IN THE
SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 70,812

BROWARD COUNTY, a political subdivision of the state of Florida,

Appellant,

vs.

THE STATE OF FLORIDA AND THE SEVERAL PROPERTY OWNERS, TAXPAYERS AND CITIZENS OF BROWARD COUNTY, FLORIDA, INCLUDING NON-RESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, AND OTHERS HAVING OR CLAIMING ANY RIGHT, TITLE OR INTEREST IN PROPERTY TO BE AFFECTED BY THE ISSUANCE OF THE BONDS HEREIN DESCRIBED, OR TO BE AFFECTED THEREBY,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

ALAN C. SUNDBERG
Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, P.A.
Suite 410
Lewis State Bank Building
P.O. Drawer 190
Tallahassee, Florida 32302
Telephone: (904) 224-1585

SUSAN F. DELEGAL
General Counsel for Broward County
Florida Bar No. 172954
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (305) 357-7600

JAMES K. MANNING
Brown & Wood
One World Trade Center
New York, New York 10048
Telephone: (212) 839-5300

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POINT I

BONDHOLDERS ARE NOT INDISPENSABLE PARTIES TO THE VALIDATION PROCEEDINGS

A. Standard of Review

The State and Intervenors incorrectly suggest that the standard for reviewing the trial court's granting the motion to dismiss for failure to join indispensable parties is one of abuse of discretion. However, review of Florida cases concerning such motions under Fla.R.Civ.P. 1.140(b)(7) reveals that the proper standard for review is whether the trial court erred as a matter of law in dismissing a cause of action which should otherwise have been heard.

Thus, in Fincher Motor Sales, Inc. v. Lakin, 156 So.2d 672 (Fla. 3d DCA 1963), the Third District determined that the trial court committed legal error in dismissing a claim for failure to join an indispensable party, because the absentee defendant was jointly liable and therefore could be sued separately and alternatively. See also Hertz Corp. v. Piccolo, 453 So.2d 12 (Fla. 1984) (affirming District Court's reversal of trial court's dismissal for failure to join indispensable party, because trial court erred as matter of law in determining absentee party was indispensable). Thus, the standard of review is whether the lower court committed legal error in dismissing this validation case for failure to join the Bondholders.

B. Prior Case Law, Relevant Statutes and the Circumstances of This Case Demonstrate That the Bondholders Are Not Indispensable Parties to the Second Validation Suit

The central legal issue at hand is simply whether Bondholders are indispensable parties to a second bond validation suit which attempts to establish validation under Chapter 159, Florida Statutes, as consistently contemplated in the original offering and previous validation suit under Chapter 166, Florida Statutes. See State v. Broward County, 468 So.2d 965 (Fla. 1985). As noted in Grammer v. Roman, 174 So.2d 443 (Fla. 2d DCA 1965):

> As a general rule an indispensable party is one whose interest in the subject matter is such that if he is not joined a complete and efficient determination of the equities and rights between the other parties is not possible.

Id. at 445. Examination of Florida bond validation cases demonstrates that even when bondholders exist before the validation suit, Florida courts have not viewed these bondholders as indispensable parties without whom a judgment could not be adequately rendered.

In State v. City of Venice, 147 Fla. 70, 2 So.2d 365 (1941), the city originally validated its bonds under the Supreme Court's approval. The city then issued refunding bonds for the purpose of refunding both principal and interest to bondholders. These bonds were also validated, without the joinder of existing bondholders. Similarly, in State v. Town of Riviera, 143 Fla. 705, 197 So. 525 (1940), a city's bonds were validated despite the prior sale of these bonds. Again, existing bondholders were not

joined, yet a judgment of validation was issued. Indeed, Florida courts regularly entertain validation proceedings for refunding bonds, as provided by the legislature in Section 132.29, Florida Statutes, and Chapter 75, to which holders of the outstanding bonds are not made parties. See, e.g., Wohl v. State, 480 So.2d 639 (Fla. 1985) (validating Sebring Utility Commission revenue refunding bonds to pay outstanding 1981 obligations); Orlando Utilities Commission v. State, 478 So.2d 341 (Fla. 1985) (validating bonds to refund outstanding long-term revenue bonds of Commission); State v. City of Daytona Beach, 360 So.2d 777 (Fla. 1978) (validating revenue refunding bonds to pay principal, interest and redemption premiums on outstanding bonds); State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978) (validating double advance refunding bonds to pay bonds issued in 1973 and 1976); Totten v. Okaloosa County Gas District, 164 So.2d 15 (Fla. 1964) (validating revenue refunding bonds to liquidate outstanding district bonds); State v. Jacksonville Expressway Authority, 93 So.2d 870 (Fla. 1957) (validating refunding bonds to pay outstanding bonds issued in 1950).

