IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOHN W. MIKOS, as Property Appraiser of Sarasota County Florida, Petitioner, vs. RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC., a Delaware corporation, et. al., Respondents.	Case No. 67,766 Second District Court of Appeal No. 84-2476

APPEAL FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT

REPLY BRIEF OF PETITIONER, JOHN W. MIKOS, AS PROPERTY APPRAISER OF SARASOTA COUNTY, FLORIDA

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SUMMARY OF THE ARGUMENT

The Legislature, in 1980, amended Section 192.032, Florida Statutes, to include a definition of the term "permanently located." Section 192.032(5), Fla. Stat. (1980). The definition provided by Section 192.032(5) is ambiguous on its face and when read together with the remaining provisions of Section 192.032, Florida Statutes. Therefore, in order to determine how Section 192.032(5) should be interpreted, this Court must look to judicial precedent and the rules of statutory construction.

The District Court of Appeal, Second District's, interpretation of Section 192.032(5) is contrary to the remaining provisions of Section 192.032, as the Court's interpretation prohibits the taxation of property permitted by Sections 192.032(2) and 192.032(6).

Respondents failed to have the Affidavit of Representative Pajcic stricken from the record and did not object to the mention of the Affidavit at the summary judgment hearing below. Therefore, Respondents waived any right to object and may not raise the issue on appeal.

I. SECTION 192.032(5), FLORIDA STATUTES, IS AMBIGUOUS, THEREFORE, JUDICIAL PRECEDENT AND THE RULES OF STATUTORY CONSTRUCTION MUST BE LOOKED TO IN ORDER TO INTERPRET THE STATUTORY PROVISION.

Respondents propose that this Court ignore all case law prior to the 1980 effective date of 192.032(5), Florida Statutes, asserting that the prior law has no value. The rationale behind Respondents' proposition is that the Florida legislature, in 1980, provided a clear and unambiguous definition of the term "permanently located". This reasoning is contrary to the District Court of Appeal, Second District's, finding below that the statutory provision was ambiguous. Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 475 So.2d 292, 295 (Fla. 2d DCA 1985).

The term "permanently located" was defined by the legislature as meaning habitually located or typically present for a twelve month period. Section 192.032(5), Fla. Stat. (1982).

The term twelve-month period, as interpreted by the District Court of Appeal, Second District, conflicts with the other provisions in Section 192.032 regarding permanent location or situs. In order to acquire situs in a county and thereby become taxable, property must be permanently located in the county on January 1, according to Section 192.032(2), Florida Statutes. Marine cargo containers acquire taxable situs after 181 days of presence, pursuant to Section 192.032(6), Florida Statutes. Tangible personal property not present in a county on January 1, nevertheless acquires taxable situs if it enters the county prior to April 1 and leaves on or before the following December 31,

whether present in the county for one day or 275 days. Section 192.032(2), Fla. Stat. (1980).

The District Court of Appeal, Second District, stated below that twelve months doesn't mean "each and every day of the twelve-month period."[1] How many days of how many months are now required in order for property to become permanently located?

Section 192.032(5) is unquestionably ambiguous, on its face and when read together with the remaining provisions of Section 192.032, Florida Statutes. Judicial precedent and the rules of statutory construction will therefore have to be utilized in order to provide a meaningful interpretation of Section 192.032(5), one which makes it compatible with the other provisions of Section 192.032.

