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 Judiciary Committee

BILL:	CS/SB 1224
INTRODUCER:	Judiciary Committee and Senator Gardiner
SUBJECT:	Negligence/Slip on Foreign Substance
DATE:	March 21, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Treadwell	Maclure	JU	**Fav/CS**
2.			WPSC	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill repeals the current statute providing the burden of proof in "slip-and-fall" negligence claims and delineates the new burden of proof in these cases. This new standard reinstates the requirement that the plaintiff prove that the business had actual or constructive knowledge of the dangerous condition causing the injury, but specifies that the business owner or operator retains any common-law duties owed to invitees.

The bill specifies that, if a person slips and falls on a foreign transitory substance in a business, 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. The bill also provides that constructive knowledge may be proven by circumstantial evidence demonstrating 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.

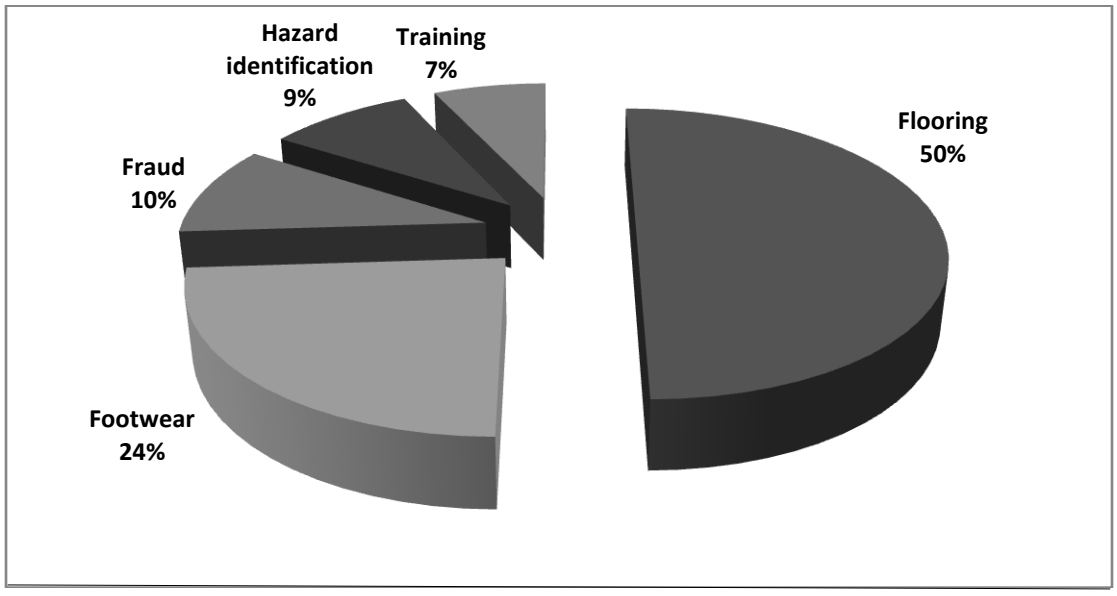
This bill creates section 768.0755, Florida Statutes, and repeals section 768.0710, Florida Statutes.

II. Present Situation:

Slip-and-Fall Liability Generally

Invitees, such as customers in a business, who slip, trip, or fall on a foreign transitory substance located on the floor, such as a banana peel or a spilled liquid, may seek to recover any damages suffered by filing a lawsuit premised upon negligence. Slip-and-fall accidents of patrons in bars, restaurants, and taverns represent the most common type of liability claims facing insurers of these businesses.[1] Supermarkets and grocery stores are also common locations for slip-and-fall accidents. Each year, approximately eight million people are injured as a result of a slip-and-fall accident.[2] The National Floor Safety Institute[3] reports that the annual cost of these accidents is approximately $100 billion each year.[4] These accidents may result from negligence in failing to properly monitor and maintain business floors, faulty flooring, improper training of employees, negligence on the part of the plaintiff, or even fraud. The following figure illustrates the causes of slip-and-fall accidents:[5]

