

STORAGE NAME: h3875.cjc

DATE: March 4, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CIVIL JUSTICE & CLAIMS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3875

RELATING TO: Negligence

SPONSOR(S): Committee on Civil Justice & Claims

COMPANION BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) CIVIL JUSTICE & CLAIMS YEAS 7 NAYS 2

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I. SUMMARY:

This bill is one of several bills produced as a result of extensive hearings conducted by the Committee on Civil Justice and Claims between September 15, 1997 and February 17, 1998. These hearings dealt with many aspects of the tort system and focused, in particular, upon the impact of tort litigation on small businesses.

This bill addresses the civil liability of holders of real property for harms which occur on the premises.

First, this bill creates s. 768.0705, F.S., which prescribes a "safe harbor" from civil liability for holders of an interest in commercial real property. This provision applies to intentional torts and criminal acts which take place on the premises and which are committed by third parties. The bill sets forth a list of eight security measures. If any six of these measures are implemented by the holder of an interest in commercial real property, other than a convenience business, the holder gains a presumption that adequate security was provided to members of the public and others. Similarly, if the owner of a convenience business implements security measures which already exist in ss. 812.173 and 812.174, F.S., the owner gains a presumption against liability. Finally, by implementing certain security measures listed in the bill, the holder of commercial real property located in an enterprise zone gains an immunity from liability for criminal acts which occur on the property, unless the property holder engages in gross negligence.

In addition, this bill limits the liability of a property holder for civil damages arising from harms that befall trespassers. It makes s. 768.075, F.S., which currently applies only to those who violate criminal trespass statutes, applicable to all trespassers. The bill provides that a property holder is immune from liability to trespassers who are intoxicated, unless the property holder engages in gross negligence or intentional misconduct. In addition, the bill defines the terms "discovered trespasser" and "undiscovered trespasser," and describes the duties owed by property holders to persons falling within these categories.

This bill will not result in any taxes, fees, or spending increases and may reduce the case load of the courts.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Premises liability involves the liability of property holders to persons who enter upon property with or without the property holder's permission. Premises liability constitutes a significant portion of tort cases heard in Florida courts and throughout the nation. The United States Department of Justice, in 1992, estimated that premises liability accounted for 16.6% of all civil jury trials that take place in state courts.

Premises liability can be divided into two general categories. First, premises liability refers to actions arising from injuries caused by a condition on the property. When persons who go upon the property are injured by such preexisting conditions, the property owner's duty is defined by the status of the injured party. Second, premises liability involves harms, inflicted upon visitors to the property, by the intentional criminal acts of a third party. Under these circumstances, the liability of the property owner turns upon whether adequate security measures were provided. The duty of the property owner is defined by the foreseeability of the incident and the obligation of the property owner to maintain a reasonably safe premises.

1. **Duty to Protect Against Third Person Criminal Acts** - Currently, no "safe harbor" provision protects property holders from liability for third person intentional torts or criminal attacks which take place on the property. As suggested above, the courts have determined the liability of a property holder based upon (1) the foreseeability of the incident, and (2) the security measures adopted by the property holder. Courts have employed a sliding scale format, wherein the greater the foreseeability of a criminal attack, the higher the duty of the property holder to provide security. This scheme has left some property holders with no clear indication of what they must do to avoid liability.
 - a. **Foreseeability of Crime.** Florida courts have discussed the element of foreseeability in several recent decisions. Because crime is present to some degree in many locations throughout the state, 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. 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. For example, would a single drug arrest in the neighborhood be sufficient to make a stabbing foreseeable? What if the drug arrest took place six months earlier? Would foreseeability be established if the drug arrest occurred more than five blocks away from the property where the stabbing occurred?

