

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO: 4D23-1635
L.T. Case No. 502020CA013355 MB

ASTRID PATERNINA,

Appellant,

vs.

TM WELLINGTON GREEN
MALL L.P., *et al.*,

Appellees.

REPLY BRIEF

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REPLY ARGUMENT

- I. **THE SUMMARY JUDGMENT MUST BE REVERSED ON THE AUTHORITY OF *Suker v. White Family Ltd., Partnership*, 193 So.3d 1028 (Fla. 4th DCA 2016) BECAUSE THERE IS AMPLE RECORD EVIDENCE THAT (1) THE SHINY TILE FLOORING IN THE AREA OF THE MALL WHERE THE PLAINTIFF SLIPPED IS OFTEN WET UNDER FORESEEABLE CONDITIONS OF USE; (2) WHEN NOT DRY, THE FLOORING IS DANGEROUS (3) THE DEFENDANTS HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE OF THIS DANGEROUS CONDITION; AND (4) BOTH SIDES' EXPERTS TESTIFIED THAT THE FLOORING WAS NOT DRY WHEN THE PLAINTIFF SLIPPED ON IT.**

The federal summary judgment rule – recently adopted in Florida - primarily replaces Florida’s old “*slightest* doubt” standard with the federal “*reasonable doubt*” standard. See *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001) (“In assessing whether the movant has met its burden, if any, the court must view the evidence in the light most favorable to, and resolve all *reasonable* doubts in favor of, the non-moving party.”) (emphasis added). But under the federal summary judgment rule there is no requirement that a non-moving plaintiff first win the equivalent of a bench trial to get her case to the jury. And there is no federal presumption of correctness - let alone a heightened one - associated with a summary

judgment order.

Throughout their Answer Brief, Appellees repeatedly invite this court to interpret disputed record evidence *in a light most favorable to Appellees*, contrary to the federal summary judgment requirement that the evidence must be viewed “in the light most favorable to the non-moving party.” *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001).

The Answer Brief also repeatedly attempts to re-frame the Appellant’s case and theory of liability, in contradiction to the axiom that the Plaintiff is the master of her complaint. Contrary to Appellees, the Mall is not being sued for allowing a specific transitory foreign substance to remain on the floor for an unreasonable period. *See, e.g. Williams v Sears, Roebuck & Co.*, 866 So.2d 122 (Fla. 4th DCA 2004); *Gordon v. Target Corp.*, 2008 WL 2557509 (S.D. Fla. 2008); and *Tallahassee Med. Ctr. v. Kemp*, 324 So.3d 14 (Fla. 1st DCA 2021).

Instead, the Appellant is suing the Appellees for tolerating, *i.e.*, maintaining, flooring that becomes unreasonably slippery and

dangerous to customers when wet.¹ See, e.g., *Brady v. Carnival Corp.*, 33 F. 4th 1278, 1281 (11th Cir. 2022) (reversing summary judgment and stating “[a]t the outset, we clarify what, under our precedent, the relevant ‘risk-creating condition’ was here. It was not, as the district court suggested, the particular ‘puddle on which [Brady] slipped.’” Rather, the salient issue is whether Carnival knew, more generally, *that the area of the deck where Brady fell had a reasonable tendency to become slippery*—and thus dangerous to passengers—due to wetness from the pool.”); *Deier v. Commodore Cruise Line*, 1995 WL 733655 *4 (S.D.N.Y., Dec. 12, 1995) (“Defendants erroneously conclude that Deier was required to prove that the particular puddle he slipped in existed for a sufficient time so as to afford them the opportunity to correct it. However, Deier’s theory of the case from the outset is that the dangerous condition was the deck itself, a deck that, when it became wet, became slippery.”); *First Federal S & L of Miami v. Wylie*, 46 So. 2d 396, 399 (Fla. 1950) (“[T]he floor had become so slippery that it offered no appreciable traction when put to traffic use and consequently

¹ The Plaintiff’s expert testified that there were other tile flooring options available to the Mall that are not slippery when wet. (R. 799).

