The Florida Justice Reform Institute Supports SB 236 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 degree of fault attributable to the third-party criminal, the plaintiff, or even other co-defendants. Thus, the Florida Justice Reform Institute supports SB 236, including Section 5 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 Apportion Fault Among the Defendants and Plaintiff in Negligent Security Actions

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. In other words, each party is responsible for their own tort, not the tort committed by others.

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. Thus, while in all other negligence actions the jury may consider the relative fault of the defendants (and plaintiff), that does not apply in negligence actions involving claims of negligent security by the defendant property owner or landlord.

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 or operator 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 or even any other defendant who shares some of the fault for negligence at issue. 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, the co-defendant operator of the premises to be 10% at fault, and the assailant who attacked the plaintiff to be 80% 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.

Negligent Security Claims Have Resulted in Very High Verdicts

Plaintiff's attorneys are highly motivated to file negligent security claims any time a crime has occurred on a business's premises due to the possibility of very high verdicts against the business owner. Negligent security cases often involve tragic factual circumstances, eliciting high damages awards, but such cases should not prompt an exception from the well-settled principles of comparative fault, where each defendant is only held to account for his portion of the fault. Below are just a few examples of actual damages awards in negligent security cases, all out of Miami-Dade County and reported by noted plaintiffs' law firm, The Haggard Law Firm.

- *Barrak v. Report Investment Corp.*, No. 02-26271 CA (Fla. 11th Cir. Ct. 2007) - Mr. Barrak was waiting for his friend in his car in the parking lot of Tootsie's Cabaret when an unknown person shot him, rendering him a ventilator-dependent quadriplegic. A jury awarded him a verdict of $102.7 million against the owner of the shopping center where Tootsie's Cabaret was located.

- *Machado v. The Waves of Hialeah, Inc.*, No. 2016CA009731 (Fla. 11th Cir. Ct. 2017), *aff'd*, 300 So. 3d 739 (Fla. 3d DCA 2020) - Ms. Guevara Machado was brutally murdered

by a man while she was walking in the halls of the motel where she was a guest. Her family was awarded $12 million against the owner of the motel.

- *Snell v. Family Food Saver II, Corp*., No. 2010-040595-CA-58 (Fla. 11th Cir. Ct. 2012), *aff'd*, 138 So. 3d 453 (Fla. 3d DCA 2014) - Mr. Snell was murdered during an attempted robbery at a gas station car wash as he waited to have his car washed. His mother was awarded $5.7 million against the gas station/car wash operator.

SB 236 Will Ensure All Defendants in Negligence Actions Are Subject to Comparative Fault Principles

Each time a property owner or operator defendant is found liable under a negligent security claim, that defendant 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 defendant is liable for the third party assailant's share of damages and potentially any other co-defendant's share of damages as well. This is inequitable. The Institute supports SB 236 which would ensure premises liability negligent security actions are subject to comparative fault principles and that all defendants in such actions are liable for only their portion of responsibility for the plaintiff's injury.