Numerous cases have discussed the element of foreseeability in connection with premises liability for criminal attacks by third persons. In Hardy v. Pier 99 Motor Inn, 664 So.2d 1095 (Fla. 1st DCA 1995), the First District Court of Appeal held that the trial court erred by granting summary judgment to a hotel in a case involving a criminal attack and stabbing in the hotel parking lot. According to the court, although there had not been any prior violent assaults on

the premises, 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). Similarly, the Fourth District Court of Appeal, in Larochelle v. Water & Way Ltd., 589 So.2d 976 (Fla. 4th DCA 1991), 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 conduct that occurred in another apartment unit. See also Holiday Inns, Inc. v. Shelburne, 576 So.2d 322 (Fla. 4th DCA 1991); Odice v. Pearson, 549 So.2d 705 (Fla. 4th DCA 1989); Paterson v. Deeb, 472 So.2d 1210 (Fla. 1st DCA 1985). In some older decisions, Florida courts were less willing to find the element of foreseeability. See Hall v. Billy Jack's, Inc., 458 So.2d 760 (Fla. 1984); Reichenbach v. Days Inn of America, Inc., 401 So.2d 1366 (Fla. 5th DCA 1981).

- b. **Adequacy of Security Measures.** In other cases, Florida courts have discussed the adequacy of various security arrangements. See generally Orlando Executive Park, Inc. v. P.D.R., 402 So.2d 442 (Fla. 5th DCA 1981). These cases, taken as a whole, provide little guidance concerning what types of security measures would be sufficient to avoid liability.

In U.S. Security Services Corp. v. Ramada Inn, Inc., 665 So.2d 268 (Fla. 3d DCA 1995), the Third District Court of Appeal held that, in a case involving a criminal attack against an invitee of a hotel, the hotel had a non-delegable duty to provide a reasonably safe premises and, therefore, the hotel was vicariously liable for any negligence of the firm it had hired to provide security services. The Fifth District Court of Appeal, in National Property Investors, II, Ltd. v. Attardo, 639 So.2d 691 (Fla. 5th DCA 1994), held that the trial court properly dismissed third-party action against a convenience store, where an abductor followed the victim from the parking lot of the convenience store to an apartment complex where the assault took place. The court noted, "Apparently the security at [the convenience store] . . . was sufficient to protect its patron so long as she remained there. No court has yet extended landlord liability beyond this point." Id. at 692. But, in Gutierrez v. Dade County School Bd., 604 So.2d 852 (Fla. 3d DCA 1992), the Third District Court of Appeal held that a student, who was shot and injured by an assailant while exiting a school parking lot, was entitled to maintain a cause of action against the school board even though the incident took place off school property. The court noted that the duty to maintain reasonably safe premises extends to approaches and entrances to the property.

2. **Duty to Warn/Maintain/Inspect** - A property holder's duty to a person who is present on the premises is guided by the status of the person. Did the person come onto the property at the invitation of the property owner or was the person a trespasser? Was the injured party a child who was lured onto the property by what the law has defined as an attractive nuisance? Florida courts have distinguished between seven types of entrants.

- a. **Public Invitee** - Property holders owe public invitees the highest degree of care available to anyone who goes upon the property of another. Public invitees are persons who enter property that is held open to the public by design or through the conduct of the property holder. Formerly, the "economic benefit test" was used to determine whether an entrant was a public invitee. This standard no longer applies. persons may be classified as invitees even if they do not bestow any sort of economic benefit upon the property holder. Examples of public invitees include store customers, delivery persons, employees, amusement park guests, restaurant and bar patrons, business visitors, museum visitors, and persons passing through airports and train stations. The property holder owes three duties to public invitees: (1) the duty to keep property in reasonably safe condition, (2) the duty to warn of concealed dangers which are known or should be known to the property holder, and which the invitee cannot discover through the exercise of due care, and (3) the duty to refrain from wanton negligence or willful misconduct. The duty to keep property in reasonably safe condition may require periodic inspections of the property as well as the duty to provide security to prevent intentional torts by third parties.
- b. **Licensee by Invitation** - Licensees by invitation are persons who enter upon property, for their own pleasure or convenience, at the express or reasonably implied invitation of the property occupier. This category was created by the Florida Supreme Court in Wood v. Camp, 284 So.2d 691 (Fla. 1973), and is unique to Florida. It requires some sort of personal relationship aspect and generally applies to party guests and social visitors. The duties owed by a property holder to licensees by invitation are identical to those owed to public invitees.
- c. **Emergency Entrant ("Firefighter's Rule")** - The firefighter's rule applies to police or firefighters who enter property during the discharge of duties for which they were summoned to the property. The property holder owes such persons: (1) the duty to refrain from wanton negligence or willful misconduct, and (2) the duty to warn of dangerous conditions, known to the property holder, when the danger is not open to ordinary observation.
- d. **Uninvited Licensee** - Uninvited licensees are persons who choose to go upon property for their own convenience. Their presence is neither sought nor prohibited, but is merely tolerated by the property holder. Included within this category might be sales persons or persons soliciting contributions for various causes. The duties owed by property holder to uninvited licensees are the same as those owed to emergency entrants: (1) the duty to refrain from wanton negligence or willful misconduct, and (2) the duty to warn of dangerous conditions, known to the property holder, when the danger is not open to ordinary observation.
- e. **Discovered Trespasser** - A discovered trespasser is any person who enters onto property without permission or privilege under circumstances where the property holder has actual or constructive notice of the presence of the intruder. Constructive notice may be established where the property holder is aware of a worn path through the woods, tire marks showing the intermittent passage of vehicles, the remains of campfires, the presence of litter, or other evidence of repeated intrusions. The property holder owes discovered trespassers two

