IN THE
SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 70,812

BROWARD COUNTY, a political subdivision of the state of Florida,

Appellant,

vs.

THE STATE OF FLORIDA AND THE SEVERAL PROPERTY OWNERS, TAXPAYERS AND CITIZENS OF BROWARD COUNTY, FLORIDA, INCLUDING NONRESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, AND OTHERS HAVING OR CLAIMING ANY RIGHT, TITLE OR INTEREST IN PROPERTY TO BE AFFECTED BY THE ISSUANCE OF THE BONDS HEREIN DESCRIBED, OR TO BE AFFECTED THEREBY,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Appellant, Broward County, was the Plaintiff in the proceeding before the Circuit Court of the Seventeenth Judicial Circuit (the "Circuit Court") in and for Broward County, Florida. Appellee, the State of Florida and the Several Property Owners, Taxpayers and Citizens of Broward County, were the Defendants. South Broward Citizens for a Better Environment, Inc. and Bruce Head joined the State as Intervenors. The parties will be referred to as the "County," the "State" and the "Intervenors," respectively. The symbol A. will refer to the Appendix.

This Brief is submitted on behalf of the County. The County has taken this appeal from a final judgment and order of the Circuit Court dismissing the complaint for revalidation of $521,175,000 Broward County Resource Recovery Revenue Bonds.

Jurisdiction is vested in the Supreme Court of Florida pursuant to Article V, § 3(b)(2), Florida Constitution, Section 75.08, Florida Statutes, as amended, and Rule 9.030(a)(1)(B)(i) of the Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE AND OF THE FACTS

By this Appeal, the County seeks review of a final judgment and order of the Circuit Court dismissing, without the requisite statutory hearing, a Complaint for Validation, filed February 27, 1987, on the grounds that the County failed to join certain bondholders as indispensable parties. The bonds at issue in the present case were initially the subject of a validation proceeding in 1984 at which time the Circuit Court validated approximately $590,000,000 of Resource Recovery Revenue Bonds (the "Bonds") under Chapter 166, Florida Statutes. The Circuit Court judgment was affirmed by this Court, in an opinion appearing at 468 So.2d 965 (Fla. 1985). The decisions of both the Circuit Court and this Court required revalidation of the Bonds prior to their conversion to industrial development bonds under Chapter 159, Florida Statutes (See 468 So.2d at 698). Issues raised in this second validation proceeding have necessitated this appeal.

A. Prior Validation History

Broward County officials have worked toward solving the waste disposal problems of Broward County over an extensive period of time. The Broward County Board of County Commissioners (the "Board") first undertook consideration of alternative solid waste disposal methods as early as the late 1970s and in 1982 retained consulting engineers, Malcolm Pirnie, Inc., ("Malcolm Pirnie"), to conduct a detailed study of the problem. Malcolm Pirnie issued a report on alternative waste disposal technologies

and recommended that the County build mass-burning incineration systems. Malcolm Pirnie also evaluated potential landfill and resource recovery sites. They informed the County that one of the two existing disposal sites, the Davie Landfill, would reach capacity by December 31, 1987, with no further opportunity to obtain extension permits. They noted that the second landfill is expected to be exhausted by the early 1990s. With the exhaustion of both sites, Malcolm Pirnie noted that the waste disposal problems of the County would be of crisis proportions (See A. Ex. 30 at 26-28). Given this situation the Board sought proposals for planning a viable waste disposal alternative to landfilling which would (1) convert waste into energy and thereby minimize the critical need for actual landfill sites and (2) pay for itself through a combination of service charges and electricity revenues. The County determined that the best way to finance such a resource recovery facility would be on a tax-free basis under the Internal Revenue Code of 1954, as amended (the "1954 Code"), and the Public Utilities Regulatory Policies Act of 1978.[1] Pub. L. 95-617, 92 Stat. 3117 (1978). In accordance with the requirements of the 1954 Code, on April 19, 1984, the Board adopted Resolution 84-964, declaring its intention to provide financing for certain waste-to-energy facilities and landfills (the "Projects") by issuing up to $590,000,000 of industrial

1. A description of the steps taken to authorize and validate the Bonds under Chapter 166 of the Florida Statutes is contained in the Complaint for Validation filed with the Circuit Court on February 27, 1987 (See A. Ex. 2). The contents of that Complaint have not yet been addressed by the Circuit Court on the merits.

development bonds under Chapter 159, Florida Statues. See generally A. Ex. 20 at 1-5.

As observed by this Court in its opinion affirming the earlier validation decision, changes in the Federal tax laws intervened and required a restructuring of the financing:

> In response [to the changes in the Federal tax laws], the County developed a two-step plan of financing. Because it was vital that the bonds be issued by December 31, 1984, the County would first issue revenue bonds under Chapter 166 and secure the payment of principal and interest by investing the bond proceeds in the United States securities. The County would then continue to proceed with the project. In the second phase, if the resource recovery plants are sold, leased, or operated by a private vendor, the present revenue bonds would be converted after notice and a full validation hearing to industrial development revenue bonds under chapter 159. If, however, the project is abandoned for any reason, the County proposed to redeem these revenue bonds, and any deficiency would be paid by the issuance of special obligation bonds.

State v. Broward County, 468 So.2d 965, 967 (Fla. 1985). The County then proceeded to validate the Bonds to be issued under this new structure. By judgment rendered on October 24, 1984, the Circuit Court (Polen, J.) held that:

> 2. The Bonds have been duly authorized for proper public purposes and in the manner as required by law and when issued as provided by the Resolution and as authorized by Chapter 166, Florida Statutes, will be valid and binding obligations of the County in accordance with their terms. . . .
>
> 5. The County is authorized under Section 166.111, Florida Statutes, to issue the Bonds secured as to the payment of principal and interest by a pledge of the principal and interest coming due on Governmental Obligations . . . to be purchased from a portion of the proceeds of the Bonds. . . .

> 10. The County shall, prior to converting the Bonds to obligations payable solely from revenues derived from the sale, operation or leasing of the Project, in accordance with Chapter 159, Florida Statutes, validate such Bonds and the contractual and financing arrangements made to secure the same. In such proceeding, notice shall be provided to counsel of record in this cause. . . .

