IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

THE SEBRING AIRPORT AUTHORITY and SEBRING INTERNATIONAL RACEWAY, INC.,	:	
Appellants/Petitioners,	:	
v.	:	CASE NO.: 82,489
C. RAYMOND McINTYRE, PROPERTY APPRAISER OF HIGHLANDS COUNTY, FLORIDA, THE DEPARTMENT OF REVENUE, STATE OF FLORIDA, and J.T. LANDRESS, TAX COLLECTOR OF HIGHLANDS COUNTY, FLORIDA,	:	
Appellees/Respondents.	:	

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE AND THE FACTS

The Sebring Airport Authority is the owner of certain real property located in Highlands County, Florida. (R.1)[1/2/] The Authority was created by the Florida Legislature, Chapter 67-2070, Laws of Florida. (R.2) The Act provides the Authority is a public instrumentality, exercising the performance of essential governmental functions. (R.2) The final resolution of the Act provides as follows:

> As airport facilities and other facilities located thereon are essential to the economic welfare of the inhabitants of the City of Sebring, and will promote the economic, commercial, industrial and residential development of said City, and as the exercise of the powers conferred by this Act to effect such purposes constitutes the performance of essential public functions, and as such, all facilities acquired or constructed under the provision of this Act will constitute public property used for public purposes. (R.2-3)

Since the late 1970's, the Authority had promoted and operated the "Twelve Hours of Sebring" race ("Race") on these public premises. (R.173) In the past, the Authority had underwritten the costs associated with the Race. (R.174) In the early 1990's, the Authority was unable to continue sponsorship and financing of the

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1/ For ease of reference herein, the Appellant/Petitioner, The Sebring Airport Authority, will be referred to as the "Authority." The Appellant/Petitioner, The Sebring International Raceway, Inc., will be referred to as the "Raceway." The Appellees/Respondents, C. Raymond McIntyre, The Department of Revenue, and J.T. Landress, will be collectively referred to as the "Government."

2/ All references to the Record on Appeal will be referred to by the symbol "R." followed by the appropriate page number from the Record on Appeal.

Race. (R.84, 174, 176) The inability of the Authority to pay for necessary safety improvements and the high budget needed to promote and operate the Race caused this result. (R.174) The Authority had been fortunate to receive some public funds to add new sections to the racetrack. (R.83) However, large sums of money were still needed to keep the racetrack's sanctions. (R.173-174)

There were critical reasons for the Authority to find a means to continue the Race. The Race promoted tourism for the surrounding area. (R.83) Numerous local businesses were dependant upon the race activities for their livelihood. (R.175-176) In fact, the Economic Development Council of Highland County advertised the existence of the Race to attract business to that area. (R.177) As such, the Authority and the community believed continuation of the Race was a necessity. (R.174)

In furtherance of this goal, the Authority entered into a lease agreement ("Lease") with the Raceway. (R.56) The Raceway undertook the functions previously performed by the Authority to promote and operate the Race. (R.84, 142) As part of the Lease, the Raceway was required to and, in fact, made improvements in excess of one million dollars to the racetrack and this public property. (R.60, 142-143, 174) The Lease also required the Raceway to construct a road to State Department of Transportation road standards. (R.62) Upon the termination of the Lease, these improvements remained a part of the Authority's public property. (R.60)

Prior to 1991, the Government had never assessed an ad valorem tax against this public property. (R.202) However, for the 1991 tax year, the Government levied such a tax on this real property and improvements. (R.206) Because the Raceway believed it used the property in furtherance of a public purpose, the Raceway sought an exemption from the tax under §196.199(2)(a) and §196.012(6), Fla. Stat., which provide:

> §196.199(2)(a)
>
> (2) Property owned by the following governmental units but used by non-governmental lessees shall only be exempt from taxation under the following conditions:
>
> (a) Leasehold interest in property of the United States, of the state or any of its several political subdivisions, or of municipalities. . . shall be exempt from ad valorem taxation only when the lessee serves or performs a governmental, municipal, or public purpose or function, as defined in s. 196.012(6).
>
> §196.012(6)
>
> Governmental, municipal, or public purpose or function shall be deemed to be served or performed when the lessee under any leasehold interest. . .is demonstrated to perform or serve a governmental purpose which could properly be performed or served by an appropriate governmental unit or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds.

