LYNX Board Audit Committee Agenda

Central Florida Regional Transportation Authority
455 N. Garland Ave.
2nd Floor Board Room
Orlando, FL 32801

Board Date: 1/18/2007
Time: 9:30 AM

As a courtesy to others, please silence all electronic devices during the meeting.

1. Call to Order

2. Approval of Minutes

- Approval of the December 7, 2006 Audit Committee Minutes (pgs. 2-8)

3. Audit Agenda Items

A. Update on Sovereign Immunity and how it relates to LYNX' insurance programs (pgs. 9-57)
- Attachment

B. Review of Administrative Rule #4 (Contracts and Procurements) (pgs. 58-65)
- Attachment

C. LYNX Operations Center Project, Bennett Facility and Dr. Phillips update (pg. 66)

D. Overview of the LYNX Maintenance Audit (pgs. 67-79)
- Presentation

4. Review of Board Package: 1/18/2007

A. Review and discussion of Consent Agenda Items
B. Review and discussion of Action Agenda Items

5. Information Items
(For Review Purposes Only - No action required)

I. Update on the Orange County Clerk of Courts second floor lease agreement (pgs. 80-81)
- Attachment

II. LYNX Board of Directors' 12-month rolling calendar of agenda items (pgs. 82-83)

LYNX
Central Florida Regional Transportation Authority
Audit Committee Meeting

PLACE: **LYNX Central Station**
455 N. Garland Avenue
Board Room, 2nd Floor
Orlando, FL 32801

DATE: **December 7, 2006**

TIME: **9:30 a.m.**

Audit Committee Members in Attendance:	**Not in Attendance:**
Seminole County Chair, Carlton Henley	City of Orlando, Mayor Buddy Dyer
FDOT District 5 Secretary, Noranne Downs	
Osceola County Commissioner, Bill Lane	
City of Orlando Representative, Roger Neiswender	
Orange County Commissioner, Mildred Fernandez	

1. Call to Order

The meeting was called to order at 9:30 a.m.

2. Approval of Minutes

Commissioner Bill Lane moved to approve the minutes of the October 26, 2006 Audit Committee meeting. Commissioner Mildred Fernandez seconded the motion. The motion passed unanimously.

3. Audit Agenda Items

a. Review of proposed Administrative Rules #4, #6, and #7

Pat Christiansen, Legal Counsel, revised the proposed changes to Administrative Rules and reviewed a chart he prepared to summarize the approval process for contracts.

Row number one indicates that any contract above $150,000 needs to be approved by LYNX' Board. The Chief Executive Officer (CEO) can execute this contract. Row number two discusses exercising options under contracts. The current rule indicates that options need to come back to LYNX' Board to be exercised unless the option was contained in the proposal the Board originally approved and authorized staff to exercise the options.

Mr. Christiansen explained that Commissioner Fernandez had the procedures reviewed by Orange County's Purchasing/Procurement department. Orange County has provided staff with their comments. Comments include the current rules are too restrictive with respect to the staff at LYNX being able to undertake some procurement actions.

Chairman Henley mentioned that because of past history the Board does not want to become too lenient and still prefers to see contracts and options reviewed.

Mr. Christiansen indicated that the current staff fully understands what needs to come before the Board.

Mr. Christiansen went on to explain that in the proposal, the CEO has the ability to execute the contract as long as it is $150,000 or less. There is, however, no delegation authority. Therefore, Mr. Christiansen recommends the following statement: "anything $150,000 or less the CEO may sign and the CEO has the authority to delegate that authority as follows:

- Chief Financial Officer of $50,000 or less
- Purchasing Manager of $25,000 or less
- Contract Administrators/buyers of $5,000 or less
- Individuals for micro purchases of $2,500 or less"

The CEO would delegate micro purchases to only certain individuals. Small purchasing programs, anything $2,500 or less may be signed. The P-Card would come under the authority that the CEO may delegate.

Mr. Neiswender asked if the Rule states "it is in the budget", is it in the authorized amounts of the budget or is it a specifically acknowledged line item in a budget. Mr. Francis explained that yes, it is already in the budget.

Chairman Henley asked if each person that receives a P-Card has a specific amount that they are able to purchase up to. Mr. Francis answered yes, there would be a cap.

Ms. Watson responded that staff is looking at many scenarios, some of which include limiting dollar amounts per person/per position, but also restricting to certain vendors. There are many built-in safeguards that can be put into place and staff is looking at all of them.

Mr. Christiansen summarized Category four, Bus Advertising Contracts. Mr. Christiansen explained that there is a contract template used and only the numbers get changed for the bus advertising procedure.

Commissioner Fernandez stated that in level three contracts, all other bus advertising contracts, there needs to be a defined threshold. Mr. Christiansen explained that there is verbiage missing from the chart and he will review it and bring it back to the Board.

Mr. Christiansen explained item five, emergency purchases. The issue is how does staff deal with emergency purchases above $150,000. Emergency purchases and emergency matters are defined as public health and safety, hurricanes, etc.

The concept is that the CEO can do that without oversight if it is $150,000 or less. If it is over $150,000 the CEO would have to contact the Chairman and/or the Vice Chairman of the Board.

Mr. Neiswender recommends adding "a designated successor in the event of the incapacitation of or during a designated leave."

Mr. Christiansen indicated that he will re-do the chart, clarify some issues, taking into account comments from the Board and bring it back to the January Board meeting for review and adoption.

Mr. Christiansen explained that in Rule 6 there are no revisions to come to the Board today other than to address how the Board functions as the Audit Committee. Historically, before this Board was restructured into the current Board, it was much larger. Then Chairman Atlee Mercer and Commissioner Henley developed the Audit Committee to review LYNX practices and procedures. Over time, the Audit Committee began doing more than just the typical audit committee. The meeting is somewhat of a workshop session for the Board. Mr. Christiansen recommends discussing the Board's Consent Agenda during the Audit Committee meetings.

Mr. Christiansen explained that he is not prepared to bring Rule #7 to the Board but wanted to explain that it is the Rule that relates to Travel & Entertainment (T&E), gifts, etc. What staff is working on is a chart to outline how T&E's would be handled in the future. For example, when the CEO goes to the APTA conference, while LYNX pays for that there may be a dinner that the CEO needs to go to. These types of issues would be outlined.

b. Update on the LYNX Operations Center (LOC), Bennett Facility and Dr. Phillips

Mr. Francis gave a brief update on the LOC. Mr. Francis explained that the truss system, which has been a major problem, in Building "B" is now under construction. It will be completed in approximately a week and a half. There is still not a completed and/or negotiated price on the entire "fix". Staff does have a negotiated price on the erection of the truss system. It was considerably less than the quote given to staff by the contractor. What staff does not have is a guaranteed price on the remainder of the items. These are still under negotiations. Staff is prepared to give the contractor a proposal at the end of this week as to what that price will be. If staff and the contractor cannot come to an agreement to the dollar amount, staff is prepared to issue a unilateral change order for the amount in the proposal.

The schedule still shows completion of Building "A" by the end of December. Mr. Francis is not confident that will occur. It is more likely it will be complete the first part of January. The tentative completion date of Building "B" is the first week in February. They are anticipating the entire project to be complete no later

than the end of February; however, staff would like to see that date backed up considerably. The contractor has not committed to that.

Commissioner Lane does not have confidence in the schedule, or the work being done. He plans on going back to the LOC for another site visit after the first of the year.

Ms. Darnall explained to the Audit Committee that staff is up and running at the Bennett facility and things are going well there.

Regarding the Dr. Phillips lease, Ms. Darnall explained that Albert Bustamante, Baker and Hostetler, has indicated that discussions are going well with Dr. Phillips' Legal Counsel. Chairman Henley requested that the Board receive copies of the written communications between Dr. Phillips and Mr. Bustamante. Ms. Darnall explained that Dr. Phillips has stated that they are holding the security deposit because they were unable to lease the property in October and wanted LYNX to pay for the month of October. That lease amount exceeded the amount of the security deposit and at the same time Dr. Phillips felt there were numerous repairs that needed to be done (approximately $25,000 worth of repairs).

Mr. Bustamante is confident he can keep the discussions going and LYNX can come out of it with minimal issues to deal with.

Ms. Watson explained that she recently learned that there is a leadership change going on at the Dr. Phillips organization.

c. Discussion on alternative solutions for the purchase of 21 buses

Mr. Francis explained that this item is tied to a regular Board item which is the issuance of a purchase order to purchase the Gillig buses that is being brought to the Board today. Mr. Francis explained that Orange County gave LYNX a significant increase to the budget which will allow LYNX to purchase some additional buses. Also, for the first time Orange County funded the $2 capital charge that is created by the regional model that LYNX prepared. That $2 capital charge generates approximately $1.7 million. The $1.7 million was earmarked for the lease of 21 buses. Staff would like the Boards approval to issue a purchase order to Gillig to keep the buses in production.

Mr. Francis indicated that LYNX can go into a traditional operating lease. It is slightly more expensive. LYNX has a proposal from Gillig to do an operating lease and that lease could be exercised today. It is approximately $1.4 million per year which is significantly less than the commitment for the capital dollars. The other option is to do a capital lease. In this scenario LYNX would retain title. Counsel is of the opinion that a capital lease would constitute a borrowing and a borrowing is prohibited by LYNX. However, Orange County does have a capital

lease program so Commissioner Fernandez was successful in getting staff together with Orange County to explore possibly riding on their lease program.

Chairman Henley asked if Orange County has stated a preference. Mr. Francis explained that no, they had not. Everyone is looking at the best deal for LYNX and Orange County.

Commissioner Lane asked what happens at the end of the lease and also asked if there are mileage restrictions. Mr. Francis explained that it would be a 5, 6, or 7 year term and there are no mileage restrictions.

Commissioner Fernandez stated that Orange County is very interested in working with LYNX to provide the transportation that our communities need.

Mr. Neiswender mentioned that under the traditional lease program the funds are available and staff is ready to go. Staff is just looking at other options to see if there is a better deal out there. Therefore, there is no risk authorizing Gillig to go ahead and issue a purchase order to keep the buses in production. Mr. Francis explained that yes that is the case.

Commissioner Lane asked when Gillig needs the purchase order. Mr. Francis responded that they need it by the end of the year.

Ms. Watson explained that there is an automatic price escalation at the end of the year so if the purchase order is issued by the end of the year it is to LYNX' advantage.

Mr. Christiansen commented that the ability for LYNX to borrow is not expressly stated in the charter. It would be necessary to go through the division of Bond Finance in Tallahassee.

d. Update on the Florida Retirement System (FRS)

Mr. Francis explained that several administrative employees of LYNX currently participating in the LYNX Money Purchase Pension Plan requested the Authority consider joining the Florida Retirement System (FRS). The request was presented to the LYNX Board of Directors who requested LYNX staff analyze the process to join FRS and present information to the Board of Directors.

There is no problem in LYNX re-entering the FRS. The problem comes in buying back service. Because LYNX has a different type of a plan (401(a)) than the FRS, it is very difficult to buy-back service. Staff could not get a benefit from both plans.

Chairman Henley asked if it is an FRS rule or a Nationwide rule. Mr. Francis explained that it is a combination of several things. FRS will not allow a dual

benefit. The question is what would be best going forward. The FRS has an investment plan. FRS has a defined benefit plan.

Chairman Henley asked if this is a recruitment tool. Ms. Peggy Gies explained that it is hard to say at this time.

Commissioner Fernandez stated that this is a very complex issue. It is important to have a comprehensive fiscal analysis before the Audit Committee can make a final decision.

Ms. Downs asked if LYNX could offer two plans. Nadine Shaw stated that you could not give the option of two plans. The monies cannot come back to LYNX. Under State statute it is not possible to offer two options.

Mr. Francis explained that part of the reason this came up is because the employees felt Nationwide was not doing a good job. Staff is working on providing different options. Investment advisors from Nationwide are helping staff develop better plans. Vesting schedules are another issue. Chairman Henley would like to see the Nationwide plan.

4. Review of Board Package

Ms. Watson reviewed the Board packet.

Ms. Watson asked to comment on Consent Agenda items D. iv. and v. These are normal standard agreements with FDOT on two services LYNX provides under a Joint Participation Agreement. Ms. Watson explained that the LYNX Board approved a contract with Lake County last September and staff has been working with Lake County since then to get Lake County approval. It was supposed to go to the Lake County Commission yesterday; however, staff did not have it ready and did not put it on their agenda. Mr. Francis spoke to the Lake County Administrator who said there were no problems with the contract and there is no indication from the County Commissioners that it will not be approved. It will be on their next agenda for December 19.

LYNX would not normally start a service like this without contract in hand; however, the service will start on Monday as planned. Lake County will pay us from the start of the service.

Chairman Henley asked who would be at risk if something occurs without the contract. Mr. Christiansen explained that Lake County would not share in any risk since LYNX is the operator.

Ms. Watson indicated that one item was added to the Board packet. LYNX will be entering into a contract that the Board has already approved at a previous meeting. Staff anticipated getting the contract signed before the fiscal year ended. This did not occur; therefore, staff needs the Board's authorization to move funds from last year's

budget to this year's budget. The budget amendment will be brought to the Board in January.

The Audit Committee meeting ended at approximately 10:35 a.m.

Audit Committee Agenda Item #3.A

To:	**LYNX Board of Directors**
From:	**Linda Watson** CHIEF EXECUTIVE OFFICER **Edward Johnson** (Technical Contact) **Presented By: Pat Christiansen, Legal Counsel, Akerman and Senterfitt & Paul Dawson, Public Risk Insurance Agency**
Phone:	**407.841.2279 ext: 3017**
Item Name:	**Update on Sovereign Immunity and how it relates to LYNX' insurance programs**
Date:	**1/18/2007**

Legal Counsel, Pat Christiansen, will lead the Audit Committee in a discussion on sovereign immunity and how it affects LYNX' insurance programs, i.e., tort liability, insurance coverage, and contractual provisions for indemnification. To help facilitate this discussion an overview on what sovereign immunity means and how it was created has been attached for your review. Additionally, excerpts from the State Constitution, a sample case law and a Florida Attorney General Opinion have been included as well.

In addition to a review of what is sovereign immunity and how it affects the agency, LYNX' third party administrator for its insurance programs will provide an overview of LYNX' coverage. For your review, a matrix has been attached for your prior review.

because *Giordano* did not address the issue of potential coverage. Coverage was conceded.

As a court of limited jurisdiction, we do not have authority to correct every district court holding we think is wrong. *Stevens v. Jefferson*, 436 So.2d 33, 36 (Fla.1983) (Boyd, J., dissenting) (noting that the Florida Constitution reflects a "determination by the legislature and the people that this Court should not be able to review any decision it pleases"). In other words, we must get the right case before we can get the case right. This is not it. Because I conclude that this case falls outside our jurisdiction under article V, section 3(b)(3), Florida Constitution, I respectfully dissent.

WELLS and BELL, JJ., concur.

AMERICAN HOME ASSURANCE COMPANY, et al., Appellants/Cross-Appellees,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, etc., et al., Appellees/Cross-Appellants.

No. SC02-709.

Supreme Court of Florida.

July 7, 2005.

Background: Several federal court lawsuits were filed arising out of passenger train collision with hauling rig stopped at crossing for entrance to municipal electric utility's plant where motor carrier was delivering turbine. The United States District Court for the Middle District of Florida, Nos. 93-01090-CV-ORL-19C, 94-0976-CV-ORL-19C, James L. Watson, J., entered judgment that sellers were free of negligence, transport of the turbine was inherently dangerous, sellers were vicariously liable for carrier's negligence, carrier was 59% at fault, railroad track owner was 33% at fault, passenger railroad was 8% at fault, and seller's insurer could recover only 41% of its damages in subrogation action. Cross-appeals were taken. The Court of Appeals, Birch, Circuit Judge, 286 F.3d 1233, certified questions.

Holdings: The Supreme Court held as a matter of first impression that:

(1) act of transporting 82-ton turbine to power plant was inherently dangerous;

(2) seller's property insurer was vicariously liable for motor carrier's negligence during inherently dangerous activity;

(3) vicariously liable party should have the negligence of the active tortfeasor apportioned to it under comparative fault statute;

(4) crossing agreement that required municipal electric utility to indemnify railroad was not controlled by statutory restrictions on waiver of sovereign immunity; and

(5) the agreement was binding on the utility.

Questions answered.

Cantero, J., concurred and filed opinion in which Anstead and Bell, JJ., concurred.

Quince, J., concurred in part, dissented in part, and filed opinion.

1. Torts ⇐131

Under the concept of "vicarious liability," a person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other. Re-

statement Third, Torts: Apportionment of Liability § 13.

See publication Words and Phrases for other judicial constructions and definitions.

2. Torts ⇐131

The vicariously liable party is liable for the entire share of the fault assigned to the active tortfeasor.

3. Negligence ⇐483

Torts ⇐131

The vicariously liable party has not breached any duty to the plaintiff; its liability is based solely on the legal imputation of responsibility for another party's tortious acts. Restatement (Third), Torts: Apportionment of Liability § 13, cmt. c.

4. Torts ⇐131

The vicariously liable party is liable only for the amount of liability apportioned to the tortfeasor. Restatement (Third) of Torts: Apportionment of Liability § 13, cmt. e.

5. Negligence ⇐483

The doctrine of "vicarious liability" takes a party that is free of legal fault and visits upon that party the negligence of another.

6. Labor and Employment ⇐3159

The "inherently dangerous activities doctrine" states that a party who employs an independent contractor to do work involving a special danger to others which the employer knows to be inherent in or normal to the work is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger. Restatement (Second) of Torts § 427.

See publication Words and Phrases for other judicial constructions and definitions.

7. Negligence ⇐305

An activity is inherently dangerous if the danger inheres in the performance of the work, such that in the ordinary course of events its performance would probably, and not merely possibly, cause injury if proper precautions were not taken.

8. Carriers ⇐115

The act of transporting 82-ton turbine to power plant for generation of electricity was inherently dangerous due to its weight and size of the equipment required to transport it; thus, seller's contractor which used transportation broker to arrange delivery through motor carrier was vicariously liable for carrier's negligence in connection with stop on railroad crossing.

9. Carriers ⇐115

Insurance ⇐3523(1)

Property insurer stepped into the shoes of its insured in a subrogation action to recover for destruction of insured's turbine as result of collision at railroad crossing; thus, the insurer was vicariously liable for motor carrier's negligence during inherently dangerous activity of transporting the turbine.

10. Negligence ⇐549(10)

Under the pure form of comparative negligence, each party is apportioned liability based on its percentage of fault. West's F.S.A. § 768.81(2, 3).

11. Negligence ⇐549(8, 10)

A vicariously liable party should have the negligence of the active tortfeasor apportioned to it under comparative fault statute reducing damages by any contributory fault chargeable to the claimant, and, thus, vicariously liable party's recovery is reduced by active tortfeasor's fault; unless "chargeable" is to be reduced to mere surplusage, it must be read to include parties other than those that are directly lia-

ble and thus applies to vicariously liable parties. West's F.S.A. § 768.81(2).

12. Negligence ⇐483
Torts ⇐131

The vicariously liable party carries the entire burden of fault imputed from the active tortfeasor; the party who is vicariously liable is responsible to the plaintiff to the same extent as the primary actor.

13. Negligence ⇐483
Torts ⇐131

The "vicarious liability doctrine" allows for parties that are not at fault to be held liable for the actions of active tortfeasors.

See publication Words and Phrases for other judicial constructions and definitions.

14. States ⇐191.2(1)

Only the legislature has authority to enact a general law that waives the state's sovereign immunity. West's F.S.A. Const. Art. 1, § 13.

15. States ⇐191.6(1)

Any waiver of sovereign immunity must be clear and unequivocal. West's F.S.A. Const. Art. 1, § 13.

16. States ⇐191.6(1)

Waiver of sovereign immunity will not be found as a product of inference or implication. West's F.S.A. Const. Art. 1, § 13.

17. Municipal Corporations ⇐254, 723.5

Crossing agreement that required municipal electric utility to indemnify railroad was not controlled by statutory restrictions allowing waiver of sovereign immunity only for liability for torts caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment; statute only applied to actions at law against the state or any of its agencies or subdivisions to recover damages in tort, but the utility's obligation to indemnify the railroad was based on contract. West's F.S.A. § 768.28(1).

18. Courts ⇐89

Although an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive.

19. Municipal Corporations ⇐254

Supreme Court's *Pan-Am Tobacco* case that addressed the contractual liabilities of the state did not apply to municipalities and, therefore, did not control crossing agreement that required municipal electric utility to indemnify railroad; municipalities historically have possessed liability for their contracts.

20. States ⇐130

The state may not employ state funds unless such use of funds is made pursuant to an appropriation by the legislature. West's F.S.A. Const. Art. 7, § 1(c).

