Filing # 14596990 Electronically Filed 06/09/2014 04:40:25 PM

RECEIVED, 6/9/2014 16:43:44, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

DORTHY SCHWEFRINGHAUS, et al.,

Respondents.

CASE NO. SC14-69
LT CASE NOS. 2D12-1097
06-1894CA

BRIEF OF AMICUS CURIAE, FLORIDA ASSOCIATION OF COUNTY ATTORNEYS

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
CASE NO: 2D12-1097

Stephen M. Durden
Authorized Attorney for *Amicus Curiae*
Florida Association of County Attorneys
Florida Bar No.: 471879
117 W. Duval Street, Suite 480
Jacksonville, Florida 32202
Phone: (904) 630-1721
E-Mail: SMdurden@coj.net

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS.....i-ii

TABLE OF AUTHORITIES.....iii-vi

INTRODUCTION AND STATEMENT OF INTEREST.....1

SUMMARY OF ARGUMENT.....1

STANDARD.....3

ARGUMENT.....4

DOT MAY NOT WAIVE SOVEREIGN IMMUNITY NOR MAY IT PROVIDE AS CONSIDERATION FOR A CONTRACT A PROMISE TO WAIVE SOVEREIGN IMMUNITY; THEREFORE, THE TERM OF THE DOT-CSX CONTRACT THAT PURPORTS TO WAIVE SOVEREIGN IMMUNITY AS CONSIDERATION FOR A LICENSE IS UNENFORCEABLE.....4

A. THE CONSTITUTIONAL GRANT OF POWER TO WAIVE SOVEREIGN IMMUNITY AND THE LEGISLATURE'S WAIVER OF SOVEREIGN IMMUNITY, EACH BEING IN DEROGATION OF THE COMMON LAW, MUST BE STRICTLY CONSTRUED...4

B. THE LEGISLATURE DID NOT AUTHORIZE DOT TO AGREE TO INDEMNIFY CSX OR ANYONE ELSE FOR DAMAGES CAUSED BY DOT OR ANYONE ELSE.....8

C. DOT CANNOT BE ESTOPPED TO ASSERT SOVEREIGN IMMUNITY AS A DEFENSE TO THE CLAIMS IN THIS CASE 15

D. THE COURT BELOW ERRONEOUSLY FOUND THAT THE ONLY CONSIDERATION FOR THE LICENSE WAS A WAIVER OF SOVEREIGN IMMUNITY VIA THE INDEMNITY CLAUSE 18

CONCLUSION 20

CERTIFICATE OF SERVICE 21

CERTIFICATE OF COMPLIANCE 22

TABLE OF AUTHORITIES

CASES Page(s)

United States Supreme Court

Brunswick Terminal Co. v. National Bank, 192 U.S. 386, 24 S. Ct. 314, 48 L. Ed. 491 (1903) 6

Federal Circuit Courts of Appeal:

Seaboard Air Line Railroad Co. v. Sarasota-Fruitville Drainage District, 255 F.2d 622 (5th Cir. 1958) 10

Florida Supreme Court:

Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459 (Fla. 2005) 4, 5

Aztec Motel, Inc. v. State ex rel. Faircloth, 251 So. 2d 849 (Fla. 1971) 12

Brumby v. City of Clearwater, 149 So. 203 (Fla. 1933) 15

Cauley v. City of Jacksonville, 403 So. 2d 379 (Fla. 1981) 4

City of Tampa v. Birdsong Motors, Inc., 261 So. 2d 1 (Fla. 1972) 6

Cook v. Navy Point, Inc., 88 So. 2d 532 (Fla. 1956) 16

County of Brevard v. Miorelli Eng'g, Inc., 703 So.2d 1049 (Fla.1997) 17

Frankenmuth Mut. Ins. Co. v. Magaha, 769 So.2d 1012 (Fla.2000).....17

Hillsborough Cnty. v. Kensett, 144 So. 393 (Fla. 1932).....7

Keck v. Eminisor, 104 So.3d 359 (Fla. 2012) 3

Metropolitan Dade County v. Reyes, 688 So. 2d 311 (Fla. 1996) 7

Miami Bridge Co. v. R.R. Comm'n, 20 So. 2d 356 (Fla. 1944).....12

Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984) 2, 8, 11, 17

Robertson v. Circuit Court for Highlands Cnty., 164 So. 525 (Fla. 1935) 6

Spangler v. Florida State Turnpike Authority, 106 So. 2d 421 (Fla. 1958) 7, 13

State ex rel. Davis v. Love, 126 So. 374 (Fla. 1930) 7

State ex rel. Green v. Pearson, 14 So. 2d 565 (1943) 5, 6

Walker v. Gatlin, 12 Fla. 9 (1867) 16

Florida District Courts of Appeal:

