IN THE SUPREME COURT OF FLORIDA

VILLASOL COMMUNITY
DEVELOPMENT DISTRICT,
Appellant,

CASE NO.: SC17-1293
L.T. CASE NO.: 5D16-1774;
492015CA000254OCXXXX

vs.

TC 12, LLC,

Appellee.

_____/

INITIAL BRIEF ON MERITS OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Appellant, Villasol Community Development District, a special purpose unit of local government, seeks discretionary review of a determination by the Fifth District Court of Appeal that, despite its status as a local government, its liability for damages due to a wrongful injunction is not limited to the amount of the bond it posted. *Villasol Community Development District v. TC 12, LLC*, 226 So. 3d. 854 (Fla. 5th DCA 2017) (the "Opinion"). References to the Appendix filed with the Fifth District shall be cited herein as "A." with the appropriate page number(s).

The appeal below arose from a non-final ***Order Granting TC 12, LLC's Motion for Award of Damages, Including Attorney's Fees and Costs*** ("Order") entered on February 1, 2016, in an action pending in the Ninth Circuit Court, in Osceola County, Florida, the honorable Scott Polodna, presiding. (A., Pages 0122-0126) The Order was entered against Appellant, Villasol Community Development District ("CDD"), in favor of Appellee, TC 12, LLC ("TC"), determining that Appellant's liability for wrongful injunction damages sought by TC was not limited by the amount of an injunction bond discretionarily established and required by the Trial Court and duly posted by Appellant.

CDD is a community development district existing under Chapter 190, Florida Statutes, and levied special assessments to pay bond debt associated with the

development. When the developer did not pay the assessments, CDD foreclosed and acquired title to certain parcels. One of those parcels was subject to delinquent ad valorem taxes. TC acquired tax certificates for those taxes and applied for a tax deed. Upon learning of TC's tax deed application, CDD filed the action below, seeking a writ of prohibition or injunction to stop the pending tax sale and seeking a declaratory judgment as to the rights of the parties holding coequal tax liens. (A., Pages 0006-0033)

CDD then filed a motion for a temporary injunction. (A., Pages 0034-0038) The Trial Court entered an order granting the temporary injunction and requiring CDD to post a $10,000.00 bond, notwithstanding CDD's status as a "political subdivision of the State." (A., Pages 0039-0040) Thereafter, CDD posted the required bond (A., Pages 0041-0044) and 78 days later, TC filed a motion to dissolve the temporary injunction (A., Pages 0058-0088), which the Trial Court granted. (A., Pages 0089-0091) TC then filed a motion ("Motion") seeking damages against the injunction bond "pursuant to Fla. Stat. § 60.07." (A., Pages 0092-0105)

In the Motion, TC expressly asserted that its damages were not capped by the amount of the injunction bond, citing *SeaEscape, Ltd., Inc. v. Maximum Marketing Exposure, Inc.,* 568 So. 2d 952, 956 (Fla. 3rd DCA1990) and *Lotenfoe v. Pahk,* 747 So. 2d 422, 425 (Fla. 2nd DCA 1999). The Trial Court entered the Order agreeing

with TC's assertion. CDD argued before the Trial Court and the Fifth District that applicable Florida law provides that, when a Trial Court grants a temporary injunction and, in its discretion, requires a governmental entity to post an injunction bond, if the injunction is later deemed wrongful by virtue of being dissolved, the liability of the governmental entity is limited by the amount of the bond. In the Opinion, the Fifth District determined that the CDD's act of seeking equity jurisdiction operated as a waiver of sovereign immunity, which waiver was not limited to the amount of the bond.[1] From that order, this appeal ensued.

SUMMARY OF ARGUMENT

ARGUMENT I: THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH *PROVIDENT MANAGEMENT CORPORATION V. CITY OF TREASURE ISLAND*, 796 SO. 2D 481 (FLA. 2001).

This Court held in *Provident Management Corporation v. City of Treasure Island,* 796 So. 2d 481, 487 (Fla. 1998) *(*also referred to herein as *"Provident II")* that when a governmental entity seeks a temporary injunction and a bond is posted, the governmental entity is liable only up to the amount of the bond. By eliminating

[1] Subsequent to the Fifth District Opinion, the parties settled their damage claims by surrender of the bond amount to TC, and TC has indicated it does not intend to file a brief in this matter. Nevertheless, as set forth in Appellant's Brief on Jurisdiction, this appeal presents a matter of great public importance to parties beyond the litigants herein.

this limit, the District Court's opinion expressly and directly conflicts with *Provident II*.

