

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 376

SPONSOR: Judiciary Committee and Senator Lee

SUBJECT: Civil Actions (Employees)

DATE: February 18, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Forgas</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>RC</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill is based on a portion of the 1998 conference committee report of the Conference Committee on Litigation Reform between which reviewed the impact of the civil litigation system on Florida's business climate. The bill makes modifications and additions to both the procedural and the substantive aspects of the civil litigation system in Florida. Some of the major provisions:

- Prescribe a rebuttable presumption against a claim of negligent hiring provided an employer takes investigatory steps of the prospective employee;
- Provide limited premises liability for certain businesses;
- Provide definitions and duties relating to premises liability for injury to invitees, customers and different categories of trespassers on business or other real property;
- Limit or prohibit recovery of certain damages under specified conditions when the influence of drugs or alcohol is involved;

This bill substantially amends the following sections of the Florida Statutes: 768.075, 768.095. The bill also creates the following sections: 768.071, 768.096, 768.36.

II. Present Situation:

Background

Select Senate Committee on Litigation Reform

In August 1997, the Senate President appointed an 11-member Select Senate Committee on Litigation Reform to conduct hearings to assess the manner and extent to which the current civil litigation environment is affecting economic development and job-creation efforts in the state. The select committee was additionally charged with ascertaining what civil litigation reforms, if any, would enhance the economic development climate of the state while continuing to preserve the rights of citizens to seek redress through the judicial system.

The select committee conducted a series of public meetings from September 1997 through early 1998. Testimony was solicited on key litigation topics from a variety of civil legal practitioners, representatives of interests in the area of civil litigation, and representatives of a judicial task force created by the Supreme Court to monitor the Legislature's efforts on litigation reform. The select committee developed and discussed specific issues within each topic. In February 1998, the select committee issued its report and recommendations on litigation reform to the Senate President, which included corresponding draft legislation.

Among the principal topics explored by the committee were employer liability and premises liability.

Current Statutory and Common Law

Negligent Hiring

An employer may be held vicariously liable under the negligent hiring doctrine for an employee's negligent, intentional or malicious acts committed outside the course and scope of employment. Pursuant to the doctrine, negligent hiring occurs when an employer knew or should have known of the employee's unfitness prior to the time the employee was hired. The plaintiff must prove:

- 1) The employer was required to make an appropriate investigation of the employee and failed to do so;
- 2) An appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and
- 3) It was unreasonable for the employer to hire the employee in light of the information he knew or should have known.

See Garera v. Duffy, 492 So.2d 435 (Fla. 4th DCA 1986).

Employer Immunity from Disclosure Liability

Currently, s. 769.095, F.S., provides employers with civil immunity when providing information about a former employee's job performance to a prospective employer. The employer is presumed to have acted in good faith unless the former employee shows by clear and convincing evidence that the information was knowingly false, deliberately misleading, rendered with malicious purpose or violated the former employee's civil rights under chapter 760, F.S.

Premises Liability - Business Premises

The owner of a business owes its invitees a duty of due care to maintain its premises in a reasonably safe condition, which includes the duty to protect such invitees from criminal conduct which is reasonably foreseeable. *Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983). This duty also extends to areas beyond or adjacent to the business premises when it is reasonable for invitees to believe the owner controls premises adjacent to his own or where the owner knows his invitees use the adjacent premises in connection with the owner's business. *See Holiday Inns, Inc. v. Shelburne*, 576 So.2d 322 (Fla. 4th DCA 1991). The foreseeability requirement can be met by proving the business owner knew, or should have known based upon past experience, there was a reasonable likelihood of disorderly conduct by third persons which may endanger the safety of the

invitee. *Stevens*. Evidence of prior criminal activity on the premises, as well as in the surrounding neighborhood, may establish foreseeability. *Patterson v. Deeb*, 472 So.2d 1210 (Fla. 1st DCA 1985).

Premises Liability - Trespass

A person who enters the land or property of another falls within one of three classifications: invitee, licensee or trespasser. The duty owed to an invitee is to maintain the premises in a reasonably safe condition and to warn of hidden dangerous conditions which are known, or should be known, by the owner. The duty owed to a licensee or a discovered trespasser is to refrain from wanton negligence or willful misconduct, intentional exposure to danger and to warn of a known dangerous condition which is not open to ordinary observation. *Lane v. Estate of Morton*, 687 So.2d 53 (Fla. 3rd DCA 1997). The duty owed to an undiscovered trespasser is merely to refrain from wanton and willful misconduct. *Wood v. Camp*, 284 So.2d 691, 693 (Fla. 1973).

The common law carved out an exception to temper a landowner's qualified immunity toward trespassing children. This exception is known as the attractive nuisance doctrine. It provides that, despite a child's status as a trespasser, landowners owe a duty of reasonable care where a child's presence is reasonably foreseeable and the potential for serious injury is great. Liability is imposed upon the landowner for failure to use reasonable care in eliminating the danger which attracts the child to the premises and ultimately causes the child's injury. For the doctrine to apply, the trespassing child must fail to appreciate the danger due to the child's youth. See *Martinello v. B&P USA, Inc.*, 566 So. 2d 761 (Fla. 1990).

