

IN THE SUPREME COURT OF FLORIDA

AMERICAN HOME ASSURANCE  
COMPANY,

Appellant,

vs.

CASE NO. SC02-709

11<sup>th</sup> Cir. Case Nos. 00-13811  
00-13986

NATIONAL RAILROAD PASSENGER  
CORPORATION, ETC., ET AL.

Appellees.

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**KISSIMMEE UTILITY AUTHORITY (KUA) AND FLORIDA  
MUNICIPAL POWER AGENCY'S (FMPA) JOINT INITIAL BRIEF  
ADDRESSING CERTIFIED QUESTIONS RELATING TO SOVEREIGN  
IMMUNITY FROM THE ELEVENTH CIRCUIT COURT OF APPEALS**

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MICHAEL J. ROPER  
Fla. Bar No. 0473227  
ERNEST H. KOHLMYER, III  
Fla. Bar No. 0110108  
BELL, LEEPER & ROPER, P.A.  
P. O. Box 3669  
Orlando, FL 32802-3669  
Telephone: (407) 897-5150  
Fax: (407) 897-3332  
Attorneys for Kissimmee Utility Authority

ALTON G. PITTS, P.A.  
Fla. Bar No. 063500  
P.O. Box 540447  
Orlando, FL 32854-0447  
Telephone: (407) 650-1610  
Fax: (407) 650-1611  
Attorney for Florida Municipal  
Power Agency

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## **PROCEDURAL HISTORY**

This action commenced on December 13, 1993 upon the filing of Plaintiff, CSX Transportation, Inc.'s [CSXT] complaint in the United States District Court, Middle District of Florida, Orlando Division against Rountree Transport & Rigging, Inc. [Rountree], Kissimmee Utility Authority [KUA], Woko Construction [WOKO], Metric Constructors, Inc. and Black & Veatch. [R1-1] CSXT's complaint contained claims against KUA alleging negligence and contractual indemnification arising from a collision between a National Railroad Passenger Corporation [AMTRAK] passenger train and a semi-tractor trailer owned by Rountree. [R1-1] On February 22, 1994, KUA timely filed its Motion to Dismiss with Memorandum in Support. [R.1-11] Thereafter, KUA timely filed its Answer and affirmative defenses on April 11, 1994. [R2-32 ]

On January 24, 1996, CSXT and AMTRAK filed their Motion for Partial Summary Judgment arguing that KUA was liable to defend, indemnify and hold harmless CSXT and AMTRAK for any damages resulting from the accident of November 30, 1993. [R53-1172] CSXT and AMTRAK claim that KUA's duty to defend and indemnify is based on Section 14.2 of the Private Road Grade Crossing Agreement.[R53-1172]

On February 9, 1996, KUA filed a competing Motion for Partial Summary Judgment against CSXT and AMTRAK.[R56-1220;R57-1221] KUA's Motion for Partial Summary Judgment sought the court's determination that Section 14.2 of the Agreement was unenforceable against KUA and that CSXT and AMTRAK were not entitled to indemnification for damages in the underlying case. [R56-1220;R57-1221] KUA presented legal arguments that the PRGC Agreement containing the indemnification provision was void and unenforceable for the following reasons: (a) KUA has not waived its right to immunity; (b) the execution of the Agreement containing an indemnification provision, without legislative authority, is an "ultra vires" act rendering the agreement void and unenforceable; (c) the Agreement by definition and purpose is a "construction" contract and is therefore governed by the statutory requirements of §725.06 of the Florida Statutes; and (d) the indemnification provision of the Agreement is an exculpatory clause and thus void and unenforceable. [R56-1220;R57-1221]

On August 20, 1996, Judge Sharp of the United States District Court, Middle District of Florida, Orlando Division issued an order denying KUA's Motion for Partial Summary Judgment against both CSXT and AMTRAK. On August 30, 1996, Judge Sharp granted CSXT's Motion for Partial Summary Judgment finding that Section 14.2 of the Agreement was "on point" and §725.06 of the Florida Statutes was

inapplicable. [R88-1638 ] In the same order, the district court determined that there was an issue of fact as to whether AMTRAK was "affiliated" with CSXT to require indemnification by KUA under the Agreement and thus denied AMTRAK's Motion for Partial Summary Judgment. [R88-1638] On September 6, 1996, KUA, by and through counsel, filed its Notice of Interlocutory Appeal based on the orders of August 20, 1996 and August 30, 1996. [R.89-1662]

On or about November 21, 1996, the jury returned a verdict finding that Rountree was 59% negligent, CSXT was 33% negligent, and National Railroad Passenger Corporation (AMTRAK) was 8% negligent. [R.90-1984] More importantly, KUA, which was also included on the jury verdict form, was found to be 0% negligent in the underlying cause of action. [R.90-1984]

Based on the orders of August 20, 1996 and August 30, 1996 regarding the issue of indemnification, KUA filed its interlocutory appeal to determine the enforceability of Section 14.2 of the Agreement in light of KUA's claim of sovereign immunity. The Eleventh Circuit, in reviewing these issues, determined that it had no jurisdiction to resolve an appeal based on sovereign immunity since the matter was not final and issues of sovereign immunity were not entitled to interlocutory review. See: National Railroad Transportation Corp. v. Kissimmee Utility Authority, 153 F.3d 1283 (11th Cir. 1998)

