IN THE SUPREME COURT OF FLORIDA

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ESCAMBIA COUNTY, FLORIDA,

Petitioner,

vs.

CASE NO. 65,347

CITY OF PENSACOLA, a municipal corporation,

REPLY BRIEF OF PETITIONER ESCAMBIA COUNTY

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ATTORNEYS FOR PETITIONER
ESCAMBIA COUNTY

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EXPLANATION OF ABBREVIATIONS AND SYMBOLS

Petitioner Escambia County shall be referred to as Escambia County and the County.

Respondent City of Pensacola shall be referred to as City of Pensacola and the City.

The following abbreviations shall be used to reference the Record on Appeal and the Appendix of Appellant:

1. "App I" shall refer to the Appendix I to the Initial Brief of Petitioner Escambia County: Selected Pleadings, Evidence and Cases.
2. "App II" shall refer to Appendix II to the Initial Brief of Petitioner Escambia County: Excerpts from Trial Transcript.
3. "R" shall refer to the Record on Appeal.
4. "Ex" shall refer to Exhibits in Evidence.
5. "p" or "PP" shall refer to the page numbers of either the Appendices to the Initial Brief of Petitioner or to the Record on Appeal.
6. "T" shall refer to Transcript of Testimony. Reference "T 450/12-20" shall refer to Page 450, Line 12 through Line 20.

POINTS ON APPEAL

POINT I

WHETHER THE "REAL AND SUBSTANTIAL BENEFITS" TEST ESTABLISHED BY CITY OF ST. PETERSBURG V. BRILEY, WILD & ASSOCIATES, INC., 239 SO.2D 817 (FLA. 1970), FLORIDA CONSTITUTION AND SECTION 125.01(7), FLORIDA STATUTES, WAS INCORRECTLY INTERPRETED AND APPLIED BY THE DISTRICT COURT AND THE TRIAL COURT IN THIS CASE.

POINT II

WHETHER THERE WAS SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE FINDING OF FACT BY THE TRIAL COURT THAT THE SERVICES PROVIDED BY THE ESCAMBIA COUNTY SHERIFF AND IDENTIFIED AS THE PATROL DIVISION WERE RENDERED IN VIOLATION OF ARTICLE VIII, SECTION 1(h), FLORIDA CONSTITUTION AND SECTION 125.01(7), FLORIDA STATUTES, AND WHETHER THE TRIAL COURT ERRED IN THE APPLICATION OF LAW TO THE FINDINGS OF FACT AS TO SUCH IDENTIFIED SERVICES.

POINT III

WHETHER THERE WAS SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE FINDING OF FACT BY THE TRIAL COURT THAT THE SERVICES PROVIDED BY ESCAMBIA COUNTY AND IDENTIFIED AS ALL SERVICES FOR THE CONSTRUCTION AND MAINTENANCE OF ROADS AND BRIDGES CLASSIFIED AS LOCAL ROADS BY THE STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION WERE RENDERED IN VIOLATION OF ARTICLE VIII, SECTION 1(h), FLORIDA CONSTITUTION AND SECTION 125.01(7), FLORIDA STATUTES AND WHETHER THE TRIAL COURT ERRED IN THE APPLICATION OF LAW TO THE FINDINGS OF FACT AS TO SUCH IDENTIFIED SERVICES.

ARGUMENT

POINT I

THE "REAL AND SUBSTANTIAL BENEFITS" TEST ESTABLISHED BY CITY OF ST. PETERSBURG V. BRILEY, WILD & ASSOCIATES, INC., 239 SO.2D 817 (FLA. 1970), FLORIDA CONSTITUTION AND SECTION 125.01(7), FLORIDA STATUTES, WAS INCORRECTLY INTERPRETED AND APPLIED BY THE DISTRICT COURT AND THE TRIAL COURT IN THIS CASE.

In the Palm Beach County case this Court recognized:

> "In the present case, the facts are essentially undisputed. Although petitioners contend that there was highly conflicting lay and expert testimony, a review of the disputed factual issues pointed to by petitioners demonstrates that it is not the facts which are contraverted but rather the legal conclusions to be drawn therefrom." (App I p 15).

Likewise, in this case the dispute at trial and on appeal is not over the facts but focuses on the application by the trial court of the constitutional test to essentially undisputed testimony and evidence.

