UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
CASE NUMBER 6:19-cv-268

MICHELLE IRIZARRY, ET AL., Plaintiffs, v. ORLANDO UTILITIES COMMISSION, ET AL., Defendants.	Orlando, Florida January 14, 2020 10:04 a.m.

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE ROY B. DALTON, JR.

UNITED STATES DISTRICT JUDGE

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THE DEPUTY CLERK: Case Number 6:19-cv-268, Michelle Irizarry, et al. versus Orlando Utilities Commission, et al.

Counsel, will you please state your appearance for the record starting with the plaintiffs.

MR. LEOPOLD: Good morning, Your Honor. Ted Leopold, co-counsel on behalf of the putative class.

THE COURT: Good morning, Mr. Leopold.

MR. BRIGHTMAN: Michael Brightman, co-counsel on behalf of the putative class.

THE COURT: Good morning, Mr. Brightman.

MS. MARTIN: Good morning. Diana Martin, also co-counsel on behalf of the putative class.

THE COURT: Good morning, Ms. Martin.

MR. BHATIA: Good morning, Your Honor. Vineet Bhatia, also co-counsel for the putative class.

THE COURT: Good morning, Mr. Bhatia.

MR. GERBER: Good morning, Judge. Dan Gerber on behalf of the Lennar defendants.

THE COURT: Good morning, Mr. Gerber.

MS. HILL: Good morning, Your Honor. Suzanne Hill on behalf of the Lennar defendants.

THE COURT: Good morning, Ms. Hill.

MR. GERBER: And with us at counsel table is Marcy Getelman of Lennar.

THE COURT: All right. Thank you.

Hold on just one minute, Counsel.

All right, Counsel. I've had an opportunity to review your submissions. We have the homeowners -- I mean the home builders, which will be the shorthand I'll use, Mr. Gerber, to refer to your group of home builder clients and the OUC motion for judgment on the pleadings.

I'm going to take the motion to dismiss first from the homeowners that's predicated on the statute of limitations question. I'm going to hear argument on both sides of that. And then I'll turn to the question of the sovereign immunity issue as it relates to the utility.

So, Mr. Gerber, let me invite you to the podium to address first the motion to dismiss.

MR. GERBER: Thank you, Judge.

Your Honor, this is an action founded on the design, planning, and construction of improvements on real property. Therefore, the statute of repose contained in Section 95.11 sub (3)(c) bars the instant action.

We know that the action against Lennar, the home builders, is founded on the design, planning, and construction of improvements on real property because the plaintiffs say so. They have said so so far in their

Complaints. They have said so so far in other pleadings.

First, the Amended Complaint makes it clear that the Lennar defendants are being sued as home builders, developers, and constructors of homes. Paragraphs 29 and 30 of the Amended Complaint are explicit on this point.

Paragraph 119 identifies U.S. Home as the developer of Stoneybrook East.

Paragraph 121 of the Amended Complaint sues Lennar for developing the Stoneybrook East subdivision.

Paragraph 123 talks about developing Stoneybrook.

Paragraphs 132 and 133 further discuss Lennar's role in developing.

And paragraphs 143 and 144 summarize the plaintiffs' position by saying the defendant developers used conventional construction equipment to excavate and grade the land where the residences would come to be located.

And going on to 144, in pertinent part, developers have also used construction materials including concrete in building the communities.

So there's no doubt that the pleading is founded on the construction and this development and improvement of real property.

When Lennar moved to dismiss the Complaint because it did not include adequate language that Lennar discharged

or polluted as required by the statute under which it was sued, the plaintiffs' challenged that argument in a response which asserted by my count no less than 13 times that Lennar was liable for, quote, development activities, end quote, and by, quote, constructing homes, end quote, using allegedly contaminated materials.

Third, we know that this is an action founded on construction and improvement of real property because when Lennar filed the instant summary judgment motion the plaintiffs did not challenge any fact on which the motion is based.

It is unrebutted, then, that Lennar developed and constructed improvements on real property more than 10 years after the relevant date under the statute.

Now, the plaintiffs argue today that the statute of repose that applies to construction and development of real property does not apply to Lennar which is only liable in this case as a constructor and developer.

The statute of repose which applies to constructers and developers is applicable to Lennar. There's only one substantive case which instructs the Court on whether defenses such as the statute of repose apply to claims under Chapter 376.

This case is the General Dynamics case from the Fifth District Court of Appeal which was written -- the

opinion was written by then Judge Lawson, who is now Supreme Court Justice Lawson on the Florida Supreme Court.

Interestingly, the plaintiffs never argue against General Dynamics in their reply. They barely mention the case --

THE COURT: You think Judge Kovachevich got it wrong, I take it, in the Jerue suit?

MR. GERBER: Well, I think Judge Kovachevich never really reached the ultimate issue. Judge Kovachevich --

THE COURT: She doesn't have a very robust discussion, that's true. But she certainly reaches at least the threshold question of whether or not 376.313 permits additional defenses such as statutes of limitations, statutes of repose.

MR. GERBER: Well, first --

THE COURT: I mean, it seems to me that if I'm inclined to agree with you I have to disagree with Judge Kovachevich.

MR. GERBER: Actually, I don't know that you have to --

THE COURT: That's a huge impediment, but it's nonetheless -- I don't find a way around her handling of the issue that would be consistent with the position you're taking.

MR. GERBER: I think there are a lot of ways that

you can address that.

First of all, Judge Kovachevich noted in Jerue, quote, On its face the Amended Complaint does not contain a claim founded on the design, planning, or construction of improvement of real property.

Period. That's the distinction here. This case against the Lennar defendants is entirely founded on that premise.

Second, in Jerue, Judge Kovachevich said, Due to the absence of such a claim -- meaning the claim founded on the design, planning, and construction -- the statute of repose argument is, quote, premature.

Ours on the other hand is ripe.

Third, in Jerue the Court noted the sparseness of the record on motion to dismiss. And the plaintiff's focus on reclamation efforts which the Court noted may or may not be later found to be part of the explicit language of the statute of repose.

And finally, Judge Kovachevich was explicit in saying that she offered her preliminary thought to the parties. Preliminary thought to the parties. She did not say here is my ruling.

In fact, what Judge Kovachevich could have done in Jerue and what Judge Byron did in the California case is they could have said, I see that the defendant is raising a

statute of repose argument. It will never apply in this case whatsoever. And that's not what Judge Kovachevich did. It's not what Judge Byron did.

And Judge Kovachevich did not address General Dynamics whatsoever and probably for good reason. Because at that time, as Judge Kovachevich said, the case wasn't ripe for adjudication on that basis on a motion to dismiss on a sparse record.

So I would like to turn to General Dynamics, though, if I may, Judge.

THE COURT: Sure.

MR. GERBER: And I hate reading from decisions during an argument like this, but, Judge, Justice Lawson's decision in General Dynamics is so persuasive on this point because he was addressing specifically the issue of whether other defenses might be raised that are not in the explicit list of defenses under 376.308.

And Justice Lawson said in General Dynamics, quote, Plaintiffs concede that if they were to settle their WQAA claim with General Dynamics in exchange for releases, the releases could be raised as a defense to any further WQAA claims by plaintiffs even though releasing settlement are not listed in the available defenses.

Similarly, plaintiffs concede that the only defenses language cannot be reasonably read as barring

defenses such as improper venue, lack of personal jurisdiction, res judicata, and the statute of limitations.

Of course, workers' compensation immunity is similar to those other basic statutory or legal defenses and that workers' compensation immunity acts as a shield against having to litigate the case in the first instance.

And that's exactly what a statute of repose is designed to do.

Now, I don't think the Court would believe that any of the 12(b) defenses which are listed as defenses under the Federal Rules of Civil Procedure are abrogated by 376.308.

And Justice Lawson said in General Dynamics, keeping in mind this is the only substantive decision which will guide the Court under Florida law, is that when you have a statute that acts as a shield against further immunity even where there is a 376 claim, the case, the claim is barred.

And that is the same exact instance that we have here. This claim is barred.

Now, the plaintiffs have argued some inapplicable state law cases in their briefing. The plaintiffs have cited -- the cases that the plaintiffs have cited do not involve cases founded on construction or improvement of real property.

Clark, for example, deals with disposing of and abandoning hazardous and toxic chemicals, not the development or improvement of property.

State versus CTL involves a remedy granted only to the Department of Environmental Protection and cites a different period of limitations, 376.307(7), which applies only to DEP claims, not this claim.

State versus Fleet involves an ongoing violation of an entirely different chapter of Florida Statutes that does not involve the construction or development of real property and, again, addresses DEP's remedy and regulatory framework only.

