16

IN THE SUPREME COURT OF FLORIDA

OSCEOLA COUNTY, a political subdivision of the State of Florida,

Appellant,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Appellee.

CASE NO. 68,791

Appeal From The District Court of Appeal
Fifth District

APPELLEE'S ANSWER BRIEF ON JURISDICTION

VANCE W. KIDDER
Attorney for Appellee
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32078-1429
Telephone: (904) 328-8321
Florida Bar No. 142709

TABLE OF CONTENTS

TABLE OF CITATIONS

APPENDIX AND CITATIONS TO APPENDIX

The Appellee incorporates the appendix of Appellant but adds to it the portions of the record below as are found in Appellee's Appendix. The portions of the record below which are added to those the Appellant appended begin numbering in sequence from the last number in Appellant's Appendix. Citations to the Appendix below A-108 can be found in the Appellant's Appendix.

STATEMENT OF THE CASE AND OF THE FACTS

The Appellee takes exception to the Appellant's Statement. The second sentence of the first paragraph of Appellant's Statement is not a correct characterization of the issue raised before or decided by the district court. Likewise, the second sentence of the fifth paragraph of the Appellant's Statement is not an accurate statement of the position taken by the Appellee. Lastly, the last paragraph of Appellant's Statement does not properly state the grounds upon which the district court made its decision.

The issue before the district court is properly stated in the first paragraph of its opinion, to wit: "whether transfer of water from one water management district to another is authorized by law" or "does the Department of Environmental Regulation of the State of Florida (DER) have the statutory authority to adopt an administrative rule prescribing the procedure to be followed and the guidelines to be observed by the respective water management districts in considering interdistrict water transfers." (A-1). Likewise, the district court in the third and tenth paragraphs of its opinion again stated the issue when it stated "[t]he real issue here is whether the Florida Water Resources Act gives DER the power to authorize such transfers" and "whether the water management districts have been properly delegated the authority by DER." (A-2, 10, 11). The Appellee's position below was that the Appellant argued a position that was counter to express, not implied, statutory authority possessed by the DER and defeative of the purposes of Chapter 373, Florida Statutes. (A-74, 77, 79). The

portion of the district court opinion quoted by the Appellant in the last paragraph of its Statement is the last sentence of a paragraph in the opinion which also contains this sentence "[t]he statutory authority to allow such interdistrict diversions of water is necessarily implied in the grant to DER of statewide power to regulate the management of water resources and by the specific legislative authority to permit the transport and use of water beyond overlying land, across county boundaries, or outside the watershed from which it is taken." (A-5, 6). (Emphasis added). The sentence quoted herein properly states the grounds upon which the district court found authority for DER.

SUMMARY OF ARGUMENT

There is no conflict with Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1979) because the validity of a statute was not an issue raised in this case as it was in Askew, and the rule of law applied in Askew--constitutional adequacy of standards set forth in legislation--was not ruled upon; and consequently, the points of law are different. Moreover, the facts are dissimilar. There is no conflict with Department of Professional Regulation v. Pariser, 483 So.2d 28 (Fla. 1st DCA 1986) because, while the point of law contained in Pariser is a point of law contained in the case herein, the facts are dissimilar and the district court explains its reasoning so that no confusion can result. The Appellant argued an interpretation of Chapter 373, Florida Statutes, that was based in expressio unius est exclusio alterius, and the district court disagreed with the Appellant's position and explained so.

(A-2 through 7. See particularly Footnotes #3, 4, and 5). The grounds for conflict asserted by the Appellants are contrived because there is absolutely no conflict between the district court's decision and the cases Appellant refers to.

The district court's opinion does not affect the duties and responsibilities of county commissioners because it does nothing more than add to case law. Its determination of the authority of Appellee does not add to or detract from the authority county commissioners have and does not change the difficult planning tasks that county commissioners or city commissioners, water management districts and regional planning councils, for that matter, have confronting them and thus does not directly and exclusively affect county commission duties and responsibilities.

ARGUMENT

I. OSCEOLA COUNTY DOES NOT CONFLICT WITH ASKEW V. CROSS KEY WATERWAYS.

In Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960), this Court succinctly set forth when a conflict between cases arises, to wit:

1. announcement of a rule of law which conflicts with a previously announced rule of law;
2. application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case disposed of.

In Nielson the Court went on to state that, as to the former, the facts are immaterial and, as to the latter, the facts are vital.

The salient facts to this case distinguish this case from Askew. Likewise, the principles of law that were applied are different.

