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

Venus Zilieris

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I. INTRODUCTION

Supermarkets in the United States annually spend $450 million to defend slip-and-fall claims. In Florida, slip-and-fall cases are one of the most common types of premises liability suits. Under Florida law, premises owners, such as supermarkets, owe a duty toward invitees, such as shoppers, to exercise reasonable care in the safe maintenance of their premises. Traditionally, invitees who slipped and fell on a transitory foreign substance, such as a banana peel, were required to prove that the premises owner had actual or constructive knowledge of the dangerous condition. However, the court’s holding in *Owens v. Publix Supermarkets, Inc.*, changed more than thirty years of Florida law by eliminating the need to prove actual or

3. “Invitee” generally refers to “someone who entered the premises of another for purposes connected with the business of the owner or occupier.” *Id.* at 563 (citations omitted).
5. 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.” *Id.* at 317 n.1 (citing BLACK’S LAW DICTIONARY 660 (7th ed. 1999)).
7. 6 SAWAYA, supra note 2, § 10.12, at 598.
9. 802 So. 2d 315 (Fla. 2001).
constructive knowledge and shifting the burden of proof from the invitee to the premises owner. As a result of this ruling, the Florida Retail Federation, representing 6000 retailers statewide, began damage control and formed the Banana Peel Coalition in seeking legislative redress. In 2002, Florida’s legislature unanimously passed Senate Bill 1946, also known as the Banana Peel Legislation, creating section 768.0710 of the Florida Statutes, that will codify the burden of proof in slip-and-fall cases. The bill, in part, retained the decision in Owens by eliminating the requirement of actual and constructive knowledge. However, the burden of proof essentially shifted back from the premises owner to the invitee, thus undoing the Supreme Court of Florida’s ruling in Owens.

This article will examine the Owens decision, its effect, and the effect of Senate Bill 1946. Beginning with Part II, this article will review Florida’s old slip-and-fall law by examining the general rule, elements, burdens of proof, and applicable liability theories. Part III will present an overview of the facts and the court’s analysis in Owens, outlining how the court came to its decision. Part IV will examine the impact of Owens by discussing how the ruling has changed Florida’s slip-and-fall law regarding the duties of both the plaintiff shopper and the defendant supermarket. Part V will examine the business community’s response to Owens, and the Florida Legislature’s approval of Senate Bill 1946. Part VI will examine the effect of Senate Bill 1946 by discussing whether the plaintiff shopper and the defendant supermarket have been equally placed regarding the burden of proof. Part VII will conclude that although Senate Bill 1946 has settled the burden of proof in slip-and-fall actions, the plaintiff shopper remains in a disadvantaged position when compared to that of the defendant supermarket, because the plaintiff shopper’s burden of proof remains great and arguably difficult to satisfy. Further, in accordance with the Supreme Court of Florida’s notation in Owens, the defendant supermarket is in a superior

15. See id. § 1(2)(b).
16. See id. § 1(2).
position because it has immediate access to its own reports, records, and in today’s supermarkets, surveillance of the premises. 17

II. FLORIDA’S SLIP-AND-FALL LAW BEFORE OWENS V. PUBLIX SUPERMARKETS, INC.

Prior to the court’s decision in Owens, Florida’s slip-and-fall law was clear: in order for a premises owner to be liable for an invitee’s injuries, the injured invitee had to prove the premises owner had actual or constructive knowledge of the dangerous condition. 18

A. Actual and Constructive Knowledge Required in Slip-and-Fall Actions

Under Florida law, a premises owner owes a legal duty to exercise reasonable care in the maintenance of his or her premises against dangerous conditions. 19 The exercise of reasonable care toward an invitee includes:

[T]wo legal duties . . . . First . . . [the premises owner shall] ascertain that the premises are reasonably safe for invitees [including] . . . reasonable care to learn of (i.e. to acquire actual knowledge as to) the existence of any dangerous conditions on the premises. Secondly, the premises [owner] has a . . . legal duty to use reasonable care to protect invitees from dangerous conditions of which the [premises owner] has actual knowledge. 20

If a premises owner had actual knowledge of a dangerous condition, such as a slippery substance on the floor, then the premises owner had a legal duty to remedy the condition. 21 If a premises owner lacked actual knowledge of a slippery substance on the floor, but the substance was there for a sufficient length of time, the premises owner could be charged with constructive knowledge. 22 Thus, premises owners were required to conduct timely inspections in order to discover those dangerous conditions of which they did not actually know. 23 Constructive knowledge could be established

18. Id. at 320.
19. Id.
21. 6 SAWAYA, supra note 2, § 10.6, at 566.
22. Id.
23. Id.
Sufficient circumstantial evidence shows either, "(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."25

In the former situation, whether the length of time a transitory foreign substance remained on the floor was sufficient to establish constructive knowledge depended on the facts and circumstances of each case.26 However, the general guideline has been fifteen to twenty minutes.27 Typically, the length of time would be determined by the slip-and-fall plaintiff's ability to describe the condition and appearance of the substance.28 However, Florida appellate courts have differed on whether the description was sufficient to charge the premises owner with constructive knowledge. The Third District has held that the description of transitory foreign substance as "‘very dirty,’ ‘trampled,’ ‘containing skid marks, scuff marks’ . . . ‘chewed up,’” is sufficient circumstantial evidence to establish a jury question of constructive knowledge.29 For example, evidence of water around a bag of peas lying on the floor in the frozen food section could be enough for a jury to conclude that the water was a result of the bag of peas thawing out over some time, and thus the defendant supermarket was put on notice of the dangerous condition.30 Still, other Florida appellate courts have held the description of the substance, without more, as insufficient circumstantial evidence to charge the defendant supermarket with constructive knowledge.31 For example, if a shopper slipped and fell on a piece of cake on the floor and the shopper could not describe the condition of the

25. Brooks, 560 So. 2d at 341 (emphasis added) (citations omitted).
26. 6 SAWAYA, supra note 2, § 10.13, at 603 (citations omitted).
28. Woods, 621 So. 2d at 711.
29. Id.
30. Id.
cake to suggest its length of time on the floor, the issue of constructive knowledge would be precluded from the jury. Yet, the Second District has held that, even if the description of the transitory foreign substance was available to suggest its length of time on the floor, the description was still insufficient circumstantial evidence.

Florida courts have also held that constructive knowledge may be established under the theory of foreseeability. Foreseeability is based on the idea that when an occurrence or spill occurs with regularity, the occurrence is foreseeable, and the premises owner is charged with a legal duty to reasonably inspect the premises so as to determine whether a substance has been spilled. For example, the Second District noted that, in a supermarket setting, it is foreseeable that shoppers will handle fruits and vegetables, will open packages, and will drop parts of those items on the floor. Because such occurrences are foreseeable, the supermarket owes a duty toward shoppers to reasonably inspect the floors in order to discover the presence of hazards, such as slippery substances. Reasonable inspection of the floors would prevent a shopper from falling and sustaining injury.

B. Negligent Mode of Operation Theory

The negligent mode of operation theory is an alternative method available to meet the requirement of constructive knowledge for injured parties who slipped and fell as a result of a transitory foreign substance on the floor. This method is most crucial in cases where the timespan in which a transitory foreign substance had been on the floor cannot be

32. Sanchez, 700 So. 2d at 406.
34. Marcotte, 553 So. 2d at 215; Cain v. Brown, 569 So. 2d 771, 772 (Fla. 4th Dist. Ct. App. 1990); Nance v. Winn Dixie Stores, Inc., 436 So. 2d 1075, 1077 (Fla. 3d Dist. Ct. App. 1983); Amended Petitioners Initial Brief at 14–15, Owens (No. 95, 667); 6 SAWAYA, supra note 2, § 10.13, at 602.
35. 6 SAWAYA, supra note 2, § 10.13, at 603.
36. Cain, 569 So. 2d at 772.
37. 6 SAWAYA, supra note 2, § 10.13, at 602.
38. Id.
established. Rather, liability rests on the idea that the premises owner created a dangerous condition through his or her own repeated conduct.

