IN THE SUPREME COURT OF FLORIDA

AMERICAN HOME ASSURANCE COMPANY,

Appellant,

vs.

NATIONAL RAILROAD PASSENGER CORPORATION, ETC., ET AL.

Appellees.
_____/

CASE NO. SC02-709

11th Cir. Case Nos. 00-13811
00-13986

KISSIMMEE UTILITY AUTHORITY (KUA) AND FLORIDA MUNICIPAL POWER AGENCY'S (FMPA) JOINT REPLY BRIEF ADDRESSING CERTIFIED QUESTIONS RELATING TO SOVEREIGN IMMUNITY FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

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KUA does not have requisite authority to contractually waive its sovereign immunity by executing an indemnification agreement, whereby KUA would be responsible for the unlimited tort liability of a private entity.

It is clear under Florida law, that a political subdivision of the State cannot waive its immunity except to the extent provided by statute or specific legislative enactment. This rule of law is articulated in Section 13, Article X, of the Constitution of the State of Florida which states that "[P]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Thus, the power to waive the State's sovereign immunity rests exclusively with the Legislature. Davis v. Watson, 318 So. 2d 169 (Fla. 4th DCA 1975, cert. denied, 330 So. 2d 16 (Fla. 1976); Arnold v. Shumpert, 417 So. 2d 116 (Fla. 1968).

The Applicability of Pan-Am Tobacco

The Railroad Companies main argument relies upon the general rule of law discussed in this court's decision in Pan-Am Tobacco Corp. v. Dept. of Corrections, 471 So.2d 4 (Fla. 1984). Pan-Am Tobacco stands for the general proposition that a governmental entity cannot raise the defense of sovereign immunity to avoid a claim for damages arising out of a breach of contract action. In Pan-Am Tobacco, this court further recognized that where the Florida Legislature has by general law authorized the

state and its agencies to enter into a contract for a specific public purpose, then sovereign immunity has been waived to that limited extent. Pan-Am Tobacco is factually distinguishable, since it involved a straightforward breach of contract claim regarding cancellation periods in a contract for sale of vending machines, and did not in any way involve the indemnification of a private party, for its own acts of negligence, by a governmental entity. Importantly, this court noted that "we would also emphasize that our holding here is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter. . . ." Pan-Am Tobacco, 471 So.2d at 6 (emphasis added)

The Railroad Companies' position and reliance upon Pan-Am Tobacco fails to present a persuasive argument that a similar result should also occur in matters relating to contractual indemnification agreements such as the one found at Paragraph 14 of the PRGC Agreement. In this case, KUA was judicially found to be without fault in the underlying trial. In comparison, both CSXT and NRPC were collectively found forty-one (41%) percent liable of the damages caused by this train accident. Therefore, this court must consider whether KUA had authority to contractually assume the potentially unlimited tort liability of the Railroad Companies, thereby effectively waiving its sovereign immunity. Florida law has never recognized a contractual waiver of sovereign immunity for those contracts into which a state agency does not possess

statutory authority to enter. Certainly, KUA recognizes that it has authority to enter into certain authorized contracts, but it does not have the requisite authority to waive its sovereign immunity by agreeing to indemnify a private entity, and thereby assume the unlimited tort liability of that private entity. This prohibition is firmly imposed by the Florida Constitution. Pursuant to Article X, §13, of the Florida Constitution, the power to waive the state's sovereign immunity rests exclusively with the State Legislature. See, Davis v. Watson, 318 So.2d 169 (Fla. 4th DCA 1975), cert. denied 330 So.2d 16 (Fla. 1975). A city may not waive sovereign immunity by local law. Donisi v. Trout, 415 So.2d 730 (Fla. 4th DCA 1981) (a municipality cannot forbid what the Legislature has expressly licensed, authorized, required, nor may it authorize what the Legislature has expressly forbidden).

It is well recognized under Florida law that a governmental entity cannot accomplish by contract that which it would be precluded from accomplishing pursuant to the enactment of an ordinance, resolution or other law. See: Nizzo v. Amoco Oil Co., 333 So.2d 491 (Fla. 2d DCA 1976); Schaal v. Race, 135 So.2d 252 (Fla. 2d DCA 1961) In this case, KUA could not have passed an ordinance waiving its sovereign immunity since only the Legislature possesses that authority. Accordingly, since KUA lacked the "statutory authority" to enter into a contract of indemnification

with CSXT, the doctrine of sovereign immunity applies and bars this indemnity claim by the Railroad Companies.

