other equipment was located near the door. Thus, the only evidence [the plaintiff] offered was that: (1) that the floor was wet; and (2) she slipped and fell. Consequently, the only permissible inference was that there was water on the floor, and [the plaintiff] slipped on it.
>
> We therefore agree with the trial court that the evidence in the record shows, to the exclusion of all permissible inferences, that Laundromax was not negligent. There is no evidence that Laundromax had actual notice of the liquid on the floor before [the

> plaintiff] fell. Therefore, [the plaintiff] was required to present some evidence Laundromax had constructive notice of the hazard. Because the mere presence of water on the floor is not enough to establish constructive notice, the record must contain additional facts in support of liability, to create a permissible inference upon which [the plaintiff] could rely in defense against Laundromax's motion for summary judgment.
>
> There were, however, no additional facts presented that would support constructive notice.

Id. *See also McCarthy v. Broward College*, 164 So. 3d 78 (Fla. 4th DCA 2015) (affirming summary judgment for defendant where there was no evidence of how long the substance was on the floor before the fall); *Walker v. Winn-Dixie Stores, Inc*., 160 So. 3d 909, 910-12 (Fla. 1st DCA 2014 (affirming summary judgment, holding: "[I]t had only started raining (or 'misting') about one minute before she fell. Therefore, at most, the unnoticeable drops of water were on the floor area in question less than four minutes before the fall. This brief time period was insufficient to satisfy the statute's requirement that the alleged dangerous condition must exist 'for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition' before constructive knowledge of the condition can be imputed.").

In yet another case substantially similar to the instant case, *Oliver v. Winn-Dixie Stores, Inc.*, 291 So. 3d 126, 127 (Fla. 4th DCA 2020), the plaintiff

slipped and fell on a substance which she did not see "before falling, did not now know how the substance got there, and did not know how long it had been there." The trial court granted summary judgment and the Fourth District Court of Appeal properly affirmed, holding "[n]*o facts* suggest the grape and surrounding liquid were on the ground for enough time to impute constructive knowledge to Winn-Dixie. Without those facts, Winn-Dixie was entitled to summary judgment." *See id*. at 130-31 (emphasis added).

Mr. Valdes' claim rested on the trial court having to lay inference upon inference to come to a conclusion based on pure speculation – that Deering Bay and/or First Service *should have* seen the alleged foreign substance on the floor (which Mr. Valdes himself did not see prior to his fall and no one knows how long it existed on the floor) and because they did not see the substance (that no one else saw), Deering Bay and First Service should be charged with constructive knowledge. This would require a jury to stack several inferences and all of these inferences would have to be made to the exclusion of all other possible, reasonable theories, such as the spill having just occurred or being caused by Mr. Valdes himself. This is entirely improper.

Suppositions, speculations and the like are insufficient, without more, to create a genuine issue of material fact, and a finding to the contrary would

have improperly shifted Deering Bay and First Service's burden. *Accord Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979) (holding that testimony based largely on guesswork was "clearly inadequate to create an issue of fact," rather affirmative allegations based on personal knowledge were necessary; further, the Fourth District's finding that, based on this testimony, "doubt" was created as to a relevant issue and the movants failed to adequately demonstrate nonexistence of genuine dispute, served to improperly shift the burden).

Likewise, impermissible inference stacking is also improper and an insufficient means by which to create a dispute of fact. "[I]f a party to a civil action depends upon the inferences to be drawn from circumstantial evidence as proof of one fact, it cannot construct a further inference upon the initial inference in order to establish a further fact unless it can be found that the original, basic inference was established to the exclusion of all other reasonable inferences." *Cohen v. Arvin*, 878 So. 2d 403, 405 (Fla. 4th DCA 2004) (citing *Nielsen v. Sarasota*, 117 So. 2d 731, 733 (Fla. 1960)); *Gelco Convention Servs. v. Pettengill*, 710 So. 2d 581, 583 (Fla. 4th DCA 1998). While in the summary judgment context, inferences are acceptable and must be made in favor of the non-moving party, the rule prohibiting impermissible inference stacking remains applicable. *Nielsen v. Sarasota*, 117 So. 2d at

733; *Pettengill*, 710 So. 2d at 583. As the Fourth District in *Cohen* explained, "[i]f a party could simply allege their beliefs as evidence of events that give rise to a cause of action to sufficiently overcome summary judgment, summary judgment would be meaningless." 878 So. 2d at 405.

