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IN THE SUPREME COURT OF FLORIDA

NORTH BROWARD HOSPITAL DISTRICT, a special tax district,

Petitioner,

vs. Case No. 66,115

SHARON T. FORNES,

Respondent.

_____/

INITIAL BRIEF OF AMICUS CURIAE, WASTE MANAGEMENT, INC.

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PREFACE

This case involves the question of whether a taxpayer has automatic standing to challenge allegedly illegal public expenditures which may increase the overall tax burden. This question has been certified to this Court as being of great public importance. Because the decision made by this Court will affect the letting of public contracts by local government entities throughout the state, Waste Management, Inc. appears as amicus curiae.

The parties will be referred to as follows:

North Broward Hospital District will be referred to as "Petitioner" or "NBHD".

Sharon T. Fornes will be referred to as "Respondent" or "Fornes"

Waste Management, Inc. will be referred to as "Amicus" or "WMI".

QUESTION CERTIFIED

DOES A TAXPAYER WHO ALLEGES THAT THE TAXING AUTHORITY IS ACTING ILLEGALLY IN EXPENDING PUBLIC FUNDS, WHICH WILL INCREASE HIS TAX BURDEN, HAVE STANDING TO SUE TO PREVENT SUCH EXPENDITURE, OR IS IT NECESSARY THAT HE SUFFER SOME OTHER SPECIAL INJURY DISTINCT FROM OTHER TAXPAYERS (AS OPPOSED TO OTHER INHABITANTS) OR LAUNCH A CONSTITUTIONAL ATTACK UPON THE TAXING AUTHORITY'S ACTION IN ORDER TO HAVE STANDING?

STATEMENT OF THE CASE AND FACTS

Amicus adopts the Statement of the Case and Facts contained in Petitioner's brief. Amicus will address the legal issues raised by the question which has been certified rather than the factual issues presented in the lower courts.

ARGUMENT

IN THE ABSENCE OF A CONSTITUTIONAL CHALLENGE OR SPECIFIC STATUTORY AUTHORIZATION A TAXPAYER HAS STANDING TO CHALLENGE ALLEGED ILLEGAL GOVERNMENTAL EXPENDITURES ONLY UPON A SHOWING OF SPECIAL INJURY DISTINCT FROM THAT SUFFERED BY EVERY OTHER TAXPAYER IN THE TAXING DISTRICT.

It has long been the rule in Florida that to challenge governmental expenditures a taxpayer must allege and prove a special injury to himself "which is distinct from that sustained by every other taxpayer in the taxing unit." Paul v. Blake, 376 So.2d 256,259 (Fla. 3d DCA 1979); see also Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981); Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972); Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205 (1917). The only exception to this special injury requirement is where the taxpayer challenges the constitutionality of the exercise of governmental powers. Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982); Markham; Horne.

The rule stated above originated in the 1917 case of Rickman v. Whitehurst, supra, where facts similar to those in the instant case were alleged. In Rickman, the plaintiff-taxpayer sought to enjoin the use of public funds for hiring day labor to construct roads. According to the facts of the case, the Legislature had by statute created a special road and bridge district in DeSoto County. The enactment required all road and bridge construction work to be let out by contract to the lowest bidder. The county commissioners and

bond trustees had, however, proceeded to use day labor for the roadwork. The plaintiff, a resident of the special taxing district, sought to enjoin the allegedly unlawful disbursement of public funds. In denying relief to the plaintiff the court stated that "the mere abstract conception that an act done by the county officials not in strict conformity of [the] law" does not provide sufficient injury to allow a taxpayer to maintain an action. 74 So. at 207. The court went on to state the rule applicable to taxpayer suits:

> The principal is universally recognized that to entitle a party to relief in equity he must bring his case under some acknowledged head of equity jurisdiction. In a case where a public official is about to commit an unlawful act, the public by its authorized public officers must institute the proceeding to prevent the wrongful act, unless a private person is threatened with or suffers some public or special damage to his individual interests, distinct from that of every other inhabitant, in which case he may maintain his bill.

Id. (emphasis added).

