Handbook of Florida Fence and Property Law: Visitors and Responsibilities to Visitors[1]

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Preface

With approximately 19,000 livestock farms in the state, along with horse farms; orange groves; croplands of soybeans, sugarcane, cotton, and peanuts; and many other agricultural and livestock facilities, livestock and farming have a significant impact on Florida's economy. Florida's agricultural economy has been required to coexist with rapid population and commercial growth in the state over the last twenty-five years. Conflicts between these interests bring prominence to issues such as the rights and responsibilities of adjoining landowners, farmers, and property owners in general. Due to the added importance placed on these areas of real property, the legal aspects of fences in the state of Florida have taken on significant importance.

This handbook is designed to inform property owners of their rights and responsibilities in terms of their duty to fence. Discussed areas include a property owner's responsibility to fence when livestock is kept on the property, the rights of adjoining landowners to fence, placement of fences, encroachments, boundary lines, easements, contracts, nuisances, and a landowner's responsibilities towards persons who enter his or her property.

This handbook is intended to provide a basic overview of the many rights and responsibilities that farmers and farmland owners have under Florida's fencing and property law. Readers may value this handbook because it informs them about these rights and responsibilities. However, the reader should be aware that because the laws, administrative rulings, and court decisions on which this booklet is based are subject to constant revision, portions of this booklet could become outdated at any time. This handbook should not be viewed as a comprehensive guide to fencing and property laws. Additionally, many details of cited laws are left out due to space limitations. This handbook should not be seen as a statement of legal opinion or advice by the authors on any of the legal issues discussed within. This handbook is not a replacement for personal legal advice, but is only a guide to educate and inform the public on issues relating to fencing and property laws in Florida. For these reasons, the use of these materials by any person constitutes an agreement to hold the authors, the Institute of Food and Agricultural Sciences, the Center for Agricultural and Natural Resource Law, and the University of Florida harmless for any liability claims, damages, or expenses that may be incurred by any person as a result of reference to or reliance on the information contained in this handbook.

Readers wishing to find further information from the Florida Statutes may access those statutes online at http://www.leg.state.fl.us/STATUTES/.

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Visitors and Responsibilities to Visitors

What are the types of people that might enter my property?

The legal duties owed by a landowner to a person entering his property depend upon the classification of the person who enters the property. Florida law classifies such people into three types. The first type, *invitees*, includes any individual who is invited onto the landowner's property or is led to believe that an invitation was given. *Breaux v. City of Miami Beach*, 899 So.2d 1059, 1064 n.3 (Fla. 2005); 41 Fla. Jur. 2d *Premises Liability* § 9 (20224). The second type, *licensees*, enters upon the owner's property, albeit without invitation, but rather with the assent of the owner for the individual's own convenience, pleasure, or benefit. *Est. of Marimon ex rel. Falcon v. Florida Power & Light Co.*, 787 So.2d 887, 890 (Fla. 3d DCA 2001); 41 Fla. Jur. 2d *Premises Liability* § 51 (2022). The third type, *trespassers*, enters upon the property of another without an invitation, license, or other right to enter the property. *Lukancich v. Tampa*, 583 So.2d 1070, 1072 (Fla. 2d DCA 1991); 41 Fla. Jur. 2d *Premises Liability* § 56 (2022).

Who is an invitee?

Invitees include those individuals on the owner's property because they have been led to believe—either by direct invitation by the owner or by other valid circumstances—that the owner's property is open for their use. Invitation occurs when the property is open to members of the public or the individual enters the property for a business dealing with the owner of the property. 41 Fla. Jur. 2d *Premises Liability* §§ 9-11 (2022). Individuals in this category may include business customers, visitors to public places such as museums or historic homes, and employees. 41 Fla. Jur. 2d *Premises Liability* §§ 10, 18 (2022).; *Post v. Lunney*, 261 So.2d 146, 148 (Fla. 1972). A property owner also owes the same duty of care to anyone invited onto the property for social reasons. *Wood v. Camp*, 284 So.2d 691, 694-95 (Fla. 1973). In addition, Florida Statutes § 112.182 classifies a firefighter or law enforcement officer who enters a property to discharge a duty as an invitee. Fla. Stat. § 112.182(1) (2021); 41 Fla. Jur. 2d *Premises Liability* § 15 (2022).

