OA 6-2-97

IN THE SUPREME COURT OF THE
STATE OF FLORIDA
CASE NOS.: 89,093 and 89,094

PROVIDENT MANAGEMENT CORPORATION
and LAURENCE N. BELAIR,

Petitioners,

vs.

CITY OF TREASURE ISLAND, a
Florida municipal corporation,

Respondent.

_____________________________/

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ON REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

RESPONDENT, CITY OF TREASURE ISLAND'S BRIEF ON THE MERITS

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I.

PRELIMINARY STATEMENT

This is a consolidated Petition for review of the Second District Court of Appeal's decision to vacate two final judgments entered by Circuit Judge Helen S. Hansel of the Sixth Judicial Circuit, Pinellas County. In the proceedings before the Second District Court of Appeal, the CITY OF TREASURE ISLAND (hereinafter referred to as "TREASURE ISLAND") was the Appellant. LAURENCE N. BELAIR (hereinafter referred to as "BELAIR") and PROVIDENT MANAGEMENT CORPORATION (hereinafter referred to as "PROVIDENT") were Appellees . Citations to the Record are referred to as (R. at p. ___).

STATEMENT OF THE CASE AND FACTS

The underlying facts and history of this case are summarized by the Second District Court's opinion in ***Belair v. City of Treasure Island,*** 611 So. 2d 1285 (Fla. 2d DCA 1992), ***review denied,*** 624 So. 2d 264 (Fla. 1993), and in ***City of Treasure Island v. Provident Management Corporation and Laurence Belair***, 678 So. 2d 1322 (Fla. 2nd DCA 1996), wherein the court stated:

> Essentially, the City obtained a temporary injunction against Provident and Mr. Belair in May 1990 in an action to enforce the local zoning code. The temporary injunction expressly stated that the City was not required to post a bond. Provident and Mr. Belair appealed the temporary injunction, and this court affirmed without written opinion. ***Belair v. City of Treasure Island, 574 So.*** 2d 145 (Fla. 2d DCA 1990); ***Provident Management Corp. v. City of Treasure Island,*** 572 So. 2d 916 (Fla. 2d DCA 1990). During the pendency of the nonfinal appeals, Provident sought a modification of the temporary injunction in the trial court, but made no effort to reauire the Citv to post a bond. Thereafter, the trial court entered a permanent injunction in June 1991, which this court reversed, ***Belair v. City of Treasure Island,*** 611 So. 2d 1285 (Fla. 2d DCA 1992), ***review denied,*** 624 So. 2d 264 (Fla. 1993).
>
> On remand, both Provident and Mr. Belair filed documents described as "notice and motion for evidentiary hearing for recover of damages . . . against Treasure Island for wrongful injunction. " All of the parties treated these documents as if they were amended complaints seeking damages from the City pursuant to section 60.07, Florida Statutes (1989). The City filed motions for summary judgment, arguing that no bond had been posted and that damages were not otherwise available. Judge David Seth Walker denied the motions for summary judgment and then recused himself. The case was then assigned to Judge Hansel to conduct a hearing on damages. The City appeals the final judgments awarding these damages. (emphasis supplied)

The trial court entered judgment in favor of PROVIDENT in the amount of $1,768,242.50 which included an award of prejudgment interest "from the time of the completion of the destruction of the business, June 3, 1991, [i.e., the date of entry of the permanent

injunction] to the date of the judgment. " The judgment also included an award of attorney's fees incurred from the time of the issuance of the May, 1988 correspondence from the City continuing through several unsuccessful efforts by PROVIDENT to dissolve or modify the temporary injunction and its subsequent successful effort to overturn the permanent injunction, excluding the appeal proceedings from the permanent injunction. (R. at p. 3214-3219)

Additionally, the trial court entered judgment in favor of BELAIR in the amount of $48,843 .OO which included an award of prejudgment interest "from April 5, 1991 [the date of sale of BELAIR's unit] through the entry of this judgment." The judgment included an award of attorney's fees incurred from the time of the issuance of the May, 1988 correspondence, continuing through the unsuccessful effort to dissolve the temporary injunction and the subsequent effort to overturn the permanent injunction, excluding the appeal proceedings from the permanent injunction. (R. at p. 3208-3213). Both judgments also provided for postjudgment interest at the rate of 12 % per year.

Timely consolidated appeals followed, (R. at p. 4297-4948). The Second District Court of Appeal reversed the judgments and found that neither PROVIDENT or BELAIR argued that the trial court's decision to dispense with a bond was argued as an abuse of discretion. In addition, the Court found that damages recoverable for wrongful injunction are limited by Section 60.07, Fla. Stat. "to the amount of the bond unless the injunction was obtained maliciously or in bad faith. " ***City of Treasure Island v. Provident Management Corp., 678 So.*** 2d 1322 (Fla. 2nd DCA 1996). This Petition follows.

111.

SUMMARY OF ARGUMENT

Under the holding in ***Parker Tampa Two v. Somerset Development, 544*** So. 2d 1018 (Fla. **1989),** and consistent with Fla. Stat. $60.07, damages recoverable for wrongful injunction are limited to the amount of the injunction bond, unless the injunction was obtained maliciously or in bad faith. If no bond has been set, then no damages are recoverable. In the instant case, despite numerous opportunities throughout the pendency of these proceedings, neither PROVIDENT nor BELAIR appealed the trial court's discretionary decision to refuse to require a bond. Therefore, PROVIDENT and BELAIR are not entitled to collect damages and the Second District Court of Appeal's decision should be affirmed.

In addition, TREASURE ISLAND is immune from suit for damages under the doctrine of sovereign immunity. How a governmental entity seeks to enforce compliance with duly enacted ordinances has never given rise to a common law duty of care. Without a duty of care, there can be no governmental tort liability. If a duty of care exists, except for a limited waiver of liability for tort created by statute, there has been no waiver of sovereign immunity.

Next, "fair market value" is the proper standard in evaluating the damages which may have been incurred by Petitioners. Treasure Island's Motion for Directed Verdict was improperly denied.

The trial court erred in awarding BELAIR telephone expenses, secretarial and administrative expenses and travel and lodging expenses as these costs are not recoverable as costs of litigation.

The trial court erred in awarding attorney's fees to PROVIDENT and BELAIR where there exists no statutory authority for such an award.

The trial court erred in awarding prejudgment interest. The evidence indicated that damages were ongoing and accumulating over time and thus were not "liquidated" as of a date certain. Thus, under Florida law there can be no recovery of prejudgment interest.

The trial court erred in imposing postjudgment interest.

IV.

ARGUMENT

A. THE SECOND DISTRICT COURT OF APPEAL PROPERLY HELD THAT DAMAGES RELATED TO THE IMPROPER ISSUANCE OF AN INJUNCTION ARE LIMITED TO THE AMOUNT OF THE INJUNCTION BOND

TREASURE ISLAND disputes that "historically" a party who has been enjoined has the right to recover all damages from the party seeking an injunction. (PROVIDENT's brief at p. 13). Historically, damages were not recoverable for an injunction which has been vacated on appeal.[1] Thus, statutes have been enacted providing for injunction bonds which are "generally

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[1] 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." 42 Am. Jur. 2d at 1172; see also 30 A.L.R. 4th at 275. (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:

> 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. Public policy was thought to demand that the free pursuit of remedies in the courts should not be obstructed by the menace of liability for innocent mistake.

In ***Truk Away of Rhode Island v. Macera Bros. of Cranston, Inc., 643*** A.2d 811, 816-817 (R.I. 1993), the Rhode Island Supreme Court stated:

conditioned for the payment of such damages as the party enjoined may incur. " ***Injunction Bond - Damages,*** 95 ALR 2d 1191 (1964).

However, in "the absence of statute, many courts have held that because a wrongfully issued injunction constitutes an error of the court, for which error no recovery is generally permitted, there is no liability for the wrongful issuance of an injunction in the absence of proof of malicious prosecution on the part of the plaintiff." ***Recovery of Damages Resulting From Wrongful Issuance of Injunction as Limited to Amount of Bond,*** 30 A.L.R. ***4th 273*** (1984), ***cited with approval, Parker Tampa Two v. Somerset Development Corp., 544 So.*** 2d 1018 at fn. 2 (Fla. 1989). Thus, in order to be entitled to damages, a statute must provide the basis for recovery.

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)." In ***Hathcock v. Hathcock, 533 S .*** 2d 802 (Fla, 1st DCA 1988), ***rev, den.,*** 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), adhering to the holding in ***Parker Tampa Two,*** the Court held that pursuant to section 60.07, Fla.

> There is no liability at common law for damages suffered by reason of an injunction erroneously granted, unless suit was maliciously brought. . . . The Supreme Court of the United States has said that 'damage arising from the act of the court itself is ***damnum absque injuria,*** for which there is no redress, . .

See also United Construction Workers et al. v. The H.O. Canfield Company et al., 116 A.2d 914 (Corm. 1955).

Stat., the defendant must look to the injunction bond as the <u>sole</u> source of recovery for any damages resulting from the wrongful issue of an injunction.

The only Florida statute addressing damages as a result of a wrongfully entered injunction in any context is Section 60.07, Fla. Stat., which provides in pertinent part:

> In injunction actions, on dissolution, the court may hear evidence and assess damages to which a defendant may be entitled under any <u>injunction bond,</u> eliminating the necessity for an action on the injunction bond if no party has requested a jury trial on damages. (emphasis added).

