
IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,000

PROVIDENT MANAGEMENT CORPORATION,

Petitioner,

vs.

CITY OF TREASURE ISLAND,

Respondent.

ON REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
LAKELAND FLORIDA

**PETITIONER PROVIDENT MANAGEMENT CORPORATION'S
INITIAL BRIEF ON THE MERITS**

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INTRODUCTION

This appeal arises out of a claim for damages by Provident Management Corporation (“Provident”) resulting from a wrongful injunction. Before this case began, Provident ran a highly visible multi-million dollar property management business at the Land’s End Condominium development in the City of Treasure Island. However, four years into the operation of Provident’s business at Land’s End, Treasure Island elected to secure a temporary injunction against Provident that completely destroyed that business. The Second District Court of Appeal ultimately held the injunction to be wrongful. Provident returned to the trial court and obtained a damage award compensating it for the loss of its business.

This is Provident’s second trip to this Court seeking to vindicate its right to recover damages for its business wrongfully destroyed by Treasure Island. In the case’s first appearance, this Court confirmed that Provident’s right to recover damages was not limited by the fact that the City did not post a bond. *Provident Management Corp. v. Treasure Island*, 718 So. 2d 738 (Fla. 1998) (“*Provident I*”). Reversing the Second District Court of Appeal’s decision to the contrary, this Court held that Provident was entitled to “the full measure of damages it sustained by reason of the wrongfully issued preliminary injunction.” *Provident I*, 718 So. 2d at 739.

On remand, the Second District reversed Provident’s damage award once again, this time holding that Provident’s recovery was limited by the doctrine of sovereign immunity. Recognizing that its ruling was “difficult to square” with this

Court's holding in *Provident I* that Provident is entitled to the "full measure" of its damages, the Second District nevertheless ruled that a wrongful injunction action is "best categorized" as a tort and, as a result, Provident is subject to the \$100,000 damage limitation imposed by Section 768.28, Florida Statutes. On rehearing, the Second District certified the sovereign immunity issue to this Court.

In this brief, Provident demonstrates that sovereign immunity does not apply. First, sovereign immunity is inconsistent with this Court's holding that a party wrongfully enjoined is entitled to recover the "full measure" of its damages. Moreover, Provident's right of action is not in the nature of a tort. The power to award injunction damages is a recognition of a court's equitable power to set the terms and conditions upon which an injunction will issue. Here, the trial court granted the injunction based on Treasure Island's acknowledgment that it would be fully liable to Provident in the event the injunction were reversed. In the same way that trial courts have the power to require a bond, courts have the power to issue an injunction premised on the understanding that the enjoined party will be made whole. As demonstrated below, this sound public policy properly balances the interests of the government against the rights of the party subject to the injunction.

STATEMENT OF THE CASE AND FACTS

Provident developed an extremely successful business devoted to securing rentals for absentee unit owners at the Land's End condominium development in Treasure Island. Provident invested significant time and resources in developing contractual relationships with unit owners and a steady client base of renters (R. 3257-60, 3262-63, 3289-90). After four years of successful operations, Treasure Island demanded that Provident cease and desist its management of rental agreements for the Land's End unit owners, claiming that such activity violated Treasure Island's zoning ordinances. *Belair v. City of Treasure Island*, 611 So. 2d 1285, 1287-88 (Fla. 2d DCA 1992), *rev. denied*, 624 So. 2d 264 (Fla. 1993).

Treasure Island brought suit against Provident and an individual unit owner at Land's End, Laurence Belair. Although no critical health, safety or welfare issues were at stake (and against the wishes of the overwhelming majority of the unit owners), Treasure Island elected to seek and obtain a temporary injunction against Provident and Belair without waiting for a final hearing from the trial court, let alone a definitive ruling from the appellate court, concerning the proper application of the zoning ordinance.¹ The temporary injunction completely shut down Provident's rental activity at Land's End. *Id.* at 1288. The temporary injunction was later made permanent. *Id.*

There was never any question about the extraordinary damages Provident

¹ In support of the temporary injunction, Treasure Island only presented evidence that a few of the unit owners at Land's End were inconvenienced by Provident's rental program (R. 1400-01).

faced as a result of the injunction. To support its arguments during the injunction proceedings, Treasure Island itself represented that Provident was making profits in excess of \$500,000 per year managing a rental operation with gross revenues for the year following the injunction projected at \$2.3 million (R. 1392-94). Through these arguments Treasure Island hoped to show that, because Provident was extremely profitable, Provident was engaged in a prohibited commercial enterprise. Even the trial court judge complimented Provident on its “obviously successful business activity” (R. 2956, 3235-37).