In October 1998, AMTRAK filed a subsequent Motion for Summary Judgment against KUA seeking a ruling on the contractual indemnification issue. [R-2099] In response, KUA and FMPA filed similar motions in opposition. [R-2114] On April 1, 1999, the District Court Judge, James Watson entered an order granting AMTRAK's Motion for Partial Summary Judgment finding that, as a matter of law, AMTRAK was similarly entitled to indemnification from KUA and FMPA based on the finding that, at the time of the accident, CSXT was "operating" the AMTRAK train as defined in Section 14.3 of the PRGC Agreement. [R.2183]

In April 1999, the district court held trials to resolve the underlying personal injury matters and in December 1999, the court resolved the underlying property damage claims, including the damage claim awarded to American Home Assurance Corporation against CSXT and NRPC. [R.2353] On June 15, 2000, the district court filed its final judgment order. [R.2363] An appeal was taken from the issues incorporated into the final judgment order to the Eleventh Circuit Court of Appeals. [R.2366] After briefing and oral argument, the Eleventh Circuit issued an opinion dated March 26, 2002, certifying the following questions relating to sovereign immunity to the Supreme Court of the State of Florida<sup>1</sup>:

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<sup>1</sup> The Eleventh Circuit stated that “Our phrasing of the certified questions is not meant to limit, in any way, how the Florida Supreme Court responds to the questions or analyzes the state law issues involved therein. [See: March 26, 2002 Order, p. 81-2]

1. Given that Kissimmee Utility Authority, a municipal agency under Florida law, agreed by contract to indemnify a private party, is the agreement controlled by the restrictions on waiver of sovereign immunity found in Fla. Stat. §768.28?
2. Is the indemnification agreement instead controlled by the rule for breach-of-contract actions enunciated in Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1985)?
3. If Pan-Am applies, does a municipal agency like Kissimmee Utility Authority lose the protection of sovereign immunity only if it has specific statutory authorization to enter into indemnification agreements, or is it sufficient that the agency more generally has statutory authorization to contract with private parties?

## **STATEMENT OF THE FACTS**

On May 7, 1992, KUA, a political subdivision of the State of Florida, entered into a purchase agreement with General Electric to construct, assemble and safely deliver "FOB at the Cane Island Combustion Turbine Project site", a GE LM6000 turbine. From this point, S&S on behalf of GE hired WOKO, who in turn, contracted with Rountree to perform the work of transporting and delivering the turbine generator from Tampa to KUA's Cane Island facility near Intercession City, Florida. In April, 1993, KUA executed a Private Road Grade Crossing Agreement (hereinafter referred to as the PRGC Agreement) to obtain an easement from CSXT to construct an access road across CSXT's property, in order gain access to its Cane Island facility. The PRGC Agreement contained an indemnity provision requiring KUA to hold CSXT harmless and indemnify them under the conditions and circumstances identified in Section 14.2, subsection (A) through (C). On November 30, 1993, during the transportation of this combustion turbine, Rountree's tractor trailer became immobilized on the railroad crossing, and shortly thereafter, an AMTRAK passenger train collided with the Rountree vehicle carrying the turbine causing property damage as well as personal injuries. [R.56-1220-2] Specifically, the collision occurred at a point at which the railroad tracks intersected the access road to the Cane Island Power Plant. [R.56-1220-2]

As a result of the accident, numerous lawsuits were filed against KUA as well as several other parties for the personal injury and property damage claims caused by this collision.

## **SUMMARY OF THE ARGUMENT**

KUA filed its appeal seeking the reversal of an August 30, 1996 Order granting summary judgment in favor of CSXT determining as a matter of law, that KUA was contractually obligated to indemnify CSXT for its own negligence in the underlying train/tractor-trailer accident. The CSXT/AMTRAK issue before the district court was whether the indemnification provision contained in the PRGC Agreement executed by KUA and CSXT was enforceable upon KUA for the benefit of CSXT and/or AMTRAK. CSXT and AMTRAK will be referred to hereafter as the “Railroad Companies.”

First, KUA asserts that it is not liable to defend and hold harmless the Railroad Companies under this Agreement because the Florida Constitution, and applicable state law prohibits KUA from contractually waiving its sovereign immunity under §768.28 for damages arising from tort, in the absence of specific legislative authority to do so. See: Davis v. Watson, 318 So. 2d 169 (Fla. 4th DCA 1975, cert. denied, 330 So. 2d 16 (Fla. 1976); Arnold v. Shumpert, 417 So. 2d 116 (Fla. 1968) Florida law has consistently determined that that the power to waive the state's sovereign immunity is the domain of the Legislature and any attempt by political officials to contractually waive immunity without clear and specific legislative authority is considered an ultra vires act rendering the contract void ab initio. These types of

indemnification agreements between a government entity and a private corporation are void and may not be enforced because the agreements are against Florida's public policy.

## ARGUMENT

### A.

#### **KUA Did Not Have the Legal Authority to Enter into an Indemnification Agreement Which Waives its Sovereign Immunity Absent Specific Statutory Authorization from the Florida Legislature.**

In the absence of specific legislative authority, KUA was not authorized to enter into a contract of indemnity with CSXT, a private company, and is therefore immune from liability.

