
IN THE SUPREME COURT OF FLORIDA

CASE NOS. 96,000 and 96,001

PROVIDENT MANAGEMENT CORPORATION,
and LAURENCE N. BELAIR,

Petitioners,

vs.

CITY OF TREASURE ISLAND,

Respondent.

ON REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
LAKELAND FLORIDA

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

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CERTIFICATE OF TYPE, SIZE AND STYLE

Counsel for Petitioner, Provident Management Corporation, certifies that this Reply Brief on the Merits is typed in 14 point (proportionately spaced) Times New Roman.

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STATUTES AND OTHER AUTHORITY

Rule 1.610(b), Fla. R. Civ. P. 2, 6

ARGUMENT IN REPLY

Treasure Island once again hinges its entire argument on the fact that it was not required to post a bond. The City concedes that, had it posted a bond, sovereign immunity would not apply and Provident would be able to recover the full measure of the damages it suffered from the wrongful destruction of its business. In the absence of a bond, the City argues, Provident's recovery is sharply limited. *This is precisely the argument rejected by this Court in Provident I.* This Court has already ruled that the absence of a bond cannot artificially limit Provident's right to recover wrongful injunction damages. Nothing the City argues now supports a different result.

The City's answer brief strains credulity before it even gets to the merits. The City argues that there is no need to accept jurisdiction in this case because the Second District's decision below settled the issue raised by this case. Obviously, the Second District disagrees. Its decision to certify the question is an implicit recognition of the potential conflict between its decision and *Provident I* and the need for certainty in this important area of the law. Much is at stake, both for litigants like Provident that face the real life catastrophe of a wrongful injunction and for state and local governments that will find it difficult and expensive to obtain injunctions if the certified question is answered in the affirmative.

Turning to the merits, the City makes no attempt to explain why sovereign immunity should be dependent upon the posting of a bond. To the contrary, as

Provident has argued and as this Court ruled in *Provident I*, there is no magic to the bond. The City's liability in this case results from its decision to invoke the equity powers of the trial court to obtain the injunction. As explained in Provident's initial brief, the trial court's equitable powers include the power to set the terms and conditions upon which the injunction will issue. See Initial Brief ("IB") at 16-17. Those conditions included the City's undertaking to make Provident whole in the event the injunction were proven wrongful. *Provident I*, 718 So. 2d at 739-40. Thus, the City's liability rests not upon the bond, but upon the decision to seek the injunction and the undertaking to make Provident whole the City accepted to obtain the injunction. The bond is nothing more than additional security for the City's undertaking. If the trial court has the power to require the City to secure its undertaking by a bond, why cannot the court, in reliance upon Rule 1.610(b), choose to require that same undertaking without a bond? Treasure Island has no answer to this key question.

The City's discussion of whether Provident's action sounds in tort or contract also misses the point. Having conceded that sovereign immunity does not apply when a bond is posted, the City makes no attempt to explain how the characterization of a wrongful injunction as a tort or contract assists in its analysis. Provident's argument by contrast has remained consistent on this issue. Provident has always suggested that liability rests on the trial court's equitable power to enforce the terms upon which the injunction was entered. As this Court recognized

in *Provident I*, the parties left the original injunction hearing with the clear understanding that, if the injunction were proven wrongful, Provident would be able to recover its damages.

¹ 718 So. 2d at 739-40. As noted in the initial brief, this understanding was confirmed by the City in connection with its successful attempt to dismiss Provident's federal court action (IB at 6-7).

The City made the choice to pursue the injunction even though there was no critical health, safety and welfare issue at stake and even though the City knew the enormous financial consequences the injunction would wreak upon Provident. The City could have chosen to let the litigation run its course before choosing to shut Provident's business down. The City could have abandoned its efforts at the injunction at any point and time. The City could have abandoned its attempt at obtaining an injunction when it became clear that an undertaking to make Provident whole was a term and condition of this injunction. The City could have attempted to limit its exposure by agreeing to post a bond. Instead, the City chose to shut down Provident and accept the consequences.

¹ Provident has never suggested that its damages sounded in contract. Rather, Provident has suggested that the same principles that persuaded this Court to hold that sovereign immunity does not apply to contract claims also apply to the City's knowing decision to seek the injunction, despite the undertaking imposed by the court. See *infra* at 4-5.

