

IN THE SUPREME COURT OF FLORIDA

PROVIDENT MANAGEMENT CORP.,
and LAURENCE N. BELAIR,

Petitioners,

v.

Case No. 96,000

Case No. 96,001

CITY OF TREASURE ISLAND, a
Florida municipal corporation,

Respondent.

ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF

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CERTIFICATE OF TYPE, SIZE AND STYLE

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I.

PRELIMINARY STATEMENT

This Court's review of the Second District Court of Appeal's opinion filed June 11, 1999 stems from following question certified to be one of great public importance:

DO THE LIMITATIONS ON LIABILITY IN SECTION 768.28, FLORIDA STATUTES (1989), APPLY TO A CLAIM FOR WRONGFUL INJUNCTION AGAINST A CITY THAT WAS NOT REQUIRED TO POST AN INJUNCTION BOND?

See City of Treasure Island v. Provident Mgmt. Corp., 24 Fla. L. Weekly D1379, D1381 (Fla. 2d DCA June 11, 1999). In the opinion below, the Second District found the City of Treasure Island liable in tort for "the incorrect decision" to "obtain . . . and to enforce" an injunction. *See id.* The Second District then found that obtaining and enforcing an injunction was an operational decision which subjected the City to a limited waiver of sovereign immunity under section 768.28, Florida Statutes (1989).

In the trial court proceedings, the City of Treasure Island ("the City") was the Plaintiff. Laurence N. Belair (Belair) and Provident Management Corporation (Provident) were co-defendants. Citations to the Record are referred to as (R. ____).

II.

STATEMENT OF THE CASE AND FACTS

As stated by the Second District, the facts of this case have been previously established by “several earlier decisions.” *See City of Treasure Island v. Provident Mgmt. Corp.*, 678 So. 2d 1322 (Fla. 2d DCA 1996); *Belair v. City of Treasure Island*, 611 So. 2d 1285 (Fla. 2d DCA 1992); *see also Provident Mgmt. Corp. v. City of Treasure Island*, 718 So. 2d 738 (Fla. 1998). Accordingly, Petitioners’ statement of the case and facts is superfluous.

Not only is Petitioners’ statement of the facts superfluous but it also contains numerous misquotes and misstatements and, in some instances, no record support. The most egregious example is Provident’s misstatement of the previous holding of this Court. In *Provident Management Corp. v. City of Treasure Island*, 718 So. 2d 738 (Fla. 1998), this Court held that Provident was “*entitled to seek the full measure of the damages it sustained by reason of the wrongfully issued preliminary injunction.*” *Id.* at 739 (emphasis added). In Provident’s initial brief, however, it repeatedly states that this Court held that Provident “*was entitled to ‘the full measure of damages it sustained by reason of the wrongfully issued preliminary injunction.’*” *See* Initial Brief of Provident at 1,2, 12 (emphasis added); *see also* Initial Brief of Belair at 6, 15.

Provident takes liberties not only with this Court’s language, but also with the record. As a result, Provident improperly injects argument into its statement of facts.

Without record support, Provident asserts the following in its brief:

- “Provident ran a *highly visible* multi-million dollar property management business . . .”
- “Provident developed an *extremely successful* business . . .”
- “Although no *critical* health, safety or welfare issues were at stake . . . Treasure Island elected to seek and obtain a temporary injunction against Provident and Belair.”

See Initial Brief of Provident at 1, 3 (emphasis added).

III.

SUMMARY OF ARGUMENT

As a threshold matter, this Court should not accept jurisdiction in this case and answer the certified question, because the question posed by the Second District Court of Appeal is not one of great public importance. Resolving the issue presented in the question will serve no useful purpose since the law in Florida is now clear. When a municipality wrongfully obtains an injunction there are two possible outcomes: (1) if no bond was obtained by the enjoined party, the enjoined party's damages will be limited to \$100,000 under section 768.28, Florida Statutes; (2) if a bond was obtained, the enjoined party will be entitled to damages under the bond which can exceed \$100,000.

If this Court decides to accept jurisdiction then the certified question should be answered in the negative and the decision below approved. To prevail in this case, Petitioners must show:

- (1) that a wrongful injunction is not a tort; and
- (2) regardless of whether it is a tort, that the City has somehow waived its sovereign immunity.

Petitioners have failed to do either in this case.

