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HOUSE OF REPRESENTATIVES

SMARTER GOVERNMENT COUNCIL
ANALYSIS

BILL #: CS/HB 1545

RELATING TO: Negligence/Transitory Foreign Objects

SPONSOR(S): Council for Smarter Government, Representatives Simmons and Kendrick

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

(1) JUDICIAL OVERSIGHT YEAS 9 NAYS 0
(2) INSURANCE (W/D)
(3) SMARTER GOVERNMENT COUNCIL YEAS 12 NAYS 0
(4)
(5)

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

In many “slip and fall” cases, a plaintiff must prove that he or she fell and was injured as a result of a transitory foreign substance. Once a plaintiff makes that proof, a rebuttable presumption of negligence arises and 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.

This bill places the duty on the person or entity that controls a business premises to maintain the premises in a reasonably safe condition. In a slip and fall case involving a transitory foreign substance, the claimant must prove that the person or entity in control of the business premises acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation. However, proof of actual or constructive notice is not required.

This bill does not appear to have a fiscal impact on state or local government.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [x]
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Negligence

To establish liability for negligence, a plaintiff traditionally must show (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the plaintiff suffered damages; and (4) that the defendant's breach was the proximate cause of the damages. See e.g. Clampitt v. D.J. Spencer Sales, 786 So. 2d 570, 573 (Fla. 2001)("A plaintiff ordinarily bears the burden of proof of all four elements of negligence-duty of care, breach of that duty, causation and damages.").

Chapter 768, F.S., deals with negligence law in Florida.

"Slip and Fall" Cases on Business Premises and Owens v. Publix Supermarkets

The Florida Supreme Court recently reconsidered the law in "slip and fall" cases where a plaintiff falls because of the presence of a "transitory foreign substance." In Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 317 (Fla. 2001), a shopper "slipped and fell on a discolored piece of banana lying on the floor." Owens brought a negligence action against Publix and the court explained what was presented at trial:

> At trial, Owens did not present any direct evidence of the length of time the piece of banana was on the floor. In fact, Owens testified that she did not see the substance that had caused her to fall. Owens did, however, present the testimony of Alma Jean Ross, another shopper in the store, who testified that she was walking down the chip and bread aisle at the same time as Owens and that Owens had slipped on "a piece of banana" without the peel, which was about an inch or longer and "kind of mushed ... where she hit it ... kind of squashed down." When asked if the banana was discolored, Ross responded, "Very much, uh-huh. It wasn't black, but it was dark." Ross further testified that she had been at Publix "[a]bout three or four minutes" before encountering Owens, but admitted she had no knowledge of how long the banana had been on the floor.
>
> As to the maintenance and inspection of the floors, there was evidence that it was the responsibility of Publix employees to look out for items on the floor and that managers

> would walk the store, "inspecting everything." However, Publix did not keep inspection records and there was no evidence presented as to when the particular aisle was last inspected.
>
> After Owens presented her case-in-chief, Publix moved for a directed verdict on liability, arguing that Owens failed to present any evidence that Publix had actual or constructive knowledge that the banana piece was on the floor. Finding that the evidence of the condition of the banana was insufficient to establish a basis for Publix's liability, the trial court directed a verdict and entered final judgment for Publix. (footnote omitted).

Owens, 802 So. 2d at 317-318.

The Owens court discussed premises liability law in Florida, as it existed prior to the Owens decision:

> All premises owners owe a duty to their invitees to exercise reasonable care to maintain their premises in a safe condition. See, e.g., Everett v. Restaurant & Catering Corp., 738 So.2d 1015, 1016 (Fla. 2d DCA 1999). **Despite this general proposition, when a person slips and falls on a transitory foreign substance, the rule has developed that the injured person must prove that the premises owner had actual knowledge or constructive knowledge of the dangerous condition "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."** Colon v. Outback Steakhouse of Florida, Inc., 721 So. 2d 769, 771 (Fla. 3d DCA 1998). **Constructive knowledge may be established by circumstantial evidence showing that: (1) "the dangerous condition existed for such a length of time that in the exercise of ordinary care, the premises owner should have known of the condition;" or (2) "the condition occurred with regularity and was therefore foreseeable."** Brooks v. Phillip Watts Enter., Inc., 560 So. 2d 339, 341 (Fla. 1st DCA 1990). In the latter category, evidence of recurring or ongoing problems that could have resulted from operational negligence or negligent maintenance becomes relevant to the issue of foreseeability of a dangerous condition. See generally Wal-Mart Stores, Inc. v. Reggie, 714 So. 2d 601, 603 (Fla. 4th DCA 1998); Nance v. Winn Dixie Stores, Inc., 436 So. 2d 1075, 1076 (Fla. 3d DCA 1983). (footnote omitted).

