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IN THE SUPREME COURT OF FLORIDA

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CASE NOS. 89,093 & 89,094

PROVIDENT MANAGEMENT CORPORATION and LAURENCE N. BELAIR,

Petitioners,

vs.

CITY OF TREASURE ISLAND,

Respondent.

ON REVIEW FROM THE
SECOND DISTIUCT COURT OF APPEAL
LAKELAND FLORIDA

PETITIONER PROVIDENT MANAGEMENT CORPORATION'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This appeal arises out of a claim for damages by Provident Management Corporation ("Provident") resulting from a wrongful injunction. Before this case began, Provident ran a highly visible multi-million dollar property management business at the Land's End Condominium development in the City of Treasure Island. However, four years into the operation of Provident's business at Land's End, Treasure Island elected to secure a temporary injunction against Provident that completely destroyed that business. The Second District Court of Appeal ultimately held the injunction to be wrongful and reversed. Provident returned to the trial court and obtained a damage award compensating it for the loss of its business.

Treasure Island was thoroughly mindful of the financial exposure it faced in the event the injunction were overturned and it accepted this risk at the time it sought its injunction. But now, Treasure Island disputes Provident's right to be made whole. At issue is the interpretation of this Court's opinion in ***Parker Tampa Two, Inc. v. Somerset Dev. Corp.,*** 544 So, 2d 1018 (Fla. 1989). ***Parker Tampa Two*** confirms that any party who suffers as a result of a wrongful injunction may recover damages, but only up to the amount of the bond. However, governmental entities like Treasure Island do not have to post a bond to obtain an injunction. Left undecided by ***Parker Tampa Two*** is whether the right to recover wrongful injunction damages vanishes if the trial court relieves the governmental entity seeking the injunction of the obligation to post a bond.

When it granted the injunction, the trial court ruled that Treasure Island did not have to post a bond because there was no question of its financial ability to answer for damages if the injunction were reversed. Despite the trial court's express intention that Treasure Island

remain liable and Treasure Island's acceptance of that ruling, the Second DCA reversed Provident's damage award and applied ***Parker Tampa Two*** to relieve the City from any responsibility for damages. Put simply, the Second DCA ruled: no bond, no recovery, no matter the intent of the parties, no matter the intent of the trial court, and no matter the intent behind Rule 1.160(b). Provident shows below that the decision to deny Provident its recovery is unfair, contrary to law, and bad public policy.

STATEMENT OF THE CASE AND FACTS

Provident developed an extremely successful business devoted to securing rentals for the unit owners at the Land's End condominium development in Treasure Island. Provident invested significant time and resources in developing contractual relationships with unit owners and a steady client base of renters (R. 3257-60, 3262-63, 3289-90). After four years of successful operations, Treasure Island demanded that Provident cease and desist its management of rental agreements for the Land's End unit owners, claiming that such activity violated Treasure Island's zoning ordinances. ***Belair v. City of Treasure Island,*** 611 So. 2d 1285, 1287-88 (Fla. 2d DCA 1992), ***rev. denied,*** 624 So. 2d 264 (Fla. 1993).

Treasure Island brought suit against Provident and an individual unit owner at Land's End, Laurence Belair. Although no critical health, safety or welfare issues were at stake, Treasure Island elected to seek and obtain a temporary injunction against Provident and Belair without waiting for a final hearing from the trial court, let alone a definitive ruling from the appellate court, concerning the proper application of the zoning ordinance.[1] The temporary injunction completely shut down Provident's rental activity at Land's End. ***Id.*** at 1288. The temporary injunction was later made permanent. ***Id.***

There was never any question about the extraordinary damages Provident faced as a result of the injunction. To support its arguments during the injunction proceedings, Treasure Island itself represented that Provident was making profits in excess of $500,000 per year managing a rental operation with gross revenues for the year following the

[1] In support of the temporary injunction, Treasure Island argued only that a few of the unit owners at Land's End were inconvenienced by Provident's rental program (R. 1400-01).

injunction projected at $2.3 million (R. 1392-94). (Treasure Island hoped to show that, because it was extremely profitable, Provident was engaged in a prohibited commercial enterprise.) Even the trial court judge complimented Provident on its "obviously successful business activity" (R. 2956, 3235-37).

The broad scope of the injunction halted Provident's entire Land's End operation. Treasure Island argued for and received an injunction that prohibited Provident from engaging in any rental activity at Land's End (R. 1844-49). Other real estate companies, however, were not so restricted. Provident's customers quickly moved their business to other realtors who continued to rent Land's End units from their off-site offices without any intervention from Treasure Island authorities (R. 3293-95).

After entry of the injunction, Provident's gross annual rental revenues from Land's End dropped from roughly $2,000,000 to zero. Likewise, Provident's significant net income from Land's End turned into significant losses as rental activity fell to zero and as Provident expended substantial legal fees in defense of the injunction (R. 3289-90). Although the injunction permitted Provident to honor its current contracts with unit owners up through their yearly renewal date (as to existing rental reservations only), Provident was precluded from entering into any new contracts or renewing any of the existing contracts at their expiration and was precluded from soliciting future rentals pursuant to its existing contracts. By June 3, 1991, Provident's number of rental contracts had dropped from 104 to zero (R. 3290).

Recognizing the magnitude of the harm Provident faced, counsel for Provident raised the issue of an injunction bond at the hearing on the motion for temporary injunction.

