HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1573 w/CS Street Lighting
SPONSOR(S): Stansel
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2226

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	14 Y, 4 N w/CS	Jaroslav	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The Florida Supreme Court recently 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.

This bill provides that neither the state, nor any of its officers, agencies or instrumentalities, nor any electric utility 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.

This bill 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.

Additionally, this bill 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.

Finally, this bill also expressly provides that it is severable: i.e., that if any provision of it 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.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[x]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[x]	No[]	N/A[]
4. Increase personal responsibility?	Yes[]	No[x]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[x]

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

By eliminating a current basis for liability, this bill may arguably reduce incentives for personal responsibility.

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.[1]
> …
> 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.[2]

The Florida Supreme Court recently had occasion to apply this language 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*,[3] 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 it was required to do by the Florida Rules of Civil Procedure,[4] 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.[5]

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[1] RESTATEMENT (SECOND) OF TORTS, § 323.
[2] *Id.*, § 324A.
[3] 28 Fla. L. Weekly S866, Nos. SC01-1955 and SC01-1956, 2003 WL 22966277 (Fla. Dec. 18, 2003).
[4] *See* FLA. R. CIV. P. 1.1510(c).
[5] *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).

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.*,[6] 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.*[7] had, in an opinion by Justice Cardozo, long since rejected the existence of a similar duty, the Supreme Court distinguished that case[8] and construed the undertaker's doctrine to require such a legal duty: i.e., to hold that Florida law does imposes 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 cases relied upon by the majority did not demonstrate the existence of such a duty;[9]
- no other state has gone so far as would the duty created by the majority opinion;[10]
- the majority opinion misreads the Restatement (Second) of Torts;[11]
- a contractual duty to a municipality does not imply a general duty to the public;[12] and
- the majority ignores its obligation to consider the public policy implications of the new tort doctrine it is creating by regarding such questions as legislative in nature.[13]

Proposed Changes

This bill creates a new 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.,[14] 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 it is severable: i.e., that if any provision of it 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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[6] 785 So.2d 1251 (Fla. 3d DCA 2001).
[7] 159 N.E. 896 (N.Y. 1928). *H.R. Moch* involved the question of whether a water company owed a duty to a plaintiff who alleged that his building burned down due to insufficient water pressure directed to fire hydrants.
[8] *See Clay Electric* at *6.
[9] *See id.* at *12 (Cantero, J., dissenting). The majority relied primarily upon *Union Park Chapel v. Hutt*, 670 So.2d 64 (Fla. 1994) and *McCain v. Florida Power Corp.*, 593 So.2d 500 (Fla. 1992). The dissent suggests that it is these opinions, and not that of the New York Court of Appeals in *H.R. Moch*, that are truly distinguishable from the facts in *Clay Electric*.
[10] *See id.* at *13 (Cantero, J., dissenting). The dissent quotes one court as recognizing that "[c]ases in other jurisdictions almost uniformly hold that utilities are not liable to third persons for injuries caused by nonfunctioning streetlights." *Vaughan v. Eastern Edison Co.*, 719 N.E.2d 520, 522 (Mass. App. Ct. 1999).
[11] *See id.* at *14-16 (Cantero, J., dissenting).
[12] *See id.* at *16-17 (Cantero, J., dissenting) (citing *Arenado v. Florida Power & Light Co.*, 541 So.2d 612 (Fla.1989); *Woodbury v. Tampa Waterworks Co.*, 49 So. 556 (Fla. 1909); *Mugge v. Tampa Waterworks Co.*, 42 So. 81 (Fla. 1906)).
[13] *See id.* at *18-20 (citations omitted).
[14] 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."

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 for severability.

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:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

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 insurance rates, or at least prevent them from rising.

D. FISCAL COMMENTS:

See above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

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."[15] 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*,[16] 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.[17] The court determined that 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.[18] 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.

