

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

PREMISES LIABILITY

Generally, premises liability is based on the negligence of the property owner or occupant in allowing invitees or licensees to enter the property, without warning, where that owner or occupant could foresee that such persons could be injured by a dangerous condition on the property that is not readily apparent.¹ Owners have a duty to provide reasonably safe premises and are only responsible for foreseeable risks. Ordinarily, a property owner has no duty to protect a person on his or her premises from a criminal attack by a third party; however, liability does exist where the likelihood of the misconduct and the unreasonable risk of it outweighs the burden of protecting against it.² In premises liability cases involving the intentional criminal acts of third parties, the duty of the property owner is defined by the foreseeability of the incident and the obligation of the property owner to maintain reasonably safe premises.

Numerous cases have discussed the element of foreseeability in connection with premises liability for criminal attacks by third persons. The recent trend has been to find that criminal attacks are foreseeable under most circumstances. To support such a determination, courts have allowed the finder of fact to consider the occurrence of other criminal incidents that took place on the property or within the community.³ An examination of the cases reveals no established pattern in the types of incidents that might support a finding of foreseeability. It is not clear what degree of factual similarity is required between other criminal activity and the incident giving rise to the action for damages.⁴

¹ See *Houssami v. Nofal*, 578 So.2d 495 (Fla. 5th DCA 1991).

² See *Drake v. Sun Bank and Trust Co. of St. Petersburg*, 377 So.2d 1013 (Fla. 2nd DCA 1979), appeal after remand, 400 So.2d 569 (Fla. 2nd DCA 1981).

³ See *Hardy v. Pier 99 Motor Inn*, 664 So.2d 1095 (Fla. 1st DCA 1995), wherein the court found that other incidents of criminal activity on or near the premises created a material issue of fact involving the foreseeability of the attack. The dissent cautioned, "In truth, a decision such as today's imposes absolute liability upon [the hotel].... The courts have lowered the bar to such an extent in this type of case that a commercial premises owner is a virtual insurer of the safety of its business invitees." *Id.* at 1099 (Kahn, J., dissenting).

⁴ See *Larochelle v. Water & Way Ltd.*, 589 So.2d 976 (Fla. 4th DCA 1991), wherein the court held that a landlord could be held liable for a sexual battery committed against a tenant, because the landlord was on notice of danger to tenants by virtue of other crimes committed within a four to twelve block radius, and as a result of unsavory (though unviolent) conduct that occurred in another apartment unit; *Odice v. Pearson*, 549 So.2d 705 (Fla. 4th DCA 1989), wherein the Fourth District Court of Appeal held that the trial court committed reversible error in limiting the issue of foreseeability to crimes that occurred on appellee's property and adjacent sidewalk; *Paterson v. Deeb*, 472 So.2d 1210 (Fla. 1st DCA 1985), wherein the court held that police records of reported crime in the geographical neighborhood, not limited to the actual premises or even to the block of the attack, are competent evidence of foreseeability of a criminal attack.

In other cases, Florida courts have discussed the adequacy of various security arrangements. These cases, taken as a whole, provide little guidance concerning what types of security measures would be sufficient to avoid liability. Generally, the courts have found the following factors to be relevant in determining whether a property owner has exercised ordinary care in providing adequate security:

- Industry standards;
- Community's crime rate;
- Extent of criminal activity in area or in similar business enterprise;
- Presence of suspicious persons; and
- Peculiar security problems posed by the building's design.⁵

The duty to provide a reasonably safe premises has been found to be non-delegable, and thus a property owner is vicariously liable for any negligence of the firm it hires to provide security services.⁶

Several other types of negligence cases are provided with a statutory 'safe harbor', wherein there is provided a presumption against negligence for the intentional criminal acts of third parties if the actor substantially complies with the required measures. For example, the owner or operator of a convenience store that substantially implements statutory security measures gains a presumption against liability in connection with criminal acts that occur on the premises and that are committed by third parties who are not owners or operators.⁷ Similarly, in a civil action for death or injury to a third person caused by the intentional tort of an employee, an employer is considered not to have negligently hired the employee if the employer complies with statutory background investigation requirements.⁸

This bill creates s. 768.0706, F.S., which establishes a presumption concerning the liability of holders of commercial real property for criminal attacks committed by third parties. The bill sets forth a list of eight security measures which may be adopted by the holder of an interest in commercial real property other than a convenience store. If a judge determines as a matter of law that any six of these measures are implemented, the property holder gains a presumption that adequate security was provided for invitees, guests, and other members of the public against criminal acts that occur on the premises and that are committed by third parties who are not employees or agents. The eight conditions are as follows:

- a) Signs are prominently posted indicating the hours of normal business operations and the general security measures provided.
- b) The parking lot, public walkways, and public building entrances and exits are illuminated at a specified intensity.
- c) Specified crime prevention training is provided to all nonmanagement employees. Under no circumstances shall the state or local law enforcement be liable for the contents of approved curriculum.
- d) Security cameras covering public entrances and exits, and at least half of the parking lot are installed, maintained, and monitored. Cameras shall operate during business hours and for at least 30 minutes after closing.
- e) An emergency call box linked to law enforcement agencies, a private security agency, or a security guard on the premises is available within 150 feet of any location in the parking lot or other public place on the premises.
- f) A licensed security guard is on duty with specified requirements.
- g) Fencing is installed and maintained.
- h) A public address system is installed and maintained.

