

IN THE CIRCUIT COURT OF THE FIFTH  
JUDICIAL CIRCUIT  
IN AND FOR LAKE COUNTY, FLORIDA

CASE NO. 2010-CA-1568

SHARON VOUGHT and LAURENCE  
VOUGHT,

Plaintiffs,

v.

WINN-DIXIE STORES, INC.,

Defendant.

DEFENDANT'S MOTION AND MEMORANDUM OF LAW  
TO APPLY PREMISES LIABILITY STATUTE RETROACTIVELY

Defendant, WINN-DIXIE STORES, INC., requests an order finding that *Fla. Stat.* § 768.0755 applies retroactively to the Plaintiff's burden of proof in this matter and as grounds states:

1. *Fla. Stat.* § 768.0755 now reads as follows:

(1) 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.* Constructive knowledge may be proven by circumstantial evidence showing that:

(a) the dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or

(b) the condition occurred with regularity and was therefore foreseeable.

- (2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises. § 768.0755, *Fla. Stat.* (2010) (emphasis added).

2. Consequently, in every transitory foreign substance slip-and-fall case involving a business establishment, a plaintiff *must* prove that the establishment had actual or constructive knowledge of the dangerous condition. There are no exceptions to this burden of proof.<sup>1</sup>

3. The Legislature indicated that proof of such knowledge can be established in one of two ways: either the condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition, or it occurred with regularity (and was therefore foreseeable). No other method of proof is enumerated.

4. By requiring that a plaintiff prove actual or constructive knowledge in every case, by necessity a plaintiff can no longer rely on the mode of operation theory, since the mode of operation theory was not predicated on the premises owner's knowledge. *See Owens*, 802 So.2d at 332 ("If the

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<sup>1</sup> The House of Representatives Staff Analysis associated with the enactment of § 768.0755 summarizes the enactment of the statute as follows: "HB 689 repeals s. 768.0710, F.S. relating to the burden of proof in 'slip and fall' claims of negligence and approximates the law with respect to slip and fall law suits as it existed before [Owens was decided in] 2001." The Senate Bill Analysis and Fiscal Impact Statement provided a similar summary of the Section 768.0755: "The bill repeals the current statute providing the burden of proof in 'slip-and-fall' negligence claims and delineates the new burden of proof in these cases. The new standard reiterates the requirement that the plaintiff prove that the business had actual or constructive knowledge of the dangerous condition causing the injury....."

evidence establishes a specific negligent mode of operation such that the premises owner could reasonably anticipate the 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").

5. Importantly, the Legislature deliberately omitted from the new statute the mode of operation theory it previously included in repealed *Fla. Stat.* § 768.0710(2)(b), which allowed a plaintiff to meet burden of proof by showing premises owner "acted negligently" by not exercising "reasonable care in the . . . mode of operation of the business premises").

6. Consequently, *Fla. Stat.* § 768.0755 requires Plaintiff, SHARON VOUGHT, to prove that WINN-DIXIE had actual or constructive knowledge of the transitory foreign substance and should have taken action to correct it, and precludes Plaintiff from attempting to establish liability by demonstrating that Winn-Dixie's mode of operation of the premises was negligent.

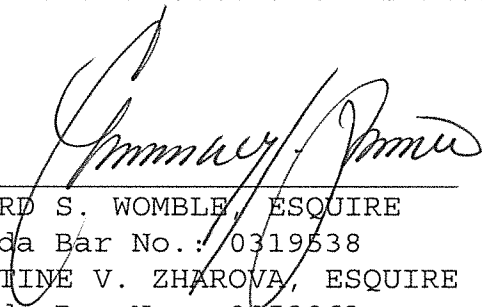
7. Under *Yates v. Walmart*, 2010 WL 4318795, (N.D. Fla. October 27, 2010), the newly enacted *Fla. Stat.* § 768.0755 is procedural in nature and has retroactive application. Thus, it is applicable to the current cause of action.

8. Additionally, this issue has been previously reviewed and decided on by numerous Florida circuit courts. Attached as Defendant's Exhibit "A" please find twenty-one orders finding that §768.0755, *Fla. Stat.* applies retroactively.

WHEREFORE, Defendant, WINN-DIXIE STORES, INC., requests that this Court enter an order finding that *Fla. Stat.* § 768.0755 applies retroactively to the Plaintiff's burden of proof in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 29, 2014 a true and correct copy of the foregoing has been furnished via e-mail service to: Kimberly@tallahasseepersonalinjury.com Suzette@tallahasseepersonalinjury.com and tina@tinawillislaw.com.



RICHARD S. WOMBLE, ESQUIRE  
Florida Bar No.: 0319538  
CHRISTINE V. ZHAROVA, ESQUIRE  
Florida Bar No.: 0052963  
Rissman, Barrett, Hurt,  
Donahue & McLain, P.A.  
201 E. Pine Street  
Suite 1500  
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Orlando, Florida 32802-4940  
Telephone: (407) 839-0120  
Facsimile: (407) 841-9726  
Attorneys for Defendant Winn-Dixie  
Stores, Inc.

RSW/CVZ/dbl/doc#1058

EXHIBIT "A'

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN AND  
FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

ALDY TORRES and ABDEL TORRES, her  
husband, -

CASE NO.: 11-5994 CA 23

Plaintiffs,

vs.

