

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 287 Liability of Persons Providing Areas for Public Outdoor Recreational Purposes

**SPONSOR(S):** Shoaf

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 920

| REFERENCE  | ACTION    | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|--|-----------|---------|--|
| 1) Civil Justice & Property Rights Subcommittee        | 18 Y, 0 N | Mawn    | Jones                                    |
| 2) Environment, Agriculture & Flooding<br>Subcommittee | 17 Y, 0 N | Gawin   | Moore                                    |
| 3) Judiciary Committee                                 |           | Mawn    | Kramer                                   |

### SUMMARY ANALYSIS

The Outdoor Recreation and Conservation Act of 1963 (“ORCA”) gives the Department of Environmental Protection specific authority to develop and execute a comprehensive statewide outdoor recreation plan (“plan”), which must “document recreational supply and demand, describe current recreational opportunities, estimate the need for additional recreational opportunities, and propose means for meeting identified needs.” Two important plan components are coordinating with and taking an inventory of private outdoor recreational enterprises. To encourage landowners in the state to make their private land and water areas (“areas”) available to the public for an “outdoor recreational purpose,” current law limits the civil liability of a landowner who:

- Gives the public free access to the area for an outdoor recreational purpose if the landowner does not otherwise derive revenue from giving the public such access.
- Contracts with the state to open the area to the public for an outdoor recreational purpose, where the contract makes the state responsible for personal injury, loss, or damage resulting from the state’s use of the area under the contract’s terms and does not result in compensation to the owner above reimbursement for reasonable costs or expenses associated with the contract.

Specifically, current law provides that such landowners:

- Do not owe a duty of care to keep the area safe or warn of hazardous conditions, structures, or activities.
- Are not civilly liable for any injury to persons or property caused by a person who enters the area, unless such injury is caused by the landowner’s deliberate, willful, or malicious conduct.

The bill:

- Expands the entities with which a landowner may contract to receive the benefit of an ORCA liability limitation from “the state” to the state or any governmental or public entity created by law.
- Expands the definition of “outdoor recreational purposes” to include “traversing or crossing for the purpose of ingress and egress to and from, and access to and from, public lands or lands owned or leased by a state agency which are used for outdoor recreational purposes.”
- By expanding the definition of “outdoor recreational purposes,” expands the purposes for which an owner may open an area to the public and receive the benefit of an ORCA liability limitation.

The bill does not appear to have a fiscal impact on state government but may have an indeterminate fiscal impact on local governments.

The bill provides an effective date of July 1, 2021.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Civil Liability and Negligence

A "tort" is a wrong for which the law provides a remedy. The purpose of tort law is to fairly compensate a person harmed by another person's wrongful acts, whether intentional, reckless, or negligent, through a civil action or other comparable process. A properly-functioning tort system:

- Provides a fair and equitable forum to resolve disputes;
- Appropriately compensates legitimately harmed persons;
- Shifts the loss to responsible parties;
- Provides an incentive to prevent future harm; and
- Deters undesirable behavior.<sup>1</sup>

"Negligence" is a legal term for a type of tort action that is unintentionally committed. In a negligence action, the plaintiff is the party that brings the lawsuit, and the defendant is the party that defends against it. To prevail in a negligence lawsuit, a plaintiff must demonstrate that the:

- Defendant had a legal duty of care requiring the defendant to conform to a certain standard of conduct for the protection of others, including the plaintiff, against unreasonable risks;
- Defendant breached his or her duty of care by failing to conform to the required standard;
- Defendant's breach caused the plaintiff's injury; and
- Plaintiff suffered actual damage resulting from his or her injury.<sup>2</sup>

##### *Duty of Care*

The first of the four elements a plaintiff must show to prevail in a negligence action is that the defendant owed the plaintiff a "duty of care" to do something or refrain from doing something. The existence of a legal duty is a threshold requirement that, if satisfied, "merely opens the courthouse doors."<sup>3</sup> Whether a duty sufficient to support a negligence claim exists is a matter of law<sup>4</sup> determined by the court.<sup>5</sup> A duty may arise from many sources, including:

- Legislative enactments or administrative regulations;
- Judicial interpretations of such enactments or regulations;
- Other judicial precedent; and
- The general facts of the case.<sup>6</sup>

In determining whether a duty arises from the general facts of the case, courts look to whether the defendant's conduct foreseeably created a broader "zone of risk" that posed a general threat of harm to others.<sup>7</sup> Such zone of risk defines the scope of the defendant's legal duty, which is typically to either lessen the risk or ensure that sufficient precautions are taken to protect others from the harm the risk

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<sup>1</sup> Am. Jur. 2d Torts s. 2.

<sup>2</sup> 21 Florida Practice Series § 1401:1; see *Barnett v. Dept. of Financial Services*, 303 So. 3d 508 (Fla. 2020).

