

The Issue

In 2002, the Legislature eliminated a central tenet of a plaintiff's burden of proof in civil suits for slip-and-fall injuries against business owners. The change removed the requirement that a plaintiff prove that a business had knowledge of the existence of an object which presented a danger to patrons.¹ The bill was a compromise between the Florida Supreme Court's² about-face disposal of constructive notice as an element of a plaintiff's burden of proof and the business community's fear that the Court's decision would usher in a whole new class of baseless lawsuits for slip-and-fall injuries.

The new law overturned the need for plaintiffs to prove that a business had actual or constructive knowledge of a foreign object that could cause a patron to "slip-and-fall." Now plaintiffs seeking damages for injuries need only show that (a) the person or entity in possession or control of the business premises owed a duty to the claimant, (b) 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 (c) the failure to exercise reasonable care was a legal cause of the loss, injury, or damage.³

This statutory framework "conflicts with basic principles of negligence law, [and] also with the common law principle that a [business] is not an insurer for a customer's safety."⁴ It "indiscriminately fling[s] open the gates to trial, substantially affect[ing] not only the Wal-Marts of the world, but also every 'Mom and Pop' business."⁵

Moreover, the statute endangers even the most careful and thorough business owners by adopting a crude mode-of-operation theory, akin to a strict liability standard in that it does not "[require] proof of a causal connection between the defendant's negligence and the plaintiff's injury."⁶

Background

In *Owens v. Publix Supermarkets, Inc.*, 802 So.2d 315, 331 (Fla. 2001), the Florida Supreme Court held that a plaintiff need not demonstrate that the store had constructive knowledge of an object that caused a slip-and-fall accident. Instead, the burden was placed on the defendant-business to demonstrate that it exercised reasonable care. Further, the Court stated that the mere existence of an object or substance on the floor "creates a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition."⁷ The Court was largely dissatisfied with the difficulties inherent in making a

¹ Fla. Stat. § 768.0710

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

³ Fla. Stat. § 768.0710

⁴ *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431, 438 (Johnstone, J., dissenting) (noting the danger in shifting the burden onto defendants).

⁵ *Id.*

⁶ Steven D. Winegar, *Reapportioning the Burden of Uncertainty: Storekeeper Liability in the Self-Service Slip-and-Fall Case*, 41 UCLA L. Rev. 861, 888 (1994); see also *Blair v. West Town Mall*, 130 S.W.3d 761, 764 (Tenn. 2004) (explaining that the mode-of-operation theory is "based on the ideas that the premises owner's method of operating the business indirectly resulted in creation of the dangerous condition, although the acts of third parties also contributed to its creation").

⁷ *Owens*, 802 So.2d at 331.

plaintiff prove how long an object or substance had been on the floor in order to demonstrate whether a business should have noticed the potentially hazardous condition.⁸

Due to the Court's substantial departure from traditional theories of negligence and burden-shifting requirements, the Legislature acted quickly to shift the burden of proof back to the plaintiff.⁹ However, Florida law falls short by failing to require plaintiffs to prove constructive knowledge on the part of the business owner.¹⁰

Further, the law adopts a flawed mode-of-operation theory which only looks to a business' mode of operation instead of events surrounding the plaintiff's actual slip-and-fall.¹¹ Such a theory allows a "plaintiff to get to a jury simply by presenting proof that a store's customer could have conceivably produced the hazardous condition."¹²

The liability of business owners for the injuries of patrons is rooted in the idea that owners are in a position of superior knowledge to know of conditions that may pose a danger to visitors.¹³ However, disregarding a business owner's ability to notice the object, or even to reasonably foresee the existence of the object, impermissibly opens the door to lawsuits, higher insurance premiums, and unconscionable levels of monetary damages to predatory plaintiffs.¹⁴

In the past few years, a new framework for slip-and-fall liability cases has been developed, which strikes a sensible balance between protections for injured patrons and protections for businesses. The Tennessee Supreme Court aptly articulated such a framework in *Blair v. West Town Mall*,¹⁵ in which it stated:

"[P]laintiffs may prove that a premises owner had constructive notice of the presence of a dangerous condition by showing a pattern of conduct, a recurring incident, or a general or continuing condition indicating the dangerous condition's existence. This 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

⁸ See *Id.* at 323 (Court expressed concerns that "an injured person's ability to establish constructive notice is often dependent on the fortuitous circumstance of the observed condition of the substance").

⁹ Section 768.710, Florida Statutes; see also D. Maurice Moore, *Watch Your Step: An Analysis of Premises Liability in the Wake of Lanier v. Wal-Mart Stores, Inc.*, 43 Brandeis L.J. 283, 296 (2005) (arguing for the inclusion of notice in slip-and-fall cases, or in the alternative, only disposing of this requirement in situations involving recurring and foreseeable hazardous conditions).

¹⁰ *Fla. Stat.* § 768.0710

¹¹ Florida Senate Judiciary/Banking & Insurance Committees, *Senate Staff Analysis and Economic Impact Statement: CS/SB 2256* (2002) citing *Owens*, 802 So.2d at 325.

¹² *Borota v. University Medical Center*, 861 P.2d 679, 681 (Ariz. App. 1993).

¹³ *Mitchell v Food Giant, Inc.*, 337 S.E.2d 353 (Ga. App. 1985); *Gunter v. U.S.*, 10 F. Supp. 2d 534 (M.D.N.C. 1998); John O. Alexander, *Torts—Blair v. West Town Mall: The Tennessee Supreme Court modifies the Doctrine of Constructive Notice, Adding to the Plaintiff's Arsenal Without Stripping the Premises Owner of Traditional Protections*, 35 U. Mem. L. Rev. 559, 564 citing *Allison v. Blount Nat. Bank*, 390 S.W.2d 716, 719 (Tenn. App. 1965).

¹⁴ Moore, *supra*, 43 Brandeis L.J. at 302.

¹⁵ *Blair*, 130 S.W.3d at 765-66.

manner relieves plaintiffs of the difficult burden of showing the duration of a particular occurrence so long as plaintiffs can show that the dangerous condition was part of a ‘pattern of conduct, a recurring incident, or a general or continuing condition’ such that its presence was reasonably foreseeable to the premises owner.”

In this analysis, circumstances relevant to the event which caused the injury are considered. Additionally, the burden of proving some kind of constructive notice is properly placed back on the plaintiff. However, plaintiffs are no longer required to use potentially unavailable and impossible evidence¹⁶ to meet the notice standard, and instead, they are merely required to meet a standard of foreseeability, a rational standard of proof for both patrons - plaintiffs and businesses - defendants.

The Solution

The Legislature must act quickly to restore predictability for business owners without forfeiting sound protections for injured business patrons. Businesses are currently at risk of having to incur enormous debts in order to defend predatory lawsuits, strangling the financial stability of owners and employees.

Reinserting a logical standard of constructive notice will help protect businesses that drive the state’s economic engine from abusive and unduly expensive litigation, without jeopardizing the meritorious claims of patrons.

¹⁶ See *Owens*, 802 So.2d at 323 (Court expressed concerns that “an injured person’s ability to establish constructive notice is often dependent on the fortuitous circumstance of the observed condition of the substance”)