IN THE SUPREME COURT OF FLORIDA

LAURENCE N. **BELAIR** and
PROVIDENT MANAGEMENT CORPORATION

Petitioners,

vs. APPEAL NO. : 89,093 and 89,094

CITY OF TREASURE ISLAND, a
Florida municipal corporation,

Respondent.

_____/

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL

AMENDED ANSWER BRIEF ON JURISDICTION

BUTLER, BURNETTE & PAPPAS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF THE CASE AND FACTS

The City of TREASURE ISLAND (hereinafter referred to as "TREASURE ISLAND") disagrees with the statement of the facts and case as stated in Provident Management Corporation's (hereinafter referred to as "PROVIDENT") and Laurence N. Belair's (hereinafter referred to as "BELAIR") Jurisdiction Briefs.

The underlying facts and history of this case are summarized in the Second District Court of Appeal's opinion in ***Belair v. City of Treasure Island,*** 611 So. 2d 1285 (Fla. 2d DCA 1992). Suffice is to say that TREASURE ISLAND filed a complaint for injunctive relief to enforce a duly enacted ordinance. The injunction was entered by the trial court and no bond was entered despite an, at best, ambiguous discussion by PROVIDENT'S counsel at the hearing at the Motion for Temporary Injunction. (R. at. p. 1487-1488)(Belair's counsel made no such statement). Contrary to BELAIR and PROVIDENT's contentions, the trial court never stated nor found that the decision to dispense with a bond was "based on the fact that Treasure Island was solvent and would be able to cover the parties damages in the event the injunction was reversed. " (PROVIDENT and BELAIR's Jurisdiction Brief at page 2). Quite the contrary, the trial court merely found that PROVIDENT and BELAIR could sue if they were damaged, a point specifically recognized by the Second District Court of Appeal in its opinion wherein the Court held that:

> In the absence of a bond, as in this case, or when a party seeks to recover damages beyond the amount of the bond, the party must allege and prove some other cause of action. Without attempting to limit the available theories, we note malicious prosecution is one option.

While the appeal of the temporary injunction was pending, and again before the final hearing on the permanent injunction, PROVIDENT and BELAIR twice sought an order of the

trial court dissolving, staying or modifying the temporary injunction. (R. at p. 662-774, 769-770, 1008-1081 and 1084-1085). In neither instance did PROVIDENT, or BELAIR, ask the court to require an injunction bond. Additionally, neither PROVIDENT or BELAIR raised the lack of an injunction bond as an issue on appeal of the non-final order entering the temporary injunction or the order entering the permanent injunction.

The trial court entered judgment in favor of PROVIDENT in the amount of $1,768,242.50 and in favor of BELAIR in the amount of $48,843.00. The appeal to the Second District Court of Appeal followed. The Second District Court of Appeal reversed, relying on the sound and unchallenged authority of ***Parker Tampa Two v. Somerset Development Corporation,*** 544 So.2d 1018 (Fla. 1989).

II. SUMMARY OF THE ARGUMENT

PROVIDENT and BELAIR fail to point out the alleged conflict between or among decisions of the District Courts of Appeal or the Florida Supreme Court and the decision under review. They cannot so demonstrate because the Second District Court of Appeal faithfully followed this Court's decision in ***Parker Tampa Two v. Somerset Development Corporation, 544*** So.2d 1018 (Fla. 1989). PROVIDENT and BELAIR's briefs address perceived issues of "great public importance, " However, despite a specific request to that court and extensive briefs on the issues, the Second District Court of Appeal refused to certify any of the issues involved herein as one of "great public importance."

Florida courts have consistently followed ***Parker Tampa Two*** to limit damages for wrongfully obtaining an injunction to the amount of the injunction bond. ***Tabsch v. Nojaim, 548*** So. 2d 851, 853 (Fla. 3rd DCA 1989); ***Shea v. Central Diagnostic Services, Inc., 552 So.*** 2d

344, 346 (Fla. ***5th*** DCA 1989); ***Multicredit, Inc. v. Ecoban Capital Ltd., 555 So.*** 2d 1249, 1250 (Fla. 3rd DCA 1989); ***Longshore Lakes Joint Venture*** v. ***Mundy,*** 616 So. 2d 1047 (Fla. 2d DCA 1993).

