HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1931 PCB JU 05-09 Premises Liability/Negligence
SPONSOR(S): Judiciary Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Judiciary Committee	8 Y, 3 N	Thomas	Hogge
1) State Administration Council		Thomas	Bussey
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

This bill addresses laws relating to the liability of business owners in slip-and-fall cases and negligent security cases occurring on their premises.

Slip-and-Fall: Since 2002, for slip-and-fall cases, a retail establishment owes a duty of reasonable care regarding transitory foreign objects or substances that might foreseeably give rise to injury. However, a claimant must prove

- The business owed a duty to the claimant;
- The business acted negligently by failing to exercise reasonable care (but the claimant does not have to show the business had actual or constructive notice of the object); and
- The failure to exercise reasonable care by the business was the cause of the loss, injury, or damage.

The bill repeals the existing law in this area and provides that a person who is injured in a slip-and-fall case due to a transitory foreign object or substance must prove that:

- The retail establishment had actual or constructive knowledge of the dangerous condition, and
- The dangerous condition existed for a sufficient length of time so that the retail establishment should have known of the dangerous condition and taken action to remedy it.

Negligent Security: Under present law, a business owner may not apportion fault or damages to an intentional tortfeasor or criminal in defense of a civil action by a person injured by the intentional tortfeasor or criminal on the business premises.

The bill makes the provisions of the comparative fault statute applicable to negligent security cases resulting from the commission of an intentional tort or criminal act. As a result, damages may be apportioned between a defendant business owner and the intentional tortfeasor or person who committed the criminal act.

It does not appear that this bill will have a fiscal impact on state or local government.

The bill takes effect on July 1, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote Personal Responsibility: The bill revises provisions relating to liability for injurious behavior.

B. EFFECT OF PROPOSED CHANGES:

Slip-and-Fall

Present Situation

Business owners owe a duty to their customers to use reasonable care in maintaining their premises in a safe condition.[1] Prior to 2001, when a person slipped and fell on a transitory foreign substance, the injured person had to prove that the business had actual or constructive knowledge of the dangerous condition and "that the condition existed for such a length of time that in the exercise of ordinary care, the premises owner should have known of it and taken action to remedy it."[2] Constructive knowledge could be established by circumstantial evidence showing that: (1) "the dangerous condition existed for such a length of time that in the exercise of ordinary care, the premises owner should have known of the condition;" or (2) "the condition occurred with regularity and was therefore foreseeable."[3]

In 2001, the Florida Supreme Court changed the standard of proof in slip-and-fall cases.[4] The Court concluded that "premises liability cases involving transitory foreign substances are appropriate cases for shifting the burden to the premises owner or operator to establish that it exercised reasonable care under the circumstances, eliminating the specific requirement that the customer establish that the store had constructive knowledge of its existence in order for the case to be presented to the jury."[5] The new standard adopted by the Court was "that the existence of a foreign substance on the floor of a business premises that causes a customer to fall and be injured is not a safe condition and the existence of that unsafe condition creates a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition."[6]

In 2002, the Legislature adopted s. 768.0710, F.S., in response to the Owens decision.[7] This statute recognizes that a business owes a duty of reasonable care to its customers to maintain "the premises free from transitory foreign objects or substances that might foreseeably give rise to loss, injury, or damage."[8] However, the statute requires a claimant to prove:

- The business owed a duty to the claimant;
- The business acted negligently by failing to exercise reasonable care (but the claimant does not have to show the business had actual or constructive notice of the object); and
- The failure to exercise reasonable care by the business was the cause of the loss, injury, or damage.[9]

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[1] See *Everett v. Restaurant & Catering Corp.*, 738 So.2d 1015, 1016 (Fla. 2d DCA 1999).
[2] *Colon v. Outback Steakhouse of Florida, Inc.*, 721 So.2d 769, 771 (Fla. 3d DCA 1998).
[3] *Brooks v. Phillip Watts Enter., Inc.*, 560 So.2d 339, 341 (Fla. 1st DCA 1990).
[4] *Owens v. Publix Supermarkets, Inc.*, 802 So.2d 315 (Fla. 2001).
[5] *Owens* at 331.
[6] *Id.*
[7] Section 1, Chapter 2002-285, L.O.F.
[8] Section 768.0710(1), F.S.
[9] Section 768.0710(2), F.S.

Proposed Changes

The bill repeals s. 768.0710, F.S., and creates a new section regarding the liability of retail establishments for transitory substances. The newly created s. 768.0755, F.S., provides that the person who is injured in a slip-and-fall case due to a transitory foreign substance must prove that:

- The retail establishment had actual or constructive knowledge of the dangerous condition, and
- The dangerous condition existed for a sufficient length of time so that the retail establishment should have known of the dangerous condition and taken action to remedy it.

The bill further provides that constructive knowledge by the retail establishment may be proven by circumstantial evidence.

