

2022 FACT Risk Management Conference
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HELP US, HELP YOU:

*Strategies for Defending
Personal Injury Claims*



Introductions



Courtney M. Johnson, Esq.

cjohnson@marksgray.com

(904)807-2164

Associate, Marks Gray, P.A.



Julianna R. Favale, Esq.

jfavale@marksgray.com

(904)807-2129

Associate, Marks Gray, P.A.



What are we discussing today?

01 Why we are here.

02 How can you help us.

03 How can we help you.

Why We Are Here

The landscape of personal injury lawsuits is changing and we are seeing increased verdicts for plaintiffs.

RECENT NUCLEAR VERDICTS

Criales v. The Georgetown Partnership, LLC

- Motor vehicle accident fatality, dram shop suit against bar owner
- Plaintiff Verdict: \$95,000,000

Rodgers v. City of Gainesville d/b/a Gainesville Regional Utilities

- Individual operating GRU vehicle in course and scope of his employment struck and killed decedent.
- Plaintiff Verdict: \$120,000,000.00

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RECENT NUCLEAR VERDICTS

*Dzion v. AJD Business Services, Inc. and
Kahkashan Carrier, Inc.*

- Motor vehicle accident fatality
- Plaintiff Verdict: \$1,000,000,000

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The landscape of personal injury lawsuits is changing and we are seeing increased verdicts for plaintiffs.

SLIP & FALL

Esposito v. Miami-Dade County

- County failed to maintain a Metrorail Station causing pedestrian to slip and fall on stairs. Plaintiff sustained injuries.
- Plaintiff Verdict: \$238,244

Thomas v. Cici's Pizza 509

- Plaintiff slipped in puddle of greasy water in parking lot. Plaintiff sustained injuries.
- Plaintiff Verdict: \$5,291,552.28

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OTHER PREMISES LIABILITY

Shaw v. Orange County

- Plaintiff stepped into open manhole and sustained injuries.
- Plaintiff Verdict: \$2,456,436.71

Whitmore v. Hillsborough County

- Plaintiff tripped and fell as a result of degraded asphalt around a water line cap
- Plaintiff Verdict: \$2,212,883.50

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OTHER PREMISES LIABILITY

Gold v. Starbucks

- Plaintiff struck by car exiting store's drive through.
- Plaintiff Verdict: \$8,970,000.00

Haugen v. City of Gainesville

- Plaintiff riding motorized scooter fell on City sidewalk; sidewalk alleged dangerous condition
- Plaintiff Verdict: \$765,459.18

Why We Are Here

The landscape of personal injury lawsuits is changing and we are seeing nuclear verdicts for plaintiffs.

VEHICULAR ACCIDENTS

Bogle v. Orange County

- Individual operating County owned vehicle in course and scope of his employment struck and killed decedent.
- Plaintiff Verdict: \$5,032,804.30

Long v. The Travelers Home and Marine Insurance Company

- Motor vehicle accident, Uninsured Motorist Claim against Plaintiff's auto insurer
- Plaintiff Verdict: \$16,433,352.80

Why We Are Here

The landscape of personal injury lawsuits is changing and we are seeing nuclear verdicts for plaintiffs.

VEHICULAR ACCIDENTS

Thomas v. Lake County Board of County Commissioners

- Individual operating Lake County BCC vehicle in the course and scope of his employment collided with Plaintiff's vehicle
- Plaintiff Verdict: \$2,486,717.76

Tsao v. Geico

- Automobile accident, UM
- Plaintiff Verdict: \$14,430,084.04

How Can You Help Us

HIRING/TRAINING

- Perform pre-hire and annual DL checks
- Involve employees and drivers in safety training
- Provide training for how to document accidents and injuries properly
- Minimize driving for employees or minimize the number of employees driving

DOCUMENTING

- Make a full and timely record of accidents and injuries, including witness information
- Keep accurate maintenance records
- Keep updated employment records
- Keep in mind the way you record information is how it will be read to the jury
- Photograph pre-injury areas and post-injury areas

FOLLOWING-UP

- Ensure that the area where an accident occurred is actually OWNED by your entity
- Avoid Spoilation but correct defects after confirming ownership
- Follow up with witnesses who were recorded to be at the scene of an accident or injury

Help with: Timely Documentation

- 01 To provide prompt and complete reporting, conduct the investigation of the accident or injury scene as soon as reasonably safe to do so
- 02 Create a standardized reporting form for public employees to complete and turn in to a central supervisor (recommended to a risk management department/director) within a certain time of an accident or injury
- 03 Make sure that the abovementioned reports are completed and reviewed for completeness and any deficiencies or questions are addressed earlier rather than later
- 04 Consider providing employees who operate motor vehicles with a camera which would remain in the vehicle, and/or revise any policies to include that an employee takes photographs of the scene and vehicles involved following a motor vehicle accident, if safe to do so

