

IN THE SUPREME COURT OF FLORIDA

CASE NOS.: SC07-2200 ; SC07-2201
Lower Tribunal No(s): 5D06-3408

PHANTOM OF BREVARD, INC. vs. BREVARD COUNTY, FLORIDA

BREVARD COUNTY, FLORIDA vs. PHANTOM OF BREVARD, INC.

Petitioner/Cross-Respondent(s)

Respondent/Cross-Petitioner(s)

**PHANTOM OF BREVARD, INC.'S REPLY BRIEF
AND CROSS-ANSWER BRIEF**

DATED: July 25, 2008

**Mark D. Shuman
Florida Bar No. 0147869
GrayRobinson, P.A.
1800 W. Hibiscus Blvd., Suite 138
Melbourne, FL 32901
Telephone: (321) 727-8100
Facsimile: (321) 984-4122**

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ARGUMENT

I. IN ENACTING SECTION 791.001, FLORIDA STATUTES, *ET SEQ*, THE FLORIDA LEGISLATURE GRANTED BOARDS OF COUNTY COMMISSIONERS AND GOVERNING BODIES OF MUNICIPALITIES ONLY LIMITED AUTHORITY TO REGULATE THE USE AND SALE OF FIREWORKS.

Pursuant to Chapter 791, local governments have authority only (1) “to adopt reasonable rules and regulations for the granting of permits for supervised public display of fireworks by fair associations, amusement parks, and other organizations or groups of individuals”, Section 791.02, Florida Statutes, (2) to provide for “more stringent regulations for the outdoor display of fireworks,” Section 791.012, Florida Statutes, and (3) to require one authorized to conduct a public display of fireworks to post a bond. Section 791.03, Florida Statutes. (Emphasis added.) Pursuant to Chapter 791, local governments have no authority to adopt any rules, regulations or ordinances which impact anything other than the public outdoor display of fireworks.

In its Answer Brief, Brevard County argues:

“[Because] Chapter 791, while prohibiting retail sales to consumers, is utterly silent on what documentation a purveyor of fireworks, like Phantom, must maintain in

order to prove that the vendor is ... only engaged in exempt sales of fireworks to persons who actually qualify for statutory exemption ... the absence of statutory provisions addressing such documentation and record keeping requirements ... make enforcement of the retail sales prohibition difficult, if not impossible [and, therefore] the existence of the County Commission's authority to enforce Chapter 791 is critical to the success of local law enforcement efforts to enforce the Section 791.02 retail sales prohibition in the field". (Brevard County's Answer Brief, at pp. 5 & 6.)

Brevard County's argument is flawed not only because it is predicated on the assumption that county commissions have the power to regulate retail sales of fireworks but also because it is precisely the absence within the statute of any provisions regarding what documentation a seller of fireworks must maintain that clearly demonstrates that it was the Legislature's intent that there should be none. This, once again, illustrates the general rule that where a legislature "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion", Beach v. Great Western Bank,

692 So. 2d 146, 152 (Fla. 1997), and that, in light of the provisions of Sections 791.012 (“**Minimum fireworks safety standards**”) and 791.02 (“**Sale of fireworks regulated; rules and regulations**”) specifically authorizing local governments to enact rules and regulations regarding the public display of fireworks, the absence of such explicit authority in other sections of the statute unequivocally reflects the Legislature’s intent that local governments were to have no authority to regulate the subject matter of such sections.

So, too, accepting Brevard County’s assertion that a county commission has authority “to enforce Chapter 791 by filling in the documentation and record keeping gaps in Chapter 791” would result in every county having the authority to promulgate its own “documentation and record keeping requirements”, thereby making impossible the uniform application of Chapter 791 throughout the state as mandated by Section 791.001 (“**Application and enforcement**”).

