

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 74

SPONSOR: Governmental Oversight and Productivity Committee and Senator Campbell

SUBJECT: Culpable Negligence

DATE: February 23, 1999

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Lombardi</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
2.	<u>Gomez</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
3.	_____	_____	<u>FP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill creates the offense of culpable negligence causing public financial injury. The offense occurs when:

- ▶ A person entrusted (given control or custody) by the state with public property,
- ▶ through culpable negligence,
- ▶ causes losses, or through inaction allows losses,
- ▶ in the value of such property of \$100,000 or more,
- ▶ in any 12-month period or contract period, whichever is longer.

The offense is a first-degree misdemeanor if the loss is valued at \$100,000 or more, but less than \$500,000. The offense is a third-degree felony if the loss is valued at \$500,000 or more.

The bill requires that notice of the new offense accompany every state contract of more than \$50,000.

The bill has an effective date of July 1, 1999.

This bill creates the following section of the Florida Statutes: 812.030.

II. Present Situation:

A. State financial assets

Section 215.32, F.S., requires that state funds be deposited in the State Treasury unless specifically provided otherwise. The State Treasury and the Department of Banking and Finance then account for the funds and disburse them among the three types of state funds: the General Revenue Fund, Trust funds, and Working Capital Funds.

State trust funds earmark monies for a specific purpose and objective and establish specific projects and programs in conjunction with the appropriation. Governmental agencies cannot always manage these projects and programs in whole or part either because they do not possess the internal resources to manage the project or program or they do not possess the necessary systems and expertise to support the task. Consequently, the state may look outside to companies or entities that possess the necessary expertise to manage the project or program more efficiently and cost effectively.

The Auditor General, under the provisions of s. 11.45, F.S., has the authority to conduct performance audits, and periodically monitor and review programs, activities, and functions of these contract managers and program administrators. Although a deterrent, it does not preclude an individual who has access to monetary resources from misdirecting funds. Although specific sanctions exist for theft, embezzlement, or conspiracy (see below), no statute sanctions poor performance or equates poor performance with culpable negligence.

Many public officers are required to furnish a bond that insures the faithful performance of their respective duties, particularly in cases in which duties of the office pertain to the oversight of public monies or other assets, or the safety and protection of citizens. To this end, the State Treasurer is required¹ to give a bond in the amount of \$100,000; the Comptroller is required² to give a bond in the amount of \$50,000; and the Commissioner of Agriculture is required³ to give a bond in the amount of \$10,000. In addition, the Division of Purchasing of the Department of Management Services purchases a blanket faithful performance of duty bond that includes state employees and public officials.

On a case by case basis, the State Board of Administration contractually imposes on its external investment managers fidelity bonding requirements to indemnify the state from potential losses. The bonding requirements encompass both real estate transactions and investment securities transactions and can range from \$1-2 million.

B. Culpable negligence is a criminal offense

In Florida, culpable negligence is a criminal offense punishable by varying penalties, depending on the circumstances. s. 784.05, F.S. When a person, through culpable negligence, merely *exposes another to personal injury*, the penalty is a second-degree misdemeanor. s. 784.05(1), F.S. When a person, through culpable negligence, *inflicts actual personal injury*, the penalty is a first-degree misdemeanor. s. 784.05(2), F.S. Finally, when a person stores or leaves a loaded firearm within easy access of a minor who then uses the firearm to inflict injury or death on another, the penalty is a third-degree felony. s. 784.05(3), F.S.

The term culpable negligence has been defined as “negligence of a gross and flagrant character which evinces a reckless disregard for the safety of others. It is that entire want of care which raises a presumption of indifference to consequences.” *Killingsworth v. State*, 584 So. 2d 647,

¹Section 18.01, F.S.

²Section 17.01, F.S.

³Section 19.14, F.S.

848 (Fla. 1st DCA 1991). Culpable negligence is distinguished from simple negligence. As stated in the culpable negligence standard jury instructions:

Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence. But culpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life. . . .

Fla. Std. Jury Instr. (Crim.) [p. 9926].

C. Theft and conspiracy

Theft. Section 812.014, F.S., sets forth the crime of “theft,” as follows:

[a] person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

- (a) Deprive the other person of a right to the property or a benefit from the property.
- (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

For purposes of the theft statutes, s. 812.012, F.S., defines property as anything of value, including:

- ▶ real property, including things growing on, affixed to, and found in land;
- ▶ tangible or intangible personal property, including rights, privileges, interests, and claims; and
- ▶ services.

“Services” is defined as anything of value resulting from a person’s physical or mental labor or skill, or from the use, possession, or presence of property, and includes:

- ▶ repairs or improvements to property;
- ▶ professional services;
- ▶ private, public, or government communication, transportation, power, water, or sanitation services;
- ▶ lodging accommodations; and
- ▶ admissions to places of exhibition or entertainment.

