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IN THE
SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 18 1996
CLERK, SUPREME COURT
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Chief Deputy Clerk

CASE NO. 89,093

PROVIDENT MANAGEMENT CORPORATION,

Petitioner,

vs.

CITY OF TREASURE ISLAND,

Respondent.

ON REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
LAKELAN D, FLORIDA

BRIEF ON JURISDICTION OF PROVIDENT MANAGEMENT CORPORATION

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BRIEF ON JURISDICTION

Pursuant to Appellate Rule 9.120, Petitioner/Appellee below, Provident Management Corporation ("Provident") requests that this Court review the opinion of the Second District Court of Appeal below because it expressly and directly conflicts with decisions of this Court and other Florida District Courts of Appeal. Resolving this conflict is important because the decision forces trial judges issuing an injunction to choose between leaving the enjoined party entirely without a damage remedy when they are wrongly sued for injunction by government entities or making injunctions sought by government entities more expensive, much harder, or potentially impossible to obtain. Neither result is acceptable. Reversing the decision below resolves the conflict in the law and eliminates altogether this unnecessary and unacceptable quandary.

STATEMENT OF THE CASE AND FACTS

Provident had a thriving property management business in the City of Treasure Island (R. 3257-60, 3262-63, 3289-90). Misconstruing its zoning statutes, Treasure Island brought an action against Provident seeking an injunction directed against Provident's rental operations. During the injunction hearing, Provident warned Treasure Island and the trial court that to grant the injunction would be to sound the death knell over Provident's business (R. 2477-78). Unfortunately, the trial court rejected Provident's arguments and entered the injunction.

At the end of the injunction hearing, Provident asked the trial court to require an injunction bond (R. 2517-18). Citing Rule 1.61 O(b), Fla. R. Civ. P., the court dispensed with the bond. Id. Rule 1.610(b) gives the trial court the discretion to dispense with the bond in cases brought by government entities.[1]

[1] Rule 1.61 O(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

The trial court decided not to require a bond because Treasure Island was solvent and would be able to cover Provident's damages in the event the injunction were reversed. Explained the trial court: "If they [Provident] are damaged, they can sue them [Treasure Island]" (R. 2517-18). Treasure Island also recognized its liability for injunction damages. In related Federal litigation, its counsel conceded: "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" (R. 2639).

Provident appealed and the Second District Court of Appeal reversed the injunction, finding it to be wrongful, Belair v. Citv of Treasure Island, 611 So. 2d 1285 (Fla. 2d DCA 1992), rev. denied, 624 So. 2d 264 (Fla. 1993). However, the reversal came too late to save Provident's business. True to its earlier prediction, Provident's business was destroyed (R. 3214-19).

Provident then brought the instant suit for damages against Treasure Island, relying on well-settled law that the victim of a wrongful injunction has the right to recover its damages from the party who sought the injunction. National Surety Comnanv v. Willys-Overland, Inc., 103 Fla. 738, 138 So. 24 (1931); Lake Worth Broadcasting Corp. v. Hispanic Broadcasting, Inc., 495 So. 2d 1234, 1234 (Fla. 3d DCA 1986).

Treasure Island defended by citing Parker Tampa Two, Inc. v. Somerset Development Corporation, 544 So. 2d 1018 (Fla. 1989). In Parker Tampa Two, this Court ruled that a private party seeking to recover for wrongful injunction is limited to damages in the amount of the bond. Treasure Island argued that,

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municipality or the state or any officer, agency, or political subdivision thereof, the court may require or dispense with the 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."'

because no bond had been set, the bond amount should be considered "zero" and, consequently, Provident should have no right to recover its wrongful injunction damages from the City. The trial court rejected this argument and, after a week-long trial, awarded Provident its damages (R. 3214-190).

Relying on Parker Tampa Two, the Second District Court of Appeal reversed, ruling that Provident's damage action was barred. According to the court, Parker Tampa Two applies when a court has exercised its discretion under Rule 1.610(b) to relieve the municipality of its obligation to post a bond – even though the trial court had contemporaneously affirmed its intention that Treasure Island remain liable if the injunction were later reversed.

Provident's notice of intent to invoke discretionary review followed.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal's decision to deny Provident a remedy for the wrongful destruction of its business by Treasure Island expressly and directly conflicts with precedent of this Court and other Florida District Courts of Appeal. Florida law has long held that a party who suffers damages as a result of a wrongfully entered injunction has the right to recover damages from the party seeking the injunction. The opinion below conflicts with this precedent by denying Provident its damages. Moreover, the decision below conflicts with recent cases in other district courts of appeal construing Parker Tampa Two and confirming that a low or nominal bond does not limit a wrongfully enjoined party's right to recover damages unless the trial court has made a reasoned and explicit determination to so limit the enjoined party's damages. Here, the trial court made no such finding. The trial court's decision to excuse the bond under Rule 1.610(b) was made with precisely the opposite understanding – the trial court (and Treasure Island for that matter) assumed that Provident would be made whole in the event the injunction proved wrongful.