A negligence action based on the mode of operation theory requires the injured party to prove "1) either the method of operation is inherently dangerous, or the particular operation is being conducted in a negligent manner; and 2) the [dangerous] condition of the floor was created as a result of the negligent method of operation." One commentator explained the application of the two-prong test in a supermarket setting. If grocery items are being served in open bins and are likely to drop on the floor and thus cause a fall, the method of operation is inherently dangerous and thus the first prong of the test is satisfied. If the injured party could then show that the grocery item on the floor was in close proximity to where it was shelved or being served, the second prong of the test should also be satisfied. However, Florida courts have been reluctant to accept the negligent method of operation theory in a supermarket setting, primarily because displays are not inherently dangerous.

The negligent mode of operation theory has been more easily applied to public amusement places. More than fifty years ago, the Supreme Court of Florida was faced with the application of this theory in Wells v. Palm Beach Kennel Club. In that case, large groups of individuals went to the racetrack. The racetrack sold bottled beverages but failed to provide any bins to dispose of the empty bottles. The patrons threw the empty bottles on the floor. A patron tripped and fell on an empty bottle in one of the

40. Id.
41. Id.
42. 6 SAWAYA, supra note 2, § 10.13, at 603–04.
43. Hickey, supra note 39, at 3.
44. Id.
45. Id.
47. Wells v. Palm Beach Kennel Club, 35 So. 2d 720, 721 (Fla. 1948).
48. 35 So. 2d 720 (Fla. 1948)
49. Id.
50. Id.
51. Id.
aisles and sued the racetrack. Based on the negligent mode of operation theory, the court held it was for the jury to decide whether the racetrack was negligent in the manner in which it sold its bottled beverages. Thus, the issue for the jury was whether the racetrack's failure to provide garbage bins for the disposal of its empty bottles created a dangerous condition. If a jury found that the racetrack implemented a negligent method of operation, then it follows that it was the creator of the dangerous condition. Therefore, constructive knowledge is not an issue.

III. OWENS V. PUBLIX SUPERMARKETS, INC.

A. Owens v. Publix Supermarkets, Inc.: A Plaintiff's Attorney's Dream Come True

Because the Supreme Court of Florida was faced with the issue of whether the condition of a transitory foreign substance in a slip-and-fall action is, alone, sufficient to charge the premises owner with constructive knowledge in two cases, the court consolidated these cases into one opinion.

1. Facts of Owens v. Publix Supermarkets, Inc.

Evelyn Owens ("Owens") was a part-time employee of Publix Supermarkets, Inc. After finishing her day at work, Owens decided to do some grocery shopping. While walking down an aisle and looking at the shelved merchandise, Owens slipped and fell. At trial, Owens testified

52. Id.
53. Wells, 35 So. 2d at 721.
54. Id.
55. Id.
58. Owens, 802 So. 2d at 317 n.2.
59. Amended Petitioners Initial Brief on Merits at 1, Owens v. Publix Supermarkets, Inc., 802 So. 2d 315 (Fla. 2001) (No. 95, 667).
60. Id.
61. Id.
62. Owens, 802 So. 2d at 317.
that she did not see what caused her to slip and fall. However, a witness in close proximity to Owens at the time of the incident testified that Owens had slipped on a small piece of slightly discolored banana. Although the witness could not testify as to the length of time the banana had been on the floor, she was able to describe it as "a piece of banana' without the peel... about an inch or longer and 'kind of mashed... where she hit it... kind of squashed down.'... It wasn't black, but it was dark." It was undisputed by Publix that Owens was an invitee at the time of her slip-and-fall incident. As a result of Owens's fall, she was transported to the hospital, treated and released, but was unable to work for several weeks. Owens provided two theories charging Publix liable for her injuries: "[1] the length of time the substance was on the floor [and]... [2] foreseeability and failure to warn." Through discovery it was revealed that, on average, Publix experienced one or more slip-and-falls per month, in the nine months prior to Owens's incident. On the day of trial, but before presenting testimony, Owens asked the court's permission for a jury demonstration to show the length of time it would take a small piece of fresh peeled banana to discolor. Owens reasoned that, "'[the] banana... must have been sitting there for a while, because it takes more than a few minutes for it to turn brown.'" Nevertheless, the court denied the request because the "[demonstration] didn't matter: There was insufficient evidence to show Publix was liable." At the end of Owens's case-in-chief, Publix moved for a directed verdict. Publix argued Owens failed to present evidence that it had actual or constructive knowledge of the banana peel on the floor. The trial court relied on Bates v. Winn-Dixie Supermarkets, Inc., because the facts in that

63. Id.
64. Amended Petitioners Initial Brief at 1, Owens (No. 95, 667).
65. Owens, 802 So. 2d at 317.
66. Amended Petitioners Initial Brief at 1, Owens (No. 95, 667).
67. Id.
68. Id. at 4.
69. Id.
70. Owens, 802 So. 2d at 318 n.3.
71. Amended Petitioners Initial Brief at 6, Owens (No. 95, 667).
72. Court's Banana-Peel Act Is No Joke, supra note 10.
74. Owens, 802 So. 2d at 318.
75. Id.
76. 182 So. 2d 309 (Fla. 2d Dist. Ct. App. 1966).
case were similar to the facts in *Owens*. In that case, a shopper also fell on a banana peel described as ""'dark,' 'over ripe,' 'black,' 'old,' and 'nasty looking.'" The *Bates* court ruled in favor of the premises owner, holding that the color and condition of the banana peel, as the only evidence, would require a jury to impermissibly stack inferences. In other words, the jury would be required to "stack a second inference (because of the color of the item the premises owner should have known of its existence) upon the first inference (the item was not that color when it was placed on the floor)." Thus, applying the holding in *Bates* to *Owens*, the trial court concluded that the condition of the banana was insufficient evidence to hold Publix liable. Therefore, the trial court granted the directed verdict in favor of Publix. Owens appealed.

On appeal, the Fifth District reversed the directed verdict but upon rehearing en banc, it affirmed the trial court's decision. In doing so, the Fifth District framed the issue to be: "Does the fact that a piece of discolored banana is found on the floor give rise to an inference that [it] had been there long enough to give this critical constructive knowledge?" The court's response was "'it depends on the other circumstances of the case.'" Reviewing the circumstances in *Owens*, the Fifth District pointed out two possible theories as to how the banana got on the floor. First, the aging of the banana may have occurred on the floor; second, the aging of the banana may have occurred in the store's fruit bin from which a shopper took it and gave it to an infant being pushed in a shopping cart, who then dropped it on the floor just prior to Owens walking down the aisle in which it lay. In

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79. Id.
80. Motion for Rehearing En Banc at 2, *Owens* v. Publix Supermarkets, Inc., 802 So. 2d 315 (Fla. 2001) (No. 95, 667).
81. *Owens*, 729 So. 2d at 450.
82. Id.
83. *Owens*, 802 So. 2d at 318.
84. Id.
85. Id. (citing to *Owens*, 729 So. 2d at 449).
86. Id.
87. Id.
88. *Owens*, 802 So. 2d at 318.
order for Publix to be charged with constructive knowledge, the Fifth District would have had to agree with the former theory and not the latter.\(^9\)

The Fifth District held that because there were two possible theories as to how the banana got on the floor, Owens bore the burden of proof in regards to where the aging of the banana actually occurred.\(^9\) In reaching its conclusion, the Fifth District relied on Montgomery v. Florida Jitney Jungle Stores, Inc.,\(^9\) where the plaintiff provided the court with “additional circumstances” to establish the length of time the transitory foreign substance was on the floor.\(^9\) These additional circumstances included 1) the time span the plaintiff was in the area of the fall prior to the accident; 2) whether other individuals were in the area of the fall; 3) whether store employees swept the floor during that period; 4) whether store employees were in the area of the fall; and 5) the description of the transitory foreign substance.\(^9\) Thus, when comparing the evidence in that case with the Owens’s case, the Fifth District, in a 6-2 vote, concluded that there were no “additional circumstances” to justify the inference that Publix had constructive knowledge.\(^9\)