duties: (1) the duty to refrain from wanton negligence or willful misconduct, and (2) the duty to warn of dangerous conditions, known to the property holder, when the danger is not open to ordinary observation. This arrangement places a slightly greater burden on the property holder than the requirements established in most other states. Most jurisdictions only require notification of *artificial* dangerous conditions, which are hidden to others, but which are known to the property holder.

- f. **Child Trespasser ("Attractive Nuisance Doctrine")** - The attractive nuisance doctrine applies to children (no fixed age limit) who are lured onto the property by the structure or condition that injures them and, who, because of their youth, are unable to appreciate the risks involved. In past decisions, the courts have applied the attractive nuisance doctrine to children who trespass upon property to swim in a pool, pond, or open pit; play upon a construction site or excavation; climb upon dirt piles, mineral heaps, debris, or trees; or use playground and sporting equipment. Under the attractive nuisance doctrine, the property holder has a duty to protect from known dangerous conditions, where the property holder knows or should know that children frequent the area, and where the expense of eliminating the danger is slight compared with the magnitude of the risk.
- g. **Undiscovered Trespasser** - An undiscovered trespasser is any person who enters onto property without permission or privilege and without the knowledge of the property holder. The only duty owed to undiscovered trespassers is to refrain from inflicting wanton or willful injury.

B. EFFECT OF PROPOSED CHANGES:

- 1. **Establishes Presumption Concerning Adequate Security** - This bill creates s. 768.0705, F.S. This section establishes a presumption concerning the liability of holders of commercial real property for criminal attacks committed by third parties. It provides that failure to implement a sufficient number of the security measures listed in the bill shall not result in a presumption that the property owner is liable.
 - a. **Commercial Real Property other than Convenience Businesses** - This bill creates a "safe harbor" from civil liability by setting 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 business. If any six of these measures are implemented, the property holder gains a presumption that adequate security was provided to members of the public and others who come upon the property.
 - b. **Convenience Businesses** - If the owner or operator of a convenience store "substantially implements" applicable security measures which already exist in ss. 812.173 and 812.174, F.S., the owner or operator gains a presumption against liability similar to that provided for commercial property other than convenience businesses.
 - c. **Commercial Real Property Located in Enterprise Zones** - By implementing a sufficient number of the security measures listed in the bill, the holder of commercial real property located in an enterprise zone gains an immunity from

liability for criminal acts which occur on the property, unless the property holder engages in gross negligence. (this provision does not provide immunity to convenience businesses located in enterprise zones)

2. **Limits Liability to Intoxicated Trespassers** - In addition, this bill limits the liability of a property holder to intoxicated trespassers. It makes s. 768.075, F.S., which now applies only to persons who violate criminal trespass statutes, applicable to all trespassers. The bill provides that a property holder is immune from liability to trespassers who are intoxicated, unless the property holder engages in gross negligence or intentional misconduct.
3. **Delineates Duties Owed to Trespassers** - This bill defines the terms "discovered trespasser" and "undiscovered trespasser," and describes the duties owed by property holders to persons falling within either of these categories. It also defines the term "implied invitation" as "the visitor entering the premises has an objectively reasonable belief that he has been invited or is otherwise welcome on that portion of the real property where injury occurs, for the visitor's intended purpose." The bill tightens the definition of "discovered trespasser" by applying the term only to persons "whose actual physical presence was detected" by the property holder "within 24 hours preceding the accident," or "to whose actual physical presence" the property holder "was alerted by a reliable source within 24 hours preceding the accident." This provision modifies the common law as it relates to constructive notice of the presence of trespassers. Evidence that a trespasser had, at one time or another, been present on the property would no longer be sufficient to elevate the duty of the property holder. The bill indicates that this provision should not be interpreted to modify the attractive nuisance doctrine, which relates to child trespassers.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