The DER is empowered by Sections 373.016, 373.019(8), 373.023(1), 373.219, and 373.223, Florida Statutes, to administer a consumptive use permitting program throughout the State of Florida; and whenever a holder of a consumptive use permit would propose to transport and use water beyond overlying land, across county boundaries, or outside the watershed from which it is taken, such transport or use may be authorized if "such transport or use is consistent with the public interest." (A-3, 4). Pursuant to Sections 373.016(3) and 373.103(1), Florida Statutes, the DER delegated administration of Part II of Chapter 373, Permitting of Consumptive Uses of Water, to the water management districts. (A-3, 4). Consistent with this delegation, the DER adopted an administrative rule that said when an application proposes to transport and use water across a boundary between water management districts that both water management districts had to approve such a transport and use as consistent with the public interest. (A-4). When an applicant located in Brevard County in the St. Johns River Water Management District applied to South Florida Water Management District and St. Johns River Water Management District for a consumptive use permit with a source in Osceola County in the South Florida Water Management District and the St. Johns River Water Management District agendaed the application for denial, Osceola County filed a Petition for Writ of Prohibition that, in effect, asked the District Court of Appeal, Fifth District, to determine whether transfers between water management

districts were authorized by statute, and if so, whether the St. Johns River Water Management District had a say in regard to any proposed transport. (A-1 through 7, 24 through 52).

The events in Askew are entirely dissimilar. Therein an agency proposed rules in an effort to administer a statute. Persons affected by the rules instituted suit claiming that the statute lacked minimum standards establishing priorities among areas and resources, and therefore, the statute and rules were constitutionally defective.

In the instant case, the Appellant argued that in the absence of it being specifically mentioned in Section 373.223(2), Florida Statutes, because of the doctrine of expressio unius est exclusio alterius, that transport and use of water across the boundary between water management districts was prohibited. (A-4). The district court rejected Appellant's argument. (A-4). Thus, the district court was not asked to rule on the constitutionality of a standard but on whether the doctrine of expressio unius est exclusio alterius was appropriate to the instant case. (A-4). Indeed the validity of the criteria for evaluating proposed transport and use contained in Section 373.223(2), Florida Statutes, "transport and use is consistent with the public interest", was never raised by Appellant below. Indeed Appellant ignored the existence of the "public interest" statutory criteria in Subsection 373.223(2), Florida Statutes. Furthermore, Appellant, but not the district court, ignored the impact of DER's rule requirement that the transport and use of water across water management district boundaries requires approval of each involved

district, i.e, no district can unilaterally authorize the use of water within its district that is obtained outside of its district (A-3, 4). The DER rule does not negate the legislatively established boundaries of the water management districts, which are irrelevant to it, but instead, for its delegation, provides a workable check and balance, if you wish, procedure for evaluating whether a proposed transport and use of water beyond overlying land, across county boundaries, and outside the watershed it is taken, which may also happen to be across water management district, municipal, special taxing district, or regional planning council boundaries "is consistent with the public interest." (A-1 through 7).

The Appellant's argument takes a sentence in the district court's opinion and uses it out of context from the remainder of the opinion and the issues before the district court. This contrived conflict is what this court has inveighed against when it said that conflicts arise from the decisions not opinions. Gibson v. Maloney, 231 So.2d 823 (Fla. 1970). Under Appellant's scenario, any time a district court found that a statute provided authority, a conflict would occur with Askew. The district court's decision was that Chapter 373 applied statewide and that DER could administer it statewide, and if it chose to delegate its authority to water management districts, as it did, DER's statewide authority was not thereby diminished. (A-5, 6). This is not applying a rule of law concerning unconstitutional delegation, nor is it a decision that condones an agency setting standards for itself. Thus, the

instant case and Askew are distinguishable on the facts and the rule of law applied.

II. OSCEOLA COUNTY DOES NOT CONFLICT WITH DEPARTMENT OF PROFESSIONAL REGULATION V. PARISER.

Under Nielsen, supra, conflict can arise from enunciation of a rule of law which is in conflict with a previously announced one and in Osceola County and in Pariser, the rule of law expressio unius est exclusio alterius was applied, but the district court in Osceola County did not enunciate a rule of law which is in conflict with that in Pariser. The Osceola County decision is consistent with the rule of law in Pariser based on the facts in Osceola.

The rule of law, expressio unius est exclusio alterius, as expressed in Thayer v. State, 335 So.2d 815, 817 (Fla. 1976), which is the case for the rule of law cited in Pariser, is not ironclad, is a general principle that ordinarily operates, but is subordinate to the legislative intent found in the language of a statute. Legislative intent is derived from the entirety of a statute, not individual portions removed from the remainder ot a statute. Englewood Water District v. Tate, 334 So.2d 626 (Fla. 2nd DCA 1976).