Judge Sharp, in his dissenting opinion, agreed that the Montgomery court was not faced with the issue of whether the condition of the item, by itself, was sufficient to create a jury question on constructive knowledge.\(^9\) However, Judge Sharp stated that the decision in Montgomery should not be extended to include the proposition that additional evidence is needed other than the condition of the substance for an injured party to withstand a directed verdict.\(^9\) In Owens, Judge Sharp stated that Owens presented sufficient evidence to charge Publix with constructive knowledge even though Owens did not see what caused her fall.\(^9\) More specifically, Judge Sharp pointed out that there was sufficient circumstantial evidence because there was a witness who testified that she was 1) in close proximity to where Owens fell; 2) saw what caused Owens’s fall; 3) described the substance as a

\(^{89}\) Id.
\(^{90}\) Id.
\(^{91}\) 281 So. 2d 302 (Fla. 1973).
\(^{92}\) Owens, 802 So. 2d at 318 (citing Montgomery, 281 So. 2d at 306).
\(^{93}\) Montgomery, 281 So. 2d at 303. In Montgomery, the transitory foreign substance was collard leaves that the slip-and-fall plaintiff described as “old, wilted and dirty looking.” Id.

\(^{94}\) Owens v. Publix Supermarkets, Inc., 729 So. 2d 449 (Fla. 5th Dist. Ct. App. 1999).
\(^{95}\) Id. at 452.
\(^{96}\) Id.
\(^{97}\) Id. at 451.
piece of banana that was discolored, kind of mushed, squashed down, and dark; and 4) that it looked like it was there for a while. 98


Elvia Soriano ("Soriano") was a frequent shopper at B & B Cash Grocery Stores, Inc. ("B & B Grocery"). After finishing her Sunday afternoon of shopping at B & B Grocery, she proceeded to the store’s exit, and while pushing her shopping cart, she slipped and fell to the ground.101

After a store manager helped Soriano get up, he pointed out that she had slipped and fallen on a banana peel and scraped it off the sole of her shoe.102

Soriano described the piece of banana peel as "brown with very little yellow on it," and stated, "it looked like a rotten banana because of the condition of the peel."104 At trial, Soriano was able to testify to the description of the banana peel but unable to testify to the length of time the banana peel was on the floor.105

In an attempt to rebut the inference that the banana peel was rotten because it was on the floor for a sufficient length of time, B & B’s store manager, Jose Alvarez ("Alvarez"), testified "the store sold only clean, nice, yellow bananas...not...darkened, browned out bananas, since customers generally do not like to buy brown bananas."106 Alvarez also testified that, based on his knowledge, the length of time a banana takes to turn from yellow to brown is one to two days.107 However, he also stated that it was not uncommon for shoppers to eat the store’s grocery items while shopping and then drop some of the item on the floor.108 Further, he testified "that he considere[d] a banana on the floor a hazard...[and] something he would want picked up ‘immediately.’"109

98. Id.
101. Id.
102. Id.
103. Id.
104. Id. However, it was revealed that Soriano did not see the banana nor did she know how long it had been on the floor. Brief of Petitioners at 1 n.1, Soriano (No. 96, 235).
105. Id. at 2.
106. Id.
107. Id.
108. Id.
Although B & B Grocery required employees to make an hourly inspection of the store's premises and fill out a report after each inspection, Alvarez admitted that these reports were only completed at one time—rather than hourly or even daily—by the assistant manager on duty on Saturday nights. Furthermore, none of the reports ever indicated that any substances or debris were found on the floor. Based on Alvarez's admission, these reports were being falsified. Apparently, falsified reports were common practice among all B & B Grocery stores. Although an assistant manager filled out an accident report on the day of Soriano's accident, the report failed to describe the color of the banana or indicate whether an employee had been in the area of the accident shortly before Soriano fell. This information might have made a critical difference in the outcome of Soriano's case. As a result of the accident, Soriano sustained a fractured kneecap and sued B & B Grocery for her injury based on two theories.

Soriano alleged, first, that B & B Grocery had constructive knowledge that the banana peel was on the floor because it was there for a sufficient length of time, and second, that B & B Grocery had a negligent method of operation. The trial court granted a directed verdict for B & B Grocery and the Fourth District affirmed. The Fourth District held that Soriano's contention that B & B Grocery had constructive knowledge was based upon an impermissible stacking of inferences. Also, the Fourth District held that the condition of the banana peel, by itself, was insufficient evidence. Rather, the Fourth District held that additional evidence like "cart tracks, footprints, dirt, or even grit," was necessary to establish that the banana peel had been on the floor for a sufficient length of time necessary to charge B & B Grocery with constructive knowledge. As to Soriano's contention that B & B Grocery was negligent in its mode of operation, the Fourth District rejected the application of this theory to a supermarket setting as an

110. Id. at 3.
111. Id. at 3–4.
112. Id. at 4.
113. Id.
114. Brief of Petitioners at 5, Soriano (No. 96,235).
115. Id. at 6.
116. Id.
117. Id.
118. Id.
119. Brief of Petitioners at 6–7, Soriano (No. 96,235).
120. Id. at 7.
121. Id.
alternative to the traditional requirement of establishing actual or constructive knowledge in a slip-and-fall action.\textsuperscript{122}

B. Analysis of Owens: An Overview of the Law as it Was

In analyzing *Owens*, the Supreme Court of Florida’s forty-two page opinion began with an overview of Florida’s slip-and-fall law by first targeting the required element of actual or constructive knowledge as related to transitory foreign substance cases,\textsuperscript{123} followed by a review of the mode of operation theory,\textsuperscript{124} and ending with an examination of what other jurisdictions have done.\textsuperscript{125}

1. Plaintiffs Traditionally Required to Prove Actual or Constructive Knowledge

In the Supreme Court of Florida’s decision to eliminate the required element of actual or constructive knowledge, the court first considered the type of circumstantial evidence that is sufficient to create a jury issue.\textsuperscript{126} In doing so, the court referred to its decision almost thirty years ago in *Montgomery v. Fla. Jitney Jungle Stores, Inc.*\textsuperscript{127}

In that case, the plaintiff had slipped and fallen on a collard leaf.\textsuperscript{128} The evidence presented was that

\begin{enumerate}
\item she had been in the area of the fall for fifteen minutes before falling;
\item no other shoppers were in the area when she fell;
\item no employee swept the floor while she was there;
\item two employees were nearby when the accident occurred;
\item the collard leaf upon which she slipped was old, wilted and dirty looking;
\item water was on the floor where she fell.\textsuperscript{129}
\end{enumerate}

In *Montgomery*, the Supreme Court of Florida was not faced with the issue of whether the condition of the collard leaf, by itself, was enough to

\begin{itemize}
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 320 (Fla. 2001).
\item \textsuperscript{124} Id. at 323.
\item \textsuperscript{125} Id. at 324.
\item \textsuperscript{126} Id. at 320.
\item \textsuperscript{127} Id. (citing Montgomery v. Fla. Jitney Jungle Stores, Inc., 281 So. 2d 302, 303 (Fla. 1973).
\item \textsuperscript{128} Montgomery, 281 So. 2d at 303.
\item \textsuperscript{129} Owens, 802 So. 2d at 321 (citing Montgomery, 281 So. 2d at 303).  
\end{itemize}
charge the premises owner with constructive knowledge. Rather, the Montgomery court noted that circumstantial evidence could be used, and because there was conflicting evidence as to the timespan the collard leaf was on the floor, the issue was for the trier of fact.

