by Gary M. Kaleita and Peter Simmons

Lions, Tigers, and Bears, Oh My!
Owner and HOA Liability for Wild Animal Attacks

It was once said that "cooperation for mutual benefit, a survival strategy very common in natural systems, is one that humanity needs to emulate."[1] Nowhere is cooperation needed more than in reducing or preventing owner and homeowner association (HOA) liability for wild animal attacks. As land development continues to escalate and intrude upon animal habitats, the barriers that historically keep proper distance between humans and animals decline. At the same time, catalyzed by conservation efforts undertaken by the Florida Fish and Wildlife Conservation Commission (FWC), an increase in the black bear population here in Florida has resulted in a significant rise in human-bear conflicts as bears learn to forage for food in residential areas where numerous attractants (like unsecured household trash) present potentially easy pickings. This has resulted in bears becoming habituated to human contact. Since 2013, there have been several instances of Florida black bears mauling residents of neighborhoods located near bear habitat. As human populations grow and natural habitats shrink, it is increasingly likely that bears may injure people and/or damage their property. Using bears as our primary exemplar, this article explores land owner and HOA responsibilities for the actions of wild animals that often result from habitat encroachment.

Liability in General

Generally, an owner of land does not have an obligation to warn others about the dangers of animals in their natural habitat or protect others from wild animal attacks.[2] Yet, the law is well settled that an owner or occupier of land must exercise ordinary care in the management of their property, and the breach of this duty gives rise to a cause of action for negligence.[3] While an owner's duty to exercise ordinary care is not expected to prevent all injury, an owner is expected to use reasonable care to discover dangerous conditions on their land and to protect permitted entrants from those conditions. The interpretation of this duty varies from court to court, but prudent owners should regard every visitor (whether a guest or contractor) as a potential party deserving such protection. Indeed, a Georgia court case indicated that, when a visitor was injured running away from a snake in overgrown grass, negligence could be found if the owner should have foreseen that there were snakes in the area on account of the overgrown grass.[4] In that respect, an owner's duty "is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[5]

In making this judicial policy determination, courts weigh the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff would suffer injury, the policy of preventing future harm, and the extent of the burden on the defendant and consequences to the community of imposing a duty to exercise care with attendant liability for breach.[6] Florida courts tend to tip the scales in favor of defendant-owners under the doctrine of ferae naturae,[7] relating to animals that are wild by nature. The crux of this rule is that the law generally does not require an owner to anticipate the presence of or guard a visitor against harm from wild animals unless the owner has reduced the animals to possession, harbors such animals, or has introduced wild animals onto the property that are not indigenous to the locality.[8] However, Florida courts have qualified that rule as follows:

> We do not say a landowner can never be negligent with regard to the indigenous wild animals found on its property. A premises owner could be negligent with regard to wild animals found in artificial structures or places where they are not normally found; that is, stores, hotels, apartment houses, or billboards, if the landowner knows or should know of the unreasonable risk of harm posed by an animal on its premises, and cannot expect patrons to realize the danger or guard against it.[9]

In a case involving a lawsuit against a hospital by a patient bitten by a black widow spider, the court described the negligence claim as "essentially a premises liability action against the landowner-hospital" by an invitee.[10] In reversing the original jury damages award in *St. Joseph's Hospital v. Cowart*, 891 So. 2d 1039, 1040 (Fla. 2d DCA 2004), the Second DCA noted that "[n]o Florida cases specifically address a premises liability action based on a spider or insect bite," but "Florida law holds that landowners do not have a duty to guard an invitee against harm from wild animals, *except in certain circumstances not applicable here*."[11]

The "circumstances not applicable here" are those in which Florida courts have held that an owner can be negligent when the evidence demonstrates the owner knew of the unreasonable risk of harm posed by a wild animal.[12] The *Cowart* court recognized that an owner's duty to guard a visitor against harm from wild animals hinges on the owner's knowledge of the danger being superior to that of their visitor.[13] For instance, the hospital in *Cowart* could have such a duty if the hospital records demonstrated that there was a black widow infestation or that other patients had been bitten by black widow spiders.[14] This was why the Colorado Supreme Court, in *CeBuzz, Inc. v. Sniderman*, 171 Colo. 246, 252 (1970), found a grocery store owner's negligence established as a matter of law when a tarantula spider bit a customer. The *CeBuzz* court found the owner negligent, as a matter of law, because the store had prior knowledge and notice of the presence of tarantulas on its premises and in the bananas it sold. Thus, the store failed to exercise due care toward its customers by allowing that condition to exist and to continue, and the store took no steps to safeguard its customers from the threat of injury.[15]