Avoiding General Dynamics further, the plaintiffs here cite to some out of state and inapplicable federal decisions.

Your Honor, if you add up all of the cases and look at exactly what they're addressing on the plaintiffs side and the defense side, I think what you'll see is, first of all, the plaintiffs rely on typically unripe cases or cases without a full or undisputed record.

Here we are ripe and we have a fully undisputed record.

Second, in those other cases, there are usually questions about what exactly is this case about. We're just at the Complaint stage. We don't know exactly what

the proof is going to be because the pleadings aren't framed up as well as they should be.

But today we are ripe. The Amended Complaint here is founded on Lennar's role as a developer and as a constructor in improving real property. And on that basis, the Court has a clear state case law precedent in General Dynamics.

Jerue is inapplicable, because as Judge Kovachevich said, I'm just going to give you some preliminary thoughts. Let's see where the case goes.

Since this is an action founded on the design, planning, or construction of an improvement on real property --

THE COURT: Suppose hypothetically I were to disagree with you and say, for instance, in paragraph 323 of the Complaint where the plaintiffs allege that it's a discharge case under the statute, not a case under the construction provision, how does that impact the application of General Dynamics?

MR. GERBER: The plaintiffs can't escape by saying the word "discharge" in a Complaint.

THE COURT: Well, I'm just asking you to accept the premise of my hypothetical. I appreciate the fact you don't agree with it.

But if it is a discharge case under the statute,

how does that impact, if it does, the application of General Dynamics?

MR. GERBER: It's still a discharge based on the construction or development of real property. And Florida law is clear that where you have a more specific, a more specific statute --

THE COURT: You're debating with me my premise. I want you to accept my premise for the purpose of my question. I appreciate you don't agree with it.

My premise is, discharge, how does that impact General Dynamics application?

MR. GERBER: I apologize if I'm not accepting the premise. But it's difficult not to accept the premise here, and I don't think -- I don't think there's a change here.

If the Court is asking -- if I can reframe the question. So I think I understand the question.

If the Court is saying, if it is a discharge case and it's only a discharge case, would the statute of repose apply?

THE COURT: Right.

MR. GERBER: And General Dynamics says, yes, it would apply because you have a substantive law which precludes the claim in the first instance.

That's what General Dynamics did for the workers'

compensation statute. That is, there was a discharge alleged in General Dynamics. And Justice Lawson analyzed it to say there's a bar, similarly to a bar under personal jurisdiction. There's a bar in the first instance.

So I would adopt Justice Lawson's language about acting as a shield against having to litigate the case in the first instance to apply to your hypothetical.

THE COURT: Okay.

MR. GERBER: Nothing further.

THE COURT: All right. Thank you, Mr. Gerber.

Who's going to be the --

MR. LEOPOLD: Ms. Martin, Your Honor. Ms. Martin is going to take the argument for the plaintiff.

Thank you.

THE COURT: Good morning, Ms. Martin.

MS. MARTIN: Good morning, Your Honor.

Plaintiffs claims fall under Section 95.11(3)(f) claims based on statutory liability and not (3)(c) claims based on the design, planning, or construction of an improvement to real property.

In the Harrell versus Ryland Group case cited in defendant's briefing, the Court poses --

THE COURT: You can see that 376, that these defenses are available notwithstanding the limiting language of 376 with respect to the availability of

defenses.

MS. MARTIN: We don't believe that (3)(c) applies at all. So we don't believe that we even need to answer the broad question of whether there are defenses available because (3)(f) does not provide for a statute of repose at all. It's merely a four-year statute of limitations. And under prevailing case law that statute of limitations has not even begun to run. So we think it avoids the whole need for the Court to even answer that other defenses question.

THE COURT: Same question, the opposite of the question I put to Mr. Gerber. If I disagree with you on that point and you think that it's a construction case and not a discharge case and the statute of repose is in play, do you think the statute of repose is available as a defense under 376?

MS. MARTIN: No, not under this broad statutory scheme set forth by the legislature. And we think this is different from the General Dynamics case which was also involving the broad statutory workers' compensation scheme in Florida providing every employer immunity.

Here we're dealing with a small section of the statute of limitations that includes a statute of repose which under Florida law is already disfavored. And so the court in viewing that is supposed to construe against

finding a limitation on the cause of action.

So we do not believe in the converse --

THE COURT: What do you think -- what's your best case on that, on that point?

MS. MARTIN: Well, I think --

THE COURT: And then I'll let you get back to your argument. But I'm interested in this threshold question, which you've skipped over. You're probably going to come back to it, but I want to take it up front here.

And that is, what defenses, if any, are available if it's a discharge case under 376?

MS. MARTIN: Well, I think -- in general, I mean, there is not a case on point obviously that holds that. But I think the cases that Florida has said we have a general policy of finding in favor of disfavoring any limitations on actions. So I believe that.

And then also looking at the legislative intent of (3)(c) and the way it's applied and if it just factually does not apply here.

I'm looking here -- I think the Sabal Chase Home case versus Disney World where it talks about limitations defenses being disfavored. And when there's any doubt, the preference in Florida is to allow the longer period of time.

THE COURT: Okay. Well, let me let you get back

to this question of whether it's a 95.11(3)(f) case or a (3)(c) case.

MS. MARTIN: Thank you, Your Honor.

So in the Harrell versus Ryland Group case, the Court posed two questions to determine whether a claim falls within (3)(c).

First, it looks at whether the plaintiff's allegations related to an improvement to real property, and then it looked at whether the plaintiff's claim was actually founded on the design, planning, or construction of that improvement.

Here, we contend that the answer to that second question is no. The plaintiffs' claims are not founded on the design, planning, or construction of an improvement to real property. We claim, as you've indicated, that where our claims are founded on a discharge of pollutants.

So in the Harrell case, the Court found both tests satisfied, both questions satisfied. There plaintiff was hurt after he was climbing an attic ladder that broke. The Court found the first question that looked at the ladder and whether that ladder was installed during the construction of the home, that it constituted improvement.

They said, yes, that's an improvement to real property.

Then it looked at whether his injury, whether his

claim and the injury was founded on that improvement to real property.

And they said, well, in this case he's not arguing that the ladder itself was defective. He's not making a product liability-type claim. He's claiming his injury came from the fact that it was improperly installed.

So we're going to find that yes, during the installation, the planning, the construction of that improvement, that's where his injuries flowed from. That is the basis for his claim. So his claim is founded on an improvement to real property. Basically his claim was founded on a defective improvement to real property.

THE COURT: I'm hesitant to get you off track, but I think part of the, part of the problem that arises, at least in the minds of the home builders -- because your Complaint really alleges a whole lot of different things.

MS. MARTIN: It does.

THE COURT: So your Complaint alleges, for instance, that they disturbed the soil, and as a result of the disturbance of the soil that they distributed these contaminants.

It also alleges that they incorporated the coal ash in the bricks and used the bricks as part of the construction.

It also includes allegations that they promoted

the development in a way that was potentially misleading or failed to take into account the safety concerns.

And so all of that constellation of claims against the home builders, they say, makes it very difficult for them to figure out what exactly they're being sued for.

How do they know it's a construction case or a discharge case when all of these allegations, some of which are more clearly in the construction pile, some of which are more clearly in the discharge pile, how are they supposed to sort that out? And shouldn't they be entitled to some clarity on that?

So get to that at some point, if you would in your argument.

MS. MARTIN: Okay. Okay, certainly. So I'll get to that right now.

So if you look at paragraphs 318, 326, and 334 in the counts against the Lennar defendants, we allege that plaintiffs sustained damages resulting from the conditions of pollution on their land. So we're not alleging anything that the defendants built, constructed. It's the pollution on their land.

In earlier allegations, 315, 323, 331, we allege the discharge of pollution is the basis of our claims. And in paragraph 316 --

THE COURT: So pardon the interruption.

What's the point of all of these allegations about how the land was marketed and how the development was promoted and what the developer intended in terms of the expenditure of his own funds?

I appreciate the fact that we're not talking about Mr. Kahli precisely here, but the home builders make the complaint that they can't sort this out. They can't -- they don't understand -- and I'm making their argument for them, and I may be making it incorrectly.

But as I distill it, at least as it relates to the sufficiency of the allegations apart from the legal defenses, is that there's so much in this Complaint that we can't figure out what we're being sued for.

So what you're telling me as it relates to discharge, I'm having a very hard time figuring out what -- what's the point of the allegations with respect to how the land was marketed or why they -- whether they have playgrounds on them or whether they have amenities that are designed to, you know, entice people to come in and buy it.