<sup>3</sup> See *Kohl v. Kohl*, 149 So. 3d 127 (Fla. 4th DCA 2014).

<sup>4</sup> A matter of law is a matter determined by the court, unlike a matter of fact which usually is determined by the jury. Matters of law include issues regarding a law's application or interpretation, issues regarding what the relevant law is, and issues of fact reserved for judges to resolve. Legal Information Institute, *Question of Law*, [https://www.law.cornell.edu/wex/question\\_of\\_law](https://www.law.cornell.edu/wex/question_of_law) (last visited Mar. 1, 2021); Legal Information Institute, *Question of Fact*, [https://www.law.cornell.edu/wex/Question\\_of\\_fact](https://www.law.cornell.edu/wex/Question_of_fact) (last visited Mar. 1, 2021).

<sup>5</sup> See *Kohl*, 149 So. 3d at 135; *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1110 (Fla. 2005).

<sup>6</sup> See *Goldberg*, 899 So. 2d at 1105 (citing *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182 (Fla. 2003)).

<sup>7</sup> See *Kohl*, 149 So. 3d at 135 (citing *McCain v. Fla. Power Corp.* 593 So. 2d 500 (Fla. 1992)); see also *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001).

poses.<sup>8</sup> However, it is not enough that a risk merely exists or that a particular risk is foreseeable; rather, the defendant's conduct must create or control the risk before liability may be imposed.<sup>9</sup>

### *Breach of Duty of Care*

The second element a plaintiff must prove is that the defendant "breached," or failed to discharge, the duty of care. Whether a breach occurred is generally a matter of fact for the jury to determine.<sup>10</sup>

### *Causation*

The third element is that the defendant's breach of the duty of care "proximately caused" the plaintiff's injury. Like a breach, whether or not proximate causation exists is generally a matter of fact for the jury to determine.<sup>11</sup> Florida follows the "more likely than not" standard in proving causation; thus, the inquiry is whether the negligence probably caused the plaintiff's injury.<sup>12</sup> In determining whether a defendant's conduct proximately caused a plaintiff's injury, the factfinder must analyze whether the injury was a foreseeable consequence of the danger created by the defendant's negligent act or omission.<sup>13</sup> This analysis does not require the defendant's conduct to be the exclusive or even the primary cause of the injury suffered; instead, the plaintiff must only show that the defendant's conduct was a substantial cause of the injury.<sup>14</sup>

### *Damages*

The final element a plaintiff must show to prevail in a negligence action is that the plaintiff suffered some harm, or "damages." Actual damages, also called compensatory damages, are those damages actually suffered by a plaintiff as the result of the injury alleged and proved.<sup>15</sup> Juries award actual damages to compensate an injured person for a defendant's negligent acts.<sup>16</sup> Factors considered when calculating actual damages include lost wages or income, medical bills connected to the injury, the cost of repair to damaged property, and costs for coping with an injury.<sup>17</sup>

### *Comparative Negligence in Florida*

In Florida, before the court awards damages in a negligence action, the jury generally assigns a fault percentage to each party under the comparative negligence rule. Florida applies<sup>18</sup> a "pure" comparative negligence rule, which allows a plaintiff to recover damages proportional to his or her fault percentage.<sup>19</sup> For example, if a plaintiff is 40 percent at fault for an accident causing the plaintiff's injury and the defendant is 60 percent at fault, the plaintiff would recover 60 percent of his or her damages.

### Outdoor Recreation and Conservation Act

In 1963, Florida enacted the Outdoor Recreation and Conservation Act ("ORCA") amid growing concerns about the potential loss of outdoor recreational opportunities due to increased development.<sup>20</sup> ORCA formalized the state's outdoor recreation planning efforts and enabled a series of funded land

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<sup>8</sup> See *Kohl*, 149 So. 3d at 135; see also *Whitt*, 788 So. 2d at 217.

<sup>9</sup> See *Bongiorno v. Americorp, Inc.*, 159 So. 3d 1027 (Fla. 5th DCA 2015), citing *Demelus v. King Motor Co. of Fort Lauderdale*, 24 So. 3d 759 (Fla. 4th DCA 2009).

<sup>10</sup> See *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009).

<sup>11</sup> See *Sanders v. ERP Operating Ltd. Partnership*, 157 So. 3d 273 (Fla. 2015).

<sup>12</sup> See *Ruiz v. Tenent Hialeah Healthsystem, Inc.*, 260 So. 3d 977 (Fla. 2018).

<sup>13</sup> See *id.* at 981-982.

<sup>14</sup> See *id.* at 982.

<sup>15</sup> See *Birdsall v. Coolidge*, 93 U.S. 64 (1876).

