Filing # 149094659 E-Filed 05/06/2022 11:09:01 AM

RECEIVED, 05/06/2022 11:09:21 AM, Clerk, Supreme Court

No. SC19-1819

In the Supreme Court State of Florida

PINELLAS COUNTY, FLORIDA

Petitioner,

v.

GARY JOINER, etc., et al.,

Respondents.

ON DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL
L.T. CASE NO. 2D17-1040

AMICUS CURIAE BRIEF OF FLORIDA ASSOCIATION OF COUNTY ATTORNEYS IN SUPPORT OF NEITHER PARTY

EDWARD G. GUEDES (FBN 768103)
2800 Ponce de Leon Blvd.,
Suite 1200
Coral Gables, FL 33134
(305) 854-0800
eguedes@wsh-law.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

INTRODUCTION 1

STATEMENT OF IDENTITY AND INTEREST OF AMICUS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE SECOND DISTRICT'S SOVEREIGN IMMUNITY ANALYSIS, TO THE EXTENT IT IS UPHELD, SHOULD NOT BE EXTENDED BEYOND THE AD VALOREM TAXATION CONTEXT. 4

   A. The Second District's potentially overbroad conclusion. 4

   B. The judiciary should not be setting statewide public policy, especially where, as in the tort context, the Legislature is authorized to act and has already acted. 6

   C. Similar concerns arise in connection with a county's sovereign immunity from contracts claims based on unwritten agreements. 11

CONCLUSION 13

CERTIFICATE OF SERVICE 15

CERTIFICATE OF COMPLIANCE 16

TABLE OF CITATIONS

Page

Cases

American Liberty Ins. Co. v. West & Conyers Architects & Eng'rs, 491 So. 2d 573 (Fla. 2d DCA 1986) 7

Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362 (Fla. 1978) 9

Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981)............... 8

County of Brevard v. Miorelli Engineering, Inc., 703 So. 2d 1049 (Fla. 1997) 12

Echarte, 618 So. 2d at 196); *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) 7

Jaar v. Univ. of Miami, 474 So. 2d 239 (Fla. 3d DCA 1985) 13

Joiner v. Pinellas County, 279 So. 3d 860 (Fla. 2d DCA 2019)... 1, 4

Manatee County v. Town of Longboat Key, 365 So. 2d 143 (Fla. 1979).. 7

Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc., 127 So. 3d 1258 (Fla. 2013).. 7

MMMG, LLC v. Seminole Tribe of Fla., Inc., 196 So. 3d 438 (Fla. 4th DCA 2016) 13

Pan-Am Tobacco Corp. v. Dep't of Corrections, 471 So. 2d 4 (Fla. 1984) 11, 12

Southern Drainage Distr. v. State, 112 So. 561 (Fla. 1927) 7

TABLE OF CITATIONS
(Continued)

Page

Spangler v. Fla. State Turnpike Auth., 106 So. 2d 421 (1958) 13

State v. Love, 126 So. 374 (Fla. 1930) 9

UCF Athletics Ass'n, Inc. v. Plancher, 121 So. 3d 616 (Fla. 5th DCA 2013) 9

University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993) 6

Statutes & Constitutional Provisions

Art. VIII, § 1(a), Fla. Const 8

Art. X, § 13, Fla. Const 7, 8

§ 768.28, Fla. Stat. .... passim

§ 768.28(1), Fla. Stat 8

§ 768.28(2), Fla. Stat 8

§ 768.28(5)(a), Fla. Stat 10

§ 768.28(5)(b), Fla. Stat. 11

§ 768.28 6(a)-(d), Fla. Stat 10

§ 768.28 (9)(a), Fla. Stat 10

INTRODUCTION

This proceeding reviews de novo the Second District Court of Appeal's decision in *Joiner v. Pinellas County*, 279 So. 3d 860 (Fla. 2d DCA 2019), in which the Second District concluded that real property owned by Pinellas County in neighboring Pasco County was subject to ad valorem taxation by Pasco County. *Id.* at 866. The court, while acknowledging the issue presented was one of first impression, *id.* at 862, nevertheless concluded that Pinellas County's sovereign immunity from taxation did not extend beyond its geographical boundaries so as to protect its property from taxation. *Id.* at 866. In doing so, both the majority opinion and the concurrence by Judge Casanueva used language that potentially suggests broader implications for a county's sovereign immunity outside the taxation question presented here.

While the Florida Association of County Attorneys ("FACA") takes no position on the ultimate taxation issue presented, it respectfully urges the Court, to the extent it does not reverse the decision below, to limit conspicuously the ruling to the subject of county immunity from ad valorem taxation. Doing so avoids a series of potential, unintended consequences relating to the broader application of sovereign immunity, particularly in the tort context.

