

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 14, 1998

Revised: _____

Subject: Crime Victim's Protection Act

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Erickson</u>	<u>Miller</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>Harkins</u>	<u>Moody</u>	<u>JU</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The bill provides that when a criminal is injured or the criminal's property is injured while the criminal is engaged in conduct constituting a felony of any kind or a misdemeanor involving violence, the criminal is barred from recovering damages for personal injury. The existing statute, which this bill amends, bars recovery only in situations where the criminal was involved in a "forcible felony."

Also, the bill provides that, if recovery is barred by the new section, the court shall award reasonable attorney's fees, costs, and other expenses to the civil defendant who was the victim or subject of the claimant's criminal conduct, including, but not limited to, necessary travel expenses and other expenses incurred by the civil defendant and the civil defendant's witnesses.

The bill amends section 776.085 of the Florida Statutes.

II. Present Situation:

Under the present law, a criminal will be barred from recovery for injuries sustained arising out of the commission or attempted commission of a forcible felony. s. 776.085(1), F.S. A "forcible felony" means treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

s. 776.08, F.S. The defense can be established in one of two ways:

- By producing evidence that the participant has been convicted of such forcible felony or attempted forcible felony; or

- By proof of the commission of such crime or attempted crime by a preponderance of the evidence.
s.776.085(1), F.S.

If a civil defendant prevails based on the defense created by s. 776.085, F.S., the losing party, if convicted of and incarcerated for the crime or attempted crime, must, as determined by the court, lose any privileges provided by the correctional facility, including, but not limited to:

- Canteen purchases;
- Telephone access;
- Outdoor exercise;
- Use of the library; and
- Visitation.

s. 776.085(4)(a), F.S.

Under the current law, the court must award a reasonable attorney's fee to the prevailing party in such a civil action to be paid in equal amounts by the losing party and the losing party's attorney. s. 776.085(4), F.S. However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client. *Id.* If the losing party is incarcerated for the crime or attempted crime and has insufficient assets to cover payment of the costs of the action and the award of fees, the losing party/prisoner must, as determined by the court, be required to pay by deduction from any payments the prisoner receives while incarcerated. *Id.* If the losing party is incarcerated for the crime or attempted crime, the court must issue a written order containing its findings and ruling, and direct that a certified copy be forwarded to the appropriate correctional institution or facility. *Id.*

In *Gonzalez v. Liberty Mutual Insurance Company*, 634 So.2d 178 (Fla. 3d DCA 1994), plaintiff, Yesenia Gonzalez, as personal representative of the Estate of Andrew Perez, filed a claim for wrongful death against Armando Valdes. Andrew Perez was shot to death by Armando Valdes when Mr. Valdes caught Mr. Perez and two others attempting to burglarize his home.

Mr. Perez's estate filed a lawsuit against Mr. Valdes to recover damages for Perez's wrongful death. Valdes filed a motion for summary judgment. The trial court granted the motion after finding that s. 776.085, F.S., (1993)., creates a defense to the wrongful death action because Mr. Perez died during the attempted commission of a forcible felony.

The third district court of appeals affirmed the summary judgment, holding that the trial court correctly concluded that s. 776.085, F.S., barred Mr. Perez's recovery.

III. Effect of Proposed Changes:

Currently, under s. 776.085, F.S., only persons who commit one of the felonies enumerated in s. 776.08, F.S., are barred from recovering damages. Under the bill, all persons engaged in conduct which constitutes a felony are barred from recovery, as are persons committing misdemeanors involving violence. Therefore, the universe of circumstances in which a plaintiff

would be barred from recovery due to participation in criminal conduct would be broadened by the bill.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Florida Constitution “guarantees to every person the right to free access to the courts on claims of redress of injury free of unreasonable burdens and restrictions.” *Swain v. Curry*, 595 So.2d 168 (Fla. St.. DCA 1992), *rev. denied*, 601 So.2d 551 (Fla.1992), citing *G.B.B Investments, Inc. v. Hinterkopf*, 343 So.2d 899 (Fla. 3rd DCA 1997) and s. 21, Art. I, Fla. Const. The bill, where not preempted by federal law, would bar recovery by plaintiffs who receive injuries to their person or property proximately caused by the tortious conduct of another, if the plaintiff was injured during the commission of a crime, or immediately thereafter, *and convicted*, even if their injury was proximately caused by the negligent, wrongful, or intentional act of the civil defendant.

If an injured criminal is subsequently convicted of committing a misdemeanor involving violence, the bill may prevent recovery where:

- A criminal fleeing the scene of a misdemeanor involving violence is accidentally struck by an automobile being operated in an unsafe manner;
- A criminal fleeing the scene of a misdemeanor involving violence is injured by a defective product, regardless of whether the manufacturer of the product was affected by the misdemeanor involving violence;
- A criminal fleeing the scene of a misdemeanor involving violence is injured and hospitalized and then catastrophically injured by medical malpractice;
- A criminal fleeing the scene of a misdemeanor involving violence is shot while passing over the property of another by the owner of that property¹.