Help with: Maintaining the Records

- 01 Make sure all **maintenance records** for areas owned, controlled and possessed by your City, County and/or Municipality are routinely maintained and that such maintenance is recorded in a central location in the event that it needs to be reviewed.
- 02 **NOTE:** This only applies to properties that the City, County, and/or Municipality owns, controls or possesses. You are not expected to maintain property owned by the public entity but leased to other private parties.
- 03 Keep accurate and updated **employment records**. This is important because if an employee was involved in responding to or witnessing an incident or making a repair, they may be a witness later on in the case.
- 04 **NOTE:** This includes updating the employment records with their new contact information and new place of employment (if given) after they are no longer employed by the public entity.

Help with: Proper Documentation

- 01 It is important to obtain a written statement from ALL witnesses present at the scene
- 02 Ask each witness, **in separate interviews**, to tell you their own account of what happened
- 03 Repeat their version of the facts back to them and give them the opportunity to make any corrections or additions
- 04 Document that the facts recorded were repeated back to the witness/injured party and he/she was provided an opportunity to supplement/edit the facts provided; if applicable, record that “no additional facts or edits were provided/made at that time”
- 05 Make sure to maintain a list of all witnesses/injured parties/responding employees and their contact information, if possible

Help with: Proper Documentation

- 06 Remember that you are recording **that individual's version of the facts**. This may not be fact in and of itself. Keep in mind that how you record an incident may be read to a jury later on
- 07 With that in mind, if an individual tells you they saw something record it as "Individual says..." or if they say that someone else said something you may record it as "Individual says they heard someone else say..."
- 08 This same method should be applied to an injured party's testimony about their injuries. Instead of saying "Individual is in immense pain" record "Individual states she is in immense pain."
- 09 This also applies to causation. If an injured party tells you they were walking and tripped and they think it was over a crack in the sidewalk, record "Individual thinks she tripped over a crack in the sidewalk" rather than "Individual tripped over a crack in the sidewalk."

Help with: Photographic Documentation

- 01 Make sure that someone is designated to photograph the scene pre-injury areas and post-injury areas
- 02 It is recommended that you have a designated employee for this task rather than relying on random employees who happen to be at the scene; this makes it easier to locate all pertinent evidence if a suit is filed
- 03 If others are present and taking photos of the scene/injuries, there should be a log of names, contact information and the device they used to take the photos
- 04 This helps us identify all possible evidence that could be used in our case or could potentially be used against us later on by other parties

Help with: Following Up With Witnesses

- 01 It is important to follow-up with those who were listed as witnesses for an incident that you potentially were unable to get a full account from
- 02 This includes reaching out and documenting their statements accurately and properly as discussed before
- 03 These statements should be maintained and stored with the other evidence and fact-gathering that was completed for this incident
- 04 Routine follow up is recommended if the incident occurred several months/years prior with no movement in any filing

How Can We Help You

UNDERSTAND THE LAW

- What is an “Open and Obvious Condition” and how to mitigate hidden defects
- When to perform remedial measures?
- What you need to know about auto-negligence cases
- What is “Outside the Course and Scope” of a public employee’s employment

KNOW WHAT TO SAY

- It is important to know what to say and even what *not* to say to injured parties or plaintiff attorneys, we can help!
- This applies to public employees who respond to the scene
- Training should be provided as such

Understand: What is an Open & Obvious Condition?

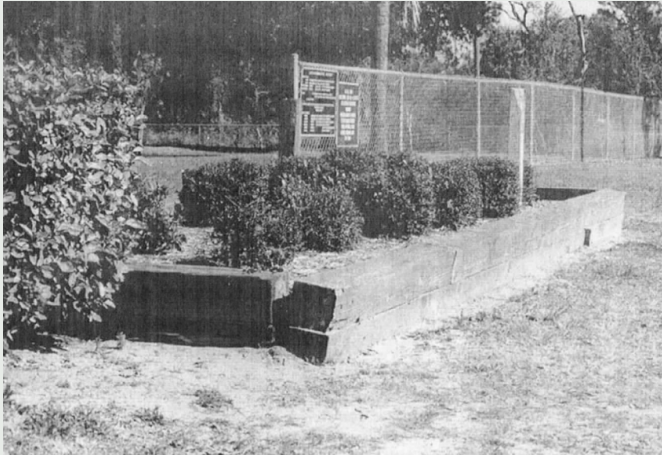
- 01 An open and obvious condition, **for which there is no duty to warn**, are those that should be obvious by the ordinary use of one's senses; whether a danger is open and obvious is determined from an objective, not subjective point of view. *Taylor v. Royal Caribbean Cruises, Ltd.*, 437 F.Supp. 3d 1255 (S.D. Fla. 2020). There is still a **duty to make safe** a premises. *Miller v. Slabaugh*, 909 So. 2d 588 (Fla. 2d DCA 2005).
- 02 Under Florida law, an invitee is obligated to exercise a "reasonable degree of care to observe open and obvious conditions." *Matson v. Tip Top Grocery Co.*, 9 So. 2d 366 (Fla. 1942).
- 03 Courts have applied this doctrine to a myriad of situations finding that, under the particular facts and circumstances of each case, the conditions which caused the injury were "simply so open and obvious, so common and so ordinarily innocuous, that they can be held as a matter of law to **not constitute a hidden dangerous condition.**" *City of Melbourne v. Dunn*, 841 So. 2d 504 (Fla. 5th DCA 2003)

