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SFA

BILL ANALYSIS

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House Bill 4793 (Substitute H-1 as reported without amendment)
Sponsor: Representative Andrew Richner
House Committee: Civil Law and the Judiciary
Senate Committee: Judiciary

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RATIONALE

Some people have raised the issue of whether governmental immunity should apply when a governmental agency enters into a contract with a private entity for police protection. Under the governmental immunity Act, a governmental agency (the State, a political subdivision, or a municipal corporation) is immune from tort liability when the agency is engaged in the exercise or discharge of a governmental function (except in cases involving highway negligence, dangerous or defective public buildings, or the negligent operation of a government-owned motor vehicle). In addition, a governmental employee is immune from tort liability when he or she is acting on behalf of a governmental agency, as long as the employee is acting or reasonably believes he or she is acting within the scope of his or her authority and the governmental agency is engaged in the exercise or discharge of a governmental function. The Act defines "governmental function" as an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter, ordinance, or other law. Governmental immunity does not apply if an injury or loss arose out of the performance of a "proprietary function", i.e., any activity that is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, except any activity normally supported by taxes or fees.

In 1995, the Michigan Court of Appeals decided a case in which off-duty sheriff's deputies were sued for actions they took pursuant to a contract between Oakland County and a private entity, the Pine Knob Music Theater, Inc. (*Pardon v Finkel*, described below in **BACKGROUND**). In exchange for a fixed fee, the county had furnished the sheriff's deputies to Pine Knob

for crowd control purposes. The Court of Appeals held that governmental immunity did not apply, because the governmental agency was not engaged in the exercise or discharge of a governmental function. Some people believe, however, that governmental immunity should be available in this type of situation.

CONTENT

The bill would amend the governmental immunity Act to specify that the term "governmental function" would include an activity performed on public or private property by a sworn law enforcement officer, within the scope of his or her authority, and as directed or assigned by his or her public employer for the purpose of public safety.

The bill states that it would not limit or reduce the scope of a governmental function as defined by statute or common law.

MCL 691.1401

BACKGROUND

Pardon v Finkel (213 Mich App 643) involved alleged injuries that resulted from an altercation between individuals attending a concert at the Pine Knob Music Theater and off-duty sheriff's deputies hired by Pine Knob and acting as security and crowd control functionaries, pursuant to a contract between Oakland County and Pine Knob. Under the 1987 contract, Pine Knob agreed to pay the county an hourly fee for each deputy, which corresponded to the deputies' overtime pay under their collective bargaining agreement. The contract contained a hold harmless agreement under which the county would be responsible for the acts or omissions of its deputies, although the deputies were declared

to be independent contractors and not employees or agents of Pine Knob.

The Oakland County Circuit Court held that the county was engaged in a governmental function and that it did not fall within the proprietary function exception when it provided deputies to Pine Knob. The court held that the county and most of the individual defendants were entitled to summary disposition on the basis of governmental immunity. (One deputy was denied summary disposition because the court found questions of fact regarding his alleged gross negligence or intentional misconduct.) The circuit court also granted Pine Knob's motion for summary disposition in part on the basis of the contract indemnity provisions, but denied Pine Knob's motion for summary disposition regarding the allegations concerning its own negligence.

The Court of Appeals held that the circuit court erred in granting the defendants' motions for summary disposition because the county and its deputies were not protected by governmental immunity. The Court found that "...the relationship between the county and Pine Knob was akin to that of a private security guard situation, and thus the county was engaged in a nongovernmental function...". The Court pointed out that, in determining 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. "In this instance, the general activity focused upon was not law enforcement but crowd control. Such an arrangement is characteristic of a private arrangement between two entities as opposed to a law enforcement governmental function."

