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: CS/SB 1790

SPONSOR: Governmental Oversight and Productivity Committee and Senator Posey

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

DATE: March 17, 2004 REVISED: _____ _____ _____ _____

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

I. Summary:

Section 316.0085, F.S., currently provides that specified governmental entities and public employees are immune from liability for any personal injury or property damage occurring when persons skateboard, inline skate, or freestyle bicycle in a public park area specifically designated for these activites. The bill amends this section to include paintball in the list of activities to which immunity applies. The bill also clarifies that this section requires a governmental entity to post rules that identify the activities specifically authorized in the park and that indicate that a child under seventeen years of age may not engage in those authorized activities until the governmental entity has received written consent from the child's parents or legal guardians. Finally, the bill provides that the immunity accorded by the bill applies whenever a child uses the park in violation of the posted rules, even if the governmental entity has not obtained written consent from the child's parents or legal guardians.

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

[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.

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.

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

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

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.

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. 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.[4] 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[5] for personal property damage or bodily injuries arising from skating or bicycling on property owned 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

[4] Chapter 99-133, L.O.F.

[5] The term "governmental entity" is defined to mean the United States, State of Florida, or any county or municipality, or any department, agency, or other instrumentality thereof. Section 316.0085(2)(a), F.S.

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.[6] The association reports that paintball games were the fastest growing sport in 2002.[7]

III. Effect of Proposed Changes:

Section 1 amends s. 316.0085(4), F.S., to include the game of paintball in the list of activities, i.e., skateboarding, inline skating, and freestyle bicycling, for which governmental entities[8] and public employees are immune from liability for property damage or bodily injuries occurring when persons engage in these activities in designated public park areas. The bill also amends all other subsections contained in s. 316.0085, F.S., to make conforming changes for the bill's addition of paintball.

Further, the bill amends subsection (5), which currently provides that the immunity accorded in subsection (4) does not apply when the governmental entity or public employee:

1) Fails to guard against or warn of a dangerous condition of which a participant does not and cannot be reasonably expected to have notice;
2) Commits gross negligence that is the proximate cause of the injury; or

[6] *See* http://www.nsga.org/public/pages/index.cfm?pageid=150, visited March 4, 2004.
[7] *See Id.*
8 The term "governmental entity" is defined in s. 316.0085(2), F.S., as: (a) the United States, the State of Florida, any county or municipality, or any department, agency, or other instrumentality thereof; and (b) any school board, special district, authority, or other entity exercising governmental authority.

3) Fails to obtain written parental consent for a child under 17 years of age, except where the child is participating in skateboarding, inline skating, paintball, or freestyle bicycling in violation of posted rules governing the hours of authorized use of the designated park area.

The third exception, stated otherwise, means that immunity applies whenever a child participates in one of the specified activities ***outside of the authorized hours posted*** even though the governmental entity has not obtained written parental consent. The bill amends this third exception to provide that immunity applies whenever a child participates in one of the specified activities ***in violation of rules posted*** even though the governmental entity has not obtained written parental consent. This amendment addresses concerns voiced by local government entities that current law would require a guard to be posted at every designated park area during authorized hours in order to insure that no children were using that area without written parental consent.

Additionally, the third exception as contained in current law and as amended by the bill appears to require governmental entities to post rules regarding authorized use of the park. The bill clarifies that such posting is in fact required by amending subsection (3) to state that:

> Each governmental entity shall post a rule in each specifically designated area that identifies all authorized activities and indicates that a child under 17 years of age may not engage in any of those activities until the governmental entity has obtained written consent, in a form acceptable to the governmental entity, from the child's parents or legal guardians.

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, who files a claim for injuries suffered while participating in paintball activities at a governmental facility, may be unable to collect 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 activities. The bill may reduce insurance costs for governmental entities that provide facilities for paintball activities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.