¹ Under current law, if a person fleeing the scene of a misdemeanor involving violence were to injure himself while traveling over the property of another, on an unknown or know hazardous condition, he could not recover against that landowner, not necessarily because he is a criminal, but because he is a trespasser. A property owner’s duty to a undiscovered trespasser is merely to refrain from willful and wanton conduct. *Wood v. Camp*, 284 So.2d 691, 693-94 (Fla.1973); See also *Florida East Coast Ry Co. v.*

In these previous hypothetical situations, the civil defendant is not the person victimized by the criminal's act or a person assisting such a victim.

In 1973, the Supreme Court of Florida declared that:

Where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the state pursuant to s. 2.01, F.S., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Kluger v. White, 281 So.2d 1, 4 (Fla. 1973).

“When reviewing article I, section 21, of the Florida Constitution, one must look to the common law as it existed on November 5, 1968. This is because the 1968 provision of section 21 differs significantly from its 1845 counterpart.” *Eller v. Shova*, 630 So.2d 537, 543 n 4. (Fla. 1993).

For instance, the intentional tort of assault or battery is of common law origin. “That the individual shall have full protection in person and property is a principle as old as the common law. . . .” Samuel Warren and Luis D. Brandeis, “The Right to Privacy,” 4 *Harvard Law Review* 193 (1890), quoted in *Cason v. Baskin*, 155 Fla. 198, 20 So.2d 243, 247 (Fla. 1944). “[I]n very early times, the law gave a remedy only for physical interference with life and property,” and interference with life “served only to protect the subject from battery in its various forms. . . .” *Id.* Later, “[f]rom the action of battery grew the action of assault.” *Id.* See *Ake v. Birnbaum*, 156 Fla. 735, 25 So.2d 213 (Fla. 1945); *Chorak v. Naughton*, 409 So.2d 35, 38 (Fla. 2d DCA 1981).

There appears to be nothing in the history of Florida's common law that bars a person injured by an assault or battery, even where the battery occurred during the course of the person committing a criminal act resulting in the person's conviction, from a cause of action based on the intentional tort of assault and battery. For example, there appears to be no bar to an intentional tort of assault or battery in the situation where a police officer uses unreasonable force against an arrestee. See *Kennedy v. City of Daytona Beach*, 132 Fla. 675, 182 So.2d

Southeast Bank, N.A., 585 So.2d 314 (Fla. 4th DCA 1991). Once a property owner knows of a trespasser's presence, or has reason to know of it, that property owner has a duty to refrain from wilful and wanton conduct and to warn the discovered trespasser of a condition known by the landowner to be dangerous when such danger is not open to ordinary observation. *Post v. Lunney*, 261 So.2d 146 (Fla.1972); *Wood v. Camp*, 284 So.2d 691 (Fla.1973); *Morris v. Florentes, Inc. et al*, 421 So.2d 582 (Fla. 5th DCA 1982).

228, 229 (Fla. 1938) (“Under the common law, law enforcement officers were considered arms of the King and . . . an officer might be held liable for his wrongful acts. . . .”)

Presently, in most circumstances, one may not intentionally commit an assault or battery on a discovered or undiscovered trespasser. If one chose to commit such acts on a trespasser, that trespasser would have an action for the tort of assault or battery, a cause of action of common law origin. Under the bill, if a person became a trespasser while fleeing from a felony or a misdemeanor involving violence, the landowner could batter the fleeing criminal with impunity (presuming the person was subsequently convicted). Regardless of his damages, the fleeing criminal could not recover. If he was convicted, bringing suit against the landowner over whose property he trespassed during flight would be futile because losing would be inevitable as would be the payment of his opponent’s attorney’s fees. For this reason, the bill may be subject to constitutional attack as barring a person’s state constitutional right to access to courts under s. 21, Art. I, Fla. Const., as articulated in the constitutional analysis in *Kluger*.

It may be argued that *Kluger* does not apply because the bill does not eliminate a cause of action; the courthouse doors remain open. However, even where a cause of action exists, no recovery could be had in many potential situations. The law would continue to bestow upon the criminal plaintiff legally cognizable rights, such as the right of a trespasser to be free from intentional conduct endangering his safety. However, where such rights are encroached upon, the bill would deny the criminal plaintiff any remedy whatsoever.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill bars recovery of damages against private sector entities and individuals who are sued by criminal offenders as a result of injuries occurring during the commission of a crime.

C. Government Sector Impact:

To the extent the bill results in fewer suits being filed, there would be an indeterminate cost savings to the judiciary.

The bill bars recovery of damages against public sector entities and individuals who are sued by criminal offenders as a result of injuries occurring during the commission of a crime.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