This bill removes from the courts the authority to define the common law duties of property holders to certain categories of entrants.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. It slightly decreases the burden placed on property holders to inspect and patrol their property for the presence of trespassers. It enhances the benefits of property ownership, by strengthening the legal position of the property holder, while diminishing the legal status of certain intruders.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Creates s. 768.0705, F.S.; amends s. 768.075, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1 Creates s. 768.0705; limits premises liability by creating a presumption for holders of commercial property; provides eight security measures which the property holder may implement; establishes that if any six of these conditions are met the property holder is entitled to a presumption against liability for failing to provide adequate security; provides that convenience businesses which substantially comply with security measures listed in the statutes gain a presumption against liability; provides an immunity for holders of certain commercial properties, located in enterprise zones, if the property holders implement security measures listed in the bill and do not engage in gross negligence; provides that failure to implement a sufficient number of security measures will not create a presumption of liability.

Section 2 Amends s. 768.075, F.S.; expands the immunity of landholders from civil liability for harm to intoxicated trespassers; provides an exception for gross negligence and intentional misconduct; provides definitions of "discovered trespasser" and "undiscovered trespasser;" describes the duties owed to discovered and undiscovered trespassers; provides for the avoidance of

liability under certain circumstances; establishes that this provision does not modify the attractive nuisance doctrine.

Section 3. Provides an effective date of October 1 of the year in which enacted.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

This bill may slightly reduce the liability of the state and state agencies to persons injured while present on state lands or at state-run facilities.

3. Long Run Effects Other Than Normal Growth:

This bill may slightly reduce the case load of the courts because it will reduce the number of persons who have a valid cause of action against property holders.

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

This bill may reduce the liability of local governments and local government agencies to persons who are injured or who sustain damages while present on public property.

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

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. In addition, trespassers would have fewer remedies against property holders. Plaintiffs who are unable to recover damages through the tort system, could place an increased burden on public services.

2. Direct Private Sector Benefits:

This bill may reduce the scope and frequency of litigation brought against property holders. It provides holders of commercial property with a means by which they can avoid liability for third-person criminal acts which occur on the premises. It would, however, in no way reduce the ability of the injured party from recovering damages from the criminal assailant. This bill also reduces the burden placed on all property holders to patrol their property for the presence of trespassers and to warn such persons of any hidden dangers. This latter provision may be particularly beneficial to holders of large or remote acreages, absentee owners, holders of tracts in heavily-populated areas, and persons who, due to age or physical limitations, are not capable of monitoring or inspecting their property.

3. Effects on Competition, Private Enterprise and Employment Markets:

Any reduction in civil litigation could attract new business to the state and could enhance the competitiveness of businesses already operating in the state.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

Key Issues - This subsection uses a question format to stimulate debate about the joint resolution under review.

1. **Question Presented** - *Whether the Legislature should create guidelines and impose limitations aimed at protecting property holders from liability to trespassers and others.*

2. **Other Policy Considerations:**

- a. Under what circumstances, if any, should a property holder be subject to liability for criminal attacks which take place on the premises?
- b. Are the security guidelines presented in the bill sufficiently clear? Are they sufficiently flexible? Should different types of commercial property be treated in a distinct manner?
- c. Under what circumstances, if any, should a property holder be subject to liability to a trespasser?
- d. If a trespasser is intoxicated, should the property owner be immunized from liability, gain a presumption against liability, or should the trespasser's fault simply be compared against that of the property holder?
- e. Should the Legislature take action to relieve property holders from the responsibility of having to post their property or patrol their property to locate trespassers and warn them of hidden dangers?
- f. Should enhanced protections apply to properties located in enterprise zones? Would such protections stimulate economic development? Are such restrictions fair to plaintiffs injured by third-person criminal acts?

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

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VII. SIGNATURES:

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