IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 66916

THIRD DISTRICT COURT OF APPEAL

NO. 84-1431

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

Petitioners,

v.

S.F. WHITMAN, et al.,

Respondents.

REPLY BRIEF ON JURISDICTION

FINE JACOBSON SCHWARTZ NASH
BLOCK & ENGLAND, P.A.
2401 Douglas Road
P.O. Box 140800
Miami, Florida 33134
(305) 446-2200

By: STUART L. SIMON

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The Respondents, S.F. WHITMAN, D.A. WHITMAN and W.F. WHITMAN accept the introductory statement in the Petitioner's Brief on Jurisdiction, and will use the same means of referring to the parties and citing documents contained in the Appendix to this Brief as the Petitioner has in his Brief.

STATEMENT OF THE CASE AND FACTS

In reciting his statement of the facts and of the case, the Property Appraiser has emphasized those facts most favorable to his point of view and used emotionally charged words in presenting his case. The Respondents therefore submit their statement of relevant facts in lieu of that furnished by the Property Appraiser. Their statement attempts to avoid words with an emotional tone and endeavors to state the facts simply, clearly and straightforwardly. The statement follows:

The Property Appraiser in this case valued the Bal Harbour Shops property for 1981 at $18,101,841. The Whitmans filed a petition with the County's Property Appraisal Adjustment Board contesting the assessed valuation. The petition was heard by a special master who recommended a reduction in the assessed value. The County Property Appraisal Adjustment Board then adopted the recommendation of the special master, and the 1981 assessment was thus reduced from $18,101,841 to $16,291,656. The Property Appraiser was aggrieved by the reduction and filed suit against the three

individual owners of the shopping center in an endeavor to have the assessment restored to the original preliminary assessment figure of **$18,101,841.**

On November **18, 1983** the Property Appraiser filed a request for the production of detailed income information addressed to each of the three individuals who own the subject property. A copy of that request addressed to one of the three brother-partners is contained in the Appendix as Exhibit **"A".** The request for production addressed to the other two owners was identical to the request contained in the Appendix, save for the name of the owner. On November **25, 1983,** the Property Appraiser addressed a set of detailed interrogatories consisting of **14** legal size pages of questions to each of the three equal-owner-partners. These interrogatories were answered in a detailed joint response, but the three requests for the production of detailed income information were not responded to.

In due course the Property Appraiser's counsel set down a motion to compel the production of the detailed income information sought from each of the three owners. On June 1, **1984** the Circuit Court entered an order granting the motion to compel. This order also permitted the Whitmans to follow one of two courses. They could produce all the income information sought by the Property Appraiser by no later than June 6, **1984** or, in the alternative, they could pay the balance of the ad valorem taxes due for **1981** based on an assessment of **$18,101,841,** without prejudice, as a condition precedent to seeking a review of the order to compel in the Third District Court. A copy of the trial court's order of June 1, **1984** is contained in the Appendix as Exhibit "B".

A petition for certiorari seeking a review of the order to compel the production of detailed income information by the three individual owners was filed with the Third District Court of Appeal on July **2, 1984.** In due course,

this resulted in the Third District opinion of February 5, 1985 which this Court is being asked to review by the Property Appraiser.

The Respondents would also indicate that the Third District Court's statement of facts sets out the particulars needed by this Court to determine whether it should take jurisdiction over the cause. Respondents will therefore also adopt the District Court's statement of the case and its issues as a fair and impartial statement of what this Court needs to know for jurisdictional purposes. The Respondents have therefore included the Third District's opinion in their Appendix as Exhibit "C", even though it also appears in the Petitioner's Appendix.

ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH THIS COURT'S OPINION IN ORLOWITZ, 199 So.2d 97 (Fla. 1967).

In analyzing the Orlowitz case, the Property Appraiser paints with an overly broad brush and misses truly significant issues and nuances. It is true that this Court quashed the Third District's opinion in Orlowitz and expressed a preference for the rationale of the Fourth District in Parker v. Parker, 182 So.2d 498 (Fla. 4th DCA 1966) over its own 1951 opinion in Jacobs v. Jacobs, 50 So.2d 169 (Fla. 1951). In ruling as it did in the Orlowitz case, the Third District had relied on the Jacobs case when it held that a husband's undertaking "to answer any reasonable order for costs, fees or other allowances" immunized that husband from an inquiry into his financial worth. This Court then reversed the Third District's opinion but stated inter alia:

> "Since the trial court possesses broad discretion, not only in the granting or refusing of a discovery motion, but also for the protection of the parties against the possible abuse of this procedure, Rule 1.310(b) F.R.C.P., 30 F.S.A. [now Rule 1.280(c), Rules of Civil Procedure], it follows that only an abuse of this discretion by the chancellor would constitute fatal error.

