IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2017-IA-00167-SCT
(CONSOLIDATED WITH 2023-CA-1273

THE PROMENADE D'IBERVILLE, LLC **APPELLANT**
v.

JEA **APPELLEE**

On Appeal from the Circuit Court of
Harrison County, Mississippi, Second Judicial District
Civil Action No. A-2402-10-41

REPLY BRIEF OF APPELLANT THE PROMENADE D'IBERVILLE, LLC

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested, as the decision of the Harrison County Circuit Court concludes that the courts of Mississippi are required by the Constitution of the United States, as construed by the Supreme Court of the United States in *Hyatt I*, *Hyatt II* and *Hyatt III*, to refrain from exercising subject matter jurisdiction over JEA. In so doing, the Harrison County Circuit Court has construed the scope and application of those decisions in a manner that results in overruling well-settled principles of Mississippi law relating to sovereign immunity, governmental immunity and comity. The constitutional issues are complex. In the view of the undersigned, oral argument would benefit the parties and the justices of this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court of Mississippi Cases

Federal Cases

Other State Cases

ARGUMENT

The Promenade D'Iberville, LLC ("Promenade") and Jacksonville Electric Authority ("JEA") agree that this case presents important and substantial constitutional issues. But the agreement largely ends there.

A close reading of JEA's Brief of Appellee (the "JEA Brief") confirms that JEA's entire argument is premised not on what *Hyatt III*,[1] actually tells us about what the Constitution of the United States requires. Instead, JEA's argument is premised on an extension of *Hyatt III* to include not only the sovereign states themselves but also public and quasi-public entities that are not "arms of the State." After making that major and unsupported leap, JEA then asserts that the *Hyatt* cases therefore (i) limit the impact of the Supreme Court of the United States decision in *Alden v. Maine*, 527 U.S. 706 (1999), to claims asserted under federal law, and (ii) implicitly overrule this Court's decision in *Church v. Massey*, 697 So. 2d 407 (Miss. 1997).[2] The *Hyatt* cases actually have no application whatsoever in the situation presented here, and – even if they did (purely *arguendo*) – the *Hyatt* cases would not support the wholesale disregard for established precedents that JEA seeks.

I. MANY OF JEA'S FACTUAL ASSERTIONS AND CHARACTERIZATIONS ARE DISPUTED

Before delving further into the constitutional issues, it is important to point out that the JEA Brief frequently makes factual assertions and characterizations – without citation – that are

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[1] *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. 230 (2019)

[2] *See, e.g.,* JEA Brief at p. 2 ("this appeal affords this Court the needed opportunity to recognize that *Church v. Massey*, 697 So. 2d 407 (Miss. 1997) cannot serve as grounds to avoid Constitutional mandates") (emphasis added).

actually disputed. Without limiting the foregoing,[3] any implicit attempt by JEA to convey the impression that the relationship between JEA and LA Ash was attenuated is far from the mark. For example, JEA suggests that JEA merely "supplied ash to LA Ash" which "LA Ash used as a component to manufacture its soil additive product"[4] without acknowledging that JEA had also worked closely with LA Ash to plan the shipments of the material to Mississippi. Indeed, the evidence at trial will show that JEA attempted to establish a buffer of "deniability" about what LA Ash was doing with the JEA byproducts that were shipped to Mississippi, but that the reality was a coordinated plan to ship JEA's byproducts out of Florida to Mississippi (where JEA believed they would be subject to less governmental scrutiny). JEA was not a local Florida utility acting locally; JEA was a Florida utility company trying to figure out where to dispose of its deleterious byproducts with the least cost and governmental supervision – preferably to a location outside the jurisdiction of the Florida environmental authorities.

JEA's Brief also emphasizes that Promenade pursued several lawsuits against JEA in Florida pursuant to the Florida Public Records Law.[5] This similarly fails to acknowledge that this case came first in time and that those public records lawsuits were initiated to obtain and preserve important documentation about the nature and uses of JEA's byproducts that might otherwise have been lost or destroyed while JEA continued to challenge subject matter jurisdiction over

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[3] For the sake of brevity, Promenade incorporates its own statement of the facts by reference and will not attempt to recite here each of the numerous factual points on which the parties disagree. The specific points called out in this reply are simply some of the more significant examples, and the omission of others is not a concession by Promenade that by addressing these limited examples the other JEA factual assertions are somehow admitted to be true.

[4] JEA Brief, at p 2.

[5] See, e.g., JEA Brief at p. 7.

Promenade's substantive claims already asserted against JEA in Mississippi.[6] Promenade did not act inconsistently by asserting substantive claims against JEA in Mississippi and then enforcing Promenade's records requests in Florida (where the records were stored) when JEA baselessly failed to provide access to the pertinent documents.

