Legal Update
ROPER TOWNSEND SUTPHEN
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JACKSON V. FDOT: SIDEWALKS GET SAFER FOR GOVERNMENTS IN THE FIFTH

Sidewalk litigation is both difficult and frustrating for the owners of the premises—particularly when the owner is a government entity. Cities, counties, and state organizations are often responsible for miles of sidewalk and lack the resources to regularly inspect and maintain them in the pristine condition it feels like litigants, and sometimes courts, expect. Inevitably, a pedestrian falls on a small misalignment in a sidewalk, never reports the alleged defect, and then the entity is served with a lawsuit months or even years later and forced to try and figure out what happened. Thankfully, the Fifth District Court of Appeal—creating binding precedent for several counties in northeastern Florida including Brevard, Volusia, and Flagler Counties to name a few—just made sidewalk litigation a little easier for government entities with its decision in *Jackson v. Florida Department of Transportation*, 2025 Fla. App. LEXIS 7638, 2025 WL 2881680 (Fla. 5th DCA, Oct. 10, 2025). *Cont'd 3*

COVID-19 RESTRICTION CASES ARE STILL PLAYING OUT IN THE COURTS

On April 2, 2020, in the height of the COVID-19 shutdowns, Walton County enacted an ordinance temporarily closing all beaches, public and private, and making it a criminal offense for anyone to enter or remain on any beach in the county. The ordinance affected private beachfront property owners who were prevented from accessing their own property. To enforce the ordinance, law enforcement patrolled private beaches, threatened owners with arrest, and forced them to leave their property. The ordinance was prompted by the Governor's issuance of numerous executed orders related to the COVID-19 pandemic. In operation, the ordinance had an effect inconsistent with other activities still allowed under pandemic restrictions. In other words, landowners could not walk or swim on their beachfront private property, but landowners could walk, swim, and engage in other recreational activities in public and private places. The ordinance also affected property owners in different ways. For example, some landowners could not access any part of their property because their entire parcel qualified as part of the "beach" under the ordinance's definition, while others owned parcels that were partly "beach" and partly adjacent to the beach. The ordinance forbade those landowners from entering and remaining on significant portions of their private property. *Cont'd 2*

The Alfords, along with other landowners, filed suit against Walton County asserting that the ordinance restricting use of their private property was an unconstitutional taking under the Fifth Amendment. While the case progressed in court, Walton County enforced the ordinance and essentially used the landowners' private property as a highway, crossing the properties multiple times an hour, parking vehicles on the properties and confronting landowners to threaten arrest. In one instance, officers threatened to arrest a landowner for walking on his private property, insisting that the ordinance took precedence. Overall, landowners were told that they could not access their property and then were in fact prevented from doing so, multiple times over the course of the month of April. The ordinance expired on April 30, 2020 and was not renewed. The private beaches in Walton County have remained open since the expiration of the ordinance and public beaches also remained open. The lower court granted summary judgment in favor of Walton County, noting that the ordinance was enacted during the COVID-19 pandemic and finding that Walton County had the authority to take measures to address the national health emergency. Also, given that the ordinance had expired, the lower court determined the claims were moot.

On appeal, the 11th Circuit considered whether the claims arising from the ordinance were moot and also whether the ordinance that prohibited all access to privately-owned beaches constituted a "taking" under the Fifth Amendment. The County argued that the landowners still had authority to exclude other, non-County officials from their property, the landowners could still use part of their property, and that, at best, the taking was merely temporary. The Court held that the claims as to the ordinance were in fact moot, given the ordinance had long since expired and there was no evidence the County would enforce the ordinance in the future. However, the Court held that this case was a "textbook" violation of the takings clause. When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the owner, regardless of whether the interest taken is an entire parcel or merely a part thereof. As the Court pointed out, there is no COVID exception to the takings clause and the government must respect constitutional rights during public emergencies. Ironically, landowners were barred from their own properties under threat of arrest while Walton County officers physically appropriated the same property for the specific purpose of excluding the landowners. Ultimately, even if Walton County had a legitimate reason to appropriate the property use, it must pay for what it took, even during a public health emergency. The order granting summary judgment was reversed and the case was sent back to the trial court for further proceedings on the finding of a taking and determination of the compensation due to the landowners.

What's the takeaway here? While the ordinance expired more than five years ago, the cause of action was not extinguished simply because the ordinance is no longer in effect. There is no exception to the takings clause for a government-authorized physical invasion of private property, even when temporary and despite the significant public health emergency presented by the COVID-19 pandemic.