A. NFPA 1124 Is Irrelevant To The Instant Litigation.

Brevard County devotes a significant portion of its Answer Brief attempting to establish that because the National Fire Prevention Association (“NFPA”) Code 1124 (“**Code for the Manufacture, Transportation, Storage and Retail Sales of Fireworks and Pyrotechnic Articles**”, **2006 Edition**) is incorporated into the Florida Fire Prevention Code, and because Section 125.01(1)(d), Florida Statutes (“**Powers and duties**”), which enumerates the powers and duties of the “legislative

and governing body of a county”, authorizes county commissioners to enforce the Florida Fire Prevention Code, then county commissioners, somehow, are empowered to enact ordinances regulating the sale of fireworks to the general public. (Brevard County’s Answer Brief, at pp. 9-11.)¹

Such argument is wholly without merit.

This is because, despite its title (“**Code for the Manufacture, Transportation, Storage, and Retail Sales of Fireworks and Pyrotechnic Articles**”, 2006 Edition), NFPA 1124 deals only with the construction, use and maintenance of buildings and facilities utilized for the retail sale and related storage of consumer fireworks, NFPA 1124, Chapter 1 – 1.1(4), NFPA 1124 containing no provisions in any way relating or referring to the manner in which

¹ Section 125.01(1)(d) provides:

“(1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to:

...

“(d) provide fire protection, including the enforcement of the Florida Fire Prevention Code”

It is interesting to note that nowhere in the more than thirty areas in which Section 125.01 (“**Powers and duties**”) empowers county commissions to act is it stated, or even implied, that such bodies are empowered to act either as a “local law enforcement department” or “officials charged with the enforcement of the laws of the state” as set forth in Section 791.001 (“**Application and enforcement**”), Florida Statutes.

such consumer sales are to be conducted. In fact, not only does NFPA Chapter 7 – 7.1.1 specifically provide that “retail sales of consumer fireworks in both new and existing buildings, structures and facilities shall comply with the requirements of this chapter unless otherwise indicated”, but also Chapter 7 describes, in detail, all aspects of the construction and design of buildings from which fireworks may be sold to the public.

In a word, NFPA 1124 makes no reference to, and provides no requirement regarding, any documentation and/or records to be kept by retail sellers of fireworks regarding such sales. In fact, Chapter 1.3.3 of NFPA 1124 specifically provides:

“This code shall not apply to the use of consumer fireworks by the general public.”

In this appeal, Phantom is not challenging the authority of Brevard County to enact ordinances regulating the granting of permits for the supervised public display of fireworks. Rather, Phantom is challenging the authority of Brevard County to enact any ordinance affecting the sale of fireworks to, and/or use of fireworks by, the general public “on private, residential property”, which such ordinances are specifically proscribed by Section 791.012, Florida Statutes (“**Minimum fireworks safety standards**”), which states “The Code for Fireworks

Display shall not govern the display of any fireworks on private residential property ...”.

Accordingly, Brevard County’s reliance in its Answer Brief upon the provisions of NFPA 1124 is a “red herring”, an effort to distract the Court’s attention from the impermissible efforts by Brevard County to regulate the sale to, and use by, members of the general public of fireworks on private, residential property, by attempting to equate the public display of fireworks to the private use thereof by the public.²

B. Local Governments And Their Members Are Not “Officials Charged With Enforcement of the Laws of the State.”

In what may best be described as an exercise in attempting to calculate the number of angels that can dance on the head of a pin, in its Answer Brief, Brevard County attempts to draw a distinction between “local law enforcement departments” and “officials charged with the enforcement of the laws of the state” as the entities and individuals charged with enforcement with Chapter 791. Section 791.001 (“**Application and enforcement**”).

² It is well settled that a party may not make an argument in support of its position for the first time upon appeal. Brevard County neither made reference to, nor asked that judicial notice be taken of, NFPA 1124 in either its written submissions or argument before the circuit court or district court of appeal. Accordingly, Brevard County should not be allowed now, for the first time, to argue that NFPA 1124 has relevance to the instant appeal.

Phantom submits that this distinction, if any, is wholly without a difference. Just as there is no practical, or theoretical, distinction between “local law enforcement departments” and “officials charged with the enforcement of the laws of the state”, there also is no distinction between “officials charged with the enforcement of the laws of the state” and “law enforcement officials”.