Acknowledging the unclear standard set by the court in Montgomery, Florida appellate courts were left with little guidance. To illustrate the effect of the ruling in Montgomery, the court cited to those appellate courts that have held the description of the transitory foreign substance as sufficient. For example, the First District held in favor of the injured party who described the substance as partially melted butter with lumps in it. Likewise, the Third District held the description of a substance as "'very dirty,' 'trampled,' 'containing skid marks, scuff marks' and 'chewed up,'" and "ice cream [that] was thawed, dirty, and splattereed," as sufficient. The Fourth District has also agreed that the description of the substance was enough where the plaintiff described the substance to look like "sauerkraut [that] was 'gunky, dirty and wet and black,'" or where the plaintiff described the substance as "'old, nasty' and 'looked liked [it] had been there for a quite a while.'" Hence, if a plaintiff were unable to provide the trial court with at least the description of the transitory foreign substance so as to establish the length of time it was on the floor, appellate courts have affirmed the trial court's ruling in favor of the premises owner.

130. Id. (citing Owens, 729 So. 2d at 451 (Sharp, J., dissenting)).
131. Id. (citing Montgomery, 281 So. 2d at 303).
132. Id. (stating that since Montgomery, Florida appellate courts have been split on whether the condition and description of the transitory foreign substance are sufficient circumstantial evidence to create a jury issue of constructive knowledge).
133. Id.
135. Id. (quoting Woods v. Winn Dixie Stores, Inc., 621 So. 2d 710, 710–11 (Fla. 3d Dist. Ct. App. 1993)).
136. Id. (citing Camina v. Parliament Ins., Co., 417 So. 2d 1093, 1094 (Fla. 3d Dist. Ct. App. 1982)).
137. Id. (quoting Ress v. X-tra Super Food Ctrs., Inc., 616 So. 2d 110, 110–11 (Fla. 4th Dist. Ct. App. 1993)).
138. Id. (quoting Washington v. Pic-N-Pay Supermarket, Inc., 453 So. 2d 508, 509 (Fla. 4th Dist. Ct. App. 1984)).
139. Owens, 802 So. 2d at 321–22. The following cases were provided as illustrations where the issue of constructive knowledge was precluded from the jury because the plaintiff could not describe the substance:
Conversely, the court noted that even in those cases where the plaintiff offered some evidence of the transitory foreign substance's aging or deterioration, one appellate court nevertheless affirmed the trial court's holding in favor of the premises owner.\(^{140}\) To illustrate this decision, the court utilized the Bates case relied on by the majorities in Owens and Soriano.\(^{141}\) In that case, the shopper slipped and fell on a banana peel, just as in Owens and Soriano.\(^{142}\) As evidence of the supermarket's constructive knowledge, the shopper offered the description of the banana peel as "'dark, over ripe, black, old and nasty looking.'"\(^{143}\) Even with the description of the banana peel as evidence of its aging, the Second District affirmed the trial court's holding in favor of the supermarket because the inference drawn from the color and condition of the banana (i.e. the length of time it was on the floor) would first have to be drawn from the inference that it was not already deteriorated when it first fell to the floor.\(^{144}\) The Second District stated, "'that this is the type of mental gymnastics [that is] prohibited . . . since the latter inference . . . is not to the exclusion of all other reasonable inferences.'"\(^{145}\)

However, that holding was rejected by the Third District in Teate v. Winn-Dixie Stores, Inc.,\(^{146}\) where the shopper provided the description of the substance on the floor so as to charge the supermarket with constructive knowledge.\(^{147}\) In Teate, the shopper

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Publix Super Market, Inc. v. Sanchez, 700 So. 2d 405, 406 (Fla. 3d Dist. Ct. App. 1997) (a piece of cake was on the floor, but there was no evidence as to how long it had been on the floor); Wal-Mart Stores, Inc. v. King, 592 So. 2d 705, 707 (Fla. 5th Dist. Ct. App. 1991) (slippery, oily, clear substance, but no evidence of "signs of age, such as skid marks, smudges, or the like"); Winn-Dixie Stores, Inc. v. Marcotte, 553 So. 2d 213, 214 (Fla. 5th Dist. Ct. App. 1989) (slippery substance, but no evidence as to how or when it got on the floor, or the length of time it was there before the fall); Winn Dixie Stores, Inc. v. Gaines, 542 So. 2d 432, 432 (Fla. 4th Dist. Ct. App. 1989) (loose dried rice and beans, but no evidence that they appeared old or were ground into the floor or crushed, and no evidence of broken packages).

Id. at 322.

140. Id. at 322 (citing Bates v. Winn Dixie Supermarkets, Inc., 182 So. 2d 309, 310 (Fla. 2d Dist. Ct. App. 1966)).

141. Id.

142. Id.

143. Id. (quoting Bates, 182 So. 2d at 309).

144. Id. (citing Bates, 182 So. 2d at 311).

145. Owens, 802 So. 2d at 322 (quoting Bates, 182 So. 2d at 311) (citations omitted) (emphasis added).

146. 542 So. 2d 1060 (Fla. 3d Dist. Ct. App. 1988).

147. Owens, 802 So. 2d at 322 (citing Teate v. Winn Dixie Stores, Inc., 542 So. 2d 1060, 1061 (Fla. 3d Dist. Ct. App. 1988)).
presented evidence that there was some water on the floor around the peas ... contend[ing] that the water was there because the peas had been on the floor for some time and had thawed. The jury could believe this and find that the peas had been on the floor for a sufficient time to put Winn Dixie on notice of the dangerous condition. Winn Dixie counter[ed] that the water was a result of "perma-frost" or ice crystals on the bag of peas that instantly melted when it hit the floor. The jury could choose to believe this argument, find the peas had fallen perhaps only seconds before the fall, and decide there was insufficient notice.\textsuperscript{148}

Because there was conflicting evidence as to how the water around the peas resulted, the Third District held the issue was for the trier of fact to determine and rejected the supermarket's contention that the jury would be impossibly stacking inferences.\textsuperscript{149} To explain its holding, the Third District stated that the existence of the water on the floor was for the jury to decide based on the direct evidence offered by the plaintiff shopper and the defendant supermarket.\textsuperscript{150} Based on that direct evidence, the jury was only required to make one inference.\textsuperscript{151}

In reviewing the required element of actual and constructive knowledge, the court recognized that case law has created constructive knowledge as the linchpin of liability.\textsuperscript{152} Thus, an injured party's likeliness of surviving a directed verdict or summary judgment depended on the injured party's ability to actually see the condition of the transitory foreign substance that caused his or her fall.\textsuperscript{153}

2. Negligent Mode of Operation Theory Historically Restricted from the Supermarket Setting

In reviewing the mode of operation theory as an alternative to the required element of constructive knowledge, the court recognized it had never extended the mode of operation theory to a supermarket setting.\textsuperscript{154} Rather, the court explained that this theory had been more easily applied to business premises such as racetracks where a large number of people

\begin{itemize}
  \item \textsuperscript{148} Id. (quoting Teate, 542 So. 2d at 1061) (alteration in original).
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} Id. at 322 (citing Teate, 542 So. 2d at 1061).
  \item \textsuperscript{151} Id. at 323.
  \item \textsuperscript{152} Owens, 802 So. 2d at 323.
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Id.
\end{itemize}
congregate by invitation. In such a scenario, the court stated that by the very nature of the business or its mode of operation, the required element of constructive knowledge is irrelevant.

"Although [the] court has never extended the mode of operation theory to a supermarket... setting, neither has th[e] [c]ourt... rejected [it]." The court reflected back to its decision over fifty years ago in Carls Markets, Inc. v. Meyer, where it stated that if the premises owner was the creator of the dangerous condition, logic dictates that the creator had knowledge of the dangerous condition, and would thus be liable for the creation of it, as was the case in Wells.

