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## **Provident Management Corp. vs. City of Treasure Island**

THE NEXT CASE ON THE COURT'S CALENDAR IS PROVIDENT MANAGEMENT CORPORATION VERSUS THE CITY OF TREASURE ISLAND. MR. BRANNOCK.

GOOD MORNING, YOUR HONOR. MAY IT PLEASE THE COURT. I AM STEVE BRANNOCK OF HOLLAND & KNIGHT, HERE ON BEHALF OF THE PETITIONER PROVIDENT MANAGEMENT CORPORATION. THIS CASE CONCERNS THE CONSEQUENCES OF A WRONGFUL PURSUIT OF INJUNCTIVE RELIEF, AS A RESULT OF THE INJUNCTION THAT WAS WRONGFULLY ENTERED BELOW. MY CLIENT'S PROVIDENT BUSINESS, \$2 MILLION A YEAR BUSINESS WAS EFFECTIVELY DESTROYED. THE SETTLEMENT OF THE VICTIM OF A WRONGFUL INJUNCTION HAS A RIGHT TO DAMAGES IN THE INJUNCTION, INCLUDING COSTS AND ATTORNEYS' FEES. THE ISSUE IS WHETHER THE CITY, LIKE ANY OTHER PARTY, IS, ALSO, LIABLE. THIS IS THE SECOND TIME THIS CASE HAS BEEN BEFORE THIS COURT. IN PROVIDENT ONLY, THIS COURT RULED THAT THE CITY WAS, IN FACT, NOT REQUIRED TO POST BOND, WAS NOT DEPENDENT ON PROVIDENT'S RIGHT TO RECOVER AND, IN FACT, PROVIDENT WAS ENTITLED TO, QUOTE, SEEK THE FULL MEASURE OF THE WRONGFUL INJUNCTION.

THE PENALTY, THAT IS WHERE WHETHER THERE WAS A CAP ON THE RECOVERY IN ACCORDANCE WITH 768.

I WOULD AGREE THAT IT WAS NOT EXPRESSLY ADDRESSED BY THE MAJORITY, BUT I WOULD SUGGEST THAT THE RATIONALE OF THE MAJORITY'S OPINION IS DISPOSITIVE ON THE SOVEREIGN IMMUNITY.

IT WAS ONE OF THE ISSUES THAT THIS COURT EXPRESSLY SAID THAT IT WAS NOT GOING TO REACH AT THIS TIME.

THAT IS CORRECT, AND SOME OF THE CONCURRING OPINIONS ADDRESS THE SOVEREIGN IMMUNITY QUESTION, BUT AS WE ARE GOING TO TALK ABOUT IN A MOMENT, WE SUGGEST THAT THE RATIONALE EFFECTIVELY SETTLES THE SOVEREIGN IMMUNITY QUESTION HERE.

WOULD YOU STATE FOR US THE DISCREET RULINGS OF THIS COURT AT THAT TIME, AS REFLECTED IN THE MAJORITY OPINION.

THE RULING OF THE COURT WAS THAT THE FACT THAT THE CITY WAS NOT REQUIRED TO POST A BOND DID NOT POSE -- DID NOT CREATE ANY LIMITATION ON THE AMOUNT OF DAMAGES THAT PROVIDENT WAS ENTITLED TO RECOVER. IN OTHER WORDS THE PROVIDENT'S DAMAGES WERE NOT DEPENDENT UPON THE POSTING OF A BOND. I THINK WHAT IS MOST INTERESTING ABOUT THE CITY'S POSITION IN THIS CASE --

DAMAGES FOR WHAT? FOR THE WRONGFUL ISSUANCE OF THE INJUNCTION, IS THAT CORRECT?

THAT'S CORRECT. BUT WHAT IS MOST INTERESTING, I THINK, ABOUT THE CITY'S POSITION IN THIS CASE IS THAT THE CITY, AS WELL AS THE SECOND DISTRICT COURT OF APPEAL BELOW, BOTH STATE THAT, IF A BOND HAD BEEN POSTED IN THIS CASE, THAT PROVIDENT WOULD, IN FACT, BE ABLE TO RECOVER, BUT THE FACT THAT THE BOND WAS NOT POSTED IN THIS CASE MEANS THAT THE CITY OF TREASURE ISLAND IS PROTECTED BY SOVEREIGN IMMUNITY. IN ESSENCE --

IS IT YOUR POSITION -- WAS IT YOUR POSITION IN THE ORIGINAL CASE THAT THE MUNICIPALITY

OR GOVERNMENTAL ENTITY SHOULDN'T HAVE TO POST A BOND. IF THEY DON'T POST A BOND, THEN THEY SHOULD BE LIABLE FOR THE FULL AMOUNT OF DAMAGES?

RIGHT. THAT --

WAS THAT YOUR POSITION AT THE ORIGINAL CASE?

THAT'S CORRECT.

AND THE AMICUS FILED BY THE ASSOCIATION AND THE COUNTY ATTORNEYS, ALSO TOOK THAT POSITION, CORRECT? THAT IT WAS NOT A GOOD IDEA TO HAVE BONDS FOR GOVERNMENTAL AGENCIES. I MEAN THEY SHOULDN'T SORT OF REQUIRE THAT, IN ORDER TO HAVE -- TO GET AN INJUNCTION.

THAT'S CORRECT. RIGHT. BECAUSE THAT WOULD, ONE, MAKE AN INJUNCTION VERY DIFFICULT TO GET, FOR A CITY OR COUNTY, BECAUSE A COURT WOULD BE VERY CONCERNED ABOUT ENTERING AN INJUNCTION, WHEN THE OTHER SIDE HAD NO RIGHT TO RECOVERY FOR WRONGFUL INJUNCTION, AND SECONDLY, BECAUSE IF A COURT DID ENTER AN INJUNCTION, IT WOULD ALWAYS REQUIRE THE POSTING OF A BOND, TO ENSURE THAT THE OTHER SIDE WAS PROTECTED, WHICH WOULD CONFLICT WITH RULE 1.6 --

IF WE DECIDE THAT THERE IS SOVEREIGN IMMUNITY, CAPPED AT \$100,000, SUBJECT TO A CLAIMS BILL, THEN THE PRACTICAL EFFECT IS THAT A TRIAL JUDGE WOULD REQUIRE THE POSTING OF A BOND IN ANY CASE WHERE AN INJUNCTION WAS ISSUED?

THAT IS WHY WE THINK THE RATIONALE OF THE COURT'S OPINION IN PROVIDENT ONE IS THE SAME OPINION, BECAUSE IT WAS THE SAME PRACTICAL CONSIDERATION THAT DETERMINED THAT THIS BOND WAS NOT A LIMITATION.

THE THING THAT I AM CONCERNED ABOUT THAT IS WHETHER OUR RULE 1.610 IS A RULE. THERE DOESN'T SEEM TO BE ANY STATUTE THAT ACTUALLY DEALS WITH THE ISSUE OF WITH OR WITHOUT BOND, DIRECTED TO GENERAL INJUNCTIONS, ALTHOUGH, AS IT PERTAINS TO ENFORCEMENT OF PUBLIC HEALTH, THERE IS A STATUTE 381.0012, WHICH IS VERY SPECIFIC ABOUT WHEN INJUNCTIONS CAN BE ISSUED, WITH OR WITHOUT BOND, AND THEN IN THE END IT SAYS THAT, IF A TEMPORARY INJUNCTION IS IMPROPERLY OR ERRONEOUSLY GRANTED, THE STATE IS LIABLE IN DAMAGES AS IN CHAPTER --

I AM NOT FAMILIAR WITH THAT STATUTE.

