

By Senator Fasano

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A bill to be entitled
An act relating to sovereign immunity; amending
s. 768.28, F.S.; prescribing limits and
conditions on the state's waiver of sovereign
immunity; providing that discretionary function
immunity is an exception to the waiver;
providing that public-duty immunity is an
exception to the waiver; providing an effective
date.

WHEREAS, Section 13 of Article X of the State
Constitution grants the Legislature sole authority to waive
sovereign immunity, and

WHEREAS, in 1973, the Legislature, exercising that
authority, adopted section 768.28, Florida Statutes, and

WHEREAS, the language of the waiver with respect to
jurisdiction, as set forth in subsection 768.28(1), Florida
Statutes, and substantively, as set forth in subsection
768.28(5), Florida Statutes, is similar to that found in 28
U.S.C. ss. 1346(b) and 2674 which governs the United States,
and

WHEREAS, it has always been the intent of the
Legislature that such waiver provisions be construed strictly
and be construed and applied as the similar provisions in
federal law are applied, and

WHEREAS, it has been brought to the Legislature's
attention that such waiver is not being applied as intended,
and

WHEREAS, in addition to clarification and explicit
direction, it is necessary that the statute set out the
legislative intent with respect to exceptions for the exercise

1 of a discretionary function or public duty and the factors to
2 be applied in determining the existence of the exceptions, and

3 WHEREAS, the exception for discretionary-function
4 immunity and the public-duty doctrine currently exist in law
5 and this legislation will make explicit in the current
6 statutes concepts that already exist, NOW, THEREFORE,

7
8 Be It Enacted by the Legislature of the State of Florida:

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10 Section 1. Subsections (1) and (5) of section 768.28,
11 Florida Statutes, are amended to read:

12 768.28 Waiver of sovereign immunity in tort actions;
13 recovery limits; limitation on attorney fees; statute of
14 limitations; exclusions; indemnification; risk management
15 programs.--

16 (1) In accordance with s. 13, Art. X of the State
17 Constitution, the state, for itself and for its agencies or
18 subdivisions, hereby waives sovereign immunity for liability
19 for torts, but only to the extent specified in this act.
20 Actions at law against the state or any of its agencies or
21 subdivisions to recover damages in tort for money damages
22 against the state or its agencies or subdivisions for injury
23 or loss of property, personal injury, or death caused by the
24 negligent or wrongful act or omission of any employee of the
25 agency or subdivision while acting within the scope of the
26 employee's office or employment under circumstances in which
27 the state or such agency or subdivision, if a private person,
28 would be liable to the claimant, in accordance with the
29 general laws of this state, may be prosecuted subject to the
30 limitations specified in this act. Any such action may be
31 brought in the county where the property in litigation is

1 | located or, if the affected agency or subdivision has an
2 | office in such county for the transaction of its customary
3 | business, where the cause of action accrued. However, any such
4 | action against a state university board of trustees shall be
5 | brought in the county in which that university's main campus
6 | is located or in the county in which the cause of action
7 | accrued if the university maintains therein a substantial
8 | presence for the transaction of its customary business. This
9 | subsection shall be construed strictly. Jurisdiction shall be
10 | ascertained by examining the complaint to determine whether
11 | the claim is one against the state or a state agency or
12 | subdivision as referred to in this subsection and in
13 | subsection (2) for money damages for injury, loss of property,
14 | personal injury, or death caused by the negligent or wrongful
15 | act or omission of any employee of the state or state agency
16 | or subdivision while acting within the scope of his or her
17 | employment under circumstances in which the state or state
18 | agency or subdivision, if a private person, would be liable to
19 | the claimant in accordance with the laws of this state.

20 | (5)(a)1. The state and its agencies and subdivisions
21 | shall be liable for tort claims in the same manner and to the
22 | same extent as a private individual under like circumstances,
23 | but liability shall not include punitive damages or interest
24 | for the period before judgment.

25 | 2. The limited waiver provided in this section shall
26 | be strictly construed, and it is the intent of the Legislature
27 | that the provisions contained in subparagraph 1. be construed
28 | and applied using the tests that have been developed by the
29 | United States Supreme Court and United States circuit courts
30 | to govern the application of similar waiver provisions found
31 | in 28 U.S.C. s. 2674(b).

1 3. Neither the state nor its agencies or subdivisions
2 shall be liable to pay a claim or a judgment by any one person
3 which exceeds the sum of \$100,000 or any claim or judgment, or
4 portions thereof, which, when totaled with all other claims or
5 judgments paid by the state or its agencies or subdivisions
6 arising out of the same incident or occurrence, exceeds the
7 sum of \$200,000. However, a judgment or judgments may be
8 claimed and rendered in excess of these amounts and may be
9 settled and paid pursuant to this act up to \$100,000 or
10 \$200,000, as the case may be; and that portion of the judgment
11 that exceeds these amounts may be reported to the Legislature,
12 but may be paid in part or in whole only by further act of the
13 Legislature. Notwithstanding the limited waiver of sovereign
14 immunity provided herein, the state or an agency or
15 subdivision thereof may agree, within the limits of insurance
16 coverage provided, to settle a claim made or a judgment
17 rendered against it without further action by the Legislature,
18 but the state or agency or subdivision thereof shall not be
19 deemed to have waived any defense of sovereign immunity or to
20 have increased the limits of its liability as a result of its
21 obtaining insurance coverage for tortious acts in excess of
22 the \$100,000 or \$200,000 waiver provided above. The
23 limitations of liability set forth in this subsection shall
24 apply to the state and its agencies and subdivisions whether
25 or not the state or its agencies or subdivisions possessed
26 sovereign immunity before July 1, 1974.

27 (b) Immunity concerning discretionary function exists
28 as an exception from the waiver contained in this section for
29 the state and state agencies and subdivisions identified in
30 subsection (1) and subparagraph (a)1. The waiver does not
31 apply to any claim based upon an act or omission of an

1 employee of the state or state agency or subdivision who
2 exercises due care in the execution of a statute, rule, or
3 ordinance, whether or not such statute, rule, or ordinance is
4 valid, or based upon the exercise or performance of, or the
5 failure to exercise or perform, a discretionary function or
6 duty on the part of the state or state agency or subdivision,
7 or an employee of the state or state agency or subdivision,
8 whether or not the discretion involved is abused. In applying
9 this exception, the court shall consider whether the
10 legislative or administrative decision is based upon
11 consideration of public policy grounded in social, economic,
12 and political policy. If the decision implicates the exercise
13 of a policy judgment of a social, economic, or political
14 nature, the exception provided for in this paragraph applies.

15 (c) The waiver contained in subsection (1) and
16 subparagraph (a)1. does not apply to any claim involving a
17 function relating to legislation, licensing, permitting, the
18 executive branch, enforcement of laws and protection of public
19 safety, or fire inspections and fire suppression.

20 Section 2. This act shall take effect upon becoming a
21 law.

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24 SENATE SUMMARY

25 Provides criteria for determining when a complaint states
26 a claim as to which the waiver of sovereign immunity
27 applies. Declares legislative intent for strict
28 construction and for construction of the waiver using
29 tests applicable to the waiver of sovereign immunity by
30 federal law. Prescribes elements of immunity concerning a
31 discretionary function as an exception to the waiver.
Excludes certain government functions from the waiver.