



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Promote personal responsibility -- This bill limits a landowner's financial responsibility to trespassers, and increases criminal penalties.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Liability to trespassers**

In tort law, a plaintiff must prove that a lawful duty exists, that the duty was breached, and that the plaintiff suffered damages as a result of the breach. Current tort law related to a landowner's duty to persons on his or her land is governed by the status of the person. There are two basic categories of persons on land: invitees and trespassers. An invitee is a person who was invited to enter the land. Section 768.075(3)(a)1., F.S., defines invitation to mean "that the visitor entering the premises has an objectively reasonable belief that he or she has been invited or is otherwise welcome on that portion of the real property where injury occurs." A landowner owes certain duties to invitees, and can be sued in tort should the landowner fail a duty and a person is injured due to that failure.<sup>1</sup> This bill does not affect or change the liability of a landowner related to invitees.

A trespasser is any person who is not an invitee. There are two classes of trespasser:

- Section 768.075(3)(a)2., F.S., defines a "discovered trespasser" as "a person who enters real property without invitation, either express or implied, and whose actual physical presence was detected, within 24 hours preceding the accident, by the person or organization owning or controlling an interest in real property or to whose actual physical presence the person or organization owning or controlling an interest in real property was alerted by a reliable source within 24 hours preceding the accident. The status of a person who enters real property shall not be elevated to that of an invitee, unless the person or organization owning or controlling an interest in real property has issued an express invitation to enter the property or has manifested a clear intent to hold the property open to use by persons pursuing purposes such as those pursued by the person whose status is at issue."
- Section 768.075(3)(a)3., F.S., defines an "undiscovered trespasser" as "a person who enters property without invitation, either express or implied, and whose actual physical presence was not detected, within 24 hours preceding the accident, by the person or organization owning or controlling an interest in real property."

Section 768.075, F.S., provides that a landowner is liable to an undiscovered trespasser only for "intentional misconduct that proximately causes injury" to the trespasser. Section 768.075, F.S., provides that a landowner is liable to a discovered trespasser for:

- Intentional misconduct
- Gross negligence

---

<sup>1</sup> The duties owed to most invitees are: the duty to keep property in reasonably safe condition; 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 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. The duty to keep the property in a reasonably safe condition does not apply to some invitees.

- The failure to "warn . . . of dangerous conditions that are known to the [landowner] but that are not readily observable by others." However, this liability does not apply where the trespasser was intoxicated or under the influence of illegal drugs.<sup>2</sup>

There is no definition of the term "gross negligence" specifically applicable to s. 768.075, F.S. The term is used in other statutes and in other contexts. One court has said that "gross negligence simply defined is failure to use slight care."<sup>3</sup> Another has explained:

[G]ross negligence is that act or omission which a reasonable, prudent man "would know would probably and most likely," result in an injury to another; and, from a standpoint of degree, it is clear that gross negligence lies between simple negligence and the "willful and wanton" conduct sufficient, if death results, to constitute "culpable negligence" within the crime of manslaughter.<sup>4</sup>

This bill creates s. 810.125, F.S.,<sup>5</sup> regarding injuries during unlawful conduct. This bill provides that an intentional trespasser on agricultural land may not sue the owner or another person with a "controlling interest" in such land for any injury caused during the course and scope of the trespasser's unlawful conduct.

### **Posted Land -- Alternative Posting**

There are two provisions related to the offense of trespassing, and the giving of notice along the border directing persons not to trespass:

- Section 810.09, F.S., provides that it is a first-degree misdemeanor to enter, uninvited, onto property that is not a structure or conveyance<sup>6</sup> if prior notice against entering has been given by verbal communication, or by posting, fencing or cultivation.<sup>7</sup> In other words, it is not trespassing where a person wanders onto land that is undeveloped and that person has no idea that the land is privately owned because he or she was not given any prior notice to that affect.
- Section 810.12, F.S., provides that "the unauthorized entry by any person into or upon any enclosed and posted land shall be prima facie evidence of the intention of such person to commit an act of trespass." "Posted land" is land upon which signs are placed not more than 500 feet apart along, and at each corner of, the boundaries of the land. Signs must contain the words "no trespassing".<sup>8</sup>

This bill amends s. 810.011(5), F.S., to provide an alternative definition for the term "posted land", which will have the effect of creating an alternative means for giving notice to persons that they may be

<sup>2</sup> Section 768.075(1), F.S., provides that a landowner is not liable to a trespasser for the failure to warn of a dangerous condition "when such trespasser was under the influence of alcoholic beverages with a blood-alcohol level of 0.08 percent or higher, when such trespasser was under the influence of any chemical substance set forth in s. 877.111, when such trespasser was illegally under the influence of any substance controlled under chapter 893, or if the trespasser is affected by any of the aforesaid substances to the extent that her or his normal faculties are impaired."

<sup>3</sup> *Concrete Const., Inc., of Lake Worth v. Petterson*, 216 So.2d 221, 222 (Fla. 1968).

<sup>4</sup> *Glaab v. Caudill*, 236 So.2d 180, 182-83 (Fla. 2d DCA 1970) (footnotes omitted); see also, *Fleetwood Homes of Florida, Inc. v. Reeves*, 833 So.2d 857 (Fla. 2nd DCA 2002).

