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FILED
SID J. WHITE
AUG 13 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MURRAY H. GOODMAN,

Appellant,

CASE NO. 78,246

ON APPEAL FROM THE 4TH DCA,
LT NO. 90-2042

vs.

BRASSERIA LA CAPANNINA, INC.
AND VITA MURPHY,

Appellees.

_____/

INITIAL BRIEF OF APPELLANT

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PREFACE

Appellant, MURRAY H. GOODMAN, was the Plaintiff in the Trial Court and was the Appellee in the Fourth District Court of Appeal and will be referred to as "Landlord". Appellees, BRASSERIA LA CAPANNINA, INC. AND VITA MURPHY, were the Defendants in the Trial Court and were the Appellants in the Fourth District Court of Appeal and they will be referred to as "Tenants". All emphasis is supplied by Landlord, unless otherwise indicated. The symbol "R-__" denotes the Appendix to the Landlord's Brief filed with the Fourth District Court of Appeal.[1] The symbol "A-__" denotes the Appendix filed by Landlord with this Brief.

STATEMENT OF THE CASE AND OF THE FACTS

This is an Appeal invoking the mandatory jurisdiction of the Florida Supreme Court pursuant to Fla.R.App.P. 9.030(a)(1)(A)(ii) and Article V, Section 3(b)(1), Fla. Const. (1980). Here, the Landlord appeals the determination of the Fourth District Court of

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1 Tenant's Appeal to the Fourth District Court of Appeal was an interlocutory appeal pursuant to Fla.R.App.P. 9.130(a)(3)(C)ii). Accordingly, a record was not transmitted from the trial court to the Fourth DCA. Rather, the parties submitted Appendices pursuant to Fla.R.App.P. 9.220. Those Appendices will be transferred to the Florida Supreme Court by the Fourth DCA as the Record on Appeal. However, because of the limited scope of the Fourth DCA's Opinion and for the convenience of the Court, Landlord is submitting with this Brief a condensed Appendix containing the relevant documents.

Appeal (the "Fourth DCA") which expressly holds that Florida's Distress for Rent Statute, §83.12, Fla. Stat. (1989), is facially unconstitutional (A-1). This case was before the Fourth DCA on Tenant's interlocutory appeal of the Trial Court's denial of Tenant's motion to dissolve a distress writ issued pursuant to §83.11, et seq., Fla. Stat., (1989) (R-169; A-14).

In this case the Fourth DCA was called upon to determine whether Florida's distress statutes, §83.11, et seq., Fla. Stat. (1989), satisfy due process requirements as enunciated by this Court. See, Phillips v. Guin & Hunt, Inc., 344 So.2d 568 (Fla. 1977) (holding the prior distress statute unconstitutional and expressly setting forth constitutional requirements).

The majority of the three-judge panel of the Fourth DCA concluded that the Statute is facially unconstitutional based upon its interpretation of a single sentence contained within §83.12, Fla. Stat. (1989) to wit: "A distress writ shall be issued by a judge of the court which has jurisdiction of the amount claimed." The majority held, based upon this single sentence, that "[t]he statute violates due process because the issuance of the distress writ is a mere ministerial act which affords the trial judge with no discretion ..." (A-1).

Nevertheless, Judge Stone, in his dissent, concluded:

> In my judgment the amended statute satisfies the Phillips requirements. The use of the word 'shall' in the current statute does not require that a writ issue but is simply directory as to the circumstances under which a writ may issue, who may issue it, and the effect of a writ. (A-5)

The Fourth DCA's opinion was initially filed on April 17, 1991. Landlord filed his Motion for Rehearing and Motion for Rehearing En Banc on May 2, 1991 (A-15). In the Motion for Rehearing Landlord urged that the two judge majority had: (1) misapprehended the constitutional standards enunciated by this Court in Phillips; (2) misconstrued the intent and legal effect of the curative amendments made (as a result of the Phillips decision) to the distress statute by failing to read and construe the statute as a whole; and (3) failed to apply appropriate principles of statutory construction in reaching their decision (A-15).

On June 6, 1991 the Fourth DCA denied Landlord's Motion for Rehearing and Motion for Rehearing En Banc (A-38) and thereafter issued its Mandate on June 28, 1991 (A-39). This Appeal ensued when Landlord filed his Notice of Appeal to this Court on July 3, 1991 (A-40).