Notwithstanding their assertions of uniqueness requiring "certification" by the District Court of Appeal below, Petitioners have failed to demonstrate that the Second District Court of Appeal's decision conflicts with any decision of any court in the State of Florida, Therefore, Petitioners have failed to show any conceivable basis upon which this Court's jurisdiction can be invoked.

III. ARGUMENT

A. PETITIONERS HAVE FAILED TO DEMONSTRATE THE EXISTENCE OF A CONFLICT BETWEEN THE SECOND DISTRICT COURT OF APPEAL'S DECISION AND THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW AND, AS SUCH, THIS COURT SHOULD DENY REVIEW OF THE SECOND DISTRICT COURT OF APPEAL'S DECISION

PROVIDENT and BELAIR fail to point out the alleged conflict between or among decisions of the District Courts of Appeal or the Florida Supreme Court and the decision under review, They cannot so demonstrate because the Second District Court of Appeal faithfully followed this Court's decision in ***Parker Tampa Two v. Somerset Development Corporation, 544*** So.2d 1018 (Fla. 1989). Failing to show a basis for jurisdiction, PROVIDENT and BELAIR instead are now solicitous of TREASURE ISLAND'S interests in that the Second District Court of Appeal's opinion might have some detrimental effect on local governments obtaining an injunction. While their concern is appreciated, it should have been demonstrated before TREASURE ISLAND expended in excess of $100,000.00 in defending this action for damages. PROVIDENT and BELAIR would have this Court believe that they want to "fix" that perceived

problem by merely reversing the Second District Court's opinion and entering a judgment of approximately $2,000,000 against the taxpayers of TREASURE ISLAND. Nowhere in the jurisdiction briefs filed by PROVIDENT or BELAIR do they address the issue of this Court's jurisdiction to entertain this appeal, PROVIDENT and BELAIR's briefs address perceived issues of "great public importance." However, despite a specific request and extensive briefs on the issues, the Second District Court of Appeal refused to certify any of the issues involved herein as one of "great public importance."

In addition, the Second District Court of Appeal's opinion does not depart from any precedent of any court in the State of Florida, or for that matter -- and, in direct conflict with the statements contained in PROVIDENT and BELAIR's Jurisdiction briefs at footnote 4 -- the majority of jurisdictions in the United States. The Second District Court of Appeal followed this Court's pronouncement in ***Parker Tampa Two v. Somerset Development Corporation, 544*** So.2d 1018 (Fla. 1989), and Petitioners have failed to show how the opinion conflicts with any decision of any court in the State of Florida.[1]

In fact, in a futile effort to invoke the jurisdiction of this Court, PROVIDENT and BELAIR, in their briefs filed in the Second District Court of Appeal in support of a request for certification of the question as one of "great public importance" and in the original briefs filed in the appeal before the Second District Court of Appeal, have previously contended that there

[1] Petitioners' contend that ***Lake Worth Broadcasting Corporation v. Hispanic Broadcasting Inc.,*** 495 So. 2d 1234 (Fla. 3rd DCA 1986) and ***National Surety Co. v. Willys-Overland,*** 138 So. 24 (Fla. 1931) are in direct and express conflict with the Second District Court of Appeal's decision. However, in both cases the trial court, as a condition of the temporary injunction, required the party to post a bond. Thus, each action awarding damages was founded upon an injunction bond.

existed no case directly on point or in support of their position, in direct contrast with their assertions in this appeal in which they now assert a conflict exists. In its Answer Brief filed in the Second District Court of Appeal, PROVIDENT stated as follows:

> Although Wall, Cozart, and SeaEscape are instructive, **there do not appear to be any cases in Florida specifically on point. . . .** Neither ***Parker Tampa Two*** or any of the cases cited by Treasure Island speak to the crucial issue in this case. None of Treasure Island's cases even involve a municipality seeking an injunction, much less a decision by the Court to relieve a municipality of the requirement of posting an injunction bond. (emphasis added).

