IN THE SUPREME COURT OF FLORIDA

AMERICAN HOME ASSURANCE CO.,	)	
Appellant,	)	
v.	)	Case No. SC02-709
NATIONAL RAILROAD PASSENGER CORPORATION, et al.	)	
Appellees	)	

_____

INITIAL BRIEF OF THE STATE OF FLORIDA

_____

ON QUESTIONS CERTIFIED BY
THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
RELATING TO SOVEREIGN IMMUNITY

_____

THOMAS E. WARNER
Solicitor General

LOUIS F. HUBENER
Deputy Solicitor General

MATTHEW J. CONIGLIARO
Deputy Solicitor General

OFFICE OF THE SOLICITOR GENERAL
The Capitol – Suite PL-01
Tallahassee, FL 32399
(850) 414-3681

(850) 410-2672 (fax)

On behalf of Robert A. Butterworth, Attorney General, and the State of Florida

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FLORIDA STATUTES

FLORIDA CONSTITUTION

OTHER AUTHORITIES

INTRODUCTION AND STATEMENT OF INTEREST

In the federal court proceeding from which this case arose, CSX Transportation, Inc. (CSX) and National Railroad Passenger Corporation are attempting to recover money damages from a municipal agency, Kissimmee Utility Authority (KUA), based on the terms of an indemnification agreement between the agency and CSX. KUA has raised sovereign immunity in defense of those claims, and by certifying a series of questions to this Court regarding that defense, the Eleventh Circuit has requested this Court to resolve the state sovereign immunity issues that govern this dispute.

Pursuant to the authority granted the Attorney General by section 16.01(4), Florida Statutes, the Attorney General of Florida appears in this matter by and through the Solicitor General and on behalf of the State of Florida (hereafter the "State of Florida" or "State") to advocate and preserve the eminence of the doctrine of sovereign immunity. That doctrine protects against uncontrolled incursions into the public treasury and helps ensure the continued and orderly administration of the government created by and for the people of Florida.

The State is particularly concerned with assertions advanced here that, without authorization by any express act of the

Florida Legislature, governmental subdivisions may undertake indemnification obligations in written agreements and thereby expose public funds to private damages claims. The State believes that many similar agreements may exist between governmental entities and private persons such as CSX. As a result, the State believes that this Court's decision will greatly impact both existing and future agreements.

In this brief, the State will demonstrate that the indemnification agreement made by the municipal agency is unenforceable in this case because only the Legislature could authorize KUA to undertake the obligations at issue here. Plainly, the Legislature did not do so.

STATEMENT

The basic facts pertinent to the sovereign immunity issues before this Court are set forth in the Eleventh Circuit's opinion. National R.R. Passenger Corp. v. Rountree Transport and Rigging, Inc., 15 Fla. L. Weekly Fed. C419 (11th Cir. Mar. 26, 2002).

To improve access to its Cane Island Power Plant, the Kissimmee Utility Authority (KUA) entered into an agreement with CSX Transportation, Inc. (CSX), called the Private Road Grade Crossing Agreement (the "Crossing Agreement"). Id. at C420.[1] The Crossing Agreement permitted KUA to build and utilize a road that crossed CSX's railroad tracks. Id. The agreement also made KUA responsible for maintaining the crossing, and, most significant here, obligated KUA to a broad indemnification agreement. Id.

In essence, the Crossing Agreement obligated KUA to hold harmless and defend CSX, as well as any company whose property CSX operated at the crossing's site, from any liabilities associated with the crossing. Ex. A, at 1.2, 14.2. The indemnification agreement placed no limit on KUA's potential liability under these obligations. See id. at 14.2.

---

[1] A copy of the Crossing Agreement is attached hereto as Exhibit A.

Thereafter, at the site of the crossing, a National Railroad Passenger Corporation (Amtrak) train collided with a generator being transported to the power plant. 15 Fla. L. Weekly Fed. at C420. Numerous claims followed, including claims by CSX and Amtrak against KUA for property damage, liability coverage, and a legal defense to the claims of others. Id. at C420-21. A federal district court entered summary judgment in favor of CSX and Amtrak on the indemnity claims, though at trial a jury determined that KUA had no responsibility for the accident. Id. at C421. KUA thereafter appealed. On appeal, the Eleventh Circuit determined that KUA's sovereign immunity defense raised numerous questions of state law, and the appellate court certified three questions to this Court regarding sovereign immunity:

1. GIVEN THAT KISSIMMEE UTILITY AUTHORITY, A MUNICIPAL AGENCY UNDER FLORIDA LAW, AGREED BY CONTRACT TO INDEMNIFY A PRIVATE PARTY, IS THE AGREEMENT CONTROLLED BY THE RESTRICTIONS ON WAIVER OF SOVEREIGN IMMUNITY FOUND IN FLORIDA STATUTE § 768.28?

