CONROY, SIMBERG, GANON, KREVANS, ABEL, LURVEY, MORROW & SCHEFER, P.A.

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# Case Law E-Alert

In an effort to bring you up-to-date information that affects your every day claims handling, the defense team at Conroy Simberg is pleased to bring you electronic alerts regarding the latest legal decisions from the Florida court system. This update will provide you with the latest rulings, verdicts, legal implications and practice tips. In addition to this electronic update, the attorneys at Conroy Simberg are ready to answer any questions you may have regarding the contents contained herein, as well as discuss the relationship to existing claims. Please feel free to contact any of our attorneys, at any of our ten office locations throughout the State of Florida. You can also visit our website at www.conroysimberg.com.

## PEMBROKE LAKES MALL, LTD. AND MILLARD MALL SERVICES, LLC V. JUNE MCGRUDER

### Case No. 4D11-4005, Opinion Filed on February 26, 2014

Florida's Fourth District Court of Appeal just released an opinion on February 26, 2014, in the case of **Pembroke Lakes Mall, Ltd. and Millard Mall Services, LLC v. June McGruder**, No. 4D11-4005 holding that Florida Statute § 768.0755 **does not** apply retrospectively to slip-and-fall accidents.

In this case, McGruder slipped and fell on a clear slippery substance on the floor while shopping at the mall before the new statute was effective and the former statute, Florida Statute § 768.0710 was repealed. In 2010, she sued the mall and the management company for negligence in failing to warn her of the substance, allowing the substance to remain on the floor, and failing to have a proper maintenance plan to prevent substances from remaining on the floor.

Before trial, the defendants filed a motion to determine that Florida Statute § 768.0755 applies retrospectively. The court denied that motion, and held the earlier statute, Florida Statute § 768.0710, would apply to the case. The case proceeded to trial in 2011, and the jury returned a verdict finding the defendants negligent for the accident.

On appeal, the Fourth District Court of Appeal noted that the Third District previously held in **Kenz v. Miami-Dade County, 116 So.3d 461 (Fla. 3d DCA 2013)** that Florida Statute § 768.0755 was a procedural change and should be applied retrospectively. The Fourth District, however, disagreed with the Third District's

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# Case Law E-Alert continued

analysis, and held instead that the new statute was a substantive change which now requires a "knowledge element" in slip-and-fall claims, thus adding a new element which was not required under Florida Statute § 768.0710. Specifically, the Fourth District compared the following language in the two statutes: "[a]ctual or constructive notice of the transitory foreign object or substance is not a required element of proof to this claim," Florida Statute § 768.0710(2)(b) as compared to "the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition," Fla. Stat. § 768.0755(1).

In its opinion, the Fourth District certified its conflict with the Third District for resolution by the Supreme Court.

**This decision is effective immediately, and unless and until the Fourth District reconsiders the case, which it is unlikely to do, it applies to all pending cases**

In cases in the Third and Fourth Districts, the trial court is obligated to follow the current law in ruling on cases before it. Therefore, in the Third District, which includes Miami-Dade and Monroe counties, the trial court must follow **Kenz** and in the Fourth District (including Broward and Palm Beach counties), trial courts must follow **McGruder**. However, if a case is pending in the Fourth District trial courts, in order to preserve the argument that the new statute should be retrospective in its application, the attorney must acknowledge to the trial court that the current law as espoused in **McGruder** binds the trial court, but articulate that the attorney believes the **Kenz** court was ultimately correct, and request that if the trial court makes a ruling on dismissal or on summary judgment based on the current law, it is without prejudice to the defense to request reconsideration in the event that the Supreme Court ultimately resolves the conflict by approving **Kenz** and quashing **McGruder**.

In all other courts throughout the State, the trial court may follow either appellate decision until their own District Court addresses the issue or the Florida Supreme Court resolves the conflict.

Assuming that the losing party seeks Supreme Court review, which must be pursued by the parties in order to obtain a resolution of the conflict, the issue may not be resolved for well over a year. We will keep you apprised of the status of the case, and any others that issue in the meantime, in order to enable you and your counsel to properly evaluate pending and future cases and ensure that they are properly handled

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