By: Jennifer C. Barron

The plaintiff in *Jackson* sued the Florida Department of Transportation ("FDOT") and a private infrastructure company after she fell on a sidewalk where the circumstances are just too good not to describe:

> After Jackson purchased beer and cigarettes at a Speedway gas station on Lane Avenue in Jacksonville, Florida—a location a block from her residence that she visited almost daily—she was walking home on a sidewalk with her leashed chiweenie dog and carrying her purchased items. This sidewalk was on public right-of-way and unconnected to any structure. "The next thing [she] knew, [she] was going down to the ground" suddenly and without warning.

Beyond this description, the plaintiff testified, "she tripped on an expansion joint of the sidewalk where one section of the concrete was approximately ¾ of an inch higher than the adjacent section." The Court's opinion included a photograph that looks like the one every risk manager has seen sent to them in sidewalk litigation. Beyond this testimony, and as the Fifth District Court of Appeal noted *a mere two-and-a-half years later*, the plaintiff hired an expert to inspect the sidewalk. This expert relied upon portions of the Florida Building Code in rendering an opinion, "that the uneven sidewalk constituted a tripping hazard because the vertical misalignment at the expansion joint was greater than ½ inch."

The defendants moved for summary judgment in the trial court, arguing the vertical misalignment was so minor that it was not inherently dangerous and therefore created no duty of care to maintain. The trial court granted this motion, holding the vertical misalignment, "was 'so open, obvious and ordinary so as to be innocuous as a matter of law.'" Moreover, the trial court concluded that the Florida Building Code did not apply to the sidewalk misalignment in the case, rendering the testimony of the plaintiff's expert inapplicable as well. Morgan & Morgan appealed on the plaintiff's behalf, and the Fifth District Court of Appeal ("Court") affirmed the grant of summary judgment and dismissal.

The Court wasted little time reaching its conclusion and announcing what can be interpreted as a bright-line rule regarding a sidewalk owner's duty when it comes to a "vertical misalignment":

> We affirm the trial court's conclusion that the minor vertical misalignment at the expansion joint of the sidewalk where Jackson fell is "so open, obvious, and ordinary" that it does not constitute a dangerous condition as a matter of law. Some conditions are 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 dangerous condition. The less-than-one-inch vertical misalignment in the sidewalk here is simply commonplace and is of such a slight and inoffensive nature that it does not present a dangerous condition to pedestrians walking thereon.

But the Court went further. The Court went on to address the lower tribunal's dismissal of plaintiff's expert's application of the Florida Building Code to sidewalks, an application increasingly seen amongst those litigating sidewalk cases and "vertical misalignments." Here again, the Court was direct in announcing its conclusion:

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> Here, the trial court was correct to reject the expert's opinion and conclude the building code was not applicable to this case. The express scope of the code prohibits its application to the right-of-way sidewalk where Jackson fell. Further, the expert was unable to provide any support for his novel interpretation applying the building code to a public sidewalk unconnected to any building or structure. His view would have the effect of extending the Florida Building Code to cover the thousands of miles of public right-of-way sidewalk across the state of Florida. Such a strained approach paves a path far too wide and stretches the building code far too long.

The *Jackson* decision represents substantial precedent and opportunities for those entities defending sidewalk litigation within the jurisdiction of the Fifth District Court of Appeals. First, the "less-than-one-inch vertical misalignment" announcement seems to signal any sidewalk claim where the misalignment is less than an inch high is ripe for a motion for summary judgment on the theory and precedent that such a defect does not create a duty to warn or maintain on the owner. Second, the Court's conclusion that the Florida Building Code is not applicable to sidewalk misalignments warrants a motion in limine challenging any attempt to admit the Code, or testimony based upon it, into evidence.

It is certainly possible the Fifth District Court of Appeal will find a case with less egregious circumstances to walk back the pronouncements made in *Jackson*. The directness and brevity of the opinion certainly reads as though the Court was somewhat offended by yet another "sidewalk" case by a plaintiff carrying beer and cigarettes while walking a "chiweenie dog." Until then, however, entities and owners of sidewalks best familiarize themselves with the *Jackson* holding and use it to attack claims, and expert opinions, that fit within its parameters and make sidewalk litigation a little safer for those groups.