Although the sole issue before this Court is whether §83.12, Fla. Stat. (1989) is facially unconstitutional, Landlord sets forth the following brief summary of the proceedings which occurred in the Trial Court before the Tenants' Appeal to the Fourth DCA.

In May, 1990 the Landlord by letters dated May 2, 1990 and May 8, 1990 advised Tenants of their default under the lease, demanded payment and advised Tenants that if they failed to make payment legal action would be taken (R-54). Notwithstanding these demands, Tenants failed to make payment of the past due rent. The Trial Court determined that the amount of past due rent was $50,775.61 as of May 18, 1990 (R-138).

On May 16, 1990, the Landlord filed a two-count VERIFIED COMPLAINT FOR BREACH OF LEASE AND FOR DISTRESS WRIT (R-1; A-42). In his VERIFIED COMPLAINT Landlord alleged, among other things, that Tenants had breached the lease by failing to timely pay rent and other charges due under the lease despite repeated demands by the Landlord that Tenants make such payments (R-2; A-43). Copies of the demand letters were attached to the COMPLAINT as Composite Exhibit "D" (R-54; A-95). It was further stated in the VERIFIED COMPLAINT that the Tenants owed the Landlord past due rent and other amounts under the lease totalling an additional $24,546.90, plus six percent of gross sales and applicable sales tax for March and April, 1990 and that, due to Tenants' wrongful failure to provide gross sales certificates for March and April, 1990, the Landlord was unable at that time to calculate the precise amount of alternative minimum rent due for the months of March and April, 1990 (R-2; A-43). Additionally, it was alleged that the Tenants were in breach of the lease and of a letter agreement dated October 24, 1989 under which Tenants owed an additional $17,306.12 in accrued rent delinquency (R-3; A-44). A copy of the October 24, 1989 letter agreement was attached to the VERIFIED COMPLAINT as Exhibit "E" (R-59; A-100).

Count II of the VERIFIED COMPLAINT re-alleged all the preceding allegations and sought the issuance of a distress writ pursuant to Chapter 83, Fla. Stats., (R-4; A-45).

At an ex parte hearing held on May 16, 1990, the Trial Court examined the VERIFIED COMPLAINT together with the exhibits thereto

and then issued a distress writ - all in compliance with and pursuant to §§83.11 and 83.12, Fla. Stats. (1989) (R-199; A-6). The language of the Writ tracked the language of §83.12, Fla. Stat. (1989).

The Distress Writ was served by the Sheriff on Tenants on May 16, 1990. Two days later, on May 18, 1990, at the request of Tenants, two emergency hearings were held by the Trial Court (R-84; R-110). These hearings occurred because on May 17, 1990, the Tenants had filed: (1) a Motion for Emergency Hearing; (2) a Motion for Dissolution of Writ; and (3) a Motion for Modification of Distress Writ (R-77, R-65, and R-70, respectively). The Trial Court immediately granted Tenants' Motion for Emergency Hearing and set a 30-minute hearing for 9:30 a.m., May 18, 1990, the very day following the Tenants' filings. At that hearing, the trial judge permitted the Tenants to proceed with whatever motions they wished to then present (R-88). Tenants elected to proceed with their Motion for Modification of Distress Writ (R-89). Tenants argued that "[t]he writ is overbroad in that it enjoins the restaurant from selling meals." (R-70). Tenants requested that the Court modify the Distress Writ to exclude food and alcohol (i.e., the restaurant's inventory) from the purview of the writ (R-92). The Court, after hearing argument and reviewing authorities, denied Tenant's Motion for Modification of Distress Writ (R-202). Tenants have never sought review of the Trial Court's Order denying their Motion for Modification of Distress Writ.

During the hearing on the Motion to Modify Distress Writ, the Trial Court repeatedly advised Tenants that it would hold a full evidentiary hearing on Tenants' Motion to Dissolve Distress Writ as soon as Tenants desired (see, R-92, R-96, R-102, and R-104). The Trial Court even offered to hold such a hearing on the very next business day (R-96), or on any day the Tenants requested, including after business hours (R-133).

Based on a telephone request by Tenants for an emergency hearing, the Trial Court held a second hearing on the afternoon of May 18, 1990. At this hearing and pursuant to §83.14, Fla. Stat. (1989), the Trial Court set the amount of bond that Tenants could post in order to replevy the distrained property (R-138). The Court, at this hearing, again offered to hold a hearing on Tenants' Motion to Dissolve Distress Writ on whatever date Tenants desired (R-133).