<sup>16</sup> See *St. Regis Paper Co. v. Watson*, 428 So. 2d 243 (Fla. 1983).

<sup>17</sup> See Legal Information Institute, *Actual Damages*, [https://www.law.cornell.edu/wex/actual\\_damages](https://www.law.cornell.edu/wex/actual_damages) (last visited Mar. 1, 2021).

<sup>18</sup> The comparative negligence standard does not apply to any action brought to recover economic damages from pollution, based on an intentional tort, or to which the joint and several liability doctrine is specifically applied in chs. 403, 498, 517, 542, and 895, F.S. S. 768.81(4), F.S.

<sup>19</sup> S. 768.81(2), F.S.; see *Williams v. Davis*, 974 So. 2d 1052 (Fla. 2007).

<sup>20</sup> Department of Environmental Protection, *Statewide Comprehensive Outdoor Recreation Plan: Introduction and Background*, <https://floridadep.gov/sites/default/files/SCORP-Chapter-1-w-tags.pdf> (last visited Mar. 1, 2021).

acquisition programs for conservation and recreation purposes, including the purchase of land for parks and recreation areas.<sup>21</sup> Due to ORCA's early success, approximately 14 million acres of public lands are currently available in the state for outdoor recreation.<sup>22</sup> ORCA also gave the Department of Environmental Protection the specific authority to develop and execute a comprehensive statewide outdoor recreation plan ("plan"), which must "document recreational supply and demand, describe current recreational opportunities, estimate the need for additional recreational opportunities, and propose means for meeting identified needs."<sup>23</sup>

Two important plan components are coordinating with and taking an inventory of private outdoor recreational enterprises. To encourage landowners in the state to make their private land and water areas ("areas") available to the public for an "outdoor recreational purpose," current law limits the civil liability of a landowner who:

- Gives the public free access to his or her area for an outdoor recreational purpose if the landowner does not otherwise derive revenue from giving the public such access.<sup>24</sup>
- Contracts with the state to open his or her area to the public for an outdoor recreational purpose, where the contract makes the state responsible for personal injury, loss, or damage resulting from the state's use of the area under the contract's terms<sup>25</sup> and does not result in compensation to the landowner above reimbursement for reasonable costs or expenses associated with the contract.<sup>26</sup>

Landowners meeting these requirements:

- Do not owe a duty of care to keep the area safe or to warn of hazardous conditions, structures, or activities.<sup>27</sup>
- Are not civilly liable for any injury to persons or property caused by a person who enters the area, unless such injury is caused by the owner's deliberate, willful, or malicious conduct.<sup>28</sup>

"Outdoor recreational purposes" include:

- Hunting;
- Fishing;
- Wildlife viewing;
- Swimming;
- Boating;
- Camping;
- Picnicking;
- Hiking;
- Pleasure driving;
- Nature study;
- Water skiing;
- Motorcycling; and
- Visiting historical, archaeological, scenic, or scientific sites.<sup>29</sup>

### **Effect of Proposed Changes**

The bill:

- Expands the entities with which an owner may contract to receive the benefit of an ORCA liability limitation from "the state" to the state or any governmental or public entity created by law.

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> S. 375.021(2), F.S.

<sup>24</sup> S. 375.251(2), F.S.

<sup>25</sup> S. 375.251(3)(a), F.S. The state's responsibility is limited by the sovereign immunity damages caps in s. 768.28, F.S.

<sup>26</sup> S. 375.251(3), F.S. The liability limitation for such owners applies only to those persons going on the area subject to the agreement, including invitees, licensees, and trespassers.

<sup>27</sup> S. 375.251(2)(a) and (3)(a), F.S.

<sup>28</sup> *Id.*

<sup>29</sup> S. 375.251(5)(b), F.S.

- Expands the definition of “outdoor recreational purposes” to include “traversing or crossing for the purpose of ingress and egress to and from, and access to and from, public lands or lands owned or leased by a state agency which are used for outdoor recreational purposes.”

By expanding the definition of “outdoor recreational purposes,” the bill expands the purposes for which a landowner may open an area to the public – including allowing the public to walk across the area to reach public land – and receive the benefit of an ORCA liability limitation.

The bill provides an effective date of July 1, 2021.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 375.251, F.S., relating to limitation on liability of persons making available to public certain areas for recreational purposes without charge.

**Section 2:** Provides an effective date of July 1, 2021.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

The bill would limit the civil liability of persons that contract with a governmental entity that is not the state under specified circumstances and make such governmental entity solely liable for damages arising out of the governmental entity’s use of an area under the contract. These governmental entities may include county and municipal governments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill limits the civil liability of landowners who contract with a governmental or public entity that is not the state under specified circumstances, which could result in a positive indeterminate financial impact on the private sector.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**