21. Municipal Corporations ⇐226

In executing contracts, municipalities are presumed to be acting within the broad scope of their authority. West's F.S.A. Const. Art. 8, § 2(b); West's F.S.A. § 166.021(1).

22. Electricity ⇐4

Provision of the Interlocal Cooperation Act on waiver of public agency's sovereign immunity with respect to electric project granted specific authority to municipal electric utility to execute the crossing agreement with railroad. F.S.1983, § 163.01(15)(k).

23. Electricity ⇐4

Crossing agreement that required municipal electric utility to indemnify railroad

was binding and enforceable as a contract fairly authorized by state law.

24. Electricity ⇐4

A municipal agency like a municipal electric utility has the inherent authority to contract with private parties and enter into an indemnification agreement as part of a contract with a private party and may not invoke sovereign immunity to defeat its obligations under the contract.

Michael R. Karcher of Underwood, Karcher and Karcher, P.A., Miami, FL, for Appellant.

Michael J. Roper and Ernest H. Kohlmyer, III of Bell, Leeper and Roper, P.A., Orlando, FL and Alton G. Pitts, Orlando, FL, for Appellants/Cross–Appellees.

William G. Ballaine of Landman, Corsi, Ballaine, and Ford, P.C., New York, NY, for Appellees/Cross–Appellants.

Christopher Michael Kise, Solicitor General, Louis F. Hubener, and Matthew J. Conigliaro, Deputy Solicitor Generals, Tallahassee, FL, on behalf of Charles J. Crist, Jr., Attorney General, and the State of Florida, as Amicus Curiae.

PER CURIAM.

We have for review a question of Florida law certified by the United States Court of Appeals for the Eleventh Circuit that is determinative of a cause pending in that court and for which there appears to be no controlling precedent. *See Nat'l R.R. Passenger Corp. v. Rountree Transp. & Rigging, Inc.*, 286 F.3d 1233, 1258, 1269 (11th Cir.2002). We have jurisdiction. *See* art. V, § 3(b)(6), Fla. Const.

This case involves a series of cases originating in the United States District Court for the Middle District of Florida. The cases involve an 82–ton combustion turbine engine which was damaged in a train collision after the hauler rig carrying the turbine became immobilized on a railroad crossing. The parties to the underlying cases included the passenger train company (National Railroad Passenger Corp., "Amtrak"), the railroad track company (CSX Transportation, Inc.), the owner of the hauler rig (Rountree Transport and Rigging, Inc.), a municipal utility authority (Kissimmee Utility Authority), a state municipal power agency (Florida Municipal Power Agency), the insurer (American Home Assurance Company, subrogee of Stewart & Stevenson Services, Inc.), and others. The parties appealed the district court's final judgments to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit consolidated the various appeals and certified four questions of Florida law to this Court for resolution. The first question relates to the application of Florida's comparative fault statute to a vicariously liable party. It asks whether a vicariously liable party should have the negligence of the active tortfeasor apportioned to it under section 768.81, Florida Statutes (1997), such that recovery of its own damages is correspondingly reduced. We answer "yes" to this question.

The remaining three questions relate to sovereign immunity. The second question asks whether, given that the Kissimmee Utility Authority, a municipal agency, contractually agreed to indemnify a private party, the agreement is controlled by the restrictions on waiver of sovereign immunity found in section 768.28, Florida Statutes (1997). We answer "no" to this question. The third question asks whether the agreement is instead controlled by the rule for breach-of-contract actions enunciated in *Pan–Am Tobacco Corp. v. Department. of Corrections*, 471 So.2d 4 (Fla.1984). Be-

cause this case involves a municipality, and even before *Pan–Am Tobacco* municipalities had both the authority to contract and liability for breaching them, we answer "no" to this question but hold that the Kissimmee Utility Authority is bound by its contractual agreement to indemnify private parties. Finally, the fourth certified question asks whether, if *Pan–Am* does apply, a municipal agency loses the protection of sovereign immunity only if it has specific authority to execute indemnification agreements, or whether it is sufficient that the agency more generally has statutory authority to contract with private parties. Our answer to the third question, explained in detail below, renders moot the fourth.

Before dealing with these legal questions, we find it helpful to explain the involved factual and procedural history of this case.

Factual Background

Kissimmee Utility Authority (KUA) is a municipal agency created by the City of Kissimmee to construct, operate, and manage the municipal electrical systems. As part of its duty, KUA was overseeing the construction of the Cane Island Power Plant, an electrical facility near Kissimmee. KUA contracted with Black & Veatch (B & V) as the project engineers. KUA also entered into a participation agreement with Florida Municipal Power Agency (FMPA), a joint-action agency organized under Florida law with authority to undertake and finance electric projects.[1] Under the participation agreement, FMPA acquired 50% ownership interest in the new plant and agreed to share the production costs of electricity with KUA. KUA also entered into a Private Road Grade Crossing Agreement (crossing agreement) with CSX Transportation (CSX), which permitted KUA to construct, use, and maintain a private road grade crossing over CSX's railroad tracks in order to ensure vehicular and pedestrian access to the plant. The crossing agreement required KUA to "defend, indemnify, protect, and save [CSX] harmless from and against" certain designated losses and casualties. The crossing agreement also required KUA to indemnify any company whose property was operated by CSX at the railroad crossing.

KUA contracted with General Electric (GE) for the purchase and delivery of customized power generation equipment, including a combustion turbine. The purchasing agreement included an indemnification provision whereby GE promised to defend and indemnify KUA, its agents, and B & V due to any negligent act or omission of GE in performing work under the contract. GE contracted with Stewart & Stevenson Services, Inc. (S & S) to purchase and customize the equipment for the plant. S & S contracted with transportation broker WOKO for the transport of the customized turbine equipment. WOKO in turn contracted with Rountree Transport and Rigging, Inc. (Rountree) to have the combustion turbine and its housing transported to the plant on November 30, 1993. This shipment only included one of forty-five boxes of the customized turbine equipment that was being transported to the plant.

Rountree transported the 82–ton combustion turbine by using a road tractor that pulled a hauler rig. The height of the hauler rig had to be adjusted to negotiate gradations in the terrain. Without remov-

1. *See State v. Fla. Mun. Power Agency*, 428 So.2d 1387, 1388 (Fla.1983) (stating that FMPA is a legal entity organized, pursuant to section 163.01, Florida Statutes (Supp.1982), for the purpose of joint acquisition, construction, and ownership of electricity-generating facilities by municipalities and other public entities).

ing the rig from the railroad tracks, the hauler crew adjusted the height of the hauler rig at the railroad crossing licensed to KUA from CSX. While this adjustment was taking place, an Amtrak passenger train collided with the rig. The collision destroyed the rig, the turbine, and its enclosure. The Amtrak train was damaged and some of the train crew and passengers suffered personal injuries.

Procedural History

Multiple lawsuits were filed by the various parties and their insurers in federal district court. CSX and Amtrak brought suit against B & V, Rountree, and KUA, claiming that the crossing was improperly designed and constructed by B & V, that Rountree and KUA were negligent in the transport of the turbine, and that KUA was obligated to defend and indemnify them based on the crossing agreement. The passengers and crew on the Amtrak train at the time of the collision sued for personal injuries and property damage. American Home Assurance Company (AHA), as subrogee of S & S, brought suit against CSX, Amtrak, Rountree, B & V, KUA, and FMPA, after compensating its insured S & S for loss of the turbine and its enclosure. AHA claimed that the collective negligence of the defendants caused S & S to sustain the loss covered by the AHA insurance policy. In turn, KUA brought a third-party complaint against GE, arguing that the purchase agreement required GE to defend and indemnify KUA.

The cases were consolidated and the district court bifurcated the proceedings into a liability phase and a damages phase. CSX and Amtrak moved for summary judgment on the indemnification by KUA under the crossing agreement; the district court granted summary judgment in favor of CSX, but denied Amtrak's motion because of unresolved factual issues. After a three-week trial in 1996 on the liability issue, the jury rendered its verdict. The district court granted judgment as a matter of law to S & S and GE, holding them free of direct negligence for the collision. The jury absolved all but three parties of direct negligence, finding Rountree 59% at fault, CSX 33% at fault, and Amtrak 8% at fault. The district court also granted B & V's motion and ruled that transportation of a combustion turbine was inherently dangerous as a matter of law and thus WOKO, S & S, and GE were vicariously liable for Rountree's negligence. The district court denied B & V, KUA, and FMPA's motion for summary judgment against GE. The district court ruled that these parties' losses in successfully defending themselves in the turbine litigation were not within the scope of the indemnification provision of the purchasing agreement with GE. The district court also granted Amtrak's renewed motion for summary judgment, ruling that as a matter of law KUA was contractually obligated by the crossing agreement to defend and indemnify Amtrak. The district court further ruled that as a matter of law Rountree's liability to AHA was limited to $1 million.

By the time the damages trial commenced in December 1999, all parties in the consolidated cases had settled their claims with all other parties, except for AHA as subrogee of S & S. AHA attempted to prove the amount of damages incurred by S & S by using the formula that its personnel had used in adjusting the insurance claim.[2] The district court refused to admit the documentary and testimonial evidence in support of this val-

2. This formula deducted the value of the equipment in boxes 2–45, which were shipped separately and not involved in the collision, from the value of all the customized turbine equipment in boxes 1–45 before the collision.

uation. The district court looked at the value of the turbine before the collision ($4,646,640) and subtracted the amount for which the damaged turbine was sold as scrap ($130,000) to arrive at the damage amount of $4,546,640. The district court concluded that AHA, standing in the shoes of S & S, was only entitled to recover 41% of the proven damages, or $1,851,822.40, because Rountree was found 59% at fault and S & S was found vicariously liable for this negligence based on the inherent dangerousness of transporting the turbine. Because the district court had already held that Rountree's liability to AHA was limited to $1 million, it entered final judgment against CSX and Amtrak jointly and severally for the remaining $851,822.40. The district court also denied AHA's request for prejudgment interest on its damages award.

AHA appealed to the Eleventh Circuit, claiming that the district court erred in restricting the evidence introduced to prove damages, in concluding that the transport of the turbine was inherently dangerous as a matter of Florida law, in applying Florida comparative fault principles to limit AHA to recovering 41% of S & S's proven damages, and in refusing to grant prejudgment interest. S & S, GE, and Rountree sought review of the ruling that the activity was inherently dangerous. KUA, FMPA, and B & V appealed against GE on the issue of contractual indemnification, arguing that the indemnification provision was applicable because they had to defend themselves against claims resulting from the collision that arose out of GE's failure to safely transport the turbine. KUA and FMPA also cross-appealed against CSX and Amtrak, arguing that the indemnification provision in the crossing agreement is unenforceable based on Florida sovereign immunity law; special requirements for indemnification in construction contracts under Florida law, which had not been met; Florida law dealing with exculpatory contracts; and the fact that the negligent actions of CSX occurred at a separate location from the crossing. KUA and FMPA also argued that even if the provision was enforceable, Amtrak was not covered by it.

On appeal, the Eleventh Circuit affirmed the district court's exclusion of AHA's damages evidence, concluding that under Florida law the proper measure of damages for loss to chattels is the difference between the value of the damaged property before and after the casualty and that Florida law requires courts to ensure that the damages awarded do not unjustly enrich the injured party. *Nat'l R.R. Passenger Corp.*, 286 F.3d at 1244–48. The Eleventh Circuit also affirmed the district court's ruling that the transport of the combustion turbine was inherently dangerous, based upon the unique dimensions and weight of the turbine and transport vehicle, the Florida statutes that strictly regulate the transportation of oversized items, and the special precautions and preparations taken in transporting this turbine. *Id.* at 1248–50. The Eleventh Circuit also agreed with the district court's conclusion that Rountree's negligence in failing to transport the hauler rig from the railroad crossing was a function of the unique dangers that arose in transporting this oversized machinery and not due to Rountree's collateral negligence. *Id.* at 1250–53. The Eleventh Circuit further concluded that, as the principal, S & S could be held vicariously liable for Rountree's negligence, based on Rountree's status as the subcontractor to transportation contractor WOKO. *Id.* at 1253–54.

Comparative Fault Issue

AHA argued on appeal that its damages recovery should not be limited to 41% under the comparative fault principles

enunciated in section 768.81, Florida Statutes (1997). *Nat'l R.R. Passenger Corp.*, 286 F.3d at 1254-56. AHA argued that a party who is only vicariously liable cannot have another's fault apportioned to him under section 768.81, as this statute only applies to parties who are directly negligent, who actively participate in the accident at issue, or who constitute joint or concurrent tortfeasors. AHA relied upon the use of the word "fault" in the statute. In response, KUA, FMPA, CSX, and Amtrak (the "comparative fault appellees") noted that under section 768.81(2) any contributory fault that is "chargeable to the claimant" has the effect of diminishing damages "for an injury attributable to the claimant's contributory fault." *Id.* at 1256. After examining the parties' arguments and reviewing Florida case law, the Eleventh Circuit concluded that existing Florida case law does not resolve the question of how section 768.81 is to be interpreted with regard to vicarious liability. Accordingly, the Eleventh Circuit certified the following question of law to this Court for instructions:

> SHOULD A VICARIOUSLY LIABLE PARTY HAVE THE NEGLIGENCE OF THE ACTIVE TORTFEASOR APPORTIONED TO IT UNDER FLORIDA STATUTE § 768.81 SUCH THAT RECOVERY OF ITS OWN DAMAGES IS REDUCED CONCOMITANTLY?

Id. at 1258.

The Eleventh Circuit agreed with the district court's refusal to grant prejudgment interest to AHA. Both courts concluded that the damages incurred by S & S were unascertainable and speculative before the time of final judgment. *Id.* at 1259.

Indemnification Agreements and Sovereign Immunity Issues

KUA, FMPA, and B & V appealed the district court's summary judgment ruling that GE was not obliged to reimburse these parties for the expenses they had suffered in defending themselves, based on the indemnification provision in the purchasing agreement between KUA and GE. The district court had ruled that as a matter of law the attorney's fees and costs incurred were not within the scope of the indemnification provision. *Id.* at 1259. The Eleventh Circuit concluded that the district court improperly focused on Florida precedent that addresses the contractual duty to indemnify and hold harmless and failed to consider other precedent addressing the duty to defend. *Id.* at 1261-62. Nevertheless, the Eleventh Circuit concluded that the district court reached the correct result because "the plain language of the indemnification provision trumped the rules that otherwise would apply in the duty-to-defend context." *Id.* at 1263. The Eleventh Circuit concluded that the provision required GE to be held *directly* negligent for the collision before it could be required to reimburse the other parties for their attorney's fees or other legal expenses incurred in defending themselves. *Id.*

KUA and FMPA appealed the district court's summary judgment holding that KUA had to defend and indemnify both CSX and Amtrak based upon the crossing agreement between KUA and CSX, which included an indemnification provision. KUA and FMPA argued that the indemnity provision is void and unenforceable because KUA could not waive its sovereign immunity beyond that authorized by section 768.28, Florida Statutes (1997), absent specific legislative authority, and because under section 725.06, Florida Statutes (1997), the terms of the provision failed to meet the requirements for such provisions when contained in construction contracts. KUA and FMPA further argued that the crossing agreement was an exculpatory or

adhesion contract and a jury had to decide whether CSX possessed a superior bargaining position in executing the agreement; that the indemnity provision was inapplicable because CSX's negligent actions occurred in a location separate and apart from the railroad crossing; and that the district court erred in ruling that Amtrak was a beneficiary of the indemnity agreement. *Id.* at 1264. The Eleventh Circuit concluded that the sovereign immunity issue has not been directly resolved by this Court. Thus, the Eleventh Circuit refrained from addressing the other challenges to the indemnity provision. *Id.*

The Eleventh Circuit noted the following principles of sovereign immunity under Florida law: sovereign immunity applies to actions where the state is a party, unless the Legislature waives this immunity by general law; in the torts context, the Legislature has authorized a limited waiver of state sovereign immunity through section 768.28; and in *Pan–Am Tobacco Corp. v. Department of Corrections,* 471 So.2d 4, 5 (Fla.1984), this Court held that these statutory limitations do not apply in actions brought against the state for breach of contract. *Nat'l R.R. Passenger Corp.,* 286 F.3d at 1264–65. KUA and FMPA argued that the indemnification provision goes far beyond what is authorized by section 768.28; CSX and Amtrak argued that section 768.28 is not applicable in this action, which involves a breach of contract. *Id.* at 1265–69. The Eleventh Circuit concluded that the sovereign immunity issues involve unanswered questions of Florida law that are not specifically addressed by controlling state precedent. *Id.* at 1269. Accordingly, the Eleventh Circuit certified three questions of law to this Court for review:

> GIVEN THAT KISSIMMEE UTILITY AUTHORITY, A MUNICIPAL AGENCY UNDER FLORIDA LAW, AGREED BY CONTRACT TO INDEMNIFY A PRIVATE PARTY, IS THE AGREEMENT CONTROLLED BY THE RESTRICTIONS ON WAIVER OF SOVEREIGN IMMUNITY FOUND IN FLORIDA STATUTE § 768.28?
>
> IS THE INDEMNIFICATION AGREEMENT INSTEAD CONTROLLED BY THE RULE FOR BREACH-OF-CONTRACT ACTIONS ENUNCIATED IN *PAN-AM TOBACCO CORP. V. DEPARTMENT OF CORRECTIONS,* 471 So.2d 4 (Fla. 198[4])?
>
> IF *PAN-AM* APPLIES, DOES A MUNICIPAL AGENCY LIKE KISSIMMEE UTILITY AUTHORITY LOSE THE PROTECTION OF SOVEREIGN IMMUNITY ONLY IF IT HAS SPECIFIC STATUTORY AUTHORIZATION TO ENTER INTO INDEMNIFICATION AGREEMENTS, OR IS IT SUFFICIENT THAT THE AGENCY MORE GENERALLY HAS STATUTORY AUTHORIZATION TO CONTRACT WITH PRIVATE PARTIES?

Id. at 1269.

First Certified Question: Comparative Fault of Vicariously Liable Party

[1–5] In order to answer the first certified question, we first must examine the law relating to vicarious liability and comparative fault. The concept of vicarious liability can be described as follows: "A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other." Restatement (Third) of Torts: Apportionment of Liability § 13 (2000). Vicarious liability is often justified on the policy grounds that it ensures that a financially responsible party will cover damages. *Id.* § 13 cmt. b. Thus, the vicariously liable party is liable for the

entire share of the fault assigned to the active tortfeasor. *Id.* The vicariously liable party has not breached any duty to the plaintiff; its liability is based solely on the legal imputation of responsibility for another party's tortious acts. *Id.* § 13 cmt. c. The vicariously liable party is liable only for the amount of liability apportioned to the tortfeasor. *Id.* § 13 cmt. e. In sum, the doctrine of vicarious liability takes a party that is free of legal fault and visits upon that party the negligence of another. 38 Fla. Jur.2d *Negligence* § 101 (1998).

[6–8] In this case, the imputed liability is two-fold. S & S was held vicariously liable for Rountree's negligence under the inherently dangerous activities doctrine. This doctrine states that a party who "employs an independent contractor to do work involving a special danger to others which the employer knows ... to be inherent in or normal to the work ... is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." Restatement (Second) of Torts § 427 (1965). An activity is inherently dangerous if the "danger inheres in the performance of the work," such that "in the ordinary course of events its performance would probably, and not merely possibly, cause injury if proper precautions were not taken." *Florida Power & Light Co. v. Price,* 170 So.2d 293, 295 (Fla.1964) (involving worker injured while working on wires charged with high voltage electricity); *see also Channell v. Musselman Steel Fabricators, Inc.,* 224 So.2d 320 (Fla.1969) (involving plaintiff injured by steel beams being used in construction of building when the cable of equipment lifting a load of steel snapped); *Baxley v. Dixie Land & Timber Co.,* 521 So.2d 170 (Fla. 1st DCA 1988) (involving an individual killed at a logging site when a sapling struck him in the head after a log was removed from the sapling that was bowed and under tension; trial court had found "the cutting, loading and delivering of logs" to be "inherently dangerous work"). Based on the immense weight of the turbine involved here and the size of the equipment required to transport it, we agree with the federal courts that the act of transporting the turbine to the power plant was inherently dangerous.

[9] AHA insured S & S for the loss of the turbine. After settling the claim with S & S, AHA sued the railroads as S & S's subrogee. AHA has stepped into the shoes of S & S and is thus vicariously liable for Rountree's negligence.