STATEMENT OF IDENTITY AND INTEREST OF AMICUS

FACA is a Florida non-profit corporation, whose purpose is to provide a forum for research, advice and discussion in the development of local government law, including technical assistance. Its membership consists of hundreds of individuals who serve as county attorneys or deputy, assistant or associate county attorneys. FACA's members regularly provide legal advice and representation to Florida's 67 counties across a broad range of subject matters, including (as germane here) the interpretation and application of sovereign immunity across a broad swath of operational and planning subjects.

FACA, therefore, has a unique interest in ensuring that, to the extent the Second District's decision is upheld, its scope (as well as its discussion of geographical limitations on sovereign immunity) is not extended outside the context of ad valorem taxation. As more fully explained below, there would be no reason for extending any geographical limitation on sovereign immunity at issue here to the doctrine's application in the tort liability context. To do so would improperly impose a judicially created and policy-driven gloss upon

the Legislature's carefully constructed and very limited waiver of sovereign immunity under section 768.28, Florida Statutes.[1]

SUMMARY OF ARGUMENT

The sovereign immunity of *any* county does not necessarily evaporate in all situations simply because the county's conduct extends into another county. As the Second District acknowledged, counties "each derive [their] sovereignty from the state," and Florida's constitution expressly recognizes that "[p]rovision may be made by general law for bringing suit against the state." In 1973, the Florida Legislature, through general law codified at section 768.28, Florida Statutes, abrogated the sovereign immunity of counties (and other political subdivisions of the state) with respect to tort claims, but in a restricted manner, leaving counties' sovereign immunity otherwise intact.

Conspicuously absent from section 768.28 is any geographical tether associated with the availability of sovereign immunity. The Legislature could have fully abrogated counties' sovereign immunity for conduct occurring outside their geographical boundaries, but

[1] All references to statutes herein are to the 2021 codification of statutes, unless otherwise indicated.

did not. The Court should decline to decide this case in a manner that facilitates (or encourages) the judiciary to act on a policy determination where the Legislature did not.

ARGUMENT

I. THE SECOND DISTRICT'S SOVEREIGN IMMUNITY ANALYSIS, TO THE EXTENT IT IS UPHELD, SHOULD NOT BE EXTENDED BEYOND THE AD VALOREM TAXATION CONTEXT.

A. The Second District's potentially overbroad conclusion.

In the decision below, the majority held: "Political entities only have sovereign immunity where they are sovereign and, to paraphrase a point cogently expressed by Judge Casanueva in his concurring opinion: Pinellas and Pasco cannot both be sovereign on the same matter in the same place." *Joiner*, 279 So. 3d at 866. Judge Casanueva, for his part in concurring, stated,

> In my view, the analysis of this issue turns in part on whether, as a matter of law, … Pinellas County is operating as a sovereign in this instance. I conclude that the answer is no because—to paraphrase a line from the movie *Highlander*—there can be only one. Here, the mantle of sovereign rests on the shoulders of Pasco County because the land at issue rests within the territorial boundary establishing its constitutional domain.

Id. at 867 (Casanueva, J., concurring).

Both of these observations more broadly suggest (or at least permit the inference) that a county loses its sovereign immunity protections whenever it acts or its property is located outside its boundaries. Such a suggestion or inference presents considerable difficulties outside the ad valorem taxation context.

For example, if County A purchases a nearby golf course to provide a public recreation facility for its residents, but the golf course happens to be located in adjacent County B, does County A lose the protection of sovereign immunity for *all* purposes in connection with its ownership of the golf course? Even assuming, *arguendo*, the golf course were subject to ad valorem taxation by County B, as the resident "sovereign" (and as the Second District held), does County A lose the protections of sovereign immunity, as circumscribed by section 768.28, Florida Statutes, if a golf cart malfunctions and injures a patron or a guest slips and falls in the gift shop?

By the same token, if County A's finance director travels to a county finance conference at County A's expense and in her county-issued vehicle, and, while driving through County C, gets into a traffic accident, is County A not entitled to the protections of

sovereign immunity and section 768.28 in connection with that accident? Or if that same finance director, having arrived at the conference in County C, verbally agrees with a vendor at the conference to purchase expensive new software for County A's finance department, but has no authorization to do so and does not execute a written agreement, is that vendor entitled to sue for enforcement of an unwritten contract that would otherwise be precluded by sovereign immunity?

The foregoing are merely some examples of the unintended consequences that might flow from an extension of the Second District's reasoning outside the ad valorem taxation context.

B. The judiciary should not be setting statewide public policy, especially where, as in the tort context, the Legislature is authorized to act and has already acted.