To give all of Section 192.032 effect, the twelve months reference must be viewed as defining a period of time used to determine whether certain property has been present in a

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1. Contrary to Respondents' assertions at pp. 5-6 of their brief, Petitioner never misrepresented the holding of the District Court of Appeal, Second District below. Respondents have lifted Petitioner's statement out of context and assert that by this statement, Petitioner argues that the court sub judice held that property must be present for an entire twelve-month period. Petitioner's statement, at p.9 of the initial brief, is as follows:

The District Court of Appeal, Second District, reviewing the issue of Sarasota County's assessment of Ringling's property for the 1980 through 1983 tax years, rejected the Autotote Court's holding that Subsection 5 applied only to property involved in multi-county disputes. The Second District Court found that the requirement of twelve-month presence applied to all tangible personal property located in the State of Florida. (emphasis supplied)

In addition, Petitioner quoted that portion of the District Court of Appeal's decision wherein the Court stated that twelve months presence did not mean each and every day of the twelve-month period (Petitioner's Initial Brief, at p.11.)

particular county, i.e., whether the property was typically and habitually present during the last year, or twelve month period. Under this view of Section 192.032(5), Florida Statutes, Respondents' property for the tax years in question obtained a permanent location in Sarasota County, Florida. It was habitually located in the County on January of each year for its winter stay, leaving to tour the country in late January or early February, but consistently returning each November. It was typically present for the months of January, November and December of each year, for use in the Circus' dress rehearsals and Sarasota County circus performances, or stored in Sarasota awaiting the upcoming national tour.

Respondents' property was habitually located and typically present during the twelve-month period and therefore permanently located in Sarasota County pursuant to Section 192.032(5), Florida Statutes. As stated by Judge Harry C. Parham: . . . "these people are here for two and a half months. They come in and leave early in the winter and they straddle January one, so they begin the year here having been on a trip and they end the year here, so it's like a barn. It's a staging yard, a place where they come to rest up, regroup and start the year out so it is in a sense that they habitually gone (sic) and come to home base." (R 358).

II. THE DISTRICT COURT OF APPEAL, SECOND DISTRICT'S, CONSTRUCTION OF SECTION 192.032(5), FLORIDA STATUTES, RENDERS THE PROVISION INCONSISTENT WITH SECTION 192.032(2), FLORIDA STATUTES.

Respondents assert that the District Court of Appeal, Second District's, interpretation of subsection 5 of Section 192.032, Florida Statutes, is consistent with subsection 2 of the Statute. This is contrary to the opinion of the Court below, wherein the Court stated:

> Admittedly, this interpretation of subsection 5 appears to create an inconsistency with that portion of subsection 2 which permits the taxation under certain circumstances of property brought into the State between January 1 and April 1 of the taxable year. Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 475 So.2d 292, 295 (Fla. 2d DCA 1985).

The inconsistency is obvious. For example, property brought into a county on March 31, 1985 and leaving on December 31, 1985, could be assessed for 1985 ad valorem tax purposes pursuant to subsection 2, but could not be assessed if the Second District Court's interpretation of subsection 5 were allowed to stand. In addition, property brought into a county on March 31, 1985 and removed on February 1, 1986, could be assessed for 1986 ad valorem tax purposes under subsection 2 but not under the Second District Court's interpretation of subsection 5. Finally, property brought into a county on March 31, 1985, and present forever thereafter, could not be assessed until January 1, 1987, according to the decision of the Second District Court below, whereas such property could be assessed for the 1986 and 1987 tax years under the

interpretation given subsection 5 by the District Court of Appeal, Third District, in Autotote Limited, Inc. v. Bystrom, 454 So.2d 661 (Fla. 3d DCA 1984); pet for rev. den., 461 So.2d 113 (Fla. 1985).[2]

Respondents and the Second District Court find fault with the District Court of Appeal, Third District's, decision in Autotote because the Third District Court looked to Rule 12D-1.03(1)(c), Fla. Admin. Code, as an aid in interpreting Section 192.032(5). The Second District Court stated that the administrative rule "could hardly clarify the intent of a separate subsection enacted three years later which contains different language and makes no reference to multi-county disputes over taxation." Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 475 So.2d 292, 295 (Fla. 2d DCA 1985).

