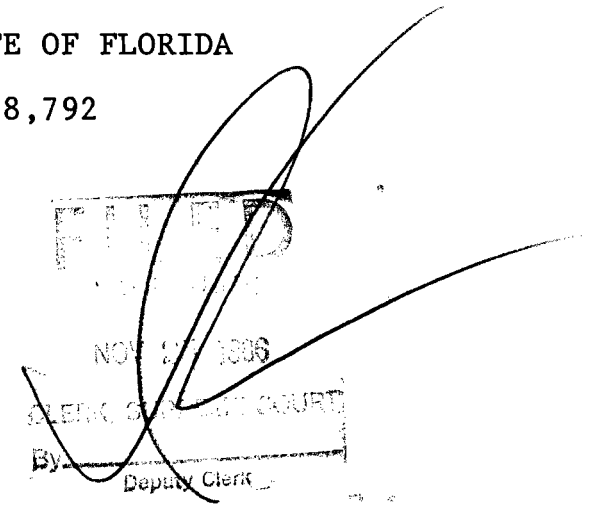
SUPREME COURT, STATE OF FLORIDA

Docket No. 68,792



RUDY MUCKENFUSS, as Property Appraiser of Marion County, Florida, and THOMAS OLSEN, as Tax Collector of Marion County, Florida

Plaintiffs,

vs.

THE DELTONA CORPORATION, a Delaware corporation authorized to do business in Florida,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE FACTS AND THE CASE

The statement of the facts and of the case set forth in the initial brief of the Property Appraiser, is accepted by Deltona, except for certain areas of disagreement which will be specifically set forth hereafter, and except for the omission by Appellant of certain relevant facts which will be set forth hereafter.

The Property Appraiser states, as fact, that he made an "initial" assessment of Deltona's land at $56,205,151, but subsequently "abandoned the method of appraisal" used in that initial assessment and then "made a reappraisal of the property, using generally recognized appraisal methods" (Pet. Br. 2). These statements are inaccurate and misleading. They imply or suggest that the Property Appraiser had the legal authority to, and did, make an official reassessment of Deltona's property, amending the official tax rolls for Marion County to reflect his "reappraisal". The tax rolls have not been changed as a result of the "reappraisal" (R/129). Deltona was not sent an amended tax notice as a result of the "reappraisal" (R/129). And Deltona was never advised of the "reappraisal" until pre-trial conference, two weeks before trial (R/130). This suit was instituted because of the invalidity of the $56 million assessment, and not because of any reassessment.

In fact, the Property Appraiser assessed Deltona's property at $56,205,151 for calendar year 1980 (P's. Ex. 3), using the same method of assessment he had testified to in Deltona's challenge to the assessments for calendar years 1976-1979 (See, trial testimony of Rudolph Muckenfuss included herewith as Appendix A, R/129-130). This method had been previously challenged by Deltona (The Deltona Corporation vs. Charles H. Fleming, et al.), and found to be illegal (See, Sturgis Final Judgment with memorandum opinion included herewith as Appendix B).

Deltona brought this action challenging the Property Appraiser's 1980 assessment for the same reasons Deltona had successfully challenged the assessments of Marion Oaks for tax years 1976-1979; those reasons being that the Property Appraiser's method of valuation was illegal and invalid. Deltona's good faith estimate of value of Marion Oaks as of January 1, 1980, was $30,335,000 (R. 606). The Property Appraiser answered Deltona's complaint and sought a jury trial over Deltona's objection (R. 623). The action was then stayed by the trial court pending the Property Appraiser's appeal of Judge Sturgis' final judgment rendered in the consolidated action challenging the assessments for tax years 1976-1979.

In Muckenfuss v. Miller, 421 So.2d 170 (Fla. 5th DCA 1982), the Fifth District Court of Appeal affirmed Judge Sturgis' final judgment for tax years 1976-1979, in which the

Property Appraiser's appraisal method was found to be illegal and invalid. (See, Appendix C for text of the court's opinion in that cause.) Subsequent to this affirmance, the stay order entered in this action was vacated and Deltona moved for a partial summary judgment in reliance upon the decision of the District Court of Appeal in the litigation involving the prior tax years (R/637). The Property Appraiser opposed Deltona's motion by contending that his "initial assessment" of $56 million was valid and was not affected by the decision of the Fifth District. The trial court denied Deltona's motion for partial summary judgment (R/642).

