IN THE SUPREME COURT OF FLORIDA

Case No. 66,115

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NORTH BROWARD HOSPITAL DISTRICT,
a special tax district,

Petitioner

v.

SHARON T. FORNES,

Respondent.

PETITIONER NORTH BROWARD HOSPITAL DISTRICT'S
AMENDED REPLY BRIEF ON THE MERITS

APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA
IN CASE NO. 83-0947

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ARGUMENT

THE TRIAL COURT PROPERLY DISMISSED THE AMENDED COMPLAINT ON THE BASIS THAT FORNES FAILED TO ALLEGE ANY FACTS WHICH WOULD GIVE HER STANDING

A. THE FLORIDA SUPREME COURT IN HORNE AND ITS PROGENY CLARIFIED THE STANDING QUESTION BY HOLDING THAT AN INCREASED TAX BURDEN IS NOT A "SPECIAL INJURY"

Respondent Fornes and her amici contend in their briefs that there is legal precedent for the Fourth District's decision that Fornes has a standing based on the alleged facts of this case.[1] The dissent in Godheim v. City of Tampa, 426 So. 2d 1084 (Fla. 2d DCA 1983), and the majority opinions in Fornes v. North Broward Hospital District, 455 So. 2d 584 (Fla. 4th DCA 1984), and Bull v. City of Atlantic Beach, Case No. AW-339 (Fla. 1st DCA January 8, 1985), have taken similar positions. All have apparently relied on Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205 (Fla. 1917).

However, the common law is not static and none of these decisions or briefs has properly been able to distinguish the far more recent pronouncements of this Supreme Court beginning with the case of Department of Administration v. Horne, 269 So. 2d 659 (Fla. 1972). The Respondent is quick to point to the specific wording of a 1917 decision as being binding precedent and yet will

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1. See Respondent's Answer Brief, p. 4

attempt to dismiss language in 1972 and subsequent decisions as being "troublesome",[2] or "distinguishable".[3]

Contrary to the Respondent's position, it is Horne and its progeny which provide the clear legal precedent which denies standing to Fornes in this case.

In Horne, as in this case, the Plaintiffs brought the action as "ordinary citizens and taxpayers" and challenged what they contended was an unlawful expenditure. By its very nature, an unlawful expenditure will increase the burden of every taxpayer; the Plaintiffs in Horne were such taxpayers. If the position taken by Fornes is correct, that is, that an increased tax burden is a "special injury", the Plaintiffs in Horne would have needed to allege nothing further than the fact that they were taxpayers and that there was an unlawful expenditure. After all, according to Fornes, this increased tax burden equals "special injury" and, therefore, the Plaintiffs would have had standing.

However, this rationale employed by the Respondent is legally infirm.. In order to find that the Plaintiffs in Horne had standing, the Florida Supreme Court added a very limited exception to the no-standing rule by stating that, in the absence of a "special injury", a taxpayer would have standing if there is a constitutional challenge to the legislature's taxing and special

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2. Common Cause of Florida brief, p. 11.
3. Respondent Fornes spent six pages of her brief (pp. 24-30) attempting to distinguish the holding in Horne and the subsequent decisions, but without reference to the specific wording of these cases.

power.[4] If there is no constitutional challenge, the "special injury" rule applies.

Respondent Fornes and her amici argue that the Horne decision is consistent with Rickman. The Petitioner assumes that this is based on the fact that the Horne Court did not specifically state that an increase in a taxpayer's burden is not a "special injury". But it was not necessary for the Supreme Court to specifically articulate or accept such a stance. There is no other appropriate interpretation of the Horne decision. First, the Supreme Court specifically said that the attempt to say that "appropriations" should be viewed differently than "expenditures" is a "distinction without a difference". Horne, at 660. Thus, an attack on an unlawful appropriation was, in fact, an attack on an unlawful expenditure. An unlawful expenditure is an obvious increase in the tax burden for each taxpayer.

Therefore, if an increase in the tax burden was a "special injury" that would give a taxpayer standing, the Florida Supreme Court would have gone no further. The allegations of the Plaintiffs in the Horne case would have been sufficient to give the Plaintiffs standing. However, the Supreme Court required more. The Respondent does not accept this logic. Instead, she argues that despite the fact that the Plaintiff in Horne already had standing, the Supreme Court engrafted a new exception to the no-standing rule, citing Flast as authority. This contention by

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4. The exception was based on the United States Supreme Court's decision of Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L.Ed. 947 (1968).

the Respondent flies in the face of the long-established appellate court practice of not creating new law when well-established principles of existing law will resolve the issues on appeal. Far more logically, the Supreme Court determined it necessary to acknowledge another exception to the no-standing rule because the Court clearly accepted the fact that an increase in tax burden is not a "special injury" that would give a taxpayer standing.