Respondent stated in the court below that the disbursements in Rickman were in fact legal because of a 1915 act which authorized the county commissioners and bond trustees to use day labor. (Appellant's Initial Brief at 7.) The Rickman court, in reciting the defenses put forth by the defendants, did make mention of the 1915 act, but nowhere did the opinion state that the actions of the government officials were legal, and nowhere did it state that the 1915 act was passed prior to the time the decision to use day labor was made. To the contrary, the entire opinion was based on

the plaintiff's claim that public funds were being illegally disbursed, and on the assumption that the county commissioners and bond trustees acted in violation of the law by using public funds for day labor. This is precisely the same claim that Respondent presented in the trial court. Rickman is consistently cited today for the proposition that any attack on an allegedly illegal exercise of the taxing and spending authority must be accompanied by a showing that the taxpayer-plaintiff has suffered some special, peculiar or unique injury not suffered by other taxpayers.

Several Supreme Court cases issued both before and after the Rickman decision caused uncertainty in the lower courts about the proper rule of standing to be applied to taxpayer-plaintiffs. In a pre-Rickman case, Anderson v. Fuller, 51 Fla. 380, 41 So. 684 (1906), a taxpayer of the City of Tampa sought to enjoin the Board of Commissioners of Public Works from proceeding with a contract let for the installation of a new sewage system. Although the taxpayer alleged that the contract had not been let to the lowest responsible bidder, the City in its answer denied that allegation. The real thrust of the plaintiff's complaint was that the bid specifications called for the contractor to be responsible for any injury to all water, gas, sewage, or drain pipes and electric lines; for all such pipes, lines, and pavements to be protected, repaired and relaid by the contractor; and for the cost of such repairs, etc. to be borne by the City. The court stated that the rights of the

gas, water and electric companies were subordinate to the rights of the public to construct a sewage system, and that no cause of action against the City for damages to the pipes and lines, etc. would lie unless the City had acted maliciously or unreasonably. Thus, the court reasoned, the City was not authorized to obligate itself to pay for removing and replacing water or gas pipes, drains, electric or telegraph poles or conduits in the course of installing a new sewage system. And although the court found that the plaintiff had standing to challenge the contract, the finding was based on the ground the tax money was being spent for an illegal or unauthorized use and not necessarily in an unauthorized manner.

After Rickman the Supreme Court issued four confusing taxpayer cases which have been variously relied on by the District Courts of Appeal. In Hathaway v. Munroe, 97 Fla. 28, 119 So. 149 (1929), the taxpayer sought to enjoin the State Road Department from letting new construction contracts because the Department had failed to adopt an annual budget as required by law, because the contracts, if let, would exceed the estimated revenue of the Department for the year, and because the Department was already indebted by more than a million dollars in excess of the funds on hand. The court in one short paragraph seemed to indicate that a taxpayer has automatic standing "to enjoin the execution of illegal contracts involving payments from a public fund to which the citizen taxpayer is a contributor." 119 So. at 150 (citing

Anderson v. Fuller and Rickman v. Whitehurst). No mention of a special injury requirement was made. The court held, however, that since no illegality was involved in letting contracts for future construction, the plaintiff was not entitled to relief. The opinion indicates that had some illegality been involved, the taxpayer would have had standing to maintain his suit. It should be noted that of the five justices constituting the majority, three concurring justices would have found that the plaintiff had not made a showing of facts sufficient to give him standing under Rickman. One justice reiterated the rule that "[a] citizen and taxpayer of a county may maintain a bill in chancery against public officials . . . to restrain the unlawful expenditure of public funds, upon a showing made . . . of peculiar injury to him which may result from such unlawful expenditure of such funds." 119 So. at 152 (Buford, J., concurring) (emphasis added).

In 1930 and 1931 this Court effectively abandoned any notion that a taxpayer suing as taxpayer must allege and prove a special injury to himself in order to be entitled to relief. In Robert G. Lassiter & Co. v. Taylor, 99 Fla. 819, 128 So. 14 (1930), a taxpayer sued to enjoin the City of Sebring from making any further payments under a contract for certain street improvements on the ground the contract, which had been let through competitive bidding procedures, had been subsequently modified to provide for a different type of work. The plaintiff claimed that since the work being done

was not in accordance with the work called for in the bid specifications, the contract was void. The taxpayer in that case made no allegations that his tax burden would be increased by the subsequent modifications; instead, his entire claim was based on the mere existence of the modifications. The court stated "[t]hat a taxpayer in a city 'can properly maintain the bill filed to restrain the paying out of the public moneys upon void and unauthorized contracts there can be no question'". 128 So. at 17 (quoting Anderson v. Fuller).