In BELAIR's Answer Brief filed in the Second District Court of Appeal, BELAIR contended as follows:

> Not finding any case law in Florida to support its position, the Plaintiff looks to cases from other jurisdiction (sic). But again, in all but one of the cases cited, the Plaintiff is not a municipality, the state or agency of the state.

In any event, regardless of which face they now choose to show, TREASURE ISLAND disputes that it is well-settled that a party who has been enjoined has the right to recover all damages from the party seeking an injunction, without limitation. Historically, damages were not recoverable for an injunction which has been vacated on appeal.[2] Thus, statutes have been

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[2] In ***Fisher v. Parkview Properties, Inc.,*** 859 P.2d 77, 82 (Wash. App. 1993), ***amended in part, reconsideration denied in part, Fisher v. Parkview Properties,*** 1993 Wash. App. LEXIS 419 (Wash. App. Nov. 22, 1993), the court stated the rule as follows:

> Generally, common law liability in tort does not result from suing out an injunction, unless the claimant proves the elements of malicious prosecution. . . . The underlying philosophy "is that an error in granting an injunction is an error of the court, for which there is no recovery in damages unless it is sufficiently intentional to be the basis for a suit for malicious prosecution. " (emphasis added)

Additionally, in ***Yonkers v. Federal Sugar Ref. Co.,*** 221 N.Y. 206, 208-09, 116 N.E. 998 (N.Y. 1917), Justice Cardozo stated the common law rule as follows:

enacted providing for injunction bonds which are "generally conditioned for the payment of such damages as the party enjoined may incur." ***Injunction Bond - Damages, 95*** ALR 2d 1191 (1964). In the absence of a statute, the common law would control and would mandate that no damages are recoverable for an injunction which has been vacated on appeal.

In ***Parker Tampa Two v. Somerset Development Corporation, 544 So.*** 2d 1018 (Fla. 1989), this Court held that "[i]n Florida, injunction bonds are addressed by Florida Rule of Civil Procedure 1.610 and section 60.07, Florida Statutes (1987). " Similarly, in ***Hathcock v. Hathcock,*** 533 So. 2d 802 (Fla. 1st DCA 1988), ***review denied,*** 542 So.2d 1333 (Fla. 1989), the court held that the only statutory basis for damages as a result of a wrongful injunction is section 60.07, Fla. Stat. Finally, in ***Shea v. Central Diagnostic Services, Inc., 552 So.*** 2d 344 (Fla. 5th DCA 1989), the court held that pursuant to section 60.07, Fla. Stat., the defendant must look to the injunction bond as the sole source of recovery for any damages resulting from the wrongful issue of an injunction.

Thus, the only arguable statute which would authorize damages as a result of a wrongful injunction is section 60.07, Fla. Stat. However, Section 60.07, Fla. Stat., only authorizes damages as a result of a wrongful injunction if and only if an injunction bond has been posted. There is not even one case in the history of Florida jurisprudence which holds that a party is

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> There was no liability at common law for damages resulting from an injunction erroneously granted unless the case was one of malicious prosecution. . . . Sometimes the chancellor made his order conditional upon the plaintiff's undertaking to assume the damages. But without such a condition the defendant had no remedy against the honest and cautious suitor.

See also Truk Away of Rhode Island v. Macera Bros. of Cranston, Inc., 643 A.2d 811, 816- 817 (R.I. 1993).

entitled to wrongful injunction damages when no bond has been issued. Again the reason is quite obvious. If there is no bond, then there is no statutory remedy for damages, *i.e.*, section 60.07 does not apply, Thus, the common law would apply and damages would not be recoverable. [3]

Rule 1.610, Fla. R. Civ. P., (which is patterned after Rule 65, Fed. R. Civ. P), allows the court to relieve the State or any of its agencies or municipalities of the requirement to post a bond keeping in mind "due regard for the public interest", *i.e.*, there may be times when the "public interest" requires the State to post a bond. Because PROVIDENT and BELAIR claim damages here, they should have appealed the trial court's finding that no bond was required. Of course they did not.[4] Without a bond, there can be no action under section 60.07, Fla. Stat.