(R.3-4) The Government denied the exemption and the Authority and Raceway instituted a lawsuit, challenging the denial of the ad valorem taxation exemption. (R.1-4)

The Government filed a Motion for Summary Judgment in the trial court, contending that the property was not exempt from ad valorem taxation because it was not both owned and used by the Authority for an exempt purpose. (R.50) The Government further argued that the §196.199 exemption was inapplicable because the Raceway, as lessee, was performing a for-profit proprietary function. (R.51, 207) According to the Government, only a function serving a governmental purpose was exempt from taxation. (R.51-53)

In opposition to the Government's Motion for Summary Judgment, the deposition of the Authority was filed. (R.154) This deposition proved the prior public use of the property, the Authority's financial difficulties, and the Raceway's continuation of the Authority's public purpose. (R.172-177) Additionally, an affidavit was filed by the Raceway, establishing that the State of Florida had allocated public funds to other Florida automobile racing events for use in promotion and development of these events. (R.82-84) The affiant opined that, like these other events, the Race was a valid subject for the allocation of public funds. (R.83)

At the summary judgment hearing, the Government argued that the operation of the racetrack was a commercial venture, for-profit, and was purely a proprietary function. (R.213-224) As a result, the Government claimed no exemption from ad valorem taxation was available. (R.213-224) The Raceway rebutted this argument by establishing that the property in question was used for

a valid public purpose and it was a valid subject for the allocation of public funds. (R.226-233) Under Florida law, the Authority and Raceway argued that these two elements permitted the application of an exemption from ad valorem taxation. (R.226-233) Moreover, the Authority and Raceway urged that any dispute of fact as to whether the Raceway was a valid subject for public fund allocation would preclude summary judgment. (R.233)

The trial court rejected the Authority and Raceway's argument and entered summary judgment for the Government. (R.123) The Authority and Raceway then appealed the summary judgment to the Second District Court of Appeal. (R.134) On appeal, the Authority and Raceway relied upon Page v. Fernandina Harbor Joint Venture, 608 So. 2d 520 (Fla. 1st DCA 1992), rev. den., 620 So. 2d 761 (Fla. 1993) to support their request for an ad valorem tax exemption. The Authority and Raceway argued that Fernandina Harbor permitted an exemption to a for-profit governmental lessee operating a public recreational facility. The Second District expressly refused to follow the First District's decision in Fernandina Harbor. Instead, the Second District announced the rule of law as follows:

> Other statutory provisions exempt privately held leaseholds of governmental property from taxation "only when the lessee . . . is demonstrated to perform a function or serve a governmental purpose which could properly be performed or served by an appropriate governmental unit, or . . [sic] which would otherwise be a valid subject for the allocation of public funds." The lessee in the present case does not serve a governmental purpose. The Corporation's operation of the speedway is "purely proprietary and for profit." The Corporation exists in order to make profits for its stockholders and uses the

> leasehold to further that purpose. This use is determinative: "It is the utilization of leased property from a governmental source that determines whether it is taxable under the Constitution." . . . Operating an automobile racetrack for profit is not even arguably the performance of a "governmental-governmental" function.

(citations omitted) (emphasis added). Sebring Airport Authority v. McIntyre, 623 So. 2d 541, 542 (Fla. 2d DCA 1993). Based upon this rule of law, the Second District rejected an ad valorem tax exemption to a for-profit lessee that was operating a racetrack for the public.

In view of the Second District's refusal to follow the decision in Fernandina Harbor, the Authority and Raceway requested the Second District to certify conflict to this Court. The Second District denied this request and, therefore, the Authority and Raceway sought conflict jurisdiction before this Court. In its Jurisdictional Brief, the Authority and Raceway demonstrated that the First District permits a for-profit corporation serving a public purpose to utilize the ad valorem tax exemption contained in §196.199, Fla. Stat. Conversely, the Second District permits a lessee serving a public function to take advantage of the ad valorem tax exemption only if the lessee is a not-for-profit corporation. Based upon this express conflict, this Court accepted jurisdiction.