So --

MS. MARTIN: I understand.

THE COURT: -- it's a lengthy Complaint.

MS. MARTIN: It is a very lengthy --

THE COURT: There's a lot in there, in the Complaint.

MS. MARTIN: Yes.

THE COURT: And, you know, I don't want to be critical of the Complaint from the standpoint of being long -- and I appreciate you have some territory to cover -- but I confess I have some sympathy for the argument that so which of these allegations are we supposed to respond to?

I also have some concern about, frankly, on a motion to dismiss not being able to put some guardrails up with respect to what are these claims? Which paragraphs in the Complaint apply to me?

I know you avoided the shotgun issue by incorporating some of the counts -- I mean, some of the counts in the Complaint, but you incorporated 206 of them.

MS. MARTIN: Yeah. No, you're absolutely right. It is a very, very lengthy Complaint. We have a lot of allegations.

The purpose of some of those allegations about the marketing was to bring Mr. Kahli in individually because he had a greater involvement on his own.

Also, you know, we're dealing with a long history here. So there were different corporations that changed hands. And maybe one did developing while the other did marketing. And, you know, so it was to be able to state a claim against, against each of them.

But I understand your point. But I think -- and we do incorporate all of the factual allegations into each count. But then I think we hone in when we get into those Lennar counts and we talk about, you know, we're looking at grading, the spreading of the fill dust, the transporting dirt that's contaminated from the Stanton power plant.

And we do, we mention the use of contaminated construction materials. And what we're alleging there and the problem with that is that it's all kind of kicking up these pollutants and discharging pollutants.

And we're not at the end of the day arguing, okay, the house you constructed is in some way defective. It's not that the improvement you've made to real property is defective. We don't care if the roof on a house leaks. It doesn't matter to us if the foundation is cracking. Those are the kinds of issues that were at play in all of the cases cited by defendants.

What we're talking about is the activities that were taking place to undergo this development and this building. Those are the kinds of things that were discharging pollution.

And I think when you look at the legislative history for (3)(c), Section (3)(c), it becomes apparent that that's not what the legislature was after. The legislature was after when it was deciding to put in place

the statute of repose.

And the reason we know the legislative history is because they were taking away access to courts. And the Florida Supreme Court at one time said, look, that's unconstitutional unless you make clear your public necessity for doing this.

And so one of the reasons is that the legislature said they were concerned about protecting architects, engineers, and contractors who have no control over an owner who was neglectful in maintaining an improvement of property and may have caused dangerous or unsafe conditions to develop over a period of years.

They wanted to protect those professionals against an owner who maybe would use an improvement on real property for purposes that it was never designed or protect them from an owner who makes alterations or changes to an improvement of real property maybe even years afterwards and by the time the claim was brought it was unknown whether the unsafe or defective condition maybe was as a result of those changes or of the original improvement.

So the legislature was looking at an actual improvement to real property being the basis of the damages and the claims, and that's what they were seeking to bar. And that's just not what we're alleging here.

Because, again, it doesn't matter to us how well

they built that house. It's just the activities that they took in doing the construction and in planning and putting it next to this coal fire power plant. Those are the kinds of actions that we think amount to improperly discharging a pollutant under Chapter 376.

We believe there's no doubt that our claims under 376.313, then, are founded on statutory liability.

Just the recent Supreme Court case that came out, the Lieupo case versus Simon's Trucking says, look, this is a far-reaching statutory scheme aimed at remedying, preventing, and removing the discharge of pollutants from Florida's water and lands.

It was not something in common law. It's brand new, an entirely new cause of action. And it's not based on tort law, on contract law like so many of those construction claims that fall under (3)(c) are based.

Here it's completely different. It's this huge broad statutory scheme.

And although not in this context, other courts have found that these claims under 376 do fall within the (3)(f) section for actions founded on statutory liability. And that is the Clark v. Ashland and Florida DEP versus CTL Distribution, for two of the cases.

And as I mentioned earlier, if the Court has a doubt whether (3)(c) or (3)(f) applies, it really should

resolve that doubt in favor of (3)(f) because in Florida we disfavor limitations on actions. And the preference is where there's any reasonable doubt to allow the longer period of time. And so we think that is what should be done here.

So in conclusion, we respectfully request that the Court deny defendants' motion for summary judgment because the plaintiffs' claims against Lennar are not founded on the design, planning, or construction of an improvement to real property.

We don't think the Court needs to hold that claims under 376.313 can never fall within the purview of (3)(c), and we don't think you need to hold that these claims can never be subject to a statute of repose.

We think looking narrowly at the facts of this case, the way we've pled our allegations, that our claims are founded on the discharge of pollutants independent of any defective improvement to real property. And for that reason we don't fall within (3)(c).

THE COURT: Thank you, Ms. Martin.

MS. MARTIN: Thank you, Your Honor.

THE COURT: Mr. Gerber, do you want the opportunity to make a brief response?

MR. GERBER: Briefly.

Your Honor, it's obvious from the Amended

Complaint and the subsequent pleadings that the plaintiffs are suing the Lennar defendants as a developer or construction -- or a constructor. And so they have to abide by the statute of repose that applies to development, improvement of land.

I would note that my colleague did cite from the Sabal case. However, my colleague cited from the concurring and dissenting section of that opinion, not the majority opinion.

In the Sabal case, the statute of repose was affirmed and the Court said in the majority per curiam opinion, We affirm finding the trial court correctly entered summary judgment in favor of the appellees because the statute of repose in Section 95.11(3)(c) barred the cause of action.

Furthermore, I would invite the Court to read Footnote 2 and the text below Footnote 2 where the Third District Court of Appeal went on and on about the importance and enforceability of statutes of repose.

And so the statute of repose was dispositive of that case. And my colleague was quoting from the first sentence of page 801, which is Judge Cope's concurrence and dissent, not the majority.

And the statute of repose we know has been reinvigorated and enforced and addressed by the legislature

over and over again, including this year. And it remains in force and effect in governing this claim.

The last point I'd like to make is that there was an argument about legislative history. And we should look at legislative history in determining how the statute of repose should be applied or should not be applied compared to the statute of limitations in sub (f).

But Justice Lawson addressed legislative history in General Dynamics in favor of reading into the fact that if there was a specific statute of compensation in that case, which barred a cause of action at the instant, then that should be applied.

And Justice Lawson's analysis of legislative history with regard to this statute is at Footnote 2. I won't read from the opinion, but it's there if the Court would like to see it.

THE COURT: Thank you, Mr. Gerber.

MR. GERBER: Thank you.

THE COURT: All right. Thank you. I'll take the motion to dismiss under advisement.

What about the motion from -- Orlando Utilities' motion. We're going to have a change in the --

MR. GERBER: Yes, Judge.

THE COURT: Let me give you all an opportunity to get the Utilities' lawyers in position.

(Pause in proceedings.)

THE COURT: All right. Welcome to counsel for Orlando Utilities Commission. If I can get you all to give me your appearances for the record, please.

MR. WEINSTEIN: Good morning, Judge. David Weinstein, Greenberg Traurig, co-counsel for OUC. To my right is Vitaliy Kats and Ryan Hopper also with Greenberg and also co-counsel for OUC.

THE COURT: Good morning.

MR. WEINSTEIN: Good morning, sir.

THE COURT: So I've had an opportunity to review your papers. And let me give you all, invite you to the podium for your argument on the motion for partial summary judgment predicated on the question of sovereign immunity.

If you need a moment to unpack there, Mr. Weinstein, take a moment.

MR. WEINSTEIN: Bear with me for just a moment, Your Honor. We'll be ready to go.

(Pause in proceedings.)

MR. WEINSTEIN: Good morning again, Your Honor.

May I proceed?

THE COURT: Good morning.

Yes, you may.

MR. WEINSTEIN: Your Honor, as the Court notes, we're here on OUC's motion for partial judgment on the

pleadings under Rule 12(c). It's directed at the Water Quality Assurance Act count, Chapter 376 of the Florida Statutes.

With the Court's permission, this morning, Your Honor, I'd like to make three points.

First is the threshold matter. Florida and federal law are both crystal clear that a waiver of sovereign immunity must be clear and unequivocal, not the product of inference or implication. It must be a waiver that's not susceptible to any other reasonable interpretation.

That's clearly not the case with the Water Quality Assurance Act, Your Honor, and we'll show you that multiple inferences would be required to find a waiver here.

Second, I'd like to discuss the cases that hold there is no sovereign immunity in the Water Quality Act or in the Comprehensive Environmental Response, Compensation, and Liability Act, CERCLA, upon which the Water Quality Act was clearly patterned and as the Florida case law dictates.