Because the trial court denied the motion for partial summary judgment, it became necessary for Deltona to prepare a case establishing the invalidity of the $56 million assessment.

At the commencement of trial--without any modification to the certified tax roll--Muckenfuss admitted that his official 1980 assessment was contrary to the laws of this state, and invalid (R/131-137). He abandoned his original assessment, candidly stating as his reason the affirmance by the Fifth District of Judge Sturgis' final judgment for tax years 1976-1979 (Appendix B, R/129, 134-137; Opening Statement, R/33-34, included herewith as Appendix D). The Property Appraiser then testified that he had "reappraised" Marion Oaks using a new method (R/130-132). His new method was merely a variation of his old method, and resulted in an

increase in value by $35 million, to an overall valuation of $90,922,896. The "reappraisal" was 200% more than Deltona's good faith estimate of value, and the jury's verdict. The Property Appraiser's method still contained the deficiencies inherent in his old method, and, like his old, invalid method, Department of Revenue guidelines for appraising property sold under agreements for deed were ignored (Appendix A, R/132).

At the close of the evidence the jury was charged as follows: that despite the Property Appraiser's status as the elected property appraiser, his opinion of just value was to be given no greater weight than the opinions of value testified to by the other appraisal experts (R/590-591); that the Property Appraiser's opinion of value carried no presumption of correctness (R/591); and that Deltona had the burden of proving just value by the greater weight of the evidence (R/590). After hearing three days of testimony, the jury returned an "advisory" verdict of $30,000,000. The trial judge adopted this sum as just value and entered final judgment accordingly.

The Property Appraiser also states, as a fact, that his "reappraisal" employed a generally recognized appraisal method, the market data approach, using some 14,000 "comparable sales" in Marion Oaks (Pet.Br. p. 2). While it is true that he did so testify at trial, he fails to mention that on cross-examination he could cite no recognized authority in the field of real estate appraising that approved his method,

or which showed that he had properly employed the market approach (R/174). His method resulted in the valuation of a fully improved lot (at $5,021) at a lower value than an unimproved lot (at $7,314) (R/166-167), and resulted in two otherwise identical lots, having different values, merely because one of such lots was under an agreement for deed (R/144-145, 150, 167, 175). And he also fails to mention that the District Court below did not agree with his contention that he did employ a generally recognized appraisal method.

Deltona's experts testified that the Property Appraiser's method is not a comparable sales method at all (R/220-222, 241-242); is not acceptable in the field of real estate appraisal (R/220-221, 241-242, 259-260); and is contrary to requirements for a valid tax assessment (R/225). The Property Appraiser fails to mention that his "comparable sales" were not completed sales transactions at all, but were merely executory contracts for deed (R/177). His "sales price" was merely the "contract price" of an executory agreement for deed to property which would be improved years down the road. He utilized such "sales", in his appraisal, as a basis for increasing value, even though the actual physical condition of the property remained the same. The jury was instructed that the value of real property for ad valorem tax purposes is not affected by agreements for deed, and that just value

should be determined unaffected by such agreements for deed (R/589).

The Property Appraiser, and his trial experts, included the value of outstanding, executory contracts for deed in their valuation of Marion Oaks (R/148-149, 398-400, 401-403, 477). Their method of appraisal was based upon the theory that the just value of real property is enhanced by two parties signing a written document, a contract for deed, as is exemplified by the following colloquy with one of the Property Appraiser's experts, to-wit:

> Q. Now, the just value for tax purposes of the real property that you're appraising out here, is enhanced by virtue of the existence of these contracts; is that correct?
>
> A. Yes, sir, by the existence of these contracts.

(R/477.)