presented a dangerous hazard.”); *Mabrey v. Carnival Cruise Lines, Inc.*, 438 So.2d 937, 938 (Fla. 3rd DCA 1983) (directed verdict properly denied because “plaintiff’s offered testimony [of] the constant wetness on the deck, even on otherwise dry days, [and that] the surface of the deck could easily have been made skid-proof if properly coated and maintained.”); and *Suker v. White Family, Ltd. Partnership*, 193 So.3d 1028, 1029 (Fla. 4th DCA 2016) (reversing summary judgment and upholding theory of liability based on “dangerous conditions that existed at the tiled entrance to the establishment **when the tile was wet**” *Id.* at 1029

The Answer Brief implies throughout - given Florida’s Transitory Foreign Substances Act, §768.0755, F.S. - that the *only* theory of liability now cognizable in a Florida slip and fall case is a defendant allowing a transitory foreign substance to remain on the floor for an unreasonable period; **and all of the cases cited by the Appellee are of this variety.** *See, e.g., Williams v Sears, Roebuck & Co., supra; Gordon v. Target Corp., supra; and Tallahassee Med Ctr. v. Kemp, supra.* The Answer Brief simply ignores the many other Florida cases - both state and federal - which recognize and allow slip-and-fall liability based upon *the characteristics of the flooring*

itself under foreseeable conditions of use, *i.e.* when wet. *See, e.g., Brady v. Carnival Corp., supra; First Federal S & L of Miami v. Wylie, supra; Mabrey v. Carnival Cruise Lines, Inc, supra; and Suker v. White Family, Ltd. Partnership, supra* (acknowledging the Transitory Foreign Substances Act while endorsing a theory of liability based on “dangerous conditions that existed at the tiled entrance to the establishment **when the tile was wet**” 193 So.3d. at 1029.

A premises liability theory which focuses on the puddle rather than the floor rarely requires testimony by a flooring expert, because the liability issue usually boils down to how long the specific puddle was on the floor. The theory here -- which focuses on the friction characteristics of the flooring when wet -- requires expert testing and testimony, which was presented by both sides here. *See, e.g., Rosenfeld v. Oceania Cruises, Inc., 654 F.3d 1190 (11th Cir. 2019)* (trial court abused its discretion in excluding plaintiff’s expert testimony regarding the slip resistance of the cruise ship’s pool decks); and *Sorrels v. NCL (Bahamas) Ltd, 796 F. 3d 1275, 1284 (11th Cir. 2015)* (same).

Appellees wrongly claim that the Plaintiff’s case requires an impermissible “stacking of inferences” (without ever once identifying

to the trial court or to this court the inferences claimed to be “stacked”). Here, there is *direct* evidence from Plaintiff she slipped on a spot that was uniquely slippery, unlike the other identical tile flooring she had traversed. (R. 119). Appellant introduced further *direct* evidence (requiring no circumstantial inferences) (1) that the tile floor becomes dangerously and unreasonably slippery when wet (R. 798); (2) that the Defendants admit having prior, actual knowledge of that fact (R. 1646; 1662); and (3) that during the preceding five years there had been 250 prior slip and falls *in the particular area where the Plaintiff slipped*, mostly due to wet substances on the tile floor (typically from multiple food and beverage venues concentrated in the same area). (R. 807). This constitutes *direct* proof (requiring no inferences to be drawn, let alone “stacked”) (1) of a dangerous condition (*i.e.*, flooring that is insufficiently slip resistant under foreseeable conditions of use, *e.g.*, when wet and therefore dangerous to customers); and (2) of both actual and constructive notice thereof by the Defendants.

The only remaining fact that requires evidence by Appellant, inferential or otherwise, is whether the floor where Plaintiff slipped

was wet.² On that point, Appellant introduced an affidavit by her expert **Frank Fore, P.E.**, an engineer and tribometrist who scientifically tested the friction characteristics of the flooring in question, and concluded:

24. My slip-resistance testing of the tile where plaintiff slipped and fell, with my XL tribometer, produced a slip index of .55 or more when dry, and as little as .31 when wet.
25. **The low slip indices yielded in my wet testing of the subject tile flooring contravene known, generally-accepted safety standards, guidelines and recommendations that such flooring be “slip-resistant” under foreseeable conditions of use, e.g. when wet.** (emphasis added).
26. **Given that a slip is improbable on dry flooring with a slip index of .55, and that Ms. Patarina walked over the same type of tile flooring without incident for a significant distance before she slipped, it is highly probable that the tile flooring was wet or similarly contaminated at the time and place of her mishap.** (emphasis added).
27. The pattern and coloring of the subject tile would effectively camouflage many types of surface liquids, e.g., water.

