IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Petitioner,

Case No. SC07-1131

v.

CONTRACTPOINT FLORIDA PARKS,
L.L.C., et al.,

Respondents.
_____/

ANSWER BRIEF OF RESPONDENTS, CONTRACTPOINT FLORIDA PARKS, L.L.C.

On Review Of A Certified Question From The District Court Of Appeal, First District

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PRELIMINARY STATEMENT

The Respondent, ContractPoint Florida Parks, L.L.C., is referred to in this brief as "ContractPoint."[1] Petitioner, Florida Department of Environmental Protection, is referred to as "DEP." References to the record on appeal are indicated as "R. __." with the appropriate volume and page number inserted.

STATEMENT OF THE CASE AND FACTS

ContractPoint augments the Statement of the Case and Facts contained in the initial DEP brief with the following.

The April 2001 Agreement between DEP and ContractPoint was a consequence of the legislature's enactment of section 258.015(3), Florida Statutes, entitled "Partnerships in Parks." Ch. 96-389, Laws of Fla. That section affirmatively encouraged the State Park Service to enter contracts with private entities like ContractPoint to enhance facilities available in the park.

In accord with the policy determination made in section 258.015(3), the legislature appropriated $9.5 million in fiscal year 2000-2001 for a cabins initiative. R. 138. The Park Service was permitted under that allocation to utilize the funds as it saw fit to increase the availability of cabins in state parks.

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[1] The Trial Court required joinder of companies affiliated with ContractPoint as parties-plaintiff, thus resulting in the "et al" language in the style. That Order and designation are irrelevant to the issues here.

At the same time that DEP entered the subject contract with ContractPoint, it entered an agreement with a separate contractor to design and construct infrastructure in the parks to service the cabins. R. 154. ContractPoint was to design, construct and operate cabins for a period of thirty to fifty years. R. 2. The jury determined that DEP had breached that contract by wrongfully terminating it and awarded ContractPoint damages based on performance costs incurred in the amount of $628,543.00. DEP simply refused to pay the judgment. R. 2.

ContractPoint filed a petition for writ of mandamus seeking to compel payment. On August 24, 2006, the trial court entered a final order denying that petition. The trial court determined that DEP's refusal to pay the judgment was contrary to a long line of judicial decisions beginning with *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984), which holds that the state waives sovereign immunity when it enters an express written contract. In denying the petition, the trial court stated that section 11.066, Florida Statutes, was an express reassertion of sovereign immunity in the context of breach of contract actions.

On appeal, the First District reversed, concluding that the trial court's order was contrary to this Court's decision in *Pan-Am Tobacco* and that section 11.066 does not express legislative intent to overturn existing statutory waivers of sovereign immunity and years of established precedent subjecting the state to

breach of contract actions. Recognizing the potential for confusion, the District Court certified the following question as one of great public importance:

> Does section 11.066, Florida Statutes, apply when judgments have been entered against the State or one of its agencies in a contract action?

STANDARD OF REVIEW

ContractPoint agrees with DEP's assertion that the interpretation of a statute is a pure question of law and so this Court's review is *de novo.*

SUMMARY OF THE ARGUMENT

Section 11.066 cannot be viewed in a vacuum. The legislature waived sovereign immunity when it authorized the state to contract. Section 11.066 does not evidence legislative intent to reinstate such immunity. A clear expression of intent is required to overcome the presumption that the legislature adopts prior judicial construction, especially when the consequence is a cataclysmic change.

Legislative pronouncements both before and after passage of section 11.066 indicate clear legislative intent to permit the state to enter valid and binding contracts. Such contracts require mutuality. *Pan-Am Tobacco* makes clear that the ability to collect a judgment is a necessary element in establishing mutuality. Conversely, the right to ask for legislative grace via a claims bill does not rise to that level.

Despite the protestations of DEP, it is an undeniable fact that the trial court's conclusion would lead to the absurd result of making all state contracts void and unenforceable.

ARGUMENT

Without changing its effect, the question certified by the First District could be rephrased as follows:

> Did the legislature intend to render every contract entered by the State of Florida illusory, and thus not enforceable, when it passed section 11.066 of the Florida Statutes.

