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# SLIP AND FALLS COME OF AGE

by Ted Babbitt

On November 15, 2001, the Supreme Court of Florida changed the law of premises liability. In an astonishingly sweeping opinion, Justice Pariente, writing for the majority, changed the rules that relate to the burden of proof in slip and fall cases.

The combined cases of Owens v Publix Supermarkets, Inc. and Soriano v B & B Cash Grocery Stores, Inc., were decided at 26 F.L.W. S756 (Fla. Nov. 25, 2001). Both cases involved a plaintiff who slipped and fell in a grocery store on a portion of a banana found lying in one of the aisles. Both cases resulted in a directed verdict for the storeowners based upon the failure of the plaintiff to show constructive knowledge on the part of the grocery store of the existence of the foreign substance. Those rulings are consistent with Florida law that a plaintiff must prove that the condition existed for a sufficient length of time that in the exercise of ordinary care the store owner should have known about it and corrected the dangerous condition. Colon v Outback Steak House of Florida, Inc., 721 So.2d 769 (Fla. 3rd DCA 1998).

In both the Owens and Soriano cases, plaintiffs provided evidence that the banana looked aged and brown but the appellate courts found that that evidence was insufficient to survive a directed verdict because the appearance of the banana could be explained by varying theories, some of which were contrary to

the aging having occurred on the floor. That kind of reasoning has led to a number of cases in which the focus of attention of the appellate courts of this state has been on the appearance of the transitory substance at the time the fall occurred. See eg. Ramey v Winn Dixie Montgomery, Inc., 710 So.2d 191 (Fla. 1st DCA 1998); Woods v Winn Dixie Stores, Inc., 621 So.2d 710 (Fla. 3rd DCA 1993); Ress v X-tra Super Food Ctrs., Inc., 616 So.2d 110 (Fla. 4th DCA 1993); Newalk v Florida Supermarkets, Inc., 610 So.2d 528 (Fla. 3rd DCA 1992); Wal-Mart Stores, Inc. v King, 592 So.2d 705 (Fla. 5th DCA 1992).

This analysis has led Courts around the country to seek new methods of determining liability in cases such as this. Florida has discussed the "mode of operation theory." The principal case in support of that theory is Wells v Palm Beach Kennel Club, 35 So.2d 720 (Fla. 1948). There a dog track at which a patron fell on an empty drink bottle in the aisle was found liable on the basis of that theory. The mode of operation theory holds that where the mode of operation of a business establishes a duty beyond that of an ordinary establishment proof of constructive notice is unnecessary. In Wells, supra, the dog track sold numerous bottled beverages and failed to provide receptacles for their disposal so that patrons left the empty bottles wherever they pleased. The Court held that that mode of operation was sufficient to suggest to a jury that the track had failed to keep their premises in a reasonably safe condition

commensurate with their business and that it was unnecessary to prove that the bottle in question had been there a sufficient length of time to put the track on constructive notice of its existence. Florida, however, has never extended the mode of operation theory to a grocery store. In fact, that extension was rejected in Rowe v Winn-Dixie Stores, Inc., 714 So.2d 1180 (Fla. 1st DCA 1998).

Courts in other states have rewritten the law with respect to the burden of proof in slip and fall cases. In Wollerman v Grand Union Stores, 221 A.2d 513 (N.J. 1966), the Supreme Court of New Jersey held that once the plaintiff proved that a fall came about as a result of a substance found on the floor of the defendant, the burden shifted to the defendant to prove that the dangerous condition was not created as a result of its negligence. Louisiana and Colorado followed the New Jersey decision in Kavlich v Kramer, 315 So.2d 282 (La. 1975) and Safeway Stores, Inc. v Smith, 658 P.2d 255 (Colo. 1983).

In reviewing the above cited cases, the Court in Owens, supra, found that it was time for a change in the law.

> 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. As the New Jersey Supreme

> Court noted in Wollerman, it is unfair to place the burden on a customer to establish actual or constructive notice on the part of the premises owner who is in control of its own premises and the evidence on which notice is based. See Wollerman, 221 S.2d at 514.

Based upon the foregoing analysis, the Supreme Court of Florida has adopted new law on the burden of proof in slip and fall cases.

> 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 reasonable safe condition.
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> 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 a greater weight of evidence that it exercised reasonable care in the maintenance of the premises under the circumstances.

In addition, the Supreme Court expanded on the scope of the mode of operation theory providing an alternate means of proving liability.

> . . . 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.

What is particularly interesting about this holding is that it is bottomed on the superior position of the defendant with respect to its knowledge of the circumstances which led to the fall.

> . . . 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.
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> 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.

What is interesting about the Supreme Court's holding in this case is that its theory of responsibility is equally applicable to cases of medical malpractice and products liability. In malpractice cases, the defendant hospital or doctor is in total control of the circumstances surrounding the injury. The health care provider not only creates all of the records surrounding the incident but the plaintiff is often unconscious, having been anesthetized while the medical procedure takes place. It is often not until weeks, if not years, after the incident

that the plaintiff in a malpractice case first discovers the existence of the condition which created the injury.  In the meantime, the defendant healthcare provider has the opportunity to make an immediate investigation, interview witnesses and have the matter reviewed by other medical providers.

In a products liability case, the manufacturer is in total control of the manufacturing process and the records concerning that process.  It is often not until years after the product is manufactured that the defect becomes apparent. The injured plaintiff is in possession of nothing other than the ultimate product which created the injury and oftentimes, that is destroyed in the accident.

It will be interesting to see what the Legislature does based upon this opinion.  It will also be interesting to see whether the Supreme Court follows up this opinion by applying this rule of law to other areas of the law in which it may be equally applicable.