WHAT I AM CONCERNED ABOUT, HERE, IS WE HAVE THE LEGISLATURE TALKING ABOUT, IN A GIVEN SITUATION WHERE THE PUBLIC HEALTH IS AT STAKE, THE EXACT WAY AND THE LIMITS OF THE LIABILITY, BUT WE HAVE A WHOLE OTHER AREA WHERE WE REALLY HAVE SILENCE, FROM THE LEGISLATURE, AS TO THE INTENT, AS TO HOLD THE GOVERNMENTAL ENTITY LIABLE, AND IN MANY OF THE OTHER STATES, LIKE NEW YORK, WHERE THEY -- WHERE THEY HAVE ALLOWED THIS, THERE HAS BEEN AN EXPRESS STATUTE THAT SAYS WE ARE WAIVING SOVEREIGN IMMUNITY, AND YOU ARE LIABLE UP TO THE TOTAL AMOUNT OF DAMAGES, AND YOU DON'T NEED A BOND. SO WHAT DO YOU SAY TO THAT THAT IS THE ABSENCE OF ANY LEGISLATIVE DIRECTION ON THIS, AND WE HAVE GOT JUDGE ALTENBURN SAY AGO BOND IS LIKE A TORT, AND THEREFORE IT HAS GOT TO BE SUBJECT TO 768 LIMITATIONS.

RIGHT. WELL, WE BELIEVE THAT THE BASIS FOR LIABILITY IS THE CONSENT TO THE TERMS AND CONDITIONS OF THE INJUNCTION. IT IS THE COURT'S EQUITABLE POWTORY DETERMINE THE CONDITIONS UPON WHICH AN INJUNCTION IS GOING TO BE ENTERED. IT IS CLEAR THAT THE PARTIES HAD AN UNDERSTANDING IN THIS CASE THAT, IF THE CITY CHOSE TO GO FORWARD AND GET THIS INJUNCTION THAT, THE CITY WAS GOING TO BE LIABLE FOR DAMAGES. THAT WAS PART

OF THE RULES OF THE GAME. THAT WAS PART OF THE TERMS AND CONDITIONS OF THIS INJUNCTION. NOW, IN TERMS OF --

NOW YOU ARE TALKING ABOUT WHAT WENT ON IN THE HEARING AND WHETHER THERE WAS SOMETHING, BECAUSE OF WHAT WAS SAID AT THE HEARING, THAT MIGHT FIND THE CITY, AND I WAS THINKING THAT THAT IS SOMETHING THAT, REALLY, YOU ARE NOT BARRED FROM SEEKING A CLAIMS BILL, AND CERTAINLY YOU COULD MAKE THE ARGUMENT TO THE LEG YOUR THAT YOU HAD THAT AGREEMENT, AND THAT IS WHY THE BOND WASN'T POSTED. DIDN'T YOU DO THAT?

BUT WHERE I WAS LEADING, YOUR HONOR, IS THAT YOU HAD ASKED ABOUT THE SPECIFIC LEGISLATIVE AUTHORIZATION, AND IN SUGGESTING THAT THEY HAVE BECOME SUBJECT TO THE COURT'S EQUITABLE POWERS, IT IS VERY MUCH LIKE THIS COURT'S DECISION IN THE PAN AM TOBACCO CASE, WHERE THIS COURT ADDRESSED WHETHER THERE WAS SOVEREIGN IMMUNITY IN CONTRACT CASES. NOW, THERE WAS NO LEGISLATIVE -- THERE WAS NO STATUTE ON THE BOOKS THAT SAID THAT A CITY OR COUNTY HAS WAIVED SOVEREIGN IMMUNITY FOR BREACH OF CONTRACT CASES. DESPITE THAT, THIS COURT RULED THAT THE VERY FACT THAT YOU HAVE BEEN GIVEN THE POWER TO ENTER INTO CONTRACTS, ALSO MEANS THAT THAT COMES, WITH IT, THE OBLIGATION TO PAY DAMAGES, IN THE EVENT THAT YOU BREACH THAT CONTRACT. IT IS VERY MUCH THE SAME IN OUR CASE. THE FACT THAT CITIES AND COUNTIES HAVE BEEN GIVEN THE POWER TO FILE A LAWSUIT AND TO SEEK INJUNCTIVE RELIEF MEANS THAT THEY ARE, ALSO, SUBJECT TO THE EQUITABLE POWERS OF THE COURT IN FRAMING THAT INJUNCTIVE RELIEF, SO WE DON'T NEED THE STATUTORY AUTHORIZATION. THE STATUTORY AUTHORIZATION IS THE POWER TO SUE AND BE SUED. THE -- BUT ONCE THEY FILE THAT LAWSUIT, THEY ARE SUBJECT TO THE RULES OF THE COURT, JUST LIKE ANY OTHER PARTY. VERY MUCH LIKE THE SIMPSON CASE THAT WE CITE IN OUR BRIEF, A DECISION DECIDED BY THIS COURT IN 1970, WHERE THIS COURT STATED THAT, ONCE THE STATE BECAME A PARTY, THEN, OF COURSE, IT WAS SUBJECT TO THE COURT'S RULINGS, IN TERMS OF BEING LIABLE FOR COSTS, JUST LIKE ANY OTHER PARTY, OR THE THIRD DCA'S DECISION IN THE CARTER CASE THAT WE CITED IN OUR BRIEF, WHICH, AGAIN, SAYS THAT ONCE A STATE BECOMES A PARTY IN THE COURTS, IT IS SUBJECT TO LIABILITY, JUST LIKE ANY OTHER PARTY, OR AS JUSTICE WELLS PUT IT, INJUSTICE WELLS' CONCURRING OPINION IN THIS CASE, ONCE THE COURT -- THE STATE OR THE CITY CAN'T USE THE -- SEEK THE USE OF THE COURT'S EQUITABLE POWERS AND THEN RAISE SOVEREIGN IMMUNITY AS A SHIELD. IT WAS ABSOLUTELY NO QUESTION IN ANYONE'S MIND WHEN THAT HEAR HEARING ENDED, THAT FATEFUL HEARING RELATING TO THE BOND ENDED, RELATING TO WHAT THE TERMS OF THIS INJUNCTION WERE. IT WAS THAT THE CITY WAS GOING TO GET THE EXTRAORDINARY RELIEF THAT IT SOUGHT. IT WAS GOING TO BE ABLE TO SHUT PROVIDENT'S BUSINESS DOWN BEFORE THE CASE WAS LITIGATED, BEFORE WE HAD AN APPELLATE RULING, BUT THE UNDERSTANDING, THEN, WAS THAT THEY WERE GOING TO BE LIABLE FOR DAMAGES, IN THE EVENT THAT THE INJUNCTION PROVED WRONGFUL.

WHAT IS THE LANGUAGE IN THE ORIGINAL OPINION FROM THIS COURT MEAN MAKE, WHEN THEY SAY, BASICALLY, THAT, WHERE NO BOND WHATSOEVER IS SET, HOWEVER AS IN THE PRESENT CASE, THE CITY'S EXPOSURE IS UNCERTAIN. I MEAN, ISN'T THE COURT LEAVING OPEN, THEN, THE QUESTION THAT WE HAVE HERE, TODAY, OF WHETHER OR NOT THE IMMUNITY, IN CHAPTER 768, IS GOING TO BE APPLICABLE IN THESE PROCEEDINGS?

NO. I THINK WHAT THE COURT WAS REFERRING TO, THERE, WAS THE RULING IN THE ORIGINAL CASE THAT CAUSED US TO BE HERE IN THE FIRST CASE, WHICH SUGGESTED THAT, IF YOU POST A BOND, THAT IS THE LIMIT OF YOUR RECOVERY, AND WHAT THIS COURT SAID IN PROVIDENT ONE WAS THAT, IF THAT BOND IS POSTED, YOU DON'T HAVE THE PROTECTION OF THAT LIMITATION. STATE OR COUNTY, IF YOU WANT THE PROTECTION OF THAT LIMITATION, YOU CAN OFFER TO POST A BOND, WHICH WOULD CAP YOUR DAMAGES AT A PARTICULAR AMOUNT. BUT WHEN THE TRIAL JUDGE, IN THIS CASE, MADE THE STATEMENT THAT, IF THE INJUNCTION PROVED WRONGFUL, THAT PROVIDENT COULD SUE AND RECOVER FOR ITS DAMAGES, THE STATE DIDN'T

SAY, WAIT A SECOND. WE WANT LIMIT NATION OUR DAMAGES OR WAIT A SECOND. WE ARE COVERED BY SOVEREIGN IMMUNITY. IT DIDN'T KM ABOUT -- -- IT DIDN'T COMPLAIN ABOUT THE TERMS AND CONDITIONS OF THE BOND. IT DIDN'T APPEAL THAT THE TERMS AND CONDITIONS UPON WHICH THE INJUNCTION WERE ENTERED WERE WRONGFUL. IT CONSENTED TO THOSE TERMS.