The limitations on liability found in section 768.28, Florida Statutes (1989), *do* apply to a claim for a wrongful injunction against a city that was not required to post a bond. First, the Second District was not clearly wrong when it determined that a wrongful injunction is a tort subject to the limited waiver of sovereign immunity in section 768.28. Although no court has found a wrongful injunction to be a strict liability form of malicious prosecution, as the Second District did, there is ample authority which holds that a wrongful injunction is a tort.

Second, the City has not waived sovereign immunity either by its counsel's statements or by seeking injunctive relief. With regard to the statements which allegedly constitute a waiver, this Court cannot even reach the merits of the issue because this issue is not before this Court. The trial court refused to address the issue of waiver; there is no record evidence of waiver; the parties never conducted discovery on the issue; and the trial court never made any findings on this issue. Moreover, Petitioners have not met their substantial burden of proving waiver and when Petitioners improperly raised the issue before the Second District, the court struck Provident's brief.

Nor did the City waive sovereign immunity by seeking an injunction. In Florida, sovereign immunity is the rule and a finding of sovereign liability is the exception. A waiver of sovereign immunity must be clear and unequivocal. Therefore, any reliance

upon decisions from jurisdictions where municipal liability is the rule and municipal immunity is the exception is simply misplaced.

Lastly, the City did not implicitly waive sovereign immunity because a wrongful injunction is not a contract breach. Even if this Court deems a wrongful injunction to be a contract breach, Petitioners should be precluded from asserting this position in *this* case because they have maintained inconsistent positions on this issue. Petitioners have repeatedly argued before the trial court and in the 1995 appeal to the Second DCA that a wrongful injunction was *not* a contract breach.

IV.

ARGUMENT

A. THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION IN THIS CASE BECAUSE IT DOES NOT PRESENT A QUESTION OF GREAT PUBLIC IMPORTANCE.

In this case, this Court has postponed its decision on jurisdiction. *See* Order Postponing Decision on Jurisdiction & Briefing Schedule, Nos. 96,000 & 96,001 (July 21, 1999). Respondent interprets this to mean that this Court has reserved jurisdiction until it can fully explore whether jurisdiction truly exists here. Respondent submits that this Court should not accept jurisdiction in this case because the question certified by the Second District is not one of great public importance.

The Florida Constitution provides that the supreme court “may review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance.” *See* Art. V, § 3(b)(4), Fla. Const.; *see also* Fla. R. App. P. 9.030(a)(2)(A). Use of the word “may” denotes sanction or authority and should not be construed as “shall.” *See Stein v. Darby*, 134 So. 2d 232, 237 (Fla. 1961), *overruled in part on other grounds by Snedeker v. Vernmar, Ltd.*, 151 So. 2d 439 (Fla. 1963). Therefore, this Court is not required to decide this case. In fact, this Court has previously declined to answer certified questions it has regarded as too insignificant,

see id., where the question is irrelevant, or where answering it would serve no “useful purpose.” *See Zirin v. Charles Pfizer & Co.*, 128 So. 2d 594, 597 (Fla. 1961).

Given the current state of the law, answering the certified question in this case would serve no “useful purpose.” *See Zirin*. In light of the decisions from this Court and the Second District Court of Appeal, the current state of the law in Florida is now clear: When an injunction is wrongfully obtained, municipalities will be liable up to \$100,000 *in the absence of an injunction bond*. *See City of Treasure Island v. Provident Mgmt. Corp.*, 24 Fla. L. Weekly D1379, D1381 (Fla. 2d DCA June 11, 1999). Parties must be vigilant and obtain an injunction bond if they believe their damages will exceed \$100,000.¹ *See Provident Mgmt. Corp. v. City of Treasure Island*, 718 So. 2d 738, 739 (Fla. 1998); *Parker Tampa Two, Inc. v. Somerset Development Corp.*, 544 So. 2d 1018, 1021 (Fla. 1989). Accordingly, since this area of law is already settled by decisional law, answering the certified question will serve

¹In this case, one of the most salient facts is that Petitioners never appealed the failure of the trial court to require a bond. *See City of Treasure Island v. Provident Mgmt. Corp.*, 678 So. 2d 1322, 1324 (Fla. 2d DCA 1996) (“In this case the trial court dispensed with the bond. The briefs in the nonfinal appeals reveal that neither Mr. Belair nor Provident argued this decision was an abuse of discretion.”) Regardless of the reason why no bond was required, Petitioners failed to argue on appeal of the temporary or permanent injunction that it would incur damages as a result of the injunction. Only now after numerous appellate opportunities, do Petitioners again ask this Court to exonerate them from their successive errors in failing to request any court to review the trial court’s decision to dispense with a bond.

no useful purpose. Therefore, this Court should decline to accept jurisdiction in this case.

