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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DEPARTMENT OF TRANSPORTATION,)
)
Appellant,)
)
v.) Case No. 2D12-1097
)
CSX TRANSPORTATION, INC.,)
)
Appellee.)
)

Opinion filed December 11, 2013.

Appeal from the Circuit Court for Pasco
County; Linda Babb, Judge.

Marc A. Peoples, Assistant General
Counsel, Department of Transportation,
Tallahassee, for Appellant.

Jose A. Gutierrez, Daniel J. Fleming,
Payone V. Puksahome of Melkus, Fleming
& Gutierrez, P.L., Tampa, for Appellee.

ALTENBERND, Judge.

The Department of Transportation (DOT) appeals a judgment that awarded $502,462.22 as indemnity to CSX Transportation. The judgment indemnified CSX for the amount of a settlement and related attorneys' fees paid by CSX to resolve a negligence action arising from an accident at a railroad crossing. DOT maintains that the indemnity clause, which was the sole consideration for a crossing agreement

between DOT and CSX, is invalid because DOT's predecessor had no legal authority to enter into the agreement. In the alternative, DOT argues that the collectible portion of any judgment entered for breach of the crossing agreement must be limited to $200,000, the amount authorized by section 768.28(5), Florida Statutes (2002). It maintains that CSX must seek any additional payment of the judgment from the Florida Legislature. We conclude that the agreement is enforceable and affirm the judgment in its entirety. At the end of this opinion, we certify these issues to the supreme court as questions of great public importance.

I. THE EARLY HISTORY OF THIS INDEMNITY AGREEMENT

In 1936, during the midst of the Great Depression, the State of Florida wanted to build a road in Pasco County on the abandoned right-of-way of an old logging railway that had served Fivay, Florida. Fivay had been a very prosperous logging community around 1910, but it was little more than a ghost town by the mid-1930s.[1] To build this road, the State Road Department needed to cross an active railroad line operated by the Seaboard Air Line Railway Company.

During the depression, the railroad was in receivership. Accordingly, the State Road Department negotiated a crossing agreement with the receiver. We have attached a replica of that agreement as Appendix A to this opinion. The agreement essentially permitted the State Road Department, as a licensee, to build and maintain a road that crossed the railroad tracks. The State did not buy or lease the land. The sole consideration for this license was an indemnity agreement in paragraph nine of the

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[1] See History of Fivay, Pasco County, Florida (Sept. 21, 2012) http://www.fivay.org/fivay.html.

license by which the State Road Department agreed to protect the railroad from any loss related to the State Road Department's activities at the crossing.

The State Road Department built this rural road, State Road 210, and the crossing agreement undoubtedly was filed away in the filing cabinets of one or both parties. One imagines that on a daily basis a few cars and a few horse-drawn vehicles crossed the railroad tracks in 1939 when the population of Pasco County was less than 14,000.[2]

II. THE ACCIDENT

On October, 29, 2002, a husband and wife were riding eastbound in their car on State Road 52 near Giddens Road. A truck, heading westbound, went over some railroad tracks owned by CSX. The crossing was allegedly in poor maintenance, and a trailer behind the truck disconnected. The trailer and its load of lumber struck the couple's car, killing the husband and badly injuring the wife. State Road 52 is the successor number for State Road 210. The railroad crossing is the subject of the 1936 crossing agreement; CSX is the successor in interest to the Seaboard Air Line Railway Company, and DOT is the successor to the State Road Department. By 2002, this road was a major highway, connecting I-75 on the east to the newly constructed Suncoast Parkway on the west.

The wife, on her own behalf and as personal representative of the estate of her husband, filed suit against CSX in 2004. The truck driver who dropped the trailer was apparently never identified and was not a party to the lawsuit. CSX brought DOT

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[2]See Richard L. Forstall, Florida Population of Counties by Decennial Census: 1900 to 1990, U.S. Census Bureau, (Mar. 27, 1995) http://www.census.gov/population/cencounts/fl190090.txt.

into this action as a third-party defendant in 2008. Ultimately, following a settlement with the plaintiffs, the trial court entered this judgment requiring DOT to indemnify CSX in the amount of $125,000 for the settlement of this lawsuit and $377,462.22 for the expenses arising from its failure to defend the suit.

III. THE ENFORCEABILITY OF THE CROSSING AGREEMENT

The only issues on appeal concern the enforceability of the crossing agreement. DOT maintains the indemnity clause is void because the State Road Department never had authority to enter into an indemnity agreement. In the alternative, it argues that any judgment under the agreement is subject to the statutory limitation under sovereign immunity. We reject both arguments.

