

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

To the extent it is more difficult for a victim to successfully litigate against a state agency or political subdivision covered by the Good Samaritan Volunteer Firefighters’ Assistance Act, it would appear that individual freedom is decreased. However, to the extent that persons are provided with more protection, their individual freedoms appear to increase.

To the extent that those donating firefighting equipment are provided with more protection from litigation, it would appear that personal responsibility is decreased.

B. EFFECT OF PROPOSED CHANGES:

Volunteer Fire Departments

A “volunteer firefighter” is defined as “any person whose name is carried on the active membership roll of a constituted volunteer fire department or a combination of a paid and volunteer fire department of any municipality or special fire control district and whose duty it is to extinguish fires, to protect life, and to protect property.”¹ A person may not be disqualified as a volunteer firefighter solely because he or she receives compensation for services rendered or has other gainful employment.² This definition does not include any person who volunteers assistance at a fire, but is not an active member of a department.³

The Florida Volunteer Protection Act currently provides that any person who volunteers to perform any service for any nonprofit organization acting as an “agent” shall incur no civil liability for any act or omission by such person which results in personal injury or property damage if the act or omission was in good faith as an ordinary reasonably prudent person would have acted under the same or similar circumstances; and, the injury or damage was not caused by any wanton or willful misconduct on the part of such person acting as an agent.⁴

The Firefighters’ Pension Trust Fund was created for each municipality and special fire control district of this state which now has or which may hereafter have a constituted fire department or an authorized volunteer fire department, or any combination thereof.⁵ To qualify as a volunteer fire department for this purpose, the department must own and use apparatus for the fighting of fires that was in compliance with National Fire Protection Association Standards for Automotive Fire Apparatus at the time of purchase.⁶

¹ See Fla. Stat. § 175.032(8)(b) (2003).

² *Id.*

³ *Id.*

⁴ See Fla. Stat. § 768.1355 (2003).

⁵ See Fla. Stat. § 175.041 (2003).

⁶ See Fla. Stat. § 175.041(2).

In 2002, the Legislature created the "Florida Firefighters Occupational Safety and Health Act."⁷ These provisions were substantially the same as the repealed provisions formerly in chapter 442, Florida Statutes, related to the Division of Safety within the Department of Labor and Employment Security, except that the provisions of the act are limited to firefighter safety and subject to the authority of the Division of State Fire Marshal (division) of the Department of Financial Services. Volunteer firefighters are required to comply with the safety and training standards of the act.⁸ As the result of the act, the division is in the process of promulgating rules to collect information on volunteer fire departments and provide standards for those departments as required by the act.

Equipment that is no longer being used by a large fire department is currently destroyed, sent out of the country, or returned to the manufacturer for refurbishment. The equipment may not have been donated to volunteer fire departments because of concerns over liability. The types of equipment that could potentially be donated by a large fire department to a volunteer department include vehicles, personal protective equipment (i.e., coats, pants, etc.), and self-contained breathing apparatuses. It has been reported from the Department of Financial Services that this bill would have no negative financial impact but is, in fact, excellent and much needed action to assist rural fire departments.⁹ It has also been reported that volunteer fire departments are in many cases working with old equipment but can only purchase equipment with funds raised by donation or fundraising activities.¹⁰

Sovereign Immunity

Article X, section 13 of the Florida Constitution, provides that sovereign immunity may only be waived through an enactment of general law. The Legislature has expressly waived sovereign immunity in tort actions for claims against its agencies and subdivisions resulting from the negligent or wrongful act or omission of an employee acting within the scope of employment, but established limits on the amount of liability.¹¹ An officer, employee, or agent of the state may not be held personally liable in tort or named as a party defendant for any injury that results from an act, event, or omission of action in the scope of her or his employment function unless the officer, employee, or agent acted in bad faith or with malicious purpose or exhibits wanton and willful disregard of human rights, safety, or property.¹²

There are statutory limits to what a state agency or subdivision may pay on a claim or judgment by any one person in that they may not exceed \$100,000, and may not exceed \$200,000 paid by the state or its agencies or subdivisions for claims arising out of the same incident or occurrence.¹³ These limits do not preclude plaintiffs from obtaining judgments in excess of the recovery cap; such claims may be paid with approval by the Legislature. However, plaintiffs cannot force the state to pay damages which exceed the recovery cap.¹⁴ Further, where the state is involved in a discretionary or planning-level function, no liability is imposed. Discretionary functions include areas such as licensing, legislating, judicial decision-making, permitting, inspecting, designing public improvements, and other types of high-level planning.¹⁵

⁷ See Fla. Stat. §§ 633.801-633.821 (2003).

