Premises Liability 101

General concepts on public property uses and potential liability concerns

Premises Liability and Negligence

- A premises liability claim is a negligence claim with the added elements of possession or control of the premises and notice of the dangerous condition.

Standard: Ordinary Negligence v. Premises Liability

To establish a claim of negligence under Florida law, Plaintiff must allege: (1) a duty, (2) breach of duty, (3) causation, and (4) damages.

Under general principles of ordinary negligence, the injured person must show the government owed a “duty of reasonable care” to them.

General principles

- It is person's status to the land which determines the government's duty and standard of care.
- Ordinary negligence involves active negligence – meaning the tort-feasor actually does something to harm the injured party, whereas premises liability involves passive negligence – meaning the tort-feasor's failure to do something to its property resulted in harm to the injured person.
- In addition to the negligence requirements of duty, breach, harm, and proximate cause, premises liability requires the landowner have notice of the dangerous condition.

How did I get here? - Legal status to the Land

- In premises liability matters, the determination of the level of duty owed, if any, to the person is based on their legal status to the land.
- Florida law classifies visitors to property in one of three categories:
- trespassers, licensees, or invitees.

Invitee

- An invitee is one who enters a premises for the purposes related to the business of the landowner or occupant.
- For an invitation to be reasonably implied, the landowner must conduct their business or arrange their property in such manner as to give the visitor reasonable belief they are welcome or invited for the visitor's intended purpose.
- "A public invitee is a licensee on the premises by invitation, either express or reasonably implied, of the owner or controller of the property."

Trespassers and Uninvited Licensees

A trespasser is one who without any right enters the premises of another for their own purposes, convenience, or "as an idler with no apparent purpose."

An uninvited licensee is a person who chooses "to come upon the premises solely for [his or her] own convenience without invitation either expressed or reasonably implied under the circumstances."

Barrio v. City of Miami Beach, 698 So. 2d 1241, 1243 (Fla. 3d DCA 1997) (quoting *Post v. Lunney*, 261 So.2d 146, 147 (Fla. 1972)).

Duty to an uninvited licensee or known trespasser

A duty to refrain from wanton negligence or willful misconduct which would injure him, to refrain from intentionally exposing him to danger, and to warn him of a defect or condition known to the landowners to be dangerous when such danger is not open to ordinary observation by the licensee.

See *Lane v. Estate of Morton*, 687 So. 2d 53, 54 (Fla. 3d DCA 1997) (quoting *Bishop v. First National Bank of Florida*, Inc., 609 So.2d 722, 725 (Fla. 5th DCA 1992)) (citing *Post v. Lunney*, 261 So.2d 146 (Fla. 1972)).

Fla. Stat. § 768.0755 – Premises Liability for transitory foreign substances in a business establishment.

Trespassing v. licensees

No trespassing signs are optional for an owner and allegations that a property is open to the public because there are no signs or fences are merely “bare conclusion” that does not rise to the level of a reasonably implied invitation.

A structure being open might constitute a general public invitation but not such that when an individual enters to serve only their own convenience that individual could believe the owner invited them for that specific reason.

Thus, one who enters for their sole personal benefit is a “mere licensee” who cannot elevate themselves to the protections of invitee.

Duty to Uninvited Licensee or Trespassers

- Fla. Stat. 768.075 – Immunity from liability for injury to trespassers on real property
  - Deals with intoxicated trespassers
  - Discovered and undiscovered trespassers
- The standard of care owed to the person would be that owed to a known trespasser or uninvited licensee:
- (1) “a duty to refrain from wanton negligence or willful misconduct which would injure” them; (2) a duty “to refrain from intentionally exposing [them] to danger;” and (3) to warn them a “defect or condition known” to the County “to be dangerous when such danger is not open to ordinary observation by the licensee.”

•Duty to Refrain from Willful and Wanton Misconduct and from Intentional Exposure to Danger

In order to show willful and wanton misconduct by the government; one must be able to identify conduct which demonstrated “reckless disregard” for their safety by the government.

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Dyals v. Hodges, 659 So. 2d 482, 484–85 (Fla. 1st DCA 1995).

Duty to Warn of Known Dangers that are Not Open and Obvious

- The duty to warn owed to uninvited licensees and trespassers is to exercise reasonable care to warn them of dangers which are hidden and that the uninvited licensee or trespasser "could not reasonably be expected to discover or appreciate."
    - *Zipkin v. Rubin Const. Co.*, 418 So. 2d 1040, 1044 (Fla. 4th DCA 1982).
- The *Zipkin* Court went on to state that there is no duty to warn of a danger that a reasonable person would have been aware of and avoided. *Id.* Thus, the landowner's knowledge must be superior. *Id.* (citing *Vermont Mutual Insurance Co. v. Conway*, 358 So.2d 123 (Fla. 1st DCA 1978)).
- There is no duty to warn when the dangers are "so open and obvious that an invitee may be reasonably expected to discover them and to protect himself."
    - *Denson v. SM-Planters Walk Apartments*, 183 So. 3d 1048, 1051 (Fla. 1st DCA 2015).

- Thus, there is no duty to warn an uninvited licensee unless a danger is both known to the landowner and not open to ordinary observation by the licensee.

