

**IN THE SUPREME COURT
STATE OF FLORIDA**

PHANTOM OF BREVARD, INC.
Plaintiff/Appellant,

Supreme Court No. SC07-2200

v.

BREVARD COUNTY,
Defendant/Appellee.

APPELLANT'S BRIEF ON JURISDICTION

**ON PETITION FOR DISCRETIONARY REVIEW
OF THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL**

MARK D. SHUMAN
Florida Bar No. 0147869
GrayRobinson, P.A.
P.O. Box 1870
Melbourne, FL 32902-1870
Telephone: (321) 727-8100
Facsimile: (321) 984-4122
Attorneys for Appellant Phantom of
Brevard, Inc.

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STATEMENT OF THE CASE AND FACTS

Appellant Phantom of Brevard, Inc. (hereinafter: “Appellant”) seeks this Court’s discretionary review of the opinion of the Fifth District Court of Appeal filed in this cause on August 31, 2007. (See Appendix.) In its opinion, the Fifth District, while concluding that the majority of the provisions of Brevard County Ordinance 05-60, as amended by Brevard County Ordinance 06-18 (hereinafter, collectively: the “Ordinance”), which purports to regulate the supply, sale and use of fireworks within the county, are not in violation of the Florida Constitution, further concluded that Section 10 of the Ordinance, which sets forth the nature of evidence of financial responsibility which sellers of fireworks must provide, is unconstitutional because said Section 10 directly conflicts with Section 791.001, Florida Statutes, which provides that Chapter 791 (“Sale of Fireworks”) shall be applied uniformly throughout the state and because Chapter 791 “does not contain any financial responsibility standard or requirement.” Phantom of Brevard, Inc. v. Brevard County, Appendix at P. 9.

Appellant filed an Amended Complaint for Declaratory Judgment against Appellee Brevard County (hereinafter: “Brevard County”), seeking a declaration that the Ordinance was unconstitutional on its face, was inconsistent with, and preempted by, § 791.001, *et seq.*, Florida Statutes, and was unconstitutional by being in violation of Article VIII, Section 1(g) of the Florida Constitution.

Brevard County, in its Affirmative Defenses, asserted that the Ordinance was consistent with state law and constitutional on its face, and that, in Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011 (Fla. 2d DCA 2005), the Second District Court of Appeal had upheld substantially the same ordinance and ruled against virtually identical legal positions advanced by Appellant in this case.

After hearing on cross-motions for summary judgment, the Circuit Court (Barlow, J.) entered Summary Final Judgment in favor of Brevard County, the Court finding that (1) Brevard County Ordinance 05-60, as amended by Ordinance No. 06-18, is substantially similar to the Pinellas County ordinance considered and ruled upon by the Second District Court of Appeal in Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011 (Fla. 2d DCA 2005); (2) the principles set forth by the Second District Court of Appeal in Phantom of Clearwater are also controlling on the issues raised by the challenges to the Brevard County ordinances raised in this case; and (3) in accordance with Pardo v. State, 596 So. 2d 665 (Fla. 1992), in the absence of conflicting inter-district decisions, the Second District Court of Appeal decision in Phantom of Clearwater, Inc. v. Pinellas County is binding upon the Court in this case.

Appellant appealed that decision, and the Fifth District, while finding that Sections 8, 10 and 13 of the Ordinance were unconstitutional, affirmed the constitutionality of the remainder of the Ordinance.

The Fifth District's decision that Section 10 of the Ordinance is unconstitutional is in direct conflict with the decision of the Second District Court of Appeal in Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011 (Fla. 2d DCA 2005), in which the Second District Court concluded that Section 62.90 of the Pinellas County ordinance under review there, which, in all material respects, mirrors Section 10 of the Brevard County Ordinance, was constitutional.

SUMMARY OF ARGUMENT

The Supreme Court should exercise its discretionary jurisdiction in this case because of the direct conflict of the decisions of the Fifth District Court of Appeal and the Second District Court of Appeal regarding the constitutionality of nearly identical sections of ordinances enacted by Brevard County and Pinellas County regulating the retail sales of fireworks.

ARGUMENT

I. The Decision of the Fifth District Court of Appeal Below Expressly and Directly Conflicts With the Decision of the Second District Court Appeal in Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011 (Fla. 2d DCA 2005) Regarding the Constitutionality of Substantially Similar Sections of County Ordinances Regulating the Sale of Fireworks.

This Court should exercise discretionary jurisdiction to review the decision of the court below which determined that Section 10 of the Ordinance purporting to regulate the sale of fireworks is unconstitutional, because that decision expressly and directly conflicts with the decision of the Second District Court of Appeal in Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011 (Fla. 2d DCA 2005), in which it was determined that a substantially similar provision contained in a Pinellas County ordinance was constitutional.

