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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CIVIL JUSTICE & CLAIMS
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 473
RELATING TO: Waiver of Sovereign Immunity in Tort Actions
SPONSOR(S): Representative Bitner
STATUTE(S) AFFECTED: s. 768.28, F.S.
COMPANION BILL(S): SB 446 by Senator Horne (i)
ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) CIVIL JUSTICE & CLAIMS
(2)
(3)
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(5)

I. SUMMARY:

HB 473 would amend s. 768.28, F.S., by narrowing the state's waiver of sovereign immunity. It would forbid certain suits against the state, state agencies, counties, municipalities, and private businesses acting as instrumentalities of the government.

The bill would prohibit four classes of plaintiffs from suing the government. First, it would prohibit suits by those injured while operating a motor vehicle under the influence of alcohol or drugs. Second, it would prohibit the passengers of intoxicated drivers from bringing suit. Third, it would prohibit suits by persons injured while on public property, who use public property without permission. Fourth, it would prohibit suits by persons who are injured while on public property, and who use public property with less than ordinary care or in an unforeseeable manner.

In addition, HB 473 would reduce the time period for presenting a claim. Currently, plaintiffs must present the government with a written claim within 3 years after the claim accrues and is denied by the Department of Insurance or appropriate agency. HB 473 would limit this period to 180 days.

HB 473 would conserve public funds by prohibiting some suits against the government and by shortening the time period available for presenting a claim. Potential savings cannot be estimated with precision.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

1. **Sovereign Immunity** - Sovereign immunity is a doctrine which prohibits suits against the government without the government's consent. Sovereign immunity extends to all subdivisions of the state, including counties, agencies, and school boards. Municipalities, while not considered subdivisions of the state, have been accorded limited immunity by the courts. The Florida Constitution addresses sovereign immunity at Article X, Section 13. This section allows the state to waive its immunity through an enactment of general law.
2. **Waiver of Sovereign Immunity** - The Florida Legislature first enacted s. 768.28, F.S., in 1973. This section partially waives the state's sovereign immunity. It allows individuals to sue the state, subdivisions of the state, and municipalities. According to subsection (1), of s. 768.28, F.S., individuals may sue the government under circumstances where a private person "would be liable to the claimant, in accordance with the general laws of th[e] state" Before filing an action, the claimant must present the claim to the appropriate agency and to the Department of Insurance. Only if the department or the agency denies the claim, can the claimant proceed with the suit. Notwithstanding the enactment of s. 768.28, F.S., some remnants of sovereign immunity remain in effect:
 - a. **Monetary Limits on Recovery** - Section 768.28, F.S., imposes a \$100,000 limit on the government's liability to a single person. Furthermore, it imposes a \$200,000 limit on the government's liability for claims arising out of a single incident. These restrictions do not preclude plaintiffs from obtaining judgments which exceed the recovery cap. If a government unit is adequately insured, it can pay these excess claims. Claimants cannot, however, force the government to pay amounts which exceed the recovery cap. Section 768.28, F.S., also prohibits claimants from recovering punitive damages or interest which accrues during the interval before judgment.
 - b. **Discretionary Function Doctrine** - Where the state is involved in a discretionary or planning-level function, courts have refused to find liability. *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258 (Fla. 1988). Discretionary functions include fields such as licensing, legislating, judicial decisionmaking, permitting, inspecting, and designing public improvements.
 - c. **Public Duty Doctrine** - Where the government owes a general duty to all citizens, but no particular duty to the injured party, sovereign immunity remains in effect. This exception to waiver is known as the "public duty doctrine."

B. EFFECT OF PROPOSED CHANGES:

1. **Four Types of Claimants Denied Standing to Sue** - HB 473 would reinstate the state's sovereign immunity in four situations. These are described below.

- a. **Intoxicated Drivers** - HB 473 would prohibit suits against the state by persons injured while operating a motor vehicle under the influence of alcohol or a controlled substance. If enacted, HB 473 would prevent such parties from bringing actions for wrongful death, personal injury, or property damage.

The bill prohibits suits by those who are "in the actual physical control of a motor vehicle" with a blood or breath alcohol level of 0.08 percent or higher. According to s. 316.193, F.S., any driver who is intoxicated to this degree is guilty of a criminal violation.