An affirmative answer to the question would require ignoring both previous and subsequent acts of the legislature inconsistent with that result as well as more than twenty years of consistent precedent. Indeed, one would be compelled to determine that the legislature casually and incidentally made a profound change in Florida law fifteen years ago which no one noticed until the DEP apparently stumbled upon it in this matter.

I. Enforceable contracts require mutuality.

The law regarding enforceability of government contracts and the defense of sovereign immunity is well settled in Florida:

> Where the legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into a contract, the legislature has clearly intended that such contracts be valid and binding on both parties.

Pan-Am Tobacco Corp. v. Dep't of Corrections, 471 So. 2d 4, 5 (Fla. 1984).[2] The

[2] This rule of law has been re-affirmed and applied dozens of times since it was announced in 1984. *See Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 462 (Fla. 2005) (reaffirming contractual waiver of sovereign

Court reached this conclusion after noting that it is "basic hornbook law that a contract which is not mutually enforceable is an illusory contract." *Id.* (citing *Howard Cole & Co. v. Williams*, 27 So. 2d 352 (Fla. 1946)). Because the

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immunity for state contracts); *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So. 2d 481 (Fla. 2001); *County of Brevard v. Miorelli Eng'g, Inc.*, 703 So. 2d 1049 (Fla. 1997); *State v. Family Bank of Hallandale*, 623 So. 2d 474 (Fla. 1993); *Chiles v. United Faculty of Fla.*, 615 So. 2d 671 (Fla. 1993); *Broward County v. Finlayson*, 555 So. 2d 1211 (Fla. 1990); *Grading & Bush Hog Servs., Inc. v. Fla. Dep't of Transp.*, 894 So. 2d 1047, 1049 (Fla. 5th DCA 2005); *Amec Civil, LLC v. State Dep't of Transp.*, 878 So. 2d 468 (Fla. 1st DCA 2004); *Waite Dev., Inc. v. City of Milton*, 866 So. 2d 153 (Fla. 1st DCA 2004); *White Constr. Co., Inc. v. State Dep't of Transp.*, 860 So. 2d 1064 (Fla. 1st DCA 2003); *Hypower, Inc. v. State Dep't of Transp.*, 839 So. 2d 856, 857 (Fla. 1st DCA 2003); *Town of Palm Beach v. Ryan Inc. E.*, 786 So. 2d 665, 667 (Fla. 4th DCA 2001); *City of Gainesville v. State Dep't of Transp.*, 778 So. 2d 519, 530 (Fla. 1st DCA 2001); *Winter Haven Citrus Growers Ass'n v. Campbell & Sons Fruit Co.*, 773 So. 2d 96, 97 (Fla. 2d DCA 2000); *Ajax Paving Indus., Inc. v. Charlotte County*, 752 So. 2d 143, 144 (Fla. 2d DCA 2000); *Parker v. State Bd. of Regents ex rel. Fla. State Univ.*, 724 So. 2d 163, 169 (Fla. 1st DCA 1998); *Pullam v. Hercules Inc.*, 711 So. 2d 72 (Fla. 1st DCA 1998); *Charity v. Bd. of Regents*, 698 So. 2d 907, 907 (Fla. 1st DCA 1997); *City of Miami v. Tarafa Constr., Inc.*, 696 So. 2d 1275, 1277 (Fla. 3d DCA 1997); *State Dep't of Health & Rehabilitative Servs. v. Law Offices of Donald W. Belveal*, 663 So. 2d 650, 652 (Fla. 2d DCA 1995); *Plumley v. Dep't of Corrections*, 627 So. 2d 135 (Fla. 1st DCA 1993); *Pub. Health Trust of Dade County v. State Dep't of Mgmt. Servs.*, 629 So. 2d 189, 190 (Fla. 3d DCA 1993); *Hudson Oxygen Therapy Sales, Co. v. Advanced Med. & Hosp. Supplies, Inc.*, 541 So. 2d 1358, 1359 (Fla. 3d DCA 1989); *Champagne-Webber, Inc. v. City of Ft. Lauderdale*, 519 So. 2d 696 (Fla. 4th DCA 1988); *Dep't of Health and Rehabilitative Servs. v. G & J Invs. Corp., Inc.*, 541 So. 2d 1197, 1201 (Fla. 3d DCA 1988); *S. Roadbuilders, Inc. v. Lee County*, 495 So. 2d 189 (Fla. 2d DCA 1986); *Windham v. Fla. Dep't of Transp.*, 476 So. 2d 735, 739 (Fla. 1st DCA 1985); *Young v. Johnston*, 475 So. 2d 1309, 1313 (Fla. 1st DCA 1985); *Nat'l R.R. Passenger Corp. (Amtrak) v. Rountree Transp. & Rigging, Inc.*, 422 F.3d 1275 (11th Cir. 2005); *Maynard v. Bd. of Regents ex rel. Univ. of S. Fla.*, 342 F.3d 1281, 1287 (11th Cir. 2003); *National R.R. Passenger Corp. v. Rountree Transp. & Rigging, Inc.*, 286 F.3d 1233 (11th Cir. 2002); *Maccaferri Gabions, Inc. v. Dynateria Inc.*, 91 F.3d 1431, 1443 (11th Cir. 1996).