2. IS THE INDEMNIFICATION AGREEMENT INSTEAD CONTROLLED BY THE RULE FOR BREACH-OF-CONTRACT ACTIONS ENUNCIATED IN *PAN-AM TOBACCO CORP. V. DEPARTMENT OF CORRECTIONS*, 471 So. 2d 4 (Fla. 1985)?

3. IF *PAN-AM* APPLIES, DOES A MUNICIPAL AGENCY LIKE KISSIMMEE UTILITY AUTHORITY LOSE THE PROTECTION OF SOVEREIGN IMMUNITY ONLY IF IT HAS SPECIFIC STATUTORY AUTHORIZATION TO ENTER INTO INDEMNIFICATION AGREEMENTS, OR IS IT SUFFICIENT THAT THE AGENCY GENERALLY HAS STATUTORY AUTHORIZATION TO

CONTRACT WITH PRIVATE PARTIES?

Id. at C428-30. The Eleventh Circuit indicated that the phrasing of the questions was not meant to limit this Court's review of the sovereign immunity issues in this case. Id.

SUMMARY OF ARGUMENT

A. Sovereign immunity protects the state and its governmental entities from claims arising under law made by the sovereign. By doing so, the doctrine defends the public treasury from unbridled encroachments in the form of defense costs or liability judgments. Sovereign immunity is applicable to all state, county and municipal levels of Florida's government.

Like most protections, sovereign immunity may be waived, but Florida's Constitution provides, and this Court has squarely held, that only the Legislature, by general law, may authorize such waivers. Art. X, § 13. Attempts by other governmental entities to waive sovereign immunity are nullities. This allows the Legislature to control the circumstances under which governmental entities may be subject to claims for liability, including the potentially substantial costs of defending claims.

This Court's case law has long confirmed that, based on separation of powers principles, a waiver of sovereign immunity will not be found unless it is clear, unequivocal, and not the product of implication. All waivers are to be strictly construed in favor of the state, which represents all of Florida's citizens.

The Legislature has enacted numerous general laws that waive

sovereign immunity in various contexts. For instance, section 768.28 waives sovereign immunity for certain tort damages, subject to general limitations on the amount of any judgment. This Court has also held that each statute authorizing a governmental entity to enter an agreement contains a concomitant waiver of sovereign immunity such that the entity may be liable for breach of that agreement. Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984). However, Pan-Am is no deviation from the rule that waivers must be clear, unequivocal, and not the product of implication: an agreement that a party need not perform is not an agreement at all, and thus where the Legislature authorizes a government entity to enter an agreement, the Legislature is necessarily authorizing the entity to be bound by that agreement.

B. The Crossing Agreement contains three indemnification obligations that are at issue in this case. The Legislature did not authorize KUA to undertake any of those indemnification obligations, the liability for any of which could be extraordinary, particularly in the context of train accidents. Therefore, under the circumstances of this case, the agreement is unenforceable.

In their brief to the Eleventh Circuit, CSX and Amtrak principally argued that Pan-Am permits this indemnification

agreement to be enforced because KUA had general statutory authority, pursuant to its home rule powers, to enter into the Crossing Agreement. CSX and Amtrak misread Pan-Am, which did not hold that an authorized agreement to do one thing may contain an unauthorized agreement to do another. Pan-Am instead holds that a government entity's failure to perform a contractual obligation may only be the subject of a suit for breach of contract where the Legislature authorized the entity to assume the particular obligation at issue.

Other arguments posited by CSX and Amtrak likewise fail. Section 768.28(18) clarifies that sovereign immunity applies to agreements between governmental entities and that no such entity may indemnify another for the other's negligence; the statute does not waive sovereign immunity to permit government entities to indemnify private parties for damages caused by other persons or for litigation costs. A case relied upon by CSX and Amtrak, City of Jacksonville v. Franco, 361 So. 2d 209 (Fla. 1st DCA 1978), simply has nothing to do with sovereign immunity. Finally, the waiver of sovereign immunity found in the Florida Interlocal Cooperation Act has no application here, since CSX did not contract with the appropriate entity to trigger that waiver and, in all events, such waivers are limited to agreements that, unlike the Crossing Agreement, relate to

electric generation facilities.

C. CSX and Amtrak argued in the Eleventh Circuit that KUA should be estopped to assert sovereign immunity. However, a municipal agency's unauthorized effort to waive sovereign immunity in a contract does not give rise to an estoppel to assert a sovereign immunity defense.

STANDARD

The Eleventh Circuit has certified questions of Florida law to this Court regarding KUA's defense of sovereign immunity. The Court's analysis is thus an original analysis based on facts presented by the Eleventh Circuit.

ARGUMENT

THE INDEMNIFICATION AGREEMENT BETWEEN KUA AND CSX IS UNENFORCEABLE IN THIS CASE BECAUSE IT CONSTITUTES AN UNAUTHORIZED WAIVER OF SOVEREIGN IMMUNITY.

