



# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. DOES THE BILL:

- |                                      |   |  |   |
|--------------------------------------|---|--|---|
| 1. Reduce government?                | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/>            | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/>            | N/A <input type="checkbox"/>            |
| 5. Empower families?                 | Yes <input type="checkbox"/>            | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

To the extent that injured parties can no longer bring suit against government entities, individual freedom is not expanded.

### B. EFFECT OF PROPOSED CHANGES:

#### **Paintball**

Paintball has been described as the fastest growing participation sport, and involves a group of players that divide into teams; each player uses a CO2 charged paint marker (or paint gun) that expels paintballs to mark opponents.<sup>1</sup> While the majority of paint ball fields are owned by private entities, the City of Palm Bay has recently opened a paint ball field within city limits.

#### **Sovereign Immunity**

Sovereign immunity is a doctrine which prohibits suits against the government without the government’s consent. Sovereign immunity extends to all subdivisions of the state, including counties and school boards.<sup>2</sup> The Florida Constitution allows the Legislature to waive immunity through an enactment of general law.<sup>3</sup> Pursuant to this provision, the Legislature has in limited circumstances partially waived sovereign immunity.

#### **Florida’s Partial Waiver of Sovereign Immunity**

In 1973, the Legislature enacted section 768.28, F.S. This section allows individuals to sue government entities under circumstances where a private person “would be liable to the claimant, in accordance with the general laws of this state.”<sup>4</sup> Pursuant to statute, government entities shall not be liable to pay a claim or a judgment by any one person which exceeds the sum of \$100,000 or any claim or judgment which, when totaled with all other claims arising out of the same incident or occurrence, exceeds the sum of \$200,000. Any amounts in excess of these limits may be paid only upon act of the Legislature (popularly known as the claim bill process). Notwithstanding the limits of liability, a government entity may pay a claim or judgment within the limits of insurance coverage provided. Courts have generally found two exceptions to the waiver of sovereign immunity: courts will not impose liability to discretionary functions,<sup>5</sup> nor for government activities wherein the government owes a general duty to all citizens, but no particular duty to the injured party (the public duty doctrine).<sup>6</sup>

<sup>1</sup> See “What is Paintball?” at [www.TopGunPaintball.com](http://www.TopGunPaintball.com).

<sup>2</sup> See s. 768.28(2), F.S., which provides that for purposes of the statutory waiver of sovereign immunity, government entities include the executive departments, the Legislature, the judicial branch, and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.

<sup>3</sup> See Article X, section 13 of the State Constitution.

<sup>4</sup> See s. 768.28(5), F.S.

<sup>5</sup> See *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979), and *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258 (Fla. 1988), in which the Florida Supreme Court designed a four-part test to determine whether a government activity should be classified as discretionary. The court asks: 1) does the challenged activity involve a basic government policy, program, or objective, 2) is the challenged activity central to the

Florida also provides immunity to various other specific government activities by statute. In s. 316.0085, F.S., no governmental entity or public employee shall be liable to any person who voluntarily participates in skateboarding, inline skating, or freestyle bicycling for any damage or injury to property or persons which arises out of a person's participation in such activity, and which takes place in an area designated for such activity. For the purposes of this section, "government entity" is defined as The United States, the State of Florida, any county or municipality, or any department, agency, or other instrumentality thereof; and any school board, special district, authority or other entity exercising governmental authority."<sup>7</sup> Section 316.0085, F.S. states specifically what it does not do:

- This section does not grant authority or permission for a person to engage in skateboarding, inline skating, or freestyle bicycling on property owned or controlled by a governmental entity unless such governmental entity has specifically designated such area for those activities;<sup>8</sup>
- This section does not limit liability which would otherwise exist for the failure of the government to warn of a dangerous condition of which a participant does not and cannot reasonably be expected to have notice; an act of gross negligence by the government entity; or the failure of the government entity to obtain the written consent from the parents or legal guardians of any child under 17 years of age, unless that child's participation is in violation of posted rules governing the hours of authorized use of the designated area.<sup>9</sup>
- This section does not create a duty of care or basis of liability for death, personal injury, or damage to personal property.<sup>10</sup>
- This section shall not be deemed as a waiver of sovereign immunity under any circumstances.<sup>11</sup>
- This section shall not limit the liability of an independent concessionaire for injuries or damages suffered as a result of the operation of skateboards, inline skates, or freestyle bicycles on public property.<sup>12</sup>