Concerning the argument that the State Road Department had no authority to enter into this agreement, we note that the issue is similar to the issue addressed in American Home Assurance Co. v. National Railroad Passenger Corp., 908 So. 2d 459 (Fla. 2005). American Home involved a comparable agreement negotiated by a utility authority that was a municipal agency. Id. at 463. The supreme court enforced the agreement, but it emphasized that it was not resolving the issue as to a state subdivision or agency. Id. at 473-74. As for a private property owner, the supreme court enforced such an agreement more than fifty years ago. See Russell v. Martin, 88 So. 2d 315 (Fla. 1956).

In deciding this issue, we observe that DOT underestimates the ramifications of its position for itself, for Florida's sixty-seven counties, and perhaps for other state agencies and subdivisions. DOT regards the indemnity agreement as an incidental provision in this contract, assuming that its enforceability can be severed from

the overall licensing agreement. But the indemnity agreement is the sole consideration that the State has provided to CSX for this long-standing license to use its property. If we were to rule in favor of DOT and hold that the indemnity agreement has always been void, then there would never have been any consideration provided by DOT for this crossing agreement. The agreement arguably would be an "illusory contract." See Pan-Am Tobacco Corp. v. Dep't of Corr., 471 So. 2d 4, 5 (Fla. 1984). While one would hope that CSX would take no drastic steps in response to such a holding, CSX arguably would have the right to treat the entire agreement as void. Even if our ruling did not render the entire agreement void, CSX would have the right to terminate the agreement in ninety days under paragraph 10 of the agreement. At that point, CSX might be entitled to prevent any vehicles from crossing its tracks, effectively closing State Road 52.

The agreement in question is obviously a standardized agreement. Our record does not establish how many comparable agreements may be filed in dusty file cabinets of counties and other state agencies and subdivisions, but DOT admitted at oral argument that it is aware of other similar agreements. Certainly, there are hundreds of such crossings involving county roads in Florida. We know from legal research that similar indemnity agreements were common both for crossing agreements and sidetrack agreements.[3] When Florida was a sparsely populated state, such

[3] See, e.g., Sol Walker & Co. v. Seaboard Coast Line R.R., 362 So. 2d 45, 47-48 (Fla. 2d DCA 1978); Brown v. Balt. & Ohio R.R. Co., 805 F.2d 1133, 1135-36 (4th Cir. 1986); Chi. & Nw. Transp. Co. v. Negus-Sweenie, Inc., 549 F.2d 47, 48 (8th Cir. 1977); Harleysville Mut. Ins. Co. v. Reliance Nat'l Ins. Co., 256 F. Supp. 2d 413, 415-16 (M.D.N.C. 2002); S. Pac. Co. v. Gila River Ranch, Inc., 460 P.2d 1 (Ariz. 1969); Langemo v. Mont. Rail Link, Inc., 38 P.3d 782, 784, 787 (Mont. 2001); Erie R.R. v.

agreements were a low-cost arrangement to permit economic development near railroad tracks. The railroad undoubtedly hoped that the development would eventually foster greater use of its services by persons not in privity under the crossing or sidetrack agreements. If we were to hold that such agreements with the state were void from inception, the immediate impact on Florida is impossible to calculate from this record, but it could be far greater than the judgment on appeal. Thus, we do not deny that there are practical reasons for this court to enforce this long-standing agreement.

DOT characterizes this issue as a challenge to the State Road Department's authority to enter into an indemnity contract in 1936. We conclude that the issue is somewhat more complex. This is not a case in which a contractor was building a road and, over and above a monetary payment for the construction project, the state agreed to indemnify the road builder for certain risks. Nor is this an indemnity agreement that is incidental to a primary contract under which the state was receiving grant funds. Cf. Op. Att'y Gen. Fla. 78-20 (1978). The indemnity agreement applies to losses arising only in connection with the DOT's obligations to perform under this agreement; DOT is not indemnifying CSX for negligent acts of CSX or others.

DOT is actually challenging a contract by which it obtained right-of-way. The State Road Department wanted to enter into the contracts necessary to build a road. There is no question that the State Road Department had the authority to build a road. It also had the authority to obtain the right-of-way to build the road. Thus, DOT must agree that the State Road Department could have purchased the land or paid an annual fee for its use. In all probability it could have taken the land by eminent domain.

Buffalo & Lackawanna Traction Co., 221 N.Y.S. 680, 681 (N.Y. App. Div. 1927); Sommerville v. Pa. R.R., 155 S.E.2d 865, 868 (W. Va. 1967).

