



**House
Legislative
Analysis
Section**

House Office Building, 9 South
Lansing, Michigan 48909
Phone: 517/373-6466

**GOVERNMENTAL IMMUNITY:
PRIVATE BUSINESS ACTIVITIES**

**House Bill 4793 (Substitute H-1)
First Analysis (6-5-01)**

**Sponsor: Rep. Andrew Richner
Committee: Civil Law and the Judiciary**

THE APPARENT PROBLEM:

In general, the governmental immunity act (Public Act 170 of 1964) gives governmental agencies – and their officers, employees, and volunteers – immunity from tort liability when the agency, officer, employee, or volunteer is engaged in the exercise or discharge of a “governmental function” or acting on behalf of the agency within its scope of authority. While case law reportedly has clarified the statutory definition of “governmental function” (defined in statute as “an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law”), a question about governmental immunity has arisen because of a 1995 appeals court case involving Oakland County deputy sheriffs and the Pine Knob entertainment center in Oakland County.

It has become customary for private entertainment enterprises to use local police services to provide crowd control at entertainment events, and to reimburse the local government unit for those services. However, due to a 1995 appeals court decision (which the state supreme court denied leave to appeal), a question has arisen as to whether off-duty police personnel continue to have the protection of governmental immunity when providing police services that are partly paid by the private sector. The case in question involved off-duty Oakland County deputy sheriffs, who provided security at Pine Knob’s entertainment center in Independence Township. The appeals court found (in *Pardon v Finkel*) that the sheriff’s deputies did not have governmental immunity when the deputies were sued by three African-Americans, an off-duty Detroit police officer and two of her friends, who attended the event. (See BACKGROUND INFORMATION.)

Although *Pardon v Finkel* involved off-duty police officers, the case apparently has caused uncertainty about the manner in which governmental immunity applies to on-duty police officers whose salaries are reimbursed by private entities rather than public tax money. Legislation addressing this issue was enrolled

last session but pocket vetoed by the governor (that is, the governor did not sign the enrolled House Bill 5672 within the 14-day constitutional time limit before the legislature adjourned at the end of the last legislative session). Legislation has been reintroduced to address this issue.

THE CONTENT OF THE BILL:

The bill would amend the governmental immunity act (Public Act 170 of 1974) to amend the definition of “governmental function.” The term currently is defined to mean “an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.” The bill would amend the definition to add that “governmental immunity” included “an activity performed on public or private property by a sworn law enforcement officer within the scope of the law enforcement officer’s authority as directed or assigned by his or her public employer for the purpose of public safety.”

MCL 691.1401

BACKGROUND INFORMATION:

According to the factual background section of the published opinion of *Pardon v Finkel* (213 Mich App 643), in 1987, Pine Knob Music Theatre entered into a contract with Oakland County to hire deputy sheriffs to provide security at Pine Knob’s entertainment center in Independence Township. Pine Knob agreed to pay the county \$28.44 an hour for each deputy, an amount corresponding to the deputy sheriff’s overtime pay under their union’s collective bargaining agreement. The contract contained a hold harmless agreement by which the county would be responsible for the acts and omissions of its deputies even though the deputies’ status was specifically declared to be that of independent contractors and not employees or agents of Pine Knob.

House Bill 4793 (6-5-01)

On July 12, 1987, Cassandra Pardon, an off-duty Detroit police officer, and two of her friends (a Detroit firefighter and a student) attended a concert at Pine Knob. Since Detroit police officers are required to carry their weapons 24 hours a day, Pardon had her .38 caliber pistol in her purse. She told an attendant, who informed Kerry Krupsky, a sergeant employed by Oakland County and the staff supervisor of the deputies at Pine Knob. Krupsky and other deputies confronted Pardon, who produced her badge and identification authorizing her to carry a pistol. An argument ensued. Pardon and her friends, Samuel Locke, Jr., and Barbara Locke, contended that they were singled out for attention and abuse because they are black; Krupsky contended that Pardon engaged in abusive name-calling. After consulting the park manager, Steven Finkel, Krupsky advised Pardon that she could either receive a refund (and not attend the concert) or stay for the concert but leave her weapon with him. Pardon contended that she agreed to leave her weapon and proceeded to unload it, but that when she asked for a receipt Krupsky became abusive and began to push his finger in her face. When she attempted to defend herself, she was physically removed from the trailer, thrown upon a cement floor, and handcuffed. When Pardon's friend, Samuel Locke tried to intercede – verbally, according to Locke and his friends, physically, according to the deputies and manager – he was handcuffed and arrested. Barbara Locke also was physically detained and arrested. The three were then charged with assault and battery, aggravated assault, and disturbing the peace, but on January 23, 1989, all three were found not guilty of all charges by a district court judge.

On May 27, 1989, the Detroit police officer and her two friends filed a civil action against the off-duty Oakland County sheriffs' deputies, Oakland County Sheriff John Nichols, the concert promoter, and others to recover for false arrest, false imprisonment, malicious prosecution, and assault and battery. The plaintiffs alleged that the individual plaintiffs had intentionally inflicted emotional distress and committed federal civil rights violations, that Oakland County had failed to educate and train its deputies in matters of law enforcement, and that Pine Knob was negligent in failing to formulate a policy for off-duty police officers attending concerts.

