IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

v. **CASE NO.: SC07-1131**

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

Respondents.

_____/

REPLY BRIEF OF PETITIONER, STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

On Review of a Certified Question From The District Court of Appeal, First District

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BILL McCOLLUM
ATTORNEY GENERAL

SCOTT D. MAKAR
SOLICITOR GENERAL
Florida Bar No. 0709697

LOUIS F. HUBENER
Chief Deputy Solicitor General
Florida Bar No. 0140084

OFFICE OF THE ATTORNEY GENERAL
PL-01, The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300

Counsel for Petitioner, State of Florida, Department of Environmental Protection

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REPLY TO CONTRACTPOINT'S STATEMENT OF THE CASE AND FACTS

In its statement of the case and facts, ContractPoint asserts that section 258.015(3), Florida Statutes, affirmatively encouraged contracts such as the one for the cabins initiative, and that in accord with section 258.015(3) the legislature appropriated $9.5 million in fiscal year 2000-2001 for the Department to use "as it saw fit to increase the availability of cabins in state parks." Ans. Br. at 1.

In response to this representation, it is important to note, first, that ContractPoint does not dispute the fact that under the contract it was solely responsible for financing the construction of the cabins in state parks. ContractPoint had a concessions contract, not one for goods and services or for construction of a public building that a state agency might enter pursuant to chapter 255, Florida Statutes, either of which would be backed by an appropriation. R 1:177 et seq. The 2000 appropriation was not intended to fund ContractPoint's concession contract. ContractPoint assumed the risk that it could not fund construction of 143 cabins.

Second, section 258.015(3) does not speak to contracts and, as argued infra, has no bearing on the proper construction of section 11.066, Florida Statutes. The contract generally cites to part I of chapter 258, but only in reference to the

Department's jurisdiction and control over state parks. R 1:177-178.

ARGUMENT

Without ever explaining what section 11.066 could mean if its arguments were accepted, ContractPoint contends that the plain language of that statute must be disregarded because i) all state contracts would be illusory and unenforceable, ii) the legislature did not intend to change existing law, and iii) other laws contradict any plain-meaning construction of section 11.066, Florida Statutes.

Each of these arguments is without merit, and therefore the certified question must be answered in the affirmative: section 11.066 applies to judgments in contract actions. The decision below must be reversed because ContractPoint has not demonstrated a clear legal right to payment of its judgment in the absence of an appropriation.

I. SECTION 11.066, FLORIDA STATUTES, REFLECTS THE LEGISLATURE'S AUTHORITY TO DECIDE WHEN AND HOW TO PAY JUDGMENTS IN CONTRACT ACTIONS.

ContractPoint first contends that in view of this Court's decision in Pan-Am Tobacco Corp. v. Dep't of Corrections, 871 So. 2d 4 (Fla. 1984), the Department's interpretation of section 11.066 means there is "no mutuality when the state enters a

contract" and that every state contract since 1991 has been illusory and unenforceable. Ans. Br. at 7-8.

There are two dispositive responses to this argument. First, the legislature has plenary constitutional authority to reestablish sovereign immunity in contract actions to any degree it may wish. ContractPoint does not dispute that authority.

Second, ContractPoint overstates what the legislature has done in section 11.066 with respect to actions in contract. This Court has previously said that lack of mutuality means "one party could nullify the agreement at any time, and for any reason." Chiles v. United Faculty of Florida, 615 So. 2d 671, 673 (Fla. 1993). Section 11.066 does not permit state agencies to nullify contracts at any time, and for any reason. Agencies may still be sued in contract. Were the legislature reestablishing sovereign immunity to its full extent, no action could be brought against the State. In section 11.066, the legislature has simply reserved the right to appropriate money to pay judgments for damages; a court may not order payment in the absence of an appropriation.

ContractPoint predicts that if the Department's plain-meaning reading of the statute is correct, chaos will reign. But ContractPoint can point to no evidence of chaos in state contracting either before the 1984 decision in Pan Am Tobacco or at any time since enactment of section 11.066 in 1991.

Moreover, it is extremely unlikely that the legislature would tolerate state agencies breaching contracts at will. The fact that the legislature has explicitly stated that it has sole authority to appropriate money for judgments for damages does not mean that it has decided not to pay such judgments. Before suggesting that only chaos can result from a plain reading of section 11.066, ContractPoint should at least have presented its judgment to the legislature and asked for an appropriation.

