



I. The History of Slip & Fall Law

A. The Old Law (pre-2001) - Burden on Plaintiff - Prior to 2001, when a person slipped and fell on a transitory foreign substance, *the injured person* had to prove: that the business had actual knowledge or constructive knowledge in that “the condition existed for such a length of time that in the exercise of ordinary care, the premises owner should have known of it and taken action to remedy it.” *Owens v. Publix Supermarkets*, 802 So. 2d 318, 320 (Fla. 2001); *see, e.g., Teate v. Winn-Dixie Stores, Inc.*, 524 So. 2d 1060 (Fla. 3d DCA 1988); *Schmidt v. Bowl American Florida, Inc.*, 358 So. 2d 1385 (Fla. 4th DCA 1978); *Winn-Dixie Stores, Inc. v. Williams*, 264 So. 2d 862 (Fla. 3d DCA 1972).

B. Post-2001 Law (Burden on Defendant) - *Owens v. Publix Supermarkets*, 802 So. 2d 318 (Fla. 2001)

- 1. Facts** - Owens slipped and fell on a discolored piece of banana lying on the floor.
- 2. Key Language** - “[P]remises liability cases involving transitory foreign substances are appropriate cases for shifting the burden to the premises owner or operator to establish that it exercised reasonable care under the circumstances, eliminating the specific requirement that the customer establish that the store had constructive knowledge of its existence in order for the case to be presented to the jury.” *Owens*, 802 So. 2d at 331.
- 3. Burden of Proof (Rebuttable Presumption)** - “[O]nce the plaintiff establishes that he or she fell as a result of a transitory foreign substance, a rebuttable presumption of negligence arises. At that point, the burden shifts to the defendant to show by the greater weight of evidence that it exercised reasonable care in the maintenance of the premises under the circumstances.” *Owens*, 802 So. 2d at 331.

C. Law in Effect from 2002 to July 1, 2010 (§ 768.0710) - Modification of Owens - In 2002, the Legislature adopted § 768.0710 in response to the *Owens* decision, shifting the burden of proof from the defendant to the plaintiff. Under § 768.0710, the claimant had the burden of proving that:

- (a) The person or entity in possession or control of the business premises owed a duty to the claimant;
- (b) The person or entity in possession or control of the business premises acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of

operation of the business premises. Actual or constructive notice of the transitory foreign object or substance is not a required element of proof to this claim. However, evidence of notice or lack of notice offered by any party may be considered together with all of the evidence; and

- (c) The failure to exercise reasonable care was a legal cause of the loss, injury, or damage.

II. The New Law (§ 768.0755) - Burden Back on Plaintiff

A. Text of New Law (eff. July 1, 2010):

Premises liability for transitory foreign substances in a business establishment.

(i) 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.

(2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.

B. Immediate Effect

1. **Repeals § 768.0710** - House Bill 689 approximates the law with respect to slip and fall suits as it existed *before* 2001.

2. **Creates § 768.0755** - Under the new law, a plaintiff once again has to prove the business owner had actual or constructive knowledge of the unsafe condition. Under the new law, constructive knowledge may be proven by circumstantial evidence showing either (i) that the 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 (2) that the condition occurred with regularity and was therefore foreseeable.

C. **Reason for the Change - Increase in lawsuits** - "Frivolous slip and fall lawsuits have risen dramatically when compared with the same businesses operating in other states," said one of the bill's sponsors. According to the House, in 2000, slip-and-fall payments consisted of 0.06% of all retail revenues in Florida. In 2008, the number rose to 0.12%, more than four times the amount of neighboring states.

- D. Anticipated Effects - Favorable to Business Establishments** - § 768.0755 is expected to affect litigation in a way considerably more favorable to business establishments. Proponents of the bill say the change will protect businesses from frivolous lawsuits.
- E. Does the New Statute Operate Prospectively or Retroactively?** (Brief Answer: Probably Prospectively)

Because the new statute is more favorable to business owners many defendants will attempt to avail themselves of the new statute in pending cases. That is, they will try to argue that the new law applies retrospectively to cases already filed. There is no clear answer to this issue.

As indicated above, the new statute merely specifies that it is effective as of July 1, 2010. The legislative history does not provide any more guidance. Unlike the prior statute (§ 768.0170), the new law does *not* state that the new statute “shall apply to all causes of action pending on or after [the effective] date.”

Nevertheless, even if the new statute were to contain this language it would not end the inquiry. Three Florida decisions touched upon, but dodged, the issue of whether the predecessor statute applied retroactively. See *Melkonian v. Broward Cty. Bd. of Cty. Comm’rs*, 844 So. 2d 785 (Fla. 4th DCA 2003); *Zimmerman v. Eckerd Corp.*, 839 So. 2d 835 (Fla. 3d DCA 2003); *Silvers v. Wal-Mart Stores, Inc.*, 826 So. 2d 513 (Fla. 4th DCA 2002). Regardless, the law relating to retroactivity of statutes is well established by the Florida Supreme Court: “The general rule is that a substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but that a procedural or remedial statute is to operate retroactively. Even when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties.” *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) (citations omitted).

Based on the foregoing, it is arguable whether the new statute applies retrospectively to pending cases. However, in the end, an appellate court or the Florida Supreme Court would probably find that the statute only applies prospectively because it impacts substantive rights, especially those of injured persons wishing to sue property or business owners. Further, the statute does not contain “clear legislative intent” to operate retroactively.