Armco Drainage & Metal Products, Inc. v. Pinellas County, 137 So. 2d 234 (Fla. 2d DCA 1962) 16

Broward County v. Conner, 660 So.2d 288 (Fla. 4th DCA 1995) 17

City of Orlando v. West Orange Country Club, Inc., 9 So.3d 1268 (Fla. 5th DCA 2009) 17

Deehl v. Weiss, 505 So.2d 529 (Fla. 3d DCA 1987) 14

Department of Transportation v. CSX Transp., Inc., 128 So. 3d. 209 (Fla. 2d DCA 2013) 9, 10, 11, 18, 19, 20

Hillsborough Cnty. Hosp. & Welfare Bd. v. Taylor, 534 So. 2d 711, 714 (Fla. 2d DCA 1988).....18

Littman v. Commercial Bank & Trust Co., 425 So. 2d 636 (Fla. 3d DCA 1983) ...14

Maloy v. Bd. of Cnty. Comm'rs of Leon Cnty., 946 So. 2d 1260 (Fla. 1st DCA, *rev. den.*, 962 So. 2d 337 (Fla. 2007).....7

State, Dep't of Health & Rehabilitative Servs. v. Law Offices of Donald W. Belveal, 663 So. 2d 650 (Fla. 2d DCA 1995).....16

State ex rel. Schwartz v. City of Hialeah, 156 So. 2d 675 (Fla. 3d DCA 1963) 15, 16

Town of Indian River Shores v. Coll, 378 So. 2d 53 (Fla. 4th DCA 1979) 17

Other Jurisdictions

Brown v. Fifield, 4 Mich. 322, 326 (1856) 6

Converse v. Aetna Nat. Bank, 79 Conn. 163, 64 A. 341, 344 (1906).....6

Elliott's Knob Iron, Steel & Coal Co. v. State Corp. Comm'n, 123 Va. 63, 96 S.E. 353, 356 (1918).....6

Finox Realty Corp. v. Lippman, 163 Misc. 870, 874, 296 N.Y.S. 945, 949 (NY Mun. Ct. 1937).....6

FLORIDA CONSTITUTION

Article X, § 13 .....2, 5, 6, 20

FLORIDA STATUTES

Section 161.101 14

Section 163.01 14

Section 234.211 14

Section 255.559 14

Section 365.171 14

Section 725.06.....14, 15

Section 768.28 .....1, 2, 7, 13, 14

OTHER AUTHORITIES

Op. Att'y Gen. Fla. 90-21 (1990) 10, 13

Op. Att'y Gen. Fla. 80-77 (1980) 13

Op. Att'y Gen. Fla. 78-20 (1978) 13

I. *INTRODUCTION AND STATEMENT OF INTEREST*

The Florida Association of County Attorneys, Inc. ("FACA"), is a Florida nonprofit corporation whose purpose is to provide a forum for research, advice and discussion in the development of local government law. In this case FCA seeks to inform the Court how the important legal issues before the Court impact the political subdivisions of the State of Florida. Lawyers who are members of FACA and who represent Florida's counties see the effect of the Court's decisions on a daily basis. The instant case concerns not only the immediate issues before the Court, *i.e.*, contractual waiver of sovereign immunity and application of section 768.28, *Florida Statutes*, to such contracts, but the broader issues of (1) governmental employees signing, perhaps even unknowingly, *ultra vires* contracts; and (2) governmental agencies and bodies seeking to use contracts to avoid statutory and constitutional restrictions. These issues affect the daily activities of counties. FACA seeks to advocate for and preserve the rule of law, in particular, the doctrine of sovereign immunity and the principle that governments (and the people those governments represent) may not be bound by the unauthorized acts of their employees.

SUMMARY OF ARGUMENT

A. Sovereign immunity, which protects the state and its subdivisions from claims, is inherent in the existence of the state and its political subdivisions.

