SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 1790

SPONSOR: Senator Posey

SUBJECT: Exemptions From Liability for Governmental Property Owners or Lessees and Public Employees

DATE: March 3, 2004 REVISED: 03/08/04

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Herrin	Yeatman	CP	Fav/1 amendment
2.			GO	
3.			JU	
4.				
5.				
6.				

I. Summary:

The bill adds paintball to the list of activities for which liability is limited for governmental entities for personal property damage or bodily injuries. This bill does not constitute a waiver of sovereign immunity and does not limit the liability of a governmental entity for failure to guard against or warn of a dangerous condition, gross negligence, or failure to obtain written parental consent for participants in paintball under the age of 17. These limitations on liability with regard to paintball do not apply to independent concessionaires or others using governmental property, regardless of whether a contractual relationship exists with the governmental entity.

The bill adds paintball to those activities for which any person, regardless of age, who participates in, assists in, or observes paintball, assumes the known and unknown inherent risks in this activity and is legally responsible for resulting damages, injury, or death to himself or herself. A governmental entity which sponsors, allows, or permits paintball on its property is not required to eliminate, alter or control the inherent risks in that activity.

Finally, the bill includes paintball among those activities for which s. 316.0085, F.S., prescribes duties required of a participant. Failure to comply with these requirements shall constitute negligence for purposes of comparative fault.

This bill amends section 316.0085 of the Florida Statutes.

II. Present Situation:

Sovereign Immunity
Article X, s. 13 of the State Constitution, provides that sovereign immunity may be waived through an enactment of general law. The Legislature, in s. 768.28, F.S., has expressly waived sovereign immunity in tort actions for claims against its agencies and subdivisions resulting from the negligent or wrongful act or omission of an employee acting within the scope of employment, but established limits on the amount of liability. Pursuant to s. 768.28(9)(a), F.S., an officer, employee, or agent of the state may not be held personally liable in tort or named as a party defendant for any injury that results from an act, event, or omission of action in the scope of her or his employment function unless the officer, employee, or agent acted in bad faith or with malicious purpose or exhibits wanton and willful disregard of human rights, safety, or property.

Section 768.28(5), F.S., provides that a claim or judgment by any one person may not exceed $100,000, and may not exceed $200,000 paid by the state or its agencies or subdivisions for claims arising out of the same incident or occurrence. 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]

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 governmental or private property owner 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.

C **Public Invitee** - Property holders owe public invitees the highest degree of care available to anyone who goes upon their property with invitation. A public invitee enters a premises by express or implied invitation of the owner or controller of the property.[2] Public invitees 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

[1] *See Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985); *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979).
[2] *See Wood v. Camp*, 284 So. 2d 691, 691 (Fla. 1973.

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.

C **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*[3] 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.

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.

C **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.

C **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.

C "**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. 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 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.

[3] *Wood*, 284 So. 2d at 691.

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:

C The place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass;
C 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;
C 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;
C 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
C 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. 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. 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.

Skateboarding, Inline skating, Freestyle bicycling, and Liability
In 1999, in response to the growing phenomenon that has become skating in its various forms, the Florida Legislature enacted s. 316.0085, F.S. The purpose of this section is to encourage governmental owners or lessees of property to make land available to the public for skateboarding, inline skating, and freestyle bicycling. The legislature acknowledged that the lack of public skating areas has been caused in large part by the potential exposure to liability from personal injury lawsuits, as well as the prohibitive costs of insurance. Section 316.0085, F.S., limits the liability of governmental entities for personal property damage or bodily injuries arising from skating or bicycling on property owned by or leased by a governmental entity for such activities. However, this 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 (5) of s. 316.0085, F.S., specifies that the section does not otherwise limit liability that exists for: 1) failure to guard against or warn of a dangerous condition that a participant does not and cannot reasonably be expected to have noticed; 2) gross acts of negligence by the entity or any of its employees considered to be the proximate cause of the injury; or 3) failure of the governmental entity to obtain written parental consent from the parents of children under 17 to participate in these activities. It is important to note, however, that this legislation may not be deemed to constitute a waiver of sovereign immunity, regardless of whether the entity carries an insurance policy that covers the act and the limits of such coverage

