**SUPREME COURT OF FLORIDA**

**CASE NO. 82,489**

THE SEBRING AIRPORT AUTHORITY and SEBRING INTERNATIONAL RACEWAY, INC.,

Appellants/Petitioners,

vs.

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.

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# APPELLEE/RESPONDENT, C. RAYMOND MCINTYRE'S BRIEF ON JURISDICTION

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## PREFACE

Petitioners, The Sebring Airport Authority and Sebring International Raceway, Inc., will be referred to herein collectively as "petitioners," or individually as the "authority" and the "raceway." Respondent, C. Raymond McIntyre, Property Appraiser of Highlands County, Florida, will be referred to herein as the "appraiser." Respondent, The Department of Revenue, State of Florida, will be referred to herein as the "department." Respondent, J. T. Landress, Tax Collector of Highlands County, Florida, will be referred to herein as "collector." References to petitioners' brief on jurisdiction will be delineated as (PB-#).

## STATEMENT OF THE CASE AND OF THE FACTS

The respondent, C. Raymond McIntyre, Property Appraiser of Highlands County, Florida, (appraiser) agrees with the petitioners', Sebring Airport Authority (authority) and Sebring International Raceway, Inc., (raceway) statement of the case and of the facts. The instant case involves the taxable status of property owned by the authority, which is an exempt entity, and leased to the raceway, which is a for profit entity. Relying upon Capital City Country Club, Inc. v. Tucker, 613 So.2d 448 (Fla. 1993), and Volusia County v. Daytona Beach Racing & Recreational Facilities Dist., 341 So.2d 498 (Fla. 1976), dismissed, 434 U.S. 804 (1977), the district court affirmed the trial court's summary judgment upholding the appraiser's denial of the authority's application for an exemption from ad valorem taxation on property used by the raceway. See Sebring Airport Auth. v. McIntyre, 18 Fla. L. Weekly D1695 (Fla. 2d DCA Jul. 30, 1993).

The appraiser, however, disagrees with the authority's statement that "[b]ased upon this rule of law, the Second District refused to permit an ad valorem tax exemption to a for profit lessee that was operating a racetrack for the public." (PB-2, emphasis added.) There is nothing in the district court's decision which states or even implies that the raceway was operating the racetrack "for the public" and certainly nothing to suggest that the lessee's use of the property was for a governmental-governmental purpose. The petitioners use the

phrase to attempt to bolster their argument on the merits that the raceway is using the racetrack for a "public purpose."

## SUMMARY OF THE ARGUMENT

The appraiser does not agree with the statement found on page 2 of the brief of the authority that the racetrack was being operated "for the public" by the lessee, if this statement is intended to suggest that the use of city owned property in the operation of a raceway pursuant to lease by a private for-profit lessee, should entitle the property to ad valorem tax exemption.

However, the appraiser cannot disagree with the authority's contention that conflict exists between Sebring Airport Auth. and Page. In both cases the involved cities had previously used the involved properties in their corporate proprietary capacity, and operated the marina and raceway themselves. The same is true of the situation in Capital City, which was relied upon by the Second District Court in its decision in Sebring Airport Auth..

## ARGUMENT

> Sebring Airport Auth. v. McIntyre, 18 Fla. L. Weekly D1695 (Fla. 2d DCA Jul. 30, 1993), expressly and directly conflicts with Page v. Fernandina Harbor Joint Venture, 608 So.2d 520 (Fla. 1st DCA 1992), review denied, --- So.2d --- (Fla. 1993).