The Appropriate Standard of Review

The issue on appellate review is not whether there is any evidence to support a finding by a trial court, but whether such evidence was competent and substantial and whether the findings by the lower court constitute a correct application of the law to the evidence presented. As stated in Adams v. McDonald, 356 So.2d 864 (Fla. 1st DCA 1978) at page 866:

> "We recognize our obligations not to substitute our judgment for that of the trial court where such judgment is supported by substantial evidence and is based upon a proper view of the applicable

law. However, where the judgment is not supported by substantial evidence and is contrary to the law of this state as pronounced by our appellate courts, we have no other alternative but to reverse."

In Northwestern National Insurance Co. v. General Electric Credit Corp., 362 So.2d 120 (Fla. 3d DCA 1978), the court stated at page 123:

> "We are fully aware of the weight that must be given to the trial judge's findings of fact on appeal. Though findings arrive at this court with a presumption of correctness, it is the duty of an appellate court to reverse where a decision is based upon a finding that represents a misapplication of the law governing the facts disclosed."

See also Dixson v. Kattell, 311 So.2d 827 (Fla. 3d DCA 1975), where the court stated at page 828:

> "Generally, appellate courts will not disturb findings of the trier of facts, but if such findings are contrary to the manifest weight of the evidence, or are contrary to the legal effect of the evidence, the reviewing court has not only the authority and power, but also the duty, to reverse."

In Oceanic International Corporation v. Lantana Boatyard, 402 So.2d 507 (Fla. 4th DCA 1981), the court at pages 511 and 512, incorporated the following additional principles of appellate review from In re Estate of Donner, 364 So.2d 742 (Fla. 3d DCA 1978):

* * *

> "We are not however bound by the trial court's legal conclusions where those conclusions conflict with established law. * * * A finding of fact by the trial court in a non-jury case will not be set aside on review unless there is no substantial evidence to sustain it, unless it is clearly against the weight of the evidence, or unless

it was induced by an erroneous view of the law. A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion. * * * When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous' and the appellate court will reverse because the trial court has 'failed to give legal effect to the evidence' in its entirety." (Emphasis added).

The court in the Oceanic International Corporation case applied the above principles of appellate review to a finding of the trial court, concluded that the findings of the trial court were not supportable and reversed the trial court on each finding.

This case is not a case in which a trial judge or a jury reconciled conflicting evidence or testimony or where witness demeanor and credibility was a factor in the findings of fact as was the issue in Shaw v. Shaw, 334 So.2d 13 (Fla. 1976) and the other cases on appellate review cited by the City in its Answer Brief. The issue in this case is whether the trial court's opinion was based upon substantial competent evidence in context of the application of the real and substantial benefits test to undisputed facts. As recognized by this Court in the Palm Beach County case:

> "As this Court has consistently stated, where the facts are essentially undisputed, the legal effect of the evidence is a question of law." (App I p 15).

<u>The Constitutional and Statutory Limitations of Article VIII, Section 1(h), Florida Constitution and Section 125.01(7), Florida Statutes</u>

Nowhere in its discussion of the "law of double taxation" in its Answer Brief does the City mention the rejection by this Court of a direct and primary use benefit under the constitutional real and substantial benefits test:

> "That it was not the intent of the framers of this provision of the Constitution to require a direct benefit to city-located property in order to avoid the proscription is evidenced by the fact that attempts to amend the provision to substitute the words 'directly' and 'primarily' for the word 'exclusively' were defeated before the proposition was submitted to the people for approval." <u>City of St. Petersburg v.Briley, Wild & Associates, Inc.</u>, 239 So.2d 817 (Fla. 1970) at page 823 and 824.

The City persists in its Answer Brief as it did at trial in ignoring this basic and essential element in the real and substantial benefits test. The issue on appeal in this case and in the <u>Palm Beach County</u> case is whether the trial court incorrectly relied on evidence of direct and primary benefit. The City glosses over this fundamental principle in an attempt to mask the direct conflict between the application and interpretation of the real and substantial benefits test in this case with the application and interpretation of such test in the <u>Palm Beach County</u> case.

As this Court recognized on page 2 of the Palm Beach County decision:

> "As we have stated in the past, substantial is not necessarily a quantifiable term and a benefit may achieve substantiality without being direct or primary. All that is required is a minimum level of benefit which is not illusory, ephemeral or inconsequential." (App I p 14).

The fact that the trial court in this case relied exclusively on minimal evidence of direct benefit presented by the City is not debatable and is candidly admitted by the trial court in the Final Judgment as follows:

> "The County argues that there are indirect benefits to the City. The Court finds that there are services provided by the County for which the citizenry of the City of Pensacola derive no real and substantial benefit and for which there are no indirect benefits as a matter of law." (App I p 10).

