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.)

BILL: SB 112

SPONSOR: Senator Kurth

SUBJECT: Skateboarding, freestyle, bicycling, and inline skating activities

DATE: January 11, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bowman	Yeatman	CA	Fav/1 amendment
2.	Rhea	Wilson	GO	Favorable
3.			FP	
4.				
5.				

I. Summary:

The bill limits the liability of governmental entities for personal property damage or bodily injuries arising from skateboarding, inline skating and freestyle bicycling activities on property owned or leased by the governmental entity and designated for such activities. The bill does not constitute a waiver of sovereign immunity and 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 limitations on liability do not apply to 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, inline skating or freestyle bike riding participant. Failure to comply with those duties constitutes negligence for purposes of comparative fault.

This bill creates section 316.0085, 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.

Section 768.28, F.S., provides a limited waiver of sovereign immunity for torts, allowing 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 the 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.[1]

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 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 of 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 which are listed below. Skateboarders, inline skaters, 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, inline skate, 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

[1] *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 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 between the occupier of the property and the person entering the property 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.[2] 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.[3] In Florida, trespassers typically have few remedies for injuries received on another's land because

[2]Prosser and Keeton on the Law of Torts Sec. 58 (5th ed. 1984).

[3]*Id*.

> [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.[4]

The attractive nuisance doctrine is an exception to this general rule which is made in order to preserve the safety of children. 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.[5] 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.[6] 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.

III. Effect of Proposed Changes:

Section 1 creates s. 316.0085, F.S., limiting the liability of governmental entities for injury or damages arising from skateboarding, inline skating 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, inline skating 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 "other entity exercising governmental authority."

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[4] *Wood v. Camp*, 284 So.2d 691, 693-94 (Fla. 1973).

[5] *Concrete Constr., Inc. v. Petterson*, 216 So.2d 221 (Fla. 1968), reaffirmed in *Johnson v. Bathey*, 376 So.2d 848 (Fla. 1979).

[6] *Martinello v. B& P Pump USA, Inc.*, 566 So.2d 761 (Fla. 1990).

Inherent risk means those dangers or conditions that are characteristic of, intrinsic to, or an integral part of skateboarding, inline skating and freestyle bicycle riding.

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

Subsection (4) provides that no governmental entity or public employee is liable for damages to persons or property which arise from a person's voluntary participation in skateboarding, inline skating, or freestyle bicycle riding within an area designated for such activities by the governmental entity.

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, inline skating or freestyle bicycle riding, failure to obtain written parental consent before authorizing a child under 17 years of age to participate in the skateboarding, inline skating 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 (6) 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 (7)(a) provides that any person, regardless of age, who participates in, assists in, or observes skateboarding, inline skating 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 (7)(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.

Under the doctrine of comparative negligence, 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 (8) 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 or may collect reduced 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, inline skating or freestyle bicycle riding activities, unless the plaintiff can prove that the governmental entity was grossly negligent, failed 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:

The bill may reduce the insurance cost incurred by governmental entities of providing facilities for skateboarding, inline skating and freestyle bicycling.

VI. Technical Deficiencies:

Subsection (5), which creates exceptions to the limitation of liability created by the bill, provides that the section does not limit tort liability that would otherwise exist where the government fails to warn of a dangerous condition, commits gross negligence or fails to obtain written parental consent for children under 17, and that the section does not constitute a waiver of sovereign immunity under any circumstances. Presumably the tort "liability that would otherwise exist" refers to tort liability actions permitted by s. 768.28, F.S. In addition, it appears that the intended purpose of the subsection is to clarify that the bill is not intended to create a waiver of sovereign immunity above or in addition to the waiver of sovereign immunity in tort actions created by s. 768.28, F.S. This intent could be clarified by specific reference to s. 768.28, F.S.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Comprehensive Planning, Local and Military Affairs:
Qualifies the exception to the limitation of liability where the governmental entity fails to obtain a written consent from the guardians of the child participating in the skateboarding, freestyle bicycling, and inline skating activity at a designated area, to exclude the circumstance where the child's participation in the activity violates posted rules governing the hours of the designated area.