Under Florida law, a political subdivision of the State cannot waive its immunity except to the extent provided by statute or specific legislative enactment. Section 13, Article X, of the Constitution of the State of Florida provides that "[P]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Thus, the power to waive the State's sovereign immunity rests exclusively with the Legislature. Davis v. Watson, 318 So. 2d 169 (Fla. 4th DCA 1975, cert. denied, 330 So. 2d 16 (Fla. 1976); Arnold v. Shumpert, 417 So. 2d 116 (Fla. 1968). The Legislature enacted §768.28 Fla. Stat. (1994) which provided for a limited waiver of sovereign immunity, in tort, for the State and its agencies or subdivisions according to §768.28. The State Constitution requires specific, clear, and unambiguous language in a statute in order to constitute a waiver of sovereign

immunity. See: Manatee County v. Town of Longboat Key, 365 So.2d 143 (Fla. 1978)

This sovereign immunity cannot be accomplished by local law and the waiver must be clear and unequivocal. Id.

In this case, there is no legislative authority which would permit KUA to waive its sovereign immunity in tort beyond that which has been provided in §768.28 Fla. Stat. KUA's authority as a governmental entity is not inherent, but is derivative only and is limited to those powers expressly or by necessary implication granted by statute. Gardinier, Inc. v. Florida Department of Pollution Control, 300 So. 2d 75 (Fla. 1st DCA 1974); State, Dept. of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d 787, (Fla. 1st DCA 1982), rev. denied 436 So. 2d 98 (Fla. 1983)

The Fifth Circuit Court of Appeals in Seaboard Air Line Railroad Co. v. Sarasota-Fruitville Drainage District, 255 F.2d 622 (5th Cir. 1958) cert. denied, 358 U.S. 836, 79 S.Ct. 60, 3 L.Ed.2d 73 (1958) held ". . .in the absence of a general law which authorizes a state agency to enter into an indemnification agreement which imposes liability on the state, such contracts are nugatory and unenforceable against the state or its agencies." In Seaboard, a Florida drainage district signed an agreement with the railroad which stated that the drainage district would:

". . .save railroad harmless from all loss, damage, cost and expense which railroad might sustain, resulting from the loss, injury, or damage, growing in any manner out of the installation, presence, operation, maintenance, removal of culverts which railroad gave the district a license. . ." Id. at 622

The Court held that the railroad indemnity agreement was void as being against Florida public policy and that the drainage district was not answerable for its torts. The Court stated that "the State of Florida has a valid interest in protecting its taxpayers and citizens through public bodies such as this drainage district from certain liabilities." Id. at 623 The conclusion reached by the Fifth Circuit in Seaboard Air Line Railroad was in accord with the weight of authority in other jurisdictions.<sup>2</sup>

Although KUA recognizes that its officials have the authority to act on behalf of the municipality in order to perform governmental functions, including the execution of contracts, KUA's execution of the PRGC Agreement **containing** an indemnification provision which provides for an unlimited waiver of its sovereign immunity in tort, was beyond the scope of the KUA's governmental authority. The unauthorized act of contractually agreeing to waive its sovereign immunity protection under §768.28 Fla.

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<sup>2</sup> See also: Nashville v. Sutherland, 93 Tenn. 335, 21 S.W. 674 , 19 L.R.A. 619; Becker v. Keokuk Water-Works, 79 Iowa 419, 44 N.W. 694; Vaughtman v. Town of Waterloo, 14 Ind.App. 649, 43 N.E. 476; Wheeler v. City of Sault Ste. Marie, 164 Mich. 338, 129 N.W. 685, 35 L.R.A., N.S. 547; Adams v. City of New Haven, 131 Conn. 552, 41 A.2d 111; Nashville Trust Co. v. City of Nashville, 182 Tenn. 545, 188 S.W. 2d 342.

Stat., renders the indemnity agreement void and unenforceable against KUA as a matter of law.

The Attorney General of the State of Florida has issued numerous opinions which consistently state that contracts containing these forms of indemnity obligations are impermissible. In Op. Att'y Gen. 90-21 (March 20, 1990), the Attorney General considered the following question:

"May the Department of Corrections, by contract, agree to release a private company from liability and to indemnify and to hold the company harmless from any damage, loss, injury caused by the sole or joint negligence of the private company, its employees or agents?"

The Attorney General determined that "the sovereign immunity of the state in tort has been waived to the extent provided in §768.28, Fla. Stat. and the Department of Corrections is not authorized to alter by contract the state's waiver of immunity in tort." Id. Similarly, in Op. Att'y Gen. 80-77 (September 11, 1980), the Attorney General stated that "in the absence a statute, the governor of the State of Florida, was not authorized to waive the sovereign immunity of the state by agreeing that the state would waive certain defenses and would hold the United States harmless from violations of the regulations prescribed by the United States Department of the Interior." This general prohibition against indemnity agreements also applies towards

inter-governmental agreements<sup>3</sup> or when the municipal corporation is agreeing to limit its police<sup>4</sup> or taxing powers.<sup>5</sup> Recently, the Florida Attorney General's Office opined that "a county may not agree to indemnify another party to a contract or alter the state's waiver of sovereign immunity such that the county's liability may be extended beyond the limits established in Section 768.28 Fla. Stat." See: Op. Att'y Gen. 2000-22 (April 4, 2000) This opinion further restricted the county from agreeing to purchase insurance or enter into an "agreement for the payment of "prevailing party" attorney's fees to the extent that it alters the limits of liability under §768.28 Fla. Stat." Id. The Attorney General faced with similar questions of the state's sovereign immunity has consistently advised governmental entities that it is impermissible for them to become a party to a contract that includes an indemnification or hold harmless provision in the absence of legislative authorization.<sup>6</sup> "Although an opinion of the

