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IN THE SUPREME COURT OF FLORIDA

Case No. SC14-0069

On Review from the Second District Court of Appeal
LT Case No. 2D12-1097; 06-1894CA

FLORIDA DEPARTMENT OF TRANSPORTATION,
Petitioner,
v.
DORTHY SCHWEFRINGHAUS, et al.,
Respondents.

AMICUS CURIAE BRIEF OF THE FLORIDA JUSTICE REFORM INSTITUTE, THE FLORIDA CHAMBER OF COMMERCE, INC., AND ASSOCIATED INDUSTRIES OF FLORIDA, INC. IN SUPPORT OF RESPONDENT CSX TRANSPORTATION, INC.

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INTRODUCTION

1. Petitioner, Florida Department of Transportation shall be referred to as "FDOT."

2. Respondent, CSX Transportation, Inc. shall be referred to as "CSX."

3. The Crossing Agreement at issue in this case was entered into between the State Road Department and the Receivers for Seaboard Air Line Railroad Company.

4. The parties in this case are the successors to those entities.

STATEMENT OF INTEREST

The Florida Justice Reform Institute (the "Institute") is Florida's leading organization of concerned citizens, small business owners, business leaders, doctors, and lawyers who are working towards the common goal of restoring predictability and personal responsibility to civil justice in Florida through the elimination of wasteful civil litigation and the promotion of fair and equitable legal practices. The Institute is the first independent organization focused solely on civil justice in Florida.

The Florida Chamber of Commerce, Inc. (the "Florida Chamber"), is a not-for-profit corporation that serves as Florida's business advocate. It is the largest federation of business, Chambers of Commerce, and business associations in Florida. This federation represents in excess of 139,900 member businesses with

more than 3 million employees across the State. Since its founding in 1916, the Florida Chamber has promoted the building of a strong Florida economy and securing Florida's future through pro business solutions, encouraging investment in the State and private-sector job creation. Florida Chamber members range in size from small businesses to some of the nation's largest corporations, and its membership reflects the diversity of Florida industries.

Associated Industries of Florida, Inc. ("Associated Industries"), is a non-profit corporation organized and existing under the laws of Florida. Associated Industries is a statewide association of business, trade, commercial, and professional organizations in the State of Florida. It represents the interests of over 10,000 corporations, professional associations, partnerships, and proprietorships.

As organizations that represent a broad range of interests, the Institute, the Florida Chamber, and Associated Industries can provide the Court with perspective on the importance of the enforcement of contracts. Florida's continued economic growth will be promoted when contracts are enforced in a manner that is both predictable and consistent. A decision in favor of Respondent CSX is in the best interest of all Floridians because it will promote stability and predictability in contract law.

SUMMARY OF THE ARGUMENT

In 1936, the State Road Department's duties included constructing and maintaining safe roads for the benefit and use of Floridians. The Department approached the receivers of the Seaboard Air Line Railroad Company ("Seaboard") with the goal of constructing and maintaining a railroad crossing over property owned by Seaboard in Pasco County. As the property owner, Seaboard's rights were well established. The State was required to fully compensate railroads for right-of-ways needed for the construction of new roads across railroad tracks. Had the parties been unable to reach an agreement, the Department's other option would have been to pay full price for the right-of-way after eminent domain proceedings.

The parties reached an agreement (the "Crossing Agreement"). Seaboard granted the Department a license to construct and maintain a railroad crossing over Seaboard's property. The Department was required to construct and maintain the crossing and to install safety features. While no payment was made to Seaboard, the Department agreed to indemnify Seaboard from any vicarious liability it might incur as a result of the Department's negligence.

In 2002, an accident caused by FDOT's negligence occurred at the crossing and resulted in liability to CSX. When FDOT repudiated the indemnity agreement, CSX brought this suit for breach of contract.

FDOT concedes that the State Road Department had statutory authority to enter into the Crossing Agreement. Yet, under the guise of immunity, FDOT contends that the indemnity portion of the agreement is void because it was not specifically authorized by statute.

FDOT's position is unfounded. In *Pan-Am Tobacco Corporation v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984), this Court held that where the state has entered into a contract fairly authorized by general law, the defense of sovereign immunity will not protect the state from liability for breach of contract. The Court added that its holding was only applicable to suits on a written contract which the state agency had statutory authority to enter.