The plaintiffs also had alleged that the activity should be categorized as a proprietary function because it was conducted for profit and would not normally be supported by tax dollars. According to the Court, one affidavit indicated that the program of providing sheriff's deputies to Pine Knob was operated at a net loss in 1987, although information in another Oakland County Circuit Court case indicated that the county generated 15% to 20% of its total budget from contracts with private entities. The Court of Appeals, however, found it unnecessary to address the proprietary function issue.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Many private events, such as concerts and sporting events, involve large crowds and the need for heightened security, particularly if alcoholic beverages may be consumed on the premises. Although the private entities sponsoring these events are responsible for controlling the crowds and keeping the peace, an enhanced police presence sometimes is desirable. In fact, the mere sight of uniformed police officers may be all that is needed to deter unruly behavior or criminal activity. Evidently, it is not uncommon for a local unit of government to contract with a private entity for the provision of police officers. According to the Court of Appeals, however, the local unit and its officers may be held liable for injuries and damages that occur while the police are performing under the contract. As a result, local units might be reluctant to enter into these arrangements and their officers might be unwilling to work at private functions. Without adequate security, private entities may be forced to restrict their entertainment events. On the other hand, if a local unit provides additional police protection but without payment from a private party, the taxpayers may incur an unfair burden for the costs of the police.

The bill would make it clear that governmental immunity would apply to activities performed by a sworn law enforcement officer within the scope of his or her authority, as directed or assigned by the public employer, for the purpose of public safety, regardless of whether the activities occurred on public or private property.

Response: The bill would apply governmental immunity even if the event for which a law enforcement agency was supplying services were not open to the public. While a police presence might be in the interests of public safety for a large privately sponsored event open to the public, such as a concert or football game, governmental immunity should not apply if a law enforcement agency is contracted to provide services at a private function such as a class reunion or a party at a country club.

Also, a similar bill in the 1999-2000 legislative session (House Bill 5672) passed both the Senate and the House of Representatives but was not signed by the Governor. Under that bill, governmental immunity would not have applied if an agreement between a private entity and a police officer or governmental agency included a provision to indemnify the private entity or otherwise hold it harmless for an act or omission of the officer or agency. Perhaps House Bill 4793 (H-1) also should include that exception.

In addition, House Bill 5672 of 1999-2000 addressed situations in which a law enforcement agency essentially acts as a private security force for a company involved in a labor dispute. That bill would have excluded law enforcement officers from governmental immunity if the private activity that was the reason for a police officer's acts or services were a labor dispute. This provision apparently was included in response to claims that, during the Detroit newspapers strike, law enforcement officers witnessed and ignored strike breakers' assaults against striking workers when the employing company contracted with a local unit of government for police presence at the site of a labor picket line. In order to prevent such occurrences, House Bill 4793 (H-1) should exclude those situations from governmental immunity.

Opposing Argument

If a private entity wants to hire municipal police officers, the private entity should be responsible for the cost of liability insurance to cover the activities of those officers. It is not necessary to extend governmental immunity to police officers who are working on behalf of a private entity. Furthermore, expanding governmental immunity in this way would conflict with the philosophy of privatization efforts undertaken in recent years. Rather than giving police officers immunity when a private entity contracts with a local unit of government for the officers' services, the law should require those private entities to carry liability insurance to cover the actions of the officers.

Opposing Argument

Law enforcement agencies, and the police officers they employ, should not be providing services under contract with private-sector companies. Doing so, and extending governmental immunity to the officers

providing the services, puts the officers in an untenable situation in which protection of the public could be at odds with the protection of the private enterprise. In addition, these contracts between a private entity and a public law enforcement agency can amount to unfair competition to private security companies, which must absorb the cost of insuring their employees against liability.

Response: If local police officers were not already on the premises of a private business engaged in an enterprise that involved large crowds of people, and then had to be called in to quell disruptive behavior, the taxpayers would foot the entire bill for the cost of the police actions. Moreover, without the 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, law enforcement agencies likely would be reluctant to provide their services at, for example, large entertainment venues. Finally, it should be noted that the bill would not apply to off-duty police officers hired by businesses as private contractors, but would apply only to officers acting within the scope of their authority and under the direction of their public employers.

Opposing Argument

Governmental immunity 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. When a private entity is in partnership with a government agency, the blanket protection of governmental immunity should not apply to officials whose salaries are, in whole or in part, directly or indirectly, paid by the private entity.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bill would have an indeterminate impact on the State and local units of government depending on the extent to which the bill would prevent future liability.

Fiscal Analyst: B. Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.