Rather than bind the state to a lump sum payment at the inception of this contract or to annual payments throughout the term of this agreement, the State Road Department obtained the right-of-way through a license that apparently was free of charge for its first sixty-five years.

This is also a contract creating continuing obligations. The parties in 1936 did not enter into a contract that was fully executed in a year or two. DOT has had an obligation to maintain, repair, and reconstruct its road on this property at all times, and CSX has had an obligation to give DOT access to the property for those purposes.[4] Never, until CSX asked DOT to pay the consideration for this ongoing agreement, did DOT claim it was not bound by this contract or that the railroad was not entitled to the benefits of this agreement.

The nature of the risk involved in this contract is also noteworthy. When a railroad crossing is dangerously rough, it is either the result of a failure to maintain the tracks or a failure to maintain the road, or a combination of both. The railroad has no claim to any immunity or to any cap upon its liability. It cannot bind members of the public to its agreement with DOT as to which entity will maintain the property that is owned by the railroad and licensed to the state. It knows, as this case demonstrates, that it will be the defendant of first choice when the other option is a governmental entity. In the absence of an indemnity clause as the consideration for this crossing

[4]Section 335.141(2)(c), Florida Statutes (2002), discusses maintenance of such crossings. It places the duty to maintain on the railroad, "unless the maintenance has been provided for in another manner by contractual agreement entered into prior to October 1, 1982." Thus, the statute in effect at the time that DOT had a duty to maintain this crossing to prevent this accident seems to have expressly recognized that a contract like the 1936 contract would control.

agreement, the railroad would have little choice but to charge a state agency an annual fee sufficient to insure the risk fully.

Thus, the issue in this case is whether DOT, as the successor to the State Road Department, is bound by the written agreement under which the railroad has fully performed for sixty-five years and has provided DOT with a right-of-way in exchange only for an agreement that DOT indemnify the railroad for all loss "arising or growing out of the construction, condition, maintenance, alteration or removal of the highway."[5] Despite the reservations concerning indemnification agreements discussed in American Home, we conclude that the crossing agreement is enforceable in this context and that DOT is bound by this agreement. DOT and its predecessor had the authority to enter into contracts necessary to build and maintain this road, and the use of a limited indemnity agreement as the sole consideration for the contract to obtain right-of-way did not render it unenforceable when a condition requiring indemnity finally occurred.

We recognize that Florida's Constitution states that "[n]o money shall be drawn from the treasury except in pursuance of appropriation made by law." Art. VII, § 1(c), Fla. Const. We do not read this provision to prevent the trial court from having the power to enter a monetary judgment requiring DOT to indemnify CSX for the settlement and defense of the underlying negligence action. A court may not issue an execution to permit state property to be seized to pay such a judgment. At most, by writ of mandamus, a court might require an agency to take the steps necessary to pay the

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[5]The dissent is correct that this explanation relies on a concept of estoppel. We simply conclude that the case law permits the application of estoppel in this limited context.

judgment in an orderly fashion. See Florida Dep't. of Env't Prot. v. ContractPoint Fla. Parks, LLC, 986 So. 2d 1260, 1271-72 (Fla. 2008).

Concerning the argument that this judgment must be limited to the state's liability under section 768.28(5), we conclude that DOT's liability in 2002 to CSX was based on an express written contract. See Pan-Am Tobacco Corp., 471 So. 2d at 5-6. The statutes limiting liability in cases of the legislature's partial waiver of sovereign immunity apply only to judgments recovering damages for tort, not to judgments recovering damages under legal theories that may be analogous to torts. See Provident Mgmt. Corp. v. City of Treasure Island, 796 So. 2d 481, 486-87 (Fla. 2001).[6]

Because we recognize that this decision could apply to other similar long-standing crossing and sidetrack agreements throughout Florida between railroads and counties or other state agencies and subdivisions and because questions concerning the enforceability of these agreements could affect commerce, we certify the following questions to the supreme court as questions of great public importance:

> IS DOT BOUND BY A RAILROAD CROSSING AGREEMENT UNDER WHICH IT RECEIVED A REVOCABLE LICENSE TO USE LAND AS RIGHT-OF-WAY IF THE SOLE CONSIDERATION FOR THE LICENSE WAS AN AGREEMENT TO INDEMNIFY THE RAILROAD FOR LOSSES ARISING OUT OF DOT'S ACTIVITY ON THE LAND?
>
> IF SO, IS DOT'S LIABILITY UNDER THE CROSSING AGREEMENT LIMITED BY SECTION 768.28(5), FLORIDA STATUTES (2002)?