The significance of this latter assertion is because, throughout Florida case law, a “law enforcement official” is consistently viewed as an individual who is authorized to arrest and maintain lawful custody over a prisoner. (See, e.g., Garner v. State, 839 So. 2d 924 (Fla. App. 4th Dis. 2003): “A ‘Prisoner’ is defined as ‘any person who is under arrest and in the lawful custody of any law enforcement official’” *Id.*, at 926; Thomas v. State, 805 So. 2d 102 (Fla. App. 4th Dist. 2002): “The defense does not dispute that a person ‘ who is under arrest and in the lawful custody of any law enforcement official’ qualifies as a ‘Prisoner’. *Id.*, at 104.)

Accordingly, because members of county commissions have no power to arrest and maintain custody over any other person, such county commission members are not “law enforcement officials”.

II. WHETHER BECAUSE OF EXPRESS PREEMPTION OR IMPLIED PREEMPTION, OR BOTH, THE ORDINANCE IS UNCONSTITUTIONAL.

A. The Phrase “Applied Uniformly Throughout The State” Unequivocally Evidences The Legislature’s Intent That, Except When Otherwise Expressly Provided In Chapter 791, It Was Preempting To Itself The Field Of Retail Fireworks Sales.

In its Answer Brief, Brevard County argues that the phrase in Section 791.001 (“**Application and enforcement**”) that “this chapter shall be applied uniformly throughout the state” does not constitute “specific language of preemption directed to the particular subject at issue”. (Brevard County’s Answer Brief, at p. 17.)

In attempting to explain away the significance of the Legislature’s use of the phrase “applied uniformly throughout the state”, Brevard County reports counting seven additional instances in which the phrase “applied uniformly” appears in Florida statutes. (Brevard County’s Answer Brief, at pp. 19-20.) Although the phrase “applied uniformly” as appears in these seven statutes has not been judicially construed, still Brevard County urges that the phrase “applied uniformly” means that local governments are precluded from applying the statute “in a manner

that is arbitrary, capricious or discriminatory.” (Brevard County’s Answer Brief, at pp. 17-22.)

Although Brevard County’s argument appears predicated on the unsupportable proposition that a governmental entity may apply some statutes in an arbitrary, capricious or discriminatory manner, assuming, *arguendo*, that the phrase “applied uniformly” within a statute precludes a county from enforcing the statute in a manner that is arbitrary, capricious or discriminatory, such an interpretation ignores the fact that Section 791.001 (“**Application and enforcement**”) specifically mandates that it is to be “applied uniformly throughout the state”, and not just applied uniformly by local governments to all persons within the jurisdiction of those local governments.

Only if the Legislature had provided in Section 791.001 (“**Application and enforcement**”) either that “this chapter shall be applied uniformly” or that “this chapter shall be applied uniformly throughout each county”, could the argument be advanced that each county was empowered to enact ordinances affecting the retail sale of fireworks.

Accordingly, the only manner in which the expressed legislative intent that Chapter 791 “be applied be uniformly throughout the state” may be achieved is by there being one, and only one, legislative body empowered to enact laws establishing enforcement parameters.

B. Chapter 791 Not Only Expressly Preempts The County Ordinance, But Also Does So By Implication.

In Browning v. Sarasota Alliance for Fair Elections, Inc., 968 So. 2d 637 (2nd DCA 2007), the court of appeal, after noting that “the absence of express preemption does not preclude a finding of preemption by implication”, Browning v. Sarasota Alliance for Fair Elections, Inc., *supra* at 645, stated:

“Preemption’ “may be implied from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area” ... ‘When courts create preemption by implication, the preempted field is usually a narrowly defined field, “limited to the specific area where the Legislature has expressed [its] will to be the sole regulator.””” Browning v. Sarasota Alliance for Fair Elections, Inc., *supra* at 645. (Emphasis added.)