There's a Middle District opinion, Judge Chappell's opinion, that holds there's no waiver.

And there are two cases -- same case, two opinions out of the Third -- I'm sorry, the Third Circuit Court of Appeal of Union Gas; and a subsequent affirmance of the second Union Gas opinion by the United States Supreme Court

in which all nine justices, Your Honor, the five in the majority and the four in the dissent, agree that the pre -- that the language that existed in CERCLA before the SARA amendments, which I'll come to -- and that's the language on which this statute is patterned -- do not evince a waiver of sovereign immunity.

And finally, Judge, I'd like to briefly dispense with plaintiff's meritless argument that OUC is a municipal agency, that it's not entitled to sovereign immunity.

The distinction in between the degrees of protection afforded the different levels of government in Florida were abrogated by the Supreme Court in the Cauley decision and have no continued liability.

First, Judge, multiple inferences would be required to find a waiver.

I'm going to refer to several sections of the statute, Judge. And if it would be helpful, I've got copies of those sections for opposing counsel and for the Court, if you'd like it.

THE COURT: You can give them to my courtroom deputy, but I've got about all I can tolerate to read up here at the moment.

MR. WEINSTEIN: May I approach, Your Honor?

THE COURT: Yes.

MR. WEINSTEIN: There is no clear and unequivocal

waiver, Judge.

As you start from their operative statute, 376.313, and they want the Court to infer that the term "person" applies to 376.313. But the problem is, Your Honor, it doesn't appear anywhere in that statute. And so it would require an inference.

An inference is permissible when we're talking about private parties, but it's not permissible in a sovereign immunity analysis, knowing it's impermissible.

And in the parallel to 376 that appears earlier in Chapter 376, there's a statute 376.205. That's the Pollution Act as opposed to the Water Quality Act, but they're analogous strict liability statutes.

And in the earlier act, in the earlier statute, pardon me, 376.205, the legislature chose the term "responsible party." It didn't use "person" at all.

And then it went through -- thank you -- a fairly elaborate analysis of, in the definitional section, of what a responsible party is. It defines in federal agencies, states, municipalities and when they're liable and when they're not.

So the legislature knew how to, you know, define who could be sued, but it didn't do so in 376. It says nothing prohibits a person from bringing an action, but it's entirely silent on against whom that action may be

brought. And that requires an inference, and an inference is impermissible.

And interestingly, Judge, 376.205 was enacted nine years prior to 376.313. So for nine years the legislature had that language or comparable language available to it. It simply failed to -- failed to incorporate it or failed to define it. And an inference won't do it.

Now, plaintiffs point to a couple of other sections of the chapter in trying to get the Court to walk down the inference path. And one of the statutes they point to, Your Honor, is 376.302.

Now, 376.302 is interesting, Judge. It is an enforcement statute by the Department of Environmental Protection. And in this Court's prior order, the Court aptly notes that the responsibility for enforcing the state's pollution laws rest largely with FDEP. That is, indeed, the case.

This is the statute, 376.302, that sets forth the number of different civil and criminal violations, all of which can be enforced not by a private party but by the Department of Environmental Protection.

So the statute that plaintiffs rely upon has nothing whatsoever to do with a private right of action. And, in fact, on its terms forecloses it.

Now, that statute is also interesting in another way. And they point to it, by the way, Judge, and they say, well, that statute, the FDEP enforcement uses the word "person" so you can infer from the use of the word "person" in 376.302 that "person" must be intended in 376.313. But that is not the case. It's not the case under the law.

And a little closer examination of 302 reveals something else, Your Honor. In, for example, 376.302 sub (5), there is a -- there's a provision that says any person who commits fraud in representing his or her qualifications as a contractor or in submitting payment invoices commits a felony of the third degree. Any person who commits a fraud commits a felony of the third degree.

Now, OUC is not a contractor. OUC doesn't submit payment invoices. And so the definition of "person" within 376.205 sub (5) can't possibly include our client.

And yet what the plaintiffs would have you do is not only infer that the legislature meant "person" when it didn't say that and when the parallel provision in 205 says "responsible party" instead of "person," they would have you infer that the word "person" means the same thing every place it's used in 376. And that's not true. The definitional section says except when the context requires.

And I've just pointed you to a provision that is impossible to read as covering a sovereign, as covering the

Orlando Utilities Commission or any other sovereign.

So they want you to infer a word that's not there in the face of a parallel statute that uses a different context. They want you to infer that the word "person" means the same thing everywhere when we've just looked at a provision that shows otherwise.

So you would have to infer that the person includes sovereign 376.313(3) but it doesn't include sovereign in 376.302(5). That's inference on top of inference on top of inference.

Permissible in a private party action? Yes, Your Honor. Permissible in a sovereign immunity analysis? Absolutely not.

And the Court really need go no further in deciding the motion in OUC's favor. It doesn't have to decide whether our interpretation of the statute is more cogent than their interpretation of the statute. Instead, all the Court has to decide is that 376.313 is unclear. And it is, indeed, unclear.

It was referred to -- and we quote this in our briefs -- by a District Court of Appeal judge: It's a real can of worms in terms of who can sue where and for what.

And it took the courts of this state a couple of decades to figure out whether there was a cause of action -- a private cause of action all under 376. And, finally,

in Aramark, the Court answered yes.

Then it took six or eight more years for the Florida Supreme Court to decide whether or not personal injury damages were recoverable under 376. And in the Curd versus Mosaic case in 2010, the Florida Supreme Court ruled that they were not recoverable.

And then it took another nine years, Judge, for the Supreme Court in the Simon's Trucking case, which was just decided, to do a complete 180 and decide that personal injury damages are recoverable.

The statute, a quick reading, in-depth reading, any reading of the statute will show it's a mess. And you cannot get to a waiver of sovereign immunity for a statute that is inherently on its face unclear.

And that should end the inquiry without, without even getting into the case law, which is clearly in our favor on statutory interpretation of this language. We're getting into the distinction between varying degrees of sovereign immunity available to municipalities in Florida which is a quagmire that would have broad ramifications well beyond this case.

The only court that has specifically considered this issue is Judge Chappell in the City of Fort Myers case. And she dismissed the -- she dismissed a Complaint based upon sovereign immunity.

And she ruled, as we argue, that nothing in Chapter 376.313 clearly or unequivocally shows a waiver. And this is true despite the fact that a government entity is a person within the statutory scheme.

And moreover, Judge Chappell rejected the exact argument that the plaintiffs make here regarding 376.308(2). And she said, at best, at best, the subsection implies a waiver by specifying that an act of government defense is unavailable to the government body that acted. But importantly, an implication is not a clear and unequivocal waiver of sovereign immunity under Florida law.

Now, when she rendered that opinion, she dismissed without prejudice. The plaintiffs refiled. The City moved again to dismiss on sovereign immunity grounds. Judge Chappell granted the motion to dismiss for the second time. And the plaintiffs dropped their 376 claim.

And with respect to 308, Judge, let me go back for just a moment. And my apologies.

That's another section on which they rely. But if you look at 376.308(1), it says in any action against -- well, by the department. I'm sorry. Any action by the department.

And so in order to get 308 as some kind of a guidepost to 313 and an action against a sovereign -- or private party action against the sovereign, you have to

weed out of the statute the two places of 308, the two places that it refers to that Subsection 1 which says in an action brought by the department. And that's another inference that would be impermissible here.

And beyond Judge Chappell's decision in the City of Fort Myers case, there are three federal decisions that are really instructive. And they're instructive because you have a Third Circuit Court of Appeals decision before the SARA amendments that finds on very similar language.

And remember, Judge, there are cases that say, Florida cases we cite in our briefs that say this statute is patterned after CERCLA.

So you have a Third Circuit opinion pre-SARA amendments that says no waiver of sovereign immunity and no waiver even though as here the word "person" includes a government agency.

And then after the Third Circuit decided Union Gas 1, I call it, the SARA amendments were passed. The United States Supreme Court vacated the Third Circuit decision and sent it back and said, hey, take another look at this based upon the language of SARA.

And the Third Circuit looked at pre-SARA-CERCLA and post-SARA-CERCLA and found a waiver of sovereign immunity based upon the following language:

A state or local government shall be subject to

the provisions of this act in the same manner and to the same extent both procedurally and substantively as any government entity.

And based upon that language, the Court read the statute as a whole, CERCLA as amended by SARA, and found that a waiver occurred.

The United States Supreme Court took cert, took another look at Union Gas for the second time, this time substantively.

