The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Commerce Committee

BILL:	SB 2402
INTRODUCER:	Senator Gardiner
SUBJECT:	Transitory Foreign Substance
DATE:	April 2, 2009
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	**Pre-meeting**
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

SB 2402 amends Florida's liability law by changing premises liability for transitory foreign substances in a business establishment. When a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove the business establishment had actual or constructive knowledge of the condition, in that the condition existed for a sufficient time for the business establishment to have taken action to remedy the condition.

This bill creates section 768.0755, Florida Statutes. The bill also repeals section 768.0710, Florida Statues.

II. Present Situation:

Liability for Others Entering Property:

To establish liability for negligence, a plaintiff traditionally must show that: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the plaintiff suffered damages; and (4) the defendant's breach was the proximate cause of the damages.[1] A premises liability case is a type of negligence case that involves an injury to a person who is on the property of another person. Persons entering the property of another typically are classified as invitees, licensees, or trespassers. In Florida, the status of the person injured is the determinative factor relative to the duty of care imposed upon the property owner.

[1] 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."

A trespasser is a person who enters the premises of another without a right.[2] A property owner owes a duty to undiscovered trespassers to refrain from intentional misconduct, but owes no duty to warn of dangerous conditions.[3] For discovered trespassers, property owners must refrain from gross negligence or intentional misconduct and must warn the discovered trespasser of dangerous conditions that are known to the property owner but are not readily observable by others.[4]

A licensee is one who enters the property of another whose presence on the property is tolerated or permitted.[5] For licensees, property owners must refrain from gross negligence or intentional misconduct and must warn the licensee of dangerous conditions that are known to the property owner but are not readily observable by others.[6] A property owner owes no duty to licensees to keep the premises in a safe condition.[7]

Property owners in Florida owe a different standard of care to persons who are invited on the property. "Invitees" are visitors who enter the property with an objectively reasonable belief that they have been invited or are otherwise welcome on the property.[8] An "invitee" is a licensee on the premises by invitation.[9]

Business Premises

A person who is invited to enter or remain on the property of another for a purpose directly or indirectly connected with business dealings with the property owner is classified as a business invitee.[10] Premises owners owe a duty to invitees to maintain the premises in a reasonably safe condition.

Traditional Liability

Under Florida law, a business premises owner owes two legal duties to invitees to exercise reasonable care in the maintenance of his or her premises against dangerous conditions. These duties are to use reasonable care to learn of existence of any dangerous conditions on premises, and to use reasonable care to protect invitees from dangerous conditions of which the business premises owner has actual knowledge.[11] Because business premises owners should reasonably foresee that some invitees "might, from time to time, create dangerous conditions on the premises…[the business premises owner's] legal duty is to use reasonable care to timely discover the existence of such dangerous conditions."[12] "In order for a premises owner to be

[2] Trespassers s. 58. Generally, FLJUR PREMISES s. 54 (2009). An invitee may lose his or her status and become a trespasser by going to a part of the premises that is beyond the scope of his or her invitation.
[3] Section 768.075(3)(b), F.S.
[4] Id.
[5] Licensees s. 51 Generally, FLJUR PREMISES s. 51 (2009).
[6] Licensees s. 53 Duties and Liabilities Regarding Licensees in General, FLJUR PREMISES s. 53 (2009).
[7] Licensees s. 54 No Duty to Keep Premises Safe, FLJUR PREMISES s. 54 (2009).
[8] Section 768.075(3)(a)1., F.S.
[9] Invitees s. 9 Invitation Test, FLJUR PREMISES s. 9 (2009).
[10] Zipkin v. Rubin Construction Co., 418 So.2d 1040 (4th DCA, 1982).
[11] Winn-Dixie Stores, Inc. v. Marcotte, 553 So.2d 213, 214 (5th DCA, 1989). See also Ugaz v. American Airlines, Inc., 576 F.Supp.2d 1354, 1368 (S.D. Fla., 2008).
[12] Id.

liable for an invitee's injuries, the injured invitee had to prove the premises owner had actual or constructive knowledge of the dangerous condition."[13]