[10] In *Hoffman v. Jones,* 280 So.2d 431 (Fla.1973), this Court abolished contributory negligence in favor of the doctrine of comparative negligence. This Court reasoned that in tort law equitable results are best reached when fault is equated with liability. *Id.* at 438. "Comparative negligence does this more completely than contributory negligence, and we would be shirking our duty if we did not adopt the better doctrine." *Id.* This Court adopted the "pure form" of comparative negligence, stating that it was "the most equitable method of allocating damages in negligence actions." *Id.* Under this form of comparative negligence, each party is apportioned liability based on its percentage of fault. *Id.* This Court acknowledged that there will be cases in which this doctrine will result in a party that is more responsible for an accident recovering more than a party that is less responsible. But, this doctrine is designed to compute each party's liability based on the damages they *caused* as opposed to the damages they *suffered. Id.* at 439.

Section 768.81, Florida Statutes, codified the holding of *Hoffman v. Jones.* The applicable portions of the statute provide:

(2) EFFECT OF CONTRIBUTORY FAULT.—In an action to which this section applies, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.

(3) APPORTIONMENT OF DAMAGES.—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability;....

§ 768.81(2)-(3), Fla. Stat. (1997).[3]

Nothing in the legislative history of this statute indicates an intention other than a direct codification of this Court's adoption of comparative liability. Section 768.81 was enacted as part of the comprehensive Tort Reform and Insurance Act of 1986. Comment and staff analysis of other sections of the act indicate that the focus of the bill as a whole was to remedy a "liability insurance crisis" in the mid–1980s. Ch. 86–160, § 60, at 755, Laws of Fla.

[11] The Eleventh Circuit's first certified question asks how comparative fault applies in a case where, instead of an active tortfeasor's damage recovery being reduced by its percentage of apportioned negligence, a vicariously liable party has stepped into the active tortfeasor's shoes. AHA contends that the key word in the comparative fault statute is "fault." AHA argues that because neither it nor its subrogor, S & S, were found to be directly negligent, the comparative fault statute is not applicable. In contrast, the railroads note that the statute provides that any award of damages is to be diminished proportionately by "any contributory fault *chargeable* to the claimant." § 768.81(2), Fla. Stat. (1997) (emphasis added). The railroads contend that the plain meaning of the word chargeable is general enough to include a vicariously liable party, while AHA's interpretation of the statute would render the word "chargeable" mere surplusage. While there is no Florida case on point with this issue, there are several cases that give guidance on similar issues.

In *Fabre v. Marin*, 623 So.2d 1182, 1185 (Fla.1993), *partly receded from by Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 659 So.2d 249 (Fla.1995), this Court held that the comparative fault statute was unambiguous in stating that damage judgments should be entered against each liable party on the basis of that party's percentage of fault. Further, this Court concluded that in order to adequately apportion fault it is necessary to determine the fault of all entities that contributed to the accident and not just those who are defendants in the lawsuit. *Id.* at 1186–87.

AHA interprets this Court's holding in *Fabre* that damages are apportioned on the basis of percentage of fault as requiring direct negligence. AHA relies in part on *Wal–Mart Stores, Inc. v. McDonald*, 676 So.2d 12, 20 (Fla. 1st DCA 1996), *approved sub nom. Merrill Crossings Assocs. v. McDonald*, 705 So.2d 560 (Fla. 1997), a decision in which the First District Court of Appeal interpreted "fault" under section 768.81 as equating to a defendant's amount of "negligence." However, the First District's analysis was narrowly aimed at distinguishing negligent acts

3. The turbine collision occurred in 1992. Prior to the damages phase of the trial, the Florida Legislature amended the statute in 1999. However, the 1999 amendment did not change the substantive language quoted above. The Eleventh Circuit applied the 1997 version of the statute. *See Nat'l R.R. Passenger Corp.*, 286 F.3d at 1255 n. 23.

from intentional, criminal acts. The First District concluded that the Legislature did not intend for the language in section 768.81 to treat negligence and intentional, criminal acts the same. Thus, the First District found the comparative negligence statute inapplicable to intentional criminal conduct. *Id.* at 22.

[12] AHA would have this Court apply the reasoning in *Wal-Mart* to the present case. AHA argues that because it and its subrogor, S & S, are innocent of fault, i.e., active negligence, the comparative fault statute does not apply to them. However, this argument ignores the premise that vicarious liability *always* involves liability without fault. As a matter of policy, the vicariously liable party carries the entire burden of fault imputed from the active tortfeasor. "The party who is vicariously liable is responsible to the plaintiff to the same extent as the primary actor." June F. Entman, *The Nonparty Tortfeasor,* 23 Mem. St. U.L.Rev. 105, 106 (1992). S & S was vicariously liable for Rountree's negligence and AHA, in turn, stepped in to S & S's shoes as a subrogee.

Our conclusion that section 768.81 applies to vicariously liable parties as well as active tortfeasors also harmonizes with Florida's contribution statute. *See* § 768.31(2)(e), Fla. Stat. (1997) (providing that a liability insurer who discharges the liability of a tortfeasor and thereby discharges its full obligation as the insurer is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability). The First District has held that an insurance company stands in the shoes of its insured with respect to the right to contribution. *Sacred Heart Hosp. v. Frazier,* 621 So.2d 491, 493 (Fla. 1st DCA 1993). Additionally, this Court has held that "an insurer cannot have a greater right than the insured through the remedy of subrogation." *Fla. Patient's Comp. Fund v. St. Paul Fire & Marine Ins. Co.,* 559 So.2d 195, 197 (Fla.1990).

AHA also points to this Court's decision in *Nash v. Wells Fargo Guard Services, Inc.,* 678 So.2d 1262, 1264 (Fla.1996), as precedent that fault and vicarious liability are not synonymous. In *Nash,* this Court held that "the named defendant cannot rely on the vicarious liability of a nonparty to establish the nonparty's fault." *Id.* This holding was in the context of putting the nonparty's name on a jury verdict form for the purpose of apportioning fault. *Id.* The instant case is readily distinguishable because the federal district court, reviewed and affirmed by the Eleventh Circuit, held that under the doctrine of inherently dangerous activities S & S was vicariously liable for the actions of Rountree. This determination was made after fault had already been apportioned to the liable parties by the jury.

AHA cites two additional cases to support its proposition that section 768.81 is not applicable to this case. However, both *Wells v. Tallahassee Memorial Regional Medical Center, Inc.,* 659 So.2d 249 (Fla. 1995), and *J.R. Brooks & Son, Inc. v. Quiroz,* 707 So.2d 861 (Fla. 3d DCA 1998), which deal with the issue of how to compute damages under the comparative fault statute when there has been a settlement, are readily distinguishable from the instant case. In *Wells,* this Court receded slightly from *Fabre* to prevent settlements from becoming a vehicle for abuse in the apportionment of economic and noneconomic damages. In all other respects, *Wells* conforms with the holding in *Fabre* that nonparties must be considered along with parties in the apportionment of fault for damage assessment. *J.R. Brooks* stands for the proposition that a plaintiff's damage award from a defendant whose

liability is based solely on vicarious liability must be reduced by the amount of the settlement entered into with the person that actually committed the negligent act. 707 So.2d at 863. The instant case involves no settlements. Thus, these cases do not support AHA's argument that the comparative fault statute does not apply when liability is based on imputed fault rather than direct liability.

[13] The doctrine of vicarious liability allows for parties that are not at fault to be held liable for the actions of active tortfeasors. The Florida Legislature specifically included the word "chargeable" in the comparative fault statute. Unless this term is to be reduced to mere surplusage, it must be read to include parties other than those that are directly liable, and thus applies to vicariously liable parties such as AHA. As a policy matter, it would be a dangerous precedent to allow insurers, through subrogation, to have a greater right to damages than their insureds. Accordingly, we answer the first certified question in the affirmative.

Certified Questions on Sovereign Immunity

The Eleventh Circuit also certified three questions regarding the sovereign immunity of KUA and the effect, if any, of KUA's indemnification agreement with CSX. In order to answer these questions, we first examine the law relating to sovereign immunity.

The doctrine of sovereign immunity, which provides that a sovereign cannot be sued without its own permission, has been a fundamental tenet of Anglo-American jurisprudence for centuries and is based on the principle that "the King can do no wrong." The doctrine was a part of the English common law when the State of Florida was founded and has been adopted and codified by the Florida Legislature. *See generally* § 2.01, Fla. Stat. (2004). The original justification for incorporating the doctrine into American jurisprudence was "the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank,* 205 U.S. 349, 353, 27 S.Ct. 526, 51 L.Ed. 834 (1907). Florida law has enunciated three policy considerations that underpin the doctrine of sovereign immunity. First is the preservation of the constitutional principle of separation of powers. *See Commercial Carrier Corp. v. Indian River County,* 371 So.2d 1010, 1022 (Fla. 1979) (stating that "certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance"). Second is the protection of the public treasury. *See Spangler v. Fla. State Tpk. Auth.,* 106 So.2d 421, 424 (Fla. 1958) (explaining that "immunity of the sovereign is a part of the public policy of the state[, which] is enforced as a protection of the public against profligate encroachments on the public treasury"). Third is the maintenance of the orderly administration of government. *See State Rd. Dep't v. Tharp,* 146 Fla. 745, 1 So.2d 868, 869 (1941) ("If the State could be sued at the instance of every citizen, the public service would be disrupted and the administration of government would be bottlenecked.").

[14–16] However, the Florida Constitution provides that the Legislature can abrogate the state's sovereign immunity. *See* art. X, § 13, Fla. Const. ("Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."). Only the Legislature has authority to enact a general law that waives the state's sovereign immunity. *Manatee County v. Town of Longboat Key,* 365 So.2d 143, 147

(Fla.1978). Further, any waiver of sovereign immunity must be clear and unequivocal. *Id.; Rabideau v. State,* 409 So.2d 1045, 1046 (Fla.1982). In interpreting such legislative waivers of sovereign immunity, this Court has stated that it must strictly construe the waiver. *Longboat Key,* 365 So.2d at 147. Moreover, waiver will not be found as a product of inference or implication. *Spangler,* 106 So.2d at 424.

Pursuant to its constitutional authority, the Legislature authorized a limited waiver of state sovereign immunity in tort for personal injury, wrongful death, and loss or injury of property through the enactment of section 768.28 in 1973. *See* ch. 73–313, § 1, Laws of Fla. Before this statute was enacted, the state and counties were immune from tort liability and all claims against the state had to be recovered through the claims bill process in the Legislature. Municipalities did not share this immunity from tort liability for their proprietary functions. *See 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,* 84 Fla. 634, 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."); *see also* Fla. H.R. Comm. on Judiciary, HB 315 and 376 (1973), Staff Summary (on file in State Archives) ("Municipalities do not have this immunity [from tort liability]."). However, municipalities were "unequivocally included within the definition of 'state agencies or subdivisions' " in section 768.28. *Commercial Carrier Corp.,* 371 So.2d at 1016; *see also* ch. 77–86, at 161, Laws of Fla. ("Whereas, in enacting section 768.28, Florida Statutes, the Legislature clearly intended to make the state, the counties, *and the municipalities* liable for tort claims in the same manner and to the same extent as a private individual under like circumstances.") (emphasis added); Op. Att'y Gen. Fla. 77–241 (1977) (explaining that the limitations of liability established by section 768.28 apply to all agencies and subdivisions of the state, including municipalities, regardless of whether those agencies and subdivisions possessed sovereign immunity prior to July 1, 1974).

Section 768.28(1), Florida Statutes (1997), provides in pertinent part:

> In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, *but only to the extent specified in this act.* Actions at law against the state or of any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted *subject to the limitations specified in this act.*

(Emphasis added.) Additionally, subsection (5) of the statute limits state liability to $100,000 per claimant and $200,000 per accident. *Id.* § 768.28(5).

The indemnity provision in the crossing agreement contract between KUA and CSX provides that KUA "assumes all liability for, and releases and agrees to defend, indemnify, protect and save [CSX] harmless" for all loss of or damage to property of CSX or third parties at the crossing or adjacent to it, all loss and

damage on account of injury to or death of any person on the crossing, and all claims and liabilities for such loss and damage. Private Road Grade Crossing Agreement, § 14.2, Record on Appeal at 53–1172 Ex. A, *Nat'l R.R. Passenger Corp. v. Rountree Transp. & Rigging, Inc.*, 286 F.3d 1233 (11th Cir.2002) (No. 6:93–cv–1090–Orl–19C) (agreement between KUA and CSX dated Apr. 26, 1993) (hereinafter "Crossing Agreement"). This contractual obligation applies regardless of cause and even if the injury, death, or property damage is caused solely by the negligence of CSX. *Id.* Further, this obligation also extends to "companies and other legal entities that control, are controlled by, are subsidiaries of, or are affiliated with [CSX], and their respective officers, agents and employees." *Id.* § 14.4. It is under this paragraph that Amtrak claims KUA is required to indemnify it as well.

[17] In the second certified question, the Eleventh Circuit asks if the crossing agreement between KUA and CSX is controlled by the restrictions on the waiver of sovereign immunity imposed by section 768.28. Under the statute, immunity is only waived for "liability for torts" caused by "the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment." § 768.28(1), Fla. Stat. (1997). The statute also limits tort claim judgments against the state, its agencies, or subdivisions to $100,000 to any one person and $200,000 per incident. § 768.28(5), Fla. Stat. (1997). In the agreement at issue here, KUA agreed to assume responsibility for the negligence of CSX and its employees and for that of companies affiliated with CSX. Further, the provision placed no limit on the amount KUA has to pay out per claimant and per accident.

CSX and Amtrak argue that section 768.28 is not applicable here because the statute only governs tort actions and the instant case involves a breach of contract in that KUA did not fulfill its contractual obligation in the crossing agreement to defend and hold harmless CSX and Amtrak. KUA and FMPA cite a number of opinions issued by the Attorney General to support their argument that the indemnification agreement between KUA and CSX is controlled by the restrictions on the waiver of sovereign immunity in section 768.28. In the opinions cited, the Attorney General concluded that a state agency or subdivision of the state may not enter a contract agreeing to indemnify another party that would extend the government's liability beyond the limits established in section 768.28. *See, e.g.*, Op. Att'y Gen. Fla.2000–22 (2000) (advising county that it may not agree to indemnify another party to a contract or alter the state's waiver of sovereign immunity beyond the limits established in section 768.28); Op. Att'y Gen. Fla. 99–56 (1999) (advising that Florida National Guard may not enter into a land use agreement that contains an indemnification agreement because authority to enter into contract does not encompass power to waive state's sovereign immunity beyond that provided in section 768.28); Op. Att'y Gen. Fla. 90–21 (1990) (advising that Department of Corrections is not authorized to alter by contract the state's waiver of immunity in tort provided in section 768.28).

[18] Although an opinion of the Attorney General is not binding on a court, it is entitled to careful consideration and generally should be regarded as highly persuasive. *See State v. Family Bank of Hallandale*, 623 So.2d 474, 478 (Fla.1993). However, the Attorney General opinions cited by KUA and FMPA 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. Thus, we do not find the Attorney General opinions to be "highly persuasive" in this case.

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.*" § 768.28(1), Fla. Stat. (1997) (emphasis added); *see also Provident Mgmt. Corp. v. City of Treasure Island,* 796 So.2d 481, 486 (Fla. 2001) (concluding 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). The indemnification provision at issue here is based on a *contract* between KUA and CSX. KUA entered into the crossing agreement with CSX, whereby CSX granted KUA a license to construct, use, and maintain a private road grade crossing over CSX's railroad tracks. For KUA, this crossing agreement ensured that there would be vehicular and pedestrian access to the power plant site. *See Nat'l R.R. Passenger Corp.,* 286 F.3d at 1263. In return for receiving the license, KUA agreed to "defend, indemnify, protect, and save [CSX] harmless from and against [designated losses and casualties]." Crossing Agreement § 14.2. Based on the definition of the term "Railroad" in the agreement, KUA also agreed to defend and indemnify "any other company ... whose property [at the crossing] may be leased or operated by [CSX]" and "any parent, subsidiary or affiliated system companies of [CSX]." *Id.* § 1.2. In the indemnification provision, KUA specifically recognized that the use of "[CSX's] property, tracks, and right-of-way involves increased risks" and agreed to defend and indemnify CSX "as further consideration for the grant of this crossing right." *Id.* §§ 14.1–14.2. Thus, we conclude that the statutory provision governing tort recovery actions is not applicable here and answer the second certified question in the negative.

[19] In its third certified question, the Eleventh Circuit asks whether the indemnification agreement between KUA and CSX is controlled by the breach-of-contract principles enunciated in *Pan–Am Tobacco.* We conclude that *Pan–Am Tobacco* does not control the agreement because that case addressed the contractual liabilities of the state, while municipalities historically have possessed liability for their contracts.

In *Pan–Am Tobacco,* this Court held that the state is not immune from suit for breach of contract and specifically stated that "[w]here the legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into a contract, the legislature has clearly intended that such contracts be valid and binding on both parties." 471 So.2d at 5. *Pan–Am Tobacco* interpreted the contractual powers of the state. In contrast, municipalities have long possessed both the power to execute contracts and the concomitant liability for their breach.

[20] Florida's Constitution provides that "[n]o money shall be drawn from the treasury except in pursuance of appropriation made by law." Art. VII, § 1(c), Fla. Const. The state may not employ state funds unless such use of funds is made pursuant to an appropriation by the Legislature. *See State v. Fla. Police Benevolent Ass'n, Inc.,* 613 So.2d 415, 418 (Fla.1992) ("[E]xclusive control over public funds rest solely with the legislature."); *Chiles v. Children A, B, C, D, E, & F,* 589 So.2d 260, 265 (Fla.1991) ("[T]his Court has long

held that the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes."). In *State ex rel. Kurz v. Lee,* 121 Fla. 360, 163 So. 859 (1935), this Court stated:

> The object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state treasury is to prevent the expenditure of the public funds already in the treasury, or potentially therein from tax sources provided to raise it, without the consent of the public given by their representatives in formal legislative acts. Such a provision secures to the Legislature (except where the Constitution controls to the contrary) the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.

163 So. at 868. Therefore, Florida's Constitution expressly limits the state's ability to expend funds and enter contracts by requiring specific statutory authority. Several laws do grant various state agencies the express authority to execute contracts. *See, e.g.,* §§ 125.012 (granting counties the power to contract relative to various project facilities such as toll roads, waterway facilities, dredging, utility agreements, etc.), 125.031 (granting counties the power to enter into leases and lease-purchase agreements involving land needed for public purposes), 153.62(11) (granting county district boards the power to contract with respect to water supply and sewage disposal), 163.370 (giving counties and municipalities the power to contract with respect to community redevelopment), 186.006(10) (granting the office of the Governor the power to contract respecting research facilities), 337.11 (authorizing the Department of Transportation to enter into contracts for road construction), 338.2216(b) (authorizing the Florida Turnpike Enterprise to contract to maintain the turnpike and promote its use), Fla. Stat. (2004). The Legislature also has authorized certain activities that implicitly grant state agencies the power to contract for necessary goods and services. *See, e.g.,* §§ 20.315, 945.215, Fla. Stat. (2004).

[21] In contrast to the specific contractual powers granted to the state, Florida's Constitution gives municipalities "governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services ... except as otherwise provided by law." Art. VIII, § 2(b), Fla. Const. The Municipal Home Rule Powers Act recognizes these same powers of municipalities, limited only when "expressly prohibited by law." § 166.021(1), Fla. Stat. (1997). Given this broad grant of power, we have held that municipalities may exercise any power for a municipal purpose "except when expressly prohibited by law." *See, e.g., City of Ocala v. Nye,* 608 So.2d 15, 16–17 & n. 3 (Fla.1992); *City of Boca Raton v. Gidman,* 440 So.2d 1277, 1280 (Fla.1983); *see also Hargrove v. Town of Cocoa Beach,* 96 So.2d 130, 133 (Fla.1957) (noting that "[t]he modern city is in substantial measure a large business institution").[4] In executing contracts, municipalities are presumed to be acting within the broad scope of their authority. Therefore, long before our decision in *Pan–Am Tobacco,* municipalities already were authorized to execute contracts and were liable for their breach.

[22] In this case, the parties have failed to identify any law prohibiting KUA from executing the crossing agreement and the indemnification provision it con-

4. The 1885 Constitution, unlike the present one, granted municipalities only those powers expressly *granted* by law. *See Gidman,* 440 So.2d at 1280.

tains. Nor do they assert that KUA cannot exercise the powers of the City of Kissimmee. In fact, although KUA did not need an express grant of authority to execute the crossing agreement, it had one. The Interlocal Cooperation Act expressly authorized public agencies to contract with private parties regarding electrical projects. Specifically, the statute states:

> The limitations on waiver in the provisions of s. 768.28 or any other law to the contrary notwithstanding, the Legislature, in accordance with s. 13, Art. X of the State Constitution, hereby declares that any such legal entity or any public agency of this state that participates in any electric project waives its sovereign immunity to:
>
> . . . .
>
> 2. Any person in any manner contracting with a legal entity of which any such public agency is a member, with relation to:
>
> a. ownership, operation, or any other activity set forth in sub-subparagraph (b)2.d with relation to any electric project.