By: Ryan Williams

UNDER FLORIDA LAW COVENANTS AND RESTRICTIONS AND PLAT NOTES ARE NOT ENFORCEABLE AGAINST GOVERNMENT ENTITIES

In 1955, the Florida Supreme Court considered whether subdivision plat restrictions, which prohibit the erection of any buildings other than residences, duplexes, apartments, and hotels, on lots of the subdivision, can be enforced against a government entity. *The Board of Public Instruction of Dade County v. Town of Bay Harbor Islands*, 81 So.2d 637 (Florida 1955). The litigation arose out of opposition to the construction of a public school on a property with a plat restriction that prohibited the use of the property for school purposes. *Id.* at 638. The court first determined, as acknowledged by Plaintiffs' Motion for Summary Judgment, that restrictive covenants are more properly classified as rights arising out of contract and are not considered property rights. *Bay Harbor* at 640. The court took time to analyze the matter from the standpoint of the government's power of eminent domain, opining that each landowner holds his estate subject to the public necessity for the exercise of the right of eminent domain for public purposes, and such a government power cannot be evaded by an agreement between a landowner and his neighbor. *Id.* at 643. In other words, landowners may so contract to control their private affairs, increasing the value of their estates; however, they are not entitled to contract to control the actions of the government. *See id.* The court reasoned that if such subdivision restrictions constituted a property interest for which compensation must be made, every time a roadway was to be extended or enlarged through a subdivision having restrictions, consent from every property owner in the subdivision would have to be obtained prior to any such improvement being made. *Bay Harbor* at 644. Ultimately, the court determined that it would place an intolerable burden on the public, out of proportion to those individuals who might be entitled to compensation, for the government to be subjected to such private agreements. *Bay Harbor* at 643. The decision made by the Florida Supreme Court in 1955 still stands firm today – subdivision restrictions may not be enforced against a government. *Bay Harbor* at 644.

In 1982, the Supreme Court of Florida considered the matter of the enforceability of covenants against the government again when the Fourth District Court of Appeal certified a question of great public importance as follows:

> "DO RESTRICTIVE COVENANTS AFFECTING THE USAGE OF LAND APPLY TO A PUBLIC BODY WHICH ACQUIRES THE LAND BY PURCHASE AS OPPOSED TO ACQUISITION BY EMINENT DOMAIN?"

Ryan v. Town of Manalapan, 414 So.2d 193 (Florida 1982). The *Ryan* Court found that the District Court's question had been answered twenty-seven years earlier in the *Bay Harbor* case, wherein the court concluded that plat restrictions could not be enforced against the school district, which had acquired the land. *Id.* at 195-196. Nonetheless, the *Ryan* Court analyzed the issue presented based on the facts before it and easily determined that if property is acquired by a government for a public purpose, regardless of the arrangement, any restrictive covenants on the deeded property are not enforceable against the government. *Id.* at 197.

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Even more recently, in 2024, the Fourth District Court of Appeals considered the applicability of both *Bay Harbor* and *Ryan* when determining whether the construction of a marina and parking lot violated a "buffer zone" restrictive covenant that was agreed to by the City of Hallandale Beach in 1969 in order to settle the lawsuit. In analyzing *Bay Harbor*, the court highlighted that restrictions do not vest in owners of other lands in a subdivision where the lands are devoted to a public use, even though the public use is inconsistent with the use to which the lands are restricted by private agreement. *Vazquez v. City of Hallandale Beach*, 391 So.3d 439 (Fla. 4th DCA 2024). Interestingly, the Fourth DCA actually distinguished the facts before it from the facts of *Bay Harbor* and *Ryan* because the City did not simply acquire the land with the restriction in place from third parties, but the City was an active participant in placing the restriction. Nonetheless, the district court, reluctant in its decision due to the fact that the City had agreed to and was an active part of creating the restrictive covenant, held that pursuant to Florida Supreme Court precedent, restrictive covenants do not run with the land to encumber a government entity's use of its property. *Id.* at 440-441.

This deeply rooted line of caselaw was put to the test again at the end of 2025, and Roper Townsend Sutphen secured Summary Judgment on behalf of a Community Development District (CDD). A property owner filed suit against the CDD, attempting to enforce plat notes and Covenants and Restrictions following a joint project wherein the CDD and the Homeowners' Association constructed a playground on property that was labeled as "open space" on the subdivision plat and wherein the Covenants and Restrictions for the subdivision prohibited construction of structures on common property. The Trial Court entered Summary Judgment in favor of the CDD based on the above principle of law. A notice of appeal was filed with the Sixth District Court of Appeals; however, prior to filing an initial brief, the appeal was voluntarily dismissed. This critical line of caselaw stands undisturbed.

By: Sherry G. Sutphen

LIABILITY FOR "BAD DOGS"

How strict is Florida's Dog Bite Statute and when does such strict liability attach? The Florida Supreme Court found that when a plaintiff asserts a claim for strict liability based on Florida's "dog bite statute" contained in Fla. Stat § 767.04, it supersedes the common law for situations that are covered by the statute (dog bites). *Belcher Yacht, Inc. v. Stickney*, 450 So.2d 1111, 1112 (Fla. 1984). The statute cuts two ways: it imposes absolute liability upon the dog owner when the dog-bite victim is in a public place or lawfully on or in a private place except when the dog is carelessly or mischievously provoked or when the owner had displayed in a prominent place on the premises a sign easily readable, including the words "Bad Dog." *Id* at 1113.

