Legal Update

ROPER TOWNSEND SUTPHEN

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CAPITAL IMPROVEMENTS AND GOVERNMENTAL IMMUNITY

Even absent an express exception in Florida Statute §768.28 for discretionary functions, certain policy-making, planning, or judgmental governmental functions cannot be the subject of traditional tort liability. Planning level functions are generally interpreted to be those requiring basic policy decisions, while operational level functions are those that implement policy. When it comes to policy-making, planning, or judgmental-level governmental functions, absolute immunity attaches.

Planning and designing capital improvements, such as parks and playgrounds, are discretionary functions of government which are immune from tort liability and do not fall within the ambit of the waiver provisions of Section 768.28, Florida Statutes. However, when a governmental entity creates a known dangerous condition, which is not readily apparent to persons who could be injured by the condition, a duty at the operational level arises to warn the public of, or protect the public from, the known danger. The failure to fulfill this operational-level duty is, therefore, a basis for an action against the governmental entity.

Capital improvements on parks and governmental property are generally considered planning-level decisions. However, when the government creates a known hidden danger, the government has a duty to warn of said dangerous condition. Further, the government has a duty to maintain the capital improvements.

By: Jeffrey A. Carter

FLORIDA'S OPEN CARRY LAW RULED UNCONSTITUTIONAL

On September 10, 2025, the Florida First District Court of Appeal ("First DCA") decided *McDaniels v. State of Florida*, which overturned the State of Florida's ban on the open carry of firearms.

Previously, under Florida Statute 790.053, it was "unlawful for any person to openly carry on or about his or her person any firearm or electric weapon or device." A violation of the statute constituted a second-degree misdemeanor, punishable by up to sixty days in jail or a fine of up to $500.

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On July 4, 2022, McDaniels stood at a major intersection in downtown Pensacola, holding a copy of the United States Constitution and waving at vehicles that drove by with his other hand. He also had a loaded handgun tucked inside his pants using an inside-the-waistband holster, which was visible to anyone who passed by.

Several hours later, law enforcement arrived at the scene. McDaniels cooperated with law enforcement and stated that he wished to take this case to the Supreme Court. He had a valid concealed carry permit on him. Law enforcement advised him that concealed carry was lawful, but open carry was not. Law enforcement removed his firearm but returned his holster to him.

Officers obtained a warrant for McDaniels' arrest. On July 10, after learning about the existence of the warrant, McDaniels turned himself in. Prior to trial, McDaniels moved to dismiss the charge and to have Florida's Open Carry Ban declared unconstitutional under the Second Amendment to the United States Constitution. The trial court denied his motion, but certified this issue as a question to the First District Court of Appeal ("DCA") as one of great public importance.

On review, the First DCA noted that over the past two decades, the United States Supreme Court had decided several landmark decisions in the area of Second Amendment jurisprudence: *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); and *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). According to the First DCA, these decisions define the contours of the Second Amendment right and establish the framework by which firearm regulations must be judged.

Following *Heller* and *McDonald*, the First DCA noted lower courts generally settled on a "two-step" framework for evaluating Second Amendment challenges. Lower courts would determine if the challenged law regulated conduct within the scope of the Second Amendment, and if not unprotected, then courts would apply a "means end" test. Generally, this led to courts applying intermediate scrutiny, upholding laws that imposed only modest burdens if they advanced important governmental interests and were appropriately tailored to those objectives. However, the Supreme Court in *Bruen* stated this approach was improper, and Second Amendment claims must be resolved by text, history, and tradition alone. 597 U.S. at 19.

With these principles in mind, the First DCA noted that the Supremacy Clause of the United States Constitution binds state judges to abide by the federal Constitution despite any state law to the contrary. McDaniels only challenged Florida's Open Carry Ban solely under the Second Amendment to the United States Constitution, not Florida's Constitution. Although the Florida Supreme Court previously upheld Florida's carry law in 2017 in *Norman v. State*, 215 So. 3d 18 (Fla. 2017), the First DCA stressed that *Norman* was decided under the now rejected two-step framework. As a result, *Norman* was no longer controlling precedent. The First DCA evaluated the ban on open carry under *Bruen*'s text, history, and tradition standard.

