

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 6 11

THIRD DISTRICT COURT NO. **84-1431**

FRANKLIN B. BYSTROM, etc.,
et al.,

Petitioners,

vs.

S.F. WHITMAN, et al.,

Respondents.

PETITIONER BYSTROM AS DADE COUNTY
PROPERTY APPRAISER'S BRIEF
ON JURISDICTION

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INTRODUCTION

In this Brief on Jurisdiction, Petitioner Franklin B. Bystrom, Dade County Property Appraiser, will be referred to as the "Property Appraiser." Petitioner Randall Miller, as Director of the Department of Revenue of the State of Florida, will be referred to as the "DOR".

The Respondents S.F. Whitman, D.A. Whitman and W.F. Whitman will be referred to collectively as "the taxpayer".

The district court of appeal in this case, the Third District Court of Appeal, will be referred to as the "District Court".

Citation to documents included in the appendix of this brief will be designated "app." All emphasis in this brief is supplied by counsel.

STATEMENT OF THE CASE AND FACTS

This appeal seeks review of judicially-created limitations of a property appraiser's discovery rights in an action to restore a tax assessment after reduction by the property appraisal adjustment board. Such an action arises at the instance of the taxpayer itself, since it is the taxpayer who initiates the property appraisal adjustment board proceeding.

In the cause within, the taxpayer petitioned the Property Appraisal Adjustment Board ("the Board") and obtained a \$1,810,185 reduction in the 1981 assessment of the luxury Bal Harbour Shops mall. The Board-ordered assessment reduction was wholly predicated on a single finding: "Expense ratio warrants change as reflected below [from \$18,101,841 to \$16,291,656, a 10% reduction] -- expenses should approximate 20% -- rentals tend to high side less 10%." See app. A, Special Master's Findings of Fact, para. 6B.

The substantial reduction by the Board was made completely without any evidentiary basis to support it, since the taxpayer's expert witness adduced absolutely no testimony or documentary evidence relating to the actual expenses or income of the subject property, and candidly confessed that the taxpayer had not provided such information even to him, the

taxpayer's own authorized agent. Property Appraisal Adjustment Board hearing transcript, app. F at 12.

The Property Appraiser determined that the Board reduction illegally reduced the assessment of the subject property to below "just" (fair market) value and filed the action below to reinstate the preliminary assessment. The taxpayer answered the Complaint, persisting in its defense of the reduced assessment.

The Property Appraiser promptly served requests for production of documents previously requested prior to the Board hearing, as well as additional documents, including hazard insurance policies and profit and loss statements with respect to the subject property. (The specific requests track Florida Administrative Code rule 12D-1.05, as was graphically demonstrated to the trial judge at the hearing on the motion to compel production of documents. See app. B, a copy of the request for production and corresponding provisions of rule 12D-1.05, in the form submitted to the trial court at hearing.)

For the four months prior to hearing on the motion to compel production, the taxpayer did not interpose any objection to production as permitted by the rules of civil procedure. The taxpayer candidly admitted to the District Court that it had made no objection: "[T]he three requests for production...have not been responded to." Petition for Writ of Certiorari at 3.^{1/}

Prior to the hearing on the motion to compel production, the Property Appraiser filed a transcript of the Property Appraisal Adjustment Board proceedings. App. F. At hearing, the trial judge considered the testimony of the Property Appraiser that in both past and present years the taxpayer had not provided income and expense information to the Property Appraiser. Id. at 3. The Property Appraiser's counsel read from the Board transcript

^{1/} Even in the face of the taxpayer's express admission to the contrary, the District Court stated without elaboration that the taxpayer had objected to the production requested, and proceeded to honor the purported objection. Slip opinion, app. D at 2, 10 FLW at 353.

the Special Master's query: "[W]hy wouldn't they give the assessor the actual figures so we can deal from actuality rather than projection?"
Id. at 12. The trial court entered an order compelling production of the records, expressly providing for their confidentiality in the hands of the Property Appraiser and preserving the taxpayer's right to object to their admission at trial or to request that the court file be sealed. App. C, para. 1.

The taxpayer's petition for certiorari ensued. The petition contained the first record assertion that the taxpayer was "prepared to accept the gross revenue, expense and net revenue attributed to [the subject] property by the Appraiser, and wished to challenge only the capitalization rate applied by the Appraiser to the property's hypothesized net income." Petition for Writ of Certiorari at 7. The District Court granted the taxpayer's wish, immunizing the taxpayer from production of any of the documents requested. App. D. On March 20, 1985, the District Court denied the Property Appraiser's motion for rehearing. App. E.