§ 163.01(15)(k), Fla. Stat. (1993).[5] This statute grants specific authority to KUA, if any were needed, to execute the crossing agreement.

[23, 24] KUA had the authority of the City of Kissimmee to enter into contracts for municipal services, including this crossing agreement, which ensured access to the power plant. As discussed above, CSX granted KUA a license to construct, use, and maintain a private road grade crossing across CSX's railroad tracks. In recognition of the increased risks associated with the use of CSX's property, tracks, and right-of-way and as part of the "consideration" for receiving this license, KUA agreed to assume all risk of loss and damage to its own property and also agreed to defend and indemnify CSX against any loss. Crossing Agreement §§ 14.1–14.2. The indemnification provision was part and parcel of the Crossing Agreement, a contract between KUA and CSX "fairly authorized" by Florida law. Thus, the indemnification agreement is binding and enforceable. Accordingly, we conclude that a municipal agency like KUA has the inherent authority to contract with private parties and enter into an indemnification agreement as part of a contract with a private party and may not invoke sovereign immunity to defeat its obligations under the contract.[6]

Conclusion

Accordingly, we answer the Eleventh Circuit's first certified question in the affirmative, the second question in the negative, the third question in the negative, and do not address the fourth question. Having answered the certified questions, we return this case to the United States Court of Appeals for the Eleventh Circuit.

It is so ordered.

PARIENTE, C.J., and ANSTEAD, LEWIS, CANTERO, and BELL, JJ., concur.

5. The "other activity set forth in sub-subparagraph (b)2.d" is broad and includes

> the planning . . . licensing, acquisition, construction, completion, management, control, operation, maintenance . . . modification . . . or disposal, or all of the foregoing of such electric project by any one or more of the parties to such agreement. . . .

§ 163.01(15)(b)2.d., Fla. Stat. (1993).

6. In light of our determination that *Pan–Am Tobacco* does not apply to municipalities we need not address the fourth certified question.

CANTERO, J., concurs with an opinion, in which ANSTEAD and BELL, JJ., concur.

QUINCE, J., concurs in part and dissents in part with an opinion.

WELLS, J., recused.

CANTERO, J., concurring.

I concur in the majority opinion. I write to further explain the historical differences in our state constitution and our common law between the sovereign immunity of the state and that of municipalities. As I explain below, these common law differences dictate that the sovereign immunity of municipalities must be construed strictly, whereas the immunity of the state must be construed more broadly. Because this case involves a municipality, I read the majority opinion as deciding only whether a *municipality* may contractually indemnify a private party for its negligence, without limitation as to amount. Because of the historical differences between the sovereign immunity of the state and that of municipalities, we need not decide in this case whether the state may also contractually waive its sovereign immunity.

The partial dissent asserts that section 768.28 should apply because otherwise a state agency could circumvent the policies underlying sovereign immunity, and the restrictions on waiving such immunity, by including an indemnity provision in a contract. Whatever force this argument may have when applied to the state and its agencies (we do not decide that issue here), it ignores the broad powers conferred on municipalities to "exercise *any* power for municipal purposes, except when expressly prohibited by law." § 166.021(1), Fla. Stat. (1993) (emphasis added). It also ignores that, unlike the effect of section 768.28 on the immunity of the state, the statute actually *granted* partial immunity to municipalities that did not previously exist. Because the immunity the statute grants municipalities is in derogation of the common law, it must be strictly construed.

The state and municipalities differ in the degree of their historical sovereign immunity. Under the common law, the state's immunity was total. *See Cauley v. City of Jacksonville,* 403 So.2d 379, 381 (Fla.1981); *Spangler v. Fla. State Tpk. Auth.,* 106 So.2d 421, 422 (Fla.1958) (holding that the state and its agencies are immune from suit); *Smith v. City of Arcadia,* 147 Fla. 375, 2 So.2d 725, 728 (1941) ("The State cannot be sued ....") (quoting *Allison Realty Co. v. Graves Investment Co.,* 115 Fla. 48, 155 So. 745, 750 (1934)); *State Road Dep't of Fla. v. Tharp,* 146 Fla. 745, 1 So.2d 868, 869 (1941) ("[The] State cannot be sued without its consent. As to tort actions, the rule is universal and unqualified unless relaxed by the State...."). The 1868 Constitution granted the Legislature the power to waive it. *See id.* (citing art. IV, § 19, Fla. Const. (1868) (now art. X, § 13, Fla. Const.)). However, the Legislature declined to act until 1973, when it adopted section 768.28. *See* Ch. 73–313, Laws of Fla.

In contrast to the state, municipalities never enjoyed total immunity from suit. *See Cauley,* 403 So.2d at 381–83 (recognizing that state sovereign immunity "remained in full force until section 768.28's enactment" while municipal sovereign immunity became subject to many exceptions before the waiver statute); *Woodford v. City of St. Petersburg,* 84 So.2d 25, 26 (Fla.1955) (holding that a municipality exercising a proprietary function is liable in the same manner as private corporations); *City of Tampa v. Easton,* 145 Fla. 188, 198 So. 753, 754 (1940) ("Unlike a county, a municipality is not a subdivision of the State with subordinate attributes of sovereignty in the performance of governmental

functions...."); *City of Tallahassee v. Fortune*, 3 Fla. 19 (1850) (distinguishing precedent from the United States and England and holding that an action for trespass may lie against a municipal corporation); *see also Cauley*, 403 So.2d at 382–84 (outlining the development of municipal sovereign immunity law in Florida from *Fortune* through the enactment of section 768.28).

Before section 768.28, questions of whether municipal sovereign immunity applied were analyzed as follows:

> 1) as to those municipal activities which fall in the category of proprietary functions a municipality has the same tort liability as a private corporation;
>
> 2) as to those activities which fall in the category of governmental functions "... a municipality is liable in tort, under the doctrine of respondent [sic] superior, [...] only when such tort is committed against one with whom the agent or employee is in privity, or with whom he is dealing or is otherwise in contact in a direct transaction or confrontation."
>
> 3) as to those activities which fall in the category of judicial, quasi judicial, legislative, and quasi legislative functions, a municipality remains immune.

Cauley, 403 So.2d at 383 (quoting *Gordon v. City of West Palm Beach*, 321 So.2d 78, 80 (Fla. 4th DCA 1975)) (citations omitted); *see also Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1015 (Fla.1979) (reviewing the history of municipal sovereign immunity and recognizing that before section 768.28 a municipality would be held liable for torts committed in the performance of proprietary acts).

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. In fact, when the statute was first enacted, its effect on municipalities was unclear. In 1976, the Attorney General issued an opinion that "municipalities possessed no aspect of the state's sovereign immunity from tort liability upon which the waiver contained in s. 768.28, and the limitations specified therein, could operate." Op. Att'y Gen. Fla. 76–41 (1976). In other words, the Attorney General opined that section 768.28, including its limitation on the amount of damages, did not apply to municipalities because they did not enjoy any immunity from tort suits that could be waived. The Legislature quickly amended section 768.28 by adding the following language in subsection 5: "The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974." Ch. 77–86, § 1, Laws of Fla.

Section 768.28, therefore, affected the State and counties differently than it did municipalities. As to the State, the statute *waived* its sovereign immunity up to specified limits. As to municipalities, the statute *granted* them immunity from judgments above those limits.

Section 768.28 nullified the common law affecting both the state and municipalities, and therefore must be strictly construed. *See Carlile v. Game & Fresh Water Fish Comm'n*, 354 So.2d 362, 364 (Fla. 1977). But it nullified the common law in different ways. As to the state and its agencies, the statute waives traditional immunity. As to municipalities, however, it grants partial immunity. Therefore, in construing the statute strictly, it must be construed in favor of granting immunity to the state, but *against* granting it to a municipality.

Section 163.01(15)(k), Florida Statutes (1993), is relevant to this issue. That section waives sovereign immunity for "[o]wnership, operation, or any other activity set forth in sub-subparagraph (b)2.d. with relation to any electric project." Because section 768.28 must be strictly construed *against* granting immunity to KUA, we must read section 163.01(15)(k), if the language allows such an interpretation, as allowing KUA to execute an indemnification agreement. There is no question that KUA would have had authority to sign such an agreement at common law, and nothing in either section 768.28 or section 163.01(15)(k) explicitly prohibits KUA from doing so. Therefore, strictly construing the immunity afforded to KUA in section 768.28, KUA had the authority to indemnify private parties for its own negligence as well as theirs.

My conclusion that section 768.28 does not prohibit municipalities from indemnifying private parties is confirmed by the lack of any effect on state funds of a judgment against municipalities. Section 768.28 limits damages amounts because the state will have to pay any judgments. That is not the case, however, for judgments against municipalities. Here, any judgment against KUA will be paid from KUA funds. As KUA acknowledges, the state will not pay a dime. Therefore, the state's interest in whether KUA should be allowed to indemnify private parties is minimal.[7]

CONCLUSION

As the majority holds, section 768.28 does not apply because KUA's indemnification was contained in a contract, which is outside the parameters of section 768.28. Even if 768.28 does apply, however, given the lack of sovereign immunity in the common law for municipalities committing torts, the statute must be strictly construed against a finding of immunity as applied to municipalities. In this case, KUA voluntarily agreed to indemnify the railroad companies for any negligence on their part. Municipalities historically have been granted broad powers to exercise their authority. No law expressly prohibited KUA's action. Therefore, its agreement should be enforced.

ANSTEAD and BELL, JJ., concur.

QUINCE, J., concurring in part, dissenting in part.

While I concur in the majority's analysis of the comparative fault issue, I do not agree with its analysis of the sovereign immunity issue or its answer to the second question posed by the Eleventh Circuit Court of Appeals on the sovereign immunity issue.

The Eleventh Circuit asked whether the indemnification provision in the crossing agreement between Kissimmee Utility Authority (KUA), a municipal utility agency, and CSX Transportation (CSX) is controlled by the restrictions on the waiver of sovereign immunity found in section 768.28. I would answer this question affirmatively. In the alternative, the Eleventh Circuit asked whether the indemnification provision was controlled by the rule for breach-of-contract actions which was established by this Court in *Pan–Am Tobacco Corp. v. Department of Corrections*, 471 So.2d 4 (Fla.1984). In light of my answer to the second certified question, I would answer this question negatively.

7. The State has filed a brief in this Court supporting the KUA's position. That brief, however, fails to recognize the historical distinction in the law between the sovereign immunity of the state and that of municipalities. In this case, the agreement was solely between the KUA and certain railroad companies. Therefore, the State's concerns do not apply.

By enacting section 768.28, the Florida Legislature has exercised its constitutional authority to waive the state's sovereign immunity for liability in tort, but "only to the extent specified in [the statute]." § 768.28(1), Fla. Stat. (1997). The statute provides that the damages or injuries for which the state waives its immunity are those "caused by the negligent or wrongful act or omission of *any employee of the agency or subdivision [of the state] while acting within the scope of the employee's office or employment.*" *Id.* § 768.28(1) (emphasis added). Further, the state's liability in such actions is limited to $100,000 per claimant and $200,000 per accident. *Id.* § 768.28(5). By the plain language of the statute, the state has only waived its immunity for the negligence or wrongful acts of a state employee who is acting within the scope of his or her employment. And even in these circumstances, the amount of the state's monetary liability is limited.

The indemnity provision in the crossing agreement between KUA and CSX goes far beyond the statutory waiver of sovereign immunity contained in section 768.28. Here, KUA has agreed to assume responsibility for the negligence of CSX and its employees and for that of companies affiliated with CSX. Further, the provision does not limit the amount KUA has to pay out per claimant or per accident as specified in section 768.28(5).

The majority concludes that section 768.28 is not applicable here as it only governs tort recovery actions against a governmental entity, whereas the instant case involves a contractual obligation. Majority op. at 474. While the crossing agreement is a contract, the provision at issue clearly relates to tort liability. Under the majority's reasoning, a governmental entity can do by contract what it does not have the authority to otherwise do, i.e., waive sovereign immunity for tort liability beyond the limits specified by the Legislature in section 768.28. Thus, any state agency or subdivision could circumvent the policies underlying sovereign immunity and the constitutional restrictions on the waiver of sovereign immunity by simply including an indemnity provision in a contract and agreeing to assume responsibility for individuals not employed by the state. Such an end-around Florida's Constitution smacks of gamesmanship.

Our decision in *Florida Department of Natural Resources v. Garcia*, 753 So.2d 72 (Fla.2000), is instructive in the instant case. In *Garcia*, this Court addressed an indemnification clause in a management agreement between the City of Miami Beach and the State of Florida for the management of South Beach. This indemnification agreement required the City to reimburse the State for any liability arising solely from ownership of the beach. The State argued that the indemnification provision was prohibited by section 768.28(18),[8] which prohibits one government entity from indemnifying a second government entity for the second's negligence. This Court concluded that the plain language of the statute did not prohibit this agreement whereby the City agreed to indemnify the State for the City's own negligence. *Id.* at 77. The Court noted that this interpretation of section 768.28(18) was consistent with the common law right of indemnification in that a non-negligent party who is vicariously liable for the tortious actions of another can seek indemnification from the tortfeasor. Thus, at common law, the State would have been able to seek indemnity from the City if the State was without

8. This provision was renumbered as section 768.28(19) when the Legislature amended the statute in 2003. *See* ch. 2003–416, § 67, Laws of Fla.

fault and held vicariously liable for the City's failure to keep South Beach reasonably safe. *Id.* at 78. The legislative history of this subsection explains that it was the Legislatures intent that "each entity [remain] liable for its own negligent acts or omissions." Fla. S. Comm. on Govtl. Ops., SB 1730 (1993) Staff Analysis (final Mar. 2, 1993) (on file in State Archives). If a government entity cannot indemnify another government entity for the second's negligence without express statutory authorization, why should a government entity be able to indemnify a private entity for the private entity's negligence without similar express authorization? It should not. Accordingly, I conclude that the contractual provision whereby KUA agreed to indemnify CSX and its affiliates for tort liability is controlled by the restrictions on the waiver of sovereign immunity found in section 768.28.

In light of my affirmative answer to the above question, I necessarily answer the questions relating to the applicability of *Pan–Am Tobacco* in the negative. In *Pan–Am Tobacco,* this Court concluded that despite the lack of an analogous waiver of sovereign immunity in contract a state agency or subdivision could not claim this defense in a breach-of-contract action on an express, written contract which the agency has the statutory authority to enter. 471 So.2d at 6. For the reasons explained below, I conclude that the indemnity provision in the instant contract does not fall under the breach-of-contract rule of *Pan–Am Tobacco.*

I agree with the majority that KUA had the authority of the City of Kissimmee to enter into contracts for municipal services, including the crossing agreement to gain access to the power plant. Majority op. at 476; *see also* art. VIII, § 2(b), Fla. Const. ("Municipalities shall have governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, except as otherwise provided by law."); § 166.021(1), Fla. Stat. (1997) ("Municipal Home Rule Powers Act" granting municipalities the powers provided in article VIII, section 2(b) of the Florida Constitution); § 163.01(2), Fla. Stat. (1997) ("Florida Interlocal Cooperation Act of 1969" permitting local governmental units to make the most efficient use of their powers by cooperating with other localities through interlocal agreements). However, both the constitutional provision and the Municipal Home Rule Powers Act recognize that the powers of a municipality may be limited when "otherwise provided by law." The Florida Interlocal Cooperation Act does not grant any additional authority to the public agencies participating in an interlocal agreement. Instead the agencies may "exercise jointly ... any power, privilege, or authority which such agencies share in common and which each might exercise separately." § 163.01(4), Fla. Stat. (1997); *see also* Op. Att'y Gen. Fla.2003–03 (2003) (explaining that an interlocal agreement entered into pursuant to section 163.01(4) may not confer any greater or additional power, privilege, or authority than is possessed by each of contracting agencies or permit exercise of powers not shared in common and not separately exercisable by each such agency). Furthermore, only the Legislature has the constitutional authority to waive the state's sovereign immunity. *See* art. X, § 13, Fla. Const.; *Manatee County v. Town of Longboat Key,* 365 So.2d 143, 147 (Fla.1978).

The power of a state agency or subdivision to enter into a contract with private parties does not encompass the power to extend the government's liability beyond the limits established in section 768.28. *See, e.g.,* Op. Att'y Gen. Fla.2000–22 (2000) (advising county that it may not agree to

indemnify another party to a contract or alter the state's waiver of sovereign immunity beyond the limits established in section 768.28); Op. Atty Gen. Fla. 99–56 (1999) (advising that Florida National Guard may not enter into a land use agreement that contains an indemnification agreement because authority to enter into contract does not encompass power to waive state's sovereign immunity beyond that provided in section 768.28); Op. Att'y Gen. Fla. 90–21 (1990) (advising that Department of Corrections is not authorized to alter by contract the states waiver of immunity in tort provided in section 768.28). While the indemnity agreement may have been included in a contract which KUA had the power to enter, the indemnity agreement itself involves a waiver of the state's liability in tort, which KUA is not authorized to change. Thus, the indemnity agreement is not controlled by *Pan–Am Tobacco.*

Under the majority's reasoning, any government entity could waive the state's sovereign immunity by simply including such a proviso in a contract relating to some activity or enterprise which the entity was otherwise authorized to participate in. KUA should not be allowed to accept liability for the negligence of others "merely because accepting it is consideration [in a contract] for the acquisition of a valuable right." *Seaboard Air Line R.R. Co. v. Sarasota–Fruitville Drainage Dist.,* 255 F.2d 622, 623 (5th Cir.1958).

For the reasons expressed above, I would find that the indemnification provision of the crossing agreement is controlled by the restrictions on the waiver of sovereign immunity and not by *Pan–Am Tobacco.*

MEMORANDUM

Akerman Senterfitt
ATTORNEYS AT LAW

TO: Carlton Henley, Chairman
Mildred Fernandez, Vice Chairman
Mayor Buddy Dyer, Secretary
Noranne B. Downs
Bill Lane
Linda S. Watson, LYNX CEO

FROM: Jill E. Kelso

CC: Patrick T. Christiansen

DATE: December 15, 2006

CLIENT: LYNX

SUBJECT: Sovereign Immunity

This Memorandum is provided for the purpose of explaining to you the concept of sovereign immunity and how it affects LYNX, including LYNX' tort liability, insurance coverage, and contractual provisions for indemnification.

A. What is Sovereign Immunity?

- Sovereign immunity means that a state or state agency may not be sued in tort unless the state or state agency has given its consent or waived its immunity. A tort is an injury or wrongful act for which a civil suit may be filed.

- The purposes of sovereign immunity are to allow smooth governmental operations and to avoid a drain on public funds, property and other resources.

B. How was Sovereign Immunity Created?

- Sovereign immunity traces its origins to early English Law when the medieval kings of England did not permit lawsuits against themselves based on the theory that "The King can do no wrong." The concept of sovereign immunity was incorporated into the common law, or the statutes and case law in effect in

England and the American Colonies before the American revolution. Ultimately, the concept of sovereign immunity was incorprated into the Florida Constitution.[i]

C. How is Sovereign Immunity Waived?

- Sovereign immunity may be waived when a state agency sues a person who in turn brings an opposing claim, or counterclaim, against the state agency. The waiver will only be to the extent of the person's monetary counterclaim against the agency.[ii]

- Sovereign immunity may also be waived by a legislative enactment or constitutional amendment.[iii]

- In Florida, the legislature has waived sovereign immunity for the state and its agencies up to certain specified amounts. Specifically, a state agency may be liable to pay the following:

  (1) a claim or a judgment by any one person up to $100,000; or
  (2) multiple claims or judgments arising out of the same incident up to $200,000.[iv]

- A state agency will NOT be liable to pay the following:

  (1) punitive damages (damages awarded as a deterrent or punishment for a severe wrong); or
  (2) pre-judgment interest.[v]

- Under sovereign immunity, a state agency will not be required to pay claims or judgments exceeding the amounts set forth above. Any portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid only by further act of the Legislature.[vi]

D. Why do Legislatures Enact Limited Waivers of Sovereign Immunity?

- Over time, legislatures have found various reasons to move away from blanket sovereign immunity protecting governmental entities from all wrongdoing. It is now commonly accepted that the government should be required to make good on certain losses caused by its misconduct. Thus, legislatures have enacted limited waivers of sovereign immunity to balance the public interests of preserving public

funds and other resources and compensating those who have suffered losses at the hands of the government.

