9-4



IN THE SUPREME COURT
OF THE STATE OF FLORIDA

APPEAL DOCKET NO.:

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| LIZZIE MAE HARRIS, WANDA M. TOWNSEND and ELLIS TOWNSEND,<br><br>Appellants,<br>vs.<br><br>DALE WILSON, JAMES JETT, LARRY LANCASTER, PATRICK McGOVERN and GEORGE BUSH, as constituting the Board of Clay County Commissioners; CLAY COUNTY, a Political Subdivision of the State of Florida,<br><br>Appellees. | DISTRICT COURT<br>NO: 93-3445 |

961210

REQUEST FOR REVIEW FROM A DECISION
OF THE FIRST DESTRICT COURT OF APPEAL

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**JURISDICTIONAL BRIEF**
**OF PETITIONERS**
**LIZZIE MAE HARRIS,**
**WANDA TOWNSEND AND ELLIS TOWNSEND**

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## STATEMENT OF THE CASE

This is an appeal of the grant of summary judgment to Clay County on a challenge to its special assessment for solid waste disposal. Appellants contend that a genuine issue of material fact was presented to the trial court, and also that the summary judgment was incorrect as a matter of law.

### A. FACTUAL SUMMARY

In 1992 Clay County enacted an ordinance imposing a partial year special assessment for the maintenance of the county solid waste facilities (R-119-146, App. 3). The assessment was applied only to residential properties in the unincorporated area of the county. Residents of the unincorporated area formerly paid a tipping fee to use the landfill, and are now entitled to deposit their solid waste without paying the tipping fee. Collection service is not funded by the assessment. Residents are required to transport their own waste to the landfill or to pay separately for the service.[1]

The Appellants are low-income homeowners subject to the assessment. Because the assessed value of their properties is less than $25,000, they pay no ad valorem taxes, but they are required to pay the special assessment. (R-5 para. 10, App. 1; R-50, para. 11, App 2)

The instant case is a challenge to the partial year

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[1] The county has entered into franchise agreements with commercial haulers, but residents who use these haulers must pay the entire cost of the services.

special assessment. Since this action was filed, the County has enacted a full year assessment, to be collected as provided by §197.3632, Fla. Stat. Appellants have challenged that ordinance as well, but those cases are pending, by agreement of counsel, until there is a resolution of this case.

**B. PROCEDURAL HISTORY**

Appellants brought two separate actions challenging the assessment, Ms. Harris on December 28, 1992, and the Townsends on March 2, 1993. The cases were later consolidated without objection. (R-467-468). Both raised the issue of the validity of the assessment, but the Townsends' case raised the additional issue of arbitrariness in determining which structures are "dwelling units" subject to separate assessments. (R-48-49 para. 8, App. 2).

Appellees moved for summary judgment on June 15, 1993. (R-92-184, App. 3). Certain County documents, obtained in discovery, were presented to the Court at the summary judgment hearings. (R-439-464, App. 4). Appellants contend that these documents show that the assessment was not calculated by determining the cost of the service, as the County claimed, but that it was instead a predetermined rate, which was justified by adjusting the budget figures for that purpose. The trial Court refused to admit these documents, though their authenticity was undisputed,[2] and granted summary judgment in favor of the county.

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[2] The trial court's alternative holding (R-474) was that the documents did not raise an issue of material fact.

(App. 5). Appellants appealed from that final order.

The First District Court of Appeal affirmed, with a dissent.

## SUMMARY OF ARGUMENT

The Court of Appeals opinion approved a special assessment for landfill maintenance, but not for waste collection, where the assessment proceeds were commingled into the County's solid waste budget, and where non-payment can result in the forced sale of a homestead.

No showing of benefit to particular property was made, and the County's listing of benefits, both in its legislative findings and its answers to interrogatories, reveals that most of the benefits are general. As to the only specific benefit--the disposal of waste from a particular property--the amount of the assessment bears no relation to the benefit, that is, to the actual use of the landfill.

This decision is in express and direct conflict with numerous decisions of this Court, and of the Courts of Appeal, which subject assessments on homestead property to close scrutiny. Self-serving, conclusory, and self-contradictory pronouncements of County officials were accepted without question by the majority of the Court of Appeal panel. This conflicts with the traditional vigilance regarding the homestead shown by this Court for more than half a century.

## I. THE DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH *HANNA v. CITY OF PALM BAY.*

In Hanna v. City of Palm Bay, 579 So. 2d 320 (Fla. 5th DCA 1991) an assessment for street resurfacing was imposed on abutting property, precisely the type of project in which courts traditionally presume that a sufficient benefit exists. However, the assessment was part of a plan for resurfacing all of the streets in the city, and thus the same benefit was provided to the community as a whole, just as it was in the waste disposal assessment at issue in this case. The Fifth District Court of Appeal noted that using an assessment enabled the City to evade the homestead exemption and restrictions on voter approval, and ruled

> even if a benefit is conferred upon particular parcels of property, if the benefit is the same or similar to that which is conferred upon the community at large, the individual homeowner may not be assessed for a pro rata cost of the improvement . . . Id. at 322.