Barrio v. City of Miami Beach, uninvited licensee duty

- *Barrio v. City of Miami Beach*, 698 So. 2d 1241 (Fla. 3d DCA 1997) - controlling case in Florida related to the status of uninvited licensees (known trespassers) and a duty to warn of criminal activity.
- Ms. Barrio was visiting a public beach after hours when she was robbed and shot in the face. Ms. Barrio claimed the city breached its duty to her by failing to warn her of previous attacks on the beach. The facts showed the beach was closed at night when the incident happened, no lifeguards were on duty, and the city did not do anything to entice Ms. Barrio to visit the beach at that time, or to prevent her from doing so.
- The Court stated Ms. Barrio could only be regarded as an uninvited licensee. The city did not breach any duty to Ms. Barrio because the city had no duty to warn an uninvited licensee because the "danger of crime and criminal assaults is an open and obvious danger for which there is no duty to warn."

Duty to Protect Invitee from Criminal Attack

- *As a basic principle of law, a property owner has no duty to protect one on his premises from criminal attack by a third person.*
- Even though one's negligence may be a cause in fact of another's loss, he will not be liable if an independent, intervening and unforeseeable criminal act also causes the loss.
- ***If, however, the criminal attack is reasonably foreseeable, a duty may arise between a landowner and his invitee.***
- But it must be borne in mind that *a landowner is not an insurer of the safety of his invitees and is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate.*
- "[A] governmental entity may be liable to an invitee for reasonably foreseeable criminal attacks committed by third parties on public property.
- A governmental entity's "duty to … an invitee on [its] premises [is] comparable to that which would arise in a case involving premises liability in the private sector".

Florida Statutes on Premises Liability

- Fla. Stat. 768.0701 - P**remises liability for criminal acts of third parties**
  - In an action for damages against the owner, lessor, operator, or manager of commercial or real property brought by a person lawfully on the property who was injured by the criminal act of a third party, the trier of fact must consider the fault of all persons who contributed to the injury.
- Fla. Stat. 768.0706 - Multifamily residential property safety and security; presumption against liability
- Fla. Stat. 768.0755 - Premises liability for transitory foreign substances in a business establishment
- Fla. Stat. 768.075 - Immunity from liability for injury to trespassers on real property

What are some of the issues we encounter?

Negligent Security Claims

- Third Party attacks
  - Do you want to have security or not?
  - If you do – must be reasonable for the circumstances
- Do you have knowledge of a dangerous condition?

Slip (Trip) and Falls

- Sidewalks
- Tile Flooring (inside and outside)
- Manhole covers
- Steps
- Walkways
- Boat Ramps
- Piers
- Playgrounds

Trip and Fall issues continued

- Was there notice?
- Was it created negligently?
- Followed building code?
- Has there been a failure to maintain?
- How was the repair?
- Can be no liability for design
- No requirement to upgrade

Responses to Natural Disasters

- Discretionary response to a natural disaster
  - When governmental entities must make decisions regarding how to use their use of finite resources, they are protected from second guessing by the judicial branch, or juries, by the doctrine of the separation of powers.
  - Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1018 (Fla. 1979); Kaisner v. Kolb, 543 So.2d 732, 788 n.3 (Fla.1989); City of Pinellas Park v. Brown, 604 So. 2d 1222, 1227 (Fla. 1992).
  - Has been used in Circuit Courts in Florida in relation to recovery from Hurricanes.

Injuries during non-sanctioned times or events

- What is the status to the land?
- Trespasser?
    - Known or unknown?
- Invitee?
- Uninvited Licensee?

Skateboarding and other rolling sports

- immune from liability pursuant to § 316.0085, Florida Statutes. See *Casserly v. City of Delray Beach*, 228 So.3d 135 (Fla. 4th DCA 2017).
- A governmental entity or public employee is not liable to any person who voluntarily participates in **skateboarding**, inline skating, paintball, or freestyle or mountain and off-road bicycling for any damage or injury to property or persons which arises out of a person's participation in such activity, and which takes place in an area designated for such activity.
- There are some exceptions in the rule,
- Must follow the requirements.
- Signage
- Specifically outlaw skateboarding in non-permitted areas

Playgrounds and Splash Pads

- A government is not an insurer of those who use the public parks, the government's duty in such case being only that of exercising due care under the circumstances.
    - For example, a city is required to provide a sufficient number of attendants for the protection of bathers at its bathing pool and to see that such attendants perform their duty and use the safety equipment provided for the protection of the bathers.
    - This duty does not, however, impose strict liability upon the government. Rather, it requires that a government maintain its parks in a condition reasonably safe for public use.
- A government's duty is fulfilled when the place is made as free from danger as such a place can reasonably be made, having regard to the contrivances necessarily used in conducting such a place.
    - *Payne v. City of Clearwater*, 155 Fla. 9, 19 So. 2d 406 (1944) (city not liable for plaintiff's slip and fall on a springboard at a bathing beach where plaintiff knew that the springboard was wet or likely to be made wet by splashing water in the usual and normal use of the springboard).

Playgrounds and Splash Pads (cont.)

- For a government to be liable for injury resulting from a defective condition in a park, there must be either actual knowledge by the government or its employees of the alleged defective condition, or the condition must be so open and obvious and exist for such a length of time that the municipality in the exercise of due care should have known of it and remedied it.
- Knowledge is important to create liability
- Cannot create the defective condition

Lagniappe! (a little something extra)

- **Duty to maintain right of ways**
  - Same elements apply
  - Notice, maintenance
  - Adds a foreseeability issue as to the damages.
  - Open and obvious?
  - Duty to warn of hidden dangers

“May you have a lawsuit in which you know you are right.”

-Spanish Gypsy curse

Questions?

Thank You