3. Overview of Other Jurisdictional Approaches in Slip-and-Fall Cases

Struggling with what to make of Florida's precedence on constructive knowledge in slip-and-fall cases, the Supreme Court of Florida examined how other jurisdictions have handled transitory foreign substance actions. The court noted that other jurisdictions, such as Kansas, have acknowledged...
the principles of premises liability as traditional, thus requiring "a broad [modern] trend toward liberalizing the rules restricting recovery by one injured on the premises of another."\textsuperscript{161} In taking a modern approach, the court stated that other jurisdictions first identified historical observations and policy considerations.\textsuperscript{162} Borrowing from other jurisdictions, the Supreme Court of Florida provided four policy considerations to justify a liberal trend away from the traditional principles of premises liability law:

\begin{enumerate}
\item the evolution of modern merchandise marketing techniques, including self-service, have increased the likelihood of spills and breaks occurring.\textsuperscript{163}
\item A store adopting the self-service technique should reasonably anticipate certain types of accidents and therefore is already on notice.\textsuperscript{164}
\item Because the self-service technique allows for lower overhead and greater profits, the businesses that adopt this technique are in a better position to prevent and attend to the risks involved.\textsuperscript{165}
\item It is unfair to place the burden on the customer to establish actual or constructive notice of the condition on the part of the premises owner or operator when the defendant is in control of its own premises and the evidence on which notice is based.\textsuperscript{166}
\end{enumerate}

Giving great weight to these policy considerations, the Supreme Court of Florida stated that other jurisdictions have, as a result, shifted the burden of proof from the injured party to the premises owner, and extended the mode of operation theory to a supermarket setting in transitory foreign substance actions.\textsuperscript{167} The Supreme Court of Florida found holdings in other jurisdictions justifying the burden-shifting analysis based on the premises owner being in a superior position to know of how the dangerous condition

\begin{enumerate}
\item\textsuperscript{161} \textit{Id.} at 324–25 (quoting Jackson v. K-Mart Corp., 840 P.2d 463, 467 (Kan. 1992) (citations omitted)).
\item\textsuperscript{162} \textit{Id.} at 325.
\item\textsuperscript{163} \textit{Id.} (citing Safeway Stores, Inc. v. Smith, 658 P.2d 255, 257 (Colo. 1983); Gonzales v. Winn Dixie La., Inc., 326 So. 2d 486, 488 (La. 1976)).
\item\textsuperscript{164} \textit{Id.} (citing Chiara v. Fry's Food Stores of Ariz., Inc., 733 P.2d 283, 286 (Ariz. 1987)).
\item\textsuperscript{165} Owens, 802 So. 2d at 325 (citing Gump v. Wal-Mart Stores, Inc., 5 P.3d 418, 434 (Haw. Ct. App. 1999), aff'd in part, rev'd in part, 5 P.3d 407 (Haw. 2000) (citations omitted in original); Pimentel v. Roundup Co., 666 P.2d 888, 891 (Wash. 1983) (citations omitted in original)).
\item\textsuperscript{166} \textit{Id.} at 325 (citing Wollerman v. Grand Union Stores, Inc., 221 A.2d 513, 514–15 (N.J. 1966)).
\item\textsuperscript{167} \textit{Id.}
was created when compared to the position of customers.\textsuperscript{168} In addition, self-service stores, by their very nature, display items on the shelves that may likely be dropped by customers.\textsuperscript{169} Therefore, stores are required to minimize that risk through reasonable care by conducting timely inspections and cleanups.\textsuperscript{170} This consideration, as the \textit{Owens} court stated, lead the Supreme Court of Louisiana to create a rebuttable presumption of negligence, thus shifting the burden of proof from the customer to the storeowner to prove that it was not negligent.\textsuperscript{171} Even if the dangerous condition was created by a third party, the Supreme Court of Louisiana still held that the burden was on the storeowner to prove that it exercised reasonable care by conducting timely inspections, because in supermarket settings, it is foreseeable that spills and breaks will occur.\textsuperscript{172} However, subsequent to the Supreme Court of Louisiana’s holding, the Louisiana Legislature codified “the requirement of actual or constructive knowledge into [the state’s] statute,” thus overruling that court’s ruling.\textsuperscript{173}

Likewise, the Supreme Court of Colorado was in accordance with Louisiana and New Jersey in recognizing an exception to the requirement of constructive knowledge in cases where the store’s mode of operation created dangerous conditions, and were thus foreseeable.\textsuperscript{174} Referring to \textit{Safeway Stores, Inc. v. Smith},\textsuperscript{175} the Supreme Court of Florida stated that the Supreme Court of Colorado found that in supermarkets a customer’s access to shelved items carries with it the increased risk of spills and breaks, thus creating a dangerous condition.\textsuperscript{176} As such, actual or constructive knowledge is inconsequential.\textsuperscript{177} In considering the evidence presented in \textit{Smith}, the court gave great weight to the testimony of the store manager who had over eighteen years of experience.\textsuperscript{178}

\begin{itemize}
\item \textsuperscript{168} Id. (citing \textit{Wollerman}, 221 A.2d at 514–15 (citations omitted)).
\item \textsuperscript{169} Id. at 326 (citing \textit{Gonzales}, 326 So. 2d at 488).
\item \textsuperscript{170} \textit{Owens}, 802 So. 2d at 326 (citing \textit{Gonzales}, 326 So. 2d at 488 (citations omitted)).
\item \textsuperscript{171} Id. (citing \textit{Kavlich v. Kramer}, 315 So. 2d 282, 285 (La. 1975) (citations omitted in original) (affirming that once the plaintiff establishes that the piece of banana was there and that he or she slipped and fell because of it, the burden shifts to the premises owner to rebut the presumption of negligence)).
\item \textsuperscript{172} Id. at 326–27 (citing \textit{Gonzales}, 326 So. 2d at 488–89).
\item \textsuperscript{173} Id. at 326 n.9.
\item \textsuperscript{174} Id. at 327 (citing \textit{Safeway Stores, Inc. v. Smith}, 658 P.2d 255, 257 (Colo. 1983) (citations omitted)).
\item \textsuperscript{175} 658 P.2d 255 (Colo. 1983).
\item \textsuperscript{176} \textit{Owens}, 802 So. 2d at 327 (citing \textit{Smith}, 658 P.2d at 257 (footnote omitted)).
\item \textsuperscript{177} Id. at 328.
\item \textsuperscript{178} Id. at 327–28 (citing \textit{Smith}, 658 P.2d at 257 n.3).
\end{itemize}
common, and the existence of substances on the floor was not unusual. Further, the *Smith* court stated that it would be unreasonable to place the burden on the plaintiff to prove that the store was negligent when it was within the store owner's own knowledge whether the store took reasonable steps to discover the dangerous condition.

In surveying other jurisdictional approaches in premises liability cases, the Supreme Court of Florida noted that although not all jurisdictions have adopted a burden-shifting analysis, other jurisdictions have instead extended the negligent mode of operation theory to the supermarket setting, thereby eliminating the requirement of constructive knowledge. The Supreme Court of Florida referred to *Chiara v. Fry's Food Stores of Arizona, Inc.*, where the Supreme Court of Arizona stated, "[t]he 'mode-of-operation' rule looks to a business's choice of a particular mode of operation and not events surrounding the plaintiff's accident. Under this rule, the plaintiff is not required to prove notice if the proprietor could reasonably anticipate that hazardous conditions would regularly arise." That holding was consistent with, and accepted by, other jurisdictions that have also held that, because storeowners implement self-service systems as its mode of operation, the storeowners are imputed with the knowledge of their customers' conduct; and where the store's mode of operation creates the dangerous condition, the dangerous condition is thus foreseeable and the element of notice is irrelevant.

The Supreme Court of Florida continued by noting that other jurisdictions, such as Wisconsin and Vermont, that are reluctant to eliminate constructive knowledge, have at least made it easier for a plaintiff to meet the requirement by first eliminating the burden of proving that the substance existed for a sufficient amount of time prior to the fall and the failure of the storeowner to provide evidence of reasonable care.