ARGUMENT II: WHEN A GOVERNMENTAL ENTITY OBTAINS A TEMPORARY INJUNCTION AND POSTS A BOND, ITS LIABILITY FOR WRONGFUL INJUNCTION IS LIMITED TO THE BOND AMOUNT.

When a governmental entity seeks a temporary injunction, it may obtain it without posting a bond under FLA.R.CIV.P. 1.610(b), it may elect to post a bond, or the court may require a bond. The governmental entity's act of resorting to the court's equitable powers operates as a waiver of sovereign immunity for damages arising from a wrongful injunction. If it proceeds without a bond, the liability for damages is unlimited. If it proceeds with a bond, the governmental entity's liability is limited to the amount of the bond, which is likened to a contract waiving immunity to the extent of the contract. Courts should not set aside the contractual limitation of the sovereign immunity waiver absent an express agreement by the sovereign to submit to greater liability.

ARGUMENT

ARGUMENT I: THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH *PROVIDENT MANAGEMENT CORPORATION V. CITY OF TREASURE ISLAND*, 796 So. 2d 481 (FLA. 2001).

The holding of the Fifth District is expressed as follows:

> "A governmental body waives sovereign immunity when it takes affirmative action to obtain an injunction. *State v. Bradenton Grp., Inc.*, 26 So. 3d 636, 637 (Fla. 5th DCA 2010). The waiver is not limited to the amount of the posted bond. It is the invocation of equity jurisdiction that gives rise to the waiver, not the posting of a bond."

The Opinion is premised upon the authority of *Bradenton Group*. In *Bradenton Group*, the Fifth District quoted from *Provident II*. Both cases provided that a governmental entity waived sovereign immunity when it obtained a temporary injunction and that such waiver was unlimited *when no bond was posted*. Because a bond was required and posted before the Trial Court below, the result in *Bradenton Group* should have been distinguished. However, the language in *Bradenton Group* presented the standard that should apply where a bond is posted:

> "The conclusion we reach provides the optimal balance between the interests of government entities and the interests of the wrongfully enjoined litigants. A governmental entity seeking injunctive relief has the option not to seek a temporary injunction but to wait and obtain a permanent injunction after a full presentation of evidence and a determination of entitlement to the relief. The government entity has the further choice to attempt to obtain the temporary injunction with a bond ***so as to cap damages in the event the injunction is wrongfully***

entered...." *Bradenton Group*, at 636, citing *Provident II* at 487 (emphasis supplied).

The Fifth District's opinion failed to follow the rationale of its own holding in *Bradenton Group* and, by doing so, departed from this Court's holding in *Provident II*. The rationale of *Provident II* described the sovereign immunity waiver as follows:

> "If a bond had been posted, the governmental entity would be liable up to the amount of the bond. This is because the bond obligation is likened to a contractual obligation for which sovereign immunity has been waived." *Provident II* at 486.

The Fifth District's Opinion cannot be reconciled with the holding of this Court in *Provident II*.

ARGUMENT II: WHEN A GOVERNMENTAL ENTITY OBTAINS A TEMPORARY INJUNCTION AND POSTS A BOND, ITS LIABILITY FOR WRONGFUL INJUNCTION IS LIMITED TO THE BOND AMOUNT.

The recovery of damages from a governmental entity, such as the CDD, is always subject to governmental immunity (sometimes called sovereign immunity) considerations. The immunity of the sovereign is absolute and unqualified; no

recovery may be had against a sovereign where there is no waiver.[2]

> *"As a general matter, 'sovereign immunity' is defined simply as the privilege of a sovereign not to be sued without its consent. Under the law of sovereign immunity, a suit may not be maintained against the State of Florida without its permission. This is so for the reason that the immunity of the sovereign is a part of the public policy of the state; it is enforced as a protection of the public against profligate encroachments on the public treasury. The immunity of the State from suit is absolute and unqualified, and the constitutional provision securing it is not to be construed so as to place the State within the reach of a court's process.*
>
> *Generally, sovereign immunity is the rule rather than the exception. Despite the doctrine's expansive safeguards, the Florida Constitution which states that provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating provides that the Legislature can abrogate the State's sovereign immunity. Any change in the rule of sovereign immunity must be effected either by constitutional amendment or by enactment of appropriate legislation or both. Further, any waiver of sovereign immunity must be clear and unequivocal; waiver will not be found as a product of inference or implication. Courts must strictly construe any alleged legislative waiver of sovereign immunity. It is within the legislature's discretion to place limits and conditions upon the scope of the sovereign immunity waiver."* (Emphasis added.) 48A Fla. Jur 2d *State of Florida* § 336 (2016).