In this case, since the State Road Department's promise to indemnify Seaboard is in a written agreement and FDOT concedes that the Department had statutory authority to enter into the agreement, the conditions outlined in *Pan-Am* have been met, and FDOT is liable.

In construing another railroad crossing agreement, this Court in *American Home Assurance Company v. National Railroad Passenger Corporation*, 908 So. 2d 459, 476 (Fla. 2005), stated that an indemnity provision contained therein was "part and parcel" of the crossing agreement. The fact that the crossing agreement in that case was between a railroad and a municipal utility does not alter the

conclusion that the indemnity provision in the instant case is also subsumed within the Crossing Agreement and would not require separate authorization.

In any event, even if this Court were to conclude that the indemnity provision was invalid for failure to have specific statutory authority, FDOT should be estopped from repudiating its promise. While the State may be subject to estoppel, it should be imposed only in compelling circumstances. The circumstances in this case cry out for estoppel relief. There was no benefit to CSX to enter into the Crossing Agreement. It was willing to authorize the crossing only if it could, at least, be indemnified for its vicarious liability resulting from the Department's (now FDOT's) own negligence. For more than 75 years, FDOT has enjoyed the benefit of its license for the crossing without a hint that the indemnity agreement might be void. Only now, when its own negligence has resulted in liability to CSX, FDOT reneges on its promise. In the interest of fair play, FDOT must be estopped from refusing to indemnity CSX.

STANDARD OF REVIEW

Because this is an appeal from an order granting summary judgment, the standard of review is "*de novo*." *Maronda Homes Inc. of Fla. v. Lakewood Reserve Homeowners Assn.*, 127 So. 3d 1258 (Fla. 2013).

ARGUMENT

I. FDOT MUST BE REQUIRED TO HONOR THE INDEMNITY AGREEMENT.

A. The importance of upholding contracts cannot be overstated.

The ability to enforce contracts is of paramount importance. Even before the Crossing Agreement was signed, this Court had stated:

> To both the citizen and his government the right to contract is the most valuable right known to the law. The Constitution guarantees its inviolability. It is the duty of every citizen to keep it so.

State ex rel. Dos Amigos, Inc. v. Lehman, 100 Fla. 1313, 131 So. 533, 539 (Fla. 1930) (emphasis added). The Court went on to say that "[a] 'promise to pay' is in no different situation when executed by an individual than when executed by a governmental entity." *Id*. (citation omitted).

To properly enforce a contract, a court must ascertain the intent of the parties. As this Court explained, "the great object, and practically the only foundation, of rules for the construction of contracts, is to arrive at the intention of the parties." *Underwood v. Underwood*, 64 So. 2d 281, 288 (Fla. 1953) (citation omitted, emphasis omitted). In this case, the intent of the parties is crystal clear. The Crossing Agreement in this case expressly states that in exchange for its license to obtain the crossing, the State Road Department must indemnify Seaboard for any of its liability vicariously caused by FDOT's negligence. There

is no valid reason why this contract should not be enforced so as to carry out the clear intent of the parties.

B. Separate statutory authorization for the indemnity agreement was not required.

FDOT concedes that its predecessor, the State Road Department, had statutory authority to enter into the Crossing Agreement. Yet it contends that it also had to have separate specific statutory authority to make the promise to indemnify Seaboard for its own negligence.

1. The Department was given broad authority to accomplish its mission of constructing and maintaining roads.

In 1917, the Legislature authorized the Department to "enter into contracts for, and to make such rules and regulations as may be necessary for, the constructions and maintenance of such highways and bridges as may by law . . . be placed under its supervision and control." Ch. 7328, Laws of Fla. § 4 at 164 (1917). These broad powers were consistent with the Department's mission of constructing and maintaining safe state roads for the use and benefit of Floridians:

> It shall be the duty of said Department to make and maintain said roads safe for the use of sober, law-abiding citizens who desire to travel over the same.

Ch. 9312, Laws of Fla. § 3 at 372 (1923). In 1935, the Legislature affirmed the power of the Department to engage in transactions acquiring or conveying interests in land:

> The State Road Department of Florida is hereby authorized and empowered to purchase, lease, or otherwise acquire, any land . . . when such lands shall be deemed necessary in connection with the lay out, construction, repair, or maintenance, of any State Highway . . . .