And interestingly, Judge, despite the clarity of the language I just read to you, it's a 5-4 decision. It's a 5-4 decision.

And the majority said, you know, we have to -- and it's in Footnote 2 in a response to the dissent. You have to read CERCLA and SARA together. And if you do that, if you imbue the SARA amendments into the CERCLA analysis, then the five justice majority found a waiver of sovereign immunity.

Interestingly, despite language that says a state and local government shall be subject to the provisions of this act as any nongovernmental entity, four justices of the United States Supreme Court, including a dissent authored by Justice White joined by Justice Rehnquist, then the chief judge, found no, found that this language was not enough, was not clear or equivocal enough.

And one of the things that the Court had relied upon, you know, is that another possible interpretation of the statute was that yes, it permitted a lawsuit against the sovereign, but only by a government entity, only by the Justice Department in that case or FDEP in our case.

So by including sovereign within the definition of person, there is still another plausible interpretation which is that in the Water Quality Assurance Act the legislature intended, as the Court noted in its prior order, for FDEP to carry the ball when it comes to environmental enforcement in the state of Florida.

And in the -- the minority chided the minority [sic] in Union Gas and said, well, you would have found a waiver under pre-SARA-CERCLA. And the majority pushed back hard in Footnote 2 and said no, said that --

Pardon me. One second, Judge.

We do not say that CERCLA's definition of persons overrides the state's immunity but instead read CERCLA and SARA together and argue that SARA's wording must inform our understanding of the statute. And SARA, for the record -- and I apologize, Judge -- is the Superfund Amendments and Reauthorization Act. So it was only SARA's more specific language that carried the day.

And the case law in Florida, Judge, holds that the

Court must presume that the Florida legislature was aware of the Supreme Court's decision in Union Gas and that pre-SARA-CERCLA -- and its decision that pre-SARA-CERCLA did not waive sovereign immunity.

Since the date of that opinion, Your Honor, the Florida legislature has met a total of 31 times. In those 31 times, 376 has been amended eight -- the 376.313 -- pardon me, Your Honor -- has been amended eight times. The definition section of the Water Quality Assurance Act found at 376.301 has been amended 18 times.

But in all of those amendments, there is no SARA-esque sovereign immunity language added by our legislature, even though the case law presumes they're aware of the holding of Union Gas and they're aware of its import with respect to the Water Quality Assurance Act.

And under these circumstances, Judge, there simply cannot be a finding that there's a clear and unequivocal waiver. All they had to say consonant with SARA was state and local government shall be subject to the provisions of this act.

And I would note, Your Honor, that there's a case, Bifulco, in which the plaintiffs rely -- and it's inapplicable here, as I'll explain. But the language in Bifulco and the language in SARA are extremely similar in their construct.

So SARA says state or local government shall be subject to the provisions of this act.

Bifulco, where a waiver was found, says every employer and employee as defined in 440.02 shall be bound by the provisions of this chapter. And that's why there's a waiver in Bifulco because there's a SARA-esque explicit language.

Last, Judge -- and I appreciate your patience -- is the sovereign immunity issue, the strata of -- supposed strata of different degrees of protection under Florida law. And they do not exist.

First, the Fifth District Court of Appeal in an OUC case called Lederer -- it's in our briefs -- ruled that OUC was not a municipality and nor was it a municipal department.

And in so ruling, the holding of the case was that the plaintiff was subject to pre-suit notice requirements of 768.28 sub (6) which apply only to a claim against the state or one of the state's agencies or subdivisions. Only apply.

In Hodge, this Court ruled that OUC must fall within the definition of, quote, state agency or subdivision in Section 768.28 sub (2) and thus is exempt from punitive damages pursuant to 768.28(5).

So both those statutes hold that OUC is the state.

It is the state. It was created by a special act of the Florida legislature in 1923 and, as the Court knows, serves a number of different counties. It is not a municipality.

And even if that was not the case, Judge -- and it is -- the Florida Supreme Court has abrogated any previous distinctions between state and municipal immunity. And it did it clearly and unmistakably in the Cauley versus City of Jacksonville case. So that forecloses the plaintiffs arguments completely.

And in Cauley, our Supreme Court ruled, and I quote, Judge, It is our decision that in this state sovereign immunity should apply equally to all constitutionally authorized government entities and not in a disparate manner.

That ruling could not be more clear. And in so ruling, the Court did acknowledge prior cases that the plaintiffs rely upon. There's a line of Florida decisions that recognize the doctrine of sovereign immunity but the term they used was pruning. They pruned it back under certain circumstances.

And the Court noted that as a result of this pruning, quote, Inconsistencies developed which defy both logic and common sense. Defied logic and common sense.

And the Court noted that it's -- in its recent decision of Commercial Carrier versus Indian River County,

which is in our briefs, the Court recognized the problems and criticisms of the prior case law and determined with the enactment of 768.28 the rules previously governing sovereign immunity had been eliminated. Had been eliminated.

The Court continued by concluding that Modlin, which is sort of the last of the Florida Supreme Court pruning decisions, if you will, Your Honor, and its ancestry and its progeny have no continuing validity subject -- subsequent to the effective date of the claims act.

Finally, Your Honor, in the Lederer case that we just talked about, the Fifth District relied on Commercial Carrier stating to the extent that the City of Tampa versus Easton case held that municipalities are not entitled to the same sovereign immunity as the state and its subdivisions, which is precisely the position that plaintiffs advance. And that holding has been superseded by Section 768.28.

And finally, in the Town of Gulf Stream versus Palm Beach County, another case on which plaintiffs rely, the Fourth DCA rejected a concurring opinion by Justice Cantero in which he argued there was a continuing difference. He argued that the common law differences between sovereign immunity of states, municipalities

dictated different approach.

The Court flatly noted that there was no precedential value in it, in a concurring opinion but more importantly stated, and I quote, Therefore, we adhered to Cauley's declaration that sovereign immunity should apply equally to all constitutionally authorized government entities.

Plaintiffs arguments to the contrary are wrong. And if you go back, Judge, and look at the Cauley decision and look at the rationale of the Court, it rests not just on the statute. It rests on constitutional grounds.

And it says -- and I may be wrong on the year, Judge. If I am, forgive me.

It says: Since 1968, it's been the principle of the Florida Constitution that all government agencies are on equal footing with equal taxing powers.

So it's not just 768.28 in play here. We're talking about the Florida Constitution.

That concludes my initial argument, Judge. And I appreciate your patience this morning.

THE COURT: Thank you, Counsel.

Who's going to take the argument for the plaintiff?

MR. LEOPOLD: Mr. Brightman, Your Honor.

THE COURT: Welcome, Mr. Brightman.

MR. BRIGHTMAN: Good morning, Your Honor.

May I proceed?

THE COURT: Yes.

MR. BRIGHTMAN: Orlando Utilities Commission moves for judgment on the pleadings on the basis that it is a state entity presumptively entitled to sovereign immunity and that nothing in the Water Quality Assurance Act waives that immunity.

Neither representation is accurate. And OUC's motion must be denied for three separate and independent reasons.

First, assuming that Florida law supplies the applicable rule, the WQAA clearly and unequivocally waives any immunity that OUC purports to possess.

Next, and in any event, OUC is ineligible for sovereign immunity under Florida law as a municipal agency in this statutory action outside Section 768.28's ambit.

And third, and alternatively, federal law rather than state law governs the sovereign immunity questions presented and federal law does not recognize municipal immunity.

To begin, the WQAA clearly and unequivocally waives any immunity that OUC may possess. A key premise of OUC's position is that state law, not federal law, governs the sovereign immunity questions at issue. And where state

law supplies the rule of decision, the decisions of the state's highest court are binding and state the applicable rule.

Conveniently for our purposes, the Florida Supreme Court has addressed substantially similar text and held that that text suffice to waive immunity. That was in the Bifulco and the Maggio decisions.

And in those decisions, the Florida Supreme Court reviewed the Florida Workers' Compensation Act and the Florida Civil Rights Act respectively and held that those acts imposed liability on employers and defined employer as including governmental entities.

And found based largely --

THE COURT: Correct me if I'm wrong, but doesn't Maggio also have some language that makes it clear that it's referencing state agencies by putting a cap on punitive damages and limiting some aspects of municipal liability by virtue of operation of the Florida Civil Rights Act?

MR. BRIGHTMAN: So in those decisions, the discussion does extend beyond the definitional section.

THE COURT: The act itself, the statute itself. The statute itself has some language which you could conceivably argue is more -- makes it much more obvious if there was a waiver.

MR. BRIGHTMAN: Well, I think in the statutes themselves --

THE COURT: In other words, why would you limit the municipal liability in the context of punitive damages if the municipality was immune from the lawsuit? It wouldn't make much sense.