There are only two instances when a bond may not be required under Rule 1.610(b): (1) when an injunction is issued on the pleading of a municipality or the state or any officer,

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[3] Petitioners never appealed the failure of the trial court to require a bond. Regardless of the reason why no bond was required, Petitioners simply failed to argue on appeal of the temporary injunction or appeal of the permanent injunction the effect of the absence of a bond on their ability to collect damages. Only now, after at least three separate and distinct appellate opportunities, do they ask this Court to relieve them of their errors in failing to request any court below to review the trial court's decision not to require a bond,

[4] PROVIDENT contends that *City of St. Petersburg v. Wall*, 475 So. 2d 662 (Fla. 1985), supports its entitlement to damages. In *Wall*, the Court specifically excused the municipality from the requirement of posting a supersedeas bond but specifically allowed appellees to seek "recovery of damages and costs resulting from any stay." Thus, the court recognized and specifically permitted "appellees to seek damages resulting from the stay." In addition, one familiar with the differences between an injunction bond, as in this case, and a supersedeas bond, as in *Wall*, cannot seriously argue that the two are synonymous. In any event, in *Wall* the court specifically held that: "Where, as here, there has been no showing of bad faith, a city should not be held liable for litigating a case which it subseauentlv loses." *Id.* at 663. Similarly, where, as here, there has been no showing of bad faith, the City of Treasure Island should not be held liable for litigating a case which it subsequently loses when no bond has been imposed.

agency, or political subdivision . . . having due regard for the public interest, and (2) when an injunction is issued to prevent physical injury or abuse. The intent of the municipality exception in Rule 1.610(b), Fla. R. Civ. P., was clearly explained in ***Yonkers v. Federal Sugar Ref. Co.,*** 221 N.Y. 206, 209-212, 116 N.E. 998 (N.Y. 1917), wherein the court stated:

> Special rules apply, however, to provisional remedies granted at the instance of municipal corporations. In such cases no security is required. . . ,
>
> If some resident of Yonkers had brought this suit, there would have been a prescribed maximum of risk. The plain mu-nose of the statute was, not to imnose upon municipal cornorations an added burden, but to give them a special privilege. The privilege is an illusory one if this order is to be affirmed. If the defendant's position is upheld, a municipal corporation, alone among litigants, may find itself involved in a crushing and indeterminate liability because of the error of a court in holding that it was entitled to relief. (emphasis added).

Florida courts have consistently followed ***Parker Tampa Two*** to limit damages for wrongfully obtaining an injunction to the amount of the injunction bond. ***Tabsch v. Nojaim, 548*** So. 2d 851, 853 (Fla. 3rd DCA 1989) ("The Florida Supreme Court has held that damages for the improper obtaining of an injunction are limited to the amount of the injunction bond"); ***Shea v. Central Diagnostic Services, Inc., 552*** So. 2d 344, 346 (Fla. 5th DCA 1989) ("The defendant must look to the injunction bond as the sole source of recovery of any damages resulting from the wrongful issuance of the injunction") (emphasis added); ***Multicredit, Inc. v. Ecoban Capital Ltd.,*** 555 So. 2d 1249, 1250 (Fla. 3rd DCA 1989) ("Damages for the improvident issuance of an injunction are limited to the amount of the injunction bond"); ***Longshore Lakes Joint Venture*** v. ***Mundy,*** 616 So. 2d 1047 (Fla. 2d DCA 1993).