The petitioners assert that conflict exists because Sebring Airport Auth. "announces a rule of law that conflicts

with a previously pronounced First District rule of law" in Page. (PB-5) See Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960). The appraiser can not viably contest the contention that express and direct conflict exists between Sebring Airport Auth. and Page. Even the district court in Sebring Airport Auth. recognized that conflict appears to exist. As the court stated:

> Appellants, however, rely upon *Page v. Fernandina Harbor Joint Venture*, 608 So. 2d 520 (Fla. 1st DCA 1992), *rev. denied*, ___ So. 2d ___ (Fla. May 6, 1993). *Page*, which does not refer to *Volusia County* and was prior to the decision in *Capital City*, does appear to be contra to the holdings in those cases and we are unable to properly distinguish *Page*. We are bound by the decisions of our supreme court which appear to us to be on point. *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). Inasmuch as the supreme court in *Volusia County* has held that [o]perating an automobile racetrack for profit is not even arguably the performance of a 'governmental-governmental' function," we are prohibited from holding otherwise.

Sebring Airport Auth., 18 Fla. L. Weekly at D1695.

Nevertheless, the nature of the apparent conflict between Sebring Airport Auth. and Page should be examined. In reaching its decision, Sebring Airport Auth. found two decisions from this Court to be controlling, i.e., Capital City and Volusia County.

Capital City held that property owned by the City of Tallahassee and leased to a private entity for the operation of a golf course was taxable. In its decision, this Court approved City of Orlando v. Hausman, 534 So.2d 1183 (Fla. 5th DCA 1988), review denied, 544 So.2d 199 (Fla. 1989), stating in part:

> The Fifth District Court of Appeal passed directly upon the issue before us in *City of Orlando v. Hausman*, 534 So.2d 1183 (Fla. 5th DCA 1988), *review denied*, 544 So.2d 199 (Fla. 1989). In that case, a number of private tenants leased property from the City of Orlando for nonmunicipal or nonpublic purposes. They contended that the properties were exempt from real estate taxation because their leasehold interests were subject only to intangible taxes.

Capital City, 613 So.2d at 451. Thereafter the court stated:

> The legislature is without authority to grant an exemption from taxes where the exemption does not have a constitutional basis. *Archer v. Marshall*, 355 So.2d 781 (Fla. 1978). Thus, we conclude that the legislature could not constitutionally exempt from real estate taxation municipally owned property under lease which is not being used for municipal or public purposes.

Capital City, 613 So.2d at 451-452.

This Court also rejected the contention that the leasehold, including the land value and building value, should be subject to an intangible tax and that double taxation would occur if both the real property and the leasehold were taxed, the former by county and local governments and the latter by the state. As this Court stated:

> We reject the club's contention that the imposition of real estate taxes on the fair market value of the land and the imposition of intangible taxes on the leasehold interest constitutes double taxation of the property. Intangible personal property is property which is not itself intrinsically valuable, but which derives its chief value from that which it represents. §§ 199.023(1), 192.001(11)(b), Fla. Stat. (1991). The intangible tax is being imposed on the rights afforded to the club under the lease. The real estate taxes, on the other hand, are being imposed on the land itself. In

> Florida, real estate taxes are collected by the county, while the intangible tax on leasehold interests is collected by the state. In this case, the club, as the holder of a leasehold interest, is legally responsible for the intangible tax. The club's responsibility for the real estate taxes, however, is contractual. It stems from the pass-through provision in the lease wherein the club agreed to pay the real estate taxes assessed against the land. Absent this provision, the city, as owner of the property, would be responsible for the real estate tax because the land is not being used for a municipal or public purpose. It is clear that the club's leasehold and the city's real property are completely separate interests. There is no unconstitutional double taxation where there are two taxpayers and two separate taxable transactions or privileges. *In re Advisory Opinion to the Governor*, 509 So.2d 292 (Fla. 1987).

Capital City, 613 So.2d at 452 (emphasis added). Because of that holding, this Court disapproved of Miller v. Higgs, 468 So.2d 371 (Fla. 1st DCA), review denied, 479 So.2d 117 (Fla. 1985). By disapproving Miller, this Court also implicitly overruled Bell v. Bryan, 505 So.2d 690 (Fla. 1st DCA 1987)(improvements to real property should be taxed at intangible personal property rate instead of real property rate).