To what extent am I, the property owner, responsible for invitees?

The property owner is responsible for any injuries to the invitee caused by the owner's intentional actions, by a failure to warn the invitee of any dangers of which the owner is aware, or by a failure to keep the property in a reasonably safe condition. 41 Fla. Jur. 2d *Premises Liability* § 19 (2022).

Post v. Lunney provides an example of liability to an invitee. In *Post*, Mrs. Lunney ("L") tripped and injured herself on a piece of vinyl after she paid an admission fee to tour Mrs. Post's ("P") home. *Post*, 261 So.2d at 147. The court ruled that when property is open to the public and the property owner invites the public inside, the visitor is considered an invitee. *Id.* at 148-49. The owner is charged with a duty of reasonable care, and is responsible for the visitor if the visitor is injured due to a condition of which the owner knew or should have been aware. Under this rule, a storeowner would be responsible for injuries to a customer as well as to injuries to a friend or child accompanying a customer into the store. *Burdine's, Inc. v. McConnell*, 1 So.2d 462, 463 (Fla. 1941).

Who is a licensee?

Licensees are individuals who enter upon the property of another for their own convenience, pleasure, or benefit. *Stewart v. Texas Co.*, 67 So.2d 653, 654 (Fla. 1953); 41 Fla. Jur. 2d *Premises Liability* § 51 (2022). This includes uninvited licensees whose presence is tolerated or permitted by the owner of the property. *Boca Raton v. Mattef*, 91 So.2d 644, 648 (Fla. 1956) (en banc). This category also includes discovered trespassers and trespassers who have done so for a substantial period of time with the owner's knowledge. 41 Fla. Jur. 2d *Premises Liability* § 51 (2022).

To what extent am I, the property owner, responsible for licensees?

For visitors classified as licensees, the property owner is responsible in cases where the owner willfully injures that person or that person is injured due to the owner's wanton or gross negligence. In other words, a licensee will not be able to recover for injuries caused by ordinary negligence and can only recover for gross or wanton negligence (the distinction between the two is imprecise and difficult to define). Additionally, the property owner has a responsibility to warn the licensee of any known dangers that someone would not readily notice. *Emerine v. Scaglione*, 751 So.2d 73, 74 (Fla. 2d DCA 1999); 41 Fla. Jur. 2d *Premises Liability* § 53 (2022). *Stewart v. Texas Co.* provides as example of the

duties of a licensee. In *Stewart*, the plaintiff ("P") walked across the areaway of a store to get change from the main office, and was injured after slipping on the greasy surface of the areaway outside the office. *Stewart*, 67 So.2d at 654. P sued the owners, claiming they failed to warn her of the slippery surface. *Id.* Because P was only going the store to get change and not to shop as a customer, the court found P to be a licensee rather than an invitee. *Id.* The court said that licensees, upon entering property, assume whatever risk of injury may exist due to conditions of the property unless those conditions are hidden. *Id.* It is important to remember, however, that where conditions show a willful or gross disregard for safety, the property owner will be held responsible to injuries caused to licensees from such conditions.

Who is a trespasser?

A trespasser is a person who intrudes upon another person's property for his own reasons without invitation or license and without any purpose other than self-interest. *Lukancich*, 583 So.2d at 1072; 41 Fla. Jur. 2d *Premises Liability* § 56 (2022). An action against trespassers may recover both compensatory and punitive damages. *Wishman v. Foster & Curry Industries, Inc.*, 145 So.2d 278, 278-79 (Fla. 3d DCA 1962).

What notice must be provided to a trespasser?

