Committee on Claims

Wednesday

January 11, 2006

11:15 A.M.

28 House Office Building

Allan G. Bense
Speaker

John Quinones
Chair

Agenda

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Claims Committee

Start Date and Time:	Wednesday, January 11, 2006 11:15 am
End Date and Time:	Wednesday, January 11, 2006 11:45 am
Location:	28 HOB
Duration:	0.50 hrs

Consideration of the following bill(s):

HB 199 Sovereign Immunity by Patterson

NOTICE FINALIZED on 12/30/2005 11:41 by WATSON.LOIS

HB 199

1 A bill to be entitled
2 An act relating to sovereign immunity; amending s. 768.28,
3 F.S.; providing that a law enforcement agency is not
4 liable for injury, death, or property damage effected or
5 caused by a person fleeing a law enforcement officer under
6 certain circumstances; providing for severability;
7 providing for application; providing an effective date.
8
9 Be It Enacted by the Legislature of the State of Florida:
10
11 Section 1. Paragraph (d) is added to subsection (9) of
12 section 768.28, Florida Statutes, to read:
13 768.28 Waiver of sovereign immunity in tort actions;
14 recovery limits; limitation on attorney fees; statute of
15 limitations; exclusions; indemnification; risk management
16 programs.--
17 (9)
18 (d) The employing agency of a law enforcement officer as
19 defined in s. 943.10 is not liable for injury, death, or
20 property damage effected or caused by a person fleeing from a
21 law enforcement officer in a motor vehicle if:
22 1. The pursuit is conducted in a manner that does not
23 involve conduct by the officer that is so reckless or wanting in
24 care as to constitute disregard of human life, human rights,
25 safety, or the property of another;
26 2. At the time the law enforcement officer initiates the
27 pursuit, the officer reasonably believes that the person fleeing
28 has committed a forcible felony as defined in s. 776.08; and

29 3. The pursuit is conducted by the officer pursuant to a
30 written policy governing high-speed pursuit adopted by the
31 employing agency. The policy must contain specific procedures
32 concerning the proper method to initiate and terminate high-
33 speed pursuits. The law enforcement officer must have received
34 instructional training from the employing agency on the written
35 policy governing high-speed pursuit.
36 Section 2. If any provision of this act or its application
37 to any person or circumstance is held invalid, the invalidity
38 does not affect other provisions or applications of this act
39 which can be given effect without the invalid provision or
40 application, and to this end the provisions of this act are
41 severable.
42 Section 3. This act shall take effect upon becoming a law
43 and shall apply to causes of action that accrue on or after the
44 effective date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 199 Sovereign Immunity
SPONSOR(S): Patterson and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 124

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Claims Committee		Birtman	Birtman
2) Justice Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

HB 199 provides that an employing law enforcement agency is not liable for certain damages caused by a person fleeing from a law enforcement officer in a motor vehicle (hot pursuit) if:

1. the pursuit is not conducted in a reckless manner;
2. the officer reasonably believes that the person fleeing has committed a forcible felony; and
3. the pursuit is conducted pursuant to a specified written policy governing high-speed pursuit, and the officer received instructional training on such policy.

The bill includes a severability clause in the event that any provision of the act is held invalid. The act applies to causes of action that accrue on or after the effective date of the act; the act takes effect upon becoming a law.

This bill may have a positive fiscal impact on state and local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – this bill eliminates the liability of the government for injuries caused by a person attempting to elude law enforcement under specific circumstances.

Safeguard individual liberty – this bill decreases the opportunity of those injured by a person attempting to elude law enforcement from obtaining a judgment against a law enforcement agency.

Promote personal responsibility – this bill focuses legal responsibility on the person who is attempting to flee law enforcement, rather than on the law enforcement agency.

B. EFFECT OF PROPOSED CHANGES:

Fleeing or attempting to elude a law enforcement officer – The basic dilemma associated with high speed chases conducted by law enforcement is whether the benefits of potential apprehension of the suspect outweigh the risk of endangering the law enforcement officer, the suspect, and the public.[1] A study conducted by the National Institute of Justice indicated that the importance of the perceived severity of the offense committed by the fleeing suspect was the major factor in determining whether or not police should engage in or continue a chase.[2] A sampling of local law enforcement pursuit policies[3] reveals that the determination to initiate a vehicle pursuit involves a balancing test that requires consideration of the following sample factors:

- the seriousness of the offense;
- the safety of the public;
- the safety of the fleeing perpetrator;
- the volume of vehicular and pedestrian traffic;
- the geographical conditions of the location;
- time of day;
- quality of radio communications between the deputy, dispatcher, and supervisor;
- weather conditions;
- the type of road;
- speeds involved;
- whether the suspect can be apprehended by other means; and
- the demeanor of pursuing deputies.

