

STORAGE NAME: h3499s1a.go

DATE: April 15, 1998

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 3499

RELATING TO: Skateboarding, Rollerblading and Freestyle Bicycle Riding Activities

SPONSOR(S): Committee on Civil Justice & Claims, Representative Futch and others

COMPANION BILL(S): CS/SB 820(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CIVIL JUSTICE & CLAIMS YEAS 8 NAYS 0
 - (2) GOVERNMENTAL OPERATIONS YEAS 3 NAYS 0
 - (3)
 - (4)
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I. SUMMARY:

This bill creates s. 316.0085, F.S., which provides limitations on governmental liability for skateboarding, rollerblading, and freestyle bicycle riding accidents which occur on public property. The bill's stated purpose is "to encourage governmental owners or lessees of property to make land available" for such activities.

This bill establishes immunity, for all governmental entities, with respect to damages or injuries arising out of skateboarding, rollerblading, and freestyle bicycle riding activities. This immunity does not extend to independent concessionaires or government contractors. Under the bill, participants in skateboarding, rollerblading, and freestyle bicycle riding activities, assistants, and spectators who voluntarily place themselves within the zone of risk or who, having the means to do so, fail to remove themselves from the zone of risk, would be prevented from bringing suit.

This bill creates three exceptions from immunity. First, the bill does not insulate government entities from liability for failure to warn of dangerous conditions, known to the government entity, and of which the participant has no notice. Second, the bill does not insulate the government from liability for injuries which occur due to gross negligence on the part of the governmental entity. Third, the immunity does not apply to children under 17 years of age, if a governmental entity provides a designated area for skateboarding, rollerblading, or freestyle bicycle riding, but fails to obtain written consent from the parents authorizing the child to participate in these activities.

Finally, the bill states that the fact that a governmental entity carries insurance which covers skateboarding, rollerblading, or freestyle bicycle riding incidents does not constitute a waiver of immunity.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

1. **Sovereign Immunity** - Sovereign immunity is a doctrine which prohibits suits against the government without the government's consent. The Florida Constitution addresses sovereign immunity in Article X, Section 13. This provision allows the Legislature to waive immunity through an enactment of general law. Sovereign immunity encompasses to all subdivisions of the state, including counties and school boards.
 - a. **Policy Considerations** - Several policy considerations support the concept of sovereign immunity. These include: (1) protecting public funds from excessive or precipitous encroachments, (2) preserving separation of powers, (3) ensuring efficient administration, and (4) preserving official discretion. Criticisms of sovereign immunity revolve around the idea that such a limitation: (1) eliminates individual remedies, (2) fails to deter wrongful conduct by government officials, and (3) limits public knowledge of government improprieties.
 - b. **Florida's Partial Waiver of Sovereign Immunity** - In 1973, the Legislature enacted section 768.28, F.S. This section allows individuals to sue state government, subdivisions of the state, and municipalities. According to subsection (1), 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" Notwithstanding the enactment of section 768.28, F.S., certain elements of sovereign immunity remain in effect:
 - (1) **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 limits do not preclude plaintiffs from obtaining judgments in excess of the recovery cap. However, plaintiffs cannot force the government to pay damages which exceed the recovery cap.
 - (2) **Discretionary Functions** - Where the state is involved in a discretionary or planning-level function, no liability is imposed. See e.g., Commercial Carrier Corp. v. Indian River County, 371 So.2d 1010 (Fla. 1979); Leonard v. Wakulla County, 688 So.2d 440 (Fla. 1st DCA 1997); Collazos v. City of West Miami, 683 So.2d 1161 (Fla. 3d DCA 1996); Freeman v. Taylor County, 643 So.2d 44 (Fla. 1st DCA 1994) rehearing denied (Oct. 28, 1994); Dennis v. City of Tampa, 581 So.2d 1345 (Fla. 2d DCA 1991), cert. denied, 591 So.2d 181 (Fla. 1991). Discretionary functions include areas such as licensing, legislating, judicial decision-making, permitting, inspecting, designing public improvements, and other types of high-level planning. The courts use a four-part test to determine whether an activity should be classified as discretionary. Courts ask: (a) does the challenged government activity involve a basic government policy, program, or objective, (b) is the challenged activity central to the accomplishment of the policy, program, or objective, (c) does the challenged activity require the government to make policy evaluations, exercise judgement, or use expertise, and (d) does the government agency possess proper legal

authority to engage in the challenged activity? Department of Health and Rehabilitative Services v. Yamuni, 529 So.2d 258 (Fla. 1988).