Florida's Constitution provides in Art. X, § 13, Fla. Con., and this Court has consistently held, that only the Legislature, by general law, may waive sovereign immunity. Section 768.28, *Florida Statutes*, provides an example of the Legislature's express waiver of sovereign immunity for certain tort damages. Additionally, this Court has held that when the Legislature authorizes the State to enter into an agreement to purchase goods or services, the Legislature has simultaneously waived sovereign immunity for breach of that contract. *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984). This Court has not held, however, that the State may provide a waiver of sovereign immunity as *consideration* for the purchase of such goods or services. On the other hand, this Court has consistently held that attempts by governmental entities to waive sovereign immunity outside of authority granted by the Legislature are *ultra vires* acts.

B. This case concerns an unauthorized and *ultra vires* promise. The agreement at issue contains indemnification obligations not authorized by the Legislature. The question in this case is not the *Pan-Am* question of whether a government may use sovereign immunity to avoid a money payment due for services rendered pursuant to an authorized contract. The correct question is whether an agency or subdivision of the State may make an *ultra vires* promise, i.e., a promise to waive sovereign immunity for torts, as the purchase price, or part

of the purchase price, for a license to cross a railroad track. The correct answer is that an *ultra vires* act of an agency or subdivision of the State does not become *intra vires* merely because the agency or subdivision of the State promises, by contract, to engage in the *ultra vires* act.

C. The lower court, avoiding the question whether DOT had the power to make the *ultra vires* promise, held that DOT was estopped from asserting the invalidity of the promise. In reaching that conclusion the lower court erroneously found that the agreement contained no consideration besides the DOT indemnification promise. As to the law of estoppel, the lower court erroneously applied no standard of law. Rather, the lower court suggested that "the immediate impact on Florida" of declaring the agreement void "is impossible to calculate," and for this "practical reason[]" the lower court should "enforce this long-standing agreement." The indemnity provision of the agreement is void and unenforceable as a violation of sovereign immunity. The doctrine of estoppel does not prevent the assertion of sovereign immunity.

STANDARD

In this case, the District Court has certified questions of Florida law to this Court regarding sovereign immunity and the interpretation of a contract. Each is a question of law and, therefore, subject to a *de novo* standard of review. *Keck v. Eminisor,* 104 So.3d 359, 363 (Fla. 2012).

ARGUMENT

DOT MAY NOT WAIVE SOVEREIGN IMMUNITY NOR MAY IT PROVIDE AS CONSIDERATION FOR A CONTRACT A PROMISE TO WAIVE SOVEREIGN IMMUNITY; THEREFORE, THE TERM OF THE DOT-CSX CONTRACT THAT PURPORTS TO WAIVE SOVEREIGN IMMUNITY AS CONSIDERATION FOR A LICENSE IS UNENFORCEABLE.

Only the Legislature has the authority to waive the sovereign immunity inherent in the State, its agencies and subdivisions. Because the Legislature did not authorize DOT to waive sovereign immunity by undertaking the indemnification obligations that CSX Transportation, Inc. ("CSX") now seeks to enforce, those obligations may not be enforced. This Court should hold that DOT may not enter into, or be bound by, an agreement that provides as consideration an unlawful waiver of sovereign immunity for torts.

A. THE CONSTITUTIONAL GRANT OF POWER TO WAIVE SOVEREIGN IMMUNITY AND THE LEGISLATURE'S WAIVER OF SOVEREIGN IMMUNITY, EACH BEING IN DEROGATION OF THE COMMON LAW, MUST BE STRICTLY CONSTRUED.

1. *Sovereign immunity inheres in sovereignty.* The American legal concept of sovereignty has its roots in English law, and under English common law sovereignty necessarily includes within it sovereign immunity. *See generally Cauley v. City of Jacksonville,* 403 So. 2d 379, 381 & n.4 (Fla. 1981). "[T]hree policy considerations…underpin the doctrine of sovereign immunity." *Am. Home*

Assur. Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 471 (Fla. 2005). "First is the preservation of the constitutional principle of separation of powers. Second is the protection of the public treasury. Third is the maintenance of the orderly administration of government." *Id*. (citations omitted). The State of Florida and the people who are the source of the power of the State rely on sovereign immunity as a foundational principle of government and waivers of such should be validated only under the most limited of circumstances.