legislature intended to authorize the state to enter binding, mutual contracts, the Court held that when the legislature authorizes a state agency to contract, that authorization constitutes a waiver of sovereign immunity with regard to causes of action arising under such contracts. The lower court's order here has the effect of turning the conduct of state business on its head by holding, contrary to *Pan-Am*, that there is no mutuality when the state enters a contract. Thus, the legislature's authorization to enter binding contracts is defeated.

DEP suggests that mutuality is created through the right of an aggrieved party to press a legislative claims bill. Of course, that exact argument was specifically rejected in *Pan-Am*:

> This court has recently held that subjecting oneself to the possibility of suit in a court of law is not sufficient obligation to support a contract. We cannot now, in good conscience, hold that the chance to seek an act of grace from the legislature is sufficient remedy to create mutuality.

Id. at 5 (citation omitted).[3] Thus, the stark reality is that adoption of DEP's

[3] The shortcomings of the legislative claims bill process were driven home in the recent case of *Holton v. Florida*, 2007 WL 951726 (M.D. Fla. Mar. 28, 2007). In that case, a prisoner sued his lawyer for malpractice for failing to timely file a claims bill. The court held that the prisoner could not allege a sufficient basis for damages because claims bills are mere matters of grace of the legislature:

> It is entirely up to Senator Miller and Representative Joyner as to whether a bill should be submitted. If submitted, it would be the prerogative of a special legislative committee, after a hearing before a special

position would render every state contract illusory. There is no other conceivable result. Said another way, under DEP's interpretation the State of Florida has not entered a valid enforceable contract since 1991.

If that is the law, let the chaos begin.

II. Section 11.066 contains no indication of legislative intent to profoundly change existing law.

Section 11.066 does not express any legislative intent to overturn years of case law subjecting the state to breach of contract actions. The legislature is presumed to know the judicial construction of existing law when it enacts a new law *and the legislature is presumed to have adopted prior judicial constructions of a law* unless a contrary intention is expressed in the statute**.** *ContractPoint Fla. Parks, LLC v. State*, 958 So. 2d 1035, 1037 (Fla. 1st DCA 2007) (citing *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912 (Fla. 2001) (legislature is presumed to have adopted prior judicial construction unless a contrary intention is expressed); *City of Ormond Beach v. City of Daytona Beach*, 794 So. 2d 660 (Fla. 5th DCA

> master, to consider the bill. . . . Ultimately, it would be up to each individual legislator to determine whether to support the claims bill. If passed, the governor would need to sign the bill into law. The legislature has discretion to allow or disallow compensation, decide the amount of compensation, and determine the conditions, if any, to be placed on the appropriation.

Id. at 3 (citation omitted). Certainly a process which involves so many purely discretionary steps has no business being considered appropriate consideration for a binding contract.