PUBLIX SUPER MARKETS, INC.,  
a Florida Corporation,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR DETERMINATION OF APPLICABILITY OF  
§768.0755, FLA. STAT., CONCERNING MODE OF OPERATION

THIS CAUSE came on to be heard on Feb 16, 2012, on Defendant, PUBLIX SUPER  
MARKETS, INC.'s, Motion for Determination of Applicability of §768.0755, Fla.Stat., Concerning  
Mode of Operation, and the Court having reviewed the motion, any response thereto, and being otherwise  
duly advised of the issues, it is hereby

ORDERED and ADJUDGED that:

This Court finds that Section 768.0755, Florida Statutes, addresses burden of proof requirements  
only and is thus procedural in nature and to be given retroactive effect to slip and fall accidents occurring  
before the statute's effective date of July 1, 2010. Furthermore, the negligent "mode of operation" theory  
is no longer viable under Section 768.0755, Florida Statutes.

DONE AND ORDERED in Chambers, Miami-Dade County, Florida on this 16<sup>th</sup> day of

P. H. H., 2012.

[Signature]  
CIRCUIT COURT JUDGE  
Conformed Copy

Copies furnished to:  
Dallas A. Robinson, Esquire  
Jeffrey A. Mowers, Esquire

FEB 16 2012

Michael A. Robinson  
Circuit Court

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN AND  
FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO.: 11-41908 CA 05

FLORENCE FIELDS,  
Plaintiff,

vs.

PUBLIX SUPER MARKETS, INC.,  
a Florida Corporation,

Defendant.

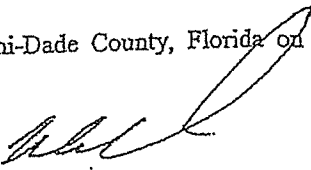
ORDER ON DEFENDANT'S MOTION FOR DETERMINATION OF APPLICABILITY OF  
§768.0755, FLA. STAT., CONCERNING MODE OF OPERATION

THIS CAUSE came on to be heard on March 13, 2012 on Defendant, PUBLIX  
SUPER MARKETS, INC.'s, Motion for Determination of Applicability of §768.0755, Fla.Stat.,  
Concerning Mode of Operation, and the Court having reviewed the motion, any response thereto, and  
being otherwise duly advised of the issues, it is hereby

ORDERED and ADJUDGED that:

This Court finds that Section 768.0755, Florida Statutes, addresses burden of proof requirements  
only and is thus procedural in nature and to be given retroactive effect to slip and fall accidents occurring  
before the statute's effective date of July 1, 2010. Furthermore, the negligent "mode of operation" theory  
is no longer viable under Section 768.0755, Florida Statutes.

DONE AND ORDERED in Chambers, Miami-Dade County, Florida on this 13<sup>th</sup> day of  
, 2012.

  
CIRCUIT COURT JUDGE

Copies furnished to:  
David M. Goldstein, Esquire  
Jeffrey A. Mowers, Esquire

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN AND  
FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO.: 11-43863 CA 15

EVELYN FELICIANO,

Plaintiff,

vs.

PUBLIX SUPER MARKETS, INC., a Florida  
profit corporation

Defendant.

ORDER ON DEFENDANT'S MOTION TO STRIKE ALLEGATION IN COMPLAINT CONCERNING  
MODE OF OPERATION

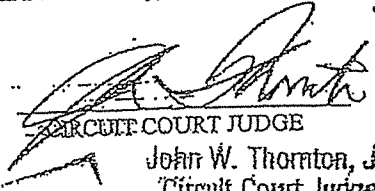
THIS CAUSE came on to be heard on March 13, 2012, on Defendant, PUBLIX SUPER  
MARKETS, INC.'s, Motion to Strike Allegation in Complaint Concerning Mode of Operation, and the Court  
having reviewed the motion, any response thereto, and being otherwise duly advised of the issues, it is hereby

ORDERED and ADJUDGED that:

1. Defendant's motion is granted and the allegation in paragraph 3 of the Complaint concerning  
mode of operation is stricken. By virtue of the repeal of §768.0710, Fla.Stat., and enactment of §768.0755, Fla.Stat.,  
effective July 1, 2010, the mode of operation theory does not apply to this alleged slip and fall accident occurring on  
July 12, 2011, on a foreign transitory substance.

DONE AND ORDERED in Chambers, Miami-Dade County, Florida on this 13<sup>th</sup> day of

March, 2012.

  
CIRCUIT COURT JUDGE

John W. Thornton, Jr.  
Circuit Court Judge

Copies furnished to:

Stephen W. Schwed, Esquire  
Jeffrey A. Mowers, Esquire

Confirmed Copy

MAR 13 2012

JOHN W.  
CIRCUIT



IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT, IN AND FOR  
MIAMI-DADE COUNTY, FLORIDA

VENDA WEST,

Plaintiff,

CASE NO.: 11-07431 CA (27)

vs.

PUBLIX SUPER MARKETS, INC., a  
Florida profit corporation,

Defendant. /

**ORDER ON DEFENDANT, PUBLIX SUPER MARKETS, INC.'S  
MOTION FOR DETERMINATION OF APPLICABLE LAW**

THIS CAUSE having come to be heard on February 14, 2012 on Defendant Publix Super Market, Inc.'s Motion for Determination of Applicable Law, and the Court having heard argument of counsel and being otherwise fully advised in the premises it is hereby:

**ORDERED AND ADJUDGED THAT:**

1. The Court finds that the new element of proof contained in Fla. Stat. §768.0755 is a procedural amendment affecting the Plaintiff's burden of proof, and therefore, does have retroactive application. See U.S. District Judge Richard Smoak's Order on Defendant's Motion Seeking Determination That Provisions of Florida Statute §768.0755 Apply to Establish Plaintiffs' Burden of Proof entered on October 27, 2010 in *Yates v. Wal-Mart Stores, Inc.*, 2010 WL 4318795 (N.D. Fla.).