- b. **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." See e.g., Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 (Fla. 1985); Layton v. Florida Department of Highway Safety & Motor Vehicles, 676 So.2d 1038 (Fla. 1st DCA 1996), rehearing denied (Aug. 7, 1996); First American Title Insurance Co. of St. Lucie County, Inc. v. Dixon, 603 So.2d 562 (Fla. 4th DCA 1992) rehearing, rehearing en banc, and cert. denied (Sept. 10, 1992); Bovio v. City of Miami Springs, 523 So.2d 1247 (Fla. 3d DCA 1988).
2. **Negligence** - Negligence is the most common cause of action within the law of tort. Black's Law Dictionary defines negligence as "the failure to use such care as a reasonably prudent and careful person would use under similar circumstances" It is, in other words, a form of legal delinquency characterized by forgetfulness, carelessness, oversight, or inadvertence.
 - a. **Elements** - To hold a defendant liable for negligence, a plaintiff must prove four elements. First, the plaintiff must establish that the defendant owed a duty of care toward the plaintiff or injured party. The defendant generally owes a duty of care to any person who is foreseeably put at risk by the defendant's activities. Some standards of care are specified in the statutes or delineated by judicial decision. Second, the plaintiff must show that the defendant breached that duty. The plaintiff, in other words, must demonstrate that the defendant's conduct departed from that of a reasonably prudent person under the circumstances. Third, the plaintiff must show that the defendant's breach caused the plaintiff's injury. Causation may be difficult to establish where several factors combine to bring about the plaintiff's injury. Finally, the plaintiff must have suffered damages.
 - b. **Comparative Fault** - Under Florida's comparative fault system, the amount in damages payable by the defendant must be reduced by any percentage of fault attributed to the plaintiff. In Cody v. Kernaghan, 682 So.2d 1147 (Fla. 4th DCA 1996) rehearing and rehearing en banc denied (Nov. 26, 1996), for example, the Fourth District Court of Appeal reviewed a personal injury action against homeowners stemming from a trampoline accident. The court held that the plaintiff's recovery of both economic and noneconomic damages should be reduced by that percentage of fault attributable to plaintiff. See also Pinellas County By and Through Board of County Commissioners v. Bettis, 659 So.2d 1365 (Fla. 2d DCA 1995); Nova University, Inc. v. Katz, 636 So.2d 729 (Fla. 4th DCA 1993) rehearing denied, clarification granted (Feb. 16, 1994); Fabre v. Marin, 623 So.2d 1182 (Fla. 1993); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).
3. **Premises Liability** - Premises liability involves the liability of property owners to persons who enter upon property with or without the owner's permission. It constitutes a significant portion of tort cases heard in Florida courts and throughout the nation. A property owner, governmental or private, may be held liable for incidents that occur when a person goes upon property and is injured by some

condition on the property. Premises liability is a form of negligence where the duty owed is defined by the status of the person who has been injured. Florida courts have distinguished between several categories of entrants. Skateboarders and rollerbladers could fall into any of these categories depending upon factual circumstances.

- a. **Public Invitee** - Property holders owe public invitees the highest degree of care available to anyone who goes upon the property of another. Public invitees are persons who enter property that is held open to the public by design or through the conduct of the property holder. Examples of public invitees include store customers, delivery persons, employees, amusement park guests, restaurant and bar patrons, business visitors, museum visitors, and persons passing through airports and train stations. The property holder owes three duties to public invitees: (1) the duty to keep property in reasonably safe condition, (2) the duty to warn of concealed dangers which are known or should be known to the property holder, and which the invitee cannot discover through the exercise of due care, and (3) the duty to refrain from wanton negligence or willful misconduct. The duty to keep property in reasonably safe condition may require periodic inspections of the property as well as the duty to provide security to prevent intentional torts by third parties. See e.g., Paul v. Sea Watch of Panama City Beach, Inc., 643 So.2d 665 (Fla. 1st DCA 1994); Walt Disney World Co. v. Goode, 501 So.2d 622 (Fla. 5th DCA 1986); Kolosky v. Winn Dixie Stores, Inc., 472 So.2d 891 (Fla. 4th DCA 1985); Winn Dixie Stores, Inc. v. Williams, 264 So.2d 862 (Fla. 3d DCA 1972).
- b. **Licensee by Invitation** - Licensees by invitation are persons who enter upon property, for their own pleasure or convenience, at the express or reasonably implied invitation of the property occupier. This category was created by the Florida Supreme Court in Wood v. Camp, 284 So.2d 691 (Fla. 1973), and is unique to Florida. It requires some sort of personal relationship aspect and generally applies to party guests and social visitors. The duties owed by a property holder to licensees by invitation are identical to those owed to public invitees.
- c. **Uninvited Licensee** - Uninvited licensees are persons who choose to go upon property for their own convenience. Their presence is neither sought nor prohibited, but is merely tolerated by the property holder. Included within this category might be sales persons or persons soliciting contributions for various causes. The duties owed by property holder to uninvited licensees are: (1) the duty to refrain from wanton negligence or willful misconduct, and (2) the duty to warn of dangerous conditions, known to the property holder, when the danger is not open to ordinary observation. See e.g., Mueller v. South Florida Water Management District, 620 So.2d 789 (Fla. 4th DCA 1993); Bishop v. First National Bank of Florida, Inc., 609 So.2d 722 (Fla. 5th DCA 1992); Morris v. Florentes, Inc., 421 So.2d 582 (Fla. 5th DCA 1982).
- d. **Discovered Trespasser** - A discovered trespasser is any person who enters onto property without permission or privilege under circumstances where the property holder has actual or constructive notice of the presence of the intruder. Constructive notice may be established where the property holder is aware of a worn path through the woods, tire marks showing the intermittent passage of

