"You Be The Judge" Seminar
Topic: Oral Motion for Summary Judgment
Presenter: Sharifa Jarrett, Esq.
January 22, 2020

I. May an oral motion for summary judgment be granted at a pretrial conference without notice, other than the current 20-day notice required for the pretrial conference, on the other party's *ore tenus* motion or even on the court's own motion?

- Yes. See *Green v. Manly Constr. Co.*, 159 So. 2d 881 (Fla. 2d DCA 1964).

II. What about Fla. R. Civ. P. Rule 1.510 regarding summary judgment?

- An oral motion for summary judgment is clearly contrary to the Florida Rule of Civil Procedure governing summary judgment. A party cannot "serve" an oral motion for summary judgment on another party, and the language of the Rule, explicitly requiring that a movant "shall serve the motion" for summary judgment at least 20 days before the time fixed for the hearing, does not permit oral motions for summary judgment. Moreover, the Rule requires that a summary judgment motion state with particularity the grounds upon which it is based and the substantial matters of law to be argued. *Casa Inv. Co. v. Nestor*, 8 So. 3d 1219 (Fla. 3d DCA 2009).

III. So what happened in the *Green v. Manly Constr. Co.* case?

- Plaintiffs brought suit for injuries sustained by minor after he climbed on the back of Defendants' road roller.
- On the court's motion the cause was duly scheduled for pre-trial conference pursuant to Rule 1.16, Florida Rules of Civil Procedure, 30 F.S.A., which required notification no less than ten days prior to the conference.
- At the pretrial conference the court considered the pleadings, the signed statement and depositions, statements of counsel and a motion *ore tenus* for summary judgment for the Defendants.
- Defendants' counsel moved the court to enter judgment for the Defendants, on the grounds that Plaintiffs' case, as stated, could not create any basis for the liability of either defendant.

- Counsel for Plaintiffs objected to Defendants' motion on the basis that no prior notice of said motion had been furnished to Plaintiffs' counsel.
- The Court ruled that "this argument failed in view of the fact that the litigants were charged with knowledge that the trial court may, of its own motion, enter summary judgment consequent upon pre-trial conference provided at least ten days advance notice of the conference has been given."
- It was not disputed that the pretrial conference was held pursuant to due notice, and the recitation in the judgment confirmed that fact.
- The purpose of a pretrial conference is to simplify the issue. If the conference progresses to the point of eliminating all questions of fact, then the court may give judgment according to the law on the facts before the court.
- Appellate Court affirmed and stated "we are constrained to agree that the showings on pre-trial conference left no genuine issue of material fact unresolved... The summary judgment remains an established means of terminating litigation when it is made duly evident that a litigant's position is untenable."

IV. Conclusion

- Be aware of this summary judgment exposure and be prepared to argue the point at the pretrial conference to prevent returning from the pretrial conference in shock.

Green v. Manly Constr. Co.

District Court of Appeal of Florida, Second District.

Jan. 24, 1964.

No. 3776.

Reporter
159 So. 2d 881 *; 1964 Fla. App. LEXIS 4778 **

William GREEN, individually, and as natural guardian and next friend of Paul Lawrence Green, a minor, Appellants, v. MANLY CONSTRUCTION COMPANY, a Florida Corporation, and Walter Meeks, Appellees.

Core Terms

summary judgment, notice, minor plaintiff, driver, pretrial conference, pre-trial, machine, trespasser, tractor, peril, trial court, deposition, last clear chance, own motion, plaintiffs', roller, wheels, road roller, hear, rear

Case Summary

Procedural Posture
Plaintiffs appealed the Florida trial court's entry of summary judgment in favor of defendants following a pretrial conference on defendants' oral motion, arguing that the judgment took them by surprise and was procedurally prejudicial.

Overview
Plaintiffs brought suit for injuries sustained by minor plaintiff after he climbed on the back of defendants' road roller. Defendants denied any negligence and alleged minor plaintiff's contributory negligence as the cause of injury. Following a pretrial conference, defendants orally moved for summary judgment; the trial court entered summary judgment for defendants, and plaintiffs appealed, arguing that the judgment took them by surprise and was procedurally prejudicial. In affirming summary judgment in favor of defendants, the appellate court concluded that the trial court did not err in granting summary judgment following the pretrial conference. Under Fla. R. Civ. P. 1.16, litigants were charged with knowledge that the trial court could, on its own motion, enter summary judgment at the time of pretrial conference provided that the parties were given a 10-day notice of the conference. Where the parties were afforded such notice, plaintiffs suffered no prejudicial surprise; where all issues of fact were resolved, the trial court properly decided the issues of law necessary to enter judgment.

Outcome
Summary judgment in favor of defendants was affirmed. The trial court did not err in granting summary judgment upon defendants' oral motion at the close of a pretrial conference, as procedural rules expressly authorized summary judgment at such time where all outstanding factual issues had been resolved and litigants had received sufficient notice of the conference.

LexisNexis® Headnotes

Civil Procedure > Pretrial Matters > Conferences > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Timing of Motions & Responses

***HN1*[↓] Pretrial Matters, Conferences**

Under Fla. R. Civ. P. 1.16, litigants are charged with knowledge that the trial court may, of its own motion, enter summary judgment consequent upon pre-trial conference provided that at least ten days advance notice of the conference has been given.

Civil Procedure > Pretrial Matters > Conferences > Pretrial Conferences

Civil Procedure > Pretrial Matters > General Overview

Civil Procedure > Pretrial Matters > Conferences > General Overview

***HN2*[↓] Conferences, Pretrial Conferences**

The purpose of a pretrial conference is to simplify the issues. If the conference progresses to the point of eliminating all questions of fact, then the court may give judgment according to the law on the facts before it.