In light of these clearly conflicting theories of valuation, as to the effect contracts for deed should have on real property value, the lower court instructed the jury to determine just value of the real property unaffected by the agreements for deed and without regard to the value of improvements Deltona may be obligated to deliver in the future, but which were not in place on January 1, 1980 (R/589-590).

By his appeal to the Fifth District Court of Appeal, the Property Appraiser sought reversal of the judgment based on

the jury's advisory verdict setting just value for 1980 at $30,000,000, citing as error certain instructions to the jury. The Court of Appeal affirmed that judgment setting just value.

Deltona cross-appealed the lower court's denial of its claim for attorney's fees. On grounds that there was no justiciable issue as to validity of the 1980 tax assessment by the Property Appraiser, Deltona alleged in its complaint that it was entitled to an award of reasonable attorney's fees, pursuant to § 57.105, Fla.Stats., for its efforts which resulted in invalidating and setting aside such assessment. The lower court denied Deltona such relief. The District Court of Appeal reversed, and held that Deltona was entitled to the trial fees it sought. Pursuant to motion in the appellate court, the District Court of Appeal also awarded Deltona a reasonable attorney's fee on appeal, on the grounds that the Property Appraiser's appeal was frivolous. The Property Appraiser's petition for rehearing en banc was denied by the Fifth District.

The Property Appraiser seeks review in this Court of both of such awards of attorney's fees.

SUMMARY OF ARGUMENT

The District Court, below, correctly awarded Deltona attorney's fees for appellate services, in defending the Property Appraiser's frivolous appeal, and for services rendered at the trial level in having the 1980 assessment of $56,205,151 set aside. There was, indeed, a complete absence of a justiciable issue of either law or fact raised by the Property Appraiser; but, the District Court below, in making its award, did not articulate its finding of such absence, in that precise language, when it rendered its written order. The court's written opinion does not contain a specific "finding" in that exact language, and neither § 57.105, Florida Statutes, nor any opinion of this Court requires the court to use that precise terminology.

This Court's decision in Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982), upholds the statutory, technical requirements of a finding; but, it was not presented with the question of whether the finding must be in the exact language of the statute. The finding by the District Court, below, that there was "virtually" a complete absence of a justiciable issue in these proceedings is not fatally defective. The variance in the wording was not an indication that there existed a justiciable issue which was resolved in favor of the party to whom attorney's fees was

awarded for prevailing on that issue. The variance in the wording was necessary because there was, indeed, a separate part of the lawsuit, at trial, which involved justiciable issues. There had to be a determination of just compensation once the official assessment was invalidated and set aside. Under § 57.105, Florida Statutes, fees can be awarded under such circumstances where a substantial part of a lawsuit involves a frivolous position and the fees are awarded only with respect to such nonjusticiable matters.

ARGUMENT

WHERE A NON-PREVAILING LITIGANT ASSERTS A FRIVOLOUS POSITION IN LITIGATION THAT CONTAINS SOME JUSTICIABLE ISSUES, AN AWARD OF ATTORNEY'S FEES TO THE PREVAILING PARTY SHALL BE MADE AS TO SUCH NONJUSTICIABLE MATTERS UNDER SECTION 57.105, FLORIDA STATUTES (1983)

The Fifth District Court of Appeal affirmed without discussion the final judgment of the trial court which found that the just value of Deltona's property was $30 million. The same decision reversed an order of the trial court denying Deltona trial level attorney's fees under Section 57.105, Florida Statutes (1983), and remanded the cause to the trial court to determine the amount of the fees to be awarded. By a separate, unreported order, the Fifth DCA granted Deltona's motion for appellate attorney's fees under § 57.105 and remanded to the trial court to determine the amount of the fees (Appendix F).

The Property Appraiser seeks review of the decision and order awarding Deltona its trial and appellate fees. This Court has exercised its discretionary jurisdiction to review both the decision awarding trial attorney's fees and the order awarding appellate attorney's fees on the basis of "conflict jurisdiction." Article V, Section 3(b)(3), Florida Constitution (1968).

The Property Appraiser contends that the decision of the Fifth DCA expressly and directly conflicts with this court's decision in Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982), and "every Florida appellate decision since that holding." Petitioner's brief, at p. 4.