WE ARE LOOKING TO THE FUTURE, THOUGH, AND WHAT MIGHT BE THE SPECIFIC SITUATION ABOUT WHAT HAPPENED. LET'S LOOK AT THE POLICY FOR THE FUTURE.

RIGHT.

WE HAVE GOT GOVERNMENTAL AID ENTITIES THAT GO INTO COURT WHO, FOR VARIOUS REASONS, QUESTION INJUNCTIVE -- REQUEST INJUNCTIVE RELIEF. THERE ARE TWO POSSIBILITIES. EITHER WE SAY THAT THERE IS UNLIMITED LIABILITY, BUT IF A BOND IS POSTED, IT IS CAPPED AT THE BOND, AND THEN THE GOVERNMENTAL ENTITY IS REALLY TREATED DIFFERENTLY THAN A PRIVATE CITIZEN, BECAUSE A PRIVATE CITIZEN HAS TO POST A BOND, AND THEN THEIR LIABILITY IS CAPPED AT THE BOND. RIGHT? SO WE HAVE GOT EITHER UNLIMITED LIABILITY BY CAP WITH THE BOND, OR WE HAVE GOT LIABILITY CAPPED AT \$100,000, UNLESS A BOND IS POSTED. NOW, THE -- SO WHAT THE FUTURE WOULD BE LIKE THIS. YOU WOULD GO IN, TOMORROW, AND YOU WOULD SAY, OR DEFEND YOUR CLIENT AGAINST THE INJUNCTION, AND THE JUDGE WOULD SAY, LISTEN, WE HAVE GOT -- WE ARE GOING TO HAVE TO POST A BOND IN THIS SITUATION, AND SO, REALLY, UNLESS THE CITY AGREES, SPECIFICALLY TO BE BOUND BY WHATEVER THE DAMAGES ARE, THEY WOULD KNOW THEY HAVE TO POST A BOND, AND SO EVERYONE WOULD KNOW THE RULES OF THE GAME FOR THE FUTURE. CORRECT? I MEAN THAT IS HOW IT WOULD REALLY WORK, BECAUSE A JUDGE WOULD NOT WANT TO, IF THEY WERE CONCERNED ABOUT THE TERMS OF THE BOND, SIMPLY ALLOW SOMEONE TO HAVE THEIR DAMAGES CAPPED AT 100,000, IF A BOND COULD PROTECT THEM FULLY. RIGHT?

EXACTLY. SO, I MEAN, GOING FORWARD, WE THINK THAT THE RESULT THAT THE CITY SUGGESTS DOESN'T MAKE ANY SENSE HERE. IF THIS COURT WERE TO DON'T OUR POSITION -- WERE TO ADOPT OUR POSITION, IF THE COURT WERE TO ADOPT THE CITY'S POSITION, THAT WOULD MEAN THAT, IN THE EVENT THAT A CITY OBTAINS AN INJUNCTION, IT WOULD LEAVE A PARTY IN THE POSITION OF PROVIDENT WITHOUT ANY AVENUE OF RELIEF AT ALL, AND AS YOUR HONOR HAS SUGGESTED, THAT IS EITHER GOING TO, A, MEAN THE COURTS ARE GOING TO BE VERY RELUCTANT TO ENTER AN INJUNCTION, OR, B, THEY ARE GOING TO REQUIRE A BOND IN THE CASE.

WHAT I DON'T UNDERSTAND IS THIS CASE HAS VERY BROAD RAMIFICATIONS FOR THE WHOLE STATE. WE HAVE NO AMICUS BRIEFS FILED. WE ARE IN A SITUATION WHERE THE NUN MUNICIPALITIES -- WHERE THE MUNICIPALITIES AND THE GOVERNMENTAL ENTITIES ARE ABOUT TO HAVE UNLIMITED LIABILITY, BUT FOR THE BOND, AND WE HAVE GOT VERY LITTLE GUIDANCE, I FEEL, AS TO WHAT THE POSITION OF THE VARIOUS PLAYERS ARE.

OF COURSE WE HAVE THE GUIDANCE OF THE INITIAL AMICUS BRIEF, FILED BY THE COUNTY, THE ASSOCIATION OF COUNTY ATTORNEYS IN BROF DENTON, AND WE HAVE THE GUIDANCE OF THIS COURT'S DECISION IN PROVIDENT ONE, WHICH DISCUSSES THE RATIONALE, BUT I WANT TO FOCUS FOR A BIT ON THIS UNLAMENT -- UNLIMITED LIABILITY SITUATION. WHAT OUR POSITION DOES IS IT GIVES THE CITY A CHOICE. IN SEEKING INJUNCTIVE RELIEF, WHERE THERE IS ALWAYS -- IN SEEKING INJUNCTIVE RELIEF, THE CITY HAS A NUMBER OF CHOICES. ONE, IT CAN AVOID ANY LIABILITY AND FOREGO THE INJUNCTION AND JUST WAIT UNTIL THE END OF THE DAY AND FIND OUT WHAT THE LAW IS. THAT CERTAINLY SHOULD HAVE BEEN THE RESULT IN THIS CASE. THERE WAS NO HEALTH, SAFETY AND WELFARE ISSUE IN THIS CASE. WE WERE TALKING ABOUT WELFARE RENTALS. THERE WAS NO PRESSING NEED FOR AN INJUNCTION TO HAVE BEEN SOUGHT IN THE FIRST PLACE. THAT IS NUMBER ONE THE OPTION. NUMBER TWO, THE OPTION IS YOU WAIT AND SEE WHAT THE TERMS AND CONDITIONS OF THE INJUNCTION IS GOING TO BE AND YOU

DECIDE WHETHER THEY ARE GOING TO BE TOO ONEROUS OR NOT. HERE THE COURT SAID YOU ARE GOING TO BE LIABLE, IF THE INJUNCTION PROVES WRONGFUL. THAT IS ANOTHER QUESTION FOR THE CITY OF TREASURE ISLAND. IT COULD HAVE SAID WE DON'T WANT TO BE SUBJECT TO LIABILITY AND WE ARE NOT GOING TO SEEK THAT INJUNCTION, AND THEY CAN PULL BACK AT THAT POINT, OR THEY CAN DO AS WE HAVE DONE HERE AND PRESS FORWARD AND OBTAIN THE INJUNCTION. ANOTHER ALTERNATIVE THAT IT HAS, THAT CITIZENS DON'T HAVE, IS THAT IT CAN CHOOSE TO GO FORWARD WITHOUT POSING A BOND AT ALL, OR IF IT WANTED TO BE CERTAIN ABOUT --

CAN IT CHOOSE? ISN'T THE DECISION AS TO WHETHER TO POST A BOND WITHIN THE DISCRETION OF THE TRIAL COURT? IT IS NOT UP TO THE MUNICIPALITY OR THE COUNTY?

THAT IS EXACTLY RIGHT. THE RULE SAYS THAT THEY MAY RECEIVE THE INJUNCTION WITHOUT POSING A BOND, AND THEY CAN ASK FOR THAT.

IT IS UP TO THE JUDGE TO ULTIMATELY DECIDE WHETHER, IN HIS OR HER DISCRETION TO REQUIRE THE BOND.

THAT IS TRUE. BUT IF THEY ARE WORRIED ABOUT THEIR LIMIT OF LIABILITY AND THEY WANT TO BE SURE, GOING IN, WHAT THEIR LIABILITY IS, THEY CAN OFFER TO POST A BOND, AND THAT BOND WILL, THEN, CAP THEIR LIABILITY, SO THEY HAVE A NUMBER OF CHOICES. NOT SEEKING THE INJUNCTION OR GOING FORWARD WITH THE INJUNCTION BUT OFFERING THE BOND, SO AS TO CAP THE LIABILITY, SO THEY HAVE A LOT OF DIFFERENT CHOICES GOING FORWARD, IN TERMS OF --

LET ME ASK YOU A RELATED QUESTION BEFORE YOU SIT DOWN, REALIZING YOUR TIME IS LIMITED. TO SOME DEGREE, YOU HAVE BEEN SPEAKING ABOUT THE CITY RECEIVING AN INJUNCTION, AS IF THE CITY HAS SOME ABSOLUTE RIGHT TO RECEIVE THE INJUNCTION. WE ALL KNOW THAT IS NOT CORRECT.