Overall, the Supreme Court of Florida noted that there is "clearly... [a] modern jurisprudential trend of departing from the traditional

179. *Id.* at 328.
180. *Id.* (citing *Smith*, 658 P.2d at 258 (citations omitted in original)).
181. *Owens*, 802 So. 2d at 328.
184. *Id.* (quoting *Dumont v. Shaw's Supermarkets, Inc.*, 664 A.2d 846, 849 (Me. 1995)).
186. *Id.* at 328–29 (citations omitted).
rule of premises liability when a plaintiff slips and falls on a transitory foreign substance.\textsuperscript{187} The Supreme Court of Florida reiterated the fact that other jurisdictional case law has recognized the unfairness placed on plaintiffs by requiring them to meet the element of constructive knowledge particularly in a supermarket setting where items regularly fall and the risk of slips are foreseeable.\textsuperscript{188}

C. Outcome of Owens: A Drastic Departure from Florida’s Precedent

After the Supreme Court of Florida’s in-depth overview of Florida’s precedent and other jurisprudential trends, it decided that today’s supermarket settings in Florida required a little change in premises liability law involving transitory foreign substance actions.

1. Proof of Actual and Constructive Knowledge Eliminated

The Supreme Court of Florida reached several conclusions in both Owens and Soriano.\textsuperscript{189} First, the court held that the directed verdicts granted to the defendant supermarkets were erroneous because even under prior case law the plaintiffs offered sufficient evidence, that is, the condition of the banana peel, which gave rise to a reasonable inference that the aging occurred on the floor.\textsuperscript{190} Thus, the Supreme Court of Florida rejected the holdings of other appellate courts regarding the theory of impermissible inference stacking.\textsuperscript{191} Rather, the Supreme Court of Florida agreed with the Third District’s holding in Teate where the court stated “the mere fact that there may be alternative explanations inconsistent with the deterioration occurring on the floor does not render the circumstantial evidence of constructive knowledge fatally deficient.”\textsuperscript{192} Moreover, the Supreme Court of Florida stated that the appropriate analysis in these cases is that of Montgomery and held that the substance’s condition gave rise to a reasonable inference that it aged on the floor.\textsuperscript{193} Further, the issue of whether the dangerous condition was a result of the store’s failure to make

\textsuperscript{187.} Id. at 329.
\textsuperscript{188.} Owens, 802 So. 2d at 329.
\textsuperscript{189.} Id.
\textsuperscript{190.} Id.
\textsuperscript{191.} Id.
\textsuperscript{192.} Id. (citing Teate, 524 So. 2d at 1061).
\textsuperscript{193.} Owens, 802 So. 2d at 329.
timely inspections and discover it is a question for the jury to decide. 194 Therefore, the Supreme Court of Florida rejected the appellate court’s reliance on Bates and approved Judge Sharp’s dissenting opinion in Owens, 195 where Judge Sharp stated that the condition of a substance is sufficient to create a jury issue on constructive knowledge. 196

Based on premises liability case law and its interpretation and application of traditional rules, the Supreme Court of Florida believed that prior case law had improperly deviated its focus from the duty of premises owners to exercise reasonable care in the maintenance of their premises to an injured party’s ability to prove actual or constructive knowledge. 197 The effect of doing so left the success of plaintiff’s case being tried dependent on whether the plaintiff could essentially provide an exact description of the condition of the transitory foreign substance. 198 Further, the court observed that premises owners were unjustly benefiting from their own lack of record-keeping because plaintiffs, as in Owens and Soriano, are often unable to prove when the floors were last maintained. 199

In Soriano, the injured customer produced evidence of 1) the condition of the banana peel; 2) the supermarket’s lack of record-keeping establishing the stores inability to know when the area was last maintained; and 3) the testimony of the store manager who stated that it was common for customers to eat and drop food on the floor. 200 Thus, the issue considered by the court was whether the store’s lack of record-keeping should give rise to an inference that the store failed to exercise the degree of care proportionate to the foreseeable risk of injury. 201 Because the store manager testified that it was common for shoppers to eat and drop grocery items on the floor, the court noted it was foreseeable that such hazards would occur. 202

Reiterating that premises owners owe a legal duty to maintain the premises in a reasonably safe condition, the Supreme Court of Florida held that a transitory foreign substance on the floor is an unsafe condition. 203

194. Id.
196. Owens, 802 So. 2d at 330.
197. Id.
198. Id.
199. Id.
200. Id.
201. Owens, 802 So. 2d at 330.
202. Id.
203. Id.
Therefore, the court concluded that supermarkets, particularly nowadays, should be aware of potentially unsafe conditions created as a result of the operation in which the supermarket is carried out. The court explained that today's supermarket shoppers are forced to focus on items that are shelved and are thus distracted from the floor on which they walk. Moreover, because supermarkets are in a superior position to show when the premises were last maintained, they are also in a better position to know what actually happened by instigating an immediate investigation including interviews with witnesses and taking photographs. Based on these factors, the court concluded that the burden-shifting analysis, as adopted by other jurisdictions, is appropriate for Florida's transitory foreign substance cases.

Thus, the court placed the burden on the storeowner to prove that he or she exercised reasonable care under the circumstances. As a result, the shopper's obligation to prove that the storeowner had actual or constructive knowledge of the unsafe condition was eliminated. Therefore, in transitory foreign substance cases the plaintiff's burden is substantially diminished because the plaintiff, in addition to proving the premises owner owed a duty, is now only required to prove 1) a substance was on the floor; 2) the plaintiff slipped on the substance and fell; and 3) the plaintiff suffered injuries. Once the plaintiff establishes these elements, "a rebuttable presumption . . . arises" and shifts the burden to the storeowner to prove, "by the greater weight of evidence, that it [did] exercise reasonable care in the maintenance of the premises." The court justified its adoption of the burden-shifting analysis from a policy perspective stating that premises owners, as a result of this decision, will adopt or increase the "protective measures [necessary] to prevent foreseeable risks." The basic effect is to allow a jury to make the ultimate factual determination of "whether the

204. *Id.* (including self-service marts, cafeterias, fast food restaurants and similar businesses).
205. *Id.*
206. *Owens*, 802 So. 2d at 330.
207. *Id.*
208. *Id.* at 331.
209. *Id.*
210. *Id.* (finding a plaintiff's burden to establish the length of time a substance was on the floor as *artificial*).
211. *Owens*, 802 So. 2d at 331.
212. *Id.* (holding that "circumstances could include the nature of the . . . hazard and the nature of the . . . [premises owner's] business").
213. *Id.*
premises owner . . . exercised reasonable care” in the maintenance of its premises.\footnote{Id.}

As a result, the Supreme Court of Florida held that because in both Owens and Soriano the condition of the banana peel was sufficient circumstantial evidence to establish the supermarket's constructive knowledge, both cases were remanded where a jury would decide whether the aging occurred before or after the banana fell to the floor.\footnote{Id. at 332.} In addition, each supermarket will bear the burden to rebut the presumption that it failed to maintain its floors in a reasonably safe manner.\footnote{Owens, 802 So. 2d at 319, 332.}

2. Negligent Mode of Operation Theory Extended to Supermarket Settings

In regard to the mode of operation theory and its traditionally restricted application to a supermarket setting, the Supreme Court of Florida rejected its restriction and acknowledged the theory as one of “continued viability.”\footnote{Id. at 332.} The issue under this theory would be “whether the specific method of operation was negligent and whether the accident occurred as a result of that negligence.”\footnote{Id. (emphasis added).} Thus, actual or constructive knowledge is not an issue.\footnote{Id.} Rather, the plaintiff need only produce evidence of a “specific negligent mode of operation such that the premises owner could reasonably foresee an unsafe condition arising because of that method.”\footnote{Id.} In other words, a supermarket “must prove [it] exercised reasonable care” by inspecting and “cleaning up spills rather than requiring injured [shoppers] to prove [that the] store employees were negligent.”\footnote{Id.}