These numerous refunding cases demonstrate that the instant situation is hardly unique as argued by the State and the Intervenors. The legislature specifically provided that the validation of refunding bonds should be conducted in a manner identical to that of all other bonds. See §132.29, Fla. Stat. (1985). Certainly the legislature recognized the existence of

bondholders in those circumstances, and yet the legislature did not create an exception to either Chapter 75 or Chapter 132 for those bondholders in validation proceedings for refunding bonds.

Against the clear statutory provisions and the host of refunding cases, which did not require the presence of bondholders as indispensable parties, the State and Intervenors can cite only State v. Hillsborough County, 113 Fla. 345, 151 So. 712 (1933), to support their arguments. Not only is Hillsborough not directly on point, as readily conceded by the State (SB 22)[1] it is distinguishable from the instant validation and the above refunding cases for reasons unique to it and discussed in the County's Initial Brief (CB 30-32). Most importantly, far from being authority for the indispensability of bondholders, Hillsborough made clear that in validation proceedings bondholders are not proper, much less indispensable, parties. Id. at 717.

In any event, the State and the Intervenors wholly fail to demonstrate how the economic interests of the Bondholders could be adversely affected by the results of the validation proceeding. As explained at length in the County's Initial Brief, Bondholders are presently protected as to principal and interest by escrowed Government Obligations together with the similarly protected excess earnings realized to date (CB 6-7).

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[1] The County's Initial Brief shall be designated by the symbol CB and the symbol CA will refer to the County's Appendix. The State's Answer Brief shall be designated by the symbol SB and the symbol SA will refer to the State's Appendix. The Intervenors' Answer Brief shall be designated by the symbol IB.

In the event that the Bonds are not validated under Chapter 159, the escrowed Government Obligations (together with the excess earnings) remain available for full payment of principal and interest. If the Bonds are validated and converted to Chapter 159 bonds, the Bondholders will have the further protection of the option of either continuing to hold the converted Bonds (pursuant to a supplement to the Official Statement describing in detail the new collateral for the Bonds) or tendering their bonds for full payment of principal and interest. At the juncture when Bondholders must make their decision to continue to hold the Bonds or tender for repayment, they are, as a practical matter, in precisely the same situation as any other potential investor in connection with a new issue of bonds. Their presence as parties to the revalidation is no more necessary or appropriate. Indeed, joinder of the existing Bondholders as indispensable parties is an exercise in futility, because a new group of investors could own the Bonds after conversion, if most existing Bondholders make a decision to tender for repayment.

Even assuming there was any prospect that the Bondholders' rights could be affected in the validation proceeding, that reason alone is insufficient to justify treating them as indispensable parties. See Natural Resources Defense Council, Inc. v. Berklund, 458 F.Supp. 925 (D.D.C. 1978), aff'd, 609 F.2d 553 (D.C. Cir. 1979) (environmental group seeking declaratory relief concerning preference right coal leases was not required to join lease applicants as indispensable parties). Likewise, every commercial insured who would have received a 10 percent rebate

under the Tort Reform and Insurance Act of 1986 was clearly not an indispensable party to the constitutional attacks against that act raised by the insurance companies. See Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987). Yet, these insureds would unquestionably be adversely affected by the outcome of that litigation since they would lose their rebates, which were ultimately declared unconstitutional. Therefore, it is evident that every person who has an interest in a lawsuit or who will be adversely affected by that lawsuit does not thereby become an indispensable party.