The district court construed Section 373.223(2), Florida Statutes, with reference to the remainder of the statute and rejected the Appellant's argument that, in the absence of mentioning something the Appellant asserts should have been mentioned, there was a lack of authority. (A-1 through 7, see 4 particularly). Interestingly, boundaries of municipalities are not

mentioned, nor are special taxing districts or regional planning council boundaries. Such boundaries are irrelevant to DER, a state agency with geographical jurisdiction coterminous with the boundaries of the State of Florida, as they are to the purpose of Section 373.223(2), Florida Statutes, which the Appellant properly asserted, is to clearly indicate that certain common law riparian right doctrines are not applicable (A-52), and of course, there were no water management districts under the common law. Thus, the district court considered Appellant's argument and rejected it as inapplicable as Appellant urged it be applied in this instance. (A-1 through 7).

III. OSCEOLA COUNTY DOES NOT AFFECT THE DUTIES AND RESPONSIBILITES OF COUNTY COMMISSIONERS.

In Spradley v. State, 293 So.2d 697 (Fla. 1974), this court made it perfectly clear that incidental impacts on the duties and responsibilities of constitutional officers, such as the incidental impacts Osceola County causes, were insufficient to invoke jurisdiction under Article V, Section 3(d)3, Florida Constitution: "[a] decision must directly and in some way exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers".

Appellant's argument has transformed the Fifth District's decision in Osceola County from one determining the jurisdiction and powers of the St. Johns River Water Management District and the Department of Environmental Regulation under Chapter 373 as one also deciding the jurisdiction, powers, and duties of county commissions under Chapters 125 and 163, Florida Statutes; however, the

jurisdiction of county commissions was not even presented or considered in the case except as argument to support Appellant's standing to seek a writ of prohibition. The writ of prohibition sought by Appellant was clearly limited to the jurisdiction of the St. Johns River Water Management District, not county commissions. (App. 11, 70).

The approval or disapproval of an inter-district transfer of water by water management districts has no greater affect on a county commission's policy or planning duties than do the monthly approval of numerous consumptive use permits by the water management districts within the respective boundaries of Florida's counties, or an intra-district transfer of water between counties, all of which Appellant's interpretation of Section 373.223(2), Florida Statutes, would allow for. Moreover, the water management districts and the DER have exclusive authority regarding the regulation of the consumptive use of water within the state. Sections 373.217 and 373.023, Florida Statutes. Cammack v. Seminole County, No. 84-3270 (Fla. 18th Cir.Ct. June 29, 1985). The decision plainly does not directly and exclusively affect the duties of county commissions but at best may indirectly affect county commissions by punctuating the necessity for planning cooperation with regional and state agencies exercising jurisdiction over resources within respective counties. See, specifically Sections 373.0395, 373.036, Florida Statutes; Chapters 185 and 186, Florida Statutes; Sections 163.3177(9)(h), 163.3184 and 163.3205, Florida Statutes. Furthermore, the decision does

not preclude county commissions from exercising due process rights within the regulatory framework of Chapter 120, Florida Statutes. See Sections 120.54 and 120.57, Florida Statutes.

Accordingly, the Osceola County decision only affects the powers and duties of the DER and water management districts and thus, jurisdiction is lacking under Article V, Section 3(b)3, Florida Constitution.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests this Honorable Court to deny the application for discretionary review because neither on the rule of law or facts is it in conflict with Askew, on the facts it is not in conflict with Pariser, and it does not directly and exclusively affect county commissioners. The case is a case of first impression, as Appellant pointed out (A-11), and as such, a conflict with another case is unlikely. See Saltz v. Perlmutter, 362 So.2d 160, 164 (Fla. 4th DCA 1978) (Anstead concurring). Furthermore, the Osceola County decision does not in any way overrule any other case, and therefore, no conflict exists. Kyle v. Kyle, 139 So.2d 885 (Fla. 1962). The Appellants alleged conflict is highly contrived and nothing more.

Respectfully submitted,

Vance W. Kidder

VANCE W. KIDDER
Attorney for Appellee
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32078-1429
(904) 328-8321

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPELLEE'S ANSWER BRIEF ON JURISDICTION has been forwarded by United States Mail this 11th of June, 1986 to the following counsel of record:

William L. Earl, Esquire
Peeples, Earl & Blank, P.A.
One Biscayne Tower, Suite 3636
2 South Biscayne Boulevard
Miami, Florida 33131;

Neal D. Bowen, Esquire
17 South Vernon Avenue
Kissimmee, Florida 32741;

Clifton A. McClelland, Jr., Esquire
Potter, McClelland, Griffith,
Jones & Marks, P.A.
700 South Babcock Street
Suite 400
Post Office Box 2523
Melbourne, Florida 32902-2523; and

Carol A. Forthman, Esquire
Department of Environmental
Regulation
Twin Towers Office Building
2600 Blairstone Road
Tallahassee, Florida 32301.

Vance W Kidder
VANCE W. KIDDER