With respect to injunctions, the doctrine is acknowledged in FLA.R.CIV.P. 1.610(b):

> ***"(b) Bond.** No temporary injunction shall be entered unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if*

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[2] Special districts such as CDD are entitled to sovereign immunity protection. *See Eldred v. North Broward Hospital District*, 498 So. 2d 911 (Fla. 1986); *See also* FLA. STAT. §§190.043, 190.044.

> *the adverse party is wrongfully enjoined. When any injunction is issued on the pleading of a municipality or the state or any officer, agency, or political subdivision thereof, the court may require or dispense with a bond, with or without surety, and conditioned in the same manner, having due regard for the public interest. No bond shall be required for issuance of a temporary injunction issued solely to prevent physical injury or abuse of a natural person.* (Emphasis added.)

The rationale behind FLA.R.CIV.P. 1.610(b) was explained by this Court in *Provident Management Corporation v. City of Treasure Island*, 718 So.2d 738 (Fla. 1998) (referred to herein as "*Provident I*"):

> *"The reason for allowing a city to forego the posting of a surety bond is to save the municipality the expense, inconvenience, and delay in obtaining such a bond. Where no bond whatsoever is set, however, as in the present case, a city's exposure is uncertain. Accordingly, to give effect to rule 1.610(b) and to place cities on the same footing as private parties in this regard, a court may require a city to post a bond but without surety."* (Emphasis added.) *Id.* at 740.

Thus, when a governmental entity seeks injunctive relief, the trial court may dispense with the requirement of a bond, and the entity may choose to proceed on that basis. However, the result of that choice is that the entity's "exposure is uncertain" (or, in other words, unlimited). The entity's choice to proceed without posting a bond acts as an unlimited waiver of its sovereign immunity for purposes of the enjoined party seeking wrongful injunction damages. On the other hand, the trial court, in its discretion, may require, or the governmental entity may request, an injunction bond. In that event, the entity may choose not to proceed or may choose

to post the bond; posting the bond acts as a waiver of the entity's sovereign immunity for purposes of the enjoined party seeking wrongful injunction damages up to the amount of the bond. In either event, the governmental entity retains control over its exposure, choosing either to proceed with uncertain (or unlimited) exposure or to proceed with the limited exposure afforded by the posting of an injunction bond.[3] *See, Provident II,* at 487. ("A governmental entity seeking injunctive relief has the option not to seek a temporary injunction but to wait and obtain a permanent injunction after a full presentation of evidence and a determination of entitlement to the relief. The government entity has the further choice to attempt to obtain the temporary injunction with a bond so as to cap damages in the event the injunction is wrongfully entered.") (Emphasis added). The difference is that the former acts as an unlimited waiver of sovereign immunity while the latter acts as a limited waiver of sovereign immunity, and either way, if the trial court dispenses with the requirement of a bond, the choice is made by the governmental entity (or sovereign). But that is not what happened in the instant case. The Trial Court did not dispense with the requirement of a bond and CDD was not, therefore, ever in a position to choose to give an unlimited waiver of its sovereign immunity and proceed with the injunction on that basis. Rather, the Trial Court required and CDD posted a $10,000

[3] In this case, the trial court required a bond, so CDD did not need to request one.

injunction bond. By doing so, CDD waived its sovereign immunity for damages for wrongful injunction up to $10,000. CDD gave no other waiver.

The connection between a sovereign immunity waiver afforded by the posting of an injunction bond and the waiver afforded by a written contract is explained in *Provident II:*

> *"If a bond had been posted, the governmental entity would be liable up to the amount of the bond. This is because the bond obligation is likened to a contractual obligation for which sovereign immunity has been waived.* See Pan–Am Tobacco Corp. v. Department of Corrections, *471 So.2d 4, 5 (Fla.1984) (where the State has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the State from action arising from the State's breach of that contract)." Provident II* at 486.