* * * * * *

> There are no doubt many instances in which a court should exercise its power to protect a party against an unwarranted disclosure of the details of his financial holdings. In the instant case none are made to appear. Therefore under the facts of this case we are forced to conclude that the chancellor abused his discretion in entering the order of protection." (Emphasis supplied)

This Court did not hold as a matter of law that any offer by a divorced or divorcing spouse to meet the financial needs of the other spouse must be disregarded and that the offering spouse or former spouse must have his financial assets and federal income tax returns scrutinized regardless of his financial status. This Court held in Orlowitz that where the offering husband indicated that he could scrape $15,000 together for a payment to the wife "if he had to", where he indicated that his net worth was less than a million dollars, and where his undertaking to answer an order for costs, fees or other allowances was qualified by the use of the word "reasonable," there was an insufficient basis to hold that the wife was prohibited from inquiring further as to the husband's financial worth, income, capital assets, income tax returns or other financial data.

This Court then did not reverse its holding in Jacobs in the Orlowitz case. It held in Orlowitz that there was an insufficient showing of the husband's wealth or earning power in that particular case to put him beyond the ability of the wife to inquire further into his financial status, while still upholding the principal that there are many instances where "a court should exercise its power to protect a party against an unwarranted disclosure of the details of his financial holdings."

Since the Orlowitz case, the Third District Court of Appeal has continued to cite and rely on this Court's ruling in Jacobs or to reach a conclusion consistent with Jacobs without mentioning that case by name, and in

several instances this Court has thereafter declined to review the Third District's opinion. In Meltzer v. Meltzer, 356 So.2d 1263 (Fla. 3d DCA 1978), the Third District issued an opinion authored by the present Chief Justice in which it tacitly approved a doctor-husband's stipulation that he was financially able to meet any reasonable award of alimony and child support, and a General Master therefore avoided making any express finding as to the specific amount of the doctor's annual earnings. Review was sought in this Court and denied at 370 So.2d 460 (Fla. 1979).

In Alterman v. Alterman, 361 So.2d 773 (Fla. 3d DCA 1978), the Third District, when faced with having to decide whether a trial judge ruled properly when he denied a former wife's motion to compel her former husband to produce his income tax returns held:

> In support of her position, appellant relies upon Orlowitz v. Orlowitz, 199 So.2d 97 (Fla. 1967), and Parker v. Parker, 182 So.2d 498 (Fla. 4th DCA 1966). In our opinion, the Orlowitz and Parker cases are inapplicable to the facts of the instant action. In both of those cases, the discovery sought related to the many facets of the financial matters pertaining to an original divorce action, whereas, in the instant case the sole issue before the trial court was the propriety of an increase in the amount of appellant's alimony which had been awarded approximately 14 years earlier in the original divorce proceeding between the parties. In the instant action, appellee responded unequivocally to appellant's petition that he was financially able to pay the increase in alimony sought by appellant. Based on the record, neither the question of appellee's ability to pay nor the concerns catalogued in Parker, at 500-01, are present. The only question is whether appellant is entitled to an increase in her alimony payments.
>
> As stated by the Supreme Court of Florida in Orlowitz, at 98, a trial court possesses broad discretion in granting or denying motions in discovery matters. The Court went on to say that "[t]here are no doubt many instances in which a court should exercise its power to protect a party against an unwarranted disclosure of the details of his financial holdings." In our opinion, based on the record before us, the trial court did not abuse its discretion in entering the order appealed; therefore, it is affirmed. See Fla.R.Civ.P. 1.280(c). See also Ortiz v. Ortiz, 194 So. 2d 38 (Fla. 3d DCA 1967).