II. THE PLAIN AND UNAMBIGUOUS LANGUAGE OF SECTION 11.066 PROHIBITS PAYMENT OF JUDGMENTS FOR DAMAGES, INCLUDING JUDGMENTS IN CONTRACT ACTIONS, WITHOUT AN APPROPRIATION THEREFOR.

ContractPoint next contends that unless the legislature expressly stated that it was overruling or modifying this Court's decision in Pan-Am Tobacco, section 11.066 cannot be read and applied according to its plain language.

"When interpreting a statute and attempting to discern legislative intent, courts must first look at the actual language used in the statute." Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000). Only if the language is unclear do rules of construction control. Id. ContractPoint's reliance on City of Ormond Beach v. City of Daytona Beach, 794 So. 2d 660 (Fla. 5th DCA 2001), for a contrary conclusion is certainly misplaced. The language of section 11.066 is clear and unambiguous. There is, therefore, no basis for turning to

principles of statutory construction to derive some other meaning.

Moreover, in City of Ormond Beach, the court stated that "the Legislature is presumed to know, and to have adopted, existing judicial constructions at the time it enacts legislation, unless a contrary intent is expressed in the statute." Id. at 664 (emphasis added). As the cited authority in City of Ormond Beach makes clear, the presumption applies to prior judicial construction of statutory law. Id. at 664 (citing Brannon v. Tampa Tribune, 711 So. 2d 97, 100 (Fla. 1st DCA 1998)). This Court was not construing a statute in its Pan-Am Tobacco decision that section 11.066 later amended. But even so, section 11.066 is plainly contrary to any reading of Pan-Am Tobacco that would compel payment of a contract judgment out of any funds in an agency budget. It could not more clearly state that there must be an appropriation to pay a judgment, and that courts may not order payment of such a judgment out of an agency's budget in the absence of an appropriation.

Reading the statute according to its plain language does not lead to an absurd result. There is nothing absurd about the legislature's manifest intent to maintain control over the public fisc in times when breach of contract actions may seek tens or hundreds of millions of dollars in damages against public bodies. See, e.g., Interactive Return Service, Inc. v.

Va. Polytechnic Institute and State Univ., 52 Va. Cir. 161 (Va. Cir. Ct. 2000)(breach of contract action against state university seeking $245 million in lost profits). Indisputably, it is within the power of the legislature to set limits on damages that may be recovered from the state. See Art. X, § 13, Fla. Const.; §768.28, Fla. Stat. Unlike section 768.28, however, section 11.066 does not set an arbitrary limit on the state's liability.

ContractPoint also claims that section 258.015(3) is a "specific statement of law" which determines that public/private contracting is in the public interest and thus controls over the "more general" section 11.066. To the contrary, section 11.066 is by far the more specific statement; section 258.015(3) says nothing about public/private contracting or payment of judgments. Accordingly, it does not exempt ContractPoint's judgment from legislative consideration pursuant to section 11.066.

III. SECTION 11.066 IS NOT LIMITED TO CITRUS CANKER ISSUES.

ContractPoint next contends that the Department is wrong in suggesting that section 11.066 was a response to a Florida Bar Journal article that argued writs of mandamus were the appropriate means to enforce monetary judgments against the state. See David K. Miller and M. Stephen Turner, Enforcement

of Money Judgments Against the State, The Florida Bar Journal, July/Aug. 1990 at 27. According to ContractPoint, the legislature was thinking only of past citrus canker litigation when it enacted section 11.066.

As shown here and in the Department's initial brief, long-standing authority does not permit the Court to go beyond the plain language of the statute unless the legislative intent is unclear. Assuming for argument that lack of statutory clarity, it is apparent that section 11.066 responds to the article's specific proposals. In addition to mentioning the decision in Conner v. Mid-Florida Growers, Inc., 541 So. 2d 1252 (Fla. 2d DCA 1989), the article discusses contract judgments and the use of a mandamus action to enforce payment of such judgments out of any available agency funds. At pages 29, 31, and 32 contract obligations are specifically mentioned. At page 30, the article advocates execution upon government property as a means to force agencies to pay judgments for damages.

