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Legislation rebuilds legal shield for people acting in self-defense

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PHOENIX — State lawmakers are moving to make it harder for people who are injured while committing crimes, or their survivors if they are killed, to sue their intended victims.

A measure approved unanimously Monday by the Senate Judiciary Committee would restore some protection to businesses who want a legal shield when one of their employees seeks to restrain a shoplifter or others who are stealing. The House already has passed HB 2813.

Businesses thought they had that protection. And they did, sort of, until the state Court of Appeals ruled two years ago the provision is unconstitutional.

Rep. John Kavanagh, R-Fountain Hills, said he believes this new version would withstand any legal challenge. To make sure of that, and try to avoid a gubernatorial veto, he even agreed to water down his measure a bit to satisfy the Arizona Trial Lawyers Association.

A 1993 law said people can't sue if they're injured while committing or attempting to commit a felony. That law provides immunity even if the person who caused the injury was grossly negligent.

Three years later, legislators extended the protection to cover misdemeanors.

What brought the law to the court's attention was a lawsuit filed by Lorna Hernandez, widow of Frank Hernandez Jr. She filed a complaint against a security guard on duty at a Tucson Safeway store whose actions she said resulted in her husband's death.

According to a police report, the guard stopped Hernandez, saying he had stolen a bottle of lotion.

His widow's attorney said the guard restrained Hernandez by wrestling him to the floor, face down, and placing his arm around Hernandez's neck. The lawsuit says that while Hernandez complained he could not breathe, the guard did not release him until he had handcuffed him, with the assistance of two Safeway employees.

The police report says that before police arrived a guard saw Hernandez had stopped breathing and officials called for medical help. He was taken to Kino Community Hospital, where he was pronounced dead on arrival.

A medical examiner's report concluded he died of "asphyxia due to neck compression." He also had internal hemorrhaging and suffered blunt-force injuries.

Attorneys for the guard, his employer and the store sought to have the lawsuit tossed, citing the law, which prohibits those who are committing crimes from filing suit if they are injured.

But appellate Judge Joseph Howard said the state constitution specifically says the question of whether someone contributed to his or her own death or injury is a question of fact that has to be decided by a jury.

The bill approved by the House says juries may choose not to award damages in that situation.

The other key change would let jurors refuse to award damages only if they concluded the defendant did not act intentionally.

Kavanagh envisioned a situation where a juvenile was stealing a low-value item — a misdemeanor — and was running from the store. He said he did not want to immunize a security guard who pulled out a gun and "blew him away."

That also addresses the other contention of defendants in the 2006 court ruling, who said there is a common-law principle of "shopkeeper's privilege." That, they argued, gives store owners and the people who work for them immunity when detaining criminals.

But Judge Howard said any immunity applies only when someone acts in a reasonable manner. More to the point, he said, the use of force is never justified unless a suspect's actions result in the person having to engage in self-defense.

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