Notwithstanding the Court's repeated offers to immediately hold a hearing on and to consider Tenants' Motion to Dissolve Distress Writ, Tenants did not set their Motion for Dissolution of Writ (the motion from which this appeal emanated) for Hearing until June 28, 1990, almost six weeks later (R-140). After hearing Tenants' Motion for Dissolution of Writ on June 28, 1990, the court rejected Tenants' arguments that the Distress Statute was unconstitutional and denied the Motion (R-169; A-14). Noticeably absent from Tenants' submissions at all three of the above-described hearings was any testimony or other evidence refuting the allegations contained in the VERIFIED COMPLAINT that the Tenants had, despite

lawful demands, wrongfully failed and refused to pay the substantial amount of rent due the Landlord.

On July 10, 1990, in the related eviction action, County Court Judge Maass entered an order evicting the Tenants from the premises because of their failure to pay rent (the Final Judgment of Eviction was filed in this action as an exhibit to Landlord's Motion re Disposition of Distress Property, served August 20, 1990 - R-179).

On July 30, 1990, Tenants filed their Notice of Appeal (R-172), thus commencing an interlocutory appeal in the Fourth DCA of the Trial Court's June 28, 1990 Order denying Tenants' Motion to Dissolve Writ. The Fourth DCA's decision declaring §83.12, Fla. Stat. (1989) facially unconstitutional was rendered June 6, 1991 (A-1). Landlord filed his Notice of Appeal appealing the Fourth DCA's decision to this Court on July 3, 1991 (A-40).

SUMMARY OF ARGUMENT

Point I

The majority of the Fourth District Court of Appeal misconstrued §83.12, Fla. Stat. (1989) when it concluded -- based solely on their interpretation of the meaning of the word "shall" as used in the first sentence of §83.12 -- that "[t]he statute violates due process because the issuance of the distress writ is a mere ministerial act which affords the trial judge no discretion" (A-1).

The appropriate and correct construction of §83.12, read in para materia with §§83.11, et seq., Fla. Stats. (1989) is that the Statute provides that, when a writ is to be issued, it shall be issued by a judge, rather than in a pro forma, ministerial way by a clerk of court. As the dissenting Judge properly concluded, the amended distress statutes satisfy the requirements of Phillips v. Guin & Hunt, Inc., 344 So.2d 568 (Fla. 1977), and are constitutional.

The Fourth DCA failed to adhere to the canons of statutory construction which obtain in Florida. It has long been the rule, as established by the decisions of this Court, that any Florida court when determining the constitutionality of a statute must if at all possible, interpret such statute in a manner so as to uphold its constitutionality. The provision "[a] distress writ shall be issued by a judge of the court which has jurisdiction of the amount claimed," §83.12, Fla. Stat. (1989) cannot be read in isolation. When the distress statutes are read as a whole and in light of the amendments made in response to the decision of this Court in

Phillips, it is crystal clear that the subject sentence was expressly designed to comply with and achieved its purpose of fulfilling the mandate of Phillips, to wit: that a judge issue a distress writ and not a clerk of court.

Even assuming arguendo that §83.12, Fla. Stat. (1989) does not clearly, as the dissenting Judge concluded it did, direct who shall issue a distress writ if one is to be issued, this Court's decisional law requires that the word "shall" be construed as discretionary and not, as the Fourth DCA majority found, "ministerial in nature." The applicable rule established by this Court is:

> The word '**shall**' when used by the Legislature to prescribe the action of a court is usually a grant of authority, and means 'may,' and even if it be intended to be mandatory it must be subject to the necessary limitation that a proper case has been made out for the exercise of the power.

Rich v. Ryals, 212 So.2d 641, 643 (Fla. 1968).

Accordingly, application of the rules of statutory construction controlling in Florida mandate a reversal of the Fourth DCA's decision declaring §83.12, Fla. Stat. (1989) facially unconstitutional.