Further, the Railroad Companies are simply incorrect when they argue that standard for determining the validity of the indemnification agreement is whether the PRGC Agreement is "fairly authorized" by law. If this court carries the Railroad Companies' argument to its logical conclusion, the court would be required to find any individual contractual provisions, otherwise illegal under Florida law, enforceable merely because the are contained within a "fairly authorized" agreement. For example, taking the Railroad Companies' argument to its logical conclusion, a municipality could agree to contractual provisions within the contract such as, agreements to enter into treaties with foreign governments, provisions which violate citizen's civil or constitutional rights, and contracts to commit crimes, so long as the overall contract was "fairly authorized" under Florida law. Obviously, that is an untenable result. The Railroad Companies' argument is not the appropriate standard this court should apply when dealing with a waiver of sovereign immunity since it is necessary for this court to specifically consider whether the indemnification provision is independently enforceable under Florida law. Florida courts have consistently held that the Florida Constitution requires "specific, clear, and unambiguous language in a statute" to constitute a waiver of sovereign immunity. See, Manatee County v. Town of

Longboat Key, 365 So.2d 143, 147 (Fla. 1978); Metropolitan Dade County v. Reyes, 688 So.2d 311 (Fla. 1996); Tucker v. Resha, 634 So.2d 756 (Fla. 1st DCA 1994). Additionally, in interpreting legislative waivers, the Florida Supreme Court has repeatedly stated that such waivers must be strictly construed. See, Metropolitan Dade County v. Reyes, supra.; Menedez v. North Broward Hospital District, 537 So.2d 89, 91 (Fla. 1988); Manatee County, supra.; Levone v. Dade County School Board, 442 So.2d 210, 212 (Fla. 1993). The Eleventh Circuit has likewise recognized this well established principle of Florida law. See, Sims v. State of Florida, Dept. of Highway Safety & Motor Vehicles, 832 F.2d 1558, 1569 (11th Cir. 1987). Instead, the correct standard in considering the validity of the indemnification clause is whether KUA has been "specifically" or "expressly" authorized by the Legislature to waive its sovereign immunity in this matter.

Although KUA recognizes that its officials have the authority to act on behalf of the municipality in order to perform certain governmental functions, including the execution of contracts, KUA's execution of the PRGC Agreement **containing** an indemnification provision which provides for an unlimited waiver of its sovereign immunity in tort, was beyond the scope of the KUA's governmental authority under Florida law. The unauthorized act of contractually agreeing to waive its sovereign immunity protection under §768.28 Fla. Stat., renders the indemnity agreement void

and unenforceable against KUA. The Attorney General of the State of Florida has issued numerous opinions which consistently state that contracts containing these forms of indemnity obligations are impermissible. In addition, the *amicus* brief filed by the Attorney General in this case specifically concurs with KUA's argument that these indemnification agreements are prohibited and unenforceable under Florida law. "Although an opinion of the [Florida] Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive" on matters of Florida law. Florida v. Family Bank of Hallandale, 623 So.2d 474, 478 (Fla. 1993)

Therefore, the execution of the PRGC Agreement should have been considered void and unenforceable as an "ultra vires" act. In Town of Indian River Shores v. Coll, 378 So.2d 53, 55 (Fla. 4th DCA 1979) the court held that "if a contract is ultra vires, no liability accrues to the municipal corporation, absent some special estoppel." In addition, the court stated that Coll was not entitled to estoppel because "one who contracts with a municipality is bound to know the limitations of the City's contracting authority." Id. Florida law states that persons contracting with a governmental entity must do so at their own peril and inquire into the power of a governmental entity before executing the contract. See: Ramsey v. City of Kissimmee, 190 So. 474 (Fla. 1939).

These cases, as well as others previous cited, support the notion that it is against public policy to allow public officials to subject citizens of the State of Florida to the unlimited liability of private individuals or corporations by contractually waiving the state's sovereign immunity. This important public policy was articulated in Seaboard Air Line Railroad Co. v. Sarasota-Fruitville Drainage District, 255 F.2d 622, 623-4 (5th Cir. 1958), cert. denied 358 U.S. 836 (1958), in which the court stated:

> To hold otherwise would be to permit the district to negate a policy the state has established for the protection of its citizens by permitting the district to assume a liability or purpose for which the taxpayer's money is to go when the legislature and the courts of Florida have said that such money must not go for that purpose.