⁸ See Fla. Stat. § 633.820 (2003).

⁹ Summary Review from the Department of Financial Services, approved by Randall Napoli (Feb. 4, 2004).

¹⁰ See article "Yard Sale Can Help Firefighters Breathe Easy" in *The Reporter*. Published Feb. 12, 2004, editor Michael Freeman.

¹¹ See Fla. Stat. § 768.28 (2003).

¹² *Id.*

¹³ See Fla. Stat. § 768.28(5) (2003).

¹⁴ *Id.*

¹⁵ See *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912 (Fla. 1985); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979).

Limitation on Liability in Section 125.27, Florida Statutes.

Section 125.27, Florida Statutes, relates to agreements between the Division of Forestry of the Department of Agriculture and Consumer Services for the establishment and maintenance of countywide fire protection of all forests and wild lands with the county.

Chapter 2001-279, Laws of Florida, amended this section to add a new subsection to permit the Department of Agriculture and Consumer Services permitted to “lease, loan, or otherwise make available, without charge, to state, county, and local governmental entities that have fire/rescue responsibilities, new or used fire protection equipment, vehicles, or supplies, which shall include all such items received from public or private entities.”¹⁶ This section then provides immunity for civil liability:

- The department, and those private or public entities providing at no cost, or de minimis cost, such items for loan or lease through the department, shall not be held liable for civil damages resulting from use or possession of such items.¹⁷

Yet, this section also provides additional immunity for civil liability:

- Private or public entities that donate fire/rescue equipment, vehicles, or supplies directly to state, county, or local governmental entities having fire/rescue responsibilities shall not be held liable for civil damages resulting from use or possession of such items.¹⁸

While this language may have application beyond fire protection of all forests and wild lands, such application is not a certainty.

Additional Limitation on Liability

This bill creates section 768.1315, Florida Statutes, to provide immunity from civil liability for qualified firefighting equipment donated by the state or political subdivision to a volunteer fire department. Specifically, it creates the “Good Samaritan Volunteer Firefighters’ Assistance Act.” It defines an “authorized technician” as a technician who is certified by the manufacturer of equipment as qualified to inspect that equipment. The term “qualified fire control or fire rescue equipment” is defined as equipment used for fire control or fire rescue which has been recertified by an authorized technician as meeting the manufacturer’s specifications and which has been distributed by or through a state agency or political subdivision to a volunteer fire department.

This bill limits liability for civil damages for a state agency or political subdivision, or its agent, which acts reasonably in donating qualified fire control or fire rescue equipment to a volunteer fire department. Specifically, this limitation on liability includes damages for personal injury, property damage, or death proximately caused, after the donation, by a defect in the equipment. However, this limitation on liability *does not apply* to a state agency or political subdivision if:

- The defect that proximately caused the injury, damage, or death resulted from the act or omission of the state agency constitutes malice, gross negligence, recklessness, or intentional misconduct;
- The state agency or political subdivision is the manufacturer of the qualified fire control or fire rescue equipment; or

¹⁶ See Fla. Stat. § 125.27(3) (2003).

¹⁷ *Id.*

¹⁸ *Id.* This provision appears to extend protections similar to those in CS/HB 1323 (2003).

- The state agency or political subdivision modifies or alters the equipment after it has been recertified by an authorized technician.

C. SECTION DIRECTORY:

Section 1: Creates section 768.1315, Florida Statutes, relating to a limitation of liability for donated firefighting equipment.

Section 2: Provides an effective date of July 1, 2004, and applies to any cause of action that accrues on or after that date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to have a fiscal impact on state government revenues.

2. Expenditures:

This bill may prevent payment on potential claims and reduce expenditures. This bill also may require the state to pay for the recertification of the equipment by the authorized technician.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have a fiscal impact on local governments.