Point II

The Fourth DCA majority erred when it held that the provisions of §83.12, Fla. Stat. (1989) do not comply with this Court's

pronouncements in Phillips v. Guin & Hunt, Inc., 344 So.2d 568 (Fla. 1977) (holding the former distress statutes unconstitutional and expressly setting forth constitutional requirements). The Legislature, clearly aware of the mandates of the Phillips decision, amended the distress statutes in 1980[2] to require, among other things, that the defendant could move for dissolution of the writ at any time and that a hearing must be held on that motion prior to the Sheriff being authorized to levy on the property subject to distress. §83.13, Fla. Stat. (1989). Additionally the amended statutes require that the complaint set forth specific facts and that it be verified §83.11, Fla. Stat. (1989), so that the trial judge is in position to know all that must be known in order to make a judicial determination concerning whether a prima facie case for the issuance of a distress writ has been made out by the plaintiffs. Further, the amended statutes no longer allow a clerk of court to issue a distress writ, rather it is provided "[a] distress writ shall be issued by a judge of the court which has jurisdiction of the amount claimed." §83.12, Fla. Stat. (1989).

Ironically, the provision which the Legislature drafted so as to comply with this Court's mandate in Phillips -- that a distress writ should be issued by a judge -- is the very provision the Fourth DCA has now seized upon in order to declare the amended statute unconstitutional.

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2 Complete copies of Florida's former distress statutes and the amended distress statutes are set forth at A-105-110.

ARGUMENT

Introduction

The sole issue to be decided in this appeal is whether the current Florida distress statutes are facially unconstitutional. In 1977, this Court held Florida's prior distress statutes unconstitutional. Phillips v. Guin & Hunt, Inc., 344 So.2d 568 (Fla. 1977). This Court's opinion in Phillips provides a succinct and thorough analysis of the due process requirements relative to distress writs.[3] Id. In holding Florida's prior distress statutes unconstitutional, this Court stated:

> Under the standards articulated in Mitchell and North Georgia Finishing, the statute [referring to the prior distress statute] is inadequate on its face because: (1) it does not provide the right to a hearing promptly after the issuance of the writ or even before the property is levied upon; and (2) it does not provide for issuance of the writ by a judicial officer rather than a clerk of court or, in lieu thereof, by a clerk who makes an independent factual determination that the statute has been complied with.

Id. at 572.

After the Phillips decision, the Florida Legislature amended the distress statutes in order to comply with the constitutional

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3 Phillips, 344 So.2d at 574, intimates that due process "requires" an immediate post-seizure hearing. Subsequent to Phillips, this court stated "we recede from that position and declare that due process only requires an opportunity for a prompt post-seizure hearing." Gazil, Inc. v. Super Food Services, 356 So.2d 312, 313 (Fla. 1978).

standards enunciated by this Court. The current distress statutes, among other things, provide:

(1) That the defendants may move for dissolution of the writ at any time and that the court shall hear the motion not later than the day on which the Sheriff is authorized under the writ to levy on the distrained property (§83.135, Fla. Stat. (1989));

(2) That the court shall have jurisdiction to order the relief provided in the distress statutes (§83.11, Fla. Stat. (1989));

(3) That a distress writ may only be issued by a judge, not a clerk (§83.12, Fla. Stat. (1989)); and

(4) That the complaint must be verified (§83.11, Fla. Stat. (1989)) so that the judge can make a factual determination as to whether the Plaintiff is entitled to the relief requested.

As the dissent concluded, the amended statutes satisfy the requirements of Phillips, 344 So.2d at 568; accordingly, this Court should reverse the majority decision of the Fourth DCA.

I. THE FOURTH DCA FAILED TO APPLY THE RULES OF STATUTORY CONSTRUCTION CONTROLLING IN FLORIDA.

A. The Fourth DCA Erroneously Interpreted the Word "Shall" in §83.12, Fla. Stat.

The Landlord earnestly contends that the majority Opinion of the Fourth DCA is the result of a misconstruction of this Court's opinion in Phillips, Id. The Landlord's argument on that point is fully set forth at pages 23 through 25, infra. However, assuming arguendo that the majority of the Fourth DCA correctly interpreted the requirements of Phillips and further, even if it were assumed that their interpretation of the first sentence of

§83.12, Fla. Stat. (1989) is plausible, nevertheless the decision below is still fatally flawed because of the failure to apply the well-established canons of statutory construction which have been enunciated by this Court.

The Fourth DCA concluded that the issuance of a distress writ by a judge is merely a ministerial act and, therefore, held §83.12, Fla. Stat. (1989) facially unconstitutional. That conclusion is premised on the erroneous interpretation of a single sentence of §83.12, Fla. Stat. (1989) which sentence provides:

> A distress writ shall be issued by a judge of the court which has jurisdiction of the amount claimed.