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[6]As a practical matter, the portion of this judgment that equates to the plaintiff's claim in the initial lawsuit is within the statutory limitation provided by section 768.28(5). It is the reimbursement of attorneys' fees and costs for failure to defend this action that is the major portion of this judgment.

Affirmed.

CRENSHAW, J., Concurs.
WALLACE, J., Dissents with opinion.

APPENDIX A

[The actual agreement was produced on a typewriter. The copies in the record are not high quality. This is a replica.]

The Crossing Agreement

GS 82166
ssh
3-23-36

THIS AGREEMENT, made this 29th day of May, 1936, between L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, hereinafter designated "Receivers"; and State Road Department of Florida, a body corporate under the laws of the State of Florida, hereinafter designated "Licensee";

WITNESSETH THAT WHEREAS, the Licensee desires to construct that certain road crossing over the tracks and property of the Receivers at a point 1305 feet, more or less, northwardly from Mile Post 817, as measured front Richmond, Virginia, said crossing being located in or near Fivay, Pasco County, Florida, as shown in RED on blue print 34707, attached hereto as a part hereof;

NOW, THEREFORE, for and in consideration of the premises and mutual advantages accruing to the parties hereto, it is covenanted and agreed by and between them as follows:

1. The Receivers hereby grant unto the Licensees the right and privilege, terminable, and with the limitations, as hereinafter expressed, to locate and continue over and upon said right of way and property, at grade, the said highway.

2. The Licensee will construct and maintain the said highway upon said right of way and property, at such times and in such manner as not to impede, interfere with, hinder or delay the passage of trains, engines and cars of the Receivers.

3. The Licensee shall bear any and all expense of every character incident to the construction, reconstruction, repair, alteration or maintenance of said highway upon said right of way and property, no assessment, levy or expenditure to be made against or required of the Receivers on account of any of the aforesaid matters, or on account of paving, drainage, fences or other improvements in connection therewith; nor shall the Receivers be required to bear the cost of any watchman or gates installed on account of the said highway crossing.

4. The right and privilege herein granted so to locate and construct said highway over and upon said right of way and property is limited to the use of said right of way and property for public highway purposes only, and should said right of way and property, or any part thereof, so occupied by said highway, at any time cease to be used for public highway purposes, or in the event the Licensee shall default in any of its undertakings herein contained, then the Receivers may at any time thereafter, at their option, cancel this agreement by written notification to the Licensee, and in the event of such cancellation all the rights and privileges in and by this agreement to the Licensee granted, and all the estate, right, title and interest of the Licensee, the State of Florida, or the public, in and to the aforesaid right of way and property, shall thereupon cease, determine and revert to the Receivers. It is further understood and agreed that should said right of way and property, or any part thereof, at any time hereafter be needed by the Receivers for railroad purposes, then, upon the expiration of ninety days notice in writing from the Receivers to the Licensee, the said road or highway shall be moved or narrowed by the Licensee to such extent as, in the opinion of the Receivers, may be necessary for the purpose aforesaid. And in any of such events, or in the event of termination of this agreement in any other manner, the Licensee hereby agrees to restore, at its sole cost, said right of way and property so occupied by said highway to approximately the condition thereof prior to the location thereon of said highway.

5. Should the said highway as so located upon said right of way and property at any time, in the opinion of the Chief Engineer or other proper officer of the Receivers, interfere with or retard the drainage of said right of way and property, the Licensee shall upon notice so to do from the Receivers, at its (the Licensee's) sole cost, remedy such condition of said drainage in manner satisfactory to said Chief Engineer or other proper officer.

6. The Licensee hereby agrees that any industrial tracks, turnouts, or other tracks, which the Receivers shall construct, may, if the Receivers so desire, be constructed across the said highway, the cost of any highway repair or restoration work made necessary as a result of any such track crossing to be borne by the Licensee. It is expressly stipulated that the Receivers will not be required to bear the cost of any watchmen, gates, or any drainage facilities of any character whatever installed on account of any such track crossings which have been or may hereafter he made.

7. It is expressly stipulated that the Licensee shall have no right hereunder to construct, maintain and/or operate, nor to permit or authorize others to construct, maintain and/or operate any electric, telephone or other wires or poles, or any gas, water, sewer or other pipes, mains or conduits, or any street car tracks or other facilities of any kind, upon, over or beneath said highway as permitted to be constructed hereunder.