In *Pan-Am Tobacco*, this Court set forth the only two instances where waiver of sovereign immunity is found and held that:

> *"In section 768.28, Florida Statutes (1981), the legislature has explicitly waived sovereign immunity in tort. There is no analogous waiver in contract. Nonetheless, the legislature has, by general law, explicitly empowered various state agencies to enter contracts. . . . We therefore hold that where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract." Pan-Am Tobacco* at 5.

Pan-Am Tobacco is the seminal case in Florida establishing non-tort waiver of sovereign immunity. *Provident II* explains that when a trial court requires a sovereign to post an injunction bond and the sovereign voluntarily accepts the trial

court's discretionary requirement and proceeds to post the bond (rather than opting to forego the temporary injunction), the posting of the bond waives sovereign immunity to the extent of the amount thereof, just as the sovereign's execution of a contract waives sovereign immunity to the extent necessary to permit the other party to seek damages in the event the sovereign fails to perform. This concept is the key to understanding the District Court's error.

In the instant case, Appellant opted to accept the Trial Court's requirement of a $10,000 injunction bond and to proceed with the entry of the subject temporary injunction with the duly posted bond acting as a waiver of Appellant's sovereign immunity up to the amount thereof. Appellant gave no other waiver of sovereign immunity in this matter. Nonetheless, the Trial Court has erred by wrongfully imputing to Appellant a waiver that Appellant has not given, thereby depriving Appellant of its rights as a sovereign.

The law controlling this case is encompassed in two Supreme Court cases (*Provident I* and *II*) and a more recent Fifth District case, *State v Bradenton Group, Inc.*, 26 So. 3d 636 (Fla. 5th DCA 2010).

In *Provident I*, the city of Treasure Island obtained an injunction and the trial court dispensed with the requirement of a bond based upon the governmental exception in FLA.R.CIV.P. 1.610. Because it had not posted a bond, the city argued

that, under the doctrine of sovereign immunity, it had not waived its sovereign immunity and was, accordingly, not liable. The Supreme Court disagreed, holding that where the city chose to proceed with the temporary injunction without posting a bond, that choice waived the city's sovereign immunity and its liability was, therefore, unlimited. In its ruling, the Court said:

> *"The reason for allowing a city to forego the posting of a surety bond is to save the municipality the expense, inconvenience, and delay in obtaining such a bond. Where no bond whatsoever is set, however, as in the present case, a city's exposure is uncertain. Accordingly, to give effect to rule 1.610(b) and to place cities on the same footing as private parties in this regard, a court may require a city to post a bond but without surety. This will fix the city's exposure at a particular amount and also protect the enjoined party in much the same manner as if a private party were seeking the injunction." Provident I,* at 740 (Emphasis supplied.)

This Court in *Provident I* seemed to be influenced by representations of the city's counsel as to its ability to pay damages in the event the injunction was improper and the city's consequent request for the bond to be waived. In such a situation, the Court deemed it unjust to leave the party damaged by the injunction without a remedy and found that the city's resort to a court of equity to obtain an injunction constituted a waiver of its immunity *Provident I*, at 740 (Wells, J., concurring).

As noted above, the instant Trial Court followed the procedure espoused by *Provident I* and required CDD to post a $10,000 bond and CDD chose to do so. The

result was to eliminate CDD's uncertainty associated with not having a bond and to "fix [the CDD's] exposure at a particular amount," specifically, the amount of the bond.

Upon remand pursuant to *Provident I,* as a clear result of the Court's finding therein that the doctrine of sovereign immunity applied to Treasure Island's liability for wrongful injunction, an issue arose as to whether Provident's damages were also limited by FLA.STAT. §768.28 as to tort liability. On a second trip to the Supreme Court, *Provident II* reaffirmed the prior holding that when a governmental entity is required to post an injunction bond and does so, the governmental entity's liability for wrongful injunction damages is limited by the doctrine of sovereign immunity to the amount of the bond. *See, Provident II,* at 486. ("If a bond had been posted, the governmental entity would be liable up to the amount of the bond. This is because the bond obligation is likened to a contractual obligation for which sovereign immunity has been waived.') In accordance with *Provident II*, CDD's obligation (or liability) "is likened to a contractual obligation for which sovereign immunity has been waived." The result is that by posting a $10,000 injunction bond (the amount of which was established solely by the Trial Court in its discretion) CDD waived its sovereign immunity up to $10,000.