Only the Legislature has the authority to waive the sovereign immunity enjoyed by all government entities within the state. Because the Legislature did not authorize KUA to undertake the indemnification obligations that CSX and Amtrak now seek to enforce, those obligations constitute unauthorized waivers of sovereign immunity and may not be enforced. Therefore, as the State now shows, the state sovereign immunity issues in this case should be resolved in favor of the municipal agency, KUA.

A. ONLY THE LEGISLATURE, BY CLEAR AND UNAMBIGUOUS ACT, MAY WAIVE SOVEREIGN IMMUNITY.

A product of Florida's heritage from the English common law, the doctrine of sovereign immunity holds that the sovereign may not be sued in its own courts for violation of its own laws.

See generally Cauley v. City of Jacksonville, 403 So. 2d 379, 381 & n.4 (Fla. 1981); see also Dep't of Revenue v. Kuhnlein, 646 So. 2d 717, 721 (Fla. 1994)(explaining that sovereign immunity is no defense to claims under the state or federal constitutions). Florida has long embraced this concept, applying it to state government, its agencies and its county subdivisions. Id. More recently, the doctrine has been interpreted to apply uniformly not only to state entities but to municipal corporations, which had previously been the subject of a confusing patchwork of exceptions and special rules that generally left them without any immunity. Cauley, 403 So. 2d at 383-85; Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1013-18 (Fla. 1979).

This Court has described sovereign immunity as "a matter of considerable importance." State ex rel. Davis v. Love, 126 So. 374, 378 (Fla. 1930). The doctrine protects the public from "profligate encroachments on the public treasury," Spangler v. Florida State Turnpike Auth., 106 So. 2d 421, 424 (Fla. 1958); State Rd. Dep't v. Tharp, 1 So. 2d 868, 869 (Fla. 1941), and, in this important sense, sovereign immunity follows the well-established notion that the Legislature possesses the exclusive power to determine how, when, and for what purpose public funds should be applied in conducting the government. See, e.g.,

State ex rel. Kurz v. Lee, 163 So. 859 (Fla. 1938); State v. Green, 116 So. 66 (1928). Defending lawsuits, and satisfying adverse judgments obtained in those lawsuits, can present substantial demands upon a state's financial resources.

Like most protections, though, sovereign immunity may be waived. Florida's Constitution expressly empowers the Florida Legislature to enact general laws that waive the state's sovereign immunity. 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 confirmed, that constitutionally prescribed method of waiving sovereign immunity – general law – is the exclusive means by which sovereign immunity may be surrendered. State ex rel. Davis, 126 So. at 380 (construing earlier constitution's identical provision, Art. III, § 22, Fla. Const. of 1885).

Thus, sovereign immunity may not be waived by laws other than general laws; nor may it be waived by entities other than the Legislature. E.g., id.; see also Arnold v. Schumpert, 217 So. 2d 116, 120 (Fla. 1968)("the Special Act here involved is unconstitutional because waiver of a county's sovereign immunity cannot be accomplished by local law"); Suits v. Hillsborough County, 2 So. 2d 353, 357 (Fla. 1941)("The only way that the

State can give its consent to be made a party defendant to a suit is by legislative act . . . ."); Davis v. Watson, 318 So.2d 169, 170 (Fla. 4th DCA 1975)("the power to waive the state's immunity is vested exclusively in the legislature"). These cases confirm that any unauthorized effort to waive sovereign immunity is unconstitutional and, therefore, a nullity.

Where the Legislature does set forth to waive sovereign immunity, the resulting law is in derogation of the common law and will be strictly construed in favor of the sovereign. See Metropolitan Dade County v. Reyes, 688 So. 2d 311, 312 (Fla. 1996); Levine v. Dade County Sch. Bd., 442 So. 2d 210, 212 (Fla. 1983); Carlile v. Game & Fresh Water Fish Commission, 354 So. 2d 362, 364 (Fla. 1978); Spangler, 106 So. 2d at 423-24. Statutes purporting to waive sovereign immunity "must be clear and unequivocal." Spangler, 106 So. 2d at 424.

On numerous occasions, the Florida legislature has utilized its constitutional authority to waive the State's sovereign immunity. For example, section 768.28 expressly waives sovereign immunity for all levels of state government with respect to certain tort damages. The statute also establishes general limits on the amount of damages that may be recovered pursuant to that waiver. § 768.28(5), Fla. Stat. (waiving

sovereign immunity up to $100,000 per claimant and $200,000 per occurrence).

Most pertinent here, the Legislature has from time to time authorized certain government entities to agree to indemnify other persons in various contexts. For example, the Florida Interlocal Cooperation Act authorizes municipalities to enter into interlocal agreements that provide for indemnification in the limited context of the joint construction of electrical generation production. § 163.01(15)(b)2.i., Fla. Stat. See also § 161.101(4), Fla. Stat. (authorizing state agency, for itself and any local government within the state, to enter into indemnification agreements designed to facilitate the implementation of beach erosion control management programs); § 234.211(2)(a), Fla. Stat. (authorizing municipalities to enter into indemnification agreements with school districts for the use of school buses to transport the disadvantaged or elderly); § 255.559(1), Fla. Stat. (authorizing indemnification agreements for asbestos removal); § 365.171(14), Fla. Stat. (authorizing indemnification agreements with telephone companies for 911 services).