2. Further, the negligent "mode of operation" theory is no longer viable under Florida Statute Section 768.0755.

DONE AND ORDERED in Chambers in Miami-Dade County, Florida this \_\_\_\_ day of \_\_\_\_\_, 2012.

CIRCUIT COURT JUDGE

Copies furnished to:  
Thomas C. Horner, Esq.  
H. Jacey Kaps, Esq.

CONFORMED COPY

FEB 14 2012  
BEATRICE BUTCHKO  
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT, IN AND FOR  
MIAMI-DADE COUNTY, FLORIDA

RITA CRAWFORD,

Plaintiff,

vs.

CASE NO.: 10-51197-CA-05

PUBLIX SUPER MARKETS, INC., a  
Florida profit corporation,

Defendant.

ORDER ON DEFENDANT, [REDACTED] [REDACTED]  
MOTION FOR DETERMINATION OF APPLICABLE LAW

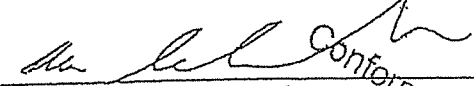
THIS CAUSE having come for hearing before this Court on January 24, 2012 on Defendant, Publix Super Market, Inc.'s Motion for Determination of Applicable Law, and the court having reviewed the court file, having heard argument of counsel and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that

this Court finds Section 768.0755, Florida Statutes addresses  
burden of proof requirements and is thus procedural in nature and to be  
given retroactive effect to slip and fall accidents occurring before the statute's  
effective date of July 1, 2010. Furthermore, the Negligence "note of decision" theory is  
no longer viable under Section 768.0755, Florida Statutes.  
DONE and ORDERED this 24<sup>th</sup> day of January, 2012 in Chambers at Miami, Miami-

Dade County, Florida.

Copies furnished to:  
Stephen W. Schwed, Esq.  
H. Jacey Kaps, Esq.

  
CIRCUIT COURT JUDGE

Confirmed Copy  
JAN 24 2012  
Marc Schumacher  
Circuit Court Judge

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN AND  
FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

MARTHA MESSIR,

CASE NO.: 11-37053 CA 05

Plaintiff,

vs.

PUBLIX SUPER MARKETS, INC., a Florida  
profit corporation, and EXTRA  
SUPERMARKET CORPORATION, a Florida  
profit corporation

Defendants.

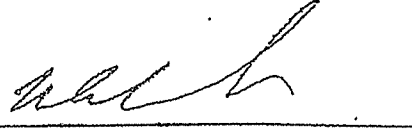
ORDER GRANTING DEFENDANT, PUBLIX SUPER MARKET, INC.'S, MOTION TO  
STRIKE ALLEGATION IN COMPLAINT CONCERNING MODE OF OPERATION

THIS CAUSE came on to be heard on March, 201 12 on Defendant,  
PUBLIX SUPER MARKETS, INC.'s, Motion to Strike Allegation in Complaint Concerning  
Mode of Operation, and the Court having reviewed the motion, any response thereto, and being  
otherwise duly advised of the issues, it is hereby

~~ORDERED and ADJUDGED that.~~

Defendant's motion is granted because the "mode of operation" theory is not applicable  
to this non-slip and fall claim. Alternatively, this Court finds that Section 768.0755, Florida  
Statutes, addresses burden of proof requirements only and is thus procedural in nature and to be  
given retroactive effect to slip and fall accidents occurring before the statute's effective date of  
July 1, 2010. Furthermore, the negligent "mode of operation" theory is no longer viable under  
Section 768.0755, Florida Statutes.

DONE AND ORDERED in Chambers, Miami-Dade County, Florida on this 1 day  
of March, 2012.



CIRCUIT COURT JUDGE

Conformed Copy

MAR 01 2012  
Marc Schwaetzer  
Circuit Court Judge

Copies furnished to:

David Knight, Esquire  
Jeffrey A. Mowers

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN AND  
FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

RAPHAEL SWANSTON,

CASE NO.: 11-38479 CA 23

Plaintiff,

vs.

PUBLIX SUPER MARKETS, INC.,

Defendant.

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ORDER ON DEFENDANT'S MOTION TO STRIKE ALLEGATION IN COMPLAINT  
CONCERNING MODE OF OPERATION

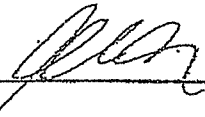
THIS CAUSE came on to be heard on March 15<sup>th</sup>, 2012 on Defendant, PUBLIX SUPER MARKETS, INC.'s, Motion to Strike Allegation in Complaint Concerning Mode of Operation, and the Court having reviewed the motion, any response thereto, and being otherwise duly advised of the issues, it is hereby

ORDERED and ADJUDGED that:

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Defendant's motion is granted and the allegation in the Complaint concerning mode of  
operation is stricken. This Court specifically finds that Section 768.0755, Florida Statutes, addresses burden of proof requirements only and is thus procedural in nature and to be given retroactive effect to slip and fall accidents occurring before the statute's effective date of July 1, 2010. Furthermore, the negligent "mode of operation" theory is no longer viable under Section 768.0755, Florida Statutes.

DONE AND ORDERED in Chambers, Miami-Dade County, Florida on this 15<sup>th</sup> day  
of March, 2012.

  
\_\_\_\_\_  
CIRCUIT COURT JUDGE

Copies furnished to:

William C. Ruggiero, Esquire  
Jeffrey A. Mowers, Esquire

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,  
IN AND FOR BROWARD COUNTY, FLORIDA

MADELINE MENDEZ,

CIRCUIT CIVIL DIVISION

Plaintiff,

CASE NO. CACE 11-009610 (05)

vs.

