UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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

CASE NO: 6:19-cv-268-Orl-37TBS

Plaintiffs,

v.

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

Defendants.

_____/

PLAINTIFFS' RESPONSE TO DEFENDANT ORLANDO UTILITIES COMMISSION'S MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

OUC moves for judgment on the pleadings on the sole basis that it is a state entity presumptively entitled to sovereign immunity under Florida law, and that the WQAA does not waive that immunity. OUC is wrong on both scores.

For starters, assuming OUC is eligible for sovereign immunity in the first instance, the Water Quality Assurance Act ("WQAA"), Fla. Stat. §§ 376.30–376.317, waives that immunity. The Florida Supreme Court has repeatedly held that statutory designation of the state or its agencies as suable entities effects a waiver of immunity. The WQAA so designates. Indeed, the Act goes further by explicitly divesting governmental bodies of the ability to invoke their sovereign status as a defense. Accordingly, the WQAA strips OUC of any "immunity" it claims to possess.

In any event, OUC is *not* a "state entity"—it is a municipal agency. The Florida Supreme Court's decision in *American Home Assurance v. National Railroad Passenger Corp*., 908 So. 2d 459 (Fla. 2005), clarifies municipal sovereign immunity. It holds that, under the common law and the Florida Constitution, municipalities and their agencies did not partake in state sovereign immunity. In 1973, the Florida Legislature enacted Fla. Stat. § 768.28, which created both a limited *waiver* of state sovereign immunity and a limited *grant* of municipal sovereign immunity in common-law torts. Outside the scope of common-law torts, however, pre-§ 768.28 law remains effective. That law establishes that OUC, as a municipal agency, enjoys no sovereign immunity from this statutory cause of action.

Alternatively, federal law—not state law—governs sovereign immunity in this federal cause of action. As OUC recognized in its notice of removal, this case arises under the federal Price-Anderson Act, which incorporates only "substantive rules for decision" from state law. Since sovereign-immunity principles are not "substantive rules for decision," federal law governs. Federal law plainly withholds sovereign immunity from municipal agencies like OUC.

ARGUMENT

I. The WQAA Waives Any Immunity OUC Purports to Possess

Assuming sovereign immunity extends to OUC in this case, the Florida Legislature waived that immunity under the WQAA. The Florida "Legislature has authority to enact a general law that waives the state's sovereign immunity." *Am. Home Assurance Co.*, 908 So. 2d at 471. Although waivers of sovereign immunity must be clear, specific, and unequivocal, "no particular magic words are required." *Klonis v. State, Dep't of Rev.*, 766 So. 2d 1186, 1189 (Fla. 1st DCA 2000). Rather, Florida courts employ commonsense, holistic interpretation to ascertain whether the Legislature intended to effect a waiver. *Id*. ("we look 'to the provisions of the whole law, and to its object and policy,' rather than consider various statutory subsections in isolation from one another and out of context").

A. The WQAA Far Exceeds the Waiver Standards Enunciated by the Florida Supreme Court in *Bifulco* and *Maggio*

Statutory designation of governmental bodies as suable entities suffices to waive sovereign immunity. In *Bifulco v. Patient Business & Financial Services, Inc.*, 39 So. 3d

1255 (Fla. 2010), the Florida Supreme Court addressed whether the Florida Workers' Compensation Law waives sovereign immunity. The Court held:

> Section 440.02(16)(a), Florida Statutes (2004), defines "Employer" to include "the state and all political subdivisions thereof [and] all public and quasi-public corporations therein." And section 440.03, Florida Statutes (2004), provides that "[e]very employer and employee as defined in § 440.02 shall be bound by the provisions of this chapter." *Therefore, under the plain language of the Workers' Compensation Law, actions for workers' compensation retaliation are authorized against the State and any of its subdivisions, as employers. By enacting chapter 440, the Legislature waived sovereign immunity . . . .*

Id. at 1257 (emphasis added).