THAT'S TRUE.

THAT THIS IS A JUDICIAL DECISION THAT IS BASED ON SOME STRICT TESTS, AND IN OTHER WORDS INJUNCTIONS ARE GENERALLY NOT FAVORED IN THE LAW, AS A MATTER OF FACT. WOULD YOU AGREE?

THAT IS VERY TRUE.

THERE ARE SOME STRICT STANDARDS THAT THIS COURT HAS SET DOWN, IN TERMS OF AN ENTITLEMENT TO AN INJUNCTION, AND THEN IT ENDS UP BEING A JUDICIAL DECISION AS TO WHETHER OR NOT AN INJUNCTION SHOULD ISSUE. I MEAN, YOU WOULD AGREE WITH THAT, RIGHT?

I WOULD AGREE.

LET ME ASK YOU THIS GENERAL PROPOSITION, AS WE ARE STRUGGLING AROUND FOR A POLICY THAT WE WILL BE ABLE TO APPLY. YOU WOULD AGREE, WOULD YOU NOT, THAT ORDINARILY, IF A GOVERNMENTAL ENTITY OR CITY DOES A WRONGFUL ACT, AND IS GOING TO BE LIABLE FOR DAMAGES TO SOMEBODY, THAT IT WOULD BE SUBJECT TO THE STATUTORY SCHEME, WITH REFERENCE TO CAPS AND EVERYTHING? I MEAN, ISN'T THAT A FAIR STATEMENT?

YES.

OKAY. PART OF THE PROBLEM THAT I AM HAVING HERE IS THAT WE, REALLY, HAVE AN ACT BY THE CITY, WHICH IS JUST ASKING FOR AN INJUNCTION, AND THAT LATER TURNS OUT OKAY,

AFTER REVIEW BY SOME OTHER COURTS, TO HAVE BEEN DETERMINED TO BE WRONGFULLY I SHOULD UNDER THE STANDARDS OF -- WRONGFULLY ISSUED, UNDER THE STANDARDS OF THE LAW, BUT WE, REALLY, HAVE AN ACT BY THE CITY HA HAS -- THAT HAS BEEN GIVEN APPROVAL BY THE COURT. THE COURT HAS SAID THIS ISN'T A WRONGFUL ACT. THIS IS A ACT THAT I AM ORDERING. IT IS AT THE CITY'S REQUEST, BUT IT, REALLY, HAS THE APPROVAL OF A COURT. USUALLY YOU CAN'T DO MUCH BETTER THAN THAT, AS FAR AS A SORT OF SAYING WILL YOU CHECK THIS OUT, BEFORE WE GET SOMETHING? SO WHY SHOULD WE HAVE A HARsher RULE, IN TERMS OF LATER DETERMINING THAT THE INJUNCTION SHOULDN'T HAVE ISSUED, I.E. THEY ASK FOR WRONGFUL RELIEF OF THIS INJUNCTION, BUT THEY END UP WITH HARsher CONS QEPZ -- CONSEQUENCES, AND YET THEY HAVE HAD A COURT ACTUALLY SAY THAT WHAT THEY ASKED FOR IS APPROPRIATE AND ALL RIGHT, AND THEY END UP WITH HARsher SANCTIONS, IF WE SAY THAT, THAN SOMEBODY THAT JUST GOES OUT AND DOES SOMETHING WRONG THAT THEY SHOULD HAVE KNOWN WAS WRONG AT THE TIME, AND WHY SHOULD WE END UP WITH THAT KIND OF -- IT STRIKES ME AS KIND OF AN UNUSUAL SITUATION, IF THE CAP DOESN'T APPLY.

IT IS NOT A HARsher SANCTION, YOUR HONOR, BECAUSE THE CITY HAS FULL AUTHORITY TO MAKE ITS DECISION, GOING FORWARD WITH IT'SSS OPEN. WHAT WE ARE TALKING ABOUT A COURT OF EQUITY TRYING TO MAKE THE VERY DIFFICULT DECISION ABOUT WHETHER AN INJUNCTION SHOULD ISSUE IN A PARTICULAR CASE.

BUT CLEARLY THE ROLE OF THE COURT IS CRITICAL, IS IT NOT? THE INJUNCTION CAN'T ISSUE, NONE OF THESE THINGS CAN HAPPEN. THIS IS A COURT DECISION.

ABSOLUTELY TRUE, BUT IT IS CRITICAL FOR TWO REASONS, ONE IT IS CRITICAL BECAUSE THE COURT HAS TO MAKE A DECISION WHETHER TO ISSUE AN INJUNCTION OR NOT, BUT SECONDLY WE ARE HERE TODAY AS THE COURT HAS A VERY DIFFICULT DECISION TO MAKE AS TO WHAT THE CONSEQUENCES OF THAT INJUNCTION GOING TO BE. WHAT PROTECTIONS AM I, THE COURT, GOING TO PROVIDE TO THE PARTY THAT IS BEING ENJOINED, AND IT IS OUR POSITION, YOUR HONOR THAT, THE COURT OF EQUITY HAS THE POWER TO FASHION THAT RELIEF. THAT RELIEF SHOULD BE FASHIONED UP FRONT, SO THAT THE PARTIES, THE CITY IN THIS CASE, KNOWS EXACTLY WHAT THEY ARE GETTING INTO, IF THEY SEEK, IF THEY DECIDE TO GO FORWARD WITH THE INJUNCTION. THE CITY KNEW WHAT THE CONSEQUENCES WERE GOING TO BE AND CHOSE TO LIVE WITH THOSE CONSEQUENCES, AND WE THINK AFTER THE FACT, LONG AFTER THE FACT, THAT THEY SHOULD NOT BE ALLOWED TO ARGUE THAT THEY WERE RELIEVED OF THOSE CONSEQUENCES.

WOULDN'T THAT BE TRUE IF, IN FACT, THE COURT SAID, WELL, YES, I WILL GRANT INJUNCTIVE RELIEF, BUT YOU HAVE TO PUT UP A BOND IN THIS AMOUNT, AND NOW, CLEARLY, THE CITY HAS A CHOICE, WITH REFERENCE TO PUTTING UP THE BOND. BUT HERE WE HAVE UNIQUE FACTS. WE DON'T HAVE THAT SITUATION, WHERE THOSE CHOICES WERE INVOLVED, DO WE?

WHAT THE COURT --

IN OTHER WORDS I REALIZE -- I AM GREATLY CONCERNED ABOUT THE UNIQUE FACTS OF THIS CASE, WHICH, UNDERLYING ALL OF THIS, IS SORT OF THE FACT THAT MORE OR LESS WAS RELIED ON BY THE MAJORITY, THAT THE CITY WAS SAYING, COURT, DON'T MAKE US PUT UP A BOND, BECAUSE WE HAVE PLENTY OF RESOURCES AVAILABLE. OF COURSE HE WILL -- WE WILL BE ABLE TO RESPOND IN THEIR DAMAGES, AND THEREFORE NO BOND.