The JEA Brief also includes some assertions about Promenade having settled with others – except JEA – "for millions of dollars in excess of the money it has spent on repairs and store owner settlements."[7] Promenade's settlements with other parties has no relevance to the constitutional issues that are now before this Court, so it is a reasonable hypothesis that JEA makes those observations with knowledge that those statements give the impression that Promenade has been fully compensated by others and that it is thus over-reaching by continuing to pursue JEA.[8] But, as JEA well knows, Promenade seeks damages far beyond the amounts necessary to compensate Promenade for the expenses it incurred in implementing the limited but nevertheless very expensive repairs that have already been completed to date. Indeed, as JEA also knows, a significant portion of the JEA byproducts that were placed at the site have not yet been removed and remain buried there to this day. Any suggestion that Promenade has already been made whole is inaccurate and is in any event not supported by the appellate record. Promenade's ability to recover its remaining damages from JEA – the out-of-state defendant who generated the

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[6] The assertion that JEA is treated as a public entity for purposes of the Florida Public Records Laws (*see, e.g.,* JEA Brief at p. 7) is also a red herring in the current context. JEA's arrangements in relation to the City of Jacksonville lead to that outcome. But that is a far cry from coming to the conclusion that JEA is a sovereign state or an "arm of the state" of Florida.

[7] JEA Brief, at p. 3.

[8] In a similar vein, the JEA Brief also goes outside the appellate record to tell this Court – without evidence – that currently the "shopping center is full and successful and no remediation has been reported to JEA in almost a decade."

deleterious materials that were sent to Mississippi and caused harm in this state – is significant to the welfare of the State of Mississippi and its citizens.

II. ***HYATT III* ONLY RECOGNIZES IMMUNITY FOR THE SOVEREIGN STATES, NOT FOR JEA**

In *Hyatt III*, the Supreme Court of the United States determined that, under the constitutional framework implemented between and among the sovereign states, each state must recognize the sovereign immunity of the other 49 states.[9] The JEA Brief invokes *Hyatt III*, insisting that, because *Hyatt III* has overruled *Nevada v. Hall*, the courts of Mississippi can no longer exercise subject matter jurisdiction over Promenade's claims against JEA.

That insistence is facially flawed. *Hyatt III* and *Nevada v. Hall* are cases interpreting and applying the Constitution of the United States. More specifically, *Hyatt III* and *Nevada v. Hall* are addressed to the inherent sovereign immunity of the sovereign states themselves under the Constitution of the United States. JEA is not a state. Therefore, *Hyatt III* speaks to the sovereignty of the State of Florida itself, but *Hyatt III* does not say that the Constitution of the United States requires Mississippi courts to provide the same immunity to JEA that they must provide to Florida as a sovereign state.

So, why does JEA think that JEA – a self-described "body politic and corporate"[10] distinct from the State of Florida itself – gets the benefit of sovereign immunity under the federal constitutional framework that is mandated by *Hyatt III*? In its brief, JEA asserts:

> JEA is not the 51st State but it has the same immunity as the State of Florida as far as any other State is concerned. This is so ***because Florida law says so***. "Article X,

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[9] Before *Hyatt III,* a federal constitutional obligation to recognize each of the other 49 states' sovereign immunity had not previously been recognized. *See, e.g., Nevada v. Hall*, 440 U.S. 410 (1979). It is undisputed that *Hyatt III* expressly overruled *Nevada v. Hall.*

[10] JEA Brief, at p. 6.

> Section 13 of ***the Florida Constitution*** provides 'absolute sovereign immunity for the state and its agencies[11] absent waiver by legislative enactment or constitutional amendment.'"[12]

JEA cannot point to anything in *Hyatt III* that actually grants JEA "the same immunity as the State of Florida," so – in the blink of an eye and without explicitly acknowledging the shift – JEA switches from reliance on the federal constitutional requirements recognized in *Hyatt III* to reliance on Florida's own internal constitutional and legislative framework.

A. Mississippi Is Bound by the U.S. Constitution, Not the Florida Constitution

The constitutional question presented by *Hyatt III* is what level of immunity (if any) the Constitution of the United States provides to an entity such as JEA, not what level of immunity (if any) the State of Florida provides to JEA for Florida's internal purposes through the Florida Constitution or Florida legislation. *Hyatt III* indicates that Mississippi and each of the other sovereign states have entered into a federal constitutional framework that provides sovereign immunity for the respective states in the courts of other states. There is nothing in *Hyatt III* requiring Mississippi to conform to the constitutional framework developed by Florida under Florida's state Constitution.

