



Back To Basics: The Second District Court of Appeals Recently Reminded us that Premises Liability Claims are About More than Just Notice

By Richard Akin, II

One of the most common types of claims faced by business and property owners is a slip and/or trip and fall. While we are all familiar with the general law regarding premises liability, a recent decision from the Florida 2nd DCA serves as a reminder that business and property owners are charged with several duties in connection with the maintenance and care of their premises. Recently in **Tallent v. Pilot Travel Centers, LLC**, the Florida 2nd DCA reversed to the trial court's entry of Final Summary Judgment in favor of a premises owner, despite undisputed facts that the allegedly dangerous condition was known to the Plaintiff at the time of the accident. The Court went on to explain in its own words the important dichotomy between the duty of a property owner to warn and to maintain the premises in a reasonably safe condition.

FACTS OF CASE

In *Tallent*, a truck driver slipped and fell in a diesel fuel spill at the Defendant's service station in Punta Gorda, Florida. The Plaintiff filed a Complaint alleging the Defendant negligently maintained the premises, causing him to fall. The Defendant asserted that the condition was open and obvious and that its employees had complied with its fuel spill clean-up procedures. Testimony of the Plaintiff revealed that he was aware of and noticed the fuel spill which had been marked off by several trash cans, before he decided to walk through the middle of the fuel spill, and slipped and fell. The 2nd DCA explained that the Defendant had both a duty to use reasonable care in maintaining the property in a reasonably safe condition, and a duty to warn of dangers of which the Defendant either had or should have had knowledge and which were unknown to the Plaintiff.

The 2nd DCA went on to explain that these two duties are separate and distinct from one another. In other words, even where the property owner has no notice of a dangerous condition on its premises, it can still be liable for failing to maintain the premises in a reasonably safe manner. This second theory of recovery is known as the "negligent mode of operation" theory.

The 2nd DCA explained that because of the Plaintiff's testimony, and the large nature of the spill, the spill was open and obvious. As a result of the fact that the spill was open and obvious, there was no duty to warn the Plaintiff of the condition at the time of the accident. Therefore, the Plaintiff could not recover under his failure to warn allegations. However, the 2nd DCA reversed the trial court's award of summary judgment on the basis that there was evidence from which a jury could determine that the Defendant had failed to maintain its premises in a reasonably safe condition. The 2nd DCA explained that the record on appeal contained the testimony of the Defendant's head maintenance employee as to the usual and customary procedure for cleaning up fuel spills. However, the maintenance employee could not testify that he had personal recollection that he had followed that procedure on the day of the accident. In addition, the Plaintiff testified that he saw no barriers or indicia of cleaning materials in the area of the spill other than the trash cans used to block the aisles. Therefore, as explained by the 2nd DCA, issues of fact remained regarding whether or not the Defendant and its employees followed its clean-up procedures on the date of the Plaintiff's accident.

The holding in *Tallent*, emphasizes the difficulty in obtaining Summary Judgments in negligence causes of action, especially in slip and fall cases.

PRACTICAL APPLICATION

The holding also provides business and property owners with several tacit warnings regarding the maintenance of their premises:

1. It is important to ensure that all maintenance personnel follow the company's procedures for maintaining and cleaning spills.
2. In the event of an accident, it is important to contact the maintenance personnel in the area immediately following the accident in order to preserve their recollection of their actions on the day in question. For example, where maintenance personnel have followed the company's policies and procedures

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for maintaining the area, or for cleaning a spill, it is imperative that steps are taken to preserve the individuals' recollection for a future law suit. As defense lawyers, we are often faced with scenarios in which the employees and/or owners of a premises simply do not recall the incident in question, and have trouble remembering the steps they took in response to a spill or an accident. Likewise, they often cannot recall steps taken to clean the area prior to the spill. This makes the defense of the matter much more difficult, and inevitably creates issues of material fact for the Plaintiff to expose in preventing Summary Judgment.

3. This case serves as a reminder that business and property owners can still be held liable even when they did not have notice of a dangerous condition at the time of the accident. As explained in

Tallent, business and property owners can be found liable where their operation of the premises may have been such that it would generally put the business or property owner on notice that a dangerous condition was likely to occur.

Bottom line: It is imperative that business and property owners maintain a set of policies and procedures for maintaining their premises, and for responding to spills, and that employees follow those procedures at all times.