In that respect, if bears are known to become habituated to human contact and attack people on premises located in bear-prone areas where bear incursions are frequent, and the owner is aware of them and makes no effort to reduce bear attractants on their property, a court could find such owner negligent when a bear attacks a visitor. Specifically, the court would find it necessary to decide the following factual questions: 1) the extent of the owner's knowledge of the presence of bears in surrounding areas; 2) the foreseeability that a bear would attack a visitor on the owner's property; and 3) the sufficiency of the owner's knowledge of danger so as to give rise to a duty to post warning signs or further safeguard visitors from such danger.[16]

The duty of care that an owner

owes to safeguard visitors from foreseeable bear attacks may be likened to a landlord's duty of care to protect tenants from foreseeable criminal attacks.[17] The question is not simply whether a criminal attack is foreseeable, but whether a duty exists to guard against it.[18] Again, whether a duty exists is a question of fairness, weighing the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.[19] That is why the Third DCA in *Ten Associates v. McCutchen*, 398 So. 2d 860, 861 (Fla. 3d DCA 1981), found that when the landlord knew (or had constructive knowledge) of a prior rape and numerous break-ins through apartment windows, a jury could reasonably determine that protective measures were inadequate, and that such inadequacy contributed substantially to a tenant's rape.[20]

Applying These Principles

The pressing question for homeowners' associations becomes whether an HOA can be held liable for injuries and damages and, if so, what steps must an HOA take to safeguard its residents from such attacks? Prevailing law views the relationship between an HOA and a homeowner as analogous to the relationship between a landlord and tenant.[21] For instance, akin to a landlord, an HOA is held responsible for the maintenance of those areas over which it exercises dominion and control. Indeed, if an HOA specifically knew or reasonably should have known that some hazardous condition or activity under its control could injure the plaintiff (such as prior crimes in the area and the need for better exterior lighting to deter criminal activity) and the HOA had a reasonable opportunity to guard against the hazard, then the HOA could be found liable for its failure to provide reasonable security against the foreseeable criminal activity.[22]

While the types of actions an HOA could take to deter or prevent criminal acts and whether they are appropriate are debatable (and the courts will generally not second guess the business decisions of an HOA's board of directors), if no action is taken at all when it would be reasonable and prudent to do so, then liability can result. Further, since homeowner rights in this area arise out of the foreseeability of criminal acts in the community and whether an HOA has acted with due care in attempting to reduce the likelihood of such acts, the mere fact that the crime occurs inside an owner's home (as opposed to an HOA common area) does not relieve an HOA from liability when the foreseeability of a particular type of harm arises out of a failure to provide reasonable safety measures in the common area.[23]

Bears have been known to enter garages looking for garbage and pet food. While they are there, they may open freezers and refrigerators looking for food, or even enter the house.

It is not much of a stretch to analogize the attack of a bear, or any other wild animal, to a criminal attack. Indeed, a recent Florida court case implicitly provided the bridge connecting criminal and animal attacks. Specifically, in *Wamser v. City of St. Petersburg*, 339 So. 2d 244, 246 (Fla. 2d DCA 1976), a case involving a lawsuit against a city by someone who was bitten by a shark while swimming at a city beach, the swimmer alleged that the city was negligent for failing to warn swimmers about sharks in the area. The *Wamser* court expressed that, absent reasonable foreseeability of danger (there was not a single shark attack on record in the history of the beach in question), the city had no duty to warn of shark attacks.[24] Implicit in that decision was the proposition that if shark attacks had been occurring, the city could have owed a duty to warn swimmers about them. In that respect, if bears are known to enter residential subdivisions, damage property, and even attack people and pets in bear-prone areas due to the presence of attractants in the community (such as unsecured trash), an HOA that is aware of these issues and makes no effort to reduce bear attractants in the community could face liability for damages, injury, or death should such occur as a result of a bear incursion.