As it was designed to do, the broad scope of the injunction halted Provident’s entire Land’s End operation. Treasure Island argued for and received an injunction that prohibited Provident from engaging in *any* rental activity at Land’s End (R. 1844-49). Other real estate companies, however, were not so restricted. Provident’s customers quickly moved their business to other realtors who continued to rent Land’s End units from their off-site offices without any intervention from Treasure Island authorities (R. 3293-95).

After entry of the injunction, Provident’s gross annual rental revenues from Land’s End dropped from roughly \$2,000,000 to zero. Likewise, Provident’s significant net income from Land’s End turned into significant losses as rental activity fell to zero and Provident expended substantial legal fees in defense of the injunction (R. 3289-90). Although the injunction permitted Provident to honor its current contracts with unit owners up through their yearly renewal date (as to existing rental reservations only), Provident was precluded from entering into any new contracts or renewing any of the existing contracts at their expiration and was

precluded from soliciting future rentals pursuant to its existing contracts. By June 3, 1991, Provident's number of rental contracts had dropped from 104 to zero (R. 3290).

Recognizing the magnitude of the harm Provident faced, counsel for Provident raised the issue of an injunction bond at the hearing on the motion for temporary injunction. Treasure Island, however, argued and the trial judge ruled that Treasure Island was not required to post a bond to secure the injunction under Rule 1.610(b), Florida Rules of Civil Procedure (R. 1487-88). Rule 1.610(b) gives the trial court the discretion to dispense with a bond in injunctive actions brought by governmental entities.² Exercising this discretion, the trial judge ruled that a bond was unnecessary because Treasure Island was financially solvent and had the ability to answer for damages. The following exchange occurred between counsel and the trial judge regarding the bond:

Mr. Ferguson (counsel for Provident): There is a bond issue here. It's undisputed, I think, from the testimony, that these people can lose substantial income.

The Court: I don't think a municipality is required to post a bond.

² Rule 1.610(b) provides: "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 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 supplied).

Mr. Foreman (counsel for Treasure Island): We are not required to post a bond.

The Court: They have unlimited resources. If they [Provident] are damaged they [Provident] can sue them [Treasure Island]. The law says they are not required to put a bond up. I mean I didn't pass that law, that is a Statute.

Mr. Foreman: There you go.

Id.

Concluding that Provident could sue Treasure Island for its wrongful injunction damages, the court entered the temporary injunction and, based on Rule 1.610(b), excused Treasure Island from posting a bond (R. 646-49). As ordered by the injunction, Provident closed its offices at Land's End and ceased all Land's End rental activities.

At the end of the injunction hearing, there was no question where the parties stood. The trial court had relieved Treasure Island of the obligation to post a bond, but only because the City had "unlimited resources" (R. 1487). The trial court had also confirmed that Provident could sue the City for its damages (R. 1487-88). The City raised no issue regarding sovereign immunity and sought no limitation of its potential damage exposure.

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The City reconfirmed its undertaking to pay damages shortly thereafter in defending against a federal civil rights lawsuit filed by Provident. In arguing to

³ Had the City voluntarily posted a bond, it could have limited its damage exposure to the amount of the bond. *See Parker Tampa Two, Inc. v. Somerset Development Corp.*, 544 So. 2d 1013 (Fla. 1989).

District Judge Castagna that the federal court should abstain in favor of the state injunctive proceeding, Treasure Island represented to the court that it would pay damages to Provident in the event the injunction proved wrongful. According to counsel for Treasure Island:

. . . If the state court determines that this order is improvidently entered at any point in time, then there are going to be some damages against the City. This Court knows more about injunctions than I'm ever going to know. And the Court knows that if its improvidently entered anywhere, there are going to be damages against the City.

(R. 2639).