E. Is LYNX Authorized to Obtain Liability Insurance?

- In anticipation of any claim or judgment that a state agency may be liable to pay, a state agency is authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage it chooses. Also, agencies subject to similar risks may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims.[vii]

- LYNX is specifically authorized to purchase liability insurance directly from local, national, or international insurance companies.[viii]

F. What is the Effect of Insurance Coverage on Sovereign Immunity?

- When a state agency obtains insurance coverage in excess of the $100,000 or $200,000 limits, it does not waive its defense of sovereign immunity or increase the limits of its tort liability.[ix]

- Also, an agency's participation in a local government liability pool will not be deemed a waiver of immunity to the extent of liability coverage.[x]

- A state agency may agree, within the limits of its insurance coverage, to settle a claim or a judgment against it without any further action by the Legislature.[xi]

G. Does LYNX have Liability Insurance?

- My assumption is that LYNX does not have liability insurance for its day-to-day operations. Rather, LYNX is currently self-insured for tort liability and pays such claims as they become due. This is generally referred to as "going bare."

H. What is the Effect of "Going Bare?"

- LYNX will be responsible for paying any judgments against it up to the $100,000 or $200,000 limits set forth above. For example, if a single individual sues LYNX in tort and obtains against LYNX a judgment in the amount of $1 million, LYNX will be liable to pay that individual $100,000.

I. Does Sovereign Immunity Prevent a State Agency from agreeing to Indemnify Third Parties?

- Indemnification is a promise, usually as a contract provision, protecting one party from financial loss at the expense of the other party. Indemnification can be either by direct payment or reimbursement for the loss.

- In the context of a contract, indemnification includes assuming the liability of all claims brought against the protected party within the scope of the agreement.

- Generally, a state agency is not permitted to enter into an agreement that has an indemnification provision which would increase the agency's liability beyond the $100,000 and $200,000 limits. Such indemnification provisions entered into by a state agency are unenforceable. In other words, LYNX cannot agree to compensate a private company for any damage, loss or injury suffered by the private company above the specified limits.[xii]

- When LYNX contracts with another state agency, it does not waive its sovereign immunity or increase the $100,000 and $200,000 limits on its liability. Such a contract between state agencies must not contain any provision that requires one state agency to indemnify the other agency or to assume any liability for the other agency's negligence.[xiii]

- There are no limitations on a state agency's right to require a non-governmental entity to provide indemnification or insurance in favor of the state agency.[xiv]

Please contact me if you would like further information relating to sovereign immunity.

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[i] See Article X, Section 13 of the Florida Constitution. See also Spangler v. Florida State Turnpike Authority, 106 So. 2d 421 (Fla. 1958) (explaining the concept of sovereign immunity).
[ii] See Fla. Stat. § 768.14.
[iii] See Article X, Section 13 of the Florida Constitution.
[iv] See Fla. Stat. § 768.28(5). See also Attorney General Opinion 93-34 (May 26, 1993).
[v] See Fla. Stat. § 768.28(5). See also Attorney General Opinion 93-34 (May 26, 1993).
[vi] See Fla. Stat. § 768.28(5).
[vii] See Fla. Stat. § 768.28(16)(a).
[viii] See Fla. Stat. § 364.64(p).
[ix] See Fla. Stat. § 768.28(5). See also Attorney General Opinion 93-34 (May 26, 1993).
[x] See Fla. Stat. § 768.28(16)(a).
[xi] See Fla. Stat. § 768.28(5).
[xii] See also Attorney General Opinion 93-34 (May 26, 1993).
[xiii] See Fla. Stat. § 768.28(19).
[xiv] See Fla. Stat. § 768.28(19).

All of the above-referenced provisions, cases and opinions are attached.

majority or other specified percentage of those members voting on the matter. "Of the membership" means "of all members thereof."

(f) The terms "judicial office," "justices" and "judges" shall not include judges of courts established solely for the trial of violations of ordinances.

(g) "Special law" means a special or local law.

(h) Titles and subtitles shall not be used in construction.

SECTION 13. Suits against the state.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

SECTION 14. State retirement systems benefit changes.—A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

History.—Added, H.J.R. 291, 1975; adopted 1976.

SECTION 15. State operated lotteries.—

(a) Lotteries may be operated by the state.

(b) If any subsection or subsections of the amendment to the Florida Constitution are held unconstitutional for containing more than one subject, this amendment shall be limited to subsection (a) above.

(c) This amendment shall be implemented as follows:

(1) Schedule—On the effective date of this amendment, the lotteries shall be known as the Florida Education Lotteries. Net proceeds derived from the lotteries shall be deposited to a state trust fund, to be designated The State Education Lotteries Trust Fund, to be appropriated by the Legislature. The schedule may be amended by general law.

History.—Proposed by Initiative Petition filed with the Secretary of State June 10, 1985; adopted 1986.

SECTION 16. Limiting marine net fishing.—

(a) The marine resources of the State of Florida belong to all of the people of the state and should be conserved and managed for the benefit of the state, its people, and future generations. To this end the people hereby enact limitations on marine net fishing in Florida waters to protect saltwater finfish, shellfish, and other marine animals from unnecessary killing, overfishing and waste.

(b) For the purpose of catching or taking any saltwater finfish, shellfish or other marine animals in Florida waters:

(1) No gill nets or other entangling nets shall be used in any Florida waters; and

(2) In addition to the prohibition set forth in (1), no other type of net containing more than 500 square feet of mesh area shall be used in nearshore and inshore Florida waters. Additionally, no more than two such nets, which shall not be connected, shall be used from any vessel, and no person not on a vessel shall use more than one such net in nearshore and inshore Florida waters.

(c) For purposes of this section:

(1) "gill net" means one or more walls of netting which captures saltwater finfish by ensnaring or entangling them in the meshes of the net by the gills, and "entangling net" means a drift net, trammell net, stab net, or any other net which captures saltwater finfish, shellfish, or other marine animals by causing all or part of heads, fins, legs, or other body parts to become entangled or ensnared in the meshes of the net, but a hand thrown cast net is not a gill net or an entangling net;

(2) "mesh area" of a net means the total area of netting with the meshes open to comprise the maximum square footage. The square footage shall be calculated using standard mathematical formulas for geometric shapes. Seines and other rectangular nets shall be calculated using the maximum length and maximum width of the netting. Trawls and other bag type nets shall be calculated as a cone using the maximum circumference of the net mouth to derive the radius, and the maximum length from the net mouth to the tail end of the net to derive the slant height. Calculations for any other nets or combination type nets shall be based on the shapes of the individual components;

(3) "coastline" means the territorial sea base line for the State of Florida established pursuant to the laws of the United States of America;

(4) "Florida waters" means the waters of the Atlantic Ocean, the Gulf of Mexico, the Straits of Florida, and any other bodies of water under the jurisdiction of the State of Florida, whether coastal, intracoastal or inland, and any part thereof; and

(5) "nearshore and inshore Florida waters" means all Florida waters inside a line three miles seaward of the coastline along the Gulf of Mexico and inside a line one mile seaward of the coastline along the Atlantic Ocean.

(d) This section shall not apply to the use of nets for scientific research or governmental purposes.

(e) Persons violating this section shall be prosecuted and punished pursuant to the penalties provided in section 370.021(2)(a),(b),(c)6. and 7., and (e), Florida Statutes (1991), unless and until the legislature enacts more stringent penalties for violations hereof. On and after the effective date of this section, law enforcement officers in the state are authorized to enforce the provisions of this section in the same manner and authority as if a violation of this section constituted a violation of Chapter 370, Florida Statutes (1991).

(f) It is the intent of this section that implementing legislation is not required for enforcing any violations hereof, but nothing in this section prohibits the establishment by law or pursuant to law of more restrictions on the use of nets for the purpose of catching or taking any saltwater finfish, shellfish, or other marine animals.

(g) If any portion of this section is held invalid for any reason, the remaining portion of this section, to the fullest extent possible, shall be severed from the void

to the streetlight upon the streetlight customer's request or as a result of the streetlight customer's failure to pay electric or gas bills when due or other breach of the applicable streetlight agreement or upon termination of the applicable streetlight agreement. In no event shall a public utility or electric utility be liable or held liable for civil damages for personal injury, wrongful death, or property damage under any circumstance affected or caused by the design, layout, quantity, or placement of streetlights or level of illumination resulting from the proper operation of a streetlight or series of streetlights.

(5) In any civil action for damages arising out of personal injury, wrongful death, or property damage when a streetlight provider's fault regarding the provision or maintenance of streetlights is at issue, if the streetlight provider responsible for providing or maintaining the streetlights is immune from liability pursuant to this section or is not a party to the litigation, such streetlight provider may not be named on the jury verdict form or be deemed or found in such action to be in any way at fault or responsible for the injury or death or damage that gave rise to the damages.

(6) In no event shall a streetlight provider's noncompliance with the provisions of subsection (3) create a presumption of negligence on the part of the streetlight provider in any civil action for damages arising out of personal injury, wrongful death, or property damage.

(7) In the event that there is any conflict between this section and s. 768.81, or any other section of the Florida Statutes, this section shall control. Further, nothing in this section shall impact or waive any provision of s. 768.28.

History.—s. 1, ch. 2005-272.

768.14 Suit by state; waiver of sovereign immunity.—Suit by the state or any of its agencies or subdivisions to recover damages in tort shall constitute a waiver of sovereign immunity from liability and suit for damages in tort to the extent of permitting the defendant to counterclaim for damages resulting from the same transaction or occurrence.

History.—s. 1, ch. 67-2204.

768.16 Wrongful Death Act.—Sections 768.16-768.26 may be cited as the "Florida Wrongful Death Act."

History.—s. 1, ch. 72-35; s. 105, ch. 2003-1.

768.17 Legislative intent.—It is the public policy of the state to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer. Sections 768.16-768.26 are remedial and shall be liberally construed.

History.—s. 1, ch. 72-35; s. 106, ch. 2003-1.

768.18 Definitions.—As used in ss. 768.16-768.26:

(1) "Survivors" means the decedent's spouse, children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the child born out of wedlock of a mother, but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child's support.

(2) "Minor children" means children under 25 ye of age, notwithstanding the age of majority.

(3) "Support" includes contributions in kind as w as money.

(4) "Services" means tasks, usually of a household nature, regularly performed by the decedent that will a necessary expense to the survivors of the decede These services may vary according to the identity of t decedent and survivor and shall be determined und the particular facts of each case.

(5) "Net accumulations" means the part of th decedent's expected net business or salary income including pension benefits, that the decedent probab would have retained as savings and left as part of h or his estate if the decedent had lived her or his norma life expectancy. "Net business or salary income" is th part of the decedent's probable gross income afte taxes, excluding income from investments continuin beyond death, that remains after deducting the dece dent's personal expenses and support of survivors excluding contributions in kind.

History.—s. 1, ch. 72-35; s. 66, ch. 77-121; s. 40, ch. 77-468; s. 1, ch. 81-182 s. 3, ch. 89-61; s. 1, ch. 90-14; s. 1167, ch. 97-102; s. 107, ch. 2003-1.

768.19 Right of action.—When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

History.—s. 1, ch. 72-35.

768.20 Parties.—The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. When a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate. The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. A defense that would bar or reduce a survivor's recovery if she or he were the plaintiff may be asserted against the survivor, but shall not affect the recovery of any other survivor.

History.—s. 1, ch. 72-35; s. 1168, ch. 97-102.

768.21 Damages.—All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

(1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income avail-

able for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.

(2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

(3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. For the purposes of this subsection, if both spouses die within 30 days of one another as a result of the same wrongful act or series of acts arising out of the same incident, each spouse is considered to have been predeceased by the other.

(4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

(5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.

(6) The decedent's personal representative may recover for the decedent's estate the following:

(a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. Loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered:

1. If the decedent's survivors include a surviving spouse or lineal descendants; or

2. If the decedent is not a minor child as defined in s. 768.18(2), there are no lost support and services recoverable under subsection (1), and there is a surviving parent.

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).

(c) Evidence of remarriage of the decedent's spouse is admissible.

(7) All awards for the decedent's estate are subject to the claims of creditors who have complied with the requirements of probate law concerning claims.

(8) The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical negligence as defined by s. 766.106(1).

History.—s. 1, ch. 72-35; s. 2, ch. 81-183; s. 1, ch. 85-260; s. 2, ch. 90-14; s. 1169, ch. 97-102; s. 1, ch. 2002-44; s. 66, ch. 2003-416.

768.22 Form of verdict.—The amounts awarded to each survivor and to the estate shall be stated separately in the verdict.

History.—s. 1, ch. 72-35.

768.23 Protection of minors and incompetents.—The court shall provide protection for any amount awarded for the benefit of a minor child or an incompetent pursuant to the Florida Guardianship Law.

History.—s. 1, ch. 72-35.

768.24 Death of a survivor before judgment.—A survivor's death before final judgment shall limit the survivor's recovery to lost support and services to the date of his or her death. The personal representative shall pay the amount recovered to the personal representative of the deceased survivor.

History.—s. 1, ch. 72-35; s. 1170, ch. 97-102.

768.25 Court approval of settlements.—While an action under this act is pending, no settlement as to amount or apportionment among the beneficiaries which is objected to by any survivor or which affects a survivor who is a minor or an incompetent shall be effective unless approved by the court.

History.—s. 1, ch. 72-35.

768.26 Litigation expenses.—Attorneys' fees and other expenses of litigation shall be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amounts awarded to them, but expenses incurred for the benefit of a particular survivor or the estate shall be paid from their awards.

History.—s. 1, ch. 72-35.

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.—

(1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued. However, any such action against a state university board of trustees shall be brought in the county in which that university's main campus is located or in the county in which the cause of action accrued if the university maintains therein a substantial presence for the transaction of its customary business.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders),

and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.

(3) Except for a municipality and the Florida Space Authority, the affected agency or subdivision may, at its discretion, request the assistance of the Department of Financial Services in the consideration, adjustment, and settlement of any claim under this act.

(4) Subject to the provisions of this section, any state agency or subdivision shall have the right to appeal any award, compromise, settlement, or determination to the court of appropriate jurisdiction.

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 or $200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $100,000 or $200,000 waiver provided above. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.

(6)(a) An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality or the Florida Space Authority, presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing; except that, if such claim is for contribution pursuant to s. 768.31, it must be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such judgment, within 6 months after the tortfeasor seeking contribution has either discharged the common liability by payment or agreed, while the action is pending against her or him, to discharge the common liability.

(b) For purposes of this section, the requirements of notice to the agency and denial of the claim pursuant to paragraph (a) are conditions precedent to maintaining an action but shall not be deemed to be elements of the cause of action and shall not affect the date on which the cause of action accrues.

(c) The claimant shall also provide to the agency the claimant's date and place of birth and social security number if the claimant is an individual, or a federal identification number if the claimant is not an individual. The claimant shall also state the case style, tribunal, the nature and amount of all adjudicated penalties, fines, fees, victim restitution fund, and other judgments in excess of $200, whether imposed by a civil, criminal, or administrative tribunal, owed by the claimant to the state, its agency, officer or subdivision. If there exists no prior adjudicated unpaid claim in excess of $200, the claimant shall so state.

(d) For purposes of this section, complete, accurate, and timely compliance with the requirements of paragraph (c) shall occur prior to settlement payment, close of discovery or commencement of trial, whichever is sooner; provided the ability to plead setoff is not precluded by the delay. This setoff shall apply only against that part of the settlement or judgment payable to the claimant, minus claimant's reasonable attorney's fees and costs. Incomplete or inaccurate disclosure of unpaid adjudicated claims due the state, its agency, officer, or subdivision, may be excused by the court upon a showing by the preponderance of the evidence of the claimant's lack of knowledge of an adjudicated claim and reasonable inquiry by, or on behalf of, the claimant to obtain the information from public records. Unless the appropriate agency had actual notice of the information required to be disclosed by paragraph (c) in time to assert a setoff, an unexcused failure to disclose shall, upon hearing and order of court, cause the claimant to be liable for double the original undisclosed judgment and, upon further motion, the court shall enter judgment for the agency in that amount. The failure of the Department of Financial Services or the appropriate agency to make final disposition of a claim within 6 months after it is filed shall be deemed a final denial of the claim for purposes of this section. For purposes of this subsection, in medical malpractice actions, the failure of the Department of Financial Services or the appropriate agency to make final disposition of a claim within 90 days after it is filed shall be deemed a final denial of the claim. The provisions of this subsection do not apply to such claims as may be asserted by counterclaim pursuant to s. 768.14.

(7) In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to a defendant municipality or the Florida Space Authority, upon the Department of Financial Services; and the department or the agency concerned shall have 30 days within which to plead thereto.

(8) No attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement.

(9)(a) No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(b) As used in this subsection, the term:

1. "Employee" includes any volunteer firefighter.

2. "Officer, employee, or agent" includes, but is not limited to, any health care provider when providing services pursuant to s. 766.1115, any member of the Florida Health Services Corps, as defined in s. 381.0302, who provides uncompensated care to medically indigent persons referred by the Department of Health, and any public defender or her or his employee or agent, including, among others, an assistant public defender and an investigator.

(c) For purposes of the waiver of sovereign immunity only, a member of the Florida National Guard is not acting within the scope of state employment when performing duty under the provisions of Title 10 or Title 32 of the United States Code or other applicable federal law; and neither the state nor any individual may be named in any action under this chapter arising from the performance of such federal duty.

[1](d) The employing agency of a law enforcement officer as defined in s. 943.10 is not liable for injury, death, or property damage effected or caused by a person fleeing from a law enforcement officer in a motor vehicle if:

1. The pursuit is conducted in a manner that does not involve conduct by the officer which is so reckless or wanting in care as to constitute disregard of human life, human rights, safety, or the property of another;

2. At the time the law enforcement officer initiates the pursuit, the officer reasonably believes that the person fleeing has committed a forcible felony as defined in s. 776.08; and

3. The pursuit is conducted by the officer pursuant to a written policy governing high-speed pursuit adopted by the employing agency. The policy must contain specific procedures concerning the proper method to initiate and terminate high-speed pursuit. The law enforcement officer must have received instructional training from the employing agency on the written policy governing high-speed pursuit.

(10)(a) Health care providers or vendors, or any of their employees or agents, that have contractually agreed to act as agents of the Department of Corrections to provide health care services to inmates of the state correctional system shall be considered agents of the State of Florida, Department of Corrections, for the purposes of this section, while acting within the scope of and pursuant to guidelines established in said contract or by rule. The contracts shall provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in this chapter.

(b) This subsection shall not be construed as designating persons providing contracted health care services to inmates as employees or agents of the state for the purposes of chapter 440.

(c) For purposes of this section, regional poison control centers created in accordance with s. 395.1027 and coordinated and supervised under the Division of Children's Medical Services Prevention and Intervention of the Department of Health, or any of their employees or agents, shall be considered agents of the State of Florida, Department of Health. Any contracts with poison control centers must provide, to the extent permitted by law, for the indemnification of the state by the agency for any liabilities incurred up to the limits set out in this chapter.

(d) For the purposes of this section, operators, dispatchers, and providers of security for rail services and rail facility maintenance providers in the South Florida Rail Corridor, or any of their employees or agents, performing such services under contract with and on behalf of the South Florida Regional Transportation Authority or the Department of Transportation shall be considered agents of the state while acting within the scope of and pursuant to guidelines established in said contract or by rule.

(e) For purposes of this section, a professional firm that provides monitoring and inspection services of the work required for state roadway, bridge, or other transportation facility construction projects, or any of the firm's employees performing such services, shall be considered agents of the Department of Transportation while acting within the scope of the firm's contract with the Department of Transportation to ensure that the project is constructed in conformity with the project's plans, specifications, and contract provisions. Any contract between the professional firm and the state, to the extent permitted by law, shall provide for the indemnification of the department for any liability, including reasonable attorney's fees, incurred up to the limits set out in this chapter to the extent caused by the negligence of the firm or its employees. This paragraph shall not be construed as designating persons who provide monitoring and inspection services as employees or agents of the state for purposes of chapter 440. This para-

graph is not applicable to the professional firm or its employees if involved in an accident while operating a motor vehicle. This paragraph is not applicable to a firm engaged by the Department of Transportation for the design or construction of a state roadway, bridge, or other transportation facility construction project or to its employees, agents, or subcontractors.

(11)(a) Providers or vendors, or any of their employees or agents, that have contractually agreed to act on behalf of the state as agents of the Department of Juvenile Justice to provide services to children in need of services, families in need of services, or juvenile offenders are, solely with respect to such services, agents of the state for purposes of this section while acting within the scope of and pursuant to guidelines established in the contract or by rule. A contract must provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in this chapter.

(b) This subsection does not designate a person who provides contracted services to juvenile offenders as an employee or agent of the state for purposes of chapter 440.