HB 473 also prohibits suits by persons who drive while "under the influence of an alcoholic beverage, and any chemical substance specified in s. 877.111, or any substance controlled under chapter 893 to the extent that such person's normal faculties are impaired" The two provisions cross referenced in the bill forbid the use of various drugs.

- b. **Passengers of Intoxicated Drivers** - HB 473 would prohibit the passengers of intoxicated drivers from bringing suit for wrongful death, personal injury, or property damage. This restriction would penalize passengers who risk getting into vehicles with intoxicated drivers.

In some cases, though, this provision could affect individuals who have not assumed any risk. Two scenarios may help bring this possibility into focus. First, on some occasions, children might be forced to accept rides with intoxicated adults. If these children are injured through the negligent act or omission of a public employee, they would be denied recovery under HB 473. Second, passengers boarding a public bus would have little reason to suspect that the bus driver might be intoxicated. If the bus driver subsequently injures the passengers in an alcohol-related accident, HB 473 would leave these people without legal recourse.

- c. **Persons using Public Property without Permission** - HB 473 would prohibit a person injured while on public property from suing the government, "unless that person is intended and permitted by the state, the agency, or the subdivision to use that property" Who, specifically, would be affected by this provision? The bill's language seems to reach some people who are not mere trespassers or intermeddlers. For example, it might apply to those who are making legal use of public property, but who have not received formal consent to engage in such activities. It might also apply to those who are legally present upon public property, but who have not received express permission to enter. Persons who cross public lands to hunt or fish, and children who use a school playground after hours, might fall within the bill's constraints. Such individuals could be classified as discovered trespassers, uninvited licensees, or implied public invitees. *Bishop v. First National Bank of Florida, Inc.*, 609 So.2d 722 (Fla. 5th

DCA 1992). Ultimately, state courts would need to determine HB 473's impact on each of these classifications.

- (1) **Undiscovered Trespassers** - HB 473 would clearly prevent undiscovered trespassers from suing the government. In this respect, it would not expand legal protections currently in place, because landowners owe no duty to undiscovered trespassers.
 - (2) **Discovered Trespassers** - Discovered trespassers are persons who, because of their regular excursions onto the land, have provided the landowner with notice of their presence. Landowners must warn discovered trespassers of dangerous artificial conditions, which are known to the owner, but which are hidden to the trespasser. Apparently, HB 473 would modify this arrangement by eliminating the government's liability.
 - (3) **Uninvited Licensees** - Uninvited licensees retain a legal status somewhere between discovered trespassers and public invitees. Their presence "is neither sought nor forbidden, but merely permitted or tolerated by the landowner." *Bishop* at 725. Landowners owe uninvited licensees a duty to warn of dangerous conditions, which are known to the owner, but which are hidden to the licensee. *Post v. Lunney*, 261 So.2d 146 (Fla. 1972). HB 473's impact on suits by uninvited licensees is not clear.
 - (4) **Implied Public Invitees** - Public invitees are persons who have been led to believe that land is being held open for their use, who enter with no business purpose, and who use the property in accordance with its apparent design or preparation. *Smith v. Montgomery Ward & Company*, 232 So.2d 195 (Fla. 4th DCA 1970). The landowner owes public invitees a heightened duty of care. If the government intentionally opens property for public use, HB 473 would not prohibit suits brought by people injured on the property. However, people relying upon an "implied" invitation, could find that they have lost the ability to sue. HB 473 grounds liability, not upon subjective perceptions, but upon the objective intent of the government owner.
- d. **Persons Who Fail to Exercise Ordinary Care** - HB 473 would prohibit suits by persons who are injured while on public property, and who use public property without ordinary care or in an unforeseeable manner. With respect to certain suits against the government, this provision of HB 473 would replace the doctrine of comparative negligence with that of contributory negligence.
- (1) **Historical Background** - Prior to 1973, Florida courts considered contributory fault a complete defense to negligence. If the claimant's own negligent conduct contributed to the harm, the claimant could not recover damages. However, discontent with the all-or-nothing quality of contributory fault prompted a shift toward comparative negligence. Under comparative negligence, the claimant's recovery is diminished, but not eliminated, by the claimant's own negligent conduct. In *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973), the Florida Supreme Court first adopted the theory of comparative negligence. The court reasoned:

The injustice which occurs when a plaintiff suffers severe injuries as the result of an accident for which he is only slightly responsible, and is thereby denied any

damages, is readily apparent. The rule of contributory negligence is a harsh one which . . . places the burden of a loss for which two are responsible upon only one party”

Subsequently, the Legislature enacted s. 768.81, F.S. Subsection (2) of s. 768.81, F.S., provides that “any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery.” Florida courts have adhered to this statutory framework when awarding damages. *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993).

- (2) **Impact of HB 473** - HB 473’s partial reinstatement of contributory negligence could have broad ramifications.
 - (a) **Use of School Property** - HB 473 might limit suits brought by public school students injured during athletic events or physical education. Students who use athletic equipment with less than ordinary care would be denied recovery, even if they could establish that they had been negligently supervised by teachers or coaches.
 - (b) **Use of Public Roads** - HB 473 restricts only suits brought by those who fail to exercise ordinary care in the use of *public* property. Therefore, courts reviewing this legislation would need to determine whether a driver’s careless operation of his or her own vehicle also constitutes careless use of the public roads. If courts answer this question in the affirmative, HB 473 could prevent some suits by persons who are injured while using public roads. Intoxicated drivers, for example, would likely fall within the bill’s proscription. In addition, HB 473 could restrict suits arising out of accidents between public and private vehicles. Even if a government driver bears 95 percent of the responsibility, the bill might operate to preclude recovery by an injured party. On the other hand, HB 473 may not insulate public entities from suits by drivers or passengers, whose injuries are partially attributable to their failure to wear safety restraints. See *Insurance Company of North America v. Pasakarnis*, 451 So.2d 447 (Fla. 1984)(holding that failure to wear a safety belt constituted a failure to mitigate damages, rather than a contributing cause of the harm); but see *Parker v. Montgomery*, 529 So.2d 1145 (Fla. 1st DCA 1988)(holding that failure to wear a safety belt was an element of fault subsumed within comparative negligence).
 - (c) **Use of Public Facilities by Pedestrians** - Potentially, HB 473 could prevent some suits by persons injured in “slip and fall” accidents which occur in public facilities. It could also limit suits brought by persons who fall into improperly marked excavations or open elevator shafts. Under such circumstances, the injured parties’ inattention often contributes to the harm they sustain.
2. **Diminished Time for Presenting Claims** - HB 473 would decrease the amount of time available to provide written notice of a suit against a public entity. Claimants must currently present the government with a claim within 3 years

from the date the claim accrues and is denied by the Department of Insurance or appropriate agency. HB 473 would shorten this period to 180 days.

3. **Government Units Protected** - Section 768.28, F.S. broadly defines "state agencies or subdivisions." HB 473 would therefore protect the state, state agencies, counties, municipalities, and corporations acting as instrumentalities of the state, counties, or municipalities.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes. Under certain circumstances, the bill would remove the judiciary's power to hear suits against the government.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

NA.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

NA.

(2) what is the cost of such responsibility at the new level/agency?

NA.

(3) how is the new agency accountable to the people governed?

NA.

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No. However, the bill could alleviate some upward pressure on state and local expenditures.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

Potentially. HB 473 would eliminate the responsibility of the state and local governments to pay damages to certain categories of claimants.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

NA.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

NA.

- (2) Who makes the decisions?

NA.

- (3) Are private alternatives permitted?

NA.

- (4) Are families required to participate in a program?

NA.

- (5) Are families penalized for not participating in a program?

NA.

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

NA.

(2) service providers?

NA.

(3) government employees/agencies?

NA.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Section 1 of HB 473 narrows the time limitation for presenting a claim against the state and eliminates the ability of certain claimants to bring a suit against the state.

Section 2: Section 2 provides that the act shall take effect upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

HB 473 would eliminate the state's obligation to settle claims or make damage payments to certain groups of claimants. This could result in considerable savings. Because HB 473 would ban certain types of suits, it would also reduce the workload of the courts.