I THINK THE CLEAR IMPORT OF PROVIDENT WAS THAT THERE WAS NO BOND. WHAT IS IMPORTANT IS THAT THERE BE AN UNDERSTANDING BY THE PARTIES OF WHAT THE CONSEQUENCES OF THE INJUNCTION WERE. ONE WAY YOU CAN EVIDENCE THAT UNDERSTANDING IS BY REQUIRING THE POSTING OF A BOND. THAT HAS CERTAIN ADVANTAGES TO THE CITY, BECAUSE IT ALLOWS THEM TO CAP THEIR DAMAGES AT A PARTICULAR AMOUNT, BUT ANOTHER WAY THAT CAN BE

EVIDENCED IS THROUGH THE UNDERSTANDING, LIKE WAS REACHED BY THIS CASE, WHERE THE COURT SAID, IF YOU ARE DAMAGED, YOU ARE GOING TO BE ABLE TO RECOVER THOSE DAMAGES. IF THE COURT HAS THE POWER TO REQUIRE THE SETTING AFTER BOND, WE THINK AN EQUITABLE COURT, ALSO, HAS THE POWER TO ENFORCE THAT UNDERSTANDING, EVEN THOUGH THAT UNDERSTANDING IS NOT ENFORCED BY A BOND. THAT IS THE CLEAR RULING IN PROVIDENT ONE. WHAT I THINK IS THE MOST CLEAR UNDERSTANDING OF THE CITY'S ISSUE HERE IS IF A BOND IS POSTED, NO SOVEREIGN IMMUNITY. IF NO BOND IS POSTED, YOU HAVE GOT SOVEREIGN IMMUNITY. THAT WAS EXACTLY THE POINT OF PROVIDENT ONE, WHERE WE CAME TO THIS COURT AND REQUESTED THAT THE LIABILITY SHOULDN'T REST ON THE BOND. IT SHOULD RELY ON THE UNDERSTANDING.

THANK YOU. YOU MAY DRAW YOUR CASE TO A CLOSE. MR. BERRY.

IF IT PLACE THE COURT, MY NAME IS DOUG BARRY WITH THE FIRM OF BUTLER BARNETT AND PAPPAS IN TAMPA WITH ME AT TABLE IS COUNSEL, MR. JIM DENHARDT, ON THE FAR RIGHT AND, ALSO, AT COUNSEL TABLE IS MR. ROB WEILL, WHO ASSISTED WITH OUR BRIEF.

LET ME NOT TAKE A WHOLE LOT OF YOUR TIME ON WHAT MAY BE AN ISOLATED VIEW, WHICH I HAVE EXPRESSED HERE, BUT FOLLOWING UP ON JUSTICE ANSTEAD'S -- ON JUSTICE ANSTEAD'S QUESTION AS TO WHETHER THIS -- AS TO WHY THIS IS A DIFFERENT SITUATION, IT IS TRUE THAT WE ARE DEALING WITH A COURT OF EQUITY, CORRECT?

YES, SIR.

AND THAT UNDER OUR RULES, IN GETTING AN INJUNCTION, OUR COURT RULES, THAT, IF MS. GROSVENOR, WHO THE TEACHER FOR THIS CLASS THAT IS HERE FROM LEON COUNTY, WENT DOWN TO LEON COUNTY COURTHOUSE TO GET AN INJUNCTION, AS A PRIVATE CITIZEN, SHE WOULD BE REQUIRED TO POST A BOND, BEFORE THE COURT WOULD ISSUE AN INJUNCTION. CORRECT?

YES, SIR.

BUT IF THE KING WENT DOWN THERE, IN THE PERSON AGE OF A MUNICIPALITY OR THE STATE, THEN WE HAVE CARVED OUT AN UNIQUE EXCEPTION FOR THE GRANTING OF THE INJUNCTION, CORRECT? IN THAT WE SAY, IN OUR RULES, THAT WE ARE GOING TO GIVE, TO THAT ENTITY, BECAUSE IT IS PART OF GOVERNMENT, THE RIGHT FOR THE COURT TO DISPENSE WITH THE BOND. IS THAT CORRECT?

YES, SIR.

NOW, WHY, BECAUSE THIS IS AN UNIQUE FUNCTION OF THE COURT, AND BECAUSE WE RECOGNIZE A SEPARATION OF POWERS, IN OUR GOVERNMENT, THAT THIS -- THAT THE COURT IS, REALLY, THE ONLY ONE THAT CAN DO THIS, THEN, IN -- AND WE ARE GIVING A SPECIAL DISPENSATION TO THE KING, THEN WHY SHOULDN'T WE REQUIRE THE KING TO LIVE UP TO THE END OF THE BARGAIN, IF WE GIVE THAT SPECIAL DISPENSATION AND WE USE THE COURT'S POWERS, AND IT TURNS OUT TO DAMAGE SOMEONE, THAT WE SAY, JUST AS THE CITIZEN WOULD HAVE TO DO, IN RESPONDING TO THE BOND, THAT THE KING COULD HAVE TO RESPOND IN WHATEVER DAMAGES ARE CAUSED BY REASON OF THE COURT INVOKING THAT POWER ON THE KING'S BEHALF?

JUSTICE WELLS, SOVEREIGN IMMUNITY IS, AS THE COURT IS WELL AWARE AND AS WE ALL KNOW, FROM OUR FIRST OR SECOND DAY OF TORTS IN LAW SCHOOL, IS A CONCEPT THAT EXTENDS FAR, FAR BACK LONGER THAN ANY OF US REMEMBER. WE ALL KNOW THE ORIGINS OF IT. IT HAS, ALWAYS, IN MORE RECENT TIMES, ANYWAY, BEEN RECOGNIZED AS CAUSING SOME DEGREE OF INJUSTICE, SOME DEGREE OF HARM, SOME DEGREE OF UNFAIRNESS, IN ITS APPLICATION.

BUT COULD YOU POINT ME TO AN EXAMPLE OF HOW THE EXECUTIVE BRANCH OF THE GOVERNMENT OR THE LEGISLATIVE BRANCH CAN USE THE COURT TO COMMIT A WRONGFUL ACT?

I WOULD SUBMIT THAT WE DID NOT COMMIT A WRONGFUL ACT. AS JUSTICE ANSTEAD POINTED OUT, AND I HAVE A NOTE HERE TO REMIND THE COURT. I DON'T THINK I NEED TO REMIND THE COURT, IN LIGHT OF JUSTICE ANSTEAD'S COMMENTS, TWO TRIAL JUDGES, NOT THE SAME COURT TWICE BUT TWO TRIAL JUDGES AND A DISTRICT COURT OF APPEAL, FOUND OUR ACTION TO BE APPROPRIATE. AS NOTED IN THE SECOND OPINION THAT IS BEFORE US TODAY, THE JUDICIAL BRANCH OF GOVERNMENT IS INVOLVED IN CREATING THESE DUGE DAGES. THEY GO TO ASK -- THESE DAMAGES. THEY GO ON TO ASK WHETHER THE MUNICIPALITY, WHEN ARMORED IN GOOD FAITH BUT ERRONEOUSLY, CONVINCES US TO IMPOSE INJUNCTIVE RELIEF. MOREOVER, IN THE PARKER TWO DECISION, THIS COURT SAID THERE ARE TWO ENTITIES GENERALLY AT FAULT WHEN A WRONGFUL INJUNCTION IS ENTERED, THE OBTAINING PARTY AND THE COURT. SO, YES, EVENTS HAVE PRISON US -- HAVE PROVEN US TO BE IN ERROR, WHEN APPLYING THE INJUNCTION, BUT WE ARE NOT SOLELY AT FAULT, WE ADMIT, AND IT IS THE FUNCTION OF THE JUDICIAL BRANCH TO WEIGH AND DECIDE AND TO ENTER THE TEMPORARY INJUNCTION, IF IT IS INDICATED BY THE FACTS, AND BY THE WAY, I WOULD POINT OUT THAT THIS INJUNCTION WAS ENTERED NOT ON AN EXPARTE BASIS OR ANY EX-PEDITED HEARING. IT WAS ENTERED AFTER ABOUT A FIVE OR SEVEN-MONTH DELAY, THREE SESSIONS OVER SEVERAL MONTHS, A 17-HOUR HEARING, EXPERT WITNESSES BY EITHER PARTY AND A FULL HEARING WAS HELD.

