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.)

Date: April 21, 1998 Revised: _____ _____ _____ _____

Subject: Skateboarding/Rollerblading/Bikes

	Analyst	Staff Director	Reference	Action
1.	Schmith	Yeatman	CA	Favorable/CS
2.	Rhea	Wilson	GO	Favorable
3.	Harkins	Moody	JU	Favorable/CS
4.				
5.				

I. Summary:

The bill contains statements of purpose and legislative findings and provides definitions. The bill provides that it does not limit the liability of a governmental entity for gross negligence, failure to guard against or warn of a dangerous condition, or failure to obtain written consent for use by a minor. It also does not limit the liability of independent concessionaires or others using governmental property, regardless of whether a contractual relationship exists with the governmental entity. Finally, the bill lists duties required of a skateboarding, rollerblading, or freestyle bike-riding participant. Failure to comply with those duties constitutes negligence for purposes of comparative fault.

The bill creates section 316.0085 of the Florida Statutes.

II. Present Situation:

Sovereign Immunity

Sovereign immunity is a doctrine which prohibits suits against the government without the government's consent. All subdivisions of the state, including counties and school boards, are encompassed by the doctrine. Section 13, Art. X, Fla. Const., allows the Legislature to waive immunity through an enactment of general law. Thus, governmental immunity is the rule and governmental liability is the exception.

Section 768.28, F.S., provides a limited waiver of sovereign immunity for torts.[1] Subsection (1) of the section states:

> In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions,[2] hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions against the state or any of its agencies or subdivisions *to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state,* may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

(Emphasis added.)

Under the act, a governmental entity is liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, except that liability does not include punitive damages[3] or interest for the period before judgment. s. 768.28(5), F.S. A governmental entity's liability is limited to $100,000 for any single person, or $200,000 for all claims arising out

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[1]A "tort" is defined as ". . . [a] private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. . . . A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. . . . A legal wrong committed upon a person or property independent of contract. It may be: (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; or (3) the violation of some private obligation by which like damage accrues to the individual." See Black's Law Dictionary (5th Ed., 1979).

[2]Section 768.28(2), F.S., defines the term "state agencies or subdivisions" to include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties or municipalities, including the Spaceport Florida Authority.

[3] "Punitive damages" are defined as ". . . damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him. . . . Unlike compensatory or actual damages, punitive or exemplary damages are based upon an entirely different public policy consideration - that of punishing the defendant or of setting an example for similar wrongdoers. . . ." See Black's Law Dictionary (5th Ed., 1979).

of a single incident. *Id.* These limits, however, do not preclude plaintiffs from obtaining judgments in excess of the recovery cap. A judgment that exceeds these amounts may be reported to the Legislature for its consideration of payment above the capped amount. Notwithstanding this limited waiver of sovereign immunity, a governmental entity may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature. In such a case, the governmental entity does not waive any defense of sovereign immunity or the statutory cap, even if its insurance coverage for a tortious act exceeds those amounts.

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. See *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912 (Fla.1985) and *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979).

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, rollerbladers, and freestyle bicycle riders 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 their property with invitation. 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. Persons coming upon areas specially designated by governmental entities as intended for use by individuals desiring to skateboard, rollerblade, or freestyle cycle, for the purpose of engaging in such activities, would probably be considered public invitees. The property holder owes three duties to such 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.

- **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.

- **"Attractive Nuisance Doctrine"** - Under the common law, trespassers had no right to demand that a landowner provide them with a safe place to trespass, or that landowner

protect the trespasser in the trespasser's wrongful use of his property. Prosser and Keeton on the Law of Torts Sec. 58 (5th ed. 1984). Consequently, the landowner was not liable for injury to trespassers caused by the landowner's failure to exercise reasonable care to put his land in a safe condition for trespassers. *Id.* In Florida, trespassers typically have few remedies for injuries received on another's land because "[t]he unwavering rule as to a trespasser is that the property owner is under the duty only to avoid willful and wanton harm to him and upon discovery of his presence to warn him of known dangers not open to ordinary observation." *Wood v. Camp*, 284 So.2d 691, 693-94 (Fla.1973). The attractive nuisance doctrine is an exception to this general rule which is made in order to preserve the safety of children. Section 339 of the Restatement (Second) of Torts (1965), sets forth the basic elements of the attractive nuisance doctrine. A possessor of land is subject to liability to children trespassing for physical harm caused by an artificial condition on the land if:

- The place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass;
- The condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children;
- The children, because of their youth, do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it;
- The utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved; and
- The possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Florida courts also require that the owner entice the child upon the dangerous premises. See *Concrete Constr., Inc. v. Petterson*, 216 So.2d 221 (Fla.1968), reaffirmed in *Johnson v. Bathey*, 376 So.2d 848 (Fla.1979). If a jury believes the child does realize the risk of intermeddling with the dangerous condition, then the attractive nuisance doctrine is inapplicable, the child is considered an ordinary undiscovered trespasser, and the child is not entitled to any recovery under ordinary negligence principles. *Martinello v. B & P Pump USA, Inc.* 566 So.2d 761 (Fla.1990). There is no fixed age under which the doctrine is applicable. Rather, courts look to the age, mental capacity, intelligence, training, and experience of the child. *Id.*

III. Effect of Proposed Changes:

The bill 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. The bill contains the legislative finding that governments have failed to provide land for these activities due to liability and the prohibitive cost of insurance.