A person can only commit theft if he or she “knowingly obtains or uses” another’s property with specific intent to deprive the owner of, or to misappropriate the property. Accordingly, a person could not be convicted of theft, who “obtains or uses” public property entrusted to him or her and causes or through inaction allows to be caused financial losses because he or she may lack the necessary “knowing” intent to obtain or use the public property.

Conspiracy. Intentional theft of state public property may, in some cases, be addressed using the state's criminal laws relating to conspiracy. In order to be convicted of conspiracy, it must be proven the person agreed, conspired, combined, or confederated with another person to commit the underlying crime. *See* s. 777.04(3), F.S. In order to prove a person conspired with another to steal public property, a prosecutor would need testimony from one of the conspirators or documentation of their illegal agreement. Conspiracies are difficult to prove since criminals rarely memorialize their crime in a written document. Additionally, they may not be forced to give testimony against themselves. Art. I, s. 9, Fla. Const.; Fifth Amendment, U.S. Const.

III. Effect of Proposed Changes:

A. Culpable Negligence Causing Public Financial Injury Offense Created

The bill creates culpable negligence causing public financial injury, committed when:

- ▶ A person entrusted (given control or custody) by the state with public property (see definitions below),
- ▶ through culpable negligence (see definition below),
- ▶ causes losses, or through inaction allows losses (see definition below),
- ▶ in the value of such property of \$100,000 or more,
- ▶ in any 12-month period or contract period, whichever is longer.

The offense is punishable as a first-degree misdemeanor or a third-degree felony, depending on the amount of the loss. The offense is a first-degree misdemeanor if the loss is valued at \$100,000 or more, but less than \$500,000. The offense is a third-degree felony if the loss is valued at \$500,000 or more. A first-degree misdemeanor is punishable by not more than 1 year in prison and a \$1,000 fine. A third degree felony is punishable by not more than 5 years in prison and a \$5,000 fine. [Section 775.083(1)(f), F.S., also provides for a higher fine amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.]

The state attorney or the Statewide Prosecutor reserves the right to prosecute on behalf of the state for violations of this act. The bill provides that only the Department of Legal Affairs, a state attorney or a state agency may institute civil proceedings under the bill's provisions.

The bill requires that notice of the new offense accompany every state contract of more than \$50,000.

B. Terms are Defined

The bill defines "culpable negligence" as negligence of a gross and flagrant character that evinces a reckless disregard for public property and is so outrageous as to raise a presumption that the offender was indifferent to the consequences of his or her action or inaction.

The bill defines "public property" as property as defined in s. 812.012, F.S., (see above), which is state owned except for funds held by the state for investment purposes, including public employee retirement or pension funds.

The bill defines “state” as the state or any of its agencies or any state political subdivision or any of the subdivision’s agencies.

The bill defines “entrust” as giving custody or control to a person, or a legal entity’s officers, directors, employees, or agents who have managerial authority over the public property or who could otherwise prevent financial injury, regardless of the existence of a fiduciary relationship.

The bill defines “causes losses or through inaction allow losses” as acting or failing to act under circumstances which would indicate that a loss of value would occur when such a loss could reasonably be foreseen and prevented, even though the loss was not actually intended.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill criminalizes a new type of “culpable negligence.” The Florida Supreme Court, in *State v. Joyce*, 361 So.2d 406, 407 (Fla. 1978), upheld s. 784.05, F.S. (1975), “the culpable negligence statute [because] the term ‘culpable negligence’ does not suffer from the constitutional infirmity of vagueness.” *See also, State v. Hamilton*, 388 So.2d 561 (Fla. 1980). It should be noted, however, that statutes criminalizing culpable negligence relate to crimes that affect the health and safety of persons as opposed to property crimes.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that businesses and their managers become criminally liable for a violation of the offense created by this bill, there will be a private sector impact.

C. Government Sector Impact:

On December 18, 1998, the Criminal Justice Estimating Conference determined that SB 74 as originally filed would have no prison bed impact. The Committee Substitute to SB 74 reduced the threshold amount, for punishment as a third degree felony, from \$1 million to \$500,000. The reduction of the threshold amount should not change the Conference's determination given that last session the Conference, in reviewing a similar bill having a \$100,000 threshold amount, determined that bill did not have a prison bed impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

