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IN THE SUPREME COURT OF FLORIDA

Case No. 66,115

NORTH BROWARD HOSPITAL DISTRICT,
a special tax district,

Petitioner

vs.

SHARON T. FORNES,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA, IN CASE NO. 83-947

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

PREFACE

The Petitioner North Broward Hospital District was the Defendant in the lower court and the Appellee in the Fourth District Court of Appeal. The Petitioner will be known as Petitioner or Hospital.

The Respondent Sharon T. Fornes was the Plaintiff in the lower court and the Appellant in the Fourth District Court of Appeal. The Respondent will be known as Respondent or Fornes.

The following symbols will be used:

R Record on Appeal

P Page or pages

STATEMENT OF THE CASE AND FACTS

On or about March 10, 1983, Fornes filed her Amended Complaint and Motion for Preliminary Injunction, a copy of which is Addendum 1 in the Appendix. Pursuant to well established case law, the allegations of fact contained in these pleadings must be accepted as true for the purpose of the Court's consideration of a Motion to Dismiss. Poulos v. Vordermeier, 327 So. 2d 245 (Fla. 4th DCA 1976). These alleged "facts" are as follows:

A. Fornes is a resident, property owner and taxpayer within the boundaries of the North Broward Hospital District;

B. The North Broward Hospital District, through its commissioners, levies taxes for, inter alia, construction projects;

C. The North Broward Hospital District, as part of a construction project, developed specifications for bids including specifications that had the effect of allowing only one supplier;

D. The specifications objected to by Fornes are a major part of the project and represent a substantial cost to the taxpayers;

E. On January 20, 1983, the North Broward Hospital District opened the bids and on or about February 2, 1983, a contract was awarded to one of the bidders;

F. The Charter of the North Broward Hospital District, Section 37 of Chapter 27438, Laws of Florida, 1951, as amended, states that contracts for construction at a contract price in excess of $5,000 are to be approved only after competitive conditions have been maintained and competitive bids sought from at least three (3) different sources.

G. Fornes concedes that she is unable to assert any "special injury" which differs from other taxpayers in the taxing district and that the only injury she will suffer is an alleged increase in her taxes. (See also Appellant's Initial Brief, page 3).

On or about March 16, 1983, the North Broward Hospital District filed its Motion to Dismiss the (1) Amended Complaint and (2) Motion for Preliminary Injunction. A copy of the Motion to Dismiss is attached as Addendum 2 in the Appendix;

On April 6, 1983, the lower court entered its Order granting the North Broward Hospital District's Motion to Dismiss based on the authority of Godheim v. City of Tampa, 426 So. 2d 1084 (Fla. 2d DCA 1983). A copy of the Order is attached as Addendum 3 in the Appendix.

Fornes took an appeal from that Order to the Fourth District Court of Appeal. The Fourth District Court of Appeal reversed the lower court, with the dissent in Godheim. Fornes v. North Broward Hospital District, 455 So. 2d 584, 585 (Fla. 4th DCA 1984), a copy of which is attached as Addendum 4 in the Appendix.

The Fourth District Court of Appeal in the Fornes decision, certified the following question to the Supreme Court as being of great public importance:

> **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?**

Based on this certification and the obvious conflict between the Fourth District's opinion in Fornes and the Second District's opinion in Godheim, the Hospital has sought review of the Fourth District's decision pursuant to Fla. R. App. Pro. 9.120.

CERTIFIED QUESTION

The Fourth District Court of Appeal has certified the following to the Supreme Court as being one of great public importance?

> **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?**

ARGUMENT

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

Although the Fourth District reversed the lower court and thereby rendered a decision directly in conflict with Godheim v. City of Tampa, 426 So. 2d 1084 (Fla. 2d DCA 1983), it is apparent from the Fourth District's opinion that it felt that there was an absence of clear legal precedence.