MR. BRIGHTMAN: I agree, Judge. And the courts do touch on those provisions, although the real linchpin of those decisions is the definitional section and the imposition of liability on employers.

The rest are mentioned as a kind of a sidenote. But, again, the heart of the decision --

THE COURT: So at the risk of getting you off your argument, you started off with the premise that there was an express waiver. Where is it?

MR. BRIGHTMAN: So the express waiver, I think, comes in two different parts of the statute.

First is where Section 376.313, which creates the private right of action under the WQAA, incorporates the remainder of the WQAA. It says that nothing in this act shall prevent any person from bringing a cause of action for all damages covered by Sections 376.30 through 376.319.

That, of course, covers the imposition of liability on persons for discharges of pollutants and hazardous substances. And it includes the definition of

person as including any governmental entity.

And, therefore, because we know that Section 376.313 creates a cause of action incorporating those provisions, private plaintiffs are, therefore, authorized to sue government defendants as well.

That's the first waiver.

THE COURT: So where in the statute do I find that the definition of persons including governmental agencies?

MR. BRIGHTMAN: Section 376.301. That's the definition section of the WQAA. Clearly defines person as including, quote, any governmental entity.

THE COURT: Thank you.

MR. BRIGHTMAN: And then Section 376.313, the private right of action then explicitly incorporates that provision.

As I mentioned, there's also a second waiver. The second waiver is including -- is also included in Section 376.313 itself where the provision explicitly limits and stipulates the available defenses they're under.

This is critically important because, as Your Honor just mentioned, why would a statute limit the remedies available against a government defendant if a government defendant were immune from liability in the first place?

Well, the same logic applies to Section 376.313

where it limits defenses available to government defendants in private rights of action.

For example, Section 376.313 says that the only defenses available thereunder are those enumerated in Section 376.308.

Turning to Section 376.308, that provides that one defense for liability is that the discharge or pollutive condition was caused solely by an act of government unless the person claiming the defense is a governmental body, in which case the defense is available only by act of other governmental bodies.

That is, in a private right of action, if a private plaintiff sues a government defendant, the government defendant cannot simply assert that the pollution in question was an act of government.

THE COURT: So that language is in the '92 amendment. Is that where that's found?

MR. BRIGHTMAN: So that language, I believe, originated from the 1986 amendment to the WQAA which incidentally shortly follows the SARA amendment to CERCLA that Mr. Weinstein just discussed.

THE COURT: I thought it was '92, but I could certainly be wrong.

I guess, in terms -- the reason I ask the question is, is there anything that you can point to as to why that

language was added with respect to one defense available -- if the defense available to a governmental agency is that another governmental agency was responsible for the discharge.

Why is that -- why is that language in the statute and where does it come from?

MR. BRIGHTMAN: So I'm not exactly sure as a matter of legislative history what the impetus was for that amendment, but the plaintiffs' position is that the purpose is to clarify about the waiver of sovereign immunity contained in the --

THE COURT: Wouldn't that be important? I mean, I'm not necessarily always a huge fan of legislative history, but wouldn't it be important to find out why it is that the statute was amended to make that reference to defenses available to governmental bodies?

I mean, presumably there was some rational basis for the legislature's amendment to the act, and I'm curious as to what it was.

MR. BRIGHTMAN: Well, Your Honor, I apologize. I'm not sure what as a matter of legislative history was the impetus for the amendment.

What I do know and what plaintiffs provided in their briefing is that legislative history for nearly identical, if not precisely identical, language in another

statute was inspired by an explicit desire to impose liability on defendants.

And then the Florida legislature used exactly the same language in this, I believe, 1986 amendment to the WQAA.

So, again, as I said, if limiting remedies recoverable against government defendants would make no sense if immunity applied, likewise, explicitly limiting defenses available to government defendants would make no sense if immunity applied. And that's precisely what Section 376.313, the WQAA's private right of action, does.

And, finally, another important element of the WQAA, which the Maggio court addressed -- although it was not the linchpin of the decision, but the Maggio court, nonetheless, found it important -- is that the WQAA directs courts to construe its provisions broadly and liberally to effectuate its remedial purposes.

The purpose of the WQAA is to vest the victims of pollution with the ability to vindicate their rights against those who are accountable for such pollution.

And, indeed, the Florida Supreme Court just held in the Lieupo versus Simon's Trucking case that the concerns animating the WQAA was pollution that sowed tremendous harm that was generated by a private and

governmental polluters alike. And, of course, the Lieupo -- the Lieupo court made that observation in the context of a private right of action.

Now, OUC makes the claim that the WQAA only provides pursuits against government defendants brought by the Florida Department of Environmental Protection but not brought by private plaintiffs.

And incidentally, and as you've just seen, the OUC cites no Florida case law supporting that proposition. Rather, OUC relies entirely upon federal law, namely, the Union Gas case addressing the SARA amendment to CERCLA as well as the employees case which addressed the Fair Labor Standards Act, which touch on a similar and yet importantly different issue.

Those cases touch on the issue of Congress' abrogation of the State's Eleventh Amendment immunity by Congressional statute. This case involves a slightly different matter. This involves the State's waiver of its own immunity.

Now, a State's waiver of its own immunity is a matter of the State's sovereign prerogative. And under Florida law, the State may waive its immunity by legislative enactment. And whether a legislative enactment suffices to waive immunity with sufficient clarity is a matter of statutory interpretation. It's a matter of state

law.

And as discussed, the Bifulco and Maggio decisions place nearly all, if not all -- the Maggio court placed exclusive emphasis on the imposition of liability upon employers and the definition of employer as including governmental entities.

And that's what the WQAA does here and, indeed, goes beyond.

The next point, Your Honor, is that irrespective of waiver, OUC is ineligible for sovereign immunity in the first instance because it is a municipal agency. And this is a statutory action that falls outside the parameters of Section 768.28.

Now, here I think just a very brief --

THE COURT: What do you say to Mr. Weinstein's reliance on the Cauley case on that issue, on that point?

MR. BRIGHTMAN: So I think Cauley does say exactly as Mr. Weinstein represented in a case arising under Section 768.28. And there's no case --

THE COURT: And there's no application because of the statutory origins of your claim here under 376?

MR. BRIGHTMAN: Yes, that is plaintiff's position. Absolutely.

And, in fact, so Cauley, as Mr. Weinstein said, Cauley says that with respect to sovereign immunity all

governmental entities within the state of Florida are treated equally.

But outside Section 768.28, there's powerful indicia, if not straightforward, explicit holds, that that is not the case.

And, again, here, first of all, I think just a brief historical overview is useful in demonstrating the nature of sovereign immunity under Florida law.

So Florida law sovereign immunity derives from the common law. And the United States Supreme Court made clear in Owen v. City of Independence that at common law municipalities were routinely hauled into court for all manner of common law and statutory violations.

Okay. Now, Florida law acknowledged and adheres to that principle. So, for example, Mr. Weinstein mentions that at common law within Florida, municipalities had enjoyed immunity until it was, quote, pruned by a series of 19th century cases. That is not plaintiffs' reading of the case law.

An 1850 case called City of Tallahassee versus Fortune, that's the first municipal immunity case that plaintiffs could encounter that Cauley cites. And incidentally, it was cited five years after Florida's establishment as a state. And it found that there was no municipal immunity. And that principle continued.

So, for example, in 1916, the Florida Supreme Court held again -- observed rather, that municipalities could be held liable in damages. The reason for that is critical. And it's one that remains part of municipal immunity law in Florida.

Namely, that municipalities are more akin to private corporations than sovereign bodies. And for that reason, they could be held liable for damages.

Now, over time a more complex framework developed in which municipalities could be held liable for their proprietary acts, those acts that were essentially corporate; but not for discretionary acts, those acts that were essentially legislative.

And Section 768.28 modified that arrangement by equalizing governmental entities within Florida for sovereign immunity purposes.

Section 768.28 is often referred to in Florida case law as a limited waiver of sovereign immunity, but I think as Justice Cantero in the American Home Assurance case hopefully clarifies that's actually a bit of a misnomer.

Section 768.28 does provide a limited waiver of the State's sovereign immunity by authorizing tort suits against the State subject to limited recovery, but at the same time the provision also provides a limited grant of

immunity to the municipalities which it had not enjoyed before, mainly the caps on liability that can be recovered against municipalities and their agencies in common law torts.

That's why in the Sebring versus Orlando Utilities Commission case, which plaintiffs cite, the Court observes that Section 768.28 extended the doctrine of sovereign immunity to municipalities. They hadn't enjoyed it before and they don't enjoy it outside the statute's parameters.