(12)(a) A health care practitioner, as defined in s. 456.001(4), who has contractually agreed to act as an agent of a state university board of trustees to provide medical services to a student athlete for participation in or as a result of intercollegiate athletics, to include team practices, training, and competitions, shall be considered an agent of the respective state university board of trustees, for the purposes of this section, while acting within the scope of and pursuant to guidelines established in that contract. The contracts shall provide for the indemnification of the state by the agent for any liabilities incurred up to the limits set out in this chapter.

(b) This subsection shall not be construed as designating persons providing contracted health care services to athletes as employees or agents of a state university board of trustees for the purposes of chapter 440.

(13) Laws allowing the state or its agencies or subdivisions to buy insurance are still in force and effect and are not restricted in any way by the terms of this act.

(14) Every claim against the state or one of its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section shall be forever barred unless the civil action is commenced by filing a complaint in the court of appropriate jurisdiction within 4 years after such claim accrues; except that an action for contribution must be commenced within the limitations provided in s. 768.31(4), and an action for damages arising from medical malpractice must be commenced within the limitations for such an action in s. 95.11(4).

(15) No action may be brought against the state or any of its agencies or subdivisions by anyone who unlawfully participates in a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience if the claim arises out of such riot, unlawful assembly, public demonstration, mob violence, or civil disobedience. Nothing in this act shall abridge traditional immunities pertaining to statements made in court.

(16)(a) The state and its agencies and subdivisions are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section. Agencies or subdivisions, and sheriffs, that are subject to homogeneous risks may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims, any charter provisions or laws to the contrary notwithstanding.

(b) Claims files maintained by any risk management program administered by the state, its agencies, and its subdivisions are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution until termination of all litigation and settlement of all claims arising out of the same incident, although portions of the claims files may remain exempt, as otherwise provided by law. Claims files records may be released to other governmental agencies upon written request and demonstration of need; such records held by the receiving agency remain confidential and exempt as provided for in this paragraph.

(c) Portions of meetings and proceedings conducted pursuant to any risk management program administered by the state, its agencies, or its subdivisions, which relate solely to the evaluation of claims filed with the risk management program or which relate solely to offers of compromise of claims filed with the risk management program are exempt from the provisions of s. 286.011 and s. 24(b), Art. I of the State Constitution. Until termination of all litigation and settlement of all claims arising out of the same incident, persons privy to discussions pertinent to the evaluation of a filed claim shall not be subject to subpoena in any administrative or civil proceeding with regard to the content of those discussions.

(d) Minutes of the meetings and proceedings of any risk management program administered by the state, its agencies, or its subdivisions, which relate solely to the evaluation of claims filed with the risk management program or which relate solely to offers of compromise of claims filed with the risk management program are exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution until termination of all litigation and settlement of all claims arising out of the same incident.

(17) This section, as amended by chapter 81-317, Laws of Florida, shall apply only to causes of actions which accrue on or after October 1, 1981.

(18) No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court. This subsection shall not be construed to mean that the state has at any time previously waived, by implication, its immunity, or that of any of its agencies, from suit in

federal court through any statute in existence prior to June 24, 1984.

(19) Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence. This does not preclude a party from requiring a nongovernmental entity to provide such indemnification or insurance. The restrictions of this subsection do not prevent a regional water supply authority from indemnifying and assuming the liabilities of its member governments for obligations arising from past acts or omissions at or with property acquired from a member government by the authority and arising from the acts or omissions of the authority in performing activities contemplated by an interlocal agreement. Such indemnification may not be considered to increase or otherwise waive the limits of liability to third-party claimants established by this section.

(20) Every municipality, and any agency thereof, is authorized to undertake to indemnify those employees that are exposed to personal liability pursuant to the Clean Air Act Amendments of 1990, 42 U.S.C.A. ss. 7401 et seq., and all rules and regulations adopted to implement that act, for acts performed within the course and scope of their employment with the municipality or its agency, including but not limited to indemnification pertaining to the holding, transfer, or disposition of allowances allocated to the municipality's or its agency's electric generating units, and the monitoring, submission, certification, and compliance with permits, permit applications, records, compliance plans, and reports for those units, when such acts are performed within the course and scope of their employment with the municipality or its agency. The authority to indemnify under this section covers every act by an employee when such act is performed within the course and scope of her or his employment with the municipality or its agency, but does not cover any act of willful misconduct or any intentional or knowing violation of any law by the employee. The authority to indemnify under this section includes, but is not limited to, the authority to pay any fine and provide legal representation in any action.

History.—s. 1, ch. 73-313; s. 1, ch. 74-235; ss. 1, 2, 3, ch. 77-86; s. 9, ch. 79-139; s. 1, ch. 79-253; s. 284, ch. 79-400; s. 1, ch. 80-271; ss. 1, 2, ch. 81-317; s. 1, ch. 83-44; s. 1, ch. 83-257; s. 1, ch. 84-29; s. 1, ch. 84-335; s. 21, ch. 86-183; s. 1, ch. 86-184; s. 3, ch. 87-134; s. 2, ch. 88-173; ss. 55, 61, ch. 89-300; s. 92, ch. 89-360; s. 8, ch. 90-192; s. 3, ch. 91-209; s. 112, ch. 92-33; ss. 2, 11, ch. 92-278; s. 1, ch. 93-89; s. 34, ch. 93-129; s. 1, ch. 94-76; s. 2, ch. 94-147; s. 70, ch. 94-209; s. 21, ch. 94-321; s. 428, ch. 96-406; s. 34, ch. 97-93; s. 1809, ch. 97-102; s. 4, ch. 98-402; s. 289, ch. 99-8; s. 9, ch. 2000-155; s. 97, ch. 2002-20; s. 24, ch. 2002-183; s. 2, ch. 2002-401; s. 9, ch. 2003-159; s. 1903, ch. 2003-261; s. 1, ch. 2003-290; s. 67, ch. 2003-416; s. 1, ch. 2006-234.

[1]Note.—Section 3, ch. 2006-234, provides that "[t]his act shall take effect [June 20, 2006,] and shall apply to causes of action that accrue on or after [June 20, 2006]."

768.295 Strategic Lawsuits Against Public Participation (SLAPP) suits by governmental entities prohibited.—

(1) This section may be cited as the "Citizen Participation in Government Act."

(2) It is the intent of the Legislature to protect the right of Florida's citizens to exercise their rights to peacefully assemble, instruct their representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution. The Legislature recognizes that "Strategic Lawsuits Against Public Participation" or "SLAPP" suits, as they are typically called, have increased over the last 30 years and are mostly filed by private industry and individuals. However, it is the public policy of this state that government entities not engage in SLAPP suits because such actions are inconsistent with the right of individuals to participate in the state's institutions of government. Therefore, the Legislature finds and declares that prohibiting such lawsuits by governmental entities will preserve this fundamental state policy, preserve the constitutional rights of Florida citizens, and assure the continuation of representative government in this state. It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts.

(3) As used in this section, "governmental entity" or "government entity" means the state, including the executive, legislative, and the judicial branches of government and the independent establishments of the state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof.

(4) No governmental entity in this state shall file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against a person or entity without merit and solely because such person or entity has exercised the right to peacefully assemble, the right to instruct representatives, and the right to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.

(5) A person or entity sued by a governmental entity in violation of this section has a right to an expeditious resolution of a claim that the suit is in violation of this section. A person or entity may petition the court for an order dismissing the action or granting final judgment in favor of that person or entity. The petitioner may file a motion for summary judgment, together with supplemental affidavits, seeking a determination that the governmental entity's lawsuit has been brought in violation of this section. The governmental entity shall thereafter file its response and any supplemental affidavits. As soon as practicable, the court shall set a hearing on the petitioner's motion, which shall be held at the earliest possible time after the filing of the governmental entity's response. The court may award, subject to the limitations in s. 768.28, the party sued by a governmental entity actual damages arising from the governmental entity's violation of this act. The court shall award the prevailing party reasonable attorney's fees and costs incurred in connection with a claim that an action was filed in violation of this section.

(6) In any case filed by a governmental entity which is found by a court to be in violation of this section, the

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(Cite as: 106 So.2d 421)

C

Supreme Court of Florida.
A. J. SPANGLER, Appellant,
v.
FLORIDA STATE TURNPIKE AUTHORITY, a corporation, Appellee. Roy ATKINS, Appellant,
v.
FLORIDA STATE TURNPIKE AUTHORITY, a corporation, Appellee. Jessie P. LOTT, Appellant,
v.
FLORIDA STATE TURNPIKE AUTHORITY, a corporation, Appellee.

Oct. 29, 1958.
Rehearing Denied Dec. 1, 1958.

Action to recover damages for alleged negligence of Turnpike Authority. The Circuit Court for Dade County, Robert L. Floyd, J., rendered final judgment dismissing the complaint, and the plaintiff appealed. The Supreme Court, Thornal, J., held that the Turnpike Authority is a state agency, and that general provision that Turnpike Authority should have power to sue and be sued in its own name was not, in and of itself, adequate to constitute a waiver of immunity from liability for tort and that Legislature had not otherwise waived Authority's immunity to liability for damages resulting from an alleged tort.

Affirmed.

West Headnotes

[1] Turnpikes and Toll Roads ⇐4
391k4 Most Cited Cases
The Turnpike Authority is an agency of the state and as a state agency it shares, absent a specific waiver, sovereign immunity to suit. F.S.A. § 340.05(5).

[2] Statutes ⇐146
361k146 Most Cited Cases
(Formerly 360k146)
A defect in title of original Act creating Turnpike Authority was cured by inclusion of Act in revised statutes and subsequent adoption of revisions by Legislature. F.S.A. § 340.01 et seq.

[3] Turnpikes and Toll Roads ⇐4
391k4 Most Cited Cases
General provision that Turnpike Authority should have power to sue and be sued in its own name was not, in and of itself, adequate to constitute a waiver of immunity from liability for tort, and Legislature has not otherwise waived Authority's immunity to liability for damages resulting from an alleged tort. F.S.A. §§ 125.01, 125.15, 340.06.

[4] States ⇐191.6(1)
360k191.6(1) Most Cited Cases
(Formerly 360k191(1.12))

[4] States ⇐191.7
360k191.7 Most Cited Cases
(Formerly 360k191(1.15))
Waiver will not be reached as a product of inference or implication, and so-called "waiver of immunity statutes" must be strictly construed.
***421** Leon Levin and George L. Knight, Miami, for appellants.

Brown, Dean, Adams & Fischer, Miami, for appellee.

***422** THORNAL, Justice.

The three appellant, who were plaintiffs below, seek reversal of a final judgment dismissing their complaints in actions for damages resulting from the alleged negligence of the appellee Florida State Turnpike Authority.

We are called upon to determine whether the appellee Turnpike Authority is a state agency and, if so, whether it is subject to liability for damages in tort.

The factual situation is quite simple. The three plaintiffs sued the Turnpike Authority claiming personal injuries and property damage resulting from the alleged negligence of the Turnpike Authority in the maintenance of the Sunshine State Parkway. The Parkway is a toll road consturcted over a distance of about 110 miles in South Florida. It was constructed and is now maintained by the appellee Turnpike Authority. It is the usual toll road for the use of which operators of motor vehicles pay tolls.

The appellee filed a motion to dismiss an amended complaint. The motion was sustained and a final judgment was entered dismissing the complaint. Reversal of this judgment is now sought.

The appellants contend that the Turnpike Authority is not a state agency and is, therefore, subject to liability for tortious injuries. In the alternative, they contend that if the Authority is a state agency, its immunity against liability has been waived by statute.

The appellee contends that it is a state agency; that it shares the State's immunity to liability for tort; and that is immunity has not been waived by statute as required by the Florida Constitution.

[1] We encounter no difficulty in arriving at the conclusion that the appellee Turnpike Authority is an agency of the state government. In the first place, Section 340.05(5), Florida Statutes, F.S.A., specifically provides that the Authority is a body corporate and politic, and that it shall be regarded 'as performing an essential government function' in the fulfillment of the powers granted by the act creating it. In addition to this specific legislative recognition of the governmental aspects of the appellee Authority, we look also to its powers and duties. It is charged with the responsibility of constructing a toll road facility through the length of the State of Florida. It has already constructed the Turnpike now in question. This road is an important segment of the State Highway System. Although its revenues are derived primarily from tolls charged for the use of the road, these revenues are nonetheless public funds inasmuch as they are devoted entirely to a public purpose, to wit, financing of construction and the continued maintenance and operation of a part of the State Highway System. Members of the Authority are commissioned state officers appointed by the Governor. One of the five members is by law also a member of the State Road Department. He serves the function of a liaison between the two agencies. The Authority has issued and sold securities which enjoy a tax-exempt status the same as any other governmentally issued securities. The Authority exercises the power of eminent domain. In addition to the toll road mentioned the Authority also has the power to use its revenues for the construction of so-called feeder roads, which likewise are a part of the State Highway System.

The sum of all these observations is that the appellee Florida State Turnpike Authority, as correctly ruled by the trial judge, is a state agency. As a state agency, absent a specific waiver, it shares in the sovereign immunity to suit.

[2] By the order dismissing the amended complaint, the trial judge appeared to be of the view that the title to Chapter 28128, Laws of Florida 1953, which created the appellee Turnpike Authority, was not sufficiently definite to comprehend within its scope any provision in the body of the act which could be construed as a waiver of ***423** immunity. We think it unnecessary to delve into this aspect of the problem. This is so for the reason that Chapter 28128, supra, was incorporated in the 1955 and 1957 revisions of the Laws of Florida and has become Chapter 340, Florida Statutes, F.S.A. Any defect in the title of the original act as it passed the Legislature has been cured by the inclusion of the act in the revised statutes and the subsequent adoption of the revisions by the Legislature. We have held that under these circumstances this court will not undertake to explore alleged defects in the title to the original act. State ex rel. Badgett v. Lee, 156

Fla. 291, 22 So.2d 804; Thompson v. Intercounty Tel. & Tel. Co., Fla.1952, 62 So.2d 16; Rodriguez v. Jones, Fla.1953, 64 So.2d 278.

[3][4] Regardless of the reasons assigned by the trial judge we, nonetheless, find that his ultimate conclusion sustaining the motion to dismiss the complaint was correct. We do so for the reason that we find that the State Legislature has not waived the Authority's immunity to liability for damages resulting from an alleged tort.

It is true that in generally defining the powers of the Authority by Section 340.06, Florida Statutes' F.S.A., the Legislature has provided that it has the power 'to sue and be sued in its own name'. Nevertheless, consistent with our own precedents as well as analogous decisions of other states, we are of the view that this general provision included in the delineation of the Authority's powers is not adequate in and of itself to constitute a waiver of immunity from liability for tort. We have specifically so held with reference to counties. Section 125.01, Florida Statutes, F.S.A., provides that county commissioners shall represent the county 'in the prosecution and defense of all legal causes'. Section 125.15, Florida Statutes, F.S.A., provides that 'The county commissioners of the several counties shall sue and be sued in the name of the county of which they are commissioners.' Despite this general language in the legislative statement of the powers of the counties, we have held throughout the years that a county which is a division of the State shares in the State's immunity from liability in tort actions. See Keggin v. Hillsborough County, 71 Fla. 356, 71 So. 372.

In similar fashion, despite the fact that the Everglades Drainage District is endowed by statute with the power 'to sue and be sued', we have also held that this legislative provision is not sufficient to constitute a waiver of immunity of this state agency from liability for damages in a tort action. Arundel Corporation v. Griffin, 89 Fla. 128, 103 So. 422. Consistent with these earlier rulings this court has held that a Drainage District organized under the general Drainage District Act, Chapter 298, Florida Statutes, F.S.A., is similarly immune to liability for damages resulting from an alleged tort. Rabin v. Lake Worth Drainage District, Fla.1955, 82 So.2d 353. Admittedly, this writer disagreed with the majority on this point in the case last cited. However, the controlling precedent was announced by the opinion of the court and supports the conclusion which we herewith reach.

The appellants suggest that we should be influenced by the decisions of the Supreme Court of Kansas in Pennington v. Kansas Turnpike Authority, 180 Kan. 638, 305 P.2d 849; and Anderson Cattle Co. v. Kansas Turnpike Authority, 180 Kan. 749, 308 P.2d 172. It is true that in the cases cited Kansas Turnpike Authority was held responsible for certain damages which resulted during the construction of the Kansas Turnpike. This was done under a specific provision of the act creating the Authority. However, the same court has held that the general power 'to use and be sued', which is included in the Kansas Turnpike act, G.S.1955 Supp. 68-2001 et seq., as it is in the Florida act, is not adequate to constitute a waiver of the Turnpike Authority immunity from liability for a tort action. State ex rel. Fatzer v. Kansas Turnpike Authority, 176 Kan. 683, 273 ***424** P.2d 198. A similar provision included in the act creating the Kansas State Highway Commission was held to be ineffective as a waiver of immunity from tort liability. State ex rel. v. Kansas State Highway Commission, 138 Kan. 913, 28 P.2d 770; Barker v. Hufty Rock Asphalt Co., 136 Kan. 834, 18 P.2d 568.

Article III, Section 22, Florida Constitution, F.S.A., authorizes the Legislature to provide by general law for the bringing of a suit against the State. This, of course, applies in equal measure to all state agencies. Inasmuch as immunity of the state and its agencies is an aspect of sovereignty, the courts have consistently held that statutes purporting to waive the sovereign immunity must be clear and unequivocal. Waiver will not be reached as a product of inference or implication. The so-called 'waiver of immunity statutes' are to be strictly construed. This is so for the obvious reason that the immunity of the sovereign is a part of the public policy of the state. It is enforced as a

protection of the public against profligate encroachments on the public treasury.

Consistent, therefore, with all of the precedents to which we have been referred and which our own research has produced, we are constrained to hold that the appellee Turnpike Authority enjoys the State's immunity to liability for damages resulting from an alleged tort and that this immunity has not been waived by the Legislature.

In order to forestall any thought that we have overlooked the case of Florida Livestock Board v. Gladden, Fla.1956, 86 So.2d 812, we mention that we, like the trial judge, have the view that this case is not analogous to the case at bar. In the Livestock Board case we had a situation where the Florida Livestock Board had proceeded pursuant to Chapter 585, Florida Statutes, F.S.A., to destory certain diseased hogs owned by Gladden. The litigation which appeared before the court was instituted by the state agency itself pursuant to the statute in order to obtain a valuation on the destroyed animals. In other words, the Gladden case was originated by the state agency seeking a judicial determination of the value of private property destroyed in the public interest. It was in no manner a proceding in tort instituted by an individual against a state agency. We were not there confronted with the immunity problem.

We therefore hold that the trial judge ruled correctly in sustaining the motion to dismiss the amended complaint and in entering the judgment accordingly.

The judgment is--

Affirmed.

TERRELL, C. J., and ROBERTS, DREW and O'CONNELL, JJ., concur.

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END OF DOCUMENT

Florida Attorney General
Advisory Legal Opinion

Number: AGO 93-34
Date: May 26, 1993
Subject: Insurance for or indemnify contractors

Ms. Phyllis O. Douglas
Board Attorney
Dade County Public Schools
School Board Administration Building
1450 Northeast Second Avenue
Miami, Florida 33132

RE: INSURANCE--SCHOOL BOARDS--PUBLIC FUNDS--CONTRACTORS--authority of school board to provide insurance for or indemnify contractors.

Dear Ms. Douglas:

On behalf of the Dade County School Board you have asked for my opinion on substantially the following questions:

1. Is the School Board of Dade County authorized to purchase insurance for or indemnify[1] school board contractors or subcontractors who work on capital construction projects of the board?

2. Is the School Board of Dade County authorized to pay in excess of 100,000 per claim or 200,000 per occurrence pursuant to an insurance policy in effect with increased coverage?

In sum:

1. The School Board of Dade County is not authorized to purchase insurance for or indemnify school board contractors or subcontractors who work on capital construction projects of the board.

2. The School Board of Dade County may obtain insurance coverage in excess of the statutory limits of 100,000 or 200,000 in anticipation of any liability under a claims bill, however, by obtaining such coverage, s. 768.28, F.S. (1992 Supp.), provides that the school board is not deemed to have waived its defense of sovereign immunity or to have increased its limits of liability.