See majority opinion of Fourth DCA, at page 2 (A-2).

In a case that is strikingly similar to the instant case, this Court stated, in reversing the Fourth DCA, that:

> The word '**shall**' when used by the Legislature to prescribe the action of a court is usually a grant of authority, and means 'may' and even if it be intended to be mandatory it must be subject to the necessary limitation that a proper case has been made out for the exercise of the power.

Rich v. Ryals, 212 So.2d 641, 643 (Fla. 1968) (quoting Fagan v. Robbins, 96 Fla. 91, 117 So. 863 (Fla. 1928)).

Much like in the instant case, in Rich the Fourth DCA had held a statute authorizing an injunction for violation of zoning laws unconstitutional based on the defendant's argument there "that since the statute uses the word 'shall' in providing for the issuance of an injunction that it mandates a chancellor to grant an injunction..." and therefore is unconstitutional. Id. at 642-643.

This Court's Rich decision clearly enunciates the appropriate rules of construction which are to be applied in analyzing the constitutionality of the distress statute here in question. This Court stated:

> It has long been the policy of this Court in the interpretation of statutes where possible to make such an interpretation as would enable the court to hold the statute constitutional. It is therefore our opinion and we hold, that since the Legislature is without authority to mandate a court of equity to issue an injunction, and since we are to presume that the Legislature intended to pass a valid and constitutional act, the word 'shall' as used in [the statute there in question], is permissive and not mandatory, and for that reason it was error for the District Court of Appeal to hold that the word 'shall' amounted to a mandate and invalidated the [statute].

Id. at 643.

Based on the foregoing controlling authority, even if the Fourth DCA were correct in its conclusion that Phillips, 344 So.2d at 568, requires that the trial judge have discretion to deny the writ even if the judge determines that a prima facie showing has been made based on the verified complaint, nevertheless, the statute is constitutional. Applying the rule set forth in Rich, and Fagan, leads to the inescapable conclusion that the appropriate interpretation of §83.12, Fla. Stat. (1989) is that it, as the dissent concluded, explains who is authorized to issue a distress writ (i.e. a judge; not a clerk), but that it certainly does not render that task of issuing the writ a mere ministerial act.

In order to uphold the constitutionality of the distress statutes all that is necessary is that the word "shall" be

interpreted consistent with the rules announced by this Court in Rich, Id., and Fagan, 117 So. at 866. The Fourth DCA's interpretation of §83.12, Fla. Stat. (1989) fails to adhere to the Rich and Fagan rule. By exalting form over substance the Fourth DCA decision unnecessarily exposes numerous Florida statutes to constitutional attack. For example, the language the Fourth DCA found unconstitutional -- "A distress writ shall be issued by a judge of the court which has jurisdiction of the amount claimed." -- is almost identical to the language contained in several other Florida statutes which provide for pre-judgment remedies. Florida's attachment statute provides "[a]ttachments **shall** be issued by a judge of the court which has jurisdiction of the amount claimed ..." §76.03, Fla. Stat. (1989). Florida's garnishment statute provides "[a] writ of garnishment **shall** be issued by the court or by the clerk on the order of the court." §77.03(1), Fla. Stat. (1989). The appropriate construction of the word "shall" will avoid unnecessarily subjecting each of those statutes to constitutional attack.

The two lower court federal decisions cited by the Fourth DCA majority are factually distinguishable from the instant case.[4] Even if they were not factually distinguishable, neither case is even persuasive authority in Florida because each is contrary to

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[4] See discussion distinguishing Johnson v. American Credit Co. of Georgia, 581 F.2d 526 (5th Cir. 1978); and Wyatt v. Cole, 710 F.Supp. 180 (S.D. Miss. 1989) at p. 22, infra.

this Court's decisions in Rich, 212 So. 2d at 643, and Fagan, 117 So. at 863.

The rule is clear that United States Court of Appeals decisions and federal trial court decisions are not binding on Florida state courts. The only federal decisions binding upon the courts of Florida are those of the United States Supreme Court. State v. Dwyer, 332 So.2d 333 (Fla. 1976); Board of County Comm'rs v. Dexterhouse, 348 So.2d 916, 918 (Fla. 3d 1977). In Dexterhouse, the court was faced with a first amendment challenge to an ordinance that was "nearly identical" to an ordinance held unconstitutional by a federal court of appeals. Id. at 917. The Third DCA, in holding the ordinance in question constitutional rejected the federal decision and stated "[t]he only federal decisions binding upon the courts of our state are those of the United States Supreme Court." Id., at 918.