Section 316.0085, F.S., provides that any person who observes, participates in or assists in skateboarding, inline skating, or freestyle bicycling assumes the known and unknown inherent risks in these activities, irrespective of age, and is legally responsible for all damages, injury, or death which may result from these activities. Government entities are not required to eliminate, alter, or control inherent risks in these activities. Further, the law requires participants to act within the limits of his or her ability and the purpose and design of the equipment used; maintain control of his or her person and the equipment used; and refrain from acting in any manner which may cause or contribute to death or injury of himself, herself, or other persons.<sup>13</sup>

Lastly, s. 316.0085, F.S., provides that the fact that a government entity carries insurance which covers any act described by this section shall not constitute a waiver of the protections set forth in this section, regardless of the existence or limits of such coverage.<sup>14</sup>

This bill adds paintball to s. 316.0085, F.S., as an activity for which government shall not be liable for injuries to persons who voluntarily participate. Paintball is also listed as an activity for which the law

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accomplishment of the policy, program, or objective, 3) does the challenged activity require the government to make policy evaluations, exercise judgment, or use expertise, and 4) does the government agency possess proper legal authority to engage in the challenged activity? If all four questions can be answered affirmatively, the activity is discretionary, and no liability will be assessed against the government.

<sup>6</sup> See *Trianon Park Condominium Association v. City of Hialeah*, 468 So.2d 912 (Fla. 1985).

<sup>7</sup> See s. 316.0085(2), F.S.

<sup>8</sup> See s. 316.0085(3), F.S.

<sup>9</sup> See s. 316.0085(5), F.S.

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See s. 316.0085(6), F.S.

<sup>13</sup> See s. 316.0085(7), F.S.

<sup>14</sup> See s. 316.0085(8), F.S.

does not grant authority or permission to engage in, unless the government entity has specifically designated such area for paintball activities; requires written consent from parents of a child under 17 to participate in order for the limited liability to attach; provides for the legal responsibility for damages, injury, or death to persons who participate in or observe paintball; provides that the government is not required to eliminate, alter or control the inherent risks of paintball; and provides that paintball participants are responsible for specified activities.

C. SECTION DIRECTORY:

Section 1 amends s. 316.0085, adding paintball to the list of activities for which liability does not attach to governmental entities under specified circumstances. Adds paintball to the list of activities for which a person is legally responsible for all damages to self or others.

Section 2 provides an effective date of July 1, 2004.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

To the extent that the state risk management pool is not responsible for any tort actions arising from paintball activities, the state may incur some savings.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill might reduce the costs of liability insurance for governmental entities that make land available for paintball activities.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Any person who participates or assists in paintball activities is legally responsible for all damages, injury, or death which results from this activity.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Article I, section 21 of the State Constitution provides that “the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.” Where citizens have enjoyed a historical right of access, the Legislature can only eliminate a judicial remedy under two circumstances: a valid public purpose coupled with a reasonable alternative, or an over-riding public necessity.<sup>15</sup> This bill provides that the purpose of the immunity provided is to encourage governmental owners or lessees of property to make land available to the public for paintball, that governmental owners or lessees of property have failed to make property available for such activities because of the exposure to liability from lawsuits and the prohibitive cost of insurance, and that the inherent risks and dangers should be assumed by those participating in such activities. It is unknown whether the stated public purpose will be considered by the court as an over-riding public necessity sufficient to overcome the constitutional right to access to courts.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

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<sup>15</sup> See *Kluger v. White*, 281 So.2d 1 (Fla. 1973).