8. Should any sign posts, or signs or fencing, in the opinion of the Receivers, be necessary at or in the vicinity of the said highway or be required by the Licensee, or other public authority, for the purpose of safeguarding traffic, the Licensee shall, upon

being notified so to do by the Receivers, provide and install the said sign posts or signs or fencing.

9. The Licensee will indemnify and save harmless Receivers from and against all loss, damage or expense arising or growing out of the construction, condition, maintenance, alteration or removal of the highway hereinabove described.

10. It is expressly agreed that in the event the Licensee shall, without the written consent of the Receivers first obtained, make any change or alteration in the location of said above described road or highway, and/or construct or extend any other highway upon, over or across the right of way or other property, and/or within one hundred feet of the center line of any railroad track, of the Receivers, then in all or any of such cases the Receivers shall have the right, if they so elect, to terminate this agreement and all the estate, right, title and interest of the Licensee and of the public hereunder upon ninety days prior written notice of the intention so to do. And upon such termination by the Receivers all of said estate, right, title and interest shall cease, determine and revert to the Receivers.

11. It is understood and agreed that the rights and privileges herein set out are granted only to the extent of the Receivers' right, title and interest in the land to be entered upon and used by the Licensee.

12. The provisions of this contract shall be binding upon and shall inure to the benefit of the Receivers of Seaboard Air Line Railway company (as Receivers, but not individually) [a]nd their successors. Regardless of anything in this contract contained, the continuance of this contract after the said Receivers or their successors cease to control and operate the line of railroad on or along which the property covered by this contract is located shall depend upon such orders as may be entered by the District Court of the United States for the Eastern District of Virginia.

13. Nothing herein or hereby, nor any act of said Receivers nor of the Licensee shall operate as an adoption or affirmance by the said Receivers of the lease between Tampa Northern Railroad Company and Seaboard Air Line Railway Company dated January 5, 1926, and/or agreement as supplemental thereto dated October 1, 1928, or as a waiver of their right to reject or disaffirm said lease and/or agreement supplemental thereto, the Licensee hereby agreeing that the said Receivers reserve in all respects their right hereafter to adopt or to disaffirm and reject said lease and/or agreement supplemental thereto.

IN TESTIMONY WHEREOF, the parties have caused these presents to be duly signed and sealed, the day and year first above written.

[the signatures have not been replicated]

WALLACE, Judge, Dissenting.

I respectfully dissent. DOT's predecessor, the State Road Department, did not have specific statutory authority to agree to the indemnity clause in the crossing agreement with the railroad.[7] For this reason, I conclude that the indemnity clause is void and unenforceable.

I. INTRODUCTION

The majority states that "[t]he only issues on appeal concern the enforceability of the crossing agreement." (maj. op. at § III) I disagree. In my view, the issues on appeal concern the enforceability of the indemnity clause contained in the crossing agreement. The parties agree that DOT has the authority generally to enter into crossing agreements. We are not called upon to address the larger issue of the enforceability of the crossing agreement as a whole.

The majority gives short shrift to DOT's argument that the indemnity clause is void because it lacked the authority to enter into an agreement to indemnify the railroad. In the second section of this dissent, I will restate DOT's argument on this issue. Next, I will discuss my disagreements with the majority's analysis. Before concluding, I will outline a brief proposal for a legislative solution to the problem illustrated by the facts of this case.

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[7]In this dissent, I will refer to both the State Road Department and its successor agency, the Department of Transportation, as "DOT." I will refer to CSX Transportation, Inc., and its predecessors in interest as "CSX" or "the railroad."

II. DOT LACKED THE AUTHORITY TO AGREE TO INDEMNIFY THE RAILROAD

DOT is an agency of the state.[8] § 20.23, Fla. Stat. (2002). As a state agency, the DOT is a creature of statute and has only such powers as may be conferred on it by statute. See Fla. Elections Comm'n v. Davis, 44 So. 3d 1211, 1215 (Fla. 1st DCA 2010) (quoting State ex rel. Greenberg v. State Bd. of Dentistry, 297 So. 2d 628, 634 (Fla. 1st DCA 1974)). The long-established rule is that "[s]tate agencies may exercise only those powers which are expressly granted by statute or which are necessarily implied from such express powers." Op. Att'y Gen. Fla. 78-20 (1978) (citing State v. Atl. Coast Line R.R., 47 So. 969, 978-79 (Fla. 1908)).