Likewise, in *Maggio v. Florida Department of Labor & Employment Security*, 899 So. 2d 1074 (Fla. 2005), the Florida Supreme Court held that the Florida Civil Rights Act waives sovereign immunity. The Court staked its holding on the following:

> Under the Act, the term "employer" is defined to mean "any *person* employing 15 or more employees . . . and any agent of such person." The Act further defines "person" to include "the state; or any governmental entity or agency." *The inclusion of the State in the definition of "person" and, hence, "employer" evidences a clear, specific, and unequivocal intent to waive sovereign immunity*.

Id. at 1078–79 (citations omitted) (emphasis added).

In both *Bifulco* and *Maggio*, the *sole basis* for the Florida Supreme Court's holding that the statutes in question waived sovereign immunity was their inclusion of the state within the definition of entities subject to suit. *Id*.; *Bifulco*, 39 So. 3d at 1257; *see also Jones v. Brummer*, 766 So. 2d 1107, 1109 (Fla. 3d DCA 2000) ("If the legislature had not intended that civil actions for damages be prosecuted in such a manner, there would be no reason for the inclusion of such public entities within the definition of employer . . . ."). Accordingly, statutory designation of the state as a suable entity, without more, waives sovereign immunity under Florida law.

Statutory limitation of defenses available to government-defendants further evinces a waiver of immunity. In *Klonis*, the Florida First District Court of Appeal found a waiver based on a provision stating: "Notwithstanding the above, the state and its agencies and subdivisions shall not be liable for punitive damages." *Id*. at 1190 (citing Fla. Stat. § 760.11(5)). "[T]he language merely limiting but not precluding other types of damages, clearly evinces a clear, unambiguous legislative intent" to waive sovereign immunity. *Id*. Limiting the remedies available against a government-defendant plainly contemplates governmental liability, evincing a waiver. It follows that limiting the defenses available to a government-defendant likewise contemplates litigation against the state, waiving immunity.

Finally, remedial statutory schemes requiring broad interpretation are more likely to effect a waiver of immunity. In *Maggio*, the Florida Supreme Court determined that the Florida Civil Rights Act provides an independent waiver of immunity based in part on the Legislature's instruction that the Act be "liberally construed to further the general purposes" of the Act. *Maggio*, 89 So. 2d at 1077.

The WQAA checks more than the requisite boxes: it designates the state as a suable entity, it limits defenses available to state-defendants, and it instructs courts to construe its provisions broadly.

First, the WQAA identifies the state as a suable entity. The Act imposes liability on "any person" who "discharge[s] pollutants or hazardous substances into upon the surface or ground waters of the state or lands." Fla. Stat. § 376.302(1)(a), (2). The Act defines "Person" as including "*any governmental entity*." Fla. Stat. § 376.301(29)

(emphasis added). By expressly designating the state as an entity subject to suit, the WQAA evinces the Legislature's clear intent to waive sovereign immunity.

The WQAA's private right of action likewise extends to governmental entities. Section 376.313 is titled "Nonexclusiveness of remedies and individual cause of action for damages *under §§ 376.30–376.317*" (emphasis added). It explicitly brings all "discharge[s] and other condition[s] of pollution covered by §§ 376.30–376.317"—including § 376.302's imposition of liability against governmental entities—within its ambit. By explicitly incorporating the WQAA's waiver of sovereign immunity, § 376.313's private right of action maintains that waiver. Under *Bifulco* and *Maggio*, that incorporation suffices to waive sovereign immunity.

But the WQAA goes further. It provides that "[t]he only defenses" to private actions thereunder "shall be those specified in § 376.308." Fla. Stat. § 376.313(3). One such defense is that the discharge or pollutive condition was "solely the result" of:

> An act of government, either state, federal, or local, *unless the person claiming the defense is a governmental body, in which case the defense is available only by acts of other governmental bodies*.

Fla. Stat. § 376.308(2)(b).

