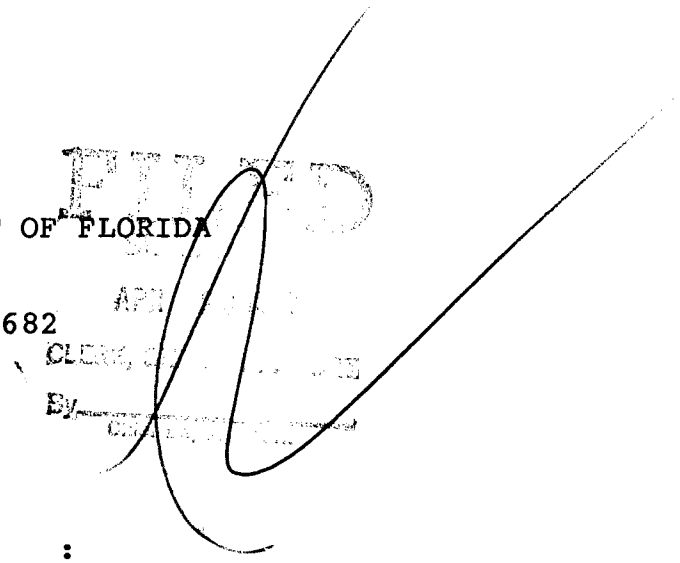
IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,682



WILLIAM MARKHAM, as Broward County Property Appraiser,

Petitioner,

-vs-

NEPTUNE HOLLYWOOD BEACH CLUB, et al.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

PETITIONER MARKHAM'S REPLY BRIEF

GAYLORD A. WOOD, JR.
304 S.W. 12th. Street
Fort Lauderdale, FL 33315-1521
Tel: (305) 463-4040

INDEX

CITATIONS OF AUTHORITY

CASES

STATUTES

STATEMENT OF THE FACTS

At page 3 of their Answer Brief, Respondents claim that the record shows that they "entered into purchase agreements with other timeshare unit owners". Nothing in the record on appeal supports that contention.

At Page 6, Respondents disagree with Petitioner's Statement of the Facts. In numbered Paragraph 1, they state, "Petitioner did not raise the issue of lack of standing in the trial Court". The Court's attention is respectfully invited to the Record on Appeal at Page 268, where Paragraph 5 of the Motion to Dismiss filed by Petitioner in the trial court states: "Plaintiffs lack standing to raise the constitutional issues".

Respondents next claim that "the complaint and the other exhibits attached thereto clearly alleged that the property is timeshare property and that the tax was levied pursuant to Section 192.037 Fla. Stat. (1983) (R-1-10, 85-247)". To the contrary, the tax notices attached to the Complaint show what properties' assessments were being contested--whole unit condominium parcels, platted real estate, and commercial personal property, with the exception of the Native Sun time-share.

Had the Property Appraiser been assessing fee time-share properties "pursuant to Section 192.037(2), Florida Statutes", all of the time share estates within a given development would have been listed on the rolls as one entry, as was done with the Native Sun. Except for that tax notice, the Exhibits to the Complaint describe specific whole-unit condominium parcels which are required by Section 718.120(1), Florida Statutes to be separately listed on the tax rolls. No attack is made on that statute as

unconstitutional. Hypothetically, were Section 192.037, Florida Statutes stricken, the Property Appraiser would be required to send out individual notices for condominium parcels in which the time share estates had been created. This would give Respondents the same tax notices and bills that are shown as Exhibits to their Complaint. Assuming arguendo that all the properties other than Native Sun and Driftwood Beach Club were in fact time-share properties, then because the Property Appraiser sent out tax notices for the condominium parcels created by the Declaration of Condominium, rather than one tax notice for the development as a whole, the Respondents have already received all of the relief sought in the litigation! Respondents failed to challenge the contention made on Pages 9 and 10 of the Initial Brief that where an undivided 1/2,040 interest in certain lots and blocks are conveyed [in the case of the Driftwood Beach Club], there is no way that such properties could be listed on the tax rolls other than to describe those lots and blocks.

The only property reflected in all those notices as being time-share property listed on the rolls as provided in Section 192.037, Florida Statutes, is Exhibit "D" to the Complaint, R-81, which lists "all unit weeks in Native Sun Condominium Time Share". Had a voluntary dismissal not been taken with respect to that property, the trial Court would have had a Plaintiff with standing to contest the unconstitutionality of Section 192.037, Florida Statutes.