Owens, 802 So. 2d at 320 (emphasis added).

At a trial, after the plaintiff rests its case, the defense usually asks the court for a directed verdict. In determining whether to grant a directed verdict, the trial judge must determining whether the plaintiff "has failed to prove any facts in support of a favorable verdict and that fair minded people could not have reached a different conclusion". Bruce J. Berman, Florida Civil Procedure, § 480.3 (2001-2002 Ed.). In slip and fall cases, the determinative issue in deciding whether a directed verdict should be granted is often whether the plaintiff has presented sufficient evidence of constructive knowledge of the dangerous condition. The Owens court discussed the problems which Florida appellate courts have encountered when trying to determine whether sufficient evidence exists to create a jury question on the issue of constructive notice. The court found that, often, the issue hinged on whether there was evidence of the condition of the transitory substance:

> Thus, with case law making constructive notice of the dangerous condition the linchpin of liability, an injured person's ability to establish constructive notice is often dependent on the fortuitous circumstance of the observed condition of the substance.

Owens, 802 So. 2d at 323.

However, the court noted that in some cases, the constructive knowledge requirement is eliminated or altered. See Owens, 802 So. 2d at 323-324. For example, the court discussed a case where it held race track owners to a higher duty of care than store owners because "a different rule applies to a place of amusement like a race track where patrons go by the thousand on the invitation of the proprietors" and because one "operating a place of amusement like a race course where others are invited is charged with a continuous duty to look after the safety of his patrons." Owens, 802 So. 2d at 323 (citing Wells v. Palm Beach Kennel Club, 160 Fla. 502, 35 So. 2d 720, 721 (Fla. 1948)). The court explained that while it had never extended this "mode of operation" theory to a supermarket, it had never rejected the theory. See Owens, 802 So. 2d at 323-324.

After the examination of law in other states, the court announced a change to Florida common law precedent in slip and fall cases:

> [O]ur review of the myriad number of cases dealing with transitory foreign substances demonstrates to us that instead of focusing on the duty of the premises owner to maintain the premises in a reasonably safe condition, courts have instead focused on the ability of the plaintiff to prove actual or constructive knowledge of an unsafe condition. The shortcomings of the traditional premises liability rule as it has been applied are apparent; particularly that the burden is placed on the plaintiff to prove that the owner had constructive knowledge of the specific transitory foreign substance. More specifically, all too often, the outcome of whether the case will be decided by the jury depends on the exact description of the transitory foreign substance. As both of the cases on review demonstrate, because a plaintiff is often unable to establish when the area was last maintained, the defendant benefits from its own lack of record-keeping.
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> ***
>
> It is undisputed that under Florida law, all premises owners owe a duty to their invitees to exercise reasonable care to maintain their premises in a safe condition. The existence of a transitory foreign substance on the floor is not a safe condition.
>
> Having surveyed cases in this State as well as in other jurisdictions, we conclude that modern-day supermarkets, self-service marts, cafeterias, fast-food restaurants and other business premises should be aware of the potentially hazardous conditions that arise from the way in which they conduct their business. Indeed, the very operation of many of these types of establishments requires that the customers select merchandise directly from the store's displays, which are arranged to invite customers to focus on the displays and not on the floors. In addition, the premises owners are in a superior position to establish that they did or did not regularly maintain the premises in a safe condition and they are generally in a superior position to ascertain what occurred by making an immediate investigation, interviewing witnesses and taking photographs. In each of these cases, the nature of the defendant's business gives rise to a substantial risk of injury to customers from slip-and-fall accidents and that the plaintiff's injury was caused by such an accident within the zone of risk.
>
> **All of these factors lead us to conclude that premises 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.** Presumptions, which are created either judicially or legislatively and arise from considerations of fairness, public policy, and probability,