Civil Procedure > Pretrial Matters > Conferences > General Overview

Legal Ethics > Client Relations > Representation > Acceptance

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

***HN3*[↓] Pretrial Matters, Conferences**

Although the entry of summary judgment at a pretrial conference is as a time-saving device when used in a proper case, it must be employed with an abundance of caution. Under the Fla. R. Civ. P. 1.16, the pretrial conference is to be called only after all issues are settled. In the ordinary case, this contemplates not only that the pleadings should be settled and that sufficient notice should be given to permit full preparation, but also that the conference should be held after the parties have had an opportunity to utilize the discovery procedures and are fully informed on all aspects of the case, thus being in a position to furnish maximum aid to the trial court in its efforts to simplify and shorten the trial. When pretrial procedure is thus used, the risk of prejudice to a party by the entry of summary judgment against him without adequate notice and before he has developed the basic case he intends to prove is greatly minimized.

Civil Procedure > Pretrial Matters > General Overview

Civil Procedure > Attorneys > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary

Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Timing of Motions & Responses

Civil Procedure > Pretrial Matters > Conferences > General Overview

Civil Procedure > Pretrial Matters > Conferences > Pretrial Conferences

***HN4*[↓] Civil Procedure, Pretrial Matters**

In connection with an ordinary motion for summary judgment, the 10-day minimum time limit prescribed for service is none too long, considering the swift and dispositive character of the motion. When noticed for a pretrial conference, counsel should recognize and prepare for the possibility that at the conference the issues of fact may be simplified to the point of elimination, whereupon the court, confronted with a pure matter of law, may resolve it by summary judgment. However, any summary judgment, whether made of the court's own motion or on motion of a party, is swift and dispositive and requires the same notice and preparation. Therefore, as a matter of construction of the Florida Rules of Civil Procedure, if less than a 10-day notice of the pretrial conference has been given, counsel should upon request be permitted a reasonable opportunity to make a showing that a genuine issue of material fact remains before summary judgment is entered by the trial court of its own motion.

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Pretrial Matters > Conferences > General Overview

***HN5*[↓] Judgments, Summary Judgment**

Counsel should be permitted to create an issue where none grew before in disregard of admissions previously made but should not, upon short notice, be deprived of an opportunity to present a case, if any he has.

Civil Procedure > Judgments > Summary Judgment > General Overview

***HN6*[↓] Judgments, Summary Judgment**

The summary judgment, though sometimes improvidently employed, remains an established means of terminating litigation when it is made duly evident that a litigant's position is untenable.

Torts > ... > Duty On Premises > Trespassers > Child Trespassers

Real Property Law > Torts > Nuisance > General Overview

Torts > ... > Standards of Care > Special Care > Children

Torts > Premises & Property Liability > General Premises Liability > General Overview

Torts > ... > Duty On Premises > Trespassers > General Overview

Torts > Premises & Property Liability > Trespass to Real Property > General Overview

***HN7*[↓] Trespassers, Child Trespassers**

In the absence of circumstances warranting application of the attractive nuisance doctrine, a trespassing minor is treated the same as a trespassing adult. The standard of care owed to a trespasser is to refrain from committing wilful or

wanton injury. The defendant must be aware of the trespasser in order to avoid causing willful or wanton injury unless there is something peculiar in the situation, which should reasonably lead him to know that children are trespassing.

Counsel: **[**1]** Sellar & Twyford, and Savage & Cobb, Leesburg, for appellants.

Monroe E. McDonald, of Sanders, McEwan, Schwarz & Mims, Orlando, for appellees.

Opinion by: WHITE

Opinion

[*882] WHITE, Judge.

Appellants William Green and minor son Paul Green were plaintiffs in a suit for damages for injuries sustained by the minor plaintiff when he climbed on the rear of a road roller belonging to the corporate defendant Manly Construction Company and operated by the defendant Walter Meeks. The mishap occurred when the boy lost his balance and was caught between the frame and a rear wheel of the vehicle causing severe abrasions of the leg. The final judgment here reviewed is a summary judgment entered for the defendants on oral motion following pre-trial conference.

The original complaint was based on the theory of attractive nuisance. However, after the defendants filed their answer the plaintiffs filed an amended complaint containing general allegations of negligence but, in essence, hinging the case on the doctrine of last clear chance. The plaintiffs alleged that Paul Green was playing near the highway where the road roller was being operated and that the operator knew that Paul Green **[**2]** was near by, that Paul Green climbed upon the rear end of the road roller, slipped and had his leg caught as indicated, began to shout, and was carried some distance before the vehicle was brought to a halt. It was alleged that the operator "persisted in his negligent and careless refusal to look behind him so that he could either hear or see minor plaintiff in his helpless peril" and that in the exercise of ordinary care the operator should have known of the boy's peril.

The defendants denied negligence, pleaded contributory negligence, averred that the operator was not aware of the boy's situation until a stranger flagged him down, that there was no reason that the operator should have had previous knowledge of the situation, and that in the circumstances the boy was a trespasser to whom the defendants owed no duty except to refrain from wilfully or wantonly injuring him after becoming aware of his presence. Plaintiffs father and son answered interrogatories propounded by the defendants, and the minor plaintiff was separately deposed. The plaintiffs took the deposition of the defendant operator who stated that he did not **[*883]** hear the boy or know of his presence until **[**3]** he brought the tractor-roller to a stop on signal from a bystander. A signed statement by the minor plaintiff witnessed by his parents was also made a part of the record and is hereafter set forth. On the court's motion the cause was duly scheduled for pre-trial conference pursuant to Rule 1.16, Florida Rules of Civil Procedure, 30 F.S.A., which requires notification not less than ten days prior to the conference.