Slip-and-Fall Accident Causes



[1] Meg Green, *Flip-Flop Risk Puts Taverns, Insurers on Shaky Footing*, 5, BEST WEEK (June 15, 2009).
[2] *Id.*
[3] The National Floor Safety Institute was founded in 1997 as a not-for-profit 501(c)(3) organization whose mission is to aid in the prevention of slips, trips, and falls through education, research, and standards development.
[4] Victor E. Schwartz, *Slip-and-Fall Claims: Holding Irresponsible Businesses Accountable, Encouraging Safety, and Guarding Against Fraud*, 1 (2010) (on file with the Committee on Judiciary)
[5] National Floor Safety Institute, *available at* http://www.nfsi.org/images/piechart1.jpg (last visited Mar. 14, 2010).

Slip-and-Fall Liability in Other Jurisdictions

Some states have retained the actual or constructive notice requirement in slip-and-fall cases while other states, such as Florida, have migrated away from this requirement.

States Retaining Actual or Constructive Notice

In the slip-and-fall context, Alabama requires a plaintiff to demonstrate that the fall resulted from the defendant's negligence and that the defendant had or should have had notice of the defect prior to the fall.[6] In one Alabama case, a patron fell after stepping on a "slippery spot" on a concrete ramp at the entrance of a supermarket. The Alabama court held that the patron could not recover from the supermarket because she failed to demonstrate what she slipped on and that the supermarket had actual or constructive notice of the hazardous condition.[7] Some state courts cite the following rationale to support the preservation of actual or constructive notice in the slip-and-fall context:

> This [actual or constructive knowledge] approach focuses directly on a principle established in our case law – that a premises owner's duty to remedy a condition, not directly created by the owner, is based on that owner's actual or constructive knowledge of the existence of the condition. It simply recognizes the logical conclusion that, when a dangerous condition occurs regularly, the premises owner is on constructive notice of the condition's existence. This places a duty on that owner to take reasonable steps to remedy this commonly occurring dangerous condition. Allowing plaintiffs to prove constructive notice in this manner relieves plaintiffs of the difficult burden of showing the duration of a particular occurrence. . . .[8]

In Georgia, a slip-and-fall plaintiff must also demonstrate that the defendant had actual or constructive knowledge of the dangerous condition.[9] Constructive knowledge could be demonstrated by:

- Demonstrating that the defendant's employee was present in the immediate area and could easily have seen the substance and removed it; or
- Demonstrating that the substance or object on the floor was there for such a time that it would have been discovered and removed had the defendant exercised reasonable care in inspecting the premises.[10]

In applying this standard, a Georgia appellate court ruled that a supermarket was not liable when a customer slipped on a grape in the produce section because there was no employee in the

[6] *Logan v. Winn-Dixie Atlanta, Inc.*, 594 So. 2d 83 (Ala. 1992).
[7] *Id.*
[8] *Blair v. West Town Mall*, 130 S.W.3d 761, 765-66 (Tenn. 2004).
[9] *Robinson v. Kroger Co.*, 493 S.E.2d 403 (Ga. 1997).
[10] *Roberson v. Winn-Dixie Atlanta, Inc.*, 544 S.E.2d 494, 495 (Ga. Ct. App. 2001).

immediate area to observe the hazard, and a store employee had inspected the aisle approximately 15 minutes before the accident.[11]

States Abandoning Actual or Constructive Notice

Some jurisdictions, such as Kansas, have moved toward "a broad [modern] trend . . . liberalizing the rules restricting recovery by one injured on the premises of another."[12] For example, the New Jersey Supreme Court shifted the burden of proof from an injured customer to the business owner to demonstrate that it was not negligent. In shifting the burden, the court reasoned that:

> [w]here a substantial risk of injury is implicit in the manner in which a business is conducted, and on that total scene it is fairly probable that the operator is responsible either in creating the hazard or permitting it to arise or to continue, it would be unjust to saddle the plaintiff with the burden of isolating the precise failure. The situation being peculiarly in the defendant's hands, it is fair to call upon the defendant to explain, if he wishes to avoid an inference by the trier of the facts that the fault probably was his.[13]