While Mississippi as a sovereign state is bound by the Constitution of the United States, Mississippi is not a party to or bound by the Florida Constitution and the laws governing activities

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[11] JEA explicitly acknowledges that JEA is not the State of Florida, but the JEA Brief is unclear as to whether it is asking this Court to consider JEA one of the state's "agencies" in this context. There is nothing in the appellate record indicating that JEA is reliant on the public fisc of the State of Florida. Moreover, the JEA Brief asserts that at one point JEA "transferred $235 million to the city." JEA Brief, at p. 7. That is consistent with the reality that JEA is actually a money *generating* business rather than an arm of the state (or even an arm of the City of Jacksonville) reliant on public funds.

[12] JEA Brief, at p. 13 (emphasis added).

within Florida enacted by the Florida legislature pursuant to the Florida Constitution. Thus, JEA's contention that JEA has the same immunity as the State of Florida "because Florida law says so" is baseless.

B. Florida's Decisions About Extending "Sovereign Immunity" to Lesser Units of Government Such as Counties and Cities Are Not Binding in Mississippi

JEA emphasizes that Florida has made the decision to extend the "sovereign immunity" set forth in Florida's Constitution to local units of government. For example, JEA cites *Miami-Dade Cty. v. Miller*, 19 So. 3d 1037, 1039 (Fla. Dist. Ct. App. 2009) for the proposition that "[g]enerally speaking, the state and its subdivisions, including municipalities and counties, are sovereignly immune from tort liability unless such immunity is expressly waived by statute."[13] Similarly, the JEA Brief cites *Cauley v. City of Jacksonville,* 403 So. 2d 379, 381 (Fla. 1981), for the proposition that "sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner"[14] and that "[m]unicipalities can no longer be identified as partial outcasts as opposed to other constitutionally authorized local governmental entities."[15]

The Florida court decisions upon which JEA relies have been rendered in the context of the Florida Constitution and the Florida statutes. Florida is obviously free to choose to extend sovereign immunity[16] to its municipalities and counties within Florida's own <u>state</u> constitutional framework.

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[13] JEA Brief at pp. 13 -14.

[14] *Id.* at 14 (citing *Cauley*, 403 So. 2d at 387).

[15] *Id.* (citing *Cauley,* 403 So. 2d at 386).

[16] Notably, the term "sovereign immunity" is not necessarily used with precision in the Florida cases, in a manner sufficient to distinguish between the immunities inherent in the State of Florida itself as a sovereign state and the so-called "sovereign immunity" bestowed on various smaller governmental entities by the Florida legislature. Furthermore, JEA makes yet another logical jump by asserting that JEA (an entity self-described as a body "politic and corporate")

JEA implicitly invites this Court to reach the same conclusion in the context of the federal constitutional framework referenced in *Hyatt III.* But there is a major and indeed insurmountable impediment to doing so: the decisions of the Supreme Court of the United States in *Alden v. Maine,* 527 U.S. 706, 713 (1999), *Jinks v. Richland County*, 538 U.S.456 (2003), and *Northern Insurance Co. of New York v. Chatham County*, 547 U.S. 189 (2006). As Promenade pointed out in its initial Brief of Appellant,[17] the *Northern Insurance* Court state that:

> A consequence of this Court's recognition of preratification sovereignty as the source of immunity from suit is that only States and arms of the State possess immunity from suits authorized by federal law. See *Alden*, supra [527 U.S. 706 (1999)], at 740; *Mt. Healthy City Bd. Of Ed. v. Doyle,* 429 U. S. 274, 280 (1977). Accordingly, this Court has repeatedly refused to extend sovereign immunity to counties. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U. S. 391, 401 (1979); *id.,* at 401, n. 19 (gathering cases); *Workman v. New York City,* 179 U. S. 552, 565 (1900); *Lincoln County v. Luning,* 133 U. S. 529, 530 (1890). *See also Jinks v. Richland County,* 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit").

547 U.S. at 193 (emphasis included in Promenade's omitted). Indeed, that opinion rendered by Justice Thomas makes it explicit that the Supreme Court of the United States "has repeatedly refused to extend sovereign immunity to counties" and that "[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit." In short, although the Florida courts have decided to extend sovereign immunity to cities and counties within Florida's state constitutional framework, the United States Supreme Court has gone the other way – refusing to extend sovereign

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somehow benefits from the extension of immunity to cities and counties when JEA is itself neither a city nor a county.

[17] Brief of Appellant, at p. 19.

immunity to lesser governmental entities that lack the pre-ratification sovereignty of the state and the so-called "arms of the state."

