SUPREME COURT, STATE OF FLORIDA

Docket No. 68,792

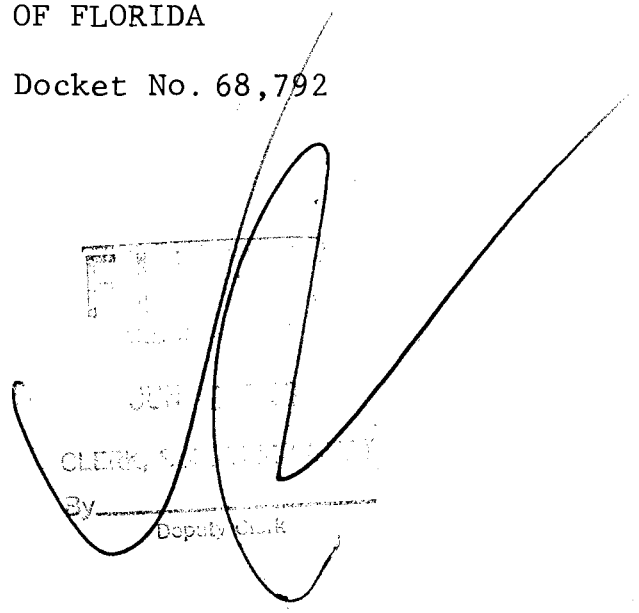
RUDY MUCKENFUSS, as Property Appraiser of Marion County, Florida, and THOMAS OLSEN, as Tax Collector of Marion County, Florida,

Appellants/Petitioners,

vs.

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

Appellee/Respondent.



BRIEF OF PETITIONER ON JURISDICTION

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PRELIMINARY STATEMENT

In this brief, the Petitioner, RUDY MUCKENFUSS, as Property Appraiser of Marion County, Florida, will be referred to as the "Property Appraiser". The Respondent, THE DELTONA CORPORATION, will be referred to as "Deltona".

STATEMENT OF THE CASE AND OF THE FACTS

The Property Appraiser assessed the real property of Deltona located in Marion County at $56,205,151. Deltona appealed to the Board of Adjustment, which upheld the tax assessment. Deltona timely filed a complaint in the Circuit Court of Marion County to contest the $56,205,151 assessed value of its property in Marion County, contending that the assessed value should be $30,335,000. The Property Appraiser filed his answer and requested a jury trial. The Court granted a trial by jury for the purpose of rendering an advisory verdict to the Court. The case was set for trial but was subsequently continued until the Fifth District Court of Appeal rendered a decision in cases between the same parties for prior tax years then pending before the Fifth District Court of Appeal. Subsequently, the Fifth District Court of Appeal declared that the methods of appraisal used by the Property Appraiser were illegal and improper but also stated that its opinion did not in any way limit or control the Property

Appraiser's valuations or tax appraisals in other years or on other projects. Muckenfuss v. Miller, 421 So.2d 170 (Fla. 5 DCA 1982). The initial $56,205,151 assessment of the Property Appraiser was made prior to the decision in the Circuit Court in the prior cases and prior to the publishing of the District Court opinion in 1982. The Property Appraiser then abandoned the method of appraisal condemned by the Circuit Court and District Court in the prior cases and made a reappraisal of the property, using generally recognized appraisal methods based upon the market value approach and using approximately 14,000 comparable sales. Using this method, the Property Appraiser arrived at an assessed value of $90,922,896.

On September 10, 1984, a three-day trial was held, which concluded September 12, 1984. The Petitioner and the Respondent submitted proposed jury instructions to the Circuit Court. The Court, after considerable argument by the respective attorneys, gave some of the Respondent's requested instructions and denied others and gave some of the Petitioner's requested instructions and denied others. The jury returned a verdict in the amount of $30,000,000, which the Court adopted and entered a final judgment for that amount. Respondent filed a motion for attorney fees pursuant to Florida Statutes Section 57.105. The lower court denied the motion. From that judgment, the Petitioner appealed to the Fifth District Court of Appeal and raised three points on appeal and cited

twenty-two cases in support of his position, together with a main brief consisting of eighteen pages. The Respondent filed a cross-appeal, contending that the lower court erred in not awarding Deltona its attorney fees because there was a complete absence of a justiciable issue of either law or fact as provided in §57.105, Florida Statutes. Both Petitioner and Respondent moved the Appellate Court to award them their attorney fees on appeal, each contending there was a complete absence of a justiciable issue of either law or fact raised on the appeal or cross-appeal. The District Court affirmed the judgment of the Circuit Court and reversed the order of the lower court denying attorney fees to Deltona and remanded the cause to the trial court for the assessment of fees for Respondent's attorney to be paid by Appellants in an amount to be assessed by the trial judge, stating that although there was perhaps a legitimate question in Petitioners' minds as to the existence of a justiciable issue of fact when the lower suit was initially filed, the question of fact was removed when it was established in 1982 that Appellants were incorrect. The District Court further stated that because a <u>substantial</u> portion of the lower court suit and appeal consisted of a <u>legal controversy</u> in which there was <u>virtually</u> a complete absence of a justiciable issue of either law or fact, attorney fees should be awarded to Deltona.