The Colorado Supreme Court has also embraced the burden-shifting paradigm recognized in Kansas and New Jersey. In Colorado, an exception to the actual or constructive notice requirement is created when a storekeeper's operating methods are such that the creation of a dangerous or hazardous condition is easily foreseeable.[14] In a Colorado slip-and-fall case, a grocery store patron slipped on a substance that appeared to be hand lotion. The court ruled that actual or constructive notice of the substance on the floor was irrelevant because the easy access to merchandise in the store often results in spills on the grocery store floors. Thus, the court concluded that dangerous conditions are inherent in the operation of the grocery store, and found the grocery store liable for the plaintiff's injuries.[15]

Florida Premises Liability Generally

Florida law requires a property owner to exercise reasonable care for the protection of invitees, such as patrons in a supermarket or restaurant.[16] Therefore, an owner must use reasonable care to protect invitees from unreasonably dangerous conditions.[17] The duty to protect invitees from these dangerous conditions can be broken down into two independent duties:

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[11] *Id.* Some of the other states retaining some form of actual or constructive notice in slip-and-fall cases include: California, Connecticut, Delaware, Iowa, Michigan, Mississippi, New York, Pennsylvania, South Carolina, Tennessee, Texas, and West Virginia.
[12] Venus Zilieris, *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*, 27 NOVA L. REV. 191, 209 (Fall 2002); *see also Jackson v. K-Mart Corp.*, 840 P.2d 463, 467 (Kan. 1992).
[13] *Wollerman v. Grand Union Stores, Inc.*, 221 A.2d 513, 515 (N.J. 1966) (emphasis omitted).
[14] *Safeway Stores, Inc. v. Smith*, 658 P.2d 255, 257 (Colo. 1983).
[15] *Id*. Some of the states abandoning actual or constructive notice include: Alaska, Arizona, Hawaii, Idaho, Indiana, Massachusetts, Missouri, Utah, Vermont, and Washington.
[16] *Ashcroft v. Calder Race Course*, 492 So. 2d 1309 (Fla. 1986).
[17] *Knight v. Waltman*, 774 So. 2d 731 (Fla. 2d DCA 2000).

- The duty to use reasonable care in maintaining the property in a reasonably safe condition; and
- The duty to warn of dangers which the owner knew, or should have known, existed and which are unknown to the invitee and cannot be discovered through the invitee's use of reasonable care.[18]

Actual or Constructive Notice in Florida

In the general premises liability context, to prove a breach of the duty to use reasonable care, the invitee must first prove notice. For example, the rule has developed that the injured person must prove that the premises owner had actual or constructive knowledge of the dangerous condition.[19] Constructive knowledge may be established by circumstantial evidence demonstrating that:

- 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
- The condition occurred with regularity and was therefore foreseeable.[20]

In order to establish the foreseeability of the dangerous condition, the injured party must introduce evidence of recurring or ongoing problems that could have resulted from operational negligence or negligent maintenance.[21] The issue of whether a company had constructive notice of a dangerous condition is for the jury in a negligence action by an injured patron.[22]

Slip-and-Fall Cases in Florida

Slip-and-fall cases resulting from a transitory foreign substance[23] are one of the most common types of premises liability actions filed in Florida courts.[24] Unlike the general burden that a plaintiff prove that the defendant property owner had actual or constructive knowledge of the dangerous condition, in slip-and-fall cases, the burden has changed. Historically, Florida courts required plaintiffs to provide actual or constructive knowledge of the dangerous condition in slip-and-fall cases. However, uncertainty developed from various decisions applying the elements of actual or constructive knowledge in the slip-and-fall context.