POINTS ON APPEAL

I. WHETHER SUMMARY JUDGMENT WAS ERRONEOUSLY ENTERED IN FAVOR OF THE GOVERNMENT AND AGAINST THE AUTHORITY AND RACEWAY WHEN THEIR REQUEST FOR AN AD VALOREM TAX EXEMPTION WAS DENIED.

A. Whether Property Leased By A Governmental Unit To A Non-Governmental Lessee Is Exempt From Ad Valorem Taxation When The Lessee Utilizes The Property For A Valid Public Purpose.

B. Whether The Property In Question Was Exempt From Ad Valorem Taxation Because Its Use Was A Valid Subject For The Allocation Of Public Funds.

SUMMARY OF THE ARGUMENT

Clear legal error was committed when the Second District affirmed the summary judgment granted in favor of the Government and against the Authority and the Raceway. This erroneous decision was the result of the Second District's misinterpretation of statutory and decisional authority. Under §196.199(2)(a), Fla. Stat., real property that is leased by a governmental unit to a non-governmental lessee is exempt from ad valorem taxation when the lessee serves or performs a public purpose. To claim this exemption, the lessee need only show that it serves a function which could properly be performed by a governmental unit or which would otherwise be a valid subject for the allocation of public funds. The evidence before the Second District and the trial court, viewed in the light most favorable to the Authority and Raceway, undeniably proved that the Raceway was serving a public function and that the function was the valid subject for the allocation of public funds.

The facts underlying the Authority and Raceway's claim were undisputed. For a number of years, the Authority had sponsored and financed the Race. Because of the substantial costs in running this Race, the Authority could no longer afford to do so. Since the Race provided exposure and profit for the community, the Authority sought another entity that could operate the Race. As a result, the Authority entered into the Lease with the Raceway.

Under the Lease, the property in question remained under the ownership of the Authority. Furthermore, at the conclusion of the

twenty (20) year Lease, all improvements made to the racetrack remained the property of the Authority. The Raceway always understood that it was undertaking the same function that the Authority had previously provided to the community. In pursuit of this function, the Raceway spent in excess of one million dollars refurbishing the track.

Under similar facts and applying Florida law, the First District held such lessees were serving a public function and were entitled to an ad valorem tax exemption. The Second District refused to follow the First District's determination that lessees, who were operating for-profit, would be entitled to an ad valorem tax exemption if they were serving a public function. The Second District instead adopted the Government's argument that this for-profit status somehow turned the function being served from a "government" to a "proprietary" function. A simple reading of the statute in question reveals that this construction of §196.199(2)(a), Fla. Stat., is unfounded. If the Legislature had only desired not-for-profit entities to fall within the scope of §196.199(2)(a), Fla. Stat., it could simply have so stated.

Admittedly, the Government was clever in appealing to the basic reluctance to permit a tax exemption to an entity hoping to make a profit. Acceptance of this argument, however, ignores the "big picture." Taxpayers are not denied needed revenues when a for-profit corporation receives an ad valorem tax exemption. Rather, providing an ad valorem tax exemption to a for-profit governmental lessee benefits taxpayers. If a governmental entity

is able to shift the economic responsibility for a public function to a private for-profit lessee, the governmental entity is skillfully channelling its funds to provide other public services. The tax revenues relinquished by the governmental entity is minimal compared to the public funds the taxpayers save as a result of this transaction.

The First District apparently recognized this desirable result and enforced the clear mandate of our Legislature. Thus, in Fernandina Harbor, the First District refused to focus on the institutional character of the entity using the property. The fact that the lessee was a for-profit company did not preclude the First District from allowing the ad valorem tax exemption when the lessee was operating a public recreational facility which served a public function. The proper inquiry in determining whether a non-governmental lessee should be entitled to an ad valorem tax exemption is the use of the property, not whether the lessee is operating for-profit. The undisputed evidence in this case established that the Raceway was undoubtedly serving a public function.