PUBLIX SUPER MARKETS, INC.,

Defendant.

ORDER ON PLAINTIFF'S MOTION FOR APPLICATION OF F.S. 768.0710

THIS CAUSE came on to be heard on April 10, 2012 on Plaintiff's Motion for Application of Florida Statute Section 768.0710, and the Court having heard argument of counsel and being otherwise fully advised, it is:

ORDERED AND ADJUDGED that this Court finds Section 768.0755, Florida Statutes addresses burden of proof requirements only and is thus procedural in nature and to be given retroactive effect to slip and fall accidents occurring before the statute's effective date of July 1, 2010. Furthermore, the negligent "mode of operation" theory is no longer viable under Section 768.0755, Florida Statutes. This Court's ruling is based on the legislative history and language of Section 768.0755, Florida Statutes and its predecessor, Section 768.0710, Florida Statutes, canons of statutory interpretation, as well as the persuasive holding and reasoning of *Yates v. Wal-Mart Stores, Inc.* 2010 WL 4318795 (N.D. Fla. 2010) and the other circuit court orders throughout the State of Florida. Accordingly, Section 768.0755, Florida Statutes shall be the operative law applied to this accident which occurred on April 14, 2009.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, this 10 day of April, 2012.

RICHARD D. EADE

HONORABLE RICHARD D. EADE

APR 10 2012

TRUE COPY

Copies furnished:

Jonathon S. Miller, Esq.

Gary D. Gelch, Esq.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA  
CIVIL DIVISION

MARGARET KYLE and ROBERT KYLE, her  
husband,

Plaintiffs,

CASE NO.: 11-00989-CI-20

vs.

PUBLIX SUPER MARKETS, INC.,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR DETERMINATION OF  
APPLICABILITY OF §768.0755, FLA. STAT.

THIS CAUSE came on to be heard on March 22, 2012 on Defendant's, PUBLIX SUPER MARKETS, INC., Motion for Determination of Applicability of §768.0755, Fla. Stat., and the Court having reviewed the motion, any response thereto, and being otherwise duly advised of the issues, it is hereby

ORDERED AND ADJUDGED that:

This Court finds that Section 768:0755, Florida Statutes, addresses burden of proof requirements only and is thus procedural in nature and to be given retroactive effect to slip and fall accidents occurring before the statute's effective date of July 1, 2010. Furthermore, the negligent "mode of operation" theory is no longer viable under Section 768.0755, Florida Statutes.

DONE AND ORDERED in Chambers at Clearwater, Florida this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

George M. Jirotska  
Circuit Court Judge



Conformed copies furnished to:

Samuel S. Mehring, Jr., Esquire  
Paula W. Rousselle, Esquire



IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT  
IN AND FOR MANATEE COUNTY, FLORIDA, CIVIL DIVISION

CYNTHIA SARKOZY

Plaintiff,

CASE NO.: 12-CA-00619

vs.

PUBLIX SUPER MARKETS, INC., a Florida  
Profit Corporation

Defendant

ORDER ON DEFENDANT'S MOTION TO DETERMINE APPLICABLE LAW AND MOTION  
TO STRIKE PLAINTIFF'S MODE OF OPERATION CLAIM

THIS CAUSE having come on to be heard upon Defendant, PUBLIX SUPER MARKETS, INC.'S, Motion to Determine Applicable Law and Motion to Strike Plaintiff's Mode of Operation Claim on September 24, 2012, and the Court, having heard argument of counsel, reviewed the pleadings and being otherwise fully advised on the premises, it is hereby

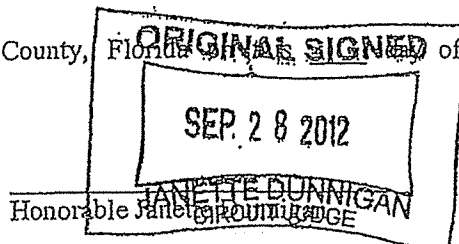
ORDERED AND ADJUDGED that this Court finds that Section 768.0755, Florida Statutes, is procedural in nature and should be given retroactive application to this cause of action which involves a slip and fall accident occurring on or about November 25, 2009. It is further

ORDERED AND ADJUDGED that Defendant's Motion to Strike Plaintiff's Mode of Operation Claim is GRANTED as the "mode of operation" theory is no longer viable under Section 768.0755, Florida Statutes. As such, paragraph number 7 of Plaintiff's complaint relating to "mode of operation" is hereby stricken with prejudice.

DONE AND ORDERED in Chambers, Manatee County, Florida, this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

Copies To:

Chris M. Hart, Esq.  
William R. Daniel, Esq.



IN THE CIRCUIT COURT OF THE  
EIGHTEENTH JUDICIAL CIRCUIT  
IN AND FOR SEMINOLE COUNTY,  
FLORIDA

CASE NO. 2011-CA-4826-11-W

CYNTHIA MIMMS-BAKER,

Plaintiff,

v.

PUBLIX SUPER MARKETS, INC.;

Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT

THIS CAUSE, having come before the Honorable Alan A. Dickey on July 23, 2012, upon Defendant, PUBLIX SUPER MARKETS, INC.'S, January 20, 2012 Motion to Dismiss Plaintiff's Complaint, and the Court having been fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that:.