In State v. Dwyer, 332 So.2d 333 (Fla. 1976), this Court held that a decision of a federal court of appeals holding a Florida statute unconstitutional was not binding on Florida trial courts in that the rule of stare decisis dictated that the lower court should have followed the ruling of the Florida Supreme Court which had previously held the statute constitutional. This court stated "[w]here an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues...." Id. at 335. Moreover, this Court found that in any event the constitutional objection raised

against the Florida statute in question had been cured by this Court's construction of the statute. Id., at 335.

Accordingly, the reasoning of Johnson v. American Credit Co. of Georgia, 581 F.2d 526 (5th Cir. 1978) and Wyatt v. Cole, 710 F.Supp. 180 (S.D. Miss. 1989), should be rejected and this Court's decisions in Rich, 212 So.2d at 643, and Fagan, 117 So. at 866, control.

B. The Fourth DCA Misconstrued the Intent and the Effect of §83.12, Fla. Stat. and Failed to Consider the Relationship Between §§83.11, 83.12, 83.13 and 83.135, Fla. Stats.

Although the authority set forth above, standing alone, mandates reversal of the Fourth DCA's opinion, there are other independent reasons why the decision should be reversed.

This Court has stated that when interpreting a statute it "should be construed and applied so as to give effect to the evident legislative intent.... Legislative Intent should be gathered from consideration of the statute as a whole rather than from any one part thereof." Florida Jai Alai, Inc. v. Lake Howell Water & R. District, 274 So.2d 522, 524 (Fla. 1973). When the 1980 amendments to §83.11. et seq., Fla. Stat. (1989) are considered as a whole and in light of the stated legislative purpose (i.e. to comply with the

standards established by this Court in Phillips),[5] the only reasonable construction is that the statutes are constitutional.

In order to demonstrate that the Fourth DCA's conclusion -- that the statute compels a trial judge to perform a mere "ministerial" act, affording the judge with absolutely no discretion in the matter -- is incorrect, we draw the Court's attention to the changes made in the amended version of the distress statutes §83.11. et seq., Fla. Stats. (1989). Set forth below on the left hand side of the page are the relevant portions of the predecessor §§83.11 and 83.12, Fla. Stat. (1977), that were held unconstitutional in Phillips. On the right hand side of the page are the relevant portions of the amended sections §§83.11 and 83.12, Fla. Stat. (1989).

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5 The reports of the Florida House Committee on Judiciary and the Senate staff analysis of the 1980 amendments to the Florida distress statutes expressly state that the Legislature's intent in passing the amendments is to correct the constitutional deficiencies in the former distress statute in response to Phillips. See Florida State Archives: R.G. 920, Series 19, Box 648, File H8918 and R.G. 900, Series 18, Box 1327, File SB701. (For the Court's convenience, copies of these reports are contained in Landlord's Appendix at A-112 and A-111, respectively).

Former Statute*	Amended Statute*
83.11 Distress for rent: complaint. - Any person to whom any rent or money for advances is due, his agent or attorney, may file an action in the court in the county where the land lies having jurisdiction of the amount claimed. The complaint shall allege the amount or quality and value of the rent due for such land, or the advances, and whether payable in money, cotton, or other agricultural product or thing.	**83.11 Distress for rent; complaint.** - Any person to whom any rent or money for advances is due or his agent or attorney may file an action in the court in the county where the land lies having jurisdiction of the amount claimed, and the court shall have jurisdiction to order the relief provided in this part. The complaint shall be verified and shall allege the name and relationship of the defendant to the plaintiff, how the obligation for rent arose, the amount or quality and value of the rent due for such land, or the advances, and whether payable in money, an agricultural product, or any other thing of value.
83.12 Distress for rent: form of writ. - On filing the complaint, the clerk shall issue a distress writ commanding the sheriff to levy on property liable to be distrained for rent or advances, and to collect the amount claimed, or the value thereof,...	**83.12 Distress for rent; form of writ.** - A distress writ shall be issued by a judge of the court which has jurisdiction of the amount claimed. The writ shall enjoin the defendant from damaging, disposing of, secreting, or removing any property liable to distress from the rented real property after the time of service of the writ until the sheriff levies on the property, the writ is vacated, or the court otherwise orders.... If the defendant does not move for dissolution of the writ as provided in §83.135, the sheriff shall, pursuant to a further order of the court, levy on the property....