It is important that this Court resolve this conflict between the second district's approach and the decisions of other district courts of appeal confirming the right to recover damages. The decision below places trial courts in an immediate and irreconcilable quandary. If the trial court grants a municipality the protection contemplated by Rule 1.61 O(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 government entity. The alternative is a disaster for Florida government entities. If the trial court protects the citizen's remedy by requiring the government entity to post a bond, the government entity 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 created by the opinion below is entirely unnecessary and can be eliminated simply by reversing, resolving the conflict created by the opinion and clarifying the scope of Parker Tampa Two, thereby restoring harmony in the law relating to wrongful injunction damages.

ARGUMENT

I. THE OPINION BELOW CREATES AN EXPRESS AND DIRECT CONFLICT

The baseless injunction Treasure Island sought and obtained against Provident destroyed Provident's business. The Second District Court of Appeal's decision to deny Provident the damages it suffered as a result of the loss of its business expressly and directly conflicts with decisions of other courts. According to cases from this Court and other district courts of appeal, any party that has been

enjoined wrongfully has the right to recover all damages from the party seeking the injunction. National Suretv, 138 So. 24; Lake Worth Broadcasting, 495 So. 2d 1234.

The opinion justified its departure from this precedent by misapplying this Court's decision in Parker Tampa Two. In Parker Tampa Two, this Court ruled that, in a case brought by a private party, the defendant's recovery of wrongful injunction damages was limited to the amount of the injunction bond. The opinion below treated the trial court's decision not to require Treasure Island to post an injunction bond based on Rule 1.61 O(b) as the equivalent of a decision that the bond was set at "zero," thus, immunizing Treasure Island from damages. This decision is a misinterpretation of Parker Tampa Two and is in direct and express conflict with decisions from other district courts of appeal construing Parker Tampa Two and also is in conflict with an earlier decision of this Court.

To understand the nature of this conflict, it is first necessary to understand the reasoning behind Parker Tampa Two. By requiring the parties to litigate over the amount of the injunction bond at the outset of the litigation and then limiting damages to the amount of the bond so litigated, the plaintiff is given notice of its potential liability from the beginning of the action. Thus, the plaintiff can make an intelligent decision as to whether the risk of liability under the bond is worth the benefits of the injunction. The defendant's right of recovery is preserved but the parties are placed in a position to make intelligent decisions about the costs and benefits of continuing the litigation.

There is no hint in Parker Tampa Two, or in any of the cases upon which it relies, that limiting recovery to the amount of the bond was designed to lower artificially the plaintiff's ultimate responsibility below the amount of the defendant's potential damages. To the contrary, Parker Tampa Two and its progeny make clear that the amount of the bond must be set at a level consistent with the

amount of damages the defendant is likely to suffer. 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 about what its obligations were.

Thus, in limiting damages to the bond amount, Parker Tampa Two contemplates a situation where a bond of some amount has been posted and the parties have had an opportunity reasonably to litigate the amount of the bond before the trial court.[2] This important prerequisite to the enforcement of the bond limitation has been confirmed by decisions of the Third and Fourth District Courts of Appeal. 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 both Ross 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. Similarly, in Seascape, the court set a nominal bond. The defendant's recovery was not limited to the amount of the bond because the

[2] In Parker Tampa Two the party seeking the injunction was a private party. Thus, plaintiff was absolutely required to post a bond in some amount to obtain the injunction. There is no provision in the rules that permits trial courts to dispense with the bond when sought by private parties (except in the domestic violence context).

trial court had never made a reasoned determination that the bond approximated defendant's potential damages.[3]

This Court reached a similar conclusion in the analogous case of City of St. Petersburg v. Wall, 475 So. 2d 662 (Fla. 1985). In Wall, St. Petersburg sought to condemn respondents' land and filed a lis pendens against the property. The City lost and took an appeal. Because the City was entitled to an automatic stay, the lis pendens remained in effect upon appeal. The respondents moved the trial court to require the City to post a bond, but this motion was denied "without prejudice to respondents seeking recovery of damages and costs resulting from any stay pending appeal . . ." When the City's appeal was later rejected, the City argued that, absent a bond, respondents had no right of recovery. This Court disagreed, approving the following quote from the District Court's opinion that could just as easily apply in 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.

Wall, 475 So. 2d at 663.