That principle would invalidate the assessment in this case, thus the decision appealed from is in direct conflict with it.

The assessment in Palm Bay was imposed pursuant to Chapter 170, Florida Statutes, and therefore the Court of Appeal tested the assessment against the language of that statute, requiring a "benefit which is different in type or degree from the community as a whole." §170.01(2) Fla. Stat. Subsequently, this Court, in City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992) determined that an assessment which failed to meet the procedural requirements of Chapter 170 could nevertheless be valid under the city's home rule

powers. However, Boca Raton did not decide that the benefit requirements of Chapter 170 were no longer binding on local governments. In fact, this Court said "special assessments must confer a specific benefit upon the land burdened by the assessment." Id. at 29. In the instant case the First District Court of Appeal interpreted Boca Raton as overruling Palm Bay as to the requirement of a particularized benefit to specific property, and thus determined that Palm Bay is "inapplicable". App. 6, p. 8. However, the requirement for a particular benefit to assessed property does not originate from Chapter 170, but from the body of assessment law developed by this Court over many years, and best expressed in Klemm v. Davenport 129 So. 904, (Fla. 1930) at 907, which defined a special assessment, saying "[i]t is imposed on the theory that the portion of the community which is required to bear it receives some special or peculiar benefit . . ." That requirement, though expressed in Chapter 170, does not depend on Chapter 170 for its validity or applicability.

Further, in the instant case the District Court of Appeal interpreted the requirement that the assessed property receive "benefits which were different in degree and type from those received by other properties within the taxing unit" as referring to classes of property. It concluded that the requirement was met because residential property received different benefits from vacant land and commercial properties. App. 6, page 9. However, Palm Bay required a special benefit to each individual piece of property assessed, not merely different benefits to broad classes

of property.

The Court of Appeal, in finding Palm Bay "inapplicable", App. 6, pp. 8-9, in effect deleted the requirement of a special benefit to assessed property, and allowed a special assessment to fund a general benefit to the community.

## II. THE DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH ALL PRIOR HOMESTEAD EXEMPTION JURISPRUDENCE

Appellants have explicitly raised and extensively argued the effect of the assessment on the homestead exemption, and the precedents involving assessments on homesteads. The Court of Appeal's decision, in ignoring the constitutional standards for homestead protection, is in express and direct conflict with all the cases that have construed the special assessments exception to the homestead exemption, since the 1938 revision of its language.[3] These cases have invalidated assessments which provided general

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[3] Article VII § 6(a), Fla. Const. used to read "except special assessments for benefits," but since 1938 has read "except assessments for special benefits" a phrase that was held to be "much more restrictive" in this Court's opinion in State v. Halifax Hospital District, 159 So. 2d. 231 (Fla. 1963), at 232.

The only exception to the statement that all cases mentioning the homestead have invalidated the assessments at issue is Nordbeck v. Wilkinson, 529 So. 2d 360 (Fla. 2d DCA 1988), a case in which a pro se plaintiff challenged both ad valorem and special assessments imposed by special districts, without any discussion of the nature of the special assessment, or the benefit involved. The First District Court of Appeal invalidated the assessments before it in Madison County v. Foxx, 636 So. 2d 39 (Fla. 1st DCA 1944), on procedural grounds, but it contains dictum that apparently acknowledges there could be a valid assessment for ongoing services. Id. at 50. However, the cases cited for this proposition did not address the issue of homestead protection.

benefits to the community, whenever the issue of homestead was raised.

The assessments invalidated in those cases often funded the same type of projects which were funded by valid assessments in the non-homestead context, such as garbage collection, City of Fort Lauderdale v. Carter, 71 So. 2d 260 (Fla. 1954) , fire protection, St. Lucie County-Fort Pierce Fire P & C Dist. v. Higgs, 141 So. 2d 744 (Fla. 1962), street paving, Fisher v. Dade County, 84 So. 2d 572 (Fla. 1956) street surfacing, Hanna v. Palm Bay supra, and health care facilities, Whisnant v. Stringfellow, 50 So. 2d 885 (Fla. 1951); State v. Halifax Hospital District, 159 So. 2d 231 (Fla. 1963). All but Palm Bay are decisions of this Court.

Most of the assessments at issue were apportioned on an ad valorem basis, but that same apportionment method was approved in City of Boca Raton v. State, 595 So. 2d 25 (Fla. 1992), and thus it is not the reason for invalidating the assessments, in the cases cited above.