Respondents and the Second District Court, however, misconstrue the Autotote opinion which states: "Review of Department of Revenue Regulation 12D-1.03(1)(c), Fla. Admin. Code, defining 'normally and usually permanently located' in light of Section 192.032(2), Fla. Stat., however, clarifies the intent of the Legislature in enacting Section 192.032(5), Fla. Stat. (Supp. 1982). [now Section 192.032(6), Fla. Stat. (1983)]." (emphasis supplied) Autotote, supra, at p. 662. The Autotote Court reasoned that the legislature enacted Subsection 5 of Section 192.032, to further clarify the existing statute [Section

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2. Tangible personal property that is moved from county to county for job purposes, such as construction, would escape taxation altogether under the Second District Court's interpretation of subsection 5.

192.032(2)] and administrative rule by providing that personal property which was "habitually located or typically present" in the preceding twelve-month period in a particular county was "permanently located" in that county for the following tax year and not in another county where it happened to be physically located on January 1.

The most important aspect of Rule 12D-1.03(1)(c), is that it indicates the existence of multi-county disputes prior to the enactment of subsection 5. Such disputes were not solved by the Mikos decision of 1979 which provided a judicial interpretation of the term permanently located. Mikos v. Ringling Bros.Barnum & Bailey Combined Shows, Inc., 368 So.2d 884 (Fla. 2d DCA 1979); cert. den., 378 So. 348 (Fla. 1979); app. dism., 445 U.S. 939 (1980). In fact, the Court's determination in the 1979 Mikos decision that ten weeks constituted permanent located could only fuel the fire between counties.[3] Subsection 5 was therefore required to settle the dispute between counties for once and for all.

Respondents, however, attempt to utilize subsection 5 as a means of escaping all taxation rather than multiple taxation. Yet, Respondents have never asserted that any county other than Sarasota County, or any state other than Florida, has attempted to assess their property and collect taxes thereon. If Respondents are allowed to succeed in their misuse of subsection 5, they will

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3. For example, a county in which property was present for only ten weeks, thereby becoming permanently located in accordance with the 1979 Mikos decision, might attempt to assess the property although it was located in another county during the remaining weeks of the year.

be excused from contributing their fair share of taxes to Sarasota County for the costly services and protection the County provides. Such a result would be contrary to the long established rule that government has the power to tax property within its jurisdiction in order to receive compensation for the benefits and protections of its laws. Curry v. McCanless, 307 U.S. 357, 364 (1938).

III. RESPONDENTS WAIVED ANY RIGHT TO OBJECT TO THE ADMISSIBILITY OF THE AFFIDAVIT OF REPRESENTATIVE PAJCIC AND MAY NOT NOW RAISE THE ISSUE ON APPEAL.

Respondents' objection to the Affidavit of Representative Pajcic may not be raised at this time, as Respondents waived any right to object by their failure to do so below.

Subsequent to Petitioner's filing of the Affidavit with the trial court sub judice (R 286), Respondents filed a Motion to Strike the Affidavit (R 306), yet never set the motion for hearing. Respondents subsequently filed a Motion for Summary Judgment (R 335), noticed the motion for hearing, and proceeded with the hearing without having disposed of their Motion to Strike.

When Petitioner mentioned the Affidavit during the summary judgment hearing (R 344, 356) Respondents did not ask to be heard on their Motion to Strike, nor object to the mention of the Affidavit and move that Petitioner's remarks concerning the Affidavit be stricken. Respondents stated only, later in the hearing, that "we have case law saying that is not valid." (R 352) Respondents therefor waived the right to be heard on their Motion to Strike and may not now raise the issue on appeal. Allstate Insurance Company v. Gillespie, 455 So.2d 617 (Fla. 2d DCA 1984); Parry v. Nationwide Mutual Fire Insurance Company, 407 So.2d 936 (Fla. 5th DCA 1982); Beaty v. Beaty, 177 So.2d 54 (Fla. 2d DCA 1965) (a claim not made before the trial court in the proper manner will be considered waived).