The Railroad Companies also attempt, unsuccessfully, to distinguish the decision in Seaboard Air Line Railroad from the instant case. In Seaboard, the court applying Florida law concluded that the governmental entity enjoyed sovereign immunity from an indemnification claim brought by a railroad pursuant to an indemnity agreement. Applying the principles of sovereign immunity under Florida law, the Fifth Circuit held ". . . that the indemnity agreement and the contract was void and may not be enforced." The Railroad Companies suggest that the Seaboard decision is no longer valid precedent and attempt to distinguish that decision. However, their brief fails to provide any persuasive authority to demonstrate that decision has ever been reversed or receded from by this Court, in any fashion.

Instead, the Railroad Companies rely upon the case of Seaboard Air Line Railroad Co. v. County of Crisp of the State of Georgia, 280 F.2d 873 (5th Cir. 1960), cert. denied 364 U.S. 942 (1961). That decision is however clearly distinguishable from the instant case. First of all, that case involved an interpretation of sovereign immunity under Georgia law, not Florida law. Secondly, as the Fifth Circuit itself noted in Crisp County,

> Our holding here does not in any way conflict with the decision in Seaboard Air Line RR Co. v. Sarasota-Fruitville Drainage District, supra., because '[Crisp] County was under a duty imposed by the Federal Power Act to protect the Seaboard's property, and thus the Act created a tort liability.

Id. at 877-8. Crisp County is clearly distinguishable from the facts in this case, because there is no implication that there was any statutorily imposed tort liability on the part of KUA to protect CSXT's property.

The Florida courts as well as the Office of the Attorney General have consistently sought to protect the citizens of the State of Florida from potential unlimited liability which may arise from the negligence of private entities by barring the waiver of the state's sovereign immunity in the absence of specific legislative authority. It is within the exclusive power of the Legislature, through its citizens, and not the state's public officials, to decide whether the state's immunity should be waived. The continuation of this constitutional right of the state will insure that the citizens of the

State of Florida will not be subject to the "untold financial liability" contractually imposed upon them by its public officials.

Railroad Companies state that if these indemnification agreements are enforceable against governmental entities, there would be little or no impact on the public treasury of State of Florida. The Railroad Companies, in their short-sightedness, fail to recognize that the taxpayers of the State of Florida would be forced to pay for the damages caused exclusively by the Railroad Companies. The public policy issue faced by this court is not whether the court should force KUA to "honor its contractual obligation" but whether it is in the best interest of the citizens of the State of Florida to allow government entities to contractually obligate its taxpayers to pay for the unlimited damages caused by the negligent acts of private individuals or entities. It has been the consistent opinion of the Attorney General's Office that the indemnification of private individuals is clearly against public policy and not in the best interest of the State of Florida taxpayers.

Section 163.01 Is Not Applicable in this Case

The Railroad Companies erroneously assert that the Florida Inter-Local Cooperation Act of 1969 (§163.01 Fla. Stat.) is applicable in this case to establish a

waiver of KUA's entitlement to sovereign immunity. Section 163.01, Fla. Stat., has no direct application or bearing on this case. A straightforward reading of those statutory sections makes it clear that the waiver of sovereign immunity only inures to the benefit of (1) those persons participating in the "electric project" and (2) those persons who contract with a separate legal entity formed pursuant to the provisions of §163.01(7), Fla. Stat.

The record clearly reflects that CSXT was not participating in an "electric project." According to the statute, the waiver only inures to the benefit of those persons contracting with that separate legal entity, with relation to ownership, operation, planning, design, etc. of the electric project itself. Subsection (2)(a) and (b) provides a waiver to those activities with relation to either the ownership, operation, or any other activity set forth in sub-paragraph (b)2.d. with relation to any electric project or the supplying or purchasing of services, output, capacity, energy, or any combination thereof. *See:* §163.01 (15)(k) *et seq.* Fla. Stat. Clearly, the purpose of obtaining the PRGC Agreement did not involve any activity associated with ownership, operation of the electric project or involve the supplying of services, output, capacity, or energy relating to such electric project as required by this statute. In fact, KUA directs the court's attention to several record cites that clearly indicate that the Railroad Companies previously conceded that point. When faced with issue