This Court well knows that the judiciary is ill-suited to establish public policy on issues of statewide importance—that is a task best reserved to the Legislature. *See University of Miami v. Echarte*, 618 So. 2d 189, 196 (Fla. 1993) ("The Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts."); (citing *American Liberty Ins. Co. v. West & Conyers Architects &*

Eng'rs, 491 So. 2d 573 (Fla. 2d DCA 1986)); *see also Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc.*, 127 So. 3d 1258, 1277 (Fla. 2013) (Canady, J., dissenting) ("We have previously recognized that the Legislature, not the courts, declares the public policy of the state.") (citing *Echarte*, 618 So. 2d at 196); *Bush v. Holmes*, 919 So. 2d 392, 398 (Fla. 2006) (noting "courts may not reweigh the competing public policy concerns underlying a legislative enactment").

Indeed, article X, section 13 of the Florida Constitution provides that, in the tort context certainly, the state's sovereign immunity may be waived only by enactment of general law. Art. X, § 13, Fla. Const. ("Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."). As this Court has observed in interpreting article X, section 13, a county "enjoys the state's sovereign immunity unless the Legislature provides otherwise by general law," and any waiver "must be clear and unequivocal." *Manatee County v. Town of Longboat Key*, 365 So. 2d 143, 147 (Fla. 1979). Absent such a waiver, the immunity of the state from suit was "absolute and unqualified." *Southern Drainage Distr. v. State*, 112 So. 561 (Fla. 1927).

In enacting section 768.28, Florida Statutes, the Legislature expressed Florida's public policy in waiving sovereign immunity for tort claims:

> In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, ***but only to the extent specified in this act***. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted ***subject to the limitations specified in this act.***

§ 768.28(1), Fla. Stat. (emphasis added).[2] *See Cauley v. City of Jacksonville*, 403 So. 2d 379, 381 (Fla. 1981) ("Common law sovereign immunity for the state, its agencies, and counties remained in full force until section 768.28's enactment."). Nowhere

---

[2] Counties are subdivisions of the state both as a matter of constitutional law and for purposes of section 768.28. *See* Art. VIII, § 1(a), Fla. Const. ("The state shall be divided by law into political subdivisions called counties."); § 768.28(2), Fla. Stat. ("As used in this act, 'state agencies or subdivisions' include … counties….").

in the statute is there any mention that sovereign immunity is waived simply because the tort arises outside the County's geographical boundaries.

Florida courts have repeatedly held that because section 768.28 constitutes an abrogation of the common law—specifically, the common law of sovereign immunity—it must be strictly construed. *See, e.g., State v. Love*, 126 So. 374, 377 (Fla. 1930) ("[S]tatutes in derogation of state sovereignty are to be strictly construed."); *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So. 2d 362 (Fla. 1978) (interpreting section 768.28 and holding, "That statute is clearly in derogation of the common law principle of sovereign immunity and must, therefore, be strictly construed[.] … A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard."); *UCF Athletics Ass'n, Inc. v. Plancher*, 121 So. 3d 616, 618 (Fla. 5th DCA 2013) (same holding) (citing *Carlile, supra*).

Without belaboring the obvious, section 768.28 has been developed legislatively over the past almost 50 years into an elaborate scheme for when and how sovereign immunity from tort liability is waived. The statute provides a series of limitations and

protections, including, but not limited to, (i) a requirement for pre-suit notice; (ii) a damages cap; (iii) protection from claims for punitive damages, and (iv) immunity from liability when an employee acts outside the course and scope of her or his employment or commits a tort in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. §§ 768.28(5)(a), 6(a)-(d), (9)(a), Fla. Stat. Conversely, the statute immunizes county employees from negligence suits if their conduct arose in the scope of their employment or function, unless such conduct was in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. *Id.* at § (9)(a).

Allowing the Second District's analysis below to be extended to tort claims would impose an unwarranted judicial gloss on the Legislature's carefully constructed scheme and usurp the role of the Legislature, which (by the plain text of section 768.28) intended only a *limited* waiver of sovereign immunity. The limited waiver did not contemplate a categorical abrogation of sovereign immunity any time a county acts outside its geographical boundaries.[3] FACA is

---

[3] The Legislature certainly knows how to further abrogate or limit sovereign immunity when it wishes to do so. *See*

(continued . . .)

unaware of any constitutional, statutory or common law limitation that precludes a county from owning property outside its geographical boundaries or sending its employees or agents beyond those boundaries on county business. Surely, the Legislature understood as much when it enacted section 768.28, and the many times over the past 50 years that is has amended the statute; and yet, the Legislature has never chosen to include in the statute a waiver of immunity tied to the geographical boundaries of a county (or other political subdivision).

C. Similar concerns arise in connection with a county's sovereign immunity from contracts claims based on unwritten agreements.

