

Section 768.28, F.S., provides a limited waiver of sovereign immunity, allows individuals to sue state government, subdivisions of the state, and municipalities under circumstances where a private person “would be liable to the claimant, in accordance with the general laws of th[e] state.” Under this section, the government’s liability is limited to \$100,000 for any single person, or \$200,000 for all claims arising out of a single incident. These limits do not preclude plaintiffs from obtaining judgments in excess of the recovery cap; such claims may be paid with approval of the Legislature. However, plaintiffs cannot force the government to pay damages which exceed the recovery cap. Further, where the state is involved in a discretionary or planning-level function, no liability is imposed. Discretionary functions include areas such as licensing, legislating, judicial decision-making, permitting, inspecting, designing public improvements, and other types of high-level planning.

Negligence

Negligence is the most common cause of action within the law of tort, and falls into the category of unintentional torts. 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.” The law of negligence is founded on reasonable conduct or reasonable care under all circumstances of the particular case. The doctrine of negligence is founded on the duty of every person to exercise due care in his or her conduct toward others from which injury may result. To make a case for negligence, the plaintiff must prove four elements: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant breached said duty of care; (3) that the breach was the actual or proximate cause of the plaintiff’s injury; and (4) damages. 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.

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.

- ▶ **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.

- ▶ 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.
- ▶ 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.
- ▶ 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.
- ▶ 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.
- ▶ 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.

Insurance Costs

In response to the demand for areas to engage in skateboarding and rollerblading activities, several cities have sought to develop skate parks or similar facilities. However, many cities have abandoned those plans after learning of the prohibitive costs of insurance. The City of Palm Bay reports that annual insurance premiums for a 100' x 100' skate park would be \$10,000.

III. Effect of Proposed Changes:

Section 1 creates s. 316.0085, F.S., to limit the liability of governmental entities for injury or damages arising from skateboarding, rollerblading or freestyle bicycle riding activities occurring on property owned or leased by the governmental entity.

Subsection (1) states the legislative purpose of encouraging governmental owners or lessees of property to make land available to the public for skateboarding, rollerblading and freestyle bicycle riding activities. This section recognizes that governments have failed to provide land for these activities due to exposure to liability and the prohibitive cost of insurance.

Subsection (2) defines “governmental entity” and “inherent risk.” Governmental entity includes the federal and state government, counties, municipalities, and their departments or agencies, special districts, school boards, authorities or “any other entity exercising governmental authority.” Inherent risk means those dangers or conditions that are characteristic of, intrinsic to, or an integral part of skateboarding, rollerblading and freestyle bicycle riding.

Subsection (3)(a) clarifies that the CS does not grant permission for the public to engage in skateboarding, rollerblading or freestyle bicycle riding activities on property owned or controlled by a governmental entity unless the governmental entity has specifically designated an area for such uses.

Subsection (3)(b) provides that no governmental entity or public employee is liable for damages or injuries to any person participating in, or any person assisting a person participating in, skateboarding, rollerblading or freestyle bicycle riding activities in an area designated for such activity. This limitation of liability also applies to damage or injury to a spectator who was voluntarily in the place of risk or, having the ability to leave, failed to do so.

Subsection (4) provides that the limitation of liability does not apply to the following acts or omissions by the governmental entity or public employee:

- ▶ The failure to guard against or warn of a dangerous condition of which he or she had actual or constructive notice and of which the participant does not and cannot reasonably be

expected to have notice. This language is closest to the duty of care owed to a discovered trespasser.

- ▶ Gross negligence which is the proximate cause of the injury.
- ▶ If the governmental entity designates an area for skateboarding, rollerblading or freestyle bicycle riding, failure to obtain written parental consent before authorizing a child under 17 years of age to participate in the skateboarding, rollerblading or freestyle bicycle riding activity in the designated area.

This subsection further provides that it does not create a duty of care or basis of liability for death, personal injury, or damage to personal property, and it is not deemed to be a waiver of sovereign immunity.

Subsection (5) provides that the limitation on liability does not extend to any independent concessionaire or any person or organization other than a governmental entity or public employee, regardless of whether the person or organization has a contractual relationship with the governmental entity.

Subsection (6)(a) provides that a person, regardless of age, who participates in, assists in, or observes skateboarding, rollerblading or freestyle bicycle riding assumes the known and unknown inherent risks of those activities, and is legally responsible for all damages, injury, or death to himself, herself or others resulting from those activities. A governmental entity which sponsors, allows, or permits those activities on its property is not required to eliminate, alter or control the inherent risks in those activities. Subsection (6)(b) provides that the participant is responsible for the following and that failure to do so constitutes negligence:

- ▶ Acting within the limits of his or her ability and the purpose and design of the equipment used.
- ▶ Maintaining control of his or her person and the equipment used.
- ▶ Refraining from acting in any manner which may cause or contribute to death of or injury to himself or herself or other persons.

Negligence on behalf of the participant may be used to reduce his or her damages in the event of a suit in which the governmental entity is found liable.

Subsection (7) provides that carrying insurance to cover these activities does not constitute a waiver, on behalf of the governmental entity, of the protections provided in this section.

Section 2 provides an effective date upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Future plaintiffs may be unable to collect damages from a governmental entity on whose property (or property leased by the entity) the plaintiff was injured while engaging in, assisting in, or observing skateboarding, rollerblading or freestyle bicycle riding activities, unless the plaintiff can prove that the governmental entity was grossly negligent, failure to warn of or guard against a dangerous condition, or failed to obtain written parental consent for a child under age 17.

C. Government Sector Impact:

Local governments wishing to provide skate parks or other facilities for use by the public for skateboarding, rollerblading or freestyle bicycle riding may save the cost of purchasing insurance under the limited liability provisions of this CS.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Both California and Illinois have legislation limiting the liability of governmental entities for use of public property for "hazardous recreational activities." The CS appears to be modeled after those

states' statutes. Neither California nor Illinois include skateboarding or rollerblading within the definition of "hazardous recreational activities."

Both California and Illinois define "hazardous recreational activities" to mean an activity occurring on the property of a local governmental entity. SB 820 does not directly link the limitation of liability to activities occurring on the governmentally-owned or leased property. However, this link may be implied from subsection (3).

VIII. Amendments:

None.

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