STORAGE NAME: h0019s2z.jud ****FINAL ACTION****
DATE: May 18, 1999 ****SEE FINAL ACTION STATUS SECTION****

HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIARY
FINAL ANALYSIS

BILL #: CS/CS/HB 19

RELATING TO: Skateboarding, Inline Skating, and Freestyle Bicycling

SPONSOR(S): Committees on Governmental Operations and Judiciary, Representative Futch and others

COMPANION BILL(S): SB 58 (similar) and SB 112 (similar)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) JUDICIARY YEAS 7 NAYS 0
(2) GOVERNMENTAL OPERATIONS YEAS 4 NAYS 0
(3)
(4)
(5)

I. FINAL ACTION STATUS:

On April 20, 1999, CS/CS/HB 19 was approved by the Governor. (Chapter #99-133)

II. SUMMARY:

This bill creates s. 316.0085, F.S., which expands sovereign immunity for skateboarding, inline skating ("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 to the public" for such activities.

This bill establishes immunity for all governmental entities and public employees, but it does not extend to independent concessionaires, non-governmental entities, 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 would be prevented from bringing suit.

This bill creates three exceptions to sovereign immunity: (1) where the governmental entity fails to warn of dangerous conditions of which the participant has no notice; (2) where the governmental entity commits gross negligence; and (3) where the governmental entity fails to obtain written consent by the parents of a child under the age of 17 allowing the child to participate in skateboarding, rollerblading, and freestyle bicycle riding 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.

III. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

1. **Sovereign Immunity** - Sovereign immunity is a doctrine which prohibits suits against the government without the government's consent. Sovereign immunity encompasses to all subdivisions of the state, including counties and school boards. 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. Pursuant to this provision, the Legislature has in limited circumstances partially waived sovereign immunity.

   a. **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 in tort cases. 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 this 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). 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).

      (3) **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 . . . " Negligence is 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 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. See, e.g., Hoffman v. Jones, 280 So.2d 431 (Fla. 1973); Pinellas County By and Through Board of County Commissioners v. Bettis, 659 So.2d 1365 (Fla. 2d DCA 1995); Cody v. Kernaghan, 682 So.2d 1147 (Fla. 4th DCA 1996) rehearing and rehearing en banc denied (Nov. 26, 1996).

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 decided by Florida courts. 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).

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., Martinello v. B & P USA, Inc., 566 So.2d 761 (Fla. 1990); Johnson v. Bathey, 376 So.2d 848 (Fla. 1979); Butler v. Porter-Russell Corp., 217 So.2d 298 (Fla. 1968).

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 provides complete immunity to the United States, the State of Florida, counties, municipalities, agencies, departments, school boards, special districts, other entities exercising governmental authority, and instrumentalities thereof. The immunity does not extend to independent concessionaires or non-governmental entities, including government contractors.

b. **Persons Affected** - Under the bill, skateboarders, rollerbladers, freestyle bicyclists, assistants, and spectators who voluntarily place themselves within the zone of risk would 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 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.

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?

N/A

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

N/A

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

N/A

b. If an 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?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

   a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

      N/A

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

      N/A

4. Individual Freedom:

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

      A goal of the bill is to increase opportunities for interested persons to engage in skateboarding, rollerblading, and freestyle bicycling on public property.

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

      The bill would limit the right of certain parties to bring suit against government entities in specific circumstances.

5. Family Empowerment:

   a. If the bill purports 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?

      N/A

   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:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 316.0085, F.S.

E. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

IV. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

The bill would reduce the costs associated with insuring public lands devoted to skateboarding, rollerblading, or freestyle bicycling by preventing certain tort claims arising out of such activities.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

The bill would reduce the costs associated with insuring public lands devoted to skateboarding, rollerblading, or freestyle bicycling by preventing certain tort claims arising out of such activities.

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

V. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

VI. COMMENTS:

The bill does not define the terms “skateboarding,” “inline skating,” or “freestyle bicycling,” and it is possible that confusion may arise regarding a governmental entity’s limits of liability associated with present uses of government-created public “bicycle trails,” for instance.

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On January 6, 1999, the Judiciary Committee adopted one amendment and the bill was made a committee substitute. The amendment clarifies one exception to the extension of sovereign immunity from liability in cases where a child under 17 years of age participates in skateboarding, inline skating, or freestyle bicycling activities without having written parental consent and is injured. In such cases, the governmental entity will retain its immunity under the bill if that child’s participation was in violation of posted rules governing the hours of authorized use of the area designated for skateboarding, inline skating, or freestyle bicycling.

On February 17, 1999, the Committee on Governmental Operations adopted without objection an amendment sponsored by Rep. Fasano which clarified that persons who observe skateboarding, inline skating and freestyle bicycling assume the risk of injury to themselves but are not liable for the injuries of persons who participate or assist in those activities.

VIII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:	Staff Director:
Michael W. Carlson	Don Rubottom

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:	Staff Director:
Douglas Pile	Jimmy O. Helms

FINAL ANALYSIS PREPARED BY THE COMMITTEE ON JUDICIARY:

Prepared by:	Staff Director:
Michael W. Carlson	Don Rubottom