Question One

Section 10, Art. VII, State Const., prohibits the state or counties or municipalities or any agency thereof from using, giving, or lending its taxing power or credit to aid any private interest or individual. The purpose of the constitutional provision is "to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be at most only incidentally benefited."[2]

Furthermore, s. 1, Art. VII, State Const., impliedly limits the imposition of taxes and the expenditures of tax revenues to public purposes.[3] As a general principle, the power to levy and collect taxes and the power to appropriate public funds are coexistent and if a tax cannot be levied for a particular purpose, no appropriation of public money can be made for such purpose.[4]

Based on these considerations, this office has consistently concluded that, in the absence of statutory authority for such an agreement, governmental entities are prohibited from agreeing to indemnify private entities. It was concluded in AGO 84-103 that a municipality was prohibited by s. 10, Art. VII, State Const., from agreeing to indemnify a private for profit corporation for financial losses which might be suffered over the term of the agreement in the provision of emergency medical services to the inhabitants of a three county area. With regard to a state administrative agency, in AGO 90-21 it was determined that the Department of Corrections was not authorized to agree by contract to release a private company from liability and to indemnify and hold the company harmless from any damage, loss, or injury caused by the sole or joint negligence of the private company, its employees or agents.[5]

You have suggested that a district school board may possess home rule powers to enter into such indemnity agreements. While school districts, acting pursuant to s. 230.03(2), F.S., may exercise any power for school purposes in the operation, control, and supervision of the free public schools in its district unless expressly prohibited by the state constitution or general law, the relation of this type of agreement to the operation, control, and supervision of public schools is questionable.[6]

In addition, as this office explained in AGO 83-72, a state statute which distinctly specifies the manner or method in which a district school board is required to act prevails over a conflicting method or procedure proposed or adopted by a district school board. Thus, the existence of specific statutory provisions regulating the purchase of insurance by district school boards would suggest that other forms of insurance, including indemnity agreements, are not favored.

In broad terms, insurance is a contract by which one party, for compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or

ascertainable sum of money on a specified contingency. The predominant feature is the granting of indemnity, or security against loss, for a stipulated consideration, and in essence it is a contract of indemnity against contingent loss.[7]

Because insurance is an indemnification agreement and primarily constitutes a benefit to the individual rather than the public, the Legislature has specifically authorized governmental agencies to purchase insurance for their officers and employees, including those of school boards.

School boards are expressly authorized to self-insure for health, accident, and hospitalization coverage for officers and employees of the school board in s. 112.08, F.S. (1992 Supp.); for workers' compensation coverage in s. 440.38, F.S.; for claims arising from acts of negligence in s. 768.28, F.S. (1992 Supp.); and for civil rights actions under s. 111.072, F.S. In addition, school boards are required to insure school property pursuant to s. 230.23(9)(d), F.S. (1992 Supp.). Section 627.6551, F.S., authorizes the purchase of insurance for a group of teachers or students of an institution of learning or a school district. Blanket health insurance is authorized for students and teachers under the policy issued to a school, district school system or other institution of learning under s. 627.659, F.S.

However, these provisions authorize the school district to provide insurance for officers and employees of the district, and their dependents. For example, s. 112.08(2)(a), F.S., states that:

"Every local governmental unit is authorized to provide and pay out of its available funds for all or part of the premium for life, health, accident, hospitalization, legal expense, or annuity insurance, or all or any kinds of such insurance, for the officers and employees of the local governmental unit and for health, accident hospitalization, and legal expense insurance for the dependents of such officers and employees upon a group insurance plan and, to that end, to enter into contracts with insurance companies or professional administrators to provide such insurance."

While the terms "officer" and "employee" are not defined for purposes of this section, s. 112.061, F.S., relating to travel expenses of public officers and employees defines an "[o]fficer" as "[a]n individual who in the performance of his official duties is vested by law with sovereign powers of government and who is either elected by the people, or commissioned by the Governor and has jurisdiction extending throughout the state, or any person lawfully serving instead of either of the foregoing two classes of individuals as initial designee or successor."[8] An "[e]mployee" is defined as "[a]n individual, whether commissioned or not, other than an officer or authorized person as defined herein, who is filling a regular or

full-time authorized position and is responsible to an agency head."[9] The mere fact of contracting with a school board to undertake capital construction projects would not appear to qualify either contractors or their subcontractors as "officers" or "employees" of the school district.

Thus, the school district would appear to be precluded from extending insurance benefits to contractors or subcontractors who work on capital construction projects for the district.[10] In fact, current rules of the Department of Education require subcontractors "to carry all required insurance such as fire, vandalism, malicious mischief, extended coverage, workman's compensation and public liability" for particular projects.[11]

I would note that the statutes do provide that an individual self-insurer with a net worth of not less than 250,000,000 may assume the worker's compensation liability of its contractors and subcontractors which are employed by or on behalf of the self-insurer.[12] You have presented this office with no information on whether this statute would apply to your situation but I bring it to your attention in the event it may be helpful.

Therefore, I find no statutory authority for the district school board to provide insurance for or indemnify either contractors or subcontractors who work on capital construction projects.

Question Two

You have not requested an answer to this question contingent on my response to Question One. Therefore, I assume that this issue arises independently of Question One and express my opinion as follows.

Section 768.28, F.S. (1992 Supp.), provides, in part, that:

"In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act."[13]

Thus, the state, for itself, its agencies and subdivisions,[14] has waived its absolute immunity from suit to the extent set forth in the

statute.

The statute goes on to provide that, generally, the officers, employees, and agents of a state agency or subdivision, such as a school district, are not personally liable in tort and may not be named defendants in any action for injuries or damages suffered as a result of any act, event or omission of action in the scope of their employment or function. The exclusive remedy for such an injury is an action against the governmental entity, or the head of the entity in his or her official capacity.[15]

The waiver of liability in s. 768.28, F.S. (1992 Supp.), is limited to 100,000 on any claim or judgment by one person or 200,000 for all claims or judgments arising out of the same incident or occurrence. Judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to the statute up to 100,000 or 200,000, as the case may be.[16] That portion of the judgment exceeding these amounts may be reported to the Legislature, but may be paid in part or whole only by further act of the Legislature, *i.e.*, a claims bill.[17]

The statute authorizes self-insurance by the state, its agencies and subdivisions, and also permits these agencies to enter into risk management programs, or "to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section."[18] Thus, this office has determined that, despite the lack of authority to self-insure for other risks, s. 768.28, F.S., specifically authorizes "state agencies and subdivisions" to self-insure in anticipation of any claim, judgment or claims bill which they may be liable to pay pursuant to s. 768.28, F.S.(1992 Supp.).[19]

As is specifically provided in s. 768.28(5), F.S. (1992 Supp.):

"Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the 100,000 or 200,000 waiver provided above."

Thus, a district school board may obtain insurance in excess of the limits of sovereign immunity established by s. 768.28, F.S. (1992 Supp.), in anticipation of a claims bill which it may be liable to pay. However, by doing so, the school board does not waive its defense of sovereign immunity or increase its limits of liability. I

would note that, prior to the amendment of s. 768.28(5), F.S. and the repeal of s. 286.28, F.S. 1975, by Ch. 87-134, Laws of Florida, the Florida courts had held that the purchase of liability insurance waived sovereign immunity up to the limits of the subdivision's coverage by such insurance.[20]

You note that the Third District Court of Appeal, in a 1990 case, *Evanston Insurance Company v. City of Homestead*,[21] cited to these old cases and determined that the city could waive its sovereign immunity to the extent of any insurance it had purchased.[22]

However, that case involved a medical malpractice claim covered by an insurance contract which was entered into in 1985, prior to enactment of Ch. 87-134, Laws of Florida, and was governed by the law as interpreted in those earlier cases.

In addition, the suit in that case was an action for breach of contract rather than an action in tort which is covered by s. 768.28, F.S. (1992 Supp.). The suit was founded in contract in an effort to avoid the sovereign immunity limitation. The court refused to permit this circumvention of the constitutional and statutory requirements and noted that "[t]he statutory maximum amount of recovery is an absolute limit to a city government's liability, including damages, costs and post judgment interest."[23]

Therefore, it is my opinion that the Dade County School Board is authorized to obtain insurance in excess of the limits of sovereign immunity established by s. 768.28, F.S. (1992 Supp.), in anticipation of any claims bill which it may be liable to pay but the board does not, by obtaining such coverage, waive its defense of sovereign immunity or increase its limits of liability.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

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[1] You have phrased your inquiry in terms of a "self-insured retention program" and explain that "there would be no insurance for that portion of the claim under the self-insured retention. Any claim the claimant, contractor or subcontractor would have for that portion of the claim under the self-insured retention would be against the School Board and not against the insurer." Thus, this plan would appear to include an indemnity program wherein the school board would

agree to indemnify the contractor or subcontractor for injuries suffered while working on capital projects for the school board if the amount of such claim is below the "self-insured retention."

[2] *Bannon v. Port of Palm Beach District*, 246 So.2d 737, 741 (Fla. 1971). Cf., Markham v. State, Department of Revenue, 298 So.2d 210 (1 D.C.A. Fla., 1974); State v. Town of North Miami, 59 So.2d 779 (Fla. 1952); and Bailey v. City of Tampa, 111 So. 119 (Fla. 1926).

[3] *See, Board of Commissioners v. Board of Pilot Commissioners*, 42 So. 697 (Fla. 1906); *Brown v. Winton*, 197 So. 543 (Fla 1940); AGO's 84-103, 82-23, 80-93, and 71-28.

[4] *See generally*, 81A C.J.S. *States* ss. 207, 209, 210; 56 Am.Jur.2d *Municipal Corporations* s. 588.

[5] *And see*, AGO's 85-66 (the Department of General Services is not authorized to enter into a limitation of remedies agreement whereby the contractor's liability for damages to the state for any cause and regardless of the form of action is limited); and AGO 78-20 (In the absence of any general law authorizing or directing such contracts to be made, or authorizing or consenting to a suit against the state on the same, indemnification contracts imposing liability upon the state entered into by a state agency as a county subgrantee of federal funds under the Federal Comprehensive Employment and Training Act of 1973 are nugatory and unenforceable as against the state or its agencies. State agencies are without statutory power to enter into such contracts, and the state is immune from actions thereon).

[6] *See*, AGO 83-72 discussing home rule powers for school boards.

[7] *See generally*, 30 Fla.Jur.2d *Insurance* s. 2.

[8] Section 112.061(2)(c), F.S.

[9] Section 112.061(2)(d), F.S.

[10] It is the rule that a legislative direction as to how a thing shall be done is, in effect, a prohibition against its being done in any other way. *See, Alsop v. Pierce*, 19 So.2d 799, 805-806 (Fla. 1944); *Dobbs v. Sea Isle Hotel*, 56 So.2d 341, 342 (Fla. 1952); *Thayer v. State*, 335 So.2d 815, 817 (Fla. 1976).

[11] *See*, Rule 6A-2.022(3), F.A.C., relating to day labor projects.

[12] *See*, s. 440.572, F.S.

[13] Section 768.28(1), F.S. (1992 Supp.).

[14] *See*, s. 768.28(2), F.S. (1992 Supp.), defining "state agencies

or subdivisions" to include "the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Spaceport Florida Authority."

[15] Section 768.28(5), F.S. (1992 Supp.).

[16] Section 768.28(5), F.S. (1992 Supp.).

[17] *Id.*

[18] Section 768.28(14)(a), F.S. (1992 Supp.).

[19] *See*, AGO 89-63 (concluding that "[s.] 112.656, F.S., which authorizes a retirement system to purchase insurance for its named fiduciary to cover liability or losses incurred by reason of acts or omissions of the fiduciary, does not authorize a retirement system to self insure. A "state agency or subdivision," as defined in s. 768.28, F.S., as amended, however, is authorized by that statute to self-insure in anticipation of any claim, judgment or claims bill which they may be liable to pay pursuant to s. 768.28, F.S., as amended.").

[20] *See, Avallone v. Board of County Commissioners of Citrus County*, 493 So.2d 1002 (Fla. 1986), and Vega v. City of Pompano Beach, 498 So.2d 532 (4 D.C.A. Fla., 1986). *And see, School Board of Orange County v. Coffey*, 524 So.2d 1052, 1053 n. 1 (5 D.C.A. Fla., 1988), *rev. denied*, 534 So.2d 401 (Fla. 1988), which recognized that "The legislature has repealed s. 286.28, which is the basis of the supreme court's finding of waiver in [*Avallone v. Board of County Commissioners of Citrus County, supra*] in favor of a new section 768.28(5) . . . ."; and AGO 89-63.

[21] 563 So.2d 755 (3 D.C.A. Fla., 1990).

[22] *Id.*, at p. 757.

[23] *Id.*, at p. 758.

Audit Committee Agenda Item #3.B

To:	**LYNX Board of Directors**
From:	**Linda Watson** CHIEF EXECUTIVE OFFICER **Edward Johnson** (Technical Contact) **Presented By: Pat Christiansen, Legal Counsel, Akerman and Senterfitt**
Phone:	**407.841.2279 ext: 3017**
Item Name:	**Review of Administrative Rule #4 (Contracts and Procurements)**
Date:	**1/18/2007**

At the December 2006 Board of Directors meeting Legal Counsel discussed with the Audit Committee proposed changes to Administrative Rule #4 (Procurements and Contracts). During that meeting, the Board made several recommendations for Legal Counsel to review and report back to the Board. Legal Counsel has made updates to the administrative rules and will present them for further discussion.

Proposed changes to Administrative Rules #4 will allow the Board of Directors to revise governance language that will add clarity and understanding as well as improve internal operating efficiencies. Subsequently, following the concurrence of the recommended changes, legal counsel will present to the Board of Directors each rule for revision or adoption.

For the ease of understanding the rules, you will find attached a copy of the administrative rule along with a summary chart, which will aid in the discussion.

Lynx

Summary of Approval Process for Contracts by Lynx

Ref: See AdMin Rule 4.3 and 4.4

	Amount of Contract	**Required/Permitted Approval**	**Rule Reference**	**Ability to Delegate**	**Who Can Execute**	**Change Requested**
1.	Above $150,000 **NOTE:** In considering the amount of any contract, the value of all options is included to see whether or not the contract amount exceeds $150,000.	Governing Board	4.3.2	No. The Board does, however, have the authority when it approves the contract to delegate authority.	CEO or, in his/her absence, other senior LYNX officials including the CFO. The Board in approving the contract, can further delegate authority who can execute the contract.	The change requested is that if the Board approves the contract, then not only may the CEO execute that agreement, but other senior officers such as the CFO can also execute it in the absence of the CEO.
2.	Approval of options under existing contracts which have previously been approved by the Governing Board (see 1 above). **NOTE:** Any approval of an option under this provision shall be noticed to the Governing Board as an information item at the next scheduled meeting of the Governing Board.	CEO, or the CEO's delegate, can execute options provided: a) such option was contained in the original approved contract and clearly described in the printed agenda of the Governing Board for that meeting; and b) Governing Board authorized the renewal of the option without the need for further Board approval	4.4.1 (B)	The ability to exercise the option would be the same as the ability to delegate under paragraph 1 above for the original contract.	CEO.	No change requested to exercise options, from current rule. In this case, the CEO will be required to approve exercise any renewal option since presumably any absence of the CEO can be accommodated as

	Amount of Contract	Required/Permitted Approval	Rule Reference	Ability to Delegate	Who Can Execute	Change Requested
		NOTE: Thus, if the Governing Board does not specifically authorize staff to exercise options, options must come back to the Board for approval.				to when the option is to be renewed.
3.	$150,000 or less and: a) Is in approved budget. b) Term including options is not more than 5 years. **NOTE:** Again, in considering the amount of the contract, the value of all options is included. Any contract of $25,000 or more shall be noticed to the Governing Board as an information item at the next scheduled meeting of the Governing Board.	CEO	4.4.1 (A)	Yes. CEO can delegate to: a) other chiefs (those senior LYNX officials reporting directly to the CEO, including CFO) of $50,000 or less. b) Purchasing Managers of $25,000 or less. c) Contract Administrators/ Buyers of $5,000 or less. d) To other LYNX employees for micro purchases of $2,500 or less.	The same party to whom authority has been delegated.	The change requested here is to permit the CEO to delegate as noted. Under existing Rule, CEO cannot delegate. Since this process includes various programs previously noticed, such as micro purchases, the notification procedures to go to the Governing Board would only be for contracts of $25,000 or more.
4.	Bus Advertising Contracts a) Level 1 contracts – contract does not exceed $180,000 in the aggregate and the term	a) CFO or CEO.	4.5	a) CFO or CEO	a) CFO or CEO	None

	Amount of Contract	Required/Permitted Approval	Rule Reference	Ability to Delegate	Who Can Execute	Change Requested
	does not exceed 12 months. b) Level 2 contracts – exceeding $180,000 but less than $300,000 or less, or having a term greater than 12 months. c) Level 3 contracts – all other bus advertising contracts. **NOTE:** A summary of monthly advertising contracts shall be provided as information items to the Governing Board. In addition, if the contract is less than $150,000, then the CEO can further delegate under 3 above.	b) CEO provided that the contracts receive prior approval by the Authority's general counsel. c) Must be approved by the Governing Board and reviewed by Authority's general counsel		b) No. c) No.	b) CEO c) As determined by Board in its approval.	
5.	Emergency Purchases a) This would apply when public health and safety is involved.	a) CEO, without Board oversight, if amount involved is $150,000 or less.	4.4.1 (D) 4.7	a) For amounts of $150,000 or less, the CEO may delegate to any senior LYNX officer, including the CFO.	a) CEO or whoever the CEO may delegate.	This provides the Chairman of the Board and the Vice Chairman of the Board, if the Chairman is absent, the ability to approve and execute contracts,

	Amount of Contract	Required/Permitted Approval	Rule Reference	Ability to Delegate	Who Can Execute	Change Requested
	b) It would also apply where circumstances arise that could have an adverse, material effect on LYNX, its properties or operations if not resolved. For example, if a supplier of fuel to LYNX went bankrupt and refused to furnish fuel, that would be an emergency situation that would be applicable under this rule so as to enable LYNX to seek alternative fuel. **NOTE:** Any such contracts shall be reported to the Governing Board at its next scheduled meeting as a discussion item.	b) If the amount exceeds $150,000, then the CEO in light of the emergency circumstances shall attempt to contact the Chairman of the Board or, in his/her absence, the Vice-Chairman for approval and oversight; if the Chairman and the Vice-Chairman cannot be contacted or the circumstances are such that the emergency does not allow time to contact the Chairman and the Vice-Chairman, then the CEO will have authority to execute the Contract. c) Authority is also provided to the Chairman of the Board or, in the absence of the Chairman and the CEO, then the Vice Chairman of the Board. However, in the absence of the CEO, the Chairman of the Board or in his/her absence, the Vice Chairman may delegate authority to execute to any senior LYNX officer,		b) CEO may not delegate amounts in excess of $150,000, which amounts will be approvable by the CEO, the Chairman of the Board, or in his/her absence, to the Vice Chairman to approve Emergency Purchases.	b) In the absence of CEO, any other senior LYNX official may execute if approved by Chairman or Vice-Chairman.	regardless of amount. It also adds in the status of public health and safety as the definition of an emergency as well as circumstances which could cause a material adverse effect to LYNX, its properties or operations. It also differentiates the value of an emergency contract between $150,000 so that contracts over that would require some effort if feasible to contact the Chairman of the Board and in his/her absence, the Vice-Chairman. It also provides in the absence of the CEO for other senior LYNX officials to become involved and

	Amount of Contract	Required/Permitted Approval	Rule Reference	Ability to Delegate	Who Can Execute	Change Requested
		including the CFO.				address emergency situations but with concurrence by the Chairman or Vice-Chairman.
6.	Fuel Purchases **NOTE:** This is a new rule to take into account how LYNX acquires and purchases its fuel. This does not apply in an emergency situation such as where the fuel supplier would go bankrupt and no longer be able to furnish fuel to LYNX. It simply recognizes how fuel purchases are done in the short time frame to commit to a contract. It also provides some flexibility for LYNX to take advantage of beneficial fuel situations where the fuel purchase would be 10% or more. **NOTE:** Any purchases under this fuel purchase rule would be reported to the	a) LYNX will continue to solicit fuel bids by the competitive process and will solicit Board approval to go out with an IFB or other competitive solicitation for a fuel bid. However, very often, when the bids come back, there is only a very short period of time (hours or days) that the bid remains open for fuel purchases, and it may be in LYNX's best interest to then accept a favorable fuel bid. What is requested is that the Board in approving going out for fuel bids, can on conditions it sets forth in its approval authorize the CEO or other persons to accept fuel bids and execute fuel contracts.	None	a) This will be determined in the approval by the Board.	a) This will be determined in the approval by the Board.	a) This is a new request to recognize that when bids for fuel are returned to LYNX, very often the bidder leaves open the bid price only for a number of days or even hours. LYNX wants to be able to take advantage of accepting those various bids and this would provide authority to staff to accept a bid and execute a fuel contract on conditions set by the Board in its

	Amount of Contract	Required/Permitted Approval	Rule Reference	Ability to Delegate	Who Can Execute	Change Requested
	Governing Board at its next scheduled meeting as a discussion item.	b) If LYNX has an opportunity to acquire fuel at a savings of 10% or more over its existing fuel contract, and that is permitted under the existing fuel contract, then the CEO would have the ability to acquire such other fuel at such a savings or more and for a term not longer than the term of the other fuel contract, including options.		b) CEO	b) CEO	initial approval to go out for fuel bid contracts. b) This may not arise but it provides some ability for LYNX to take advantage of changes in fuel prices in order to save LYNX money.
7.	Miscellaneous This proposal is to take into account the following two circumstances: a) the Board approves a contract and the CEO may not be present to execute that contract and	a) When the Board approves a contract, then, unless the Board indicates otherwise in its approval, not only can the CEO execute that contract, but also the CFO and other senior LYNX officials can execute that		Very often, the Rule will refer to the Chief Executive Officer's delegate, but that process is not clarified in the statute. A change to the rules would be that if the Governing Board approves a contract, then the CEO may delegate approval to sign that contract to any other chief or senior management of the Authority. It also takes into account the		This recognizes the reality that if the Governing Board approves a contract, then any senior person at LYNX should be entitled to execute that contract in the absence of the CEO. For the purposes of this and other rules,

	Amount of Contract	Required/Permitted Approval	Rule Reference	Ability to Delegate	Who Can Execute	Change Requested
	b) those general circumstances when the CEO is not present.	contract. b) In the case of other contracts which need to be executed from LYNX's perspective, and said contract has been otherwise approved in accordance with the procurement process, and CEO is absent, the CFO and other senior LYNX officials could execute the contract.		circumstances from time to time that time requires that a contract be executed by LYNX, and that if that contract has otherwise been approved in accordance with LYNX policies, and the CEO is absent (e.g. away at a business meeting for a week), then the CEO can execute that contract.		"senior LYNX officials" mean any LYNX official who has direct reporting to the CEO, unless the CEO directs otherwise. This would include for example the CFO.