Not only did the evidence establish that the Raceway was serving a public function, the evidence also proved that the Authority had received and used public funds to operate the racetrack and promote the Race. Under §196.012(6), Fla. Stat., if the Race was a valid subject for the allocation of public funds, then the Raceway was serving a public function. Undisputed evidence confirmed that the Race was a valid subject for the

allocation of public funds because other Florida racing events received public assistance. This evidence stood uncontradicted. On summary judgment, courts are prohibited from deciding factual issues. Based upon this uncontradicted evidence, both the Second District and the trial court should have refused to enforce a summary judgment against the Authority or Raceway. For this reason, as well as all the foregoing reasons, this Court should reverse the summary judgment entered in favor of the Government and remand to the trial court for a trial on the merits.

ARGUMENT

I. SUMMARY JUDGMENT WAS ERRONEOUSLY GRANTED IN FAVOR OF THE GOVERNMENT AND AGAINST THE AUTHORITY AND RACEWAY WHEN THEIR REQUEST FOR AN AD VALOREM TAX EXEMPTION WAS DENIED.

This appeal emanates from an order granting summary judgment on the issue of whether a tax exemption was available to the Authority and Raceway. Several principles are applicable in reviewing the trial court's decision on a summary judgment. First, to grant a summary judgment, a trial court must find that there exists no genuine issue of material fact. St. Clair v. Smith, 445 So. 2d 113 (Fla. 2d DCA 1984); Monroe v. Appelton, 419 So. 2d 356 (Fla. 2d DCA 1982). If any evidence exists which would weigh against the movant, a summary judgment simply cannot be granted because the process of weighing evidence is a jury question and not a judicial process. Brady v. Steyr-Daimler-Puch, 429 So. 2d 1348 (Fla. 2d DCA 1983).

On appeal from a summary judgment, if the existence of genuine issues of material fact or the probability of the existence is reflected in the record, or the record raises the slightest doubts in such respect, summary judgment must be reversed. Furlong v. First National Bank of Hialeah, 329 So. 2d 406 (Fla. 3d DCA 1976), cert. den.. 341 So. 2d 291 (Fla. 1976). The reviewing court is solely concerned with whether the moving party has successfully met the challenge of showing conclusively the non-existence of material fact. Hoder v. Sayet, 196 So. 2d 205 (Fla. 3d DCA 1967).

Because the trial court was required to determine whether an exemption applied to the ad valorem taxes assessed against the Authority and Raceway's property, additional statutory construction rules apply. The Authority and Raceway recognize that tax exemption statutes are strictly construed against the taxpayer. State Department of Revenue v. Anderson, 403 So. 2d 397 (Fla. 1981), on remand, 405 So. 2d 242 (Fla. 3d DCA 1981); Jones v. Life Care of Baptist Hospital, Inc., 476 So. 2d 726 (Fla. 1st DCA 1985), rev. den., 486 So. 2d 596 (Fla. 1985). However, the rule of strict construction of a statute granting tax exemption may not be invoked against a municipality asserting an exemption. State ex rel. Green v. City of Pensacola, 126 So. 2d 566 (Fla. 1961); Saunders v. City of Jacksonville, 25 So. 2d 648 (Fla. 1946). Moreover, this rule of strict construction does not require that a meaning as narrow as possible be given to words descriptive of exemption from taxation of properties. Johnson v. Presbyterian Homes of Synod of Florida, Inc., 239 So. 2d 256 (Fla. 1970). Provisions under which exemptions are claimed in good faith should not be subjected to such strained and unnatural constructions as to defeat the plain and evident intendments thereof. Lummus v. Cushman, 41 So. 2d 895 (Fla. 1949). Strict construction of an exemption should not force the conclusion that the Legislature intended other than that which it expressed in plain language, if the exemption, as expressed in plain language, is reasonable. Green v. Eglin AFB Housing, Inc., 104 So. 2d 463 (Fla. 1st DCA 1958). In this instance, it is clear that both the Second District and the trial court failed to abide

by these rules of procedure and statutory construction. Instead, summary judgment was improvidently granted in favor of the Government.

A. Property Leased By A Governmental Unit To A Non-Governmental Lessee Is Exempt From Ad Valorem Taxation When The Lessee Utilizes The Property For A Valid Public Purpose.

