IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
FEB 14 1985
CLERK, SUPREME COURT
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Chief Deputy Clerk

NORTH BROWARD HOSPITAL DISTRICT, a special tax district,

Petitioner,

vs.

SHARON T. FORNES,

Respondent.

Case No. 66,115

AMICUS CURIAE, WASTE MANAGEMENT, INC.'S

REPLY BRIEF ON THE MERITS

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CERTIFIED QUESTION

The following question has been certified to this Court by the Fourth District Court of Appeal 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?

ARGUMENT

I. BY ITS DECISION IN HORNE THE FLORIDA SUPREME COURT EXPRESSLY LIMITED TAXPAYER STANDING TO THOSE CASES INVOLVING A CONSTITUTIONAL CHALLENGE OR INVOLVING A SPECIAL INJURY TO THE TAXPAYER DISTINCT FROM THAT SUFFERED BY ALL OTHER TAXPAYERS IN THE TAXING DISTRICT.

In their briefs Respondent and her *amici* rely strongly on those Florida cases which have recognized a taxpayer's standing to challenge alleged unlawful governmental disbursements. They argue that based on these cases a taxpayer in Florida has virtually automatic standing to challenge allegedly illegal governmental expenditures.

In their initial briefs Petitioner and its *amici* recognize the checkered history of taxpayer standing in Florida and recognize that several opinions issued by this Court appear to have permitted a taxpayer to sue based solely on allegations of unlawful expenditures. *See*, *e.g.*, *Robert G. Lassiter & Co. v. Taylor*, 99 Fla. 819, 128 So. 14 (1930); *Wester v. Belote*, 103 Fla. 967, 138 So. 721 (1931); and *City of Daytona Beach v. News Journal Corp.*, 116 Fla. 706, 156 So. 887 (1934). Conversely, however, Petitioner and its *amici* point out that other early decisions indicated that a taxpayer would have no standing to challenge unlawful expenditures based solely on allegations of an increase in the overall tax burden of the community. *See*, *e.g.*, *Hathaway v. Munroe*, 97 Fla. 28, 119 So. 149 (1929).

In the case of Henry L. Doherty & Co., Inc. v. Joachim, 200 So. 238 (Fla. 1941), the court stated:

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

Id. at 239 (emphasis supplied). The Doherty case involved the vacation of a pathway by the Town of Palm Beach. As a result of the town's actions, the plaintiff no longer had easy access from his property to the beach. Although no allegations of unlawful expenditures appear to have been involved in Doherty, the court relied on the rule established in Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205 (1917), to hold that the plaintiff had no standing to maintain the action. The court found that the injury suffered by the Plaintiff was the same as that suffered by everyone else in the community; they all had to walk farther to gain access to the beach. The court reasoned that even though the impact of the town's actions upon the plaintiff may have been more direct, he still lacked standing:

> That there has been injury we have no doubt; that it is greater in degree than that of many others in the community we believe; that it is different in kind we cannot agree.

200 So. at 240 (emphasis supplied).

The differing interpretations made by the Courts stem mainly from the 1917 case of Rickman v. Whitehurst,

supra. The "Rickman Rule" has been variously interpreted as allowing taxpayer standing based on allegations of unlawful expenditures or as requiring a taxpayer to show that he will suffer an injury distinct from that suffered by all other taxpayers.

The basis of the argument presented by Petitioner and its amici, however, is that the confusion regarding taxpayer standing which may have been created by Rickman and various other decisions was settled when this Court issued its opinion in Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972).

A. AN ALLEGED INCREASE IN THE OVERALL TAX BURDEN BORNE BY THE COMMUNITY DOES NOT CONSTITUTE A "SPECIAL INJURY" FOR STANDING PURPOSES.

The facts of the Horne case have been sufficiently set forth by the parties and their amici in earlier briefs. Suffice it to say that in Horne the taxpayer-plaintiffs alleged the existence of unlawful appropriations. During the proceedings, the State admitted that the plaintiffs would have had standing had their challenge been to expenditures rather than to appropriations. The court, however, found this to be a "distinction without a difference" and likened appropriations to expenditures. Id. at 660.