* Complete copies of both versions of §83.11, et seq., are set forth at A-105 - 110.

Certainly, the Legislature, acting in response to Phillips, did not intend that the amended version of §83.12, Fla. Stat. (1989) operate to preclude a judge from performing the impartial, factual determination required by Phillips. In fact, the Senate Staff Analysis of the amended statute expressly acknowledges that the prior distress statute was held unconstitutional in Phillips because it allowed a "writ [to] be issued without an impartial determination of the factual situation by a judicial officer." Florida State Archives, R.G. 900, Series 18, Box 1327, File SB701 (A-111). Accordingly, it is absolutely clear that the Legislature was aware of the mandate of Phillips and drafted the amended legislation set forth above with the express intent of curing the constitutional deficiencies. Id. (A-111).

The use of the word "shall" in §83.12, Fla. Stat. (1989) does not require that the writ be issued. Rather the word establishes who shall issue a writ - if one is to be issued at all. This construction is the one supported by a careful comparison of the former distress statutes and the current distress statutes. The former version of §83.12 provided "[o]n filing the complaint, the clerk shall issue a distress writ commanding the Sheriff to levy on property...." The former version directed that, upon the filing of the complaint, the clerk was required to issue a distress writ. As can plainly be observed, in the amended version the Legislature removed the language "on filing the complaint" and completely reworded the first sentence to provide "a distress writ shall be issued by a judge of the court which has jurisdiction of the amount

claimed." The Fourth DCA erroneously concluded that that sentence "directs that the judge 'shall' issue the writ." Fourth DCA Opinion at 5 (A-5).

Additionally, the order of the words is significant to the meaning of the sentence. The sentence "[a] distress writ shall be issued by a judge of the court which has jurisdiction of the amount claimed" explains which judicial officer is authorized to issue the writ. The Legislature clearly had no intent that such language be construed to be a command requiring the judge to perform a mere ministerial task. Further, the amended language of §83.11, which must be considered in para materia with §§83.12 et seq., grants the court jurisdiction to "order the relief provided in this part" and requires that the complaint set forth certain facts and be verified.

Another significant change between the predecessor distress statute and the current statute is the legal effect accorded to the distress writ when issued. Under the former version of §83.12 when a writ was issued by the clerk, it would "command the Sheriff to levy ... and to collect the amount claimed, or the value thereof...." The current version of §83.12 provides that the writ enjoins the defendant from disposing of the property liable to distress until "the court otherwise orders." Furthermore, current §83.12 references the defendant's right to move for dissolution of the writ pursuant to §83.135 and requires a "further order of the court" prior to the Sheriff levying (i.e., seizing) property liable to distress.

Accordingly it can now be seen that, under the current version of Florida's distress statutes, a tenant enjoys significant procedural safeguards which operate in the tenant's favor prior to any actual levy upon the tenant's property.

C. The Lower Court Federal Decisions Relied on By the Fourth DCA are Distinguishable.

The statutes at issue in the two federal decisions relied on by the Fourth DCA are clearly distinguishable from Florida's distress statutes. In Johnson v. American Credit Co. of Georgia, 581 F.2d 526 (5th Cir. 1978), the statute in question provided that when a judge, justice of the peace or clerk of any court of record is presented with a creditor's affidavit and bond, any of these officials has the "duty ... to issue an attachment against the defendant." Id. at 534. The statute in Johnson (as opposed to the one here involved) unequivocally provided that there was a "duty" to issue the attachment upon the presentment of an affidavit and it allowed a clerk to issue it.

In Wyatt v. Cole, 710 F.Supp. 180 (S.D. Miss. 1989), Mississippi's replevin statute provided that "[i]f any person ... shall file a declaration ... and shall present such pleading to a judge ... such judge shall issue an order directing the clerk of the court to issue a writ of replevin...." Id. at 181-182.