The WQAA's private right of action thus expressly extends liability to governmental entities. Indeed, the italicized language would have no meaning or effect if § 376.313 were somehow interpreted to preclude claims against governmental bodies altogether, as OUC claims it should be. *See McGhee v. Volusia Cty.*, 679 So. 2d 729, 768 (Fla. 1996) (holding that, where possible, status should be construed to give full effect to each provision). Once subject to private suit, a governmental entity may cite acts of other

governmental entities to defend itself. But the governmental entity cannot invoke its own sovereign status as a defense. Indeed, the Florida Legislature described an identical provision as "restricting the ability of government entities to interpose a defense to such liability." Ex. 1 at 1823 (describing amendments to Fla. Stat. § 403.727(5)(b), identical to present-day Fla. Stat. § 376.308(2)(b)).[1] By explicitly eliminating invocation of sovereignty as a defense against private actions, the WQAA far surpasses *Bifulco*'s and *Maggio*'s requirements for waiving sovereign immunity.

Finally, the WQAA directs courts that its provisions, "being necessary for the general welfare and the public health and safety of the state and its inhabitants, shall be liberally construed to effect the purposes set forth under §§ 376.30–376.317 . . . ." Fla. Stat. § 376.315. By subjecting "Persons" to suit, including as "Persons" "any governmental entity," extending that definition to private rights of action, eliminating invocation of sovereignty as a defense in private actions, and demanding broad construction, the WQAA unequivocally waives sovereign immunity.

OUC's arguments to the contrary do not pass muster. OUC contends that, by extending liability to "governmental entities," the WQAA intended to subject the state to only Florida Department of Environmental Protection ("Department") enforcement actions, but not private rights of action. Mot. 7. That argument collapses under even cursory review.

To repeat, the WQAA's private right of action *incorporates* the WQAA's subjection of governmental bodies to suit. Fla. Stat. § 376.313(3) (incorporating "all

[1] Available at http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1983/1983V1Pt2.pdf.

discharge[s] or other condition[s] of pollution covered by §§ 376.30–376.317," including those on which § 376.302 imposes liability). In so doing, the WQAA extends its waiver of immunity to private rights of action. Indeed, the Florida Supreme Court has recognized that the WQAA may afford private litigants *broader* rights than those enjoyed by the Department. *See Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 27 (Fla. 2004) ("[E]ven if . . . our interpretation of the [WQAA] would allow private parties to sue where the [Department] could not, that would simply reflect the legislative policy decision to allow private parties, the actual victims of pollution, greater ability to recover damages from the owners of contaminated property.").

What's more, OUC cites *no Florida caselaw* supporting its proposition. Rather, OUC cites *only* federal cases addressing congressional abrogation of Eleventh Amendment immunity. Mot. 7–8. Yet OUC does not claim Eleventh Amendment immunity. Rather, OUC asserts only that it "is protected by sovereign immunity *under Florida law*." Mot. 6 (emphasis added). OUC's Eleventh Amendment authorities are inapposite. *See Pennsylvania Nat. Mus. Cas. Ins. Co. v. St. Catherine of Siena Par.*, 790 F.3d 1173, 1182 (11th Cir. 2015) (federal courts applying state substantive law "are bound to follow 'the latest statement of state law by the *state supreme court*'") (emphasis added).

Rather, Florida Supreme Court precedent is dispositive. In *Bifulco*, the Florida Supreme Court held that the Florida Workers' Compensation Law waives sovereign immunity in private causes of action, even though the Law also vests the Florida Department of Financial Services with enforcement authority. 39 So. 3d at 1257; *see also*

Fla. Stat. § 440.107 (empowering "[t]he department" to "Levy and pursue actions to recover penalties"). The Court did not hold, or even consider, that the Law's subjection of the state to suit was limited to Department enforcement actions.

