IN THE SUPREME COURT OF FLORIDA

FILED
JUN 1986
CLERK, SUPREME COURT
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Deputy Clerk

RUDY MUCKENFUSS, as Property Appraiser of Marion County, Florida, and THOMAS OLSEN, as Tax Collector of Marion County, Florida,

Appellant/Petitioners,

vs.

THE DELTONA CORPORATION, a Delaware corporation authorized to do business in Florida,

Appellee/Respondent.

______________________________/

Docket No. 68,792
DCA No. 85-48

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent accepts the statement of the case and of the facts as set forth in Petitioner's brief on jurisdiction, except as specified below.

Petitioner states that his initial $56,205,151 assessment was made prior to the decision of the circuit court in Deltona's successful challenge to Petitioner's assessment for the tax years 1976, 1977, 1978 and 1979. This statement is not correct. The property appraiser's assessment for 1980 taxes was not made until February 18, 1981. The final judgment, accompanied by a written opinion, was entered on February 6, 1981.

Petitioner states that, after the circuit court and the district court condemned the method of appraisal upon which his $56,000,000 assessment was predicated, he abandoned that method of appraisal and made a "reappraisal" using generally recognized appraisal methods based upon the market value approach. This "reappraisal" resulted in an assessed value of $90,922,896. These statements are not accurate. Petitioner did abandon his official assessment and the method of appraisal upon which it was predicated, and he did so after the decisions of the trial court, and the district court, in the earlier litigation. But the property appraiser did not notify Deltona of his "abandonment" until two weeks before the trial of the action challenging the 1980 assessment, which took place in September, 1984. Although the decision of the district court was rendered in September, 1982, the property appraiser continued to assert his invalid appraisal for two more years. When the property

appraiser ultimately abandoned his official assessment, he never took any affirmative action to change the tax rolls. He merely testified at trial to a value of $90,000,000, and the methodology relied upon by him in such "reappraisal" still contained the deficiencies inherent in his old method. These deficiencies were specifically discussed by the circuit court and the district court in their respective opinions rendered in the earlier litigation. He never employed generally recognized appraisal methods as stated in his brief on jurisdiction. He continued to value unimproved, raw land, at a higher value than fully developed lots, solely on the erroneous basis that agreements for deed increased the value of real property.

The property appraiser increased his valuation for trial purposes by some $35,000,000 and stated to the jury in closing argument that he did so because Deltona was the only taxpayer who had ever brought suit against him to challenge one of his assessments. He said this is what happens to someone who does not "let the sleeping dog lie."

SUMMARY OF ARGUMENT

The decision of the district court below did not announce a rule of law which conflicts with a rule previously announced by this court or another district court of appeal. This court announced a rule of law in Whitten v. Progressive Casualty Insurance Company, 410 So. 2d 501 (Fla. 1982), followed by other district courts of appeal referred to by Petitioner, which sets forth the technical requirements for an award of attorneys' fees

under Sec. 57.105, Florida Statutes. This rule of law requires that the court awarding attorneys' fees must make a specific finding that there is a complete absence of a justiciable issue raised by the losing party. In order for the decision of the district court below to be in express and direct conflict with Whitten, supra, and the other district courts of appeal following Whitten, the decision below must announce a conflicting rule of law relating to the technical requirements for an award of attorneys' fees under Sec. 57.105, Florida Statutes. In order for there to be conflict, the rule announced below must state that there is no necessity for a specific finding, by the court awarding fees, regarding a complete absence of a justiciable issue. The decision below did not announce such a rule of law. There is no basis for conflict jurisdiction.

The decision of the district court below did not apply 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 by this court or another district court of appeal. The only case relied upon by Petitioner for conflict, which involves controlling facts similar to the instant case, is Schultz v. Williams, 472 So. 2d 1347 (Fla. 2d DCA 1985). The result produced by the decision in the instant case is different than the result produced in Schultz, supra, because of the substantial differences in the controlling facts of these two cases.