In Schottenstein v. Schottenstein, 384 So.2d 933 (Fa. 3d DCA 1980) the Third District again opined:

> *Mr.* Schottenstein may not by contract with his wife obviate or impair his obligation to support his minor children. Lee v. Lee, 157 Fla. 439, 26 So.2d 177 (1946). The child support payments agreed upon by the parties in 1973 are not commensurate with the husband's present financal ability and the present needs of his school-age children. Meltzer v. Meltzer, 356 So.2d 1263 (Fla. 3d DCA 1978); Jelke v. Jelke, 233 So.2d 408 (Fla. 3d DCA 1970). Where a party stipulates that he can adequately pay increased child support in order to foreclose inquiry into his present financial circumstances, a court can properly assume that his earnings and assets have substantially increased. A substantial increase in the earnings of the husband will, by itself, justify an increase in child support. Meltzer v. Meltzer, supra.: Sherman v. Sherman, 279 So.2d 887 (Fla. 3d DCA 1973). We conclude that the trial court's failure to increase the child support payments constitutes an abuse of discretion.

Review of this opinion was also sought in this Court and denied at 392 So.2d 1378 (Fla. 1980).

In Palmar v. Palmar, 402 So.2d 20 (Fla. 3d DCA 1981) the Third District Court of Appeal similarly ruled by saying:

> The husband stipulated to his financial ability to pay any award determined reasonable by the court and we find no error in denying the wife discovery of husband's financial assets.

Relatively recently, the First District Court of Appeal has followed the ruling of the Third District on this issue of law. In Granville v. Granville, 445 So.2d 365 (Fla. 1st DCA, 1984), the First District was called upon to review the denial by the trial judge of the motion made by the noted stock market prognosticater for a protective order prohibiting inquiry by a former wife into his financial status. In reversing the trial judge, the First District held:

> Florida Rule of Civil Procedure 1.280(c), dealing with protective orders, provides:
>
> > Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to

> protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, ...
>
> In view of the unique circumstances regarding husband's reputation and career as a market forecaster: the fact that he has stipulated to his financial ability and willingness to pay a reasonable increase in child support; the almost oppressive interrogatories requested by the wife, as well as her failure to specify any dollar amounts of the modifications requested, we find that the trial court erred in denying husband's motion for protective order in that such denial would, in our opinion, result in irreparable harm that could not be cured on direct appeal.[5] Cf. Alterman v. Alterman, 361 So.2d 773 (Fla. 3d DCA 1978); Palmar V. Palmar, 402 So.2d 20 (Fla. 3d DCA 1981).

[5] Wife argues that Orlowitz v. Orlowitz, 199 So.2d 97 (Fla. 1967) requires us to uphold the denial of husband's motion for protective order. We find Orlowitz distinguishable on the facts, and note also the statement of the court that "[t]here are no doubt many instances in which a court should exercise its power to protect a party against an unwarranted disclosure of the details of his financial holdings." Id. at 98.

In presenting his argument, the Property Appraiser has quoted undersigned counsel unfairly and out of context. The Brief of the Whitmans did concede that actual income data was both relevant and admissible in ad valorem tax cases generally; in the face of Section 195.027(3), Florida Statutes, no straightforward advocate can say differently. But when the challenging taxpayer accepts the hypothesized net income figure arrived at by a Property Appraiser who values only on the basis of an income approach, and thus limits his challenge solely to the capitalization rate applied to the hypothesized net income, then the estimated income figures used by the Property Appraiser are accepted by the taxpayer and become irrelevant to the single and sole issue remaining in the litigation, namely, the correctness of the capitalization rate.

The remainder of the Property Appraiser's argument on this point is addressed to the merits of the case rather than the limited jurisdictional issues and will not be responded to in this Brief.

POINT II

THE OPINION OF THE DISTRICT COURT DOES NOT CONFLICT WITH THIS COURT'S OPINION IN BLAKE V. XEROX, 447 So.2d 1348 (Fla. 1984).

In the Xerox case the Dade County Property Appraiser used a method of valuation, which this Court denominated as the "List Price less depreciation method," in which the list prices of the various machines adjusted for depreciation formed the basis of the assessed value. The Xerox Company contended that an income capitalization method was superior and would produce a more equitable valuation result. This Court held that, regardless of which method of valuation was theoretically superior, the Court should uphold the Property Appraiser's method if it was supported by any reasonable hypothesis of legality.