29. **Prior to the Paternina incident, there were available, feasible means to significantly increase**

²The Answer Brief concedes that “a plaintiff need not ‘identify with any specificity the nature of the substance or condition on the floor that caused her to fall,’” [citations omitted]. (AB, pp. 12-13).

the friction properties of the flooring, such as installation of slip-resistant tile or chemically treating the existing tile with anti-slip applications – all of which would have made her slip unlikely, even if the floor was wet.

(R. 798-799). (Emphasis added).

The Answer Brief, at page 9, suggests that, to be safe, flooring need only be slip resistant *when dry*; but Mr. Fore, in Paragraph 25 of his affidavit, *supra*, explains that applicable safety standards also require flooring to be reasonably slip resistant *when wet* (which makes sense given that people rarely slip on dry floors). (R. 798).

The Answer Brief, at page 3, attacks, as “speculation,” Mr. Fore’s conclusion in Paragraph 26 of his affidavit that it is “highly probable” that the flooring was wet when and where Plaintiff slipped (R. 799); but Mr. Fore based that conclusion *on his scientific testing* of the flooring in question. And it is noteworthy that Appellees in the trial court never directly accused Mr. Fore of speculation, let alone filed a *Daubert* motion to preclude his testimony on that or any other basis. Compare, *e.g.*, *Castillo v. Carnival Corp.*, 2023 WL 5096090 (S.D. Fla., July 24, 2023) (denying *Daubert* motion directed to Mr. Fore in similar case alleging that flooring was insufficiently slip-resistant and unreasonably slippery and dangerous to guests when

wet).

Appellees' own expert, Mr. Vaghar, agreed with Mr. Fore:

Q. . . . If Ms. Paternina, in fact, slipped in that spot that day, okay, would you say that the only explanation for that slip would be that there was some liquid or other contaminant present on the surface that she slipped on?

A. Most likely, yes.

Q. She's not going to slip on that surface if it's dry. Fair enough?

A. Highly unlikely; highly unlikely.

Q. Almost infinitesimally unlikely, correct.

A. No, you know, we're talking about – okay, **so we're talking about one in a million, something in that range, to slip on that surface, on a dry surface.**

(R. 1311). (Emphasis added). He was then asked:

Q. . . . Would you agree that if she, in fact, slipped, it is far more likely that that surface she slipped on had fluid or some other contaminant on it than that it was dry?

A. Yes.

(*Id.*). Surely, a reasonable jury could credit the testimony from both experts and find that the floor must have been wet with a foreign substance at the time and place of the Paternina incident. Such a conclusion involves or requires no second inference, “stacked” or

otherwise. See *Merideth v. Carnival*, 49 F.Supp. 3d 1090 (S.D. Fla. 2014) (denying summary judgment in a slip-and-fall case based on flooring that was not reasonably slip-resistant flooring when wet, even though the Plaintiff herself could not say what caused her to slip).

Here, as in *Suker v. White Family, Ltd. Partnership*, 193 So.3d 1028, 1029 (Fla. 4th DCA 2016), testimony of witnesses, including the deposition of the Defendant's own employees, "tended to show the defendant's actual or constructive knowledge of the dangerous conditions that existed at the tiled entrance to the establishment **when the tile was wet**" *Id.* at 1029. Neither the *Suker* opinion nor the briefs mention a specific substance on the floor or how long it existed. *Suker* was not a specific-puddle-on-the-floor case; and neither is this one.

The Answer Brief implies that the Plaintiff's theory of liability (based, like *Suker*, on flooring which is unsafe under foreseeable conditions of use) is inconsistent with Florida's Transitory Foreign Substances Act, §768.0755, FS; but that very argument was rejected by this Court in *Suker*. The Act itself expressly states that "[t]his section does not affect any common-law duty of care owed by a person

or entity in possession or control of a business premises.” (emphasis added). This would include the common-law duty to maintain the premises in a reasonably safe condition. See *Burton v. MDC PGA Plaza Corp.*, 78 So.3d 732, 734 (Fla. 4th DCA 2012).