In *Wilson-Greene v. City of Miami*, 208 So. 3d 1271 (Fla. 3d DCA 2017), for example, this Court affirmed summary judgment in favor of the defendants when the plaintiff fell in cold pea soup. The plaintiff offered no direct evidence of the length of time the pea soup had been on the floor, rather relied solely on the theory that the soup was cold, and, therefore, must have been present for some time to have chilled. *Id*. This Court rejected that argument as improper inference stacking without any evidence that the soup had been hot at any time. *Id*. This Court affirmed summary judgment for the defendants and concluded, "In the instant case, the jury first would need to infer that the substance was hot prior to spilling on the floor and infer from this that it was on the floor a sufficient amount of time for it to have cooled. This requires a jury to impermissibly stack inferences," *Id*. at 1276; *see also Encarnacion*, 211 So. 3d at 278 (holding the floor being oily, dirty, and dark – factors not present here – without more, to be improper inference stacking and "insufficient to create a jury issue."). Similarly, here,

this inference stacking and speculation could not, and did not, properly serve to establish notice.

Lastly, it is also worth noting with respect to general negligence that "[w]hile the rule is well settled that a business invitee is entitled to expect that the proprietor will take reasonable care to discover the actual condition of the premises and either make them safe or warn him of dangerous conditions, it is equally well settled that ***the proprietor has a right to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. [T]he law does not require a proprietor of a public place to maintain his premises in such condition that an accident could not possibly happen to a customer. Plaintiff was in turn obligated to exercise a reasonable degree of care for her own safety***." *Earley v. Morrison Cafeteria Co*., 61 So. 2d 477, 478 (Fla. 1952) (emphasis added) (internal citation omitted).

In sum, Mr. Valdes failed to come forward with any evidence to establish a genuine issue of material fact existed as to Deering Bay and First Service's notice of the alleged transitory substance, which was his burden to sustain. Based on the available record evidence, Mr. Valdes would not be able to establish his claim and thus summary judgment was proper as a matter of law.

CONCLUSION

WHEREFORE, based on all of the foregoing arguments and legal authorities, Appellees, VERONA AT DEERING BAY CONDOMINIUM ASSOCIATION, INC. and FIRSTSERVICE RESIDENTIAL FLORIDA, INC., respectfully request that this Honorable Court affirm in all respects the February 1, 2023 Order Denying Motion for Rehearing and February 1, 2023 Final Judgment, and grant any further relief deemed just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 19th day of February, 2024, a true and correct copy of the foregoing was electronically filed with the Third District Court of Appeal by using the Florida Courts e-Filing Portal, therefore furnished *via* E-mail to: **Philip D. Parrish, Esquire,** Philip D. Parrish, P.A., 7301 SW 57th Court - Suite 430, Miami, Florida 33143, phil@parrishappeals.com; betty@parrishappeals.com, *Counsel for Appellant*; and **Stephan M. Greco, Esquire** and **Michael T. Tomlin, Esquire,** Torres Victor, 1451 W. Cypress Creek Road, Suite 211, Ft. Lauderdale, FL 33309, sgreco@torresvictor.com; skahn@torresvictor.com; eservice@torresvictor.com, *Counsel for James Hofford and Lisa Austin.*

Respectfully submitted,

COLE, SCOTT & KISSANE, P.A.
Counsel for Appellees
Cole, Scott & Kissane Building, Ste. 1400
9150 South Dadeland Boulevard
Miami, Florida 33156
Telephone: (305) 350-5368
Facsimile: (305) 373-2294
E-mail: lissette.gonzalez@csklegal.com
E-mail: emily.fernandez@csklegal.com

By: */s/ Lissette Gonzalez*
LISSETTE GONZALEZ
FBN: 99779

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045(b), the undersigned counsel hereby certifies that this brief was submitted in Arial 14-point font. This brief also complies with the word count limit requirements, excluding the parts exempted by Fla. R. App. P. 9.045(e).

By: */s/ Lissette Gonzalez*
LISSETTE GONZALEZ
FBN: 99779