The Complaint filed by the Authority and Raceway requested the trial court to determine whether the property leased to the Raceway was exempt from ad valorem taxation.[3/] The statute which governed the Authority and Raceway's right to a property exemption was §196.199, Fla. Stat., which provides, in pertinent part, as follows:

> (2) Property owned by the following governmental units but used by non-governmental lessees shall only be exempt from taxation under the following conditions:
>
> (a) Leasehold interest in property of the United States or the state or any of its several political subdivisions or of municipalities. . . . shall be exempted from ad valorem taxation only when the lessee serves or performs a governmental, municipal, or public purpose or function, as defined in Section 196.012(6).

3/ The issues before the trial court did not address whether the Authority's fee interest was exempt. It should be noted, however, that the Authority is a "political subdivision of the state," entitled to immunity from taxation. See e.g. Sarasota-Manatee Airport Authority v. Mikos, 605 So. 2d 132 (Fla. 2d DCA 1992), rev. den., 617 So. 2d 320 (Fla. 1993).

Under the definition of §196.012(6), Fla. Stat., a municipal or public purpose is defined as a function:

> which could properly be performed or served by an appropriate governmental unit or which is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds. (emphasis added)

Despite the fact that the statute defines a "public function," the definition is, at best, uninformative. Numerous courts have, therefore, addressed the issue of what exactly constitutes a "public function." The answer to this query was most recently provided by Page v. Fernandina Harbor Joint Venture, 608 So. 2d 520 (Fla. 1st DCA 1992), rev. den., 620 So. 2d 761 (Fla. 1993). There, the City of Fernandina Beach leased a marina previously operated by the City to a joint venture. The joint venture was required to and constructed improvements upon the marina property. The property appraiser assessed an ad valorem tax upon the improvements. The City and joint venture claimed the property was exempt from ad valorem taxation under §196.199(2)(a), Fla. Stat. The First District agreed.

The evidence before the First District demonstrated that the City owned and leased the marina and improvements to the joint venture. Prior to imposing an ad valorem tax on the joint venture, the property appraiser had never assessed or taxed the City for the marina property. Once the City leased the property to the joint venture, however, the property appraiser claimed no statutory public purpose exemption was possible. Reviewing §196.199(2)(a), Fla. Stat., the First District rejected this argument. In doing

so, the First District noted that Florida courts have long recognized that governmental construction or promotion of recreational facilities constitutes a valid public function. The court also found that the evidence conclusively proved that the joint venture's use of the property was identical to that previously undertaken for years by the City. Because the statute clearly and unambiguously stated that property leased by a municipality to a non-governmental lessee is exempt from ad valorem taxation when the lessee utilizes the property for a valid public purpose, the court held that the property was exempt from taxation. The fact that the marina was now operated by a private entity did not void the exemption.

Similarly, the record before the Second District and the trial court conclusively proved that the Authority had previously operated the racetrack and promoted the Race. (R.172-174) In fact, during the period of time that the Authority operated the Race, the State of Florida provided public funds to the Authority for the purpose of adding new sections to the racetrack. (R.83-84) The Authority promoted the Race and operated the track for a number of years but, after a period of time, was no longer financially able to continue sponsoring and underwriting the cost of the Race. (R.84, 173-174) In response to the community's request that the Authority contract out this essential public function of managing and promoting the Race, the Raceway's company was created specifically to perform the very same function that the Authority had performed in promoting and operating the Race and racetrack.

(R.84, 142) As part of this contractual agreement, the Authority leased the property in question to the Raceway.

Furthermore, the Lease between the Authority and the Raceway is almost identical to the lease in Fernandina Harbor. In both situations, the leases required the lessees to make significant improvements to the publicly owned property. And, both leases keep ownership in the governmental unit. At the end of the leases, all improvements become the property of the city or authority. There are no factual dissimilarities between the leases that permit one to distinguish Fernandina Harbor from this case. Given these facts, it is clear that the activities of the Raceway serve a valid public purpose and that the property in question should have been exempt from ad valorem taxation.

The Second District, claiming to follow this Court's decision in Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So. 2d 498 (Fla. 1976), appeal dism., 98 S.Ct. 32 (1977), reached a contrary result. The rule of law announced by the Second District is as follows:

> The lessee in the present case does not serve a governmental purpose. The Corporation's operation of the speedway is purely proprietary and for profit. The Corporation exists in order to make profits for its stockholders and uses the leasehold to further that purpose. This use is determinative: It is the utilization of leased property from a governmental source that determines whether it is taxable under the Constitution.