Treasure Island's injunction was wrongful. In December, 1992, the Florida Second District Court of Appeal reversed the injunction, finding that Provident's rental activity did not violate Treasure Island's zoning code. *Belair*, 611 So. 2d at 1285. Following the Second District's reversal of the injunction, Provident filed a motion for an award of damages, attorneys' fees and costs for wrongful injunction against Treasure Island (R. 2427-31).

In response, Treasure Island moved to strike Provident's request (R. 2447). For the first time, Treasure Island took the position that Provident was, as a matter of law, precluded from recovering its wrongful injunction damages. Treasure Island argued that Provident's damages for wrongful injunction were limited to the amount of the injunction bond and, because Treasure Island had not been required to post a bond, Provident was not entitled to recover any damages (R. 2447-48). Treasure Island also filed a motion for summary judgment on Provident's damages claims in which it asserted the same arguments contained in the motion to strike (R. 2441-43).

Treasure Island later added an argument that sovereign immunity protected it from Provident's claims.

Provident responded to Treasure Island's motions to strike and for summary judgment, pointing out that Treasure Island was excused from posting an injunction bond only because it was a municipality, not because the trial court intended to relieve Treasure Island from the obligation of paying damages should its injunction ultimately be declared wrongful (R. 2505-14). Provident also contended that, even if a trial court's decision to excuse a municipality from posting an injunction bond generally precludes the enjoined party from seeking wrongful injunction damages, Treasure Island waived or is estopped from claiming that protection in this case (R. 2705-07, 2713-19). As the basis of its waiver and estoppel arguments, Provident cited Treasure Island's acknowledgement of its potential responsibility for wrongful injunction damages throughout the course of the litigation (R. 2516-18, 2705-07).

Treasure Island's defenses were all rejected by the trial court (R. 2772-74). The court ruled that Treasure Island was not immune from damages merely because the predecessor trial judge had exercised his discretion not to require Treasure Island to post a bond. *Id.* The court also rejected Treasure Island's new sovereign immunity defense. *Id.*

The parties then proceeded to an evidentiary hearing to determine the amount of Provident's wrongful injunction damages. *Id.* After eight days of testimony, including the testimony of numerous experts, the trial court found that the temporary injunction had completely destroyed Provident's business as of June 3, 1991, the day of Provident's last rental at Land's End (R. 3214-19). The court awarded

Provident damages of \$1,158,000.00, representing the value of Provident's destroyed business. The trial court also awarded Provident its attorneys' fees incurred in overturning the injunction plus pre-judgment and post-judgment interest (R. 3214-19).

The Second District Court of Appeal reversed holding that, absent a bond, Provident had no right to recover damages, even though the trial judge exercised its discretion to dispense with the bond based solely on the City's solvency. *City of Treasure Island v. Provident*, 678 So. 2d 1322 (Fla. 2d DCA 1996). The court, however, recognized the consequences of its decision, expressly warning trial judges henceforth to use extreme caution in exercising their discretion to dispense with the bond under Rule 1.610(b). *City of Treasure Island*, 678 So. 2d at 1325 n.3.

Provident I is Decided

Believing the Second District's decision to deny Provident its damages to be in error, Provident petitioned this Court for review. This Court accepted jurisdiction and reversed. *Provident I*, 718 So. 2d 738. This Court held that the trial court's decision to dispense with the bond did not relieve Treasure Island of liability. According to this Court, "where a court 'dispense[s] with a bond' pursuant to the provisions of Rule 1.610(b), the enjoined party is entitled to seek the full measure of the damages it sustained by reason of the wrongfully issued preliminary injunction." *Id.* at 739 (brackets in original). The case was remanded to address any issues left unresolved. *Id.* at 749.

On remand, the Second District held that Provident's damage award was supported by

competent substantial evidence. The court ruled, however, that the doctrine of sovereign immunity applied. Stating that Provident's claim for wrongful injunction damages was "best characterized" as a tort, the court held that Provident's right to recover damages was limited by the \$100,000 cap imposed by Section 768.28, Florida Statutes. Thus, the court reversed the damage award and ordered the trial court to enter a judgment restricting execution of any amount over \$100,000. *City of Treasure Island v. Provident Management Corp.* 24 Fla. L. Weekly D1379 (Fla. 2d DCA June 11, 1999).