The Fifth District Court of Appeal addressed this issue in *Bradenton Group,*

wherein the lower court denied Bradenton Group's motion to dissolve a temporary injunction and ordered the State to post an injunction bond. On the issue of whether the State was entitled to claim immunity from damages arising from its wrongful injunction, the Fifth District followed *Provident II*, holding:

> *"The conclusion we reach provides the optimal balance between the interests of government entities and the interests of the wrongfully enjoined litigants. A governmental entity seeking injunctive relief has the option not to seek a temporary injunction but to wait and obtain a permanent injunction after a full presentation of evidence and a determination of entitlement to the relief. The government entity has the further choice to attempt to obtain the temporary injunction with a bond so as to cap damages in the event the injunction is wrongfully entered...."* (Emphasis added.) *Bradenton Group,* at 637.

Like the State in *Bradenton Group*, CDD had the option not to proceed with the temporary injunction upon learning the amount of the bond required and the "further choice" to post the bond and proceed with the amount of the bond "cap[ping its] damages in the event the injunction [was later found to have been] wrongfully entered."

In arriving at its decision in *Provident II*, this Court found that, where a sovereign posts a bond when it obtains an injunction, it makes a contractual waiver of sovereign immunity under the concept described in *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984). Thus, while a sovereign makes an *equitable* waiver of immunity when it elects to obtain an injunction without bond,

it makes a *contractual* waiver when it proceeds with a bond. This Court held that a contractual waiver of sovereign immunity is limited to the express terms of the contract in *County of Brevard v. Miorelli Engineering, Inc.*, 703 So. 2d 1049 (Fla. 1997) (county not liable for additional work not contemplated by the express contract terms, notwithstanding claims of implied waiver). Thus, a further express waiver of immunity would be required for the governmental entity's liability to exceed the contract.

The Trial Court in the instant case recognized the sovereign immunity issue, expressly noting that "Villasol is a governmental entity for purposes of the injunction and the bond." (A., Page 125) However, the Trial Court ignored that issue and based its ruling on cases that did not involve sovereigns. In doing so, the Trial Court deprived CDD of its right to determine the extent of its waiver of immunity.

The Trial Court began by acknowledging the general rule established in *Parker Tampa Two, Inc. v. Somerset Development Corporation*, 544 So. 2d 1018 (Fla. 1989), which answered in the affirmative the following certified question:

> *"Are the damages which are recoverable for wrongfully obtaining an injunction limited to the amount of the injunction bond?"*

Perhaps the Trial Court's confusion arises from the fact that, while *Parker* does not deal with a sovereign, it nonetheless addresses the core question raised by TC in its Motion. However, the Trial Court's analysis did not end with the general rule. TC

argued and the Trial Court ultimately ruled that the general rule did not apply.

TC based its argument on *SeaEscape* and *Lotenfoe.* In addition to the glaring and crucial fact that, like *Parker*, neither *SeaEscape* nor *Lotenfoe* addresses the situation where the party seeking the injunction is a sovereign (thereby never addressing the question of whether and to what extent sovereign immunity has been waived), the facts of both cases are otherwise significantly distinguishable from the facts of the instant case.

In *SeaEscape,* Plaintiffs, Maximum Marketing Exposure, Inc., and Joseph M. Panebianco, included in their motion a request for a $500 bond, which the trial court increased to $1,500. Defendant, SeaEscape, "promptly moved" to dissolve the injunction and to increase the amount of the bond to $1 million. At the hearing on SeaEscape's motions, the trial court denied the motion to dissolve and refused to hold an evidentiary hearing on the motion to increase the bond (for which SeaEscape came prepared) due to a shortage of time. Notwithstanding that all parties agreed that an evidentiary hearing would be necessary, the trial court entered an order denying the bond increase. SeaEscape filed an emergency motion for rehearing, in response to which Plaintiffs claimed that the matter had already been heard and decided. SeaEscape's motions were denied and the bond remained set at $1,500. Explaining why the general rule established in *Parker* should not be followed, the

Third District Court said:

> *"In* Parker, *the petitioner had moved to increase the bond amount and had ample opportunity to participate in the setting of an appropriate amount.* [Citation omitted.] *Under those circumstances, the court held that Parker was limited to the amount of the bond when seeking damages for the wrongful obtaining of the injunction. Here, by contrast, SeaEscape never obtained the evidentiary hearing* <u>*despite having diligently sought that relief, including expedited consideration here.*</u>*"*
>
> <u>*On these facts*</u> *SeaEscape cannot be bound by the $1,500 ex parte bond amount."* (Emphasis added.) *SeaEscape* at 955.

