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Conflict In Fla. Regarding Premises Liability Law

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On Feb. 26, 2014, Florida's Fourth District Court of Appeal (West Palm Beach) certified a conflict with the Third District Court of Appeal (Miami) regarding whether Florida Statute § 768.0755, which governs premises liability actions against business establishments, applies retroactively. The statute, enacted in 2010, requires a plaintiff to prove that the business had actual or constructive knowledge of the dangerous condition that caused the plaintiff's injuries to establish liability against the defendant. In Pembroke Falls Mall Ltd. et al. v. McGruder, the Fourth DCA held that applying the statute retroactively would be unconstitutional. The Third DCA reached the opposite conclusion in Kenz v. Miami-Dade County. Before 2001, Florida law required that a slip-and-fall plaintiff show actual or constructive knowledge. In 2001, however, the Florida Supreme Court held that once a slip-and-fall plaintiff established that he or she fell as a result of a transitory substance, a rebuttable presumption of negligence arose. Owens v. Publix Supermarkets Inc., 802 So. 2d 315 (Fla. 2001). The burden then shifted to the defendant to show that it exercised reasonable care in maintaining the premises under the circumstances. Thus, under Owens, plaintiffs were no longer required to establish actual or constructive knowledge. In 2002, the Florida Legislature enacted Florida Statute 768.0710, which removed the burden-shifting aspects of Owens. However, the statute specifically provided that "actual or constructive notice of the transitory substance is not a required element" of these claims. Thus, under Section 768.0710, slip-and-fall plaintiffs were required to prove that defendants were negligent, but were not required to establish that defendants had actual or constructive knowledge of the dangerous condition. A significant revision was enacted on July 1, 2010. The Legislature repealed Section 768.0710 and replaced it with Section 768.0755, which now states, in part: "If a person slips and falls on a transitory foreign substance in a business establishment, *the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it*" (emphasis added). As expected, there was much litigation over whether the new statute, Section 768.0755, applied retroactively. If so applied, causes of action that accrued prior to July 1, 2010, would be governed by Section 768.0755, and plaintiffs will be required to establish actual or constructive knowledge. Both the McGruder court and the Kenz court explained that the analysis of

whether Section 768.0755 should apply retroactively required a determination of whether the new statute was substantive in nature or instead procedural/remedial. Substantive statutes will not operate retrospectively, unless there is clear legislative intent to the contrary. However, the general rule against retroactive application does not apply to procedural or remedial statutes. Both courts also acknowledged that there are constitutional implications when applying a statute retroactively. An accrued cause of action constitutes a vested property right, and a statute cannot be applied retroactively in a way that eliminates a party's vested property right. The Kenz court analyzed these principles and concluded that Section 768.0755 is a procedural statute because it does not add a new element to a cause of action. Rather, it codified a means by which plaintiffs prove an existing element of a cause of action. That is, "the statute simply means that in establishing the element of breach of duty, the plaintiff has the burden of producing evidence of actual or constructive knowledge." The Third DCA in Kenz cited a Florida Supreme Court opinion and other Florida appellate decisions to explain that issues relating to a party's burden of proof are generally procedural matters. Accordingly, the Kenz court concluded that retroactive application of 768.07555 is constitutionally permissible because plaintiffs with an accrued cause of action under 768.0710 continue to have the same cause of action under 768.0755. The court reasoned that actual or constructive knowledge is not a new required element under 768.0755. Instead, it concerns evidence that the jury must consider to determine whether there has been a breach of duty. On the other hand, the Fourth DCA in McGruder determined that Section 768.0755 is a substantive statute and that applying the statute retroactively would abolish claims that had accrued prior to July 1, 2010. Thus, applying the statute retroactively would be constitutionally impermissible. The Fourth DCA reasoned that a slip-and-fall plaintiff could successfully assert a cause of action under Section 768.0710 by showing that the defendant acted negligently by failing to exercise reasonable care, without showing the defendant had actual or constructive knowledge of the transitory substance. The same plaintiff, however, would not be able to maintain the cause of action under Section 768.0755. Until the Florida Supreme Court resolves the conflict between the Third and Fourth DCAs, different standards will apply in the two districts for premises liability cases that accrued prior to July 1, 2010. In counties within the purview of the Third DCA, slip-and-fall plaintiffs will be required to prove that defendants had actual or constructive knowledge of the dangerous condition that caused their injuries to successfully maintain a cause of action. In counties within the purview of the Fourth DCA, slip-and-fall plaintiffs will only have to show that defendants acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises. Florida has a four-year statute of limitations for torts such as premises liability cases. Therefore, any Supreme Court decision will impact only a limited class of cases given that the effective date of the new statute was July 1, 2010. After July 1, 2014, there will be no new cases with dates of loss where it is debated whether Section 768.07555 is retroactive. Any claims for pre-July 1, 2010, accidents will be time-barred. All causes of actions accruing after July 1, 2010, will be governed by the statute requiring actual or constructive notice, regardless of how the Supreme Court rules on the issue of retroactivity. *Originally published by*

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