Treasure Island, however, argued and the trial judge ruled that Treasure Island was not required to post a bond to secure the injunction under Rule 1.610(b), Florida Rules of Civil Procedure (R. 1487-88). Rule 1.610(b) gives the trial court the discretion to dispense with a bond in injunctive actions brought by governmental entities.[2] Exercising this discretion, the trial judge ruled that a bond was unnecessary because Treasure Island was financially solvent and had the ability to answer for damages, The following exchange occurred between counsel and the trial judge regarding the bond:

> Mr. Ferguson (counsel for Provident): There is a bond issue here. It's undisputed, I think, from the testimony, that these people can lose substantial income.
>
> The Court: I don't think a municipality is required to post a bond.
>
> Mr. Foreman (counsel for Treasure Island): We are not required to post a bond.
>
> The Court: They have unlimited resources. If they [Provident] are damaged they [Provident] can sue them [Treasure Island]. The law says they are not required to put a bond up. I mean I didn't pass that law, that is a Statute.
>
> Mr. Foreman: There you go.

Id.

Concluding that Provident could sue Treasure Island for its wrongful injunction damages, the court entered the temporary injunction and, based on Rule 1.610(b), excused

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[2] Rule 1.610(b) provides: "No temporary injunction shall be entered unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined. When any injunction is issued on the pleading of a municipality or the state or any officer, agency, or political subdivision thereof, the court may require or dispense with a bond, with or without surety, and conditioned in the same manner, having due regard for the public interest. No bond shall be required for issuance of a temporary injunction issued solely to prevent physical injury or abuse of a natural person. "

Treasure Island from posting a bond (R. 646-49). As ordered by the injunction, Provident closed its offices at Land's End and ceased all Land's End rental activities.

At the end of the hearing, there was no question where the parties stood. The trial court had relieved Treasure Island of the obligation to post a bond, but only because the City had "unlimited resources" (R. 1487). The trial court had also confirmed that Provident could sue the City for its damages (R. 1487-88).

The City reconfirmed its undertaking to pay damages shortly thereafter in defending against a federal civil rights lawsuit filed by Provident. In arguing to Judge Castagna that the federal court should abstain in favor of the state injunctive proceeding, Treasure Island represented to the court that it would pay damages to Provident in the event the injunction proved wrongful. According to counsel for Treasure Island:

> . . .If the state court determines that this order is improvidently entered at any point in time, then there are going to be some damages against the City. This Court knows more about injunctions than I'm ever going to know. And the Court knows that if its improvidently entered anywhere, there are going to be damages against the City.

(R. 2639).

Treasure Island's injunction was wrongful, In December, 1992, the Florida Second District Court of Appeal reversed the injunction, finding that Provident's rental activity was not in violation of Treasure Island's zoning code. *Belair*, 611 So. 2d at 1285. Following the court's reversal of the injunction, Provident filed a motion for an award of damages, attorneys' fees and costs for wrongful injunction against Treasure Island (R. 2427-31).

In response, Treasure Island moved to strike Provident's request (R. 2447). For the first time, Treasure Island took the position that Provident was, as a matter of law, precluded

from recovering its wrongful injunction damages. Treasure Island argued that Provident's damages for wrongful injunction are limited to the amount of the injunction bond and, because Treasure Island had not been required to post a bond, Provident was not entitled to recover any damages (R. 2447-48). Treasure Island also filed a motion for summary judgment on Provident's damages claims in which it asserted the same arguments contained in the motion to strike (R. 2441-43). Treasure Island later added an argument that sovereign immunity protected it from Provident's claims,

Provident responded to Treasure Island's motions to strike and for summary judgment, pointing out that Treasure Island was excused from posting an injunction bond only because it was a municipality, not because the trial court intended to relieve Treasure Island from the obligation of paying damages should its injunction ultimately be declared wrongful (R. 2505-14). Provident also contended that, even if a trial court's decision to excuse a municipality from posting an injunction bond generally precludes the enjoined party from seeking wrongful injunction damages, Treasure Island waived or is estopped from claiming that protection in this case (R. 2705-07, 2713-19). As the basis of its waiver and estoppel arguments, Provident cited Treasure Island's acknowledgement of its potential responsibility for wrongful injunction damages throughout the course of the litigation (R. 2516-18, 2705-07).

Treasure Island's defenses were all rejected by the trial court in an order executed March 29, 1994 (R. 2772-74). The court ruled that Treasure Island was not immune from damages merely because the predecessor trial judge had exercised his discretion not to

require Treasure Island to post a bond, Id. The court also rejected Treasure Island's new sovereign immunity defense. Id.

The parties then proceeded to an evidentiary hearing to determine the amount of Provident's wrongful injunction damages. *Id*. After eight days of testimony, including the testimony of numerous experts, the trial court found that the temporary injunction had completely destroyed Provident's business as of June 3, 1991, the day of Provident's last rental at Land's End (R. 3214-19). The court awarded Provident damages of $1,158,000.00, representing the value of Provident's destroyed business. The trial court also awarded Provident its attorneys' fees incurred in overturning the injunction plus pre-judgment and post-judgment interest (R. 3214-19).