Instead, all the Act does is to codify the existing common-law requirement that there be some proof “that the business establishment had actual or constructive notice of the dangerous condition and should have taken action to remedy it.” The Act specifies two non-exclusive, circumstantial ways to demonstrate “[c]onstructive knowledge.” §768.0755(1). But see *Cosmo v. Carnival Corporation*, 272 F. Supp. 3d 1336, 1341 (S.D. Fla. 2017) (“[E]vidence of substantially similar accidents is but one of the ways a plaintiff may prove a defendant's constructive notice of a defective condition’ *it is certainly not the only way.*” [citations omitted]) (emphasis added).

Contrary to Appellees’ argument, Appellant’s theory of liability is not based upon a mode of operation theory. Rather, it is based upon a theory of negligent maintenance always recognized by Florida common law and by Fla.Stat. §768.0755(1)(b) (“*This section does not affect any common law duty of care owed by a person or entity in*

possession and control of business premises.”) (emphasis added). Frankly, if this case is not a case to apply that subsection, we don’t know what case could be. None of the cases upon which Appellees rely, unlike the present case, involved expert testimony from engineers who tested the actual floor and found that *the flooring itself* failed to meet applicable guidelines, which is itself evidence of negligence. See *Echevarria v. Lennar Homes, LLC*, 306 So.3d 327 (Fla. 3d DCA 2020).

II. THE SUMMARY JUDGMENT SHOULD BE REVERSED UNDER FLA. STAT. §768.0755(1)(b) BECAUSE, INTER ALIA, THE DEFENDANTS CONCEDED THAT IN THE FIVE PLUS YEARS PRECEDING PLAINTIFF’S SLIP AND FALL, AT LEAST 250 OTHER CUSTOMERS SLIPPED AND FELL ON THE SAME TILE FLOOR IN THE SAME AREA WHERE THE PLAINTIFF SLIPPED AND FELL (WHICH ESTABLISHES CONSTRUCTIVE NOTICE UNDER FLA. STAT. §768.0755(1)(b))

While subsection (1)(a) of Florida’s Transitory Foreign Substances Act, §768.0755 FS, focuses on a specific spill, subsection (1)(b) is different. Subsection (1)(b) has a much broader focus and does not require evidence about the specific spill that caused the incident. Subsection (1)(b) requires only evidence that “the condition occurred with regularity and was therefore foreseeable.” This is a

further strong indicator that the Act does not preclude Appellant's theory of liability based on the friction properties of the flooring (or the lack thereof). *See Suker, supra.*

The Appellant marshalled significant, undisputed evidence that (1) the tile floor in the Mall becomes unreasonably slippery when wet; (2) the Mall actually knew of that fact; (3) the tile floor where she slipped was often wet due to the numerous food and beverage kiosks/stores in that specific area; and (4) (according to the Mall's former Security Supervisor, **Jason Gilbert**) over the preceding five years the security staff was responding to 4-5 customer slips and falls per month near Ms. Paternina's slip and fall (which were mostly due to spilled drinks and which were reported to mall management).

The Answer Brief, at page 6, asserts that "none of the prior incidents occurred in the same area where Plaintiff fell. (R. 1168)."

But Mr. Gilbert testified:

Q. Were there stores in the common area, away from the food court, that also sold food, beverages, and ice cream?

A. Yes.

Q. And generally, where were they located? I don't need specifics but just ... were they all over the common areas or just in certain locations?

A. Really, just in two main locations.

Q. And can you identify those for me?

A. The one location is the Auntie Anne's, which is right by the play area, which is directly across from Forever 21.

Q. Right.

A. And the other one is over by City Furniture on the Macy's corridor, which was another Auntie Anne's and also a Cinnabon. But they were all on the first floor.

Q. Was the flooring next to Forever 21, Auntie Anne's, Haagen-Dazs, and Great American Cookies a shiny tile flooring we talked about?