Broward County v. State, No. 84-375730, slip op. at 8-9 (Fla. 17th Cir.Ct. Oct. 24, 1984). The judgment of the Circuit Court was appealed to this Court.

On November 21, 1984, Brown & Wood, in its capacity as bond counsel for the County, pursuant to the County's request and in order to comply with the requirements of the 1954 Code, filed articles of incorporation for two Florida corporations, North Broward County Resource Recovery Project, Inc. and South Broward County Resource Recovery Project, Inc. These two corporations were established with three Brown & Wood attorneys serving as non-compensated directors to conduct the public hearing required by the 1954 Code and to help the County in obtaining permits and licenses for the project sites while negotiations with the vendors proceeded.[2] A public hearing required by the 1954 Code was held on December 10, 1984.

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2. If the control of the corporations was not retained by the County or its agents but was prematurely given to the vendors, the County would lose necessary bargaining leverage in negotiations. In order to retain control over the public hearing rights under the 1954 Code and the permits and licenses, it was decided that the three original directors will remain the directors until such time as the County allows the Bond proceeds to be spent on construction costs of the project by noticing a "Construction Funds Designation Date," at which time the two Florida corporations will be assigned or transferred, without charge or expense, to the vendors.

On December 18, 1984, the Board adopted Resolution 84-3097 authorizing the issuance of the Bonds and the terms and provisions thereof, which Resolution was confirmed and ratified by Resolution 84-3113 adopted by the Board on December 20, 1984. On December 27, 1984, with the appeal of the validation judgment pending, the County issued its $521,175,000 of resource recovery bonds in three series. Official Statements, dated December 18, 1984 (the "Official Statements") were provided to all Bond purchasers in conjunction with the issuance and sale of the Bonds.[3]

The Official Statements fully disclose the two-step nature of the transaction and outline the protections to be afforded the Bondholders (see A. Ex. 30 at 3-22). The Official Statements provide that under Chapter 166, before project vendors are selected and funds are committed to commence project construction (the "Construction Funds Designation Date"), the Bonds will be secured by a pledge of all Bond proceeds with a simultaneous prohibition against any use of those proceeds other than for payment of principal and interest on the Bonds. The Official Statements also explain to the Bondholders that prior to the Construction Funds Designation Date the proceeds from the sale of the Bonds will be continually invested and reinvested in certain United States government obligations (the "Government Obligations"). It notes that the excess earnings received from

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3. The Bonds were issued in three series--1984A, 1984B and 1984C. Where language is quoted from the Bonds or the Official Statements, the Series 1984A language is used. The Series 1984B and 1984C language differs only by reference to those series instead of Series 1984A.

these investments over and above the amounts required to pay current Bond interest will be placed in the Excess Earnings Holding Account, which further secures the Bonds (A. Ex. 30 at 18-19). (To date, excess earnings exceed $20 million. See A. Ex. 31 at 2.)

The Official Statements provide that, at such time as the necessary arrangements are made with the private project operators, the prohibitions against the use of the proceeds will end, the security for the Bonds will cease to be the Government Obligations and the security will become instead the revenues derived from the sale, operation or leasing of the Projects constructed with the Bond proceeds. Prior to this substitution of collateral, each Bondholder can elect to continue to hold the Bonds or to tender the Bonds for payment in full of principal and accrued interest. The notice provisions set forth in the Official Statements require the present Bondholders to affirmatively respond to this notice of election or their Bonds will be deemed tendered at a purchase price equal to the principal plus any accrued interest (A. Ex. 30 at 6-7; A. Ex. 31). Thus, the Bondholders will have to affirmatively elect to continue to hold the Bonds once there is a substitution of security and the Bonds are validated under Chapter 159.

The Official Statements also included a section on validation which noted that the State and certain citizens were appealing the initial validation order of the Circuit Court (A. Ex. 30 at 46). Given the pendency of that appeal, the County did not include on the form of Bond delivered to the Bondholders any statement or certification as to validation

as is usually the case in bond financings in Florida. In addition, the Supplement to the Official Statements, delivered to the Bondholders in November 1986, informed the Bondholders of the anticipated revalidation proceedings (See A. Ex. 32).

By decision rendered on April 11, 1985, this Court affirmed the judgment of the Circuit Court. See State v. Broward County, 468 So.2d 965 (Fla. 1985). In affirming the judgment, this Court stated:

> The State argues that permitting the County to proceed under the authority of section 166.111 in the present case circumvents the purpose of article VII, section 10(c), Florida Constitution, and chapter 159, part II. We disagree. Although these plants, if constructed, are intended to be either sold to or operated by a private vendor, the bonds in this proceeding are merely the first step in a complex financing scheme. Any such sale or lease which requires compliance with chapter 159 will be addressed at that time.
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> * * *
>
> It is important to note at this point that we review only the issuance of revenue bonds by the County under section 166.111, Florida Statutes (1983), despite any future intention of the County to convert these bonds to industrial development revenue bonds authorized and secured under chapter 159, part II. Subsequent aspects of this financing plan are not before this court, and the County's authority to issue chapter 159 bonds is not determined at this time.

Id. at 967. Thus, this Court affirmed the decision of the Circuit Court and approved the two-step procedure for validation and issuance (and subsequent conversion) of the Bonds, provided the revalidation of the Bonds under Chapter 159 takes place, as is now sought by the County.

The State sought unsuccessfully a rehearing of the decision of this Court affirming the final judgment of the Circuit Court, seeking to revisit

the issue of the propriety of the County proceeding under Chapter 166 by contending that the outstanding bonds had been sold through misrepresentations of their status as municipal revenue bonds as opposed to industrial development revenue bonds. This misrepresentation argument had been first raised by the State at oral argument and was rejected by this Court when it "[found] no merit in any of the other arguments raised by Appellants." Id. at 969. This Court made that decision after reviewing, among other things, the Official Statements which contained the alleged misrepresentations. Rehearing on these issues was denied by this Court.

