

MAY 12, 2010

LAW ALERT

Section **768.0755**, Florida Statutes

New Florida Slip and Fall Statute, Effective July 1, 2010:
Shifting the Burden of Proof in “Banana Peel” Cases.

If you have questions or would like additional information on the material covered in this Law Alert, please contact the Managing Partner.

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House Bill 689, which was signed into law by Governor Charlie Crist on April 14, 2010 represents a major victory to business owners and their insurers. This tort reform bill repeals Florida Statute §768.0710 and creates Florida Statute §768.0755 in its place, essentially reinstating slip and fall law in Florida as it existed prior to the Florida Supreme Court’s decision in *Owens v. Publix Supermarkets, Inc.*¹ Effective July 1, 2010, Florida Statute §768.0755 will provide that *a slip and fall plaintiff must once again prove the business establishment had actual or constructive knowledge of the transitory foreign substance or object alleged to have caused injury.*² As prior to *Owens*, constructive knowledge may be proven by circumstantial evidence that the dangerous condition existed for such a length of time that in the exercise of ordinary care, the business owner should have known of the condition; or, the condition occurred with regularity and was therefore foreseeable. It is unclear whether Florida Statute §768.0755 will apply to all currently pending cases or only to actions accruing on or after July 1, 2010.³

A Brief History

It is well established in Florida that a business owner owes two duties to an invitee: 1) to use reasonable care in maintaining its premises in a reasonably safe condition; and 2) to warn the invitee of concealed dangers that are unknown to the invitee and cannot be discovered through the exercise of due care.⁴ Historically, slip and fall plaintiffs were required to prove that a business owner had actual or constructive knowledge of the dangerous condition. Constructive knowledge could be established by circumstantial evidence that the dangerous condition existed for such a length of time that in the exercise of ordinary care, the business owner should have known of the condition; or, the condition occurred with regularity and was therefore foreseeable.⁵

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In 2001, however, the Florida Supreme Court in *Owens* held that a transitory foreign substance on the floor of a business premises is not a safe condition and the *mere existence of such a condition would create a rebuttable presumption that the business owner failed to maintain the premises in a reasonably safe condition*. Consequently, once a plaintiff established that a transitory foreign substance caused him to fall, the burden shifted to the business owner to prove that it exercised reasonable care in maintaining the premises.

The Court's very plaintiff-friendly decision was based partly on policy concerns regarding the unfairness of burdening the plaintiff with proof of the owner's knowledge, when the business owner was in a superior position to offer evidence of the existence of and compliance with internal policies for maintenance and inspection of the premises. Essentially, the *Owens* decision largely relieved plaintiffs from proving their cases and instead forced business owners to prove their "innocence." Obviously, such a burden shift represented great cause for concern to business owners and their insurers over a likely increase in the number of slip and fall lawsuits and adverse verdicts.

In response to the *Owens* decision, the Florida Legislature in 2002 enacted Florida Statute §768.0710. Section 768.0710 provided that in any negligence action involving injury caused by transitory foreign objects or substances on business premises, the plaintiff must prove: the person or entity in possession or control of the business premises owed a duty to the plaintiff; 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; and the failure to exercise reasonable care was a legal cause of the loss, injury, or damage.

Importantly, Section 768.0710 also provided that *actual or constructive notice of the transitory foreign object or substance was not a required element of proof* of the claim, but evidence of notice or lack of notice could be considered by the fact-finder. Section 768.0710 partially superseded the *Owens* decision by shifting the burden off the business owner to prove reasonable care was taken, and back on the plaintiff to prove the business owner was negligent. However, this statute also eased the plaintiff's pre-*Owens* burden of proof by not requiring proof of actual or constructive notice to the owner of the transitory foreign substance.

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Anticipated Effects

Florida Statute §768.0755 by its terms does not affect a business owner's common law duty of care to its invitees, such as its duty to use reasonable care in maintaining its premises in a reasonably safe condition and to warn of hidden dangers. However, by fully placing the burden of proof back on the plaintiff, litigation results will more frequently favor business owners and their insurers, who will likely save much time and expense in defending claims where the business owner had no actual or constructive knowledge of the dangerous condition. For further information, contact Anthony J. Petrillo, Tampa Partner.

¹ *Owens v. Publix Supermarkets, Inc.*, 802 So.2d 315 (Fla. 2001).

² The Court defined "transitory foreign substance" as "any liquid or solid substance, item or object located where it does not belong," such as a banana peel or spilled liquid. *Id.* at 317.

³ The same question arose regarding the retroactive applicability of its predecessor, Florida Statute §768.0710, despite a provision that it would apply to all pending cases. See, e.g. *Silvers v. Wal-Mart Stores, Inc.*, 826 So.2d 513 (Fla. 4th DCA 2002); *Zimmerman v. Eckerd Corp.*, 839 So.2d 835 (Fla. 3rd DCA 2003); *Melkonian v. Broward Cty. Bd. of Cty. Com'rs*, 844 So.2d 785 (Fla. 4th DCA 2003).

⁴ *Maldonado v. Jack M. Berry Grove Corp.*, 351 So.2d 967 (Fla. 1977); *St. Joseph's Hospital v. Cowart*, 891 So.2d 1039 (Fla. 2nd DCA 2004).

⁵ *Sutherland ex rel. Sutherland v. Pell*, 738 So.2d 1016 (Fla. 2nd DCA 1999); *Brooks v. Phillip Watts Enter., Inc.*, 560 So.2d 339 (Fla. 1st DCA 1990).

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