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<sup>3</sup> Op. Att'y Gen. 95-12 (February 9, 1995)

<sup>4</sup> See: P.C.B. Partnership v. City of Largo, 549 So.2d 738 (Fla. 2d DCA 1989)(City did not have authority to effectively contract away exercise of its police powers)

<sup>5</sup> Op. Att'y Gen. 84-103 (December 19, 1984)

<sup>6</sup> See also: Op. Att'y Gen. 076-188; Op. Att'y Gen. 84-103 (December 19, 1984); Op. Att'y Gen. 85-66 (August 2, 1985); Op. Att'y Gen. 89-61 (September 15, 1989); Op. Att'y Gen. 90-21 (March 20, 1990); Op. Att'y Gen. 93-24 (March 24, 1993); Op. Att'y Gen. 95-12 (February 9, 1995); Op. Att'y Gen. 95-61 (September 28, 1995).

[Florida] Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive” on matters of Florida law. Florida v. Family Bank of Hallandale, 623 So.2d 474, 478 (Fla. 1993)

Therefore, the execution of the PRGC Agreement should have been considered void and unenforceable as an "ultra vires" act. In Town of Indian River Shores v. Coll, 378 So.2d 53, 55 (Fla. 4th DCA 1979) the court held that "if a contract is ultra vires, no liability accrues to the municipal corporation, absent some special estoppel." In addition, the court stated that Coll was not entitled to estoppel because "one who contracts with a municipality is bound to know the limitations of the City's contracting authority." Id. Florida law states that persons contracting with a governmental entity must do so at their own peril and inquire into the power of a governmental entity before executing the contract. See: Ramsey v. City of Kissimmee, 190 So. 474 (Fla. 1939). In Cook v. Navy Point, Inc., 88 So. 2d 532 (Fla. 1956), the Court determined that:

Any agreement by the City, of which there was no written record, to waive city's portion of all building, plumbing, and electrical permit fees in connection with construction of a housing development on unimproved land in the city was ultra vires and void. . ." Id. at 535.

Other Florida cases have voided contracts where the municipal corporation or county acted beyond its legislative authority.<sup>7</sup> In Crowell v. Monroe County, 578 So.2d 837 (Fla. 3rd DCA 1991) the court held that where "extension" letters sent by the Assistant Building Official were beyond the authority granted by the county's code, the official's acts were considered ultra vires and were void *ab initio*."

These cases, as previous cited, support the notion that its is against public policy to allow public officials to subject citizens of the State of Florida to the unlimited liability of private individuals or corporations by contractually waiving the state's sovereign immunity. This important public policy was articulated in Seaboard Air Line Railroad, 255 F.2d at 623-4, in which the court stated:

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.

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<sup>7</sup> See also: Edwards v. Town of Lantana, 77 So.2d 245 (Fla. 1955) (Town acted beyond its prescribed power in entering contract and in absence of such provision in the charter or statute, the act was ultra vires because the town had no inherent power to grant a privilege. . .); Corona Properties of Florida, Inc. v. Monroe County, 485 So.2d 1314 (Fla. 3d DCA 1986) (county zoning officials did not have authority to issue vested rights letter and therefore act was "ultra vires " and building permit was void ab initio.)

The public policy justification was also recognized in the case, City of Panama City, Florida vs. T&A Utilities Contractors, 606 So. 2d 744, 747 (Fla. 1st DCA 1992)

where the court stated:

It seems clear that to us that the policy justification underlying the Ramsey decision is that taxpayers should not be held accountable on a contract unless a contract has been entered into according to the strict letter of the law.

The Florida courts as well as the Office of the Attorney General have consistently protected the citizens of the State of Florida from potential unlimited liability which may arise from the negligence of private entities by barring the waiver of the state's sovereign immunity in the absence of specific legislative authority. It is within the exclusive power of the Legislature, through its citizens, and not the state's public officials, to decide whether the state's immunity should be waived. The continuation of this constitutional right of the state will insure that the citizens of the State of Florida will not be subject to the "untold financial liability" contractually imposed upon them by its public officials. This ability to contractually waive the state's sovereign immunity and agree to provide unlimited indemnification to private individuals or corporations must continue to rest in the hands of the Legislature.

Therefore, KUA asserts that the district court erred in holding that the indemnification provision of the Agreement was enforceable because the court failed

to consider KUA's entitlement to sovereign immunity under §768.28 Fla. Stat. As a matter of law, KUA is entitled to judgment in its favor because the execution of an agreement, by a political subdivision of the State of Florida, which contains an provision obligating its to indemnify a private corporation for its unlimited financial liability caused by the private corporation's own negligence is unenforceable in the absence of the appropriate legislative authority. In light of the foregoing, the indemnification provision should have been deemed void and unenforceable by the district court entitling KUA to judgment as a matter of law with respect to the claims of the Railroad Companies for contractual indemnity.