Current Florida law provides that any person who willfully flees or attempts to elude a law enforcement officer in an authorized law enforcement patrol vehicle, with agency insignia and other jurisdictional markings prominently displayed on the vehicle, with siren and lights activated, and during the course of fleeing causes serious bodily injury or death to another person, commits a first degree felony.[4]

Sovereign immunity – Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent. The Florida Constitution addresses sovereign immunity in Article X, section 13 as follows:

> Suits Against the State.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

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[1] "Police Pursuit: Policies and Training," by Geoffrey P. Alpert, National Institute of Justice Research in Brief, May, 1997.
[2] Id at 7.
[3] The Florida Sheriff's Self-Insurance Trust Fund provided the pursuit policies of the Hillsborough County Sheriff's Office; the Orange County Sheriff's Office; the Lee County Sheriff's Office; and the Citrus County Sheriff's Office.
[4] Section 316.1935(3)(b), F.S.

In 1973, the Florida Legislature enacted a limited waiver of sovereign immunity in section 768.28, F.S. This section provides that the state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. Sovereign immunity extends to all state agencies or subdivisions of the state, which by statutory definition includes the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.[5] Liability does not include punitive damages[6] or interest for the period before judgment.

The statute imposes a $100,000 limit per person, and a $200,000 limit per incident, on the collectability of any tort judgment based on the government's liability. These limits do not preclude plaintiffs from obtaining judgments in excess of the statutory cap; however, plaintiffs cannot force the government to pay damages that exceed the recovery cap. Florida law requires a claimant to petition the Legislature in accordance with its rules, to seek an appropriation to pay a judgment against the state or state agency.[7] In fact, the legislative appropriation is the sole method to compensate a tort claimant in an amount that exceeds the caps,[8] and such act is considered a matter of legislative grace.[9]

Section 768.28(9)(a), F.S., provides that the exclusive remedy for injury or damage suffered by an act, event, or omission of a government employee acting within the course and scope of their employment is by action against the governmental entity, unless such act was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Notwithstanding the limited waiver of sovereign immunity provided in statute, Florida courts have found that a government entity is not liable where such entity is involved in a discretionary or planning-level function. The Florida Supreme Court reasoned that under the constitutional separation of powers doctrine that "certain policy-making, planning, or judgmental governmental functions cannot be the subject of traditional tort liability."[10] An act is considered discretionary if it involves fundamental questions of policy or planning.[11]

Conversely, the Florida Supreme Court has held that operational functions of the government are subject to liability. An act is considered operational if it reflects a secondary decision as to how policies or plans will be implemented.[12] The Court has further held that where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty to either lessen the risk or provide a warning.[13]

In 1992 in a case called Pinellas Park v. Brown, the Florida Supreme Court found that police who initiated a hot-pursuit which resulted in the fleeing vehicle striking the vehicle of innocent bystanders and killing them, owed a legal duty to the victims.[14] "We think the rule is that the officer should take

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[5] Section 768.28(2), F.S.

[6] Punitive damages are distinguished from compensatory damages in that punitive damages are intended to punish the defendant for a wrong aggravated by violence, malice, fraud, or wanton or wicked conduct on the part of the defendant. Black's Law Dictionary (5th Edition 1979). In Florida, a non-government defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. Section 768.72, F.S.

[7] Section 11.066, F.S.

[8] Notwithstanding the limited waiver of sovereign immunity provided by statute, the government may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action of the Legislature, but the government shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of obtaining insurance coverage for tortuous acts in excess of the statutory caps. Section 768.28(5), F.S.

[9] See Gamble v. Wells, 450 So.2d 850, 852 (Fla. 1984).

[10] Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979).

[11] Pinellas Park v. Brown, 604 So.2d 1222 (Fla. 1992).

[12] Id.

[13] Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989).

[14] 604 So.2d 1222 (Fla. 1992).

such steps as may be necessary to apprehend the offender but in doing so, not exceed proper and rational bounds nor act in a negligent, careless or wanton manner."[15] The Court further held that the police were not protected by sovereign immunity as the hot pursuit was operational in nature: not necessary to or inherent in policy or planning.[16] In the Pinellas Park case, the Legislature ultimately authorized and directed Pinellas County to pay the surviving parents of the victims $1.6 million.[17]

HB 199 creates an incentive for law enforcement agencies to enact policies that govern high speed chases, and to provide training to the officers who will implement such policies. The bill provides that the employing agency of a law enforcement officer as defined in s. 943.10, F.S.[18] is not liable for injury, death, or property damage effected or caused by a person fleeing from a law enforcement officer in a motor vehicle if:

1. the pursuit is conducted in a manner that does not involve conduct by the officer that is so reckless or wanting in care as to constitute disregard of human life, human rights, safety, or the property of another;[19]

2. at the time the pursuit is initiated, the officer reasonably believes that the person fleeing has committed a forcible felony as defined in s. 776.08, F.S.[20]; and

3. the pursuit is conducted pursuant to a written policy governing high-speed pursuit adopted by the employing agency. The policy must contain specific procedures for initiating and terminating high-speed pursuits. In addition, the officer must have received training from the employing agency on such written policy.