> Although there are numerous cases in Florida involving a taxpayer's suit to prevent the illegal expenditure of public funds, at the present time there appears to be some uncertainty regarding the requirements for standing to bring such a suit. That uncertainty is well presented by the majority and dissenting opinions in the Godheim case relied upon by the trial court.

Fornes v. North Broward Hospital District, 455 So. 2d 584, 585 (Fla. 4th DCA 1984).

The Fourth District agreed with the dissenting opinion in Godheim and therefore reversed the lower court. However, recognizing the conflict and the "uncertainty", the Fourth District has certified this question of taxpayer standing to the Florida Supreme Court.

Although the lower court's Order dismissing the Amended Complaint cites only the Godheim decision for the principle of law that a taxpayer does not have standing unless he or she can allege a special

injury,[1] the real precedence for the dismissal is the series of post-1941 Florida Supreme Court decisions upon which Godheim is based.

Although Florida decisions prior to 1941 provided no definitive guidelines on the standing of taxpayers to bring suit,[2] the decisions since 1941 have been consistent and clear on this subject. In the 1941 Supreme Court case of Henry L. Doherty & Co., Inc. v. Joachim, 200 So. 238 (Fla. 1941), the Court, without dissent, said:

> Both parties seem to recognize the rule announced in Rickman v. Whitehurst et al., 73 Fla. 152, 74 So. 205, that in the event an official threatens an unlawful act, the public by its representatives must institute the proceeding to prevent it, unless a private person can show a damage peculiar to his individual interests, in which case equity will grant him succor.

Doherty, at 239. Thus, based on this precedent alone, the Amended Complaint in this case was properly dismissed as Fornes failed to allege, and admits that she could not allege, any special injury different than that suffered by other taxpayers.

The Doherty decision is significant. The Fourth District and Fornes put great emphasis on the supposition that Rickman does not say what the Godheim majority says it does. It is argued that the Godheim majority misinterpreted Rickman and that the proper interpretation is in the Godheim dissent.[3] But in fact, the Godheim majority's interpretation of Rickman is entirely consistent with the Supreme Court's interpretation of that case, as evidenced by the

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1. The exact wording of the pertinent portion of the Order reads: "Ordered and Adjudged that said Motion (to Dismiss) be, and the same is hereby granted. Godheim v. City of Tampa, 2d District (January 28, 1983) -- 20 days to Amend."
2. See discussion below.
3. Fornes, at 585.

Doherty decision in 1941 and every other Supreme Court case on this subject since that date.[4] A district court may disagree with an interpretation by the Supreme Court, but it must accept as controlling precedent the most recent decisions of the Supreme Court. Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974).

Although there may be an argument as to exactly what the Rickman case meant to say,[5] there can be no argument as to what the Supreme Court has said beginning with the Doherty decision in 1941.

In Town of Flagler Beach v. J.W. Green, 83 So. 2d 598 (Fla. 1955), the Supreme Court specifically approved the Doherty reasoning:

> In a similar situation (in Doherty) we placed upon the Plaintiff the burden of showing that the claimed injury was different in kind as distinguished from different in degree from the injury that might be suffered by the public generally. This burden must be carried by the Plaintiffs in the case at bar.

Town of Flagler Beach, at 600. Fornes had the same burden in the instant case and did not meet it. The failure to allege a special injury was fatally defective to the Amended Complaint. With the Respondent's own admission that she did not suffer any special injury different from that allegedly suffered by all taxpayers, no further

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4. See Town of Flagler Beach v. J.W. Green, 83 So. 2d 598 (Fla. 1955); Department of Administration v. Horne, 269 So. 2d 659 (Fla. 1972); United States Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974); Williams v. Howard, 329 So. 2d 277 (Fla. 1976); Brown v. Firestone, 328 So. 2d 654 (Fla. 1980); Florida Wildlife Federation v. State Department of Environmental Regulation,390 So. 2d 64 (Fla. 1980); Department of Revenue v. Markham, 396 So. 2d 1120 (Fla. 1981).
5. See, for example, Judge Lehan's dissent in Godheim wherein he stated: "The short Rickman opinion does not make easy reading." Godheim, at Page 1091.

amendment could save the cause of action. Wolfson v. Maye, 214 So. 2d 629 (Fla. 3 DCA 1968). The Plaintiff accepted this as she was given leave to amend but chose not to do so. (R-16).