vehicles, the remains of campfires, the presence of litter, or other evidence of repeated intrusions. The property holder owes discovered trespassers two duties: (1) the duty to refrain from wanton negligence or willful misconduct, and (2) the duty to warn of dangerous conditions, known to the property holder, when the danger is not open to ordinary observation. Hix v. Billen, 284 So.2d 209 (Fla. 1973).

- e. **Child Trespasser ("Attractive Nuisance Doctrine")** - The attractive nuisance doctrine applies to children (no fixed age limit) who are lured onto the property by the structure or condition that injures them and, who, because of their youth, are unable to appreciate the risks involved. In past decisions, the courts have applied the attractive nuisance doctrine to children who trespass upon property to swim in a pool, pond, or open pit; play upon a construction site or excavation; climb upon dirt piles, mineral heaps, debris, or trees; or use playground and sporting equipment. Under the attractive nuisance doctrine, the property holder has a duty to protect from known dangerous conditions, where the property holder knows or should know that children frequent the area, and where the expense of eliminating the danger is slight compared with the magnitude of the risk. See e.g., Mueller v. South Florida Water Management District, 620 So.2d 789 (Fla. 4th DCA 1993); Martinello v. B & P USA, Inc., 566 So.2d 761 (Fla. 1990); In re Estate of Starling v. Saha, 451 So.2d 516 (Fla. 5th DCA 1984), per curiam aff'd., 491 So.2d 356 (Fla. 5th DCA 1986); Alegre v. Shurkey, 396 So.2d 247 (Fla. 1st DCA 1981); Johnson v. Bathey, 376 So.2d 848 (Fla. 1979); Lister v. Campbell, 371 So.2d 133 (Fla. 1st DCA 1979); Sparks v. Casselberry Gardens, 227 So.2d 686 (Fla. 4th DCA 1969); Butler v. Porter-Russell Corp., 217 So.2d 298 (Fla. 1968); Allen v. William P. McDonald Corp., 42 So.2d 702 (Fla. 1949).
- f. **Undiscovered Trespasser** - An undiscovered trespasser is any person who enters onto property without permission or privilege and without the knowledge of the property holder. The only duty owed to undiscovered trespassers is to refrain from inflicting wanton or willful injury. See e.g., Florida East Coast Railway Co. v. Pickard, 573 So.2d 850 (Fla. 1st DCA 1990)

B. EFFECT OF PROPOSED CHANGES:

- 1. **Provides Immunity** - This bill establishes immunity, for certain governmental entities, with respect to damages or injuries arising out of skateboarding, rollerblading, or freestyle bicycle riding activities which take place within designated areas.
 - a. **Definition of Governmental Entity** - This bill applies complete immunity to a wide range of entities, including: The United States, the State of Florida, counties, municipalities, agencies, departments, school boards, special districts, other entities exercising governmental authority, and instrumentalities thereof. However, the immunity does not extend to independent concessionaires or government contractors.
 - b. **Persons Affected** - Under the bill, skateboarders, rollerbladers, freestyle bicyclists, assistants, and spectators who voluntarily place themselves within the

zone of risk or who, having the means to do so, fail to remove themselves from the zone of risk, would all be prevented from bringing suit.