B. ASSUMING THIS COURT ACCEPTS JURISDICTION, THE LIMITATIONS ON LIABILITY IN SECTION 768.28, FLORIDA STATUTES (1989), APPLY TO A CLAIM FOR WRONGFUL INJUNCTION AGAINST A CITY THAT WAS NOT REQUIRED TO POST AN INJUNCTION BOND.

It is well established in Florida that the state cannot be sued without its consent. This is because the immunity of a sovereign is part of the public policy of the state; it is enforced as a protection of the public against profligate encroachment on the public treasury. 48 Fla. Jur. 2d *State of Florida* § 224 (1981). By constitutional authority, however, provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating. The legislature is the proper body to authorize suits against the state. Thus, any change in the rule of sovereign immunity must be effected by constitutional amendment, or by appropriate legislation, or both. *Id.*

In Florida, the bedrock of sovereign immunity is Article X of the Florida Constitution. Section 13 of Article X provides: “Provision may be made by general law for bring suit against the state as to all liability now existing or hereafter originating.” As of January 1, 1975, *see* § 768.30, Fla. Stat. (1997), the legislature enacted a limited

waiver of sovereign immunity for agencies and subdivisions of the state. This waiver of sovereign immunity only applies to torts and then only to the first \$100,000 of any claim or judgment by any one person. *See* § 768.28(1), (5), Fla. Stat. (1997). Accordingly, for section 768.28, Florida Statutes (1989), to apply to this case, a wrongful injunction must be in the nature of a tort.

Florida courts have repeatedly interpreted the language of Article X, Section 13 as providing absolute sovereign immunity for the state and its agencies absent a *waiver* by legislative enactment or constitutional amendment. *See Circuit Court of Twelfth Judicial Cir. v. Dep't of Natural Resources*, 339 So. 2d 1113, 1114 (Fla. 1976); *see also Pan-Am Tobacco Corp. v. Dep't of Corrections*, 471 So. 2d 4, 5 (Fla. 1984) (“In Florida, sovereign immunity is the rule, rather than the exception”). Any waiver of sovereign immunity must be clear and unequivocal and can only be accomplished by unambiguous language in a statute provided by the Legislature in general law. *See Manatee County v. Town of Longboat Key*, 365 So. 2d 143, 147 (Fla. 1978).

Therefore, in order to prevail in this case, Petitioners must show this Court either: (1) that obtaining a wrongful injunction is not a tort and, further, that sovereign immunity has been waived for whatever their cause of action is now to be labeled; or (2) that notwithstanding the tortious nature of a wrongful injunction, the City has somehow waived its sovereign immunity. For the reasons discussed below, Petitioners

are unable to establish either the non-tortious nature of a wrongful injunction or a waiver of sovereign immunity. Therefore, the decision of the Second District below should be approved and the certified question answered in the negative.

1. *Section 768.28, Florida Statutes (1989) Applies to Petitioners' Claim for Wrongful Injunction Because the Second District Was Not Clearly Wrong in Finding That a Wrongful Injunction Is a Tort.*

Although the City still adheres to its position that a wrongful injunction is neither a contract nor a tort, the City concedes that there is some authority to support the Second District's conclusion that a wrongful injunction is a tort. *See Provident*, 718 So. 2d at 741 (“This is not a tort action . . .”) (Overton, J., dissenting). In the decision below, however, Judge Altenbernd, writing for the Second District, found that a wrongful injunction “appears to be” a strict liability form of malicious prosecution:

We have struggled with the nature of a claim for wrongful injunction. It clearly is not a claim in contract. It appears to be a form of strict liability, in the sense that the city attorney does not need to be negligent or to commit malpractice for liability to exist. Indeed, the City is liable in this case, even though the injunction appeared proper to this court upon initial appellate review.

