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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

REPLY BRIEF OF PETITIONER, FLORIDA DEPARTMENT OF TRANSPORTATION

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

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I. Specific statutory authority to agree to indemnify is required.

CSX argues that the indemnity clause is enforceable because specific statutory authority permitting it to agree to indemnify CSX as partial consideration for the crossing agreement is not required. (AB 16.)[1] In support, CSX argues that the Department had statutory authority to build roads and acquire rights-of-way (AB 15-16),[2] and "Pan-Am [Corp. v. Dep't of Corr., 471 So. 2d 4 (Fla. 1985)] held that only the 'contract' – not each individual provision of the contract – must be fairly authorized before the state can be sued for breach." Id.

According to CSX, if the Legislature authorizes a particular kind of contract, any term the Executive branch might agree to in that contract is enforceable, even if that term upends the separation of powers by purporting to waive sovereign immunity. (AB 19) ("[S]tate agencies can be sued for breach of *any* provision of an

[1] "AB" refers to CSX's answer brief and "IB" refers to the Department's initial brief.

[2] The crossing agreement is not a "contract for work done," which is defined as "a contract the substance of which is that skill and labour must be exercised in carrying out the contract, in addition to supplying the materials used in the work." http://www.oxfordreference.com/view/10.1093/oi/authority.20110803124745447 (last visited July 18, 2014). The substance of the crossing agreement is not that CSX agreed to use its skill and labor to build a road for the Department, but is rather that CSX agreed to allow a road to cross over CSX's property. Counsel did not "concede" below that the crossing agreement is a contract for work done. (R. 3222) ("This is not a contract for work done, this is an indemnity provision.").

authorized contract, even if the provision was not itself specifically authorized by statute.") (emphasis in original). Justice Quince has explained why CSX's argument is ill-conceived. Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 482 (Fla. 2005) ("While the indemnity agreement may have been included in a contract which KUA had the power to enter, the indemnity agreement itself involves a waiver of the state's liability in tort, which KUA is not authorized to change.") (concurring in part and dissenting in part). The three concurring justices recognized Justice Quince's concerns, but found they did not apply to municipalities. Id. at 477 (Cantero, J.).

CSX argues that because contracts require consideration, and because indemnity clauses are a type of consideration, the Legislature "authorizes indemnity clauses when it authorizes a contract . . . ." (AB 20.) This argument takes the form of: "All judges wear robes. Muhammad Ali wears a robe. Therefore Muhammad Ali is a judge." Rice, Stephen M., Indispensable Logic: Using the Logical Fallacy as a Litigation Tool, 43 Akron L. Rev. 79, 92 (2010); see also id. at 89-102 (discussing the "Fallacy of the Undistributed Middle" and precedent rejecting arguments exhibiting this fallacy.)

A. Indemnity clauses are different.

Faulty logic aside, indemnity clauses **are** different from other types of consideration (AB 20-21) because they carry the potential to expose the state

treasury to liability arising from a tort in excess of the statutory cap on such liability set by the Legislature. See Seaboard A.L.R. Co. v. Sarasota-Fruitville Drainage Dist., 255 F.3d 622, 623 (5th Cir. 1958) (applying Florida law). Seaboard involved the validity of an indemnity clause in a right-of-way contract between a state drainage district and a railroad. Id. at 622. The Fifth District Court of Appeal found that the district had the power to purchase right-of-way, "but the issue is whether it can agree to pay for such purchase by a means which is contrary to the policy of the state." Id. at 623. The Court continued:

> Certainly the district could pay money or other valuable consideration, so long as the consideration is not one that is itself illegal. Since the district could not be liable by law in tort for its negligence . . . it should not be allowed to accept such liability merely because accepting it is consideration of a valuable right. 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.

Id. at 623-624. The Court held the indemnity clause was void and unenforceable. Id. at 624.