These cases demonstrate that a trial court's decision to waive a bond because the plaintiff is a municipality is not the equivalent of a reasoned determi-

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[3] Treasure Island's simplistic response has been that Provident should have appealed the decision not to post a bond. This argument is circular in that it assumes that a decision to dispense with a bond under Rule 1.610(b) is the same as a reasoned decision setting the amount of a bond. The trial court dispensed with the bond but affirmed Treasure Island's liability if the injunction later proved wrongful. The court in Wall did much the same when it denied the motion to require a bond but contemporaneously affirmed that the City would ultimately be liable if it lost the appeal. In Wall, the absence of the bond did not limit recovery. Thus, there was nothing for Provident to appeal, unless one presumes, like the court below, that the trial judge could give effect to Rule 1.610(b) only by depriving Provident of its well-settled right to damages.

nation of what the defendant's damage limitation should be. Rule 1.61 O(b) was designed to make it easier and less expensive for a public body to obtain an injunction. There is no authority for the proposition that it was designed to immunize a public body from the consequences of seeking and obtaining a wrongful injunction. Clearly, the trial court did not intend to confer such an immunity in this case. Although excusing Treasure Island from posting a bond, the trial court confirmed its intent that Treasure Island remain liable for wrongful injunction damages. According to the court: "If they [Provident] are damaged, they can sue them [Treasure Island]."[4]

The Second District Court of Appeal's decision to enforce the bond limitation of Parker Tampa Two in the absence of any intent to provide immunity for damages, and in the absence of any reasoned determination to set a bond in the amount of Provident's potential damages, is in direct and express conflict with cases like National Suretv and Lake Worth which confirm the right to recover wrongful injunction damages. It also conflicts with cases like Ross, Seascape, and Wall which demonstrate that a decision not to require a bond under Rule 1.61 O(b) should be distinguished from a decision to set the amount of a bond after a full and fair opportunity to litigate the amount of defendant's damages. This Court should accept jurisdiction and resolve this conflict.

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[4] The Second District's decision also conflicts with the majority view in other states on this issue. The more recent decisions have ruled that a trial court's decision to dispense with a bond because of the City's solvency does not deprive the defendant of the right to seek wrongful injunction damages. State v. Williams, 472 P. 2d 109 (Ariz. Civ. App. 1970); Cone v. City of Lubbock, 431 S.W. 2d 639 (Tex. Civ. App. 1968). See Monroe Div. Litton Bus. Sys., Inc. v. De Bari, 562 F.2d 30, 32 (10th Cir. 1977) (the protection of Rule 65 is not eliminated "when the court relies on the financial strength of the party seeking the injunction in place of a security bond.") Contra, Doyle v. City of Sandpoint, 112 P. 204 (Idaho 1910).

II. IT IS IMPORTANT THAT THE CONFLICT BE RESOLVED

The decision of the court below 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 obligation to post a bond. 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.

Even the decision below recognizes this problem. The Court specifically cautions trial courts to be very careful in dispensing with a bond, even when it is sought by a government 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.

Opinion at 6 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 against a party knowing that the enjoined 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, Rule 1.610(b) has been rendered useless.

Thus, the practical effect of the Second District's order is that trial courts will give even greater scrutiny to applications for injunction sought by government entities. Thus, as discussed in the amicus brief submitted by the Florida Association of County Attorneys supporting the exercise of this Court's jurisdiction, the

effect of the decision below will be to make it more difficult for government entities to obtain injunctions. Injunctions that would otherwise be entered on behalf of government entities may well be denied. If the court enters the injunction, it is likely to require the government 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 remedy-less or offering the government the protections afforded by Rule 1.610(b) is entirely unnecessary. By accepting jurisdiction in this case, this Court will have the opportunity to explain the proper application of Parker Tampa Two and to confirm that the bond limitation applies only when there has been a reasoned determination that the bond has been set to approximate the defendant's damages. The District Court's opinion to the contrary misconstrues Parker Tampa Two, turns Rule 1.610(b) on its head, and creates conflict in the law relating to wrongful injunctions. This Court should accept jurisdiction and take the opportunity to resolve the dissonance created by the opinion below, thus harmonizing the defendant's right to an effective remedy with the government's right to protect its citizens without bearing the burdens of an unnecessary bond.

CONCLUSION

For all the foregoing reasons, this Court should accept jurisdiction over this case and resolve the conflict between the opinion below and cases confirming that victims of a wrongful injunction should be made whole.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was delivered by U.S. Mail to: **Brian P. Battaglia, Esquire and Rodney S. Fields, Esquire,** Battaglia, Ross, Dicus & Wein, P.A. 100 North Tampa Street, Tampa, Florida **33602; 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 on this 15th day of October, 1996.

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