LET ME FOLLOW-UP ON WHAT JUSTICE WELLS IS SAYING AND TRYING TO UNDERSTAND THE RESPECTIVE ROLES OF THE JUDICIARY, HERE, THE LEGISLATURE AND THE EXECUTIVE BRANCH. IN THIS UNIQUE SITUATION, AS JUSTICE WELLS IS POINTING OUT, IT IS THE COURT THAT HAS THE POWER TO GRANT THE INJUNCTION, AND IN RULE 6 -- 1.610-B, WE HAVE SAID EVERYONE BUT THE STATE OR ITS SUBDIVISION HAS TO HAVE A BOND. IN THE CASE OF THE STATE, IT MAY REQUIRE A DISPENSE WITH THE BOND, WITH OR WITHOUT SURETY, AND CONDITIONED IN THE SAME MANNER, HAVING DUE REGARD FOR THE PUBLIC INTEREST. WE, THEN, GO ON AND TALK ABOUT DAMAGES, IN THE -- OR THE FLORIDA STATUTE TALKS ABOUT THE DAMAGES, AND IT TALKS ABOUT THAT A DEFENDANT MAY BE ENTITLED TO THE -- THAT THE DAMAGES FOR THE WRONGFUL -- FOR THE INJUNCTION, BEING OBTAINED IMPROPERLY, NOT THE WRONGFUL ACT, JUST THAT IT WAS REVERSED, IS UP TO THE INJUNCTION, LIMITS OF THE INJUNCTION BOND, SO DOESN'T IT FOLLOW THAT, IN THE ABSENCE OF THE BOND, THAT AT LEAST IN THE CASE OF THE STATE AND ITS SUBDIVISIONS, THAT THERE SHOULD BE UNLIMITED LIABILITY, IF A BOND IS NOT POSTED, AND ISN'T THAT, REALLY, THE BETTER WAY TO GO, BECAUSE IN THAT SITUATION, IF WE SAY OTHERWISE, THAT THE CAP IS AT 100,000, THEN WHAT IS THE INCENTIVE FOR THE STATE OR THE COUNTY TO SAY -- GIVE US A BOND? I MEAN THEY ARE ALWAYS GOING TO SAY DON'T GIVE US A BOND, BECAUSE THE WORST THAT IS GOING TO HAPPEN IS THEY ARE LIABLE FOR \$100,000. SO AS A PRACTICAL MATTER, ISN'T IT IF THE JUDGE THINKS AN INJUNCTION IS IN ORDER, BUT ISN'T SURE WHETHER -- DOESN'T KNOW IF IT IS GOING TO BE REVERSED, ISN'T THE PRACTICAL CONSEQUENCE THAT THE JUDGE IS ALWAYS GOING TO REQUIRE A BOND, AND THAT MIGHT HAVE OTHER CONSEQUENCES FOR STATES AND MUNICIPALITIES?

YOU HAD A LOT OF QUESTIONS IN THERE.

I AM TRYING TO FOLLOW THROUGH WHERE WE ARE GOING HERE, AND TO MAKE SURE THAT WE ARE ALL PLAYING THE SAME GAME, AND THAT IT IS NOT "I WIN-I WIN", IN TERMS OF THE INJUNCTIVE SITUATION. IN OTHER WORDS THAT THE COURT IS DISPENSING WITH THE REQUIREMENT THAT EVERY OTHER CITIZEN HAS TO LIVE BY. AND WHAT IS THE TRADE-OFF FOR THE COURT SAYING YOU CAN'T HAVE AN INJUNCTION WITHOUT A BOND? IS IT THAT, IF YOU LOSE, YOU ARE JUST CAPPED AT \$100,000?

WELL, LET ME POINT OUT THAT, DESPITE COUNSEL'S REPRESENTATIONS IN THE BRIEF AND BEFORE THIS COURT THIS MORNING, I DISAGREE THAT THERE IS A CLEAR UNDERSTANDING OR

THAT THE PARTIES HAD NO QUESTION, WITH RESPECT TO EACH OTHER'S RESPONSIBILITIES, BECAUSE THAT IS AN ISSUE --

I DON'T WANT TO GET -- BECAUSE IF WE STAY JUST ON THIS CASE, WE ARE NOT GOING TO HAVE A RULE FOR THE FUTURE.

YES, MA'AM, BUT MY POINT WAS THAT, WHEN NO BOND IS REQUIRED OF A MUNICIPALITY, THERE MAY BE A VERY GOOD REASON. IT MAY BE, INDEED, THAT THE TEMPORARY INJUNCTION IS SOUGHT IN FURTHERANCE OF A DISCRETIONARY GOVERNMENTAL FUNCTION, WHICH, FRANKLY, WE THOUGHT WE WERE DOING THIS IN THIS CASE, TOO, UNTIL WE WERE TOLD THAT, UNDER THE PARK CRITERIA, THAT WE WERE NOT, THAT IT WAS NOT A GOVERNMENTAL FUNCTION TO BRING THE TEMPORARY INJUNCTION AS AN EXERCISE OF LAW ENFORCEMENT. I SUBMIT THAT THERE ARE OCCASIONS WHEN, WITH DUE REGARD TO THE PUBLIC INTEREST, THERE MAY BE NO NEED TO POST A BOND. I THINK THERE ARE SEVERAL OPTIONS. ONE IS, CLEARLY, NO BOND. THE OTHER IS BOND WITH OR WITHOUT SURETY. THE QUESTION CAME UP BEFORE, ABOUT NO MAGIC TO THE BOND. I SUBMIT THAT THERE IS MAGIC TO THE BOND. I SUBMIT THE MAGIC TO THE BOND IS THAT, WHEN THE BOND IS EXECUTED, WHETHER IT IS A PROMISE IN WRITING THROUGH A PRIVATE INSURANCE COMPANY OR DONE WITHOUT SURETY, THAT IS A CONTRACT, UPON WHICH THE OTHER SIDE CAN EXECUTE, AT THE APPROPRIATE TIME, AND THEREBY, HAVING EXECUTED A CONTRACT, UNDER THE PAN AMERICAN DECISION, SOVEREIGN IMMUNITY HAS BEEN WAIVED. TO GO BACK AND FINISH MY ANSWER --

HAS SOVEREIGN IMMUNITY BEEN TOTALLY WAIVED THEN? WOULD THERE BE ANY \$100 CAP ON THE RECOVERY OF THE BOND?

I THINK THE SECOND DISTRICT'S OPINION RAISES THAT QUESTION, NOW, JUDGE, SINCE IT DOES CAP SOVEREIGN IMMUNITY AS A TORT, AND THE NEXT TIME I HANDLE ONE OF THESE CASES AND THE DAMAGES APPEAR TO BE IN EXCESS OF \$100,000, I THINK THERE MAY BE AN ISSUE FOR APPEAL AS TO WHETHER OR NOT A BOND COULD OR SHOULD BE REQUIRED, IN EXCESS OF \$100,000, IF, INDEED, THIS COURT AFFIRMS A SECOND DISTRICT AND SAYS THAT IT IS A TORT.

BUT DOESN'T THAT -- WHAT IS REALLY BOTHERING ME, I MUST ADMIT, AND I WOULD LIKE FOR YOU TO SPEAK TO, IS THIS SEPARATION OF POWERS ISSUE, AND THAT IS THAT, REALLY, THE DAMAGES AREN'T CAPPED, OTHER THAN WHAT CAN BE RECOVERED IN THE COURT AT \$100,000. ALL IT HAS DONE IS THAT IT IS CEDING TO THE LEGISLATIVE BRANCH, THE -- CEDING TO THE LEGISLATIVE BRANCH, THE DETERMINATION AS TO WHETHER THOSE DAMAGES THAT ARE GOING TO BE PAID ARE IN EXCESS OF \$100,000.