Respondents claim that the transcript of the April 2 hearing indicates that the original Order of Dismissal of the Complaint was with prejudice. But, this is not supported by

either the Order entered by the Circuit Court or by the Transcript, attached to the Answer Brief:

> MR. EICHENBAUM: If your Honor will look at the exhibt of the complaint you will see what we are talking about. There were five separate projects that were given tax notices. They are all time-share condominiums. All five are done differently. On one of them they sent an assessment notice and broke it down by unit, and the other one they sent one giant tax bill to the entire project. "Here, pay it". There is mass confusion in their office, and that is what we are asking the Court to correct.
>
> MR. WOOD: No, there is no confusion in our office, and let me suggest also --
>
> THE COURT: I am going to grant the motion to dismiss, and you can take it up to the Appellate Court, and if they say I am wrong, then we will do the constitutionality.
>
> MR. WOOD: I think they should have 20 days to amend, Your Honor, at least as far as this is concerned. (Transcript, page 10)

The Court's original Order clearly reflects that twenty days' leave to amend was properly given, as requested by counsel for the Property Appraiser. Only later was the dismissal made final. The Order of Dismissal entered at the April 2 hearing was not with prejudice. The Notice of Appeal was filed on April 3, 1984, and the Fourth District never relinquished jurisdiction for the purpose of having the trial Court amend the Order that was appealed. It is apparent that counsel for Respondents realized when Petitioner Markham moved to dismiss the appeal in the Fourth District that the first Order of Dismissal was not an appealable order because it was entered with twenty days' leave to amend. No Notice of Appeal was ever filed with respect to the Order of April 17, the so-called "nunc pro tunc" order. The trial Court indicated at Page 10 of the hearing on April 17 that it did not

believe it had jurisdiction to sign the requested "nunc pro tunc" order, but did so anyway:

> THE COURT: How can I sign an amended order if you have already appealed?
>
> MR. EICHENBAUM: Nunc pro tunc.
>
> MR. WOOD: I think the Court has lost jurisdiction.
>
> THE COURT: I think I have too. I think I have to have the court return it to me to enter an order.
>
> ...(page 11) MR. EICHENBAUM: If the appellate court thinks you don't have jurisdiction to do that, then they will knock it out.
>
> THE COURT: I'll sign it.

POINT I. THE TRIAL COURT CORRECTLY GRANTED THE TAXING AUTHORITIES' MOTION TO DISMISS THE COMPLAINT, WITH LEAVE TO AMEND.

In the Summary of Argument at Page 8, and again at Page 10, Respondents argue that Section 194.171, Florida Statutes, applies only to cases involving overvaluation and not to claims that the assessment is void. Courts have applied the statute with equal vigor to cases in which it was claimed that the property was exempt under Chapter 196 and thus not subject to taxation, or should have been classified as agricultural under Section 193.461, Florida Statutes.

In Harvey W. Seeds Post #29, American Legion v. Dade County, 230 So.2d 696 (Fla. 3d.DCA 1970), and in Dade Dry Dock Corp. v. Broward County, 250 So.2d 286 (Fla. 4th.DCA 1971), the 60-day statute of nonclaim was applied to bar claims that property was totally exempt and not subject to taxation.

In Blake v. R.M.S. Holding Corp., 341 So.2d 795 (Fla. 3d.DCA 1977), at 800, the Third District Court of Appeal applied the statute to a case where property was claimed not to be subject to taxation under Section 193.011, Florida Statutes, the "just value law", and was claimed to be taxable under the agricultural classification statute, Section 193.461, Florida Statutes.

At Page 9, Respondents claim that the prescient 1983 Legislature added Section 194.171(6), Florida Statutes, in reaction to a 1984 decision of this Court. Petitioner correctly pointed out at page 8 of the Initial Brief that the Legislature was reacting to a decision of the Second District, Cape Cave Corp. v. Lowe, 411 So.2d 887 (Fla. 2d.DCA 1982).

As pointed out in the Initial Brief of the Department of Revenue, and as recognized by the Second District in Gulfside Interval Vacations, Inc. v. Schultz, 479 So.2d 776 (Fla. 2d.DCA 1985), the old "void-voidable" distinction is no longer viable, having been supplanted by an express statute conferring jurisdiction on the Circuit Courts to hear challenges to assessments only where the taxpayer meets both the sixty-day and good faith payment provisions of the statute.

Not enough has been said concerning Respondents' failure to make the statutorily-required good faith payment. Nowhere in their Answer Brief have Respondents claimed that the properties that are described in the Exhibits to the Complaint in the trial court are not real estate in Broward County, which is subject to taxation. Even the fee time share estates at the Native Sun, the only time-share properties described in the Exhibits, are real property; viz., Section 721.03(5), Florida Statutes:

> The treatment of time-share estates for ad valorem tax purposes and special assessments shall be as prescribed in Chapters 192 through 200.

In the transcript of the April 17, 1984, at page 12, counsel for Respondents stated:

> MR. EICHENBAUM: Thank you. With respect to the motion for stay, Your Honor, my clients would be happy to pay into the registry of the Court the money they have collected.