Consistent with Seaboard, the Department does not argue that specific statutory authority is required for **each type** of consideration. (AB 22-24.) Rather, the Department argues that specific authority is required for the types of consideration that would waive sovereign immunity, contradict public policy, or

otherwise infringe on the separation of powers – indemnity clauses, for example. See Donisi v. Trout, 415 So. 2d 730, 730 (Fla. 4th DCA 1981) ("Since the power to waive sovereign immunity is vested exclusively in the Legislature, a city may not waive sovereign immunity by local law."). The Department lacked specific authority to agree to indemnify and therefore the indemnity clause is void.

B. Pan-Am does not affect Opinion 78-20.

In its initial brief, the Department discussed Attorney General Opinion 78-20, which, unlike the opinions discussed in American Home, approached the question on appeal from the standpoint of whether an indemnity clause without specific statutory authority is enforceable. (IB 15-16, 22.) CSX argues that Opinion 78-20 "rests almost entirely on the premise that, as a general matter, 'courts are without jurisdiction over actions against the state for breach of contract'" and that this reasoning "cannot survive" Pan-Am. (AB 25.) CSX ignores that the passage the Department relies on begins by assuming for argument's sake that a breach of contract claim can be raised against the state:

> Indeed, even assuming the existence of a general law abrogating sovereign immunity as to suits on legislatively authorized indemnification contracts, I have found no law authorizing any of the state agencies mentioned in your letter to bind the state by entering into an indemnification contract . . . .

Op. Att'y Gen. Fla. 78-20. Pan-Am does not affect this reasoning because it anticipates the holding of Pan-Am and still concludes that, absent express statutory authority,

> the state agencies acting as your county's subgrantees are without authority to execute indemnification contracts of the type you have mentioned or to anywise bind the state in that regard. If any of these state agencies did enter into such an indemnification contract, any judgment in a suit thereupon would be of no legal force or effect . . . .

Id.

C. The *inclusio unius* canon applies.

CSX claims that the *inclusio unius* canon – the fact that the Legislature has specifically authorized the Executive to indemnify in specific cases means the Legislature did not authorize indemnity in all other cases[3] – does not apply because these statutes only reflect the Legislature's interpretation of the Constitution. (AB 27.) CSX argues that this case will decide whether specific authority to indemnify is required under Florida's Constitution, "and thus it is not a question as to which the Legislature's actions are relevant." Id. at 28.

CSX's argument is baseless. The Legislature's actions are relevant because whether to waive sovereign immunity is the sole prerogative of the Legislature. Art. X, § 13, Fla. Const. Waiver of sovereign immunity "must be clear and unequivocal," "strictly construed," and "will not be found as a product of inference

[3] IB at 17-21.

or implication." Am. Home, 908 So. 2d at 471-472. Because the Constitution reserves to the Legislature the exclusive power over sovereign immunity, the Legislature's actions in this field are not only relevant, they are conclusive.

CSX essentially argues that the Legislature has nothing to say on constitutional questions. In fact, the Legislative branch has "not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution." City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

> This has been clear from the early days of the Republic. In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that "it would be officious" to consider the constitutionality of a measure that did not affect the House, James Madison explained that "it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty." . . . Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.

Id. (citation omitted).

In the event of a direct conflict on constitutional questions between the Legislature and this Court, this Court's interpretation would prevail because this Court is the final arbiter of constitutional meaning. But this case does not invoke this Court's power of judicial review. Nobody claims that the statutes authorizing state agencies to agree to indemnify are unconstitutional. Rather, the only sensible conclusion to draw from the fact that the Legislature has enacted statutes allowing

agencies to indemnify under specific circumstances is that the Legislature thinks that state agencies cannot agree to indemnify without such enabling statutes. If state agencies were free to agree to indemnify without specific statutory authority, the statutes cited in the Department's brief would be useless, a reading this Court takes care to avoid. Dennis v. State, 51 So. 3d 456, 463 (Fla. 2010) ("It is a basic rule of statutory construction that 'the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.'") (citation omitted).