Ch. 17280, Laws of Fla. § 1 at 1196 (1935).

2. FDOT's cases are inapposite.

In summing up its argument for the invalidity of the indemnity provision, FDOT rests its case on the premise that "*Pan-Am* and *Miorelli* compel holding the indemnity clause void." (FDOT Brief, p. 26) An analysis of these cases demonstrates directly to the contrary.

In *Pan-Am Tobacco Corporation v. Department of Corrections*, 471 So. 2d 4 (Fla. 1985), the Department sought to invoke the doctrine of sovereign immunity as a bar to an action against it for breach of contract. In response, this Court ruled:

> We therefore hold that where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract.

Id. at 5. The Court added:

> 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 6. In this case the indemnity provision is contained in an express contract, and FDOT had the statutory authority to enter into that contract.

FDOT points to the statement in *Pan-Am* that the requirement for an agency to have authority to enter into the contract will prevent an unscrupulous or careless

employee from binding the State without authority to do so. (FDOT Brief p. 27) Yet FDOT can hardly suggest that that was the case here, since the Crossing Agreement was signed by the State Road Department's Chairman.

In *County of Brevard v. Miorelli Engineering, Inc.*, 703 So. 2d 1049 (Fla. 1997), a contractor sued the County for extra work which was done beyond the provisions of the express contract. Consistent with *Pan-Am*, this Court held that sovereign immunity prevented recovery because no change order had been signed and the work was done completely outside the provisions of the contract. Significantly, however, the Court agreed that there could have been a recovery had the work been done pursuant to an implied covenant of the contract itself. *Miorelli*, 703 So. 2d at 1051 (agreeing with the court below that "*Pan-Am* did not preclude a contractor from recovering additional expenses based on a claim of breach of implied covenants or conditions contained within the scope of an express written contract").

Thus, the two cases most heavily relied upon by FDOT stand opposed to its position. Furthermore, FDOT's argument that it needed additional statutory authority for the indemnification provision defies logic. Indeed, by authorizing crossing agreements, the Legislature had every reason to assume that the railroads would require some sort of indemnification for the risks that they were undertaking by authorizing the crossings.

This Court's recent opinion in *American Home Assurance Company v. National Railroad Passenger Corporation*, 908 So. 2d 459 (Fla. 2005), demonstrates that the indemnity provision was subsumed within the Crossing Agreement. In that case, the court stated that an indemnity provision within a railroad crossing agreement was "part and parcel" of that agreement. *Id*. at 476. That the crossing agreement in that case was between a railroad and a municipal utility does not diminish the logic or credibility of that statement.

No special authority for an indemnity clause was required when the Crossing Agreement was signed. The fact that subsequent to the Crossing Agreement, the Legislature has enacted a few statutes authorizing indemnification in other contexts has no bearing on this case.[1] To conclude that the enactment of these statutes imposed a requirement that the indemnity provision in the Crossing Agreement had to have specific statutory authorization would result in an impairment of that contract.[2]

The indemnity agreement must be enforced.

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[1] *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992) ("Valid laws in effect at the time a contract is made enter into and become part of the contract as if expressly incorporated into the contract.").

[2] Art. 1, § 10, Fla. Const.; U.S. Const., art. 1, § 10, cl. 1; *see also State v. Chadbourne, Inc*., 382 So. 2d 293, 297 (Fla. 1980) ("This Court has generally prohibited all forms of contract impairment.").

II. AFTER ACCEPTING THE BENEFITS OF A CONTRACT FOR NEARLY 80 YEARS, FDOT MUST BE ESTOPPED FROM DENYING ITS DUTY TO INDEMNIFY CSX.

FDOT has enjoyed the benefits of the Crossing Agreement for nearly 80 years, allowing traffic to freely cross Seaboard's (and now CSX's) property at the crossing. Instead of paying in cash, the Department paid with a promise to indemnify Seaboard. Now FDOT invites this Court to sanction FDOT's attempt to break its promise. For reasons explained above, the indemnity should be enforced. However, if the indemnity were held to be not enforceable, this Court should hold that the FDOT is estopped from denying its obligation to indemnify CSX. To do otherwise would violate the rules of fair play. *Branca v. City of Miramar*, 634 So. 2d 604, 605 (Fla. 1994) ("The theory of estoppel is an application of the rules of fair play.").