The statutes at issue in Johnson and Wyatt differ in their language and structure from Florida's distress statutes. Florida's distress statutes provide separate sections detailing: what is required before a writ may be issued, §83.11; and who may issue the

writ and its effects, §83.12. Section 83.11 grants the court the power "to order the relief provided by" the distress statutes and requires the complaint to be verified. The purpose of the verified complaint is so that the judge can make a factual determination whether each of the essential elements listed in §83.11 have been satisfied. Unlike the statutes in Johnson and Wyatt, there is no language in §83.11 that could possibly be construed as requiring the judge to issue a writ if the judge does not independently find that a prima facie showing has been made. Section 83.12 simply makes clear which judicial officer has the power to issue a distress writ, if one is to be issued at all.

Moreover, application of this Court's decisional law relating to the construction of the word "shall" when used by the Legislature to prescribe the action of a court, mandates a contrary result to that in Johnson and Wyatt. This Court's decisions in Rich; Fagan; and Dwyer require that the word "shall" in §83.12, Fla. Stat. (1989) be construed as discretionary. (See argument beginning at p. 12, supra.)

II. THE FOURTH DCA ERRED IN HOLDING THE AMENDED DISTRESS STATUTES DO NOT COMPLY WITH THE DUE PROCESS REQUIREMENTS ENUNCIATED IN PHILLIPS

The holding of the Fourth DCA majority misapprehends the constitutional standard for the issuance of a distress writ enunciated by this Court in Phillips. The Fourth District Court of Appeals opinion states:

> The statute [Section 83.12] violates due process because the issuance of the distress writ is a mere ministerial act which affords the trial judge with no discretion to permit an impartial factual determination of the need for the writ.

Fourth DCA opinion, p. 1 (A-1).

Phillips and its progeny, do not require that the judge have discretion to determine the "need for the writ". The determination of what circumstances are appropriate for distress is within the province of the Legislature. In fact, this Court in Gazil, Inc. v. Super Food Services, Inc., 356 So.2d 312 (Fla. 1978), stated that its analysis of United States Supreme Court precedent did not reveal any decision limiting the states (i.e., legislatures) right to identify the circumstances which are appropriate for pre-judgment remedies. Id., at 313, n.4.

The constitutional requirement is satisfied if a judge, prior to issuing the distress writ, reviews a verified pleading and makes an independent determination that a prima facie showing of the essential elements, as the Legislature has determined and set forth as the basis upon which a distress writ should be issued, have been sufficiently alleged. Phillips, 344 So.2d at 568. An examination of the following quotation from Phillips, which the Fourth DCA misconstrued in concluding that the judge must make an impartial, factual determination of "the need for the writ", shows the correctness of Landlord's position:

> ...it is constitutionally imperative that a writ issue only after an impartial factual determination is made concerning the existence of the essential elements necessary for the issuance of the writ.

> Consequently, a writ must be issued by a judicial officer based upon a prima facie showing rather than pro forma by the clerk of court, unless the initial pleading is made under oath to a clerk who makes an independent factual determination that the requirements of the statute have been complied with. Only then can the individual have his use and enjoyment of the property protected from arbitrary encroachment. Under [former] Section 83.12, Fla. Stat., the distress writ [was] issued by the clerk, based upon an unverified complaint without the necessity of a preliminary factual determination as to the validity of the claim.

Fourth DCA opinion, at p.2 (A-2) quoting Phillips, 344 So.2d at 574 (emphasis changed).

The foregoing quote shows that Phillips does not require that the judge have discretion to determine the "need for the writ" as the Fourth DCA held (A-1). Rather, the requirements of Phillips are satisfied if the writ is issued by a judge based upon a verified complaint which the judge determines contains all of the essential elements of the cause of action as established by the Legislature. Phillips, 344 So.2d at 574; see also, Gazil, 356 So.2d at 313 n.4 (Legislature decides appropriate grounds for pre-judgment remedies).

CONCLUSION

Based upon the foregoing, Landlord respectfully submits that Florida's amended distress statutes are constitutional and therefore this Court should reverse the decision of the Fourth DCA which declared that Section 83.12, Florida Statute (1989) is facially unconstitutional. All that is necessary to reverse the Fourth

District Court of Appeal's decision, and to thereby avoid subjecting numerous Florida statutes to unnecessary constitutional attack, is to apply the controlling rules of statutory construction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument, together with Appellant's/Landlord's Appendix, have been furnished, by Hand Delivery, to Jack Scarola, Esquire, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401 And Russell S. Bohn, Esquire, Edna L. Caruso, P.A., Suite 4-B/Barristers Bldg., 1615 Forum Place, West Palm Beach, Florida 33401, this 12th day of August, 1991.

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