Under Florida Statutes § 588.09, a property owner must provide proper notice to all parties that may enter the property. Fla. Stat. § 588.09 (2021). All gates, fence corners, and all boundaries that lay along waterways must have posted notices of proper size and composition. Fla. Stat. § 588.10 (2021). The postings can be no more than 500 feet apart. *Id.* If no notice of trespassing is posted on a piece of property and the party cannot know who owns the land, the party may not be able to be assumed to be a trespasser. *Id.; 41 Fla. Jur. 2d Premises Liability § 57 (2022).* This may change the party's status in liability for damages for harm that may befall that individual. Certain facilities require different wording in the posted notices, and a different penalty for the person caught trespassing.

For example, if someone is caught trespassing on a property that manufactures agricultural chemicals, the offender commits a felony of the third degree. Fla. Stat. § 810.09(2)(i) (2021). However, prior to the offense, the facility owner must post notices throughout the property that include the following phrases: "THIS AREA IS A DESIGNATED AGRICULTURAL CHEMICALS MANUFACTURING FACILITY, AND ANYONE WHO TRESPASSES ON THIS PROPERTY COMMITS A FELONY." *Id.*

To what extent am I, the property owner, responsible for trespassers?

The property owner's duty to such persons is to not intentionally injure the trespasser. However, if the property owner knows or has reason to know of trespassers on the land, the property owner must warn the trespasser of dangerous conditions that are not open or obvious to the trespasser. *Dyals v. Hodges*, 659 So.2d 482, 484 (Fla. 1st DCA 1995); 41 Fla. Jur. 2d *Premises Liability* § 57 (2022). Although there are few cases dealing with liability for the conduct of trespassers and others acting without the possessor's knowledge or consent, it is clear that there is no liability until the possessor knows or should know of the likelihood of trespassers and has had a reasonable opportunity to exercise the proper care to prevent injury to others. *Fisel v. Wynns*, 650 So.2d 46, 49 (Fla. 5th DCA 1994). In other words, a property owner is generally not liable for injury suffered by an unknown trespasser.

For example, if someone sneaks into the property owner's pool without the owner's knowledge, and then drowns, the property owner is not liable because they are only responsible for not intentionally harming the trespasser. *See generally Pedone v. Fontainebleau Corp.*, 322 So.2d 79 (Fla. 3rd DCA 1975).

As stated in the above paragraph, the property owner has the responsibility of warning a trespasser of known dangers not ordinarily visible, if the owner knows or has reason to know that the trespasser is present on his property. This area has been the subject of much controversy and many court cases.

PROPERTY OWNER IS NOT RESPONSIBLE FOR INJURIES TO TRESPASSERS

In the *Johnson v. Rinker Materials, Inc.*, 520 So.2d 685-86 (Fla. 3d DCA 1988), Rinker Materials ("R"), a cement plant and sand quarry owner, had a problem of trespassers entering his property to ride all-terrain cycles (ATCs) on sand hills. In response to these trespassers, R placed "no trespassing" signs and erected a fence around his property's perimeter. *Id.* at 686. In addition, he implemented a permanent, 24-hour security guard service on his property to expel trespassers. *Id.* Despite these measures, Garrett Johnson ("G") entered R's land as a trespasser to ride the sand hills. *Id.* G was aware that the hills on R's land were often dug away, resulting in sheer cliffs, but on the day of his accident, G did not look to see if the hill had been dug

away. *Id.* As a result, G fell down the sheer cliff and died after landing under his ATC. *Id.* The court found R was not liable because R had taken precautionary measures to keep trespassers off of his land. *Id.* at 687–88. Most importantly, the court found that because the dangerous condition of the cliff was open to ordinary view, R could not be held responsible for G's failure to see the dangerous cliff. *Id.* When a danger is open to ordinary view, the trespasser has a responsibility to avoid such dangers, and the property owner will generally not be responsible for a trespasser's injuries. *Id.* at 687.

In *Nolan v. Roberts*, 383 So.2d 945, 945 (Fla. 4th DCA 1980), Nolan ("N"), a neighbor to the Roberts family, planted vegetation that had needle-like points on his property. Trying to recover her dog from underneath the needle-like plants, Brenda Roberts ("B"), a six-year old member of the Roberts family, injured her eye, causing a partial loss of vision. *Id.* The court found that N was not responsible for warning B, because B's parents had already warned B about the harm that might be caused by those plants. *Id.* at 946.

