UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHELLE IRIZARRY; VALERIE WILLIAMS; JOANN NIXON; JOANN ROBINSON; and BRANDON LITT,

Plaintiffs,

v.

ORLANDO UTILITIES COMMISSION; LENNAR CORPORATION; LENNAR HOMES, LLC; U.S. HOME CORPORATION; AVALON PARK GROUP MANAGEMENT, INC., d/b/a/ AVALON PARK GROUP; BEAT KAHLI; BORAL RESOURCES, LLC; and PREFERRED MATERIALS, INC.,

Defendants.

Case No. 6:19-cv-268-Orl-37EJK

OUC'S SUPPLEMENTAL BRIEFING ON SOVEREIGN IMMUNITY

Pursuant to this Court's May 11 Order (Doc. 117), Defendant Orlando Utilities Commission ("OUC") answers this Court's sovereign immunity questions below.

I. What immunity do municipal agencies enjoy under Florida common law outside the context of a tort action?

Outside the context of a tort action, Florida common law affords municipal agencies sovereign immunity from all actions that do not involve a constitutional question, except to the extent that the immunity is statutorily, contractually, or otherwise waived clearly and unequivocally. (*See* Doc. 89 at 5–6.) Entitlement to this immunity does not turn on whether the agency is more like a municipality than a state (*see* Doc. 95 at 4–8), but it can be demonstrated exclusively using municipalities' sovereign immunity as a benchmark.

Most importantly here, Florida common law affords municipalities sovereign immunity from statutory causes of action. Bert Harris Act jurisprudence is instructive in this regard. The Bert Harris Act created a new cause of action to "protect private property interests against 'inordinately burdensome' governmental regulation." *Royal World Metro., Inc. v. City of Miami Beach*, 863 So. 2d 320, 321 (Fla. 3d DCA 2003). As originally enacted, Section 13 of the Act provided that the statute did "not affect the sovereign immunity of government." *Id.* (quoting § 70.001(13), Fla. Stat. (1999)). In an early case against a municipality, Florida's Third DCA held that Section 13 could not be given a "literal reading" without defeating the Act's purpose—precisely because municipalities presumptively have sovereign immunity from statutory claims. *See id.* at 321–22. So instead, to avoid an absurd result, the court held "that Section 13 does not bar a private property rights claim pursuant to the Harris Act, but merely preserves the sovereign immunity benefits the City in the instant case, and governmental entities in general, otherwise enjoy." *Id.* at 322. In other words, the court interpreted Section 13 as a narrow waiver of sovereign immunity from Bert Harris Act claims.

The Legislature later amended Section 13 to clarify that the "Bert Harris Act contains a very narrow waiver of sovereign immunity," and Florida courts continue to strictly construe Bert Harris Act claims against municipalities in recognition of their presumptive sovereign immunity from suit. *Bair v. City of Clearwater*, 196 So. 3d 577, 581 (Fla. 2d DCA 2016) (narrowly construing the scope of the Act in accordance with presumptions in favor of immunity); *see also City of Jacksonville v. Smith*, 159 So. 3d 888, 894 (Fla. 1st DCA 2015) (same). This same adherence to the presumption of sovereign immunity is also why courts elsewhere permit statutory claims against municipalities only because of clear and unequivocal

waivers. *See, e.g.*, *Longman v. City of Tallahassee*, 776 So. 2d 1130 (Fla. 1st DCA 2001) (allowing a Florida Civil Rights Act claim against a municipality because "the defense of sovereign immunity has been waived under chapter 760, Florida Statutes").[1]

Florida courts also routinely enforce municipalities' sovereign immunity in the contract context. Despite Plaintiffs' unfounded contention that municipalities have "no immunity to waive" (Doc. 99 at 4), the Florida Supreme Court has explained that "[w]hen a city enters into an express, written contract it waives sovereign immunity." *See City of Largo v. AHF-Bay Fund, LLC*, 215 So. 3d 10, 17 (Fla. 2017) (emphasis added) (citing *Pan–Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984)). Consequently, municipalities' "sovereign immunity protections remain in force" absent an express contractual waiver. *See City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 447–48 (Fla. 4th DCA 2015); *see also City of Fort Lauderdale v. Nichols*, 246 So. 3d 391, 392 (Fla. 4th DCA 2018) ("We have recognized that a municipality may waive the protections of sovereign immunity when it enters into an *express* contract. That is not the case here." (citation omitted)); *City of Orlando v. W. Orange Country Club, Inc.*, 9 So. 3d 1268, 1272 (Fla. 5th DCA 2009) (same).[2]