A year later, in Wester v. Belote, 103 Fla. 967, 138 So. 721 (1931), the court, still relying on Anderson v. Fuller, stated that "payments under [a void] contract will be enjoined at the suit of a citizen and taxpayer of the affected county . . . ." 138 So. at 724. Again, the court ignored any requirement that a special injury be shown by the complainant.

Several additional post-Rickman Supreme Court decision upheld the taxpayer's standing to contest a violation of the competitive bidding provisions of a city charter. In City of Daytona Beach v. News Journal Corp., 116 Fla. 706, 156 So. 887 (1934), the taxpayer filed suit to prohibit the City of Daytona Beach from publishing legal notices in a particular newspaper without first receiving bids from other newspapers. The court relied exclusively on Lassiter, Wester, and Anderson to hold that where a taxpayer is challenging disbursement of public funds for an unauthorized or

illegal purpose, no showing of special injury is required. It is interesting to note, however, that it appears that the plaintiff, News Journal Corporation, did have a special injury in fact, e.g., as a potential vendor. See also Lewis v. Peters, 66 So.2d 489 (Fla. 1953); Bryan v. City of Miami, 56 So.2d 924 (Fla. 1951).

Each of the above-cited cases dealt squarely with the issue presented in Rickman v. Whitehurst: The showing a taxpayer-plaintiff must make in order to maintain an action against a governmental body to prohibit the paying out of public funds under an allegedly illegal or unauthorized contract. Yet none of these cases addressed the Rickman requirement that

> where a public official is about to commit an unlawful act, the public by its authorized officers must insititute the proceeding to prevent the act, unless a private person is threatened with or suffers some public or special damage to his individual interests, distinct from that of every other inhabitant . . . .

74 So. at 207.

Because of the conflicting signals sent out by the Supreme Court after Rickman, the lower courts adopted varying standards in taxpayer suits. The First District Court of Appeal followed the Anderson-Lassiter-Wester line of cases and held that a taxpayer would have the right to injunctive relief to protect the treasury from the illegal disbursement of public funds upon only a showing that the plaintiff is a taxpayer in the taxing district. See Robinson's, Inc. v. Short, 146 So.2d 108 (Fla. 1st DCA 1962); R. L. Bernardo &

Sons, Inc. v. Duncan, 134 So.2d 297 (Fla. 1st DCA 1961). In fact, in R. L. Bernardo & Sons the court noted expressly that its decision was in conflict with Rickman. Id. at 302-303.

The Second District Court of Appeal dealt with the taxpayer standing question several times. Most of these cases rely on pre-Rickman authority. In Ashe v. City of Boca Raton, 133 So.2d 122 (Fla. 2d DCA 1961) the court stated that in a taxpayer's suit seeking judicial review of governmental action the complaint must allege facts to show "that the action sought to be forestalled or nullified will result in a wrongful increase of taxes or in some special injury to the plaintiffs apart from other members of the community." 133 So.2d at 124. In Hunter v. Carmichael, 133 So.2d 584 (Fla. 2d DCA 1961), the court noted that taxpayers have the right to maintain a suit to restrain officials from paying out public funds under an illegal contract. There again the court relied on Anderson v. Fuller and failed to even note the decision in Rickman v. Whitehurst.

The Third District Court of Appeal cases cited by Respondent in her brief below, (Appellant's Initial Brief at 11), cannot be used for the proposition that taxpayers have automatic standing to challenge illegal or unauthorized governmental expenditures. Although the court in Krantzler v. Board of County Commissioners of Dade County, 354 So.2d 126 (Fla. 3d DCA 1978), found that taxpayers could maintain an action against the board challenging unauthorized expenditures, that case can be distinguished on two grounds. First,

the plaintiffs alleged a violation of the Dade County Citizens' Bill of Rights. The court quoted from the section entitled "Remedies for Violations" and impliedly held that that section of the Bill of Rights gave citizens statutory-type standing. Second, although the decision relied on Rickman as authority for its holding, the opinion failed to even note the Horne decision handed down by this Court only six years earlier. See discussion below. Finally, although Respondent cited Glatstein v. City of Miami, 399 So.2d 1005 (Fla. 3d DCA), pet. rev. den. 407 So.2d 1102 (1981), as authority for her proposition, the issue of standing was not mentioned in that opinion. See also Ratner v. City of Miami Beach, 288 So.2d 520 (Fla. 3d DCA 1974).