III. Effect of Proposed Changes:

This bill reflects the consensus legislation submitted by select members of the Senate and the House of Representatives as part of the 1998 final report of the Conference Committee on Litigation Reform. The bill makes wide-ranging and substantial modifications as follows:

- Provides an employer with safe harbor provisions for limited vicarious liability from negligent hiring of certain employees and provides broader protections against liability for disclosing information about employees;
- Provides limited premises liability for certain businesses;
- Provides immunity from liability for negligent actions for injury to trespassers on real property or to a person who is committing or attempting to commit a crime; and
- Prohibits a plaintiff from recovering damages if he or she was under the influence of drugs or alcohol to a specified degree and the drug or alcohol use contributed substantially to the plaintiff's injuries.

A section-by-section description follows:

Section 1 creates s. 768.096, F.S., to provide for a rebuttable presumption that an employer was not negligent in hiring an employee if, before hiring such employee, the employer conducted a pre-employment background investigation and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the individual for the particular work to be performed or for the employment in general. The background investigation must consist of: 1) a criminal background investigation, 2) reasonable efforts to contact references and former employers, 3) completion of an employment application that elicits information on criminal convictions and civil actions for intentional torts, 4) a check of the prospective employee's driver's license record, if such a check is relevant to the type of work the employee will be conducting and the record can be reasonably obtained, and 5) an interview with the prospective employee.

Section 2 amends s. 768.095, F.S., to broaden the immunity from liability for information disclosed by an employer about a former employee to a prospective employer, to apply also to information disclosed about current employees. The bill also expands the immunity from liability to apply to information disclosed beyond information about an employee's job performance. Further, this section narrows the grounds for subjecting the employer to liability by requiring a showing of clear and convincing evidence that the information disclosed by the employer was knowingly false or violated the person's civil rights. Under current law, the employer may also be subject to liability if the information was intentionally misleading or was disclosed with a malicious purpose. This section eliminates those two grounds.

Section 3 creates s. 768.071, F.S., relating to limitation for premises liability. A person or organization owning or controlling an interest in a business premises ("business property owner") is not liable for civil damages sustained by invitees, guests, or other members of the public caused by the intentional criminal acts of third parties, other than employees or agents, if the business property owner maintains a reasonably safe premises in light of the foreseeability of the occurrence of the particular criminal act. This provision essentially restates current case law on premises liability for damages sustained by visitors from criminal acts by third parties.

Additionally, this section creates a "safe harbor" for business property owners by providing a presumption that adequate security existed for invitees, guests or other members of the public against criminal acts of third parties, other than employees or agents, that occurred in common areas, in parking areas, or on portions of the premises not occupied by buildings or structures. (Convenience stores are not included as business premises.) In order for the presumption to apply, the business property owner must have substantially complied or implemented at least 6 of 9 statutory security measures enumerated in this section. This presumption would not be applicable in actions where criminal acts of third parties took place in the interior of buildings or structures. It is not known whether the presumption would apply when criminal acts occurred on premises adjacent to the business premises and the owner knows, or should have known, the adjacent premises were used by the invitee in connection with the owner's business.

Section 4 amends s. 768.075, F.S., to expand the immunity from liability to trespassers on real property, to preclude recovery of damages by *all* civil or criminal trespassers under the influence of drugs or alcohol. The elements of trespass must still be proved by the property owner. This section also lowers the blood-alcohol threshold from 0.10% or higher to 0.08% or higher. The

immunity does not apply if the property owner engaged in gross negligence or intentional misconduct.

This section defines the terms “invitation,” “discovered trespasser,” and “undiscovered trespasser.” This section also delineates the duties owed by property owners to different categories of trespassers. Under this section, a property owner is not liable to an undiscovered trespasser if the property owner refrains from intentional misconduct. There is no duty to warn of dangerous conditions. A property owner is not liable to a discovered trespasser if the property owner refrains from gross negligence or intentional misconduct and warns the discovered trespasser of dangerous conditions known to the property owner but which were not readily observable by others. This section modifies the common law as it relates to constructive notice of the presence of trespassers.

This section expressly provides that it does not alter the common law doctrine of attractive nuisance which applies to children who are lured onto property by the structure or condition that injures them, and who, because of their age, are unable to appreciate the risks involved. Therefore, a property owner has a duty to protect children from dangerous conditions when he or she knows that children frequent the area, and the expense of eliminating the danger is slight compared to the risk.

This section also provides that a property owner is not liable for civil damages for negligent conduct resulting in death, injury or damage to a person attempting to commit, or in the commission of, a felony on the property.

Section 5 creates s. 768.36, F.S., to prohibit recovery of any damages for injury, or loss to person or property, in any civil action by a plaintiff whose blood or breath alcohol level was at least 0.08% or whose faculties were impaired due to the influence of alcohol or drugs, at the time of injury, and, as a result was more than 50 percent at fault for his or her own harm. The section also defines the terms “alcoholic beverage” and “drug.”

Section 6 provides a severability clause.

Section 7 provides that the act shall take effect October 1, 1999.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This bill could have a substantial impact on the business community as it narrows employer liability and business premises owner liability in several areas. Insurance rates on employer liability policies and commercial general liability policies could potentially decrease, with savings indirectly passed to consumers. Individual homeowner policy premiums could also be affected due to limitations on liability to trespassers. However, precise impact of this bill on the private and business sector is indeterminate. Further insight into the impact of certain litigation reform measures may be available upon completion of the actuarial study report, as provided in SB374, on expected reductions in settlements, judgments, and related costs, due in March 2001, and of the Department of Insurance's review of certain insurers' rate filings.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.