B. Current Validation Proceedings

In accordance with the prior validation decisions, the County filed the Complaint for Validation on February 27, 1987 (the "Complaint") seeking to validate the Bonds under Chapter 159. The Complaint describes the prior validation proceedings and notes that, as a result of those proceedings, the County would be required to validate the Bonds, and the contractual and financing arrangements in connection therewith, prior to the conversion of the security for the Bonds from the Government Obligations presently securing the Bonds to revenues to be derived from the operation, sale, lease and use of the Projects. The Complaint also notes that the County is authorized to finance solid waste facilities under Chapter 159 and states with particularity the actions taken in accordance with Chapter 159 (A. Ex. 2 at 4, 5, 35, 36). On March 4, 1987, an Order to Show Cause was issued by the Circuit Court establishing a validation hearing date of April 6, 1987 (A. Ex. 3).

Pursuant to Section 75.05, Florida Statutes, the County served the Complaint on the State Attorney on March 6, 1987 and published notice of the hearing as required by Section 75.06. (Additionally, and as directed by this and the Circuit Court, the County served all counsel of record in the earlier proceeding.) The State Attorney responded with an Answer on behalf of the named defendants on March 11, 1987. On March 20, 1987, the Intervenors filed a motion to dismiss alleging that the County failed to attach the exhibits referred to in the Complaint and alleging that the Complaint had been prematurely filed (A. Ex. 5). A hearing was held in the Circuit Court on March 27, 1987 at which time the Assistant State Attorney sought a continuance of 30 days arguing that she would need more time to prepare because the proceeding is so complicated, even though she had acted on behalf of the State in the prior related proceeding. The County objected to any extension of time and in particular objected to a 30-day extension, because it noted that delay would increase the County's costs and was contrary to the intent of Chapter 75, Florida Statutes. The Circuit Court nonetheless adjourned the hearing to May 8, 1987. That hearing has never been held. During the course of the March 27 hearing, the Circuit Court also raised, in passing and sua sponte, the issue of whether the Chapter 166 Bondholders must be joined as indispensable parties in this proceeding (A. Ex. 7 at 3, 22, 23).

On March 31, 1987, the Intervenors filed interrogatories and a request for admissions and made a motion to expedite discovery stating that time was of the essence in this case (A. Ex. 8). On April 6, 1987, a hear-

ing was held to inform all parties of the continuance. At that hearing the County objected to the Intervenors' discovery requests as unprecedented in bond validation proceedings. (The State, while conceding that it had never engaged in discovery in a bond validation proceeding, contended that neither it nor the Intervenors were precluded from taking discovery.) The County also stated that the discovery requested by the Intervenors related to matters collateral to the bond validation proceeding, since it inquired as to the validity of the County's determination regarding the feasibility of the Projects. Nevertheless, the Circuit Court granted the Intervenors' motion for discovery and allowed them to submit an additional 75 interrogatories (A. Ex. 9 at 5, 9, 19, 31, 34). On April 8, the Intervenors amended their Motion to Dismiss and moved to dismiss the Complaint for failure of the County to name the Bondholders as indispensable parties (A. Ex. 10).

The County filed a Memorandum in Support of Validation on April 17, 1987. On April 24, 1987, the State moved to compel the production of records and documents by the County, filed requests for admissions and interrogatories, and filed a Motion for Judgment on the Pleadings for failure to join the bondholders as indispensable parties in this proceeding (A. Ex. 13). On May 1, 1987, the State made a motion to impose on the County the State's costs to retain an expert witness to testify against the County at the hearing scheduled for May 8, 1987. On May 1, 1987 the County filed a motion to admit Brown & Wood, its bond counsel, as foreign counsel in the present action. On May 4, 1987, the County filed amended Answers to Intervenors' Interrogatories.

At a hearing on May 5, 1987, the Court granted the unprecedented motion by the State allowing the State to hire, at the County's expense, an expert witness to contest the feasibility of a solid waste mass-burn facility without citing its authority for doing so. (During the discussion on the motion, the Court nonetheless reserved the right to find the expert testimony irrelevant, recognizing that it would address collateral issues. See A. Ex. 16 at 17.)

Next, the Court considered the County's motion for the appearance of Brown & Wood as foreign counsel. That firm had been allowed to appear in the initial validation, without objection, in this Court. The Intervenors objected to this motion erroneously alleging that members of Brown & Wood had a pecuniary interest in the project vendors. The Intervenors also alleged that entering into such a transaction on behalf of the County presented a conflict of interest and a violation of the Florida Code of Professional Responsibility. Although the County contested the misrepresentations of the Intervenors, the Circuit Court accepted the Intervenor's representations of facts and denied the motion (A. Ex. 16 at 12).[4]

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4. On May 18, 1987, the County submitted a Motion for Reconsideration of the issue together with a memorandum of law demonstrating the inapplicability of the cases cited by the Circuit Court and an affidavit of a member of Brown & Wood stating that no attorney owned any interest in or received any compensation from the project vendors. The Circuit Court nonetheless denied the motion for rehearing on June 1, 1987. This denial of the motion necessitated a petition by the County to the District Court of Appeal for a writ of certiorari to reverse the Circuit Court's decision. The District Court, recognizing the need for an expeditious resolution of the bond validation proceeding, issued an order, sua sponte, establishing an abbreviated time frame for filing papers in connection with the petition.

Finally, the Court considered the State's Motion for Judgment on the Pleadings and the Intervenors' Amended Motion for Dismissal for the County's alleged failure to join the Bondholders as indispensable parties. The County had provided the Court a memorandum of law supporting its position that Bondholders are not parties contemplated by the validation statute and need not be (and, in fact, have not been) parties to bond validation proceedings. The County also presented the Affidavit of Alan D. Marks, a representative of the Remarketing Agent for the Bonds. Mr. Marks' affidavit explained the protections provided the Bondholders and why they have no right or interest to be determined or jeopardized in the revalidation of the Bonds. The County also noted that as a practical matter it would be impossible to join the Bondholders, who are numerous and geographically diverse, as parties (A. Ex. 16 at 41). Nevertheless on May 8, 1987, the Circuit Court issued an Order dismissing the Complaint with 30 days leave to amend to name the Bondholders as defendants.