CSX argues that these statutes do not imply that agencies are generally forbidden from agreeing to indemnify, but rather that the Legislature wanted to limit agencies' ability to indemnify in certain situations, "limits that would not exist but for the statutes." (AB 29.) CSX is apparently arguing that before these statutes were passed, the state had plenary authority to agree to indemnify, but now after their enactment, the state only has authority to indemnify consistent with the statutory scheme. (AB 28-30.)

This is nonsense. State agencies are creatures of statute and only have such powers as the Legislature confers. (IB 13.) These statutes do not **limit** agencies' authority to indemnify; they **create** a narrow band of circumstances in which agencies are **allowed** to indemnify. Take for example Section 215.245, entitled "Contracts with Federal Government; indemnification authorized in certain

circumstances." The statute provides that the state and its subdivisions "are authorized to agree . . . to indemnify and hold harmless the United States from damages due to the construction, maintenance, repair, replacement, and rehabilitation of" water resource development projects. A statute informed by the background understanding that the state may agree to indemnify generally would **prohibit** the state from indemnifying the federal government **except** in the context of a water development resource project. But the statute we have "**authorizes**" the state to indemnify in that context – in "certain circumstances," to borrow the statutory language – meaning that the state did not have that authority before.

D. CSX's attempt to distinguish Section 341.302 fails.

The fact that the SunRail track purchase agreement between CSX and the Department was contingent upon the Legislature amending Section 341.302 to allow the Department to agree to indemnify, Fla. S. Comm. on Judiciary, SB 1212 Staff Analysis at 4, shows that CSX understood that, absent such an amendment, the Department could not agree to indemnify CSX. (IB 18-21). CSX argues this statute was Legislative approval of a "unique" indemnity clause. (AB 30-31.)

The Department agrees that Section 341.302 is unique, and agrees that it authorizes the Department to agree to indemnify CSX under the specific circumstances stated in the statute. This is precisely the point: CSX, the Department, and the Legislature all agreed that authority like that vested by

Section 341.302 was a necessary precondition for the Department to agree to indemnify. CSX concedes that there is no analogue to Section 341.302 which permits the Department to indemnify a landowner in the course of entering a right-of-way agreement. (IB 21.) Absent such authority, the indemnity clause here is void and unenforceable.

CSX argues that "unlike the indemnity clause in this case," the SunRail contracts "carried the inherent potential to expose the state to almost boundless liability." (AB 30.) CSX has it backwards. CSX points out that the statute limits the state's liability and allows the state to purchase liability insurance and establish a self-insurance retention fund. (AB 30-31.) There is no enabling statute for the indemnity clause here, and there is no statutory limitation on liability or provision for insurance. Thus, it is the indemnity clause at issue here, not the considered, authorized indemnity provisions in the SunRail contracts, that truly exposes the state treasury to "boundless" liability.

II. CSX's estoppel claim fails.

A. Estoppel is unavailable to enforce a contractual promise.

The application of estoppel in this case has never been developed. CSX did not argue estoppel below and while the majority opinion below is based on estoppel, the opinion never identifies the promise the Department supposedly made and never explains why CSX's reliance on this unnamed promise was reasonable.

Now, for the first time, CSX reveals that the Department's promise is the indemnification clause itself. (AB 35) ("Here, FDOT made an express representation in the crossing agreement that it would indemnify CSXT for losses caused by the construction and maintenance of the road."); (AB 36) ("FDOT affirmatively represented that it would indemnify CSXT as part of the crossing agreement . . . .").