[1] Plaintiffs cite Section 542.235(2) of the Florida Antitrust Act, which they claim would be superfluous if municipalities possessed sovereign immunity. (Doc. 99 at 2–3.) Like its federal counterpart in 15 U.S.C. § 35(a), Section 542.235(2)'s purpose is to expand state action immunity—which is distinct from sovereign immunity and unique to antitrust cases. *See Sandcrest Outpatient Servs., P.A. v. Cumberland Cty. Hosp. Sys., Inc.*, 853 F.2d 1139, 1142 (4th Cir. 1988) ("Congress enacted the [LGAA] in order to broaden the scope of antitrust immunity applicable to local governments."). Thus, Section 542.235(2) expands state action immunity by prohibiting money damages sought by any plaintiff (public or private). *See* Keith C. Hetrick, Comment, *The Federal Local Government Antitrust Act of 1984 and the 1985 Amendments to the Florida Antitrust Act: A Survey and Analysis of Florida Local Government Antitrust Vulnerability*, 13. FLA. ST. U.L. REV. 77, 105–10 (1985). It has nothing whatsoever to do with sovereign immunity.

[2] Plaintiffs read *American Home Assurance Co. v. National Railroad Passenger Corp.*, 908 So. 2d 459 (Fla. 2005) as a case that has nothing to do with contractual waiver and holds that municipalities have no immunity to waive. (Doc 99 at 3.) Considering the cases above, this argument is patently incorrect. As addressed in OUC's Reply, *American Home* addressed whether a municipality needs specific statutory authorization before entering

Similarly, the Florida Supreme Court has acknowledged municipal sovereign immunity in the equitable context. In *Provident Management Corp. v. City of Treasure Island*, the court held that a municipality was liable for damages caused by wrongfully obtaining an injunction—not because the municipality lacked sovereign immunity in the first instance, but rather because it had cast aside "its cloak of immunity" by invoking the trial court's equitable jurisdiction. *See* 796 So. 2d 481, 486 (Fla. 2001) (citation omitted).

The availability of municipalities' sovereign immunity from non-tort actions does not depend on whether the action is based on a discretionary or operational act. That distinction matters only when determining whether acts that fall within the scope of Section 768.28's waiver should nevertheless be afforded sovereign immunity out of allegiance to the constitutional separation of powers. *See Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1022 (Fla. 1979) ("[A]lthough section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain 'discretionary' governmental functions remain immune from tort liability."). "Functionally, the discretionary-versus-operational-function test is intended 'to determine where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins.'" *Wallace v. Dean*, 3 So. 3d 1035, 1053 (Fla. 2009) (citing *Commercial Carrier*, 371 So. 2d at 1018).

Even in the tort context, municipalities have sovereign immunity from torts that are excluded from Section 768.28's waiver, regardless of whether those torts are based on operational acts. For instance, in *Brown v. City of Vero Beach*, the estate of a drowned

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into a contract that waived sovereign immunity. (Doc. 95 at 7–8.) Outside of Justice Cantero's heterodox concurrence, nothing in *American Home* supports Plaintiffs' reading.

swimmer brought a wrongful-death action against the City of Vero Beach, alleging a failure to warn of dangerous ocean conditions. 64 So. 3d 172, 173 (Fla. 4th DCA 2011). The Florida Supreme Court had already decided that a city's duty to warn of such dangers is operational. *Id.* at 176–77 (citing *Breaux v. City of Miami Beach*, 899 So. 2d 1059 (Fla. 2005)). Nevertheless, the *Brown* court affirmed dismissal of the estate's claims because of Section 380.276(6), Florida Statutes, which excludes from Section 768.28's limited waiver of sovereign immunity actions based on "naturally occurring conditions along coastal areas." *Id.* at 175, 177. In other words, because Section 380.276(6) carved out certain torts from Section 768.28's waiver, it effectively restored the City's preexisting sovereign immunity from such actions. *Id.* at 175 ("[T]he statute clearly and unambiguously shows the legislature's intent to limit the statutory waiver of sovereign immunity it created in section 768.28, Florida Statutes"). Importantly, the court rejected the estate's "argument that section 380.276(6) abrogated a long-standing common law right to bring a negligence claim against the City" because no such right existed under common law. *Id.* at 177. Thus, by enacting Section 380.276(6), the legislature exercised its discretion to undo the effects of Section 768.28 and restore municipal sovereign immunity. *See id.* ("It is within the legislature's 'discretion to place limits and conditions upon the scope of the sovereign immunity waiver.' Such discretion was exercised by the legislature in enacting section 380.276(6)." (citation omitted)).