In Schultz, supra, the property appraiser did not admit at trial that his tax assessment resulted from the application of a

method of appraisal which was contrary to Florida law. In Schultz, supra, there was nothing in the record to indicate that the property appraiser was attempting to relitigate the same issues previously resolved adverse to him in earlier litigation. In Schultz, supra, the taxpayer did not have to file suit to obtain the benefits of a judgment entered by a trial court on substantially the same facts, nor did the property appraiser continue to defend, for 2 years, an assessment methodology which had been determined by a district court of appeal to be contrary to the laws of Florida. Because of these differences in the controlling facts, the results in these two cases were different; and it is significant to note that the court in Schultz specifically stated that if facts similar to those of the instant case had existed in Schultz they would have had a "significant bearing on whether attorneys' fees should be awarded." Schultz v. Williams, 472 So. 2d 1347, at 1348 (Fla. 2d DCA 1985)

There is no express and direct conflict in decisions. Petitioner relies upon semantics to show conflict in opinions, and fails woefully short in his effort to show conflict in decisions, which is required to invoke the jurisdiction of this court. Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970). The two types of decisional conflict which may give rise to Article V, Sec. 3(b)(3), jurisdiction are described above. See Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960); City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So. 2d 632 (Fla. 1976). Neither of these two types of decisional conflict exist in this case.

ARGUMENT

Petitioner seeks to invoke jurisdiction pursuant to the Florida Constitution, Article V, Sec. 3(b)(3).

To determine whether there is conflict jurisdiction, it is first necessary to determine what question of law was decided by the district court below; then determine whether this court or another district court of appeal previously rendered a decision on the same question of law; and then determine whether there is an "express and direct conflict."

The district court of appeal below decided that the trial court erred when it denied Deltona's motion to assess attorneys' fees when Deltona prevailed by invalidating the 1980 assessment. Section 57.105, Florida Statutes (1980), provides that the trial court "shall" award reasonable attorneys' fees to the prevailing party when there is a complete absence of a justiciable issue raised by the losing party.

In the instant case, Deltona alleged that the property appraiser's tax assessment was not made in compliance with the requirements of Florida law and should be set aside. The property appraiser defended by asserting the validity of his assessment. Deltona prevailed on this issue. The property appraiser admitted at trial that his assessment was not made in accordance with Florida law. By such admission, there was no issue ultimately tried regarding the validity of the assessment. His admission, on the eve of trial, in September, 1984, was claimed by him to be based upon the Circuit Court decision of

February, 1981, affirmed by the District Court of Appeal in September 1982. The property appraiser's answer to Deltona's complaint was filed in August, 1981, and he continued to defend the validity of his official assessment, notwithstanding the results in the earlier litigation. The property appraiser did not concede the invalidity of his assessment until the eve of trial.

The district court of appeal decided that the lower court erred in failing to award attorneys' fees to Deltona, pursuant to Section 57.105, Florida Statutes (1980). The record revealed a complete absence of a justiciable issue raised by Petitioner in defending his assessment. In its opinion, the district court gave its reason for reversal. Its reason was that a "substantial portion" of the lawsuit "consisted of a legal controversy in which there was virtually a complete absence of a justiciable issue of either law or fact." The reason for its decision, as stated in its opinion, was not an announcement of a rule of law establishing a litigant's entitlement to an award of attorneys' fees. Its reason was nothing more than dicta and was not essential to its decision, although it was an accurate statement. Petitioner erroneously relies upon the opinion as his basis for decisional conflict.

The instant case involved two issues: (1) the validity of the official assessment, and (2) the determination of just value. There was a complete absence of a justiciable issue regarding the validity of the official assessment. This, alone, was sufficient to justify an award of attorneys' fees. That

portion of the litigation is the only portion for which Deltona sought fees. The remaining issue involved in the lawsuit was the determination of just value. Because of the property appraiser's grossly deficient appraisal methodology relied upon in trial testimony, the testimony of the property appraiser's expert could have been stricken, and a verdict could have been directed in Deltona's favor. Based upon those circumstances, the district court was imminently correct when it stated that there was "virtually" a complete absence of a justiciable issue as to a "substantial portion" of the lawsuit. That characterization of the entire lawsuit was not essential to its decision to award attorneys' fees for successfully invalidating the official assessment. And that characterization was not an announcement of a rule of law that all of the attorneys' fees incurred in the trial court should be awarded when most of the lawsuit related to issues which were in essence frivolous. Petitioner attempts to elevate dicta to the status of a decision announcing a new rule of law. Such a semantical ploy cannot be used to vest this court with jurisdiction.