Constructive notice may be established by circumstantial evidence: (1) "by showing that the dangerous condition existed for such a length of time that in the exercise of ordinary care, the defendant should have known of the condition;" or (2) "by showing that the condition occurred with regularity and was therefore foreseeable."[14]

The "length of time" that a transitory foreign substance[15] remained on a floor that is sufficient to establish constructive knowledge depends on the facts and circumstances of each case. "However, the general guideline has been 15 to 20 minutes. Typically, the length of time would be determined by the slip-and-fall plaintiff's ability to describe the condition and appearance of the substance. However, Florida appellate courts have differed on whether the description was sufficient to charge the premises owner with constructive knowledge."[16]

At least one Florida court has held that a plaintiff may provide the court with "additional circumstances" to establish the length of time the transitory foreign substance was on a floor. "These additional circumstances include 1) the time span the plaintiff was in the area of the fall prior to the accident; 2) whether other individuals were in the area of the fall; 3) whether store employees swept the floor during that period; 4) whether store employees were in the area of the fall; and 5) the description of the transitory foreign substance."[17]

Another method to show constructive knowledge is through a negligent mode of operation theory. Under this theory, "if it is determined that the owner created the danger, knowledge of the dangerous condition is irrelevant to determining the owner's liability."[18] "[L]iability rests on the idea that the premises owner created a dangerous condition through his or her own repeated conduct. A negligence action based on the mode of operation theory requires the injured party to prove '1) either the method of operation is inherently dangerous, or the particular operation is being conducted in a negligent manner; and 2) the [dangerous] condition of the floor was created as a result of the negligent method of operation.'"[19] The theory generally looks to a business's choice of a particular mode of operation and not events surrounding the plaintiff's accident.[20]

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[13] Florida's Slip-And-Fall Law, Abandoned and Re-Established: Owens v. Publix Supermarkets, Inc. Versus Florida's Legislature: A Tug of War on Who Bears the Burden of Proof, Zilieris, Venus, 27 Nova L. Rev. 191, 194 (2002).

[14] R.B. Brooks v. Phillip Watts Enterprises, Inc., 560 So.2d 339, 341 (1st DCA, 1990), citations omitted.

[15] "In a footnote, the [Owens] court defined "transitory foreign substance" as follows: "we refer generally to any liquid or solid substance, item or object located where it does not belong." Id. at 317 n. 1." Melkonian v. Broward County Bd. of County Com'rs, 844 So.2d 785, 786-787 (4th DCA, 2003).

[16] Florida's Slip and Fall Law, 27 Nova L. Rev. at 195 (2002). "The Third District has held that the description of transitory foreign substance as "'very dirty,' 'trampled,' 'containing skid marks, scuff marks'… 'chewed up,"' is sufficient circumstantial evidence to establish a jury question of constructive knowledge. For example, evidence of water around a bag of peas lying on the floor in the frozen food section could be enough for a jury to conclude that the water was a result of the bag of peas thawing out over some time, and thus the defendant supermarket was put on notice of the dangerous condition. Still, other Florida appellate courts have held the description of the substance, without more, as insufficient circumstantial evidence to charge the defendant supermarket with constructive knowledge."

[17] Florida's Slip and Fall Law, 27 Nova L. Rev. at 201 (2002), citing Montgomery v. Florida Jitney Jungle Stores, Inc., 281 So.2d 302 (Fla., 1973).

[18] Invitees s. 29 Generally (Knowledge or Notice of Condition), FLJUR PREMISES s. 29 (2009).

[19] Florida's Slip and Fall Law, 27 Nova L. Rev. at 197 (2002).

[20] Owens v. Publix Supermarkets, Inc., 802 So.2d 315, 325 (Fla., 2001).