JUSTICE WELLS, I GO BACK, AS I BELIEVE WE ALL MUST, TO ARTICLE 10, SECTION OF THE FLORIDA CONSTITUTION, WHICH SPECIFICALLY SAYS THAT SOVEREIGN IMMUNITY IS PRESERVED, UNLESS WAIVED BY GENERAL LAW. WE HAVE ONE GENERAL LAW, 768.828, AND FRANKLY, JUSTICE PARIENTE, I LEARNED, THIS MORNING, ABOUT ANOTHER ONE, WHERE IT APPEARS THAT SOVEREIGN IMMUNITY MAY HAVE BEEN WAIVED, TO SOME EXTENT, WITH RESPECT TO PUBLIC HEALTH INJUNCTIONS. THE CONSTITUTION IS WHAT IT IS. AND THE CONSTITUTION ESTABLISHES THE RULE, IN THE STATE OF FLORIDA, THAT IMMUNITY IS THE RULE. WAIVER IS THE EXCEPTION. AND THE CONCURRING OPINION, FROM PROVIDENT ONE, CITES CASES, AND THE STATUTES IN THOSE STATES ARE EXACTLY THE OPPOSITE. THE STATUTES IN THOSE CASES PROVIDE SOVEREIGN IMMUNITY IS WAIVED. IMMUNITY IS THE EXCEPTION. FLORIDA AND -- I AM OLD ENOUGH TO HAVE VOTED ON THAT CONSTITUTION, SAYS WHAT IT SAYS, AND I DON'T FIND, AND IT IS OUR POSITION TODAY AND IT HAS BEEN OUR POSITION BEFORE, THAT THERE HAS BEEN AN EXPRESS WAIVER, BY GENERAL LAW, FOR THESE DAMAGES. JUDGE ALTENBURN, FRANKLY -- JUDGE ALTENBURN, FRANKLY, I SUBMIT, FOUND A WAIVER, WHEN HE CONCLUDED THAT THIS ACTION AMOUNTED TO A TORT, BUT IF IT IS NOT A TORT, AND UNLESS THERE IS SOME OTHER SPECIFIC LEGISLATIVE ENACTMENT THAT WAIVES SOVEREIGN IMMUNITY, THE ANSWER TO YOUR QUESTION IS ART -- THE

ANSWER TO YOUR QUESTION IS ARTICLE 10, SECTION 13, PRESERVES SOVEREIGN IMMUNITY. NOW, AS I SAID BEFORE, DOES THAT WORK AN INJUSTICE? YES. SOMETIMES IT GOOD. THIS -- SOMETIMES IT DOES. THIS COURT RECOGNIZES IT. THIS COURT WRESTLES WITH SOVEREIGN IMMUNITY ALL THE TIME, AND THEY, TYPICALLY, ARE COMING OUT OF TORTS OR OPERATIONAL VERSUS GOVERNMENTAL-TYPE FUNCTIONS, BUT THERE IS RELIEF. THERE IS RELIEF THROUGH THE CLAIMS BILL. THERE IS RELIEF FOR THE \$100,000 CAP, AND LET ME GO BACK AND EMPHASIZE THAT, DESPITE THE NOTION OF AN UNDERSTANDING BETWEEN THE PARTIES, THERE NEVER WAS AN APPEAL IN MAY OF 1990, WHEN THIS ORDER WAS ENTERED, WHERE THE TRIAL JUDGE DECEMBER PENSED WITH A BOND.

LET ME MAKE SURE I UNDERSTAND YOUR POSITION ON, HERE, IN THIS COURT. I UNDERSTOOD THAT YOU WERE NOT FURTHER PURSUING THE ARGUMENT THAT THERE SHOULD BE TOTAL SOVEREIGN IMMUNITY FOR THIS -- FOR OBTAINING AN INJUNCTION THAT SUBSEQUENTLY REVERSED, THAT YOU DID NOT -- THAT YOU DID NOT CONTINUE TO ASSERT THAT POSITION IN THIS COURT. AT LEAST THAT THE IS HOW I READ --

OUR BRIEF, I BELIEVE, ARGUES, ALTHOUGH I WOULD ADMIT NOT PARTICULARLY STRENUOUSLY, THAT WRONGFUL INJUNCTION IS NOT A TORT. THEREFORE, IF IT IS A TORT, THEN SOVEREIGN IMMUNITY IS WAIVED, UP TO THE EXTENT OF THE STATUTE, SO IF YOU FIND THAT SOVEREIGN -- THAT A WRONGFUL INJUNCTION IS NOT A TORT, THEN IT IS OUR POSITION THAT SOVEREIGN IMMUNITY WOULD BAR ANY OTHER RELIEF FROM ANY OTHER SOURCE, BECAUSE, AGAIN, IT IS NOT WAIVED BY GENERAL LAW.

IF IT IS A TORT, THEN YOUR POSITION WOULD BE THAT, WITH OR WITHOUT A BOND, THAT THE LIABILITY IS CAPPED AT \$100,000, AND IT IS SORT OF ANALOGOUS TO WHERE AN ENTITY CAN GET AN INSURANCE POLICY FOR BEYOND \$100,000 BUT THAT THAT DOES NOT WAIVE SOVEREIGN -- THEIR CAP OF \$100,000?

I THINK, YES, IF THIS COURT APPROVES THE SECOND DISTRICT, I THINK THERE IS A CLEAR READING, IN THE SECOND DISTRICT'S OPINION THAT, LIABILITY FOR WRONGFUL INJUNCTION, OBTAINED AT THE PLEADING OF A MUNICIPALITY, IS CAPPED AT \$100,000.

SO THEN IT WOULDN'T BE THAT, IF THERE IS A BOND, IT IS CAPPED AT WHATEVER THE BOND AMOUNT IT, BUT IF IT IS NO BOND, IT IS CAPPED AT \$100,000.

THAT WOULD RAISE THE OTHER ISSUE. IF YOU PRESUME, FOR EXAMPLE, THAT DAMAGES ARE ESTIMATED AT \$500,000, THE TRIAL COURT, AS IT, PERHAPS, SHOULD HAVE IN THIS CASE, CONDITIONS THE INJUNCTION UPON THE ISSUANCE OF A BOND IN EXCESS OF \$100,000. NOW, THE MUNICIPALITY HAS A DECISION TO MAKE. THEY EITHER POST THE BOND OR THEY FOREGO THE INJUNCTION.

AND THAT WOULD BE SOMETHING THAT JUDGES COULD DO. IN OTHER WORDS IF THEY WILL ARE REALLY CONCERNED, SAY, YOU KNOW, YOU REALLY DON'T -- THIS IS A QUESTION. THIS IS A -- JUSTICE ANSTEAD SAID WE DON'T USUALLY FAVOR INJUNCTIONS, BUT IF WE DO, THEN WE ARE GOING TO CONDITION THIS ON A BOND OF A MILLION DOLLARS OR 500,000.

IF THAT BOND IS ENTERED, UNDER THE WAIVER OF SOVEREIGN IMMUNITY IN THE PAN AMERICAN TOBACCO CASE, I BELIEVE SOVEREIGN IMMUNITY IS NO LONGER AN ISSUE. THE BOND IS THE BOND, IS THE CONTRACT, AND SOVEREIGN IMMUNITY IS WAIVED, FOR THE PURPOSES OF THE CONTRACT. I WOULD POINT OUT, THOUGH, HOWEVER, AT LEAST IN THE FIRST CASE WHERE THAT COMES UP, THERE MAY BE AN ISSUE ON APPEAL, AS TO WHETHER OR NOT THE CITY IS LIABLE IN EXCESS OF \$100,000, AT ALL. THEY MAY BOND IT OFF AND THEN TAKE AN APPEAL, IN ORDER TO REVIEW THE TERMS OF THE INJUNCTION, TO INCLUDE THE BOND, BUT THAT IS, REALLY, THE ONLY ISSUE I SEE REMAINING, OUT OF THE SECOND DISTRICT'S OPINION, SHOULD THIS COURT DON'T IT, AND THAT IS JUST HOW FAR DOES A \$100,000 CAP GO? IS IT ESSENTIALLY ABSOLUTE, OR

IS IT WAIVED BY VIRTUE OF A BOND IN EXCESS OF THAT AMOUNT, AND I THINK THAT, ALSO, PUTS THE APPELLATE COURT IN THE POSITION TO JUDGE WHETHER OR NOT, IN THAT PARTICULAR INSTANCE, WHETHER OR NOT IT IS A PROPRIETARY FUNCTION, WHICH SHOULD BE -- FOR WHICH SOVEREIGN IMMUNITY WOULD BE WAIVED OR WHETHER IT IS A GOVERNMENTAL TYPE DECISION, FOR WHICH THERE WOULD BE NO LIABILITY AT ALL, ANYWAY.

SHOULDN'T --

I AM SORRY?

SHOULD WE BE ATTRACTED TO THE SECOND DCA'S POSITION, WOULD YOU SAY THAT IT IS AN OPERATIONAL LEVEL, AS OPPOSED TO A POLICY-MAKING DECISION?

WELL, IN THIS CASE --

WOULD YOU AGREE WITH THAT?