The Oakland County Court dismissed most of the counts in the civil action, holding that Oakland County was engaged in a governmental function and that the county, the sheriff, and the deputy sheriffs were entitled to governmental immunity. (The court did not dismiss an allegation that Sgt. Krupsky was

grossly negligent or engaged in intentional misconduct, nor an allegation that Pine Knob also had been negligent.) However, the court of appeals held that the county and its deputies were *not* protected by governmental immunity because the relationship between the county and Pine Knob was akin to that of a private security guard situation. The county thus was engaged in a nongovernmental function, and so was not entitled to governmental immunity. The court further noted that in order to determine whether a governmental agency is engaged in a governmental function, “the focus must be on the general activity, not the specific conduct involved at the time of the tort.” The court went on to say, “In this instance, the general activity focused upon was not law enforcement but crowd control. Such an arrangement is characteristic of a private agreement between two entities as opposed to a law enforcement governmental function. In addition, either party had the ability to opt out of the contract or even decline to enter into or perform the contract. The county would not have such options if its service were mandated by constitution, statute, or local ordinance [which is in the statutory definition of “governmental function”]. The county was not at Pine Knob under any public duty doctrine, but was there only pursuant to contract.” The state supreme court denied leave to appeal.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

Local governments enter into contracts with private companies to the mutual benefit of both. An enhanced police presence to maintain crowd control is in everyone's best interests, and arguably this kind of public orderliness can only be maintained by well-trained police officers. If a police agency must provide extra protection at times when large crowds gather, such as happens at certain large entertainment venues, the expense of that extra police protection clearly is borne by taxpayers and the police surely are performing a governmental function. When a private sector business behaves as a good corporate citizen and offers to share the costs for extra police protection with fellow taxpayers, the police officers who provide the service should not be denied the protection of governmental immunity. The bill would make clear, by amending the definition of “governmental function,” that activities performed on public or private property by sworn law enforcement

officers within the scope of their authority and as directed or assigned by their public employer for the purpose of public safety were indeed a governmental function.

Against:

The bill would seem to reverse a decade-long trend of privatizing many government functions. Or, rather, it would seem to continue this trend, but set a potentially dangerous precedent of extending governmental immunity to situations involving public officials (that is, police officers) engaged in providing security services to private entities. Moreover, the bill would seem to be anti-competitive; establishing an unequal playing field for private security service that otherwise would have to be hired to provide security at private business functions. Instead of giving police officers governmental immunity when they are hired by private companies to serve, essentially, as a private security force, why not just require the private company to provide private sector liability insurance or simply let them hire private security guards? The bill would appear to provide unfair competition for private security firms, whose services the private businesses might otherwise pay for. Presumably, private security firms provide private liability insurance for their employees, who do not enjoy immunity for injuries or damages caused by their workers.

Response:

If local police officers weren't already on the premises of a private business that was engaged in an enterprise that involved crowds of people, and had to be called in to quell disruptive behavior, then the taxpayers would foot the entire cost of the police actions. Moreover, without the bill, and its provision of governmental immunity to sworn law enforcement officers under certain circumstances, it might be difficult for private businesses to hire local police officers in light of the *Pardon* decision. Without immunity, police officers likely would be reluctant to provide their services at, for example, large entertainment venues. Finally, it should be pointed out that the bill would not apply to off-duty police officers hired by businesses, but only to on-duty officers acting within the scope of their authority and under the direction of their public employers. Thus, the bill presumably would not reverse *Pardon*, which involved off-duty deputy sheriffs.

Against:

Governmental immunity too often denies victims of governmental negligence the opportunity to collect compensation for their injuries and effectively creates

a separate class of government officials who are unaccountable to the public they serve. The bill would expand the already ill-conceived concept of governmental immunity even further, and should be opposed. In particular, when a private entity is in partnership with government, immunity should not be extended to government officials whose salaries are in whole or in part paid by the private entity.

Against:

The bill potentially could encourage more private businesses to hire local police to serve, essentially, as private security guards in labor disputes. In particular, the bill would allow businesses to use local police to engage in strike- and union-busting activities, as happened during the 1995 Detroit newspaper strike. The newspaper corporation reimbursed the city of Sterling Heights for police costs, and strikers were injured by police acting on behalf of the corporation's strike-busting activities. Why should police officers engaged in such actions be given governmental immunity? The bill should at least be amended, as similar legislation last session was amended, to specify that governmental immunity would not apply if the private activity that was the reason for the governmental agency's – or the on-duty officer's – acts or services involved a labor dispute.

POSITIONS:

The Oakland County Sheriff's Department supports the bill. (6-4-01)

The Michigan Township Association supports the bill. (4-6-01)

The Michigan Trial Lawyers Association does not support the bill. (6-4-01)

The Michigan Municipal League does not oppose the bill. (6-4-01]

The AFL-CIO has not yet taken a position on the bill. (4-6-01)

Analyst: S. Ekstrom

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.