In *Maggio*, the Florida Supreme Court held that the Florida Civil Rights Act waives sovereign immunity in private causes of action, even though the Act also endows the Florida Commission on Human Relations with enforcement discretion. 899 So. 2d at 1078–79; *see also* Fla. Stat. § 760.06 (authorizing "the commission" to "receive, initiate, investigate, seek to conciliate, hold hearings on, and act upon complaints alleging any discriminatory practice"). Once more, the Court did not entertain the notion that the Act subjected the state to only Commission enforcement actions, but not private suits. Florida law has not adopted the purported Eleventh Amendment principle that OUC advocates.

OUC urges this Court to follow *Miller v. City of Fort Myers*, No. 2:18-cv-195-FtM-38UAM (M.D. Fla. Apr. 1, 2019) (Doc. 61), in which Judge Chappell determined that the WQAA does not waive sovereign immunity. *Miller* is distinct on two grounds. First, the *Miller* plaintiff did not cite § 376.308(2)(b)'s express elimination of the state's invocation of sovereignty as a defense. *Id*. at 22 (noting "neither party addresses the issue"). That provision is dispositive. Second, Judge Chappell based his decision in part on the dearth of relevant caselaw cited by the parties. *Id*. at 23. OUC neglects to mention that a Florida court has found sovereign immunity inapplicable under the WQAA. Ex. 4 at 2 (*Hinton v. City of Ft. Lauderdale*, No. 07-30358 (26) (Fla. 17th Cir. Ct. May 31, 2018)) (finding "no immunity as to [§ 376.313] claims"). *Hinton* is owed some deference. *See Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (state trial court decisions must

be "attributed some weight" in diversity actions). What's more, because the *Miller* plaintiff did not address § 376.308(2)(b), the Court had no reason to question its conclusion that § 376.313 "merely references" § 376.308. But in fact, § 376.313 does far more. It explicitly incorporates § 376.308 as "[t]he only defenses available" thereunder, including § 376.308(2)(b)'s elimination of the invocation of sovereignty as a defense. Beyond "merely referencing" § 376.308, § 376.313 adopts it wholesale, rendering § 376.308 *part of* § 376.313. *Miller* should not sway this Court.

B. Contrary to OUC's Claim, CERCLA's Amendment History Reinforces the WQAA's Waiver of Immunity

OUC contends that, because the WQAA contains no language paralleling CERCLA's 1986 SARA amendment, the WQAA does not waive sovereign immunity. Mot. 10–11. That argument is misguided on three grounds.

First, OUC is incorrect that the WQAA's waiver provisions mirror pre-SARA CERCLA. To be sure, pre-SARA CERCLA's identification of the state as a suable "person" sufficed to waive immunity under Florida law. Nonetheless, the WQAA plainly goes beyond pre-SARA CERCLA in waiving immunity by precluding governmental bodies from asserting their sovereignty as a defense. Fla. Stat. § 376.308(2)(b). Pre-SARA CERLCA's purported insufficiency to abrogate Eleventh Amendment immunity does not bear on this dispute.

Second, OUC is incorrect that, under *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), CERCLA abrogated Eleventh Amendment immunity only post-SARA. In *Union Gas*, the Supreme Court addressed whether post-SARA CERCLA abrogated the states' Eleventh Amendment immunity. The Court began by observing that CERCLA includes

"States" within its definition of "persons" and "owners or operators" subject to suit. *Id*. at 7. The Court continued,

> The express inclusion of States within the statute's definition of "persons," and the plain statement that States are to be considered "owners or operators" in all but very narrow circumstances, together convey a message of unmistakable clarity: Congress intended that States be liable along with everyone else for cleanup costs recoverable under CERCLA.

Id. at 8.

The Court explained that SARA reinforced Congress's "background understanding—evidenced first in its inclusion of States as 'persons'—that States would be liable in any circumstance described in § 107(a) from which they were not expressly excluded." *Id*. Although it did not hold as much (because the question was not presented), the Supreme Court left open the possibility that CERCLA's pre-SARA designation of states as suable entities sufficed to abrogate Eleventh Amendment immunity.