However, the Owens court rejected the application of the negligent mode of operation theory in Soriano because Soriano only produced evidence establishing that the supermarket employees failed to sweep as required by store policy and timely fill out inspection reports.\footnote{Owens, 802 So. 2d at 332.} The court found Soriano’s allegation to be a “general claim of negligence” in

\begin{footnotes}
\footnotetext{214. Id.}
\footnotetext{215. Id. at 332.}
\footnotetext{216. Owens, 802 So. 2d at 319, 332.}
\footnotetext{217. Id. at 332.}
\footnotetext{218. Id. (emphasis added).}
\footnotetext{219. Id.}
\footnotetext{220. Id.}
\footnotetext{221. Mark Albright, Florida’s High Court Places Burden of Proof on Grocers in Slip-and-Fall Cases, ST. PETERSBURG TIMES, Nov. 16, 2001, 2001 WL 30267234.}
\footnotetext{222. Owens, 802 So. 2d at 332.}
\end{footnotes}
maintaining the floors rather than a "specific claim of negligent mode of operation." 223

Chief Justice Wells emphasized in his concurring opinion that the duty owed by premises owners toward invitees to "maintain [their floors] in a reasonably safe condition" is the real issue, rather than, whether the premises owner had "constructive knowledge of an unsafe condition." 224 Moreover, Chief Justice Wells noted that evidence of establishing lack of actual knowledge and issues of care are determinations based on apportionment of fault and not duty. 225 Because these issues focus on facts, Chief Justice Wells concluded that these factual issues are for the jury and not the judges. 226 Although Chief Justice Wells concurred with the Owens majority, he disagreed with the majority's opinion concerning the viability of the negligent mode of operation theory as applied to supermarkets. 227

In addition, Justice Harding concurred with the majority, however, he disagreed with the majority's discussion on "the shortcomings of traditional premises liability" law, finding that the majority unnecessarily rewrote Florida's slip-and-fall law. 228

IV. IMPACT OF OWENS

Plaintiffs' attorneys were ecstatic, defense attorneys were stunned, and business premises owners were in a panic. Legal experts labeled the Owens decision a landmark case because the Supreme Court of Florida did away with Florida's traditional slip-and-fall standard established in Montgomery. 229 Prior to the decision in Owens, a shopper had to prove the supermarket had constructive knowledge of the dangerous condition, that is, the supermarket "knew or should have known that the treacherous mess was on the floor and still failed to clean it up, an almost impossible burden." 230 As a result of the Owens ruling, the shopper is merely required to prove that he or she slipped and fell and was injured. 231 At that point, the supermarket must

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223. Id.
224. Id. at 333 (Wells, C.J., concurring in result only).
225. Id. (Wells, C.J., concurring in result only).
226. Id. (Wells, C.J., concurring in result only).
227. Owens, 802 So. 2d at 332 (Wells, C.J., concurring in result only).
228. Id. at 333–34 (Harding, J., concurring in result only).
231. Owens, 802 So. 2d at 331.
prove that it exercised reasonable care to keep the premises safe.\textsuperscript{232} The rebuttable presumption was viewed as a translation into “guilty until proven innocent,”\textsuperscript{233} because to rebut the presumption storeowners must produce “evidence such as inspection reports, surveillance video[s], or testimony” on what precautions it took to ensure the safe condition of its floors.\textsuperscript{234}

Now armed with the court’s ruling, Owens was ready to go back to court.\textsuperscript{235} Envious attorneys only wished this decision came sooner, because prior to Owens, attorneys were forced to reject roughly “nine out of ten slip-and-fall cases” solely because the burden of proof was so hard to meet.\textsuperscript{236}

One recent commentator stated that the Owens decision “strained an already tense relationship between” the Supreme Court of Florida and Florida’s “republican leadership and business community.”\textsuperscript{237} As such, a “lobbying battle . . . over legislation to protect the owners of [business] premises” was a possibility in the very near future.\textsuperscript{238} Defense attorneys believed the Owens decision “set a dangerous precedent [by opening the] floodgates to frivolous lawsuits.”\textsuperscript{239} While, on the other end, plaintiffs’ attorneys argued that Florida’s old law prevented cases from going to the jury due to the unclear guidelines set in Florida’s precedent.\textsuperscript{240} As a result of this decision, plaintiffs’ attorneys believed Florida’s new rule provided clearer guidelines with the burden of proof fairly allocated.\textsuperscript{241} As one attorney stated, “‘the real significant difference . . . is that . . . [plaintiffs will] never . . . get a directed verdict anymore.’”\textsuperscript{242} However, business defense attorneys argued that the “ruling undermine[d] the fundamental principle that plaintiffs bear the burden of proof in negligence actions.”\textsuperscript{243} Puzzled and shocked by the court’s flip-flop of Florida law, accusations of financial motivation were made where one attorney stated, “‘[t]his is just another example of shifting financial responsibility to those that the judicial

\begin{itemize}
\item \textsuperscript{232} Id.
\item \textsuperscript{233} Banana Peel Coalition Legislation Passes Committee, at http://www.flchamber.com/home/FBAR_020222.asp (last visited July 05, 2002).
\item \textsuperscript{234} Miller I, supra note 1.
\item \textsuperscript{235} Kennedy, supra note 10.
\item \textsuperscript{236} Miller I, supra note 1.
\item \textsuperscript{237} Id.
\item \textsuperscript{238} Id.
\item \textsuperscript{239} Id.
\item \textsuperscript{240} Id.
\item \textsuperscript{241} Miller I, supra note 1.
\item \textsuperscript{242} Id.
\item \textsuperscript{243} Id.
\end{itemize}
system perceives can afford to pay.’” 244 Thus, the court is viewed by some as just “another government mechanism for the redistribution of wealth.” 245 Moreover, to avoid the risk of large jury awards, storeowners will be forced to settle. 246

Because of Owens, storeowners will not only be forced to better maintain their floors but must also develop better inspection methods that will enable them to prove the precautionary safety measures implemented so as to avoid allegations of negligence. 247 The exercise of reasonable care in maintaining premises in a safe condition is not a new duty but one traditionally imposed on premises owners. 248 What this duty entails, as the Owens decision reflects, is that supermarkets must do more than declare that a floor maintenance system exists. Rather, the maintenance system must be implemented and religiously carried out if a supermarket wishes to avoid liability. 249 Some supermarkets, like B & B Grocery in Soriano, theoretically had inspection and maintenance methods for the purpose of fulfilling its duty as a premises owner. 250 However, as the store manager of B & B Grocery testified, the inspections were not carried out as scheduled and required by store policy. 251 Further, the inspection reports were all completed at one time, by one person, and were falsified. 252 Based on these facts, it is fair to say that B & B Grocery is the poster supermarket for failing to fulfill its legal duty to exercise reasonable care toward its shoppers in the maintenance of its floors in a safe condition.

Conversely, supermarkets that do implement and carry out a floor maintenance system have still been accused of negligence by shoppers that alleged they slipped and fell. 253 However, some allegedly injured shoppers were arrested in South Florida because they were “staging falls in supermar-

244. Id.
247. Miller I, supra note 1.
249. Major, supra note 246.
251. Id.
252. Id.
253. Law: Case on a Peel, supra note 245.
kets to collect awards and settlements." Thus, the ruling in Owens could also shield a supermarket by compelling it to implement better precautionary protective measures because those measures will prove the supermarket is free from liability in instances where the shopper is faking to make a buck. However, a National Floor Safety Institute representative stated that even though supermarkets spend $1.5 billion each year in the maintenance of their premises, they have been inattentive toward slip-and-fall incidents because supermarkets have traditionally had an upper hand under the old Florida law. Supermarkets did not have to implement better preventive methods because supermarkets had a "history of winning these types of cases." In other words, no supermarket would improve a faulty system when the lower and higher courts had traditionally protected it from liability. Now that supermarkets have to perfect their systems and, for some, implement a system to avoid the likeliness of a jury trial, supermarkets will be forced to actually train employees, conduct regular scheduled floor walks, and maintain accurate and detailed records, such as sweep logs. Or will they?