Until the dissent in Godheim, the meaning of the Horne decision had not been questioned. Now both the Fourth District in Fornes and the First District in Bull have broken away from the clear legal precedent of Horne. This departure was created by giving an interpretation to a 1917 decision that simply is not consistent with the law as clearly pronounced by the Supreme Court in Horne and subsequent decisions. Significantly, none of the above-cited opinions successfully reconciles itself with the Horne decision. The Fornes and Bull District Courts do not even try, simply noting that the decisions in Horne and in the subsequent Department of Revenue v. Markham, 396 So. 2d 1120 (Fla. 1981), are inconsistent with Rickman. The dissent in Godheim makes an attempt to reconcile Horne with Rickman,[5] but in doing so, the dissenting judge had to reach the same conclusion that the Respondents reached, that is, that the Supreme Court ignored the obvious standing that the Plaintiff had under the Respondent's interpretation of the "special injury" rule and created a new exception without the necessity to do so. As stated above, this

5. Godheim, at 1093.

is not logical and it is not consistent with subsequent Supreme Court decisions.

Williams v. Howard, 329 So. 2d 277 (Fla. 1976), followed Horne in time and in reasoning.[6] In Williams, the Plaintiffs sued in their official capacities as a minority of the Parole and Probation Commission and also as citizens and taxpayers. While the Plaintiffs did attack the validity or constitutionality of a Florida statute, they did not allege that this particular statute would result in the unlawful expenditure of public monies. Therefore, the Supreme Court, citing Horne, held that the Plaintiffs did not have standing.

Contrary to what the Respondent asserts,[7] this Williams decision is directly on point with Horne. The Respondent's position is based on a misreading of Williams. She asserts that the sole reason for the Supreme Court's denial of standing was the Plaintiff's failure to allege an unlawful expenditure, which obviously would equate to an increased tax burden.

But Williams does not state this. Rather, the Williams taxpaying Plaintiffs failed to allege an unlawful expenditure arising from the implementation of an unconstitutional or invalid statute. The Plaintiffs did allege the invalidity of statute; however, that specific law would not result in an expenditure of

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6. In between Horne and Williams, the Supreme Court decided United States Steel Corporation v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974), which reversed the Second District's decision granting the Plaintiff standing and in doing so extensively cited the Horne decision as precedent. The Second District had attempted to eliminate the special injury requirement in a public nuisance case.
7. See Respondent's Answer Brief, p. 19

public funds.[8] The mere attack on the validity of a statute does not impart standing to a Plaintiff, anymore than the mere allegation that there will be an unlawful expenditure, i.e., an increased tax burden. Under Horne, the Plaintiff must allege both in order to have standing.

In the instant case, the Plaintiff did not allege the invalidity of any statute. Rather, her only allegation is the unlawful expenditure of money. Per Horne and Williams, this clearly is not sufficient to give the Plaintiff standing.

While the Respondent and amici rely heavily on the fact that the Fourth District (Fornes) and First District (Bull) have decided cases in favor of taxpayer standing, it should not be forgotten that the majority opinion in the Second District (Godheim) and the Third District follows the very clear precedent of Horne in deciding against taxpayer standing. And very significantly, a Third District opinion has been specifically approved and cited by the Supreme Court as a correct statement of the law.

This leading Third District case is Paul v. Blake, 376 So. 2d 256 (Fla. 3d DCA 1979). In Paul, the issue was whether a county taxpayer had standing to bring a declaratory and injunctive action against public officials of the county when the action sought to enjoin the grant of certain tax exemptions, given to other taxpayers in the county, on the ground that such exemptions

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8. The Williams Plaintiffs attacked the validity of §20.315(6), Fla. Stat. (1975), which dealt with the duties of an assistant secretary in the Department of Offender Rehabilitation.

violate specific limitations on the county's authority to grant tax exemptions opposed by the Florida Constitution. The Third District found that the taxpayers had standing but this standing was based on the taxpayer's constitutional attack on a statute which placed this case under the limited exception to "special injury" rule that the Supreme Court had announced in Horne. The Third District specifically said that a taxpayer, absent the Horne exception, only had standing if he could show a special injury to him which was distinct from that sustained by every other taxpayer in the taxing unit.[9]

The Paul decision was specifically cited by the Supreme Court with approval in the 1981 decision of Department of Revenue v. Markham, 396 So. 2d 1120 (Fla. 1981). In Markham, county appraisers brought an action seeking declaratory judgment as to whether household goods and personal effects of non-residents were subject to ad valorem taxation. The suit was brought by Markham not only in his official capacity but also as a citizen and taxpayer. The Supreme Court held that Markham did not have standing. In so holding, the Supreme Court found:

> The Complaint for declaratory relief contained no allegation of any special injury, and it did not attack the constitutionality of the taxing statutes in question. It has long been the rule in Florida that in the absence of a constitutional challenge, a taxpayer may bring suit only upon a showing of special injury which is distinct from that suffered by other taxpayers in the taxing district.