Section 11.066 was passed in the next legislative session, only a few months after publication of the article. Subsections (3) and (4) require an appropriation for monetary judgments and expressly prohibit the use of mandamus actions to enforce judgments for damages. Subsection (4) expressly prohibits issuance of writs of execution against the state or state

agencies.[1] Section 11.066 thus directly addresses arguments made in the article.

While the legislature might also have had the citrus canker experience in mind in 1991, it had previously addressed its concerns with that litigation in 1989. See § 602.025, Fla. Stat. (1989)(setting forth legislative findings and intent). The requirements of section 11.066 are obviously not limited to constitutional taking claims that may be brought following the state's exercise of its police power. One prominent concern of the legislature was that as a result of the citrus canker litigation, "[t]he potential exists for disruption of the legislatively prescribed plan for the expenditure of public funds which would adversely affect the important functions of government." § 602.025(1)(m), Fla. Stat. (1989). That same potential for disruption would exist with contract actions seeking tens or hundreds of millions of dollars in purportedly lost profits. The legislature recognized this and asserted its appropriations power over judgments for damages in section 11.066. Had the legislature wanted to limit section 11.066 to citrus canker concerns, it could easily have said so. It did not.

[1] Section 11.066 was amended in 2001 by the addition of subsection (5) which provides that state property is not subject to a lien of any kind. §1, ch. 2001-266, Laws of Florida.

This Court's decision in Haire v. Florida Dep't of Agriculture and Consumer Services, 870 So. 2d 774 (Fla. 2004), does not foreclose the legislature's right to exercise its exclusive constitutional authority to decide appropriations and make provision by general law for suits against the state. Art. VII, § (1), Fla. Const.; Art. X, § 13, Fla. Const. The decision in Haire was based on the constitutional requirement to pay just and fair compensation for the destruction of all citrus trees, including healthy ones, within a 1900 foot radius of an infected tree. Id. at 785. Therefore, as this Court said, neither section 581.1845 nor section 11.066(3) could relieve the state of its duty to provide full and just compensation. Id. The state has no obligation, however, to pay judgments for damages in contract actions except as the legislature may provide by general law. Art. X, § 13, Fla. Const. Section 11.066 is such a general law.

IV. OTHER STATUTES DO NOT FORECLOSE A PLAIN MEANING INTERPRETATION OF SECTION 11.066, FLORIDA STATUTES.

ContractPoint asserts that other statutes militate against a plain-meaning interpretation of section 11.066(3) and (4), but never explains what those subsections could possibly mean if the Department's interpretation is rejected.

First, at page 14 of its brief, citing American Home Assurance Co. v. Nat. R.R. Passenger Corp., 908 So. 2d 459, 495

(Fla. 2005), ContractPoint calls attention to various statutes that authorize state agencies to execute contracts. However, the authorization to contract does not and cannot mean that the legislature has thrown open the doors to the state treasury and abdicated its exclusive control over the appropriation of public funds. As stated in American Home Assurance with respect to breach of contract claims against the State, "this Court has long held that the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes." 908 So. 2d at 475. Section 11.066 is such a statute and it requires an appropriation for agencies to pay judgments for damages.

ContractPoint also relies on section 45.062, Florida Statutes, which allows agencies to settle civil actions within certain limits. It asserts that section 45.062 is "inconsistent" with the requirement of 11.066 that there be appropriations for damages judgments. Nothing compels the legislature, however, to treat settlements, within specific limits, the same way it treats damages judgments. Moreover, ContractPoint overlooks section 45.062(4) which provides that

> [a]ny settlement that commits the state to spending in excess of current appropriations or to policy changes inconsistent with current state law shall be contingent upon and subject to legislative appropriation or statutory amendment. The state agency or officer may agree to use all efforts to

> procure legislative funding or statutory amendment.

Under section 45.062, settlements are either appropriately limited or they are subject to legislative action. Section 11.066 is consistent with section 45.062 because the latter statute strictly limits agency discretion and retains the legislature's authority to protect the public fisc.

Finally, ContractPoint contends that section 255.05(9), Florida Statutes, enacted eight years after section 11.066, is an express waiver of sovereign immunity that renders section 11.066 nugatory. ContractPoint does not fully quote section 255.05(9). Its brief, at page 16, omits key introductory language (underscored below) which provides

> (9) On any public works project for which the public authority requires a performance and payment bond, suits at law and equity may be brought and maintained by and against the public authority . . . .