PROPERTY OWNER IS RESPONSIBLE FOR INJURIES TO TRESPASSERS

In *Dyals*, *X,* while driving on a county road, failed to stop at a stop sign, crashed into Raymond Hodges's ("H") fence, and struck a large pile of brush and stumps. *Dyals*, 659 So.2d at 483. The accident resulted in the death of the other passenger in X's car, Joseph Dyals ("D"). *Id.* H, a farm owner, had erected the fence to keep his cattle inside. *Id.* Having had several occasions where cars collided and damaged his fence so that the cattle could escape, H created a large pile of debris and tree stumps behind the fence. *Id.* at 484. His reasons for creating this pile were not completely clear. *Id.* H claimed it was to prevent his cattle from escaping when an individual collided and damaged his fence. *Id.* H's neighbors, however, testified that H claimed to have created the pile for the wrongful motive of injuring those who damaged his fence with their motor vehicles. *Id.* The court in this case found that because H knew from previous damage to his fence that vehicles often collided with it, H's decision to build the pile could be seen as acting in reckless disregard for the safety of others. *Id.* at 485-86. The court also found that the pile was not very visible at night, therefore making it difficult for the driver to see it and discover the danger. *Id.* at 486.

In *Webster v. Culbertson*, 761 P.2d 1063, 1064 (Ariz. 1988) (decided by the Supreme Court of Arizona, but cited and followed by the Florida courts), Joe Webster ("W"), a trespassing horseback rider, was riding his horse in the evening and ran into an unmarked barbed wired fence that Diane Culbertson ("C") had put across her property line. Previous experience showed that the location of the barbed wire fence was often traveled on horseback. *Id. at 1066.* The court said that because C knew that the area in which she put up the fence was one that was frequently traveled and that the fence was difficult to see after dark, she was held responsible for W's injuries. *Id.* at 1067.

To what extent am I, the property owner, responsible for child trespassers?

The final area of concern for landowners occurs when the trespasser is a child. In general, the same standard of care applies to child trespassers: landowners are not liable for injuries that are not caused by willful or wanton actions of the property owner. A special type of liability may be imposed, however, when the property owner did not guard against a dangerous condition that attracted the child onto the property. *Stark v. Holtzclaw*, 105 So. 330, 331-33 (Fla. 1925); 41 Fla. Jur. 2d *Premises Liability* § 64 (2022). Courts consider whether the child was attracted onto the property by an instrumentality (usually a machine, appliance, or other such item which may be natural or man-made) that is dangerous to them, but because of their tender age, they are unable to understand the danger of the nuisance. This doctrine is known as attractive nuisance. *Cockerham v. R.E. Vaughan, Inc.*, 82 So.2d 890 (Fla. 1955); *see generally* 41 Fla. Jur. 2d *Premises Liability* §§ 64–77 (2022).

In addition, Florida Statutes § 823.08 specifies that any abandoned icebox, refrigerator, clothes washer or dryer, deep-freeze locker, or other airtight unit, the doors of which have not been removed, is an attractive nuisance to children. Fla. Stat. § 823.08 (2021).

When does the attractive nuisance doctrine apply?

The court looks for the following criteria to determine the full applicability of the Attractive Nuisance Doctrine:

- Whether the dangerous instrumentality was located in a place where the property owner knew or should have known that children are likely to trespass
- That the danger must have attracted the child onto the property
- That the property owner knew or should have known that the property poses an unreasonable risk of death or serious bodily harm to children

- That the children, because of their age, do not realize the danger of the dangerous instrumentality.
- That the dangerous instrumentality's benefit to the property owner is small compared to the risk to young children
- That the property owner did not take reasonable steps to remove the danger or protect the child

See Martinello v. B&P USA, Inc., 566 So.2d 761 (Fla. 1990); 41 Fla. Jur. 2d *Premises Liability* § 66 (2022).