Now, the Florida Court of Appeals decision in Bifulco, which plaintiffs also cite, makes claim that Section 768.28 applies only to common law torts not, for instance, in statutes that create whole new causes of action like the Florida workers' compensation law and like the WQAA.

And here, incidentally, a rare point on which the parties are in total agreement, Section 768.28 has no application; therefore, it's limited grant of immunity to municipalities has no effect. And Cauley, a Section 768.28 case likewise has no effect.

There are three principal cases that most clearly illustrate the principle that in statutory causes of action like this one outside Section 768.28's ambit, municipalities continued to enjoy diluted, near nonexistent immunity.

The first case is American Home Assurance. That's a Florida Supreme Court case from 2005, more than two decades after Cauley. And American Home Assurance reached two critical holdings for our purposes.

First, American Home Assurance was a breach of contract case involving a municipal agency, Kissimmee Utility Authority, very similar to OUC. And the Court held that Section 768.28 was of no moment because the case arose from breach of contract, not from common law tort. So, therefore, its provisions could have no effect.

So then the question becomes, well, what impact does the removal of Section 768.28 from the analysis have on sovereign immunity?

And what the Florida Supreme Court holds is that without Section 768.28 municipalities have only unequal and diluted immunity. And it illustrated the point because it held that municipalities like KUA, a municipal agency, could be held liable for breach of contract.

It stated: We hold that KUA, that no sovereign immunity applies because municipalities have historically been susceptible to contractual liability.

So in other words, outside Section 768.28 the old rules continue to govern and those rules provide that municipal immunity is diluted, indeed, near nonexistent. American Home Assurance is an illustration of that.

Now, OUC says that American Home Assurance is actually a case about waiver. That's what OUC says in their reply brief. They say that, in fact, KUA enjoyed sovereign immunity but waived it by entering into an indemnification agreement.

That can't be right and I'll explain why. So under Florida law, there is the Pan-Am doctrine. The Pan-Am doctrine is a slight deviation from the general Florida law of principle that immunity can be waived only by statute.

The Pan-Am doctrine provides that when the Florida legislature authorizes state agencies to enter into contract and when state agencies exercise that authority by, in fact, entering into contracts, they waive immunity for breach of contract.

And the reason for that is because it gives effect to Florida -- to the Florida legislature's authorization for entry into those contracts without -- if state agencies were not responsible for their breach, the contract would be wholly illusory and without mutuality undermining the legislature's intent.

But American Home Assurance explicitly addressed the question certified by the Eleventh Circuit about how the Pan-Am doctrine applied in that case. And the Florida Supreme Court held that it didn't.

So in other words, the notion that a government entity enjoys sovereign immunity but waives it by entering into a contract, i.e., the Pan-Am doctrine, did not apply because the American Home Assurance court explained that doctrine applies only to the state and state agencies, not to municipalities and municipal agencies.

Yet another demonstration outside Section 768.28 that municipalities are not for purposes of sovereign immunity. And Cauley's holding does not extend.

The next case that best illustrates municipalities diluted immunity outside Section 768.28 is a case which Mr. Weinstein touched on briefly, that is, the Town of Gulf Stream case. It's an interesting case.

There, the Palm Beach County amended its charter by providing for an office of inspector general to investigate local government wrongdoing, and the county came to the Town of Gulf Stream and demanded payment to finance the OIG. The Town of Gulf Stream refused and asserted that sovereign immunity insulated it from any obligation to make that payment.

Now, what's interesting about the case is that it's not a Section 768.28 case. The provision is never cited either in the briefs, as far as I can tell, and certainly not in the decision and, of course, the case does not involve a common law tort.

And what's interesting is, in that context, how do the Florida courts treat the immunity of municipality Town of Gulf Stream?

And the Court's analysis proceeds as follows:

The Court first addresses whether the Town of Gulf Stream is eligible for immunity in the first instance.

Okay. And what the Court holds is yes, the Town of Gulf Stream is immune for the reason that the decision whether to finance the county OIG was a legislative decision or a discretionary decision for which municipalities are entitled to immunity.

Now, of course, what that means is had the municipal act in question been not discretionary but, rather, operational, no immunity would have attached. That's the purpose of the analysis.

Now, we know from cases like Sebring and Hardy, which plaintiffs cite in their response, that operation of an electrical utility -- that is the municipal acts giving rise to OUC's liability in this case -- are not discretionary or legislative in nature. Rather, they are operational.

And pursuant to the Florida Court of Appeals analysis in Town of Gulf Stream, they are ineligible for sovereign immunity in the first instance irrespective of waiver.

Now, the final case that illustrates municipalities diluted, near nonexistent immunity outside Section 768.28 is a case called Duck Tours Seafari versus City of Key West. That's a case that arises under the Florida antitrust law in which private plaintiff Duck Tours Seafari sued the City of Key West for anticompetitive acts.

In response, the City defended that it was entitled to what's called a state action exemption. The state action exemption is a -- it's sort of a presumption read into the antitrust law that the law applies only to private restraints of trade and is intended to respect the sovereign prerogative to regulate its own markets.

Okay. So the City invoked that exemption. When faced with antitrust liability, the Florida Court of Appeals roundly rejected that defense.

Why? Well, the reason that the Florida Court of Appeals gave was because while the State and its agencies may be sovereign, quote, municipalities are not themselves sovereign, end quote.

Therefore, the City could not invoke the state action exemption and was entirely subject to antitrust liability under the Florida Statute. The same analysis applies here to a statutory action outside Section 768.28's ambit.

Finally, Your Honor, and alternatively,

plaintiffs' position is that a federal law rather than state law supplies the rule of decision with respect to the sovereign immunity questions presented.

The reason for that is that this is, in fact, despite all the discussion about the WQAA, this is at its core a Price-Anderson action, a PAA action. The PAA incorporates only substantive rules of decision from state law.

Now, the word "substantive" must be given effect and must be read to modify rules of decision. That means that nonsubstantive rules of decision are not incorporated from state law and remained governed by federal law.

Sovereign immunity is a jurisdictional principle. The United States Supreme Court has held as much. The Eleventh Circuit has held as much. Therefore, federal law, not state law, governs sovereign immunity in this case.

And federal law is completely clear that sovereign immunity does not extend to municipalities. It said so on innumerable occasions, most recently and explicitly in the Northern Insurance case which plaintiffs cite in their response brief which provides that a consequence of the Constitution's adoption or incorporation of preratification sovereign immunity is that the immunity extends to states and arms of the state but not to municipalities.

Now, finally, Your Honor, I'd like to close by

addressing OUC's notion that it is not a municipal agency but, rather, a state agency.

First, OUC relies on the Lederer case. But, again, just like OUC's argument regarding Cauley, Lederer is a Section 768.28 case.

Okay. The great innovation shown by Section 768.28 is by defining municipalities and their agencies as state agencies. That had never been done before. That's the great difference that Section 768.28 makes.

And the issue in Lederer was whether the plaintiff Lederer was bound by that section's pre-suit notice requirements. The issue is that pre-suit notice applies unless the defendant is a municipality.

The Lederer court held that OUC is not a municipality. And incidentally plaintiffs agree. OUC is not a municipality. It's a municipal agency which is crucially different.

The Court also held that OUC was not a municipal department. All that means is that OUC can be sued as its own entity. It need not be sued by going through the City of Orlando.

So an example of municipal departments include the Orlando Police Department and the Orlando Fire Department. Per the analysis of Lederer, those departments cannot be

sued individually. They can only be reached by suing the City of Orlando.

That's all the Lederer case means when it says that OUC is not a municipal department. And although Lederer reserves the question of what precisely OUC is, it cites -- I believe it's the Cobo case strongly suggesting that OUC is a municipal agency for the primary reason that the Florida legislature defines OUC as, quote, part of the government of the City of Orlando, end quote.

The Hodge case decided by this Court took the next step and held explicitly that OUC is a municipal agency.

Now, that was a Title VII case. The question presented there was whether OUC was a local government for purposes of covering punitive damages because Title VII provides that -- or Section 1981, rather, provides that punitive damages cannot be recovered from local government.

And the Hodge court held that OUC was a municipal agency; therefore, no punitive damages could be recovered from them given Congress' intent not to subject local governments to punitive damages further clarifying that OUC is a municipal agency, is a municipal body.

So for those reasons, Your Honor, OUC's motion must be denied. It is a municipal agency. It's not entitled to immunity in this case. And to the extent that it is, Florida law is completely clear that the WQAA waives

that immunity.