In the instant case there is no disagreement between the parties as to the method of valuation to be used. The County Property Appraiser has utilized an income capitalization method which immediately on formulation became cloaked in a presumption of correctness. The taxpayer accepts the income capitalization method as the proper method for valuing the property, and there is thus no difference between the Appraiser and the taxpayer as to the valuation method to be used. The taxpayer accepts both the method of valuation chosen by the Appraiser and the determination of net operating income calculated by the Appraiser as correct. It will be immediately apparent to the Court that the Xerox case and the instant case involve wholly dissimilar legal issues. In the Xerox case there was a difference of opinion as to the best and fairest method of valuation, while in the instant case there is no disagreement as to the method of valuation to be used or the net income attributed to the property by the Appraiser, but only as to whether the valuation method chosen was properly implemented by the Appraiser.

POINT III

THERE IS NO CONFLICT BETWEEN THE OPINION OF THE FIRST DISTRICT IN *COUNTY* OF VOLUSIA v. UNION CAMP CORP., 302 So.2d 160 (Fla. 1st DCA 1974) AND THE OPINION IN THE INSTANT CASE.

The two cases alleged to be in conflict are wholly dissimilar and not comparable in any way. In the Union Camp case the First District held that Union Camp must answer interrogatories about and produce correspondence between Union Camp and the Branigar Organization Inc., an alleged subsidiary of Union Camp, concerning the agricultural or non-agricultural status of certain properties conveyed by the companies between themselves. The situation arose because a large parcel of property conveyed to Union Camp was denied the agricultural status for ad valorem tax purposes that it previously enjoyed, and Union Camp then challenged the legality of the new assessment. The Court required the discovery sought by Volusia County in order to permit the County to ascertain or prove that the land would be used for real estate development rather than for bona fide agricultural purposes. It will be obvious to the Court that the facts and circumstances involved in the Union Camp case are so dissimilar to those involved in the instant case that they cannot be said to be in conflict with one another. The only possible point of conflict that can be said to exist is that discovery was permitted in the Union Camp case but denied in the instant case, a clearly insufficient basis for any alleged conflict.

POINT IV

THERE IS NO CONFLICT BETWEEN THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL IN GREENWOOD v. FIRSTAMERICA DEVELOPMENT *COW.*, 265 So.2d 89 (Fla. 1st DCA 1972) AND THE OPINION IN THE INSTANT CASE.

The opinions said to be in conflict coincide rather than conflict. The First District's opinion states inter alia:

> By the order appealed herein, the trial court denied appellants' motion to require appellee to produce its income tax returns and restricted the other documents sought to be produced by appellee for appellants' inspection and copying to those documents relating only to the tax year **1967,** that being the tax year involved in this proceeding.
>
> Appellants contend that the trial court abused its discretion and erred in denying their motion to require appellee to produce copies of its income tax returns for the years **1966** through **1970,** inclusive. With this contention we are unable to agree.
>
> * * * * * *
>
> In the absence of a more convincing and specific showing of necessity for such income tax returns of appellee, the court will not be held to have abused its discretion in this regard under the circumstances of this case.

POINT V

THIS COURT SHOULD DECLINE TO REVIEW THE DECISION IN THIS CASE.

Although the opinion in the instant case pertains to County Property Appraisers, a class of constitutional officers, the opinion is very narrow in its scope. It clearly and unequivocally holds that an assessment challenging taxpayer's income and expense records are relevant and discoverable in litigation involving the correctness of an assessment, notwithstanding that such records were not used by the Appraiser in formulating the assessment. It is only when the Appraiser derives his assessment using only the income capitalization method, and the taxpayer agrees with both the method used and the net income derived by the Appraiser that the need for actual income and expense figures disappears. The sole remaining issue to be determined in the litigation is the correctness that the capitalization rate used, and anything else becomes redundant.

The Third District's opinion in the instant case properly seeks to narrow the issues in controversy between parties in tax litigation and should be viewed with favor by the Court.

FINE JACOBSON SCHWARTZ NASH
BLOCK & ENGLAND, P.A.
2401 Douglas Road
P.O. Box 140800
Miami, Florida 33134
(305) 446-2200

By: Stuart L. Simon
STUART L. SIMON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Jurisdiction was furnished by mail this 7th day of June, 1985, to Daniel A. Weiss, Esq. Assistant County Attorney, 16th Floor, Dade County Courthouse, 73 West Flagler Street, Miami, Florida 33130, and to John C. Mellichamp, III, Esq., Assistant Attorney General, Room LL04, The Capitol, Tallahassee, Florida 32301.

By: Stuart L. Simon
STUART L. SIMON

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