

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2226

SPONSOR: Senator Bennett

SUBJECT: Political Subdivisions/Streetlights

DATE: March 25, 2004 REVISED: 04/16/04 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Herrin	Yeatman	CP	Fav/1 amendment
2.			GO	
3.			JU	
4.				
5.				
6.				

I. Summary:

The bill provides that a person or political subdivision providing streetlights, security lights, or other similar illumination may not be held liable for any civil damages for injury or death caused by the failure of such lights. It eliminates the duty of a person or political subdivision to provide, operate, or maintain the illumination in any manner.

This bill creates a new section of the Florida Statutes

II. Present Situation:

The Florida Supreme Court recently adopted the section 324A of the Restatement (Second) of Torts as the standard for liability in cases involving the “undertaker’s doctrine.” In *Clay Electric Co-op., Inc. v. Johnson*,¹ the court held that Florida law imposes a duty to the public on utilities for the maintenance of streetlights, under which they may be held liable in tort to third parties with whom they are not in contractual privity. The court set out the undertaker’s doctrine as follows: “Whenever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service—i.e., the “undertaker”—thereby assumes a duty to act carefully and to not put others at an undue risk of harm.”²

The Restatement (Second) of Torts provides as follows: One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (1) his

¹ 28 Fla. L. Weekly S866, Nos. SC01-1955 and SC01-1956, 2003 WL 22966277 (Fla. Dec. 18, 2003).

² RESTATEMENT (SECOND) OF TORTS, § 323.

failure to exercise reasonable care increases the risk of such harm, or (2) he has undertaken to perform a duty owed by the other to the third person, or (3) the harm is suffered because of reliance of the other or the third person upon the undertaking.³

In *Clay Electric*, a utility under contract with the Jacksonville Electric Authority to maintain streetlights was sued by the estate of a pedestrian who was hit and killed by a truck driver on an unlit street. The estate alleged that the utility owed a duty to the public to maintain the streetlights, and that its failure to do so was the proximate cause of the decedent's death. The utility moved for summary judgment, arguing that no such legal duty to parties with which it was not in contractual privity existed. The trial court agreed and entered summary judgment for the utility. The First District Court of Appeal reversed, holding that such a legal duty did exist.⁴

The Florida Supreme Court granted review on the basis that this holding by the First District conflicted with the Third District's ruling, in *Martinez v. Florida Power & Light Co.*,⁵ that there was no such duty in Florida law. Although confronted by the fact that the New York Court of Appeals in *H.R. Moch Co. v. Rensselaer Water Co.*⁶ had, in an opinion by Justice Cardozo, long since rejected the existence of a similar duty, the Supreme Court distinguished that case⁷ and construed the undertaker's doctrine to require such a legal duty: i.e., to hold that Florida law does impose liability to third parties on utilities for failing to maintain lighting.

Writing in dissent in *Clay Electric*, Justice Cantero, joined by Justice Wells, argued that the majority opinion misapplied the Restatement (Second) of Torts and puts Florida in the minority of states that have considered such cases.⁸ The dissent distinguishes *Union Park Memorial Chapel v. Hut*⁹ and *McCain v. Florida Power Corp*¹⁰, as imposing liability for a person who undertakes an act to protect other from danger and, instead, places others at greater risk than they would have been without such acts.¹¹ The dissent argued that "for a utility to assume a duty to the public arising from a contract with a municipality, the contract must specifically establish an intent to compensate the public in the event of a default."¹²

III. Effect of Proposed Changes:

Section 1 creates a new section of Florida Statutes that provides no person or political subdivision that provides, operates, or maintains street lights, security lights or other similar illumination, shall be held liable for any civil damages for injury or death effected or caused by

³ *Restatement (Second) of Torts*, § 324A.

⁴ *See Lance, Inc. v. Johnson*, 790 So. 2d 1163 (Fla. 1st DCA 2001); *Johnson v. Lance, Inc.*, 790 So.2d 1144 (Fla. 1st DCA 2001).

⁵ 785 So. 2d 1251 (Fla. 3d DCA 2001) (holding a utility owed no duty to maintain and/or repair a streetlight that was no functioning on the evening the decedent was struck and killed while crossing the street).

⁶ 159 N.E. 896, 897-99 (N.Y. 1928) (finding that a water company's failure to furnish an adequate supply of water that resulted in fire damage does not constitute a wrong, but is instead the denial of a benefit).

⁷ *See Clay Electric* at 6.

⁸ *See id.* at 11.

⁹ 670 So. 2d 64, 65 (Fla. 1976) (holding that a funeral director who voluntarily leads a funeral procession owes a duty of reasonable care to its participants).

¹⁰ 593 So. 2d 500, 503 (Fla. 1992) (imposing liability on a utility where a person was injured after using a trencher in an area that a power company employee had marked as being safe for digging a trench).

¹¹ *See Clay Electric* at 12.

¹² *See id.* at 16.

the adequacy or failure of that illumination. This new section further specifies that no such entity owes a duty to the public to provide, operate, or maintain the illumination in any manner.

Section 2 provides that the act shall take effect July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article I, section 21 of the Florida 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.” Because this bill eliminates the current ability of plaintiffs to bring suit against utilities for negligent maintenance of streetlights, it may raise concerns under this provision.

In *Kluger v. White*,¹³ the Florida Supreme Court considered the Legislature’s power to abolish causes of action. The court held that a statute violates the access to courts provision of the state constitution where a right to access the courts for redress for a particular injury predates the adoption of the access to courts provision in the 1968 state constitution and the Legislature abolishes the right without providing a reasonable alternative, unless the Legislature can show (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity.¹⁴ Because the right to recover for property damage caused by auto accidents predated the 1968 adoption of the declaration of rights, the court held that the restriction on that cause of action violated the access to courts provision of the state constitution.

Because this bill eliminates current causes of action, a litigant could argue that it likewise denies him or her access to the courts. A court confronted with the issue would first have to determine whether such a cause of action could nonetheless have been pursued under Florida law before the adoption of the access to courts provision in 1968. Should a court find that such action could not have been pursued prior to 1968, the judicial inquiry would end at that point, and this bill’s provisions would be allowed to stand. It is also possible that a court could hold that pre-1968 Florida law would have allowed such suits

¹³ 281 So. 2d 1 (Fla. 1973).

¹⁴ *See id.* at 4.

under the common-law cause of action for negligence, in which case, this bill would have to withstand the *Kluger* test.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill precludes any claim against a person or political subdivision that provides, operates, or maintains certain types of lighting for civil damages for an injury or death alleged to have been caused by the adequacy or failure of such lighting.

C. Government Sector Impact:

The bill provides immunity for a political subdivision that provides, operates, or maintains streetlights, security lights, or other similar illumination.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Comprehensive Planning

This strike everything amendment creates a rebuttable presumption of reasonable care for a governmental entity that maintains streetlights and follows certain procedures for maintaining those street lights. It provides that in an action for damages in which a duty to maintain streetlights is at issue, an entity responsible for maintaining the streetlights, which is not a party to the litigation, may not be deemed or found at fault or responsible for the injury or death that gave rise to the damages.