NOTE: The above process simply relates to the approval process to award and execute contracts. It does not modify the process for solicitation of contracts which remains as follows:

Contract amount greater than $50,000	A formal competitive bidding process required such as an IFP or RFP
Greater than $2,500 but less than $50,000	Generally a request for quote which would require three quotes which could be by phone, email, etc.
$2,500 or Less	Does not require formal competitive process but does require that purchases generally be distributed among buyers and that the price is fair and reasonable.

This process would not be required to be followed in the event of Emergency Purchases or sole source contracts.

_____

For clarification purposes, "senior LYNX officials" mean those persons who have direct reporting responsibility to the CEO and would include the CFO (currently Mr. Bert Francis), chief of staff (currently Mr. Edward Johnson), chief operating officer (currently Ms. Lisa Darnall), _____, _____ and _____.

Audit Committee Agenda Item #3.C

To:	**LYNX Board of Directors**
From:	**Bert Francis** CHIEF FINANCIAL OFFICER **Rick Wilson** (Technical Contact) **Lisa Darnall** (Technical Contact) **Blanche Sherman** (Technical Contact) **Presented By: Bert Francis and Lisa Darnall**
Phone:	**407.841.2279 ext: 3047**
Item Name:	**LYNX Operations Center Project, Bennett Facility and Dr. Phillips update**
Date:	**1/18/2007**

Project Update:

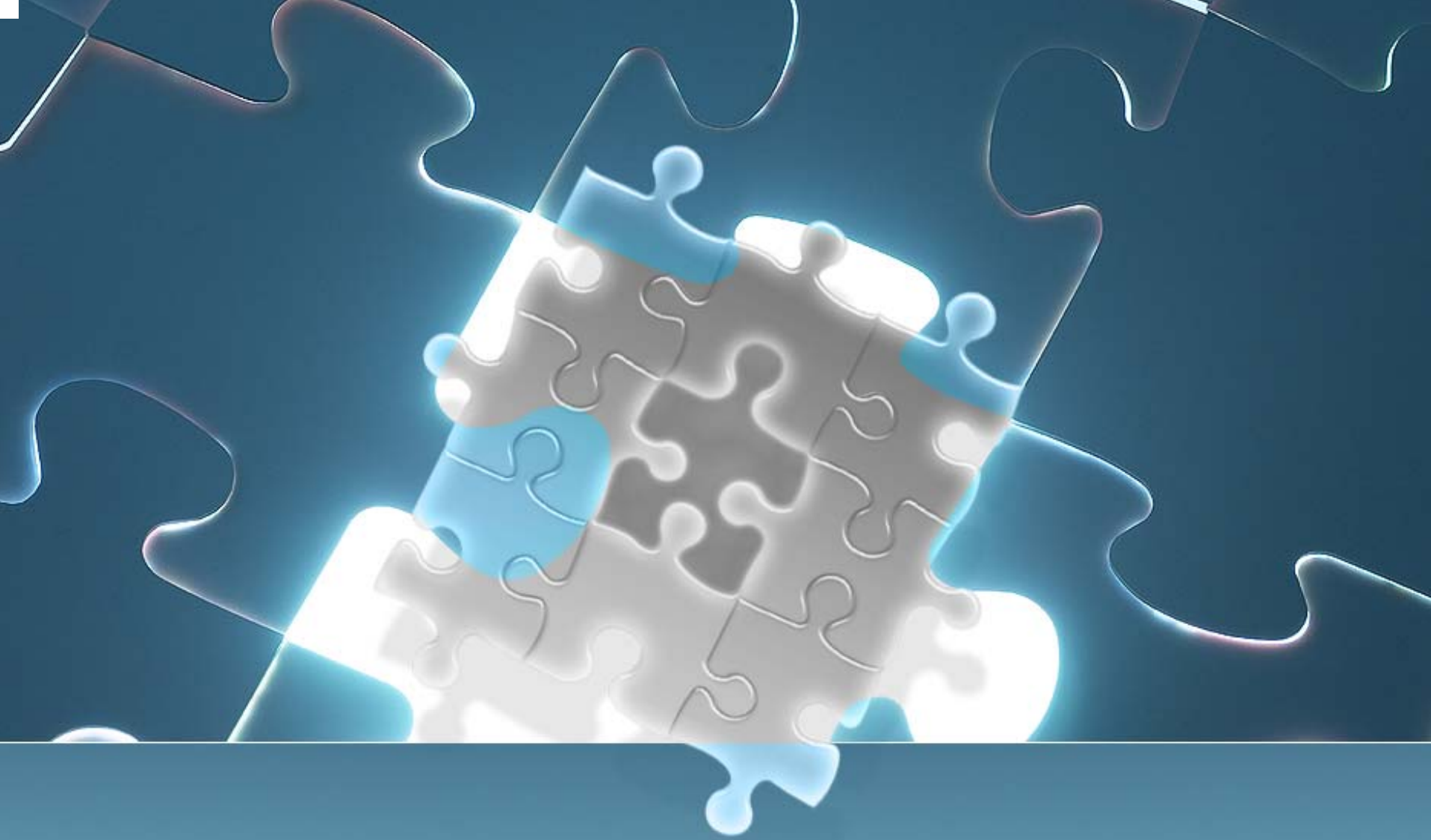
Members of the LOC subcommittee conferred with representatives of Collage and EarthTech on, December 18th to discuss issues regarding the new LYNX Operations Center as well as to monitor progress on the project and review adherence to the agreed upon schedule.

Staff and EarthTech continue to work on critical on-going issues, as well as establish a definitive project deadline. Bert Francis will provide an update on to the results of these discussions as well as any actions that may require Board approval.

1. Briefing on request for authorization:
    a. Ratification of Change Order #79, a unilateral change order for structural modification to the building "B" roof in the amount of $235,071.
    b. Authorization to execute Change Order #81, an additive change order to provide funds to repair the rusted areas on the pre-engineered metal buildings structural steel for buildings A, A expansion, C1, C2 and E in the amount of $22,711.
    c. Authorization to execute Change Order #83, an additive change order to provide funding for a "Compensable Time Extension" due to delays related to the building "B" roof structural changes in the amount of $252,559.
    d. Discussion of the associated budget.
2. Insurance of premises.
3. Possible partial certificate of occupancy except building B.
4. Change orders #66 through #82 as information items.

Audit Committee Agenda Item #3.D

To:	**LYNX Board of Directors**
From:	**Lisa Darnall** CHIEF OPERATING OFFICER **Joe Cheney** (Technical Contact) **Presented By: John Schiavonne, Transit Resource Center**
Phone:	**407.841.2279 ext: 3036**
Item Name:	**Overview of the LYNX Maintenance Audit**
Date:	**1/18/2007**



LYNX Maintenance Evaluation

Key Findings and Recommendations

Phase I

- February 2006
- Physical inspection of 25 buses and corresponding records
- Provided general assessment of LYNX's maintenance program

Phase II

- April-June 2006
- More thorough investigation and analysis
- Included examination of:
  - Maintenance documentation
  - Preventive maintenance
  - Policies and procedures
  - Facility condition and utilization
  - Training and workforce adequacy
  - Workforce morale
  - Procurement and materials management
  - Warranty
  - Comparing Lynx to other agencies
  - Internal performance monitoring program
- Report submitted to LYNX

Key Findings - Advantages

- Staff extremely cooperative and willing to improve
  - Maintenance manager extremely capable and motivated
  - Trainers are well qualified and dedicated
  - Mechanics willing to help improve operation
- Buses are clean and present well to public despite older age
- Scheduled inspections are done on time (exceptional performance)
- Random fluid sampling (75) all came back normal
  - Indicates major components are well maintained

Key Findings – Disadvantages

- High number of total defects (10 per bus on average)
  - Range at other agencies: 2 to 30 per bus
- High number of safety defects (3 per bus on average)
  - Range at other agencies: 0 to 3 per bus
- 3,000-mile bus inspection program is too frequent
  - 6,000-mile frequency is industry norm
- Mechanics note defects during inspections
  - Too many get deferred; lack of time available for repair
- Rapidly expanding service area and high average daily bus mileage exceeds existing maintenance resources
  - Buses accumulate mileage very quickly
  - Accelerates the need for service & repairs

Disadvantages (cont.)

- Agency has difficulty maintaining staffing levels
  - Mechanics are difficult to find in central Florida
  - Becoming an industry-wide concern
- Maintenance manager pulled in too many directions
  - Limited support staff
- Training personnel also pulled in too many directions
  - Limited time to conduct needed training
- Overall morale suffers
  - Maintenance perceived as NOT being critical to agency
  - Reflects general society trend

Management Misconceptions towards Maintenance

- Vehicles have become “Maintenance Free”
- Electronics simplify diagnostics – laptop identifies faulty part
- The Truth is:
  - Buses have become increasingly complex and need more skills & attention
    - Virtually all bus systems are now run by onboard computers
    - Emission regulations & alternative propulsion adds to complexity
    - Transit environment is extremely harsh on electronics
    - Skills can’t keep pace with evolving technology
  - Self-diagnostics perfected on cars, not buses
    - Bus builders lack resources of GM, Ford, Toyota, etc.
    - Low bid discourages investments in onboard diagnostics

Conflict/Result

- Conflict: Buses need more time & skills to maintain and repair
  - But LYNX is constantly in short of needed mechanics
- Result: Time can NOT be spared to repair defects
  - And time can NOT be spared for training

Primary Recommendations

- Move to 6,000-mile inspection program (already being done)
- Initiate program to repair safety defects
  - Make list of defects that would keep buses from re-entering service
  - Ensure that these defects get top priority
- Increase staff levels
  - Agency is short by about 10 mechanics
  - Also recommend 3 new positions:
    - Assistant maintenance manager
      - Too many responsibilities for one manager to handle
    - MIS person dedicated exclusively to maintenance
    - Data entry clerk to relieve supervisors of clerical duties

Primary Recommendations

- Increase mechanic recruiting efforts
  - Emphasize benefit package, warm climate & new facility
- Improve management awareness and appreciation of maintenance
  - Public perception of LYNX is tied to success or failure of maintenance
  - Unique conditions at LYNX place increased demands on maintenance:
    - Rapidly expanding service area
    - Results in large number of bus miles traveled annually
    - Escalating complexity of bus technology
    - Difficulty in finding qualified technicians locally
  - Comparison to five similar agencies using FTA data shows that:
    - LYNX is at the top of the list when it comes to accumulated annual bus miles traveled
    - But lags the others with regard to expenditure of labor and maintenance expenses

Secondary Recommendations

- Improve warranty program
  - Monies owed agency not being collected
- Improve bus historical records
  - Provide technicians with needed information
- Give trainers time they need to focus on training
  - Especially electrical/electronics training
- Improve the process of accounting for road calls
  - Critical performance indicator
- Other recommendations listed in the report

Bottom Line

- Maintenance department can improve the way it operates
- Management can offer maintenance more support

Audit Committee Information Item #.I

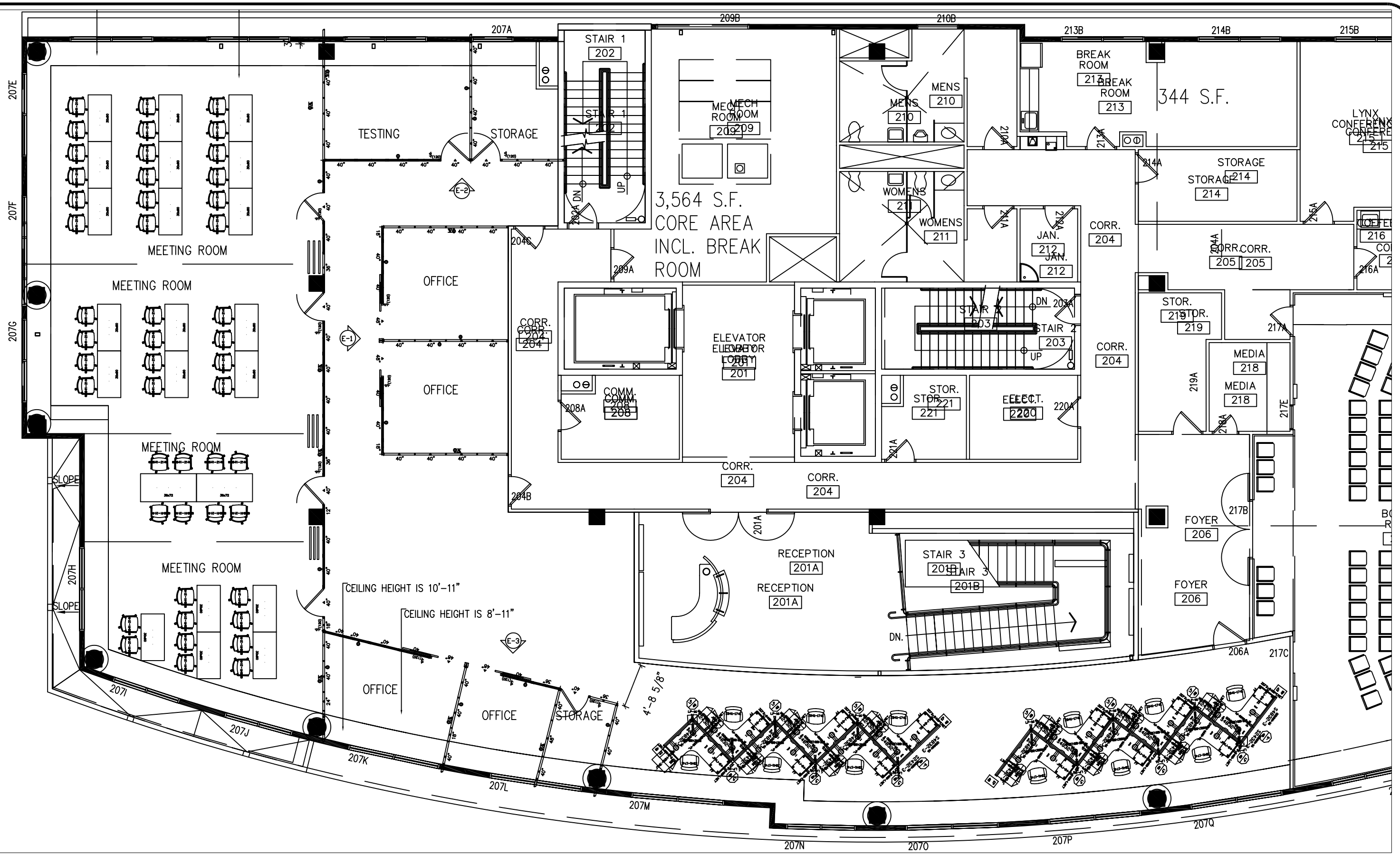
To:	**LYNX Board of Directors**
From:	**Linda Watson** CHIEF EXECUTIVE OFFICER **Edward Johnson** (Technical Contact)
Phone:	**407.841.2279 ext: 3017**
Item Name:	**Update on the Orange County Clerk of Courts second floor lease agreement**
Date:	**1/18/2007**

At the October 2006 Board of Directors meeting, LYNX' governing board authorized staff to negotiate with the Orange County Clerk of Courts (Clerk of Courts) to execute a five year lease agreement with a one 5-year extension for nearly 5, 800 square feet of office space on the second floor of the LYNX Central Station (LCS). Since then, through the assistance of legal counsel and our real estate consultant (First Capital Property Group), the Clerk of Courts has tentatively agreed to the language in the draft lease agreement.

At the October 2006 Board meeting, it was explained that LYNX would be required to build out the second floor to specifications desired by the Clerk of Courts. Based on the conceptual drawings, the estimated cost to make the tenant improvements would be approximately $87,000. Since then, there has been a reconfiguration of the layout to provide better functionality of the work space (see attached). It is anticipated that the reconfiguration will not add any costs to the original estimates. We anticipate receiving a final quote on the build out later this month. Additionally, we learned that more security measures need to be installed on the second floor to safeguard the access and entry to the leased space. The additional security features will include three additional cameras monitoring access points, three proximity card access readers and back-office panels to control the system. The cost for the additional security features is less than $11,500, with the bulk of the expense being associated with the back office control panel.

The next phase of the lease agreement negotiations will include meeting with the Information Technology Section of the Clerk of Courts to finalize the systems infrastructure requirements. Now that the final drawings have been delivered, LYNX' Information Technology Division will meet with the Clerk of Courts and provide the cabling and coordination for telephone and data connections.

Upon finalizing the agreement, it is expected that an 8-week lead time will be required for the furniture and wall systems to be delivered and installed. With that understanding, the earliest the Clerk of Courts can move into the LCS would be March 2007.



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FBI Florida Business Interiors 940 Williston Park Point Lake Mary, Florida 32746 Phone (407) 805-9911 Fax (407) 805-9977	Lynx - AI Walls	Street Name Suite # City, State Zip	APPROVED BY:
	FBI CONTACT: Suzanne Tillman	DATE: December 14, 2006	DATE:
	DWG FILE:	SCALE: N.T.S.	

This drawing is not a construction document. It is to be used only for space planning, specifying, and installing furniture. This drawing is the property of Florida Business Interiors, Inc. and is subject to return upon request. This drawing cannot be made public unless authorized by Florida Business Interiors, Inc.

Audit Committee Information Item #.II

To:	**LYNX Board of Directors**
From:	**Linda Watson** CHIEF EXECUTIVE OFFICER **Edward Johnson** (Technical Contact)
Phone:	**407.841.2279 ext: 3017**
Item Name:	**LYNX Board of Directors' 12-month rolling calendar of agenda items**
Date:	**1/18/2007**

LYNX Board of Directors
12-month Rolling Calendar of Agenda Items
JANUARY 2007

February 2007

- Authorization to award contract for Tire Services
- Authorization to amend Administrative Rule #4 – Procurement
- Authorization to amend Administrative Rule #7
- Authorization to award contract for CAD/AVL
- Authorization to issue an IFB for the Manufacturing of Shelters
- Notice of Fuel Contract Awards
- Authorization to award contract to Pride for Printing of Time Tables
- Authorization to amend FY2007 Operating and Capital Budget

March 2007

- Authorization to award contract for Banking Services
- Authorization to award contract for CAD/AVL
- Authorization to award contract for LCS concessionaire buildout/bathroom renovations

April 2007

- Preliminary approval of the annual operating and capital budget for submission to the funding partners
- Authorization to submit FDOT Service Development Grant Applications
- Authorization to award contract for shelter Manufacturer
- Authorization to execute final option year for security guard services
- Authorization to award contract for Leasing of buses

May 2007
- Authorization to award contract for commuter vans using State of Florida Contract
- Work session on Transit Development Plan (TDP) Major Update for FY08-12
- Authorization to award contract for the construction of Osceola square Mall Superstop

June 2007
- Authorization to dispose of fixed assets
- Adoption of TDP Major Update for FY08-12
- Authorization to purchase Gillig Buses

July 2007
- Authorization to award contract for general printing services

August 2007
- Adoption of the annual operating and capital budget

September 2007
- Authorization to execute local funding agreements
- Annual Board of Directors' selection of officers
- Adoption of Title VI Program

October 2007
- Acceptance of the Chief Executive Officer (CEO) annual appraisal

December 2007
- Authorization to Purchase Gillig Buses