As argued by amicus Waste Management, Inc. in its initial brief, once the court had determined that appropriations were substantially the same as expenditures for taxpayer standing purposes, then according to the positions now espoused by Respondent and her amici the plaintiffs would

have had standing to maintain their action. Instead, however, the Horne court went on to find that the plaintiffs had standing because their challenge was based on constitutional grounds. 269 So.2d at 663.

In reaching its conclusion the court noted the Rickman decision and stated "the 'Rickman Rule' requires a showing of special injury. We find, however, that the instant case presents a valid exception to the so-called 'Rickman Rule.'" 269 So.2d at 662 (emphasis supplied). According to the language contained in the Horne decision then, the plaintiffs did not fit the "special injury" requirement of Rickman, even though they alleged the existence of unlawful appropriations, which the court determined to be the same as expenditures. This brings to fore the question with which this appeal is primarily concerned: What constitutes a "special injury"?

Amicus, Waste Management, Inc., reasserts that the "special injury" requirement, as defined by Horne, is not met by mere allegations of an increased tax burden to be borne by the general public. If a mere increase in the overall tax burden suffices to give taxpayer standing, then why did this Court carve out an "exception" for the plaintiffs in Horne, particularly when the State virtually conceded the plaintiffs would have had standing had their challenge been to an expenditure? The only logical answer is that the State was incorrect when it assumed that an increase in the tax burden

borne by the general public constitutes a "special injury" within the Rickman Rule.

In her brief, Respondent Fornes attempts to harmonize Horne with earlier case law by stating that the Horne decision recognized two bases for taxpayer standing arising out of Rickman, (i.e., an increase in taxes or a special injury distinct from that suffered by other inhabitants), and created a third basis for taxpayer standing - constitutional challenges. Brief for Respondent at 28. This analysis, however, begs the question because it fails to explain the court's creation of an "exception" to the rule where, based upon the facts presented in the opinion, the plaintiffs fit right within the rule that Respondent would have this Court adopt.

Furthermore, Respondent's argument completely fails to address the Horne court's statement that "the 'Rickman Rule' requires a showing of special injury." 269 So.2d at 662 (emphasis supplied). In her own brief Respondent recognizes the difference between a "special injury" and an injury resulting from an increased tax burden placed upon the population as a whole. Brief for Respondent at 28.

Amicus Common Cause attempts to harmonize Horne with its position in this appeal by stating that the plaintiffs in Horne failed to allege a special injury. Brief for Amicus Curiae Common Cause of Florida at 10. Amicus Waste Management, Inc. submits that if an unlawful increase in governmental expenditures, (which by its nature results in an

increase in the overall tax burden), fulfills the special injury requirement, then the Horne plaintiffs' allegations would have brought them within Common Cause's interpretation of the Rickman Rule of special injury and the creation of an exception to the rule would have been unnecessary.

Respondent and her amici discount the importance of the decision in Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981), on the ground the case did not involve the issue of an increased tax burden. Brief for Respondent at 29. The significance of the Markham case, however, lies in the fact that in reaching its decision the court relied upon Paul v. Blake, 376 So.2d 256 (Fla. 3d DCA 1979), and stated 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." Markham, 396 So.2d at 1121 (emphasis supplied), citing Horne and Rickman. Similar language was utilized by the Third District Court of Appeal in both Paul v. Blake, supra, and Fredricks v. Blake, 382 So.2d 368 (Fla. 3d DCA 1980). Each case involved allegedly illegal ad valorem taxation practices yet in each case the court required the plaintiff, in the absence of a constitutional challenge, to demonstrate an injury different from that suffered by the rest of the taxpaying public.