But what about situations where someone owns certain property but not the canine that causes injury?

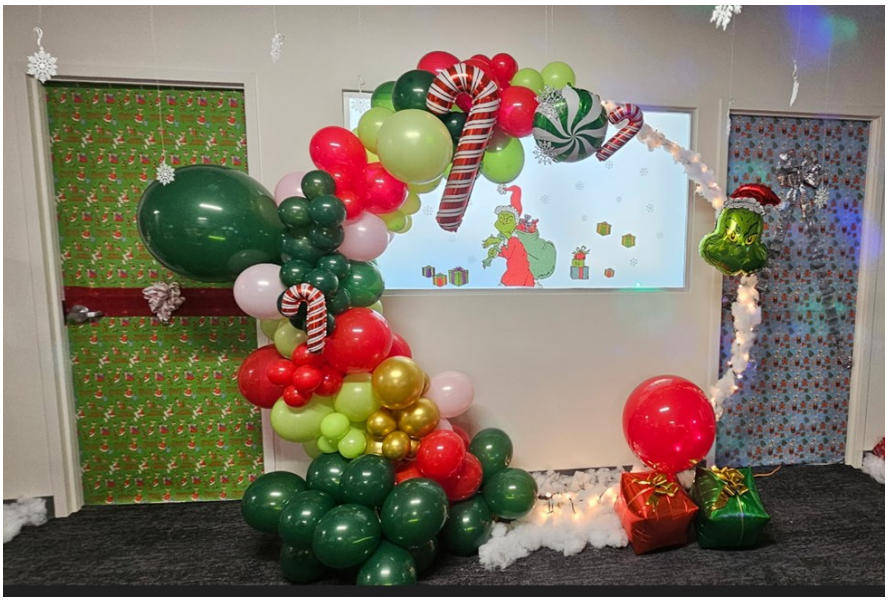
Although the so-called "dog bite" statute, section 767.04, Florida Statutes controls actions against a dog's owner, actions against a non-owner must be brought upon a theory of common law liability. *See Tran v. Bancroft*, So.2d 314, 315 (Fla. 4th DCA 1995); *Noble v. Yorke,* 490 So.2d 29 (Fla.1986). It is well established that unless a landlord has actual knowledge of the vicious nature of a tenant's dog, or such knowledge can be imputed to the landlord, there is no liability to third persons for injuries caused by the tenant's dog. *Bessent by and Through Bessent v. Matthews*, 543 So.2d 438, 39 (Fla. 1st DCA 1989). Further, when a landlord has no right to control access by third parties on the premises and the tenant has taken possession, the tenant has the continuing duty to keep it safe. *Bovis v. 7–Eleven, Inc.*, 505 So.2d 661, 663–4 (Fla. 5th DCA 1987).

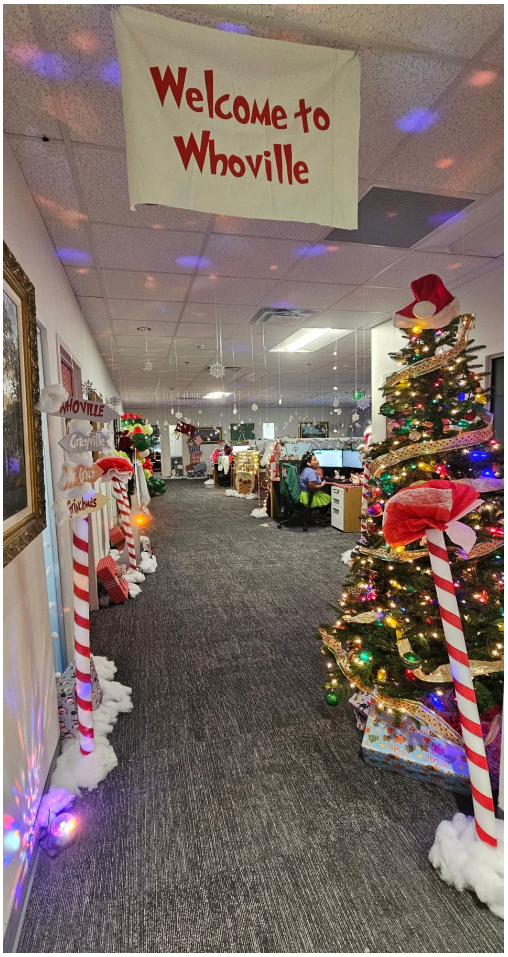
The authority is well settled, that a landowner must be aware of the "vicious nature" of the dog. Further, when a landowner has no right to control access to the subject property, it is the responsibility of the tenant to ensure the property is kept safe. To put it plainly, no knowledge, no control, no liability.