I THINK YOU HAVE TO LOOK AT WHAT IT IS THAT IS SOUGHT TO BE ENJOINED. WE, CERTAINLY, THOUGHT, AND PERHAPS STILL DO, THAT THIS IS A TRIANON PARK CATEGORY TWO DISCRETIONARY DECISION ABOUT HOW AND WHERE AND WHEN TO ENFORCE THE LAW. HOWEVER, JUDGE ALTENBURN'S DECISIONS SUGGEST THAT THE RESULT MIGHT BE DIFFERENT, IF THERE WERE A SEVERE PUBLIC HEALTH THREAT. I FORGET HOW HE PHRASED IT.

THAT IS IN A DIFFERENT CATEGORY.

WELL, BUT, THAT LEAVES OPEN THE POSSIBILITY THAT THE RULE IS NOT ABSOLUTE FOR ALL WRONGFUL INJUNCTIONS. I SEE, IN THERE, THE OPPORTUNITY TO SUGGEST THAT THERE MAY BE SOME INJUNCTIONS WHICH ARE SOUGHT, FOR WHICH THERE IS NO LIABILITY, BECAUSE THEY ARE PURELY OF GOVERNMENTAL DISCRETION EARL EXERCISE. -- DISCRETIONARY EXERCISE.

THAT IS LIMITED TO CARRYING OUT A CITY ORDINANCE. ABATEMENT OF NUISANCE OR SOMETHING LIKE THAT. THAT IS LIMITED TO THAT. THEN WOULD YOU AGREE, THEN, THAT IT IS AN OPERATIONAL LEVEL DECISION?

WELL, NO. I DON'T. BUT I MEAN, THE OPINION IS WHAT IT IS, AND WE ARGUE THAT BELOW, AND WE ARE WRONG. WE WOULD SUBMIT THAT IT IS A CATEGORY TWO LAW ENFORCEMENT DISCRETIONARY EXERCISE OF LAW ENFORCEMENT, AND I THINK, FRANKLY, THE HAIR IS BEING SPLIT A LITTLE TOO NARROWLY, WHEN THE SECOND DISTRICT FINDS THAT THIS IS NOT A TRIANON PARK CATEGORY TWO DISCRETIONARY DECISION.

YOU MAY HAVE ANSWERED THIS QUESTION, WHEN YOU RESPONDED TO JUSTICE WELLS' QUESTION, BUT I THINK IT IS STILL A QUESTION THAT HAS TO BE ASKED. THAT IS, REALLY, UNDERLYING THIS COURT'S PRIOR DECISION, THE MAJORITY DECISION, WAS A CONCLUSION THAT THE CITY, IN ESSENCE, HAD REPRESENTED THAT IT SHOULD NOT BE REQUIRED TO PUT UP A BOND, BECAUSE IT HAD UNLIMITED RESOURCES TO RESPOND TO ANY DAMAGES, AND A REJECTION OF THE CITY'S POSITION THAT, UNDER THE ORDINARY LAW, ABOUT THE ISSUANCE OF WRONGFUL INJUNCTIONS, THAT THERE IS ONLY A RESPONSE IN DAMAGES WHEN A BOND HAS BEEN PUT UP. IN OTHER WORDS WHEN A FUND HAS BEEN CREATED, IN ESSENCE, TO RESPOND TO THOSE DAMAGES. IT SEEMS TO ME AN UNDERLYING THEME OF THE MAJORITY OPINION THIS THIS CASE WAS THAT NO CITY, BECAUSE YOU, IN ESSENCE, SAID, JUDGE, YOU DON'T HAVE TO PUT UP, REQUIRE US TO PUT A BOND UP, BECAUSE WE HAVE PLENTY OF RESOURCES. WE CAN RESPOND. AND -- TO ANY DAMAGES. THAT THEY HAVE HERE. THEREFORE, YOU SHOULD HAVE NO RESTRICTION ON YOUR DAMAGES NOW. AND I AM -- BECAUSE THAT WAS AN UNDERLYING THEME OF THE DECISION OF THE MAJORITY, HOW COULD WE AVOID THAT OUTCOME, IN THIS PARTICULAR CASE? JUST AS IF YOU HAD PUT UP A BOND.

I --

DO YOU UNDERSTAND MY QUESTION?

I THINK I DO, BUT I THINK I HAVE TO CORRECT THE COURT, IF YOU WILL INDULGE ME, SIR, AND THAT IS THAT COUNSEL FOR THE CITY SAID WE ARE NOT REQUIRED TO POST A BOND. THAT IS ALL HE SAID. HE DID NOT SAY NOT REQUIRED TO POST A BOND BECAUSE --

I KNOW THAT, BUT WHAT I AM TALKING ABOUT IS THE BASIS FOR THIS COURT'S DECISION THAT, IN OTHER WORDS, REJECTING THE CITY'S ARGUMENT THAT, BECAUSE A BOND WAS NOT REQUIRED, IN OTHER WORDS, THE ORDINARY LAW ABOUT THE ISSUANCE OF WRONGFUL INJUNCTION, IS THAT THERE IS A RESPONSE, WHEN A BOND IS REQUIRED, AND YOU RESPOND AGAINST THAT BOND, AND THE CITY HAS TAKEN THE POSITION THAT THERE WAS NO BOND PUT UP IN THIS CASE AND THEREFORE NO ENTITLEMENT TO DAMAGES. IS THAT NOT CORRECT?

THAT WAS OUR POSITION BELOW. NO BOND, NO DAMAGES. YES, SIR.

AND IN ESSENCE, THIS COURT SAID, WELL, SINCE, IN ESSENCE, YOU WERE REPRESENTING THAT YOU DIDN'T NEED TO PUT UP A BOND, BECAUSE YOU HAD ADEQUATE RESOURCES TO RESPOND TO THEIR DAMAGES, THAT WE ARE GOING TO REJECT YOUR CLAIM, AND YOU ARE LIABLE FOR DAMAGES.

JUDGE, THE TRIAL JUDGE SAID THEY HAVE UNLIMITED DAMAGES. EXCUSE ME. THEY HAVE UNLIMITED RESOURCES. WE DIDN'T SAY THAT. NUMBER ONE. NUMBER TWO, I WOULD SUBMIT THAT, AT THE TIME, AND I THINK IT IS STILL A CLOSE QUESTION, BASED ON JUSTICE SHAW'S QUESTION, I THINK THAT, AT THE TIME WE DID NOT HAVE TO POST A BOND, BECAUSE WE WERE IN THE EXERCISE OF A PURELY GOVERNMENTAL FUNCTION, LAW ENFORCEMENT, DETERMINATION OF HOW, WHEN AND WHERE TO ENFORCE THE LAW. SO I THINK THE STATEMENT -- I DON'T THINK -- EXCUSE ME. WE ARE NOT REQUIRED TO POST A BOND IS ABSOLUTELY CORRECT, UNDER OUR ASSUMPTION, AT THE TIME, THAT THE EXERCISE OF A CATEGORY TRIANON PARK DECISION, WAS A GOVERNMENTAL DISCRETIONARY DECISION. SUBSEQUENTLY, THE SECOND DISTRICT, OF COURSE, SAYS THAT IS NOT RIGHT, BUT I THINK, AT THE TIME, WHEN THE INJUNCTION IS ENTERED, THE ISSUE OF IS THERE -- SHOULD THERE OR SHOULD THERE NOT BE A BOND, IS A DETERMINATION THAT HAS TO BE MADE, BY LOOKING AT WHETHER OR NOT THIS PARTICULAR FUNCTION THAT IS BEING EXERCISED IS A PROPRIETARY GOVERNMENTAL OPERATION, A BUSINESS OPERATION, LIKE IN THE CARTER CASE THAT IS CITED, OR WHETHER IT IS A -- EXCUSE ME -- A GOVERNMENTAL DISCRETION AN AREA -- DISCRETIONARY FUNCTION, RESERVED ONLY TO GOVERNMENT OR RESERVED ONLY TO GOVERNMENTAL ENTITIES TO EXECUTE.

THANK YOU. YOUR TIME IS CONCLUDED. THANKS TO BOTH OF YOU.

THANK YOU VERY MUCH.

FOR YOUR ASSISTANCE IN THIS MATTER. WE WILL BE IN RECESS FOR 15 MINUTES.