The Second District Court of Appeal reversed holding that ***Parker Tampa Two's*** damage limitation applied even in cases where the trial judge exercised its discretion to dispense with the bond based on a city's solvency. ***City of Treasure Island v. Provident, 678*** So. 2d 1322 (Fla. 2d DCA 1996). The court, however, recognized the consequences of its decision, expressly warning trial judges henceforth to use extreme caution in exercising their discretion under Rule 1.610(b). ***City of Treasure Island, 678 So,*** 2d at 1325 n.3.

Believing the court's decision to deny Provident its damages to be in error, Provident petitioned this Court for review. Provident's jurisdictional brief pointed out the conflict between the Second DCA's ruling and decisions of this Court and other district courts of appeal confirming the right to recover damages for wrongful injunction. This Court accepted jurisdiction on February 26, 1997.

SUMMARY OF THE ARGUMENT

Florida law permits a wrongfully enjoined party to recover all damages, including costs and attorneys' fees, caused by the wrongful injunction. There is no exception to this rule for municipalities. The fact that a trial court may relieve a municipality from the expense and inconvenience of posting a bond does not render the municipality immune from wrongful injunction damages under ***Parker Tampa Two.*** To the contrary, the bond does not limit the amount of recovery unless the court has made a reasoned attempt to approximate the bond to the amount of potential damages. Cases in other jurisdictions, directly on point, have recognized that the purpose of rules such as 1.610(b) is to relieve a municipality from the expense and inconvenience of posting a bond -- not to immunize the municipality from the consequences of its wrongful conduct. The trial court's decision to excuse Treasure Island from posting a bond because of its certain financial solvency does not deprive Provident of the right to wrongful injunction damages.

The decision below is bad public policy because it places trial courts in an immediate and irreconcilable quandary. If the trial court grants a municipality the protection contemplated by Rule 1.610(b) and permits an injunction to be entered without a bond, Florida citizens, like Provident, will find themselves completely without remedy when damaged by a hasty or ill-considered injunction action brought by a governmental entity. The alternative is a disaster for Florida governmental entities. If the trial court protects the citizen's remedy by requiring the governmental entity to post a bond, the government loses the very benefit conferred by the drafters of Rule 1.610(b). The inevitable result is that injunctions will be harder to obtain by the government or, at the very least, such injunctions

will be more time consuming and expensive. Indeed, any county or municipality that regularly seeks injunctive relief may find itself with substantial funds tied up to secure its bond obligations, or worse, may be unable to post a bond at all, thus paralyzing its ability to act in the protection of the public interest.

This dilemma can be eliminated simply by clarifying ***Parker Tampa Two*** to confirm that the decision to dispense with the bond because of the government's solvency, as provided by Rule 1.610(b), does not deprive the enjoined party of its right to compensation. As Florida law already confirms, the amount of the bond does not serve as a limit unless it was based on a reasoned approximation of the enjoined party's exposure. This approach protects the enjoined party's right to be made whole. At the same time, it protects governmental entities from being forced unnecessarily to post a bond. To the extent a governmental entity seeks to know the limit of its exposure, it may still seek such relief from the trial court at the time the injunction is entered -- not years later as Treasure Island attempts here.

This Court should reverse, reinstate the damages awarded by the trial court, and relieve trial courts from the "Catch 22" created by the Second DCA's ruling below.

ARGUMENT

Treasure Island was unrelenting in its efforts to secure and enforce an injunction against Provident -- an injunction that lasted over four years and completely destroyed Provident's business. Throughout this case, Treasure Island had full knowledge of the value of Provident's business at Land's End and knew that the injunction would completely shut that business down. Both the trial judge and Treasure Island specifically acknowledged that Treasure Island was financially sound and that Provident could sue Treasure Island for its damages in the event the injunction were reversed. Treasure Island even obtained the dismissal of Provident's federal lawsuit using the same argument that Provident had a remedy for wrongful injunction damages in the state court.

Having avoided posting a bond by recognizing its liability to pay Provident's damages, Treasure Island now seeks to disclaim its responsibility for damages by pointing to the absence of a bond. Besides the obvious inequity in Treasure Island's change of position, its argument should be rejected as contrary to precedent and public policy. The effect of the decision below is either to leave the victims of wrongful injunctions without a remedy or to rewrite Rule 1.610(b) to require municipalities to post a bond in every case to secure the traditional protections afforded by Florida law.

I. A MUNICIPALITY EXCUSED FROM POSTING AN INJUNCTION BOND IS STILL LIABLE FOR WRONGFUL INJUNCTION DAMAGES.

Perhaps the most extraordinary remedy available to any litigant is the power to obtain a preliminary injunction. Prior to any resolution on the merits, and often in great haste and without a full hearing, the successful applicant for an injunction obtains immediate relief -- many times to the severe detriment of the party being enjoined. Recognizing the

consequences of an erroneous decision, courts balance this extraordinary remedy with the responsibility to pay damages if the injunction proves wrongful. Thus, it has long been settled in Florida and in most other states that a party who has been enjoined wrongfully has the right to recover all damages including attorneys' fees and costs from the party seeking the injunction. ***E.g., Lake Worth Broadcasting Corp. v. Hispanic Broadcasting, Inc., 495*** So. 2d 1234, 1234 (Fla. 3d DCA 1986); ***Roger Dean Chevrolet, Inc. v. Painters, Decorators and Paperhangers of Am., Local*** No. 452, 155 So. 2d 422, 425 (Fla. 2d DCA 1965). As one Florida court put it: "This right should not be denied." ***Shea v. Central Diagnostic Services, Inc.,*** 552 So. 2d 344 (Fla. 5th DCA 1989).