2001) (passage of Comprehensive Planning Act did not inferentially overrule Supreme Court decision that annexation cannot be contracted away)).[4] Likewise, the courts will not infer an intent by the legislature to effect *so important a measure* as the **repeal** of existing law without an express intention to do so. *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1 (Fla. 2004).

Thus, when the legislature passed section 11.066 in 1991—seven years after the *Pan-Am* decision—the legislature knew that the courts construed existing contracting statutes as a waiver of sovereign immunity for breach of contract and that contracts required mutuality to be valid. Both before and after enacting section 11.066, the legislature has time and time again authorized and indeed encouraged the state to enter contracts. That action must be presumed to have been taken with full knowledge of the *Pan-Am* decision and, specifically, the holding that mutuality requires a remedy greater than the ability to ask for legislative grace through a claims bill. Thus, the obvious legislative intent is to permit the state to enter valid and enforceable contracts. This policy must be the predicate to consideration of the effect of section 11.066. *See Knowles*, 898 So. 2d at 7 ("As the court often has noted, our obligation is to honor the obvious legislative intent and policy behind an enactment, even where that intent requires an interpretation that exceeds the literal language of the statute.") (citation omitted); *Tampa-*

[4] DEP's attempt to distinguish revisions to existing laws from passage of new laws in this context fails under the authority of *Ormond Beach.*

Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc., 444 So. 2d 926, 929 (Fla. 1983) ("When a statute is susceptible of and in need of interpretation or construction, it is axiomatic that courts should endeavor to avoid giving it an interpretation that will lead to an absurd result."). *See also Cox v. Roth*, 348 U.S. 207, 209 (1955) ("The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law made be had to ameliorate its seeming harshness or to qualify its apparent absolutes . . . ." (citation omitted)).

As noted by the First District, the legislature affirmatively encouraged public/private partnerships in the context of development of state parks.

> The legislature recognizes that many of the parks in the state park system need a variety of facilities to enhance their use and potential. Such facilities include, but are not limited to, improved access, camping areas, picnicking shelters, park management offices and facilities, and environmental education facilities. The need for such facilities has exceeded the ability of the State to provide such facilities in a timely manner with moneys available. The legislature finds it to be in the public interest to provide incentives for partnership with private organizations with the intent of producing additional revenue to help enhance the use and potential of the state park system.

§ 258.015(3)(a), Fla. Stat. (1996). Thus, in the exact situation at issue here, the legislature made a specific determination that public/private contracting was in the public interest. Such contracting cannot occur without a remedy being available for breach. *Pan-Am*, 471 So. 2d at 5. Therefore, this is a specific statement of

legislative intent which must control over the more general statement in section 11.066, if there is a contradiction. *See Maggio v. Fla. Dep't of Labor & Employment Sec.*, 899 So. 2d 1074 (Fla. 2005) (when two or more statutes appear in conflict, a specific statute prevails over the more general). And, it is a later expression of legislative intent, which also must control over an earlier inconsistency. *See S.S.M. v. State*, 898 So. 2d 84 (Fla. 5th DCA 2004), *abrogated on other grounds by V.K.E. v. State*, 934 So. 2d 1276 (Fla. 2006) (later expression of legislative intent prevails over earlier).

III. Context indicates section 11.066 was a result of citrus canker issues.

In an act of pure conjecture, DEP suggests that the legislature may have reacted to a *Florida Bar Journal* article indicating that writs of mandamus were the appropriate means to enforce judgments against the state. Presumably, legislators did not read the complete article which reiterated the statement in *Pan-Am Tobacco* that:

> The creditor's opportunity to request a claim bill creates no obligation on the part of the legislature even to consider the bill, and thus creates no enforceable remedy for the judgment creditor that would constitute consideration to support a contract obligation.

David K. Miller & M. Stephen Turner, *Enforcement of Money Judgments Against the State*, The Florida Bar Journal, July/Aug. 1990, at 32. If the legislators actually acted in reliance upon that article and intended to overturn the result of *Pan-Am*,

surely the legislation that followed would have more clearly indicated an intent to reinstate sovereign immunity in contract actions and damn the consequences.