The act applies to causes of action that accrue on or after the effective day of the act.

C. SECTION DIRECTORY:

Section 1 amends s. 768.28, F.S., to provide immunity to employing law enforcement agencies for damages caused by a person fleeing from law enforcement under specified circumstances.

Section 2 provides a severability clause.

Section 3 provides applicability to actions that accrue on or after the effective date, and provides that the act shall take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

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[15] Id at 1226, quoting City of Miami v. Horne, 198 So.2d 10, 13 (Fla. 1967), which held that city was not liable for the wrongful death of a third party killed by an offender attempting to escape from the pursuing officer.
[16] Id at 1226.
[17] Ch. 95-512, L.O.F. The total jury verdict was for $7,018,976.
[18] Section 943.10, F.S., defines "law enforcement officer" as any person who is elected, appointed, or employed full time by any municipality of the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. The definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.
[19] The use of the term "reckless" infers a standard of negligence that is in between simple negligence (failure to use such care as a reasonably prudent and careful person would use under similar circumstances) and gross or criminal negligence (intentional failure to perform a manifest duty in reckless disregard of the consequences affecting the life or property of another.) Black's Law Dictionary, 5th Edition, pp. 930-931.
[20] "Forcible felony" is defined in s. 776.08, F.S., to include treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; 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.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

This bill may reduce the number of claim bills filed for damages caused by a person fleeing law enforcement.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill may reduce the insurance premiums paid by law enforcement agencies.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There may be cases in which the employing law enforcement agency is not liable, leaving only the individual law enforcement officer and/or the person fleeing as available defendants.

D. FISCAL COMMENTS:

Since the Pinellas Park v. Brown case was decided by the Florida Supreme Court in 1992, the amount per claim paid by the Florida Sheriff's Self-Insurance Fund for damages in high speed pursuit cases doubled. Between 1992 and 2006, the Florida Sheriff's Self-Insurance Fund paid a total of $10,414,993.[21] In the past 10 years, the Legislature has passed 7 claim bills compensating individuals for damages caused by a person fleeing law enforcement, authorizing the payment of $12,508,829.[22] This amount includes $1.6 million paid by the Pinellas County Sheriff's Office to Lawrence Brown, subject of the City of Pinellas Park v. Brown case decided by the Florida Supreme Court.[23] It is expected that this bill will decrease the number of claims against local law enforcement agencies.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Access to Courts: Article I, Section 21 of the Florida Constitution provides, "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or

[21] Information provided by the Florida Sheriff's Self Insurance Fund.
[22] See chapters 95-512, 95-471, 99-406, 00-428, 00-430, 01-302, and 02-329, L.O.F.
[23] See chapter 95-512, L.O.F.

delay." Where citizens have enjoyed a historical right of access to the courts, the Legislature can only eliminate a judicial remedy under two circumstances: a valid public purpose coupled with a reasonable alternative,[24] or an overriding public necessity.[25] Because citizens did not enjoy a right to sue the government prior to the adoption of the 1968 Florida Constitution or in common law adopted by statute, and because Article X, section 13 of the Florida Constitution gives the Legislature the power to provide for suits against the state by general law, it would appear that a challenge to HB 199 based upon access to courts provisions would not be viable.

HB 199 does include a severability clause which provides that in the event that any provision of the act or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications which can be given effect. The Florida Supreme Court has held that the absence of a severability clause does not prevent the court from exercising its inherent power to preserve the constitutionality of an act by the elimination of invalid clauses.[26] Conversely, the Court indicated that the presence of a severability clause will not prevent the court from throwing out the whole act if, in its opinion, to preserve a remainder would produce an unreasonable, unconstitutional, or absurd result.[27]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

[24] Kluger v. White, 281 So.2d 1 (Fla. 1973).
[25] Rotwein v. Gersten, 36 So.2d 419 (Fla. 1948).
[26] Small v. Sun Oil Co., 222 So.2d 196 (Fla. 1969).
[27] Id.