On May 18, 1987, the County filed a motion requesting a rehearing or clarification of the Court's order (A. Ex. 17). In that motion, the County outlined the impossibility of complying with the order for statutory, jurisdictional and practical reasons. The County reiterated that it would be impossible to effectively serve the Bondholders. The County requested that in the event the Circuit Court denied its motion, that it promptly enter a final judgment appealable to this Court without awaiting the expiration of the 30 days (A. Ex. 17). The State responded on May 26, 1987, contesting the procedural authority of the County to seek a

rehearing. The State (as it had before this Court on rehearing in the initial validation proceeding) once again challenged the validity of the outstanding Bonds by advancing the argument that the County issued the Bonds in contravention of the requirements of the decisions in the earlier validation proceeding and, thus, intentionally misled the Bondholders (A. Ex. 18). The Circuit Court reviewed the County's motion for rehearing and the State's response and issued an order of June 4, 1987, stating that it would take the matter under advisement for another 30 days pending receipt from the County of additional information in the form of (1) answers to interrogatories propounded by the State and (2) a memorandum regarding the relationship between the several companies which participate in this business transaction and the Bondholders (A. Ex. 19).

On June 16, 1987, the County filed the answers to the interrogatories and a memorandum at the request of the Circuit Court which explained (1) the methods employed to finance the Bonds and the considerations attendant thereto, (2) the relationships of the companies selected as vendors to complete the construction of the resource recovery system and (3) a discussion of information before the Circuit Court and this Court during the initial validation proceeding (A. Ex. 20). Simultaneously, the County made a motion requesting an emergency hearing on its motion for rehearing or clarification of the Bondholder issue and attached in support of the motion an affidavit of the Project director stating that the continual court delays being incurred by the County would result in escalated project costs of approximately $100,000 per day, which will eventually be borne by the

County's citizens (A. Ex. 21). On June 23, 1987, the Intervenors filed a response in opposition to the County's motion for an emergency hearing (A. Ex. 23). The State similarly responded on June 24, 1987 (A. Ex. 24). That same day, the Circuit Court denied the County's motion for rehearing on the Bondholder issue (A. Ex. 25). On June 26, 1987, the County served an Ex Parte Motion upon the Circuit Court seeking a final, appealable judgment (A. Ex. 26). Only then did the Circuit Court, sua sponte, issue the final order dated June 29, 1987 (the "Order"), dismissing the validation action, which Order is the subject of this appeal (A. Ex. 1).

SUMMARY OF ARGUMENT

The County respectfully submits that the Circuit Court erred in that the Order: (1) is founded upon allegations by the State and Intervenors, wholly unsubstantiated and in support of which no evidence was taken nor hearing held, addressing issues previously litigated and decided in the prior validation; (2) entertains issues which are collateral to a bond validation proceeding and is in error substantively as to the issue of the proper parties to validation proceedings generally and this proceeding in particular and (3) is not authorized as a procedural matter under the validation statute (Chapter 75, Florida Statutes).

POINT I

THE STATE AND THE INTERVENORS ARE ATTEMPTING IMPERMISSIBLY TO RELITIGATE ISSUES ALREADY DETERMINED BY THIS COURT

The Circuit Court erred when it permitted the State and the Intervenors to relitigate, as a predicate to arguing the indispensability of the Bondholders, the issue of purportedly misleading information in the Official Statements, an issue litigated and decided against these parties in the earlier proceeding.

It is clear in Florida that the doctrine of collateral estoppel prevents parties to prior litigation from relitigating, in a subsequent action, issues raised and determined adversely to them in the earlier case. Mobil Oil Corporation v. Shevin, 354 So.2d 372 (Fla. 1977). In Mobil, the plaintiffs, major oil companies, sought to enjoin the Florida Attorney General from prosecuting Federal antitrust claims against them arguing that the Attorney General had no such authority under Florida law. This Court upheld a dismissal of the action on grounds of collateral estoppel, since the same issue had been decided adversely to the oil companies in antitrust actions commenced against them by the Attorney General in Federal court. Rejecting arguments by the oil companies that only this Court could finally determine the issue of the Attorney General's authority, this Court held that the litigation of that issue between the same parties in a court of competent jurisdiction precluded the oil companies from raising it again. Similarly, in Eastern Shores Sales v. City of North Miami Beach, 363 So.2d

321 (Fla. 1978), this Court held that the City of North Miami Beach was collaterally estopped from challenging the constitutionality of an agreement between it and a developer pursuant to which the City contracted away its taxing power. While this Court agreed with the City that the agreement was unconstitutional (363 So.2d at 323), it nonetheless held that the City was precluded from raising the issue by virtue of an earlier decision of the Circuit Court (unappealed) upholding that agreement in a declaratory judgment action involving the same parties. Id.

In the instant case, the Circuit Court in direct contravention of the collateral estoppel doctrine, entertained the arguments of the State and Intervenors (both of whom were parties to the prior validation) that the Official Statements contain information misleading to the Bondholders. Although this Court decided the question adversely to the State and Intervenors in the prior validation, the Circuit Court relied upon the State's and Intervenors' identical arguments and determined that the Bondholders are indispensable parties to the present validation proceeding. Allowing such arguments as the foundation for the Circuit Court's decision is tantamount to overruling this Court's determination and constitutes reversible error. See Mobil, 354 So.2d at 377.

In their Reply Brief in the original validation appeal to this Court, the Intervenors first raised the issue of whether the purchasers of the Bonds had been adequately informed that the Bonds were Chapter 166 revenue bonds only and had not been validated as industrial development bonds under Chapter 159 (A. Ex. 27). In that Brief, the Intervenors

argued that the Official Statements disseminated in connection with the issuance of the Bonds were misleading as to the statutory authority for the Bonds. In order to support their contention that the Bonds were actually being issued solely pursuant to Chapter 159, the Intervenors cited the following language contained in the Official Statements:

> The Series 1984A bonds will be issued pursuant to the Constitution and laws of the State of Florida, particularly Chapter 159, Part II and Section 166.111, Florida Statues as amended (collectively, the "Act") and Resolution No. 84-2053 of the Board of County Commissioners adopted on September 4, 1984, as supplemented and amended by the Supplemental Resolution of the Board of County Commissioners adopted on December 18, 1984 (collectively, the "Resolution"), authorizing the issue of the series 1984A bonds. (Emphasis supplied by Intervenor) (A. Ex. 27 at 5).

The Intervenors argued that the County had not complied with Chapter 159, but had nonetheless represented to the public that they were proceeding under Chapter 159 rather than Chapter 166 and thus requested the Court to declare the Bonds null and void. Id. at 6.