First, in some instances, the Florida Supreme Court recognized that, by virtue of the operation of the business or its mode of operation, the requirement of establishing constructive knowledge was altered or eliminated.[25] If evidence established a specific negligent mode of operation such

[18] Benjamin Jilek, *The "Open and Obvious" Defense and Summary Judgment in Premises Liability Claims*, 25 No. 4 TRIAL ADVOC. Q. 36 (Fall 2006).
[19] *Davis By and Through Davis v. Bell*, 705 So. 2d 108 (Fla. 2d DCA 1998).
[20] *Sutherlund ex rel. Sutherland v. Pell*, 738 So. 2d 1016 (Fla. 2d DCA 1999).
[21] *Kolosky v. Winn Dixie Stores, Inc.*, 472 So. 2d 891 (Fla. 4th DCA 1985); *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 1076, 1076 (Fla. 3d DCA 1983).
[22] *Freeman v. BellSouth Telecommunications, Inc.*, 954 So. 2d 45 (Fla. 1st DCA 2007)
[23] Transitory foreign substance" is referred to as "any liquid or solid substance, item, or object located where it does not belong . . . [a] substance found . . . where it is not supposed to be found." BLACK'S LAW DICTIONARY 660 (7th ed. 1999).
[24] Zilieris, *supra* note 12 at 192.
[25] *See Wells v. Palm Beach Kennel Club*, 35 So. 2d 720, 721 (Fla. 1948).

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 on the floor was deemed to be a non-issue.[26] Under the "mode of operation theory," the dispositive issue was whether the specific method of operation was negligent and whether the accident occurred as a result of that negligence. Confusion continued to flow from whether the "mode of operation theory" applied only to amusement type operations, or applied more broadly to encompass other types of businesses, such as grocery stores and restaurants.

Owens v. Publix Supermarkets, Inc.

In *Owens v. Publix Supermarkets, Inc.*, the Florida Supreme Court attempted to resolve confusion of the applicable burdens of proof in slip-and-fall cases by eliminating the plaintiff's burden to prove that the business owner had actual or constructive knowledge of the presence of the transitory substance.[27] In *Owens*, the court reviewed consolidated slip-and-fall cases. The following is a brief synopsis of the facts and final disposition in both cases under review in *Owens*:

- ***Owens*** – In the first case, Evelyn Owens, an employee of Publix, clocked out of work, and started grocery shopping in the Publix store where she worked. While walking down an aisle, Ms. Owens slipped and fell on a discolored piece of banana lying on the floor. Owens testified that she did not see the banana, but another shopper testified that the banana was very discolored. However, the other shopper did not know how long the banana had been on the floor. Publix did not maintain inspection records, and there was no evidence presented as to when the particular aisle was last inspected. Finding that the evidence of the banana was insufficient, the trial court directed a verdict in favor of Publix, which the Fifth District Court of Appeal affirmed.[28]

- ***Soriano*** – In the second case, Elvia Soriano also slipped and fell on a discolored piece of banana in the B & B Cash Grocery Store (B & B). A store employee testified that a piece of banana peel was taken off of Ms. Soriono's shoe after the fall. Ms. Soriano described the banana peel as discolored with very little yellow. The store manager testified that the store tried not to sell brown bananas. The store kept daily inspection records, but a store employee testified that the floor was not swept hourly. Testimony was also presented that the daily inspection records were sometimes falsified. At trial, the court directed a verdict in favor of B & B stating that the evidence was insufficient to show actual or constructive knowledge, which the Fourth District Court of Appeal affirmed.[29]

In examination of the liability and the evidence presented in these cases, the *Owens* court held that the existence of the foreign substance on the floor of a business premises that caused a customer to fall and be injured was not a safe condition, and the mere existence of that unsafe condition created a rebuttable presumption that the property owner did not maintain the premises

[26] *Markowitz v. Helen Homes of Kendall Corp.*, 826 So. 2d 256 (Fla. 2002).
[27] *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315 (Fla. 2001).
[28] *See Owens v. Publix Supermarkets, Inc.*, 23 Fla. L. Weekly D2655 (Fla. 5th DCA 1998), *reh'g en banc granted and opinion withdrawn*, 729 So. 2d 449 (Fla. 5th DCA 1999).
[29] *Soriano v. B & B Cash Grocery Stores, Inc.*, 729 So. 2d 449 (Fla. 5th DCA 1999).