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Get to Know Bill Boltrek

What was your first job: Landscaping

How long have you been with Henderson Franklin: 1.5 years

What is your area of practice: Tort & Insurance Litigation

How do you help your clients? I practice negligence defense and represent clients in all aspects of defense. I represent everyone from homeowners to municipalities to the sheriff's department. I defend clients in slip and falls, motor vehicle accidents, defamation, and 1983 civil right actions. When people ask what I do, I tell them I

am the opposite of the lawyers you see advertising on TV, radio and newspaper. I defend the people, towns, and cities that they sue. I also practice some criminal defense, as I did that in my former legal career, before switching to the civil litigation, and I like to keep current with that type of law.

Your best source of referrals: Insurance adjusters

Most memorable case: I worked Night Court in Brooklyn from 1:00 am to 9:00 am handling criminal cases. It was fascinating to see all the "interesting" people that come through the system at night. For a civil case, it was a motor vehicle accident. The plaintiff became pro se midway through the trial and tried to testify and question himself at the same time.

What are you currently reading: *Unbroken*, by Laura Hillenbrand

Name two people (dead or alive) you'd like to have dinner with and why: Steve Jobs. I'd love to learn what he would have created if he had lived longer. My uncle who died in 9/11 to discuss what has occurred after he passed

What's your favorite gadget: My iPad.

Who would play you in a movie about your life: Chris Farley, if he was still alive.

If you had a magic wand: I would be the owner of an NFL Football team (preferably a winning one).

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Bill can be reached at 239.344.1299 or via email at william.boltrek@henlaw.com.



Bill is pictured above on the right with Mark Schultz and Traci McKee at the recent Summer Associate Farewell party.

RECENT VICTORIES

Mark Schultz recently obtained a defense verdict in a personal injury case in Lee County. The 10 day jury trial centered on allegations that a not-for profit water utility was negligent in accepting the water distribution system in plaintiffs' neighborhood and was negligent in providing acceptable quality drinking water to plaintiffs. Plaintiffs claimed to have suffered from Restrictive Airway Dysfunction Syndrome (RADS) as a result of drinking the potable water plaintiffs claimed contained biofilm. Defense experts, an engineer, physician and certified industrial hygienist, explained that the water distribution system was accepted properly, provided appropriate quality drinking water, did not contain biofilm and that plaintiffs did not suffer from RADS which could not be contracted via the ingestion of drinking water. The jury deliberated for 35 minutes before returning a defense verdict in favor of our client.

Michael Corso, Mark Schultz, and Robert Anderson recently obtained an order granting summary judgment in their client's favor in a case in Lee County. Mr. Corso represented an engineering firm that was providing construction engineering & inspection services ("CEI") for the owner of a roadway construction project. The case involved a natural gas line explosion accident at the construction site in which an employee of a road contractor sustained very serious injuries (20 year old plaintiff had burns over 75% of his body, survived, and had over \$2.5 million in medical expenses). The plaintiff sued the engineering firm and others for negligence. However, the court granted summary judgment in the engineering firm's favor based on the engineering firm being entitled to statutory immunity from the claim per Florida Statute 768.28(10)(e).

Robert Shearman and Richard Akin recently obtained a final order in a five day administrative hearing in favor of a Southwest Florida School Board. The administrative hearing involved claims under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act. The claims involved allegations of discrimination, retaliation, and failure to provide appropriate accommodations and services for the disabled claimants. The 45 page order from the State of Florida, Division of Administrative Hearings, found in favor of the School Board on all of the Petitioner's claims

J. Matthew Belcastro and **John Miller** successfully defended a federal court appeal. The plaintiffs claimed that they were owed a refund for sewer services and that their constitutional fundamental property rights had been violated. The trial court had dismissed plaintiffs' third amended complaint for failure to state a claim of denial of substantive due process. Defense counsel successfully defended the dismissal and the Eleventh Circuit Court of Appeals affirmed that ruling.

J. Matthew Belcastro obtained an affirmance of summary judgment entered in favor of defendants in a case alleging negligence by a real estate appraiser in overstating the subject property's

value. The defense was able to demonstrate that the plaintiff had no contractual relationship with the defendant and no other legal basis to rely upon the appraisal.