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The State of Florida did not dispute that the Open Carry Ban targeted conduct protected by the Second Amendment's plain text. Nor did the First DCA believe it could credibly contend otherwise. The Second Amendment protects the right to "keep" and "bear" arms. *Bruen*, 597 U.S. at 31-32. The definition of "bear" arms extends to both carrying "upon the person" or to carrying "in the clothing or in a pocket." *Heller*, 554 U.S. at 584.

Next, under the historical tradition of firearm regulation, the First DCA held that the State was required to prove that Florida's Open Carry Ban was "relevantly similar to laws that [ ] tradition is understood to permit." *Bruen*, 597 U.S. at 29. The State of Florida failed to identify any Founding-era law that broadly prohibited the open carry of firearms in public. Nor did it cite to any historical regulation imposing a burden or justification comparable to Florida's Open Carry Ban. After conducting a historical analysis, the First DCA noted that the historical record did not show that the United States regarded concealed carry and open carry as interchangeable. The right to keep and bear arms did not extend to the carrying of weapons in secret, which was regarded as the practice of the cowardly and the disreputable, and was incompatible with the legitimate exercise of the right of self-defense. Open carry, by contrast, was understood to be the manner of bearing arms that gave full effect to the rights secured by the Second Amendment. *See Sinnissippi Rod & Gun Club, Inc. v. Raoul*, 253 N.E.3d 346, 360 (Ind. Ct. App. 2024) (Holdridge, J., dissenting).

After evaluating the text and history of the Second Amendment, the First DCA ruled that no historical tradition supported Florida's Open Carry Ban. This decision has effectively legalized open carry of firearms within the State of Florida.

By: David R. Jadon

11TH CIRCUIT REVIVES FREE SPEECH CLAIM AGAINST SUPERINTENDENT: A REMINDER ON VIEWPOINT DISCRIMINATION

In *Huggins v. School District of Manatee County, 2025 WL 2374371* (11th Cir. Aug. 15, 2025), the Eleventh Circuit revived First Amendment claims against a school superintendent who ordered a community member removed from a board meeting after he criticized her handling of a charter school.

Plaintiff-Appellant Arthur Huggins criticized Defendants-Appellees, the School Board of Manatee County, Florida, and District School Superintendent Cynthia Saunders's decision to take control of a local charter school and to remove its administration. According to Huggins, Saunders prevented Huggins from speaking at a public board meeting and arranged, through the school district's Chief of Security, Paul Damico, to have City of Bradenton Police Officer Adam Wollard remove Huggins from the meeting before he had a chance to give his comments. Huggins sued and brought several claims against the Board, the City of Bradenton, and individuals involved. The district court dismissed Huggins' complaint for failure to state a claim, and Huggins appealed the dismissal of his First Amendment claims and the district court's denial of leave to amend his complaint a second time.

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The district court had dismissed all claims, finding qualified immunity barred liability. Qualified Immunity shields government officials performing discretionary functions from civil liability unless their conduct violates clearly established statutory or constitutional rights that a reasonable person would have known about. *Baker v. City of Madison,* 67 F.4th 1268, 1278 (11th Cir. 2023). On appeal, however, the Eleventh Circuit held that the superintendent had failed to meet her initial burden of showing that she acted within the scope of her discretionary authority. Under Florida law, only the presiding officer—not the superintendent—has authority to order removal of disruptive attendees.

The government may restrict speech in a limited public forum only if the restrictions are both (1) reasonable in light of the forum's purpose and (2) viewpoint neutral. *McDonough v. Garcia*, 116 F.4th 1319, 1329 (11th Cir. 2024). The court found that Saunders knew the opinion Huggins wished to convey, ordered his removal, and did so because of Huggins' viewpoint. The allegations supported the reasonable inference that Saunders removed Huggins because of his "specific motivating ideology, opinion or perspective." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

For Huggins to allege a First Amendment Retaliation claim he has to meet three requirements: (1) he engaged in constitutionally protected speech, such as his right to petition the government for redress; (2) the defendant's retaliatory conduct adversely affected that protected speech and right to petition; and (3) a causal connection exists between the defendant's retaliatory conduct and the adverse effect on the plaintiff's speech and right to petition. The court found that Huggins presented sufficient evidence to demonstrate that the alleged retaliation would deter a person from exercising their ordinary firmness, and his dismissal from the meeting indicated that Huggins would face a difficult choice if he attempted to express his views at a future meeting. Saunders also offered no viable alternative rationale for removing Huggins and did not identify any way in which Huggins violated the decorum policy applicable to Board meetings. Accepting the complaint's allegations as accurate, the court concluded that directing the removal of a speaker in this context reasonably amounted to viewpoint discrimination and retaliation.