By cutting the time period for providing written notice of a claim, from 3 years to 180 days, HB 473 would reduce public expenditures. More claimants would miss this shortened deadline, reducing the state's exposure to suit. Moving this deadline forward could also help ensure that the memories of witnesses are clear and that crucial evidence does not disappear.

3. Long Run Effects Other Than Normal Growth:

HB 473 would alleviate some upward pressure on spending.

4. Total Revenues and Expenditures:

The Department of Insurance reviewed HB 473's Senate companion. The department observed:

Since the state risk management program currently does not separately code claims involving claimants that are intoxicated or impaired, it is not possible to extract such claims from our database in order to provide an accurate cost projection of the impact of this legislation. It is also not possible to provide a projection resulting from a change in

the time period required to present a claim, since significant speculation would be required as to the number of claimants that would still meet the shortened time frame.

Our best estimate was therefore derived from discussion with our claim staff. They estimate we receive fifteen to twenty claims a year involving an intoxicated or impaired claimant, generally claims against the Department of Transportation involving some claim of negligent design or maintenance of a roadway. They estimate these average around twenty to forty thousand dollars to resolve, which would indicate a cost of from \$400,000 to \$800,000 per year. Again, this is an extremely rough estimate based on the best knowledge of our claims staff.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

HB 473 would shield local governments from suits brought by certain claimants. Overall, the bill would have a positive impact on local government revenues.

3. Long Run Effects Other Than Normal Growth:

HB 473 would alleviate some upward pressure on spending.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

HB 473 would preclude intoxicated drivers and their passengers from recovering damages against the government. It would also prevent persons who enter public property without permission, and persons who use public property without exercising ordinary care, from suing the government. The amount which HB 473 would deny to such persons cannot readily be determined.

Claimants who are denied recovery under HB 473, could redouble their efforts to collect damages from other responsible parties. If they are unable to recover through the tort system, the individual claimant or the claimant's family might bear the costs. Where the individual cannot afford to pay for treatment, such expenses would likely be spread to society through increased medical costs. Where the individual remains incapacitated, the government might be forced to render monetary assistance.

Because the 180-day limit on presenting claims to the Department of Insurance would take effect immediately, some claimants might miss this deadline. As a result, injured persons could lose their opportunity to recover damages. This potentiality could lead to malpractice suits against attorneys.

2. Direct Private Sector Benefits:

The relationship between denying standing to a narrow class of intoxicated drivers and reducing alcohol- or drug-related accidents seems fairly attenuated. However, in some instances, HB 473 could deter people from driving while under the influence of alcohol or drugs. Such activities exact numerous costs upon society, including medical expenses, lost earnings, lost productivity, and property damage.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

1. **Key Issues** - This subsection uses a question format to stimulate debate about the bill under review.

a. **Question Presented** - *What is the proper balance between providing individual compensation for harm and protecting public funds from potentially unwarranted encroachment?*

b. **Additional Policy Questions:**

(1) Should this act deny standing to the each of the four groups of claimants it would impact? If not, which of these groups should be permitted to recover damages against the government?

(2) Is the shortened time for presenting claims fair to individual claimants?

2. **Technical Concerns:**

- a. **Wrongful Death Suits** - HB 473 would prohibit a "wrongful death" action, brought "by a person who is driving or is in the actual physical control of a motor vehicle," while under the influence of drugs or alcohol. Apparently, the bill aims to prevent wrongful death suits brought by the *personal representative* of a person killed under such circumstances. See the "Wrongful Death Act," at s. 768.20, F.S.
- b. **How Is the Level of Intoxication Determined?** - HB 473 would prohibit persons, with "a blood or breath alcohol level of 0.08 percent or higher," from bringing suit against the government. This stricture is derived from s. 316.193, F.S., a criminal statute which prohibits driving under the influence. The bill does not specify any procedures or guidelines courts might use to determine whether claimants have exceeded this threshold. Presumably, because HB 473 addresses civil actions, the applicable standard of proof is "more probable than not." However, the bill does not indicate which party would have the burden of establishing this matter.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE & CLAIMS:

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