Section 60.07, Fla. Stat., specifically states that the court may "assess damages to which a defendant" may be entitled to under an <u>injunction bond</u>. However, such assessment must be drawn from, and limited to, the injunction bond. If no bond has been entered, then no recovery can be obtained under Section 60.07, Fla. Stat. ***Huthcock v. Hathcock, 533 So.*** 2d 802, 803 (Fla. 1st DCA 1988) (Section 60.07, Fla. Stat., applies <u>only</u> where an injunction bond has been filed).

It is ironic that neither Petitioners' nor the Amicus briefs filed herein and on appeal to the Second District Court of Appeal ever mention Section 60.07, Fla. Stat. The reason, of course, is quite obvious. Section 60.07, Fla. Stat., <u>only</u> authorizes damages as a result of a wrongful injunction <u>if</u> and <u>only if</u> an injunction bond has been posted. There is not a single case in the history of Florida jurisprudence which holds that a party is entitled to monetary damages for a wrongful injunction in the absence of an injunction bond. Again the reason is quite obvious. If there is no bond, then there is no statutory remedy for damages, ***i.e.,*** section 60.07, Fla. Stat., does not apply. Thus, the common law would apply and damages would not be recoverable.

When a statute is created which changes the common law, the statute must be clear and unequivocal because the presumption is that no change is intended otherwise. City *of Miami* v. Cosgrove, 516 So. 2d 1125 (Fla. 3rd DCA 1987), ***citing, Carlile v. Game and Freshwater Fish Commission, 354*** So. 2d 362 (Fla. 1977). Statutes are to be construed in reference to the principles of common law, for it is not presumed that the Legislature intended to make any innovation in the common law other than that which is specified. ***Ellis v. Brown, 77 So.*** 2d 845 (Fla. 1955). Section 60.07, Fla. Stat., specifically requires that any entitlement to damages may only be assessed against the injunction bond. Since no bond was entered in the instant case, and the absence of a bond was not appealed, Section 60.07, Fla. Stat., does not apply? The ***Parker Tampa Two, supra,*** holding is totally consistent with and faithful to this principle. ***Id.*** at 1020-1021.

In ***Parker Tampa Two, supra,*** this Court held that damages recoverable for wrongfully obtaining an injunction are limited to the amount of the injunction bond absent evidence that the injunction was obtained maliciously or in bad faith.[3] The court stated:

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[2] One of the most critical facts is that Petitioners never appealed the failure of the trial court to require a bond. ***See City of Treasure Island, 678 So.*** 2d at 1324 ("In this case the trial court dispensed with the bond. The briefs in the non-final appeals reveal that neither Mr. Belair nor Provident argued this decision was an abuse of discretion. ") 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 that it would incur damages as a result of the injunction. Only now after at least three different appellate opportunities do they ask this Court to relieve them of the consequences of their successive errors in failing to request any court to review the trial court's decision not to require a bond.

[3] It should be noted that the trial court and the Second District Court of Appeal found that Provident and Belair were entitled to bring a separate action to recover damages if the injunction was overturned. The trial court stated that "if they [Provident] are damaged they can sue." Necessarily, such a lawsuit would involve allegations that the injunction was obtained maliciously or in bad faith. Contrary to Petitioners' assertions, (Provident brief at p. 24), there has never

> When a court initially sets an injunction bond, this constitutes the court's determination of foreseeable damages based on the good faith representations that are before it . . . . Should this amount prove insufficient or excessive, an affected party is free to move for modification. A court order denying a motion to modify is directly appealable . . . . Limiting liability to bond amount thus provides an orderly step-by-step procedure wherebv all parties can be continually apprised of the consequences of their actions. To hold the obtaining party fully liable would in many cases expose the party to potentially staggering consequential damages difficult or impossible to project. The public policy encouraging fair access to the courts for those who are in good faith pursuit of their equitable rights must be protected from the deterrent certain to be posed bv unknown liabilitv for mistake.

Id. at 1021 (emphasis added).

The rationale behind limiting liability to the bond amount is two-fold. First, a party who is in good faith pursuit of its equitable rights should be protected from the deterrent posed by an unknown liability for mistake. Without limiting the liability to the bond amount, the party seeking the injunction has no ability to project accurately the possible consequential damages of its actions. The ability to accurately and precisely project potential damages is especially important where, as here, a municipality is the moving party and is faced with the need to budget and manage its assets with an eye to the public treasury. If a municipality or any other party is able to gauge the potential expense of its actions as a matter progresses, it is better able to determine whether or not to proceed to the next stage of the proceedings.

PROVIDENT suggests that rationale is absent in this case because discovery had revealed the magnitude of PROVIDENT's business. From this, PROVIDENT suggest TREASURE ISLAND should have deduced the amount of PROVIDENT's damages, including, presumably the attorney's fees and interests ultimately awarded by the trial court. Since PROVIDENT

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been any finding that Treasure Island would be liable under Section 60.07, Fla. Stat., in the absence of a bond.

admits "there has been no reasoned determination regarding the amount of the bond, " (Brief p. 14), TREASURE ISLAND would submit neither has there been a "reasoned determination" of the potential damages.

Second, this Court held that:

> Limiting liability to the bond amount can also be viewed as an equitable way of apportioning liability between the two entities generally at fault in the issuance of a wrongful injunction, i.e., the obtaining party and the court. The obtaining party often is at fault for asking the court to act hastily, requiring it to dispense with normal procedural safeguards. The court, on the other hand, at times simply misreads or misapplies the law independent of any time constraint imposed upon it by the obtaining party.

Id.[4]

In the instant case, if this court were to reverse the Second District Court of Appeal's decision it would, in fact, be holding the obtaining party fully liable for the wrongful injunction, something this Court in ***Parker Tampa Two*** specifically held was improper. By doing so, this Court would not be employing the balancing approach of apportioning liability approved in ***Parker Tampa Two,***

Petitioners have contended that it would be absurd to apply the holding of ***Parker Tampa Two*** to municipalities because municipalities have unlimited ability to raise funds and pay debt.

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[4] Although the May 30, 1990 order of the trial court is denominated a "temporary injunction, " the proceedings leading to the entry of that order were not "hasty" nor were the "normal procedural safeguards" dispensed with. The temporary injunction Order was entered six months after the motion for temporary injunction was filed and after several days of hearings between January and May 1990. Petitioners were represented by counsel throughout, called numerous witnesses, including experts, and cross-examined other witnesses at length. They fully participated in the drafting of the May 30, 1990, Order, a process which took over two weeks. Thus, contrary to Petitioner's contentions, the "temporary injunction" was not done in "great haste and without a full hearing, " nor "prior to any resolution on the merits. " (See PROVIDENT brief at p. 11).

However, this contention is in direct contradiction of the two-fold rationale behind ***Parker Tampa Two,*** which is to put a party on notice of its potential obligations for **wrongfully** seeking an injunction and to apportion liability between the parties at fault, ***i.e.,*** the party seeking the injunction and the court for entering the temporary injunction.

In any event, Petitioners' contentions and the trial court's conclusion have previously been rejected. In ***Town of Davie*** v. ***Sloan,*** 566 So. 2d 938 (Fla. 4th DCA 1990), the Sloans obtained a temporary restraining order against the Town of Davie enjoining it from commencing construction on a road located in Broward County. Originally, the trial court required the Sloans to post a $2,000 bond. On a motion to increase the bond, there was discussion about the value of the Sloans' property being in excess of $6 million, "so as to imply that [the Sloans] would have assets from which an award could be satisfied, if it were later determined that the injunction were wrongfully issued, and damages awarded in an amount greater than the $2,000 bond. " Id. at 939. On appeal, the court limited the amount of damages to the amount of the injunction bond even though the Sloans appeared to have virtually unlimited assets with which to satisfy a judgment. As can be seen in ***Town of Davie,*** the ***Parker Tampa Two*** doctrine of limiting liability to the amount of the bond applies even in those cases where the party obtaining the injunction has the apparent ability to pay any judgment. ***Town of Davie*** stands for the proposition that even when a party has unlimited resources to pay any damage award, as Petitioners consistently claim is the reason for relieving a municipality of an injunction bond, and as Sloan obviously had, damages are limited to the amount of the injunction bond. The rationale argued by Petitioners that a municipality is different because of its power to tax is wholly inconsistent with this

holding. The fact that the enjoining party may have unlimited assets from which to pay damages has nothing to do with exempting a party from the bond requirement.

In ***A, Sherman Lumber Co, v. Kildare Club,*** 174 N.Y.S. 769,770 (N.Y. Sup, Ct. 1919), the court considered these same contentions and rejected them stating:

> There seems to be no doubt that the defendants are limited to the amount of the undertaking for any damages which may be sustained by them in connection with this action and injunction. The fact that the plaintiff is a wealthy corporation and able to respond in damages is not, therefore, of importance, except as it might bear upon the question of discretion in the court, and tend to show that the undertaking would not be burdensome, and might be necessary to fully protect the defendants.

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 at 346 ("The defendant must look to the injunction bond as the <u>sole</u> 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 ***S .*** 2d 1047 (Fla. 2d DCA 1993) ("[D]amages recoverable for wrongfully obtaining an injunction are limited to the amount of the injunction bond").

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 required.

Id. at 153, (emphasis added).

As can be seen from the holding in *Ross,* courts recognize there are instances when damages are not recoverable because no bond has been required. In *Cushman & Wakefield, Inc.,* v. *Cozart,* 561 So. 2d 368 (Fla. 2d DCA 1990), the Court held:

> Before a trial court sets a bond below the range of anticipated costs and damages, the trial judge should be very confident that this extraordinary decision is completely appropriate under the circumstances of the case. Since a movant must establish a clear legal right to relief and a substantial likelihood of success before any temporary injunction is appropriate . . . it is apparent that entitlement to a reduced bond requires an even stronger showing. Obviously, the consideration given to the movant's high probability of success must be very circumspect because the bond will be useful only if the trial court's prediction proves incorrect. . . .