As demonstrated above, regardless of the various interpretations of the "Rickman Rule" prior to 1972, this Court's decision in the Horne case clarified the standard to

be applied to taxpayer cases involving allegedly illegal disbursements which may operate to increase the overall tax burden borne by the public. To maintain his suit a taxpayer must launch a constitutional challenge or he must allege that he will suffer a special injury different from that suffered by all other taxpayers in the taxing district. The injury must be different in _kind_, not merely in degree; a mere increase in the overall tax burden borne by the taxpaying public will not suffice to confer standing. The Second District Court of Appeal recognized the importance of the _Horne_ decision in _Godheim v. City of Tampa_, 426 So.2d 1084 (Fla. 2d DCA 1983), when it stated:

> At this point, however, it makes no difference that others might read _Rickman_ in a different light. The supreme court has, in fact, unmistakably interpreted _Rickman_ to mean that the plaintiff must show a special injury different from other taxpayers in order to have standing to bring a taxpayer's suit. The court obviously believed this to be the law when it decided _Department of Administration v. Horne_ . . . .

_Id_. at 1087.

B. THERE IS NO CONSTITUTIONAL PROHIBITION ON THE COURT'S ABILITY TO RESTRICT TAXPAYER STANDING IN CASES INVOLVING ALLEGED VIOLATIONS OF COMPETITIVE BIDDING REQUIREMENTS.

Amicus Manasota '88 argues that under the provisions of Article I, Section 21 of the Florida Constitution the court may not limit taxpayer standing in cases involving alleged violations of competitive bidding requirements. _Amicus_ states that since taxpayer suits were available prior

to 1885, their availability cannot now be limited. Brief for Amicus Curiae Manasota '88 at 10-11.

In Kluger v. White, 281 So.2d 1 (Fla. 1973), this Court stated that where a right of access to redress an injury was provided by statutory or common law prior to 1885 the legislature may not abolish that right without providing a reasonable alternative. The instant appeal, however, involves allegations of violations of competitive bidding requirements placed upon North Broward Hospital District by virtue of Chapter 27438, Laws of Florida (1951), as amended. Petitioner's Brief on the Merits at 1. In the absence of that statutory requirement there is no common law rule which would require North Broward Hospital District to let its contracts on a competitive bid basis. Volume Services Division of Interstate United Corp. v. Canteen Corp., 369 So.2d 391,395 (Fla. 2d DCA 1979). Accordingly, the access to courts provision of Article I, Section 21 of the Florida Constitution is not applicable to the facts of this appeal since under the common law taxpayers had no right to challenge contracts let on a non-competitive bid basis.

In noting that competitive bidding requirements are legislatively imposed upon public agencies it is also interesting to note that those requirements contain no provisions for enforcement by taxpayers in general. For example, Section 287.055, Florida Statutes (1984 Supp.), requires professional services to be procured on a competitive basis under certain circumstances. That statute, however, contains no

provision enabling a taxpayer to sue to enjoin its violation. Conversely, in other instances the legislature has seen fit to grant standing to members of the public to enforce certain statutory restrictions on the operation of government. For example, the "Sunshine Law", provides that "[t]he circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state." §286.011(2), Fla. Stat. (1983) (emphasis supplied). Certainly, if the legislature intended for taxpayers to operate as "private attorneys general" to enforce the competitive bidding laws then it would have expressly authorized them to do so.[1]

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[1] For an example of a statute enabling citizens to act as "private attorneys general" see Chapter 542, Florida Statutes (1983), the Florida Antitrust Act of 1980, which gives citizens the right to sue for equitable relief based on a violation. §542.23, Fla. Stat. (1983).

II. POLICY CONSIDERATIONS SUPPORT THE REQUIREMENT THAT A TAXPAYER DEMONSTRATE A "SPECIAL INJURY" OR BASE HIS CLAIM UPON A CONSTITUTIONAL CHALLENGE.

A. THE THREAT OF A SUBSTANTIAL DISRUPTION TO THE OPERATION OF GOVERNMENT OUTWEIGHS THE BENEFIT OF ALLOWING ALL TAXPAYERS STANDING TO CHALLENGE GOVERNMENTAL EXPENDITURES, PARTICULARLY IN LIGHT OF THE ALTERNATIVE REMEDIES AVAILABLE TO PROTECT PUBLIC FUNDS.

In *Paul v. Blake*, *supra*, the Third District Court of Appeal succinctly explained the policy reasons which support the taxpayer standing rule which requires a taxpayer to demonstrate a special injury. The court recognized society's increasing appetite for litigation and increasing dissatisfaction with the operation of local government:

> 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.