Thus, while nominally invoking *Hyatt III*, JEA asks this Court to follow the lead of the Florida courts rather than the decisions of the United States Supreme Court regarding the application of sovereign immunity to entities that are not part of state government. JEA would have this Court in effect overrule those decisions or limit them to their respective specific procedural postures. In a desperate attempt to distinguish away *Alden* and *Northern Insurance*, JEA points out that the language that Promenade quotes from *Northern Insurance* says that "only States and arms of the state possess immunity from suits **authorized by federal law,**"[18] and arguing that the underscored language indicates a limitation on the principle stated to cases involving claims under federal law. JEA similarly seeks to distinguish away other United States Supreme Court cases cited by Promenade (that consistently refuse to extend sovereign immunity to municipalities, counties and other lesser governmental entities), asserting that the cited cases all relate to federal claims, claims asserted in federal courts, or both.

JEA's efforts to avoid the precedential impact of the cases cited by Promenade is ultimately unavailing for several reasons. First, JEA is unable to point to a single case in which the United States Supreme Court has extended constitutionally mandated sovereign immunity to lesser governmental entities. Second, the fact that some of the cases cited by Promenade involved federal claims, cases adjudicated in federal courts or both does not change the reality that there is no constitutional mandate to extend sovereign immunity of the type recognized in *Hyatt III* to

[18] JEA Brief, at p. 24 (emphasis as added by JEA, not included in the underlying case itself)

municipalities or counties in any procedural posture or in regard to any type of federal or state claim.

Third, JEA attempts to distinguish away *Jinks v. Richland County,* 538 U.S. 456 (2003), by including a parenthetical indicating that *Jinks* involved "an arrestee's widow's case under federal §1983 law." (JEA Brief, at p. 25; original underscore as included in the JEA Brief.) While it is true that the *Jinks* litigation at one time included a §1983 claim asserted in the United States District Court for South Carolina, 538 U.S. at 460, summary judgment was granted on that federal claim and the remainder of the case was dismissed without prejudice. *Id.* A separate case asserting state law claims for wrongful-death and survival was initiated in a South Carolina state court. That separate state court case is the one that made its way to the South Carolina Supreme Court and ultimately to the United States Supreme Court. *Id.* It is in that context – involving neither a federal claim nor a claim asserted in a federal district court – that the *Jinks* decision points out that "municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit." *Id.* at 466. JEA's attempt to distinguish away *Jinks* based on the nature of the claims asserted or based on the forum in which the claims are asserted is without merit. Municipalities – unlike States – simply do not enjoy a constitutionally protected immunity from suit. Thus, there is nothing in the pertinent United States Supreme Court cases to support JEA's assertion that a municipality-adjacent entity such as JEA has a constitutionally protected immunity from suit under the Constitution of the United States.

JEA also attempts to overcome the effect of these binding United States Supreme Court precedents by pointing out various state court cases in which counties and other political subdivisions have been found to be part of the state government and thus protected by constitutionally protected sovereign immunity. *See, e.g.*, JEA Brief, at pp. 15-17. Those cases

simply do not support JEA's position, given that neither side is asserting that JEA is actually part of the state government of Florida in the situation presented here. Furthermore, the decisions of individual state courts about how to apply the now overruled *Nevada v. Hall* do nothing to create a federal constitutional sovereign immunity in a context where the United States Supreme Court has repeatedly and consistently refused to recognize one.

III. ***MISSISSIPPI SHOULD NOT APPLY COMITY IN THE SITUATION PRESENTED HERE***

The JEA Brief also asserts various arguments to support its contention that the courts of Mississippi should refrain from exercising jurisdiction in this case based on principles of comity. This Court has already addressed those types of arguments, drawing a contrary conclusion: "A foreign government entity enjoys no greater status under our tort law than any other similarly situated tort defendant." *Church v. Massey*, 697 So. 2d 407, 410 (Miss. 1997).[19]

Nothing has changed since *Church v. Massey* was decided in 1997. Entities like JEA must still be treated like "any other similarly situated tort defendant." Nor does anything compelling in the situation presented here support JEA's plea for the application of comity. The fact of the matter is that by its conduct, JEA has caused great physical harm in Mississippi in furtherance of its own business interests and JEA should be held accountable just like "any other similarly situated tort defendant."

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[19] Promenade acknowledges that, in theory, *Church v. Massey* could be limited by the principles stated in *Hyatt III* when the defendant is one of the other 49 sovereign States – but that is not the circumstance presented here.

IV. *JEA'S FULL FAITH AND CREDIT ARGUMENTS ARE ALSO UNAVAILING*

At JEA's request, the trial court also included full faith and credit as alternative support for its decision to refrain from exercising jurisdiction over JEA in this context. Promenade has addressed those arguments at some length in its initial brief and will not rehash them here, and instead incorporates them here by reference.

CONCLUSION

For the reasons stated here and in Promenade's Brief of Appellant, the dismissal of Promenade's claims against JEA by the Harrison County Circuit Court must be reversed and this case remanded to allow Promenade the opportunity to fully litigate its claims against JEA.

Respectfully submitted this the 18th day of December 2024.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served via the Court's MEC system:

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