On rehearing, the Second District granted Provident's motion for certification and certified the following sovereign immunity question to this Court as a question 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?

Id. at D1381.

Provident's timely appeal followed.

SUMMARY OF THE ARGUMENT

This Court has already ruled in *Provident I* that Provident is entitled to the “full measure” of the damages it suffered as a result of the wrongful injunction. Even the District Court recognized that its decision to grant the City sovereign immunity was “difficult to square” with this ruling. The decision is also impossible to square with Florida law holding that parties wrongfully enjoined may recover their damages. The City is like every other litigant seeking an injunction. Having invoked the equitable powers of the court to shut Provident down, the City is subject to the court’s power to enforce the terms and conditions upon which the injunction was entered. As this Court has already held in *Provident I*, it was clear to all parties to this case that the City would be liable for damages in the event the injunction were overturned.

To adopt the City’s approach would ill-serve the interests of city and county governments regularly forced to seek injunctions. If the government is immune from damages, trial courts will be very reluctant to grant injunctions in the future. Provident’s approach assures that the interests of the City and the defendant are carefully balanced. The City can obtain an injunction without posting a bond. If the City wishes to cap its liability, it can do so. Most importantly, the trial court can grant that injunction secure in the knowledge that, if the injunction is wrongful, the defendant can be made whole.

The decision of the Second District Court of Appeal should be reversed.

ARGUMENT

SOVEREIGN IMMUNITY DOES NOT INSULATE TREASURE ISLAND FROM WRONGFUL INJUNCTION DAMAGES

Treasure Island was unrelenting in its efforts to secure and enforce an injunction against Provident — an injunction that lasted over four years and completely destroyed Provident’s business. Throughout this case, Treasure Island had full knowledge of the value of Provident’s business at Land’s End and knew that the injunction would completely shut that business down. Both the trial judge and Treasure Island specifically acknowledged that Treasure Island was financially sound and that Provident could sue Treasure Island for its damages in the event the injunction were reversed. Treasure Island even obtained the dismissal of Provident’s federal lawsuit using the same argument that Provident had a remedy for wrongful injunction damages in the state court.

Recognizing Treasure Island’s acknowledgment of its liability, this Court has already ruled that, despite the absence of a bond, Provident is entitled to the “full measure” of its damages. For precisely the same reasons articulated by *Provident I*, this Court should reject the sovereign immunity defense accepted by the Second District below. As demonstrated by *Provident I*, the City’s sovereign immunity argument is blatantly inequitable and contrary to precedent and public policy. The effect of the decision below is either to leave the victims of wrongful injunctions with a sharply limited remedy or to make it much more difficult and expensive for a municipality to obtain an injunction. Neither result is acceptable or necessary.

A. Parties Wrongfully Enjoined are Entitled to be Made Whole.

Perhaps the most extraordinary remedy available to any litigant is the power to obtain a preliminary injunction. Prior to any resolution on the merits, and often in great haste and without a full hearing, the successful applicant for an injunction obtains immediate relief — many times to the severe detriment of the party being enjoined. Recognizing the consequences of an erroneous decision, courts balance this extraordinary remedy with the responsibility to pay damages if the injunction proves wrongful. Thus, it has long been settled in Florida, and in most other states, that a party who has been enjoined wrongfully has the right to recover all damages including attorneys’ fees and costs from the party seeking the injunction. See, e.g., *Lake Worth Broadcasting Corp. v. Hispanic Broadcasting, Inc.*, 495 So. 2d 1234, 1234 (Fla. 3d DCA 1986); *Roger Dean Chevrolet, Inc. v. Painters, Decorators and Paperhangers of Am., Local No. 452*, 155 So. 2d 422, 425 (Fla. 2d DCA 1965).

Historically, this right of recovery for wrongful injunction has been protected by requiring the plaintiff to post an injunction bond sufficient to cover the damages caused by the injunction if reversed. In Florida, a private party may not obtain an injunction without posting such a bond.

⁴ Rule 1.610(b). Except in extraordinary circumstances, this bond must be sufficient to cover the defendant’s potential damages.