This Court heard oral argument on this issue on March 6, 1985. During oral argument, both the State and the Intervenors pressed the issue of whether the language of the bond resolutions, the Bond forms and the Official Statements misrepresented the status of the Bonds as Chapter 159 bonds and thus misled the Bondholders. This Court rejected that argument when it "[found] no merit in any of the other arguments raised by Appellants." See 468 So.2d at 969. This Court made that decision based

on a record which included, among other things, the Official Statements that contained the alleged misrepresentations.

Moreover, immediately following this Court's decision, the State filed a Motion for Rehearing and reasserted its allegations that the Bondholders were misled by the language in the Official Statements. In that motion, the State asserted that "[t]here was also great concern expressed by this Court at the oral argument of March 6, 1985, that the Bondholders were not misled (i.e., that they understood the two-step transaction that requires further validation) and that they receive the 'benefit of their bargain' (A. Ex. 28 at 2)." In this regard, the State advanced precisely the same arguments that it does here, i.e., that the County misrepresented the Bonds as validated under Chapter 159 contrary to the rulings of the Circuit Court affirmed by this Court. More specifically, the State, on rehearing, adverted to the following language of the Circuit Court judgment:

> 'bonds MAY NOT by virtue of the rendition of this judgment BE REPRESENTED AS HAVING BEEN VALIDATED AS REVENUE BONDS WITHIN THE MEANING OF SAID CHAPTER 159.' (Emphasis added by State).

Id. at 1. The State then charged the Bonds contain language contrary to that judgment, because they provide:

> 'This Bond IS ISSUED, and the Bond Resolution was duly adopted UNDER AND PURSUANT to the Constitution and Laws of the State of Florida, PARTICULARLY PART II OF CHAPTER 159, Florida

Statutes, as amended, and Section 166.111, Florida Statutes.' (Emphasis added by State.)

Id. at 2. The issuance of the Bonds as both Chapter 166 revenue bonds and Chapter 159 bonds (in anticipation of conversion to such) as part of a complex, two-step financing is obviously not inconsistent with validation of the Bonds initially only as Chapter 166 bonds and a revalidation as Chapter 159 bonds prior to their conversion to such. Additionally, and as pointed out to this Court in 1985, the Official Statements, read in their entirety, make perfectly clear the two-step nature of the transaction and the full range of Bondholder options and protections. Thus, upon consideration of the State's Motion for Rehearing and the County's response in opposition to that motion (A. Ex. 29), this Court denied the motion.

The State and the Intervenors have since relied upon these very same arguments and have attempted to relitigate this issue before the Circuit Court in the current validation proceedings. The State first resurrected this issue when it moved for a judgment on the pleadings on April 24, 1987 for failure of the County to join all Bondholders as indispensable parties. In that motion, the State referred to the language on the face of the Bonds (the very same language referred to by the State in its Motion for Rehearing in the initial validation proceeding) and to the decisions rendered in the initial validation (A. Ex. 13 at 2). Next, during the hearing on this issue that was held before the Circuit Court on May 5, 1987, the State charged:

> MS. SPUDEAS: . . . On page three [of the County's Memorandum in Response and Opposition to the State's Motion for Judgment on the Pleadings] he says in number three at the bottom 'the present Bondholders will be holders of Chapter 159 bonds only if they opt to continue to hold the bonds.'
>
> The bondholders don't know that, Judge. They are issued bonds that state on the face of the bonds these bonds were issued and entitled to authority of a resolution and they're issued under part two Chapter 159 Florida Statutes.
>
> THE COURT: The present bonds say that?
>
> MS. SPUDEAS: Absolutely do.
>
> The Official Statement that Mr. Pfeffer has in his hand says that also.
>
> THE COURT: They're not 159 bonds, though.
>
> MS. SPUDEAS: If he'll show me that official statement, I'll show him where it says that (A. Ex. 16 at 31-32).

The State raised this argument again in its Response to Motion for Rehearing or Clarification dated May 27, 1987. Again it argued that the Official Statements and the Bond forms did not adequately notify the Bondholders of the two-step nature of the transaction (A. Ex. 18 at 2-6). In that Response, the State cited the identical Circuit Court language that it quoted in its 1985 motion for rehearing before this Court. Compare supra pages 20-21 to A. Ex. 18 at 2.

The State conveniently failed to recollect its arguments before this Court in 1985 because, after vehemently contesting the County's authority to issue the Bonds in the manner it did, the State maintained in the May 27 response:

> In the instant cause, the State has alleged that the original Broward County Resource Recovery Bonds (the "Bonds"), were fraudulently issued as Industrial Development Revenue Bonds, under Part II, Chapter 159, Florida Statutes. (See, States Motion for Judgment on the Pleadings.) Therefore, Plaintiff's assertions that noone (sic) [no Bondholder] has questioned the validity of the outstanding Bonds, is clearly erroneous. Since the Bonds were issued after the 1984 Judgment was entered, the State has had no jurisdiction to challenge Plaintiff's actions in the instant proceedings until the present (A. Ex. 18 at 2-3).

Thus, the State completely ignores the fact that it raised these issues in the initial validation proceeding at oral argument and in its Motion for Rehearing and conveniently chooses to forget that this Court already has ruled against the State on these issues.

The Circuit Court, perhaps confused by the State's misrepresentations about the validity of the outstanding bonds, acted in total disregard of this Court's findings in the prior validation. The Circuit Court erroneously held:

> A review of the record and exhibits in this case reveal that the Official Statements issued in connection with the selling of the Resource Recovery Bonds may have been in violation of the original Court order validating the, Section 166.111 Florida Statutes, Bonds. (See attached copies.)
>
> Therefore, the Court is of the opinion that the State of Florida has presented prima facie evidence to support the allegation of fraudulent issuance of the Bonds sufficient to require the joinder of the Bondholders as indispensable parties (A. Ex. 25 at 1).