Historically, this right of recovery for wrongful injunction has been protected by requiring the plaintiff to post an injunction bond sufficient to cover the damages caused by the injunction if reversed. In Florida, a private party may not obtain an injunction without posting such a bond.[3] Rule 1.610(b). Except in extraordinary circumstances, this bond must be sufficient to cover the defendant's potential damages. ***Parker Tampa Two, 544 So.*** 2d at 1021; ***Cushman & Wakefield, Inc.*** v. *Cozart*, 561 So. 2d 368, 371 (Fla. 2d DCA 1990). ***See Marston v. Gainesville Sun Publishing*** Co., 314 So. 2d 257, 259 (Fla. 1st DCA 1975) (rejecting an obviously inadequate bond as a "farce" and a "mockery").[4]

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[3] The only exception is an action to enjoin physical injury or abuse. Rule 1.610(b).

[4] The City conceded this point in its initial brief below acknowledging that "the bond should be in an amount sufficient to indemnify the Defendant for such costs and damages as he might incur in the event it is ultimately determined that the Defendant was wrongfully restrained." Initial Brief at 16.

The rule regarding injunction bonds is different for governmental entities such as Treasure Island. The trial court has the discretion to award an injunction on behalf of the governmental entity without requiring a bond. Rule 1.610(b). The reason for this rule is obvious. There is no question of the governmental entity's solvency and thus, it is wasteful to require the government to incur the expense and inconvenience of the bond.

The bond requirement has significance beyond the issue of solvency in cases between private parties. In most states, including Florida, when a private party seeks an injunction, the bond serves as the limit of the defendant's recovery for wrongful injunction. ***Parker Tampa Two, Inc.*** v. ***Somerset Dev. Corp.,*** 544 So, 2d 1018 (Fla, 1989). However, ***Parker Tampa Two,*** and the cases upon which it relies, do not address what happens when a municipality seeks an injunction and the trial court dispenses with the bond. Ignoring that it was a private party who sought the injunction in ***Parker Tampa Two, the*** Second DCA mechanistically applied ***Parker Tampa*** Two to an action brought by a municipality. The court below misinterpreted ***Parker Tampa Two*** to hold that, if a municipality posts no bond, it completely escapes its otherwise historically settled liability for seeking and obtaining a wrongful injunction.

This erroneous interpretation overlooks the reasoning behind ***Parker Tampa Two.*** Nothing in this Court's analysis suggests that its intention was to immunize the plaintiff from liability. Instead, this Court undertook a careful balancing process, adopting a procedure to ensure that the plaintiff had notice of its exposure but that the defendant remained fully protected from loss. 544 So. 2d at 1021. In fact, ***Parker Tampa Two*** and its progeny make clear that the defendant's right to be made whole must be preserved. Thus, the amount of

the bond should be set at a level consistent with the amount of damages the defendant is likely to suffer. ***544 So.*** 2d at 1021; *Cushman & Wakefield*, 561 So. 2d at 371. The point of ***Parker Tampa Two*** was not to lessen the plaintiff's damage obligations or to limit artificially the defendant's right to be made whole, but to set these obligations in advance, giving the plaintiff fair notice of its obligations.

In limiting damages to the bond amount, ***Parker Tampa Two*** contemplates a situation where a bond of some amount is a prerequisite to the injunction and the parties have litigated the amount of the bond before the trial court. Where, as here, there has been no such reasoned determination regarding the amount of the bond, the bond does not serve as a limitation. ***City*** *of St.* ***Petersburg*** v. ***Wall, 475*** So. 2d 662 (Fla. 1985); ***Leibowitz v. City*** *of* ***Miami Beach,*** 683 So, 2d 204 (Fla. 3d DCA 1996); ***Seascape, Ltd. v. Maximum Marketing Exposure, Inc.,*** 568 So. 2d 952 (Fla. 3d DCA 1990); ***Ross v. Champion Computer*** *Corp.*, 582 So. 2d 152 (Fla. 4th DCA 1991).

In *Wall*, the City filed a condemnation action against the respondents and an accompanying lis pendens. The trial court ruled that the City had failed to show a necessity for the taking and dismissed the action. The City filed an appeal and secured an automatic stay. The stay was the equivalent of an injunction because it kept the lis pendens in place which prevented the defendant from disposing or encumbering his property so long as the lis pendens was effective.

Much like Rule 1.610(b), Rule 9.310(b)(2), Florida Rules of Appellate Procedure, permits a municipality to secure a stay pending appeal without the necessity of posting a bond. Like Provident in this case, the respondents in *Wall* asked the court to require the

City to post a supersedeas bond. The trial court denied the request "without prejudice to appellees seeking recovery of damages and costs resulting from any stay pending appeal. "

The trial court's dismissal was later affirmed and the lis pendens lifted. The respondent sought an award of its damages caused by the stay. St. Petersburg, like Treasure Island, defended by arguing that it was not liable in the absence of a bond. In awarding damages to the defendant, the Second DCA held, in words that apply equally to this case:

> Here the city was on notice that we recognized its potential liability even though we excused it from the expense of posting a bond. There is little reason to request a solvent municipality to post a bond when its potential liability for obtaining a stay is made a matter of record,

City of St. Petersburg v. ***Wall,*** 419 So. 2d 1167, 1169 (Fla. 2d DCA 1982), ***approved, 475*** So. 2d 662 (Fla. 1985). This Court affirmed, quoting this language with approval. 475 So. 2d at 663.