In *D. G. Broome v. Hattiesburg Building and Trades Council, 206 So.* 2d 184, 187 (Miss. 1968), the court stated:

> It does not appear from the record what was the nature of the injunction, or what was enjoined. But whatever may have been its nature and effect, it is manifest that no remedy for the injury resulting to the party enjoined, in consequence of it, could be maintained in an action upon the bond, beyond the plain terms of the bond. If the bond, in the form in which it was executed, was an insufficient security to the party enjoined, for the damage which might be sustained in consequence of the injunction, it was his duty to require, by order of the court, a sufficient bond; but having failed to do so, he cannot afterwards recover upon the bond to an extent beyond the measure of the obligation, (emphasis added).

Indeed, the failure to require a bond, or requiring a bond in an amount insufficient to address the enjoined party's anticipated damages is directly appealable. *Parker Tampa Two,*

supra. Petitioners failed to seek an order of the trial court setting a sufficient bond. Having failed to do so and having failed to appeal the absence of a bond, Petitioners waived their rights to, and cannot therefore recover, damages for the wrongfully issued temporary injunction. See ***Behar v. Jefferson National Bank at Sunny Isles,*** 519 So.2d 641 (Fla. 3rd DCA 1987), ***review denied,*** 531 So. 2d 167 (Fla. 1988).

Even if this Court were to find that ***Parker Tampa Two*** is not applicable to municipalities (by determining that Rule 1.610(b), Fla.R.Civ.P., creates an exception to the common law by holding that there may be municipal liability for wrongful injunction in the absence of an injunction bond), Section 60.07, Fla. Stat., still does not permit money damages as a result of an improper injunction in the absence of a bond. In ***Hathcock v. Hathcock, 533 So.*** 2d 802, 804 (Fla. 1st DCA 1988), the court held that:

> The order is further deficient, except insofar as the restraint against physical injury or abuse, in that the trial court failed to impose the bond requirements of Rule 1.610(b).[3]
>
> Finally, appellant claims that he is entitled, on reversal and remand to the trial court, to compensatory and punitive damages and attorney's fees as determined by the trial court based upon the erroneous issuance of the temporary order. . . However, fatal to appellant's reliance upon the above authority is the fact that Section 60.07 allowing the court in the main suit to determine and award damages upon dissolution of an injunction applies only where an injunction bond is filed.
>
> Footnote:[3.] -- Under the Rule, no bond is required with respect to that aspect of the order which sought to prevent physical injury or abuse of the plaintiff/appellee. (emphasis added)

As can been seen from the holding in ***Hathcock,*** even in circumstances where Rule 1.610(b), Fla.R.Civ.P., does not require a bond, ***i.e.*** where an injunction is entered to prevent physical injury or when a municipality seeks an injunction, damages as a result of a wrongful

injunction can only be awarded from the bond. If there is no bond, then no damages can be awarded.

Without informing this Court of its holding to the contrary, Petitioners contend that this Court should follow minority decisions specifically considered and previously rejected by this Court. Petitioners' briefs encourage this Court to rely upon out-of-state cases for the proposition that damages are not limited to the amount of the injunction bond when a municipality seeks the injunction. Specifically, Petitioners cite ***Howard D. Johnson Co, v. Parkside Dev. Corp.,*** 169 Ind. App. ***379, 348*** N.E. 2d ***656*** (1976); ***State v. Williams,*** 472 P.2d 109 (Ariz. Ct. App. 1970) and ***Cone v. City of Lubbock,*** 43 1 S. W .2d 639 (Tex. Civ. App. 1968). Each of these cases were decided in a state which has adopted the minoritv view regarding injunction damages. This minority view and the ***Howard D.*** Johnson decision specifically have previously been rejected by this Court in ***Parker Tampa Two,*** 544 So.2d at p. 1020, yet Petitioners' briefs are devoid of any reference to this fact.

This Court has already considered the factual situation where a governmental organization has wrongfully enjoined a party but has been excused from posting a bond. In ***Parker Tampa Two, supra,*** this Court held in pertinent part:

> The minority view, which is followed in five states,' holds that liability is not limited to the amount of the bond since the amount is often set in an ex parte proceeding and is at best a court estimate based upon opinion or ex parte representations. The majority view, on the other hand, limits liability to the bond amount and is followed in the overwhelming majority of states and by the federal courts. . . . We too adopt the **maiority** view and limit liability to the bond amount where the iniunction is obtained in good faith. (emphasis added)

[Footnote 1 referenced in the above quoted passage from ***Parker Tampa Two, supra,*** states:

1. ***See Smith v. Coronado Foothills Estates Homeowners Ass'n, 117*** Ariz. 171, 571 P.2d ***668*** (1977); ***Howard D. Johnson Co. v. Parkside Dev. Corp.,*** 169 Ind.App. ***379,*** 348 N.E.2d ***656*** (1976); ***Davis v. Poitevant & Favre Lumber*** Co., 15 La.App. ***657,*** 132 ***So. 790*** (1931); ***Miller Surfacing Co. v. Bridgers***, 269 SW. 838 (Tex.Civ.App. 1924); ***Houghton v. Grimes,*** 103 Vt. 54, 151 A. 642 (1930).] (emphasis added).

In ***Howard D. Johnson Co. v. Parkside Dev. Corp,*** 348 N.E. 2d 656 (Ind. App. 1976), a case considered and specifically **rejected** by this ***Court*** in ***Parker*** as representing the minority view, the court held that damages for wrongful injunction are not limited to the amount of the bond when a governmental organization is excused from posting a bond. By rejecting the holding in ***Howard D. Johnson*** Co., this Court has implicitly decided the issue currently before it and held that even in cases where a governmental organization is excused from posting a bond, no damages are recoverable against a municipality for entry of a wrongful injunction.

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 that:

> This action was commenced by appellant against the city of Sandpoint to recover damages for the issuance and wrongful continuance of an injunction, preventing the use of a certain building owned by him situated in the corporate limits of the defendant city. The original action in which the injunction issued was instituted by the city against Doyle to enjoin and restrain him from connecting his building with a bridge constructed and maintained by the city along and over the street in front of the building. The case was finally determined by this court adversely to the city. 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."

It will be observed from the provisions of the foregoing section that the city comes within the excepted class and was not required to give an undertaking on the issuance of an injunction, and so no undertaking was required or given by the city on the suing out of the injunction in the case of *Sandpoint v. Doyle.*

The uuestion with which we are confronted in this case is whether a municipal cornoration is liable for damages for wrongfully suing out a writ of iniunction 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 iniunction was procured maliciously and without probable cause. It is well established by the authorities that damages caused by an injunction erroneously granted in the exercise of jurisdiction, where the proceedings have been regular, cannot be recovered from the party who obtained the writ in the absence of a bond or undertaking, unless it be shown that the transaction was malicious and without probable cause.

. . .

It is argued by counsel for appellant that the state. a county. municipal corporation, or married woman, is, under the nrovisions of that section, just as liable for damages resulting from the wrongful or erroneous issuance of an injunction as is anv one who given an undertaking under the provisions of the statute. and 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 liabilitv for the wrongful or erroneous suing out a writ of iniunction. except in cases where a court or eauitv might see fit to requre 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. (emphasis supplied)

Florida follows the majority rule regarding 1:imiting damages to the amount of the bond and Idaho is a majority rule state as well. 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.

It should also be noted[5] that while Rule 1.610(b), Fla. R. Civ. P., was extensively amended to parallel Rule 65, Fed. R. Civ. P., the case law interpreting Rule 65 dictates that damages are limited to the injunction bond even when the state or municipality is not required to post a bond. Rule 65(c) specifically excludes the United States and its agencies from posting a bond. In fact, Federal case law holds that when the United States or one of its agencies

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[5] PROVIDENT has cited ***Monroe Div., Litton Bus. Sys. v. De Bari*, 562** F.2d 30, 32 (10th Cir. 1977), for the proposition that when a municipality is excused from posting a bond, the municipality remains liable for damages. However, ***De Bari*** did not involve a municipality. In addition, PROVIDENT did not cite the most important portion of the opinion. In ***De Bari,*** the court held that:

> Where, as here, the applicant opposes a motion for posting of security on the basis of its financial responsibility and does not seek to limit its liability, it may not avoid liability on the ground that a bond was not required. (emphasis supplied).

At no point in any hearing or memorandum filed in any court in this matter has TREASURE ISLAND opposed a motion for posting of bond on the basis of its financial responsibility, TREASURE ISLAND merely contended, as is specifically allowed under Rule 1.610, Fla. R. Civ. P., that it was not required to post a bond, The trial court made the finding that the reason for this rule is that the municipality has unlimited resources to pay any judgment. TREASURE ISLAND has never contended that this was the correct finding. However, TREASURE ISLAND was not aggrieved by the ruling and had no right or responsibility to appeal this finding. PROVIDENT and BELAIR were aggrieved by this finding and should have appealed the trial court's finding. They, of course, did not.

petitions the court for a temporary injunction it is not required to post a bond and when the temporary injunction is later vacated it is not liable for damages because it is sovereignly immune. This rationale was clearly spelled out in ***Securities and Exchange Commission v. Unifund*** SAL,, 910 F.2d 1028, 1039 (2nd Cir. 1990), wherein the court, in deciding the standard to be applied in obtaining a temporary injunction by a governmental agency, held:

> Perhaps the alternative test has been denied the Government in recognition of the fact that the United States and its agencies are relieved of the obligations imposed on private litigants to provide security for damages incurred by a party wrongfully enioined, see Fed.R.Civ.P. 65(c), and are protected by sovereign immunity, thereby leaving a party without recourse if wrongfully enioined. . . . (emphasis added)

The ***Unifund*** court is quite clear that without the requirement of posting a bond, there can be no action under the bond to recover damages for wrongful injunction. Additionally, because the United States is immune from suit, there can be no independent action against the United States for wrongful injunction and a party is without recourse against the United States or one of its agencies if wrongfully enjoined.