Negligent Security

Present Situation

Generally, premises liability lawsuits are based on the alleged negligence of the property owner or occupant in providing adequate security for invitees or licensees entering the property, without warning, where that owner or occupant could foresee that such persons could be injured by a dangerous condition on the property that is not readily apparent.[10] Owners or occupants have a duty to provide reasonably safe premises and are only responsible for foreseeable and preventable risks. Ordinarily, a property owner has no duty to protect a person on his or her premises from a criminal attack by a third party; however, liability does exist where the likelihood of the misconduct and the unreasonable risk of the criminal attack outweighs the burden of protecting against it.[11]

In premises liability cases involving the intentional criminal acts of third parties, the duty of the property owner is defined by the foreseeability of the incident and the obligation of the property owner to maintain reasonably safe premises. Many cases have discussed the element of foreseeability in connection with premises liability for criminal attacks by third parties. The recent trend of decisions 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.[12] 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.[13]

In other cases, Florida courts have discussed the adequacy of various security arrangements. These cases, taken as a whole, provide little guidance concerning what types of security measures would be

[10] See *Houssami v. Nofal,* 578 So.2d 495 (Fla. 5th DCA 1991).
[11] See *Drake v. Sun Bank and Trust Co. of St. Petersburg,* 377 So.2d 1013 (Fla. 2nd DCA 1979), *appeal after remand,* 400 So.2d 569 (Fla. 2nd DCA 1981).
[12] See *Hardy v. Pier 99 Motor Inn,* 664 So.2d 1095 (Fla. 1st DCA 1995), wherein the court found that 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).
[13] See *Larochelle v. Water & Way Ltd.,* 589 So.2d 976 (Fla. 4th DCA 1991), wherein the court 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 (though nonviolent) conduct that occurred in another apartment unit; *Odice v. Pearson,* 549 So.2d 705 (Fla. 4th DCA 1989), wherein the Fourth District Court of Appeal held that the trial court committed reversible error in limiting the issue of foreseeability to crimes that occurred on appellee's property and adjacent sidewalk; *Paterson v. Deeb*, 472 So.2d 1210 (Fla. 1st DCA 1985), wherein the court held that police records of reported crime in the geographical neighborhood, not limited to the actual premises or even to the block of the attack, are competent evidence of foreseeability of a criminal attack.

sufficient to avoid liability. Generally, the courts have found the following factors to be relevant in determining whether a property owner has exercised ordinary care in providing adequate security:

- Industry standards;
- Community's crime rate;
- Extent of criminal activity in area or in similar business enterprise;
- Presence of suspicious persons; and
- Peculiar security problems posed by the building's design.[14]

The duty to provide a reasonably safe premise has been found to be non-delegable, and thus a property owner is vicariously liable for any negligence of the firm it hires to provide security services.[15]

The Florida Supreme Court has held that Florida's comparative fault statute, s. 768.81, F.S., does not provide for apportionment of damages between a defendant business owner and the intentional tortfeasor or person who committed the criminal act.[16] By it terms, s. 768.81, F.S., does not apply "to any action based upon an intentional tort."[17] While it was argued that this language only excluded cases filed directly against the intentional tortfeasor, the Court held that since the statute displaced common law, it was to be strictly construed.[18] Many states do allow for apportionment of damages between a defendant business owner and the intentional tortfeasor or person who committed the criminal act.[19]

Proposed Changes

The bill makes the provisions of the comparative fault statute, s. 768.81, F.S., applicable to negligent security cases resulting from the commission of an intentional tort or criminal act. As a result, damages may be apportioned between a defendant business owner and the intentional tortfeasor or person who committed the criminal act. The bill prohibits, however, an intentional tortfeasor from using these provisions to apportion fault to a negligent business or person.

C. SECTION DIRECTORY:

Section 1. Creates 768.0755, F.S., relating to premises liability for transitory foreign substances in a retail establishment.

Section 2. Amends s. 768.81, F.S., relating to comparative fault and the apportionment of damages.

Section 3. Repeals s. 768.0710, F.S., relating to the duty to maintain premises in a reasonably safe condition for the safety of business invitees.

Section 4. Reenacts s. 25.077, F.S., relating to case reporting of negligence case settlements and jury verdicts.

Section 5. Provides that the bill takes effect on July 1, 2005.

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[14] See *Orlando Executive Park, Inc. v. P.D.R.*, 402 So.2d 442 (Fla. 5th DCA 1981).
[15] See *U.S. Security Services Corp. v. Ramada Inn, Inc.,* 665 So.2d 268 (Fla. 3rd DCA 1995), *rev. denied* 675 So.2d 121 (Fla. 1996).
[16] *Merrill Crossings Associates v. McDonald*, 705 So.2d 560 (Fla. 1997).
[17] Section. 768.81(4)(b), F.S.
[18] *Merrill Crossings Associates v. McDonald*, supra, 705 So.2d at 561.
[19] See *Martin By and Through Martin v. United States*, 984 F.2d 1033, 1040 (9th Cir.1993) (California); *Thomas v. First Interstate Bank of Arizona*, 930 P.2d 1002 (Arizona 1996); *Weidenfeller v. Star & Garter*, 2 Cal.Rptr.2d 14 (California 1991); *Blazovic v. Andrich*, 590 A.2d 222 (New Jersey 1991); *Reichert v. Atler*, 875 P.2d 379 (New Mexico 1994); *Siler v. 146 Montague Associates*, 652 N.Y.S.2d 315 (New York 1997); *Field v. Boyer Co., L.C.*, 952 P.2d 1078, 1080 (Utah 1998).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

   This bill does not appear to have a fiscal impact on state government expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

   This bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an impact on the outcome of litigation against businesses related to the provision of security. The bill may serve as an incentive for business owners to make improvements to their security practices as a way to defend themselves from potential liability.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this joint resolution does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

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."[20] In *Kluger v. White*,[21] 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.[22] 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

[20] *See generally* 10A FLA. JUR. 2D CONSTITUTIONAL LAW §§ 360-69.
[21] 281 So. 2d 1 (Fla. 1973).
[22] *See* ch. 71-252, s. 9, L.O.F.

abolish the right and (2) no alternative method of meeting such public necessity.[23] 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.

B. RULE-MAKING AUTHORITY:

Not applicable under this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

[23] *See Kluger* at 4.