Wall demonstrates that a party suffering damages as the result of a municipality's stay can recover its damages against the municipality even in the absence of a bond. 475 So. 2d at 663. Importantly, *Wall* also demonstrates that municipalities are excused from posting bonds only in the interest of convenience and expense, not out of an intent to relieve them of liability. As this Court makes clear in ***Wall,*** a municipality should be bound when its potential liability for damages is made a matter of record. ***Wall, 475 So.*** 2d at 662-64.

Similarly, in ***Ross, Leibowitz,*** and ***Seascape,*** the courts declined to limit recovery to the amount of the bond because there had been no reasoned attempt by the trial court to set a bond approximating the defendants' potential damages. In ***Ross, the*** trial court granted an injunction without a bond based on a contract between the parties that purported to waive the

obligation to post a bond. The Fourth District Court of Appeal rejected the plaintiff's argument that the defendant had no right to recover injunction damages because no bond had been posted. Instead, the court remanded to permit the trial court to make a reasoned determination concerning the amount of the bond. 582 So. 2d at 153. Likewise, in ***Leibowitz*** and ***Seascape,*** the court set a nominal bond. The defendant's recovery was not limited to the amount of the bond because the trial court had never made a reasoned determination that the bond approximated defendant's potential damages. ***Leibowitz, 683 So.*** 2d at ***205; Seascape, 568 So.*** 2d at 956.

These cases, like ***Parker Tampa Two*** itself, are merely an acknowledgment of the strong public policy expressed by Rule 1.610(b) that the enjoined party be made whole. Florida courts have uniformly rejected attempts to set nominal bonds, declaring in the strongest possible terms that attempts to enter an injunction without affording protection to the enjoined party makes a "farce" of Rule 1.610 and "a mockery of its application." *Wasserman* ***v. Gulf Health. Inc.,*** 512 So. 2d 234, 235 (Fla. 2d DCA), ***rev. denied,*** 518 ***So,*** 2d 1279 (1987); ***Minimatic Components v. Westinghouse*** *Elec.* ***Corp., 494 So,*** 2d 303, 304 (Fla. ***4th*** DCA 1986); *Marston* ***v. Gainesville Sun Publishing Co.,*** 314 So. 2d 257, 259 (Fla. 1st DCA 1975).

Decisions Outside of Florida Confirm That the Municipality Remains Liable.

Several other jurisdictions have considered and rejected the very argument raised by Treasure Island. For example, in ***State v. Williams,*** 472 P.2d 109 (Ariz. Civ. App. 1970), the State of Arizona secured a permanent injunction against a private party. On appeal, the permanent injunction was set aside and the enjoined party sought to recover wrongful

injunction damages against the state. The state argued that, because it was not required under the Arizona Rules of Civil Procedure to post an injunction bond, the enjoined party was not entitled to assert a cause of action against the state for wrongful injunction damages. The state contended that the enjoined party's only remedy was an action for malicious prosecution. The court rejected the state's argument and explained that the "statutory reason for not requiring the state to post a bond is that there is no problem of solvency. " *Williams,* 472 P.2d at 111. The court then concluded that relief from the bond requirement does not also relieve the state from liability for wrongful issuance of an injunction. Id.

Likewise, in ***Cone v. City of Lubbock,*** 431 S.W.2d 639 (Tex. Ct. App. 1968), the court concluded that even when a municipality is excused from posting an injunction bond, the municipality remains liable for wrongful injunction damages. See Cone, 431 S. W.2d at 646-47.[5]

Any other result would be unjust. Indeed, in an analogous context the Tenth Circuit agreed using even stronger language:

> . . .Implicit in our decision.. . is recognition that Rule 65 mandates security for the protection of the person enjoined. That protection is not eliminated when the court relies on the financial strength of the party seeking the injunction in place of the security bond. **To hold otherwise would make a farce of the rule and of our.. .decision.**

Monroe Div., Litton Bus. Sys., Inc. v. De Bari, 562 F.2d 30, 32 (10th Cir. 1977) (emphasis supplied).

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[5] The only contrary authority cited by Treasure Island below is one Idaho case decided in 1910, ***Doyle v. City of Sandpoint,*** 18 Idaho 654, 112 P. 204 (1910).

Consistent with the case law, nothing in the language of Rule 1.610 suggests that a court's discretionary decision to excuse a municipality from posting an injunction bond should be construed as a decision to deny completely the enjoined party's right to damages for wrongful injunction. To the contrary, the obvious intent of the rule is to *secure* an enjoined party's right to recover damages. As one court explained:

> A surety bond is a convenient manifestation of financial responsibility on the part of the plaintiff. . . A governmental organization is responsible for costs and damages as may be incurred or suffered by a party wrongfully enjoined or restrained. The presumption of financial integrity on the part of a governmental organization may obviate the necessity for the giving of security. . . .

Howard D. Johnson Co. v. Parkside Dev. Corp., 348 N.E.2d 656, 663 (Ind. Ct. App. 1976).

In the present case, the trial court undertook the analysis contemplated by the rule. The trial court determined that Treasure Island would not be required to post a bond -- not because Provident would suffer no damages, but rather because Treasure Island was financially able to pay those damages without the security of an injunction bond.

Public Policy Supports Provident.