Third, OUC is incorrect that the WQAA's waiver provisions went uninfluenced by CERCLA's amendment history. The Florida Legislature enacted the WQAA in 1983 and modified it in 1986, months before SARA's promulgation. Ex. 1 (Stat. 83-310); Ex. 2 (Stat. 86-159).[2] Both the 1983 and 1986 Acts limited the defenses available in private WQAA actions to those enumerated therein. Ex. 1 at 1885; Ex. 2 at 687. One such defense was that the alleged discharge "was solely the result of . . . [a]n act of government, either state, federal, or municipal." Ex. 1 at 1884; Ex. 2 at 686.

Months after the 1986 Act, Congress enacted SARA, more explicitly abrogating Eleventh Amendment immunity. In 1992, the Florida Legislature modified the WQAA's

[2] Available at http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1986/1986V1Pt1.pdf.

"act of government" defense, providing that defendants may argue that the alleged discharge:

> [W]as solely the result of . . . [a]n act of government, either state, federal, or local, *unless the person claiming the defense is a governmental body, in which case the defense is available only by acts of other governmental bodies*.

Ex. 3 at 223 (Stat. 92-30) (italicized text added by 1992 Act) (emphasis added).[3]

In the 1992 Act, the Florida Legislature clarified that a governmental body haled into court under the WQAA cannot invoke its sovereign status as a defense. Rather, government-defendants may cite only acts of war, acts of *other* governmental bodies, acts of God, or acts of third-parties. Accordingly, after Congress more explicitly abrogated Eleventh Amendment immunity under CERCLA, the Florida Legislature followed suit under the WQAA.

Under Florida Supreme Court precedent, the WQAA's express designation of governmental bodies as "persons" subject to suit suffices to waive sovereign immunity. The WQAA goes further by neutralizing as a defense government-defendants' invocation of sovereignty. The Act's amendment history tracks CERCLA's, creating an even more explicit waiver. OUC's arguments to the contrary, based only on inapposite law, crumble.

II. OUC Cannot Claim Sovereign Immunity As a Municipal Agency in This Statutory Action

Irrespective of waiver, OUC's motion collapses on an independent basis. OUC is ineligible for sovereign immunity in the first instance. OUC claims it is a "state entity" that is "protected by sovereign immunity under Florida law." Mot. 6. But OUC is a

[3] Available at http://edocs.dlis.state.fl.us/fldocs/leg/actsflorida/1992/1992V1Pt1.pdf.

municipal agency. Florida common and constitutional law, recapitulated by the Florida Supreme Court in *American Home Assurance*, never bestowed sovereign immunity on municipalities as it did on the state. To be sure, the Florida Legislature shook up the sovereign-immunity landscape with its 1973 enactment of § 768.28. Yet that statute applies only to common-law torts. Elsewhere, Florida law continues to withhold sovereign immunity from municipalities and their agencies. Since the instant dispute arises from statute rather than a common-law tort, and since OUC is a municipal agency, OUC cannot invoke sovereign immunity.

Moreover, OUC assumes, without analysis, that state law governs sovereign immunity in this case. But this is a federal cause of action arising under the Price-Anderson Act ("PAA"). Although the PAA incorporates state-law "substantive rules for decision," sovereign immunity is jurisdictional. Accordingly, federal law supplies the applicable principles. Federal law repudiates municipal sovereign immunity.

A. Florida Law Does Not Extend Complete Sovereign Immunity to Municipalities or Their Agencies Under the Circumstances Presented

Although states enjoyed sovereign immunity at common law, municipalities and their agencies did not. *Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 400–01 (1979) (The U.S. Supreme "Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'"); *Northern Ins. v. Chatham Cty.*, 547 U.S. 189, 193 (2006) ("A consequence of this Court's recognition of preratification sovereignty is that only States and arms of the State possess immunity from suits authorized by federal law").

Indeed, "there is no tradition of immunity for municipal corporations" as "municipalities—like private corporations—were treated as natural persons for virtually all purposes of constitutional and statutory analysis. In particular they were routinely sued in both federal and state courts," and "were regularly held to answer in damages for a wide range of statutory and constitutional violations." *Owen v. City of Independence*, 445 U.S. 622, 639 (1980).

