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REVISE HOSPITAL EXCEPTION TO GOVERNMENTAL IMMUNITY

House Bill 4629 as passed by the House
Second Analysis (8-6-97)

Sponsor: Rep. Alan Cropsey
Committee: Judiciary

THE APPARENT PROBLEM:

In general, the governmental tort liability act (Public Act 170 of 1964) gives governmental agencies (and their officers, employees, and volunteers) immunity from tort liability when the agency (officer, employee, volunteer) is engaged in the exercise or discharge of a governmental function (or acting on behalf of the agency within the scope of their authority). However, the act contains a number of exceptions; including an exception for governmentally *owned or operated* hospitals or county medical care facilities (other than those owned or operated by the Department of Mental Health or those operated by the Department of Corrections) and the agents or employees of these hospitals or facilities.

Recently, the court of appeals concluded that the hospital exception to governmental immunity did not exempt certain governmental employees who worked at private hospitals (*Vargo v Sauer and Sisters of Mercy Health Care Corporation, et al.*). The incident from which this case and the decision arose involved a medical malpractice lawsuit instituted against a physician who worked for a university that did not own or operate a hospital. The court concluded that since the physician was a governmental employee and was not subject to the hospital exemption (or any other exemption), he was entitled to immunity as long as he had been acting within the scope of his authority, the agency for which he was working was engaged in the exercise or discharge of a governmental function, and his conduct was not so reckless as to show a substantial lack of concern for whether an injury resulted. The court concluded that the physician involved met these criteria, was therefore entitled under the language of the act to immunity from tort liability, and dismissed the case.

It has been suggested that the hospital exception to governmental immunity was not intended to provide immunity to doctors who worked for universities that did not own or operate hospitals, and that the *Vargo* case has illuminated a loophole in the hospital exception as it is currently written. Legislation has been introduced to close this loophole.

THE CONTENT OF THE BILL:

House Bill 4629 would clarify the hospital/medical care facility exception to governmental immunity by providing that immunity would not be given to a governmental agency, employee, or agent for *providing medical care or treatment*, unless the treatment was provided to a patient in a mental or psychiatric hospital owned or operated by the Department of Community Health or a hospital owned by the Department of Corrections. The bill's provisions would be remedial, and the changes to the hospital/medical care facility exception would apply to any causes of action that arose after July 6, 1986 and to cases based on those causes of action that were filed after July 6, 1986 and are still pending in trial or pending on appeal or that have not been filed, but are still within the statute of limitations. It should also be noted that the bill would delete the act's definitions of the terms "hospital" and "county medical care facility."

Further, the bill would make an additional change in the language of the act that is described by the Legislative Service Bureau as having no substantive effect, as it essentially implements a decision of the Michigan Supreme Court (*Dedes v Asch*). One of the conditions required for the extension of governmental immunity is that the officer's (employee's, member's, or volunteer's) conduct "does not amount to gross negligence that is the proximate cause of the injury or damage" (emphasis added). The bill would change this phrase to refer to conduct that "does not amount to gross negligence that is a proximate cause of the injury or damage" (emphasis added). The supreme court has interpreted the prior phrase as having the latter meaning.

MCL 691.1407

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill would have no fiscal impact. (8-6-97)

ARGUMENTS:

For:

The appeals court's decision in the *Vargo* case does not reflect the intent of the legislature when it enacted the current version of the governmental tort liability act. The bill will close a previously undetected loophole, that is manifestly unfair. Those who seek medical care from doctors who are immune under the court's decision have no way of knowing that those doctors will be protected from any malpractice actions. Doctors should be held accountable for negligent acts and special immunity should not be granted to doctors who work for universities merely based upon whether or not the university owns or operates a hospital. It could be argued that some physicians could view this grant of immunity as grounds to become less diligent in their medical practice. While this risk is probably minimal, there is a far greater risk that the public, upon learning of the immunity granted to such doctors, will choose to seek treatment from doctors who are not immune from tort liability.

Against:

The current statute is clear and the court's decision in the *Vargo* case is equally so. There is a solid rational basis for the distinction between those physicians who practice at universities that own or operate hospitals and those that do not. Those physicians who work in hospitals owned and operated by the universities that employ them are presumed to have input into the operation or control over the hospital. On the other hand, those physicians who practice in hospitals that are not owned or operated by the university for which they work do not have this presumed control or input into the hospital's operations, and therefore should not be held liable. Furthermore, protecting university doctors that are not attached university hospitals encourages those physicians to engage in community-based medical care; conversely, removing the act's grant of immunity could cause those physicians to decide not to engage in such practices to minimize their risk of liability.

POSITIONS:

The Michigan Trial Lawyers Association supports the bill. (7-10-97)

The Michigan Health and Hospital Association supports the concept of the bill. (7-21-97)

Analyst: W. Flory

■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.