Understand: What is an Open & Obvious Condition?

- 04 Generally, courts have held that under most normal circumstances, such conditions such as ordinary sidewalk curbs, uneven floor levels in public places and in homes, and uneven parking lot surfaces do not constitute, as a matter of law, latent or concealed dangers which would require an owner or occupier to comply with the general duty owed to invitees. They will “consider all facts and circumstances surrounding the accident and the alleged dangerous condition.” *Krol v. City of Orlando*, 778 So. 2d 490 (Fla. 5th DCA 2001).
- 05 For example, **landscaping features are usually open and obvious and therefore generally do not constitute a dangerous condition as a matter of law.** *Wolf v. Sam's East, Inc.*, 132 So. 3d 305 (Fla. 4th DCA 2014) (“As to the instant case, we find that tree roots in the landscaping areas were ‘so obvious and not inherently dangerous’ as to constitute a non-dangerous condition as a matter of law.”)
- 06 As in *Taylor v. Universal City Property Mgmt.*, 779 So. 2d 621, 622 (Fla. 5th DCA 2001), anyone who walks into a planter containing shrubbery and/or flowers with a large tree in the middle is held to know that this is a hazard to walking; the precise nature of the hazard need not be observable.

Understand: What is an Open & Obvious Condition?

- 07 Similarly, to the pedestrian who walked in the planter in *Taylor*, a 21x7x1 foot planter was a “glaringly open and obvious obstacle” for anyone walking out of the park and the plaintiff in *Dunn* “knew or should have known” that she mounted and walked on a foot-high planter built of timbers and filled with mulch and plantings.” The hazard was concluded to be known and the plaintiff had ample notice of the open and obvious hazard.



Understand: What is an Open & Obvious Condition?

- 08 A six-inch sidewalk curb located at a mall is not a concealed or latent danger. *Aventura Mall Venture v. Olson*, 561 So. 2d 319 (Fla. 3d DCA 1990).
- 09 A building owner did not have a duty to warn an air conditioning repair person that there were construction items on the second floor where the air conditioning unit was located, where the dark lighting conditions were obvious; it was the repair person's responsibility to provide the lighting necessary for the work, the building appeared to be under construction, and the pieces of pipe on which the repair person slipped were there to be seen upon any reasonable inspection of the work area. *Roberts v. Dacra Design Associates, Ltd.*, 766 So. 2d 1184 (Fla. 3d DCA 2000).
- 10 Empty pallet outside store exit was open and obvious condition and customer who fell over it could not prevail. *Brookie v. Winn-Dixie Stores, Inc.* 213 So. 3d 1129 (Fla. 1st DCA 2017).

Understand: What is NOT an Open & Obvious Condition?

- 01 Whether a condition is latent (hidden or concealed), so as to require an owner or occupant aware of the danger to warn an invitee, depends on whether a reasonable and prudent invitee, exercising due care, would observe the danger; a danger is latent, or hidden, **if it cannot be discovered by casual observation of the premises**. *Houk v. Monsanto Co.*, 609 So. 2d 757 (Fla. 1st DCA 1992). What constitutes a latent condition will vary depending on the site in question.
Examples include: hidden utility services such as power and drainage lines, mine shafts, soil contamination, etc.
- 02 For example, in *Krol v. City of Orlando*, the court held that an **open throat storm water drain** located adjacent to a sidewalk that is **difficult to see by pedestrians** stepping off the sidewalk is **not** open and obvious as a matter of law. 778 So. 2d 490 (Fla. 5th DCA 2001).
- 03 A pothole is not a natural condition, nor does it create a reasonable risk of harm, the pothole's obvious nature does not make it, as a matter of law, a reasonably safe condition for premises liability purposes. *Burton v. MDC PGA Plaza Corp.*, 78 So. 3d 732 (Fla. 4th DCA 2012).
- 04 A slippery algae condition on a boat launching ramp was not, as a matter of law, so open and obvious as to completely relieve the defendant from liability. *Metropolitan Dade County v. Yelvington*, 392 So. 2d 911 (Fla. 3d DCA 1980).