This same rationale is applicable in Florida. 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.[6]

[6] PROVIDENT contends that ***City of St. Petersburg*** v. ***Wall,*** 475 So.2d 662 (Fla. 1985), supports its entitlement to damages. However, 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 anv stay." Thus, the court

Contrary to Petitioners' contentions that there is only one exception to the requirement of posting a bond, (see footnote 3 - PROVIDENT Brief at p. 12), there are actually two instances when a bond may not be required under Rule 1.610(b), Fla. R. Civ. P.: (1) when an injunction is issued on the pleading of a municipality or the state or any officer, agency, or political subdivision . . . having due regard for the public interest, and (2) when an injunction is issued to prevent physical injury or abuse. Petitioners contended below that ***Parker Tampa Two*** and its progeny were decided in an arena in which an injunction bond in some amount is an absolute requirement. Quite the contrary, in ***Hathcock v. Hathcock,*** *supra*, an injunction bond in some amount was not an absolute requirement. ***Hathcock*** specifically stands for the proposition that even in cases when an injunction bond is not required pursuant to Rule 1.610(b), damages are in any event still limited to the amount of the injunction bond unless separate action involving some intentional tort could be brought to prove malicious prosecution. This was the precise holding of the Second District Court of Appeal below.

If this court were to reverse the Second District Court of Appeal's decision, not only would the taxpayers be required to pay for the failure of PROVIDENT or BELAIR to appeal the order which did not require a bond, but the discretion to relieve a municipality of posting a bond

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recognized and specifically permitted "appellees to seek damages resulting from the stay." It should be noted that the ***Wall*** court reversed an award of damages incurred during pendency of the lower court condemnation hearing. 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. In the instant case, the trial court found that if Petitioners were damaged they could "sue," presumably under the theory that the injunction was obtained maliciously or in bad faith. However, as a reading of the record will show, contrary to Provident's contentions, the trial court did not issue the "injunction based on the condition that Treasure Island would be responsible for damages." (Provident brief at p. 23). There is absolutely no evidence that the trial court found that Treasure Island would be liable for unlimited liability when it ruled to dispense with the bond.

would be completely written out of Rule 1.610(b), because the municipality would always be facing unlimited and potentially unforeseeable damages. This was not the intent of the exception in Rule 1.610 as was clearly explained in ***Yonkers v. Federal Sugar Ref. Co,, 22*** 1 N .Y. 206, 209-212, 116 N.E. 998 (N.Y. 1917), wherein the court stated:

> A plaintiff then has the opportunity, if he thinks the security excessive, to abandon his injunction. In any case, he counts the cost, and assumes a liability whose maximum is a determinate amount.
>
> 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. <u>The plain purpose of the statute was, not to impose upon municipal corporations an added burden. but to give them a special privilege. The privilege is an illusory one if this order is to be affirmed.</u> 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).

1. <u>CONTRARY TO PETITIONERS ASSERTIONS, PUBLIC POLICY CONSIDERATIONS DO NOT SUPPORT REVERSAL OF THE APPELLATE COURT'S DECISION</u>

Petitioners' and The Florida Association of County Attorneys contend that the decision of the Second District Court of Appeal is bad "public policy." Specifically, they state that "Rule 1.610(b) relieves public bodies of the burden of spending time and money normally associated with obtaining a temporary injunction by allowing the trial court to dispense with the requirement of posting a bond." (Amicus brief at p. 3). In addition, they contend that "The Second District's ruling will have the effect of making it more difficult for a governmental agency to obtain a temporary injunction, defeating the purpose of Rule 1.610(b). " (Amicus brief at p. 5). Finally, they state that "[t]o avoid putting all of the risk of wrongful injunction on the enjoined

party, courts will be forced to either deny a temporary injunction to a public body or require it to post a bond." (Amicus brief at p. 6). It is ironic that Petitioners seek to defend all municipalities in the State of Florida, while at the same time attempting to enforce a multi-million dollar judgment against one of the smaller cities in the State of Florida. In any event, Petitioners' and the Amicus' contentions are meritless.

The Florida Rules of Civil Procedure expressly provide that when a temporary injunction is granted, unless certain circumstances exist, the court must require the party obtaining the injunction to post a bond conditioned for the payment of such costs and damages as may be incurred by the party who was wrongfully enjoined. Rule 1.610, Fla.R.Civ.P., states in pertinent part:

> **(b) Bond.** 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, <u>with or without surety</u>, and conditioned in the same manner, having due regard for the public interest. . . . (emphasis added).

Contrary to Petitioner's and the Amicus' contentions, a trial court has three options when a municipality obtains a temporary injunction.[7] The trial court can: (1) require a bond with surety, (2) require a bond without surety or, (3) dispense with a bond. Bond with surety is defined in section 45.011, Fla. Stat., as follows:

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[7] The Florida Association of County Attorneys erroneously contends that "Courts will have only two choices when a public body requests a temporary injunction: they can either deny the request, or they can require that a bond be posted to give the enjoined party recourse if the issuance of the injunction proves to be wrongful. Public bodies will be treated the same as private parties, making the waiver provision in Rule 1.610(b) useless, and defeating its purpose." (Amicus brief at p. 7).

a bond with two good and sufficient sureties, each with unencumbered property not subject to any exemption afforded by law equal in value to the penal sum of the bond or a bond with a licensed surety company as surety or a cash deposit conditioned as for a bond.

When the trial court requires the municipality to post a bond with surety, the municipality will be faced with the same costs that a private individual would have in obtaining a temporary injunction. These costs include obtaining the bond and paying the premiums to secure the bond. However, when the trial court requires a bond without surety, the municipality acts as its own surety and does not face any additional costs or delay in obtaining the temporary injunction. There is no premium to pay because no bonding agency is employed. In both instances the damages are fixed by the amount of the bond. The public policy concerns delineated in the initial briefs are non-existent because the trial court has the discretion to set a bond but dispense with a surety. Thus, there is no additional cost in obtaining an injunction and no municipal "funds [are] tied up in order to secure its bond obligations." (Provident at p. 20). In this way, the municipality knows the extent of its liability if the injunction is deemed improper. Moreover, sovereign immunity concerns are obviated because the action for damages becomes an action on the bond, a written agreement to pay. ***Squaxin Island Tribe v. State of Washington,*** 781 F.2d 715 ***(9th*** Cir. 1986); ***Pan-Am Tobacco Corp., v. Department of Corrections,*** 471 So. 2d 4 (Fla. 1984).

The third scenario involves the situation where the trial court dispenses with the bond altogether. Under this scenario the trial court must take into account "due regard for the public interest", i.e., there are times when the trial court may decide that the injunction involves sovereign immunity issues or other matters for which the public interest requires the injunction be entered and the City is not required to post a bond. This is a discretionary function of the

court for which there is a direct appeal to the appellate court. There may be times when the trial court abuses that discretion and an appeal might be successful and a bond required. However, that presumes the aggrieved party appeals the trial court's discretionary decision. In the instant case, neither Provident nor Belair, although having appealed numerous other issues from both the temporary and permanent injunctions, sought redress on appeal from the trial court's discretionary decision to dispense with the bond.

Finally, PROVIDENT contended below that if the trial court intended to dispense with PROVIDENT's right to damages along with the bond, it would have been obligated to give PROVIDENT a hearing on that issue. PROVIDENT simply misses the point. Taken in the light most favorable to Petitioners, **PROVIDENT** and BELAIR were afforded a hearing on their request for a bond. (R. at p. 1487-1488). The request was denied and no appeal was taken from that order. Thus, PROVIDENT and BELAIR must be deemed to have waived any entitlement to damages. No constitutional issues are raised because PROVIDENT and BELAIR were given a hearing and an opportunity to appeal. For some reason not reflected in the record, they decided not to appeal the decision.

B. THE TRIAL COURT ERRED IN FINDING THAT THE CITY OF TREASURE ISLAND IS NOT IMMUNE FROM SUIT UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY

The Second District Court of Appeal declined to address the remaining issues presumably because its resolution of the first issue was dispositive of the case. However, each issue will be addressed below.

Article X, Section 13, The Constitution of the State of Florida states:

> **Suits against the state.** - Provision may be made by general law for bringing suit against the state as to all liabilities now existing and hereafter originating.

General principles regarding sovereign immunity are stated in 48 Fla. Jur. 2d ***State of Florida*** **§ *224*** (1981), as follows:

> It is well established in Florida that the state cannot be sued without its consent. A suit, whether at law or in equity, is not maintainable against the state either in its own courts or the courts of the sister state unless it has consented to be sued. This is so for the obvious reason that the immunity of the sovereign is a part of the public policy of the state. It is enforced as a protection of the public against profligate encroachment on the public treasury. . . .
>
> By constitutional authority, however, provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating. The legislature is the proper body to authorize suits against the state. Thus, any change in the rule of sovereign immunitv must be effected by constitutional amendment, or by an act of appropriate legislation, or both. (emphasis supplied).

"Florida courts have often interpreted the language of Article X, Section 13, . . . as providing absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment. " ***Circuit Court of Twelfth Judicial Circuit v. Department of Natural Resources, 339*** So. 2d 1113, 1114 (Fla. 1976). Any waiver of sovereign immunity must be clear and unequivocal. Waiver of sovereign immunity can only be accomplished by unambiguous language in a statute provided by the Legislature in general law. ***Manatee County v. Town of*** *Longboat* Key, 365 So. 2d 143 (Fla. 1978).