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9. The Paul decision also has an excellent discussion on public policy, which will be addressed in the next section of this Reply Brief.

Markham, at 1121 (Emphasis added) (Cites of Horne and Rickman omitted).

Respondents have attempted to dismiss this Markham decision as not being on point. It is argued by the Respondent that Markham can be distinguished because there was no allegation that his tax burden would increase. This is not true. As the Respondent very candidly admitted in her brief, Markham did make allegations in the lower court that it would cost the appraiser more to make the tax assessments than the amount of tax that would be collected.[10] Further, if this was all that the Plaintiff needed to add, the Supreme Court would appropriately have permitted the Plaintiff to amend his complaint to add the magical words. Instead, the Supreme Court used carefully worded language to establish that Markham, as a citizen and taxpayer, did not have standing.

This is the specific language that the Respondent and her amici have called "troublesome".[11] It is "troublesome" to the Respondent's position, because it resolves the issue created by this appeal. Clearly, it establishes that Fornes did not have standing to bring the case at bar. Unable to allege any "special injury" which was distinct from other taxpayers in the taxing district of the Hospital, the Plaintiff failed to establish her standing to bring this lawsuit. The lower court, therefore, properly dismissed the complaint and the Fourth District improperly reversed the lower court's decision.

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10. See Respondent's brief, at p. 29.

B. PUBLIC POLICY FAVORS THE POSITION THAT THE TAXPAYER NOT HAVE STANDING UNLESS THE TAXPAYER CAN SHOW A "SPECIAL INJURY" DISTINCT FROM ALL OTHER TAXPAYERS

The Florida Supreme Court has already addressed all the public policy arguments raised by the Respondent and her amici in their briefs.

In Markham, the Supreme Court said that in absence of a constitutional challenge, a taxpayer had to show a "special injury" which was different from that suffered by other taxpayers. It cited the Third District case of Paul for providing the rationale for this rule:

> This rule is based on the sound policy ground that without a special injury standing requirement, the courts would in all likelihood be faced with a great number of frivolous lawsuits filed by disgruntled taxpayers who, along with much of the taxpaying public these days, are not entirely pleased with certain of the taxing and spending decisions of their elected representatives. It is felt that absent some showing of special injury as thus defined, the taxpayers' remedy should be at the polls and not at the courts. Moreover, it has long been recognized that in a representative democracy the public's representatives in government should ordinarily be relied on to institute the appropriate legal proceedings to prevent the unlawful exercise of the state or county's taxing and spending power.

Markham, at 1122 (citing Paul, at 259).

The above quoted paragaph succinctly responds to all of the public policy arguments that have been raised by the Respondent. The Supreme Court has visited each of these issues and has

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11. Common Cause of Florida brief, p. 11.

resolved these issues in favor of not affording standing to a taxpayer unless this taxpayer can show a "special injury" different than that suffered by other taxpayers.

Respondent contends that taxpayers must have the right to sue to correct abuses. In support, Respondent raises the expected public policy arguments which, the Petitioner is sure, were already presented to this Court prior to the Horne and Markham decisions. But each one of the Respondent's points has tremendous mitigating factors which have to be balanced and, in fact, outweigh the right of a taxpayer to bring suit:

1. The Respondent contends that the Attorney General or other governmental representatives cannot be counted upon to act when elected or appointed officials do not follow the law. The Respondent offers no basis for this conclusion. The duty of the Attorney General is to enforce the law and if an elected or public official does in fact violate the law, the Attorney General must act to uphold the law.

2. The Respondent contends that the right to vote a public official out of office does not provide an immediate adequate remedy. Standing alone, perhaps this is true. But the right to vote an elected official out of office or to demand that an appointed official not be reappointed, does not stand as a lone remedy. If a public official does in fact act illegally, there is immediate recourse through the Attorney General. Further, the

Governor has the immediate authority to remove the public official from office in certain situations.[12]

3. The Respondent contends that suits by other bidders are not effective means of preventing unlawful expenditures. Once again, the Respondent's contention is without basis in fact. The Respondent states that unsuccessful bidders will not sue because suits are costly. Suits are also costly to taxpayers, not to mention the public body which must defend all of them regardless of merit. The Respondent says that bidders are not inclined to sue public bodies, because the bidder is concerned about his future relationship with the public body. There is no justification for this argument. Suits by unsuccessful bidders fill the Southern Reporter. Unlike private industry, where this statement may be true, public bodies are governed by public bidding requirements, the Public Records Act and the Sunshine Law. Unsuccessful bidders sue public bodies all of the time. They do so with full knowledge that if they are the low bidder on the next project, the public body will be compelled to give them the project. If not, the bidder will be in even a better position in future litigation against the public body.