1. Defendant's Motion to Dismiss Plaintiff's Complaint is hereby GRANTED.

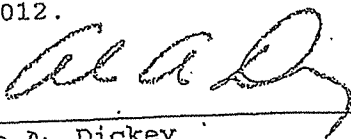
2. This Court finds that Fla. Stat. §768.0755 (2010) is procedural in nature, has retroactive application and is applicable to this cause of action, which accrued on September 14, 2009.

due by  
8-27-12  
BML

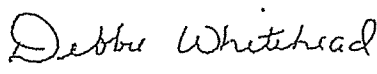
3. This Court also finds that, under Fla. Stat. §768.0755, the negligent mode of operation claims are no longer viable.

4. Plaintiff shall have twenty (20) days from the date of this Order to amend the Complaint.

DONE AND ORDERED in Chambers at Sanford, Seminole County,  
Florida, this AUG 6 2012 day of July, 2012.

  
\_\_\_\_\_  
Alan A. Dickey  
Circuit Court Judge

I HEREBY CERTIFY that copies of the foregoing Order were furnished to the attorneys and/or parties of record this AUG 6 2012 day of July, 2012.

  
\_\_\_\_\_  
Judicial Assistant

Copies to: Justin Presser, Esquire  
Art C. Young, Esquire

nms/f134

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN AND  
FOR MIAMI-DADE COUNTY, FLORIDA

CIRCUIT CIVIL DIVISION

SILVIA COLMENAREZ and OLAVO  
GOUVEIA, her husband,

CASE NO.: 12-9909 CA 30

Plaintiff(s),

vs.

PUBLIX SUPER MARKETS, INC.,

Defendant(s):

ORDER ON MOTION FOR DETERMINATION OF APPLICABILITY OF  
§768.0755 FLA. STAT. CONCERNING MODE OF OPERATION

THIS CAUSE came on to be heard on May 17, 2012, on Defendant, PUBLIX SUPER  
MARKETS, INC.'s, Motion for Determination of Applicability of §768.0755 Fla. Stat. Concerning Mode  
of Operation, and the Court having reviewed the motion, any response thereto, and being otherwise duly  
advised of the issues, it is hereby

ORDERED and ADJUDGED that:

1. Defendant's motion is GRANTED. By virtue of the repeal of §768.0710, Fla. Stat., and  
enactment of §768.0755, Fla. Stat., effective July 1, 2010, the mode of operation theory does not apply to  
this alleged slip and fall accident occurring on December 31, 2010, on a foreign transitory substance.

DONE AND ORDERED in Chambers, Miami-Dade County, Florida on this 17 day of

May, 2012.

CIRCUIT COURT JUDGE

**CONFORMED**

MAY 17 2012

Judge Lester Langer  
Circuit Court Judge

Copies furnished to:

Leonard A. Canton, Esquire  
Jeffrey A. Mowers, Esquire  
Kirstie L. Hayduk, Esquire

IN THE CIRCUIT COURT OF THE 11TH  
JUDICIAL CIRCUIT IN AND FOR MIAMI-  
DADE COUNTY, FLORIDA

CASE NO.: 10-36742 CA 13

YUDEYCIS MORENO,

Plaintiff,

v.

PUBLIX SUPER MARKETS, INC., a  
Florida Corporation,

Defendant.

ORDER ON DEFENDANT'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

THIS matter having come to be heard on Defendant, PUBLIX SUPER MARKETS, INC.'s, Motion for Partial Summary Judgment, and the Court having considered the pleadings, law, and argument, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED:

1. Publix' Motion is Granted. *Judge Schertel's prior order is hereby reversed.*
2. The Court finds that Florida Statute §768.0755 is procedural in nature and should be applied retroactively to accidents taking place prior to the enactment

of this statute. Therefore, Florida Statute §768.0755 shall govern this case which involves an accident taking place on March 9, 2008.

DONE AND ORDERED in Chambers, at Miami, Miami-Dade County, Florida,  
this 10<sup>th</sup> day of May, 2012.

CONFORMED COPY  
MAY 10 2012  
CIRCUIT COURT JUDGE  
MARY E TRAWICK  
CIRCUIT COURT JUDGE

Copies Furnished to:  
Daniel Gomez Esquire  
Robert R. Coulombe, Jr., Esquire

IN THE CIRCUIT COURT, FOURTH  
JUDICIAL CIRCUIT, IN AND FOR  
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2011-CA-9257

DIVISION: CV-D

MERLE MASON,

Plaintiff,

vs.

PUBLIX SUPER MARKETS, INC.,  
A Florida Profit Corporation,

Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS COUNT II OF PLAINTIFF'S  
COMPLAINT

This cause was heard before the Court on February 15, 2012 upon the Motion to Dismiss Count II of Plaintiff's Complaint filed by Defendant, Publix Super Markets, Inc., and the Court, having heard argument from the parties and having fully considered the record, including the pleadings and case law submitted by the parties, and otherwise being fully advised in the premises, makes the following findings of fact and conclusions of law.

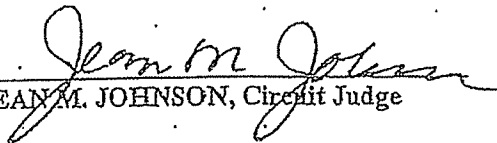
Plaintiff's action arises out of allegations that Defendant's negligent maintenance of its premises caused injuries which Plaintiff received in a slip-and-fall accident on Defendant's premises on August 21, 2010. Count II of Plaintiff's Complaint is a cause of action for negligent mode of operation. Upon consideration of Florida Statute § 768.0755, which was enacted on July 1, 2010 to repeal Florida Statute § 768.0710, and other relevant legal authority, the Court finds that the negligent mode of operation theory of liability is no longer viable under Florida Statute § 768.0755.

As Florida Statute § 768.0755 was enacted prior to the date of Plaintiff's injuries, it provides the applicable law in this action, and precludes maintenance of a cause of action for negligent mode of operation.

