

NORTH CAROLINA GENERAL ASSEMBLY

LEGISLATIVE FISCAL NOTE

BILL NUMBER: Senate Bill 1277

SHORT TITLE: Civil Procedure Rule Changes (2nd Edition. Judiciary Committee Substitute adopted August 10, 1998)

SPONSOR(S): Senator W Dalton

FISCAL IMPACT

Yes () No () No Estimate Available (X)

FY 1998-99 **FY 1999-00** **FY 2000-01** **FY 2001-02** **FY 2002-03**

REVENUES

EXPENDITURES

The Fiscal Research Division is unable to provide a reliable estimate of the fiscal impact of this bill.

We *do* find that SB 1277 has the *potential* to increase the State's liability relative to current liability under the Tort Claims Act, and we set forth this finding in the sections on Legal Context and Fiscal Analysis (pages 3-4 below). This may affect state agencies in terms of claims paid and efforts to increase resources devoted to inspection and regulation in order to reduce liability exposure.

In addition, applying Section 10 (page 14-15 in the Bill) to pending cases as of October 1 rather than for cases filed on or after that date increases the state's *maximum* potential liability by \$60 Million.

We are unable to provide a reliable estimate in part because there are sharply divided views on the legal interpretation of the proposed language. After receiving information from the Department of Justice, the Industrial Commission and counsel for Departments of Health and Human Services and Environment and Natural Resources, we are not able to determine which perspective should guide this analysis. Because of the legal debate, this note includes a discussion of the legal context as well as the fiscal analysis.

Even if there were not debate on the legal implications of SB 1277 (2nd edition) , no dollar amount can be reliably assigned to the bill. The estimated cost would depend upon (1) an unknown number of future incidents and claims of tort liability against the State; (2) the legal strategy of the claimants and the state; (3) the decisions of the Industrial Commission and Appellate Courts.

POSITIONS: None

PRINCIPAL DEPARTMENT(S) &

PROGRAM(S) AFFECTED: All State Agencies; Industrial Commission; Department of Justice

EFFECTIVE DATE: Section 10 (Clarify Public Duty Doctrine and the Tort Claims Act) applies to claims pending on or after October 1, 1998. Sections 1-9 apply to actions filed on or after October 1, 1998. Section 11 (Official Comments) is effective upon ratification.

BILL SUMMARY: SB 1277 CIVIL PROCEDURE RULES CHANGES. TO AMEND THE RULES OF CIVIL PROCEDURE AND TO CLARIFY THE PUBLIC DUTY DOCTRINE AND THE TORT CLAIMS ACT.

Service of process and pleadings. Amends Rule 4(c) to extend from 30 to 60 the number of days after issuance within which a summons must be served. Amends Rule 4(j) to allow service to be made by use of a private delivery service certified by the Administrative Office of the Courts for service of process, and makes conforming amendments to Rules 4(j1) and 4(j2) and to GS 1-75.10. Amends Rule 5(b) to allow service under that rule by fax to the attorney's office between 9:00 a.m. and 5:00 p.m. on a regular business day.

Briefs and memoranda. Adds new Rule 5(f) requiring that, to be considered by the judge, a brief or memorandum must be served by the moving party on the adverse party no later than the fifth business day before the scheduled hearing date on the matter for which it is submitted and that the adverse party must serve a brief or memorandum on the moving party no later than the second business day prior to the scheduled hearings on the motion.

Motion Stated with Particularity. Amends Rule 7(b) to specify that motions and other papers shall state "With Reasonable Particularity" the grounds under which relief or an order are sought.

Discovery. Amends Rule 28(c) to allow a videotaped deposition to be taken before a person who otherwise would be excluded for interest under that subsection, if the notice of deposition states the person's name and relationship, if any, to a party or a party's attorney. Adds to Rule 37(a)(2) a requirement that a motion to compel discovery include a certification that the movant has conferred or attempted to confer in good faith with the person failing to make discovery in an effort to secure the information or material without court action.

Default judgment. Adds to Rule 55(b) authority for judge to decide a motion for judgment by default without a hearing if (1) the motion states that the court will decide the motion without a hearing if the party against whom judgment is sought fails to serve a written response within 30 days of service of the motion and (2) the party against whom judgment is sought fails to serve the response in accordance with the Rule.

Notice for temporary restraining order. Adds to Rule 65(b) a provision that a temporary restraining order may be granted without notice only if the applicant's attorney certifies to the court in writing the efforts that have been made to give notice and reasons supporting the claim that notice should not be required.

Clarify Public Duty Doctrine and the Tort Claims Act. Rewrites GA 143-291(a) to add the language "Negligence, within this section, is the failure to use ordinary care in following a duty imposed by law, whether the duty is for the benefit of a specific person or of the general public."