CSX has overlooked that contractual promises do not support an estoppel claim. Advanced Mktg. Sys. Corp. v. ZK Yacht Sales, Inc., 830 So. 2d 924, (Fla. 4th DCA 2002) ("Promissory estoppel is unavailable in this case because a written contract between the parties covered the sale of the yacht and the commissions due to the broker. . . . Promissory estoppel is not a doctrine designed to give a party to a negotiated contract a second bite at the apple in the event it fails to prove breach of contract.") (citations omitted); Comentis, Inc. v. Purdue Research Found., 765 F.Supp.2d 1092, 1098 (N.D. Ind. 2011) ("[P]romissory estoppel is a noncontractual remedy. . . . [A] claim of promissory estoppel will permit recovery only where no contract in fact exists.") (citations omitted); Schade v. Dietrich, 760 P.2d 1050, 1060 (Ariz. 1988) (characterizing promissory estoppel as a "substitute for consideration, thus permitting enforcement of noncontractual promises . . . ."); Opdyke Inv. Co. v. Norris Grain Co., 320 N.W.2d 836, 842 (Mich. 1982). Under

these authorities, because the estoppel claim rests on a contractual promise, estoppel is unavailable to CSX.

B. The state cannot be estopped from repudiating an *ultra vires* promise contrary to public policy.

As for CSX's claim that the record shows the kind of "exceptional circumstances" needed to maintain an estoppel claim against the state (AB 35-36), none of the cases CSX cites involve a contractual promise, and none of the cases CSX cites involve an *ultra vires* promise. CSX concedes that its claim is based on a contractual promise. As shown in the Department's initial brief and above, this contractual promise was *ultra vires*:

> In considering a case such as this it must be borne in mind that the defense of the Drainage District carries with it none of the moral stigma which attaches to the repudiation by persons *sui juris* of the contractual obligations. If the district is by law incapable of binding itself in this manner it is because of an overriding public policy, and moreover it is or should be as apparent to the other party to the contract as to the court which announces the principle. It is, after all, one of the oldest concepts in our system of government that the sovereign cannot be sued without its consent.

Seaboard, 255 F.2d at 622-623.

C. There is no record support for CSX's predictions.

This record does not support estoppel against the Department. Nor does this record support the "severe consequences" CSX speculates about. (AB 37-41.) The record is silent on whether CSX would seek to void the crossing agreement if the

Department prevails (AB 38), but the fact that only five of 233 crossing agreements between CSX and the Department have an indemnity clause in CSX's favor (IB 6-7) hints at the answer. There is no record support for CSX's statement that indemnity clauses in crossing agreements are "widespread" (AB 39); there is no record support for its supposition that there are other contracts where other state agencies have agreed *ultra vires* to indemnify a private party (AB 40); and there is no record support for its supposition that a decision in the Department's favor would lead to "mass invalidation" of public/private contracts (AB 41). Below, Judge Wallace noted that his court "lack[ed] sufficient information to predict the impact of a reversal of the final judgment in this case." Dep't of Transp. v. CSX Transp., Inc., 128 So. 3d 209, 221 (Fla. 2d DCA 2013). This Court should adopt Judge Wallace's approach.

III. Alternatively, Section 768.28(5), Florida Statutes (2002) limits CSX's recovery to $100,000.

A. An unauthorized indemnity clause purports to waive sovereign immunity in tort and is therefore void or subject to the statutory cap.

If the indemnity clause is not void, the Department argues alternatively that CSX's recovery is limited to $100,000 under Section 768.28(5), Florida Statutes (2002). In response, CSX argues that its recovery is not subject to the statutory cap because its suit is based on a contract, not a tort. (AB 42-50.) The Department anticipated this argument in its initial brief. (IB 29-34.) The concurrence in

American Home, 908 So. 2d at 477; the partial dissent in American Home, 908 So. 2d at 482; Judge Wallace below, CSX, 128 So. 3d at 220; the First DCA, Donisi, 415 So. 2d at 731; and the Attorney General of Florida (IB 32-33) have all recognized that an unauthorized indemnity provision serves to circumvent or waive the statutory cap on tort liability and is therefore either void or subject to the statutory cap. CSX's own brief shows why this conclusion is inevitable by arguing that the underlying accident was caused by the Department's negligence (AB 1-5) and its concession that had Ms. Schwefringhaus sued the Department directly, Section 768.28(5) would apply (AB 49).