Also pertinent here, this Court has held that all statutes authorizing government entities to contract with private parties contain a concomitant waiver of sovereign immunity for liability

on the statutorily authorized agreement. Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984). This is no exception, however, to the rule that all waivers of sovereign immunity must be clear and must emanate from the Legislature. Rather, based on the legal truism that an agreement imposing no obligation on one party is illusory and therefore not a valid contract, Pan-Am expressly concludes that wherever the Legislature authorizes a governmental entity to enter a contract with a private party, the Legislature has enacted a clear waiver of sovereign immunity with respect to the obligation that the governmental entity is authorized to undertake.

In sum, determining whether to waive sovereign immunity for a particular act or type of act is the exclusive privilege of the Florida Legislature, which may do so only through clearly expressed general law. All other governmental entities, including agencies, counties, and municipalities, are constitutionally prohibited from making such decisions, and where any such governmental entity attempts to do so, absent legislative authorization, its act is a nullity and the waiver may not be enforced.

B. THE LEGISLATURE DID NOT AUTHORIZE KUA TO AGREE TO INDEMNIFY CSX OR ANYONE ELSE FOR DAMAGES NOT CAUSED BY KUA; NOR DID THE LEGISLATURE AUTHORIZE KUA TO AGREE TO DEFEND ANYONE IN LITIGATION.

Having established that sovereign immunity may be waived only by the clearly expressed will of the Florida Legislature, the State now turns to the broad indemnification agreement at issue in this proceeding. Reduced to its essence, so long as a claim for loss or damages arises out of, results from, or is connected with the construction, maintenance, use or removal of KUA's crossing over CSX's railroad tracks, the agreement purports to hold KUA liable for:

- all damage to property at or near the crossing, including damages for loss of use,
- all loss and damages caused by injury to any person at the crossing, and
- the defense of any claims relating to the above.

See Ex. A, at 14.2. These obligations run not only to CSX but to any company whose property CSX "operate[s]" at the crossing, and they exist regardless of who causes the damages or loss, including situations where CSX is solely at fault. Id. at 1.2, 14.2. There is no limitation on the amounts KUA might be required to expend to fulfill these obligations.

Three distinct aspects of this indemnification agreement are

at issue here: KUA's obligation to indemnify CSX and Amtrak (whose property CSX supposedly operated at the crossing) for property damage at the crossing, KUA's obligation to defend CSX and Amtrak in the claims that arose out of the collision that precipitated this litigation, and KUA's responsibility for any liabilities resulting from that litigation. The federal district court determined that, in all three respects, KUA is liable to CSX and Amtrak.[2]

None of these indemnification obligations is enforceable against KUA unless the sovereign immunity enjoyed by the

---

[2] With some emphasis, the State notes that this brief does not address the validity, vel non, of the entire indemnification agreement between KUA and CSX, because this case does not concern the extent to which that agreement might require KUA to indemnify CSX or others for property damage or liability for injuries caused by KUA. Enforcement of that aspect of the indemnification agreement is not a matter before this Court, given that the jury in this case found KUA to have no fault in causing the accident that prompted this litigation. Accordingly, this brief speaks in terms of whether the indemnification agreement may be enforced in the context of this case, not whether the agreement is valid or invalid.

For purposes of completeness, however, the State notes that the Attorney General has previously opined on whether a governmental entity may agree to indemnify another for the entity's negligence, and that decisions of Third District may be read to speak to such agreements. See Op. Att'y Gen. Fla. 2000-22 (2000)(opining that a county may agree to indemnify another for the county's negligence, within the limits imposed by § 768.28, inasmuch as the county is contractually recognizing its liability as provided by law); see also Dade County Sch. Bd. v. Radio Station WQBA, 699 So. 2d 701 (Fla. 3d DCA 1997), aff'd in part, quashed in part, 731 So. 2d 638 (Fla. 1999); Evanston Ins. Co. v. City of Homestead, 563 So. 2d 755 (Fla. 3d DCA 1990).

municipal agency has been validly waived. Thus, the ultimate issue here is whether any such waiver has occurred in this case. None has. No Florida statute authorized KUA to agree to compensate CSX or anyone else for property damage not caused by KUA. Nor did any Florida statute authorize KUA to agree to compensate CSX or anyone else for liabilities imposed as a result of acts by persons other than KUA. Finally, with respect to claims for any of these potential liabilities, no Florida statute authorized KUA to agree to defend CSX or anyone else in any litigation.