J. Matthew Belcastro obtained summary judgment for plaintiff who brought suit seeking a declaration of specific property rights and the applicability of certain subdivision restrictions. The declaratory judgment action resulted from an underlying case in which the parties owned property adjacent to one another and a dispute arose over whether certain subdivision restrictions applied to the plaintiff's property through the chain of title to the current owner, and/or whether the restrictions were enforceable and currently in effect. The trial court agreed that the defendant had no legal basis for enforcing the subdivision restrictions against our client's property

J. Matthew Belcastro successfully defended a lawsuit brought alleging tortious interference with a contractual relationship. The case arose out of contracts to sell real property, in which the plaintiff claimed damages in excess of \$10 million. Plaintiff alleged that defendants had schemed to induce a breach of the real estate contracts. The defense argued the real estate contracts had expired by their own terms, and that tortious interference cannot exist unless a valid contract can be enforced at the time of the alleged interference.

Stefani Norrbin successfully defended a business from claims that it had wrongfully towed an individual's car from the businesses premises. The Plaintiff claimed that the business did not have appropriate signs posted warning him that the car would be towed if left unattended. Ms. Norrbin successfully defended the claims by establishing that the car had been left in business's parking lot for over a week, and appeared abandoned.

Tips Team

Michael J. Corso, Chair
Richard B. Akin, II
Robert Anderson
J. Matthew Belcastro
William "Bill" Boltrek
Kelly Spillman Jablonski
William Kratochvil
Traci T. McKee
John Miller

Stefani Norrbin
Mark Schultz
Robert C. Shearman
Bruce M. Stanley, Sr.





John Lewis Retires

After working in the TIPS department for 33 years, longtime partner John Lewis retired in December 2013. Those of us who worked with John know him for his unwavering defense viewpoints and his oft repeated war stories. John tried more than 100 jury cases to verdict, all from the defense chair.

2014 Claims Defense Update Seminar

The annual Claims Defense Update Seminar will be held on Thursday, September 11, 2014 at the DoubleTree by Hilton Tampa Airport Westshore on 4500 West Cypress Street, Tampa.

As the State of Florida, Department of Financial Services, has instituted a new required "5-620 Adjuster 5 Hour Update Course," our September 11 seminar has been approved for same, along with 1.0 in Adjuster Optional (CEU324-c). The Florida Bar has also approved this course for 7.5 General and 1.5 Ethics CLE Credits, as well as 5.5 for Civil Trial Certification Credits. Online registration is available on our website: www.henlaw.com/news-events/eventspage/Claims-Defense-Update-Seminar/.

If you have any questions, please contact Gail Lamarche at gail.lamarche@henlaw.com. Thank you to Markham Norton Mosteller Wright & Co., P.A., our breakfast sponsor; and to Global Engineering and Scientific Solutions (GESS), our 2014 lunch sponsor.

Happy Birthday Mr. James Franklin Jr.!

Mr. James Franklin Jr., graduated from Fort Myers High School in 1942 and the University of Florida in 1949. He enlisted in the Navy in 1942 and served as acting chief quartermaster on a destroyer escort in the Pacific. After the war, Mr. Franklin finished his bachelor of law degree at the University of Florida in 1949. "I graduated on a Saturday night and came to work the next Monday morning. I didn't even have a desk; just sat at a big table next to all the office supplies with a manual Royal typewriter, which is still in my office today."

Throughout Mr. Franklin's career, he was dedicated to civic and community service. He was active in the Chamber of Commerce, served as Lee County Bar Association President and was a District Governor of

Rotary. Even though he retired in 1993, Mr. Franklin still visits the office every Tuesday afternoon and shares his experience and insight with other attorneys. One of those is Kelly Jablonski. Kelly shares "I was raised in Fort Myers, so it's really nice to be part of a firm that appreciates history and its elders." She's grateful for Franklin's deep institutional knowledge and time-honed insights. "One of the most important parts of having him there is his perspective from his years of experience. I don't know any other firm that has that. He's such a good communicator. It seems like nowadays, litigation can get so complicated and we get bogged down with experts and other things that Mr. Franklin did not need in order to get his job done. So he helps me focus on the fact that it's really all

about communication."

We take this moment to salute and celebrate Mr. James Franklin Jr. More photos from the birthday celebration can be found on our Facebook page.



Mr. James Franklin Jr. (right) with Bruce Stanley

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ATTORNEYS AT LAW

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