In evaluating this doctrine, the courts have said that a properly fenced area will usually protect the property owner from liability resulting from the Attractive Nuisance Doctrine. *See Banks v. Mason, 132 So.2d 219 (Fla. 2d DCA 1961).*

In applying the Attractive Nuisance Doctrine, the courts do look to see whether the child realized the nuisance's danger. Although no specific age limit exists, the courts look to each child's ability to appreciate the danger by considering factors such as age, intelligence, knowledge, and experience. The age and capacity of the child is also considered in determining whether a property owner must warn the child verbally or in writing. *Larnel Builders, Inc. v. Martin*, 110 So.2d 649 (Fla. 1959); *Idzi v. Hobbs*, 186 So.2d 20 (Fla. 1966); *Nunnally v. Miami Herald*, 266 So.2d 76 (Fla. 3d DCA 1972).

Additionally, the courts will look to whether the attractive nuisance is what actually attracted the child onto the property. If the child is attracted onto the property for some reason other than the attractive nuisance, the doctrine will not apply unless there is a hidden danger contained within the reason the child was attracted onto the property. *Martinello*, 566 So.2d at 763.

PROPERTY OWNER IS LIABLE FOR CHILD TRESPASSER INJURIES

In *Larnel Builders*, Larnel Builders, Inc. ("L"), a contractor, began excavations of land close to a housing development and a school ground where small children played. *Larnel Builders*, 105 So.2d 580, 581-82 (Fla. 3d DCA 1958). The excavation site had a large pile of loose sand and gravel that concealed a large, ten-foot deep pond. *Id. at 582*. Carl Martin ("M"), a minor child, went to play on the sand-and-gravel pile, and while climbing the pile, fell and drowned in the pond. *Id.* The court found that large mountain-like masses of sand, gravel, rock, coal, or other similar substances are an attraction for children. *Id.* at 583.

PROPERTY OWNER IS NOT LIABLE FOR CHILD TRESPASSER INJURIES

In *Sparks v. Casselberry Gardens, Inc.*, 227 So.2d 686-87 (Fla. 4th DCA 1969), S, a minor, and his minor friend entered onto an excavation site to dig a tunnel. When digging the tunnel, the ground collapsed, trapping and killing S. *Id.* at 687. The court pointed to two factors in ruling against S. *Id.* First, while excavations are themselves dangerous, the property owner could not have anticipated S's tunneling activity. *Id.* Second, the court looked to testimony by S's friend, which showed that S realized the risk involved in the activity. *Id.*

In *Johnson v. Bathey*, 350 So.2d 545, 546 (Fla. 2d DCA 1977), two boys, H and J, trespassing through farm property as a shortcut, came across an irrigation pump. While H was viewing the pump, his shirt caught in the pump's rotating shaft and, as a result, H suffered severe injuries. *Id.* The court did not apply the attractive nuisance doctrine to this case because the irrigation pump did not attract the boys onto the property. *Id.* at 546-47.

To what extent am I, the property owner, responsible for child trespassers drowning?

Florida courts have generally *not* recognized drowning in artificial lakes; fishponds; millponds; gin ponds; and other pools, streams, and similar bodies of water as actionable negligence by trespassers. However, if the court finds a drowning resulted from an unusual element of danger or trap around the body of water, it will find the landowner liable for the drowning. *See, e.g.*, *Allen v. William P. McDonald Corp.*, 42 So.2d 706 (Fla. 1949); *Newby v. West Palm Beach Water Co.*, 47 So.2d 527 (Fla. 1950); 41 Fla. Jur. 2d *Premises Liability* § 82 (2022).

LANDOWNER IS NOT RESPONSIBLE FOR THE DROWNING

In *Banks,* the Banks' three-year-old son drowned in the Masons' private swimming pool. *Banks*, 132 So.2d 219-20 (Fla. 2d DCA 1961). The pool was unfenced, and without a guardrail or any other protective safety devices. *Id.* Nonetheless, the court did not find the landowner liable, holding instead that:

. . . under Florida law, the general rule is that the owner of an artificial body of water is not guilty of actionable negligence for drowning unless it is so constructed as to constitute a trap or unless there is some unusual element of danger around it that does not exist in ponds generally.

Id. at 222.