While the claims against the superintendent were reinstated, the court affirmed dismissal of claims against other defendants. The board's chief of security and a police officer were shielded by qualified immunity because there were no allegations that they knew of the plaintiff's viewpoint. The communications director was likewise immune from disseminating a video tying the plaintiff's removal to other public meeting disruptions. And the board and city were not subject to municipal liability under *Monell (*a municipality does not incur Section 1983 liability solely because of its employer-employee relationship with an alleged wrongdoer) *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692-94 (1978).

This opinion highlights two critical points: (1) qualified immunity requires a threshold showing that the official acted within the scope of discretionary authority—failure at that step ends the defense; and (2) allegations of viewpoint-based retaliation at public meetings will survive dismissal if they are tied to clearly established First Amendment protections. For public bodies, the decision serves as a reminder that the safest course is to adhere strictly to statutory authority and to ensure that decorum rules are applied in a viewpoint-neutral manner.

By: Pausha Taghdiri

FLORIDA COURTS CONTINUE TO HOLD THAT DEFENDANTS DO NOT OWE A DUTY TO PLAINTIFFS WHO ARE INJURED WHILE WALKING IN AREAS NOT DESIGNED OR INTENDED FOR PEDESTRIAN FOOT TRAFFIC

Recently, in the case of *Sierra Orlando Props., Ltd. v. Allen*, the Sixth DCA reversed the trial court's denial of a motion for directed verdict wherein a Plaintiff was injured when she stepped through an unstable lid to an irrigation box which was located within a grassy area of a median adjacent to a sidewalk in a parking lot. In reversing the trial court's denial, the Sixth DCA discussed the duty that a premise owner owes to an invitee stating, "This duty owed to business invitees 'extends to all portions of the premises *which are included within the invitation* and which it is necessary or convenient for the invitee to visit or use in the course of the business for which the invitation was extended, and at which his presence should therefore reasonably be anticipated, or *to which he is allowed to go*.'" *Sierra Orlando Props., Ltd. v. Allen*, No. 6D2023-2448, 2025 WL 2423831, at *3 (Fla. 6th DCA Aug. 22, 2025) (citing *Morris v. Cap. City Bank*, 403 So. 3d 369, 373 (Fla. 1st DCA 2025) (quoting *Hall v. Holland*, 47 So. 2d 889, 892 (Fla. 1950)).

The evidence in the case on appeal demonstrated that the Plaintiff injured herself after stepping over a curbed barrier and onto the lid of an irrigation box in an unpaved, grassy median. The facts further demonstrated that there was a sidewalk adjacent to the parking lot for pedestrians to use when walking from the parking lot to the nearby building. The sidewalk was two parking spaces away from Plaintiff's car; however, she testified that she chose to negotiate the grassy median, rather than use the sidewalk, because it was closer to her truck.

The Plaintiff argued that because there was evidence that showed the grass was worn down in the median, and that it looked like people had previously walked through it, the Defendant was on notice that this grassy area was used for pedestrian traffic.

However, the Sixth DCA argued that the analysis does not hinge on whether pedestrians may have used the area as a walkway previously, but rather whether the Defendant *invited* or *allowed* pedestrians to use the area as a walkway. Here, the Court stated that the fact that there was an adjacent sidewalk undermined the Plaintiff's argument that the grassy area was intended for pedestrian use.

Ultimately, the 6th DCA based its reversal on the longstanding principle of Florida law contained in the *Dramstadt* case, that there is simply no duty of care owed to pedestrians walking in an area not intended to be used as a walkway, and that pedestrians "use such areas … at their own risk." *Id*. (quoting *Dramstadt v. City of W. Palm Beach*, 81 So. 2d 484, 485 (Fla. 1955).

