o/a 5-10-85

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF TRANSPORTATION,

Appellant,

vs.

CECIL DURDEN, et al.,

Appellees.

CASE NO. 66,770

APPELLANT'S REPLY BRIEF
DEPARTMENT OF TRANSPORTATION

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PRELIMINARY STATEMENT

Reference to the Appendix attached to the Department's Reply Brief shall be designated by the symbol "AA" followed by the appropriate page number.

Appellant, Department of Transportation, will be referred to as Department.

The Department requests that its Initial Brief be corrected to insert the word "not" to the last sentence on page 15 of the Initial Brief between the words "does" and "afford". Such sentence should read:

> The fact that there may be a risk of error in the Department's determination that a sign is unpermitted and that a sign may be erroneously removed does not afford a rational predicate for holding unconstitutional an entire statutory scheme that is generally followed in at least 25 states.

STATEMENT OF CASE AND FACTS

The Department relies on the Statement of Case and Facts contained in its Initial Brief, however, the Department denies that such Statement contained any implication that Appellees' waived Count II of its Complaint.

SUMMARY OF ARGUMENT

Appellees have failed to establish that they have been deprived of any interest encompassed in the protection of due process. The existence of such an interest is the threshhold question in determining whether the dictates of procedural due process have been met.

The Report of the legislative committee supports the statutory scheme of Section 479.105, Fla. Stat. (Supp. 1984).

Appellees lack standing to challenge the compensation provisions of Section 479.105, Fla. Stat. (Supp. 1984).

ARGUMENT

POINT I

APPELLEES HAVE NOT BEEN DEPRIVED OF ANY PROPERTY INTEREST ENCOMPASSED IN THE PROTECTION OF DUE PROCESS

Appellees assert that the property interest to be taken by the actions of the Department pursuant to Section 479.105 Fla. Stat.(Supp. 1984) is their interest in the material in the sign. (Appellee's Brief p. 3, 6). However, Appellees go out of the Record in stating that the Department seeks to destroy Appellees' signs. The Record and the legislative scheme as evidenced in the language of Section 479.105 clearly establishes that the Department seeks only to remove signs. Should the Department remove signs, the material components of such signs may be recovered by the owner. Further, Appellees are given thirty (30) days to remove and retain the material components of the sign structure, prior to any removal by the Department.

Appellees' claim that the bifurcation of the trial court proceedings and the Department's consent to such excuses Appellees from having to establish the existence of a protected property right is also without merit and is not supported by the Record. It is true that by Order entered January 25, 1985, the Circuit Judge bifurcated the final hearings. However, there is nothing in the Record which establishes that the Department

waived any burden placed on the Appellees necessary in proving a violation of their procedural due process rights. Further, it is arguable whether the Department would have the power to do so, since it is clearly established that the existence of a legitimate property or liberty interest is prerequisite to an examination of whether governmental action is violative of due process. The threshold question in any alleged violation of procedural due process is whether or not a protected property interest is involved, since a court must know what protected interest is implicated before it can decide what procedures constitute due process. Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed. 2d 711 (1977); Thurston v. Dekle, 531 F.2d 1264(5th Cir. 1976), vacated 438 U.S. 901, on remand 578 F.2d 1176. The failure of the Appellees to establish the existence of a protected right which is being taken by departmental action precludes the further examination of what procedures Appellees were to be afforded under due process.

Appellees' suggestion that the "Notice" posted on an unpermitted sign must advise the sign owner that he may apply for a permit to prevent removal of his sign (Appellees Brief p. 5) is without merit. Section 479.07 Fla. Stat. (Supp. 1984) provides that prior to erection of all signs on any portion of the Interstate System, a permit must be obtained from the Department. The Department has no duty to notify Appellees of the provisions

of Chapter 479 as all persons are charged with the knowledge of the provisions of statutes and must take notice thereof. 58 Am. Jur. 2d Notice § 21. Further, Appellees admit that they had actual knowledge that signs located along I-10 had to be permitted. (R: 182, 185).

The contention by Appellees that their signs may not be removed until a determination has been made that such signs are unlawful is without substance. Section 479.07 Fla. Stat.(Supp. 1984) requires all signs along an interstate to be permitted. Appellees stipulated to the fact that they had not obtained the necessary permit (R: 197) and therefore are in no position to assert that their signs were lawfully erected. Even assuming that later Appellees were to prevail in establishing that the sign sites were permittable, whether a site is permittable or not should be decided before the sign is erected, not after.

Appellees' rely on Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) as to the dictates of due process. Although easily distinguished from the instant case in that Fuentes addresses due process in the context of ex parte application by private parties of replevin law, even Fuentes states:

> "The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection." Id. U.S. 84

Since Appellees have failed to establish that even a semblance of a property right has been taken, their argument that there can be no summary taking through the police power unless justified by a compelling public interest is superfluous.

POINT II

FACTORS PRESENT IN THIS CAUSE JUSTIFY DEPARTURE FROM THE REQUIREMENT OF A PREDEPRIVATION HEARING AND SUPPORT THE LEGISLATIVE DETERMINATION OF SUMMARY REMOVAL OF UNPERMITTED SIGNS PRIOR TO ADMINISTRATIVE HEARING.