of whether the contract was void since no separate consideration was provided for indemnification agreements as required by §725.06 Fla. Stat., CSXT characterized the PRGC Agreement as merely a "licensing" agreement to use CSXT's land to construct a railroad crossing. [CSXT's Eleventh Circuit brief, page 43] *See also:* [R.1255-8-11] In fact, the district court ruled in its August 20, 1996 order that the PRGC Agreement was not a "construction" contract but merely a "licensing" agreement. [R.1638-6] It is inconceivable that having prevailed below on the argument that this was not a construction project, the Railroad Companies now assert they were contractually participating the design, construction, and/or operation of the KUA Cane Island facility in order to secure a waiver of sovereign immunity under §163.01. Fla. Stat. Clearly their argument on this point is disingenuous. As pointed out in KUA's initial brief, the PRGC Agreement is a CSXT "standardized" form (i.e. CSXT Form 7422), and therefore, the licensing agreement would have been proposed in its current form, irrespective of whether the purpose or reason for the crossing was for an electric project, school, restaurant or any other reason. At best, the PRGC Agreement was incidental to KUA's construction of the Cane Island facility since CSXT merely owned available land for which KUA sought to gain a more convenient access to their facility. The Railroad Companies' assertion that this crossing was "essential" to the operation of the KUA facility is simply incorrect. The record before this court

indicates that prior to the execution of the PRGC Agreement, KUA already had access to their facility via an existing public crossing, for which there was no crossing agreement and, hence, no indemnification clause. [R.1443-Deposition Exhibits 120 and 123] Certainly, the Railroad Companies cannot seriously contend that PRGC Agreement, a licensing agreement to grant an easement for a railroad crossing on CSX's property, falls within the waiver provisions of Section 163.01(15)(k) as an activity relating to the ownership or operation of KUA's electric project. Under the Railroad Companies broad interpretation of this waiver, even the most tangential services would fall under this definition. Presumably, they would contend a vendor delivering candy bars to the plant would also be "participating" in the electric project.

As stated above, Florida courts have consistently held that the Florida Constitution requires "specific, clear, and unambiguous language in a statute" to constitute a waiver of sovereign immunity. See, Manatee County v. Town of Longboat Key, 365 So.2d 143, 147 (Fla. 1978); Metropolitan Dade County v. Reyes, 688 So.2d 311 (Fla. 1996); Tucker v. Resha, 634 So.2d 756 (Fla. 1st DCA 1994). The interpretation of legislative waivers must be strictly construed. See, Metropolitan Dade County v. Reyes, supra.; Menedez v. North Broward Hospital District, 537 So.2d 89, 91 (Fla. 1988); Manatee County, supra.; Levone v. Dade County School Board, 442 So.2d 210, 212 (Fla. 1993). As such, KUA requests this court determine that the

PRGC Agreement does not fall within the activities recognized under Section 163.01 to warrant a waiver of KUA's sovereign immunity since the Railroad Companies' interpretation is overly broad.

Secondly, pursuant to the express language of §163.01, the waiver of sovereign immunity only applies to those persons that contract with a legal entity formed pursuant to §163.01(5) and (7) Fla. Stat. As pointed out in KUA's initial brief, the PRGC Agreement was executed exclusively between KUA and CSXT. The record is completely devoid of any evidence that CSXT entered into any contractual relationship with FMPA, as the "legal entity" defined under Section 163.01 to support the Railroad Companies' search for statutory waiver of KUA's sovereign immunity. Despite the Railroad Companies assertions, the record fails to contain any evidence that CSXT was "participating" in the electric project, thus the waiver provision contained in §163.01 Fla. Stat. is inapplicable to factual circumstances in this matter.

CONCLUSION

KUA and FMPA respectfully request this Honorable Court to find that, as a matter of Florida law, KUA did not have the specific legislative authority to contractually waive its sovereign immunity under the PRGC Agreement to provide an unlimited financial indemnification to the Railroad Companies for their own negligent acts and thus are not liable to defend and hold harmless these parties under said Agreement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to those individuals listed on the attached certificate this ____ day of July, 2002.

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CERTIFICATE OF TYPE FACE COMPLIANCE

The undersigned counsel hereby certifies that the size and style of type used in this brief is: Times New Roman, 14-point.

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