2. Expenditures:

This bill may prevent payment on potential claims and reduce expenditures. This bill also may require the state to pay for the recertification of the equipment by the authorized technician.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may prohibit potential plaintiffs from seeking damages because state agencies, political subdivisions, and persons acting as agents thereof, are no longer liable for reasonably donating qualified fire control or fire rescue equipment to volunteer fire departments if a defect in the equipment proximately causes personal injury, property damage, or death. This bill may also reduce the number of used fire apparatus for resale.

The private sector may benefit economically, however, from volunteer fire departments receiving equipment that will better enable them to respond to emergencies and protect property.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to

raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

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 delay." No similar provision exists in the federal constitution. Where citizens have enjoyed a historical right of access, the Legislature can only eliminate a judicial remedy under two circumstances: a valid public purpose coupled with a reasonable alternative,¹⁹ or an over-riding public necessity.²⁰ This bill does not explicitly set forth a public purpose or an over-riding public necessity. Because this bill immunizes potential defendants from civil liability, it is possible that it may violate this access to courts provision.

B. RULE-MAKING AUTHORITY:

The bill does not appear to provide any rule-making authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments – Other States

Other states, such as California²¹ and Arkansas²², have implemented similar provisions.

Other Comments – Level of Immunity

This bill provides immunity for the state when the state is donating firefighting equipment to volunteer fire departments. It is unclear, however, whether this bill will extend total sovereign immunity similar to the Good Samaritan Act,²³ or sovereign immunity pursuant to statutory limits similar to health care providers that contract with Department of Corrections.²⁴

Other Comments – "Acts Reasonably"

Section 768.1315(3) removes liability "under any state law" for state agencies, political subdivisions, and persons acting as an agent thereof, which act *reasonably* in donating qualified fire control or fire rescue equipment to a volunteer fire department even though a personal injury, property damage or death may be proximately caused by a defect in the equipment. This language creates a fact-based question for a finding of "negligent donating" of which there is no clear standard provided.

Drafting Issue – Threshold of Modification and Agency

The exception to liability protection for "modifications or alterations" to equipment made after the equipment has been recertified may lead to unintended problems. A requirement for "material or substantial" modification or alteration to firefighting equipment may provide a higher standard for a potential plaintiff to prove and provide more protection for the state donor.

In subsection (4), "or agent thereof" is left out of the list of exceptions to immunity and may be construed to immunize an agent even when one of the exceptions to immunity is satisfied and the state agency or political subdivision is held liable.

¹⁹ See *Kluger v. White*, 281 So.2d 1 (Fla. 1973)

²⁰ See *Rotwein v. Gersten*, 36 So.2d 419 (Fla. 1948)

²¹ See Cal. Civ. Code. § 1417 (2004).

²² See Ark. Code Ann. § 15-31-116 (2004).

²³ See Fla. Stat. § 768.13 (2003).

²⁴ See Fla. Stat. § 768.28(10) (2003).

Other Drafting Issues Raised by the Committee on Judiciary

There are a few technical drafting issues as follows:

- Consider removing “political” from the phrase “state agency or political subdivision”²⁵ in conformity with section 768.28(2), Florida Statutes, relating to sovereign immunity.²⁶
- Consider inserting “employee or” after the word “an” on line 35 to clarify that employees are treated as agents under the theory of respondeat superior.
- Consider rephrasing line 44 by inserting “an employee or agent of” after “of” for grammatical clarification.
- Consider inserting “Nothing in this section shall be construed to waive sovereign immunity” between lines 53 and 54 to eliminate a possible unintended substantive change in the statute establishing a waiver of sovereign immunity.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 15, 2004, the Committee on Judiciary adopted an amendment that replaced “need not” with “shall not” in the definition of “authorized technician” to now reflect that the authorized technician shall not be employed by the state agency or political subdivision. The bill was reported favorably with committee substitute.

²⁵ See Fla. Stat. § 1.01(8) (2003) (defining “political subdivision” to include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state).

²⁶ See Fla. Stat. § 768.28(2) (referring to “state agencies and subdivisions”).