The Florida Constitution provides the reason why this Court should validate waivers of sovereign immunity under the most limited of circumstances, because only by express constitutional authority may the Legislature waive the sovereign immunity that protects the State. This conclusion follows from considering and contradistinguishing the "familiarly accepted doctrine of constitutional law that the power of the Legislature is inherent," *State ex rel. Green v. Pearson*, 14 So. 2d 565, 567 (1943) ("The legislative branch looks to the Constitution not for sources of power but for limitations upon power."), with the Constitution's specific grant of power to waive sovereign immunity. *See*, 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."). "An elementary rule of construction is that…a construction of the Constitution which renders superfluous or meaningless any of the provisions of the Constitution should not be adopted by this Court."

City of Tampa v. Birdsong Motors, Inc., 261 So. 2d 1, 5 (Fla. 1972). This rule of construction leaves no doubt that if the Legislature's *inherent* powers, *State ex rel. Green, supra, include* the power to waive sovereign immunity, then the Article X, Section 13's specific grant of power to waive sovereign immunity would be superfluous. The conclusion necessarily follows that but for Article X, Section 13, not even the Legislature could waive the State's inherent sovereign immunity.

2. *Waivers of sovereign immunity must be strictly construed.* Because the Article X, Section 13 grant of power to waive sovereign immunity is in derogation of the common law, it must be strictly construed. *Robertson v. Circuit Court for Highlands Cnty*., 164 So. 525, 526 (Fla. 1935) ("said section of the Constitution, being in derogation of the [common law], is to be strictly construed…."). *See also, Brunswick Terminal Co. v. National Bank*, 192 U.S. 386, 24 S. Ct. 314, 48 L. Ed. 491 (1903); *Finox Realty Corp. v. Lippman*, 163 Misc. 870, 874, 296 N.Y.S. 945, 949 (NY Mun. Ct. 1937); *Elliott's Knob Iron, Steel & Coal Co. v. State Corp. Comm'n*, 123 Va. 63, 96 S.E. 353, 356 (1918); *Converse v. Aetna Nat. Bank*, 79 Conn. 163, 64 A. 341, 344 (1906); and *Brown v. Fifield*, 4 Mich. 322, 326 (1856). The inherent nature of sovereign immunity requires the same conclusion, *i.e.*, any exercise of the power to waive sovereign immunity must be narrowly construed.

Because the Constitution expressly limits the Legislature's "authority to enact a statute that waives the state's sovereign immunity," *Maloy v. Bd. of Cnty. Comm'rs of Leon Cnty.*, 946 So. 2d 1260, 1264 (Fla. 1st DCA, *rev. den.*, 962 So. 2d 337 (Fla. 2007), general law is the *exclusive* means by which sovereign immunity may be surrendered. *State ex rel. Davis v. Love,* 126 So. 374, 380 (Fla. 1930). Any unauthorized effort to waive sovereign immunity is unconstitutional and, therefore, a nullity. *See, e.g., Hillsborough Cnty. Hosp. & Welfare Bd. v. Taylor*, 534 So. 2d 711, 714 (Fla. 2d DCA 1988), *quashed in part*, 546 So. 2d 1055 (Fla. 1989).

Even where the Legislature waives sovereign immunity by general law, the resulting law, being in derogation of the common law, will be strictly construed in favor of the sovereign. *See Metropolitan Dade County v. Reyes*, 688 So. 2d 311, 312 (Fla. 1996). Statutes purporting to waive sovereign immunity "must be clear and unequivocal." *Spangler v. Fla. State Tpk. Auth.*, 106 So. 2d 421, 423-24 (Fla. 1958). Given that the Legislature has the authority to waive sovereign immunity only because the Florida Constitution specifically grants that power, the courts must be particularly careful to find a waiver only in the clearest of circumstances.

3. *Lawful waivers of sovereign immunity.* Section 768.28, *Florida Statutes*, which waives sovereign immunity for torts, provides one example of the Legislature utilizing its constitutionally-granted authority. Additionally, this Court

has held that when a statute authorizing government entities to contract with private parties, the agreement contains a concomitant waiver of sovereign immunity for liability on the *statutorily authorized* agreement, *Pan-Am, supra*, but only with respect to the obligation that the governmental entity is authorized to undertake. *Pan Am*, supra. This Court in *Pan Am* held that the State could be bound by its *authorized promises*. The court below conflated *Pan Am* by holding, in effect, that *all promises are authorized* whenever a promise is contained in a contract that has an *authorized purpose*. This Court should hold that the court below should have narrowly (and properly) construed *Pan Am* rather than erroneously and unconstitutionally expanding the power of the State and its agencies and subdivisions to waive sovereign immunity in a manner not authorized by the Legislature.