The reality that the City seeks to avoid is a focus on the inadequacy of the undisputed evidence and testimony of quantified direct benefit presented by it at trial. Evidence and testimony limited solely to the most minimal factors of quantified direct benefit does not conform with the Briley, Wild test as such test has been uniformly applied by all courts applying the test at different times to different facts. Such consistent court application has resulted in the emergence of stability and predictability in this area of complex local government relationships.

POINT II

THERE WAS NOT SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE FINDING OF FACT BY THE TRIAL COURT THAT THE SERVICES PROVIDED BY THE ESCAMBIA COUNTY SHERIFF AND IDENTIFIED AS THE PATROL DIVISION WERE RENDERED IN VIOLATION OF ARTICLE VIII, SECTION 1(h), FLORIDA CONSTITUTION AND SECTION 125.01(7), FLORIDA STATUTES, AND THE TRIAL COURT ERRED IN THE APPLICATION OF LAW TO THE FINDINGS OF FACT AS TO SUCH IDENTIFIED SERVICES.

Evidence and Testimony of the City Relied on by the Trial Court

As to the services provided by the Escambia County Sheriff, the City limited its focus to within its geographic boundaries and to documented assistance to City victims and the recovering of property owned by City residents. Such myopia ignores the total law enforcement service provided by the Sheriff throughout an urban county where the municipal boundaries are not confining walls to its mobile citizenry.

The argument of the City beginning on page 14 of its Answer Brief under the heading "municipal-type services" underscores the City's fundamental misunderstanding or misconstruction of the constitutional real and substantial benefits test. The City argues on page 14 of the Answer Brief that when counties provide "municipal services" the cost of such services should be paid by the citizens receiving the "real and substantial benefit" of the services provided. The degree of benefit received by unincorporated area residents from the challenged services is immaterial to the issues in this case. Unincorporated residents do not enjoy the

protection of Article VIII, Section 1(h), Florida Constitution and Section 125.01(7), Florida Statutes, and there is no resulting benefit nexus required. Tucker v. Underdown, 356 So.2d 251 (Fla. 1978).

Nowhere in any constitutional or statutory provision or case is a distinction made for purposes of dual taxation or taxation in general betweeen county services and "municipal-type" services provided by a county. This belated fantasy theory is novel to Respondent and finds no support in the law or case precedent. Contrary to the City's assertions, neither Article VII, Section 9(b), Florida Constitution[1], nor Section 125.01(1)(q), Florida Statutes, support the "argument" of the City labeled "municipal-type services" in its Answer Brief.

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[1]The City misconstrues and distorts Article VII, Section 9(b), Florida Constitution. These millage restrictions, novel to the 1968 Florida Constitution, are upon the purpose for which ad valorem taxes may be levied: municipal purposes or county purposes. Such 10 mill constitutional limitations are not placed upon the county or municipality as a unit of local government but rather as a ceiling on the limit to which ad valorem taxes can be used as a source of revenue for county and municipal purposes regardless of which unit of local government is making the levy. The last sentence of Section 9(b) of Article VII clarifies the first sentence by permitting a county to levy up to an additional 10 mills within the 10 mill limit provided for municipal purposes. The end result is that no taxpayer shall pay more than 10 mills for county purposes and 10 mills for municipal purposes regardless of where they live and who furnishes the service. Gallant v. Stephens, 358 So.2d 536 (Fla. 1978); and State ex rel. Dade County v. Dickinson, 230 So.2d 130 (Fla. 1969).

It is important to recognize the difference between the limitations of the constitutional and statutory standard and the statutory authority granted all counties to create municipal service taxing units under Section 125.01(1)(q), Florida Statutes. Article VIII, Section 1(h), Florida Constitution, and Section 125.01(7), Florida Statutes, are limitations on the power of a county to levy countywide taxes or to appropriate countywide revenues. Section 125.01(1)(q), Florida Statutes, by authorizing the creation of a municipal service taxing unit, is a grant of additional taxing power to a county to isolate all or a portion of the burden of the cost of a service in the unincorporated areas only. A board of county commissioners may not be legally required to create a municipal service taxing unit under the constitutional and statutory standard but could politically decide such a levy is more equitable within the discretion of the Board. Such decision is a political decision within the discretion of the board of county commissioners.

While admitting on page 21 of the Answer Brief that the opinion testimony of Mr. Chambers based on the statistical studies of Dr. Sherry was central to its case, the City maintains that its case on the road patrol of the sheriff consisted of a "great deal more". The great deal more asserted on pages 21 and 22 of the City's Answer Brief is the deposition testimony of Mr. Richard Kelton, the

isolated statement by Captain Silcox that the road patrol of the sheriff operates as the police officers for the unincorporated area and does not give police protection within the City[2] and the opinion testimony of Dr. George Kelling.