The Railroad Companies now assert that the Florida Inter-Local Cooperation Act of 1969 (§163.01 Fla. Stat.) is applicable in this case to establish a waiver of KUA's entitlement to sovereign immunity. First, this Court should not even consider whether §163.01 Fla. Stat. is applicable since the Railroad Companies failed to raise this issue at the district court level. The record is clear that the Railroad Companies first raised the issue as to whether the provisions of §163.01 Fla. Stat. applied to KUA in their appellate brief filed with the Eleventh Circuit and at no time alleged §163.01 Fla. Stat. as a basis to support a waiver of sovereign immunity in opposing KUA's motion for summary judgment. It is a well recognized general rule of law that the court shall not address an issue raised for the first time on appeal. See: Federal Deposit Ins. Corp.

v. 232, Inc., 920 F.2d 815, 817 (11th Cir.1991); Bonded Transp., Inc. v. Lee, 336 So.2d 1132 (Fla. 1976)

Second, Section 163.01, Fla. Stat., has no direct application or bearing on this case. This statutory section states in pertinent part as follows:

“(k) the limitations on waiver in the provisions of §768.28 or any other law to the contrary notwithstanding, the Legislature, in accordance with §13, Article X of the state constitution, hereby declares **that any such legal entity or any public agency of this state that participates in any electrical project waives its sovereign immunity to:**

**(1) all other persons participating therein; and**

**(2) any person in any manner contracting with a legal entity of which any such public agency is a member, with relation to:**

**(a) ownership, operation, or any other activity set forth in subparagraph (b)2.d. with relation to any electric project; or**

**(b) the supplying or purchasing of services, output, capacity, energy, or any combination thereof.”**

§163.01(15)(k), Fla. Stat. (Emphasis added)

This statutory waiver of sovereign immunity must be strictly construed and therefore the waiver only applies to those limited circumstances specifically described therein.

A straightforward reading of those statutory sections makes it clear that the waiver of sovereign immunity only inures to the benefit of (1) those persons participating in the electric project and (2) those persons who contract with a separate legal entity formed

pursuant to the provisions of §163.01(7), Fla. Stat. According to §163.01(2)(d) an “electric project” is defined as:

Any plant, works, system, facilities, and real property. . . which is used or useful in the generation, production, transmission, purchase, sale, exchange, or interchange of electric capacity or energy, including the facilities or property for the acquisition, extraction, conversion, transportation, storage, reprocessing, or disposal of fuel and other materials of any kind for such purposes.

§163.01(2)(d) Fla. Stat.

The record clearly reflects that CSXT was not participating in an “electric project.” The PRGC Agreement was incidental, at best, to KUA’s construction of the Cane Island facility since CSXT merely owned available land for which KUA sought to gain access to the site. In fact, CSXT affirmatively characterizes the PRGC Agreement as merely a “licensing” agreement to use CSXT’s land to construct a railroad crossing rather than a “construction” contract for which separate consideration would be required under §725.06 Fla. Stat. [CSXT brief, page 43] Further, if CSXT contemplated that the provisions of §163.01 Fla. Stat. would apply, CSXT would have affirmatively stated so in their PRGC Agreement. Given the fact, that the PRGC Agreement is a CSXT “standardized” form (i.e. CSXT Form 7422), it is evident that CSXT did not consider the PRGC Agreement to be executed pursuant to the provisions of §163.01(15)(k).

Next, the waiver only applies to those persons that contract with a legal entity formed pursuant to §163.01(5) and (7) Fla. Stat. In this case, Florida Municipal Power Agency (FMPA) was formed as defined under these provisions, whereas, KUA was formed by the City of Kissimmee in accordance with its established Charter. [See KUA Charter] In this case, CSXT only entered into a contractual relationship through the PRGC Agreement with KUA and not FMPA.

Additionally, the waiver only inures to the benefit of those persons contracting with that separate legal entity, **with relation to** ownership, operation, planning, design, etc. of the electric project itself. Subsection (2)(a) and (b) provides a waiver to those activities with relation to either the ownership, operation, or any other activity set forth in sub-paragraph (b)2.d. with relation to any electric project or the supplying or purchasing of services, output, capacity, energy, or any combination thereof. Clearly, the PRGC Agreement did not involve any activity associated with ownership, operation of the electric project or involve the supplying of services, output, capacity, or energy relating to such electric project.

The significance of §163.01, Fla. Stat., and the principle for which it was cited in the amicus brief filed by the Office of the Solicitor General, is that it demonstrates that the Legislature has only allowed governmental bodies to enter into indemnity agreements with other governmental bodies under very limited circumstances. See,

§163.01(15)(b)2.i, Fla. Stat.; §768.28(18). The Legislature has however, never authorized a governmental body to enter into an indemnification agreement with private parties.