Official Comments Adds language to the Comments for GA 1A-1 Rule 5(b) for annotation purposes regarding deadline for filing of brief or memorandum for motions calendared for a Monday. (parts of this summary are based on Institute of Government's Daily Bulletin, May 14, 1998)

ASSUMPTIONS AND METHODOLOGY:

- I. Sections 1-9 of this Bill modify specified rules of civil procedure. The Judicial Branch does not foresee any fiscal impact on the Court System from these changes.
- II. Section 10 adds language to GA 143-291(a) , The Tort Claims Act, to specify that for the purposes of this section, "negligence is the failure to use ordinary care in following a duty imposed by law, whether the duty is for the benefit of a specific person or of the general public." (underlying for purposes of emphasis)

LEGAL CONTEXT

Because of the differing legal perspectives on the impact of recent Supreme Court decisions and the language in Section 10, this note was prepared with considerable technical assistance from Martha Walston, attorney with the Fiscal Research Division, and Walker Reagan, Committee Counsel for Senate Judiciary.

The language in Section 10 would affect the application of the Public Duty Doctrine to State Government. The Public Duty Doctrine, most commonly raised by local governmental entities, bars claims based on negligence actions against a governmental entity absent a special relationship or a special duty to a particular individual. By specifying that negligence includes a failure to use ordinary care in following a duty for the benefit of the general public, SB 1277 Section 10 would make the Public Duty Doctrine inapplicable to State Government. This language does not in and of itself determine a finding of liability against the State since the plaintiff would still need to verify that the state activity in question constituted a 'duty for the benefit of the general public', establish that there was a failure to use ordinary care, determine a causal link between this breach of care and the incident that resulted in damages, and disprove contributory negligence. These issues would be determined in each case by the Industrial Commission and Appellate Courts.

Attorney General's Opinion

In defending State Agencies against filings under Tort Claims, the Attorney General has in the past sometimes used the argument that the Public Duty Doctrine bars the claim. However, there had not been any judicial opinion on the applicability of the Public Duty Doctrine as to State Agencies in Tort Claims actions until February 1998. In Stone v NC Department of Labor 347 N.C. 473 (1998), the NC Supreme Court held that the Public Duty Doctrine applied to the Department of Labor and dismissed claims that the Department was liable for failure to adequately inspect a poultry plant in Hamlet where workers were injured and killed in a workplace fire.

There have been sharply divided opinions on the impact of this court decision on the State's liability. In the opinion of the Attorney General, relying on the Stone decision, the Public Duty Doctrine (although rarely raised) already applied to the State, the decision is consistent with existing law and any changes to the law (eg Section 10, SB 1277) expand liability. In a letter dated August 17, 1998 the Department of Justice submitted the opinion that the Stone decision

did not create new law and that the language in Section 10, SB 1277 would "abrogate" (invalidate) the Public Duty Doctrine to a state agency and thus change the status of the law.

Other Perspectives

However, it has also been argued (including a dissent to the Stone decision by two Justices) that the decision in Stone v DOL was not consistent with existing law. For instance, it could be interpreted to mean that when a state employee is acting within the scope and course of their employment, they are carrying out a *public* duty and therefore there can be no liability under the State Tort Claims Act. In this case, the state's liability today is sharply reduced from what it was prior to February 1998. Based on this analysis it is argued that SB 1277 increases the State's liability relative to today's reduced level of exposure, but not necessarily beyond where it stood prior to February 1998. The North Carolina Industrial Commission has indicated (August 25, 1998) that the proposed language in SB 1277 states the law as many believed it to be prior to the recent appellate court cases (eg Stone) . From the Industrial Commission's perspective, liability under SB 1277 would **not be** greater than it had been prior to February 1998.

FISCAL ANALYSIS

Tort Claims Under Existing Law

Under existing law prior to February 1998, state agencies were liable under the Tort Claims Act in a variety of areas. The greatest number of tort claims involve school bus accidents, incidents involving state vehicles (accidents, damages to property) and incidents involving damage inflicted by DOT (eg damage to right of way). There are additional claims related to injuries sustained in state facilities, including State Parks, Museums, Office Buildings (slips and falls) ; claims by inmates and patients at State facilities, including assaults against inmates or patients due to inadequate supervision; and malpractice claims against medical personnel who are state employees.