The decision of the court below is bad public policy because it creates a terrible and entirely unnecessary dilemma for trial courts faced with actions for injunctions brought by government bodies. Rule 1.610(b) was designed to make it easier for municipalities to obtain an injunction by relieving government bodies of the burden and expense of a bond. As discussed above, Rule 1.610(b) is simply a recognition that government bodies are generally solvent and that a bond is superfluous. Yet, if the trial court follows Rule 1.610(b) and dispenses with the bond, it risks placing the defendant in a position where, contrary to

long-settled precedent, the defendant has no right to be made whole if the injunction proves wrongful. Leaving the defendant without a remedy is completely contrary to the bedrock principle of Florida jurisprudence that there is a remedy for every wrong. Art. I, § 21, Fla. Const.

The decision below recognizes but does not address this problem. The best it can do under its approach is to caution trial courts to be very careful in dispensing with a bond, even when it is sought by a governmental entity. According to the court:

> A trial court that automatically dispenses with the bond when the plaintiff is a governmental agency risks creating losses for a defendant that will not be recoverable if the injunction is ultimately reversed. Thus, this discretionary decision should be made with care.

678 So. 2d at 1325 n.3.

The Opinion's cautionary instruction highlights what may be the biggest problem caused by the opinion below. No court is likely to enter an injunction in favor of the government and against a private party knowing that the private party will be without a remedy in the event the injunction proves wrongful. Certainly, the trial court in this case had no such intent. In short, the interpretation of ***Parker Tampa Two*** adopted by the Second DCA will have the practical effect of rendering useless the protection afforded to governmental entities by Rule 1.610(b).

Thus, if the Second DCA's order is not reversed, trial courts will inevitably give even greater scrutiny to applications for injunction sought by governmental entities. Thus, as discussed in the amicus brief submitted by the Florida Association of County Attorneys supporting Provident's position, the effect of the decision below will be to make it far more difficult for governmental entities to obtain injunctions, Injunctions that would otherwise be

entered on behalf of governmental entities may be denied. If the court enters the injunction, it is likely to require the governmental entity to post a bond. Every case in which such an entity seeks an injunction will be less likely to succeed, and, at the very least, will be more time-consuming and expensive. Indeed, any county or municipality that seeks injunctive relief may find itself with substantial funds tied up in order to secure its bond obligations, or worse, may be unable to post a bond and be forced to forego an injunction otherwise in the public interest.

This quandary between leaving the defendant without remedy or offering the government the protections afforded by Rule 1.610(b) is entirely unnecessary. Properly applied, ***Parker Tampa Two,*** limits recovery to the amount of the bond only when there has been a reasoned determination that the bond has been set to approximate the defendant's damages. By ruling that the limitation of ***Parker Tampa Two*** does not apply when no bond is set, the enjoined party is protected and the governmental entity is not forced unnecessarily to post a bond.

Treasure Island's response, which was accepted by the court below, is that it is not fair to expose government bodies to "unlimited" liability when seeking an injunction. Treasure Island overlooks the fact that it could have asked at any time for a determination of its potential liability. As discussed below, the trial court has the equitable powers to set the terms and conditions under which an injunction will be issued. One of the terms could have been to set in advance the limit of Treasure Island's undertaking to pay damages. Had Treasure Island indicated its desire to set its exposure in advance, the parties could then have intelligently argued the appropriate amount of the damage limitation. Provident could have

appealed if the City's undertaking was too small and Treasure Island could have appealed if it was too large.[6]

What Treasure Island cannot do is indicate its assent when the trial court states that the City will be liable if reversed and then, after the fact, ask to be immunized from the consequences of its actions. Just as the courts have properly rejected nominal bonds as a limit to liability, this Court should reject Treasure Island's even more extreme argument that it can be insulated from recovery by the complete absence of a bond.

Moreover, any claim by Treasure Island that it has unfairly been saddled with limitless liability is unconvincing.[7] To begin with, it was Treasure Island's choice to resolve this matter on temporary injunction despite the absence of any genuine emergency. There was no pressing reason not to have waited for the final plenary appeal to be resolved before taking steps to put Provident's Land's End operation out of business.

In any event, Treasure Island made the decision to proceed with the temporary injunction, having had fair notice of its damage exposure. As a result of extensive discovery, Treasure Island possessed all the information it needed to determine whether it should risk the economic repercussions of wrongfully putting Provident out of business. During the numerous hearings in this case, Provident presented evidence of the harm (including specific dollar amounts) the injunction would cause Provident (R. 2477-78).

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[6] As discussed above, it is important to note that the most Treasure Island could properly argue for was certainty regarding its damage obligations, not an artificial limitation of its liability. ***See supra*** at 11-14.

[7] As a threshold matter, it is an overstatement to complain about "unlimited liability," The City is liable only to the extent its intentional actions caused damage. This is the same "unlimited" liability faced by any party that causes damages.

Moreover, during the course of its arguments, Treasure Island itself made repeated and detailed references to the substantial income that had been generated by Provident at the Land's End location prior to the injunction (R. 1392-94).[8] Provident filed a motion to stay containing detailed affidavits concerning Provident's historical financial performance and probable losses (R. 662-744 at 675-79). Common sense alone should have warned Treasure Island that completely enjoining the operation of a multi-million dollar business exposed it to the risk of substantial damages if the injunction were ultimately overturned. Treasure Island knew the risk and accepted it. No public policy suggests that it should now be relieved from responsibility for its intentional decision to destroy Provident.