Any person, regardless of age, who participates in, assists in, or observes any of these activities assumes the known and unknown inherent risks in this activity and is legally responsible for all damages, injury, or death to himself or herself that may result from the activity. Further, subsection (7) of s. 316.0085, F.S., outlines the responsibilities of participants in these activities, including the requirement to: 1) act within the limits of his or her ability, as well as the design and purpose of the equipment used; 2) maintain control of his or her person and equipment used; and 3) refrain from acting in any manner which may cause or contribute to death or injury of himself, herself, and other persons.

Paintball

The term "paintball" refers to any one of several games involving two or more players that attempt to "mark" each other by firing paintballs at each other using a paintball marker or gun. Paintball games are played at a variety of facilities. Although few governmental entities in this state own paintball facilities, the City of Palm Bay recently opened a paintball park, which is used by an estimated 150-200 people per day on weekends. According to the National Sporting Goods Association, there were 6.9 million participants in paintball games in 2002 which reflects a 24.4% increase.[4] The association reports that paintball games were the fastest growing sport in 2002.[5]

III. Effect of Proposed Changes:

Section 1 amends s. 316.0085, F.S., to include the game of paintball in those activities for which a governmental owner or lessee is encouraged to make property available. It adds paintball to the list of activities that involve dangers and conditions as defined by "inherent risk." The bill provides that paintball games may not occur on property owned or controlled by a governmental entity unless the entity specifically designates an area for that purpose.

This bill limits the liability of governmental entities for personal property damage or bodily injuries arising from paintball games on property owned by or leased by a governmental entity for such activities. However, the bill specifies that this limitation on liability does not apply to the following acts or omissions of the governmental entity or public employee:

- The failure to guard against or warn of a dangerous condition of which a participant does not and cannot be reasonably expected to have notice.
- Gross negligence by the governmental entity or public employee that is the proximate cause of the injury.
- The failure of a governmental entity that designates an area for paintball to obtain written parental consent for a child under 17 to participate in such activity in the designated area.

Further, the bill specifies 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. Any person, regardless of age, who participates in, assists in, or observes paintball assumes the known and unknown inherent risks in this activity and is legally responsible for all damages, injury, or death to himself or herself that may result from the

[4] *See* http://www.nsga.org/public/pages/index.cfm?pageid=150, visited March 4, 2004.
[5] *See id.*

activity. A governmental entity which sponsors, allows, or permits paintball on its property is not required to eliminate, alter or control the inherent risks in that activity.

Finally, the bill provides that a participant, while engaged in paintball, 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.
- Refraining from acting in any manner which may cause or contribute to death or injury of himself or herself, or other persons.

Failure to comply with these requirements shall constitute negligence for purposes of comparative fault.

Section 2 of the bill provides the act shall take effect July 1, 2004.

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:

A plaintiff, filing a claim based on damages resulting from participation in paintball activities at a governmental facility, may be unable to collect damages or receive reduced damages unless the plaintiff can show 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 participant under the age of 17.

C. Government Sector Impact:

This bill limits liability for governmental entities for personal property damage or bodily injuries that may result from paintball. Further, it may reduce the insurance cost for governmental entities that provide facilities for paintball activities.

VI. Technical Deficiencies:

When s. 316.0085(5), F.S., was created in 1999, it established exceptions to the limits on liability provided in the act. The language in this subsection specifies that it does not limit liability that would otherwise exist for failure to guard against or warn of a dangerous condition, gross negligence, or failure to obtain written parental consent for participants in paintball under the age of 17. Further it states, "Nothing in this section shall be deemed to be a waiver of sovereign immunity under any circumstances." Presumably, "liability that would otherwise exist" refers to tort actions as permitted by s. 768.28, F.S. However, adding a specific reference to the waiver of sovereign immunity under s. 768.28, F.S., would clarify matters if this is the intended reference.

VII. Related Issues:

None.

VIII. Amendments:

1 by Comprehensive Planning:
Title amendment.