The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Budget Subcommittee on General Government Appropriations

BILL:	CS/SB 802
INTRODUCER:	Judiciary Committee and Environmental Preservation and Conservation Committee
SUBJECT:	Premises Liability
DATE:	February 27, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Uchino	Yeatman	EP	**Favorable**
2.	Munroe	Cibula	JU	**Fav/CS**
3.	Pigott	DeLoach	BGA	**Pre-meeting**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill allows private property owners who provide outdoor recreational opportunities on their property to enter into written agreements with the state, as opposed to a formal lease, and still receive the benefit of the limitation of liability.

The bill also provides limitation of liability protection to private property owners who make their land available to specific persons, as opposed to only "the public," for the purpose of hunting, fishing or wildlife viewing. To limit liability, the landowner must provide notice of the liability limits to the person or persons using the land and must not derive revenue from patronage of the property for outdoor recreational purposes.

This bill substantially amends section 375.251, Florida Statutes.

II. Present Situation:

Legal Duties for Landowners Towards Persons on Their Land

In a negligence action, to be entitled to certain remedies, a plaintiff must prove:

- a lawful duty exists;
- the duty was breached; and
- damages were suffered as a result of the breach.

Current tort law in Florida related to landowners' duty to persons on their land is governed by the status of the person and the duty of care owed by the landowner to the person.[1] There are two basic categories of persons on land, invitees and trespassers.

Generally, an invitee is a person who was invited to enter the land.[2] Section 768.075(3)(a)1., F.S., defines "invitation" to mean, "the visitor entering the premises has an objectively reasonable belief that he or she has been invited or is otherwise welcome on that portion of the real property where injury occurs." Landowners owe certain duties to invitees and can be sued in tort if an injury is caused by a breach of a duty. The duties owed to invitees are:

- to use reasonable care to keep and maintain property in reasonably safe condition; and
- to warn of concealed dangers that are known or should be known to the landowner and that the invitee cannot discover through the exercise of due care.[3]

A trespasser [4]can either be a "discovered trespasser" or an "undiscovered trespasser." A discovered trespasser is a person who did not have an express or implied invitation and whose actual presence was discovered in the preceding 24 hours before an injury occurred.[5] An undiscovered trespasser is a person whose actual presence was not discovered in the preceding 24 hours before an injury occurred.[6] "An owner cannot, however, be held liable for a negligent condition as to an undiscovered trespasser who chooses to come upon his property without his knowledge."[7] To avoid liability to an undiscovered trespasser, a property owner must not engage in intentional misconduct that causes the injury.[8] The duty owed to a discovered trespasser is broader and includes:

- refraining from gross negligence or intentional misconduct that causes the injury; and
- warning the trespasser of hidden dangerous conditions.[9]

Current Law for Private Landowners or Lessees who Allow the Public on Their Land

Section 375.251, F.S., provides limited liability protection to private landowners who enter into "lease" agreements with the state to provide outdoor recreational activities on their land or who

[1] Thomas D. Sawaya, 6 Fla. Prac., Personal Injury & Wrongful Death Actions § 10:6 Invitees (2011-2012 ed.).
[2] *Id.* (citing *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973) which expand[s] the definition of invitee to include social guests which the court referred to as 'licensees by invitation.' After *Wood,* invitees are defined as those persons who come on the property at the invitation of the landowner.").
[3] Thomas D. Sawaya, 6 Fla. Prac., Personal Injury & Wrongful Death Actions § 10:6 Invitees (2011-2012 ed.).
[4] "A trespasser is one who enters the owners (sic) property for his own convenience without right or authority." Thomas D. Sawaya, 6 Fla. Prac., Personal Injury & Wrongful Death Actions § 10:4 Trespassers (2011-12 ed.).
[5] Section 768.075 (3)(a)2., F.S.
[6] Section 768.075(3)(a)3., F.S.
[7] Sections 768.075(3)(a) and (b), F.S., *See also Wood*, 284 So. 2d at 693-694.
[8] *Id.*
[9] *Id. See also, Florida East Coast Ry. Co. v. Gonsiorowski*, 418 So. 2d 382, 384 (Fla. 4th DCA 1982).

otherwise provide recreational opportunities to the public. To take advantage of the limited liability protection afforded by statute, the property owner:

- cannot charge for entry to the property or conduct commercial or other activity where profit is derived from public patronage on any part of the property;[10] or
- may lease[11] the property to the state for outdoor recreational purposes.[12]

"Outdoor recreational purposes" include, but are not limited to, "hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, motorcycling, and visiting historical, archaeological, scenic or scientific sites."[13]

Limitation of Liability for Private Landowners Who Enter Into Leases with the State

If private landowners enter into leases with the state to provide recreational opportunities on their land, they are provided with limited liability protection. If, however, the written agreements are anything other than a lease, the law is silent. For example, the Florida Fish and Wildlife Conservation Commission (FWC) may enter into leases with private landowners for the purpose of facilitating scheduled hunts. The only purpose of the lessor/lessee relationship is to avail the private party of the liability protection provided by s. 375.251, F.S. This arrangement may create legal obligations and rights that exceed what is necessary to accomplish the specific goal of offering hunts to the public.