The injunction itself is equitable in nature and was obtained by invoking the jurisdiction of the judicial branch. The remedy for wrongful injunction, however, is monetary damages. It is difficult to distinguish these damages from the damages that might have occurred if a city truck driver had negligently driven a dump truck into the rental office, closing the rental operation for a period of months. The fact that the judicial branch of government is involved in creating these damages does not distinguish this claim from one sounding in malicious prosecution.

Indeed, wrongful injunction appears to be a strict liability version of malicious prosecution.

See City of Treasure Island, 24 Fla. L. Weekly at D1380.²

In Florida, only one case (other than the instant case) has expressly classified a wrongful injunction as a tort, although without explanation. In *Proctor v. Commercial*

²Importantly, Judge Altenbernd recognized that the judiciary should bear some liability for damages in this instance since it acted upon evidence presented in a fully developed, evidentiary proceeding. *See City of Treasure Island*, 24 Fla. L. Weekly at D1381 (“[W]e question whether we have the power to place unlimited liability on a municipality or an arm of the executive branch when it, in good faith, but erroneously, convinces us to impose injunctive relief.”). This Court employed the same rationale in *Parker Tampa Two, Inc. v. Somerset Development Corp.*, 544 So. 2d 1018 (Fla. 1989):

Limiting liability to bond amount thus provides an orderly step-by-step procedure whereby all parties can be continually apprised of the consequences of their actions. . . .

Limiting liability to the bond amount can also be viewed as an equitable way of apportioning liability between the two entities generally at fault in the issuance of a wrongful injunction, i.e., the obtaining party and the court. The obtaining party often is at fault for asking the court to act hastily, requiring it to dispense with normal procedural safeguards. The court, on the other hand, at times simply misreads or misapplies the law independent of any time constraint imposed upon it by the obtaining party. Limiting liability to the bond amount strikes a median between holding the court fully liable (in which case no recovery could be had), and holding the obtaining party fully liable.

Id. at 1021.

Consistent with the rationales espoused by this Court and Judge Altenbernd, there is no basis for wrongful injunction damages in *this* case. The permanent injunction was entered only after a protracted five-month, evidentiary proceeding.

Bank of Okeechobee, 373 So. 2d 943 (4th DCA 1979), which was not cited by the Second District in the decision below, the court stated in pertinent part:

This is a lawsuit alleging a tort. . . . The suit is generally about an alleged wrongful injunction obtained by appellant against the Sheriff of Marion County preventing the execution sale. . . .

Id. at 944.

In another case classifying a wrongful injunction as a tort, the court stated, “The wrong of obtaining an invalid injunction is an action sounding in tort.” *See County of Lake v. Cuneo*, 100 N.E.2d 521, 525 (Ill. App. Ct. 1951). The *Cuneo* court, like the *Proctor* court, did not explain its rationale. Nevertheless, the logic of *Cuneo* was followed and adopted in *The Village of Wilsonville v. Earthline Corp.*, 382 N.E.2d 689 (Ill. App. Ct. 1978). However, Judge Reardon filed a spirited dissent in *Earthline*, stating:

The *Cuneo* court erred when it found the wrongful issuance of an injunction to be a tort. In *Chicago Title & Trust Co. v. City of Chicago*, 110 Ill. App. 395, aff’d 209 Ill. 172, 70 N.E. 572 (1904), the court stated:

The contention of counsel – not supported by any of the cases they cite – that no definite proof from which damages can be computed is requisite, that the complainant having obtained an injunction which was dissolved occupies the position of a tortfeasor, and that damages should be awarded upon that theory, is not tenable. The assessment should not exceed the damages actually sustained. An injunction is not the act of the party applying for it, but the act of the court. It issues because the court is of the opinion it ought to issue

and so orders. No wrong is committed by the applicant although it be dissolved, unless he was acting maliciously and without probable cause.

However, there is no precedent in the jurisprudence of any state which supports the Second District's specific conclusion that a wrongful injunction is a strict liability version of malicious prosecution. Nevertheless, the City does not believe the Second District's conclusion that a wrongful injunction is a tort was without legal support.