At the pre-trial conference the court considered the pleadings, the aforementioned statement and depositions, statements of counsel and a motion *ore tenus* for summary judgment for the defendants. From this material it was clearly evident that the road roller was a large and heavy vehicle towed by a tractor which made considerable noise, and the driver of the tractor was seated to the front near the engine and not far from the exhaust and was

required by the nature of his work to look in a generally forward direction. Other pertinent facts, similarly evident, are included in the findings of the trial cout in the order entitled "Pre-trial Order and Final Judgment" from which the following quotation reflects the determination of the case:

"Plaintiffs' counsel announced **[**4]** that his theory of liability was that, as soon as the minor plaintiff lost his footing and had his lower extremities caught and jammed in such a manner as to injure him, that he was then in such a position of helpless peril as to place upon the driver of the machine the duty of protecting him from further injury; that the minor plaintiff's cries ought to have put the operator on notice of his peril even though the driver did not hear these cries, since Plaintiff stated that some other persons did hear them.

"There is no allegation in the Complaint that the defendant driver had any actual knowledge that the minor plaintiff was upon, or near the machine at the time of injury. The complaint alleges that the defendant-driver in the exercise of ordinary care *should* have known that the minor plaintiff was in a position of peril from which he could not escape unassisted. This is a conclusion of the pleader. No facts are alleged which would support such a conclusion.

"Counsel for the defendant then moved the court to enter judgment for the defendants, on the grounds that plaintiff's case, as stated, could not create any basis for the liability of either defendant. Counsel for **[**5]** Plaintiffs raised objection to Defendant's motion on the basis that no prior notice of said motion had been furnished Plaintiffs' counsel. Counsel for the defendant urged that the minor plaintiff was a trespasser upon the machine; that no duty would arise until the defendant driver became aware of the minor plaintiff's position of peril, and that the doctrine of last clear chance could not come into play until the defendant knows, or in the exercise of ordinary care, ought to know, this fact, and that such knowledge, actual or implied, must reach the defendant in sufficient time to permit the defendant to act.

"The court then heard arguments of counsel, and statements by plaintiff's counsel that he had evidence that other persons heard the minor plaintiff's cries before the defendant driver stopped the machine. Both parties referred to the depositions of the minor plaintiff and the operator, Walter Meeks, and freely discussed the facts.

"The undisputed evidence showed that at the time the minor plaintiff tried to climb upon the rear of the machine and was injured neither he nor the operator could see the other because of the height of the roller.

"The operator did not hear **[**6]** the minor plaintiff's shout, nor is it contended that he did.

"At the conclusion of arguments, the court granted the defendant's motion **[*884]** on the grounds that the facts showed no liability on the part of the defendants, and particularly on the 'last clear chance' theory.

"After the court had granted the defendants' motion, counsel for plaintiff sought leave to amend the Complaint, without indicating in what respects. The court denied this motion.

"It is accordingly

"ORDERED AND ADJUDGED that judgment be and it is hereby rendered against the Plaintiffs and in favor of the Defendants; that the Plaintiffs take nothing by their case and that the Defendants go hence without day."

Plaintiffs protest on appeal (1) that the adverse judgment took them by surprise and was procedurally prejudicial; (2) that it was error to deny their oral request for leave to amend the amended complaint; and (3) that the judgment was otherwise erroneous, particularly in its rejection of the "last clear chance" theory of liability.

Plaintiffs first contend that it was error to grant the defendants' motion for judgment in the absence of a

formal advance notice to the plaintiffs that such [**7] judgment would or might be sought. [1] This argument fails in view of the fact that the HN1[↑] litigants were charged with knowledge that the trial court may, of its own motion, enter summary judgment consequent upon pre-trial conference provided at least ten days advance notice of the conference has been given. F.R.C.P. 1.16. See and compare *Roberts v. Braynon, Fla.1956, 90 So.2d 623, 626*; *Cook v. Navy Point, Inc., Fla.1956, 88 So.2d 532*; *Waite v. Dade County, Fla.1954, 74 So.2d 681*; *Hillsborough County v. Sutton, 1942, 150 Fla. 601, 8 So.2d 401, 402*. It is not disputed that the pre-trial conference was held pursuant to due notice, and the recitation in the judgment confirms the fact.

Roberts v. Braynon, supra, was a personal injury case which the Supreme Court of Florida held to be within the guest statute. The trial court at first denied defense counsel's motion for summary judgment but thereafter, of its own motion, entered summary judgment for the defendant. The Supreme Court affirmed insofar as simple negligence was held insufficient to establish liability under the guest statute. On the summary phase of the case the court said:

"A procedural [**8] aspect of the case remains to be considered. After the pleadings were closed, a pretrial conference was noticed by the circuit judge, and thereafter a motion for summary judgment was filed by the defendant and set for hearing on the same date as the pretrial conference. At the pretrial conference, plaintiff objected to defendant's motion for summary judgment on the ground that plaintiff had not received the full notice required by the rules of procedure. *This objection was sustained by the trial judge, who observed, however, that he conceived it to be within his power to enter a summary judgment of his own motion after the pretrial conference if, upon consideration, he was convinced that such judgment should be entered.* Several days after the pretrial conference, the summary judgment appealed from was entered, the order reciting that it was based upon the plaintiff's deposition and the admissions made at the conference, that there was no genuine issue as to any material fact, and that defendant was entitled to judgment as a matter of law.

"We sanctioned such procedure in *Waite v. Dade County, Fla., 74 So.2d 681*. There the facts had been fully developed at the pretrial conference, [**9] whereupon the trial judge, who was convinced that no genuine factual issue remained, entered judgment for the defendant. [*885] The same procedure was presented to us earlier in *Hillsborough County v. Sutton, 150 Fla. 601, 8 So.2d 401, 402*, wherein we stated in part:

HN2[↑] "'The purpose of a pretrial is to simplify the issue. If the conference progresses to the point of eliminating all questions of fact, then the court may give judgment according to the law on the facts before him.'