The rulings by this Court most frequently cited for the proposition that assessments may fund municipal services are Fire District No. 1 of Polk County v. Jenkins, 221 So. 2d 740 (Fla. 1969) and South Trail Fire Control District v. State, 273 So. 2d 380 (Fla. 1973). However, it was commercial property owners who challenged the assessments in both those cases.

Where the homestead issue has been raised in challenges to assessments for ongoing services, this Court has developed a level of scrutiny appropriate to protect the constitutional interest

involved. That scrutiny was expressed in the Fisher decision, supra at 576. "The unsupported conclusion of the County Engineer under the circumstances revealed in this record regardless of his ability and integrity cannot be accepted as determinative of the constitutional question involved." The District Court of Appeal, in simply accepting the pronouncements of County officials with respect to the benefit, is in express and direct conflict with the cases protecting the homestead from such assessments.

## III. THE DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THE REASONING OF THIS COURT'S RECENT DECISION IN *PORT ORANGE*

State v. City of Port Orange, 650 So. 2d 1 (Fla. 1994) was decided after oral argument had been completed in the instant case. The Court of Appeal requested additional briefs on the implications of this Court's decision in Port Orange. Nevertheless, it was only mentioned in a footnote which noted that assessments, unlike fees, do not have to be voluntary. App. 6, p. 5. n.3.

The Court of Appeal relied on the distinction that Port Orange involved fees rather than assessments. They failed to recognize this Court's concern with local government evasion of constitutional tax limitations, including the homestead tax exemption. That concern animated the Port Orange decision, and it applies whether the funding mechanism is called a fee or an assessment.

Further, the Court of Appeal ignored this Court's careful scrutiny in Port Orange of the nomenclature used by the local

government, and of the detailed, statistical data presented to the trial court to justify the fee. Instead of following this Court's example by judging the local government's claims realistically, the Court of Appeal, like the trial court in the instant case, uncritically accepted the County's claims without any scrutiny. The Court of Appeal abdicated its judicial role, in spite of this Court's recent example to the contrary in Port Orange.

## IV. THE DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH A CRUCIAL PROVISION IN THE *FISKE* RULING

Although purporting to be based on Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977), the decision ignored one crucial limitation in Fiske, that there be no "improper 'tax' aspect inuring to the benefit of the county at large." Id. at 581. In Fiske the funds collected were simply turned over to the contract hauler, and the amount of the fee or assessment was set by dividing the hauler's fee by the number of households paying the fee. In the current case, the funds collected are deposited in the County's Solid Waste Enterprise Fund, a $4 million fund which pays for many things besides the maintenance of the landfill. The fund, for example, pays for portions of the salaries of the County Attorney, the Chairman of the County Commission, and the County Clerk/Comptroller, and for other substantial professional fees. (App. 4, R-457-458).

Thus, this case goes far beyond Fiske, and negates a crucial limitation imposed by the Fiske court. To that extent, it is in

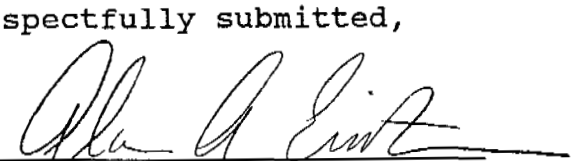
express and direct conflict with Fiske.

## CONCLUSION

The instant case has gone further than any reported case in blurring the distinction between a special assessment and a tax. App. 6, p. 23, (J. Booth, dissenting). It is in conflict with decisions of this Court, as well as other District Courts of Appeal which have maintained that distinction. That distinction, while it appears to be a technical one, has important constitutional implications.

Florida's Constitution embodies our citizens' resolve to limit taxes, and to protect a family's home. This Court has safeguarded those concerns for over half a century, by invalidating numerous schemes which sought to evade the constitutional limitations. The decision in this case, if unreviewed by this Court, will provide authority for many other local governments to impose assessments for ongoing municipal services. Thus, by creative nomenclature and conclusory findings, local governments will be able to nullify the will of the people, as expressed in the constitution.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to MARK H. SCRUBY, Attorney for Clay County, Post Office Box 1366, Green Cove Springs, Florida 32043; and to GREGORY T. STEWART, Esquire, at Nabors, Giblin & Nickerson, P.A., 315 South Calhoun Street, Barnett Bank Building, Suite 800, Post Office Box 11008, Tallahassee, Florida 32302, Attorneys for Appellees; and ROBERT BUTTERWORTH, Esquire, Attorney General, The Capitol, Tallahassee, Florida 32399-1050, by First Class United States Mail, this 9th day of August, 1995.

GLORIA A. EINSTEIN, ESQ.