Mr. Kelton's study was performed three years prior to the trial in this case. (App II p 8). He was the "double taxation expert" whose opinion was discredited by the court in the Palm Beach County case. The statistical study relied on by Mr. Kelton as the basis of his expert opinion in his deposition as to whether the road patrol of the Escambia County Sheriff provided the requisite benefit was based

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[2]The City fails to mention that Captain Silcox clarified on cross-examination that by stating that the Sheriff does give police protection in the City, he did not mean that sheriff personnel were not involved in the City but meant that the sheriff's patrol districts did not include city areas (App II p 10). The City conveniently omits that Captain Silcox testified that because of the jagged boundaries of the City, a deputy sheriff does not know whether he is within the boundaries of the City or not; that it is a common occurrence for a deputy to be in the City and that it "occurs every day"; that it is common for a deputy sheriff to provide back-up to municipal police officers; that it is common for a deputy sheriff to provide assistance to municipal police officers particularly in the urbanized unincorporated areas adjacent to the City; and that the Sheriff had hired 43 additional deputy sheriffs since October 1, 1982. (App II pp 9-14). The City also conveniently omits the specific incidents testified to by Captain Silcox where sheriff's uniformed deputy sheriffs provided assistance to the City during natural disasters and emergencies. (App II pp 12-13).

on a review of a 5% sample to determine "complaints responded to within the City" (T 209/19-25). Such evidence of minimal direct benefit was rejected in the Palm Beach County decision, the only case in which Mr. Kelton had testified as a self-annointed "double taxation" expert. (T 202/7-11).

The assertion of the opinion testimony of Dr. George Kelling as a part of the City's "great deal more" of testimony is puzzling. Dr. Kelling testified that the use of law enforcement officers in preventative patrol is "low productivity" in terms of the use of the officer's time.[3] If benefit gained from visibility of law enforcement officers on preventative patrol is "minimal", as characterized by the City, the major complaint of the City that the patrol officers of the sheriff do not provide routine patrol within the City evaporates. In addition, the City fails to mention that Dr. Kelling admitted that the arrest of a career criminal in the unincorporated areas was a benefit to residents of the City. (App II p 40).

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[3]The characterization of Dr. Kelling's testimony on page 21 of the City's Answer Brief is misleading. Dr. Kelling testified that preventative patrol is a low payoff strategy for deployment of law enforcement personnel since studies indicate that approximately 7% of arrests are obtained from preventative patrol and that such activity involves 40 to 60% of the time of the officer. Dr. Kelling testified that 7% of total arrests is not inconsequential but that such percentage was a "low production rate". (App II pp 33-34).

Evidence and Testimony Establishing Real and Substantial Benefit Under the Constitutional Standard and Appellate Court Decision

The City argues at length that the County and its expert witness, Mr. Randall Young, attempted "to expand the concept of benefit" and relied upon "a patently ridiculous definition" of benefit. Suffice it to say that the constitutional real and substantial benefits test created by the Florida Supreme Court in the Briley, Wild case and consistently applied by all courts except the reversed trial court in Palm Beach County case demanded that the City's concept of benefit be expanded.[4]

Is an arrest by the sheriff of a suspect who is a City resident a "patently ridiculous" benefit to other law abiding City residents? Why is not a law enforcement incident involving a resident outside of Escambia County a benefit to residents and property within a City where tourism is a major industry and the largest employer in the area is the Pensacola Naval Air Station? Is there any logical rationale why the entire cost of law enforcement

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[4]The City on page 30 of its Answer Brief criticizes Mr. Young for "restricting the sample only to a portion of the sheriff's reported activities". Mr. Young focused his analysis only on the Deputy Field Reports since the remaining portion of Dr. Sherry's sample relied on by Mr. Chambers had incomplete information. The only City address that can appear on the Complaint card is where the "offense" occurred and the address of the complainant.

involving transients in the unincorporated area should be the sole burden of unincorporated areas taxpayers? Is it not, in fact, "patently ridiculous" to maintain the construction and maintenance of certain county and state roads is a benefit while in the same breath maintain that the law enforcement necessary to insure their safe use is not a benefit?