"See also *Bruce's Juices, Inc. v. American Can Co., 155 Fla. 877, 22 So.2d 461.*

HN3[↑] *"Although the procedure indicated is salutary as a time-saving device when used in a proper case, it must be employed with an abundance of caution.* Under the Florida Rules of Civil Procedure, Rule 1.16, 30 F.S.A., the pretrial conference is to be called only 'after all issues are settled'. In the ordinary case, this contemplates not only that the pleadings should be settled and that sufficient notice should be given to permit full preparation, *Town of Coreytown v. State ex rel. Ervin, Fla., 60 So.2d 482*, but also that the conference should be held after the parties have had an opportunity to utilize the discovery [**10] procedures and are fully informed on all aspects of the case, thus being in a position to furnish maximum aid to the trial court in its efforts to simplify and shorten the trial. See comments by Raymond and Wilson following Rule 1.16, 30 F.S.A. 419, and authorities cited. *When pretrial procedure is thus used, the risk of prejudice to a party by the entry of summary judgment against*

[1] F.R.C.P. Rule 1.36(c).

him without adequate notice and before he has developed the basic case he intends to prove is greatly minimized.

"As we pointed out in Cook v. Navy Point, Inc., Fla., 88 So.2d 532, HN4[↑] in connection with an ordinary motion for summary judgment, 'the ten day minimum time limit prescribed for service is none too long, considering the swift and dispositive character of the motion.' *When noticed for a pretrial conference, counsel should recognize and prepare for the possibility that at the conference the issues of fact may be simplified to the point of elimination, whereupon the court, confronted with a pure matter of law, may resolve it by summary judgment as we have indicated above.* But any summary judgment, whether made of the court's own motion or on motion of a party, is 'swift and dispositive' **[**11]** and requires the same notice and preparation. Therefore, as a matter of construction of the Rules, *if less than ten days' notice of the pretrial conference has been given, counsel should upon request be permitted a reasonable opportunity to make a showing that a genuine issue of material fact remains before summary judgment is entered by the trial court of its own motion.*

"This is not to say that HN5[↑] counsel should be permitted to create an issue where none grew before, in disregard of admissions previously made, see Lewis v. Lewis, Fla., 73 So.2d 72, but only that counsel should not upon short notice be deprived of an opportunity to present a case, if any he has." (Emphasis added.)

Deferring treatment of the basic merits of the present judgment which are not involved in this aspect of the appeal, we observe here that the difference between the procedure in Roberts v. Braynon, supra, and the procedure followed in the immediate case is not significant. In Roberts v. Braynon there was no procedural error in the entry of the judgment on the court's own motion after denial of counsel's motion to the same effect. Similarly, there was no procedural error in the entry of the instant **[**12]** judgment by the somewhat different but permissible approach, even though the trial court's action may not have been expected by the plaintiff.

It is next submitted that it was an abuse of discretion to deny leave for further **[*886]** amendment of the complaint as orally requested by plaintiffs who now state *arguendo* that it was their desire to allege that some additional bystander or bystanders had seen and heard the minor plaintiff in his perilous situation. Already apparent, however, was the fact that a bystanding observer had signalled the defendant's machine to a halt. No further amendment was necessary to accommodate that showing or any cumulative showing to the same effect. It may be noted parenthetically that sideline observers, regardless of number, could not have been occupied or positioned as was the operator of the tractor. In any event it nowhere appears that the plaintiffs offered significant new matter or suggested to the trial court any alternative theory of liability that would harmonize with the basic facts already plainly disclosed. It is also notable that the plaintiffs did not move for rehearing after judgment as permitted by Rule 2.8(a) F.R.C.P., **[**13]** 31 F.S.A. Accordingly the plaintiffs' second point on appeal is not well taken.

The plaintiffs' final point questions the merits of the summary judgment with particular reference to rejection of the last clear chance theory of liability. [2] Here again no error is demonstrated. We are constrained to agree that the showings on pre-trial conference left no genuine issue of material fact unresolved. It was affirmatively shown that the injured plaintiff, though a minor, understood the implications and hazards of his position. Having been warned by his father, he was a wilful trespasser whose presence was neither known to the operator nor reasonably should have been known to him until he was signalled to a halt. We think the evidentiary factors before the trial court were so

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[2] See James v. Keene, Fla.1961, 133 So.2d 297, 299, for prerequisites to application of the doctrine of last clear chance.

impelling as to preclude any reasonable inference contrary to the foregoing conclusion. In these circumstances the trial court's recognition of the limitations of plaintiffs' case was not a usurpation of jury prerogative.

HN6[↑]

The summary judgment, though sometimes improvidently employed, **[**14]** remains an established means of terminating litigation when it is made duly evident that a litigant's position is untenable. Bearing importantly on an evaluation of the case is the minor plaintiff's deposition and his statement, witnessed by his parents. The statement follows:

"I am Paul L. Green, white, male, 10 years of age, am a student and live with my mother and father at Fruitland Park, Fla. I wish to make the following statement.

"On January 20, 1960 sometime after school in the afternoon, I came home and got a piece of bread and jelly. I went out into the yard, and was watching the man on the tractor pulling the rolling machine, where [they] were working on the road in front of our house, I had been running along side the road, keeping up with the tractor. When the man turned the tractor and roller around, and slowed down, I ran out into the road, and got my feet on a bolt on the machine, and tried to hitch a ride. I was going to stand on the hitch on the machine, but my foot slipped and my leg got caught between the wheels. I became scared and do not remember much of what happened after that.

"My father had told me before to keep away from the construction **[**15]** work, and told me to stay in the yard while the men were working on the road.

"My father has read this statement to me and it is true. I have received a copy of this 2 page statement."

The deposition of the minor plaintiff discloses the following questions and answers:

"Q. Did you know that that was dangerous equipment?

[*887] "A. Yeah, I knew it.