This is particularly so since the Bondholders, unlike the insureds in Smith, would retain their right to litigate any prejudice to them. In this regard, the Florida courts have repeatedly found that bondholders retain the opportunity to litigate their rights on the bonds in proceedings other than validation. See, e.g., State ex rel. Conn v. Henderson, 130 Fla. 288, 177 So. 539 (1937) (peremptory writ of mandamus granted in action to levy tax to pay past due interest on bonds); City of Winter Park v. Dunblaine, Inc., 121 Fla. 600, 164 So. 366 (1935) (action against city to recover amounts due on matured bonds affirmed); Whitney v. Hillsborough County, 99 Fla. 628, 127 So. 486, 494 (Fla. 1930) (bondholders are not necessary parties to suit to enjoin further collection of taxes to pay bonds because their contract rights are not prejudiced; they still have an independent legal remedy and their interests are represented by county commissioners and trustee).

The Intervenors' assertion that principles of due process would be violated by failure to join the Bondholders simply begs the question of whether the Bondholders are indispensable parties. If they are, then the notice and hearing requirements will be satisfied by their joinder. If they are not indispensable parties, then due process concerns are not raised. Thus, the notice and hearing requirements of due process are subsumed under the principles of indispensable parties, and do not represent additional considerations. See 3A Moore's Federal Practice ¶19.01-1[2] (2d ed. 1987).

C. Under An Analysis of Comparable Fed.R.Civ.P. 19, the Bondholders Cannot Be Considered Indispensable

Although Florida has no civil rule dealing with the issue of indispensable parties, this concept is clearly included in Fla.R.Civ.P. 1.140(b)(7). Analysis of the comparable federal rule, Fed.R.Civ.P. 19(b), is a useful guide to determine whether a party is truly indispensable.[2]

The federal rule provides a helpful analysis in determining indispensability:

> The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence

[2] Florida courts have consistently turned to the federal rules and cases to assist in problems arising under Florida's civil rules. See Zuberbuhler v. Division of Administration, 344 So.2d 1304 (Fla. 2d DCA 1977), cert. denied, 358 So.2d 134 (Fla. 1978).

> will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed.R.Civ.P. 19(b).

Under the first factor, extent of potential prejudice, those who are parties are certainly not prejudiced by the Bondholders' absence, since all that is sought is a declaration of validity. As to the Bondholders, any prejudice is purely theoretical, since they have the absolute right to tender for full payment of principal and interest, regardless of whether the Bonds are validated or not under Chapter 159. Moreover, the Bondholders' interests are adequately protected by the State and other persons opposing the new validation. There is simply no substantial risk to the Bondholders raised by the validation proceedings.

The second factor, protective measures to avoid prejudice, would permit the trial court to fashion various remedies to avoid prejudice. For instance, the decree could specifically exclude such collateral matters as the alleged misrepresentations made to the Bondholders, allowing separate suits by aggrieved bondholders. Moreover, the validation statute itself preserves the right of "[a]ny . . . person interested" (including any interested Bondholder) to intervene "at or before the time set for hearing." §75.07, Fla. Stat. (1985). This broad right of intervention, coupled with the obligation of the County to publish notice of the validation proceeding (§75.06, Fla. Stat. [1985]) and to afford such additional protection as providing

notice to counsel of record as directed by this Court in the prior proceeding (CB 10), affords all interested parties the opportunity to appear and protect their interests.

The third factor, adequacy of judgment, is clearly met by the rendition of a judgment validating these Bonds under Chapter 159. This relief is the complete relief sought by the County, and a finding of compliance with the requirements of Chapter 159 in no way necessitates the presence of Bondholders in order to be adequate.

The final factor, whether the plaintiff will have an adequate remedy if dismissed, weighs heavily in favor of finding that Bondholders are not indispensable parties. As the Intervenors note, practically all of the numerous Bondholders are outside the jurisdiction of Florida. There is serious doubt that the County could acquire jurisdiction over all of these out-of-state Bondholders for the purpose of serving process. Merely purchasing a bond hardly leads one to expect he will be haled into a Florida court to defend against a validation proceeding. Because the jurisdictional nexus is highly suspect, the County has no alternative means of pursuing validation proceedings. Dismissal in this case amounts to denial of any chance to establish validation of these Bonds under Chapter 159.

