House
Legislative
Analysis
Section

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REVISE HOSPITAL EXCEPTION TO GOVERNMENTAL IMMUNITY

House Bill 5063 (Substitute H-7)
House Bill 5803 as introduced
Sponsor: Rep. Larry Julian

Committee: Family and Civil Law
First Analysis (5-30-00)

THE APPARENT PROBLEM:

The governmental immunity act gives governmental agencies immunity from tort liability (i.e. protection against lawsuits) when engaged in the exercise or discharge of a governmental function and gives immunity to officers, employees, members, and volunteers acting within the scope of their authority as long as their conduct does not amount to gross negligence. However, the act contains a number of exceptions to this granting of immunity. Significantly, the act does not grant immunity to governmentally owned or operated hospitals or county medical care facilities and the agents or employees of these hospitals or facilities, unless they are owned and operated by the Department of Community Health or a hospital operated by the Department of Corrections.

These provisions were put in their current form by 1986 amendments, part of large tort reform package. The amendments created what some knowledgeable observers describe as an unintentional loophole and granted immunity from malpractice lawsuits to a certain category of doctors. This is because the language of the act exempts from immunity governmentally owned hospitals and the agents or employees of these hospitals and thus appears to grant immunity to doctors who are governmental employees performing a governmental function but who are not agents or employees of governmentally owned or operated hospitals. Courts have dismissed cases brought against such doctors, notably doctors employed by Michigan State University practicing in private hospitals. (Michigan State has medical schools but does not operate a hospital of its own, using instead private hospitals in the community.) This means that doctors at MSU have been considered immune from malpractice lawsuits when doctors affiliated with the University of Michigan or Wayne State University, which operate their own hospitals, are not immune. Critics say that the hospital exception to governmental immunity was not intended to provide immunity to university-employed doctors just because the university employer does not operate a hospital, and they have urged the enactment of legislation to close this loophole.

THE CONTENT OF THE BILLS:

House Bill 5063 would amend the governmental immunity act (MCL 691.1407) so that it would provide that it did not grant immunity to a governmental agency or an employee or agent of a governmental agency with respect to providing medical care or treatment to a patient, except medical care or treatment provided to a patient in a hospital owned or operated by the Department of Community Health or a hospital owned or operated by the Department of Corrections. The bill specifies that it would apply only to a cause of action arising on or after the effective date of the bill. (See Background Information for the current immunity provision.)

Further, the bill would make an additional change in the language of the act that has been 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 said "the" means "a" for the purposes of this provision.

House Bill 5803 would amend Section 20175 of the Public Health Code (MCL 333.20175) to include within the current confidentiality provisions related to professional review functions those records, data, and knowledge collected for or by individuals assigned a professional review function in an institution of higher education that has colleges of osteopathic and human

medicine (e.g., Michigan State University). Currently, the code applies to professional review functions "in a health facility or agency." The code says the records are confidential, can be used only for the purposes provided under the code, and are not subject to court subpoena.

BACKGROUND INFORMATION:

** The governmental immunity act currently says: "This act does not grant immunity to a governmental agency with respect to the ownership or operation of a hospital or county medical care facility or to the agents or employees of such a hospital or county medical care facility." The act provides definitions of "county medical care facility" and "hospital", and says that the term "hospital" does not include a hospital owned or operated by the Department of Community Health or a hospital operated by the Department of Corrections.

** House Bill 4629 of the 1997-98 legislative session addressed this issue. The bill passed both the House and the Senate, but in different versions. Among other differences, the House version was retroactive to 1986 while the Senate version was prospective, as House Bill 5063 (H-7) would be.

** This issue was the subject of decisions by both the Michigan Court of Appeals and the Michigan Supreme Court in *Vargo v Sauer and Sisters of Mercy Health Care Corporation*. The lawsuit involved a malpractice case against an MSU-employed physician and a private hospital. The appeals court in February of 1996 agreed with the circuit court decision to dismiss the case, concluding that since the physician was a governmental employee and was not subject to the hospital exemption (or any other exemption) from immunity, 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 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 the physician met the criteria and was entitled to immunity. The supreme court decision in April of 1998, on the other hand, reversed the trial court's grant of summary disposition and remanded the case to circuit court for further proceedings. The court agreed with the appeals court that the physician was performing a governmental function as a university-employee for the purposes of the immunity statute, but also opined that "an individual may serve two masters simultaneously" and that there remained a material question of fact (to submit to the jury) about whether the physician was also acting as an agent for the private hospital.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

House Bill 5063 would correct an unintended loophole in the governmental immunity act, stemming from 1986 amendments, that prevents people from suing doctors for malpractice if they are university employees practicing at a private (or non-university) hospital if they are affiliated with a university that does not operate a hospital. The practical effect of this is to prevent people from suing doctors affiliated with Michigan State University but allowing lawsuits against doctors affiliated with the University of Michigan and Wayne State University, simply because MSU does not have its own hospital but uses private facilities. This is obviously unfair. Doctors should be held responsible for negligent acts, and special immunity should not be granted to doctors who work for universities based on whether or not the university operates a hospital. Moreover, people seeking treatment from protected doctors are not likely to know that their providers are insulated from malpractice lawsuits. Knowledgeable observers say that had someone raised the issue during the legislative discussions over the 1986 amendments, this category of doctors would never have been granted immunity from lawsuits.

For:

House Bill 5803 would essentially provide the same peer review confidentiality protections to peer review activities at Michigan State University (or any university that operates colleges of osteopathic and human medicine) that are already available in the Public Health Code for professional review functions in a health facility or agency. (MSU does not operate a health facility or agency.) Information related to peer review is not subject to court subpoena.

POSITIONS:

Michigan State University supports the two-bill

package. (5-25-00)

The Michigan Trial Lawyers Association supports the bills. (5-25-00)

Analyst: C. Couch

■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.