⁵ Once the bond is in place, however, damages are generally limited to the amount of the bond. *Parker Tampa Two, Inc. v. Somerset Development Corp.*, 544 So. 2d

⁴ The only exception is an action to enjoin physical injury or abuse. Rule 1.610(b).

⁵ See *Parker Tampa Two, Inc. v. Somerset Development Corp.*, 544 So. 2d 1018, 1021 (Fla. 1989); *Cushman & Wakefield, Inc. v. Cozart*, 561 So. 2d 368, 371 (Fla. 2d DCA 1990). See *Marston v. Gainesville Sun Publishing Co.*, 314 So. 2d 257, 259 (Fla. 1st DCA 1975) (rejecting an obviously inadequate bond as a “farce” and a “mockery”).

1018 (Fla. 1989).

In this case, the trial court dispensed with the bond under Rule 1.610(b) because of the City's obvious solvency. The fact that no bond was posted did not relieve the city of liability. As this Court made clear, the government, like any other litigant, must make the enjoined party whole when an injunction is proven wrongful, even in the absence of a bond. *Provident I*, 718 So. 2d. at 739.

B. The Decision Below is Inconsistent with *Provident I*.

Treasure Island's argument completely disregards the import of this Court's analysis of the bond issue in *Provident I*. In effect, Treasure Island raises the same bond argument in a slightly different form. Treasure Island now argues that, in the absence of a bond, the doctrine of sovereign immunity sharply limits *Provident*'s damages. This Court's response to the City's argument should be the same as it was in *Provident I*— *Provident* should be made whole, regardless of whether the City posted a bond. As shown below, the City's argument conflicts with the understanding of the parties and the courts, confuses enforcement of the court's equitable powers with a tort action and ignores the important public policies underlying this Court's initial decision in *Provident I*.

Consider first, the history of this litigation, now in its second visit to this Court after three different decisions of the Second District. If sovereign immunity protects Treasure Island from the consequences of its actions, what has been the point of these many years of litigation? If sovereign immunity constitutes an absolute defense to the recovery of wrongful injunction damages against a municipality, the entire bond issue is irrelevant and the decision in *Provident I* was

meaningless. This case has progressed to this point only because of the correct assumption by the parties and the courts that sovereign immunity does not apply to Treasure Island's obligation to pay wrongful injunction damages. Even Treasure Island recognized that this Court's decision implicitly resolved the sovereign immunity issue. In its motion for rehearing in *Provident I*, Treasure Island argued that "by holding that a party may 'seek the full measure of damages' against a municipality when no injunction bond is required [the] Court's holding has the unintended consequence of ruling on the sovereign immunity issues.... ." See Treasure Island's Motion for Rehearing at page 1. According to Treasure Island, "[b]y allowing a party to 'seek the full measure of damages' against a municipality, ... this Court has inferentially ruled that sovereign immunity has been waived." *Id.* at 3.

When Provident raised the issue of the injunction bond, Treasure Island did not contend that it was protected by sovereign immunity. Instead, as noted by this Court, the City acknowledged that if Provident prevailed it would have the right to recover its damages sustained by reason of the wrongful injunction. *Provident I*, 718 So. 2d at 739-40. Treasure Island not only acknowledged its liability to obtain the injunction, it reiterated its obligation to pay damages in a subsequent federal court proceeding. Convincing Judge Castagna to defer to the state courts, the City could not have been clearer in its acknowledgment of liability for wrongful injunction damages. According to counsel, "the court knows that if [the injunction] is improvidently entered anywhere, there are going to be damages against the City" (R. 2639).

Treasure Island was surely correct (then). Like any other litigant, Treasure Island cannot avail itself of the “sword” of the court system and, when its actions are wrongful, retreat behind the “shield” of sovereign immunity. *See City of St. Petersburg v. Wall*, 475 So. 2d 662, 662 (Fla. 1985) (award entered against municipality for damages caused by stay pending appeal); *Simpson v. Merrill*, 234 So. 2d 350, 351 (Fla. 1970) (municipality not immune from award of prevailing party costs under § 57.041); *Northern Coats v. Metropolitan Dade County*, 588 So. 2d 1016, 1017 (Fla. 3d DCA 1991) (municipality responsible for payment of fees under § 57.105); *Dade County v. Carter*, 231 So. 2d 241, 242 (Fla. 3d DCA 1970) (where state becomes plaintiff in its own court, it waives any immunity and is subject to costs the same as a private litigant), *cert. denied*, 237 So. 2d 761 (Fla. 1970).⁶ Similarly, other jurisdictions have awarded wrongful injunction damages against the government without any hint that the government was immune. *State v. Williams*, 472 P.2d 109 (Ariz. Ct. App. 1970); *Cone v. City of Lubbeck*, 431 S.W. 2d 639 (Tex. Civ. App. 1968).