Florida's constitution and statutes impose strict limits on the expenditures of public funds by state agencies. In accordance with article VII, section 1(c) of the Florida Constitution, "[n]o money shall be drawn from the treasury except in pursuance of appropriation made by law." A legislative enactment reinforces this constitutional command in no uncertain terms:

> No agency or branch of state government shall contract to spend, or enter into any agreement to spend, any moneys in excess of the amount appropriated to such agency or branch unless specifically authorized by law, and any contract or agreement in violation of this chapter shall be null and void.

§ 216.311(1), Fla. Stat. (2002).

DOT currently has specific statutory authority to enter into many different kinds of contracts. See § 337.02, Fla. Stat. (2013) (contracts to purchase commodities such as materials, machinery, tools, equipment, and supplies); § 337.026(2) (contracts

[8]The material in this section of my dissent consists largely of a condensed version of the argument made by DOT in point one of its initial brief.

to purchase construction aggregate materials); § 337.03(1) (contracts to purchase surplus property from the federal government); § 337.107 (contracts for right-of-way services); § 337.1075 (contracts for transportation-related planning services); § 337.11(1) (contracts for road construction and maintenance); § 337.111 (contracts for the installation of monuments and memorials to military veterans at highway rest areas). However, the current statutes do not—and the statutes in effect in 1936 did not—authorize the DOT to enter into an indemnity agreement of the type at issue in this case.

Notably, section 337.108(2) provides that the DOT "may agree to hold harmless and indemnify a contractor for damages when the contractor discovers or encounters hazardous materials or pollutants during the performance of services for the department. . . ." The legislature enacted section 337.108 in 1992. Ch. 92-152, § 125, at 1607-08, Laws of Fla. The DOT informs us that section 337.108 "is the only statute the DOT is aware of that authorizes the DOT to agree to indemnify or otherwise bind the state in that regard."[9] Undeniably, section 337.108(2) is not applicable to the indemnity clause under review.

The enactment of section 337.108 demonstrates that the legislature knows how to authorize DOT to agree to indemnify a contract party. Under the doctrine of inclusio unius est exclusio alterius, the legislature's authorization of an indemnity agreement in one very specific instance regarding hazardous materials and pollutants supports the conclusion that the DOT is prohibited from entering into indemnification agreements in all other instances. <u>See</u> <u>Indus. Fire & Cas. Ins. Co. v. Kwechin</u>, 447 So.

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[9]CSX does not dispute DOT's representation that section 337.108 is the only statute that authorizes the DOT to enter into a contract for an indemnity.

2d 1337, 1339 (Fla. 1983); Miulli v. Fla. High Sch. Athletic Ass'n, Inc., 998 So. 2d 1155, 1157 (Fla. 2d DCA 2008); Davis, 44 So. 3d at 1215.

Florida's Attorney General has specifically addressed the question whether a state agency such as the DOT may agree to an indemnity clause contained in a contract to which it was otherwise authorized to enter. In 1978, Palm Beach County requested an opinion from the Attorney General on the following question: "Are there any legal constraints which would limit the power of a state agency to enter into an indemnification agreement?" Op. Att'y Gen. Fla. 78-20 (1978). The Attorney General's response was unequivocal:

> There being no express statutory power here, the state agencies acting as your county's subgrantees are without authority to execute indemnification contracts of the type you have mentioned or to anywise bind the state in that regard. If any of these state agencies did enter into such an indemnification contract, any judgment in a suit thereupon would be of no legal force or effect, not merely because consent thereto has not been duly given nor sovereign immunity duly waived as to such a suit, but also because a claim against the state cannot be paid by a state agency unless a statute exists empowering it to pay such claims, and the Legislature has appropriated funds for such purpose, and the claim has been audited and approved as provided by law. Florida Development Commission v. Dickinson, 229 So. 2d 6, 8 ([Fla. 1st DCA] 1969), cert. denied, 237 So. 2d 530 (Fla. 1970); AGO 071-28; accord Attorney General Opinions 077-12 and 076-46.

Id. The Attorney General concluded his opinion as follows:

> [C]onstitutional and legal constraints limiting the power of a state agency to enter into an indemnification agreement imposing contractual liability upon the state do exist, and that, at least with regard to indemnification agreements of the type you have mentioned, these constraints render nugatory and unenforceable as against the state or its agencies any such agreement entered into by a state agency.

Id.