> are used to allocate the burden of proof. See generally Charles W. Ehrhardt, Florida Evidence § 301.1 (2000 ed.)
>
> Accordingly, we adopt the following holding to be applied to slip-and-fall cases in business premises involving transitory foreign substances. **We hold that the existence of a foreign substance on the floor of a business premises that causes a customer to fall and be injured is not a safe condition and the existence of that unsafe condition creates a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition.**
>
> **Thus, once 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. The circumstances could include the nature of the specific hazard and the nature of the defendant's business.**
>
> This shift away from the artificial requirement that the injured person establish how long a transitory foreign substance was on the floor of the defendant's premises makes sense from a policy viewpoint because it will prevent premises owners or operators from benefiting from their absence of record-keeping and it will increase the incentive for them to take protective measures to prevent foreseeable risks. This opinion shall be applicable to all cases commenced after the decision becomes final and those cases already commenced, but in which trial has not yet begun.
>
> We emphasize that this burden-shifting does not eliminate the plaintiff's burden of proving that the slip and fall accident was the cause of the plaintiff's injuries. We also emphasize that this holding does not render the premises owners or operators strictly liable for the injury. The ultimate question for the jury is whether the premises owner or operator exercised reasonable care in maintaining its premises in a safe condition.

Owens, 802 So. 2d at 330-332 (emphasis added; footnotes omitted).

Owens requires a plaintiff to prove that the existence of a foreign substance on the floor of a business premises that caused him or her to fall and be injured. If a plaintiff makes that proof, the defendant must show that it exercised reasonable care in the maintenance of the premises under the circumstances. It can be argued that, under Owens, it will become impossible for trial judges to grant directed verdicts in slip and fall cases involving transitory foreign substances. Owens became final on December 14, 2001, so the impact of the case cannot yet be determined.

Criticism of Owens

Justice Harding, in a concurring opinion joined by Justice Lewis, criticized the majority opinion for going too far. Justice Harding said the case could be decided by simply stating that the condition of the banana was sufficient evidence for a jury determination as to whether the dangerous condition was a result of the store's failure to maintain or inspect the floors. Justice Harding continued:

> However, I would go no further. The majority's decision regarding "the shortcomings of traditional premises liability" is supervenient and not necessary to the resolution of these cases. By doing as such, the majority goes too far in deciding the cases at hand and essentially rewrites Florida's law regarding slip-and-fall cases.

Owens, 802 So. 2d at 334 (Harding, J., concurring in result only).

C. EFFECT OF PROPOSED CHANGES:

This bill adds a new section to Florida's negligence statutes. It requires that in a civil action arising out of injury, death, or other loss to a business invitee as a result of a dangerous condition involving a transitory foreign object on business premises, the plaintiff must prove:

(1) that the person or entity in possession or control of the business premises owed a duty to the claimant;

(2) that 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.

This bill provides that a person or entity in control of a business premises owes a duty of reasonable care to maintain the premises in a reasonably safe condition.

This bill provides that proof of actual or constructive notice is not an element of the negligence claim but notice or lack of notice may be considered together with other evidence presented.

This bill takes effect upon becoming law and applies to all causes of action pending after the bill's effective date.

D. SECTION-BY-SECTION ANALYSIS:

See "Present Situation" and "Effect of Proposed Changes".

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. It is not known how the shifting of the burden in negligence cases will impact the number of lawsuits, the cost of defending such lawsuits, or the cost of liability insurance.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 21, 2002, the Committee on Judicial Oversight adopted a “strike everything” amendment. By the amendment, a claimant in a “slip and fall” case involving a transitory foreign substance must prove:

(1) the defendant owed a legal duty to the claimant;

(2) the defendant acted negligently by failing to exercise reasonable care in the maintenance, inspection, warning, or mode of operation of the business premises; and

(3) the failure to exercise such care was the legal cause of the injury or damage.

The bill, as amended, was then reported favorably.

The Council for Smarter Government reported this bill favorably as a committee substitute on March 1, 2002.

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:	Staff Director:
L. Michael Billmeier, Jr., J.D.	Nathan L. Bond, J.D.

AS FURTHER REVISED BY THE SMARTER GOVERNMENT COUNCIL:

Prepared by:	Council Director:
L. Michael Billmeier, Jr., J.D.	Don Rubottom, J.D.