376 So.2d at 259. The court asserted that the policy grounds upon which the standing rules are based are "sound", particularly when viewed in light of the alternative remedies available to taxpayers to protect the public treasury.

> 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.

Id., citing Henry J. Doherty and Co. v. Joachim, supra. Accord, Department of Revenue v. Markham, supra. 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 Jan 8, 1985), the Fourth and First District Courts of Appeal disagreed with the policy decisions made by the Third District Court of Appeal in Paul v. Blake and by this Court in Horne and Markham, and favored instead a policy which would allow a taxpayer whose tax burden would be increased by an alleged illegal expenditure to have standing to challenge that expenditure.

Respondent Fornes and her amici also question the policy decisions previously articulated by this Court. They assert that there is no evidence to show that a "floodgate" of taxpayer litigation would result from a liberalization of the taxpayer standing rule. Brief for Respondent at 33. The press and numerous legal publications, however, are replete with reports concerning the litigiousness of modern society and the tremendous burden that eagerness to sue has placed upon our court systems. See Yates, In the Chief Justice's Office, The Florida Bar Journal 497 (Oct. 1984); Want, The Caseload Monster in the Federal Courts, 69 American Bar Association Journal 612 (May, 1983).

Regardless of the prospects for an actual "floodgate" of litigation, a single strategically placed lawsuit brought under a liberalized taxpayer standing rule could have dire consequences upon the operation of a local government.

For example, in Godheim, supra, the plaintiff sought to enjoin the award of a contract for the design, construction and operation of a refuse-to-energy facility. 426 So.2d at 1085. The City responded that its actions were lawful and were required because the City was facing an emergency situation regarding garbage disposal.[2] Clearly, had the taxpayer been able to delay the award of the contract through lengthy litigation and possibly multiple appeals, the City would have faced an even greater emergency with respect to its garbage disposal program and would possibly have incurred substantial financial loss. In situations like the one presented in Godheim it is not necessarily the "floodgate" of litigation that would impair the operation of government; rather, it is the substantial social and fiscal impact which even a single lawsuit by a disgruntled taxpayer could have on the entire community. By limiting taxpayer suits to those involving special injury or a constitutional challenge, this Court has correctly balanced the citizens' interest in prohibiting official misconduct against the threat to government posed by unlimited taxpayer standing.

In balancing these interests the courts have correctly considered the alternative remedies available to tax-

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[2] The City had been enjoined from the use of its incinerator and was utilizing the Hillsborough County Landfill to dispose of city garbage. The County, however, had been ordered by DER to close its landfull by October 31, 1984. The alternative landfill site proposed by the County was determined to be nearly cost prohibitive to the City.

payers. One remedy which has been discounted by Respondent and her _amici_ in their briefs is the possibility of a lawsuit by a losing vendor. In her brief Respondent states that a losing vendor is not likely to institute suit because "the cost of such litigation precludes the challenging of all but the largest contracts." Brief for Respondent at 37. Waste Management seriously questions Respondent's logic. If the cost of litigation will operate as a deterent to a disappointed bidder who, presumably, has a substantial financial interest in the outcome of such litigation, then why would an average taxpayer, with a limited income, be willing to incur this "tremendous cost" to protect a de minimis interest in the public treasury? Waste Management asserts that in reality these so-called "taxpayer suits" are, in fact, being financed and controlled by disappointed vendors who, for various reasons are unwilling to come forward directly.[3]

Amicus Common Cause asserts it is improbable that the Attorney General, when presented with facts indicating unlawful official conduct, would bring suit to prohibit such

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[3] For example, in the _Godheim_ case the plaintiff was an employee of a subsidiary of the losing vendor, who controlled the litigation. Contrary to the assertions in _amicus_ Manasota '88's brief, Brief for _Amicus Curiae_ Manasota '88 at 2, Mr. Godheim was not "pressured" into settling the case. Instead, representatives of the losing vendor approached city officials and said they were no longer interested in pursuing the appeal. Subsequenlty, a settlement was reached. Waste Management recognizes that these statements may be beyond the scope of this appeal but felt it necessary to respond to the suggestion of impropriety raised in _amicus_ Manasota '88's brief.