Under this reasoning, the absence of any specific statutory authorization for the indemnity clause in the crossing agreement compels the conclusion that the clause has "no legal force or effect" and is "nugatory and unenforceable" against the DOT. Id.; see also § 216.311(1); Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 475 (Fla. 2005) ("Florida's Constitution expressly limits the state's ability to expend funds and enter contracts by requiring specific statutory authority.") "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." State v. Family Bank of Hallandale, 623 So. 2d 474, 478 (Fla. 1993) (citing Lowry v. Parole & Prob. Comm'n, 473 So. 2d 1248, 1249 (Fla. 1985), and Beverly v. Div. of Beverage of Dep't of Bus. Reg., 282 So. 2d 657, 660 (Fla. 1st DCA 1973)).

CSX concedes that DOT must have specific statutory authority to enter into contracts. It argues that DOT had the necessary authority to enter into a crossing agreement such as the one at issue in this case. However, as DOT points out, it "must have specific authority to agree to indemnify another, and it makes no difference if the agreement stands alone or is part of a larger contract whose overall purpose is authorized." An agency cannot evade the prohibition against incurring unauthorized obligations simply by including a prohibited agreement in another contract. It was just such a proposed arrangement which prompted Palm Beach County to make the inquiry that resulted in the issuance of Attorney General Opinion 78-20.

Finally, as the majority notes, the supreme court's decision in the American Home case does not address the question that we are called upon to decide

here. In the American Home case, the entity that had negotiated a comparable agreement containing an indemnity clause was a municipal agency. 908 So. 2d at 463-64. The supreme court did not address the question of whether an indemnity agreement was enforceable against a state agency such as DOT. Id. at 473-74.

In closing, DOT reminds us that the state's waiver of sovereign immunity for contractual obligations is limited "to suits on express, written contracts into which the state agency has the statutory authority to enter." Pan-Am Tobacco Corp. v. Dep't of Corr., 471 So. 2d 4, 6 (Fla. 1984). The indemnity clause at issue here does not qualify as such a contract because DOT lacked the statutory authority to enter into it.

III. CONSIDERATION OF THE MAJORITY'S ANALYSIS

The majority does not address the issue of DOT's authority to enter into an agreement to indemnify CSX. Instead, the majority reframes the issue before us as one of equitable estoppel. I have several disagreements with the majority's estoppel analysis.

First, the majority repeatedly states that the indemnity clause was "the sole consideration" for the crossing agreement. I think that this is incorrect. The agreement gave the DOT the right to locate a highway crossing over the railroad's track at the designated location near Fivay. However, DOT also assumed the liability for the cost of the construction, repair, and maintenance of the crossing, plus the responsibility for safety measures such as "the cost of any watchman or gates." By assuming the obligation to construct the crossing and to pay for its maintenance and continuing costs,

DOT bound itself to do something that it was not otherwise obligated to do.[10] This was a sufficient consideration for the railroad's promise. See Mangus v. Present, 135 So. 2d 417, 418 (Fla. 1961); Lake Sarasota, Inc. v. Pan Am. Sur. Co., 140 So. 2d 139, 142 (Fla. 2d DCA 1962); Fontainbleau Hotel Corp. v. Crossman, 323 F. 2d 937, 942 (5th Cir. 1963) (applying Florida law).

Second, the majority's "parade of horribles" argument is both unsupported by the record and addresses issues not properly before us. The majority conjures a disquieting scenario of the dire consequences it suggests may occur if this court declines to affirm the trial court's decision to enforce the indemnity clause contained in the crossing agreement. According to the majority, a reversal of the judgment might prompt CSX to cancel not only the crossing agreement under review but also its other crossing agreements with DOT. The result, the majority warns, may be the closing of many important roads around the state.

Based on my review of the record, I think that this court lacks sufficient information to predict the impact of a reversal of the final judgment in this case. DOT certainly has many capable lawyers. I think that it is fair to assume that some of these lawyers have carefully considered the state-wide implications of DOT's decision to contest CSX's claim for indemnity in this case. More importantly, the question of CSX's right to treat the crossing agreement under review and others like it as void or to cancel such agreements is not before us. Accordingly, we ought not to address the question of

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[10]Absent the crossing agreement, CSX would be obligated to maintain the crossing under current law. Section 335.141(2)(c), Florida Statutes (2013), provides, in pertinent part, as follows: "Any public railroad crossing opened prior to July 1, 1972, shall be maintained by the railroad company at its own expense, unless the maintenance has been provided for in another manner by contractual agreement entered into prior to October 1, 1982."

what CSX could or could not do in the event of a decision holding the indemnity clause to be void and unenforceable. See Lightsee v. First Nat'l Bank of Melbourne, 132 So. 2d 776, 778 (Fla. 2d DCA 1961) ("We are not authorized to pass upon issues other than those properly presented on appeal.").