Sebring at 542. (emphasis added). Reliance upon the Volusia County holding is misplaced.[4/] In Volusia County, the governmental unit had not been operating public property in a manner that served a public function. Rather, the governmental unit leased raw land to the lessee corporation. This corporation then proceeded to build a racetrack on the property. No evidence was introduced in Volusia County that a race was previously operated by a public body or that the race was an integral part of the community's economic development. Also absent was any evidence that public funds had been allocated to any future race on the soon-to-be constructed racetrack. Since no public function had previously been served by this property, this Court understandably denied the ad valorem tax exemption.

Although this Court indicated in Volusia County that operation of a racetrack could not be a proper governmental function, this Court had yet to be confronted with facts similar to this case.

[4/] In addition to relying upon Volusia County, the Second District also relied upon Capital City Country Club, Inc. v. Tucker, 613 So. 2d 448 (Fla. 1993). In Capital City, the First District certified the following question to this Court:

> Is land owned by a municipality exempt from real estate taxation if it was leased to a private party prior to April 15, 1976, and is used for non-governmental purposes?

In Capital City, the non-governmental lessee conceded that the property was not being used for municipal or public purposes. As such, Capital City is inapplicable to the facts of this case because the Authority and Raceway are using the property for a public purpose. If the Authority and Raceway were using the racetrack for non-governmental purposes, then Capital City would be relevant.

Here, the Authority did operate the racetrack for the community. The Race was an integral part of the community's reputation and marketed to other countries and companies to attract their business.[5/] The community desired its local government to continue to provide this function.[6/] The Authority did so, in the only financially viable way it could: by leasing out this function. The one million dollars that the Authority saved its budget is probably more than the ad valorem taxes assessed against the property. Instead of rewarding the Authority for being fiscally

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[5/] In Ch. 91-415, Laws of Florida, the Legislature amended Ch. 67-2070, Laws of Florida, to provide as follows:

> Section 24. The Sebring Airport Authority is authorized to budget and use the funds accruing to it from auxiliary enterprises, gifts, and concessions for promotion and public relations, including expenditures for hospitality of business guests, and industry recruitment (including funds for travel, meals, and lodging at the actual expense, rather than the otherwise legally established per diem rates).
>
> The accrual and expenditures of said funds shall be considered part of the authority's budget and shall be answerable to the provisions as stated in section 16 of this act.

Clearly, this bill provides evidence of the Legislature's understanding that funds received by the Authority should be used to attract new business to this area.

[6/] Not only did the community recognize this need, so did the Legislature. In Ch. 89-484, Laws of Florida, Ch. 2070 was amended to allow the Authority to lease the "tire and automobile testing" and racing facility, among other facilities.

responsible, denial of the tax exemption punishes the Authority and the Raceway for its exemplary behavior.

Surely, this Court never intended the Volusia County decision to create such a bright line of demarcation between functions that serve a public versus a private purpose. Instead, there must be a spectrum that the courts use, under a fact intensive inquiry, which permits reason to control, not artificial categories. By reviewing Volusia County within its historical context, it is clear that the Second District's reliance on isolated language of that case was unfounded.

Volusia County applied the test from Williams v. Jones, 326 So. 2d 425 (Fla. 1975), appeal dism., 97 S.Ct. 34 (1976) to reach its conclusion. In doing so, it cited the following passage:

> The exemptions contemplated under Sections 196.012(5) and 196.199(2)(a), Florida Statutes, relate to "governmental-governmental" functions as opposed to "governmental-proprietary" functions.

This passage is instructive for two reasons. First, the facts in Williams were totally opposite from the facts in this case. In Williams, the Santa Rosa Island Authority leased land to commercial and residential leaseholders. The commercial leases included barber shops, plumbing business, beauty shops, laundries, motels, and restaurants. These commercial taxpayers claimed that their facilities constituted a governmental purpose. This Court rejected this contention, holding that the operation of these commercial establishments were not governmental functions. Such a ruling is logical. The government is not in the business of providing

haircuts or unclogging drains. Conversely, governments routinely provide recreational facilities to their communities. Stadiums, racetracks, zoos, and parks are commonly funded and built by governments.[7/] Undoubtedly, these recreational undertakings are entirely different from the commercial activities such as those present in Williams.