Volusia County, relying on Williams v. Jones, 326 So.2d 425, (Fla. 1975), held that property owned by the Daytona Beach Racing and Recreational Facilities District and leased to the International Speedway Corporation was taxable. Sebring Airport Auth. extensively quoted from Volusia County as follows:

> Other statutory provisions exempt privately held leaseholds of governmental property from taxation "only when the lessee," Section 196.199(2)(a), Florida Statutes (1975), "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." Section 196.012(5), Florida Statutes (1975). 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." *Williams v. Jones*, 326 So.2d 425, 433 (Fla.1975) (reh. den. 1976). 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." *Straughn v. Camp, supra,* at 695.

18 Fla. L. Weekly at D1695 (quoting from Volusia County, 341 So.2d at 502).

Volusia County further held that:

> 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. With the exemption being so interpreted all property used by private persons and commercial enterprises is subjected to taxation either *directly* or *indirectly* through taxation on the leasehold. Thus, all privately used property bears a tax burden in some manner and this is what the Constitution mandates.

At 433.

> Operating an automobile racetrack for profit is not even arguably the performance of a "governmental-governmental" function.

341 So.2d at 502 (quoting from Williams v. Jones, 326 So.2d 425, 433 (Fla. 1975).

In contrast to Capital City, Hausman, Volusia County, and Sebring Airport Auth., Page held that property owned by the City of Fernandina Beach and leased to Fernandina Harbor Joint Venture was exempt from ad valorem taxation. Page involved a marina that the city had operated for many years and which, historically, had not been taxed. Under the lease, Fernandina Harbor Joint Venture was required to demolish the existing marina and construct a "first class public marina consisting of 100 deep water boat slips, a public boat ramp and 900 feet of floating concrete break water." Page, 608 So.2d at 521. The appraiser taxed those improvements and the leased real property.

In holding that the marina was exempt from ad valorem taxation, Page focused on the fact that the Fernandina Joint Harbor Venture's use of the property was identical to that previously undertaken by the city for years. "The only change pursuant to the Lease has been which entity, plaintiff or the City, was responsible for operating the Marina." Page, 608 So.2d at 523. The court then held that:

> The Court, therefore, finds that the use of the Improvements by plaintiff for the 1988 and 1989 tax years is identical to the use of the Improvements by the City historically, and that this is a valid public purpose as that term is used in Section 196.199(2)(a). Because the City owns the Improvements and plaintiff uses them for a valid public purpose, plaintiff has carried its burden of demonstrating that the Improvements are not taxable to plaintiff or the City for 1988 or 1989.

Page, 608 So.2d at 523 (emphasis added).

Such an expansive application of the term "public purpose" is at odds with the more restrictive application of the term found constitutionally mandated in Williams and Volusia County. As this Court stated:

> The Constitution of 1885 provided that property owned by corporations "shall be subject to taxation unless . . . used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." Article 16, Section 16, Florida Constitution. The phrase "municipal . . . purposes" was broadly interpreted to include any "public" purpose; under the Constitution of 1885, this Court decided that simply holding a proprietary interest in "a community recreational asset and business stimulant," *Daytona Beach Racing & Rec. Fac. Dist. v. Paul*, 179 So.2d 349, 353 (Fla. 1965), like the speedway served a "municipal purpose." *Id.* Perceiving decisions of this kind as creating inequities in the tax structure, the draftsman of the Constitution of 1968 limited the municipal purpose exemption to "property owned by a municipality and used exclusively by it for municipal or public purposes." Article VII, Section 3(a), Florida Constitution 1968.

Volusia County, 341 So.2d at 501 (emphasis added). Thus, use of property by a lessee for a community recreational asset and business stimulant, such as a marina or racetrack, would not constitute a municipal or public purpose so as to exempt the property from ad valorem taxation. See Volusia County.

Considering that Sebring Airport Auth. relied upon Capital City and extensively quoted from Volusia County in reaching its decision, any conflict based upon announcing a rule of law that conflicts with a previously announced rule of law*

*See Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

apparently would lie between Page and Capital City, Hausman, or Volusia County. This Court, however, already declined conflict review in Page.