By characterizing Provident’s suit for wrongful injunction damages as a tort, the City ignores this precedent and highlights the conflict with *Provident I*. Provident does not sue in tort. The City’s liability in this case rests upon the trial

⁶ *See also State v. Second District Court of Appeal*, 261 So. 2d 818 (Fla. 1972) (state is not immune from court costs); *City of Miami v. Murphy*, 137 So. 2d 825 (Fla. 1962); *In the Interest of R. W.*, 409 So. 2d 1069 (Fla. 2d DCA 1981), *rev. denied*, 418 So. 2d 1279 (Fla. 1982); *City of Miami Beach v. Town of Bay Harbor Islands*, 380 So. 2d 1112 (Fla. 3d DCA 1980); *State ex rel. Com’rs of Land Office v. Sparks*, 253 P.2d 1070 (Okla. 1953); *State v. Kilburn*, 69 A. 1028 (Conn. 1908).

court's equitable power to set the terms and conditions upon which the injunction would be issued. As Judge Cardozo explained in an often-cited decision, courts of equity have always had the power to condition "the right to relief upon just and equitable terms in respect of liability for damages." *City of Yonkers v. Federal Sugar Refining Co.*, 221 N.Y. 206, 116 N.E. 998, 999 (1917). Thus, the trial court's equitable powers include the power to require the City to agree to make Provident whole as a condition of the injunction. Here, as this Court observed, the injunction was imposed upon the express condition that the City would be liable if the injunction proved wrongful. *Provident I*, 718 So. 2d at 739-740.

As the cases discussed above suggest, once Treasure Island sought to invoke the court's equitable powers to obtain the injunction, it necessarily consented to the consequences that flow from a finding that the injunction is wrongful. This Court's *Wall* decision is an excellent example. In *Wall*, the respondent sought an award of damages against a municipality. Like the present case, the damages in *Wall* were caused when the City obtained a *lis pendens* which had the effect of an injunction.

⁷ When the *lis pendens* obtained by the City was proven wrongful, this Court affirmed the City's liability. Having invoked the trial court's equitable powers, the City was "on notice" of its potential liability. 475 So. 2d at 663.

The proper analogy in this case is to contract rather than tort cases. Many courts describe wrongful injunction actions as the equivalent of a contract claim.

⁷ The City had obtained a *lis pendens* that prevented the defendant from selling its property.

Marine Constr. & Dredging, Inc. v. United States Army Corp. of Engineers, 892 F.2d 83, 1989 WL 150661 at *3 (9th Cir. 1989)(“almost all states classify a wrongful injunction as an action in contract, not tort”). Even Treasure Island concedes that there is no sovereign immunity for contract actions.

To treat a claim for wrongful injunction like a contract action makes sense. Just as the legislature’s authorization for the government to enter into a contract carries with it the right to be sued in contract, the right to seek an injunction carries with it the responsibility to be bound by the terms and conditions of the injunction. *See Pan-Am Tobacco Corp. v. Dept. of Corrections*, 471 So. 2d 4, 5 (Fla. 1984) (entering into contract results in waiver of sovereign immunity). If Treasure Island wanted to avoid the damages it caused, it could have chosen not to seek an injunction and simply allowed the litigation to run its course. Instead, even after the trial court ruled that Treasure Island could be sued for wrongful injunction damages, Treasure Island offered no objection and indicated its assent to liability before both the state and federal courts. Nor did Treasure Island seek to limit its liability by voluntarily posting a bond. By seeking the injunction and accepting the conditions set by the court, Treasure Island waived any right to claim the protection of sovereign immunity.

