

IN THE SUPREME COURT OF FLORIDA

Case No. SC07-2201

BREVARD COUNTY, FLORIDA, a  
political subdivision of the State of  
Florida,

Defendant/Petitioner,

v.

Lower Tribunal Case No.  
5D06-3408  
Fifth District Court of Appeal

PHANTOM OF BREVARD, INC.,

Plaintiff/Respondent.

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**JURISDICTIONAL BRIEF**

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On Review from the District Court of Appeal, Fifth District

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## **STATEMENT OF THE CASE AND FACTS**

This case was commenced when Phantom of Brevard, Inc. filed a declaratory judgment seeking to have Brevard County Ordinance 05-60, as amended by Brevard County Ordinance 06-18 (the Ordinance), declared to be unconstitutional. The Ordinance regulates the supply, sale, and use of fireworks, and sparklers while imposing various record-keeping requirements on retailers and establishing a permitting process for the regulation of any public display of fireworks within the County. A financial responsibility applicable to vendors is also an integral provision of the Ordinance.

Phantom asserted that fireworks regulation has been preempted to the State by Chapter 791, Florida Statutes, which governs the manufacture, distribution, storage, sale and use of fireworks. Chapter 791 allows local governments to issue fireworks-related permits and enforce state laws and rules. The statute contains the following express provisions, among others:

This chapter shall be applied uniformly throughout the state. Enforcement of this chapter shall remain with local law enforcement departments and officials charged with the enforcement of the laws of the state.” § 791.001, Fla. Stat. (2006)

The board of county commissioners shall require a bond deemed adequate by the board of county commissioners from the licensee in a sum not less than \$500 conditioned for the payment of all damages which may be caused either to a person or to property by reason of the

licensees display, and arising from any acts of the licensee, his or her agents, employees or subcontractors. § 791.03, Fla. Stat. (2006).

The lower court upheld the Ordinance in its entirety and an appeal was filed with the Fifth District Court of Appeal, which affirmed in part and reversed in part. In reversing a part of the lower court's decision, the Fifth District Court of Appeal found specific portions of the Ordinance to be preempted by chapter 719 or inconsistent with the uniformity requirement in section 791.001, Florida Statutes. (2006).

### **SUMMARY OF ARGUMENT**

The Supreme Court has jurisdiction over this case as a result of the express and direct conflict on a point of law addressed in both *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005) and *Phantom of Brevard, Inc. v. Brevard County*, attached hereto as Appendix 1.

### **ARGUMENT**

#### **I. THE FLORIDA SUPREME COURT HAS CONFLICT JURISDICTION OVER THIS CASE BECAUSE AN OPINION FROM THE SECOND DISTRICT COURT OF APPEAL IN *PHANTOM OF CLEARWATER, INC. V. PINELLAS COUNTY* AND THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICT ON A POINT OF LAW**

Brevard County invokes the jurisdiction vested in the Florida Supreme Court under Article V, section 3(b)(3), Florida Constitution and Rule 9.030(a)(2)(A), Florida Rules of Appellate Procedure. Specifically, the Fifth District Court of

Appeal decision in this case 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), a case in which the Second District Court of Appeal upheld a Pinellas County fireworks ordinance, in its entirety, against a preemption and inconsistency challenge.

The basis for the express and direct conflict between the Fifth District Court of Appeal decision in this case and the Second District Court of Appeal in *Phantom of Clearwater, Inc. v. Pinellas County*, is articulated within the four corners of the Fifth District Court's opinion, which is where this Honorable Court must look in determining jurisdiction. *Jones v. Florida Insurance Guaranty Association, Inc.*, 908 So. 2d 435 (Fla. 2005) Although the Fifth District Court found the Brevard fireworks ordinance to be very similar to the Pinellas ordinance, the Fifth District expressly disagreed with the following ruling regarding the validity of the financial responsibility section of the Brevard ordinance, beginning at page 5 of the opinion:

Section 10, entitled "Evidence of financial responsibility," provides:

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.

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.” [Emphasis supplied]

The citation by the Fifth District to 894 So. 2d 1023 of the Second District’s opinion in *Phantom of Clearwater v. Pinellas County*, refers to the Second District’s discussion of Pinellas’ permitting requirements for fireworks sales, including a million dollar liability insurance requirement in the Pinellas ordinance<sup>1</sup> that is mirrored by section 10 (set forth above) of the Brevard ordinance. The

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<sup>1</sup> The Pinellas provision, as taken from the Second District Court of Appeal opinion, reads as follows:

Sec. 62-90. Evidence of Financial Responsibility.

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.

*Phantom of Clearwater, Inc.v. Pinellas County*, 894 So. 2d at 1029

permitting scheme in the Pinellas ordinance was described by the Second District as follows.

Section 5 of the ordinance generally provides for a local permitting process before a person can engage in the sale of fireworks in Pinellas County. To obtain this permit, the seller must provide considerable information, including the names and addresses of all persons or entities that have “an interest” in the fireworks inventory. The applicant for a permit must also obtain a \$1,000,000 combined single limits liability insurance policy to cover the risk of loss or injury to other people arising from its business operations in Pinellas County.

*Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d at 1023

After describing the Pinellas permitting requirements, the Second District Court of Appeal went on to express the following specific holding with regard to that permitting system, which included the one million dollar liability insurance requirement:

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.*** [Emphasis supplied]

*Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d at 1023



It is the language from this portion of the Second District Court of Appeal opinion with which the Fifth District Court of Appeal expressly disagreed, as is evident from the following quote from the Fifth District's opinion:

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."

The decision from the Fifth District Court of Appeal and the Second District Court of Appeal are, therefore, express and directly conflict on the same point of law. As a result, this Honorable Court has jurisdiction. *See: Jollie v. State*, 405 So. 2d 418 (Fla. 1981)

### **CONCLUSION**

For the foregoing reasons, Brevard County asserts that this Honorable Court has jurisdiction over this matter and respectfully requests that the Court accept jurisdiction of the case.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to ark D. Shuman, Esquire, 1800 West Hibiscus Blvd., Suite 138, Melbourne, Florida, 32901, this 26th day of November, 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.

OFFICE OF THE COUNTY ATTORNEY  
2725 Judge Fran Jamieson Way  
Viera, FL 32940  
321.633.2090  
321.633.2096 fax

    /s/      
Scott L. Knox  
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Florida Bar No. 211291

Attorney for Brevard County

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**APPENDIX**

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1. Fifth District Court of Appeal Opinion filed August 31, 2007