In all likelihood, section 11.066 was the consequence of an ongoing dispute over compensation for destruction of trees infected with citrus canker. In 1988, this Court ruled in *Department of Agriculture & Consumer Services v. Mid-Florida Growers, Inc.*, 521 So. 2d 101 (Fla. 1988), that the citrus canker eradication procedure amounted to a taking. The legislature responded by passing section 602.025, Florida Statutes, in 1989, which included the legislative finding that the *Mid-Florida Growers* case "has placed the State in a difficult financial and regulatory position with respect to future disease and pest eradication programs." § 602.025(1)(k), Fla. Stat. (1989). That statute set up a compensation schedule and fund to pay for the eradication of citrus trees and essentially provided a phasing out period for such compensation.

Review of the Senate committee tapes discussing section 11.066 indicates that the only issue referred to as a rationale for the legislation was the citrus canker program, which was beginning to phase out by the terms of section 602.025 in 1991. There is no reference in any of the committee materials to the statute having an effect on contract actions or the state's ability to enter binding and enforceable contracts. Fla. S. Comm. on Approp. tape recording of proceedings (Mar. 14, 1991) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

In fact, the citrus canker context is consistent with the language of section 11.066(2) which states:

> The state and each state agency, when exercising its inherent police power to protect the public health, safety or welfare is presumed to be acting to prevent a public harm.

Certainly there is nothing about the contract setting, unlike the citrus canker setting, which invokes the state's police power. *See Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ("It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole.").

Finally on this subject, the only time that section 11.066 has ever been cited prior to this case is in the context of citrus canker in *Haire v. Florida Department of Agriculture & Consumer Services*, 870 So. 2d 774 (Fla. 2004). That case considered whether the citrus canker law of 2003, section 581.184, Florida Statutes, was constitutional. A portion of that statute stated that compensation was subject to the availability of appropriated funds. The Court noted that statement was "nothing more than a reiteration of the language in section 11.066(3), Florida Statutes 2003," stating that this proviso "is not a limit on the state's obligation to pay compensation for the destruction of exposed citrus trees." *Id*. at 786. By analogy, the language of section 11.066 cannot be considered to be a limit on the state's obligation to pay judgments which are a consequence of its breaches of contract.

IV. Substantial legislative action is directly contrary to DEP's position.

Legislative intent to allow the state to enter binding contracts is pervasive and directly contradicts DEP's position as to the impact of section 11.066. First, as recently detailed by this Court in *American Home Assurance Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459, 475 (Fla. 2005), several laws grant various state agencies the express authority to contract:

> Several laws do grant various state agencies the express authority to execute contracts. *See, e.g.*, §§ 125.012 (granting counties the power to contract relative to various project facilities such as toll rods, waterway facilities, dredging, utility agreements, etc.), 125.031 (granting counties the power to enter into leases and lease-purchase agreements involving land needed for public purposes), 153.62(11) (granting county district boards the power to contract with respect to water supply and sewage disposal), 163.370 (giving counties and municipalities the power to contract with respect to community redevelopment), 186.006(10) (granting the office of the Governor the power to contract respecting research facilities), 337.11 (authorizing the Department of Transportation to enter into contracts for road construction), 338.2216(b) (authorizing the Florida Turnpike Enterprise to contract to maintain the turnpike and promote its use), Fla. Stat. (2004). The Legislature also has authorized certain activities that implicitly grant state agencies the power to contract for necessary goods and services. *See, e.g.*, §§ 20.315, 945.215, Fla. Stat. (2004).

More specifically, two years after passing section 11.066, the legislature revised section 45.062, Florida Statutes, to establish a line of settlement authority

for civil actions against the state. That section is entirely contradictory to DEP's interpretation of section 11.066 in that it requires an existing appropriation only for settlement of actions in excess of $1 million:

> (1) in any civil action in which a state executive branch agency or officer is a party . . . such agency or officer may not settle such action, consent to any condition or agree to any order in connection therewith, if the settlement, condition, or order requires the expenditure of or the obligation to expend any state funds or other state resources exceeding $1 million, the refund or future loss of state revenues as exceeding $10 million, or the establishment of any new program, unless, (a) the expenditure is provided for by an existing appropriation or program established by law.