Moreover, the Circuit Court's Order attaches copies of and refers to those portions of the Official Statements which allegedly contain the misleading

statements. These references are identical to the references made by the Intervenors in their Reply Brief in the original appeal and by the State in its Motion for Rehearing in 1985 (See A. Ex. 27 at 4-5; A. Ex. 28 at 3). In fact, the County had supplied the Circuit Court with copies of those Official Statements in order to demonstrate that this Court was familiar with their content, and had already addressed the State's and Intervenors' charges regarding misleading statements. Nevertheless, the Circuit Court refused to recognize the conclusion of this Court on this very issue, in spite of the fact it took judicial notice, at the State's request, of the prior validation record. Therefore, the Circuit Court's order dismissing this action for failure to join the Bondholders should be reversed since this Court addressed and settled in the initial validation proceeding the question of whether the Bondholders had been misled in the initial validation proceeding.

In making this argument, the County is not attempting to minimize the interests of all parties to the present proceedings, nor is it attempting to ignore the prior decision of this Court and the concern for the Bondholders' protection.[5] Rather, the County simply desires to

5. In fact, the Bondholders are fully protected under the terms of the Bonds. For Bondholder purposes, the essential distinction between bonds issued under Section 166.111, Florida Statutes, and Chapter 159, Florida Statutes, is the source of revenues that will secure the Bonds. The primary concern of the Bondholders is that they will retain the ability to make the investment decision to tender the Bonds. These Bondholders presently recognize that the revenues are derived from investments in Government Obligations and that prior to any change in security they must tender their Bonds unless they elect, in writing, to keep them. Therefore, validation of the Bonds under Chapter 159 cannot affect their rights in any way and there is no need to join them as parties in the present proceeding.

proceed to a hearing on the merits of the issues presented under Chapter 159 and a determination of the validity of the Bonds thereunder. The State's and the Intervenors' efforts to sidetrack the bond validation proceeding by rearguing issues already determined by this Court are obscuring the main issue to be determined in a bond validation proceeding: whether the County has the authority to issue the Bonds pursuant to its various Resolutions (See infra Point II.A. at 26-28).

POINT II

BONDHOLDERS ARE NOT PROPER PARTIES TO A VALIDATION PROCEEDING

Even assuming that the State and the Intervenors were not precluded from litigating the issue of the alleged misrepresentations to Bondholders by their participation in the earlier proceeding, it is clear that the issue is as devoid of merit now as it was two years ago. First (and as argued by the County before this Court on the State's Motion for Rehearing), allegations of Bondholder deception are collateral to bond validation proceedings. Second, the validation statute and decisions thereunder make it clear that bondholders are not proper parties to validation proceedings, much less indispensable ones. Finally (and as litigated in length in the prior proceeding), the Bondholders, through the Official Statements and supplements thereto, have been kept fully apprised as to the status of the Bonds and their options with respect thereto.

A. The Issue of a Fraudulent Sale of Bonds is Collateral to the Issues Before the Court on Validation.

"The scope of judicial inquiry in bond validation proceedings is limited." Taylor v. Lee County, 498 So.2d 424, 425 (Fla. 1986). The purpose of validation is to examine and settle those questions under Florida law that determine the authority of the County to issue the Bonds. McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252, 253 (Fla. 1980). This Court recently articulated the precise issues germane to validation:

> Specifically, courts should: 1) determine if a public body has the authority to issue the subject bonds; 2) determine if the purpose of the obligation is legal; and 3) ensure that the authorization complies with the requirements of law.

Id. at 425. It is well settled under Florida law that issues collateral to those specified in Taylor do not belong before the court in a validation proceeding, but should be raised in a separate proceeding by a party with standing. State v. City of Miami, 103 So.2d 185 (Fla. 1958); City of Gainesville v. State, 366 So.2d 1164 (Fla. 1979). Moreover, this Court has consistently refused to consider issues broader than those enumerated above. For example, in State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978), this Court stated its authority to examine "double advance refunding bonds" was sharply limited, and although the Court could decide whether the City was authorized to issue such bonds and had fulfilled the constitutional and statutory requirements to do so, the Court would not reach the question of whether the bond issuance was fiscally sound or a wise method of municipal finance. Id. at 1209-10. Similarly, this Court has held to be collateral the issue of whether a community development district abused its discretion by commencing a bond validation proceeding for water and sewer bonds before it resolved separate litigation challenging the district's water management plan. Zedeck v. Indian Trace Community Development District, 428 So.2d 647, 648 (Fla. 1983).

In the prior validation proceeding, this Court affirmed the findings that the County had the requisite authority to issue the Bonds under Chapter 166 and that the Bonds were being issued for a valid public

purpose. See 468 So.2d at 969. The County filed its Complaint for revalidation to demonstrate that in addition to complying with Chapter 166, the County has fulfilled the requirements of Chapter 159. By introducing the issue of an allegedly fraudulent sale of Bonds more than two years ago, the State and the Intervenors have raised a patently collateral issue and the Circuit Court's handling of the issue, to date, has frustrated the purpose of the validation statute and disrupted what should have been an expeditious hearing on the questions raised under Chapter 159.

B. There Exists No Statutory Authority or Case Law Supporting the Joinder of Bondholders in a Validation Proceeding.

1. The Validation Statute Specifies the Proper Parties to the Proceeding.

Chapter 75 details the parties to be named and procedures to be followed in a bond validation proceeding. Specifically, § 75.05, Fla. Stat. (1985) provides:

> Order and Service
>
> (1) The Court shall issue an order directed against the state and the several property owners, taxpayers, citizens and others having or claiming any right, title or interest in property to be affected by the issuance of bonds or certificates, or to be affected thereby, requiring all persons in general terms and without naming them and the state through its state attorney or attorneys of the circuits where the county, municipality or district lies, to appear at a designated time and place within the circuit where the complaint is filed and show why the complaint should not be granted and the proceedings and bonds or certificates validated.

Further, § 75.06, Fla. Stat. (1985) states, in part:

> Publication of notice
>
> (1) By this publication all property owners, taxpayers, citizens and others having or claiming any right, title or interest in the county, municipality or district, or the taxable property therein, are made parties defendant to the action and the court has jurisdiction of them to the same extent as if named as defendants in the complaint and personally served with process.

Finally, § 75.07, Fla. Stat. (1985) allows:

> Intervention; hearings
>
> Any property owner, taxpayer, citizen or person interested may become a party to the action by moving against or pleading to the complaint at or before the time set for hearing. . . .