Thank you very much for your time.

THE COURT: Thank you, Mr. Brightman. Very helpful.

Mr. Weinstein.

MR. WEINSTEIN: Please.

Whatever plaintiffs may think regarding Florida common law, Judge, the Constitution was amended in 1968.

THE COURT: Pull that mic down just a little bit.

MR. WEINSTEIN: Sure. My apologies.

Whatever they may think about prior common law, the law changed in 1968 when the Constitution was changed. And this is a constitutional issue. And one cannot read Cauley meaning anything else other than the previous distinctions between various strata of sovereign immunity protection are abrogated.

And the Supreme Court in Cauley says, quote, It is the philosophy of Florida's present constitution that all local governments be treated equally. Since 1968 municipal corporations, counties, school districts, et cetera, have a constitutional parity with one another possessing equal taxing powers. Municipalities can no longer be identified as partial outcasts as opposed to other constitutionally authorized governments.

In its decision, which -- it precedes with: It is

our decision that in this state sovereign immunity should apply equally to all constitutionally authorized government entities and not in a disparate manner.

Does not mention 768. It's a constitutional principle. And our Supreme Court has adopted it in Cauley.

Next and briefly, the Gulf Stream decision that plaintiffs rely upon has the right holding and the wrong rationale. It does, as counsel correctly points out, talk about a distinction between operational and discretionary decisions.

But it cites for that proposition Commercial Carrier. Commercial Carrier doesn't say that, Judge. It says something very, very different.

Well, Commercial Carrier says that you look to that distinction between operational and discretionary to find whether or not sovereign immunity applies notwithstanding a waiver.

And that makes sense because even if there's a waiver under 768.28 there's certain functions of government purely discretionary, a quasi-judicial hearing, for example, Judge, for which immunity is --

And so -- and I commend to the Court a reading of Cauley and Commercial Carrier. They follow one another, but it says something completely different and, quite frankly and respectfully, the case got it wrong. They rely

upon --

And this is what it says:

So too we hold that although 768 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain discretionary governmental functions remain immune from tort liability. This is so because certain functions of coordinate branches of government may not be subject to scrutiny by a judge, jury -- judge or jury as to the wisdom of their performance.

In order to identify those functions, we adopt the analysis of Johnson versus State which distinguishes between planning and operational decisions.

It's the opposite. It's you look. Has there been a waiver in the statute? If so, is it a discretionary decision of government? Immunity applies notwithstanding the waiver. And that's the clear holding of Cauley.

Next, they try and say that reading person -- reading sovereign in the person would be meaningless if there was no private right of action. And the Supreme Court itself rejected that principle statutory construction, U.S. Supreme Court.

THE COURT: What does the section of the statute that gives the governmental agency that contends that liability should be posited with another governmental

agency, what does that mean? What's the difference?

MR. WEINSTEIN: It's there for an action by the FDEP. And it's clear, Judge, because the first five or six words of 376.308 says: In any suit instituted by the department.

And then the section in which they rely upon, Section (2) says: In addition to the defense described in (1)(c) -- we just read (1) -- the only other defenses of a person specified in Subsection (1) -- and there's only one person specified in Subsection (1), and that's a defendant in a suit instituted by the department.

And we concede, Your Honor, that, again, in a private party action, what's necessary to make 308 stick is the Court has to infer that that's not what the legislature meant, okay, in a private right of action.

It must have intended to weed out "in any suit instituted by the department" and it intended, apparently, courts to weed out the words "the only other defense of a person described in Subsection (1)."

But the law is clear and it's constitutionally based that those types of inferences are not permissible in a sovereign immunity waiver analysis. It has to be clear. It has to be unequivocal. And it has to be susceptible of no other reasonable interpretation.

And the U.S. Supreme Court in the majority

decision in Union Gas took this on directly. And it said, Although it is true that the inclusion of states within CERCLA's definition of person would not be rendered meaningless if we held that CERCLA did not subject the states to suits brought by private citizens.

In other words, if they had just held that states were amenable to enforcement actions by EPA, Department of Justice, or any other federal agency, the statute would still have meaning.

And then the Court goes on to say, but the language of SARA, that I read to you earlier, that's what tips the balance. And despite the fact that the legislature has met 31 times since this case, there is no comparable SARA language.

And respectfully, Judge, the Court is not permitted to infer language that just isn't there.

Let me touch briefly on Maggio and Bifulco. The Court -- if the statute at issue in Maggio says the state and its agencies twice in the operative enforcement part of the statute. And then it incorporates 768.28 as well.

So while the Supreme Court makes short shrift of the decision, it's clear that the substance of the statute waives sovereign immunity by incorporating the state and its subdivisions not once, not twice but three times.

And Bifulco has the same -- I won't take the

Court's time again -- has the same waiver-type construct to SARA because it tells you exactly who was liable.

And neither of those statutes, the Florida Civil Rights Act or the workers' compensation retaliation provision suffer from the fatal defect that 376.313 suffers. And that is, it doesn't say who can be sued. It would require an inference.

And when you look at the parallel provision in 376.205, it doesn't say "person," Judge. It says "responsible party." So the Court can't assume what the legislature might have meant here. The legislature needs to fix this problem.

And lastly, under the Robinson -- Price-Anderson Act, they're just wrong, Judge. Respectfully.

What happens when a sovereign removes under Price-Anderson is we lost our right to object to being in a federal forum, being in this courtroom.

Of course we did. We removed. We asked this Court to take jurisdiction. We certainly waive those rights. But we didn't waive substantive sovereign immunity. We waived the procedural sovereign immunity of being in federal court.

And the cases make that clear. There's a case cited in our brief called Kiick versus Metro, and it explains that the Price-Anderson Act is only intended to

interfere with state law to the minimum extent possible.

The Price-Anderson Act doesn't advocate the theory doctrine, Judge. State law applies to this.

That concludes my argument this morning. I appreciate the Court's attention.

THE COURT: Thank you, Mr. Weinstein.

Thank you to all the lawyers. I appreciate your well-argued points.

I'll take it all under advisement and get you a disposition on both the matters that we heard this morning as quickly as I can.

MR. WEINSTEIN: Thank you again, Your Honor.

MR. LEOPOLD: Your Honor, may we take up one housekeeping matter with the Court?

THE COURT: Sure.

MR. LEOPOLD: Thank you, Your Honor.

Just wanted to alert the Court that the parties, at least with the Orlando Utility Commission, and I believe Mr. Weinstein on behalf of the defense is taking the labor in order to address the prospects of moving hopefully with an agreement on extending some of the CMO dates.

That in light of all of the dispositive motions, that has been ongoing as well as the parties good efforts, at least on the defendants, to try to produce documents, primarily OUC and word searches, et cetera. It has been

quite difficult to get documents and setting depositions to date.

The Court may be aware that in March, actually March 2nd, I believe, the expert reports by plaintiffs are due. And due to the fact that some delays -- again, not on behalf of any particular party. We've been cooperative, work very well together. But we need more time.

And if the Court is inclined, we'd like to try -- we're going to be actually meeting after this hearing with some of the defendants and try to propose some alternative dates, maybe 120 days or at least 90 days after the Court rules on these, some of these dispositive motions to extend the dates, to alert the Court to that.

THE COURT: Here's what I will do, Mr. Leopold.

First of all, I appreciate the heads-up. And I'm certainly receptive to getting some input from the lawyers with respect to demonstrating good cause, what you've done to this point in time to try to meet the deadlines. I appreciate that there's some complex issues that are involved here, how much more time you need.

I will tell you what I'm not going to do. I'm not going to tie the deadlines to my work product. I'm going to resolve these motions as quickly as I can.

I hear the argument all the time from lawyers, you

know, we don't want to do any of this work until you've ruled on the motion to dismiss.

I, frankly, have too many plates to keep spinning to tie the case management scheduling order to when I get my work done. I'm going to get my work done as efficiently as I can recognizing that sometimes it's not as quick as the lawyers would like it.

But -- so just know that that's a nonstarter for me. So when you all work to try to come up with a requested extension for the deadlines, which I'll be receptive to if it's reasonable, don't make it dependent upon me resolving any of the things that I have under advisement currently.

Fair enough?

MR. LEOPOLD: Understood, Your Honor.

Thank you for your time.

THE COURT: Wish you well. Have a good afternoon.

And as I said, I'll get something on this as quickly as I can.

(Proceedings adjourned at 11:44 a.m.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

July 17, 2020

s\ Amie R. First

Amie R. First, RDR, CRR, CRC, CPE
Federal Official Court Reporter
United States District Court
Middle District of Florida