Similarities between Capital City, Hausman, Volusia County, Sebring Airport Auth., and Page are striking. Furthermore, Capital City, Hausman, Volusia County, and Sebring Airport Auth. are totally consistent with City of Bartow v. Roden, 286 So.2d 228 (Fla. 2d DCA 1973), which also was a decision rendered by the Second District Court. Although City of Bartow was decided under the 1885 Constitution, it found the various city owned properties leased or held for lease to private commercial entities taxable. All of these cases, including Page, involved municipally owned property that was leased to a private entity. In each case, the private entity used the property for profitmaking activities. In Capital City, the use was for a golf course. In Hausman, the use was by tenants at a airport. Volusia County and Sebring Airport Auth. both involved use of the property for a raceway. In Page, the use was for a marina.

The only distinction that could be drawn between these cases is that in Capital City and Hausman the plaintiffs conceded that the lessees' use of the property was not for a municipal public purpose. However, in Volusia County, Sebring Airport Auth., and Page the parties did not make such a concession. The appraiser, therefore, acknowledges that direct and express conflict exists between Sebring Airport Auth. and Page.

## CONCLUSION

Based upon the aforementioned authorities and argument, this Court respectfully is requested to exercise its discretionary jurisdiction and review Sebring Airport Auth. based upon express and direct conflict with Page.

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 PAUL R. PIZZO, ESQUIRE and HALA A. SANDRIDGE, ESQUIRE, Fowler, White, et al., Post Office Box 1438, Tampa, Florida 33601; 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 25th day of October, 1993.

Larry E. Levy

*State*, 18 Fla. L. Weekly S326 (Fla. June 10, 1993). The trial court, which obviously did not have the benefit of *Tripp*, had the following exchange with Dotson at the sentencing on the violation of probation:

> THE COURT: . . . .
> . . . .
> . . . Credit for all time you served.
> . . . .
> THE DEFENDANT: Is that—on that time served, does that include the prison time that Judge Cary gave me for the charges that is coming back on here?
> THE COURT: Only credit time served you get is the time you served on this particular case. Any time served on any other cases, unless it was concurrent with this case, I can't speak to, but for any day that you served on this particular offense, you get credit for, up until and includes today. Okay.

In *Tripp*, the supreme court stated:

> We hold that if a trial court imposes a term of probation on one offense consecutive to a sentence of incarceration on another offense, credit for time served on the first offense must be awarded on the sentence imposed after revocation of probation on the second offense.

*Tripp*, 18 Fla. L. Weekly at S326-27. In a footnote the supreme court explained:

> We note that prior to the enactment of chapter 89-531, Laws of Florida, "credit for time served" included jail time actually served and gain time granted pursuant to section 944.275, Florida Statutes (1991). *State v. Green*, 547 So. 2d 925, 927 (Fla. 1989). It did not include "provisional credits" or "administrative gain time" which is used to alleviate prison overcrowding and is not related to satisfactory behavior while in prison. *See* § 944.277, Fla. Stat. (1991). By virtue of chapter 89-531, the revocation of probation or community control now serves to forfeit any gain time previously earned. This change in the law is inapplicable to Tripp because his crimes were committed before October 1, 1989, the effective date of the act.

*Tripp*, 18 Fla. L. Weekly at S327 n.2.

We remand this case to the trial court to clarify Dotson's sentence. If the order of clarification reflects that the jail time credit complied with the dictates of *Tripp*, no change in the sentence is necessary. If *Tripp* requires the awarding of additional jail time credit, we direct the trial court to enter an order awarding the necessary jail time credit. In either instance, the defendant need not be present. (SCHOONOVER, A.C.J., and ALTENBERND, J., Concur.)