A Georgia case, *Landings Ass'n, Inc. v. Williams*, 291 Ga. 397 (2012), explicitly addressed the issue of whether an HOA failed to take reasonable steps to protect a victim from being attacked and killed by a wild animal (in this case an alligator) in a residential community. While it was ultimately determined that the HOA did not breach its duty, the reasoning is far more important than the result. The court exonerated the HOA because the victim had equal knowledge of the threat of alligators within the community on account of the HOA's widely publicized policy of removing any large or aggressive alligators and frequent warnings as to the presence of alligators and the danger they pose to humans and pets.[25] Had the HOA not adopted or followed this policy, the court could easily have found liability on the part of the HOA.

Emerging Law Implications

The emerging law signals that HOAs in bear-prone areas should seriously consider adopting and enforcing bear-wise community policies designed to reduce bear attractants in their subdivisions and thereby reduce the likelihood of bears entering into or lingering in the community looking for food. Failure to do so could result in the HOA being found liable for an attack. Of course, if an HOA adopts such a policy, then the HOA will be expected to comply with and enforce that policy, and its failure to do so could result in liability on the part of the HOA should an attack occur.

If a resident or visitor is killed by a bear, it is likely that an HOA will be sued, and it is quite possible that such a suit could survive a motion to dismiss given the right circumstances. To conceptualize just how cogent this belief is, an attorney in South Carolina reached a self-proclaimed landmark legal settlement against a private development for his client who had his arm ripped off and eaten by a 10-foot alligator.[26] The complaint alleged that despite having "actual and constructive knowledge of the ongoing presence and aggressive behavior of the large alligator [the defendants] failed to take reasonable action to secure the premises of the golf course and to warn its business invitees, including the plaintiff, of the alligator's aggressive presence, size, or aggressive behavior." These allegations were apparently sufficient to induce a settlement.

While homeowners and HOA's generally carry liability insurance, sometimes such an insurance policy may not cover animal attacks, or may have an animal liability exclusion endorsement, which caps the insurance coverage for them. If an HOA is found liable and does not have sufficient liability insurance, it can be required (at least in Florida) to levy a special assessment against its homeowners to pay any shortfall in insurance coverage. A homeowner's own liability insurance policy may not cover such an assessment unless the homeowner has a loss assessment endorsement, and even those can cap the insurance coverage available to a homeowner to pay such an assessment.

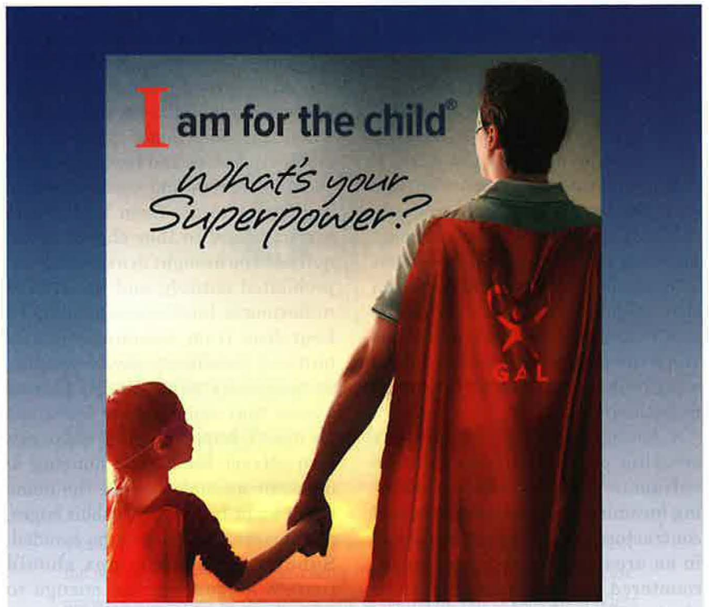
Practical Tips for Controlling Liability by Being Bear-Wise

The best way to keep bears out of subdivisions you represent (or live in) is to enact a program to make those communities bear-wise, which is adopting the principles detailed by various organizations, including the FWC, to reduce human-bear conflict.[27] While a plethora of information about this subject is easily available,[28] this article summarizes some of the readily available information on various steps that can be implemented as appropriate depending on the circumstances.