The Property Appraiser's argument is two-fold: first, the Property Appraiser contends that in order to properly award attorney's fees under § 57.105, the court must make an affirmative finding there was "a complete absence of a justiciable issue of either law or fact. . . ." Petitioner's brief, pp. 4-5. The Property Appraiser cites this court's decision in Whitten, supra, as authority for this contention. Second, the Property Appraiser contends that § 57.105 does not sanction an award of attorney's fees where the non-prevailing party asserts non-justiciable issues in litigation that contains some justiciable issues.

As shown below, both the cases that have construed § 57.105, and the policy behind that statute do not support the positions taken by the Property Appraiser.

A. The Assertion Of A Position By A Litigant That Is "Virtually" Nonjusticiable Requires An Award Of Attorney's Fees Under § 57.105

Section 57.105, Florida Statutes (1983), provides:

> The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a

> justiciable issue of either law or fact raised by the losing party.

The decision of the Fifth District Court of Appeal found:

> that a substantial portion of this lawsuit and this appeal consisted of a legal controversy in which there was virtually a complete absence of a justiciable issue of either law or fact. . . . [Emphasis added.]

487 So.2d 1079; Appendix E.

The Property Appraiser contends that the fine distinction that exists between a "complete absence" and "virtually a complete absence" of a justiciable issue of either law or fact, should immunize him from an award of attorney's fees under § 57.105. The Property Appraiser would have this Court construe § 57.105 in a manner that would frustrate the intent and purpose of the statute. The Property Appraiser contends that the assertion of a virtually nonjusticiable claim or defense should escape the reach of § 57.105, while the assertion of a "completely" nonjusticiable claim or defense would not. The Property Appraiser states that this Court in Whitten requires such a reading of § 57.105.

In Whitten, this Court discussed the purpose for enacting § 57.105:

> to discourage baseless claims, stonewall defenses, and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities.

Whitten at 505.

This court noted in Whitten that the assertion of non-justiable claims or defenses "constitutes a reckless waste of judicial resources as well as the time and money of prevailing litigants."

Deltona had the burden at trial to overcome the presumption of correctness that attaches to all legally constituted property assessments. This burden of proof is one of the most onerous known at law.

The method of appraisal used by the Property Appraiser in arriving at the 1980 assessment was identical to the method which was condemned as illegal and invalid by the Marion County Circuit Court for tax years 1976-1979. At the commencement of trial of this cause, the Property Appraiser acknowledged for the first time during the litigation that the method he used to arrive at the $56 million assessment was invalid. The Property Appraiser acknowledged that he had never informed Deltona or its attorneys that his $56 million assessment was invalid and improper, or that he had set such assessment aside. Nor had he mailed Deltona a new tax bill reflecting his erroneous assessment or his so-called "reas-sessment".

Instead of acknowledging the invalidity of his assessment and notifying Deltona that the $56 million assessment was void, the Property Appraiser elected to "stonewall". Without notice to Deltona or its attorneys, the Property Appraiser had, one year prior to trial of this cause, "reappraised"

Marion Oaks to reflect a $33 million increase in "value". This so-called $90 million "reappraisal" was not made the subject of any "revised tax notice"; nor were the tax rolls amended to reflect such "reassessment"; nor was Deltona accorded its right of review to the Property Appraisal Adjustment Board. The final "reappraisal" was not made available to Deltona or its lawyers until two weeks prior to trial. Despite his having determined that the $56 million assessment was void at least 4 years prior to trial, no effort was made by the Property Appraiser to follow any reasonable and acceptable procedures to accomplish a "reassessment" of Marion Oaks. Nor did the Property Appraiser recede from his unfounded contention that the $91 million reappraisal be accorded a presumption of correctness.

Despite having determined that his $56 million assessment was invalid, and knowing that his $90 million "reappraisal" was not presumptively correct, and contained the same fundamental deficiencies as had been condemned by the Marion County Circuit Court and the Fifth District Court of Appeal, the Property Appraiser insisted until trial that his original assessment was valid, and thereafter insisted that his $90 million re-determination of just value was entitled to a presumption of correctness. In fact, the Property Appraiser vigorously opposed Deltona's motion for partial summary judgment which addressed itself to the validity of the $56 million assessment (R/637).