Florida law is well-established that a county may not be held liable on a contract claim absent a written agreement that expressly provides for the contractual obligation in question. In *Pan-Am Tobacco Corp. v. Dep't of Corrections*, 471 So. 2d 4 (Fla. 1984), this Court concluded that the state's sovereign immunity was impliedly

---

(. . . continued)
§ 768.28(5)(b), Fla. Stat. (amending the statute in 2021 to allow a claim against municipalities for failure to "allow the municipal law enforcement agency to respond appropriately to protect persons and property during a riot or an unlawful assembly," and removing the damages cap in subsection (5)(a) for such claims).

waived when the state enters into a written agreement that is valid and binding on both parties. However, the Court "emphasized" that its waiver holder was "applicable only to suits on express, written contracts into which the state agency has statutory authority to enter." *Id.* at 6. The Court subsequently extended this reasoning to county contracts in *County of Brevard v. Miorelli Engineering, Inc.*, 703 So. 2d 1049 (Fla. 1997), where despite the existence of a written contract, this Court concluded Brevard County was sovereignly immune from claims for extra work performed, where the claims were for work outside the terms of the contract and no written change order was executed. *Id.* at 1051.

In the hypothetical scenario referenced above, *supra* at 5-6, the traveling finance director's unauthorized verbal agreement to purchase expensive software would not, on sovereign immunity grounds, be enforceable against County A, under the authority of *Pan-Am Tobacco* and *Miorelli Engineering*. However, if the broad pronouncements in the Second District's decision hold broader sway beyond ad valorem taxation disputes, then the argument might be advanced that County A's sovereignty ended when the finance director traveled beyond County A's boundaries into County C, where the contract was formed. Such an argument would merely

serve to defeat the purpose of sovereign immunity. *See Spangler v. Fla. State Turnpike Auth.*, 106 So. 2d 421, 424 (1958) ("[T]he 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 encroachments on the public treasury."); *Jaar v. Univ. of Miami*, 474 So. 2d 239, 245 (Fla. 3d DCA 1985) (same holding); *see also MMMG, LLC v. Seminole Tribe of Fla., Inc.*, 196 So. 3d 438 (Fla. 4th DCA 2016) (noting "one of the historic purposes of sovereign immunity in general" is to "protect[] the sovereign['s] … treasury").

It would be a wholly unintended consequence of the Second District's decision if sovereign immunity terminated at County A's boundaries, flinging wide the doors of the county's treasury because an unauthorized verbal agreement was entered into where a different county is "sovereign." Before there could be such a dramatic departure from sovereign immunity precedent, the issue would have to be properly presented in the context of a more fully developed record and with comprehensive briefing. This is not such a case.

CONCLUSION

As the Court decides this case, FACA respectfully requests that the Court, should it approve the Second District's conclusion

regarding taxation of Pinellas County's property in Pasco County, nonetheless disapprove the sweeping statements in the decision suggesting (or at least permitting the inference) that sovereign immunity ends at a county's boundaries in all circumstances. Alternatively, it should expressly limit such statements to the ad valorem taxation context.

Respectfully submitted,

EDWARD G. GUEDES, ESQ.
(FBN 768103)
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
2800 Ponce de Leon Blvd., Ste. 1200
Coral Gables, Florida 33134
Tel. (305) 854-0800
eguedes@wsh-law.com
szavala@wsh-law.com

Counsel for Florida Association of County Attorneys, Inc.

By: /s/ *Edward G. Guedes*
Edward G. Guedes

CERTIFICATE OF SERVICE

I certify that a copy of this amicus curiae brief was filed and served via the E-Portal on May 6, 2022, on:

Loren E. Levy, Esq.
The Levy Law Firm
1828 Riggins Lane
Tallahassee, Florida 32308
levytorres@me.com
service.levylaw@comcast.net
geri.smith@comcast.net

Counsel for Respondent, Gary Joiner, as Pasco County Property Appraiser

H. Clyde Hobby, Esq.
Frederick Reeves, Esq.
clyde.hobby@hobbylaw.com
carole.cox@hobbylaw.com
freeves@tbaylaw.com
meghancox@tbaylaw.com

Counsel for Mike Fasano, Pasco County Tax Collector

Christy Donovan Pemberton, BCS, Esq.
Managing Asst. County Attorney
cpemberton@pinellascounty.org
Donald S. Crowell, BCS, Esq.
Chief Assistant County Attorney
dcrowell@pinellascounty.org
Pinellas County Attorney's Office
315 Court Street, 6th Floor
Clearwater, Florida 33756

Attorneys for Petitioner, Pinellas County

Timothy Dennis, Esq.
timothy.dennis@myfloridalegal.com
jon.annette@myfloridalegal.com
rebecca.padgett@myfloridalegal.com

Counsel for Respondent, Executive Director of the Florida Department of Revenue

/s/ *Edward G. Guedes*
Edward G. Guedes

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Florida Rules of Appellate Procedure 9.045 and 9.210, and contains 2,704 words.

/s/ *Edward G. Guedes*
Edward G. Guedes