The key distinction between *Parker* and *SeaEscape* is that Parker "had ample opportunity to participate in the setting of an appropriate [bond] amount," whereas SeaEscape was deprived of that opportunity "despite having diligently sought that relief." It was "[o]n those facts" that the Third District Court determined that SeaEscape's recovery was not limited by the general rule. Those facts are not the facts of the instant case.

In the instant case, TC was served with CDD's motion for temporary injunction on February 4, 2015 (A., Page 0047) The order granting the temporary injunction and establishing the amount of the bond was served to TC by mail on February 9, 2015. (A., Page 40) Nevertheless, TC did nothing further at all to address the temporary injunction or the bond amounts until filing a Notice of Appearance on April 24, 2015, some 70-plus days later. (A., Page 51) TC had ample

opportunity (70-plus days) to challenge the amount of the bond, but did not do so. In fact, TC never moved for an increase in the bond amount. Rather, on April 29, 2015, TC served an affirmative defense to the merits of CDD's Complaint asserting that CDD "should be denied equitable relief, or ... [t]he bond amount should be increased to at least $130,000." (A., Page 56) Clearly, an affirmative defense is not a motion, subject to being called up for hearing. Moreover, on the same day as TC filed its Answer and Affirmative Defenses, it filed a motion to dissolve the temporary injunction, but never even mentioned the bond. (A., Pages 58-88) Accordingly, TC is more like Parker than SeaEscape; TC had ample opportunity to challenge the amount of the bond, but did not do so, diligently or otherwise. In the Order, the Trial Court noted that, like SeaEscape, TC was not given "an opportunity to argue for a higher bond." (A., Page 126) However, the only reason that TC did not have an opportunity to argue for a higher bond is that, unlike SeaEscape, TC did not seek an opportunity to do so. If TC was deprived of any opportunity, it deprived itself by failing to act.

In *Lotenfoe,* the trial court conducted a hearing on the temporary injunction at which Defendant, Lotenfoe, appeared and participated.

> *"When the court announced that it would enter an injunction, Lotenfoe's counsel advised the court it needed to take evidence on the bond amount. He specifically mentioned that the bond must cover the damages Lotenfoe would suffer if required to close his practice, and the*

> *attorney's fees he would incur. Without taking any evidence, the court set the bond at $20,000." Lotenfoe,* at 425.

Citing *SeaEscape, Lotenfoe* ultimately held that Lotenfoe's damages would not be limited to the amount of the bond and remanded the matter for further proceedings. The rationale for the Second District Court's decision is found in the following:

> *"Lotenfoe proceeded expeditiously. At the end of the injunction hearing on February 22, 1999, he advised the court of the necessity of an evidentiary hearing on the bond. At the hearing on his motion to dissolve the injunction on March 10, 1999, his counsel again raised the question of the bond amount and stated that the doctor was present to testify about his damages. Counsel argued that the hearing time, thirty minutes, was insufficient for something as extraordinary as a temporary injunction, and reiterated that Lotenfoe was prepared to testify. The court had no time left for the parties on that day, but refused to stay the injunction until adequate time was available. Lotenfoe filed his appeal to this court on March 23, 1999. He was diligent in seeking relief from the erroneously-entered bond. His damages for wrongful injunction will not be limited to the $20,000 bond Pahk posted."* (Emphasis added.) *Lotenfoe* at 426.

The Trial Court cites *Lotenfoe* and notes in the Order that Lotenfoe "promptly and diligently sought relief from the erroneously issued bond." (A., Page 124) As with *SeaEscape*, the facts in *Lotenfoe* are not the facts of the instant case. TC was neither expeditious nor diligent in seeking to increase the bond amount. TC waited 70-plus days before acting and then elected to not file a motion to increase the amount of the bond. As it was with SeaEscape, TC is more like Parker than Lotenfoe. The reason there was no hearing in the instant case to increase the bond amount is because,

unlike Lotenfoe (and SeaEscape before him), TC did not seek one, expeditiously, diligently or otherwise; TC did not seek any hearing at any time to increase the amount of the bond. If TC was deprived of any opportunity, it deprived itself by failing to act. The facts in the instant case do not support setting aside the *Parker* general rule in favor of the exceptions established in *SeaEscape* and *Lotenfoe.* As such, even without addressing the sovereign immunity issue, TC cannot now claim entitlement to those exceptions.