conduct in light of his plenary discretion to decide which cases to prosecute. Brief for Amicus Curiae Common Cause of Florida at 17. This argument assumes that because the Attorney General has substantial leeway in his decision-making authority he will refuse to use his best efforts to enforce the laws of the state. In a representative democracy, however, the public must often rely on its legal representatives to enforce its rights. One example of this reliance is demonstrated by our system for criminal prosecutions. There the public is without power to prosecute criminal proceedings; that authority is vested solely in the state attorney who has plenary discretion in the prosecution of all cases within his jurisdiction. Wilson v. Renfroe, 91 So.2d 857 (Fla. 1956); 1958 Op. Att'y Gen. Fla. 058-64 (Feb. 21, 1958).

Additionally, Respondent and her amici argue that the special injury rule deprives the public of all remedies against government officials who breach the public trust. Ms. Fornes states that the competitive bidding laws were enacted to prevent "collusion between public officials and bidders" and that political remedies at the polls "[serve] merely to limit the time a public official may feed at the public trough." Brief for Respondent at 38, 36. Amicus Waste Management suggests that if situations arise involving collusion or other such unlawful acts by public officials, penalties against such officials, including removal from office, may be imposed under Part III, Chapter 112, Florida

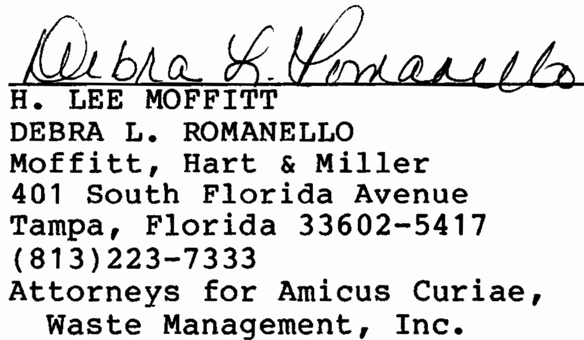
Statutes, the Code of Ethics for Public Officers and Employees. Furthermore, under the Code of Ethics _any person_ may file a complaint to initiate an investigation by the Commission on Ethics. §112.324, Fla. Stat. (1983).

Finally, Respondent and her _amici_ state that the special injury standing requirement utilized in zoning cases is not suitable for use in taxpayer cases because zoning cases frequently involve "acts that have no direct or measurable impact on challengers." Brief of _Amicus Curiae_ Common Cause of Florida at 22. To the contrary, however, Waste Management asserts that citizens suffer a more direct injury from developments which may damage the environment, since the environment is a finite asset: one which cannot be enlarged or substituted if damaged. The public treasury, on the other hand, is not irreplacable and the consequence of increased spending on an individual taxpayer may not even be measurable. Certainly, a special injury rule applicable to cases involving impact upon the environment is just as useful for cases involving alleged fiscal impact.

SUMMARY AND CONCLUSION

For the foregoing reasons _amicus_ Waste Management, Inc. requests this Court to reverse the decision of the Fourth District Court of Appeal on the ground a taxpayer has no standing to sue to prevent allegedly unlawful disbursements of governmental funds absent a showing of special injury or a constitutional challenge.

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 United States Mail to William Zei, Esquire, 224 Southeast Nineth Street, Ft. Lauderdale, Florida 33316; John L. Korthals, Esquire, 2401 East Atlantic Boulevard, Pompano Beach, Florida 33061; James C. Pilkey, Esquire, Eleventh Floor, 1111 South Bayshore Drive, Miami, Florida 33131; James R. Wolf, Esquire, Post Office Box 1757, Tallahassee, Florida 32302; Parker D. Thompson, Esquire, 100 South Biscayne Boulevard, Suite 1000, Miami, Florida 33131; Thomas W. Reese, Esquire, 123 8th Street North, St. Petersburg, Florida 33701; and John H. Rains, III, Esquire, Post Office Box 3433, Tampa, Florida 33601 this 12th day of February, 1985.

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