B. THE LEGISLATURE DID NOT AUTHORIZE DOT TO AGREE TO INDEMNIFY CSX OR ANYONE ELSE FOR DAMAGES CAUSED BY DOT OR ANYONE ELSE.

Reduced to its essence, the indemnification agreement at issue in this proceeding provides that 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 DOT's crossing over CSX's railroad tracks, including but not limited to the decision whether or not to construct crossing rails or signs, the agreement purports to hold DOT liable "from and against all loss, damage or expense arising from or

growing out of the construction, condition, maintenance, alteration or removal of the highway." *Department of Transportation v. CSX Transp., Inc.*, 128 So. 3d. 209, 216-17 (Fla. 2d DCA 2013), *review granted*, SC14-69, 2014 WL 1654458 (Fla. Apr. 3, 2014). The DOT must indemnify CSX, according to the lower court's holding, without monetary limit for any injury caused by any person who happens to be on the property and regardless of who causes the damages or loss, so long as CSX is required to pay damages to any person. *Id.*

In this case DOT is required to indemnify CSX for property damage, death, and injury at the crossing. A truck driver, who was never found, left a trailer loaded with lumber on or near the track, and the train hit the trailer. *Id*. at 211. The lumber fell off the trailer killing one person and injuring another. *Id*. Allegedly, the crossing was "in poor maintenance." *Id*. CSX joined DOT as a third-party defendant. *Id*. CSX then settled with the injured parties. *Id*. CSX thereafter sought indemnity from DOT. Fortunately for CSX, it did not need to prove any fault on the part of DOT in order claim indemnity. It simply needed to prove that it paid damages to the injured party.

DOT's indemnification obligation is enforceable only if the sovereign immunity enjoyed by it 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 DOT to agree to compensate CSX or anyone else for liabilities imposed

as a result of acts by persons other than DOT. In the absence of clear legislative authorization, the unenforceable nature of DOT's indemnity agreement is well illustrated by the 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. The Fifth Circuit held that sovereign immunity precluded enforcement of the indemnification provision, noting 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 opined that the Legislature has not authorized government entities to enter indemnity agreements and, consequently, that such agreements violate the Constitution and are unenforceable. *See, e.g.*, Op. Att'y Gen. Fla. 90-21 (1990).

Rather than engage in a meaningful review of the analysis and precedent examined by these persuasive authorities, the court below perfunctorily dismissed them with its superficial reasoning that DOT had authority to obtain a right-of-way, therefore, DOT had authority to purchase that right-of-way with a waiver of sovereign immunity. The lower court added that even if DOT did not have authority to waive sovereign immunity, DOT was estopped to deny that authority, because the "*sole* consideration" (*Department of Transportation*, *supra,* 128 So.3d

at 212) for "a contract that *creat[ed] continuing obligations*" (*Id*. at 213) (emphasis added) for DOT, was that waiver of sovereign immunity. The court below erred.

1. *General Authority to Contract.* Without citation to authority, the lower court reasoned that DOT had authority to purchase a right-of-way, and that, therefore, DOT could purchase the right-of-way with a waiver of sovereign immunity. *Dep't of Transp., supra*, 128 So.3d at 214. For support, the court below seems to rely on this Court's decision in *Pan-Am,* which held that state entities may be sued for breach of contract with regard to "express, written contracts into which the state agency ha[d] statutory authority to enter." *Pan Am*, 471 So.2d at 6. In this case, the Legislature authorized DOT to build roads. The Legislature did not authorize DOT to waive sovereign immunity. The Legislature did not authorize DOT to promise that it would violate the Florida Constitution or the Federal Constitution. The general grant of authority to build roads does not, standing alone, authorize DOT to waive sovereign immunity. Authorization to build a road does not include the authority to violate statutes or the Florida Constitution or to make any promise it, or its individual officers or employees, would like to make.