There is an obvious reason why the Legislature would allow governmental entities to enter into indemnification agreements with each other, but not with private parties. The Legislature allows governmental bodies to indemnify each other because this does not increase the respective governmental entities' liability exposure. First of all, the Legislature clearly dictates that result. See, e.g. “. . . [s]uch indemnification may not be considered to increase or otherwise waive the limits of liability to third party claimants established by this section.” §768.28(18), Fla. Stat. Additionally, pursuant to Florida law, the limits of liability in tort remain the same (i.e.) \$100,000/\$200,000, regardless of the number of different governmental bodies sued for the same occurrence. See, Gerard v. Dept. of Transportation, 472 So.2d 1170 (Fla. 1985); Orange County v. Gipson, 539 So.2d 526 (Fla. 5<sup>th</sup> DCA 1989). That limitation on liability would not exist if a governmental body agreed to indemnify a private entity and assume its tort liability. As a result, the Legislature has consistently refrained from allowing governmental entities from agreeing to indemnify private entities for their tort liability.

Since the record is completely devoid of any evidence demonstrating that CSXT was “participating” in the electric project, the waiver provision contained in §163.01 Fla. Stat. is inapplicable to factual circumstances in this matter.

B.

**This Court’s Decision in Pan-Am Tobacco Does Not Authorize a Governmental Entity to Waive its Sovereign Immunity by Contract Which Would Bind the Governmental Entity to Indemnify a Private Corporation for Unlimited Tort Damages Arising out the Private Corporation’s Own Negligent Acts**

The Railroad Companies also contend that the Florida Supreme Court’s decision in Pan-Am Tobacco Corp. v. Dept. of Corrections, 471 So.2d 4 (Fla. 1984), is controlling in this appeal. However, a review of the holding in Pan-Am Tobacco shows that it has no relevance to the specific issues involved in the instant appeal.

In Pan-Am Tobacco, the court recognized that where the Florida Legislature has by general law authorized the state and its agencies to enter into a contract for a specific public purpose, then sovereign immunity has been waived to that limited extent. Pan-Am Tobacco is factually distinguishable, since it involved a straightforward breach of contract claim regarding cancellation periods in a contract for sale of vending machines, and did not in any way involve the indemnification of a private party, for its own acts of negligence, by a governmental entity. More importantly, in that decision, the court specifically noted:

“We would also emphasize that our holding here is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter. . . .” (Emphasis added).

Pan-Am Tobacco, supra. at 6.

Florida law has never recognized a waiver of sovereign immunity in contract for those contracts into which a state agency does not possess statutory authority to enter. That is the crux of the argument posited by KUA in its appeal to the Eleventh Circuit. Certainly, KUA recognizes that it has general authority to enter into contracts, but it does not have the requisite authority to waive its sovereign immunity by agreeing to indemnify a private entity, and thereby assume the unlimited tort liability of that private entity. Pursuant to Article X, §13, of the Florida Constitution, the power to waive the state’s sovereign immunity rests exclusively with the State Legislature. See, Davis v. Watson, 318 So.2d 169 (Fla. 4<sup>th</sup> DCA 1975), cert. denied 330 So.2d 16 (Fla. 1975). A city may not waive sovereign immunity by local law. Donisi v. Trout, 415 So.2d 730 (Fla. 4<sup>th</sup> DCA 1981) (a municipality cannot forbid what the Legislature has expressly licensed, authorized, required, nor may it authorize what the Legislature has expressly forbidden).

Clearly, a governmental entity cannot accomplish by contract which it would be precluded from accomplishing pursuant to the enactment of an ordinance, resolution or other law. See: Nizzo v. Amoco Oil Co., 333 So.2d 491 (Fla. 2d DCA 1976);

Schaal v. Race, 135 So.2d 252 (Fla. 2d DCA 1961) Since KUA lacked the “statutory authority” to enter into a contract of indemnification with CSXT, the doctrine of sovereign immunity applies and bars this indemnity claim by the Railroad Companies.

As the Florida Supreme Court noted in Pan-Am Tobacco, *supra.*,

“In Florida, sovereign immunity is the rule, rather than the exception, as evidenced by Article X, §13 of the Florida Constitution: ‘provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.’ See, Pan-Am, *supra.*”

See, Pan-Am Tobacco, *supra.* at 5.

In addition, Pan-Am Tobacco is further distinguishable to the extent that it is based, in part, on the premise that “. . . a contract which is not mutually enforceable is an illusory contract.” Pan-Am Tobacco, 471 So.2d at 5. However, the fact that the indemnification provision in this case may be void and unenforceable, does not render this an illusory contract. In fact, the parties, apparently recognizing that some of the provisions might be determined in the future to be void and unenforceable, included a severability clause at paragraph 19.5.<sup>8</sup>

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<sup>8</sup> That provision states as follows:

“19.5 This Agreement is executed under current interpretation of applicable Federal, state, county, municipal or other local statute, ordinance or law. Each separate division (paragraph, clause, item, term, condition, covenant or agreement) herein shall have independent and severable status from each other separate division for the determination of the legality, so that if any separate division is determined to be void,

As a result, a declaration that the indemnification provision is not enforceable, will not result in a determination that the contract is not mutually enforceable or an illusory contract. The primary purpose of the contract was not to provide indemnity, but was rather to allow for the construction of the crossing on CSXT property. There are many other terms and conditions of the contract which provide for mutuality of obligation, separate and apart from the indemnification provisions contained at paragraph 14.

