

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1046

SPONSOR: Comprehensive Planning, Local and Military Affairs Committee, Senators Posey and Mitchell

SUBJECT: Actions Against Law Enforcement Officers.

DATE: February 12, 2002 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bowman	Yeatman	CA	Favorable/CS
2.	_____	_____	JU	_____
3.	_____	_____	AGG	_____
4.	_____	_____	AP	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The CS redefines the term “law enforcement officer” for the purposes of the payment of costs and attorney’s fees in certain actions brought against a law enforcement officer. In addition, the bill mandates that the employing or sponsoring agency of a law enforcement officer pay the costs and attorney’s fees in actions brought against a law enforcement officer where:

- The civil or criminal action is dismissed or not prosecuted or the law enforcement officer is not guilty;
- The action arose within the course and scope of the officer’s official duties;
- The action complained of occurred in response to what the officer reasonably believed was an emergency; was necessary to protect the officer or others from imminent harm; or occurred during an officer’s fresh pursuit, apprehension or attempted apprehension of a suspect whom the officer reasonably believes has perpetrated or attempted to perpetrate a forcible felony or escape; and
- The action complained of is not a willful act that constitutes a material departure from the employing or sponsoring agency’s written policies and procedures, or from generally recognized criminal justice standards if no written policies or procedures exist.

The CS limits the amount of attorney’s fees to be paid by the employing or sponsoring agency to \$100,000.

The CS takes effect upon becoming a law.

This CS amends section 111.065 of the Florida Statutes.

II. Present Situation:

Section 111.065, Florida Statutes, (F.S.), authorizes the employing agency of certain law enforcement officers to pay the legal costs and reasonable attorney's fees for any law enforcement officer in any civil or criminal action against the law enforcement officer when the action arose out of the performance of the officer's official duties and:

- 1) the plaintiff requests dismissal of the suit; or
- 2) the law enforcement officer is found to be not liable or not guilty.

Law enforcement officer is defined by s. 111.065(1), F.S., as "any person employed full time by any municipality of the state or any political subdivision thereof or any deputy sheriff whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state."

Section 943.10(14), F.S., defines an "Officer" as "any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, or correctional probation officer." Unlike the definition in s. 111.065(1), F.S., the s. 943.10(14), F.S., definition includes correctional officers and correctional probation officers.

Section 943.10(1), F.S., defines law enforcement officer as:

...any person who is elected, appointed, or employed full time by a municipality or the state or any political subdivision thereof; who is vested with the 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. This 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, part-time law enforcement officers but does not include support personnel employed by the employing agency.

The term political subdivision is defined in s. 1.01, F.S., to "include counties, cities, towns, villages, special tax school districts, special road and bridge districts, and all other districts in this state." However, Article VIII, Section 1(a), of the State Constitution provides that "the state shall be divided by law into political subdivisions called counties." Chapter 166, F.S., governing the powers of municipalities does not specifically define a municipality to be a political subdivision of the state, nor does the language of Article VIII, Section 2, of the State Constitution define municipalities as "political subdivisions."

Caselaw

Scope of Employment

In the majority of cases brought against a law enforcement officer for actions taken while the officer is on duty, the employing agency and the law enforcement officer are named in the action. In most of these cases, the legal defense of the law enforcement agency and officer is provided by the law enforcement agency until a conflict of interest arises requiring the hiring of outside counsel for the law enforcement officer. Usually, the cost of this defense is covered by

insurance or self-insurance. Some law enforcement agencies provide for such legal defense by police union contract. For example, the City of Atlantic Beach has a provision in its contract with the police union that:

The City agrees to provide at no cost to the employee, the services of an attorney to defend the employee against any civil actions brought against him while acting as an agent of the City, in the line of duty and on the city's behalf, unless such action is brought about by an act of the employee due to his own violation of Department Rules, Policies, Procedures or Instructions, negligence, carelessness or the employee acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights safety, or property.

For a governmental entity in Florida to be liable to a third party for the negligent acts of its employees under s.768.28, F.S., the employee must be within the course and scope of employment and the action must not have been taken in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

The controlling law on the issue of course and scope of employment the cases of *Sussman v. Florida East Coast Properties*, 557 So. 2d 74 (Fla. 3rd DCA 1990) and *Craft v. John Sirounis and Sons, Inc.*, 575 So. 2d 795 (Fla. 4th DCA 1991). In *Sussman*, a fitness instructor at a health spa owned by Florida East Coast Properties received a telephone call from her boss asking her to pick up a birthday cake on her way to work. En route to work after picking up the cake at the grocery store, the fitness instructor hit the car driven by Mr. Sussman. The court held, as a matter of law, the employee was not acting within the scope of her employment. In reaching this conclusion, the court defined the following test: The conduct of an employee is within the scope of his employment, for the purpose of determining the employer's vicarious liability to third persons injured by the employee, only if:

- 1) the conduct is of the kind the employee is hired to perform;
- 2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed; and
- 3) the conduct is activated at least in part by a purpose to serve the master. *Sussman* at p. 76.