In ***Pan-Am Tobacco Corp. v. Department of Corrections,*** 471 So. 2d 4, 5 (Fla. 1984), this Court set forth the only two instances where waiver of sovereign immunity is found and held that:

> In section 768.28, Florida Statutes (1981), the legislature has explicitly waived sovereign immunity in tort. There is no analogous waiver in contract. Nonetheless, the legislature has, by general law, explicitly empowered various state agencies to enter contracts. . . . We therefore hold that where the state has entered into a contract fairly authorized by the powers granted by general law, the

defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract.

Thus, there are only two alternative theories of waiver available to Petitioners. First, waiver of sovereign immunity is applicable to breach of contract actions. However, there has been no allegation that the instant case involves a breach of contract. Therefore, waiver of sovereign immunity for contract actions is not applicable here. Second, a limited waiver of sovereign immunity is found in Section 768.28, Fla. Stat., for tort actions. Therefore, in order for there to be a waiver of sovereign immunity in the instant case, and to prevail, Petitioners must base their claims on some action founded in tort. All other actions or claims of governmental liability are barred by the doctrine of sovereign immunity. Art. X, Sec. 13, Const. Fla.

In the instant case, Petitioners are claiming entitlement to damages as result of a wrongful injunction. Because damages for a wrongful injunction are limited to the amount of the bond and no bond was posted here, Petitioners may, notwithstanding counsel's representations, be asserting some alternative basis for an award of damages. Thus, it is assumed that Petitioners are asserting that TREASURE ISLAND is liable in tort, ***i.e.,*** TREASURE ISLAND was negligent in enforcing section 29-182 of the Treasure Island Code.

In ***Trianon Park Condominium Association, Inc. v. City of Hialeah,*** 460 So. 2d 912 (Fla. 1985), this Court held that a city owed no common law or statutory duty to a private landowner to conduct a building inspection in a reasonable manner and set forth the standard to be applied in sovereign immunity cases holding that:

> [T]here has never been a common law duty to individual citizens for the enforcement of police power functions. Further, we find that no statutory duty for the benefit of individual citizens was created by the city's adoption of the

building code, and, therefore, there is no tort liability on the part of the city to the condominium owners for the allegedly negligent exercise of the police power function of enforcing compliance with the building code. To hold a governmental entity liable for carrying out this type of enforcement activity would make the taxpayers of the enforcing governmental entity insurers of all building construction within the jurisdiction of the entity. We conclude that such a result was never intended by either the legislature or the city in enacting the building code provisions.

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In order to clarify the law regarding governmental tort liability, it is important to first set forth certain basic principles.

First, for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct. For certain basic judgmental or discretionary governmental functions, there has never been an applicable duty of care.

Second, it is important to recognize that the enactment of the statute waiving sovereign immunity [Section 768.28, Fla. Stat.] did not establish any new duty of care for governmental entities. The statute's sole purpose was to waive that immunity which prevented recovery for breaches of existing common law duties of care . . .

Third, there is not now, nor has there ever been, any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals. In addition, there is no common law duty to prevent the misconduct of third persons.

Fourth, under the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government absent a violation of constitutional or statutory rights. *See Commercial Carrier* [371 So. 2d 1010 (Fla. 1979)]; *Askew v. Schuster,* 331 So. 2d 297 (Fla. 1976); art. II, § 3, Fla. Const. Judicial intervention through private tort suits into the realm of discretionary decisions relating to basic governmental functions would require the judicial branch to second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine.

Fifth, certain discretionary functions of government are inherent in the act of governing and are immune from suit. *Commercial Carrier.* It is "the nature of the conduct, rather than the status of the actor," that determines whether the

function is the type of discretionary function which is, by its nature, immune from tort liability. ***Varig Airlines,*** 104 S.Ct. at 2765.

. . .

To better clarify the concept of governmental tort liability, it is appropriate to place governmental functions and activities into the following four categories: (I) legislative, permitting, licensing, and executive officer functions; (II) enforcement of laws and the protection of the public safety; (III) capital improvements and property control operations; and (IV) providing professional, educational, and general services for the health and welfare of the citizens.

. . .

II. ***Enforcement of Laws and Protection of the Public Safety***

How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there never has been a common law duty of care. The discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials, as well as the discretionary authority given fire protection agencies to suppress fires.

. .

If we approved this principle for building inspections, we would also necessarily have to find governmental entities and their taxpayers fiscally responsible for the failure to use due care in carrying out their power to enforce compliance with laws regarding fire department inspections, elevator inspections, hotel and restaurant inspections, water and sewer plant inspections, swimming pool inspections, and multiple other governmental inspection programs designed to protect the public. We choose instead to join the majority of jurisdictions in rejecting governmental liability in these types of situations.

We find that the enactment of a statute giving a governmental entity the power to enforce compliance with the law does not, in and of itself, give individuals a new right of action that previously never existed.

. . .

Governments must be able to enact and enforce laws without creating new duties of care and corresponding tort liabilities that would, in effect, make the

> governments and their taxpayers virtual insurers of the activities regulated. To hold otherwise would result in a substantial fiscal impact on governmental entities which was never intended by the legislature. Such a holding would inevitably restrict the development of new programs, projects, and policies and would decrease governmental regulation intended to protect the public and enhance the public welfare. Further, such a holding would represent an unconstitutional intrusion by the judiciary into the discretionary judgmental functions of both the legislative and executive branches of government. (emphasis added).

Essentially, the holding in ***Trianon Park*** emphasizes that in order for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to alleged negligent conduct. The enactment of § 768.28, Fla. Stat., (1975), did not create any new duty. Section 768.28, Fla. Stat., merely waived sovereign immunity for breaches of existing common law duties of care. At the motion for rehearing before the trial court, Petitioners could not identify a common law duty owed by TREASURE ISLAND in enforcement of section 29-182 of the Treasure Island Code ("Code").[8] Additionally, the analysis

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[8] In fact, at the hearing on the Motion for Rehearing held on February 5, 1995, counsel for PROVIDENT, stated that:

> This action lies neither in tort nor in contract. . . This is not a tort . . . And it's not a contract. It is neither. It is a case where the municipality has availed itself just as a private litigant of judicial proceedings to seek relief. It has used the sword of the court process to seek relief. It cannot now go behind the shield of sovereign immunity when it finds -- When the consequences of going into the court have worked in a way that they are not pleased with. A court that recognized that was the case of ***Dade County v. Carter,*** the Third District Court of Appeal in 1970.

However, counsel's reliance upon this case is grossly misplaced. In ***Dade County v. Carter,*** 231 So.2d 241 (Fla. 3rd DCA 1970), Dade County instituted suit claiming that Carter had defaulted in payment of sums due under a contract. The court noted that "where the State appears in litigation in a proprietary rather than a governmental capacity it waives its immunity and may be subjected to costs. "

The ***Carter*** court accepted and agreed with the general rule as stated in ***State ex rel. Ervin v. Colonial Acceptance, Inc.,*** 80 So.2d 681 (Fla. 1955), that in those cases, as here, where the

in ***Trianon Park*** indicates that there is no duty to enforce the ordinance in a selective manner to benefit PROVIDENT or BELAIR. The ordinance was duly enacted and TREASURE ISLAND had a duty to enforce the ordinance for the benefit of its citizens. As stated in ***Trianon Park, 468*** So. 2d at 917, "[f]or certain basic judgmental or discretionary governmental functions, there has never been an applicable duty of care." Therefore, without a duty of care, there is no governmental tort liability.

If the trial court's order is reinstated, the Judiciary would be second-guessing TREASURE ISLAND'S well-intentioned decision to enforce compliance with section 29-182 of the Code. Essentially, this court would be holding that TREASURE ISLAND should not have sought to enforce the provisions of its Code. However, the decision to enforce compliance with duly enacted zoning codes is purely an executive function. Thus, this Court would be invading the executive branch's discretionary power to enforce compliance with code provisions, a power wholly reserved to the executive branch by the doctrine of separation of powers.

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state appears in its governmental capacity, it is <u>not</u> liable for costs and <u>is</u> sovereignly immune. In ***Colonial Acceptance,*** the Comptroller and the Attorney General instituted suit against Colonial Acceptance charging them with a violation of the Small Company Loan Act. A temporary injunction was secured and a receiver was appointed to take charge of Colonial Acceptance. A motion to dismiss the complaint, dissolve the injunction and discharge the receiver was denied. On certiorari, the Supreme Court directed the lower court to dissolve the injunction. On remand, a motion to tax costs and receiver's fees was granted and the trial court entered an order assessing costs and the receiver's fee against the Comptroller and Attorney General. The Florida Supreme Court held that:

> The general rule is that in suits where the state is a party in its own courts [even when it initiates an injunction action as it did in ***State v. Colonial Acceptance],*** it is not liable for costs in the absence of an express statute creating such liability . . . . we have no such statute in this state.

In *Trianon Park,* this Court set forth four categories of governmental functions and activities which should be employed for determining whether the governmental entity is liable in tort. The most appropriate category is Category II which applies to Enforcement of Laws and Protection of Public Safety. In *the Trianon Park* opinion, the court held that a government's discretion to enforce compliance with duly enacted laws is a matter of governance for which there has never been a common law duty.