* * *

"Q. That thing [roller] was being pulled by a tractor, wasn't it?

"A. Yes.

"Q. Was it a noisy tractor?

"A. Yes, it had a pipe stuck up here.

"Q. I see - like a Diesel exhaust pipe?

"A. Yes.

"Q. And it made a lot of noise?

"A. Yes.

"Q. And the only thing you could see of the driver was the top of his head and that's when you were holding onto the pipe on the side?

"A. Yes, sir.

* * *

"Q. Now they had * * * this road roller had a lot of wheels on it, didn't it?

"A. Yes, sir.

"Q. A lot of wheels along the side of each other, do you know how many wheels?

"A. I think it was about 6 or 7.

* * *

"Q. Now you say there was a hump on this roller, could it have been dirt or objects piled up on it to make it heavier?

"A. No, sir. They put water inside **[**16]** of it that weighs it down.

"Q. Well, uh - what was the big hump on the back

of it that made it so you couldn't see the driver?

"A. It was a big watertank-like thing that was built into the roller.

* * *

"Q. When you were trying to climb up that way with your foot on this bolt fastened to the turning wheel, your foot slipped somehow and you got jammed up?

"A. Yes, sir.

"Q. And when that happened you couldn't see the driver because of the hump on the back of the thing?

"A. Yes, sir."

It has been noted that the defendant driver stated on deposition that he was unaware that the minor plaintiff was on the rear of the roller. He stated that he heard nothing and knew of nothing that would lead him to suspect that the boy was so positioned or had fallen into a perilous situation and we think that these assertions are verified by the uncontroverted physical facts and by a record which overwhelmingly repels any contrary inference. Compare *Byers v. Gunn, Fla.1955, 81 So.2d 723*.

HN7[↑] In the absence of circumstances warranting application of the attractive nuisance doctrine, - and this is not an attractive nuisance case, - a trespassing minor is treated the same as **[**17]** a trespassing adult. *Johnson v. Wood, 1945, 155 Fla. 753, 21 So.2d 353, 355*; *Stark v. Holtzclaw, 1925, 90 Fla. 207, 105 So. 330, 332, 41 A.L.R. 1323*. The standard of care owed to a trespasser is to refrain from committing wilful or wanton injury. 23 Fla.Jur., Negligence, §§ 54 and 17. The defendant must be aware of the trespasser in order to avoid causing wilful or wanton injury "unless there is something peculiar in the situation which should reasonably lead him to know that children are trespassing." See 60 C.J.S. Motor Vehicles §§ 258 and 401. Cf. *McNulty v. Hurley, Fla.1957, 97 So.2d 185, 187.*

Since there was no showing that the defendant driver did know of the minor plaintiff's presence, and since the record before the trial court does not disclose any peculiar factor which reasonably should **[*888]** have placed the defendant on notice, plaintiffs' allegations to the contrary constituted no more than a bare conclusion of the pleader. The judgment is affirmed.

Affirmed.

SMITH, C.J., and OVERSTREET, MURRAY W., Associate Judge, concur.

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User Name: Sharifa Jarrett
Date and Time: Wednesday, January 22, 2020 8:25:00 AM EST
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Document (1)

1. *Shepard's*®:Green v. Manly Constr. Co. 159 So. 2d 881, 1964 Fla. App. LEXIS 4778 (Fla. Dist. Ct. App. 2d Dist.,1964)

Client/Matter: -None-

Requested Categories:

Appellate History - Requested

Citing Decisions - None applied

Other Citing Sources - None applied

Table of Authorities - None applied

LexisNexis®

Shepard's®: Report Content

Appellate History: Requested

Citing Decisions: None Applied

Other Citing Sources: None Applied

Table Of Authorities: None Applied

***Shepard's*®:** Green v. Manly Constr. Co. 159 So. 2d 881,1964 Fla. App. LEXIS 4778: (Fla. Dist. Ct. App. 2d Dist. 1964)

No subsequent appellate history

Appellate History (1)

1. **Citation you *Shepardized*™**

Green v. Manly Constr. Co., 159 So. 2d 881, 1964 Fla. App. LEXIS 4778

Court: Fla. Dist. Ct. App. 2d Dist. | **Date:** 1964

Citing Decisions (5)

Analysis: Followed by (1), "Cited by" (4)

Headnotes:HN7 (3), HN1 (1)

Florida District Court of Appeals

1. Rodriguez v. Brutus, 702 So. 2d 1302, 1997 Fla. App. LEXIS 12274, 22 Fla. L. Weekly D 2527

Cited by: 702 So. 2d 1302 p.1304
... , then the defendants did not breach the duty they owed to her. Although it makes no difference to the result, we observe that Claudine might also be considered to have been an unknown trespasser, having been warned by her father not to enter the defendants' shed. See **Green v. Manly Constr. Co., 159 So. 2d 881(Fla. 2d DCA 1964)** , in which a ten-year-old boy was injured when he climbed onto operating construction equipment (although warned by his father to stay away from the area), slipped ...

Discussion: | **Court:** Fla. Dist. Ct. App. 3d Dist. | **Date:** November 5, 1997 | **Headnotes:**: HN7

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2. Money v. Noonan Constr. Co., 229 So. 2d 15, 1969 Fla. App. LEXIS 6459

Cited by: 229 So. 2d 15 p.16
... Elements, Duty Duty On Premises, Trespassers HN2 The duty owed to a trespasser is to refrain from inflicting willful or wanton injury. the duty owed to a trespasser is to refrain from inflicting willful or wanton injury. See **Green v. Manly Construction Co.,159 So.2d 881(Fla.App.1964)** . In the case at bar there was no evidence from which a reasonable inference could be drawn that the defendant's negligence, if any, was willful or wanton. We conclude from the foregoing that, at the hearing ...