For example, as a developer, the most effective way would be to include bear-wise community requirements in subdivision restrictions. This gives the homeowners' association a mechanism to enforce them, including the imposition of fines for violations. Builders selling homes in a community that already has subdivision restrictions recorded by another developer can consider asking the developer or the homeowners' association to amend them. If this is not feasible, consider adding an addendum to home sales contracts addressing some of these matters. For those operating or managing an existing homeowners' association, investigate whether a given subdivision's restrictions grant the board of directors the authority to impose bear-wise community requirements, or whether it must be done with the approval of the homeowners, and proceed accordingly.

Regardless of the means or methods of adopting them, bear-wise community requirements should typically address the following types of issues:

- *Educate Residents* — Residents should be aware of the possibility that bears will enter the subdivision. Inform homeowners (via the subdivision restrictions or sales contracts) that the community is located in an area that may contain various species of wild animals, such as bears, that may stray into the community,



Use your super power - advocacy and legal expertise - to give a voice to a child. You can be a part of the Defending Best Interests Project, complete pro bono service hours, and earn CLE credits all with the support of our skilled program attorneys and executive leadership.

GAL Guardian ad Litem FOR CHILDREN FLORIDA

Email infoprobono@gal.fl.gov
or visit www.GuardianadLitem.org

and which may pose a nuisance or hazard. This kind of disclosure can include a disclaimer that a resident buying a home in the community accepts all risks associated with wild animal encounters. This can limit potential liability that may be asserted against the developer, builder, or homeowners' association should a bear attack occur. Residents should be conscious of the possibility of a bear encounter when they are in their yards, or walking around the subdivision, especially when walking dogs. When out at night, residents should be alert and carry a flashlight so they are not surprised by a bear. Some people recommend that persons walking in bear-prone areas also carry an air horn and/or bear spray. Residents should know to report bear contact to the FWC. Bear encounters or intrusive bear activity should be reported to FWC's applicable regional office (there are five located throughout Florida). Report known instances of anyone feeding bears to FWC's Wildlife Alert Hotline at (888) 404-3922. If the homeowners' association has a staffed gatehouse, ask residents to notify the gatehouse when bears are seen in the community so that a "bear alert" sign can be posted in the window at the entrance to the community, at least for a day or so. Have the gate attendants maintain a log book of bear activity reported by residents.

• *Erect Signage* — Consider erecting permanent signs at the entrances to the community, warning incoming residents, visitors, and contractors that the community is in an area where bears may be encountered, and advising them to be alert and avoid contact. Although residents may know of this possibility, visitors and contractors may not. Such signs can also serve to limit the potential liability of a developer, builder, or homeowners' association should an attack occur.

• *Secure Human Food Sources* — Inform all residents that they must not feed wild animals of any kind, nor engage in conduct that attracts wild animals into the community. This includes leaving food waste in containers or areas that are accessible to wild animals, and allowing wild animals to access food waste, pet food, bar-b-que grills, refrigerators, or freezers in garages, or on porches or patios. Require bar-b-que grills to be cleaned after each use, or otherwise stored in closed garages (after detaching the propane tank, which should never be stored indoors), since grills on porches are bear attractants. The FWC has advised that if potential food sources are properly controlled, bear intrusions go down to near zero unless bears are already habituated to seek these food sources in your subdivision.

• *Reduce Natural Food Sources* — Some fruit and nut trees attract bears, as do some berry bushes (but bears are not generally attracted to citrus). Avoid planting landscaping that attracts bears near patios and entryways. Fruits, nuts, and berries should be picked when ripe, and not allowed to remain on the ground when they fall. Some types of vegetables (potatoes and root vegetables, such as carrots and beets) are also bear attractants. Even birdfeeders attract bears, so they should be required to be brought in at night if not prohibited entirely, and the ground underneath birdfeeders should be kept free from accumulations of birdseed. Needless to say, beekeeping attracts bears, as do salt and mineral blocks that some people leave out for deer. Composting food waste can also attract bears. The housing of domestic animals outside the home (such as in bird cages, rabbit cages, dog houses, etc.) should be avoided. Subdivision restrictions should contain language broad enough to address these kinds of activities in its bear-wise requirements.