The unjustified and frivolous assertion by the Property Appraiser that his opinions of just value were clothed with a presumption of correctness, forced Deltona's attorneys to prepare for issues at trial and present evidence to refute such presumption, when in fact, the Property Appraiser knew, since 1980 with respect to his $56 million assessment, and at least one year prior to trial with respect to his $90 million reappraisal, that his opinions of just value were not entitled to any presumption of correctness.

Deltona's task at trial required it to first overcome the presumption of correctness that attaches to all lawfully prepared assessments, then to defend the Property Appraiser's attempt to assert a presumption of correctness to his "re-assessment", and, assuming Deltona overcame the presumption of correction of such assessments, to prove the just value of its property.

Despite the fact that the Property Appraiser had abandoned his $56 million assessment, and "reappraised" the property at least a year earlier, it was not until the day of trial that the Property Appraiser admitted, for the first time, that the $56 million assessment was invalidated, and that he was relying upon a reassessment prepared secretly a year earlier, as his official assessment. All of the time and effort expended by Deltona in pre-trial preparation, in anticipation of meeting the onerous burden of proof required to set aside the official assessment, had suddenly gone to

waste, by virtue of the Property Appraiser's admission of invalidity.

This is the type of frivolous and meritless activity § 57.105 was intended to prevent. And because of the Property Appraiser's continued assertion of a presumption of correctness, Deltona's attorneys necessarily incurred undue and unnecessary time in preparing for and refuting the Property Appraiser's contentions. See, Fritillary Holdings, Inc. v. Pat and Mae's Danceland Club, 443 So.2d 506 (Fla. 4th DCA 1984) (Attorney's fees properly awarded under § 57.105 where prevailing party is impelled by the loser to waste time, money and judicial resources to halt a course of conduct engaged in by his appeal); 51 Island Way Condominium Association, Inc. v. Williams, 458 So.2d 364 (Fla. 2d DCA 1984).

The Fourth District Court of Appeal, in two separate decisions, has stated that an award of attorney's fees under § 57.105 must be supported by a finding that "the position advanced by the losing party is virtually frivolous." Ferra v. Caves, 475 So.2d 1295 (4th DCA 1985); Strathman v. Henderson Mental Center, 425 So.2d 1185 (4th DCA 1983). Both these opinions cite this Court's decision in Whitten as authority for this proposition.

The construction placed on § 57.105 by the Fourth District does justice to the intent and purpose for enacting the statute. To allow a litigant to skirt the reaches of

§ 57.105 by the semantical ploy advanced by the Property Appraiser would place form over substance, and frustrate the remedial purposes behind the law.

B. Attorney's Fees Are Properly Awarded Pursuant To § 57.105 Despite The Existence Of A Justiciable Issue Where The Losing Party Asserts Other, Non-Justiciable Claims Or Defenses In The Same Litigation

Deltona sought an award of attorney's fees only for the efforts expended by its attorneys to overcome the presumption of correctness and prove the invalidity of the $56 million assessment and the $90 million "reappraisal". The just value of Deltona's property remained as a justiciable issue, and no award of attorney's fees was sought for that part of the litigation.

In Henderson v. Leiva, 391 So.2d 292 (Fla. 3d DCA 1980), the court held that attorney's fees may be awarded under § 57.105 where a defendant asserted a frivolous position with respect to his liability to perform under a contract, but there was remaining for adjudication a justiciable issue on the question of damages as a result of the breach of contract. This court in Whitten cited Henderson v. Leiva with approval.

The Property Appraiser contends that he should be free under § 57.105 to assert nonjusticiable defenses with impunity so long as some portion of the litigation contains justiciable issues. He cites no authority for this proposition. Even though the Fifth District found from the record before it

that a "substantial portion" of the proceeding at the trial level and the proceedings before it on appeal were nonjusticiable, the Property Appraiser contends that he cannot be liable for attorney's fees unless the entire lawsuit is infected with frivolity. This Court's opinion in Whitten does not lend itself to the construction placed on § 57.105 by the Property Appraiser. Rather, Whitten confirms that "stonewall defenses" like the kind employed in the case at bar are no longer countenanced.