Justice Wells addressed this issue specifically in his concurrence to this Court’s majority opinion in *Provident I*, stating:

Sovereign immunity is a shield that a governmental agency may raise to protect itself from answering to a claim for damages in a court of law. Sovereign immunity, however, is not a sword that may be used by the state when it invokes a court’s equitable jurisdiction to enjoin a party and the injunction later turns out to be

wrongful and causes damages to be incurred.

718 So. 2d at 740. Justice Wells further explained, “When a governmental body invokes a court’s equitable jurisdiction, it necessarily casts aside its cloak of immunity and is like any other litigant.” *Id.*

Thus, by deliberately avoiding other less financially devastating enforcement alternatives and choosing instead to seek an injunction in this case, Treasure Island waived its sovereign immunity as to wrongful injunction damages. Such a result is particularly warranted in this case where Treasure Island secured injunctive relief based on a specific acknowledgment that it would be liable for Provident’s wrongful injunction damages. It is intolerable for Treasure Island to induce the trial court to enter an injunction against Provident based on Treasure Island’s assurance that it would be liable for Provident’s wrongful injunction damages, and now, contend that the doctrine of sovereign immunity operates as an absolute defense.

The City’s Argument is Inconsistent with Rule 1.610(b)

Besides conflicting with *Provident I*, Treasure Island’s sovereign immunity argument is also inconsistent with the very existence of Rule 1.610(b). Rule 1.610(b) generally requires a party seeking injunctive relief to post a bond as security for the enjoined party’s ability to recover wrongful injunction damages. Rule 1.610(b), however, also permits a court, in its discretion, to dispense with the bond when the party seeking the injunction is a municipality because municipalities are presumed to be financially responsible. If Treasure Island is correct that municipalities are protected from liability for wrongful injunction damages by sovereign immunity, there would be no need for Rule 1.610(b) to reference bonds for municipalities. If there were blanket immunity, there would never be the need for a bond. Thus, in adopting Rule 1.610(b), the

Florida Supreme Court clearly understood that municipalities are liable for wrongful injunction damages. Treasure Island's sovereign immunity argument renders the Rule a nullity, and, as a result, should be rejected.

Imposing Liability on the City Does Not Violate the Separation of Powers.

There is no separation of powers issue in this case. On remand, the Second District rejected Provident's argument concerning the trial court's equitable powers holding instead that the doctrine of separation of powers prevents the judiciary from imposing liability upon a municipality when a court wrongfully issues injunctive relief. 24 Fla. L. Weekly at D1381. Inconsistently, the court then confirmed the trial court's equitable power to require the government to post a bond as a condition of obtaining injunctive relief. *Id.*

By once again placing such emphasis on the presence of a bond the Second District's opinion brought the parties full circle. Put simply, the Court ruled once again that, had Treasure Island been required to post a bond, it would have been fully liable up to the amount of the bond, but in the absence of a bond, its liability is drastically limited pursuant to Section 768.28.

By predicating liability on the existence of the bond, the court below, like Treasure Island, overlooked the entire import of *Provident I*. As this Court has already held, there is no magic to the bond. If the trial court had the power to require that a bond be set in an amount large enough to make Provident whole, why did it not have the same power to impose the same condition in the absence of a bond? After all, in either case, it is Treasure Island, not the bonding company, that ultimately pays the judgment. The bond is nothing more than security for the City's underlying promise to make Provident whole. If a court has the power to impose a bond to secure the City's ultimate liability as a condition of the injunction, then it must also have the power to require the

City to agree to liability in the absence of a bond. By reaching a contrary conclusion, the court below overlooked this Court's decision that liability is not dependent upon the bond, but rather is predicated upon the trial court's power to set the terms and conditions of the injunction.

Provident I, 718 So. 2d at 739-40.

The Second District also overstated its concern that the City could face unlimited liability. Like any private party seeking an injunction, the City could have limited its liability by offering to post a bond. Of course, that bond would have had to have been sufficient to protect Provident against its damages, which the City knew to be significant.