Thus, under section 45.062, DEP could have entered into a settlement with ContractPoint in the amount of the judgment and paid that settlement. It is a nonsensical inconsistency to take the position that a judgment in the same amount cannot be paid.

Likewise, DEP ignores the legislature's amendment of section 255.05 in 1999, fully eight years after enactment of section 11.066. In 1998, this Court decided *County of Brevard v. Miorelli Engineering, Inc.*, 703 So. 2d 1049 (Fla. 1998). In that case, the Court revisited and reiterated the holding of *Pan-Am Tobacco* and clarified that the state could be held liable for breaches of both express and implied covenants of written contracts which it entered. The case went on to hold that doctrines of waiver and estoppel could not be used to defeat

the express terms of such contracts. The latter language gave rise to substantial debate in the public contracting arena as to what constituted waiver and estoppel, as opposed to mere contract administration. The legislature addressed that by amending section 255.05 to add subsection 9 which states in pertinent part:

> [S]uits at law and inequity may be brought and maintained by and against the public authority on any contract claim arising from breach of an express provision or an implied covenant of a written agreement or a written directive issued by the public authority pursuant to the written agreement. In any such suit, the public authority and the contractor shall have all of the same rights, obligations, remedies, and defenses as a private person under a like contract, except that no liability may be based on an oral modification of either the written contract or written directive.

This constitutes an express legislative waiver of sovereign immunity in contract several years after enactment of section 11.066.

The legislative history to this section recognizes the *Pan-Am Tobacco* holding that sovereign immunity was waived in contractual disputes. The legislative report states:

> The bill would codify much of the *Miorelli* opinion regarding the conditions when a suit may be brought against a public entity arising from breach of written contract, including breach of implied covenants and written directives. **It provides for the mutuality of the rights, obligations, remedies and defenses of parties to a public service contract.**

Fla. H.R. Comm. on Judiciary, HB 243 (1999) Staff Analysis 3 (rev. Mar. 12,

1999) (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.) (emphasis added).

The Recurring Effects section of the analysis states:

> By preventing the invocation of sovereign immunity in certain contractual disputes, state agencies would then be subject to more contractual disputes with fewer legal advantages. State agencies would have to pay the cost of addressing the merits of the claims against them, just as private parties do, rather than win dismissal of the claims regardless of fault.

Id. The bill passed and was enacted. This explicit waiver of sovereign immunity for contract, years after passage of section 11.066, is the prevailing indication of legislative intent.

V. 11.066 merely reiterates language from Florida's Constitution.

The language of section 11.066 is substantively indistinguishable from article VII, section 1(c) of the Florida Constitution, which states: "No money shall be drawn from the treasury except in pursuance of appropriation made by law." That section was in effect when *Pan-Am* and its progeny were decided; therefore, this Court must be deemed to have considered it in its determination of *Pan-Am*.

Article VII, section 1(c) was considered by the Second District in *Department of Health & Rehabilitative Services v. Lee County*, 409 So. 2d 1069 (Fla. 2d DCA 1981). The court was asked to determine the validity of a judgment requiring HRS to pay fees to a guardian ad litem. HRS relied on article VII,

section 1 to argue that no money was appropriated for such payment by the legislature. The court stated:

> We feel that the constitutional limitation does not require every expenditure for which the state might be obligated to pay to be specifically itemized in appropriations to the various departments of state government. That would be impossible.

Id. at 1070. Likewise, here, while there was no specific appropriation to pay a judgment which ContractPoint might ultimately receive due to DEP's subsequent breach of a contract, there was money appropriated to DEP and specifically its Parks Division. That appropriation is sufficient to meet the constitutional and statutory requirements.[5]

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[5] The language of section 11.066 is also similar to language that existed in the Florida Statutes at the time *Pan-Am* was decided. At the time, as now, section 768.28 provided in part:

> Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000. . . . [T]hat portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.