• *Secure Garages and Vehicles* — Bears have been known to enter garages looking for garbage and pet food. While they are there, they may open freezers and refrigerators looking for food, or even enter the house. A 2014 attack in central Florida took place when a resident entered her garage (which had been left open) from the house, only to find it occupied by bears feeding on garbage kept in the garage pending pick-up.[29] Garage doors should be kept closed when not actually in use. Bears are known to break into vehicles, especially when they smell food in them. You should not leave pet food, groceries, garbage, coolers, or food products of any type or other scented items (like Chapstick) in vehicles.

• *Mandate Bear-Resistant Trash Cans* — Consider mandating the use of bear-resistant trash cans for the disposition of food waste. This may require homeowners to place food waste in a bear-resistant trash can and other waste in a regular trash can. Bear-resistant cans are advertised as such, and contain special locking mechanisms of various types that are designed to withstand a bear's attempts to open them, and they are strong enough to preclude the bear from damaging them. However, they can be expensive, and must be capable of pick-up by the trash hauler servicing your subdivision. The trash hauler may charge an annual fee to accept these cans because they may require the use of tilting mechanisms on their trucks, and it may take a hauler 10 to 15 extra seconds to empty them. In a subdivision of 150 homes, that can add 30 or 40 minutes to the hauler's pick up time. These matters can be investigated by contacting the trash hauler servicing your subdivision. The hauler may be able to sell homeowners or their association acceptable bear-resistant cans at the hauler's cost. The board of directors of the homeowners' association may have authority under its governing documents to require residents to use these, but the documents may require a vote of the owners.

• *Regulate Trash Pickup* — Bears are frequently attracted into a community by residents putting trash out for pick-up the night before, instead of the morning of pick-up. This should be precluded by the subdivision restrictions, especially if bear-resistant trash cans are not being used.

These types of precautions will go a long way toward reducing or eliminating bear incidents in your communities, and thereby avoid habituating the local bear population. It is important that homeowners' associations be vigilant in enforcing these requirements, like all subdivision restrictions. A successful bear-wise community can offer residents the benefits of Florida's natural surroundings, while minimizing the risk of adverse interactions with wildlife. Such precautions will also offer a developer, builder, or homeowners' association a better chance of minimizing its potential liability should an incident actually occur. ❑

[1] Eugene Odon, AZ Quotes, http://www.azquotes.com/quote/528230.
[2] *Palumbo v. State Game and Fresh Water Fish Com'n*, 487 So. 2d 352 (Fla. 1st DCA 1986).
[3] *Post v. Lunney*, 261 So. 2d 146 (Fla. 1972).
[4] *Williams v. Gibbs*, 123 Ga. App. 677 (1971).
[5] *See Rupp v. Bryant*, 417 So. 2d 658, 667 (Fla. 1982).
[6] *McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992).
[7] Latin, meaning of a wild nature. *See* Ferae Naturae, COLLINS DICTIONARY, *available at* https://www.collinsdictionary.com/us/dictionary/english/ferae-naturae.
[8] *Wamser v. City of St. Petersburg*, 339 So. 2d 244, 246 (Fla. 2d DCA 1976).
[9] *See Hanrahan v. Hometown Am., LLC*, 90 So. 3d 915, 918-19 (Fla. 4th DCA 2012).
[10] *See St. Joseph's Hospital v. Cowart*, 891 So. 2d 1039, 1040 (Fla. 2d DCA 2004).
[11] *Id.* at 1041 (emphasis added).
[12] *See Simmons v. Florida Dep't of Corr.*, 2015 WL 3454274, at *5 (M.D. Fla. May 29, 2015).
[13] *Cowart*, 891 So. 2d at 1042.
[14] *See id.*
[15] *CeBuzz*, 171 Colo. at 249.
[16] *See, e.g., Carlson v. State*, 598 P.2d 969, 975 (Alaska 1979).
[17] *Ten Associates v. McCutchen*, 398 So. 2d 860, 861 (Fla. 3d DCA 1981).
[18] *Id.* at 862.
[19] *Id.*
[20] *Id.*
[21] *See Frances T. v. Village Green Owners Ass'n*, 723 P.2d 573 (Cal. 1986).
[22] *See Ten Associates*, 398 So. 2d at 862.
[23] *See Holley v. Mt. Zion Terrace Apartments, Inc.*, 382 So. 2d 98 (Fla. 3d DCA 1980).
[24] *Wamser*, 339 So. 2d at 246.
[25] *Landings*, 291 Ga. at 399.
[26] Tucker Mitchell, *Golfer Loses Arm to Gator, Wins Suit Against Course*, SCNOW MORNING NEWS (April 13, 2013), *available at* http://www.scnow.com/news/local/article_ee635a38-9d80-11e2-995d-0019bb30f31a.html.
[27] *See* Florida Fish and Wildlife Conservation Commission, BearWise Cost Share Funding Opportunity, http://myfwc.com/wildlifehabitats/managed/bear/wise/.
[28] For example, Florida Fish and Wildlife Conservation Commission, Living with Florida Black Bears, *available at* http://myfwc.com/wildlifehabitats/managed/bear/living/.