It is the conflict of decisions, not of opinions or reasons, that gives rise to conflict jurisdiction. Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970); Firestone v. Time, Inc., 271 So. 2d 745 (Fla. 1972); and Niemann v. Niemann, 312 So. 2d 733 (1975).

Petitioner contends that an award of attorneys' fees under Sec. 57.105, Florida Statutes, is reversible if the court awarding such fees fails to make a finding regarding a complete

absence of a justiciable issue. This contention, on the merits of the case, may be technically correct and could have been the basis for a motion for rehearing in the district court of appeal. In fact, it was the basis for a motion for rehearing, which was denied by the district court. But a district court of appeal is a court of final appellate jurisdiction and unless its "decision" expressly and directly conflicts with a decision of this court or of another district court, there is no jurisdictional basis for this court to correct that "technical deficiency." Lake v. Lake, 103 So. 2d 639 (Fla. 1958); Nielsen v. City of Sarasota, supra; Johns v. Wainwright, 253 So. 2d 873 (Fla. 1971).

Petitioner relies upon 23 cases as his basis for conflict jurisdiction. He argues that these cases "expressly and directly hold" that in order to award attorneys' fees under Sec. 57.105, Florida Statutes, there "must be a finding" regarding a complete absence of a justiciable issue. But nowhere in his jurisdictional brief does petitioner contend that the district court in the instant case "expressly and directly held" that there need not be a finding regarding a complete absence of a justiciable issue in order to award attorneys' fees under Sec. 57.105, Florida Statutes. Such a holding is essential to show a conflict with the decisions relied upon by Petitioner and thereby invoke the jurisdiction of this court to review the merits of petitioner's claim of technical error.

In Whitten v. Progressive Casualty Insurance Company, 410 So. 2d 501 (Fla. 1982), this court reversed a lower court's award of attorneys' fees under Sec. 57.105, Florida Statutes,

because its order contained no finding regarding a complete absence of a justiciable issue. This "technical deficiency", as it was described by this court, did not create a conflict, however, so as to invoke this court's jurisdiction, as is sought in the instant case. Jurisdiction in Whitten, supra, was based upon Sec. 3(b)(1) of Article V, Florida Constitution, relating to the constitutionality of a state statute, not Sec. 3(b)(3) of Article V, dealing with decisional conflict. If a "technical deficiency" does exist in regard to the district court's decision, because there is no finding regarding a complete absence of a justiciable issue, this does not create a conflict so as to support jurisdiction in this court. Such "technical deficiency" relates solely to the merits of the case, which can only be considered by this court after jurisdiction is established. Jurisdictional conflict, however, has not been established and does not exist.

This court in Whitten, supra, specifically approved the holding in Hernandez v. Leiva, 391 So. 2d 292 (Fla. 3d DCA 1980), where attorneys' fees were awarded for prevailing on non-justiciable issues raised by the losing party, even though there were other justiciable issues involved in the litigation. This is precisely the circumstances which existed in the instant case, although the property appraiser's defense of the justiciable issues was virtually frivolous, as noted by the district court below. In Whitten, supra, this court held that the decision in Hernandez v. Leiva, supra, comports with the

intent of the legislature in adopting Sec. 57.105, Florida Statutes, which was to:

> discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities. (id at 505)

The decision in the instant case comports with the purpose of Sec. 57.105, Florida Statutes. The lower court properly awarded attorneys' fees against the property appraiser who engaged in stonewall defenses and continued to maintain a frivolous defense solely in retaliation for the taxpayer's challenging his unlawful assertion and not letting a "sleeping dog lie." The decision sought to be reviewed is totally consistent with Whitten, supra, and the other cases relied upon by Petitioner as a basis for conflict.

CONCLUSION

Based upon the foregoing argument and authorities, Respondent requests that this court decline to accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copy of the foregoing brief on jurisdiction was furnished C. Ray Greene, Jr., of Greene, Greene, Falck & Coalson, P.A., 2600 Gulf Life Tower, Jacksonville, Florida 32207, by United States Mail this 18th day of June, 1986.