



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Increase Personal Responsibility:** On one hand, by eliminating a current basis for liability, this bill may affect incentives for utilities to perform maintenance on street lights. On the other hand, removing the duty from the utilities may create incentives on others to assume more responsibility for their own safety.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

The American Law Institute's Second Restatement of the Law of Torts describes the "undertaker's doctrine," in pertinent part, as:

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 thereby assumes a duty to act carefully and to not put others at an undue risk of harm.<sup>1</sup>

...

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 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.<sup>2</sup>

The Florida Supreme Court has applied this Restatement in determining the extent to which Florida law imposes liability to third parties on utilities for the maintenance of streetlights. In *Clay Electric Co-op., Inc. v. Johnson*,<sup>3</sup> 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. Construing all reasonable inferences in favor of the nonmoving parties, as required to do by the Florida Rules of Civil Procedure,<sup>4</sup> 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.<sup>5</sup>

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.*,<sup>6</sup> that there was no such duty in Florida law. The Florida Supreme Court agreed with the First District Court of Appeal applying the undertaker's doctrine and finding that such a legal duty does exist in Florida.

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<sup>1</sup> RESTATEMENT (SECOND) OF TORTS, § 323.

<sup>2</sup> *Id.*, § 324A.

<sup>3</sup> 873 So.2d 1182 (Fla. 2003).

<sup>4</sup> See FLA. R. CIV. P. 1.1510(c).

<sup>5</sup> 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).

<sup>6</sup> 785 So.2d 1251 (Fla. 3d DCA 2001).

Clay Electric had argued that the undertaker's doctrine was inapplicable because the inoperative streetlight did not increase the risk to the decedent. The decedent "was no worse off with an inoperative streetlight than he would have been with no light at all."<sup>7</sup> Further Clay Electric and the dissenting opinion argued that the test for determining whether utility conduct imposes a duty to the public was described in *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928).<sup>8</sup> The following test was articulated in that case:

If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward. . . . The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.<sup>9</sup>

Accordingly, the dissent argued that the failure to repair a streetlight was the withholding of a benefit rather than the launching of an instrument of harm and therefore no duty existed.<sup>10</sup>

### Proposed Changes

This bill creates s. 768.1382, F.S., in ch. 768, F.S., the general negligence chapter of the Florida Statutes. This new section provides that neither the state, nor any of its officers, agencies or instrumentalities, nor any electric utility, as defined in s. 366.02(2), F.S.,<sup>11</sup> that provides, maintains or operates street lights, security lights or other similar illumination, shall be held liable for any civil damages for injury or death affected or caused by the adequacy or failure of that illumination, unless such liability was expressly assumed by written contract.

The new section further specifies that no such entity owes a duty to the public to provide, operate, or maintain the illumination in any manner, unless such a duty is expressly assumed by written contract.

Finally, the new section provides that in any civil action for damages arising out of personal injury or wrongful death when the entity's fault regarding the maintenance of street lights is at issue, if it is not a party to the litigation, the entity is not to be deemed or found in that proceeding to be in any way at fault or responsible for the injury or death that gave rise to the damages.

This bill also expressly provides that if any provision of the bill or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications which can be given effect without the invalid provision or application.

### C. SECTION DIRECTORY:

**Section 1.** Creates s. 768.1382, F.S., providing for the absence of liability for maintenance or operation of streetlights on the part of certain public and private entities.

**Section 2.** Provides that if any provision of the bill or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications which can be given effect without the invalid provision or application.

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<sup>7</sup> *Clay Electric*, 873 So. 2d at 1187.

<sup>8</sup> *Id.* at 1188 and 1196-1197.

<sup>9</sup> *Id.* at 1197 (emphasis in original).

<sup>10</sup> *Id.* at 1198.

<sup>11</sup> Section 366.02(2), F.S., defines an electric utility as "any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains or operates an electric generation, transmission or distribution system within the state."

**Section 3.** Provides an effective date of upon becoming law, applying to all causes of action accruing on or after the effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

The bill does not appear to have any impact on state revenues.

#### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

#### 2. Expenditures:

By eliminating a current legal basis for liability, it is possible that this bill may reduce municipal owned utilities' liability in the future and may impact insurance rates.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

By eliminating a current legal basis for liability, it is possible that this bill may reduce utilities' liability in the future and may impact insurance rates.

### 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 take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

#### 2. Other:

##### **Access to Courts**

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."<sup>12</sup> In *Kluger v. White*,<sup>13</sup> the Florida Supreme Court considered the Legislature's power to abolish causes of action. At issue in *Kluger* was a statute which abolished causes of action to recover for property damage caused by an automobile accident unless the damage exceeded \$550.<sup>14</sup> The court determined that

<sup>12</sup> See generally 10A FLA. JUR. 2D CONSTITUTIONAL LAW §§ 360-69.

<sup>13</sup> 281 So. 2d 1 (Fla. 1973).

<sup>14</sup> See ch. 71-252, s. 9, L.O.F.

the statute violated the access to courts provision of the state constitution, holding that 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, the Legislature cannot abolish 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.<sup>15</sup> 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.

A litigant could argue that the bill denies him or her access to the courts if a cause of action existed under Florida law before the adoption of the access to courts provision in 1968. Should a court find a cause of action did not exist, the judicial inquiry would end at that point. But it is also possible that a court could hold that pre-1968 Florida law would have allowed such suits under the common-law cause of action for negligence. If so, this bill might be evaluated under the *Kluger* standard.

B. RULE-MAKING AUTHORITY:

Not applicable under this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

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<sup>15</sup> See *Kluger* at 4.