Quite the contrary, Treasure Island's arguments ignore the most important policy that is at the heart of all of the cases addressing wrongful injunctions -- the innocent party must be made whole. Treasure Island asks this Court to adopt a rule that places all the risk on the innocent party while the guilty bears no responsibility for its actions. No court could justify such a policy.

Treasure Island's Technical Defenses Are Without Merit.

Treasure Island argued below that the trial court has no power to award damages in the absence of a bond. Treasure Island correctly pointed out that, at common law, there was no cause of action for wrongful injunction. From this premise, Treasure Island leaps to the erroneous conclusion that, in the absence of a cause of action at common law, the right to

[8] Mr. Foreman pointed out to the court that Provident's expected gross (prior to the entry of the injunction) was $2,300,000. Foreman also calculated Provident's profits at $500,000 for the year preceding the injunction. Treasure Island knew exactly what its exposure was.

recover for wrongful injunction damages is based solely on the existence of a bond. Thus, Treasure Island accords the bond almost jurisdictional significance.

This argument overstates the importance of the bond, which, after all, is nothing more than security for a promise or undertaking to make the other party whole. Although courts of law recognized no right to recover for wrongful injunction, courts of equity recognized early on that they had the power to set the conditions under which an injunction would issue. As Judge Cardozo explained in an often-cited decision, courts of equity have always had the power to condition "the right to relief upon just and equitable terms in respect of liability for damages. " ***City of Yonkers v. Federal Sugar Refining Co.*** , 221 N .Y. 206, 116 N.E. 998, 999 (1917).

Thus, there is nothing magic about the bond. The source of liability is not the bond. Rather it is the court's determination that the party seeking the injunction must undertake to make the other party whole. ***Id.*** at 998. As Judge Cardozo observed, the rule is not changed where the plaintiff undertakes this obligation without sureties. "The undertaking is still the source and measure of liability." ***Id.***

There is no question in this case that the trial court issued the injunction based on the condition that Treasure Island would be responsible for damages. When Provident's counsel raised the issue of the bond, the court stated:

> they have unlimited resources. If they [Provident] are damaged, they [Provident] can sue them [Treasure Island]. The law says they are not required to put a bond up. I mean I didn't pass that law, that is the statute.

(R. 1487-88). Mr. Foreman on behalf of Treasure Island immediately indicated his assent by responding "there you go. " ***Id.***

Mr. Foreman later confirmed that undertaking at a federal court hearing. On behalf of Treasure Island he represented:

> . . . if the state court determines that this order is improvidently entered at any point in time, than there are going to be some damages against the City. This Court knows more about injunctions than I am ever going to know, And the Court knows that if its improvidently entered anywhere, there are going to be damages against the City.

(R. 2639).

Treasure Island's attempt to accord jurisdictional significance to the bond also ignores cases like *Seascape* and *Leibowitz* where the court specifically rejected attempts to limit recovery to the amount of a nominal bond. If Treasure Island's argument were correct, the court would have no power to award damages in excess of the bond under any circumstances, yet such power has been recognized routinely.

Treasure Island's second technical argument is that Provident should have appealed the trial court's decision not to post a bond. Treasure Island has it exactly backwards. Although the court refused to require a bond because of Treasure Island's solvency, the clear intent of the court's ruling was that Treasure Island was fully liable for any damages it caused. At that point, there was nothing for Provident to appeal. If any party was aggrieved by the court's order, it was Treasure Island. If Treasure Island wished to avoid liability or to set a limit on its liability it should have sought rehearing or appealed.

In any event, Treasure Island's argument is circular. In effect, Treasure Island attempts to resolve this case in advance. Provident cannot be considered to have been aggrieved by the trial court's order dispensing with the bond unless one also agrees with Treasure Island's simplistic "no bond--no damages" argument. As discussed above, if this

assumption were correct, Rule 1.610(b) might as well be erased from the Rules of Civil Procedure. No fair-minded Florida court in the future will ever award an injunction to a governmental body without requiring a bond. As confirmed by the amicus brief of the Florida Association of County Attorneys, Treasure Island's position is bad policy and must be rejected,

II. SOVEREIGN IMMUNITY DOES NOT INSULATE TREASURE ISLAND FROM WRONGFUL INJUNCTION DAMAGES

Almost as an afterthought, Treasure Island argued that Provident's claim for wrongful injunction damages is barred by the doctrine of sovereign immunity. However, there is no Florida authority holding a municipality immune from wrongful injunction damages. Indeed, in a case such as this where the municipality has requested the judicial remedy of an injunction, and where Provident has played no role other than that of wrongfully enjoined citizen, the sovereign immunity defense is both illogical and inequitable.

Treasure Island affirmatively availed itself of the judicial injunction procedure. That procedure is a powerful one and, as a result, carries with it a potential cost to the requesting party. If the injunction is ultimately declared wrongful, the requesting party will be liable for the damages its injunction has caused the enjoined party, Treasure Island's status as a municipality makes it no different than any other litigant seeking the benefits of the injunction procedure. It must likewise pay the costs. There is no authority supporting Treasure Island's contention that it may avail itself of the "sword" of the court system and, when its actions are wrongful, retreat behind the "shield" of sovereign immunity, In fact, the law is to the contrary. See *Wall*, 475 So. 2d at 662 (award entered against municipality for damages caused by stay pending appeal); *Simpson* v. *Merrill*, 234 So. 2d 350, 351 (Fla.