The trial court did not issue a ruling, written or oral, with regard to Respondents' Motion to Strike the Affidavit, nor did Judge Harry C. Parham say he would not consider the Affidavit, as Respondents state in their brief. (Respondents' Answer Brief, at p. 15) Judge Parham stated only that he didn't accept Representative Pajcic as an amicus curiae. (R 356) Since the issue of the admissibility of the Affidavit was not ruled on by the trial court, it may not now be raised on appeal. Wisner v. Goodyear Tire & Rubber Co., 167 So.2d 254 (Fla. 2d DCA 1964). See also: Williams v. Williams, 172 So.2d 488 (Fla. 1st DCA 1965), wherein the Court stated that an appellate court will consider only those questions timely presented and ruled upon in the trial court.

In addition, the record on appeal as prepared by the Clerk of the Circuit Court for the District Court of Appeal, Second District, included the Affidavit (R 268-305), yet Respondents did not move to have the Affidavit excluded from the record.

Finally, the Affidavit of Representative Pajcic was submitted in response to the trial court's request. In January of 1984, a summary judgment hearing took place before Judge Parham. (R 151, 165) Judge Parham, however, continued the hearing, instructing Petitioner to obtain legislative notes or minutes of legislative committee meetings in order to establish the legislative intent of Section 193.032(5). (R 164) On February 9, 1984, attorney for Petitioner submitted an Affidavit stating that the House Committee on Finance and Tax did not have any record of Committee discussion. (R 247) The Committee, however, had forwarded to

attorney for Petitioner the Affidavit of Steve Pajcic, Chairman of the House Committee on Finance and Tax during the 1979 Session, and papers appearing of record in the Autotote case. The papers and Affidavit were filed together with the Affidavit of Petitioner's attorney pursuant to Judge Parham's earlier request (R 247-266, 286-305).

The Affidavit of Representative Pajcic is admissible as evidence that the legislature viewed multi-county disputes regarding the assessment of property as a problem that necessitated a cure, and that the legislature, through the enactment of Section 192.032(5), provided a means to prevent or settle such multi-county disputes. Department of Revenue v. Markham, 381 So.2d 1101, 1109 (Fla. 1st DCA 1979); quashed on other grounds, 396 So.2d 1120 (Fla. 1981).

Respondents' assertion that the decision of the District Court of Appeals, First District, in Markham, supra, limits the admissibility of affidavits of legislators is unfounded, due to the fact that the Court never held that it was error to admit such affidavits. In addition, contrary to Respondents' assertion that an affidavit of a legislator is inadmissible as evidence of legislative intent, citing McLellan v. State Farm Mutual Automobile Insurance Company, 366 So.2d 811, (Fla. 4th DCA 1979), the District Court of Appeal, Fourth District, stated only that such proof is generally not accepted as admissible evidence to demonstrate legislative intent. Supra, at p. 813. (emphasis supplied)

CONCLUSION

The District Court of Appeal, Second District, erred in rejecting the District Court of Appeal, Third District's, interpretation of Section 192.032(5) as set out in Autotote Limited, Inc. v. Bystrom, 454 So.2d 661 (Fla. 3d DCA); pet. for rev. den., 461 So.2d 113 (Fla. 1985), and finding that Respondents' property could not be assessed in Sarasota County, Florida. Therefore, Petitioner prays that this Court adopt the decision of the District Court of Appeal, Third District, in Autotote as the correct interpretation of Section 192.032(5), reverse the decision of the District Court of Appeal, Second District, and the trial court sub judice, and direct that summary judgment be entered in Petitioner's favor.

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to Granville H. Crabtree, Jr., 100 South Washington Boulevard, Sarasota, Florida 33577, K. Jane Fankhanel, 345 Park Avenue, New York, New York 10154; Daniel A. Weiss, Assistant County Attorney, Metro-Dade Center Suite 2810, 111 N.W. 1st Street, Miami, Florida 33128-1993; and Jeffrey P. Kielbasa, Deputy General Counsel, Department of Revenue, 202 Carlton Building, Tallahassee, Florida 32301, this the 13th day of January, 1986.

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