2. *The City Has Not Waived And Is Not Estopped From Asserting Sovereign Immunity Beyond the Limited Waiver Found in Section 768.28, Florida Statutes (1989)*

a. *Section 768.28, Florida Statutes (1989) applies to Petitioners' claim for wrongful injunction because there is no issue of fact with regard to waiver.*

Petitioners have repeatedly argued that two statements made by counsel for the City waived its sovereign immunity or estopped it from asserting sovereign immunity. *See Provident*, 718 So. 2d at 740; *see also* (R. 2639). Aside from the fact that the statements quoted by Petitioners lack any context and do not estop the City from asserting sovereign immunity, *see City of Treasure Island*, 24 Fla. L. Weekly at D1381 n.6 (holding that "the comments of the City's attorney quoted in the supreme court's opinion were insufficient to estop the City from raising sovereign immunity"), any

argument that the statements were tantamount to a waiver of sovereign immunity or estoppel to assert it is not properly before this Court.

First, the issue of waiver/estoppel has never been briefed and the trial court explicitly precluded this as an issue. *See Sierra v. Public Health Trust of Dade County*, 661 So. 2d 1296, 1298 (Fla. 3d DCA 1995) (holding that “[a]ppellate courts may not decide issues that were not ruled on by a trial court in the first instance”); *Cabral v. Diversified Servs., Inc.*, 560 So. 2d 246, 247 (Fla. 3d DCA 1990) (holding that “only questions that were before the trial court may be reviewed on appeal”). On March 24, 1994, after finding the City not immune under the doctrine of sovereign immunity, the trial court stated: “In light of the Court’s findings above, the Court finds it unnecessary to consider any issues of waiver or estoppel.” (*See* R. 2772-74) (Order Denying Treasure Island’s Motion for Rehearing and/or Reconsideration, Motion for Clarification, and Amended and Supplemental Motion for Summary Judgment). Despite the trial court’s finding, on appeal Provident’s answer brief before the Second District contained argument pertaining to waiver and estoppel. *See* Answer Brief of Provident at 25-27 (Appeal Nos. 95-00806, 95-00807). The City’s motion to strike this argument was granted by the Second District. *See* Order Granting Appellant’s Motion to Strike Answer Brief, Nos. 95-00806 & 95-00807 (Fla. 2d DCA Nov. 3, 1995).

Second, even if this Court finds waiver and/or estoppel to be an issue before this Court, there is no record evidence on either issue. The parties never conducted discovery on either issue and, since they were never issues below, the trial court never made any factual or legal findings on this issue. *See Patterson v. Weathers*, 476 So. 2d 1294, 1296 (Fla. 5th DCA 1985) (holding that “an appellate court cannot reverse a trial court on the basis of facts which were not presented to the trial court, and therefore are not part of the record on appeal”).

Moreover, the second of these two statements was made nine months *after* entry of the judgment in federal court, (*see* R. 2639), after Provident sued the trial judge claiming it could not get a fair hearing in state court. (*See* R. 2637-2686). Even assuming that these post-judgment statements could create a waiver or estoppel situation, comments of counsel in open court cannot form the basis for a waiver of any right or privilege of a governmental entity, absent a showing of express authority to make such a waiver. *See State Dep’t of Health & Rehab. Servs. v. Law Offices of Donald W. Belveal*, 663 So. 2d 650, 652 (Fla. 2d DCA 1995) (holding that unwritten word of HRS employees did not estop the sovereign since they did not constitute “clear and convincing evidence of ‘a positive act on the part of some officer of the state’”); *Greenhut Constr. Co. v. Henry A. Knott, Inc.*, 247 So. 2d 517, 524 (Fla. 1st DCA

1971) (holding that “[u]nder no circumstances may the state be estopped by the unauthorized acts or representations of its officers”).

Finally, Petitioners have not met their burden of proving that the City is estopped from asserting sovereign immunity. As the Second District correctly noted, a party has a substantial burden to prove that a sovereign is estopped from asserting sovereign immunity. *See City of Treasure Island*, 24 Fla. L. Weekly at D1381. Generally, equitable estoppel should be applied against a sovereign in only “rare instances” and under “exceptional circumstances.” *See North American Co. v. Green*, 120 So. 2d 603, 610 (Fla. 1959); *Law Offices of Donald W. Belveal*, 663 So. 2d at 652. Since there is absolutely no record on this issue in this case, Petitioners have not proven this case to be one of the “rare instances” or “exceptional circumstances” where equitable estoppel should be applied against a sovereign. In light of the foregoing, there is no issue of *fact* regarding whether the City waived sovereign immunity or should be estopped from asserting it.