A. Yes.

Q. In your experience as a security supervisor at the mall, would you commonly see adult and child customers walk away from Auntie Anne's, Haagen-Dazs, and Great American Cookies with drink cups in their hands?

A. Yes.

Q. Was the area of level one that is bounded by Forever 21, Auntie Anne's, Haagen-Dazs, and Great American Cookies in a place where it was uncommon for customers to spill drinks on the shiny tile floor from time to time?

A. Okay. No, it wasn't uncommon to see a spill.

Q. Was part of your job as a security supervisor at the mall to respond to customers slips and falls in the common areas?

A. Yes.

Q. Was it part of your job to investigate the slips and falls that you responded to to get the facts and details as best you could?

A. Yes.

Q. As a supervisor, was it part of your job to be aware of the facts and details of responses by the other security officers to slips and falls on your shift?

A. Yes.

Q. Would it be fair to say in between October 2014 and February 2020 that you and the other security officers working for you responded to numerous customer slips and falls in the area we've been talking about, **namely that area bounded by Forever 21, Auntie Anne's, Haagen-Dazs, and Great American Cookies** on level one? (emphasis added)

A. Yes. You can say that.

Q. So can you basically give us some...just an estimate will do. You don't need to remember exact numbers. But how often slips and falls would typically occur **in that area we've been talking about** that would

require a security response. I mean, maybe tell me how often a week or how often a month or whatever? (emphasis added)

A. **On a monthly scale, as far as when I was working, I can probably say maybe three to four.** (emphasis added)

Q. And when you would respond to those types of events **in that area**, again, is this something that you would write up and put into the mall's data base.

A. Yes.

Q. Was the liquid that was involved in most of those slips and falls in that area sourced from spilled drinks?

A. Typically. Typically.

(R. 804-808).

The Answer Brief, at page 4, baldly asserts that “Appellant did not identify a single incident where the circumstances were similar to appellant’s.” But see *Cosmo v. Carnival Corp.*, 272 F. Supp. 3d 1336, 1341 (S.D. Fla. 2017) (“The requirement of substantial similarity is relaxed...when the evidence of other incidents is used to demonstrate notice...”); and *Brady v. Carnival Corp.*, 33 F. 4th 1278, 1281 (11th Cir. 2022) (reversing summary judgment and stating that “the salient issue is whether Carnival knew, more generally, *that the*

area of the deck where Brady fell had a reasonable tendency to become slippery—and thus dangerous to passengers—due to wetness from the pool.”) (emphasis added).

The Answer Brief, on pages 12-13, concedes that “a plaintiff need not ‘identify with any specificity the nature of the substance or condition on the floor that caused her to fall [citations omitted].” The customer slip and fall incidents referred to by Mr. Gilbert all occurred in the very same area where the Appellant slipped, mostly on surfaces wet from spilled drinks. (R. 808). In any event, Charles Sigman, the mall’s operations manager, testified that the tile is the same throughout the common areas and that he knew for years (*i.e.*, had *actual notice*) that the tile becomes dangerously slippery when wet. (R. 1646; 1674).

There is ample record evidence (1) that the tile floor becomes unreasonably slippery and dangerous when wet; (2) that the Defendants admit having prior, actual knowledge of that fact; (3) that during the preceding five years there had been 250 prior slip and falls in the particular area where the Plaintiff slipped, due to wet substances on the tile floor. Therefore, a reasonable jury easily could reasonably and easily find that the condition occurred with regularity

and was therefore foreseeable. There is also competent evidence by both sides' experts that the flooring could not have been dry (a "one-in-a-million" chance) at the time and place of Appellant's fall. The trial court erred in granting summary judgment as to Plaintiff's claim under either the common law and/or under Florida Statute §768.0755(1)(b), even were this Court to find that the trial court did not err in granting summary judgment as to Plaintiff's subsection (1)(a) claim.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand.

CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

The foregoing complies with the font and word count requirements of Rule 9.045 and 9.210, Fla.R.App.P. It is typed in Bookman Old Style 14-point font and contains 3,760 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was served via the Florida Courts E-Filing Portal on April 10, 2024 to counsel on the attached Service List.

Respectfully submitted,
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