In the absence of clear legislative authorization, the unenforceable nature of KUA's indemnity agreement is well illustrated by the former Fifth Circuit's decision in Seaboard Air Line Railroad Co. v. Sarasota-Fruitville Drainage District, 255 F.2d 622 (5th Cir. 1958). There, a Florida drainage district agreed to indemnify a railroad with respect to culverts the district had installed near the railroad's tracks, much as KUA agreed to indemnify CSX with respect to the crossing in this case. The Fifth Circuit squarely held that sovereign immunity precluded enforcement of the indemnification provision, and in doing so the court specifically noted that while the district had statutory authority to engage in numerous acts, it lacked statutory authority to agree to indemnify the railroad as it

did. Id. at 623-24.

Likewise, Florida's Attorney General has issued numerous opinions regarding the ability of government entities to obligate themselves to pay damages or incur liability as a result of another person's acts, or to do the same with regard to their own acts in excess of the monetary limits set forth in section 768.28, which waives liability for tort damages. The Attorney General has consistently opined that, absent legislative authorization, such agreements are in violation of the Florida Constitution and are not enforceable. E.g., Op. Att'y Gen. Fla. 2000-22 (2000); Op. Att'y Gen. Fla. 99-56 (1999); Op. Att'y Gen. Fla. 95-61 (1995); Op. Att'y Gen. Fla. 95-12 (1995); Op. Att'y Gen. Fla. 93-34 (1993); Op. Att'y Gen. Fla. 90-21 (1990); Op. Att'y Gen. Fla. 80-77 (1980); Op. Att'y Gen. Fla. 78-20 (1978).

Despite these authorities, CSX and Amtrak presented the Eleventh Circuit with several theories to support their view that KUA's indemnification agreement is the product of a valid waiver of sovereign immunity. The State will briefly explain why each theory fails.

1. Home Rule Powers and the General Authority to Contract

Principally, CSX and Amtrak argued that Article VIII, section 2(b), of the Florida Constitution and Florida Statutes

section 166.021, the Municipal Home Rule Powers Act, authorized the indemnification agreement in this case by enabling municipalities to exercise any power that is not expressly prohibited by law. From this, CSX and Amtrak contended that KUA was authorized to enter into the Crossing Agreement, and, therefore, the indemnification provisions found in that agreement are legitimate exercises of the municipality's home rule powers. Brief of Appellees National Railroad Passenger Corp. and CSX Transportation, Inc. Opposing KUA and FMPA Cross-Appeal (hereafter, CSX 11th Cir. Br.), at 21-24. This argument fails for multiple reasons.

To begin, the broad, general grant of authority that municipalities receive through Article VIII, section 2(b), and section 166.021 does not, standing alone, authorize municipalities to waive sovereign immunity. To the contrary, those provisions authorize municipalities to exercise only powers that they are not otherwise prohibited from exercising, and, as previously shown, no less an authority than the Florida Constitution prohibits all governmental entities other than the Legislature from waiving sovereign immunity. Art. I, § 13, Fla. Const.; Art. VIII, § 2(b), Fla. Const.

Also, a strict reading of the Municipal Home Rule Powers Act reveals no legislative intent, let alone clear legislative

intent, to authorize municipalities to waive sovereign immunity in any manner whatsoever. Yet CSX and Amtrak contend that, as a product of their general home rule powers, municipalities may waive sovereign immunity in any context and to any extent. That is simply irreconcilable with this Court's requirement that waivers of sovereign immunity "must be clear and unequivocal." Spangler, 106 So. 2d at 424.

CSX and Amtrak were also wholly incorrect in their contention that an authorization to enter a contract for a given purpose permits a government entity to be bound by any provision that might be found within that contract, including an indemnification agreement imposing unlimited liability for acts committed by other persons. In essence, CSX and Amtrak argue that an unauthorized agreement is in fact enforceable, so long as it is included within a written and otherwise authorized agreement. For support, CSX and Amtrak relied only on this Court's decision in Pan-Am, CSX 11th Cir. Br., at 20-23, 31-32, 35, which can be read only to reject this theory.

In Pan-Am, a vending machine company alleged that the Department of Corrections breached a contract for vending services. Finding that the Department of Corrections had statutory authorization to enter contracts for goods and services, this Court held that the Legislature had clearly

waived sovereign immunity with respect to liability on the contract. 471 So. 2d at 5.

Pan-Am also clarified that state entities may be sued for breach of contract only with regard to "express, written contracts into which the state agency ha[d] statutory authority to enter." 471 So. 2d at 6. That holding necessarily applies to whichever contractual provision is the subject of a claim for breach of contract. Otherwise, the limitations expressed in Pan-Am would be meaningless: a state entity could be sued for breach of any contractual provision, so long as it was included within an agreement of the sort the entity was authorized to enter. Accordingly, to whatever extent the City of Kissimmee's home rule powers permitted KUA to contract with CSX, those powers did not authorize KUA to waive its sovereign immunity and agree to the indemnification obligations at issue in this case.