Contrary to the assertions of the Railroad Companies, since Pan-Am Tobacco, the Florida courts have not frequently rejected the defense of sovereign immunity in contract actions. In fact, Florida courts have adopted a very restrictive approach when considering a waiver of sovereign immunity in contract actions. See, e.g. Southern Roadbuilders, Inc. v. Lee County, 495 So.2d 189 (Fla. 2<sup>nd</sup> DCA 1986) (sovereign immunity barred a contractor's claim for payment for additional work where that work was not included in the original contract or any subsequent written instrument) During the pendency of this case, this Court in County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1997) held that the doctrine of

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voidable, invalid or unenforceable for any reason, such determination shall have no effect upon the validity or enforceability of each other separate division herein contained, or any other combination thereof.”

sovereign immunity precluded recovery of costs of extra work performed which was authorized but which was outside the terms of the original contract and absent a written change order. It is clear, that Florida still recognizes the doctrine of sovereign immunity as a complete defense to contract actions in those circumstances where (1) there is not an express, written contract and (2) those instances in which the state agency does not have statutory authority to enter into the contract. As the court in Southern Roadbuilders, Inc., noted

Sovereign immunity is a doctrine designed to protect the public treasury from what would otherwise be countless claims filed by the vast number of citizens affected by the actions of a government. Though it germinated in the monarchical maxim, ‘The King Can Do No Wrong,’ Prosser , Law of Torts 971 (4<sup>th</sup> ed. 1971) - an odious concept by modern standards - sovereign immunity, at least to the extent retained by the legislature and the courts, is a positively necessary and rational safeguard of taxpayers’ money.

Southern Roadbuilders, Inc., *supra*. at 190, footnote 1.

The Railroad Companies are simply incorrect when they argue that standard for determining KUA’s ability to enter into this contract, is whether the contract was “fairly authorized.” That is not the standard when dealing with a waiver of sovereign immunity. Florida courts have consistently held that the Florida Constitution requires “specific, clear, and unambiguous language in a statute” to constitute a waiver of sovereign immunity. See, Manatee County v. Town of Longboat Key, 365 So.2d 143,

147 (Fla. 1978); Metropolitan Dade County v. Reyes, 688 So.2d 311 (Fla. 1996); Tucker v. Resha, 634 So.2d 756 (Fla. 1<sup>st</sup> DCA 1994). Additionally, in interpreting legislative waivers, the Florida Supreme Court has repeatedly stated that such waivers must be strictly construed. See, Metropolitan Dade County v. Reyes, supra.; Mendez v. North Broward Hospital District, 537 So.2d 89, 91 (Fla. 1988); Manatee County, supra.; Levone v. Dade County School Board, 442 So.2d 210, 212 (Fla. 1993). The Eleventh Circuit has likewise recognized this well established principle of Florida law. See, Sims v. State of Florida, Dept. of Highway Safety & Motor Vehicles, 832 F.2d 1558, 1569 (11<sup>th</sup> Cir. 1987). Instead, the correct standard is whether KUA has been specifically or expressly authorized to waive its sovereign immunity in this matter.

The Railroad Companies contend that this is a contract action and therefore §768.28, Fla. Stat., which provides for a limited waiver of tort immunity, does not apply. This is the same argument which was considered and rejected by the court in Evanston Ins. Co. v. City of Homestead, 563 So.2d 755 (Fla. 3<sup>rd</sup> DCA 1990). In Evanston, supra., the city purchased a liability insurance policy (i.e., a contract) with a \$500,000 deductible. The insurance company paid \$2,700,000 to settle a medical malpractice claim against the city and then sought to recoup the \$500,000 deductible from the city. The city defended the action saying that its legal liability was limited to

\$200,000 pursuant to sovereign immunity. The insurance company, like the Railroad Companies in this case, alleged that this was a breach of contract action and therefore there was no immunity. In responding to that argument the court stated as follows:

“Evanston has brought this action alleging breach of contract for which it alleged there is no immunity, and thereby seeks to circumvent the constitutional and statutory requirements of Article X, Section B, Florida Constitution (1968) and section 286.28(2) Florida Statutes (1985). This we cannot permit. A contract may not give validity to an illegal act, notwithstanding upon whom the hardship should fall . . .”

Evanston, at 757, 758.

The court obviously recognized a distinction between a contract in which a governmental entity offers to pay for goods and services and an indemnification contract, where a governmental entity agrees to assume the unlimited tort liability of a private entity, thereby effectively waiving its sovereign immunity in tort. The former is allowed under Florida law, while the latter is specifically prohibited by the Florida Constitution. The court equated the unauthorized waiver of sovereign immunity with an illegal act and held that the city could not contract to waive its sovereign immunity above that which was provided by the Legislature.

According to §768.28(18) Fla. Stat., the Florida Legislature has specifically provided that:

[N]either the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon

entering into a contractual relationship with an other agency or subdivision of the state. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other parties' negligence. This does not preclude a party from requiring a non-governmental entity to provide such indemnification or insurance.