1970) (municipality not immune from award of prevailing party costs under § 57.041); ***Northern Coats v. Metropolitan Dade*** County, 588 So. 2d 1016, 1017 (Fla. 3d DCA 1991) (municipality responsible for payment of fees under ***§ 57.105); Dade County v. Carter, 23*** 1 So. 2d 241, 242 (Fla. 3d DCA) (where state becomes plaintiff in its own court, it waives any immunity and is subject to costs the same as a private litigant), ***cert. denied, 237 So.*** 2d 761 (1970).[9] Moreover, in the two on-point cases from other jurisdictions discussed above, there is no hint that the state or municipality is immune from wrongful injunction damages. ***State v. Williams,*** 472 P.2d 109 (Ariz. Ct. App. 1970); ***Cone v. City of Lubbock,*** 431 S.W. 2d 639 (Tex. Civ. App. 1968).

The decision of this Court in *Wall* is particularly instructive, In *Wall*, the respondent sought an award of damages against a municipality. *Wall*, 475 So. 2d at 662. Like the present case, the damages in *Wall* were caused by the municipality's use of a remedy that was the equivalent of an injunction. This Court affirmed that the municipality was liable for those damages. This Court should reach the same result here.

Treasure Island suggests that holding it liable for wrongful injunction damages would result in judicial second-guessing of its enforcement actions and have a chilling effect on its future decisions about whether to seek enforcement of other ordinances. That is precisely the point. Treasure Island, like any other litigant, ***should*** give careful consideration to the decision of whether to seek injunctive relief. Part of that analysis is an evaluation of the risk

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[9] ***See also State v. Second District Court of Appeal,*** 261 So. 2d 818 (Fla. 1972) (state is not immune from ***court*** costs); ***City of Miami*** v. ***Murphy,*** 137 So. 2d 825 (Fla. 1962); ***In the Interest of R. W.***, 409 So. 2d 1069 (Fla. 2d DCA 1981), ***rev, denied,*** 418 So. 2d 1279 (Fla. 1982); ***City of Miami Beach v. Town of Bay Harbor Islands,*** 380 So. 2d 1112 (Fla. 3d DCA 1980).

of wrongful injunction damages. The risk of liability for wrongful injunction damages is intended to have the very calming influence on plaintiffs that Treasure Island seeks to avoid. Treasure Island was free to enforce its zoning ordinance without the use of an injunction and could have done so without the risk of wrongful injunction damages.[10] Treasure Island, however, wants to enjoy the benefits of the injunction procedure without facing liability for its associated costs. There is no support for Treasure Island's position in the law, and this Court should not permit such a blatantly inequitable result.

III. THE TRIAL COURT'S AWARD OF DAMAGES IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

As its fall back position, Treasure Island takes on the daunting task of proving that the trial court's award of damages in this case was not supported by competent substantial evidence. Treasure Island contends that the trial court erred in its valuation of Provident's destroyed business, However, the trial court's valuation determination is a finding of fact. This Court may not overturn such a finding of fact if there is competent substantial evidence in the record to support that finding. ***See, e.g., Pasco County v. Franzel, 569 So,*** 2d 877, 879 (Fla, 2d DCA 1990); ***Tsavaris v. NCNB National Bank of Florida, 497 So.*** 2d 1338, 1338-39 (Fla, 2d DCA 1986). Not only is there competent substantial evidence in the record, the evidence is overwhelming that the trial court's determination was the correct one. The trial court's ruling should be affirmed.

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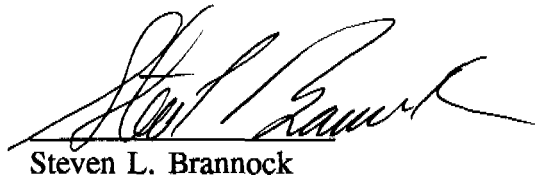
[10] For example, Treasure Island could have sought declaratory relief. Alternatively, Treasure Island could have awaited the decision of the Second District Court of Appeal before shutting Provident's business down. Provident had run a highly visable rental operation for four years prior to the request for injunctive relief. There simply was no emergency justifying Treasure Island's decision to press for extraordinary relief.

CONCLUSION

Treasure Island embarked upon a course that resulted in Provident's business being wrongfully destroyed. The trial judge's determination that Treasure Island should be held responsible for its actions is correct. The damage award is supported by competent substantial evidence. For all the foregoing reasons, the decision of the Second District Court of Appeal should be reversed and the trial court's judgment in favor of Provident reinstated.

HOLLAND & KNIGHT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was delivered by U.S. Mail on this 31ST day of March, 1997 to: **Brian P. Battaglia, Esquire,** Battaglia, Ross, **Dicus** & **Wein,** P.A. P.O. Box 41100, St. Petersburg, FL 33743, Counsel for Petitioner Laurence **Belair; James Denhardt, Esquire,** 2700 First Avenue North, St. Petersburg, Florida 33713; **Edward Foreman, Esquire,** 100 Second Avenue North, Suite 300, St. Petersburg, Florida 33701; **W. Douglas Berry,** Esquire, **Bayport** Plaza, Suite 1100, **6200** Courtney Campbell Causeway, Tampa, Florida 33607-1458, Counsel for Respondent, City of Treasure Island.

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