- b. Neither the provisions of section 768.28, Florida Statutes (1989), nor those of article X, section 13 of the Florida Constitution were waived by the City’s initiation of injunctive proceedings against the Petitioners**

In *Provident Management Corp. v. City of Treasure Island*, 718 So. 2d 738 (Fla. 1998), Provident argued to this Court that the City could not avail itself of the “sword” of the court system and, when its actions are wrongful, retreat behind the “shield” of sovereign immunity. See Initial Brief of Provident at 25-27 (Case Nos. 89,093 & 89,094). One of the Justices on this Court subscribed to Provident’s argument. See *Provident*, 718 So. 2d at 740 (Wells, J., concurring). Justice Wells wrote that “[w]hen the governmental body invokes a court’s equitable jurisdiction, it necessarily casts aside its cloak of immunity and is like any other litigant.” *Id.* To support this proposition, Justice Wells cited to cases from Oklahoma, Minnesota, and Connecticut. See *State v. Kilburn*, 69 A. 1028, 1030 (Conn. 1908); *State v. Bucholz*, 210 N.W. 1006 (Minn. 1926); *State ex rel. Comm’rs of Land Office v. Sparks*, 253 P.2d 1070, 1074 (Okla. 1953).

However, in each one of these states there is a blanket waiver of sovereign immunity for municipalities except where the legislature has specifically reserved it. See generally Okla. Stat. Ann. tit. 51, §§ 151-171 (West 1997); Ch. 466, Minn. Stat. (1998). In Oklahoma, the legislature has decreed that unless a “limitation or exception” applies:

The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their

employment subject to the limitations and exceptions specified in this act

...

See Okla. Stat. Ann. tit. 51, § 153(A) (West 1997). Section 155(4), Oklahoma Statutes

Annotated, then sets out certain “exemptions from liability” which include:

The state or a political subdivision shall not be liable if a loss or claim results from . . . [a]doption or enforcement of or failure to adopt or enforce a law, whether valid or invalid, including, but not limited to, any statute, charter provision, ordinance, resolution, rule, regulation or written policy.

In Minnesota, section 466.02, Minnesota Statutes (1998), provides for the general tort liability of municipalities. It provides:

Subject to the limitations of section 466.01 to 466.15, every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function.

Section 466.03, Minnesota Statutes (1998), delineates the exceptions to this general rule of tort liability. *See* Minn. Stat. § 466.03(1) (1998) (stating that “[s]ection 466.02 does not apply to any claim enumerated in this section”); *id.* § 466.03(5) (section 466.02 does not apply to “[a]ny claim based upon an act or omission of an officer or employee, exercising due care, in the execution of a valid or invalid statute, charter, ordinance, resolution, or rule”).

Since Oklahoma preserves sovereign immunity for actions to “enforce a law, whether valid or invalid,” as does Minnesota, it would appear that the City would be

sovereignly immune from damages resulting from its ill-fated injunction under both Oklahoma and Minnesota law as well.

In Connecticut, while the state has sovereign immunity from suit, municipalities do not. *See Tango v. City of New Haven*, 377 A.2d 284, 285 (Conn. 1977); *Cone v. Town of Waterford*, 259 A.2d 615, 616 (Conn. 1969); *Fukelman v. City of Middletown*, 492 A.2d 214, 214 (Conn App. Ct. 1985). Rather, municipal governments have a limited immunity from liability when they act in the performance of a governmental duty. *See Tango*, 377 A.2d at 285; *Cone*, 259 A.2d at 616.

Unlike these states, the Florida Constitution declares sovereigns to be immune except when waived by the Legislature. *See* Art. X, § 13, Fla. Const. In fact, any waiver of sovereign immunity must be clear and unequivocal and can only be accomplished by unambiguous language in a statute enacted by the legislature. *See Manatee County v. Town of Longboat Key*, 365 So. 2d 143, 147 (Fla. 1978). Therefore, in Florida the rule is immunity; the exception is waiver. In Oklahoma, Minnesota, and Connecticut, however, the rule is municipal liability; the exception is immunity. Accordingly, any reliance on decisions from these states to find a waiver in this case is improper and not grounded in the law of Florida. Waiver of sovereign immunity in Florida is province of the legislature not the province of the courts.