The Department of Administration v. Horne, 269 So. 2d 659 (Fla. 1972), is a major case in the area of the standing of a Florida taxpayer to bring suit. In Horne, the Plaintiffs brought suit as "ordinary citizens and taxpayers" challenging what they contended to be an unlawful expenditure. The Court cited and approved the Rickman rule of the special injury requirement. Horne at 662. Following the United States Supreme Court case of Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 v. Ed. 2d 947 (1968), the Florida Supreme Court added a very limited exception to the no standing rule by stating that a taxpayer would have standing if there is a constitutional challenge to the Legislature's taxing and spending power. If this is done then:

> there is standing to sue without the Rickman requirement of special injury, which will still obtain in other cases. (Emphasis added.)

Horne, at 663.

Since Fornes makes no constitutional challenge, the Rickman rule of special injury applies. The Amended Complaint was properly dismissed.

The Horne decision is also important for its dicta regarding the role of public officials in challenging alleged unlawful acts of other public officials. This language answers the following questions raised by the Fourth District in its Fornes decision, at 586:

> [I]f an offended taxpayer cannot sue to prevent such activity, who will? Even other bidders may not have standing unless they, too, are taxpayers. Furthermore, an interesting question presents itself, should the enforcement of competitive bidding laws be left solely to the public officials and the bidders?

The Supreme Court has evidently felt (and time has supported its decision) that in the factual situation presented by the instant case, public officials and bidders can and have protected the public. Suits by unsuccessful bidders against public bodies are numerous. Further, if a public body has in fact violated the law, the attorney general and state attorneys have the right and duty to investigate and prosecute.

Even in the limited situations in which the Supreme Court has held that taxpayers do have standing, the Supreme Court has not ignored the public policy issue in arriving at its conclusion that taxpayers do not have standing unless there is either (1) a special injury or (2) a constitutional challenge, the Supreme Court still admonished that even in these exceptions, the proper channels should be followed:

> We choose to follow the United States Supreme Court (Flast). It would be appropriate in such a taxpayer's suit that, as in other similar instances, the certificate of the Attorney General be provided, setting forth that he elects not to sue, as a predicate to a taxpayer proceeding. This would be in accord with orderly procedure wherein the appropriate public officer usually deals with such matters, rather than the possible multitude of individual citizens who might attempt to act in instances which are many times unwarranted or where such citizens do not have access to appropriate information and procedures involved; otherwise the courts might

> be subjected unduly to unnecessary and unwarranted litigation on such subjects.

Horne, at 663.

The limited exceptions for taxpayer standing has worked and what isn't broke, shouldn't be fixed. Especially if the "repair" holds the potential damage of the continued threat of numerous and unfounded litigation challenges and the delays and high legal cost that this would inflict on all taxpayers of the public body. The Supreme Court made reference to this in Horne and followed that with specific language in subsequent opinions.

For example, the Supreme Court in United States Steel Corp. v. Save Sand Key, Inc., 303 So. 2d 9 (Fla. 1974), reversed the Second District and affirmed the trial court's dismissal of the complaint on the grounds the Plaintiff did not have standing. The Supreme Court reaffirmed its holding in Horne and emphatically stated that the Horne decision created only a limited exception; the special injury requirement would control in all other cases. The Supreme Court would not accept the Second District's attempt to create any further exception. On the public policy question, the Supreme Court approved and quoted extensively from a prior Second District case:

> Neither of appellees has alleged or shown that one or the other of them will suffer a special injury or that either has a special interest in the outcome of this action. In order to maintain this kind of action, absent a sufficient predicate to a proper class suit (and there is no such predicate here), it is well settled that a plaintiff must allege that his injury would be different in degree and kind from that suffered by the community at large. (Cites omitted.)
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> If it 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 interest, since none of them would be bound by res judicata as a result of prior suits; and as against public authorities, they may be intolerably hampered in the performance of their duties and have little time for anything but the interminable litigation.