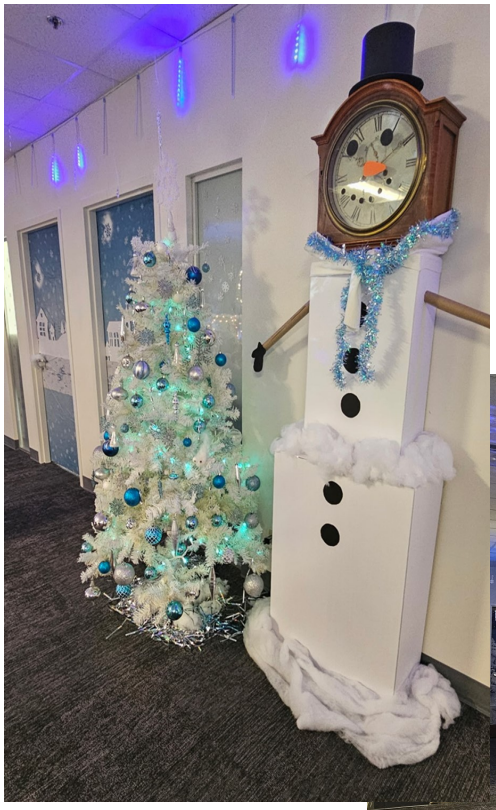
By: David A. Belford

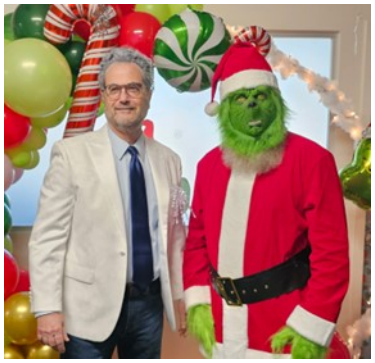
FIRM NEWS

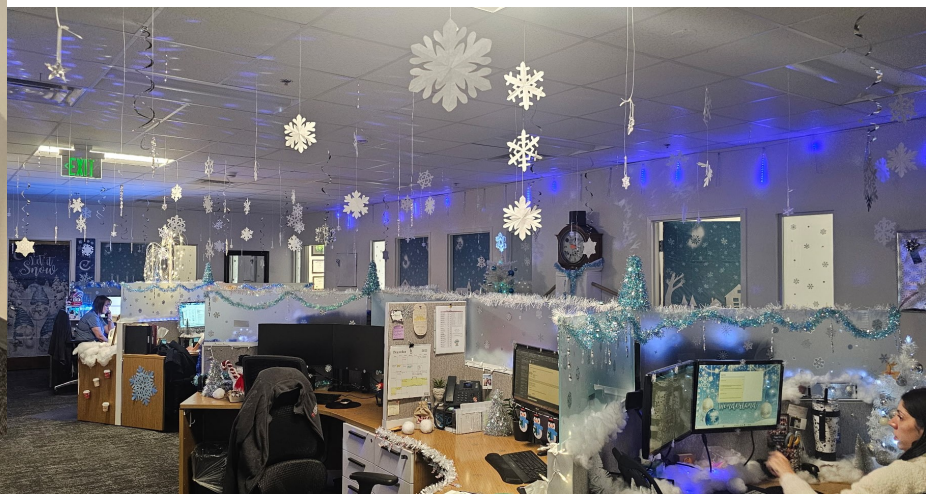
Holiday cheer was in full swing at Roper Townsend Sutphen as our offices were transformed into a festive holiday escape. From a Winter Wonderland in the South Pole to Whoville in the North Pole, the season was capped off with special appearances by Jack Frost and The Grinch.











FIRM SUCCESS

SUCCESSFUL DEFENSE CONFIRMS CDD'S AUTHORITY TO SERVE THE PUBLIC

Attorney Sherry G. Sutphen successfully secured a Final Summary Judgment on behalf of a Community Development District (CDD), with the Court dismissing all claims brought by neighboring property owners. The Court affirmed the CDD's statutory authority to use its property for public purposes and held that private covenants and restrictions and plats cannot override a CDD's governmental powers. This decisive ruling protected the CDD's ability to serve the public interest and brought the litigation to a complete and favorable conclusion.

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