The statute *sub judice* clearly evidences both (1) a “need for State-wide uniformity”, the objective specifically established by the Legislature by providing in Section 791.001 (“**Application and enforcement**”) that it “be applied uniformly throughout the state”, and (2) the fact that the field being preempted by the Legislature is a narrow one, i.e., the retail sale of fireworks to the general public.

Accordingly, it is submitted that the language which the Legislature utilized when framing Chapter 791 permits this Court to find not only that the Legislature expressly preempted to itself the field of regulation of the sale of fireworks to the public, but also impliedly preempted that field to itself.

III. IT IS PROPER FOR THE COURT TO CONSIDER THE LEGISLATIVE HISTORY OF SECTION 791.001, FLORIDA STATUTES.

In Rollins v. Pizzarelli, 761 So. 2d 294 (Fla. 2000), the Supreme Court of Florida stated:

“We recognize that when the statutory language is clear, legislative history cannot be used to alter the plain meaning of the statute. (Citation omitted.) However, when the statutory language is susceptible to more than one meaning, legislative history may be helpful in ascertaining legislative intent. See Magaw v. State, 537 So. 2d 564, 566 (Fla. 1989); cf. Hawkins v. Ford Motor Co., 748 So. 2d 993 (Fla. 1999) (using legislative history to support an interpretation of the meaning of the statute).” Rollins v. Pizzarelli, *supra* at 299. (Emphasis added.)

Accordingly, while legislative history may not be utilized to “alter” the plain meaning of a statute, such legislative history may be utilized by a court both (1) to determine legislative intent where a statute is ambiguous, and/or (2) to support a court’s interpretation of a statute’s meaning. (See, e.g., Hawkins v. Ford Motor Co., 748 So. 2d 993, at 1000 (Fla. 1999): “In addition to consideration of the plain language of [the statute under review], we find that the legislative history underlying those statutory subsections supports our conclusions regarding their relationship.”

Thus, whether to plumb the meaning of an ambiguous statute or to confirm its interpretation of an unambiguous statute, a court may look to the legislative history of the subject statute.

Phantom submits that the initial sentence of Section 791.001 (“**Application and enforcement**“), Florida Statutes (the initial section of Chapter 791), which provides that: “This chapter shall be applied uniformly throughout the state”, constitutes the unequivocal expression by the Florida Legislature that Chapter 791 preempts to the Legislature the regulation of the retail sale and use of fireworks throughout the state.

In its Answer Brief, Brevard County cites Section 790.33, Florida Statutes (“**Field of regulation of firearms and ammunition preempted**”), and Section 316.75, Florida Statutes (“**Operator use of commercial mobile radio services**

and electronic communication devices”), as examples of statutory provisions where the Legislature expressly set forth its intention to preempt regulation of a certain field. Brevard County’s Answer Brief, at P. 18. However, the differing language utilized in these statutes by the Legislature to evidence its intention to preempt regulation of the field illustrates that there is no single, formulaic statement used by the Legislature to establish such an express preemption.

Phantom submits that the Legislature’s intent to preempt the regulation of the sale and use of fireworks throughout the State of Florida is expressly embodied in the initial sentence of Section 791.001, Florida Statutes (“**Application and enforcement**“), that “This chapter shall be applied uniformly throughout the state,” and that such express preemption is confirmed by an examination of the legislative history of said section.

Alternatively, the parties’ contrasting arguments regarding the meaning and significance of the sentence “This chapter shall be applied uniformly throughout the state”, viewed both independently and in the context of the conclusions of the Second District Court of Appeal in Phantom of Clearwater, Inc. v. Pinellas County, 894 So. 2d 1011 (2d DCA 2005), that “the language of [Section 791.001] is puzzling” and that “the first sentence of this statute is arguably surplus language”, *id* at 1018, indicate that the meaning of the subject sentence is ambiguous and, therefore, the legislative history of Section 791.001, Florida Statutes, may be

examined in an effort to resolve that ambiguity. (See Rollins v. Pizzarelli, 761 So. 2d 294, 297 (Fla. 2000): “Ambiguity suggests that reasonable persons can find different meanings in the same language”.) As discussed in Phantom’s Initial Brief, it is submitted that resort to the legislative history of Section 791.001, Florida Statutes, compels the conclusion that it was the specific intent of the Legislature to preempt the regulation of the sale and use of fireworks to the public throughout the State of Florida.^{3, 4}

