



*The Florida Justice Reform Institute
Supports Amendment 957413 to HB
837 and Application of Comparative
Fault to Negligent Security Actions*

In a negligent security action, where an invitee, e.g., a customer, is injured by the criminal conduct of a third person while the invitee was on the property owner's premises, the property owner can be held liable for the invitee's injuries if the third person's criminal conduct was foreseeable, and the property owner failed to take reasonable measures to protect the invitee from the criminal conduct. Even though such actions sound in negligence, comparative fault principles do not apply. This is because the Florida Supreme Court has interpreted the intentional tort exception to comparative fault set forth in section 768.81(4), Florida Statutes, to apply to negligent security actions. As a consequence, a defendant in a negligent security action can be found liable for the **full** amount of damages found for a plaintiff, no matter the fact that the plaintiff's injury was caused by a third-party criminal. Thus, the Florida Justice Reform Institute supports Amendment 957413 to HB 837, which would create new section 768.0701, Florida Statutes, to state as follows:

Premises liability for criminal acts of third parties.—Notwithstanding s. 768.81(4), in an action for damages against the owner, lessor, operator, or manager of commercial or real property brought by a person lawfully on the property who was injured by the criminal act of a third party, the trier of fact must consider the fault of all persons who contributed to the injury.

Under Current Florida Law, the Jury Cannot Consider the Fault of a Third Party Who Committed the Criminal Act that Directly Caused the Plaintiff's Injury

Under Florida law, for almost all negligence actions in which more than one tortfeasor (i.e., person or entity who has committed negligence or an intentional tort) caused the plaintiff's injury, the doctrine of comparative negligence applies and the doctrine of joint and several liability does not apply. As a result, each tortfeasor is only liable for the plaintiff's damages in proportion with the tortfeasor's own fault in causing the plaintiff's injury. See § 768.81(3), Fla. Stat. For example, if Tortfeasor A and Tortfeasor B were each found by a jury to be 50% at fault for causing the plaintiff's injury, and the plaintiff was awarded a total of \$200,000 in damages for her injury, Tortfeasor A and Tortfeasor B would each be liable for \$100,000 in damages. Neither tortfeasor is responsible for the \$100,000 owed by the other tortfeasor. However, pursuant to section 768.81(4), Florida Statutes, and *Merrill Crossings Associates v. McDonald*, 705 So. 2d 560, 561 (Fla. 1997), the reverse is true in negligent security actions: comparative negligence does not apply and joint and several liability does.

In *Merrill Crossings*, the plaintiff was shot and injured by an unknown assailant in the parking lot of a Wal-Mart shopping center and brought a negligent security action against Wal-Mart and the owner of the shopping center. 705 So. 2d at 561. The jury found the defendants liable for failing to maintain reasonable security measures on the premises. *Id.* The trial court did

not allow the shooter to be included on the verdict form, and, consequently, the jury did not apportion any fault for the plaintiff's injury to the shooter. *See id.* The Florida Supreme Court upheld, finding that negligent security claims fall within the comparative negligence statute's exemption for "any action based upon an intentional tort." *Id.* at 562–63 (citing § 768.81(4), Fla. Stat.). The Court explained that "the language excluding actions 'based [up]on an intentional tort' from the statute gives effect to a public policy that negligent tortfeasors . . . should not be permitted to reduce their liability by shifting it to another tortfeasor whose intentional criminal conduct was a foreseeable result of their negligence." *Id.* at 562. Thus, the Court held that the trial court properly omitted the shooter from the verdict form and entered judgment for the entirety of the plaintiff's damages against Wal-Mart and the property owner. *See id.* at 562–63.

Accordingly, under existing Florida law, the defendant-premises owner in a negligent security case cannot have any of her damages reduced by the fault of the unrelated criminal who intentionally attacked or otherwise injured the plaintiff. Instead, the premises owner is liable for the entirety of the plaintiff's damages, even though the owner's fault in causing the plaintiff's injury is likely slight compared to the assailant who committed the criminal attack on the plaintiff. For example, if a jury were allowed to apportion fault among all tortfeasors in a negligent security action, and found the premises owner to be 10% at fault for causing the plaintiff's injury and the assailant who attacked the plaintiff to be 90% at fault, the business owner would nonetheless be liable for **100% of the plaintiff's damages**. In addition to unfairly shifting the liability of third-party criminals to business owners, this rule of law gives plaintiffs a reason to sue business owners any time a crime is committed on their premises, even where it appears that any negligence on the business owner's part in maintaining reasonable security measures was minimal.

Amendment 957413 to HB 837 Will Ensure All Defendants in Negligence Actions Are Subject to Comparative Fault Principles

Each time a business owner is found liable under a negligent security claim, the owner is not only liable for her share of the damages in proportion to her share of the fault for causing the plaintiff's injury; the business owner is liable for the third party assailant's share of damages as well. This is inequitable. The Institute supports Amendment 957413 which would ensure premises liability negligent security actions are subject to comparative fault principles.

Amendment No. 10

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	<u> </u>	(Y/N)
ADOPTED AS AMENDED	<u> </u>	(Y/N)
ADOPTED W/O OBJECTION	<u> </u>	(Y/N)
FAILED TO ADOPT	<u> </u>	(Y/N)
WITHDRAWN	<u> </u>	(Y/N)
OTHER	<u> </u>	

1 Committee/Subcommittee hearing bill: Civil Justice Subcommittee
 2 Representative Fabricio offered the following:

Amendment (with title amendment)

Between lines 388 and 389, insert:

Section 5. Section 768.0701, Florida Statutes, is created to read:

768.0701 Premises liability for criminal acts of third parties.—Notwithstanding s. 768.81(4), in an action for damages against the owner, lessor, operator, or manager of commercial or real property brought by a person lawfully on the property who was injured by the criminal act of a third party, the trier of fact must consider the fault of all persons who contributed to the injury.

Amendment No. 10

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T I T L E A M E N D M E N T

Remove line 21 and insert:

medical care; creating s. 768.0701, F.S.; requiring the trier of
fact to consider the fault of certain persons contributing to an
injury; amending s. 768.81, F.S.; providing that