* * *

**Taxation—Ad valorem—Exemptions—Public purpose—Privately held leasehold of governmental property not exempt from ad valorem taxation where lessee is not performing a "governmental-governmental" function—Lessee's operation of automobile racetrack for profit is not performance of "governmental-governmental" function—Request for public purpose exemption properly denied**

THE SEBRING AIRPORT AUTHORITY and SEBRING INTERNATIONAL RACEWAY, INC., Appellants, v. 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. 2nd District. Case No. 92-04403. Opinion filed July 30, 1993. Appeal from the Circuit Court for Highlands County; J. David Langford, Judge. Paul R. Pizzo and Hala A. Sandridge of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tampa, for Appellants. Larry E. Levy, Tallahassee, for Appellee C. Raymond McIntyre, as Property Appraiser for Highlands County, Florida. Robert A. Butterworth, Attorney General, and Ralph R. Jaeger, Assistant Attorney General, Tallahassee, for Appellee Department of Revenue, State of Florida.

(CAMPBELL, Judge.) Appellants, The Sebring Airport Authority and Sebring International Raceway, Inc., challenge the final summary judgment entered against them in their action against appellees, Raymond McIntyre, the Highlands County Property Appraiser; the Department of Revenue; and J.T. Landress, Highlands County Tax Collector. Appellants, relying on section 196.199, Florida Statutes (1989), had requested and been denied a public purpose exemption from ad valorem taxation for the property used by the raceway. We affirm.

The pertinent parts of section 196.199 provide as follows:

> (2) Property owned by the following governmental units but used by nongovernmental lessees shall only be exempt from taxation under the following conditions:
> (a) Leasehold interests 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 Section 196.012(6).

In affirming, we rely upon *Capital City Country Club, Inc. v. Tucker*, 613 So. 2d 448 (Fla. 1993) and *Volusia County v. Daytona Beach Racing and Recreational Facilities Districts*, 341 So. 2d 498 (Fla. 1976), *dismissed*, 434 U.S. 804, 98 S.Ct. 32, 54 L.Ed.2d 61 (1977). In *Volusia County*, the supreme court held as follows:

> Other statutory provisions exempt privately held leaseholds of governmental property from taxation "only when the lessee," Section 196.199(2)(a), Florida Statutes (1975), "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." Section 196.012(5), Florida Statutes (1975). 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." *Williams v. Jones*, 326 So.2d 425, 433 (Fla.1975) (reh. den. 1976). 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." *Straughn v. Camp*, *supra*, at 695.
>
> The burden is on the claimant to show clearly any entitlement to tax exemption. "The rule is that all property is subject to taxation unless expressly exempt and such exemptions are strictly construed against the party claiming them. *State ex rel. Wedgworth Farms, Inc. v. Thompson*, 101 So.2d 381 (Fla.1958)." *Williams v. Jones*, *supra*, at 435. Mr. Justice Sundberg, writing for the Court in *Williams v. Jones*, *supra*, delineated the scope of the exemption at issue here in the following words:
>
> 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. With the exemption being so interpreted all property used by private persons and commercial enterprises is subjected to taxation either *directly* or *indirectly* through taxation on the leasehold. Thus all privately used property bears a tax burden in some manner and this is what the Constitution mandates.
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> At 433.
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> Operating an automobile racetrack for profit is not even arguably the performance of a "governmental-governmental" function.

341 So. 2d at 502 (emphasis in original).

Appellants, however, rely upon *Page v. Fernandina Harbor Joint Venture*, 608 So. 2d 520 (Fla. 1st DCA 1992), *rev. denied*, __ So. 2d __ (Fla. May 6, 1993). *Page*, which does not refer to *Volusia County* and was prior to the decision in *Capital City*, does appear to be contra to the holdings in those cases and we are unable to properly distinguish *Page*. We are bound by the decisions of our supreme court which appear to us to be on point. *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). Inasmuch as the supreme court in *Volusia County* has held that "[o]perating an automobile racetrack for profit is not even arguably the performance of a 'governmental-governmental' function," we are prohibited from holding otherwise.

Affirmed. (FRANK, C.J., and THREADGILL, J., Concur.)

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