SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 2256

SPONSOR: Judiciary Committee, Senator Brown-Waite and others

SUBJECT: Premises Liability/Burden of Proof

DATE: March 12, 2002 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Forgas	Johnson	JU	Favorable/CS
2.	Emrich	Deffenbaugh	BI	Favorable
3.				
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 2256 creates s. 768.0710, F.S., to provide standards relating to the standard of care and burden of proof in premises liability cases involving an injury to a business invitee that is caused by a transitory foreign object or substance. Specifically, the bill states that a person 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. The bill provides that the injured business invitee has the burden of proof to prove by a greater weight of the evidence that:

- 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 bill further provides that actual or constructive notice of the transitory foreign object or substance is *not* a required element of proof to the claim. The bill takes effect upon becoming law and applies to all causes of action pending on or after that date.

The genesis of this bill arose due to a recent Florida Supreme Court ruling in a case involving a grocery store shopper who slipped and fell on a piece of banana lying on the floor.[1] In *Owens v. Publix Supermarkets*, the Supreme Court changed Florida common law precedent in slip and fall cases by shifting the burden to the business owner to establish that he or she exercised reasonable

[1] *Owens v. Publix Supermarkets, Inc*., 802 So.2d 315, 317 (Fla. 2001).

care under the circumstances and by eliminating the requirement that the business invitee (claimant) establish that the owner had constructive knowledge of the existence of the transitory foreign object (the banana in the *Owens* case).

This bill reverses that 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 bill preserves the mode of operation theory[2] of liability expressly recognized in *Owens* and preserves that portion of the ruling which eliminated the claimant from having to prove that the business owner had actual or constructive knowledge of the transitory foreign object or substance. With these exceptions, the bill essentially returns premises liability law to its pre-*Owens* status.

This committee substitute creates section 768.0710 of the Florida Statutes.

II. Present Situation:

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. *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 premises liability case is a type of negligence case that involves an injury to a person who is on the property of another person. In Florida, the status of the person injured is the determinative factor relative to the duty of care imposed upon the property owner. Persons entering the property of another typically are classified as invitees, licensees, or trespassers.

Section 768.075(3), F.S., establishes the duty of care for property owners as far as discovered and undiscovered trespassers are concerned. Subsection (3)(b) provides that a property owner owes a duty to undiscovered trespassers to refrain from intentional misconduct, but owes no duty to warn of dangerous conditions. For discovered trespassers, subsection (3)(b) provides that 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.

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. *See* s.768.075(3)(a)1., F.S. 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. *See Zipkin v. Rubin Construction Co.*, 418 So.2d 1040 (Fla. 4th DCA 1982). Premises owners owe a duty to invitees to maintain the premises in a reasonably safe condition. *See Wood v. Camp*, 284 So.2d 691 (Fla. 1973).

[2] The "mode of operation" rule generally looks to a business's choice of a particular mode of operation and not events surrounding the plaintiff's accident. *Owens*, 802 So.2d at 325.

The Florida Supreme Court recently reconsidered the law in "slip and fall" premises liability cases. 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. The court discussed premises liability law in Florida as it existed prior to its 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 determine 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 court in *Owens* 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. 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. *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:

> **…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).

III. Effect of Proposed Changes:

Section 1. Creates s. 768.0710, F.S., pertaining to the burden of proof in negligence claims involving transitory foreign objects or substances.

Subsection (1) provides that a person in possession or control of business premises owes a duty of reasonable care to maintain the premises in a reasonably safe condition for the safety of business invitees, including reasonable efforts to keep the premises free from transitory foreign objects or substances that might foreseeably give rise to loss, injury, or damage.

Subsection (2) provides that a business invitee who brings a negligence claim involving loss, injury, or damage as the result of a transitory foreign object or substance has the burden to prove 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.

Actual or constructive notice of the transitory foreign object or substance is not a required element of proof to the claim. However, evidence of notice or lack of notice offered by any party maybe considered together with all of the evidence.

Section 2. Provides that it shall take effect upon becoming a law and shall apply to all causes of action pending on or after that date. Presumably, this bill would affect all lawsuits filed after the effective date and all lawsuits filed before the effective date that have not had a final judgment rendered.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill effectively reverses that portion of the Supreme Court's ruling in *Owens* that placed the burden of proof on the defendant to prove that he or she was not negligent once the claimant showed that he or she fell on a transitory foreign object or substance. However, the bill preserves the mode of operation theory of liability that was expressly recognized in *Owens*. Likewise, the bill preserves that portion of the ruling in *Owens* that eliminated the claimant from having to prove that the defendant had actual or constructive knowledge of the transitory foreign object or substance. With these exceptions, the bill essentially returns premises liability law to its pre-*Owens* status.

C. Government Sector Impact:

None.

D. Other:

The bill provides that it applies to all "…causes of action pending on or after .." the effective date of the act. This language carries retroactive implications. Generally, statutes which are inherently procedural, such as those affecting only the measure of damages or the burden of proof, may be abrogated retroactively and applied to pending cases as no one has a vested right in any given mode of procedure. *See Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239 (Fla. 1977); *Gupton v. Village Key & Saw Shop, Inc.*, 656 So.2d 475 (Fla. 1995). Therefore, the bill's retroactive effective date should be constitutional since the bill pertains to the burden of proof in a premises liability case.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.