Thus, it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss Count II of Plaintiff's Complaint is hereby GRANTED. Count II of Plaintiff's Complaint is dismissed with prejudice.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 2 day of March, 2012.

  
JEAN M. JOHNSON, Circuit Judge

Copies to:

Michael S. O'Neal  
Howell & O'Neal  
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76 South Laura Street, Suite 1100  
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Case No.: 16-2011-CA-9257

IN THE CIRCUIT COURT OF THE  
SIXTEENTH JUDICIAL CIRCUIT, IN AND FOR  
MONROE COUNTY, FLORIDA

BEVERLY ELIZABETH DAUGHERTY,

Plaintiff,

vs.

CASE NO.: 2010CA310M

PUBLIX SUPER MARKETS, INC. a  
Florida profit corporation,

Defendant.

ORDER ON DEFENDANT, PUBLIX SUPER MARKETS, INC.'S  
MOTION FOR DETERMINATION OF APPLICABLE LAW

THIS CAUSE having come to be heard on February 16, 2012 on Defendant Publix Super Market, Inc.'s Motion for Determination of Applicable Law, and the Court having heard argument of counsel and being otherwise fully advised in the premises it is hereby:

**ORDERED AND ADJUDGED THAT:**

1. The Court finds that the new element of proof contained in Fla. Stat. §768.0755 is a procedural amendment affecting the Plaintiff's burden of proof, and therefore, does have retroactive application.

2. Further, the negligent "mode of operation" theory is no longer viable under Florida Statute Section 768.0755.

DONE AND ORDERED in Chambers in Monroe County, Florida this 16 day of

Feb, 2012.

*Keith Becker*  
CIRCUIT COURT JUDGE

Copies furnished to:  
Scott Black, Esq.  
H. Jacey Kaps, Esq.



IN THE CIRCUIT COURT OF THE  
17TH JUDICIAL CIRCUIT IN AND FOR  
BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 10-06877 CACE (25)

PATRICIA FLEURANTUS, individually,

Plaintiff,

v.

ROSS DRESS FOR LESS, INC., a foreign  
Profit corporation.,

Defendant.

---

ORDER GRANTING DEFENDANT'S, ROSS DRESS FOR LESS, INC.'S, MOTION  
SEEKING A DETERMINATION THAT THE PROVISIONS OF FLORIDA STATUTE  
SECTION 768.0755 APPLY TO ESTABLISH PLAINTIFF'S  
BURDEN OF PROOF IN THIS ACTION

THIS CAUSE having come before the Court on June 27, 2011, on Defendant's, ROSS  
DRESS FOR LESS, INC.'s, Motion Seeking a Determination that the Provisions of Florida  
Statute Section 768.0755 Apply to Establish Plaintiff's Burden of Proof in this Action, and the  
Court having heard argument of counsel and being otherwise fully advised, it is:

ORDERED and ADJUDGED:

1. Defendant's Motion Seeking a Determination that the Provisions of Florida  
Statute Section 768.0755 Apply to Establish Plaintiff's Burden of Proof in this Action is hereby  
GRANTED.

2. Florida Statute Section 768.0755 addresses burden of proof requirements only and  
is thus procedural in nature and to be applied retroactively.

3. Further, the negligent "mode of operation" theory is no longer viable under  
Florida Statute Section 768.0755.

4. Accordingly, Florida Statute Section 768.0755 shall be the operative law applied to the subject incident which occurred on May 21, 2009.

DONE AND ORDERED in Chambers at Ft. Lauderdale, Broward County, Florida this \_\_\_\_\_ of \_\_\_\_\_, 2011.

HONORABLE CAROL-LISA PHILLIPS  
Circuit Court Judge

cc: Miriam R. Merlo, Esq.  
Susan Guller, Esq.

CAROL-LISA PHILLIPS

JUN 30 2011

A TRUE COPY

---

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT  
IN AND FOR BROWARD COUNTY, FLORIDA

CLAUDIA PADOVANI,

CIRCUIT CIVIL DIVISION

Plaintiff,

CASE NO. CACE 10-48062 (13)

vs.

PUBLIX SUPER MARKETS, INC.,

Defendant.

ORDER ON PUBLIX'S MOTION FOR DETERMINATION OF APPLICABLE LAW

THIS CAUSE came on to be heard on June 22, 2011 on Publix Super Markets, Inc.'s Motion for Determination as to Applicable Law as to the retroactive application of Section 768.0755, Florida Statutes, and the Court having heard argument of counsel and being otherwise fully advised, it is:

ORDERED and adjudged that this Court finds Section 768.0755, Florida Statutes addresses burden of proof requirements only and is thus procedural in nature and to be given retroactive effect to slip and fall accidents occurring before the statute's effective date of July 1, 2010. Furthermore, the negligent "mode of operation" theory is no longer viable under Section 768.0755, Florida Statutes. This Court's ruling is based on the legislative history and language of Section 768.0755, Florida Statutes and its predecessor, Section 768.0710, Florida Statutes, canons of statutory interpretation, as well as the persuasive holding and reasoning of *Yates v. Wal-Mart Stores, Inc.*, 2010 WL 4318795 (N.D. Fla. 2010) and the other circuit court orders throughout the State of Florida. Accordingly, Section 768.0755, Florida Statutes shall be the operative law applied to this accident which occurred on December 22, 2008.

DONE AND ORDERED at Ft. Lauderdale, Broward County, Florida, on June \_\_\_\_, 2011.