The bill provides that failure to implement a sufficient number of the conditions does not create a presumption of liability.

⁵ See *Orlando Executive Park, Inc. v. P.D.R.*, 402 So.2d 442 (Fla. 5th DCA 1981).

⁶ See *U.S. Security Services Corp. v. Ramada Inn, Inc.* 665 So.2d 268 (Fla. 3rd DCA 1995), rev. denied 675 So.2d 121 (Fla. 1996).

⁷ See s. 768.0705, F.S.

⁸ See s. 768.096, F.S.

The bill also provides immunity from liability in connection with criminal acts that occur on the premises and are committed by third parties to owners of commercial real property that is located in an enterprise zone,⁹ if such owners meet at least six of the eight conditions and do not engage in gross negligence that permits or invites the occurrence of the criminal act.

COMPARATIVE FAULT

Section 768.81, F.S., is Florida's comparative fault statute which generally provides that any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault. The statute requires the court to enter judgment against a party on the basis of fault rather than on the basis of joint and several liability,¹⁰ with statutory exceptions based upon the degree of fault of the parties.¹¹ Comparative fault applies to negligence cases, and specifically excludes actions based upon an intentional tort.¹² The Florida Supreme Court has found that the exclusion of intentional torts from the comparative fault statute "gives effect to a public policy that negligent tortfeasors ... should not be permitted to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a foreseeable result of their negligence."¹³ An example of the application of the comparative fault doctrine can be found in the Merrill Crossings case, wherein the plaintiff was shot and injured by an unknown criminal in a Wal-Mart parking lot. The plaintiff sued for failure to employ reasonable security measures and the jury found Wal-Mart 75% negligent and Merrill Crossings (the owner of the shopping center) 25% negligent. The Florida Supreme Court held that the action was based on an intentional tort, and therefore the comparative fault statute did not apply. Thus, the criminal actor was not apportioned any liability, rather the liability of the criminal actor was shifted to Wal-Mart and Merrill Crossings.

The Florida Supreme Court has addressed how to apply the comparative fault statute when not all tortfeasors are parties to the lawsuit, in the Fabre case.¹⁴ Courts are required to impose liability on a defendant equal only to that defendant's percentage of fault: "We are convinced that s. 768.81 was enacted to replace joint and several liability with a system that requires each party to pay for noneconomic damages only in proportion to the percentage of fault by which that defendant contributed to the accident."¹⁵

This bill would eliminate joint and several liability based on intentional torts, and expand the Fabre rule to permit damages to be apportioned to nonparty tortfeasors, even if those tortfeasors are intentional criminal actors. For example, in a case such as Merrill Crossings, which was based on an intentional tort, the jury would have to apportion fault between Merrill Crossings, Wal-Mart, and the unknown criminal. The plaintiff would only be able to recover from Merrill Crossings and Wal-Mart based on their respective percentages of fault and would not be able to recover the percentage of damages caused by the unknown criminal.¹⁶

⁹ See s. 290.0065, F.S.

¹⁰ Joint and several liability is a doctrine that allows a claimant to recover all of his or her damages from one or multiple defendants, even though that defendant may be the least responsible defendant in the cause. All negligent defendants are held to be responsible for the claimant's damages, regardless of the extent of each defendant's fault in the cause. See *Gouty v. Schnepel*, 795 So.2d 959 (Fla. 2001).

¹¹ See s. 768.81(3), F.S., which apportions damages differently dependent on whether the plaintiff is found to be at fault, whether the plaintiff is found to be without fault; and defendants whose percentage of fault is less than the fault of a particular plaintiff.

¹² See s. 768.81(4)(b), F.S.

¹³ See *Merrill Crossings Associates v. McDonald*, 705 So.2d 560 (Fla. 1997).

¹⁴ See *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993).

¹⁵ *Id.* at 1185.

¹⁶ See s. 768.81(3)(d) and (e), F.S., which require a defendant to affirmatively plead the fault of a nonparty and prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries. This bill does not affect these statutory requirements.

C. SECTION DIRECTORY:

Section 1 creates s. 768.0706, F.S., to create a legal presumption; provide specified immunity; and provide that failure to implement specified conditions does not create a presumption of liability.

Section 2 amends s. 768.81, F.S., to expand the application of comparative fault to include negligence cases based on intentional torts.

Section 3 reenacts s. 25.077, F.S., to incorporate the amendment to s. 768.81, F.S., in a reference thereto.

Section 4 provides an effective date of October 1, 2004, and shall apply to claims filed on or after that date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may reduce the ability of certain persons to recover civil damages. Specifically, persons harmed by crimes which occur on commercial property would have a diminished chance of recovery against the property holder. The bill may also reduce the liability to businesses for civil actions based on intentional torts.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

2. Other:

Access to Courts - Article I, section 21 of the State Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." No similar provision exists in the federal constitution. Where citizens have enjoyed a historical right of access, the Legislature can only eliminate a judicial remedy under two circumstances: a valid public purpose coupled with a reasonable alternative,¹⁷ or an overriding public necessity.¹⁸ To the extent that this bill provides immunity from liability under specified circumstances to owners of real property that is located in an enterprise zone, it does not appear that a valid public purpose with a reasonable alternative, nor an overriding public necessity has been expressly provided in the bill.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.

¹⁷ See *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

¹⁸ See *Rotwein v. Gersten*, 36 So.2d 419 (Fla. 1948).