Given the facts of Williams, and Volusia County's reliance on Williams, it is clear that the holdings in those cases are based on different facts and policy concerns than present in this case. For these reasons, the Second District's blanket reliance on this authority, without a thoughtful comparison to this case, was legally erroneous.

Not only was the Second District's application of the decisional authority inappropriate, the inherent logic behind the decision is defective. Both the Second District and the trial court were enamored with the Government's argument that the Raceway was a for-profit corporation. (R.124) According to the Government, this for-profit status somehow turned the function served from a "government" to a "proprietary" function. (R.101) Such a reading of the statute is strained. Obviously, the Legislature anticipated for-profit companies would operate governmental functions, otherwise, it would not have enacted §196.199(2)(a), Fla. Stat. If the Legislature had only desired

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[7/] See §159.27(11), Fla. Stat., which expresses legislative intent on this very point.

not-for-profit non-governmental entities to fall within the scope of §196.199(2)(a), Fla. Stat., it could have expressly stated.

The logic employed by the Government in its construction of §196.199(2)(a), Fla. Stat., is similar to an argument recently rejected by this Court. In Ford v. Orlando Utilities Commission, 19 Fla.L.Weekly S17 (Fla. January 6, 1994), the Government requested this Court to determine whether the Florida Constitution permitted an exemption from ad valorem taxation for a municipality's property located in another county. Art. VII, §3(a), Florida Constitution, reads, in pertinent part:

> (a) all property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. A municipality, owning property outside the municipality, may be required by general law to make payment to the taxing unit in which the property is located.

The property in question was an electrical generating plant that supplied most of that municipality's electricity to the municipality's residents but did not supply any electrical power to the residents of the county in which the plant was located. The Government attempted to graft restrictive language onto this constitutional provision to serve its purposes. Specifically, the Government argued that the municipality was not entitled to a municipal ad valorem tax exemption because the property did not provide a municipal or public benefit to the residents of the county in which the electrical generating plant was located. This Court rejected this argument and held:

> We find that the language in article VII, section 3(a), is clear and unambiguous and fully approve the decision reached by the district court. Article VII, section 3(a), contains no limitation on the location of the municipal property-only a limitation on the property's use. Because the Orlando Utility Commission property is used for a valid municipal purpose, we find that the constitutional exemption applies.

Id. at 518. Similarly, §196.199(2)(a), Fla. Stat., is clear and unambiguous. This statutory section contains no limitation on the status of the lessee. Rather, the statute only contains a limitation on the property's use. If the Legislature had desired only non-profit companies to benefit from this exemption, it would have been a simple matter to expressly state this limitation in §196.199, Fla. Stat. The absence of such a limitation prohibits the Government from imposing such a limitation.

Another compelling reason to reject the Government's position is the very cases relied upon by the Government. In Williams, Volusia County, and City of Orlando v. Hausman, 534 So. 2d 1183 (Fla. 5th DCA 1988), rev. den., 544 So. 2d 199 (Fla. 1989), the focus is on the use of the taxed property, not the status of the taxpayer using the property. There exists no rational explanation to claim that whether a company makes no money, little money, or substantial sums of money, somehow effects its entitlement to the public purpose exemption. The utter lack of logic to this position is best demonstrated by the following exchange which occurred during the deposition of the Government's representative:

> (Counsel for Raceway): If the Sebring Airport Authority put on the race, did not do it under a lease with [the Raceway] which puts on the

> race, do you have an opinion as to whether or not that land would then be exempt?
>
> A: If the Airport Authority itself administered the race, my opinion would be that, yes, it would probably be exempt at that point.

(R.207) Based upon this admission by the Government, as well as the other points previously mentioned, it is clear both the Second District and the trial court erred in determining that the property was not used for a valid public purpose.

B. The Property In Question Was Exempt From Ad Valorem Taxation Because Its Use Was A Valid Subject For The Allocation Of Public Funds.