Only the clearest of justifications should warrant dismissal of an action for failure to join an indispensable party. See, e.g., Amerada Hess Corp. v. Morgan, 426 So.2d 1122 (Fla. 1st DCA 1983) (appellant did not meet burden of showing absentee was indispensable party). The County has shown that it has no

alternative adequate remedy and that any prejudice to existing Bondholders is purely speculative. See Phillips v. Choate, 456 So.2d 556 (Fla. 4th DCA 1984) (dismissal of action for failure to join indispensable party was error where it effectively foreclosed suit). Under these circumstances, the County should be permitted to present the merits of its Complaint for Validation to a trier of fact, and should not be foreclosed by the inability to join existing Bondholders.

POINT II

THE ORDER ON APPEAL IS FINAL AND PROPERLY REVIEWABLE BY THIS COURT

The Intervenors do not contest the appealability of the Circuit Court's Order of June 24, 1987 (the "Order"). Moreover, the State is plainly ambivalent on this issue. In its Preliminary Statement, the State refers to the Order as "a final order and judgment of the Circuit Court dismissing" the County's Complaint for Validation and goes on to assert that jurisdiction of this appeal is vested in this Court pursuant to precisely the same Constitutional, statutory and procedural provisions as relied upon by the County (SB 1). Notwithstanding this apparent concession, the State goes on to argue that the Order is not appealable (SB 8).

It is clear that both the County and the State (CA 24 at 1; CA 18 at 9; SB 5) sought a final, appealable order and that the Order as entered by the Court at the request of both parties is final, both in form and as to substance. As to form, Section 75.08, Florida Statutes, specifically provides that "any party to

the action . . . dissatisfied with the final judgment, may appeal to the supreme court within the time and in the manner prescribed by the Florida appellate rules." §75.08, Fla. Stat. (1985) (emphasis added). As the State concedes, the Circuit Court clearly intended its Order as final and, indeed, denominated the Order as its "Order and Final Judgment." As to substance, the Circuit Court Order has the effect of a final order. As noted in the County's Statement of the Case and Facts (and as conceded by the Intervenors [IB 3]), it would be impossible as a practical matter to join the Bondholders, who are numerous and geographically diverse, as parties to this action (CB at 13). Thus, any order finally determining that the Bondholders must be joined effectively terminates this validation proceeding.

The State's reliance on Lawler v. Harris, 418 So.2d 1239 (Fla. 5th DCA 1982) is misplaced in that Lawler stands for the proposition that the bare dismissal of a complaint without a formal dismissal of the action is insufficient. In this instance, however, it is clear that the Circuit Court intended to dismiss the action as well as the complaint and that it has rendered a "final judgment". Even as regards its limited holding, the district court in Lawler specifically acknowledges that there is a split in authority and that there are cases where an order granting a motion to dismiss a complaint is considered to be a final appealable order. Id. at 1240 (citing Cordani v. Roulis, 395 So.2d 1276 (Fla. 4th DCA 1981), and Segal v. Garrigues, 320 So.2d 475 (Fla. 4th DCA 1975)). Furthermore, the State fails to make clear that Lawler favors only "temporary

relinquishment of an inchoate jurisdiction rather than a non-productive and wasteful dismissal of the cause." Lawler, 418 So.2d at 1240 (citing Gries Investment Company v. Chelton, 388 So.2d 1281, 1282 n.4).

The suggestion by the State here that the Court relinquish jurisdiction back to the Circuit Court (SB 8) for purposes of having that Court reiterate its (and, for that matter, the parties') intent would surely exalt form over substance. Such a procedural diversion is particularly inappropriate given the delays to date in this proceeding.

POINT III

THE ISSUE OF COLLATERAL ESTOPPEL HAS NOT BEEN WAIVED NOR HAS THE COUNTY ACQUIESCED IN THE PRE-HEARING DISPOSITION OF ISSUES

The County, contrary to the State's assertions, has preserved the issue of collateral estoppel for appeal. As noted by the State, the County raised the issue of collateral estoppel in its Memorandum in Support of Validation (CA 11 at 13-16). In addition, in the course of the litigation of the indispensability issue, the County raised on two additional occasions the controlling nature of the earlier decisions of this Court and the Circuit Court in connection with the predicate issues raised by the State and the Intervenors in support of their Bondholder indispensability argument. (See CA 17 at 2 and CA 20 at 5-6).