SUMMARY OF ARGUMENT

The District Court of Appeal, Fifth District, erred by holding that "because a substantial portion of this law suit 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, we reverse the order denying attorneys fees". (Emphasis added). This holding expressly and directly conflicts with the holding of this court in Whitten v. Progressive Cas. Ins. Co., 410 So.2d 501 (Fla. 1982), and every Florida appellate decision since that holding, which required the affirmative finding of a complete absence of a justiciable issue of either law or fact in order to make an award of attorneys fees, rather than finding that a substantial portion of the law suit consisted of a legal controvery in which there was virtually a complete absence of a justiciable issue of law of fact.

ARGUMENT

The decision in this case by the Fifth District Court of Appeal expressly and directly conflicts with the decisions of this Court in Whitten v. Progressive Cas. Ins. Co., 410 So.2d 501 (Fla. 1982), and Treat v. State ex rel Milton, 163 So. 883 (Fla. 1935), and the decisions of the District Court of Appeal, First District, in Sheriff of Alachua County v. Hardie, 433 So.2d 15 (Fla. 1 DCA 1983), Castaway Lounge of Bay County, Inc. v. Reid, 411 So.2d 282 (Fla. 1 DCA 1982), and All-Brite Sales Company v. Roderick, 416 So.2d 1202 (Fla. 1 DCA 1982), and the decisions of the District Court of Appeal, Second District, in Apgar & Markham Const. v. Macasphalt, 424 So.2d 41 (Fla. 2 DCA 1982), Greater Clearwater Chamber of Commerce, Inc. v. Modern Graphic Arts, 464 So.2d 594 (Fla. 2 DCA 1985), United Companies Financial Corp. v. Hughes, 460 So.2d 585 (Fla. 2 DCA 1984), Schultz v. Williams, 472 So.2d 1347 (Fla. 2 DCA 1985), Wall v. Dept. of Transp. of State of Fla., 455 So.2d 1138 (Fla. 2 DCA 1984), Braden River Civic Ass'n, Inc. v. Manatee Cty., 403 So.2d 1007 (Fla. 2 DCA 1981), Ferm v. Saba, 444 So.2d 976 (Fla. 2 DCA 1983), Am. Glass Industries v. Allstate Ins. Co., 441 So.2d 672 (Fla. 2 DCA 1983), and decisions of the District Court of Appeal, Third District, in A. M. Shandloff, Inc. v. Richter, 445 So.2d 358 (Fla. 3 DCA 1984), Fireman's Fund Insurance Companies v. Rojas, 447 So.2d 1023 (Fla. 3 DCA 1984), Eckhoff, et al. v.

Revlon, Inc., 414 So.2d 1152 (Fla. 3 DCA 1982), and Sachs v. Hoglund, 397 So.2d 447 (Fla. 3 DCA 1981), and decisions of the District Court of Appeal, Fourth District, in Klein v. Layne, Inc. of Florida, 453 So.2d 203 (Fla. 4 DCA 1984), Stevenson v. Rutherford, 440 So.2d 28 (Fla. 4 DCA 1983), City of Deerfield Beach v. Oliver-Hoffman Corp., 396 So.2d 1187 (Fla. 4 DCA 1981), Greenberg v. Manor Pines Realty Corporation, 414 So.2d 260 (Fla. 4 DCA 1982), Cohen v. General Motors Corporation, Cadillac Division, 444 So.2d 1170 (Fla. 4 DCA 1984), and Sepner v. Village of Royal Palm Beach, 444 So.2d 68 (Fla. 4 DCA 1984).

All of the above cited cases, except Treat, supra, expressly and directly hold that in order to award an attorney fee pursuant to §47.105, Florida Statutes, there must be a finding that there is a complete absence of a justiciable issue of either law or fact rather than virtually a complete absence of a justiciable issue of either law or fact in a substantial portion of a law suit and appeal as was expressly held by the Fifth District Court of Appeal in the case at bar.

The Treat case, supra, defined "frivolous appeal" as one presenting no justiciable question and so readily recognized as devoid of merit on the face of the record that there is little prospect it can ever succeed and is cited in Whitten, supra.

The Schultz case, supra, expressly and directly held

that where the appraiser's assessment was upheld by the Property Appraisal Board, it was appropriate for him to at least initially defend the assessment.

CONCLUSION

The decision of the Fifth District Court of Appeal in awarding an attorney fee to the Respondent pursuant to §57.105, Florida Statutes, where there was virtually a complete absence of a justiciable issue of either law or fact in a substantial portion of a law suit expressly and directly conflicts with the decision of this Court in Whitten, supra, and the decisions cited above by the District Courts of Appeal, First, Second, Third and Fourth Districts, on the same point of law.

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was furnished L. Ralph Smith, Jr., Esquire, P. O. Drawer 10369, Tallahassee, Florida 32302, by U. S. Mail, this May 29, 1986.

Attorney