2. Section 768.28(18)

Before the Eleventh Circuit, CSX and Amtrak also argued that section 768.28(18) establishes the enforceability of KUA's indemnification agreement. That subsection provides that sovereign immunity is not waived where a governmental entity contracts with another governmental entity and that, while they may obtain indemnification agreements from private persons, one governmental entity may not agree to indemnify another

governmental entity for the other's negligence. CSX and Amtrak contended that, by prohibiting governmental entities from agreeing to indemnify each other for the others' negligence, the Legislature implied that government entities were permitted to indemnify private parties for their negligence. CSX 11th Cir. Br., at 29-30.

CSX and Amtrak are incorrect for two reasons. First, this Court has long held that sovereign immunity may not be waived by implication; rather, waivers must be clear and unequivocal. E.g., Spangler, 106 So. 2d at 424. Section 768.28(18) does not clearly waive sovereign immunity for all governmental entities that wish to indemnify private parties for their negligence.

Second, the implication drawn by CSX and Amtrak is inaccurate. The Legislature added subsection (18) to section 768.28 in 1993, see Ch. 93-89, s. 1, Laws of Fla., and reading the first two sentences of the subsection together, it is likely, if not manifest, that governmental entities were operating under the belief that sovereign immunity did not apply to agreements among themselves, such as an agreement between the Department of Transportation and a municipality concerning road construction. As a result, governmental entities were including indemnification provisions in those agreements. The amendment clarified that sovereign immunity is applicable to agreements

between state entities and that indemnification provisions for another's negligence are not permissible. By no means did that clarification permit all governmental entities to agree to indemnify private parties without limitation.

3. City of Jacksonville v. Franco

In their Eleventh Circuit brief, CSX and Amtrak next relied on City of Jacksonville v. Franco, 361 So. 2d 209 (Fla. 1st DCA 1978), wherein the First District held that an indemnification agreement obligated the City of Jacksonville to indemnify a railroad for all losses incurred in connection with a collision at a crossing, even losses caused by the railroad. Franco, however, had nothing to do with sovereign immunity, as the city apparently chose not to challenge the agreement on that basis and no mention of sovereign immunity is made in the decision.

Undeterred, CSX and Amtrak argued to the Eleventh Circuit that Franco should be read to indicate that "there was no viable legal basis for asserting a sovereign immunity defense to an express indemnity claim." CSX 11th Cir. Br., at 31. This ignores that, at the time the Franco litigation was wending its way through the courts, the prevailing view was that municipalities had no sovereign immunity, and only later did this Court clarify that sovereign immunity is uniformly shared among state entities, state subdivisions, and municipalities.

See Cauley v. City of Jacksonville, 403 So. 2d 379, 383-85 (Fla. 1981); Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1013-18 (Fla. 1979). Franco is thus inapposite.

4. The Florida Interlocal Cooperation Act

Finally, CSX and Amtrak directed the Eleventh Circuit to a provision in the Florida Interlocal Cooperation Act, section 163.01, Florida Statutes, in which the Legislature does authorize persons such as KUA to waive sovereign immunity to certain persons in connection with electric power projects:

> (k) The limitations on waiver in the provisions of s. 768.28 or any other law to the contrary notwithstanding, the Legislature, in accordance with s. 13, Art X of the State Constitution, hereby declares that any such legal entity or public agency of this state that participates in any electric project waives its sovereign immunity to:
>
> 1. All other persons participating therein; and
>
> 2. Any person in any manner contracting with a legal entity of which any such public agency is a member, with relation to:
>
> a. Ownership, operation, or any other activity set forth in sub-subparagraph (b)2.d. with relation to any electric project; or
>
> b. The supplying or purchasing of services, output, capacity, energy, or any combination thereof.

§ 163.01(15)(k), Fla. Stat. CSX and Amtrak relied specifically on subsection (15)(k)2.a. While they have identified a legislative enactment that expressly waives sovereign immunity, this waiver has no application to these companies for two

separate reasons.

First, subsection (15) identifies the public agencies and legal entities to which the remainder of the subsection refers: "any public agency of this state which is an electric utility," and "any separate legal entity created pursuant to the provisions of this section, the membership of which consists only of electric utilities, and which exercises or proposes to exercise the powers granted by part II of chapter 361, the Joint Power Act . . . ." § 163.01(15). KUA, a municipal agency and an electric utility, would qualify as a "public agency," but CSX did not "contract[] with a legal entity of which [KUA] is a member . . . " as required to trigger application of section 163.01(15)(k)2. KUA is a member of the Florida Municipal Power Association (FMPA), and FMPA entered into a licensing agreement with KUA with regard to the Cane Island Power Plant, but in the Crossing Agreement CSX contracted only with KUA, not FMPA, and, as a result, section 163.01(15)(k)2. does not apply to that contract.