Generally, law enforcement decisions are immune from suit. In *Everton v. Willard,* 468 So. 2d 936 (Fla. 1985), this Court held that the decision of whether to enforce the law by making an arrest is a basic judgmental or discretionary governmental function that is immune from suit. Similarly, TREASURE ISLAND's decision to enforce compliance with the ordinance is no different than the decision to make an arrest. (In fact, TREASURE ISLAND could have sought to enforce its ordinance by criminal citation but elected injunction as a less intrusive method to enforce its ordinance.) In both instances, the governmental entity is using its discretionary power as to whether or not to enforce compliance with the duly enacted law. "Accordingly, the government has been held immune from tort liability for damages allegedly resulting from the failure to properly enforce various types of laws." 44 Fla. L. Rev. 1, *Tort Suits Against Governmental Entities in Florida,* Wetherington and Pollock, page 55 (Jan. 1992). In *Carter v. City of Stuart,* 468 So. 2d 955, 957 (Fla. 1985), this Court held:

> A government must have the flexibility to set enforcement priorities on its police power ordinances in line with its budgetary constraints, Without the ability to make such choices a government must either pay the high cost of total enforcement or forego the exercise of its police power. Neither option serves the public interest.
>
> Deciding which laws are proper and should be enacted is a legislative function. How and in what manner those laws are enforced is, in most instances, a

> judgmental decision of the executive branch. The judicial branch should not trespass into the decisional process of either.

Therefore, these decisions of a municipality must be, and are, sovereignly immune. ***Randall v. Delta Charter Township,*** 328 N.W.2d 562, 565 (Mi. App. 1982) ("To hold otherwise would severely discourage municipalities from enacting ordinances which provide for the welfare of their citizens out of fear that their failure to zealously enforce those ordinances would open the floodgates of litigation"). An election to enforce an ordinance is indistinguishable from an election not to enforce an ordinance and the consequences are the same. If sovereign immunity applies to the latter, it should apply equally to the former,

Finally, the principle of sovereign immunity and entitlement to wrongful injunction damages has been discussed extensively in two federal cases dealing with sovereign immunity and Indian tribes. In ***Chemehuevi Indian Tribe v. California State Board of Equalization,*** 757 F.2d 1047, 1053 (9th Cir. 1985), ***rev'd on other grounds,*** 474 U.S. 9, 88 L.Ed.2d 9, 106 S.Ct. 289 (1985), the Court recognized that even though an Indian tribe may institute suit for injunctive relief, it is sovereignly immune for wrongful injunction damages in the absence of an injunction bond. The court held:

> Like the United States, an Indian tribe can consent to suit, but "such consent must be unequivocally indicated." . . . The United States does not implicitly waive its immunity by instituting an action in which a defendant asserts a counterclaim. . . . Nor does an Indian tribe. . . . The Chemehuevi Tribe's initiation of a suit for declaratory and injunctive relief does not constitute consent to the Board's counterclaim [for damages]. (citations omitted)

As noted in ***Chemehuevi,*** an Indian Tribe is sovereignly immune from suit in the same fashion that the United States is sovereignly immune from suit. Neither the United States nor an Indian tribe consents to a counterclaim for damages by initiating a suit for injunctive relief.

Thus, no claim for damages as a result of a wrongful injunction may be maintained in an independent action against an Indian tribe, the United States, or, in Florida, the State and its municipalities. This principle was further explained in the context of injunction bond damages and the exemption contained in Rule 65(c) for the United States and its agencies, In *Squaxin Island Tribe v. State of Washington,* 781 F.2d 715, 723-724 (9th Cir. 1986), the Indian tribe attempted to avoid liability under a previously posted injunction bond for wrongful injunction damages. However, the Court specifically held that while sovereign immunity would preclude an independent action for wrongful injunction damages, no such independent action was necessary because a bond had been posted. Thus, damages could be recovered only under the bond. However, the Court clearly implied that had the injunction been issued on behalf of the United States, no damages would be recoverable as the United States is sovereignly immune from an independent action and is exempt under Rule 65(c) from posting a bond. Similarly, if the trial court exempts a municipality from posting a bond under Rule 1.610, no action may be maintained under the injunction bond, as no bond exists. In addition, because the state is sovereignly immune from an independent action, no damages are recoverable absent a waiver by legislative enactment or constitutional amendment. There has been no waiver in the instant case and neither PROVIDENT nor BELAIR cite this Court to any waiver of sovereign immunity. Therefore, in the absence of a bond and the inability to bring an independent action against the State or its sub-divisions such as the City of Treasure Island, Plaintiffs are not entitled to damages.

PROVIDENT apparently misses the point when it contends that this was an action where the City used the court system as a sword and then retreated behind the shield of sovereign

immunity. Quite the contrary, PROVIDENT and **BELAIR** were entitled to request the court to cause TREASURE ISLAND to drop its alleged "shield" by conditioning the injunction upon the City posting a bond (with or without surety). See *Yonkers, supra*, at 211. When the court denied PROVIDENT's motion it should have appealed this discretionary act for a ruling on whether or not it would incur injunction bond damages and its entitlement thereto. Having failed to perform this act, PROVIDENT and BELAIR waived any entitlement to damages.

The law in Florida is clear that a City's enforcement of its ordinances is a discretionary function of government and there can be no liability imposed upon a City because of mistakes or omissions in the performance of those functions. ***See City of Tarpon Spring v. Garrigan,*** 510 So.2d 1198 (Fla. 2nd DCA 1987); ***Martin County v. Indiantown Enterprises, Inc., 658 So.*** 2d 1144 (Fla. 4th DCA 1995).

C. THE TRIAL COURT ERRED IN REJECTING "MARKET VALUE" AS THE MEASURE OF DAMAGES INCURRED BY PROVIDENT

The final judgment entered in favor of PROVIDENT states in pertinent part:

> 5. The Court rejects the City's assertion that the only applicable measure of damages is fair market value as obtained by seeking sales of comparable properties. This approach is usually applied to sales of real property, where cornparables are more easily ascertainable, for example, by a review of public records. Here, the City offered no evidence of sales that were comparable to the Land's End operation.
>
> ***6.*** In this case, the value of the Land's End business is largely contingent on its actual income in this rental operation, including the collections of rents. The value of such an enterprise depends upon satisfactorily performing services for unit owners and their guests and drawing more unit owners into the program.
>
> ***7.*** The preponderance of the evidence shows that all of the services provided by Provident and the increase in unit owners participating in Provident's Land's End operation were extremely successful, which resulted in a continuing increase in income to Provident, an increase that the evidence demonstrates would continue in the future.

8. The Court finds that, under the facts of this case, damages can only be derived through an income approach to value.

There can be no debate but that the burden of proving one's damages rests with the claimant. ***Saucer v. City of West Palm Beach,*** 21 So. 2d 452 (Fla. 1945); ***Smith v. Austin Development*** Co., 538 So. 2d 128, 129 (Fla. 2d DCA 1989). Furthermore, it is incumbent upon the party seeking damages to present evidence to justify an award of damages in a definite amount. Thus, it is ironic that Petitioner, BELAIR, starts its brief with the following quote:

> The proper measure of damages for wrongful injunction in Florida is set forth in ***Global Contact Lens, Inc., v. Knight, 254*** So.2d 807 (Fla. 3d DCA 1971) is as follows:
>
> All actual damages sustained by reason of the wrongful issuance of the injunction, that is, such damages as are the direct, natural, and proximate result of the injunction. In such actions the general rules governing the measurement of damages ordinarily apply. The measure of damages is the difference between the fair cash reasonable market value of the items in controversy on the day the injunction was issued and such value on the day it was dissolved. Id. at 809. (BELAIR brief at p. 13).

Assuming that the business was completely destroyed as found by the trial court, the measure of damages, as set forth in ***Ryan v. Atlantic Fertilizer & Chemical Co.,*** 515 So. 2d 324, 326-27 (Fla. 3rd DCA 1987), is calculated as follows:

> Unless a claimant proves what his actual damages are and that the damages were actually caused by the other party, there will be no recovery of damages from that party . . . . These legal requirements include: lost profits if the business is not completely destroyed . . . ; market value of the business completely destroyed or of property completely destroyed on the date of destruction . . . ; or, if property is not totally destroyed, either cost of repair or difference in value before and after the damage . . . .

(citations omitted) (emphasis added).

From the foregoing, the measure of damages is the market value of the operation on the date of destruction. For example, in ***Aetna Life & Casualty Co. v. Little, 384 So.*** 2d 213, 216 (Fla. 4th DCA 1980), the Court noted:

> Lost profits and loss of use may be a proper item of damages if the property or business is not completely destroyed . . . . However. where the property or business is totallv destroyed we hold the proper total measure of damages to be the market value on the date of the loss.

(citations omitted) (emphasis added).

This rule is not altered because a wrongful injunction is the cause of the damage. See ***Global Contact Lens, Inc., supra.***

When viewed in its entirety, the evidence submitted by both Petitioners and Respondent on the question of damages was not at all in conflict. Virtually all of the testimony is consistent and can be easily reconciled, particularly when the court considers that each side measured different things. The plain fact is that PROVIDENT, through the testimony of Mr. Michael Mard, sought to prove the "investment value" of Land's End. (R. at p. 3887-3896). Mard freely admitted that the "investment value" of Land's End is not the same as its "fair market value" and that he never calculated the latter. (R. at p. 3896, 3952).

"Fair market value" is the price at which a piece of property will change hands between a willing seller and a willing buyer, both being informed of all relevant facts and neither being under any compulsion to buy or sell. (R. at p. 3891-3892, 4398). It is the measure of damages mandated by the case law. ***Ryan; Global Contact Lens, supra.*** "Investment value, " on the other hand, is the value of the operation to a particular investor, in this case, the majority shareholder of PROVIDENT, Mr. Ed Droste, the founder and owner of the Hooters Restaurant chain. (R. at p. 3900). In large part, the investment value of a particular investment is a function of the

rate of return on investment a particular investor desires. (R. at p, 4470). Despite the fact that Mr. Mard had done other work for Mr. Droste (R. at p. 3914), he could not testify as to the critical element necessary to even determine investment value, the expected return this particular investor, Droste, required or historically experienced. (R. at p. 3913-3914).