Regardless of the rule of taxpayer standing applied by the courts after Rickman, in 1972 this Court clarified the taxpayer standing requirements by specifically conforming Florida law to the federal rule established in Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968), and by requiring a taxpayer-plaintiff to allege that he will suffer an injury different from that suffered by every other taxpayer in the taxing district. In Flast the Court held that standing will be conferred on a federal taxpayer, (based on his taxpayer status) only where the taxpayer can show that the challenged governmental action violates a specific constitutional limitation placed upon Congress' taxing and spending power.

In Department of Administration v. Horne, supra, this Court relied on Flast to clarify previous Florida case law and held that the "Rickman Rule" of special injury will apply in all cases where the taxpayer challenges the legality of the government's exercise of the taxing and spending authority unless the challenge is based on constitutional grounds, in which case no showing of special injury will be required. 269 So.2d at 663.

The taxpayers in Horne attacked the constitutionality of various provisions of the General Appropriations Act. The Department of Administration asserted that the plaintiffs would have standing under Rickman had their challenge been to expenditures rather than to appropriations. The court rejected this distinction outright by stating "[a]n 'expenditure' is not made sacrosanct by the fact that it is placed in the General Appropriations Act. Once an appropriation is made, the expenditure follows administratively as a matter of due course . . . ." Id. at 661. In other words, the Court said that the rule of taxpayer standing applicable to "expenditures" was equally applicable to "appropriations". If the "Rickman Rule" requires only that a taxpayer-plaintiff show an increase in taxes due to an illegal expenditure of public funds, then certainly the court in Horne would have had to go no further than its analogy of appropriations to expenditures. At that point the plaintiffs would have alleged unlawful expenditures resulting in an increased public burden, and they would have had standing to challenge the

Act. Instead, the court found it necessary to go a step further in its analysis in order to grant the Horne plaintiffs standing. The court went on to adopt the Flast v. Cohen standard and to hold that the plaintiffs' standing was obtained through the constitutional challenge exception to the "Rickman Rule." It is axiomatic that the courts will decide issues on the narrowest grounds available; if the plaintiffs otherwise had standing in Horne, there was no reason for the court to develop a new rule of law, or an exception to the established rule of law. The Horne decision, therefore, stands for the proposition that the mere increase in the public burden caused by illegal governmental expenditures is not in and of itself sufficient to confer standing on a taxpayer to challenge those expenditures. If the law was unclear prior to Horne, that decision served to eliminate uncertainty about the proper rule of taxpayer standing.

After 1972, the Third District Court of Appeal, in a series of cases, specifically conformed to the Horne decision and in fact elaborated upon it. In Paul v. Blake, supra, the court stated the rule of standing to be that:

> a taxpayer . . . has standing to bring a declaratory decree and injunctive action against the proper public officials to restrain the unlawful exercise of the state or county's taxing or spending authority only upon a showing of special injury to such taxpayer which is distinct from that sustained by every other taxpayer in the taxing unit.

376 So.2d at 259 (emphasis added). In support of this proposition the court cited Horne and Rickman. In Paul v. Blake

the plaintiff-taxpayers brought a petition for declaratory and injunctive relief to prohibit county officials from granting ad valorem tax exemptions to certain leasehold interests. The plaintiffs claimed that the exemptions violated Article VII, Sections 3(a) and 10(c) of the Florida Constitution. In an opinion upholding the plaintiffs' right to maintain their constitutional challenges, the court stated that the special injury requirement is based on policy grounds of eliminating frivolous lawsuits and preventing a multiplicity of lawsuits which would prevent government officials from performing their official duties:

> 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 taxpayer's remedy should be at the polls and not in 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.