KUA asserts that if the holding in Pan-Am Tobacco is applicable to this case, the impact of this decision would create a nugatory effect on the statutory prohibition of such indemnity agreements under §768.28(18). A clear reading of the statute demonstrates the Legislature's awareness of sovereign immunity in contractual relationships where at least one party is either the state or other governmental agency or sub-division. It is unreasonable to conclude that the Legislature specifically prohibited inter-governmental contractual indemnity agreements, yet, provided an implied exception in favor of non-governmental entities. In viewing §768.28(18) under the statutory construction principle *inclusio unius est exclusio alterius*, the Legislature could have easily made such an expressed exception for the benefit of non-governmental entities, however, chose to allow contractual indemnification only from non-governmental entities. Since immunity should be narrowly and strictly construed, the Legislature has provided no specific authority for the contractual indemnification of private individuals by governmental entities. "The waiver must be limited to the acts or conduct clearly and unequivocally protected against. Therefore, the waiver must be strictly construed and applied. A protection against acts not clearly delineated

as prohibited or protected must not be implied” See: Irven v. Dept. of Health and Rehab. Services, 790 So.2d 403,405 (Fla. 2001)

The Railroad Companies also attempt, unsuccessfully, to distinguish the decision of the Fifth Circuit in Seaboard Air Line Railroad Co. v. Sarasota-Fruitville Drainage District, 255 F.2d 622 (5<sup>th</sup> Cir. 1958), cert. denied 358 U.S. 836 (1958) from the instant case. In Seaboard, the court applying Florida law concluded that the governmental entity enjoyed sovereign immunity from an indemnification claim brought by a railroad pursuant to an indemnity agreement. Applying the principles of sovereign immunity under Florida law, the Fifth Circuit held “. . . that the indemnity agreement and the contract was void and may not be enforced.” They suggest that the Seaboard decision is no longer valid precedent and attempt to distinguish that decision, but fail to provide any persuasive authority to demonstrate that decision has ever been reversed or receded from by this Court, in any fashion.

Instead, the Railroad Companies rely upon the case of Seaboard Air Line Railroad Co. v. County of Crisp of the State of Georgia, 280 F.2d 873 (5<sup>th</sup> Cir. 1960), cert. denied 364 U.S. 942 (1961). That decision is however clearly distinguishable from the instant case. First of all, that case involved an interpretation of sovereign immunity under Georgia law, not Florida law. Secondly, as the Fifth Circuit itself noted in Crisp County,

Our holding here does not in any way conflict with the decision in Seaboard Air Line RR Co. v. Sarasota-Fruitville Drainage District, supra., because “[Crisp] County was under a duty imposed by the Federal Power Act to protect the Seaboard’s property, and thus the Act created a tort liability.

Id. at 877-8. Crisp County is clearly distinguishable from the facts in this case, because there is no implication that there was any statutorily imposed tort liability on the part of KUA to protect CSXT’s property. The Crisp County decision is simply not helpful in any sense to this Court.

### C.

#### **Public Policy Favors the Protection of the Public Treasury**

The Railroad Companies’ assertion that somehow the public treasury would not be affected if KUA were required to indemnify them for damages arising out of this train accident is completely disingenuous. The Railroad Companies seem to suggest that there is a distinction between the “public treasury” and the “funds of the utility systems.” Apparently, they fail to understand that since KUA is a public entity and “. . . part of the government of the City of Kissimmee . . . .” [R.-2099], its funds are public funds and therefore part of the public treasury. KUA is a municipally owned utility, which is charged with the provision of electrical and other utility services to its citizens. It is axiomatic that since KUA is a governmental entity, all of its assets or funds are publicly owned, and therefore part of the public treasury. An adverse

judgment against KUA would necessarily result in those public funds being depleted, in turn resulting in either increased rates to its customers, the citizens of Kissimmee, or diminished service. Further, it is highly probable that other governmental entities within the State of Florida have signed identical Private Road Grade Crossing Agreements with CSXT therefore, an adverse result would significantly impact those existing contractual relationships and potentially create unlimited financial exposure to these governmental entities, irrespective of their fault or liability. In short, the argument that a judgment against KUA would not adversely affect the public treasury is completely fallacious.

## CONCLUSION

KUA and FMPA respectfully request this Honorable Court to find that, as a matter of Florida law, KUA did not have the specific legislative authority to contractually waive its sovereign immunity under §768.28 Fla. Stat. under the PRGC Agreement to provide an unlimited financial indemnification to the Railroad Companies for their own negligent acts and thus are not liable to defend and hold harmless these parties under said Agreement.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to those individuals listed on the attached certificate this \_\_\_\_\_ day of May, 2003.

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MICHAEL J. ROPER  
Fla. Bar No. 0473227  
ERNEST H. KOHLMYER, III  
Fla. Bar No. 0110108  
BELL, LEEPER & ROPER, P.A.  
P. O. Box 3669  
Orlando, FL 32802-3669  
Telephone: (407) 897-5150  
Fax: (407) 897-3332  
Attorneys for Kissimmee Utility Authority

---

ALTON G. PITTS, P.A.  
Fla. Bar No. 063500  
P.O. Box 540447  
Orlando, FL 32854-0447  
Telephone: (407) 650-1610  
Fax: (407) 650-1611  
Attorney for Florida Municipal  
Power Agency

**CERTIFICATE OF TYPE FACE COMPLIANCE**

The undersigned counsel hereby certifies that the size and style of type used in this brief is: Times New Roman, 14-point.

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MICHAEL J. ROPER  
Fla. Bar No. 0473277  
ERNEST H. KOHLMYER, III  
Fla. Bar No. 0110108  
BELL, LEEPER & ROPER, P.A.  
P. O. Box 3669  
Orlando, FL 32802-3669  
Telephone: (407) 897-5150  
Fax: (407) 897-3332  
Attorneys for Kissimmee Utility Authority