<sup>5</sup> Chapter 810, F.S., is not a part of the tort law, but is the chapter regarding criminal trespass. The title or subject of a chapter does not control its meaning, and thus there is no legal impediment to placement of a tort provision in a chapter on criminal law.

<sup>6</sup> "Conveyance" means any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car; and "to enter a conveyance" includes taking apart any portion of the conveyance. Section. 810.011, F.S.

<sup>7</sup> Trespass in a dwelling, structure or conveyance is considered a more serious offense.

<sup>8</sup> Section 810.011(5), F.S.

charged with trespassing on the land beyond the notice. This bill provides that posting may be accomplished by conspicuous purple paint marks that are:

- Vertical lines at least 1 inch in width and at least 8 inches in length.
- Placed so that the bottom of the mark is between 3 and 5 feet from the ground.
- Readily visible and no more than 1,000 feet apart.

Between October 1, 2007, and October 1, 2009, a landowner using purple paint markings for posting of land must also place signs wherever entry to the land would normally be expected. The signs must explain that the purple markings mean "no trespassing."

### **Unlawfully damaging or destroying signs from posted land**

Section 810.10, F.S., provides that it is a second degree misdemeanor for any person to willfully remove, destroy, mutilate, or commit any act designed to remove, mutilate, or reduce the legibility or effectiveness of any posted notice placed by the owner, tenant, lessee, or occupant of legally enclosed or legally posted land. A second degree misdemeanor is punishable by up to sixty days in county jail and a fine of up to \$500.<sup>9</sup> The offender may be ordered to repay the landowner for the repair cost.

This bill amends s. 810.10, F.S., to increase the penalty for unlawfully damaging or destroying a "no trespassing" sign from a second degree misdemeanor to a third degree felony. The offender may be ordered to repay the landowner for the repair cost. A third degree felony is punishable by up to five years imprisonment and a fine of up to \$5,000.<sup>10</sup> The offense is not ranked in the offense severity ranking chart of the Criminal Punishment Code, and thus defaults to a level 1 offense.

### **Unlawfully breaking or injuring fences**

Section 810.115(1), F.S., provides that it is a first degree misdemeanor for any person to willfully and maliciously break down, mar, injure, deface, cut, or otherwise create or causes to be created an opening, gap, interruption, or break in any fence, or any part thereof, belonging to or enclosing land not his or her own. A first degree misdemeanor is punishable by up to one year in county jail and a fine of up to \$1,000.<sup>11</sup> The offender may be ordered to repay the landowner for the repair cost. If the fence contains animals, the offense is a third degree felony punishable by up to five years imprisonment and a fine of up to \$5,000.

This bill amends s. 810.115(1), F.S., to increase the penalty for breaking or injuring a fence from a first degree misdemeanor to a third degree felony. The offense is not ranked in the offense severity ranking chart of the Criminal Punishment Code, and thus defaults to a level 1 offense.

#### **C. SECTION DIRECTORY:**

Section 1 amends s. 768.075, F.S., regarding liability of landowners to trespassers.

Section 2 amends s. 810.10, F.S., regarding the criminal penalty for intentionally damaging or removing posted no trespassing signs.

Section 3 amends s. 810.115, F.S., regarding the criminal penalty for breaking or injuring fences.

Section 4 provides an effective date of October 1, 2007.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

<sup>9</sup> Sections 775.082(4)(b) and 775.083(1)(e), F.S.

<sup>10</sup> Sections 775.082(3)(d) and 775.083(1)(c), F.S.

<sup>11</sup> Sections 775.082(4)(a) and 775.083(1)(d), F.S.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Estimating Conference has determined that the criminal provisions in this bill have an insignificant prison bed impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### 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, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

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 held 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 an overpowering public necessity to abolish the right and no alternative method of meeting such public necessity.<sup>14</sup>

Section 1 of the bill may abolish a common law cause of action that existed prior to 1968 whereby a trespasser might have a cause of action against a landowner for failure to warn of a dangerous condition that is not readily observable.

B. RULE-MAKING AUTHORITY:

None.

---

<sup>12</sup> See generally 10A Fla. Jur. 2d, Constitutional Law, ss. 360-69.

<sup>13</sup> *Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

<sup>14</sup> *Kluger* at 4.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The members of the Policy & Budget Council suggested that Section 1 of the bill could be better drafted. The following replacement language is recommended for consideration:

Section 1. Section 810.125, Florida Statutes, is created to read:  
810.125 Injury to certain trespassers on agricultural land; recovery limited.--No person having a real property interest in agricultural lands shall be liable to any person who intentionally and knowingly trespassed on such agricultural lands and who is injured or harmed during the course and scope of his or her unlawful conduct.

D. STATEMENT OF THE SPONSOR

No statement received.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 23, 2007, the Policy & Budget Council adopted one amendment to this bill. The amendment:

- Removed changes that would have provided that a landowner is liable to a discovered trespasser only for causing intentional harm to the trespasser; replacing the tort limitation with a narrower exemption from liability applicable only to agricultural lands.
- Redefined the term "posted land" to include posting by the use of purple paint markers.

The bill was then reported favorably with a council substitute.