Nowhere are Bondholders cited as parties to the proceedings. While the statute is broad enough to entertain the concerns of all citizens and taxpayers of the issuing municipality, it has not been construed to permit -- much less require -- the participation of parties whose purported interest is not encompassed within the limited scope of validation proceedings. Thus, in the case of City of Sunrise v. Town of Davie, 472 So.2d 458 (Fla. 1985), this Court denied a city's right to intervene in a validation proceeding relating to bonds issued by another municipality. In that case, the City of Sunrise sought to intervene because it contended that Davie's expansion would preempt services provided by Sunrise to a portion of Davie. Id. at 459. Importantly, this Court denied the city's motion to intervene in spite of its claim that a portion of the proceeds to be

raised by the sale of the bonds would be used in violation of the Florida Statutes, an issue "not germane to the validation." Id.

It is also significant that this Court, in affirming the Circuit Court's decision, reiterated the Circuit Court's ruling that, in addition to the service and notice required by the statute, all counsel of record for the parties in that proceeding be notified of the revalidation. By the time of this Court's ruling, the Court had been advised through the briefs, the Appendix and the oral arguments that the Bonds had been issued and sold to the Bondholders. Nonetheless, this Court articulated no requirement that the Bondholders, on revalidation, be named as parties or notified.

2. The Circuit Court Relied on Case Law That Does Not Support Naming Bondholders in a Validation Proceeding.

At the urging of the State and the Intervenor, the Circuit Court relied upon State v. Hillsborough County, 113 Fla. 345, 151 So.2d 712 (1933), in holding that bondholders are indispensable parties to the validation proceeding. In Hillsborough, this Court addressed an appeal from a Circuit Court order validating refunding bonds. Id. at 346, 151 So. at 712. The State and intervening taxpayers opposed the validation charging that certain of the original bonds sought to be refunded had been issued in violation of the Florida Constitution. 113 Fla. at 347, 151 So. at 713. (The original bonds had been validated at the Circuit Court level from which no appeal was taken. Id.) This Court found that the intervenors, who had not appeared in the earlier proceeding validating the

bonds to be refunded, were not barred from asserting the constitutional infirmity of the original bonds against the issuance of refunding bonds. Id. at 716. This Court reversed the validation decision and remanded to the Circuit Court the question of whether the original bonds were issued in violation of the Florida Constitution, noting that the then existing Florida refunding statutes "contemplate that the original debts or obligations proposed to be refunded shall not be subject to any substantial legal objection as to their validity or enforceability against the county as general county obligations." Id. at 357-358, 151 So. at 716-717. If upon remand the Circuit Court determined that there was no merit to the State's or intervenors' arguments then it would be free to validate the refunding bonds. But if the Circuit Court found substantial legal impediments to the issuance of the original bonds to be refunded, it should withhold validation of the refunding bonds until the issue could be adjudicated in a separate proceeding in which both the county and the bondholders could be made parties. Id. at 357, 151 So. at 717.

The validation questions before the Hillsborough court clearly are distinguishable for three reasons. First, the purpose of the present proceeding is not to validate refunding bonds where the State or Intervenors would be free to raise a constitutional issue in connection with the bonds to be refunded. Second, and in any event, neither the State nor the Intervenors have raised or questioned the findings in the initial validation that the Bonds were issued for valid constitutional purposes. Moreover, neither the State nor the Intervenors are in a position to challenge the

constitutionality of the Bonds as issued because both were parties to the initial validation proceeding. Third, the Hillsborough case does not stand for the proposition that the Circuit Court in a validation proceeding can or should exercise jurisdiction over the Bondholders. To the contrary, the Hillsborough court found that "the validity of the original bonds cannot be determined in this cause because of lack of jurisdiction of parties holding such bonds." Id. at 357, 151 So. at 715.[6] Thus, Hillsborough, in the final analysis and to the extent relevant, supports precisely the contentions of the County that the Circuit Court, in a validation proceeding, has -- and should exercise -- no jurisdiction over bondholders.

Additionally and even assuming that the Bondholders were proper parties to the validation proceeding for intervention purposes, they are not, by even the most tortured analysis of the validation statute or case law, indispensable parties. In Florida, indispensable parties:

> are necessary parties so essential to a suit that no final decision can be rendered without their joinder. This is in contrast to other necessary parties, who have an interest in a suit and ought to be made parties, but who do not have to be joined before a final decision can be rendered.

Hertz Corporation v. Piccolo, 453 So.2d 12, 14 n. 3 (Fla. 1984) (alleged that a tortfeasor is not an indispensable party in an action against his insurer since governing law permitted direct action against the insurer).

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6. The rights of the Hillsborough bondholders against the county were ultimately litigated before the federal district court. See Hillsborough County v. Keefe, 82 F.2d 127 (5th Cir. 1936), cert. denied, 298 U.S. 679 (1935).

Given the limited scope of validation proceedings generally and this proceeding in particular, it is clear that the Bondholders' presence as parties defendant is hardly necessary "before a final judgment decision can be rendered." Id. If the State or the Intervenors genuinely believe that the County has not fully complied with Chapter 159, they are free to advance their views at a hearing on the merits and, if they are correct, the Bonds will not be validated under Chapter 159. In that event and even assuming that Bondholders were somehow misled into believing that the Bonds had already been validated as Chapter 159 bonds, the Bondholders would be free to pursue whatever remedies they might have and would remain fully protected by the escrowed Government Obligations and the excess earnings thereon. If the Bonds were, however, validated under Chapter 159, the Bondholders would own precisely what the State contends they have been misled into purchasing -- Bonds validated under Chapter 159. In neither event, would the absence of the Bondholders as parties constitute an impediment to a final validation decision.

C. The Official Statements Contain No Representation That The Bonds Were Validated Under Chapter 159.

This Court's decision affirming the initial validation reiterated the Circuit Court's proscription against representing the Bonds as having been validated as revenue bonds within the meaning of Chapter 159. See 468 So.2d at 969. The State takes the position that the County has somehow violated that proscription. Given the record in this and the prior

proceeding, it is hard to accept that this position is espoused in good faith.