Second, section 163.01(15)(k)2.a. provides that the waiver of immunity specified therein extends only to ownership, operation, or, by incorporation of section 163.01(15)(b)2.d., planning, design, engineering, licensing, acquisition, construction, completion, management, control, operation,

maintenance, repair, renewal, addition, replacement, improvement, modification, insuring, decommissioning, cleanup, retirement, or disposal of an electric project. The Crossing Agreement effectively gave KUA an easement over railroad tracks, and the agreement's clear terms give no indication that CSX had any involvement whatsoever with any of the enumerated activities. Thus, the waiver provided by section 163.01(15)(k) has no application to the Crossing Agreement or, for that matter, this case.

In sum, no statute authorized KUA to agree to any of three indemnification obligations at issue in this case: the obligation to indemnify CSX and Amtrak for property damage not caused by KUA, the obligation to indemnify CSX and Amtrak for liabilities incurred in connection with the crossing that were not the result of KUA's acts, and the obligation to defend CSX and Amtrak in litigation related to the crossing. Absent legislative authorization, those purported obligations are nullities and are not enforceable against KUA.

C. KUA CANNOT BE ESTOPPED TO ASSERT SOVEREIGN IMMUNITY AS A DEFENSE TO THE CLAIMS IN THIS CASE.

It remains only to address the estoppel argument raised by CSX and Amtrak in their brief to the Eleventh Circuit. Specifically, CSX and Amtrak argued that KUA is estopped under

Florida law from asserting its sovereign immunity defense to the breach of contract claims in this case. CSX 11th Cir. Br., at 39. That argument, which the State expects CSX and Amtrak to repeat here, should be rejected.

As shown, KUA had no authority to undertake the indemnification obligations that CSX and Amtrak now seek to enforce, obligations that impose unlimited liability on KUA. Therefore, any contention that estoppel could apply here is without merit. This Court long ago held that illegal contracts will not be enforced and that the parties to such contracts will be left where they have placed themselves. Brumby v. City of Clearwater, 149 So. 203 (Fla. 1933); Escambia Land & Mfg. Co. v. Ferry Pass Inspectors' & Shippers' Ass'n, 52 So. 715 (Fla. 1910).

The law has long held that "the doctrine of estoppel is not applicable in transactions which are forbidden by statute or which are contrary to public policy." State ex rel. Schwartz v. City of Hialeah, 156 So. 2d 675, 676 (Fla. 3d DCA 1963) (citing Montsdoca v. Highlands Bank & Trust Co., 95 So. 666 (Fla. 1923)). See also Local No. 234 v. Henley & Beckwith, 66 So. 2d 818, 821 (Fla. 1953)(an agreement that violates the constitution or statute is illegal and void, and courts have an affirmative duty to refuse to sustain that which by statute or

constitutional provision has been declared repugnant to public policy). The reason for this is simple and conclusive: to permit otherwise "would be for the law to aid in its own undoing." Armco Drainage & Metal Products, Inc. v. Pinellas County, 137 So. 2d 234, 237 (Fla. 2d DCA 1962). This is so even where one party who has obtained a benefit refuses to perform, and the law sustains that refusal because the interests of society and the state demand complete suppression of illegal agreements. Id. at 238.

Furthermore, the law is clear that persons who contract with a governmental entity must apprise themselves of the entity's powers, or lack of them, before entering the contract. Cook v. Navy Point, Inc., 88 So. 2d 532 (Fla. 1956); Edwards v. Town of Lantana, 77 So. 2d 245 (Fla. 1955); Ramsey v. City of Kissimmee, 190 So. 474 (Fla. 1939). The contract itself does not create an estoppel. Town of Indian River Shores v. Coll, 378 So. 2d 53, 55 (Fla. 4th DCA 1979).

Although CSX and Amtrak cited several cases to the Eleventh Circuit in support of their estoppel argument, none applies that doctrine to enforce an illegal contract, especially a contract that contravenes a principle as fundamental as that found in Article X, section 13, of the Florida Constitution: that only the Legislature may waive sovereign immunity. That

constitutional requirement is intended to prevent profligate encroachments on the public treasury at all levels of government.

Nevertheless, CSX and Amtrak dismissed out of hand the State's concern for the impact of this case on public treasuries because, supposedly, any liability of KUA is its own responsibility, not that of the City of Kissimmee. Of course, that argument begs the question of whether any government entity in Florida can assume unlimited liability without legislative authorization. Here, without any such authorization, KUA simply agreed to assume unlimited liability for any loss related to the crossing and to defend CSX and others in litigation related to the crossing. That agreement is unenforceable with respect to the claims of CSX and Amtrak, and the law must leave the parties where it found them. CSX and Amtrak are entitled to no relief from KUA.