Third, the majority bases its theory for the affirmance of the judgment entirely on an estoppel against DOT, as if DOT were just an ordinary litigant. This approach ignores DOT's status as a state agency. In order for the state or its agencies to be estopped, the circumstances must be exceptional. Greenhut Constr. Co., Inc. v. Henry A. Knott, Inc., 247 So. 2d 517, 524 (Fla. 1st DCA 1971). In addition, the circumstances "must include some positive act on the part of some officer of the state upon which the aggrieved party had a right to rely and did rely to its detriment." Id. The state may not be estopped by the unauthorized acts or representations of its officers. Id. "[I]t is fundamental that the doctrine of estoppel will not apply to 'transactions that are forbidden by statute or that are contrary to public policy.' " Reedy Creek Improv. Dist. v. State, Dep't of Envtl. Reg., 486 So. 2d 642, 647 (Fla. 1st DCA 1986) (quoting Montsdoca v. Highlands Bank & Trust Co., 95 So. 666, 668 (Fla. 1923)).

Here, the indemnity clause is not authorized by statute and is contrary to public policy. The person who executed the crossing agreement on behalf of DOT acted without authority in agreeing to the inclusion of the indemnity clause in the agreement. CSX either knew or should have known that the indemnity clause was unauthorized. Under these circumstances, there can be no estoppel against DOT with regard to the indemnity clause. See Reedy Creek, 486 So. 2d at 647; Greenhut Constr., 247 So. 2d at 524.

Finally, the majority suggests that the $502,462.22 judgment against DOT should be viewed as a deferred payment for a license "that apparently was free of charge for its first sixty-five years." (maj. op. at § III) Disregarding the effects of inflation and the time-value of money, the majority's deferred payment theory equates to an annual payment of approximately $7800 by DOT to CSX for the crossing agreement. There is no information in our record concerning the market value of DOT's license to cross CSX's railroad tracks. However, in light of DOT's other obligations for the cost of construction, repair, and maintenance of the grade crossing, $7800 seems to me like a substantial annual payment.

There is a much more serious difficulty with the majority's effort to support the affirmance of the final judgment with its deferred-payment theory. The problem is that the deferred-payment approach does not take into account the unlimited nature of DOT's exposure under the indemnity clause. A single $500,000 payment every sixty-five years might be manageable. But another claim might be made next year and the year after that. The claim in this case resulted from an accident involving a fatality. The next claim or claims could easily total five, ten, or fifteen million dollars. If DOT has an unlimited exposure under indemnity clauses similar to the one under review in multiple crossing agreements around the state, the decision to declare such indemnity clauses enforceable could pose a significant challenge to DOT's budget.

IV. A POSSIBLE LEGISLATIVE APPROACH

The courts are ill-equipped to solve the real problems posed by old crossing agreements containing indemnity clauses such as the one under review in this case. We have only two options; we can declare the indemnity clauses unenforceable,

or we can enforce them. As the majority opinion and this dissent suggest, either approach poses difficulties.

A legislative solution to the problem we face may be in order. One possible approach would be legislation validating indemnity clauses in old crossing agreements executed by DOT such as the agreement in this case. In conjunction with such retroactive authorization, DOT's liability under the indemnity clauses could be limited in amount as in section 768.28(5), Fla. Stat. (2013). Such an approach might minimize the possibility that CSX and other railroads would attempt to cancel or to rescind the crossing agreements, while limiting DOT's potential liability under such indemnity clauses.[11]

V. CONCLUSION

Because the indemnity clause in the crossing agreement is void and unenforceable, I would reverse the final judgment in favor of CSX and remand for the entry of a final judgment in favor of DOT. I agree with the majority that we should certify the questions raised by this case to the supreme court as questions of great public importance. I would rephrase the questions as follows:

> IS DOT BOUND BY AN INDEMNITY CLAUSE FOR WHICH IT HAD NO SPECIFIC STATUTORY AUTHORITY WHEN THE INDEMNITY CLAUSE IS CONTAINED IN A RAILROAD CROSSING AGREEMENT UNDER WHICH IT RECEIVED A REVOCABLE LICENSE TO USE LAND AS RIGHT-OF-WAY IN EXCHANGE FOR THE INDEMNITY CLAUSE AND OTHER CONSIDERATIONS?
>
> IF SO, IS DOT'S LIABILITY UNDER THE INDEMNITY CLAUSE LIMITED BY SECTION 768.28(5), FLORIDA STATUTES (2002)?

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[11]A discussion of the constitutionality of such legislation is beyond the scope of this dissent.