\_\_\_\_\_  
CIRCUIT JUDGE

MICHAEL L. GATES  
Circuit Judge

JUN 27 2011

A TRUE COPY

Copies furnished to:

Jonathon S. Miller, Esq. (Counsel for Publix)  
Evan R. Krakower, Esq. (Counsel for Plaintiff)  
Rick S. Jacobs, Esq. (Counsel for Plaintiff)

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT,  
IN AND FOR BROWARD COUNTY, FLORIDA

JULIO ROBLEDO,

CIRCUIT CIVIL DIVISION

Plaintiff,

CASE NO. 10-35412(04)

vs.

PUBLIX SUPER MARKETS, INC.,  
a Florida corporation,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR DETERMINATION AS TO APPLICABLE LAW

THIS CAUSE came on to be heard, on June 1, 2011 on Publix Super Markets, Inc.'s Motion for Determination as to Applicable Law as to the retroactive application of Section 768.0755, Florida Statutes, and the Court having heard argument of counsel and being otherwise fully advised, it is:

ORDERED and adjudged that this Court finds Section 768.0755, Florida Statutes addresses burden of proof requirements only and is thus procedural in nature and to be given retroactive effect to slip and fall accidents occurring before the statute's effective date of July 1, 2010. Furthermore, the negligent "mode of operation" theory is no longer viable under Section 768.0755, Florida Statutes. This Court's ruling is based on the legislative history and language of Section 768.0755, Florida Statutes and its predecessor, Section 768.0710, Florida Statutes, canons of statutory interpretation, as well as the persuasive holding and reasoning of *Yates v. Wal-Mart Stores, Inc.* 2010 WL 4318795 (N.D. Fla. 2010). Accordingly, Section 768.0755, Florida Statutes shall be the operative law applied to this accident which occurred on August 29, 2009.

DONE AND ORDERED at Ft. Lauderdale, Broward County, Florida, on June 1, 2011.

EILEEN O'CONNOR

JUN -- 1 2011

EILEEN M. O'CONNOR  
CIRCUIT JUDGE

ATLUE COPY

Copies furnished to:

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515 E. Las Olas Boulevard, Suite 1400  
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Russell A. Dohan, Esquire  
Goldberg & Dohan, L.L.P.  
Counsel for Plaintiff  
2020 Ponce de Leon Blvd., Suite 1105B  
Coral Gables, FL 33134

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY  
CIVIL DIVISION

MAYRA QUINONES-REBOYRAS,

Plaintiff,

CASE NO.: 12-CA-000625

v.

DIVISION: "F"

PUBLIX SUPER MARKETS, INC.,  
a Florida corporation,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came on to be heard upon Defendant, PUBLIX SUPER MARKET, INC.'S, Motion to Dismiss Plaintiff's Complaint on June 19, 2012, and the Court, having read the pleadings, hearing argument from counsel and being otherwise fully advised on the premises, it is hereby:

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss Plaintiff's Complaint is GRANTED. Specifically, the Court finds that under Section 768.0755, Florida Statutes, "negligent mode of operation" claims are no longer viable. Plaintiff shall have twenty (20) days from the date of this order to amend her Complaint in accordance with this order.

DONE AND ORDERED in Chambers, Hillsborough County, Florida on this \_\_\_\_ day of July, 2012.

Honorable Charles E. Bergmann

Circuit Court Judge

Copies To:

Marcus Fernandez, Esq.

Chris M. Hart, Esq.

ORIGINAL SIGNED  
CONFORMED COPY

JUL 11 2012

CHARLES ED BERGMANN  
CIRCUIT JUDGE

✓

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN  
AND FOR SUMTER COUNTY, FLORIDA

MICHAEL MCCORMICK,

Plaintiff,

vs.

CASE NO.: 2012-CA-32

PUBLIX SUPER MARKETS, INC.,

Defendant.

---

**ORDER ON DEFENDANT'S MOTION TO APPLY PREMISES LIABILITY STATUTE  
RETROACTIVELY**

THIS CAUSE came before the Court upon the Defendant's Motion to Apply Premises Liability Statute Retroactively, which was filed with the Clerk on August 28, 2013. Defendant asserts section 768.0755, Florida Statutes applies retroactively to the Plaintiff's burden of proof.

The recent case of Kenz v. Miami-Dade County, 116 So.3d 461 (Fla. 3d DCA 2013) found §768.0755 to be procedural in nature and to be given retroactive application. The Third Circuit determined that §768.0755 was procedural since it concerned the means and methods to enforce duties and rights, rather than prescribing a right or duty, which is substantive. The court determined that the requirement that the plaintiff prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it did not create a new element of a cause of action for negligence. Such a requirement merely defined how a breach of duty is proven by requiring proof of actual or constructive knowledge. The Third Circuit concluded that under Florida case law, including Florida Supreme Court case law, that issues relating to a party's burden of proof are procedural.

The decision rendered by Kenz v. Miami-Dade County, 116 So.3d 461 (Fla. 3d DCA 2013) is right on point to the issue of retroactivity presented in this case. When there is no

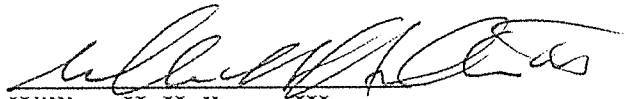
binding precedent from the Florida Supreme Court or an appellate court for the district in which a trial court sits, the trial judge is bound to follow the decisions of other appellate courts that are on point. The decisions of the district courts of appeal are binding precedent throughout Florida. System Components Corp. v. Florida Dept. of Transp., 14 So. 3d 967, 973 (Fla. 2009).

Consequently, this Court is bound by the determination made by the Third Circuit in Kenz.