In Mesa Petroleum Company v. Coniglio, 787 F.2d 1484 (11th Cir. 1986), former Florida Supreme Court Justice Hatchett, writing for the Eleventh Circuit in a Florida diversity case, affirmed an award of attorney's fees under § 57.105 where the defendant persisted in framing an irrelevant issue, which was one of many issues advanced by the defendant.

There is simply no place in our democratic society for governmental officials who abuse the powers entrusted in their office. It is bad enough for a tax assessor to assess one's property at double its just value. It is even worse, however, when the taxpayer refuses "to let the sleeping dog lie", and exercises the right to challenge such assessment in court, only to be met with an eleventh hour reappraisal that is three times higher than the original assessment. Such conduct on the part of a public officer is bad faith and clearly a breach of the public trust. Section 57.105, was

designed to discourage such conduct "by placing a price tag through attorney's fees awards on losing parties who engage in those activities." Whitten v. Progressive Casualty Ins. Co., supra, at 505.

The assertion by the Property Appraiser of the validity of his $56 million assessment, and his $90 million "reassessment", is so totally devoid of merit that to label it as frivolous may be a euphemism, as it was in Catron Beverages, Inc. v. Maynard, 395 So.2d 261 (Fla. 1st DCA 1981).

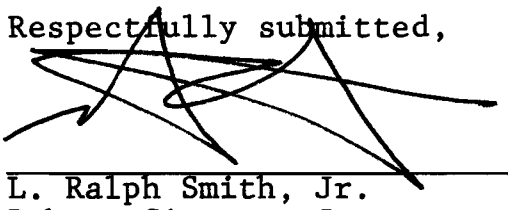
In the case at bar, the Property Appraiser's 1980 assessment was invalid at the time it was made. It was the identical method rejected by the circuit judge during trial of the case for tax years 1976 through 1979. The Property Appraiser elected to officially stand on that invalid assessment until the day of trial. More than a year before trial he "reappraised" Marion Oaks for $90 million under an improper method of appraisal which also placed a value on agreements for deed, and involved undue speculation. He vigorously opposed Deltona's motion for partial summary judgment which specifically addressed the validity of his $56 million assessment. It was not until trial of this cause, four years after the tax bill was mailed to Deltona, that the Property Appraiser conceded the invalidity of his method of appraisal for the $56 million assessment. He then attempted to "grandfather" his $90 million reappraisal, under the presumption accorded valid property assessments, by insisting at

trial that his eleventh hour reappraisal should be presumed valid solely because he is the official property appraiser, and not because an official assessment was based upon such reappraisal. These trial tactics, asserting frivolous positions with such flippancy, can not be countenanced. Appellate tactics of similar frivolity, are just as reprehensible. Awards of attorney's fees are justified as a deterrant against the use of such tactics in the future. Under the facts of the instant case, the District Court's finding of virtually a complete absence of a justiciable issue presented by the Property Appraiser more than satisfies the requirements of § 57.105, Florida Statutes.

CONCLUSION

Based upon the foregoing argument and authority, Respondent, The Deltona Corporation, requests that this Court reconsider its decision to grant jurisdiction and enter an order denying conflict jurisdiction. In the alternative, The Deltona Corporation requests that the Court affirm the decision and the order under review, and remand this cause to the Circuit Court for the purpose of determining reasonable attorney's fees and entering judgment for such reasonable attorney's fees against the Marion County Property Appraiser.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by United States Mail this 24th day of November, 1986, upon C. Ray Greene, Jr., Greene, Greene, Falck & Coalson, 2600 Gulf Life Tower, Jacksonville, Florida 32207, and J. C. O'steen, Assistant Attorney General, Department of Legal Affairs, The Capitol, Room LL04, Tallahassee, Florida 32301.