That history—in which municipalities did not partake in state sovereign immunity and were routinely haled into court without consent—is reflected in Florida law. In *Keggin v. Hillsborough County*, 71 So. 372 (1916), the Florida Supreme Court explained that "a municipality" may be subject to "liability in damages," observing: "Many of the powers exercised by a municipality, such as building and maintaining streets, erecting and operating water supply systems, *lighting and power plants*, are, in their nature and character, corporate rather than governmental." *Id*. at 373 (emphasis added). Municipalities and their agencies, unlike states, could not claim immunity for conduct committed in the course of their (essentially corporate) functions.

A century later, the Florida Supreme Court has adhered to that principle. In *American Home Assurance Co v. National Railroad Passenger Corp.*, 908 So. 2d 459 (Fla. 2005), the Court addressed whether sovereign immunity insulated a municipal agency, the Kissimmee Utility Authority ("KUA"), from its contractual obligation to indemnify a railroad company. The Court began with a helpful overview of municipal sovereign immunity under Florida law. *Id*. at 472. Traditionally, the state enjoyed sovereign immunity from tort liability, but "[m]unicipalities did not share this immunity

from tort liability." *Id*. (citing *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 133 (Fla. 1957) ("The modern city is in substantial measure a large business institution."); *Kaufman v. City of Tallahassee*, 94 So. 697, 699 (Fla. 1922) ("[A] city is merely a large quasi public corporation whose activities partake more of the nature of a business than a government."); Fla. H.R. Comm. on Judiciary, HB 315 and 376 (1973) ("Municipalities do not have this immunity [from tort liability].").

In 1973, the Florida Legislature enacted Fla. Stat. § 768.28. Although courts commonly refer to § 768.28 as a "limited waiver of sovereign immunity," that characterization is only partially correct. While § 768.28 effected a limited *waiver* of state sovereign immunity, the statute *created* limited municipal immunity from common-law tort liability, which had not existed. *Id*. ("Before [§ 768.28] was enacted, the state and counties were immune from tort liability . . . . Municipalities did not share this immunity from tort liability . . . .").

Justice Cantero's concurrence, joined by Justices Anstead and Bell, further clarifies § 768.28's impact on Florida-law sovereign immunity. He explains that, due to "the historical differences in our state constitution and our common law between the sovereign immunity of the state and that of municipalities," "the sovereign immunity of municipalities must be construed strictly, whereas the immunity of the state must be construed more broadly." *Id*. at 477 (Cantero, J., concurring). "Under the common law, the state's immunity was total." *Id.* However, "[i]n contrast to the state, municipalities

never enjoyed total immunity from suit." *Id*. Consequently, § 768.28 "actually *granted* partial immunity to municipalities that did not previously exist." *Id*.[4]

> Essentially, the state and its agencies, on the one hand, and municipalities, on the other, arrived at section 768.28 from opposite directions: the state from a status of near total immunity; and *municipalities from a status of near-nonexistent immunity*.

Id. at 478 (Cantero, J., concurring) (emphasis added). Accordingly, while § 768.28 waived state sovereign immunity up to specified limits, "[a]s to municipalities, the statute *granted* them immunity from judgments above those limits." *Id*.

Justice Cantero concluded that § 768.28's dual derogation of the common law must be strictly construed: On the one hand, § 768.28's evisceration of state sovereign immunity enjoyed at common law must be narrowly understood. *Id*. On the other hand, § 768.28's creation of limited municipal immunity, unheard of at common law, must be scrupulously cabined. *Id*.

With that background in mind, the Court turned to the case before it. Faced with an action to recover contractually owed indemnification, municipal agency Kissimmee Utility Authority invoked § 768.28's partial grant of municipal immunity. The Court rejected KUA's defense, as § 768.28 applied only to common-law torts. *Id*. at 474 (majority op.) ("By its plain language, section 768.28 only applies to 'actions at law against the state or any of its agencies or subdivisions *to recover damages in tort*.' . . . The indemnification provision at issue here is based on a *contract*.").