At the time of the accident in 2002, the Department's liability for its negligence was capped at $100,000. See III.D. *infra*. The order on appeal sets the Department's liability – based on the same operative facts – at more than $500,000, simply because the Department was nominally sued for breach of contract. CSX "cannot do indirectly what it cannot do directly." N. Port Rd. & Drainage Dist. v. W. Villages Improvement Dist., 82 So. 3d 69, 72 n.4 (Fla. 2012).

B. Under Pan-Am, the state waives sovereign immunity in contract, not tort, when it enters an authorized indemnity agreement.

CSX argues that the Legislature has implicitly endorsed this artifice in Section 341.302(17), which authorizes the Department to agree to indemnify a freight rail operator in connection with the acquisition and operation of a rail

corridor, and provides that the Department's assumption of the obligation to indemnify does not waive the state's sovereign immunity in tort. (AB 45-46.)

CSX is mistaken. The statute supports the Department's argument. If the Department agrees to indemnify under the authority granted by Section 341.302(17)(a)1.a., that is deemed a waiver of sovereign immunity for any contract claims under Pan-Am. The statute does not waive sovereign immunity in tort because the statute has already waived sovereign immunity in contract. This is why an indemnity claim brought on an indemnity clause authorized by Section 341.302(17)(a)1.a. is not subject to the Section 768.28(5) cap. By contrast, where, as here, an indemnity clause is not authorized, the provision is a waiver of the state's sovereign immunity in tort and is therefore either void or, alternatively, limited by Section 768.28(5) (2002). See § 768.28(19), Fla. Stat. (provision allowing regional water supply authority to agree to indemnify its member governments "may not be considered to increase or otherwise waive the limits of liability to third-party claimants under this section.").

C. This Court has held Section 768.28(5) must be strictly construed.

CSX argues that Section 768.28(5) (2002) should not be strictly construed. (AB 48.) Accepting this argument would require reversal of this Court's precedent. Am. Home, 908 So. 2d at 472 (citing Manatee County v. Town of Longboat Key, 365 So. 2d 143, 147 (Fla. 1978)).

D. The Department's argument is preserved.

The Department's initial brief notes that the second certified questions ask whether the Department's liability is limited by the 2002 version of Section 768.28. (IB 27.) The initial brief also notes that the accident was in 2002 and that the 2002 version of the statute limits a single claimant to $100,000. Id.; Star Ins. Co. v. Dominguez, 141 So. 3d 690 (Fla. 2d DCA 2014) ("We cite to the 2009 version of section 768.28(5) because it was in effect when the cause of action accrued."). The Department argued alternatively below that CSX was limited to $100,000. (Appellant's In. Br., Case No. 2D12-1097 at 29, 33.) The argument is preserved. CSX's brief makes no substantive argument in opposition; this failure constitutes a waiver. Wyatt v. State, 71 So. 3d 86, 107 n.17 (Fla. 2011) (cited in AB 50 n.24).

CONCLUSION

For these reasons and for those stated in the Department's initial brief, this Court should answer the first certified question as framed by the dissent below in the negative, reverse the final judgment and remand with instructions to dismiss the third party complaint against the Department with prejudice.

Alternatively, this Court should answer the second certified question in the affirmative, reverse the final judgment and remand for entry of final judgment in the amount of $100,000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by email on this 5th day of September, 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; and furnished by U.S. Mail on this 28th day of May, 2014, to counsel for Respondent CSX Transportation, Inc., **DAN HIMMELFARB, ESQUIRE**, Mayer Brown LLP, 1999 K Street, N.W., Washington, DC 20006 and to **RICHARD P. CALDARONE, ESQUIRE**, Mayer Brown LLP, 1999 K Street, N.W., Washington, DC 20006.

/s/ Marc Peoples

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/ Marc Peoples