Appellees' suggestion that the Legislature through a committee report would torpedo its own statute by enacting an unconstitutional act is absurd. The legislature is always presumed to have intended to enact constitutional laws. Rich v. Ryals, 212 So.2d 641 (Fla. 1968). While it is true that the exact language of Section 479.105, Fla. Stat. (Supp. 1984) is not found in the Report, the statute as enacted does comply with the spirit of the Report. In addition to stating that the law should be amended to provide for removal after notice, the Report also states:

> When queried as to the effectiveness of the current enforcement procedure, the central office indicated that it is not adequate to keep illegal signs from being erected or to remove illegal signs that are already in place. As illustrations of this problem, the department cited three case histories, all involving signs erected without having obtained the required permit. In all three cases, administrative hearings and appeals resulted in three or more years of proceedings during which the unpermitted signs were standing. . . Further, . . . these delays have a serious adverse impact on the overall enforcement efforts of the department. Based on these findings, committee staff recommends that the department be granted the authority to remove signs erected without the required permit after notice to the sign owner. If, after a hearing, it is determined

> that the department erroneously exercised its authority, then the sign owner would be entitled to full compensation or reerection of the sign in-kind, at the department's expense. (AA: 1-2).

Although the Report does not contain the express language that no pre-removal hearing is required, it is definitely implied. Further, the Report, as used in the Department's Initial Brief was simply illustrative of the facts before the legislature. The Department has never asserted that the Report did or needed to sanction the statutory scheme employed in Section 479.105, Fla. Stat. (Supp. 1984).

The fact that the Agreement between the State of Florida and the United State Department of Transportation does not provide for the summary removal of outdoor advertising signs is irrelevant. Under the Agreement, the State must make provisions for effective control of the erection and maintenance along the Interstate System. These provisions were enacted in Chapter 479. Thus the purpose of the Agreement was to set forth the standards for effective control, while the specific enforcement procedures were left to the State. As noted in the Report (AA: 1-2), without Section 479.105's summary removal, unpermitted, illegal signs often remain standing for more than three years after notice has been given. To argue that the United States Department of Transportation would accept such "enforcement" as effective control reflects a naive understanding of the burden

the Florida Department of Transportation carries in order to avoid a loss of federal funding.

Appellees lack standing to challenge the validity of the compensation provisions of Section 479.105(d), Fla. Stat. (Supp. 1984). The only instance in which subsection (d) applies is when it has been determined that the Department made an error in the determination that the sign was unpermitted. There is no way that the Department could wrongfully or erroneously remove Appellees signs under this subsection since Appellees stipulated to (R: 197) and testified to (R: 182, 185) the fact that their signs were unpermitted signs and hence are in violation of Section 479.07(1), Fla. Stat. (Supp. 1984). Since Appellees are not adversely affected by Section 479.105(d), fundamental constitutional principles dictate that Appellees may not challenge such portion of the statute. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Sandstrom v. Leader, 370 So.2d 3 (Fla. 1979); Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974).

However, assuming that Appellees had standing to challenge the compensation provision their argument is not supported by the evidence. Kenneth Michael Towcimak, Chief of the Bureau of Right-of-Way for the Department of Transportation, testified that the erroneous taking of a sign by the Department would fall into the funding category of acquisition of property.

(R: 302). The source of revenue for the acquisition of property is the right-of-way fund (R: 292). Mr. Towcimak further testified in his deposition that the erroneous removal of a sign under Section 479.105 would fall within the category of inverse condemnation actions and that funds for such are available through the right-of-way fund (R: 268). The size of this fund for fiscal 1985-85 was approximated by Mr. Towcimak to be in the range of hundreds of millions of dollars. (R: 269).

As to the remaining bare assertions set forth by the Appellees, the Department stands on its Initial Brief and the analysis of the factors and justifications set forth therein.

POINT III

THE TRIAL COURT ERRED IN STRIKING DOWN THE ENTIRE PROVISION OF SECTION 479.105, FLA. STAT., WHEN THE STATUTORY LANGUAGE DEEMED OFFENSIVE WAS SEVERABLE FROM THE REMAINDER OF THE PROVISION.

Since Appellees "suggest they would have no objection to the new position of the Department if this Court determines it meets the statutory severability test" (Appellees Brief p. 14), the Department feels that no response is necessary. Therefore, the Department stands on its Initial Brief.

CONCLUSION

The Order of the circuit court declaring Section 479.105, Fla. Stat. (Supp. 1984), unconstitutional as being in violation of procedural due process should be reversed and the statutory provision reinstated.

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 U.S. Mail this 26th day of April, 1985, to CHARLES M. WYNN, ESQUIRE, Post Office Box 793, Marianna, Florida 32446; and to NEIL BUTLER, ESQUIRE and CATHI C. O'HALLORAN, ESQUIRE, Pennington, Wilkinson and Dunlap, Post Office Box 3985, Tallahassee, Florida 32303.

Maxine F. Ferguson

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