Discussion: | **Court:** Fla. Dist. Ct. App. 1st Dist. | **Date:** December 16, 1969 | **Headnotes:**: HN7

3. Gates v. Fien, 219 So. 2d 477, 1969 Fla. App. LEXIS 6189

Followed by: 219 So. 2d 477 p.478
The record fails to reveal that the driver had any reason to believe that the minor plaintiff was on the truck; no such event had occurred in the past, and the circumstances fail to reveal any reason why he should have known that the minor plaintiff was going to trespass on his vehicle. We affirm the summary final judgment upon the reasoning of the Second District Court of Appeal in Green v. Manly Const. Co., Fla.App.1964, 159 So.2d 881, wherein in a similar situation they said: ... * * * "* * * The defendant must be aware of the trespasser in order to avoid causing wilful or wanton injury 'unless there is something peculiar in the situation which should reasonably lead him to know that children are trespassing.' * * * "Since there was no showing that the defendant driver did know of the minor plaintiff's presence, and since the record before the trial court does not disclose any peculiar factor which reasonably should have placed the defendant on notice, plaintiffs' allegations to the contrary constituted no more than a bare conclusion of the pleader. **(HN7)**

Discussion: | **Court:** Fla. Dist. Ct. App. 3d Dist. | **Date:** February 25, 1969 | **Headnotes:**: HN7

4. Robinson v. Friedman, 219 So. 2d 54, 1969 Fla. App. LEXIS 6124

Cited by: 219 So. 2d 54 p.55
... issues of fact were raised by the allegations in his complaint. But the defendant-appellees have demonstrated beyond any genuine issue of material fact that the accord and satisfaction was reached after the claim of fraud has been made and that the general release was executed for the purpose of discharging that claim. Therefore the trial judge correctly entered summary judgment for the defendants as a matter of law. See **Green v. Manly ConstructionCompany, Fla.App.1964,159 So.2d 881, 886** ...
Discussion: [redacted] | **Court:** Fla. Dist. Ct. App. 3d Dist. | **Date:** February 18, 1969

5. Edenfield v. Crisp, 186 So. 2d 545, 1966 Fla. App. LEXIS 5383

Cited by: 186 So. 2d 545 p.549
... that the Judge may exercise any of the broad powers at his disposal at such hearing, even to the point of terminating the litigation by entry of summary judgment, without specifying in his order the particular areas to be covered , **Green v. Manly Const. Co., Fla.App.1964,159 So.2d 881** . Under the stated facts which confronted the able Chancellor in the instant case on January 19, 1966, where the corporation was completely inactive, where a large sum of money was in the Court's registry belonging ...
Discussion: [redacted] | **Court:** Fla. Dist. Ct. App. 2d Dist. | **Date:** May 18, 1966 | **Headnotes:**: HN1

Other Citing Sources: (18)

Law Reviews and Periodicals

1. 20 U. Miami L. Rev. 820

Content: Law Reviews

2. 20 U. Miami L. Rev. 599

Content: Law Reviews

Treatise Citations

3. **7 Personal Injury--Actions, Defenses, Damages @ 28.02**

... law) (even though two-year-old boy living with his mother contrary to lease provision was trespasser, jury could find that landlord was willful and wanton in his failure to repair defective screen on third-floor window from which child fell). **Green v. Manly Constr. Co.,159 So. 2d 881(Fla. 1964)** (minor boy who climbed on rear of roller and was caught between frame and rear wheel had been warned by father about this conduct and was therefore willful trespasser to whom defendant owed duty to ...

Content: Treatises

Briefs

4. STREMS v. CITIZENS PROP. INS. CORP., 2018 FL App. Ct. Briefs LEXIS 3482

... , Court Commentary, 1984 Amendment; Author's Comment, 1967. It gives express authority to the trial court to determine any matters that may aid in the disposition of the action and extends to any order that will aid in the fair, orderly, and efficient disposition of the action provided that proper notice of the conference is given. **Green v. Manly Const. Co.,159 So. 2d 881(Fla. 2d DCA 1964).** This does not include the authority to order a specific attorney attend all future hearings or to disregard ...

Content: Court Documents | **Date:** August 20, 2018

5. BUESCHER v. AMT CADC VENTURE, 2014 FL App. Ct. Briefs LEXIS 427

... Defendant next relies upon Edenfield v. Crisp, 186 So. 2d 545 (Fla. 2d DCA 1966). That matter involved the sua sponte entry of the appointment of a receiver. That case does not support Defendant's untenable position in this matter. In **Green v. Manly Construction Co.,159 So. 2d 881(Fla. 2d DCA 1964),** the trial court made specific findings of fact and conclusions of law in granting judgment for the defendant on plaintiff's "last clear chance" theory of liability. Id. at 883-884. Unlike ...

Content: Court Documents | **Date:** March 7, 2014

6. BUESCHER, 2013 FL App. Ct. Briefs LEXIS 1950

... Consistent with trial judges' power to grant summary judgment on their own volition, there is no procedural error in the entry of summary judgment on a party's ore tenus motion for summary judgment made at a pretrial conference. **Green v. Manly Const. Co.,159 So. 2d 881(Fla. 2d DCA 1964);** Portales v. Another Beautiful Corp., 121 So. 3d 562 (Fla. 3d DCA 2012). In **Green v. Manly Const. Co .,** the trial

court on its own motion, scheduled a pretrial conference pursuant to Florida Rules of ...

Content: Court Documents | **Date:** December 23, 2013

7. **GARCIA v. SUPER FUN, INC.**, 2012 FL App. Ct. Briefs LEXIS 174

... 262 So.2d 243 (Fla. App. 1972), Tenenbaum v Biscayne Osteopathic Hospital, Inc., 190 So.2d 777 (Fla. 1966). Summary judgment is an established means of terminating litigation when it is made duly evident that a litigant's position is untenable. **Green v Manly Const. Co.,159 So.2d 881** (Fla. 2nd DCA, 1964). Such is not the case at bar. At bar, Defendants' (Appellees') position cannot be supported because there are numerous questions of fact in issue and summary judgment is therefore not proper ...