Even had the calculation of investment value been based upon complete information, which clearly it was not, the result is nothing more than what the owner would value the business at, based upon his or her investment history and expectations. (R. at p. 3913; 4469-4470). Investment value does not reflect the judgment of the marketplace on the assumptions that underlie the calculation; it only reflects the judgment of the owner as to these assumptions. (R. at p. 4579). If the marketplace disagrees with these assumptions, investment value is not the price at which the property will change hands. (R. at p. 4777).

If the owner is permitted to be the sole judge of the value of his or her property, the disastrous consequences to the administration of the justice and the economy in general should be obvious; there would never be a need for a court to determine property value in, for example, an eminent domain or regulatory taking action, because the court would simply have to accept that owner's estimate of value. For this reason, the proper measure of damages should be, and is, in terms of "fair market value."

TREASURE ISLAND presented abundant evidence of the Provident enterprise at Land's End. Despite PROVIDENT's impermissible desire to rely upon investment value as the measure of its damages, TREASURE ISLAND sought to demonstrate the fair market value of the Land's End operation as of May 30, 1990. It did so through the testimony of Mr. John F. Curry, Mr. Joseph Agiato and Mr. Thomas Britven. Significantly, each of these witnesses testified they

reached their ultimate conclusions as to the fair market value of Land's End without consultation with each other. (R. at p. 4020, 4058, 4217; 4341).

D. THE TRIAL COURT ERRED IN AWARDING BELAIR CERTAIN OUT-OF-POCKET EXPENSES AS DAMAGES

The final Judgment against TREASURE ISLAND and in favor BELAIR provides in pertinent part:

> (d). This Court awards Belair damages in the total amount of $2,770.00 which relates to Belair's out-of-pocket expenses for the wrongful injunction proceedings for telephone expenses in the amount of $270.00, secretarial and administrative expenses in the amount of $1,000.00, and travel and lodging expenses in the amount of $1,500.00. (R. at p. 3208-3213) (app. 2)

The courts of this State have consistently held that a prevailing party may not recover as costs of litigation items of this nature. In ***Seigler v. General Leisure Corporation,*** **289** So.2d 429 (Fla. 1st DCA 1974), the court held that the taxation of overhead and clerical and administrative expenses was not authorized. In ***Mitchell v. Osceola Farms*** Co., 574 So.2d 1162 (Fla. 4th DCA 1991), the court held that photocopy expenses, postage, long distance calls, travel expenses, and courier service expenses were all office expenses which should not have been taxed as costs. In ***Metal Form Corporation of America*** v. ***Cain,*** 411 So.2d 898 (Fla. 2d DCA 1982), the court held that air travel expenses could not be taxed as costs. ***See Long v. Martin,*** 410 So.2d 607 (Fla. ***5th*** DCA 1982).

Simply stated, the telephone expenses, secretarial and administrative expenses, and travel and lodging expenses are not compensable elements of damage. Therefore, the award of these expenses should be eliminated from any subsequent award.

E. THE TRIAL COURT ERRED IN FINDING THAT BELAIR AND PROVIDENT WERE ENTITLED TO ATTORNEY FEES AS A ELEMENT OF THEIR DAMAGES AS A RESULT OF THE WRONGFUL INJUNCTION.

In the final judgment in favor of PROVIDENT, the court awarded attorney's fees incurred by PROVIDENT for the period May 30, 1988, through the reversal of the permanent injunction, February 11, 1992. In the final judgment in favor of BELAIR, the court awarded attorney's fees incurred by BELAIR for the period May, 1988 through entry of the permanent injunction, June 25, 1991. However, several factors dictate against an award of attorney's fees for these periods.

First, there is no statutory or contractual basis for the recovery of attorney's fees. In Florida, it is axiomatic that attorney's fees are not recoverable in the absence of a statute or contractual agreement authorizing their recovery. ***P.A. G.*** v. *A.F.,* 602 So. 2d 1259 (Fla. 1992); *Bidon* ***v. Department of Professional Regulation, Florida Real Estate Commission, 596 So.*** 2d 450 (Fla. 1992). Thus, if there is no contract between the parties or an applicable statute requiring Plaintiff to pay Petitioner's attorney's fees, then fees are not recoverable. In the instant case, there is obviously no contract between the parties requiring payment of attorney's fees. Section 60.07, Fla. Stat., provides the only statutory basis for an award of attorney's fees in a civil action founded on issuance of an injunction. Section 60.07, Fla. Stat., provides that:

> In injunction actions, on dissolution, the court may hear evidence and assess damages to which a defendant may be entitled under any injunction bond, eliminating the necessity for an action on the injunction bond if no party has requested a jury trial on damages.

In ***Hoffman*** v. *Barlly*, 97 So. 2d 355, 356 (Fla. 3rd DCA 1957), the trial court's order awarded attorney's fees for a wrongful injunction even though no bond had been posted in

obtaining the injunction. On appeal, the court reversed the award of attorney's fees and held that:

> In ***Brite v. Orange Belt Securities Co.,*** 133 Fla. 266, 182 So. 892, 895, the Supreme Court said:
>
> > "Attorney's fees can not be charged as a general rule, in the absence of statutory authority, unless the defendant is bound for their payment by contract. As stated in 15 C.J. 114:
> >
> > "'The general rule requires each party to the litigation to pay his own counsel fees. Attorney's fees are not allowable in the absence of a statute or in the absence of some agreement or stipulation authorizing the allowance thereof, and it has been held that the rule applies equally in Courts of Law and in Courts of Equity.'"

In a footnote, the Court construed § 64.16, Fla. Stat. (the predecessor of §60.07), and stated:

> Section 64.16, Fla.Stat., F.S.A., allowing a court to assess defendant's damages (which would include attorney's fees) under an *injunction bond* in the main suit, upon dissolution, was not applicable here. The injunction was issued July 6, 1956, without notice and without requiring bond. Bond was moved for and ordered August 6. The bond was not filed, and for that reason the injunction was dissolved August 8. (emphasis in original).

Thus, attorney's fees are recoverable under § 60.07, Fla. Stat., only if a bond has been entered. Without a bond, no attorney's fees are recoverable. Without any other statutory basis for the award of attorney's fees, each party should bear its own costs of litigation.

Petitioners argued below that § 60.07, Fla. Stat., nevertheless authorizes recovery of attorney's fees even in the absence of an injunction bond. However, statutes authorizing awards of attorney's fees are in derogation of common law, and must be strictly construed. ***Kittel** v. Kittel,* 210 So. 2d 1 (Fla. 1968); *Gimbel v. International Mailing and Printing Co., Inc., 506* So. 2d 1081 (Fla. 4th DCA 1987). As such, it cannot be inferred that § 60.07, Fla. Stat., was

intended to make any alteration to the common law other than as is specified and plainly pronounced, and it cannot be interpreted to displace the common law further than is necessary. *Robinson & St, John Advertising and Public Relations, Inc, v. Lane,* 557 So. 2d 908 (Fla. 1st DCA 1990). Since there is no contract between the parties and no statute authorizing a recovery of attorney's fees, Petitioners simply are not entitled to an award of attorney's fees.

Finally, the trial court failed to make proper *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla. 1985), findings in its award of attorney's fees. In *Rowe, supra,* this Court set forth the guidelines still in effect for award of attorney's fees. *Rowe* has been interpreted to require an express finding by the trial court of the number of hours reasonably expended by counsel and a reasonable rate for those hours. *State Farm Mutual Automobile Insurance* Co. v. Gal, 573 So. 2d 90, 91 (Fla. 3rd DCA 1991).

F. THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST TO PROVIDENT AND BELAIR.

The final judgment entered in favor of PROVIDENT states in pertinent part:

> The Court also finds that it is appropriate to award prejudgment interest on the $1,158,000 from the time of the completion of the destruction of the business, June 3, 1991, to the date of this judgment, as well as prejudgment interest on Provident's attorney's fees, which interest should run from February 11, 1992, through the date of this judgment.

Additionally, the final judgment entered in favor of BELAIR states in pertinent part:

> Laurence Belair is entitled to prejudgment interest on the award of $21,000 from April 5, 1991 through the entry of this judgment which is in the amount of $9403.88.

PROVIDENT sought to have the trial court declare that its damages were "liquidated" as of May 30, 1990, because if its damages were not deemed liquidated as of a date certain, it was not entitled to prejudgment interest. The facts demonstrate that PROVIDENT'S damages

were on-going and accumulating over time and thus were not "fixed" as of the date of the temporary injunction. In situations such as this, Florida law does not allow prejudgment interest. *See* **Parker v. Brinson** *Const.* Co., 78 So.2d 873 (Fla. 1955) (No entitlement to prejudgment interest on personal injury claims).

In the instant case, PROVIDENT's damages increased the longer the temporary injunction remained in place. This was the basis for its numerous futile efforts to have the terms of the temporary injunction dissolved, stayed or modified. The affidavits of Mr. Howie submitted in support of those motions did not allege the business was destroyed on May 31, 1990 (the day after entry of the order of temporary injunction); rather, they predicted that unless the terms of Judge Beach's order were altered, the business would be destroyed. (R. at p. 675). From such an argument, it must be concluded that the business was not destroved on May 31, 1990, and therefore the damages cannot be deemed to have been liquidated as of that date.