³ The Supreme Court of Florida, in *Rollins*, noted: “An interpretation of a statutory term cannot be based on this Court’s own view of the best policy.” Rollins v. Pizzarelli, 761 So. 2d 294, 299 (Fla. 2000).

⁴ The Ordinance, composed of 15 sections in Ordinance No. 05-60 and 3 additional sections in Ordinance No. 06-18, *inter alia*:

- (1) Provides eleven definitions (Section 1);
- (2) Provides descriptions of the “documentary evidence” that retail purchasers of fireworks must provide to sellers (Section 5);
- (3) Imposes strict liability upon sellers of fireworks (Section 8);
- (4) Authorizes the Brevard County fire authority to issue permits to sellers of fireworks, and describes the “proof” that must be submitted by sellers to obtain such permits (Section 9);
- (5) Establishes that all sellers of fireworks must maintain not less than \$1,000,000.00 combined single limit insurance coverage for each loss that may result from the activities of the seller (Section 10);
- (6) Prohibits the use of fireworks within the county without a permit first having been obtained “for the public display of fireworks”, other than use (1) “by a railroad or other transportation agency for illumination or signal purposes”, (2) “associated with quarrying, blasting, or another industrial purpose” in accordance with Section 791.04, Florida Statutes, or (3) “in conjunction with a bona fide agricultural use”, as provided in Section 791.07, Florida Statutes (Section 13); and
- (7) Provides penalties for violations of the Ordinance (Section 14).

In light of the clear statement contained in the first sentence of Section 791.001 that “This chapter shall be applied uniformly throughout the state”, it is submitted

REPLY BRIEF CONCLUSION

For the foregoing reasons, Plaintiff/Appellant Phantom of Brevard, Inc., submits that the combination of (1) the 1987 legislative history of amendments to Chapter 791, Florida Statutes (“**SALE OF FIREWORKS**”), (2) the specific language contained in Section 791.001, Florida Statutes (“**Application and enforcement**”), that the chapter “shall be applied uniformly throughout the state”, and (3) the rejection, in 2004, by the Florida Senate of an amendment to Chapter 791 which would have authorized local governments to enact “more stringent” laws regulating fireworks, establish that the Legislature unequivocally expressed its intent to preempt regulation of the sale of fireworks to the public throughout the state of Florida.

Accordingly, Phantom requests that this Court reverse the judgment of the court of appeal and enter judgment that the Ordinance is unconstitutional because it is violative of Section VIII 1(g) of the Florida Constitution prohibiting the enactment by local governments of ordinances which are not consistent with general law.

that nothing will lead to a greater lack of uniformity in the application of Chapter 791 throughout the State of Florida than by allowing every local government and board of county commissioners to enact ordinances as far reaching as the Ordinance *sub judice*.

CROSS-ANSWER BRIEF

In response to Brevard County's Cross-Initial Brief, Phantom is content to rely upon the arguments set forth in its Initial Brief and Reply Brief.

Respectfully submitted,
Phantom of Brevard,
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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by First Class Mail to Scott L. Knox, Esq., Office of the County Attorney, 2725 Judge Fran Jamieson Way, Viera, FL 32940, counsel for Defendant/Appellee Brevard County, and Scott Widerman, Esq., 202 N. Harbor City Blvd., Suite 101, Melbourne, FL 32935, counsel for Intervenors Thunderbolt Fireworks, Inc., and Sky King Unlimited, Inc., this ____ day of July, 2008.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellant's foregoing Initial Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

Mark D. Shuman
Counsel for Plaintiff/Appellant
Phantom of Brevard, Inc.