In *Hendershot v. Kapok Tree Inn, Inc.*, 203 So.2d 628 (Fla. 2d DCA 1967), Harold Hendershot's two-year-old son drowned in an artificial pond. The pond's water was dark and murky, which created a false impression of shallowness. Additionally, the pond had an island at its center with ducks, shade trees, shrubs, and flowers. Nevertheless, the court found these characteristics insufficient for creating an unnatural, unusual element of danger, and held that an attractive nuisance did not exist. *Id.* at 629-30.

LANDOWNER IS RESPONSIBLE FOR THE DROWNING

Turning to *In re Estate of Starling*, 451 So.2d 516, 518 (Fla. 5th DCA 1984)., Chad Starling ("S"), a minor, drowned while swimming in a pond when he was held underwater by a suction hose. The court held that the attractive nuisance doctrine applied because the nuisance that brought S onto the property, the pond, had a concealed trap, the hose, which led to S's injury. *Id.* at 518-20. The test to be applied in these situations is whether a reasonably prudent person should have anticipated the presence of children or other persons at the place where the landowner created a condition, such that a jury could find it was an "inherently dangerous condition." *Id.* at 520.

In *Allen*, the defendant excavated the land to create an artificial lake and left the area unfenced without any barrier or obstruction. *Allen*, 42 So.2d at 706 (Fla. 1949). A child entered the area of steep, white sand, ending in his death by drowning. *Id.* The court held that a sandy slope adjacent to an artificial lake may constitute an alluring trap (attractive nuisance) for a young child. *Id.* at 707.

To what extent am I, the property owner, responsible for recreational visitors?

Florida Statutes § 375.251 covers the limitation on liability of persons making available to the public certain areas for recreational purposes without charge. Fla. Stat. § 375.251 (2022). If a landowner makes a property available to the public for outdoor recreational purposes *free of charge*, the landowner is not responsible for keeping that park area or land safe for entry or use by others, or for giving warning of any hazardous conditions, structures, or activities on the property to persons entering or going on that park area or land. Fla. Stat. § 375.251(2) (2022). This limitation on liability will not apply if any commercial or other profitable activity is derived from the general public's patronage on the property. *Id.* Also, any person remains liable for deliberate, willful, or malicious injuries. Fla. Stat. § 375.251(4) (2022).

Summary

There are three types of individuals who may enter upon your property. The first type is an *invitee* (a person who enters onto your property either by direct or implied invitation). For these persons, the property owner is responsible for keeping his property in a reasonably safe condition and warning the invitee of any dangerous conditions.

The second type is a *licensee* (an individual who enters upon the property of another for personal convenience, pleasure, or benefit). For these persons, it is the property owner's responsibility to avoid dangerous conditions due to gross negligence, to not willfully harm such a person, and to warn the licensee of any dangerous conditions that are not readily noticeable.

The third type of person is a *trespasser*. For these persons, the landowner must not intentionally cause them harm, and if aware of the trespasser's presence, the landowner must warn the trespasser of any dangerous conditions that are not readily noticeable.

The courts look to the following five aspects in determining whether the attractive nuisance doctrine applies:

1. The property owner knows, or should know, that children are likely to trespass where a dangerous instrumentality is located on the property

2. The property owner knows, or should know, that children are likely to trespass

3. The danger actually attracted the children onto the property

4. The children, because of their age, do not realize the danger of the attractive nuisance

5. The dangerous instrumentality's benefit to the property owner is small compared to the risk to young children

Additionally, where owners think that a condition exists, such as a mound of sand, hay, tractors, etc., which may be considered an attractive nuisance, they should take preventive measures to avoid liability in case of an injury to a child. These preventive measures include enclosing the attractive nuisance, posting signs warning children of the dangerous instrumentality, and verbally warning neighbors of the dangerous instrumentality. While these measures

are not a guarantee against liability, they help reduce the possibility of injury and provide evidence showing that the owner was not negligent.

Further Information

Handbook of Florida Fence and Property Law
https://edis.ifas.ufl.edu/entity/topic/BOOK_Florida_Fence_and_Property_Law