A. This case presents an instance where estoppel is properly applied against the State.

It is undisputed that the general elements of estoppel – a representation, reliance on the representation, and a detrimental change in position – are satisfied in this case. The contested issue is whether estoppel should be applied against the State. While Florida has a long history of applying the doctrine of estoppel against the State, the party asserting it "must show exceptional or special circumstances and some positive act on the part of a state officer or officers to support it." *Trs. of*

Internal Improvement Fund. v. Lobean, 127 So. 2d 98, 103 (Fla. 1961) (citation omitted). These requirements are easily satisfied in this case.

As the court explained in *Killearn Properties, Inc. v. City of Tallahassee*, 366 So. 2d 172, 179 (Fla. 1st DCA 1979), without the doctrine of estoppel, a government agency could "fail to comply with some statutory prerequisite to the execution of a contract, avail itself of the benefits of that contract until such time as it arbitrarily and capriciously chose to ignore it, and then do so with no fear that any court could compel it to honor its agreement." That is exactly what FDOT is attempting here.

The Crossing Agreement at issue was executed by the State Road Department, an agency with contracting authority. The Crossing Agreement was signed for the Department by the Chairman and attested by the Secretary. The official seal of the Department was affixed to the Crossing Agreement. Furthermore, the Crossing Agreement was signed by counsel for the Department indicating that it was "approved as to legal form." Having entered into the Crossing Agreement under those circumstances makes FDOT's position all the more egregious.

B. It would be unfair and unjust to allow the State to avoid its obligations under the Contract after the State has enjoyed the benefits from the Contract for nearly 80 years.

The State may only take private property for a public purpose after giving full compensation. *Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 624 (Fla. 1990) (noting that while the state may take private property for public use, "[i]n so doing, the state is obliged to make full compensation"). The State Road Department could have used its power of eminent domain to obtain a right-of-way for the crossing. Had that approach been taken, the Department was authorized (and constitutionally required) to pay full value for the right-of-way taken for a public purpose.

The Department avoided its legal duty to pay full compensation for access to Seaboard's private property by virtue of the Crossing Agreement. What benefits did Seaboard receive under the Crossing Agreement? Only the Department's indemnity promise. FDOT points out that the Department had agreed to construct and maintain the crossing and to provide safety features. However, these promises were simply conditions for obtaining the license and were only necessary because the Department decided to build the crossing in the first place. For nearly 80 years the Department (now FDOT) has enjoyed the benefits of the Crossing Agreement. For the Court to adopt FDOT's position would effectively sanction the taking of

private property without compensation, a position at odds with both the Florida and the United States constitutions.[3]

C. Allowing FDOT to repudiate its clear contractual obligation would have far-reaching negative implications.

To allow FDOT to walk away from its clear and unambiguous duties under the Crossing Agreement would raise serious doubts concerning the fairness of our judicial system. It could even call into question other contracts with governmental entities.

The Department has accepted the benefits under the Crossing Agreement since 1936. Yet not once prior to the 2002 accident that gave rise to this action did the Department articulate its position that the indemnity clause could not be enforced. Moreover, it was the FDOT's own failure to properly maintain the crossing which gave rise to its duty to indemnify CSX. The FDOT must be estopped from repudiating its contractual obligation.

CONCLUSION

1. State agencies are liable for breach of the express provisions of written contracts into which they have been authorized to enter. *Pan-Am*.

[3] U.S. Const. Amends. V, XIV; Art. I, § 9 & Art. X, § 6(a), Fla. Const.; *see also Joint Ventures, Inc. v. Dep't of Transp.*, 563 So. 2d 622, 624 (Fla. 1990) (discussing the State's duty to make full compensation when taking private property for a public purpose).

2. FDOT was authorized by statute to enter into the Crossing Agreement.

3. The indemnity provision was "part and parcel" of the Crossing Agreement.

4. In any event, FDOT is estopped from now repudiating its express promise to indemnify Seaboard (CSX) for its vicarious liability resulting from FDOT's own negligence.

The decision below should be AFFIRMED.

Respectfully submitted this 28th day of July, 2014.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF RULE 9.210 COMPLIANCE

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