By: Chris Prusinowski

FIRM SUCCESS

Court Strikes Plaintiff's Claim for Lost Profits and Consequential Damages in Breach of Contract Claim Against Local Housing Authority Reducing Potential Liability by Nearly $2 Million

Attorney Chris Prusinowski recently obtained a favorable ruling on a Motion for Partial Final Summary Judgment as to Plaintiff's claims for contractual damages against a local housing authority stemming from an alleged breach of a construction agreement.

The Plaintiff, a contractor hired by the housing authority, who was subsequently terminated, sought damages for an alleged breach of a construction agreement. Among the damages sought by the Plaintiff were lost profits, and consequential damages, including specifically - compensation for additional damages to Plaintiff allegedly stemming from the cancellation of two large contracts between the Plaintiff and other entities, which were allegedly terminated by those other entities as a result of the Defendant housing authority's termination of the contract with the Plaintiff. The Plaintiff claimed that the cancellation of those contracts resulted in losses of approximately $2 million. Plaintiff also claimed that its lost profits, and other damages, as a result of the Defendant terminating it were approximately $500,000.00; bringing the Plaintiff's total claim to damages to approximately $2.5 million.

However, the contract between Plaintiff and the housing authority expressly stated that the housing authority would not be liable for any indirect, incidental, consequential, or exemplary damages. Furthermore, the contract also expressly stated that in the event the housing authority elected to terminate the contract, it would only be liable for payment of services rendered before the effective date of termination.

The Court agreed with defense counsel's interpretation of the contract, and its application to the facts of the case, thereby granting the Motion, and striking the Plaintiff's claim to lost profits and consequential damages. The striking of the aforementioned damages sought by the Plaintiff eliminated approximately $2 million from the amount of damages potentially available to the Plaintiff, if they were to succeed on their cause of action.

FIRM SUCCESS

First DCA Affirms FCHR's Dismissal of Former Employee's Discrimination Complaint

On September 16, 2025, the First District Court of Appeal affirmed the Florida Commission on Human Relations' ("FCHR") Final Order dismissing a former employee's complaint alleging sex and disability discrimination. The matter commenced with the employee's filing of a Charge of Discrimination, which the FCHR investigated and ultimately dismissed. The complainant then sought review, leading to a formal administrative hearing before the Division of Administrative Hearings. Following an evidentiary hearing, the Administrative Law Judge issued a Recommended Order finding no evidence of unlawful discrimination or retaliation by the employer. The FCHR ultimately adopted the Judge's findings and conclusions and dismissed the discrimination complaint with prejudice.

Firm attorneys, Cindy A. Townsend and Farideh E. Tadros, provided zealous representation throughout the proceedings and successfully secured the favorable decision from the First DCA.

Firm Secures Arbitration Victory for Employer in Labor Dispute with Teamsters Local 79

Our firm is pleased to announce a decisive victory in a recent labor arbitration against Teamsters Local 79. The Union alleged that the employer violated the collective bargaining agreement by requiring Controllers to answer after-hours customer service calls, which the Union claimed was the exclusive work of another bargaining unit. Two consolidated grievances were brought forward: one challenging the assignment of the calls and another alleging that the employer failed to honor a prior settlement agreement.

Attorneys Chris Prusinowski and Jamie McManus represented the client throughout the lengthy arbitration process. Following multiple days of hearings and post-hearing briefing, the arbitrator issued an Opinion and Award fully dismissing the Union's claims. This result represents a significant affirmation of management's contractual rights and preserves the employer's operational flexibility in managing its transportation system. The ruling also protects the client from costly and duplicative staffing burdens that could have resulted had the Union's grievances been sustained.

We congratulate Chris Prusinowski and Jamie McManus for their outstanding preparation and advocacy, which led to this important win for our client. Their work underscores the firm's depth of experience in labor and employment law, particularly in defending employers in complex arbitration proceedings.

FIRM NEWS

WELCOME TO THE FIRM!

Roper Townsend Sutphen proudly announces:

Joshua D. Roth
Partner

Josh's practice will include the representation of clients in governmental liability, insurance coverage, civil rights, premises liability, wrongful death, bodily injury and wrongful death, automobile negligence, appellate practice and employment law.

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