V. EVERYONE BUT THE PLAINTIFF'S RESPONSE TO OWENS: NO WAY!

A. Florida Retail Federation Takes Immediate Action

In response to Owens, the Florida Retail Federation ("Federation") immediately took action to reduce the damage caused by what it called an "errant decision" and formed the Banana Peel Coalition. It believed the Supreme Court of Florida created a "new profit center for trial lawyer industry," by increasing the number of slip-and-fall cases to go before the jury. With nowhere else to turn, the Federation worked on legislative approaches stating that "[l]egislation is the only thing you have left when the Supreme Court [of Florida] dumps you out the front door." Thus, a two-page bill was drafted in an attempt to undo the Owens decision by

254. Id.
255. Miller I, supra note 1.
256. Id.
257. A Slippery Slope, supra note 11.
258. Major, supra note 246.
259. A Slippery Slope, supra note 11.
261. Major, supra note 246.
262. Miller I, supra note 1.
shifting the burden back to the plaintiff. The Federation’s vice-president of governmental affairs and political action, Bill Herrle, stated that the bill was not an attempt to overrule the decision in Owens but only an “effort to exert the legislature’s prerogative in writing statutes,” that included returning back to the common law standard implemented under Florida law.

After negotiations between the Federation and the Academy of Florida Trial Lawyers, a joint letter was sent to the Florida Senate in attempt to have the bill passed in 2002. The joint letter expressed that Senate Bill 1946 was a “compromise to both sides . . . [that would] avoid a protracted legislative battle.” While the Federation’s attempts were threatening to plaintiffs, the general counsel for the Academy of Florida Trial Lawyers was not too worried when he stated that the Florida Legislature would be too busy to even consider the bill. Even the Federation believed that the odds of receiving legislative redress in 2002 would be unlikely since the Florida Legislature is “busy, distracted, and strained.” However, that viewpoint proved to be wrong.

B. Florida Legislature Quickly Reacts and Unanimously Passes Senate Bill 1946 Settling the Burden of Proof

Senate Bill 1946, considered the most significant litigation-related bill, was unanimously passed in Florida’s 2002 legislative second session

264. Id.
265. Miller VI, supra note 263.
266. Joint Letter from Rick McAllister, President & CEO, Florida Retail Federation and Scott Carruthers, Executive Director, The Academy of Florida Trial Lawyers, to the Honorable John McKay, Florida Senate (Mar. 21, 2002) (on file with the Florida Retail Federation).
267. Id.
268. Miller VI, supra note 263.
269. Major, supra note 246.
An act relating to the burden of proof in negligent actions involving transitory foreign objects or substances; creating s. 786.0710, F.S.; providing requirements with respect to the burden of proof in claims against persons or entities in possession or control of business premises; providing for the application of the act; providing an effective date.
WHEREAS, on November 15, 2001, the Florida Supreme Court decided the case of Owens v. Publix Supermarkets, Inc., Case No. SC95667 & SC96235, and
and became effective as of May 30, 2002. In response to the ruling in Owens, the bill created section 768.0710, of the Florida Statutes, to settle the burden of proof in transitory foreign substance cases involving business premises owners. The bill is said to "reassert an equitable division of burdens in slip-and-fall cases." The bill retained the traditional rule of imposing a legal duty on premises owners to exercise reasonable care in the maintenance of their premises in a safe condition, including the maintenance of premises free from foreseeable hazards. Like the ruling in Owens, the bill does not require the plaintiff to prove actual or constructive knowledge and extends the negligent mode of operation to the supermarket setting. However, unlike the decision in Owens, the bill essentially shifts the burden of proof back to the plaintiff who must now show

1. The premises owner owed a duty to the plaintiff; 2. The premises owner acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises; [and] 3. The failure to exercise reasonable care was the legal cause of the loss, injury, or damage.

Thus, Senate Bill 1946 now arms the plaintiff with additional liability theories, including the duty to exercise reasonable care in warning. This theory was argued by the supermarket in Owens as "inviting the court to

[1] The premises owner owed a duty to the plaintiff; [2] The premises owner acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises; [and] [3] The failure to exercise reasonable care was the legal cause of the loss, injury, or damage.
proceed down the path to strict liability against premises owners."\textsuperscript{278} Under this theory, supermarkets would presumably have to place signs such as ""[w]arning, it is foreseeable that food can fall to the floor. Please watch for that possibility.""\textsuperscript{279} However, the Florida Legislature clearly disagreed with that argument by including it in Senate bill 1946. After all, supermarkets post warning signs of wet floors as common practice. Thus, it is not unfair to expect at least that same level of reasonable care for other hazardous conditions, such as slippery grocery items.

\section*{VI. \textbf{Plaintiff Shopper or Defendant Supermarket: Which Has the Upper Hand Now?}}

Hence, the decision in \textit{Owens} was undone, as sought by the Florida Retail Federation.\textsuperscript{280} Nevertheless, Senate Bill 1946 is considered a compromise and noted "as a rare agreement between the plaintiff bar and the business community."\textsuperscript{281} For the plaintiff, the only significant compromise is the elimination of constructive knowledge because it was this element that "erected a roadblock to recovery."\textsuperscript{282} For the defendant supermarket, the real significant compromise is shifting the burden back to the plaintiff.\textsuperscript{283} The new Florida burden of proof statute requires the plaintiff, who has been acknowledged by the Supreme Court of Florida as an inferior party,\textsuperscript{284} to prove issues of care prior to even litigating the issue before a jury.\textsuperscript{285} As Chief Justice Wells noted in his concurring opinion in \textit{Owens}, issues of care are based on facts not as a matter of law and should thus be left to the trier of fact.\textsuperscript{286} Although the statute provides a plaintiff shopper with a number of liability claims against defendant supermarkets, the plaintiff shopper's burden of proof remains great because the plaintiff shopper's knowledge remains inferior, as the \textit{Owens} court and other jurisdictions have held.\textsuperscript{287} As the \textit{Owens} court stated, supermarkets have access to its inspection records, and the opportunity to immediately investigate, interview witnesses, and take

\begin{thebibliography}{99}
\bibitem{278} Respondent's Brief On the Merits at 22, Owens v. Publix Supermarkets, Inc., 802 So. 2d 315 ( Fla. 2001) (No. 95, 667).
\bibitem{279} Id.
\bibitem{280} Miller I, \textit{supra} note 1.
\bibitem{281} Pendleton, \textit{supra} note 272.
\bibitem{282} Miller I, \textit{supra} note 1.
\bibitem{283} Miller II, \textit{supra} note 230.
\bibitem{284} Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 330 (Fla. 2001).
\bibitem{285} Id.
\bibitem{286} Id. at 333 (Wells, C.J., concurring in result only).
\bibitem{287} Id. at 330 (citations omitted).
\end{thebibliography}
Thus, the Florida Legislature did more than put business premises owners in a "more level playing field," because as it was revealed in *Soriano*, it is fair to say that supermarkets are likely to have a common practice of falsifying inspection records. Therefore, the Florida Legislature, in effect, lends support to the defendant supermarket's lack of record keeping, a sloppy habit the Supreme Court of Florida intended to correct.

**VII. CONCLUSION**

The tug of war on who bears the burden of proof in slip-and-fall actions is now settled law. By passing Senate Bill 1946, the Florida Legislature shifted the burden of proof back to the slip-and-fall plaintiff. In accordance with the Supreme Court of Florida, the plaintiff shopper is no longer required to prove actual or constructive knowledge of the slippery substance that caused his or her fall. Still, the plaintiff shopper does bear the burden to prove that the defendant supermarket failed to exercise reasonable care in maintaining the premises free from hazards, including those that are foreseeable, through its inspection, repair, warning, or mode of operation. In one way, the effect of Senate Bill 1946 benefits the slip-and-fall plaintiff by eliminating the burden to prove constructive knowledge, a requirement that once barred the case from the jury. In another way, Senate Bill 1946 benefits the defendant supermarket by shifting the burden of proof back to the plaintiff. Whether the plaintiff shopper or the defendant supermarket is more, less, or equally likely to prevail under Florida's new law will ultimately be determined by the plaintiff shopper's likeliness of meeting his or her new burden. Although the plaintiff shopper's burden of proof has changed by extending the number of liability theories under which the defendant supermarket may be charged, the burden remains great, as it was in prior case law.

288. *Id.*
291. *Owens*, 802 So. 2d at 330.