CONCLUSION

The indemnification obligations that CSX and Amtrak seek to enforce are void and unenforceable pursuant to Article 10, section 13, of the Florida Constitution. Returning to the questions certified by the Eleventh Circuit, those questions should be answered as follows:

1. The indemnification obligations that CSX and Amtrak seek to enforce are not controlled by the waiver of sovereign immunity found at section 768.28, Florida Statutes. This case is controlled by Article 10, section 13, of the Florida Constitution and Florida case law requiring clear and unequivocal legislative authorization to waive sovereign immunity.

2. The decision in Pan-Am does not support a waiver of sovereign immunity with regard to the indemnification obligations that CSX and Amtrak seek to enforce.

3. General statutory authorization to enter into contracts does not provide the specific legislative authorization required to waive sovereign immunity as to indemnification agreements.

Respectfully submitted,

_____
THOMAS E. WARNER
Solicitor General
Fla. Bar No. 176725

LOUIS F. HUBENER
Deputy Solicitor General
Fla. Bar. No. 0140084

MATTHEW J. CONIGLIARO
Deputy Solicitor General
Fla. Bar. No. 63525

Office of the Solicitor General
The Capitol – Suite PL-01
Tallahassee, FL 32399
(850) 414-3681
(850) 410-2672 (fax)

On behalf of Robert A. Butterworth, Attorney General, and the State of Florida

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing amicus brief has been served by U.S. mail this 6th day of May, 2002 to:

Daniel John Fleming, Esq.
A. J. Melkus, Esq.
Jose A. Gutierrez, Esq.
Melkus & Fleming
410 Ware Boulevard, Suite 1101
Tampa, Florida 33619

Sutton G. Hilyard, Jr., Esq.
Hilyard, Bogan, Palmer & Lockeby, P.A.
P. O. Box 4973
105 E. Robinson Street, Ste 201
Orlando, Florida 32802-4973

John W. Bussey, III, Esq.
P. O. Box 531086
Orlando, Florida 32853-1086

Michael Roper, Esq.
Ernest H. Kohlmyer, III, Esq.
Bell, Leeper & Roper, P.A.
P. O. Box 3669
Orlando, Florida 32802

L. Lee Williams, Jr., Esq.
Williams, Bryant & Gautier, P.A.
P. O. Box 4128
Tallahassee, Florida 32315-4128

Alton G. Pitts, Esq.
Post Office Box 540447
Orlando, Florida 32854-0447

Allen C. Sang, Esq.
Carman, Beauchamp, Sang & Topkin, P.A.
1936 Lee Road, Suite 250
Winter Park, FL 32789

Thomas M. Burke, Esq.
Holland & Knight LLP
200 South Orange Avenue, Suite 2600
P. O. Box 1526
Orlando, Florida 32802-1526

James Warden, Esq.
Darren M. Dick, Esq.
Blackwell, Sanders, Peper, Martin, LLP
9401 Indian Creek Parkway
Suite 1200
Overland Park, Kansas 66210

Thomas T. Demas, Esq.
101 E. Madison St.
P. O. Box 1933
Lake City, Florida 32056-1933

Michael R. Karcher, Esquire
Underwood, Karcher & Karcher,
Grove Plaza Building- 6th Floor
2900 Middle Street
(S. W. 28th Terrace)
Miami, Florida 33133

Thomas B. DeWolf, Esq.
37 N. Orange Ave., Ste. 500
Orlando, Florida 32801

Richard A. Sherman, Esq.
1777 South Andrews Ave. Ste 302
Fort Lauderdale, Florida 33316

William L. Eagan, Esq.
Arnold, Matheny & Eagan
801 N. Magnolia Ave., Ste 201
Post Office Box 2967
Orlando, Florida 32802-2967

Joseph Charles Ingram, Esq.
Hannah, Estes & Ingram, P.A.
37 North Orange Ave. Ste 300
P. O. Box 4974
Orlando, Florida 32802-4974

Richards H. Ford, Esq.
Wicker, Smith, Tutan, O'Hara
Barnett Bank Center
390 North Orange Ave., Ste 1000
P. O. Box 2753
Orlando, Florida 32802-2753

William G. Ballaine
Landman Corsi Ballaine & Ford, P.C.
120 Broadway 27th Fl.
New York, New York 10271

Steven L. Brannock
400 N. Ashley Dr. #2300
P. O. Box 1288
Tampa, Florida 33601-1288

Stephen A. Smith, Esq.
P. O. Box 1792
Lake City, Florida 32056-1792

James Read Holland, II, Esq.
Burge & Wettermark
1 Independent Dr. Ste 3100
Jacksonville, Florida 32202-5025

Brian J. Anthony, Esq.
Rardon Rodriquez & Anthony
816 W. Martin Luther King Blvd.
Tampa, Florida 33603-3302

Edmund T. Woolfork, Esq.
Woolfork Jordan and Assoc. PA
518 E. Colonial Drive
Orlando, Florida 32803-4504

_____
Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared with 12-point Courier New font in compliance with Fla. R. App. P. 9.210(a)(2).

_____
Attorney