Further, to contend the business was destroyed only one day after entry of the temporary injunction defies logic as well as the terms of Judge Beach's order. (R. at p. 646-649). The order of temporary injunction allowed Provident to honor its existing reservations for one year from the date of the order. If reservations could be honored and income could be and was received over the coming twelve months, the business can hardly be considered to be destroyed as of a date certain and, although the court refused to accept his testimony on this point, Mr. Howie was unable to testify as to exactly when the business was destroyed. (R. at p. 3328-3331).

The trial court further erred in awarding prejudgment interest, not only on the alleged damages, but also on the claim for attorney fees. A court may not award prejudgment interest

on attorney fees when its judgment has "the effect of simultaneously determining . . . liability for, and setting the amount of attorney's fees." ***Bremshey v. Morrison,*** 621 So. 2d 717, 718 (Fla. ***5th*** DCA 1993), ***approved, Quality Engineered Installation v. Higley South, Inc., 670 So.*** 2d 929 (Fla. 1996). A court may only award prejudgment interest on attorney fees when those attorney fees were previously liquidated by an agreement, arbitration award or court determination. ***See id. at 93 1; and also Visoly v. Security Pacific Credit Corp., 625 So.*** 2d 1276, 1277 (Fla. 3d DCA 1993) (Prejudgment interest on attorney fees accrued from date of court's entry of final judgment striking pleadings); ***Inacio v. State Farm Fire & Casualty, Co.,*** 550 So. 2d 92, 97 (Fla. 1st DCA 1989) (Prejudgment interest on attorney fees accrued from date of settlement agreement). In the instant case, the trial court's judgment on December 31, 1994 impermissibly determined liability for, and the amount of, attorney fees. Moreover, on May 3 1, 1990, the date the trial court considered attorney fees "liquidated," there was neither an agreement nor an arbitration award nor a court determination of entitlement to attorney fees. Consequently, the trial court's award of prejudgment interest on attorney fees was improper.

Finally, even if the court determines the damages are, in fact, "liquidated, " the doctrine of sovereign immunity bars the claim for interest. The trial court considered and rejected TREASURE ISLAND'S claim that sovereign immunity bars the claim for monetary damages. Inherent in such a ruling is a determination that TREASURE ISLAND'S sovereign immunity has, indeed, somehow been waived. The only possible source of a waiver of sovereign immunity is found in Florida Statute § 768.28 which provides for a limited waiver of sovereign immunity in tort actions. Therefore, further inherent in the court's ruling is a determination that the acts of the City in obtaining a wrongful injunction are tortious. Florida Statute §768.28(5) further

provides, however, that there is no waiver of sovereign immunity and therefore no liability for prejudgment interest on tort claims.

> The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before the judgment. (emphasis added.)

Overseas Private Investment Corp., v. Metropolitan Dade County, 826 F. Supp. 1564 (S.D. Fla. 1993); ***Dept. of Transportation*** v. *Bailey,* 603 So.2d 1384, 1387 (Fla. 1st DCA 1992) ("Because an award of prejudgment interest does not fall within the parameters of the waiver of sovereign immunity expressed in Section 768.28, Florida Statutes, the trial court was without jurisdiction to enter such an award. "); *Tunnell* ***v. Hicks,*** 574 So.2d 264, 265 (Fla. 1st DCA 1991) (" [S]ection 768.28(5) does not permit such awards [of prejudgment interest] in tort claims against a subdivision of the state. ").

G. THE TRIAL COURT ERRED IN AWARDING POSTJUDGMENT INTEREST AT THE RATE OF 12% PER YEAR

The final judgment entered in favor of PROVIDENT states in pertinent part:

> 7. This judgment shall bear interest at [sic] the rate of 12% a year only on the damages amount of $1,242,269.54 and shall not bear interest on the prejudgment interest amount of $525,972.96.

The final judgment entered in favor of BELAIR states in pertinent part:

> 10. This judgment shall bear interest at rate of 12% a year only on the damages which are in the amount of $39,05 1 .00 and shall not bear interest on the prejudgment interest in the amount of $9,792.00

Under Florida law, post judgment interest must be calculated pursuant to Section 55.03,

Fla. Stat., (1994), which states in pertinent part:

> (1) On December 1 of each year beginning December 1, 1994, the Comptroller of the State of Florida shall set the rate of interest that shall be payable on judgments or decrees for the year beginning January 1 by averaging the discount rate of the Federal Reserve Bank of New York for the preceding year, then adding 500 basis points to the averaged federal discount rate. The Comptroller shall inform the clerk of the courts and chief judge for each judicial circuit of the rate that has been established for the upcoming year. The initial interest rate established by the Comptroller shall take effect on January 1, 1995, and the interest rate established by the Comptroller in subsequent years shall take effect on January 1 of each following year. Judgments obtained on or after January 1, 1995, shall use the previous statutory rate for time periods before January 1, 1995, for which interest is due and shall apply the rate set by the Comptroller for time periods after January 1, 1995, for which interest is due. Nothing contained herein shall affect a rate of interest established by written contract or obligation.

Under Florida law, postjudgment interest must be calculated pursuant to Section 55.03, Florida Statute (1994) as amended and not at the previous rate of 12 percent. Section 55.03, Fla. Stat., (1994), became effective on October 1, 1994, and repealed then existing § 55.03, Fla. Stat. (1993). Thus, on the date that the instant judgment was entered, i.e., December 31, 1994, the only statute which set the rate of postjudgment interest was § 55.03, Fla. Stat., (1994). While § 55.03, Fla. Stat., (1994), specifically addresses the rate of interest for judgments obtained on or after January 1, 1995, that statute does not set the rate for judgments obtained after the effective date of the amendment, *i.e.,* October 1, 1994, and prior to January 1, 1995. Thus, a void was created for judgments obtained after the effective date of § 55.03, Fla. Stat,, (1994), *i.e.* , October 1, 1994, and before January 1, 1995, and there was no statute which would entitle Petitioners to postjudgment interest.[9] In the event this Court is inclined to interpret § 55.03, Fla.

[9] "Post-Judgment interest did not exist at common law and is solely a matter of legislative creation." *Whitehurst* v. *Camp, 677* So. 2d 1361 (Fla. 1st DCA 1996).

Stat., it can be read to apply the new statutory postjudgment rate to judgments entered after October 1, 1994, but before January 1, 1995. Section 55.03, Fla. Stat., (1994), states as follows:

> "The comptroller . . . shall set the rate of interest that shall be payable on judgments . . . for the year beginning January 1, 1995."

Clearly, this statement suggests that the rate payable on judgments for the period beginning January 1, 1995, is set according to § 55.03, Fla. Stat., (1994). There is nothing in this statute which would award postjudgment interest at 12%, i.e., the rate contained in the pre-amended statute, § 55.03, Fla. Stat., (1993), forever, particularly, in light of the fact that § 55.03, Fla. Stat., (1994), was in effect at the time this judgment was entered and § 55.03, Fla. Stat., (1993) was repealed at the time the judgment was entered. Since there was no statute authorizing post-judgment interest for the period October 1, 1994 through December 31, 1994, the judgment entered herein erroneously included post-judgment interest, Thus, the Honorable Helen Hansel's Order awarding postjudgment interest at the rate contained in § 55.03, Fla. Stat., (1993), i.e., 12%, must be reversed.

IV.

CONCLUSION

The trial court erred in finding that damages as a result of a wrongful injunction are not limited to the amount of the bond. This finding contradicts the holding in ***Parker Tampa Two, Inc. v. Somerset Development Corp.,*** 544 So. 2d 1018 (Fla. 1989). Thus, the Second District Court of Appeals decision should be affirmed.

This court should also reverse the trial court's order and enter judgment in favor of TREASURE ISLAND since a municipality is immune from suit under the doctrine of sovereign immunity under these circumstances.

The trial court erred in employing "investment value" in the calculation of damages. "Market value" has, and is, employed by the courts of the State of Florida to determine valuation. TREASURE ISLAND'S Motion for Directed Verdict was improperly denied and the holding of the trial court should be reversed and judgment entered in favor of Treasure Island.

The trial court erred in awarding telephone expenses, secretarial and administrative expenses and travel and lodging expenses as these costs are not recoverable as costs of litigation. Therefore, the final judgment entered against **Belair** must be reversed.

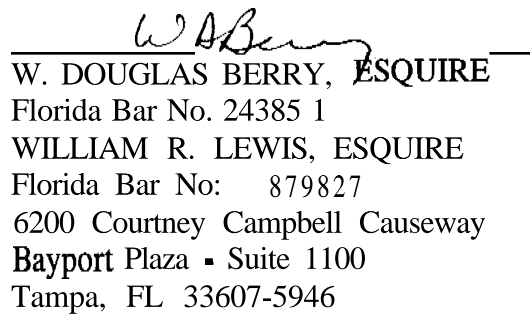
Additionally, no statutory authority exists for an award of attorney's fees. Therefore, the trial court's order awarding attorney's fees must be reversed, In any event, the award of attorney's fees does not contain the necessary *Rowe* findings and thus must be reversed.

The trial court erred in awarding prejudgment interest. The evidence indicated that damages were ongoing and accumulating over time and thus were not "liquidated" as of a date certain. Thus, under Florida law there can be no recovery of prejudgment interest.

The trial court erred in imposing postjudgment interest at the rate of 12% rather than the rate prescribed by Section 55.03, Florida Statutes.

WHEREFORE, based on the foregoing, TREASURE ISLAND respectfully requests that this Court affirm the Second District Court of Appeal's decision and reverse and enter judgment in favor of TREASURE ISLAND.

BUTLER, BURNETTE & PAPPAS



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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to the following persons this 28th day of April, 1997:

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