When to Remedy: Hidden Defects

- 01 Who is responsible for mitigating hidden or latent defects/conditions depends on who owns, possesses and controls the property at issue.
- 02 In some cases, responsibility for maintenance and mitigation of dangerous conditions is provided in the lease or rental agreement or a contract for service. It is important to check the language of such documents before engaging in any mitigation or repairs of a condition.
- 03 If the public entity does own, possess, control the property at issue and no agreement for maintenance exists otherwise, timely mitigation of the defect or dangerous condition should be made.

What to Know About: Auto Negligence

- 01 Ensure your drivers are properly qualified, credentialed, and trained
- 02 Drivers have a duty to drive responsibly to keep others on the road safe.
- 03 Multiple parties can be at fault – comparative negligence
- 04 Defending auto cases can be expensive

What is: Outside the Course & Scope of Employment

- 01 The General Rule: “an employer cannot be held liable for the tortious or criminal acts of an employee, unless they were committed during the course of the employment and to further a purpose of interest, however excessive or misguided, of the employer.” *Nazareth v. Hernandon Ambulance Serv., Inc.*, 467 So. 2d 1076, 1078 (Fla. 5th DCA 1985).
- 02 The state or its agencies and subdivisions may be held liable under the doctrine of *respondeat superior* for the wrongful acts of its employees pursuant to the waiver of sovereign immunity statute only if the employee was acting within the course and scope of his/her employment. Fla. Stat. § 768.28 (1).
- 03 An employee who deviates from his or her employment to engage in a personal errand is **NOT** within the scope of employment if an accident occurs before the employee returns to the course he or she was pursuing in the interest of the employer. *Ford v. Florida Dept. of Transp.*, 855 So. 2d 264 (Fla. 4th DCA 2003).
- 04 While there may be no prior knowledge by government officials of the particular conduct of an employee, nevertheless, a governmental entity might still be liable if the conduct is of the same general nature as that authorized or incidental to the conduct authorized. *Duyser by Duyser v. School Bd. of Broward County*, 573 So. 2d 130 (Fla. 4th DCA 1991).

What is: Outside the Course & Scope of Employment

- 05 The question of whether an employee is acting within the course and scope of employment, where the facts are not in dispute, is that of law. *Saullo v. Douglas*, 957 So. 2d 80, 86 (Fla. 5th DCA 2007).
- 06 Conduct of an employee is considered **WITHIN** the course and scope of employment, for vicarious liability purposes, when it:
- (1) is of the kind the employee is hired to perform;
 - (2) occurs substantially within the time and space limits authorized by the work to be performed, and
 - (3) is activated at least in part by a purpose to serve the master [Employer].
- Goss v. Human Services Associates, Inc.*, 79 So. 3d 127 (Fla. 5th DCA 2012).

What is: Outside the Course & Scope of Employment

07

For example, an employer does not owe a duty to persons who are injured by its employees while the employees are off duty, not then acting for the employer's benefit, not on the employer's premises, and not using employer's equipment. *K.M. ex rel. D.M. v. Publix Super Markets, Inc.*, 895 So.2d 1114 (Fla. 4th DCA 2005).

08

A college teacher was not acting within the course and scope of employment when taking a student and the student's daughter on an excursion, during which the student was injured and the daughter was killed in an accident in a van rented and driven by the teacher, so as to establish an agency relationship between the teacher and the college, where the term had ended at the time of the accident, college policy was that field trips could only be taken during scheduled class periods, and the teacher had already turned in grades, so the excursion did not affect the student's grades. *Fernandez v. Florida Nat. College, Inc.*, 925 So.2d 1096 (Fla. 3d DCA 2006).

Know: What to Say (and What NOT to Say)

- 01 It is important to remember what you know for certain and what you do not know for certain. It is important to only make a record and comment as to what you know for certain to be the true and accurate account of the events..
- 02 Do NOT make comments that admit liability or take responsibility. Avoid comments such as “I should have been watching..”; “I should not have made that turn..”
- 03 Do NOT make comments that speak generally about the public entity’s policies or procedures for how they typically require something to be done. Avoid comments such as “I am supposed to do..” or “I always do..” or “The City requires me to do..”

Summary

Practices for Initial Handling a Personal Injury Matter

- 01 Be diligent in your hiring and ongoing training of employees
- 02 Thorough and accurate documentation of event – reports, photographs, witness information