Pan-Am holds that *if* a state agency or subdivision is *legislatively-authorized* to make a particular contractual promise, *then* sovereign immunity is waived to the extent of enforcing the *authorized promise*. DOT is no more authorized to offer as

consideration a waiver of its sovereign immunity for torts than it is authorized to offer as consideration a waiver of its police powers. *Miami Bridge Co. v. R.R. Comm'n*, 20 So. 2d 356, 361 (Fla. 1944) ("[G]overnmental powers cannot be contracted away, nor can the exercise of rights granted, nor the use of the property, be withdrawn from the implied liability to governmental regulations.") As explained by this Court, not even "[t]he Legislature [may], by any contract, divest itself of the power to provide for the protection of the lives, health and property of citizens, and the preservation of good order and public morals." *Aztec Motel, Inc. v. State ex rel. Faircloth*, 251 So. 2d 849, 852 (Fla. 1971). Under the lower court's analysis, however, courts would be required to enforce a DOT promise that the State "divest itself" of its police powers if the DOT made the promise in order to purchase a license to cross the railroad. DOT may no more waive sovereign immunity than it may waive the State's police powers. Each such promised waiver is an *ultra vires* promise, whether that promise is part of a larger contract or a promise standing alone. Rather than agree with the court below, this Court should follow its decision in *Aztec Motel, supra*, and hold that a state agency cannot be said to be bound by any provision within a contract simply because it is within a contract. This Court should overturn the decision below and conclude that the *ultra vires* agreement under consideration in this case does not become *intra vires* by its inclusion within an agreement for the authorized purpose of building roads.

2. *Section 768.28(19), Florida Statutes.* CSX may also argue that section 768.28(19), *Florida Statutes*, establishes the enforceability of DOT's indemnification agreement. That subsection provides that sovereign immunity is not waived where a governmental entity contracts with another governmental entity. CSX may contend that, by prohibiting governmental entities from agreeing to indemnify each other for the others' negligence, the Legislature implied that government entities are permitted to indemnify private parties for their negligence. This Court should reject such an argument, as it has long held that sovereign immunity may not be waived by implication; rather, waivers must be clear and unequivocal. *See, e.g., Spangler, supra*, 106 So.2d at 424. Section 768.28(19), does not mention waiver of sovereign immunity as to private persons; this cannot be deemed a clear and unequivocal waiver of sovereign immunity.

Furthermore, the Legislature adopted section 768.28(19) after the Attorney General had opined, several times, that governments could not enter into indemnity contracts with private citizens. *E.g.,* Op. Att'y Gen. Fla. 90-21 (1990); Op. Att'y Gen. Fla. 80-77 (1980); Op. Att'y Gen. Fla. 78-20 (1978). Neither the Legislature nor the governmental agencies that the Legislature sought to regulate with section 768.28(19), Florida Statutes, would have reasonably believed that governmental agencies could enter into indemnity agreements with private persons. Courts of this state must interpret statutes in light of Attorney General Opinions existing at

the time of the enactment of the statute. *See, e.g., Deehl v. Weiss*, 505 So.2d 529, 531 (Fla. 3d DCA 1987) ("Significantly, the Legislature added [the] section [under review] to the statute, which otherwise remained essentially unchanged, after the issuance of the Attorney General's opinion concerning this point."); and *Littman v. Commercial Bank & Trust Co.*, 425 So. 2d 636, 639 (Fla. 3d DCA 1983) ("Additionally, both section[s] were amended…after the unpublished Attorney General Opinion upon which appellants rely, demonstrating that the legislature found no conflict between the provisions."). The amendment clarified that sovereign immunity is applicable to agreements between state entities and that indemnification provisions for another's negligence are not permissible. Section 768.28(19) did not authorize indemnity contracts with private entities, contracts already deemed unlawful for government entities.

3. *Statutory Regulation of Indemnity Contracts.* Rather than conclude that the Legislature by implication waived sovereign immunity by adopting section 768.28(19), this Court should consider the statutes regulating indemnity contracts and recognize instead that the Legislature presumes that governmental indemnity contracts are invalid unless the Legislature grants specific authority. For example, the Legislature has authorized certain government entities to agree to indemnify other persons in various contexts. *See, e.g.*, Sections 163.01(15)(b) 2.i, 161.101(4), 234.211(2)(a), 255.559(1), 365.171(14), 725.06, *Florida Statutes*. These statutes

recognize that an indemnity provision is a separate provision of a contract in and of itself. Section 725.06 grants permission to public agencies to enter into certain indemnity agreements, suggesting that without permission such indemnity contracts would be invalid.