Section 10 of the Brevard County Ordinance entitled “Evidence of financial responsibility”, in its entirety, reads:

“In furtherance of the provisions of sections 8 and 9, all sellers of fireworks must keep in force an insurance policy showing general, comprehensive, liability and property damage insurance coverage on an occurrence basis with minimum limits in the policy of not less than \$1,000,000.00 combined single limit coverage for each loss that may result from the activities of the sellers. Sellers must maintain Workers Compensation coverage

as required pursuant to F.S. Ch. 440. A failure to maintain this required coverage after the procurement of a permit shall be a violation of this ordinance and grounds for suspension of their permit from the authority and the sale of the permitted goods shall cease until such time as the required insurance is obtained.”

Section 62-90 of the Pinellas County ordinance reviewed in *Phantom of Clearwater, Inc.*, entitled “Evidence of Financial Responsibility”, in its entirety, reads:

“In furtherance of the provisions of Sec 62-88, all sellers of fireworks, must keep in force an insurance policy showing general, comprehensive, liability and property damage insurance coverage on an occurrence basis with minimum limits in the policy of not less than one million dollars (\$1,000,000.00) combined single limit coverage for each loss that may result from the activities of the sellers. Sellers must maintain Workers’ Compensation coverage as required pursuant to Chapter 440, Florida Statutes. A failure to maintain this required coverage after the procurement of a permit shall be a violation of this Division and grounds for suspension of their permit from the Authority and the sale of the permitted goods as set forth in Sec 62-82 shall cease until such time as the required insurance is obtained.”¹

For ease of comparison of these sections of the Brevard County and Pinellas County ordinances, in the following recapitulation (1) identical provisions of the ordinances appear in black, (2) provisions contained only in the Brevard County

¹This section of the Pinellas County ordinance reviewed in *Phantom of Clearwater, Inc.*, was transcribed from the Appendix to the Second District’s decision. See *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011, 1028-29 (Fla. 2d DCA 2005).

Ordinance appear in blue, and (3) provisions contained only in the Pinellas County ordinance appear in red:

“In furtherance of the provisions of **sections 8 and 9, Sec 62-88**, all sellers of fireworks, must keep in force an insurance policy showing general, comprehensive, liability and property damage insurance coverage on an occurrence basis with minimum limits in the policy of not less than **one million dollars (\$1,000,000.00)** combined single limit coverage for each loss that may result from the activities of the sellers. Sellers must maintain Workers’ Compensation coverage as required pursuant to **F.S. Ch. 440. Chapter 440, Florida Statutes**. A failure to maintain this required coverage after the procurement of a permit shall be a violation of this **ordinance** **Division** and grounds for suspension of their permit from the **authority** **Authority** and the sale of the permitted goods **as set forth in Sec 62-82** shall cease until such time as the required insurance is obtained.”

As discussed above, the Fifth District Court, in determining Section 10 of the Ordinance to be unconstitutional, concluded:

“Upon considering substantially similar language in the Pinellas County ordinance, the Phantom of Clearwater court determined that a county may, as part of its permitting process, demand proof of the seller’s ability to respond in damages. 894 So. 2d at 1023. We disagree. Brevard County’s financial responsibility

Ordinance is in direct conflict with section 791.001, Florida Statutes, which provides that chapter 791 ‘shall be applied uniformly throughout the state.’ Because chapter 791 does not contain any financial responsibility standard or requirement, retailers and other supply-side entities are subject to potentially disparate obligations throughout the state. Although the legislature has provided counties with considerable discretion to determine the amount of a bond required of a fireworks display licensee under section 791.03, there is no reason to believe that the legislature would have countenanced a system in which a seller of fireworks or sparklers must maintain a particular amount of liability insurance simply because one of the counties in which it does business requires such coverage. On remand, therefore, the circuit court shall sever section 10, entitled “Evidence of financial responsibility,” from the Ordinance. Sellers must continue to comply with the state’s worker’s compensation code.” Phantom of Brevard, Inc. v. Brevard County, Appendix at PP 8-9.

In contrast, in determining to be constitutional the permitting process contained in the Pinellas County ordinance, which process included, at Section 62-90, the requirement that a seller of fireworks must keep in force a liability insurance policy with limits of one million dollars, concluded:

“Although the ordinance does establish a permitting process for all businesses involving fireworks and that process imposes additional requirements on businesses wanting to avail themselves of the benefits of doing business in Pinellas County, this permitting process does not directly conflict with the provisions of

chapter 791.” Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011, 1023 (Fla. App. 2d DCA 2005). (Emphasis added.)

CONCLUSION

Because of the direct conflict in the decisions of the Fifth District Court of Appeal and Second District Court of Appeal regarding the constitutionality of the provisions of county ordinances requiring the seller of fireworks to obtain liability insurance, Appellant respectfully requests that this Court exercise its discretionary jurisdiction.

Respectfully submitted,
Appellant Phantom of Brevard, Inc.,
By its attorney,

Mark D. Shuman
Florida Bar No. 0147869
GrayRobinson, P.A.
P.O. Box 1870
Melbourne, FL 32902-1870
Telephone: (321) 727-8100
Facsimile: (321) 984-4122

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Scott L. Knox, Esq., Office of the County Attorney, 2725 Judge Fran Jamieson Way, Viera, FL 32940, this ____ day of December, 2007.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing instrument complies with the font requirements of Rule 9.210(a), Florida Rules of Appellate Procedure.

Mark D. Shuman