In framing their misapplication of the "discretionary-versus-operational-function test," Plaintiffs cite *Town of Gulf Stream v. Palm Beach County*, a peculiar case in which the Fourth DCA concluded that municipalities' decisions not to fund an inspector-general program were discretionary, and then ultimately held that they had not waived their sovereign immunity from

funding requirements imposed by a county ordinance. *See* 206 So. 3d 721, 726 (Fla. 4th DCA 2016). At best, the court's discretionary-function discussion should be considered dicta given its conclusion that the municipalities had not waived their sovereign immunity. At worst, the discussion misapplies the discretionary-operational test and, in so doing, conflicts with the test's explanation in *Commercial Carrier* and the better-reasoned holding of *Brown*. Regardless, *Town of Gulf Stream* cannot be read to support Plaintiffs' contention here that municipalities are not afforded the same sovereign immunity as the state; the court expressly rejected both that proposition and Justice Cantero's concurrence in *American Home*, on which Plaintiffs heavily rely. *See id.* at 725 & n.2 (emphasizing that Justice Cantero's concurrence "has no precedential value" and that "sovereign immunity should apply equally to all constitutionally-authorized governmental entities").

In sum, Florida common law affords municipal agencies sovereign immunity from virtually[3] all actions in which it has not been waived clearly and unequivocally. Plaintiffs' contrary argument improperly relies on: (1) Justice Cantero's concurrence from *American Home*, which is belied by subsequent case law and has been expressly rejected by Florida's intermediate appellate courts; and (2) a misapplication of the discretionary-function test.

II. What is the source of that immunity, if any?

The source of a municipal agency's sovereign immunity—regardless of whether it is considered a state or municipal entity—is twofold.

First, a municipal agency's sovereign immunity is rooted in English common law prior

[3] *Dep't of Revenue v. Kuhnlein*, 646 So.2d 717, 721 (Fla. 1994) ("Sovereign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will.").

to 1776, under which "sovereign immunity applied without distinction between governmental entities." *Cauley v. City of Jacksonville*, 403 So. 2d 379, 381 (Fla. 1981); *see also Russell v. The Men of Devon* (1788), 100 Eng. Rep. 359; 2 Term Rep. 667 (representing the status of English common law prior to 1776); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 261 & n.19 (1981) (explaining that under English common law, as exemplified by *Russell*, "[l]ocal units of government initially were shielded from tort liability by the doctrine of sovereign immunity," but subsequent developments in America had exposed municipalities to a variety of tort liability by 1871).[4] Florida adopted the pre-1776 English common law by statute. § 2.01, Fla. Stat. (2019); *see also Cauley*, 403 So. 2d at 385 ("There was no statutory right to recover for a municipality's negligence predating the adoption of the declaration of rights contained in the Florida constitution nor was there a cause of action at common law as of July 4, 1776, adopted under section 2.01, Florida Statutes.").

Second, even if the Court finds the pre-1776 English common law to be unclear, a municipal agency's sovereign immunity is independently rooted in the current Florida Constitution, which was ratified in 1968 and placed all local government entities—including municipalities—on an even playing field as subdivisions of the state. *See* Art. VIII, § 2, Fla. Const.; *compare Cauley*, 403 So. 2d at 386-87 (explaining that the philosophy of the 1968 Constitution was that "all local government entities be treated equally," and therefore

[4] Plaintiffs' Opposition cites multiple cases from the Supreme Court which they claim support their alternative reading of English common law. (Doc. 91 at 12–13.) In fact, a closer reading shows that these cases support the historical account in *Cauley*. *See Owen v. City of Indep., Mo.*, 445 U.S. 622, 638-39 (1980) ("[B]y 1871 municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis." (emphasis added)); *see also Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 n.19 (citing the late 19th century case of *Lincoln County. v. Luning*, 133 U.S. 529 (1890) as the earliest example of local government entities not being protected by the Eleventh Amendment); *N. Ins. Co. of New York v. Chatham Cty., Ga.*, 547 U.S. 189, 193 (2006) (same).

"sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner"), *with Keggin v. Hillsborough Cty.*, 71 So. 372, 372–73 (Fla. 1916) (articulating the post-common-law and pre-1968 view that counties enjoyed sovereign immunity because, in part, they were political subdivisions of the state under the Florida Constitution of 1885, and municipalities were not).