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[4] Indeed, shortly following § 768.28's enactment, the Florida Attorney General did not understand the statute to affect municipal liability at all, as municipalities "did not enjoy any immunity from tort suits that could be waived." *Id*. at 478 (Cantero, J., concurring) (citing Op. Att'y Gen. Fla. 76–41 (1976)).

KUA cited Florida Attorney General opinions holding that state agencies cannot agree to indemnifications beyond § 768.28's limits. *Id*. at 473. The Court again rebuffed KUA. It explained that, while sovereign immunity might protect the *state* from contractual liability, it did not protect *municipalities or their agencies*. *Id*. at 473–74 ("However, the Attorney General opinions cited by KUA . . . have ignored the plain language of section 768.28 and do not apply under these circumstances, *where the contracting party is a municipality, not a state agency*.") (emphasis added).

Since the dispute did not arise from a common-law tort, § 768.28's limited grant of municipal immunity did not apply. And since § 768.28 was inapplicable, the Court reverted to the common-law understanding of municipal immunity. *Id*.; *see also id*. at 474 (relying on the understanding that "municipalities," in contrast to states, "have long possessed both the power to execute contracts and the concomitant liability for their breach"). Under the common law, municipalities, unlike states, did not partake in the sovereign immunity enjoyed by states, scorching KUA's defense.

The upshot of *American Home Assurance* is that, in actions other than common-law torts, where § 768.28 does not govern, Florida courts adhere to the common-law tradition of municipal immunity. *See id*. at 474 (citing *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So. 2d 481, 486 (Fla. 2001), for the proposition that "section 768.28 'applies only when the governmental entity is being sued in tort'; thus, limitations of section 768.28 did not apply to restrict award of damages against governmental entity for the erroneous issuance of a temporary injunction"). Under that tradition, municipal immunity was "near nonexistent." *Id*. at 478 (Cantero, J., concurring); *see also id*. at 472

(majority op.) (documenting municipalities' historical lack of immunity). Where a municipality or its agency is sued on a basis other than a common-law tort, and where no affirmative grant of immunity other than § 768.28 applies, a municipality generally cannot claim immunity.[5]

In statutory causes of action (where § 768.28 does not apply), and absent an alternative grant of immunity, municipalities and their agencies may invoke only that (extraordinarily circumscribed) immunity recognized at common law. *See Bifulco*, 997 So. 2d 1257, 1258 (Fla. 5th DCA 2009) ("The sole purpose for the enactment of section 768.28 was to waive sovereign immunity for breaches of *common law torts*. . . . A claim for violation of [the Florida Workers' Compensation Law], although perhaps tort like in nature, is not a claim sounding in common law tort."); *see also* Mot. 19 n.7 ("Section 768.28 was enacted to waive sovereign immunity for traditional common law torts, not statutory causes of action.").

[5] In cases outside § 768.28's scope, where municipal immunity remains subject to common-law principles, a municipality may be able to claim sovereign immunity based on its "discretionary" rather than its "operational" acts. *See Town of Gulf Stream v. Palm Beach Cty.*, 206 So. 3d 721, 725 (Fla. 4th DCA 2016). OUC has not argued as much. In any event, OUC's misconduct is plainly operational. *See, e.g.*, *Sebring Utilities Comm'n v. Sicher*, 509 So. 2d 968, 970 (Fla. 2d DCA 1987) (explaining that, before § 768.28, "operation by a municipality of a proprietary entity [namely, an electric utility] would not have been entitled to the protection afforded by the doctrine of sovereign immunity"); *Hardie v. City of Gainesville*, 482 So. 2d 394, 396 (Fla. 1st DCA 1985) ("the implementation of the 'policy, program or objective' to provide electricity is an operational level function' for which a city is not immune from tort liability").