Thus, the courts are not imposing unforeseen liability on the City or punishing it in any way. A finding that the City must make Provident whole simply holds the City to the promise it made to secure the injunction. *Id.* at 739-40.⁸ In other words, the courts are imposing only that liability to which the City agreed. The trial court told the parties in advance what the terms and conditions of this injunction would be. As this Court recognized, the City did not have to accept these conditions. It could have dropped its request for injunction and awaited the results of the trial, it could have asked the court to limit its liability by offering to post a bond, or it could have asked that it be relieved of liability altogether. Instead, the City chose to go forward and to accept the consequences. As a result, the City is liable for the "full measure" of the damages it caused in light of the

⁸ As this Court noted in *Provident I*, "the enjoined party is entitled to seek the full measure of the damages it sustained by reason of the wrongfully issued preliminary injunction. *This was the position advocated in the present case by both the court and the City when Provident requested a bond.*" 718 So. 2d at 739-40 (emphasis supplied).

promise it made as a condition of the injunction. 718 So. 2d at 740.

The Finding of Sovereign Immunity Would be Unsound Public Policy.

The City's immunity argument also contradicts this Court's analysis of public policy in *Provident I*. In its opinion, this Court noted that rendering a municipality immune from liability may be a good result for Treasure Island in this case, but a bad result for the government in general. Quoting the amicus brief filed by the Association of County Attorneys in *Provident I*, this Court noted that, if immunity is granted, municipalities will find it very difficult to obtain injunctions. If Florida citizens have no redress for wrongful injunctions, most trial courts will be unwilling to issue an injunction unless they are absolutely certain that the injunction will not be overturned. As observed by this Court, requiring municipalities to satisfy such a high standard of certainty will, without doubt, result in courts entering far fewer injunctions at the request of municipalities. *Provident I*, 718 So. 2d at 740.

Alternatively, the trial court could protect the enjoined party by requiring the municipality to post a bond in the amount of the potential damages. But this solution directly conflicts with Rule 1.610(b) which is designed to relieve municipalities of the expense of posting a bond to secure an injunction. Thus, if the City's approach is followed, injunctions either become impossible to obtain or more expensive, neither of which is a satisfactory result for municipalities. Indeed, any county or municipality that seeks injunctive relief may find itself with substantial funds tied up to secure its bond obligations, or worse, unable to post a bond and be forced to forego on injunction otherwise in the public interest. For these precise reasons, this Court rejected Treasure Island's arguments in *Provident I*. 718 So. 2d

at 739-40.

The rejection of Treasure's Island's sovereign immunity argument does no more than recognize the power of trial judges to do equity when injunctions are issued by permitting the court to set terms and conditions that are fair to all parties and to enforce these terms if an injunction is overturned. If the municipality does not want to accept the responsibility to make the enjoined party whole, it can drop its request for injunction at any time. Like any other plaintiff seeking an injunction, the municipality can also limit its exposure. During the process of obtaining an injunction, the City can offer to post a bond, thus setting the upper limit of its liability. If the defendant believes this amount to be too low, the amount of the bond can be litigated before the trial and appellate courts.

Thus, Provident's approach, which relies on long-recognized powers of equity courts, assures that the interests of the City and the defendant are each considered. The City can obtain an injunction without posting a bond. If the City wishes to cap its liability, it can attempt to do so. Most importantly, the trial court can grant that injunction secure in the knowledge that if the injunction is wrongful, the defendant can be made whole.

There is no reason that Treasure Island, like any other litigant, should not be forced to consider the damages it may cause in seeking the extraordinary remedy of an injunction. Treasure Island will not be prevented from seeking enforcement of its ordinances through less extreme methods. Treasure Island will simply be required to consider whether the immediate sanction of an injunction is truly necessary in light of the harsh consequences that may result to the enjoined citizen.

CONCLUSION

For all the foregoing reasons, this Court should answer the certified question in the negative and rule that principles of sovereign immunity do not bar Provident's right to recover wrongful injunction damages.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished via U.S. Mail to: **Brian P. Battaglia, Esquire**, Battaglia, Ross, Dicus & Wein, P.A. 980 Tyrone Blvd., St. Petersburg, FL 33710; **James Denhardt, Esquire**, 2700 First Avenue North, St. Petersburg, Florida 33713; **Edward Foreman, Esquire**, 100 Second Avenue North, Suite 300, St. Petersburg, Florida 33701; **W. Douglas Berry, Esquire**, Bayport Plaza, Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-1458 on this _____ day of September, 1999.

Attorney

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