In ***Ross v. Champion Computer*** Corp., 582 So. 2d 152 (Fla. 4th DCA 1991), the trial court entered a temporary injunction without requiring the moving party to post a bond. The court held:

> *Parker* stands for the proposition that if any damages incur to the party against whom an injunction is issued, where such injunction is later determined to have been wrongfully issued, the damages recoverable are limited to the amount of the bond, if any, required upon the issuance of the injunction. case, if it is later determined, upon a full hearing and the presentation of further evidence, that Champion's injunction was wrongfully obtained, appellant would not be able to collect any damages. as there was no bond reauired.

Id. at 153. (emphasis added).

Finally, in *Doyle v. City of Sandpoint,* 112 P. 204 (Idaho 1910), the Idaho Supreme Court decided the identical issue presented herein and held that in absence of a bond, even when a bond requirement has been excused for a municipality, damages are not recoverable. The Court stated:

> Under the provisions of the statute, section 4291, Rev. Codes, "On granting an injunction, the court or judge must require, except when the state, a county, or municipal corporation, or a married woman in a suit against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties to the effect that the plaintiff will pay to the party enjoined such costs, damages, and reasonable counsel fees, not exceeding an amount to be specified, as such party may incur or sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto." , . ,
>
> The question with which we are confronted in this case is whether a municipal corporation is liable for damages for wrongfully suing out a writ of injunction or wrongfully causing the same to be continued in force. It is clear to us that as to any party specifically excepted from the operation of the statute, there can be no liability for damages, unless it is alleged and proven that the injunction was procured maliciously and without probable cause. . . .
>
> It is argued . . . that the only purpose of the exception was to avoid the inconvenience and annoyance that might be entailed on the state, county, or city officer, or a married woman, in case they were required to secure an undertaking before the writ would issue. It is further contended by counsel that an undertaking on the part of the excepted classes would not add anything to the security. We cannot agree to this line of reasoning. In the entire absence of this statute, there would be no liability for the wrongful or erroneous suing out a writ of injunction, except in cases where a court or equity might see fit to require a bond in advance. In the absence of the statute, it is therefore clear that the state, county, and municipal corporation would not be liable as on bond. It is equally

> certain that this statute does not require them to give a bond or declare that they shall be liable, the same as an individual, although they do not give a bond. The reasons for the enactment of this statute might be the subject of much speculation, but we are inclined to think that it was the legislative purpose to exempt the public from such liability, whether they be acting as a state, a county, or a municipal corporation, and that it was considered by the law-making power that, since an injunction must be sought and procured through executive or administrative officers who can have no personal interest in the matter except the discharge of their public duties, and the writ, if granted at all, must be granted by the judicial department of the state - that with these two means of investigation and two branches of the state government passing upon the matter, the chances of damages occurring to the individual would be minimized, and that no liability should be imposed on the public for any error or misjudgment on the part of the officers, both executive and judicial, so acting.

Florida follows the majority rule regarding limiting damages to the amount of the bond and Idaho is a majority rule state as well.[5] The identical claim presented herein has been addressed and rejected by the Idaho Supreme Court in *Doyle* and, by extension, the same result should obtain in Florida.

IV. CONCLUSION

Notwithstanding their assertions of uniqueness requiring "certification" by the District Court of Appeal below, Petitioners have failed to demonstrate that the Second District Court of Appeal's decision conflicts with any decision of any court in the State of Florida. In addition, the Second District Court of Appeal refused to certify this case as one of "great public importance." Therefore, Petitioners have failed to show any conceivable basis upon which this Court's jurisdiction can be invoked. Based on the foregoing, review should be denied.

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[5] Petitioners choose to change the meaning of words to suit their needs. In PROVIDENT and BELAIR's briefs, they contend that the Second District Court of Appeal's decision conflicts with the majority view in other states on this issue. (See PROVIDENT and BELAIR's briefs at page 8.) Thereafter, PROVIDENT and BELAIR cite cases from Arizona and Texas despite clear knowledge that those states are among those which adopt the minority view. *Parker Tampa Two, supra,* at Ftn. 1.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to the following persons this 18th day of November, 1996:

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