The City argues that it cannot be subject to the equitable powers of the Court because the limits of its sovereign immunity can be set only by the legislature. Yet, the City's own brief proves it wrong. The most obvious example is this Court's decision, cited by the City, holding that sovereign immunity does not apply to contract claims. *Pan Am Tobacco Corp. v. Dept. of Corrections*, 471 So. 2d 4 (Fla. 1984). In *Pan Am*, this Court held, in an analysis that applies equally to this case, that the state's power to enter into a contract carries with it the implicit recognition that the state can be sued when it breaches that contract. *Id.* at 5-6.

In the same way, the City's decision to invoke the equitable powers of the Court is a recognition that it is bound by the terms and conditions set by the Court in issuing an injunction. This principle that the government cannot utilize the sword of litigation and then hide behind the shield of sovereign immunity runs throughout

² Treasure Island also repeats its argument, rejected by *Provident I*, that Provident should have appealed the trial court's refusal to require a bond. To the contrary, it is Treasure Island that should have appealed if it objected to the requirement that Provident be made whole if the injunction were overturned. Provident was not aggrieved by the order below unless this Court determines that a trial court's decision not to require a municipality to post a bond is the equivalent of a decision to immunize the municipality from liability. Provident certainly had no reason to think itself aggrieved. The trial court made clear when it entered its injunction that the City would remain liable for damages. Treasure Island offered no objection to the trial court's holding and explicitly confirmed its liability shortly thereafter to the federal court.

Florida case law as described by the initial brief (IB at 16-17).

³ Thus, the government may be liable for sanctions, costs, or damages, when it undertakes litigation as confirmed by cases such as *Dade County v. Carter*, 231 So. 2d 241, 242 (Fla. 3d DCA), *cert. denied*, 237 So. 2d 761 (1970). *See* cases collected in IB at 16. Likewise, the government may be liable for damages when it seeks and obtains a wrongful *lis pendens*. *City of St. Petersburg v. Wall*, 475 So. 2d 662 (Fla. 1985).

Thus, there was no need for the court below to struggle to find a “tort” analogy. Indeed, even the City could not bring itself to endorse the Second District’s characterization of Provident’s claim as the heretofore unrecognized tort of “strict liability malicious prosecution.” The City’s brief states that it “adheres to its position that a wrongful injunction is neither a contract or a tort” (*See* Answer Brief “AB” at 11) and concedes that “[T]here 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” (AB at 14).

⁴ Just as a court may grant costs or enter sanctions without classifying these awards as “torts,” it may enforce the terms upon which an injunction is entered.

³ As Justice Wells points out in his concurring opinion in *Provident I*, this principle has been recognized in other states as well. 718 So. 2d at 740-41.

⁴ It is ironic that the City accuses Provident of shifting its position. The entire premise of the City’s sovereign immunity argument in *Provident I* was that a wrongful injunction action should be treated like a tort, a position it now disclaims.

The City's answer brief also ignores the other fundamental problem with its analysis. As this Court recognized in *Provident I*, if sovereign immunity applies, it will be much more difficult and expensive for the government to obtain injunctive relief. Any trial court faced with a difficult injunction decision, knowing that the enjoined parties' right of recovery would either be non-existent or sharply limited would be very reluctant to grant the injunction. If the enjoined party can be protected, as the City suggests, only through the posting of a bond, trial courts will require a bond in virtually every case. Governments that frequently seek injunctions may face significant bonding expense or, even worse, may face having substantial assets tied up as security for their bonding obligations. All this is sharply inconsistent with Rule 1.610(b) which is designed to relieve the government from the obligation to post a bond, as confirmed by this Court in *Provident I*. 718 So. 2d at 740.

Put simply, answering the certified question in the negative reaffirms the principles established by *Provident I* and achieves a balance between protecting the government's ability to obtain an injunction while preserving the right of an enjoined party to recover damages when the injunction is wrongful. Should *Provident I* be reaffirmed, the government would be able to obtain injunctions while avoiding the expense of posting a bond. However, whenever the government wishes to set the limits of its liability it can offer to post a bond (with or without surety) which would set the limit of its exposure under this Court's decision in *Parker Tampa Two*.

⁵ The enjoined party would have a remedy even in the absence of a bond and the right to litigate the amount of the bond if it believes that the bond has been set too low. By contrast, the City's position ignores the rights of the enjoined party while simultaneously impairing the ability of governments to obtain injunctions. The City's unworkable and inequitable argument should be rejected.

CONCLUSION

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

Respectfully submitted,

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⁵ *Parker Tampa Two, Inc. v. Somerset Dev. Corp.*, 544 So. 2d 1013 (Fla. 1989)

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