In addition to *SeaEscape* and *Lotenfoe*, the Trial Court cited other cases which followed *SeaEscape*. These cases all stand for the premise that where there was no evidentiary hearing on the amount of the bond and the enjoined party expeditiously and diligently sought an increase in the amount of the bond, the enjoined party's damages for wrongful injunction are not limited by the amount of the bond. However, these cases do not apply to the instant case because they do not address the question of whether and to what extent the enjoining party waived its sovereign immunity. Even more importantly, they do not in any way establish that the lack of an evidentiary hearing on the amount of the bond acts as an unlimited waiver of the enjoining party's sovereign immunity.

In cases not involving the sovereign, perhaps a trial court is free to set aside this Court's case-made construct from *Parker*. A different situation exists where a

waiver of immunity must be found. Any waiver of sovereign immunity must be clear and unequivocal and will not be found as a product of inference or implication. *American Home Assurance Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459, 472 (Fla. 2005); *City of Key West v. Florida Keys Community College*, 81 So. 3d 494 (Fla. 3rd DCA 2012). Given this principle, it is hard to imagine how the facts as determined by the Trial Court could have constituted a waiver of the CDD's right to have its liability limited to the bond amount. It is well established that a waiver is "the intentional relinquishment of a known right, or voluntary relinquishment of a known right, or conduct which warrants inference of relinquishment of a known right." *Fireman's Fund v. Vogel*, 195 So. 2d 20, 24 (Fla. 2nd DCA 1967). Thus, in order for CDD to have waived its right to have liability limited to the bond amount under *Provident I* and *Provident II* it must have knowingly waived that right or have engaged in conduct which evidenced a waiver. No such evidence of a waiver exists in this record.

The Trial Court found that damages were not limited to the amount of the bond because "the Court determined the temporary injunction was wrongfully issued for the reasons previously stated in this Order and dissolved it, without giving TC 12 an opportunity to argue for a higher bond, in direct contrast to *Parker Tampa Two, Inc.*" (A., 125-126). As such, the waiver, if it occurred, arose from the actions

or omissions of the Trial Court, according to the Order. In reality, as discussed above in the factual statement, TC never affirmatively sought to set the issue of the bond amount for hearing and never even filed a motion to increase the bond. There was no conduct on the part of CDD to avoid a hearing on the sufficiency of the bond amount which could give rise to an intentional waiver of its sovereign immunity rights or an implied waiver by conduct. Absent such intent or conduct, the Trial Court was wrong to apply the *SeaEscape* line of cases to furnish a waiver of CDD's right to have its damages limited to the bond amount.

Compounding the error, the Fifth District did not even look for or discuss the issue of waiver of the limitation imposed by the bond amount. Instead, contrary to *Provident I* and *Provident II* and contrary to its own holding in *Bradenton Group*, it simply held, as a matter of law, that a sovereign waives its immunity when it seeks injunctive relief, and that the waiver is not limited to the bond amount. That holding cannot be squared with *Provident I* and *Provident II,* and it must be reversed by this Court. This Court should also clarify the application of *SeaEscape* and its progeny in the context of the sovereign. Under *County of Brevard v. Miorelli Engineering, Inc.* , it is difficult to discern how the sovereign can waive its right to rely on the

bond limitation due to the action or inaction of third parties[4], such as courts or opposing litigants, in challenging the bond amount.

CONCLUSION

This Court in *Provident II* struck a careful balance between the rights of private litigants in temporary injunction cases and the desire of governmental entities to protect the public treasury by providing injunction bonds when they seek temporary injunctions. The Opinion rejects that balance and ignores the rule of law set forth by this Court in *Provident II*. Because the Opinion so clearly conflicts with *Provident II* and because of the important public policy considerations at stake, this Court should reverse the Opinion of the Fifth District and determine that, where a sovereign posts a bond as a condition to obtaining a temporary injunction, that bond establishes its maximum exposure for wrongful injunction damages. Moreover, this Court should clarify that the *SeaEscape* line of cases has no application in cases where sovereign immunity limits the exposure to the bond amount.

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[4] This Court found that the rule was necessary so that "[a]n unscrupulous or careless government employee could alter or waive the terms of the written agreement, thereby leaving the sovereign with potentially unlimited liability." *Miorelli*, at 1051.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2018, the foregoing was filed electronically using the Florida Courts E-filing Portal and was furnished by email to:

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CERTIFICATE OF COMPLIANCE

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