Moreover, the fact that there has been no waiver by the City's initiation of injunctive proceedings against Petitioners is supported by case law. Generally, a waiver of sovereign immunity must be unequivocal and the mere filing of a lawsuit does not constitute a waiver of sovereign immunity. *See, e.g., Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987); *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715 (9th Cir. 1986); *Chemehuevi Indian Tribe v. California State Board Of Equalization*, 757 F.2d 1047 (9th Cir. 1984), *rev'd on other grounds*, 474 U.S. 9 (1985).

- c. **Section 768.28, Florida Statutes (1989), applies to Petitioners' claim for wrongful injunction because a wrongful injunction is not a contract breach and Petitioners have maintained inconsistent positions on this issue.**

Sovereign immunity has been waived in this state only for actions sounding in tort, *see* discussion, *supra*, and contract. *See Provident*, 718 So. 2d at 741 (Overton, J., dissenting). In *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d. 4 (Fla. 1984), this Court was asked to resolve the following question certified by the First District as a matter of great public importance:

When a state agency improperly rescinds an express executory contract with a private vendor who suffers a loss of profit as a consequence, may the state invoke sovereign immunity as a bar to an action on the breach of contract?

Id. at 5. Although the Florida Supreme Court did not expressly hold in *Pan Am Tobacco* that the legislature waived sovereign immunity for contract claims, it held that a private party should be able to sue a governmental agency in breach of contract on a contract the state authorized the governmental agency to procure. The court stated:

We recognize that in so holding we recede from a line of cases holding that the state may not be sued in contract without express consent to the suit. . . .

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.

Id. at 5-6 (citations omitted). Accordingly, Petitioners must prove that the wrongful injunction was some type of contract breach. They have failed to do so in this case.

Even if this Court believes that a wrongful injunction is a contract, Petitioners, *in this case*, should be not be allowed to maintain such a position. Not only have Petitioners never alleged that a wrongful injunction is a contract breach, *see Provident*, 718 So. 2d at 741 (“[T]here is no allegation of a contract breach.”), but Petitioners have maintained the exact opposite – that a wrongful injunction *is neither* a contract breach *nor* a tort.

In this case, Provident contends in its initial brief that “[t]o treat a claim for wrongful injunction like a contract action makes sense.” *See* Initial Brief of Provident at 18; *see also* Initial Brief of Belair at 18 (“this case was analogous to a contract

action”). Until review before this Court, Petitioners had *never* considered a wrongful injunction a contract breach action.

Petitioners argued before the trial court and in the 1995 appeal to the Second District that a wrongful injunction was not a contract. At the hearing on the Motion for Rehearing held on February 3, 1995, counsel for Provident stated:

This action lies neither in tort nor in contract. . . . This is not a tort. . . . And it's not a contract. It is neither. It is a case where the municipality has availed itself just as a private litigant of judicial proceedings to seek relief. It has used the sword of the court process to seek relief. It cannot now go behind the shield of sovereign immunity when it finds--when the consequences of going into the court have worked in a way that they are not pleased with.

(Tr. 7-8) (filed on or around June 6, 1995). Before the Second District, Provident argued:

TREASURE ISLAND's discussion simply misses the point . . . PROVIDENT has not sued TREASURE ISLAND for breach of contract, negligence or any other cause of action.

See Amended Answer Brief of Provident at 28 (Case Nos. 95-00806, 95-00807) (filed in Second DCA). Ultimately, the Second District agreed that a wrongful injunction is not a contract. *See City of Treasure Island*, 24 Fla. L. Weekly at D1380.

Finally, even this Court concludes that Petitioners should not be prevented from asserting that a wrongful injunction is a contract, their argument is incorrect. A wrongful injunction is not in the nature of a contract. *See City of Treasure Island*, 24

Fla. L. Weekly at D1380 (holding that a wrongful injunction is “clearly . . . not a claim in contract”). The elements of a contract are an offer, acceptance and consideration. *See Donahue v. Davis*, 68 So. 2d 163, 170 (Fla. 1953). Those elements are not present here.³

³Respondent believes that if there had there been an injunction bond, the analysis might be different.

CONCLUSION

Respondent, City of Treasure Island respectfully requests this Court to decline jurisdiction in this case. In the alternative, Respondent requests this Court to answer the certified question in the negative and to approve the decision below of the Second District Court of Appeal.

BUTLER BURNETTE PAPPAS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to the following persons this 25th day of October, 1999:

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