Based on the foregoing, it is thereupon;

**ORDERED AND ADJUDGED:** That the Defendant's Motion to Apply Premises Liability Statute Retroactively is **GRANTED**. Section 768.0755, Florida Statutes **shall** apply retroactively to this case.

**DONE AND ORDERED** in Chambers, at Bushnell, Sumter County, Florida, on this 30 day of September, 2013.

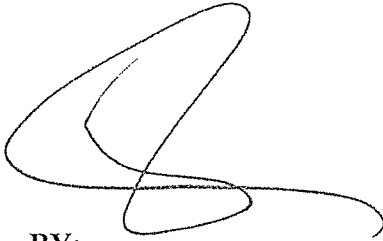
  
William H. Hallman, III.  
Circuit Judge

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true copy of the foregoing has been furnished to the following individuals by U.S. Mail/Courthouse box delivery/e-mail/facsimile this 3 day of ~~September~~, 2013:

OCTOBER  
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Richard S. Womble, Esquire  
Rissman, Barrett, Hurt et al.  
P.O. Box 4940  
Orlando, FL 32802-4940  
cvs.service@rissman.com  
Facsimile: 407-841-9726



BY: \_\_\_\_\_  
Judicial Assistant



IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT IN  
AND FOR SUMTER COUNTY, FLORIDA

MICHELE GOULD,

Plaintiff,

vs.

CASE NO.: 2011-CA-129

WINN-DIXIE STORES, INC., a  
Florida corporation,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S  
DECEMBER 4, 2012 ORDER DENYING DEFENDANT'S MOTION TO APPLY  
PREMISES LIABILITY RETROACTIVELY

THIS CAUSE came before the Court upon the Defendant's Motion for Reconsideration of the Court's December 4, 2012 Order Denying Defendant's Motion to Apply Premises Liability Retroactively, which was filed with the Clerk on August 13, 2013. Defendant asserts recent case law suggests that the premise liability statute at section 768.0755, Florida Statutes must be applied retroactively.

Plaintiff's Response to Defendant's Motion for Reconsideration of the Court's December 4, 2012 Order Denying Defendant's Motion to Apply Premises Liability Retroactively was filed with the Clerk on August 23, 2013. Plaintiff argues she would be prejudiced if §768.0755 was applied retroactively. Plaintiff asserts the Defendant failed to present the proper argument to support a finding that §768.0755 applies retroactively and §768.0755 is substantive in nature.

Defendant's Reply to Plaintiff's Response to Defendant's Motion for Reconsideration of the Court's December 4, 2012 Order Denying Defendant's Motion to Apply Premises Liability Retroactively was filed with the Clerk on August 27, 2013. Defendant maintains the Plaintiff will not be prejudiced in the event §768.0755 is applied retroactively.

The recent case of Kenz v. Miami-Dade County, 116 So.3d 461 (Fla. 3d DCA 2013) found §768.0755 to be procedural in nature and to be given retroactive application. The Third Circuit determined that §768.0755 was procedural since it concerned the means and methods to enforce duties and rights, rather than prescribing a right or duty, which is substantive. The court determined that the requirement that the plaintiff prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it did not create a new element of a cause of action for negligence. Such a requirement merely defined how a breach of duty is proven by requiring proof of actual or constructive knowledge. The Third Circuit concluded that under Florida case law, including Florida Supreme Court case law, that issues relating to a party's burden of proof are procedural.

The Court notes the Order denying Defendant's Motion to Apply Premises Liability Statute Retroactively, which was issued on December 4, 2012, concluded § 768.0755 created a new legal obligation and attached new legal consequences to events that took place before the statute's enactment since the plaintiff is required to prove that the defendant had actual or constructive knowledge of the dangerous condition. In reaching its decision, the Court considered U.S. District Court opinions which were consistent with the Court's analysis. At that time, there weren't any Florida appellate decisions regarding the newly enacted § 768.0755.

The decision rendered by Kenz v. Miami-Dade County, 116 So.3d 461 (Fla. 3d DCA 2013) is right on point to the issue of retroactivity presented in this case. When there is no binding precedent from the Florida Supreme Court or an appellate court for the district in which a trial court sits, the trial judge is bound to follow the decisions of other appellate courts that are on point. The decisions of the district courts of appeal are binding precedent throughout Florida.

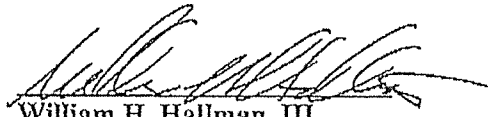
System Components Corp. v. Florida Dept. of Transp., 14 So. 3d 967, 973 (Fla. 2009),

Consequently, this Court is bound by the determination made by the Third Circuit in Kenz.

Based upon the foregoing, it is hereby;

**ORDERED AND ADJUDGED:** That the Defendant's Motion for Reconsideration of the Court's December 4, 2012 Order Denying Defendant's Motion to Apply Premises Liability Retroactively is **GRANTED**. Section 768.0755, Florida Statutes shall apply retroactively to this case,

**DONE AND ORDERED** in Chambers at Bushnell, Sumter County, Florida, and this 4 this day of September, 2013.

  
William H. Hallman, III  
Circuit Judge

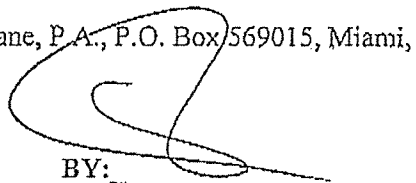
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following individuals by U.S. Mail/Courthouse box delivery/fax this 4 day of September, 2013:

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michael.brand@csklegal.com

  
BY: \_\_\_\_\_  
Judicial Assistant