The court applied the *Kluger* test in *Smith v. Department of Insurance*.[19] In 1986, the Legislature passed comprehensive tort reform legislation that included a cap of $450,000 on noneconomic damages.[20] The cap on damages was challenged on the basis that it violated the access to courts provision of the state constitution. The Florida Supreme Court found that a right to sue for unlimited noneconomic damages existed at the time the constitution was adopted.[21] The *Smith* court held that the Legislature had not provided an alternative remedy or commensurate benefit in exchange for limited the right to recover damages and noted that the parties did not assert that an overwhelming public necessity existed.[22] Accordingly, the court held that the $450,000 cap on noneconomic damages violated the access to courts provision of the Florida 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 no, the judicial inquiry would end at that point, and this bill's provisions would be allowed to stand. 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, in which case this bill would have to withstand the *Kluger* test. Given its legislative findings, it is possible that it could do so.

Impairment of Contracts

Both Article I, section 10 of the United States Constitution and Article I, section 10 of the Florida Constitution forbid state impairment "of the obligation of contracts."[23] Florida courts have generally

[15] *See generally* 10A FLA. JUR. 2D CONSTITUTIONAL LAW §§ 360-69.
[16] 281 So. 2d 1 (Fla. 1973).
[17] *See* ch. 71-252, s. 9, L.O.F.
[18] *See Kluger* at 4.
[19] 507 So. 2d 1080 (Fla. 1987).
[20] *See* ch. 86-160, s. 59, L.O.F.
[21] *See Smith* at 1087.
[22] *See id.* at 1089.
[23] *See generally* 16 AM. JUR. 2D CONSTITUTIONAL LAW §§ 708-744; 10 FLA. JUR. 2D CONSTITUTIONAL LAW §§ 348-373.

treated the requirements of the state and federal Contract Clauses as identical, although they have suggested that the provision in the state constitution is probably stronger.[24]

Applying the effects of this bill to contracts entered into before its effective date may raise concerns about legislative impairment of these contracts, which might be held subject to prior law.[25] Courts use a balancing test to determine whether particular legislation violates the Contract Clause, measuring the severity of contractual impairment against the importance of the interest advanced by the regulation, and also looking at whether the regulation is a reasonable and narrowly tailored means of promoting the state's interest.[26]

However, even if an attempt to retroactively apply the effects of this bill were held not to unconstitutionally impair the obligations of contract, Florida common law does not allow government to adversely affect substantive rights once those rights have vested;[27] moreover, unless the Legislature states otherwise, a statute is presumed only to operate prospectively, especially when such operation would impair vested rights.[28]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Severability clauses in Florida legislation are often considered unnecessary because courts are required to sever unconstitutional portions of a statute if doing so could save the rest and still preserve the intent of the Legislature.[29] Therefore, Section 2 of this bill, expressly providing for severability, may be unnecessarily redundant.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 23, 2004, the House Committee on Judiciary adopted five amendments to this bill. The first amendment substituted the state and the electric utilities for "any person … or political subdivision" as the entities to be held not liable under this bill. The second amendment specified that the liability otherwise alleviated by this bill may nonetheless be expressly assumed by written contract. The third amendment changed the effective date from applying the bill's provisions to cases pending on that date to only causes of action accruing on or after that date. The fourth amendment expressly provided for this bill's severability. The fifth amendment eliminated the "whereas" clauses and legislative findings that had been contained in a preamble to the original bill. The committee then reported this bill favorably with a committee substitute. This analysis is drafted to the bill as amended.

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[24] *See, e.g.*, *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1980) (accepting as persuasive an interpretation of the federal Contract Clause by the Supreme Court of the United States in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978)).

[25] *See, e.g., Marion Mortgage Co. v. State ex rel. Davis*, 145 So. 222 (Fla. 1932); *Ex parte Amos*, 114 So. 760 (Fla. 1927); *Columbia County Comm'rs v. King*, 13 Fla. 451 (1869) (all holding that, under Contracts Clause, articles of incorporation were subject to law in effect when they were first promulgated). *Cf. Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (holding that, by attempting to transform Dartmouth College into a public university, the State of New Hampshire had unconstitutionally impaired obligations of contract that the state had inherited as successor-in-interest to the British Crown, which granted Dartmouth's corporate charter in 1769).

[26] *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); *Ruhl v. Perry*, 390 So.2d 353 (Fla. 1980); *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1980); *Yellow Cab Co. v. Dade County*, 412 So.2d 395 (Fla. 3d DCA 1982).

[27] *See Bitterman v. Bitterman*, 714 So.2d 356 (Fla. 1998).

[28] *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352 (Fla. 1994).

[29] *See Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987).