Save Sand Key, at 12, quoting from Askew v. Hold the Bulkhead - Save Our Bays, 269 So. 2d 696 (Fla. 2d DCA 1972). And the Supreme Court did not even mention the costs to the taxpayers of such "interminable litigation".

The Save Sand Key case is a further affirmation of the special injury rule and of the Supreme Court's consideration of the public policy argument.[6]

Department of Revenue v. Markham, 396 So. 2d 1120 (Fla. 1981), was still another case where a taxpayer was denied standing. The Supreme Court stated that since the complaint did not (1) attack the constitutionality of the taxing statutes nor (2) allege a special injury distinct from that suffered by other taxpayers in the taxing district, it was properly dismissed as the Plaintiff had no standing. Likewise, in the instant case, Fornes fails to allege either of the only two exceptions, so therefore the amended complaint was properly dismissed.

In Markham, the Supreme Court cited with approval the case of Paul v. Blake, 376 So. 2d 256 (Fla. 3d DCA 1979):

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6. See also Williams v. Howard, 329 So. 2d 277 (Fla. 1976); Brown v. Firestone, 328 So. 2d 654 (Fla. 1980); and Florida Wildlife Federation v. State Department of Environmental Regulation, 390 So. 2d 64 (Fla. 1980).

> 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 elective 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 country's taxing and spending power. (Emphasis added.)

Paul, at 259.

It is with this background that the Second District decided Godheim in 1983. The Hospital contends that there is no current conflict in Florida law in the area of the standing of taxpayers to bring suit. Perhaps prior to 1941 there was, but the Supreme Court has been clear and consistent since that time. This consistency renders moot the significance that the Fourth District and the Respondent attempt to place on the word "inhabitants" in the 1917 Rickman decision. The Fourth District and the Respondent contend that an increased tax burden fulfills the standing requirement because it constitutes a peculiar injury distinct from other "inhabitants". It does not matter if Rickman said that or did not say that; the Supreme Court has unequivocally held since 1941 that the peculiar injury must be distinct from other taxpayers. Whether this is a clarification or a reversal of Rickman is not important. The Supreme Court's decisions have been clear, consistent and convincing decisions and fully support the lower court's dismissal of the Amended Complaint.

There can be no question that Florida has indeed had "a checkered history concerning the requirements for standing to bring a taxpayer's suit." Godheim, at 1086. But the same can be said for numerous other evolving legal principles.[7] In all of these areas of law, the Florida Supreme Court has been the appropriate forum to revisit and reconsider its prior decisions and to render the current and definitive law for the courts of this state to follow. See Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

Such is the case in the matter of the standing of taxpayers to bring suit.

Florida decisions prior to 1941 provided no definitive law on the standing of taxpayers to bring suit. After a series of decisions which granted standing to taxpayers without any showing of special damage[8] the Supreme Court decided Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205. Although a few courts and legal writers have read other things into Rickman,[9] the Florida Supreme Court has, since at least the Doherty decision in 1941, consistently interpreted Rickman to stand for the principle of law that a taxpayer does not have standing unless he can allege and prove a special injury which is different in kind from that suffered by the public in general.[10]

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7. For example, governmental immunity, equitable distribution in dissolution of marriage, and family immunity in tort.
8. See, for example, Cotton v. Commissioners of Leon County, 6 Fla. 610 (1856); Lanier v. Padgett, 18 Fla. 842 (1882); Anderson v. Fuller, 51 Fla. 380, 41 So. 684 (1906); and Whitner v. Woodruff, 68 Fla. 465, 67 So. 110 (1914).
9. See, for example, Judge Lehan's dissent in Godheim.
10. See the Supreme Court decisions of Town of Flagler Beach, Horne, Save Sand Key, Williams, Brown, Florida Wildlife Federation and Markham, all cited and discussed above.