Content: Court Documents | **Date:** January 25, 2012

8. **RAND YE TUCKER v. SAM'S EAST, INC.**, 2019 FL Cir. Ct. Briefs LEXIS 934

... 2015 WL 4529616 (N.D. 2015) citing Scott v. Harris , 550 U.S. 372 , 380 (S. Ct. 2007) . Summary judgment is an established means of terminating litigation when it is made duly evident that a litigant's position is untenable. **Green v. Manly Construction Company, 159 So. 2d 881(Fla. 2d DCA 1964)** . B. DEFENDANT DID NOT HAVE A DUTY TO WARN PLAINTIFF; THEREFORE, DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT . Defendant is entitled to summary judgment because Defendant did not have a ...

Content: Court Documents | **Date:** August 16, 2019

Motions

9. **TUCKER v. SAM'S EAST, INC.**, 2019 FL Cir. Ct. Motions LEXIS 6763

... 2015 WL 4529616 (N.D. 2015) citing Scott v. Harris , 550 U.S. 372 , 380 (S. Ct. 2007) . Summary judgment is an established means of terminating litigation when it is made duly evident that a litigant's position is untenable. **Green v. Manly Construction Company, 159 So. 2d 881(Fla. 2d DCA 1964)** . B. DEFENDANT DID NOT HAVE A DUTY TO WARN PLAINTIFF; THEREFORE, DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT . Defendant is entitled to summary judgment because Defendant did not have a ...

Content: Court Documents | **Date:** June 28, 2019

10. **UCHTORFF v. GLENCARE CORP.**, 2019 FL Cir. Ct. Motions LEXIS 8607

... Castellano v. Raynor , 725 So. 2d 1197 , 1199 (Fla. 2d DCA 1999) (emphasis added). Summary judgment is an "established means of terminating litigation when it is made duly evident that a litigant's position is untenable." **Green v. Manly Construction Company, 159 So. 2d 881, 886(Fla. 2d DCA 1964)** . II. Purpose of the Statute of Limitations The Complaint alleges Defendants committed negligence against the while she resided at The Glenview at Premier Palace, a skilled nursing facility. ...

Content: Court Documents | **Date:** April 11, 2019

11. **SIEGLER v. SMITH**, 2015 FL Cir. Ct. Motions LEXIS 980

... facts, entitled to judgment as a matter of law."). If a party moved against is without substantial, competent evidence to support facts that they must establish to succeed, or is without evidence to rebut the moving party, thus precluding a judgment in its favor, then a summary final judgment may be decreed. Harvey Building, Inc. v. Haley, 175 So. 2d 780 (Fla. 1965); Connolly v. Sebeco, Inc., 89 So. 2d 482, 484 (Fla. 1956); **Green v. Manly Construction Co., 159 So. 2d 881, 887 (Fla. 2d DCA 1964).** ...

Content: Court Documents | **Date:** March 13, 2015

12. ALLEN v. ADVANCED HOMECARE, INC., 2014 FL Cir. Ct. Motions LEXIS 4482

... Ameriseal of N.E. Fla., Inc. v. Leiffer, 738 So.2d 993, 995 (Fla. 5th DCA 1999); Fla. R. Civ. P. 1.510 . Summary judgment is an established means of terminating litigation when it is made duly evident that a litigant's position is untenable. **Green v. Manly Construction Company,159 So. 2d 881(Fla. 2d DCA 1964).** In this case, as is set forth below, the Plaintiff has failed to establish essential elements of her claim for Defamation, especially that Defendant's employees Rush and Jones acted ...

Content: Court Documents | **Date:** February 4, 2014

13. ACOSTA v. CITIZENS PROP. INS. CORP., 2014 FL Cir. Ct. Motions LEXIS 18174

... A party moving for summary judgment must show the absence of any genuine issue of material fact. See Moore v. Morris, 475 So. 2d. 666 , 668 (Fla. 1985). Summary judgment "remains an established means of terminating litigation when it is made duly evident that a litigant's position is untenable." **Green v. Manly Construction Company, 159 So. 2d 881, 886 (Fla. 2d DCA 1964).** Once the movant for summary judgment shows the absence of a genuine issue of material fact, the burden shifts to the ...

Content: Court Documents | **Date:** January 16, 2014

14. ACOSTA v. CITIZENS PROP. INS. CORP., 2013 FL Cir. Ct. Motions LEXIS 14521

... A party moving for summary judgment must show the absence of any genuine issue of material fact. See Moore v. Morris, 475 So. 2d. 666 , 668 (Fla. 1985). Summary judgment "remains an established means of terminating litigation when it is made duly evident that a litigant's position is untenable." **Green v. Manly Construction Company, 159 So. 2d 881, 886 (Fla. 2d DCA 1964).** Once the movant for summary judgment shows the absence of a genuine issue of material fact, the burden shifts to the ...

Content: Court Documents | **Date:** December 13, 2013

15. ALLEN v. ADVANCED HOMECARE, INC., 2013 FL Cir. Ct. Motions LEXIS 5732

... Ameriseal of N.E. Fla.. Inc. v. Leiffer, 738 So.2d 993, 995 (Fla. 5th DCA 1999); Fla. R. Civ. P. 1.510 . Summary judgment is an established means of terminating litigation when it is made duly evident that a litigant's position is untenable. **Green v. Manly Construction Company,159 So. 2d 881(Fla. 2d DCA 1964).** By Plaintiff's failure to establish elements of her Defamation claim, Plaintiff's claims are untenable, It is clear from the pleadings, affidavits, depositions and other record evidence ...