Subsequently, after denial of the motion for rehearing, the Property Appraiser and the DOR filed their joint Notice to Invoke Discretionary Jurisdiction of this Court because the decision of the District Court expressly and directly conflicts with decisions of another district court of appeal and with decisions of this court on the same question of law and significantly affects the duties and responsibilities of property appraisers as a class of constitutional officers.

ARGUMENT

- I. THE SUPREME COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT BECAUSE THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN THE CASES OF Orlowitz v. Orlowitz, 199 So. 2d 97 (Fla. 1967); Blake v. Xerox Corp., 447 So.2d 1348 (Fla. 1984), AND WITH THE DECISIONS OF THE FIRST DISTRICT COURT OF APPEAL IN County of Volusia v. Union Camp Corp., 302 So.2d 160 (Fla. 1st DCA 1974) AND Greenwood v. Firstamerica Development Corp., 265 So.2d 89 (Fla. 1st DCA 1972) ON THE SAME QUESTION OF LAW.

- A. The Decision of the District Court Expressly and Directly Conflicts with the Decision of this Court in Orlowitz.

In Orlowitz v. Orlowitz, 199 So.2d 97 (Fla. 1967), this Court quashed

a decision of the Third District immunizing a husband in a divorce case from inquiry concerning his financial worth. The Third District had expressly relied on Jacobs v. Jacobs, 50 So.2d 169 (Fla. 1951). The District Court reasoned that matters relating to financial worth were not discoverable because the husband had represented to the court that he was "ready, willing and able to answer any reasonable order for costs, fees or other allowances."

This Court quashed the Third District decision in Orlowitz and approved the conflicting decision in Parker v. Parker, 182 So.2d 498 (Fla. 4th DCA 1966), quoting approvingly, 199 So.2d at 98, the rationale of the Parker court:

'We must say, based upon our understanding of the Rules and the philosophy behind them, that we do not look with favor upon the husband's position in not wishing to reveal any of the details of his financial position and his effort to bridle the dependents' discovery rights by substituting his secondary non-verifiable conclusion in lieu of primary detailed facts. The adversary and the court are entitled to the whole factual picture to the end that an independent complete understanding and evaluation may be had.'

The Parker rule adopted by this Court in Orlowitz is that the scope of discovery under the Florida Rules of Civil Procedure "is specifically related to the suit's subject matter without limitation by the paper issues made by the respective claims and defenses." Parker, 182 So.2d at 501 (distinguishing Jacobs, 50 So.2d at 173, where this Court had said that under the old Equity Rules "the sole purpose for the rule is to procure evidence pertinent to the issues...made by the pleadings.") Since Orlowitz, only the Third District has cited Jacobs to immunize a party from discovery. Whitman v. Bystrom, app. D at 5, 10 FLW at 354 (Fla. 3d DCA 1985); Powell v. Powell, 386 So.2d at 1215 n. 4 (Fla. 3d DCA 1980).

In the case within, the Third District has again reverted to the Jacobs discovery immunization rule. In doing so, however, the District Court erroneously concluded that there was "no disputed issue to which the taxpayers' records are germane". App. D at 5, 10 FLW at 354. This conclusion of lack of relevance, the linchpin in the District Court's

confidentiality analysis, was reached in spite of the Property Appraiser's protestations and the taxpayer's own candid admission to the contrary: "The argument made by the Appraiser under Point IIC is persuasive in establishing that the 'Omni' decision [Bystrom v. Equitable Life Assurance Society of the United States, 416 So.2d 1133 (Fla. 3d DCA 1982), rev.den., 429 So.2d 5 (Fla. 1983)] holds that actual income data is both relevant and admissible." Taxpayer's Reply to Response to Petition for Writ of Certiorari at 3. The taxpayer herein has not stipulated to the validity of the Property Appraiser's entire income appraisal, which involves the application of a capitalization rate to the revenue and expenses of the subject property. Where, as here, the taxpayer attempts to "accept" only one hypothesized component in the income appraisal formula, the actual income cannot be eliminated as an object of discovery by a purported stipulation by the taxpayer. The fact that "actual income data" remains a relevant issue for the trial court's consideration (as expressly admitted by the taxpayer itself) distinguishes the instant case from the divorce cases cited by the District Court and brings the instant case within the Orlowitz rule.

In quashing the district court's decision in Orlowitz, this Court agreed with *Mrs. Orlowitz's* contention that the Third District decision denying access to her husband's financial records had the effect of denying to the court information concerning issues other than the husband's ability to pay alimony. In the instant case, the decision of the Third District denying the Property Appraiser access to mortgage appraisals prepared by third parties, leases, rent rolls, operating statements, insurance policies, and other documents relating exclusively to Bal Harbour Shops, and not otherwise indicative of the taxpayer's personal finances, has the effect of denying to the trial court information admittedly relevant to the valuation of the subject property, the ultimate issue in this tax assessment action.