In the *Craft* case, this test was applied to the fact situation of an off-duty police officer who had been drinking and got into a bar room brawl with four off-duty police officers. None of the officers were in uniform, carrying a gun or wearing a badge. *Craft* was injured in the fight and sued the cities of Fort Lauderdale and Deerfield Beach, the employers of the police officers. Each of the police officers asserted that they were on duty 24 hours a day. The Fourth District Court of Appeal applied the *Sussman* test to conclude that the conduct of the officers was not within the scope of their employment "nor was their action in the interest of the cities." *Craft* at p. 11.

Hot or "Fresh Pursuit"

Many civil cases against police departments and law enforcement officers have arisen due to injuries to third persons caused by high speed chases by law enforcement officers in "fresh pursuit" of a suspect of crime. Early court cases implicitly recognized a fundamental social cost-

benefit analysis regarding immunity from liability for a law enforcement officer's decision to pursue despite the inherent risk of harm to innocent persons. *See City of Miami v. Horne*, 198 So.2d 10 (1967). However, over the years the actions of law enforcement taken under these county-by-county pursuit policies, including what functions are discretionary or operational and whether the social benefits outweigh the inherent risks, have come under increased judicial and public scrutiny. Partly in response, various law enforcement offices have adopted pursuit policy manuals. In *City of Pinellas Park v. Brown*, 604 So.2d 1222 (Fla. 1992), the Florida Supreme Court placed a duty of care on the police in a comparable high-speed pursuit scenario even though the accident did not directly involve a police vehicle. The Court reasoned that a substantial portion of the risk of injury to a foreseeable victim was being created by the police themselves. The court held that the duty would have existed regardless of whether a specific policy governing such pursuits was in place. Further, the Court, in finding that the issue of the city's liability was a jury question, concluded that police officers engaging in hot pursuit is an operational function that is not immune from liability or subject to sovereign immunity if accomplished in a manner contrary to public reason and public safety.

Actions Against Law Enforcement Officers Employed by the State

Section 111.07, F.S., authorizes any agency of the state, or any county, municipality, or political subdivision of the state to:

Provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents for an act or omission arising out of and in the scope of his or her employment or function, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety or property.

However, any attorney's fees paid from public funds for an employee found to be personally liable by virtue of acting outside the scope of his or her employment, or was acting in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety or property may be recovered by the state, county, municipality or subdivision against the employee.

Chapter 284, Part II creates the state self-insurance fund, the "State Risk Management Trust Fund," that is administered by the Department of Insurance. The purpose of the fund is to provide insurance for workers' compensation, general liability, fleet automotive liability, federal civil rights actions under 42 U.S.C. 1983 or similar federal statutes, and court awarded attorney's fees in other proceedings against the state except for awards in eminent domain or for inverse condemnation actions or for awards by the Public Employees Relations Commission. According to staff from the Division of Risk Management, the Department of Insurance lacks the authority to pay for the costs of defense of any criminal action.

Survey of Attorney's Fees Paid by Law Enforcement Agencies

The Florida Legislative Committee on Intergovernmental Relations is conducting a FAXNET Survey of law enforcement agencies regarding the number and costs of civil and criminal actions brought against full-time law enforcement officers employed in the fiscal year ending September 30, 2001. The surveys were sent to approximately 400 municipalities and 67 counties. Of that number, 83 municipalities responded that they had no civil or criminal actions against full-time law enforcement officers for FY ending September 30, 2001. Thirty municipalities responded that they had civil actions against full-time law enforcement officers for FY ending September 30, 2001, and 2 municipalities also had criminal actions against full-time law enforcement officers for FY ending September 30, 2001 (City of St. Petersburg and the City of Daytona Beach). Many municipalities with actions taken against their law enforcement officers were covered in full or by deductible insurance policies.

The responses from counties included the response of 6 counties who reported that they had no civil or criminal actions against full-time law enforcement officers for FY ending September 30, 2001. In addition, 5 counties responded that they had civil actions against full-time law enforcement officers for FY ending September 30, 2001. And finally, one county (Hillsborough) also had criminal actions against full-time law enforcement officers for FY ending September 30, 2001. As was the case with municipalities, the majority of counties with actions taken against their law enforcement officers were covered in full or by deductible insurance policies.

III. Effect of Proposed Changes:

The CS is named the "Law Enforcement Fair Defense Act."

The CS changes the definition of law enforcement officer in s. 111.065, F.S., to reference the definition of officer in s. 943.10(14), F.S., to include any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, or correctional probation officer by a municipality, political subdivision or the state. Hence, the number of law enforcement officers included within the scope of the CS is broadened to include part-time and auxiliary officers, correctional officers and correctional and law enforcement officers employed by the state.