In sum, determining whether to waive sovereign immunity for a particular act or type of act is the exclusive privilege and, indeed, the sole province 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.

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

The court below opined that DOT is estopped under Florida law from asserting its sovereign immunity defense to the breach of contract claims in this case. 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). Contrary to the conclusion of the court below, "the doctrine of estoppel is not applicable in transactions which are forbidden by statute or which are contrary to public policy."

Schwartz v. City of Hialeah, 156 So. 2d 675, 676 (Fla. 3d DCA 1963). 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). Even where one party who has obtained a benefit refuses to perform, the law sustains that refusal because the interests of society and the state demand complete suppression of illegal agreements. *Id.* at 238.

Estoppel applies to the sovereign only under exceptional circumstances. *State, Dep't of Health & Rehabilitative Servs. v. Law Offices of Donald W. Belveal*, 663 So. 2d 650, 652-53 (Fla. 2d DCA 1995). Most importantly, the party seeking estoppel against the government must demonstrate that it had a "*right*" to rely on the government's actor or action. *Id*. (emphasis in original). Persons who contract with a governmental entity must apprise themselves of the entity's powers, or lack of them, before entering into the contract. *Cook v. Navy Point, Inc.*, 88 So. 2d 532 (Fla. 1956).

Nearly 150 years ago, this Court held that all contracts are subject to a higher law, that some contracts are simply unenforceable, strongly suggesting that a party may not "rely" on enforcement of an unenforceable contract. *Walker v. Gatlin*, 12 Fla. 9, 16 (1867). Reliance cannot and does not eliminate responsibility to know the laws of the state, particularly with regard to government contracts. Several cases have refused to enforce government contracts that were improperly

authorized, even where the claimant alleged estoppels. See e.g., *Frankenmuth Mut. Ins. Co. v. Magaha,* 769 So.2d 1012 (Fla.2000) (holding that contract entered by county comptroller could not bind the board of county commissioners); *County of Brevard v. Miorelli Eng'g, Inc.,* 703 So.2d 1049, 1051 (Fla.1997) (refusing to apply estoppel and noting, "an unscrupulous or careless government employee could alter or waive the terms of the written agreement, thereby leaving the sovereign with potentially unlimited liability."); *City of Orlando v. West Orange Country Club, Inc.*, 9 So.3d 1268, 1273 (Fla. 5th DCA 2009)(refusing to apply promissory estoppel to enforce a government contract that violated the statute of frauds); *Broward County v. Conner,* 660 So.2d 288 (Fla. 4th DCA 1995) (holding county attorney "could not bind the county"); *Town of Indian River Shores v. Coll,* 378 So.2d 53 (Fla. 4th DCA 1979) (holding contract entered by mayor was *ultra vires* and unenforceable against city when not properly approved by city council).

In this instance, CSX would need to claim that its predecessor had a *right* to rely on the power of an agency of the government to waive sovereign immunity. This Court should not find that CSX's predecessor possessed such a right. First, not until *Pan Am* (well after the signing of the agreement at issue) did this Court recognize the power of the government to waive sovereign immunity by contract. Certainly, CSX's predecessor could not rely on a case to be decided in the future. Second, a few years before the parties signed the agreement, this Court held, "A

county of this state, being a mere governmental agency through which many of the functions and powers of the state are exercised, partakes of the immunity of the state from liability, and *may not be sued in an action ex delicto for damages to private interests resulting from construction of a public highway.*" *Hillsborough Cnty. v. Kensett*, 144 So. 393, 394 (Fla. 1932) (emphasis added). CSX's predecessor could not have possibly relied on the right to sue the government based on a tort that occurred on a public highway.

The court below erred when it held that DOT was estopped from asserting sovereign immunity. The lower court, without citation to a single case, "*simply conclude[d]*that the case law permits the application of estoppel." *Dep't of Transp., supra*, 128 So.3d. at 214 n. 5 (emphasis added). The law of estoppel demands that this Court reject unsupported conclusions regarding estoppel and reverse the court below.