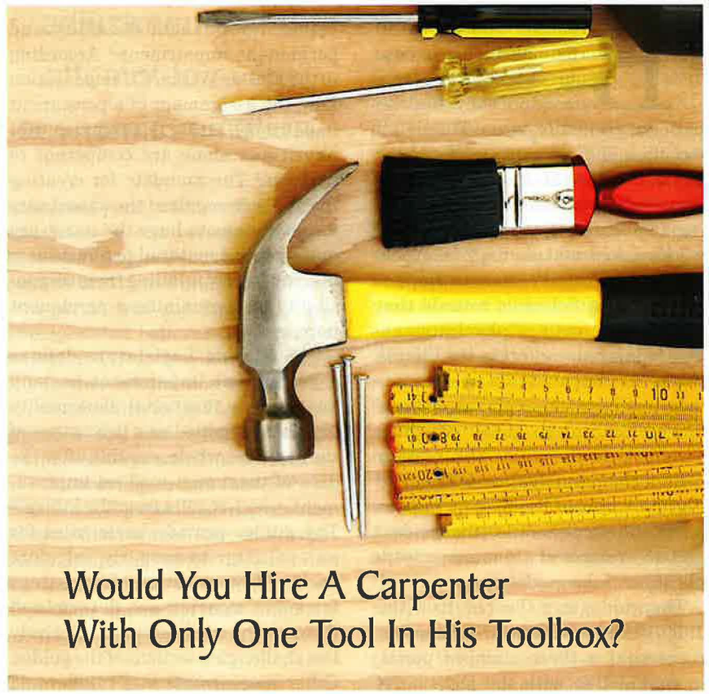
Another is The Get Bear Wise Society (Canada), http://www.bearwise.com (offers helpful information on how to become a bear-wise community on its website).

[29] *See* Joe Sutton, *Bear Drags Florida Woman from Garage*, CNN (April 13, 2014), http://www.cnn.com/2014/04/13/us/florida-bear-attack/index.html.

Gary M. Kaleita *is a partner and board certified real estate lawyer practicing at the Orlando law firm of Lowndes, Drosdick, Doster, Kantor & Reed, P.A. He is also on the board of directors of the homeowners' association for his own subdivision, which adjoins the Wekiva River Preserve and is the first bear-wise community officially recognized as such by the FWC. Kaleita is also a member of the stakeholder group for the FWC's Central Bear Management Unit.*

Peter Simmons *was an associate at the same law firm when this article was written, but has since relocated to San Francisco, where he joined the law firm of Coblentz Patch Duffy & Bass LLP.*

This column is submitted on behalf of the Animal Law Section, Gregg R. Morton, chair, and Debbie Brown, editor.



The Centers provides a full range of services specifically designed to meet the needs of law firms and the clients they serve. From our dedicated case management center to our accounting department, our organization offers a full spectrum of tools to optimize your client's settlement, minimize your risk and increase your bottom line.

THE CENTERS
4912 Creekside Drive | Clearwater, FL 33760
www.centersweb.com | (877) 766-5331