As the above demonstrates, the taxpayer has been and will be protected against true unlawful expenditures and other illegal conduct of public officials. This has been the case and will continue to be the case in the future. In addition to the above,

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12. Section 112.52, Fla. Stat. The City of Sunrise in the County of Broward recently had its Mayor removed from office in this manner.

the public is also very well protected by numerous other Florida statutes such as the Sunshine Law and the Public Records Act.[13] There is no evidence to support the Respondent's position that the taxpaying public is not adequately protected.

However, there could be serious implications if the law in this area were to change.[14]

Society in 1985 is not society in 1917. Litigation has exploded far out of proportion to the increase in population over this period. It is easy to imagine the potential suits faced by a public body over any action that it might take. As cited by the Supreme Court in Markham and the Third District in Paul, public bodies and the courts would likely be faced with a great number of suits filed by disgruntled taxpayers. True, this may not happen in all cases and in all areas, but in those cases and in those areas in which it does happen, the public body can tragically have its hands tied by a small group of taxpayers or even just one taxpayer.

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13. See Florida League of Cities brief, p. 9-10, for excellent discussion on this point.
14. Although the Respondent contends that the existing law allows taxpayers to sue if they show that there tax burden has increased, as discussed above, this clearly is not the law as pronounced by the Supreme Court and certainly not the law followed in the Second District (Godheim) and Third District (Paul). In fact, not until the Fornes decision of the Fourth District were taxpayers able to contend that perhaps they did have standing by only showing a perceived increased tax burden. Yet, despite this certainty of the law, there have been numerous appellate decisions of late which have been forced to address this issue. One can easily imagine the number of suits that will be generated if the Supreme Court reversed Horne and sides in favor of taxpayer standing on the basis of only a showing of an increased tax burden.

Under the guise of saving taxpayers money by preventing the alleged unlawful expenditure of funds, the public body could be spending a fortune in attorney fees and costs in defending what could be a multiplicity of lawsuits.

> If it (the standing rule) were otherwise there would be no end to potential litigation against a given defendant, whether he be a public official or otherwise, brought by individuals or residents, all possessed of the same general interests, since none of them would be bound by res judicata as a result of prior suits; and as its public authorities, they may be intolerably hampered in the performance of their duties and have little time for anything but the interminable litigation.

United States Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974).

A potential recovery of attorney fees and costs will have little effect. First of all, the recovery of cost to the prevailing party will not be significant enough to be a major deterrent. As far as attorney fees are concerned, they would only be recoverable under Section 57.105, Fla. Stat., which limits the recovery of attorney fees to a prevailing party when there is an absence of any justiciable issue. The courts have wisely limited the use of this statute, and certainly it will be very easy for taxpayers to at least claim that the public body in exercising its discretion, violated the law or the spirit of the law. If the court must make an interpretation, then there is arguably a justiciable issue.

But even the recovery of cost and fees will not compensate for the time lost in such actions. When public officials must

litigate, they cannot govern. Worthwhile projects can be stalled for months and years by those few taxpayers which it may not favor.

The Supreme Court has already addressed and decided this public policy issue. The Supreme Court was right then; it is even more right today. This case, in and of itself, is the best public policy argument for denying standing to a taxpayer who claims only an increase in her tax burden. For if the Supreme Court decides that Fornes does in fact have standing, this case might be only the first case in a series of cases on the same subject. Fornes can lose her claim on the merits and yet this will not prevent another taxpayer from coming forward on the very same or similar issue. If a taxpayer only needs to establish an increase in tax burden, there is no end to the number of potential litigants. A new standing rule would also open the door for an unsuccessful bidder to take advantage of the judicial system. Instead of the unsuccessful bidder being forced to sue in its own name, on a one-time basis, the unsuccessful bidder can line up a series of taxpayers to bring a series of suits against the public body as res judicata would not apply. This would clearly be a travesty and yet the door is wide open if an increased tax burden is the only requirement for a "special injury".

Public policy clearly dictates that a potential taxpayer/plaintiff must show more than just an increased tax burden. Fornes needed to show more. She was unable to do so, and, therefore, the trial court was correct in finding that the plaintiff lacked standing to bring this action.

CONCLUSION

Based on the above authority, the Petitioner NORTH BROWARD HOSPTIAL DISTRICT respectfully requests this Court to reverse the Fourth District and thereby affirm the Circuit Court's dismissal of Fornes' Amended Complaint.

Respectfully submitted,

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