Because this language is contained in the statute governing actions in tort, it was not applied to the breach of contract action in *Pan-Am* or the many cases that followed it. Likewise, section 11.066 is in the context of protection of the state's police power. For the same reasons that the general use of the word "judgment" in section 768.28 does not refer to judgments in breach of contract actions, the use of the word "judgment" in section 11.066 does not include judgments in breach of contract actions.

In fact, it should be noted that this is not a situation where there was never an appropriation related to the contract at issue. Indeed, in the fiscal year 2000-2001, the legislature appropriated $9.5 million for the cabins initiative. DEP was free to use this money to build the cabins itself, pay for infrastructure, partner with private entities such as ContractPoint or utilize another appropriate method. R.138. Money remained in that fund after the ContractPoint contract was breached by DEP and litigation ensured. Sometime between commencement of the underlying litigation and commencement of the mandamus procedure, DEP apparently expended the remainder of the funds by building its own cabins in parks previously contracted to ContractPoint. R. 169. Thus, the fact that no money remains to pay the judgment from the cabins initiative appropriation is purely a function of DEP's rush to expend those sums.

On this issue, the instant situation is analogous to that addressed by this Court in *Flack v. Graham*, 453 So. 2d 819 (Fla. 1984). Petitioner Flack sought a writ of mandamus to compel payment of her back salary as a county judge following a four-year election protest. The judge's salary had been previously been paid to her opponent, who served in the position while the protest was addressed administratively. The Court looked to article VII, section 1(c) of the Florida Constitution and noted that the funds appropriated for the salary of the Wakulla County judge were paid to the opponent and therefore no funds remained

to pay the salary requested by Petitioner Flack. However, the Court also looked to the requirement that salaries be duly paid and determined the consequence was that Petitioner Flack must be paid out of any available monies in the state treasury. *Id*. at 820. Similarly, here, there is a statutory requirement that the state be able to enter valid and binding contracts in this context. That leads to the same conclusion as in *Flack* - - judgments must be paid out of any available monies in the state treasury.

An agency's previous expenditure of appropriated funds was also addressed by this Court in *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993). That case resulted from a legislative determination to postpone and ultimately eliminate pay raises authorized for unionized state employees. The state argued that the agreement it had reached with its unions "somehow failed to reach the level of a fully enforceable contract." *Id.* at 672. Similar to the instant situation, this Court wrote:

> The logical conclusion of the state's position is that public-employee bargaining agreements cannot ever constitute fully binding contracts, even after they are accepted and funded. We cannot accept this position.

Id. Likewise, here, the only conclusion from DEP's position is that no state contract can ever become fully binding. The Court should not accept that position.

Critical to the current discussion is the *Chiles* Court's further determination that "[t]he act of funding through a valid appropriation is the point in time in which

the contract comes into existence." *Id*. at 673. Here, at the time of the contract with ContractPoint, as well as the time of the breach, there was a valid appropriation sufficient to pay the ultimate judgment. The fact that the state, in the face of litigation for its own breach of contract, chose to spend the money elsewhere does not change that. Indeed, in line with the *Chiles* decision, this Court may well determine that DEP must pay ContractPoint out of its generally appropriated funds without reaching the ultimate question of the application of section 11.066, because of the existence of an appropriation at the time of contract.

CONCLUSION

The state waives sovereign immunity when it enters a legislatively authorized contract. Acceptance of DEP's position inexorably leads to the conclusion that the legislature casually abrogated this principal, and the state's ability to enter valid and enforceable contracts, without expressly stating its intention to do so. That conclusion is contrary to expressions of legislative intent both before and after enactment of section 11.066.

This Court should answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by U.S. Mail upon: Louis F. Hubener, Office of the Attorney General, The Capitol – PL01, Tallahassee, FL 32399-1050, this 13th day of September, 2007.

_____
Mike Piscitelli

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is printed in Times New Roman 14-point font in compliance with Rule. 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Mike Piscitelli