The bill 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." The term "inherent risk" is defined to mean those dangers or conditions that are characteristic of,

intrinsic to, or an integral part of skateboarding, rollerblading, and freestyle bicycle riding. Risks such as encountering a dangerous condition like uneven pavement, poor lighting, inordinately hard floor surfaces, etc., are probably not which can be said to be inherent in the aforementioned sports. The criminal or tortious conduct of third parties or negligent instruction or supervision would probably also not be considered risks inherent in these sports. The bill does not enumerate any risks inherent in these sports and so the question of whether a particular phenomenon is a risk inherent to rollerblading, cycling, or skateboarding will probably be determined on a case by case basis as governmental defendants assert this new defense in the future.

The bill 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 those uses.

The bill provides that it does not limit the liability of a governmental entity for gross negligence, failure to guard against or warn of a dangerous condition, or failure to obtain written consent for said use by a minor.

The bill provides that it does not limit liability if a governmental entity is responsible for the following acts or omissions:

- 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.
- 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 bill states that the forgoing circumstances do not create a duty of care or basis of liability for death, personal injury, or damage to personal property, and that the bill is not deemed to be a waiver of sovereign immunity.

The bill provides that it does not limit the liability of an 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.

The bill 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.

The bill lists duties required of a skateboarding, rollerblading, or freestyle bike-riding participant. Failure to comply with those duties constitutes negligence for purposes of comparative fault. While engaged in skateboarding, rollerblading, or freestyle bicycle riding, *irrespective of where such activities occur*, a participant is responsible for doing all of the following:

- 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; and
- Refraining from acting in a manner which may cause or contribute to the death of or injury to himself, herself, or other persons.

Finally, the bill 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.

The bill takes effect 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:

None.

C. Government Sector Impact:

It is unclear whether this bill would provide enough protection from potential suits from rollerbladers, freestyle cyclists, or skateboarders to create a response from the insurance

industry. Therefore, the impact this bill will have on insurance premiums and thereby on the costs of providing governmental facilities for the aforementioned sports is indeterminate.

VI. Technical Deficiencies:

The bill creates s. 316.0085(4)(c), F.S., which will read as follows:

> *As to children under 17 years of age, if a governmental entity* that provides a designated area for skateboarding, rollerblading, or freestyle bike riding *fails to obtain the written consent*, in a form acceptable to the governmental entity, *from the parents or legal guardians of any child under 17 years of age before authorizing such child or children to participate* in skateboarding, rollerblading, or freestyle bicycle riding in such designated area.

The bill creates no consequence for failing to obtain written consent, although taken as whole, the section suggests that a consequence was intended.

VII. Related Issues:

This bill does not provide for a limitation, i.e, a cap, on damages. To the extent the bill addresses instances in which a governmental authority would already be immune under s. 768.28, F.S., the bill might have the unintended consequence of removing certain liability caps. When laws conflict, courts are obliged to resort to the rules of statutory construction. Under these rules, a specific statutory provision trumps a provision of general application.

Under this bill (which appears to apply only when a governmental authority is sued by a rollerblader, skateboarder, or cyclist), a governmental authority does not enjoy immunity for negligence arising from a breach of its proprietary duties. It would not enjoy such immunity under s. 768.28, F.S. However, the existing statute, s. 768.28, F.S., provides for an absolute limit on liability even when the governmental entity is found to have exercised its proprietary responsibilities negligently. No matter how negligent the governmental entity is, and irrespective of a victim's damages, a single plaintiff is entitled to no more than $100,000 absent an act of grace by the Florida Legislature. The bill, on the other hand, which would be passed later in time and with full knowledge of the existence of s. 768.28, F.S., provides for no caps whatsoever. It is at least arguable that no monetary limitations were intended when suit is brought against a governmental authority by a rollerblader, skateboarder, or cyclist. Such an interpretation sounds absurd, but it is not. Statutory waivers of sovereign immunity are in derogation of the common law and therefore are *strictly construed*. Thus, if no monetary limit on liability is specifically provided by the bill, it is at least possible that no monetary cap on liability will be implied by the courts. At the very least, the argument will be advanced.

However, the bill does contain the following statement:

> Nothing in *this section* shall be deemed to be a waiver of sovereign immunity under any circumstances.

(Emphasis added.)

It could be argued that this is evidence of the Legislature's intent not to waive the monetary limits where the statute that would be created by this bill, s. 316.0085, F.S., and s. 768.28, F.S. conflict. But, such an intent is hardly patent. The bill makes no reference to the monetary caps of s. 768.28, F.S., and the quoted provision is as easily interpreted as applying only to the immunity reserved by the statute that would be created.

VIII. Amendments:

None.