After Rickman was decided in 1917, but before Doherty in 1941, there were a few cases decided which are arguably inconsistent with the present interpretation of Rickman.[11] It may be contended, as Appellant does, that these decisions either (1) overruled Rickman by implication or (2) gave Rickman a different interpretation than the Florida Supreme Court gives it today. Under either alternative, any decision which is inconsistent with the Supreme court's current interpretation of Rickman is of no precedential value in the resolution of this appeal. Rice v. Arnold, 54 So. 2d 114 (Fla. 1951). In fact, it does not even matter what the intent of the Rickman court was; the current Supreme Court decisions have established the clear principle of law that a taxpayer shall not have standing unless he alleges either (1) special injury different in kind from that suffered by the taxpaying public generally or (2) a constitutional defect and Rickman is cited for this principle. The current Supreme Court cases are not subject to attack merely on the basis that Rickman is being mis-read.

The Respondent argues that this appeal should be decided by comparing the number of decisions "for" taxpayers suits to the number of decisions "against" taxpayers suits. The greater number would decide this appeal. But if the greater number of cases, no matter when decided, would always control, there would be no progression in the law.

> Stare decisis and res adjudicata are perfectly sound doctrines, approved by this court, but

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11. See, for example Hathaway v. Munroe, 97 Fla. 28, 119 So. 149 (1929); Thursby v. Stewart, 133 So. 742 (Fla. 1931); and Webster v. Belote, 103 Fla. 976, 138 So. 721 (Fla. 1931).

> they are governed by well-settled principles and when factual situations arise that to apply them would defeat justice we will apply a different rule. Social and economic complexes must compel the extension of legal formulas and the approval of new precedents when shown to be necessary to administer justice. In a democracy the administration of justice is the primary concern of the State and when this cannot be done effectively by adhering to old precedents they should be modified or discarded. Blind adherence to them gets us nowhere.

Wallace v. Luxmore, 156 Fla. 725, 24 So. 2d 302.

In the matter of taxpayers' suits, the Florida Supreme Court has stated its position in clear and convincing terms. All prior decisions inconsistent with these recent Supreme Court decisions are overruled or modified explicitly or by implication, whether or not they are mentioned or commented upon. State ex rel. Garland v. West Palm Beach, 193 So. 297 (Fla. 1940) and Rice.

The most recent Florida Supreme Court decisions unequivocally support the lower court's dismissal of the Amended Complaint.

CONCLUSION

Based on the above authority, the Petitioner NORTH BROWARD HOSPITAL 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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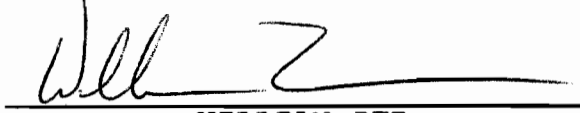
By: 

WILLIAM ZEI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief on the Merits has been mailed this 4th day of December, 1984, to JOHN L. KORTHALS, Esq., MUSSELMAN, RHINEHARDT, WELCH & KORTHALS, Counsel for Respondent, 2401 East Atlantic Boulevard, Pompano Beach, Florida 33061; JAMES C. PILKEY, Esq., TAYLOR, BRION, BUKER & GREENE, Co-Counsel for Respondent, 1451 Brickell Avenue, Miami, Florida 33131; JAMES R. WOLF, Esq., League Counsel, FLORIDA LEAGUE OF CITIES, INC., 201 West Park Avenue, Post Office Box 1757, Tallahassee, Florida 32302; and to H. LEE MOFFITT, Esq., MOFFITT, HART & MILLER, Attorneys for Waste Management, Inc., 401 South Florida Avenue, Tampa, Florida 33602.

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