in a reasonably safe condition. As a result, once the plaintiff demonstrated that she fell as a result of a foreign substance, a rebuttable presumption of negligence arose. Thereafter, the burden shifted to the property owner to show that it exercised reasonable care in the maintenance of the premises under the circumstances.[30]

The court emphasized that the burden-shifting did not relieve the plaintiff of her burden of proving that the slip-and-fall accident was the cause of the plaintiff's injuries, and that the holding did not render business owners and operators strictly liable for slip-and-fall injuries.[31] However, the court concluded that the directed verdicts were erroneously entered because the burden shifts to the stores to prove that they exercised reasonable care by properly maintaining and inspecting the premises.[32]

Legislative Response to Owens

In response to the decision in *Owens*, the Legislature addressed the burden of proof in slip-and-fall cases on business premises.[33] Under the current statute governing slip-and-fall negligence claims, in any civil action for negligence involving loss, injury, or damage to a business invitee as a result of a transitory foreign object or substance on business premises, the claimant has the burden of proving that:

- The person or entity in possession or control of the business premises owed a duty to the claimant;
- 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.[34]

In proving 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, actual or constructive notice of the transitory foreign object or substance is not a required element of proof to this claim. However, evidence of actual or constructive notice or lack of notice offered by any party may be considered together with all of the evidence.[35]

The statutory changes to the elements of slip-and-fall cases eased the burden on plaintiffs in these cases by eliminating the need for proof of what otherwise might be considered an essential fact, as opposed to shifting the burden of proof to the property owner, as required in *Owens.*[36] In addition, the statutory changes do not limit the types of business premises covered in the manner that the cases suggest under the negligent mode of operation theory.[37]

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[30] *Owens*, 802 So. 2d at 332.
[31] *Id.* at 331.
[32] *Id*. at 332.
[33] *See Silvers v. Wal-Mart Stores, Inc.*, 826 So. 2d 513 (Fla. 4th DCA 2002); *see also* Chapter 2002-285, s. 1, Laws of Fla.
[34] Section 768.0710(2)(a)-(c), F.S.
[35] Section 768.0710(2)(b), F.S.
[36] William E. Adams, Jr., *TORT LAW: 2001-2003 Survey of Florida Law*, 28 NOVA L. REV. 317 (Winter 2004).
[37] *Id.*

III. Effect of Proposed Changes:

The bill repeals the current statute providing the burden of proof in "slip-and-fall" negligence claims and delineates the new burden of proof in these cases. This new standard reinstates the requirement that the plaintiff prove that the business proprietor or operator had actual or constructive knowledge of the dangerous condition causing the slip-and-fall injury.

The bill specifies that, if a person slips and falls on a foreign transitory substance in a business establishment, such as a banana peel or a spilled liquid, 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. The bill does not define "business establishment," and there is no definition of the term currently included in statute.

The bill provides that constructive knowledge may be proven by circumstantial evidence demonstrating 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.

In effect, the burden of proof rests with the slip-and-fall plaintiff, who must present affirmative evidence of the business's actual knowledge, or circumstantial evidence of the business's constructive knowledge, of the transitory substance or object on the floor and that the business should have removed the hazard prior to the accident.

The bill specifies that the newly created section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises. In other words, although the burden of proof for slip-and-fall cases is clearly delineated in the bill, the business owner or operator retains any common-law duties of care, such as the duty to use reasonable care to protect invitees from unreasonably dangerous conditions on the premises.

The effective date of the bill is July 1, 2010.

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:

Business owners and operators may experience a decrease in expenses associated with defending claims and compensating plaintiffs in slip-and-fall cases when the business had no actual or constructive knowledge of the dangerous condition causing a patron's injury.

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.)

CS by Judiciary on March 18, 2010:
The committee substitute specifies that the newly created 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. Amendments:

None.