The decision sought to be reviewed represents a clear departure

from the essential requirements of law since it is predicated upon (1) a finding of lack of relevance where the record indicates that the parties agree that the matter sought to be discovered is relevant; and (2) ostensible consideration of the confidential nature of some of the documents sought to be discovered, where the trial court itself expressly provided for protection of the confidentiality of all documents ordered to be produced. App. C, para. 1.

The decision of the District Court below expressly and directly conflicts with this Court's Orlowitz decision on the question of whether a litigant may discover matters relating to income and financial data.

B. The Decision of the District Court Expressly and Directly Conflicts With the Decision of This Court in Blake v. Xerox.

Herein, the Property Appraiser and the DOR contend that the District Court's decision effectively denies the trial court the very information necessary to show that the Bal Harbour Shops was not assessed in excess of its fair market value. Herein, the District Court found that the taxpayer had "conceded" that the income figure hypothesized by the Property Appraiser was correct. To reach its conclusion that the trial judge had abused his discretion in permitting the discovery requested, the District Court found that the requested "records are not relevant because they are probative only of the income earned from the ownership of the property, an issue which is not being litigated." App. D at 5, 10 FLW at 354. The conclusion that actual income is not at issue in a tax assessment case involving income-producing property expressly and directly conflicts with the recent decision of this Court in Blake v. Xerox Corporation, 447 So.2d 1348 (Fla. 1984) on the same question of law.

Under Xerox, the taxpayer challenging an assessment must show that the property appraiser's valuation is unsupported by any of the three standard approaches to value: market, cost and income (or economic). The Property Appraiser's request for production below included items directed to discovery of information related to all three approaches.

For example, face amounts of policies insuring the Bal Harbour Shops against damage from fire and other hazards are no doubt based on calculations of reproduction or replacement cost and may well lead to discovery of admissible appraisal data evaluating the estimated cost of replacing the existing improvements.

Additionally, on December 16, 1982, the mortgagee of the subject property increased a November 21, 1980 mortgage from \$13,700,000 to \$21,000,000. The inference is inescapable that the mortgagee had at least one fair market value appraisal prepared to justify such a quantum increase in the outstanding debt secured by the Bal Harbour Shops. Such an appraisal would reflect on the property's value as indicated by its performance in 1981 (the tax year in question), and would be admissible at trial and therefore discoverable. See Florida Administrative Code rule 12D-1.05(9). A mortgage appraisal on such a property must necessarily involve all three approaches to value. The Appraisal of Real Estate, Eighth Edition, 53-54, 497-505. The economic approach to value featured in the mortgagee's appraisal must involve the selection of an appropriate rate of capitalization, an issue which even the District Court and the taxpayer must agree remains to be adjudicated by the trial court. Transactions which generate an appraisal of the subject property provide admissible evidence of the value of property for assessment purposes, Southern Bell v. County of Dade, 275 So.2d 4, 9 (Fla. 1973), and a fortiori are admissible.

The foregoing arguments were submitted to the trial court, which is traditionally accorded broad discretion in discovery matters. The trial judge weighed the need for discovery against the privacy rights of the taxpayer. The court was persuaded that the requested documents were discoverable under Fla.R.Civ.P. 1.350 in light of the applicability of the three approaches to property valuation, Xerox, supra, and the absence of any timely objection by the taxpayer. The trial court expressly provided for protection of the confidentiality of the taxpayer's records.

App. C, para. 1.

In quashing the trial court's order and immunizing the taxpayer against discovery of any document relating to any of the three hypotheses of legal assessment, the District Court issued a decision in express and direct conflict with the decision of this Court in Xerox.

C. The Decision of the District Court Expressly and Directly Conflicts With Decisions of the First District in County of Volusia v. Union Camp Corp. and Greenwood v. Firstamerica Development Corp.

The District Court decision herein is in express and direct conflict with two First District decisions on the question of discovery of taxpayer records in a tax assessment suit. In Union Camp, supra, 302 So.2d 160 (Fla. 1st DCA 1974), the First District reversed the trial court for denying the Volusia County Property Appraiser access to documents relating to the acquisition of property whose assessment was being litigated. Sub judice, the Third District **has** reversed the trial court for granting the Dade County Property Appraiser access to just such "acquisition information". App. B, para. 12. The Property Appraiser **has** also requested production of other documents relating to actual transactions with respect to the subject property other than its acquisition. Such documents include leases, app. B, para. 3; loan applications and mortgages, id., para. 6; appraisals, id., para. 7; and rent rolls, id., para. 11.