2. **Sets Forth Exceptions** - This bill creates three exceptions from immunity. First, the bill does not insulate government entities from liability for failure to warn of dangerous conditions, known to the government entity, and of which the participant has no notice. This represents a very significant exception because a high percentage of premises liability actions are based upon the failure to warn of known dangerous conditions. Second, the bill does not insulate the government from liability for injuries which occur due to gross negligence on the part of the governmental entity. Third, the bill's immunity does not apply to children under 17 years of age, if a governmental entity provides a designated area for skateboarding, rollerblading, or freestyle bicycle riding, but fails to obtain written consent from the parents authorizing the child to participate in these activities. From the bill's language it is not clear whether government entities would be subject to liability if children, who have not obtained parental consent, use the facilities outside business hours.
3. **Delineates Negligent Conduct by Participants** - This bill provides that skateboarders, rollerbladers, and freestyle bicyclists are negligent if they fail to: (1) act within the limits of their ability (2) use equipment in conformity with its purpose or design, (3) maintain control over themselves or their equipment, or (4) refrain from acting in a manner which could result in death or injury. This provision does not appear to alter the standards for negligence under common law principles. Additionally, the bill states that skateboarders, rollerbladers, freestyle bicycle riders, assistants, and spectators assume "the known and unknown inherent risks in these activities."
4. **Provides that Insurance Does Not Constitute Waiver** - This bill states that the fact that a governmental entity carries insurance, which covers skateboarding, rollerblading, or freestyle bicycle riding incidents, does not constitute a waiver of immunity.

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?

This bill would allow government entities to designate areas for skateboarding, rollerblading, and freestyle bicycle riding without subjecting themselves to liability.

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

This bill requires those government entities, which designate an area for skateboarding, rollerblading, or freestyle bicycle riding to obtain written consent from the parents of children who are under 17 years of age.

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

This bill would reduce the ability of certain injured parties to obtain damages from government entities.

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

No 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?

N/A

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

N/A

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

N/A

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

- 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?

No

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

No

4. Individual Freedom:

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

Yes. This bill may provide skateboarders, rollerbladers, and freestyle bicycle riders with more places where they are permitted to engage in these sports.

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

Yes. Under narrow circumstances it would limit the ability of claimants to bring actions against the government.

5. Family Empowerment:

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

This bill does not purport to provide services to families or children.

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

N/A

- (2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

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

N/A

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

N/A

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:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Creates s. 316.0085, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1. Provides a statement of purpose; provides definitions; establishes an immunity for governmental units or public employees in connection with skateboarding, rollerblading, and freestyle bicycle riding activities; provides exceptions; delineates negligent conduct on the part of participants; provides that insurance does not constitute a waiver of immunity.

Section 2. Provides that the act shall take effect upon becoming a law.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None

2. Recurring Effects:

This bill may slightly reduce the liability of governmental entities for accidents which occur on public property and which involve skateboarding, rollerblading, or freestyle bicycle riding. Claimants who are unable to recover damages through tort actions against the government may place increased reliance upon public health care services.

3. Long Run Effects Other Than Normal Growth:

None

4. Total Revenues and Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None

2. Recurring Effects:

This bill may slightly reduce the liability of governmental entities for certain accidents which occur on public property within designated areas.

3. Long Run Effects Other Than Normal Growth:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Claimants who are unable to recover damages through actions against the government may bear the costs associated with their injuries.

2. Direct Private Sector Benefits:

None

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:

Key Issues - This subsection uses a question format to stimulate debate about the joint resolution under review.

1. **Question Presented** - *Whether the Legislature should establish complete governmental immunity with respect to certain accidents which involve skateboarding, rollerblading and freestyle bicycling.*

2. **Other Policy Considerations:**

a. What rationale justifies according immunity with respect to skateboarding, rollerblading, and freestyle bicycle riding when the government is not protected from liability with respect to analogous activities such as diving, surfing, dirt biking, ATV riding, water scooter operation, climbing, bicycling, swimming, and hunting?

b. Are skateboarding, rollerblading, and freestyle bicycle riding, activities that the government should encourage?

- c. Should the failure to use certain safety equipment, such as helmets, be included, when delineating what constitutes negligence on the part of a participant, or are such items adequately covered?
- d. Does the bill's exception, for failure to warn of known dangerous conditions, largely eclipse the immunity accorded by the bill? If so, is this arrangement desirable?

Note- The grant of immunity contained in section 316.0085(1)(3), F.S., as created by this bill, does not include "death" within its language. As such, there appears to be no immunity established for death under any of the provisions of this bill.

Further, section 316.0085 (1)(4)(a), F.S., as created by this bill, does not clearly specify that liability for "failure to guard against or warn of a dangerous condition" would be based on such condition being the "proximate cause" of an injury. As presently written, section 316.0085 (1)(4)(a) merely states a condition of negligence per-se, for which liability ordinarily does not attach.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

At the March 19, 1998 meeting of the Committee on Civil Justice and Claims, twelve amendments were adopted. These amendments included freestyle bicycle riding among the activities covered by the bill. In addition, one amendment limited governmental immunity to areas which are designated for skateboarding, rollerblading, and freestyle bicycle riding.

VII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE & CLAIMS:

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