Owens v. Publix Supermarkets, Inc. Case

In Owens v. Publix Supermarkets, Inc., the Supreme Court changed Florida common law precedent in slip and fall cases by shifting the burden to the business premises owner to establish that he or she exercised reasonable care under the circumstances, and by eliminating the requirement that the business invitee establish that the owner had constructive knowledge of the existence of the transitory foreign object. The business invitee retained the burden of showing that there was a transitory foreign substance and that the injury was a direct result of this substance.[21]

Further, the court stated,

> …we recognize the continued viability of the mode of operation theory. If the evidence establishes a specific negligent mode of operation such that the premises owner could reasonably anticipate that dangerous conditions would arise as a result of its mode of operation, then whether the owner had actual or constructive knowledge of the specific transitory foreign substance is not an issue. The dispositive issue is whether the specific method of operation was negligent and whether the accident occurred as a result of that negligence.[22]

In the Supreme Court's written decision to support the modern trend of departing from the traditional principles of premises liability law, which other jurisdictions have previously embraced, the Court discusses the following policy considerations:

1. The evolution of modern merchandise marketing techniques, including self-service, have increased the likelihood of spills and breaks occurring.
2. [A] store adopting the self-service technique should reasonably anticipate certain types of accidents and therefore is already on notice.
3. [B]ecause the self-service technique allows for lower overhead and greater profits, the businesses that adopt [this] . . . technique are in a better position to prevent and attend to the risks involved.
4. [I]t is unfair to place the burden on the customer to establish actual or constructive notice of the condition on the part of the premises owner …[because] the premises owner [is] in a superior position to know of how the dangerous condition was created when compared to the position of customers.[23]

Current Law

The genesis of the current law, enacted in 2002, was in response to the Owens case.[24] Current law requires that the person or entity in possession or control of a business premises owes a duty to business invitees to exercise reasonable care to maintain the premises in a reasonably safe condition. This duty includes reasonable efforts to keep the premises free from transitory foreign objects or substances that foreseeably might cause loss, injury, or damage.[25] In a civil action for negligence involving loss, injury, or damages as a result of a transitory foreign object or substance, the business invitee filing the claim has the burden of proving that:

[21] Owens, 802 So.2d at 331 (Fla., 2001).
[22] Owens, 802 So.2d at 332 (Fla., 2001).
[23] Florida's Slip and Fall Law, 27 Nova L. Rev. at 209-210 (2002); Owens, 802 So.2d at 324-330 (Fla., 2001).
[24] Chapter 2002-285, L.O.F.
[25] Section 768.0710(1), F.S.

- The business premises owner or operator owed a duty to the business invitee;
- The business premises owner or operator 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 the legal cause of the loss, injury, or damage to the business invitee.

The law further provides that the business premises owner's actual or constructive notice of the transitory foreign object or substance is not a required element of proof to the claim.[26]

The 2002 legislation reversed the portion of the Supreme Court's ruling that placed the burden of proof on the business owner to prove that he or she exercised reasonable care and was not negligent once the claimant showed that he or she fell on a transitory foreign object or substance. However, the legislation preserved the mode of operation theory of liability expressly recognized in Owens and preserved that portion of the ruling which eliminated the requirement of the claimant to prove that the business owner had actual or constructive knowledge of the transitory foreign object or substance.

Comparative Negligence

The comparative negligence statute provides that the plaintiff's damages will be reduced based on the percentage of fault attributed to the plaintiff.[27] Also, when there are multiple parties that are liable for the injury, the judgment against each liable party, with some exceptions, should be in proportion to each party's percentage of fault and not on the basis of the doctrine of joint and several liability.[28] This method of distributing fault applies to negligence cases.[29]

III. Effect of Proposed Changes:

Section 1 creates s. 768.0755, F.S., to change premise liability for business establishments. When 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;
- The condition existed for a sufficient length of time; and
- Because of that time, the business should have, in the exercise of ordinary care, known about the condition and taken action to remedy it.

Constructive or actual knowledge may be proven by circumstantial evidence showing that:

- 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
- The condition occurred with regularity and was therefore foreseeable.

[26] Section 768.0710(2), F.S.
[27] Section 768.81(2), F.S.
[28] Section 768.81(3), F.S.
[29] Section 768.81(4), F.S.

In effect, the bill reverses the portion of the Owens ruling which eliminated the requirement that the claimant prove that the business owner had actual or constructive knowledge of the transitory foreign object or substance. Additionally, the mode of operation theory of liability is discarded.

Section 2 repeals s. 768.0710, F.S., (see *Current Law* discussion in the Present Situation).

Section 3 provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This change to current law would make establishing liability on businesses in slip-and-fall cases more difficult for plaintiffs, which may limit their ability to obtain favorable rulings.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.