Like Union Camp, Greenwood v. Firstamerica Development Corp., 265 So.2d 89 (Fla. 1st DCA 1972), involved the classification and valuation of certain lands for tax assessment purposes. The trial court granted the Volusia County Property Appraiser's motion to require the taxpayer to produce all its books of account and other income records reflecting revenues attributable to the land involved in the lawsuit. The court denied access to the taxpayer's federal income tax returns, since it had granted access to the income and expense records from which such returns had been prepared. 265 So.2d at 91. The First District reversed and remanded with directions to enlarge the scope of the Property

Appraiser's discovery to include an additional year's records. Id.
at 92.

Because the decision of the court below expressly and directly conflicts with this Court's decisions in Orlowitz and Xerox, and with the decisions of the First District in Union Camp and Firstamerica, this Court should exercise its discretionary jurisdiction and review the decision of the District Court in this cause.

II. THE SUPREME COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT BECAUSE THE DECISION DIRECTLY AND EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OFFICERS.

County property appraisers are a class of constitutional officers under art. VIII, sec. 1(d), Fla. Const. (1980). This Court has jurisdiction of *this* case pursuant to art. V, sec. 3(b)(3), Fla. Const. and Fla.R.App.P. 9.030 (a)(2)(A)(iii) because the District Court's decision directly and expressly affects the Property Appraiser of Dade County and, thereby, all property appraisers in the State. The District Court's decision does more than simply modify or construe or add to the existing case law on ad valorem taxes: it directly and exclusively affects the powers and duties of property appraisers in that it allows a taxpayer to obtain a reduced assessment from the property appraisal adjustment board and then immunize itself from discovery of admittedly relevant documents when the property appraiser **seeks** judicial reinstatement of his assessment. The District Court's decision thus severely handicaps the property appraiser by limiting discovery in this ~~de novo~~ proceeding in which the property appraiser has the burden of proof. Sec. 194.032(6)(c), Fla. Stat. (1981).

In Dade County alone, 21,591 petitions were filed with the Property Appraisal Adjustment Board in 1981, one of which resulted in the cause within. Given such an enormous number of petitions, it is a statistical certainty that a number of Board decisions will reduce assessments below the constitutional/statutory fair market value standard and be so egregious

as to impel the property appraiser to file suit to restore the preliminary assessment pursuant to sec. 194.032(6)(a), Fla. Stat. (1981).

Taxpayers must not be permitted to obtain a windfall from the property appraisal adjustment board unsupported by any evidence and then raise a shield of purported confidentiality when the property appraiser brings an action in circuit court to restore the assessment to fair market value and seeks discovery admittedly relevant and admissible on the issue of valuation. Taxpayer's Reply to Response to Petition for Writ of Certiorari at 3. By its decision herein substantially impairing the discovery rights of the property appraiser in a tax assessment action, the District Court has shackled a constitutional officer in the performance of his duty to ensure that all property in the county is assessed at fair market value and that all property owners pay their full and equal share of taxes to defray the costs and expenses of government. E.g., Dade County Taxing Authorities v. Cedars of Lebanon Hospital Corp., 355 So.2d 1202, 1204 (Fla. 1978). The decision sought to be reviewed departs significantly from the essential requirements of law governing pretrial discovery and is peculiarly inequitable since these proceedings have actually arisen at the instance of the taxpayer, who successfully petitioned the Property Appraisal Adjustment Board for a \$1,810,185 reduction in assessment.

This Court should therefore exercise its jurisdiction and review the decision of the District Court because it greatly affects property appraisers, a class of constitutional officers.

CONCLUSION

Based on the foregoing argument and authority, this Honorable Court is respectfully requested to exercise its discretionary jurisdiction and accept this case for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail on this 29 day of April, 1985, upon Stuart L. Simon, Esq., Fine Jacobson Block England Klein Colan & Simon, P.A., 2401 Douglas Road, P.O. Box 140800, Miami, Florida 33134.

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APPENDIX ASpecial Master's Findings of Fact, Conclusions of Law and Recommendations to the Property Appraisal Adjustment Board, May 27, 1982

APPENDIX BRequest for Production Interlined with Corresponding Portions of Florida Administrative Code Rule 12D-1.05, In the Form Submitted to the Trial Judge at the May 22, 1984 Hearing

APPENDIX CTrial Court Order Compelling Production of Records and Providing for Their Confidentiality in the Hands of the Property Appraiser, June 1, 1984

APPENDIX DConformed Copy of Decision of the District Court Below, February 5, 1985

APPENDIX EOrder of the District Court Denying Property Appraiser's Motion for Rehearing, March 20, 1985

APPENDIX FTranscript, Property Appraisal Adjustment Board Hearing, May 27, 1982