As regards the original sale of the Bonds, that sale took place after the original validation by the Circuit Court but while the appeal to this Court was pending. Obviously, the Official Statements attendant to the initial sale of the Bonds could not have misrepresented a decision by this Court which had yet to be rendered. Rather, the Official Statements accurately set forth the then uncertain outcome of the validation proceeding:

VALIDATION

> $590,000,000 Resource Recovery Revenue Bonds of Broward County as authorized by Resolution No. 84-2053, adopted by the Board of County Commissioners on September 4, 1984, were validated by a judgment rendered by the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County on October 24, 1984. The Series 1984A Bonds would constitute a part of that validated authorization; however, no representation is made by the County as to the judicially binding effect of the validation of the Series 1984A Bonds due to the extensive changes in the security for and the provisions affecting the Series 1984A Bonds put in place by Resolution No. 84-3097 adopted by the Commission on December 18, 1984 supplementing Resolution No. 84-2053. Bond Counsel, however, is of the opinion that the Series 1984A Bonds will be validly issued under the Constitution and laws of the State of Florida and delivery of the Series 1984A Bonds is conditioned upon the receipt of an opinion of Bond Counsel to that effect in substantially the form attached hereto as Appendix B. The State Attorney for the Seventeenth Judicial Circuit and certain residents of the County acting through counsel have appealed the validation of the Series 1984A Bonds and raised certain legal issues with respect to the

> authority of the County to issue the Series 1984A Bonds under the Constitution and laws of the State of Florida. Bond Counsel is of the opinion that the appeal as to the Series 1984A Bonds is without merit, and delivery of the Series 1984A Bonds is conditioned upon the receipt of such opinion (A. Ex. 30 at 46).

Moreover and at such time as the County was prepared to proceed with revalidation, the County so notified the Bondholders in a Supplement to the Official Statements dated November 4, 1986. The pertinent language of that Supplement states:

> REVALIDATION OF SERIES 1984A BONDS
>
> The County's Board of Commissioners expects to adopt a resolution prior to December 1, 1986 authorizing the commencement of validation proceedings to revalidate the Series 1984A Bonds. The revalidation requirement is a condition contained in the judgments validating the Series 1984A Bonds. The primary purpose for the revalidation proceedings is to obtain judicial approval of (i) the security for the Series 1984A Bonds after the Construction Funds Designation Date for the Series 1984A Bonds and (ii) the various contractual arrangements to which the County is or will be a party. If the Florida court rendering the judgment does not approve such matters, the validity of the Series 1984A Bonds will not be adversely affected so long as the County takes no actions prohibited by the court's judgment. The County has stated that it will not take any actions in contravention of the judgment which would adversely affect the validity of the Series 1984A Bonds (A. Ex. 32 at 2).

Additionally, the Official Statements set forth in great detail the conditions precedent to the conversion of the Bonds to Chapter 159 bonds, as required by the authorizing resolution of the County (See A. Ex. 30 at 6-8). Thus, the Official Statements disclose that, if the County decides to convert part or all of the Bonds to industrial development bonds, it must first send a designation notice to all affected Bondholders. The designation notice would state that the Bonds are subject to "mandatory tender" unless the Bondholders elect to convert their Bonds to industrial development bonds. A disclosure document, sent with or immediately after the designation notice, would describe the new security for the industrial development bonds (i.e., the Projects). Bondholders who elect conversion must notify the trustee of the Bonds in writing, reciting an awareness of the security for the industrial development bonds as described in the disclosure document.

Given the ample disclosure as to the status of validation proceedings and the elaborate safeguards of the rights and options of Bondholders, it is ludicrous for the State to suggest that the language on the Bonds stating that "All acts, conditions, and things required to happen . . . precedent . . . the issuance of this Bond . . . have happened . . . as so required" warrants that the Bonds have been validated as industrial development bonds (A. Ex. 13 at 2). The simple fact is that the Bonds have not been warranted as validated under Chapter 159 and the Bondholders have been afforded every protection of their rights to make an informed investment decision prior to conversion of the Bonds to Chapter 159 bonds.

POINT III

THE CIRCUIT COURT HAS FAILED TO FOLLOW THE REQUIREMENTS OF CHAPTER 75 OF THE FLORIDA STATUTES

Putting aside the merits of the issues raised by the State and the Intervenors, it is clear under the validation statute that those issues should have been considered and resolved, along with all other issues, in the context of the single validation hearing contemplated by Chapter 75, Florida Statutes.

Section 75.07, Florida Statutes, provides: "At the hearing the court shall determine all questions of law and fact and make such orders as will enable it to properly try and determine the action and render a final judgment with the least possible delay." § 75.07 Fla. Stat. (1985) (emphasis added). In addition, this Court has held that proceedings for validation of bonds are special statutory proceedings and as such must be strictly followed. Boatright v. City of Jacksonville, 117 Fla. 477, 158 So. 42 (Fla. 1934). ("The general rule in all proceedings under a special statutory enactment is that the proceedings prescribed by the statute shall be strictly followed and that rule obtains in this state." Id. at 59.) Furthermore, this Court has confirmed that the bond validation statute was designed to have all questions concerning the validation of bonds decided in a "single judicial proceeding." Id. at 43 (emphasis added). Finally, this Court has long held that "[i]t is the intent of the law that validations

be expedited at the earliest time reasonably possible." Rianhard v. Port of Palm Beach District, 186 So.2d 503, 505 (Fla. 1966).

Rather than the single, expedited hearing envisioned by Chapter 75, the State and the Intervenors have been permitted to raise a whole host of issues by way of a series of motions which have been decided without the single hearing contemplated by Chapter 75 and which have delayed this proceeding intolerably. The net result is that, almost six months after the filing of the Complaint for Validation, the County (1) has had no opportunity to present its case on the merits, (2) has been forced to appeal to this Court an issue which is collateral at best, and (3) faces the prospect of similar procedural tactics below should this Court reverse and remand to the Circuit Court. As noted above, the County estimates that every day of delay occasions costs of $100,000 which will, ultimately, be borne by its citizens. As a consequence, the County requests that this Court, reverse the Order appealed and remand this case to the Circuit Court with instructions that future proceedings be conducted as required by Chapter 75 and that the single, expedited hearing contemplated be conducted as soon as is feasible.

CONCLUSION

The County respectfully submits that, for the reasons set forth above, this Court should reverse the Circuit Court's Order and remand the cause with instructions to conduct a validation proceeding in accordance with the spirit and dictates of Chapter 75, Florida Statutes.

Respectfully submitted,

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