An impetus for this bill stems from an investigation undertaken by the Statewide Prosecutor of the circumstances under which the State of Florida contracted the management of its state employees' health insurance program to a third party administrator, Unisys, Incorporated. During the course of the contract, cumulative recurring and nonrecurring losses exceeding \$300 million were experienced. Testimony elicited from the Division of State Group Insurance, and from the presentment of the Statewide Grand Jury in its report dated June 19, 1997, has attributed these losses to several factors: the inability of the third party administrator to perform its duties under terms of the contract, the contractor's inability to receive the represented discounts from providers, the contractor's inability to assemble internal systems capable of executing its responsibilities, the suppression of premium increases by the State for the prior five years, and mismanagement by both state agency and corporation officials. In mid-1997 Unisys entered into an agreement in which it terminated its active management of the plan effective January 1, 1998. Blue Cross and Blue Shield of Florida was designated the successor third party administrator for the plan. Unisys paid several million dollars in liquidated damages for its performance shortcomings. Shortly thereafter, the company realigned its business operations to close several manufacturing and service operations. The self-insurance trust fund has had to borrow money from the General Revenue Fund to maintain its solvency and will require at least two years to rebuild its financial position.

The above situation was not the only large-scale operational failure of a public/private infrastructure information system. Some years earlier the State of Florida experienced similar problems in implementation of a fully automated on-line benefits management system for beneficiaries of its social service entitlement programs. That system, rushed to implementation and completion ahead of its original timetable, experienced significant performance failures and costly retrofits. Litigation followed between the state agency and its prime contractor and required the expenditure of additional funds by all parties and participating federal agency funding sources to resolve these failures. A subsequent grand jury review of these matters found substantial managerial fault but could not successfully attribute any criminal responsibility due to profit, gain or advantage. Since then, the system has become satisfactorily operational.

Two other large-scale systems have also been affected by delays in their implementation due to technical and nontechnical matters. The Statewide Automated Child Welfare Information System

and the 800 Megahertz Law Enforcement Radio System are similar large-scale attempts at taking emergent technology and applying them across multiple governmental sectors. Poorly integrated project plans have characterized the former project thus resulting in cost underestimates as high as \$83 million. The latter has suffered through unrealistic implementation schedules, funding underestimations, and technological obsolescence. Its full implementation is not complete and is years behind its original expectation.

The 1998 Legislature addressed potential systemic failures in its own and contracted automation systems in anticipation of Year 2000 date calculation failures. Provisions contained in Committee Substitute for House Bill 3619 provided immunity for state agencies, units of local government, and designated public or private health care providers. By the end of January 1999 the Office of the Governor reported substantial compliance among most state-agency information systems. The drivers' licensing system in the Department of Highway Safety and Motor Vehicles and the trial court system are still questionable.

In *Miccosukee Tribe of Indians of Florida v. United States of America, et. al*, Case No. 95-0533-Civ-Davis (United States District Court, Southern District of Florida, September 11, 1998), a federal court concluded that state officials had violated state narrative standards for agricultural runoff in the Everglades Agricultural Area, also in violation of federal water quality standards. The court also found that the state act violated the federal *Clean Water Act*. Were these state officials protected because they were operating under color of state law, the *Everglades Forever Act*, or could they be determined to be culpably negligent and criminally prosecutable, under terms of this bill, because their actions led to an admitted further degradation of *protected public property at considerable remedial expense within the scope of their authority*? The Board of Trustees of the Internal Improvement Trust Fund, the Governor and Cabinet, is the owner of many state lands. Some of these lands are managed by the Department of Corrections which leases them to the prison industry corporation created under Part II of ch. 946. That corporation then subleases them to proprietary concerns for the growing and harvesting of sugar cane, also in the vicinity of the Everglades Agricultural Area.

When Congress deauthorized the Cross Florida Barge Canal in 1992 it transferred ownership, title, and liability for the locks at the eastern and western terminus of the canal (Buckman and Inglis) to the State of Florida. The Department of Environmental Protection has been advised repeatedly of the locks' deteriorating physical condition but no actions have been taken to address the engineering findings and recommendations. A lock failure could cause significant, widespread property and environmental damage to which some form of liability would attach.

A 1997 Florida Senate publication entitled *Procurement and Contracting Reform* discussed the growth of contracted public services among Florida governmental agencies. The report noted significant variations in agency styles in the administration of contracted services. Its principal recommendation was the development of organizational training incentives for personnel charged with negotiating and managing major financial commitments. Writing in the July/August issue of the *Public Administration Review*, authors Mary Maureen Brown and Jeffrey Brudney noted that the public sector will reap the benefits of contracted technology only when it equips its own public managers with the skills to make informed decisions which invest in their internal agency capacities. One positive application of this training investment was reported in that same issue by Frances Stokes Berry and others on the successful implementation of technology without the

sacrifice of supervisory discretion in the Florida Department of Highway Safety and Motor Vehicles as it affected employee disciplinary proceedings.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