It is a fair inference to be drawn from this statement that the Respondents simply did not have the money to pay their tax bills, and brought the action in the Circuit Court as a delaying tactic to prevent a sale of tax certificates. Other than

that statement, Respondents have never offered to pay one nickel in taxes for the year 1983, thereby depriving the governmental bodies of Broward County such as the County and School Board, the funds needed to carry out their essential functions. Section 194.171(3), Florida Statutes, requires a "good faith" payment to be made with the Tax Collector, and a receipt to be filed with the Complaint. Since the Collector's "good faith payment" window is only open for sixty days following certification of the roll, Respondents were in the bind of having to pay all of the taxes claimed to be due in order to meet the jurisdictional requirements of subsection (3). By Mr. Eichenbaum's admission, they had not collected all the money, so they could not pay the taxes. Yet, were this Court to affirm the Fourth District, such a property owner would be free to contest a tax assessment on real estate without paying even the monies admitted to be due!

Markham v. Corlett, 453 So.2d 907 (Fla. 4th.DCA 1984), holds that a circuit court lacks jurisdiction to hear an agricultural classification case when the taxes were not paid before they became delinquent. In Mikos v. Ringling Bros.-Barnum and Bailey Combined Shows, Inc., 475 So.2d 292 (Fla. 2nd.DCA 1985), the Second District Court of Appeal held that a "good faith payment" was not necessary when the challenge was only to the taxability of the property. Respondents have not raised any challenge to the taxability of even the time-share estates in question, let alone the whole-unit condominium parcels, the platted lands or the commercial personal property. They simply do not like the method established by the Legislature for the collection of those taxes from the time-share estate owners by the

managing entity. This is not a sufficient basis for the assessments of property that is conceded to be taxable to be "void".

This Court has taken a strong position on the standing issue, even when it has not been addressed by the trial Court. When Petitioner Markham felt that a rule of the Department of Revenue was at variance with the statutes, he filed an action in the Circuit Court of Leon County to contest that rule, and prevailed. The Department of Revenue appealed the Final Judgment to the First District Court of Appeal, which affirmed. Department of Revenue v. Markham, 381 So.2d 1121 (Fla. 1st.DCA 1979) On the Department of Revenue's petition for review, this Court held that the Property Appraiser lacked standing to contest the rule, and ordered the Opinion of the First District Court of Appeal quashed and the Complaint in the circuit court dismissed! Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981). (As an interesting aside, when the merits of the same case came before this Court after having been properly raised by an affected taxpayer, this Court held that the trial Court and the First District Court of Appeal were right all along. Colding v. Herzog, 467 So.2d 980 [Fla. 1985].)

Since no Respondent has standing to contest the constitutionality of Section 192.037, Florida Statutes, this Court should quash the Opinion of the Fourth District Court of Appeal and order the Complaint dismissed, with prejudice.

POINT II. RESPONDENTS CANNOT COMPLAIN ABOUT THE DISMISSAL WITH PREJUDICE OF THE ACTION TO CONTEST THE CONSTITUTIONALITY OF SECTION 192.037, FLORIDA STATUTES, SINCE THEY INVITED WHATEVER ERROR MAY HAVE BEEN COMMITTED BY THE COURT IN SO DOING.

Respondents have apparently conceded the correctness of Petitioner's argument on this Point, since they have failed to submit an argument to the contrary. An examination of Pages 9-12 of the Transcript of the April 17, 1984 hearing, makes it abundantly clear that counsel for Respondents, Mr. Eichenbaum, insisted that the Court sign the "nunc pro tunc" order, even though both counsel for Petitioner and the Court opined that it could not do so until the Fourth District Court of Appeal relinquished jurisdiction for that purpose.

CONCLUSION

The Second District Court of Appeal correctly decided the very point which is before this Court in Gulfside Interval Vacations, Inc. v. Schultz, 479 So.2d 776 (Fla. 2d.DCA 1985).

No Respondent presently in the case has standing to contest the constitutionality of Section 192.037, Florida Statutes, since even assuming arguendo that time-share property was involved, the assessments were not listed on the rolls together as one notice for the entire development, as required by Section 192.037, Florida Statutes.

The decision of the Fourth District Court of Appeal should be reversed, with instructions that the Order of Dismissal be reinstated.

Respectfully submitted,

GAYLORD A. WOOD, JR.

By: Gaylord A. Wood, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief and Appendix of Petitioner, WILLIAM MARKHAM, as Broward County Property Appraiser, was served by mail this 18th. day of April, 1986, on LEONARD LUBART, ESQ., Greenspoon, Marder & Freeman, P.A., Attorney for Respondents, 12000 Biscayne Boulevard, Suite 204, Miami, Florida 33181-2710, on SUE DELEGAL, General Counsel of Broward County, Room 423 Government Center, 115 South Andrews Avenue, Fort Lauderdale, Florida 33301, and on HON. JIM SMITH, Attorney General, Room LL-04 The Capitol, Tallahassee, Florida 32301, Attorney for Department of Revenue.

Law Offices Of
GAYLORD A. WOOD, JR.
304 S.W. 12th. Street
Fort Lauderdale, Florida 33315-1521
Telephone 463-4040

By: Gaylord A. Wood, Jr.
Attorney for Petitioner MARKHAM