RISSMAN, BARRETT, HURT, DONAHUE & MCLAIN, P. A.

ATTORNEYS AT LAW

STEVEN A. RISSMAN
ROBERT C. BARRETT
JENNINGS L. HURT III
ROBERT A. DONAHUE
JOHN E. McLAIN III
RICHARD S. WOMBLE
JOHN P. DALY
STACIE B. GREENE
THEODORE N. GOLDSTEIN
RAYMOND A. LOPEZ
VANCE R. DAWSON
RICHARD B. MANGAN JR.
HENRY W. JEWETT II
DANIEL M. POLLACK
ART C. YOUNG
NICOLE D. RUOCCO
DANIEL T. JAFFE
BEATRIZ E. JUSTIN
J. GREGORY GIANNUZZI
DAVID K. BEACH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN
G. WILLIAM LAZENBY IV
R. CLIFTON ACORD II
ROBERT D. BARTELS
JILL M. SPEARS
JEFFREY J. KERLEY
KARISSA L. OWENS

OF COUNSEL
ROBERT J. JACK

EXECUTIVE DIRECTOR
W. SCOTT PETERSON

201 EAST PINE STREET
15TH FLOOR
P.O. BOX 4940
ORLANDO, FLORIDA 32802-4940
TELEPHONE (407) 839-0120
TELECOPIER (407) 841-9726
ORLANDO@RISSMAN.COM

TAMPA COMMONS
ONE NORTH DALE MABRY HIGHWAY
11TH FLOOR
TAMPA, FLORIDA 33609
TELEPHONE (813) 221-3114
TELECOPIER (813) 221-3033
TAMPA@RISSMAN.COM

207 S. 2nd STREET
FT. PIERCE, FLORIDA 34950
TELEPHONE (772) 409-1480
TELECOPIER (772) 409-1481
FTPIERCE@RISSMAN.COM

AMY L. BAKER
SEAN M. CROCKER
CHRISTOPHER E. DENNIS
SARAH E. EGAN
JAMES E. FAVERO III
JOSHUA T. FRICK
SUSAN R. FULLER
PAUL B. FULMER
JANNINE C. GALVEZ
ELISE J. GEIBEL
CHRISTOPHER A. HANSON
VICTORIA S. LUNA
LAURA F. LYTLE
DARIEN M. MCMILLAN
ERIC F. OCHOTORENA
JEREMY T. PALMA
JEFFREY M. PATNEAUDE
WENDY L. PEPPER
D. BLAKE REHBERG
KELLEY A. RICHARDS
JUAN A. RUIZ
BRYAN R. SNYDER
LARRY D. SPENCER
MEREDITH M. STEPHENS
ELIZABETH M. STUART
F. PAUL TIPTON
NICOLETTE E. TSAMBIS
JASON R. URBANOWICZ
CHRISTINE V. ZHAROVA

WWW.RISSMAN.COM

PLEASE REPLY TO: ORLANDO

June 20, 2011

F.S. § 768.0755
REINSTATING THE TRADITIONAL PREMISES LIABILITY DOCTRINE

Under the current law codified in F.S. § 768.0755, plaintiffs must now show that the defendant owner of a premises had actual or constructive knowledge of the hazardous condition which proximately caused their injury.

Prior to the passage F.S. § 768.0755, premises liability law was dominated by the 2001 opinion of the Florida Supreme Court in ***Owens v. Publix Supermarkets, Inc.,*** 802 So. 2d 315 (Fla. 2001). Before Owens, premises liability claimants carried the burden to show that the defendant had either actual or constructive knowledge of a transient substance.

To show constructive knowledge, a plaintiff could produce evidence to show that a hazardous condition had persisted for such a length of time that the defendant's failure to address it violated its duty of care. Additionally, a plaintiff could show constructive knowledge through foreseeability by producing evidence that the hazardous condition occurred with regularity.

In ***Owens***, the Florida Supreme Court effectively abolished the constructive knowledge requirement, replacing it instead with a rebuttable presumption once an injury had occurred that

the defendant business had failed to exercise reasonable care to invitees, thereby shifting the burden from plaintiff to defendant. The Court's cited rationale in ***Owens*** was to incentivize greater adherence by businesses to their duty of care, and to ease the evidentiary burden on plaintiffs who were often required to show how long a transient substance had remained on a floor prior to their injury.

The Florida legislature first responded to ***Owens*** in 2002 with the passage of F.S. § 768.0710, which abolished the rebuttable presumption of negligence as articulated by the Florida Supreme Court. However, F.S. § 768.0710 did not address constructive knowledge and thus, ***Owens*** remained controlling on the issue until July 1, 2010.

On July 1, 2010, the Florida Legislature passed F.S. § 768.0755, which places the burden upon the claimant to show the defendant's actual or constructive notice of a hazardous condition, thus returning to the traditional doctrine prior to ***Owens***. Under the new law, business owners and their agents still owe a duty of care to maintain their premises and warn invitees of any hazards. But because the plaintiff in a premises liability cause of action now has the burden of showing another element, it will likely be easier for defendants to move for summary judgment.

It remains to be resolved as to whether F.S. § 768.0755 may operate retroactively on causes of action arising prior to its passage on July 1, 2010. The retroactivity of the statute may turn on whether individual courts interpret it as substantive or procedural, as the Florida Supreme Court has held that substantive statutes may only operate prospectively.

The U.S. District Court for the Northern District of Florida interpreted F.S. § 768.0755 as procedural in ***Yates v. Wal-Mart Stores, Inc***., 2010 WL 4318795 (N.D. Fla. Oct. 27 2010). The Northern District founded its procedural interpretation on the rationale that the new statute merely shifted the burden of proof from the plaintiff to the defendant. Based on this procedural interpretation, the Northern District Court applied F.S. § 768.0755 retrospectively.

However, the U.S. District Court for the Middle District of Florida interpreted F.S. § 768.0755 as substantive in ***Kelso v. Big Lots Stores, Inc.***, 2010 WL 2889882 (M.D. Fla. July 21 2009). According to the Middle District, because the statute required a new element of proof for the plaintiff, it was substantive and therefore could not operate retrospectively.

The Middle District confirmed the substantive interpretation of F.S. § 768.0755 in ***Mills v. Target Corp.,*** WL 4646701 (M.D. Fla. Nov. 9 2010). As in ***Kelso***, the Middle District held in ***Mills*** that F.S § 768.0755 could operate only prospectively on causes of action arising on or after its enactment.

JLH/AEE/smm/tsr

*This is a summary of an article that appeared in the Spring 2011 edition of *Trial Advocate Quarterly*.