B. OUC Is a Municipal Agency and, Consequently, Cannot Invoke Sovereign Immunity in this Statutory Cause of Action

OUC claims it is part of the state—specifically, that it is "a state entity presumptively protected by sovereign immunity." Mot. 5. This Court holds differently. In *Hodge v. Orlando Utilities Commission*, 2009 WL 4042930 (M.D. Fla. Nov. 23, 2009), this Court held that "the special acts of the Florida Legislature empowering OUC to produce and distribute utilities to the City of Orlando persuade the Court that OUC is a *municipal agency*." *Id*. at *7 (emphasis added); *see also Lederer v. Orlando Utilities Commission*, 981 So. 2d 521 (Fla. 5th DCA 2008) (citing *Cobo v. O'Bryant*, 116 So. 2d 233, 237 (Fla. 1959), for the proposition that an "independent utility commission" that managed a "city utility" constituted a "municipal agency").

OUC's status as a municipal agency is identical to Kissimmee Utility Authority's in *American Home Assurance*. *See* 908 So. 2d at 462 (classifying KUA as a "municipal agency"). Since KUA did not enjoy sovereign immunity outside § 768.28's limited grant in that case, neither does OUC here.

C. Alternatively, Sovereign Immunity under the Price-Anderson Act Is Governed by Federal Law, Which Does Not Extend Sovereign Immunity to Municipal Agencies Like OUC

OUC's motion raises an additional wrinkle. This action ultimately arises under the federal Price-Anderson Act ("PAA"). As OUC noted, "'[T]he Price-Anderson Act *transforms into a federal action* any public liability action arising out of or resulting from a nuclear incident.'" Doc. 1 at 3 (citing *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 484–84 (1999)). To be sure, the PAA incorporates "substantive rules for decision" from state law. 42 U.S.C. § 2014(hh). But rules governing sovereign immunity are not

"substantive" because (1) they are jurisdictional; and (2) they do not set forth the available causes of action.

The meaning of "substantive rules for decision" is a question of federal law. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111–12 (1983) (overruled on other grounds) (interpretation of a federal statute is a question of federal law); *see also Dumontier v. Schlumberger Tech. Corp.*, 543 F.3d 567, 570 (9th Cir. 2008) ("The [Price-Anderson] Act doesn't call for us to apply state law in its *interpretation*."). Under federal law, sovereign immunity is a nonsubstantive, jurisdictional concept. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."); *Henderson v. United States*, 517 U.S. 654, 675–76 (1996) (distinguishing "jurisdictional" matters from "substantive" matters). Since the PAA incorporates only "substantive rules for decision" from state law, jurisdictional rules are supplied by federal law. Under federal law, sovereign immunity does not extend to municipalities or their agencies. *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977); *Northern Ins. Co. v. Chatham Cty.*, 547 U.S. 189, 193–94 (2006). Accordingly, irrespective of Florida law, OUC cannot invoke sovereign immunity in this PAA action.

Furthermore, *Dumontier* construed "substantive rules for decision" as setting forth "the available causes of action." 543 F.3d at 570. For instance, if the state in which the nuclear incident occurred provides a cause of action for emotional distress, the PAA incorporates that cause. *Id*. Rules governing sovereign immunity plainly do not set forth a substantive cause of action, and fall outside "substantive rules for decision." They are

therefore governed by federal law, which does not extend sovereign immunity to municipalities and their agencies.

CONCLUSION

The WQAA waives sovereign immunity by expressly subjecting governmental bodies to suit, limiting their defenses (including invocation of their sovereign status), and demanding broad construction. Those provisions are beyond sufficient to constitute waiver under multiple Florida Supreme Court precedents.

Independent of waiver, OUC is ineligible for sovereign immunity in the first instance. Assuming Florida law governs sovereign immunity, Florida does not extend immunity to municipal agencies like OUC outside common-law torts. Assuming federal law governs sovereign immunity (due to the PAA's incorporation of only "substantive rules for decision" from state law), federal law likewise does not recognize municipal immunity. Accordingly, OUC's motion must be denied.

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Respectfully submitted,

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