§ 255.05(9), Fla. Stat. (emphasis added). As pointed out, ContractPoint had a concessions contract, not a contract under chapter 255 to construct public buildings that was supported by an appropriation. R 1: 177. The Department did not require a performance and payment bond for the concessions contract, nor does ContractPoint argue it procured one.

Thus, even assuming that section 255.09(5) is a waiver of sovereign immunity consistent with Pan-Am Tobacco, it does not

apply to ContractPoint's concessions contract and it does not abandon the legislature's power to approve appropriations for damages judgments.

V. CONTRACTPOINT CANNOT SATISFY ITS JUDGMENT FROM FUNDS THAT WERE NOT APPROPRIATED FOR ITS CONTRACT AND THAT HAVE BEEN LAWFULLY EXPENDED FOR ANOTHER PURPOSE.

In the last section of its brief, ContractPoint argues that section 11.066 merely reiterates the constitutional language of article VII, section 1(c) of the Florida Constitution, and concludes that there need not be a specific appropriation to pay a damages judgment; nearly any appropriation will do, no matter how tenuously related to the contract or the judgment.

Assuming for argument that under section 11.066 an appropriation to fund a contract could be used to pay what a court might find owing under that contract, ContractPoint must concede that there has never been an appropriation to fund its contractual obligation. ContractPoint was to finance construction of the cabins, not the state. It knowingly assumed that risk. The appropriation for fiscal year 2000-2001 was made to fund the Department's related obligations, such as providing needed infrastructure.

The authority on which ContractPoint relies does not support the conclusion that it is entitled to payment from an appropriation that was not made to fund the contract and that

has been lawfully expended by an agency consistent with legislative intent. The decision in Department of Health and Rehab. Servs. v. Lee County, 409 So. 2d 1069 (Fla. 2d DCA 1981), preceded the enactment of section 11.066 by ten years. It is no authority for disregarding the plain language of section 11.066. Moreover, the Lee County decision concerned fees for a guardian ad litem, which the court analogized to costs and attorney's fees that the state had long been required to pay. Section 11.066 pertains to judgments for damages, not costs and fees.

ContractPoint's reliance on Flack v. Graham, 453 So. 2d 819 (Fla. 1984), and Chiles v. United Faculty of Florida, 615 So. 2d 671 (Fla. 1993), is also misplaced. In Flack, this Court found that payment of a judicial salary was constitutionally compelled. "Recognition of the constitutional appropriation . . . satisfies the requirement that money drawn from the treasury be done so only pursuant to appropriation by law." 453 So. 2d at 820. Similarly, in United Faculty of Florida this Court held that the legislature's elimination of pay raises negotiated for state employees violated the constitutional right of state employees to collectively bargain. 615 So. 2d at 672. The Court found that the state was bound by the agreement "[o]nce the executive has negotiated and the legislature has accepted and funded [the] agreement." Id. at 672-673 (emphasis the Court's). Further, "[t]he act of funding through a valid

appropriation is the point in time at which the contract comes into existence." Id.

ContractPoint has no constitutional claim to an appropriation. Moreover, the legislature did not fund its contract. Accordingly, ContractPoint should present its judgment to the legislature and request an appropriation.

CONCLUSION

The certified question must be answered in the affirmative. Section 11.066 applies to actions in contract. Therefore, because ContractPoint has shown neither a clear legal right to payment out of any funds in the Department's budget nor a clear legal duty of the Department to pay the judgment in the absence of an appropriation, the decision of the First District Court of Appeal must be reversed.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

SCOTT D. MAKAR
SOLICITOR GENERAL

LOUIS F. HUBENER
Chief Deputy Solicitor General
Florida Bar No. 0140084

Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 410-2672 facsimile
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing has been furnished by U. S. Mail this _____ day of October, 2007, to:

MIKE PISCITELLI
Vezina, Lawrence & Piscitelli, P.A.
300 Southwest First Avenue - Suite 150
Fort Lauderdale, Florida 33301

BRADLEY S. COPENHAVER
Vezina, Lawrence & Piscitelli, P.A.
413 East Park Avenue
Tallahassee, Florida 32301

CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Dark Courier 12 point, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
Louis F. Hubener