To determine whether the real property and improvements were exempt because they served a public purpose, the trial court's inquiry was two-fold. Under §196.012(6), Fla. Stat., a public purpose is either:

> (1) a function which could properly be performed by an appropriate governmental unit or
>
> (2) a function which is demonstrated to serve a purpose which would otherwise be a valid subject for the allocation of public funds.

Under this statute, satisfying either one of the prongs provided a basis for exemption from ad valorem taxation. As previously discussed, the Authority and Raceway undisputedly proved that the Raceway performed a function which could properly be performed by a governmental unit. Such evidence satisfied the first prong. Nevertheless, the second inquiry was also satisfied: the property was a valid subject for the allocation of public funds. Given

certain undisputed evidence, it is clear both the Second District and the trial court legally erred in finding otherwise.

Undisputed evidence established that, through the years of promoting the Race, the Authority had used its money to sponsor the Race. (R.172-174) And, the Authority had previously obtained funds from the State of Florida to use in adding new sections to the racetrack. (R.83-84) This evidence is identical to the evidence before the First District in Fernandina Harbor. There, the court noted that:

> For years the City used tax revenues to pay operating expenses for the City Marina.

Id. at 2562. Because of this use of public funds for the marina, the First District found that the second aspect of the statutory public function definition had been satisfied. The evidence before the First District was no different than here. As such, the same result should have been reached.

The reason for this disparate treatment was the trial court's restrictive review of the evidence and the Second District's implicit acceptance of this action. In the record was evidence from the Raceway's representative that detailed how other state racing events received public funds. (R.83-84) More specifically, the evidence proved that the State of Florida allocates public funds to the Miami Grand Prix, the Saint Petersburg Grand Prix and to the International Motor Sports Association for use in promotion and development of automobile racing events. (R.83) Inasmuch as these events received public funds, the evidence proved that the

Raceway and Race were likewise a valid subject for the allocation of public funds. (R.83)

This evidence should have caused the trial court to deny the summary judgment motion. The principles governing summary judgment proceedings were ignored, however, by the trial court. In its order granting summary judgment, the trial judge stated:

> [T]here is no allegation . . . that the . . . Raceway as an entity could receive these funds and that if they could, that these promotional funds are funds which would fit within the definition of F.S. 196.012(6).

(R.126) This conclusion by the trial court, on summary judgment, was legally erroneous. In light of the statement in the affidavit that the Raceway was a "valid subject for the allocation of such public funds," the trial court could not reject this evidence on summary judgment. The Government never came forward with conflicting evidence. Rather, the trial court chose not to believe the Authority. Apparently, the Second District accepted this decision. Issues of credibility cannot be decided on summary judgment. Ham v. Heintzelman's Ford, Inc., 256 So. 2d 264 (Fla. 4th DCA 1971). The trial court had substantial, relevant evidence before it that raised more than a slight doubt as to whether the Raceway was a valid subject for public funds. Such evidence triggered the right to claim an ad valorem tax exemption under §196.012(6) and §196.199(2)(a), Fla. Stats. Granting summary judgment against the Authority and Raceway was, therefore, procedurally improper.

CONCLUSION

For all the foregoing reasons, summary judgment was improperly entered in favor of the Government. Both statutory and decisional authority mandates that a government lease to a non-governmental lessee is exempt from ad valorem taxation if the lessee serves a public purpose. This exemption is applicable to non-governmental lessees regardless of whether the lessee operates for-profit. Here, the evidence proved the Raceway served a public purpose. For a number of years, the Authority had promoted and financed the Race. And, the Race was a valid subject for the allocation of public funds. Facts supporting these rulings were uncontroverted. Even if the evidence was disputed, the trial court was prohibited from deciding such disputes on summary judgment. Accordingly, the summary judgment entered in favor of the Government and against the Authority and Raceway should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: LARRY E. LEVY, Esquire, Post Office Box 10583, Tallahassee, Florida 32302; CLIFFORD M. ABLES, III, Esquire, 130 E. Center Street, Sebring, Florida 33870; and RALPH R. JAEGER, Esquire, Assistant Attorney General, Department of Legal Affairs, Tax Section - The Capitol, Tallahassee, Florida 32399-1050 on this the 15th day of February, 1994.

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