Moreover, the State has relied upon case law that is hardly applicable to the present case. The State relies upon only those cases in which the defense of collateral estoppel has never been

raised at all. See, e.g., Lipe v. City of Miami, 141 So.2d 738 (Fla. 1962) ("The record is devoid of a single fact which would indicate this question was ever before the trial court"); Dober v. Worrell, 401 So.2d 1322 (Fla. 1981).

In addition, it is clear that the issue of Bondholder misrepresentation was raised in the first validation proceeding by the Intervenors in their Reply Brief and was specifically adopted by the State on oral argument. Indeed, the State, at oral argument, characterized as its "main contention" the allegation that the County was misrepresenting Chapter 159 bonds as Chapter 166 bonds. Moreover, that argument was sufficiently central to the oral argument of the State and the County that the State, in its Motion for Rehearing stated that "[t]here was also great concern expressed by this Court at the oral argument of March 6, 1985, that the Bondholders were not misled (CA 28 at 2) . . . ." It is simply disingenuous for the State to now disavow arguments clearly advanced by it and to contend that this issue was never litigated before or decided by this Court. Quite to the contrary, this Court, after full briefing and oral argument, "[found] no merit in any of the other arguments raised by appellants." State v. Broward County, 468 So.2d 965, 969 (Fla. 1985).

Finally, the State argues that the County has somehow acquiesced in the pre-hearing disposition of issues such as the indispensability question, thus preventing the County from raising these issues on appeal (SB 26-27). Nothing could be farther from the truth. For instance, and as regards the

indispensability issue, both the State and the Intervenors made motions on that question returnable on May 5, 1987, two days before the scheduled validation hearing on May 7, 1987 (CA 10 and CA 13). The County obviously had no choice but to respond and submitted a brief to the Circuit Court at the May 5, 1987 hearing (CA 16 at 21 and CA 33). As regards the factual support for its position, the County submitted an affidavit of Alan D. Marks of the investment banking firm of Smith Barney, Harris Upham & Co. Incorporated (CA 16 at 23-24 and CA 31). By agreement with the State, the purpose of submitting that affidavit was not to permit disposition of the indispensability issue at the May 5 hearing, but, rather, to preserve the issue for the validation hearing at which Mr. Marks was to testify (CA 16 at 23-24). Contrary to the intent and understanding of the County, the Circuit Court decided the issue on May 5, 1987 and the validation hearing was cancelled. The County is unable to understand how its response to various issues raised by the State and the Intervenors constitutes acquiescence in the pre-hearing disposition of these issues and most particularly of the indispensability issue.

CONCLUSION

The County respectfully submits that, for the reasons set forth above, this Court should reverse the Circuit Court's Order and remand the cause with instructions to conduct a validation proceeding in accordance with the spirit and dictates of Chapter 75, Florida Statutes.

Respectfully submitted,

SUSAN F. DELEGAL
General Counsel for Broward County
Florida Bar No. 172954
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (305) 357-7600

ALAN C. SUNDBERG
Carlton, Fields, Ward, Emmanuel,
Smith, Cutler & Kent, P.A.
Suite 410
Lewis State Bank Building
P.O. Drawer 190
Tallahassee, Florida 32302
Telephone: (904) 224-1585

Of Counsel:

JAMES K. MANNING
Brown & Wood
One World Trade Center
New York, New York 10048
Telephone: (212) 839-5300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been delivered by mail to FRANK KRIEDLER, ESQUIRE, 521 Lake Avenue, Suite 3, Lake Worth, Florida 33460; and CHRISTINA SPUDEAS, ESQUIRE, State Attorney's Office, 201 Southeast Sixth Street, Room 640, Fort Lauderdale, Florida 33301, on this 10th day of August, 1987.

By F. Townsend Hawkes
F. TOWNSEND HAWKES
Carlton, Fields, Ward,
Emmanuel, Smith, Cutler &
Kent, P.A.

* correct spelling
Frank Kreidler