The Department of Public Instruction budgets \$3.15 Million for potential tort claims involving school buses; there were 931 claims in 1996-97. Other agencies pay claims from lapsed salaries with two exceptions. Department of Transportation attributes the cost of any successful Tort Claim to the mark up of the specific project involved. These costs totaled \$678,772 in 1996-97. All claims related to the use of State vehicles are handled by a private insurer who acts to settle (with approval of Department of Justice) or contest claims. For 1,247 incidents during fiscal year 1996-97, claims paid in this area totaled \$4.8--\$5.4 Million with approximately \$2 Million additional expenses related to administering and insuring 32,343 units. In 1996-97 there were a total of 1,346 claims closed for other bodily injury or property damage; about 80% of these cases were handled by Department of Justice adjusters while the remainder were handled by attorneys. Because the claims are paid by the individual department in question, the total cost of these claims was not easily available.

An additional cost of tort claims to the State is maintaining the Tort Claims Section in the Department of Justice. The 1997-98 budget for that section is approximately \$1.37 Million supporting 8 attorneys, 2 paralegals, 7 adjusters and 6 support staff.

Potential for Increased Liability

The Department of Justice maintains that neither the Stone decision nor the proposed language in SB 1277 will affect the State's liability for incidents in State facilities or involving State vehicles. (The Industrial Commission, however, disagrees). The greatest concern about expanded liability under SB 1277 is the possibility that the State would be liable for incidents that occur on private property (eg private workplaces, private rest homes and medical facilities, day care centers, elevators in private buildings) because the State has the duty to inspect and/or regulate these facilities. There is also concern that the State could be liable, based on an argument of not providing normal care in enforcing regulations, for claims related to environmental damage (e.g. water quality, agricultural runoff) or health hazards related to food processing. An additional concern is liability for damages to victims of crime where state law enforcement is involved (DMV, Highway Patrol, supervision of offenders in the community) . Each of these categories of liability involve considerable cost. While individual claimants are limited to \$150,000 in compensation, some of these areas could involve multiple claimants. While the Fiscal Research Division recognizes the increase in *potential* liability, no dollar figure can be reliably assigned. Whether new cases are filed depends on future incidents and the legal strategy of potential victims, as noted above in the Fiscal Impact on page 1.

Two additional concerns have been raised. In the face of increased exposure to liability, State agencies may seek to increase their resources to better protect against future liability (eg hiring more inspectors or probation officers). An additional issue relates to local government employees who enforce state regulations (eg child protection workers at Social Services). Earlier court decisions have found that these local employees can be considered agents of the State. To the extent that SB 1277 expands the State's liability, these areas may also be affected.

Dissenting View

There is a difference of opinion on what the State's liability will be if there is no legislative action. The Attorney General maintains that the law is as it has been in the past. Two Supreme Court dissenters, however, felt that the Stone decision eviscerated the Tort Claims Act and limited the State's liability. Of particular concern are areas where the State's duty is to the public at large rather than individuals, or where a program is designed to serve the needs of a particular population (e.g. abused children), but in a way that may not be found to constitute a relationship with a specific individual. If the Stone decision in fact limited the state's liability, Section 10 would increase liability relative to today's level, but not necessarily beyond where it was prior to the court decision.

III. EFFECTIVE DATE

SB 1277 2nd Edition specifies that Section 10 would apply to claims pending on or after October 1, 1998. The Department of Justice provided Fiscal Research with a list of cases pending before the Industrial Commission as of August 17th which may be affected by Section 10. In each of these cases, the Attorney General has made a motion to dismiss based on the applicability of the Public Duty doctrine to State agencies. In some of these cases, DOJ may have used the same defense strategy even prior to the Stone decision. In each case, Section 10 of SB 1277 would likely cause the Industrial Commission to deny the motion to dismiss and they would proceed to consider the specific facts of each case. These include cases involving claims against DENR for permitting the Shell Island Resort, for not investigating and closing a manufacturing plant in

Randolph County, and for certifying low flow pipe sewage systems, claims against Departments of Correction, Wildlife Resources and the Highway Patrol for supervision of arrestees and parolees, a case involving adequate supervision of child abuse cases, cases against DOT for design of railroad crossings, and several others. There are 14 specific pending cases with a total of 401 claimants. If each claimant received the \$150,000 statutorily maximum award, the fiscal impact to the State would be \$60.15 Million. Even with the passage of SB 1277, the state may successfully defend against these claims and in some cases damages would be less than \$150,000 so the \$60.15 Million represents the maximum potential additional exposure for the State of applying new law to pending --as well as new-- cases.

IV. IMPACT ON INDUSTRIAL COMMISSION

The NC Industrial Commission believes it is likely that SB1277 will not cause an increase in their workload.

V. IMPACT ON THE DEPARTMENT OF JUSTICE

Even if the language in SB1277 does not result in more *successful* claims against the State, the fact that the Tort Claims Act has been amended and the surrounding debates may well generate more cases filed and investigated. This will likely affect the workload of the Tort Claims Section.

TECHNICAL CONSIDERATIONS: None

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