The FWC wants to provide outdoor recreational activities on privately owned lands that would not require the degree of legal control and complexity of a lease. In some instances use or management agreements, contracts for services or easements may be more appropriate arrangements between private landowners and the state.[14] When a landowner enters into a lease with the state, the landowner gives the state a possessory interest in the property. Other contractual arrangements may transfer fewer rights to the state and do not give the state a possessory interest in the land. For instance, if a landowner grants the state an easement to a property, the state has a limited right to use the property for a specific purpose.

> An easement is an incorporeal, nonpossessory interest in land which concerns the use of the land of another. An easement is not an estate in land and does not convey title to land or dispossess the owner of the land subject to the easement. Instead, an easement only grants the right to use the property for some particular purpose or purposes.[15]

[10] Section 375.251(2), F.S.
[11] "Lease" means "a contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usu. rent. • The lease term can be for life, for a fixed period, or for a period terminable at will." BLACK'S LAW DICTIONARY (9th ed. 2009).
[12] Section 375.251(3), F.S.
[13] Section 375.251(5), F.S.
[14] An easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose."BLACK'S LAW DICTIONARY (9th ed. 2009).
[15] *Sears, Roebuck and Co. v. Franchise Finance Corp. of America*, 711 So.2d 1189, 1191 (2d DCA 1998).

The state would only exercise as much control over the property as is necessary to use the easement for the intended purpose. This is a more limited *nonpossessory* interest in the land. The FWC indicates the state may also benefit from alternative types of written arrangements because the parties will not be subject to landlord/tenant law, which creates certain obligations on both the landowner and the state.[16]

Private Landowners Who Allow the Public to Use Their Land for Recreational Activities

Under current law, private landowners who make their land available to the public for outdoor recreational activities are also afforded limited liability protection. This protection does not apply for individuals or groups of individuals.[17] For example, if landowners allow troops of Boy Scouts on their land but do not want anyone else in the general public to have the same access, they are not afforded any limitation on liability protection.

According to the FWC, Georgia, Alabama, Louisiana and South Carolina all provide landowner liability protection to landowners who allow people other than the general public to use their land for recreational purposes.[18]

Sovereign Immunity

The term "sovereign immunity" originally referred to the English common law concept that the government may not be sued because "the King can do no wrong." Sovereign immunity bars lawsuits against the state or its political subdivisions for the torts of officers, employees, or agents of such governments unless the immunity is expressly waived.

Article X, s. 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the right to waive such immunity in part or in full by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state. Under this statute, officers, employees, and agents of the state will not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.[19]

Instead, the state steps in as the party litigant and defends against the claim. Section 768.28(5), F.S., limits the recovery of any one person to $200,000 for one incident and limits all recovery related to one incident to a total of $300,000.[20] Parties may pursue a claim bill with the

[16] Florida Fish and Wildlife Conservation Commission, 2012 Session Legislative Proposal, (Dec. 13, 2011) (on file with the Senate Committee on Judiciary).
[17] Section 375.251(2), F.S.
[18] Florida Fish and Wildlife Conservation Commission, 2012 Session Legislative Proposal, (Dec. 13, 2011) (on file with the Senate Committee on Judiciary).
[19] Section 768.28(9)(a), F.S.
[20] Section 1, ch. 2010-26, Laws of Florida, amended s. 768.28(5), F.S., to increase the limits to $200,000 for one person for one incident and $300,000 for all recovery related to one incident, to apply to claims arising on or after the law's effective date of October 1, 2011.

Legislature for any excess judgment or equitable claim that is not recovered from a state agency or other entity covered by the waiver of sovereign immunity.[21]

III. Effect of Proposed Changes:

This bill specifies ways a private property owner may limit his or her liability to persons allowed onto the property for outdoor recreational purposes.

Hunting, Fishing, Wildlife Viewing

Under the bill, a property owner may limit his or her liability to a person allowed on the property for hunting, fishing, or wildlife viewing if the property owner:

- notifies (via written notice or conspicuously posts a notice on the area) the person upon entry to the land that the property owner's liability is limited under state law; and
- does not impose a charge or derive revenue from patronage of the property for outdoor recreational purposes.