The statement on page 29 of the City's Answer Brief that testimony of the existence of a non-duplicate file to the Complaint file was inconclusive is simply untrue. There are no "phantom" files. Both Dr. Sherry and Mr. Chambers admitted that they did not examine the Investigative File System or the pending Arrest File System of the Sheriff.[5]

The statement on page 32 of the City's Answer Brief that many of the indirect benefits mentioned by the County "would be picked (sic) upon in Dr. Sherry's figures" is a gross misstatement of the record. The only incidents characterized by Dr. Sherry as a benefit in his review of the sample taken from the Complaint File System are those that occurred directly within the boundaries of the City or where the Complaint Card or the initial Deputy Field Report reflected that the "victim" or "owner of stolen property" was a City resident.

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[5]See pages 17 through 19 of the County's Initial Brief for explanation of the three file systems maintained by the Sheriff.

On page 37 of its Answer Brief the City characterized as the County's position at trial and on appeal that all nonquantified activities of the sheriff are of real and substantial benefit. Such characterization either reflects a misunderstanding or distortion of the County's position in this case. An undeniable truth is that all factors of benefit cannot be quantified. Many factors of benefit that cannot be quantified have been characterized in the Briley, Wild case, the second Alsdorf case and the Palm Beach County case and in other appellate decisions as "indirect benefits". In addition, not all direct benefits to City residents and property that can be quantified occur within the boundaries of the City. The contention of the County is that the City and the trial court relied upon minimal factors of direct benefit and rejected all factors of indirect benefit that could not be quantified. Such reliance is contrary to the constitutional real and substantial benefits test of Briley, Wild and is inconsistent with the application of such test in the second Alsdorf case and the Palm Beach County case to services provided by a sheriff.

POINT III

THERE WAS NOT SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE FINDING OF FACT BY THE TRIAL COURT THAT THE SERVICES PROVIDED BY ESCAMBIA COUNTY AND IDENTIFIED AS ALL SERVICES FOR THE CONSTRUCTION AND MAINTENANCE OF ROADS AND BRIDGES CLASSIFIED AS LOCAL ROADS BY THE STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION WERE RENDERED IN VIOLATION OF ARTICLE VIII, SECTION 1(h), FLORIDA CONSTITUTION AND SECTION 125.01(7), FLORIDA STATUTES AND THE TRIAL COURT ERRED IN THE APPLICATION OF LAW TO THE FINDINGS OF FACT AS TO SUCH IDENTIFIED SERVICES.

The City attempts to avoid direct conflict with the Palm Beach County case by asserting that, in addition to opinion testimony, it had "offered explicit proof concerning the classification of local roads by the DOT". Such "explicit proof" was the testimony of Mr. Royace Pitts, District Manager of the Florida Department of Transportation. Otherwise, the evidence before the trial court in this case and the court in the Palm Beach County case is essentially identical.

Mr. Pitts testified that the purpose of the functional classification system is for the Florida Department of Transportation to decide whether or not the state, the county or the city is responsible for the operation and maintenance of a road and the primary purpose of the classification is to designate funding responsibility. (App II p 45). The use of this crude statutory tool developed for the purpose of dividing funding responsibility between state and local government as the basis for determining benefit under the constitutional real and substantial benefits

test is the precise methodology rejected by the court in the Palm Beach County case.[6]

Reference to the quote from the Final Judgment on pages 38 and 39 of the City's Answer Brief highlights the misapplication by the trial court of the real and substantial benefit test in reliance on the testimony of Mr. Chambers. Such quote from the Final Judgment is replete with the word "primarily" in the description of the benefit of the challenged local roads to unincorporated areas. The Florida Supreme Court in Burke v. Charlotte County, 286 So.2d 199 (Fla. 1973), rejected the contention that all roads in the unincorporated area failed to provide the requisite benefit. The City's attempt to superficially latch upon an existing state classification system developed for other purposes simply does not meet the burden of proof of the Briley, Wild test under the undisputed evidence and testimony presented to the trial court.

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[6]The only conceivable additional "explicit proof" was the Wilbur Smith Report. Such report is a thin thread of support in the City's attempt to distinguish this case from the holding in the Palm Beach County case. The Wilbur Smith report was completed in 1972 and was introduced into evidence over the objection of the County (T 520/8-15). This report was a state-wide report that was utilized by the Florida Department of Transportation in the early 70's in establishing the state classification system (T 368/21-371/4). It was characterized by the lead counsel for the City as the "starting point" for the state classification system in the early 1970's. (T 370/9-371-4). No witness was presented who was involved in the preparation of the report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner Escambia County has been furnished by U.S. Mail to all parties listed below this 28th day of December, 1984.

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