Next the CS changes the prerequisites which must be met before the employing or sponsoring agency of the law enforcement officer has the option to pay legal costs and reasonable attorney's fees. First, the civil or criminal action against the officer is dismissed or not prosecuted, as opposed to the plaintiff requesting dismissal of the suit, which is the criterion under current statute, and second; the law enforcement officer is found to be not liable or not guilty.

Subsection 3 contains some additional circumstances where the employing or sponsoring agency *must* pay the law enforcement officers legal costs and attorney's fees . These circumstances include where:

- The civil or criminal action is dismissed or not prosecuted or the law enforcement officer is found not liable or not guilty;
- Arose while the officer was acting within the course and scope of the officer's official duties; and
- One of the following conditions regarding the action is met:

1. Occurred in response to what the officer reasonably believed was an emergency; or
 2. Was necessary to protect the officer or others from imminent death or bodily harm; or
 3. Occurred in the course of the officer's fresh pursuit, apprehension, or attempted apprehension of a suspect whom the officer reasonably believes has perpetrated or attempted to perpetrate a forcible felony or the offense of escape.
- The action complained of is not a willful act that constitutes a material departure from the employing or sponsoring agency's written policies and procedures, or generally recognized criminal justice standards if no written policies exist.

The determination of the employing or sponsoring agency's responsibility to pay legal costs and reasonable attorney's fees is made by the court before which the action was heard. The court shall determine:

- Responsibility of the employing or sponsoring agency for payment of legal costs and attorney's fees;
- The amount of legal costs to be awarded;
- The amount of reasonable attorney's fees and recovered costs to be awarded, not to exceed \$100,000 and the calculation of fees must be based on the prevailing rate for the defense of such matters in that circuit.

A lodestar provision is not to apply to the calculation of fees. The application of a lodestar provision to the calculation in attorney's fees has been defined by the Florida Supreme Court as a formula based on the number of hours reasonably expended multiplied by a reasonable hourly rate. *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, (Fla. 1985). In calculating the reasonable hourly rate, the court, in calculating attorney's fees, is to consider the following factors¹:

1. The time and labor required, the novelty and difficulty of the question involved, and the skill necessary to perform the legal service properly.
2. The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the service.
8. Whether the fee is fixed or contingent.

The language of the CS would preclude the court from calculating fees based on the lodestar approach. Instead, the court would be limited to considering the prevailing rate for handling the defense of similar claims within the circuit where the action is brought.

The bill is effective upon becoming a law.

There are several technical problems with the language of the bill:

¹ *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1150 (Fla. 1985).

1. The CS does not define “sponsoring agency” or distinguish the difference between employing agency and sponsoring agency.
2. The CS does not include a definition of “forcible felony” or the “offense of escape” in the context of the officer’s fresh pursuit, apprehension, or attempted apprehension of a suspect.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Under the terms of the CS, political subdivisions, cities and counties (through the sheriff’s department) would have to pay the legal costs and reasonable attorney’s fees for certain civil and criminal actions brought against law enforcement officers and no funding source is provided to such political subdivisions, the bill could constitute a mandate as defined in Article VIII, Section 18(a) of the Florida Constitution:

No county or municipality shall be bound by any general law requiring such County or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills important state interest and unless; funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the Legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989 ...the law requiring such expenditure is approved by two-thirds of the membership of each house of the Legislature...

For purposes of legislative application of Article VII, Section 18 of the Florida Constitution, the term “insignificant” has been defined as a matter of legislative policy as an amount not greater than the average statewide population for the applicable fiscal year times ten cents. Based on the 2000 census, a bill that would have a statewide fiscal impact on counties and municipalities in aggregate of in excess of \$1,598,238 would be characterized as a mandate. While the terms of the bill limit the exposure of the employing agencies payment of attorney’s fees to no more than \$100,000 per action, 16 lawsuits involving \$100,000 in attorney’s fees per case, would reach the mandate threshold.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The employing political subdivisions of law enforcement officers will incur the additional costs of paying the attorney's fees and costs for the defense of law enforcement officers whose actions meet the criteria of subsection (3). The State of Florida will also be subject to the provisions of the CS, for all of the correctional officers and law enforcement officers it employs. As the State of Florida is self-insured, these attorney fees and costs would have to be paid out of general revenue dollars.

VI. Technical Deficiencies:

See discussion in "Effect of Proposed Changes."

VII. Related Issues:

Because the State Risk Management Trust Fund coverage does not cover the defense of criminal claims, there is no mechanism for paying attorney's fees for the criminal defense of law enforcement officers employed by the state out of the state self-insurance fund. Accordingly, in order to pay such attorney's fees, an employing agency would likely need to obtain a specific appropriation from the Legislature.

VIII. Amendments:

None.