Content: Court Documents | **Date:** December 12, 2013

16. ESTATE OF TOWNSEND v. BRIAR HILL, INC., 2011 FL Cir. Ct. Motions LEXIS 7316

... Pearson v. St. Paul Fire & Marine Insurance Company, 187 So 2d 343, 347 (Fla. 1st DCA 1966). Summary judgment is recognized as an established means of terminating litigation when it is made duly evident that a litigant's position is untenable. **Green v. Manley Construction Company, 159 So. 2d 881, 886 (Fla. 2nd DCA 1964).** Although breach, causation and damages are generally questions for the fact finder, determination of duty is purely a legal issue. See McCain v. Florida Power Corp., 593 So. ...

Content: Court Documents | **Date:** January 3, 2011

17. ESTATE OF TOWNSEND v. BRIAR HILL, INC., 2010 FL Cir. Ct. Motions LEXIS 6453

... record evidence in the case at bar is clear that there is no genuine issue of material fact because there is no evidence: BROWN owed a duty to ARTLENE TOWNSEND, violated the nursing home resident rights of ARLENE TOWNSEND or otherwise committed some act of negligence upon ARLENE TOWNSEND. 2. Summary judgment is an established means of terminating litigation when it is made duly evident that a litigant's position is untenable. **Green v. Manley Construction Co.,159 So. 2d 881(Fla. 2nd DCA 1964).** ...

Content: Court Documents | **Date:** September 24, 2010

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18. **BAKER v. CITY OF WEST MELBOURNE**, 2009 FL Cir. Ct. Motions LEXIS 3885

... When there are no facts in dispute, as here, summary judgment should be granted Plaintiff can only overcome this Motion for Summary Judgment by coming forward with " counterevidence sufficient to reveal a genuine issue It is not enough for [Plaintiff] merely to assert that an issue does exist " Landers, 370 So 2d at 370 This case is a classic example of a time when the Plaintiff's position is "untenable " See **Green v Manly Construction Co159 So 2d 881** . 886 (Fla 2d DCA 1964) Here, the Plaintiff ...

Content: Court Documents | **Date:** June 2, 2009

Table Of Authorities (12)

Analysis: Distinguishing (1), "Citing" (11)

Florida Supreme Court

1. Hillsborough County v. Sutton, 150 Fla. 601, 8 So. 2d 401, 1942 Fla. LEXIS 1039

   Citing

   First Ref:159 So. 2d 881 at p.884
   Discussion: | **Court:** Fla. | **Date:** May 22, 1942

2. Roberts v. Braynon, 90 So. 2d 623, 1956 Fla. LEXIS 3499

   Citing

   First Ref:159 So. 2d 881 at p.884
   Discussion: | **Court:** Fla. | **Date:** July 1, 1956

3. Cook v. Navy Point, Inc., 88 So. 2d 532, 1956 Fla. LEXIS 3819

   Citing

   First Ref:159 So. 2d 881 at p.884
   Discussion: | **Court:** Fla. | **Date:** March 28, 1956

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4. Waite v. Dade County, 74 So. 2d 681, 1954 Fla. LEXIS 1155

   Citing

   First Ref:159 So. 2d 881 at p.884
   Discussion: | **Court:** Fla. | **Date:** September 24, 1954

5. **Bruce's Juices, Inc. v. American Can Co.**, 155 Fla. 877, 22 So. 2d 461, 1944 Fla. LEXIS 557, 1944 Fla. LEXIS 558

   Citing

   First Ref:159 So. 2d 881 at p.885
   Court: Fla. | **Date:** October 20, 1944

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6. Lewis v. Lewis, 73 So. 2d 72, 1954 Fla. LEXIS 1505

Citing

First Ref:159 So. 2d 881 at p.885
Discussion: | **Court:** Fla. | **Date:** May 11, 1954

7. Coreytown v. State, 60 So. 2d 482, 1952 Fla. LEXIS 1392

Citing

First Ref:159 So. 2d 881 at p.885
Discussion: | **Court:** Fla. | **Date:** August 29, 1952

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8. James v. Keene, 133 So. 2d 297, 1961 Fla. LEXIS 2035

Citing

First Ref:159 So. 2d 881 at p.886
Discussion: | **Court:** Fla. | **Date:** 1961

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9. Johnson v. Wood, 155 Fla. 753, 21 So. 2d 353, 1945 Fla. LEXIS 643

Citing

First Ref:159 So. 2d 881 at p.887
Discussion: | **Court:** Fla. | **Date:** March 16, 1945

10. Stark v. Holtzclaw, 90 Fla. 207, 105 So. 330, 1925 Fla. LEXIS 571, 41 A.L.R. 1323

Citing

First Ref:159 So. 2d 881 at p.887
Discussion: | **Court:** Fla. | **Date:** July 25, 1925

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11. McNulty v. Hurley, 97 So. 2d 185, 1957 Fla. LEXIS 2986

Citing

First Ref:159 So. 2d 881 at p.887
Discussion: | **Court:** Fla. | **Date:** 1957

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12. Byers v. Gunn, 81 So. 2d 723, 1955 Fla. LEXIS 3641

Y Distinguishing

First Ref:159 So. 2d 881 at p.887

Discussion: | **Court:** Fla. | **Date:** July 8, 1955

Legend

	Warning - Negative Treatment is Indicated	R	Red - Warning Level Phrase
Q	Questioned - Validity questioned by citing references	O	Orange - Questioned Level Phrase
	Caution - Possible negative treatment	Y	Yellow - Caution Level Phrase
	Positive - Positive treatment is indicated	G	Green - Positive Level Phrase
A	Analysis - Citing Refs. With Analysis Available	B	Blue - Neutral Level Phrase
I	Cited - Citation information available	LB	Light Blue - No Analysis Phrase
!	Warning - Negative case treatment is indicated for statute		

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