D. THE COURT BELOW ERRONEOUSLY FOUND THAT THE ONLY CONSIDERATION FOR THE LICENSE WAS A WAIVER OF SOVEREIGN IMMUNITY VIA THE INDEMNITY CLAUSE.

The court below described the indemnity agreement as "limited" and as "the sole consideration for the contract to obtain right of way." *Department of Transp.*, 128 So.3d at 210-11 (Fla. 2d DCA 2013). Such a conclusion is without basis. Pursuant to the agreement at issue, in successive paragraphs, DOT promised to (1) construct the highway "at grade"; (2) "construct and maintain" the highway "in

such a manner as not to impede, interfere with, hinder or delay the passage of trains"; (3) "bear [all] cost of any watchman or gates installed on account of the said highway crossing"; (4) "restore, at its sole cost, said right of way and property so occupied by said highway" should CSX demand that the road be closed in order to use the right of way for "railroad purposes"; (5) "remedy," upon the sole demand and satisfaction of CSX, any drainage problem identified by CSX; (6) permit CSX to construct any additional track across the DOT highway based on the desire of CSX, and to bear all costs of repairing the highway due to construction of the new track; (7) bear the cost of "any watchmen, gates, or drainage facilities…installed on account of any" new track; (8) refrain from using the highway right of way for installation of any utilities (a promise that would impact planning for installation of utilities, DOT knowing that it could not extend a utility down the entire right-of-way of the highway); and (9) install at its own cost any "signs or fencing…at or in the vicinity of the said highway" upon demand of CSX. *Id*. at 215-16. Finally, in the ninth paragraph of the agreement, DOT agreed 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. *Id*. at 216-17. The indemnification agreement placed no limit on DOT's potential liability under these obligations. *Id*. Certainly, the agreement contains far more consideration than the indemnity promise. Indeed, the lower court contradicts its

own statement regarding the indemnity being the "sole" consideration when it observed, "[t]his is also a contract creating continuing obligations…DOT has had an obligation to maintain, repair, and reconstruct its road on this property at all times...". *Id*. at 213. Yet the lower court premised its estoppel conclusion on the erroneous conclusion that the agreement contained only indemnity as consideration. Consequently, this Court should reverse the lower court's application of estoppel.

CONCLUSION

The indemnification obligations that CSX seeks to enforce are void and unenforceable pursuant to Article X, section 13, of the Florida Constitution. Returning to the questions certified below, those questions should be answered as follows:

The indemnification obligations that CSX seeks to enforce are prohibited by Article X, section 13, of the Florida Constitution and Florida case law requiring clear and unequivocal legislative authorization to waive sovereign immunity; therefore, DOT is not bound by promises that were *ultra vires* when made and continue to be *ultra vires*.

Section 768.28, Florida Statutes, is inapplicable to this *ultra vires* contract.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service on this 9th day of June, 2014, to counsel for Respondent, **DANIEL J. FLEMING, ESQUIRE,** Melkus, Fleming & Gutierrez, P.L. 800 West De Leon Street, Tampa, Florida 33606, djf@mfglaw.com; to counsel for Petitioner, **GERALD B. CURRINGTON, ESQUIRE**, Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, Florida 32399, jerry.currington@dot.state.fl.us; and **MARC PEOPLES, ESQUIRE**, Haydon Burns Building, MS 58, 605 Suwannee Street, Tallahassee, Florida 32399, marc.peoples@dot.state.fl.us; and furnished by e-mail on this 9th day of June, 2014, to counsel for Respondent CSX Transportation, Inc., **DAN HIMMELFARB, ESQUIRE**, Mayer Brown LLP, 1999 K Street, N.W., Washington, DC 20006 dhimmelfarb@mayerbrown.com; and to **RICHARD P. CALDARONE, ESQUIRE**, Mayer Brown LLP, 1999 K Street, N.W., Washington, DC 20006 rcaldarone@mayerbrown.com.

/s/ Stephen M. Durden
STEPHEN M. DURDEN, ESQUIRE
Florida Bar No.: 471879
Primary E-Mail: SMdurden@coj.net
Secondary E-Mail: lcenac@coj.net
117 West Duval Street, Suite 480
Jacksonville, Florida 32202
Phone: (904) 630-1721
Fax: (904) 630-1316
Authorized Attorney for Amicus Curiae
Florida Association of County Attorneys

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Stephen M. Durden
ATTORNEY