376 So.2d at 259.

The Third District Court of Appeal reiterated this position in Fredericks v. Blake, 382 So.2d 368 (Fla. 3d DCA 1980). There, the plaintiff-taxpayer challenged the legality of the tax rolls, claiming that the assessments were dissimi-

lar and unequal. The lower court dismissed the complaint for failure to exhaust administrative remedies and for mootness. The appellate court affirmed and also found that the allegations of the complaint failed to fall within the special injury requirement. The court relied on its holding in Paul v. Blake and stated that where a taxpayer is challenging assessments, he or she must allege either that his or her property is being assessed at greater than 100 percent of fair market value, or that substantially all other property is being assessed at a lower rate. In other words, the taxpayer must distinguish himself from substantially all other taxpayers in the taxing district.

If, as held by the lower court, an increased burden of taxation caused by allegedly illegal government action is sufficient to give a taxpayer standing to challenge that governmental action, then the plaintiffs in the Paul v. Blake and Fredericks v. Blake cases would certainly have had standing. In each case the taxpayer was challenging the legality of certain ad valorem taxation practices which had a direct effect on the burden of taxation to be borne by the taxpaying public in general. In fact, there is probably no action which impacts on the tax burden more than the ad valorem assessment or the grant of ad valorem tax exemptions. Yet in each case the court insisted (in the absence of a constitutional challenge) that the plaintiff make a showing of special injury distinct from that suffered by every other taxpayer in the taxing district.

In the 1981 case of Department of Revenue v. Markham, supra, this Court legitimized the Third District's interpretation of the Horne decision. In Markham the court stated: "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." 396 So.2d at 1121 (emphasis added). This rule is applicable to all taxpayer suits regardless of the theory upon which they are based.

The rule of taxpayer standing as set forth in Horne and its progeny was recently recognized by the Second District Court of Appeal in Godheim v. City of Tampa, 426 So.2d 1084 (Fla. 2d DCA 1983). In Godheim the plaintiff-taxpayer brought suit to enjoin the City from entering into a contract for the construction of a solid waste refuse to energy facility. The plaintiff alleged that the contract had been awarded in violation of the City's competitive bidding ordinance. The trial court dismissed the case for lack of standing, and the appellate court affirmed. In its opinion the court recognized that Rickman could be interpreted various ways but stated that any question as to the applicable rule of standing was settled by the decision in Horne. The court noted the policy reasons why a taxpayer should be permitted to attack the legality of governmental action affecting his tax burden, but stated:

> these are the same reasons which made the adoption of the special injury standing rule the highly debatable policy choice referred to in Paul v. Blake. The lang-

> uage of Department of Administration v. Horne and Department of Revenue v. Markham clearly indicates that the supreme court intended to impose the special injury requirement upon all taxpayer suits except where constitutional issues are involved.

Id. at 1086.

As a final point this Court should note that this test of standing does not eliminate taxpayer actions. There are proper parties available to bring suit to protect the public treasury from illegal disbursements, waste or improvident spending. As the Court noted in Markham, the public's representatives in government should be relied on to institute legal proceedings to prevent the unlawful exercise of the taxing and spending authority. For example, the Governor on the information and belief of a citizen is empowered to institute legal proceedings to enforce the law. Art. IV, §1(b), Fla. Const. Additionally, an otherwise qualified losing vendor may show a special injury within the meaning of Rickman and thus have standing to challenge alleged violations of competitive bidding laws. See, e.g., City of Daytona Beach v. News Journal Corp., supra; Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So.2d 1190 (Fla. 2d DCA 1978); Marriott Corp. v. Metropolitan Dade County, 383 So.2d 662 (Fla. 3d DCA 1980). Finally, as the Paul v. Blake and Markham courts noted, the taxpayers' ultimate remedy should be at the polls.

SUMMARY AND CONCLUSION

For the reasons stated above, Amicus, WMI, respectfully requests this Honorable Court to find that a taxpayer has no standing to sue to prevent allegedly illegal expenditures of funds absent a showing of some special injury distinct from that suffered by other taxpayers, and accordingly, to reverse the decision of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular United States Mail to William Zei, Esq., Gibbs & Zei, P.A., 224 S. E. 9th Street, Ft. Lauderdale, Florida 33316; James C. Pilkey, Esq., Taylor, Brim, Buker & Greene, 1451 Brickell Avenue, Miami, Florida 33131; John L. Korthals, 2401 East Atlantic Boulevard, Suite #400, Pompano Beach, Florida 33062; and James R. Wolf, Esq., Post Office Box 1757, Tallahassee, Florida 32302, this 6th day of December, 1984.

H. LEE MOFFITT