Much of Plaintiffs' authority (including *Keggin*) is inapposite because it post-dates the period when Florida courts began creating non-common-law exceptions to municipalities' sovereign immunity and pre-dates the 1968 Florida Constitution. (Doc. 91 at 13; Doc. 99 at 1.) Indeed, even Plaintiffs' modern authority recognizes that the structure of Florida's Constitution, as articulated in *Cauley*, provides all constitutionally authorized government entities with equal sovereign immunity. *See Town of Gulf Stream*, 206 So. 3d at 725 n.2 (rejecting the argument that municipalities' sovereign immunity must be strictly construed and pronouncing, "[W]e adhere to *Cauley*'s declaration that sovereign immunity should apply equally to all constitutionally-authorized governmental entities.").

III. What is OUC's claimed source of sovereign immunity?

OUC is a state entity—more specifically, it is a "municipal agency" that was created by statute for a municipal purpose but otherwise operates independently from the City of Orlando. (Doc. 95 at 4); *see also Lederer v. Orlando Utilities Comm'n, 9*81 So. 2d 521, 525 (Fla. 5th DCA 2008). Accordingly, the source of OUC's sovereign immunity is identical to that of any state entity: the common law at the time of the founding. *See Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) ("The Founders believed that 'common law sovereign immunity' . . . prevented States from being amenable to process in any court without

their consent."). All of Plaintiffs' arguments are based on OUC being a municipal entity, and therefore Plaintiffs have implicitly conceded that OUC being a state entity resolves any doubt about the source of its immunity. (Doc. 91 at 18.)

But even if a state-created municipal agency's sovereign immunity is equivalent to a municipality's, then OUC's sovereign immunity is still supported by English common law, as discussed in *Cauley*, *Russell*, and *City of Newport*. Moreover, OUC's sovereign immunity has an independent basis in the Florida Constitution, which treats municipalities as subdivisions of the state. Municipalities are therefore given the same sovereign-immunity protection as any state entity. *Cauley*, 403 So. 2d at 386–87; *Town of Gulf Stream*, 206 So. 3d at 725 n.2.

IV. Since the Price Anderson Act applies substantive rules for decisions of the state, what is the effect of the PAA on the resolution of the immunity issue here?

The PAA has no effect on the resolution of the sovereign immunity issue. As this Court correctly observes, the PAA "derive[s] from the law of the State" any "substantive rules for decision." 42 U.S.C. § 2014(hh). Florida's law of sovereign immunity is substantive. *See Cassady v. Hall,* 892 F.3d 1150, 1155 (11th Cir. 2018) (noting that the Rules Enabling Act prohibits the Federal Rules of Procedure from modifying "substantive rights" which "includes a state's substantive rights vis-à-vis sovereign immunity")*; see also Fluid Dynamics Holdings, LLC v. City of Jacksonville*, 752 F. App'x 924, 925 n.1 (11th Cir. 2018) ("We apply Florida substantive law, including Florida sovereign immunity law, in this diversity case." (citing *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1318 (11th Cir. 2015))).

Plaintiffs' only counterargument is that sovereign immunity is "jurisdictional" and therefore cannot be "substantive." (Doc. 91 at 19.) This is a false dichotomy. As OUC explained in its Reply, sovereign immunity "encompasses more than . . . narrow immunity

from federal jurisdiction"—it is a "divisible concept" with "multiple aspects," including "immunity from suit as well as immunity from liability, depending on a state's choices in fashioning the scope of its immunity." (Doc. 95 at 9 (quoting *Stroud v. McIntosh*, 722 F.3d 1294, 1301 (11th Cir. 2013)).) Thus, depending on how it fashions its immunity, a state may waive its jurisdictional immunity from a federal forum by removing to federal court without waiving its substantive immunity from liability. *Id.* at 1302 (citing *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618 (2002)). The Florida Supreme Court has recently reinforced what OUC stated in its Reply: Florida's sovereign immunity "is both an immunity from liability and an immunity from suit." *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1185 (Fla. 2020); (Doc. 95 at 9.) In other words, Florida's sovereign immunity encompasses both jurisdictional and substantive immunity from liability. *Stroud*, 722 F.3d at 1301.

Accordingly, removal to this Court under the PAA has no effect on the resolution of the immunity issue. Florida's substantive law of sovereign immunity—which protects all subdivision of the state equally—must apply.

CONCLUSION

Florida law affords OUC sovereign immunity from virtually all actions—including private actions under Section 376.313(3)—unless that immunity has been waived clearly and unequivocally. Nothing in the PAA changes these substantive rules. Because "waiver will not be found as a product of inference or implication," *American Home*, 908 So. 2d at 472, and because reading a waiver into Section 376.313 would require a series of compounding, unwarranted inferences (*see* Doc. 89 at 6), this Court should find that OUC's immunity from Section 376.313 remains intact.

May 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 21, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ David Weinstein
Attorney