This provision does not require a property owner to provide access to the property to the general public in order to receive the benefit of the limitation on liability.

Outdoor Recreational Purposes/Agreements with the State

Under the bill, a property owner may limit his or her liability to a person allowed on the property for outdoor recreational purposes if the property owner enters into a written agreement with the state concerning the property for the benefit of the public. The agreement must recognize that the state is responsible for personal injury, loss, or damage resulting in whole or in part from the state's use of the area under the terms of the agreement subject to the limitations and conditions specified in s. 768.28, F.S.

The bill provides legislative intent that such agreements between the owner of the area and the state compensate the owner only for reasonable costs and expenses as provided in the agreement. However, an owner of the area and the state are not subject to liability if the compensation identified in the agreement exceeds the costs and expenses.

Existing law requires the property owner to enter a lease with the state to receive the benefit of the liability limitation. This change will enable the state to execute a written agreement with a private property owner to expand outdoor recreational activities without taking a leasehold interest in the property where the activities are conducted. This may simplify the legal arrangement and provide better protection for a private property owner should a lawsuit arise.

Effective Date

The bill provides an effective date of July 1, 2012.

[21] Section 768.28(5), F.S. (provides that any portion of a judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues

Article 1, section 21 of the Florida Constitution addresses access to the courts. It states, "[t]he courts shall be open to every person for redress of any injury." Tort limitations may implicate judicial review under this section of the Florida Constitution; however, the Florida Supreme Court has held that the current statute does not deny access to courts.[22]

The Florida Supreme Court in "*Kluger v. White* announced a test that the Legislature must meet when it abolishes a common law or statutory right of redress. But [the Supreme Court] also noted the distinction between abolishing a cause of action and merely changing a standard of care."[23]

In *Iglesia v. Floran*[24] the Court held that although a 1978 amendment to a workers' compensation statute[25] precluded liability for simple negligence, the statute did not implicate the access to courts provision in the State Constitution.[26]

The Florida Supreme Court has repeatedly held that a statute that merely alters the standard of care owed by one party to another or increases the degree of negligence necessary to maintain a successful tort action does not abolish a preexisting right of access and does not, therefore, implicate Article I, Section 21 of the State Constitution. In *Abdin v. Fischer*, the Court upheld a statute that exempted property owners from liability

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[22] *See Abdin v. Fischer*, 374 So. 2d 1379 (1979) (holding that s. 375.251, F.S., limiting liability of owners and lessees who provide the public with a park area for outdoor recreational purposes, is a reasonable exercise of legislative power and does not violate Art. 1, s. 21, FLA. CONST., regarding access to courts).

[23] *Id.* at 1380-1381 (citing *Kluger v. White*, 281 So. 2d 1 (Fla. 1973)).

[24] *Iglesia v. Floran*, 394 So. 2d 994 (Fla. 1981).

[25] Section 440.11(1), F.S., as amended by s. 2 of ch. 78-300, Laws of Florida, "grants immunity from tort liability to co-employees who, while in the course of their employment, negligently injure other employees of the same employer, unless the employees act with willful and wanton disregard or unprovoked physical aggression or with gross negligence." (cited in *Iglesia*, 394 So. 2d at 995).

[26] *Iglesia*, 394 So. 2d at 995-96 (citing *McMillan v. Nelson*, 5 So. 2d 867 (Fla. 1942)). The Court described its rationale that "[s]ection 440.11[(1), F.S., as amended] still provides a cause of action for gross negligence just as the court-sustained 'guest statute' did. The Florida Legislature has broad powers in enacting legislation. The acts that it passes are to be sustained unless they run afoul of a limitation placed upon them by the Florida Constitution or violate a provision of the United States Constitution."

for injuries occurring on private property set aside for public recreation, unless the owner inflicted "deliberate, willful, or malicious injury to persons or property."[27]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There is the potential for a positive fiscal impact on private sector landowners in the form of reduced litigation and liability. Conversely, the bill will limit legal remedies available to a person who is injured on private land.

C. Government Sector Impact:

According to the FWC, this bill does not have a fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on February 9, 2012:
The committee substitute outlines the manner in which a property owner must notify persons that the owner's liability is limited under state law. The committee substitute requires the state to assume liability for personal injuries resulting from the state's use of an area as a concurrent condition to limiting the landowner's liability.

B. Amendments:

None.

[27] *Abdin v. Fischer*, 374 So. 2d 1379, 1380-81 (Fla. 1979) (holding that to the extent the "statute alters the standard of care owed to plaintiff by defendants, this type of modification by the legislature is not prohibited by the constitution." The Florida Supreme Court noted in *Kluger* that there is a "distinction between abolishing a cause of action and merely changing a standard of care.").