O/A 8-31-88

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71-826

CRANE RENTAL OF ORLANDO, INC.,

Petitioner,

vs.

FORD S. HAUSMAN, as Orange County Property Appraiser,

Respondent.

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

CHARLES EVANS DAVIS, ESQ., of
Fishback, Davis, Dominick
& Bennett
170 East Washington Street
Orlando, Florida 32801
Phone No. (305) 425-2786
Attorneys for Petitioner
FLORIDA BAR LAWYER NO. 018161

TABLE OF CONTENTS

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

Motor cranes are exempt from ad valorem taxation as motor vehicles pursuant to Article VII, §1(b) of the Constitution of the State of Florida, and Fla. Stat. §§320.01 and 320.08.

ARGUMENT

The Respondent, in his Answer Brief, states that the decision below should be affirmed primarily because there is competent evidence to support the trial court's ruling. This principle has no application to the case in issue because this case should be determined upon the basis of the statutes adopted by the Florida Legislature and the exemption provided in the Constitution which the trial court and appellate court have misapplied.

Notwithstanding the above, there was competent evidence as well as the statutes presented in the trial court to support a conclusion that the subject cranes were motor vehicles, and therefore exempt from ad valorem taxation. Petitioner's witness, Mr. Ashlock with 24 years of experience in crane rental and operation, gave expert testimony which was clearly competent. Respondent quotes (AB 5) the opinion of Respondent's witness, Mr. Cooper, that the machines involved in this case could not be used to transport persons or property over the state roads, while the same witness, on cross-examination (R 60-61), admitted that the cranes could lawfully transport

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References herein are:

(AB) - Respondent's Answer Brief
(R) - Record on Appeal

persons and property on the public roads.

The Respondent asserts at (AB 6) that the Petitioner was totally unable to substantiate that its claims that the cranes were motor vehicles or show the relative time that the cranes spent traveling the roads, etc. This totally disregards the testimony of Mr. Ashlock, whose testimony (R 65-69) is uncontroverted in the record that the majority of the cost, weight, horsepower and time of operation of the cranes is incurred in the travel of the cranes over the public highways and that they are used to transport persons and property. These are factual statements based upon the experience and knowledge of the witness and characterized by Respondent in his Brief as conclusory and unsupported by substantial competent evidence. This testimony was uncontroverted in the trial court and undisputed by any evidence.

The Respondent quotes Mr. Ashlock as conceding that the crane portion of the equipment should be taxed and that some of the cranes should be taxed. Respondent is therefore contending on the one hand Mr. Ashlock's testimony is not competent, while at the same time using that same testimony to reach a legal conclusion. This opinion of the witness was clearly contrary to all of his basic testimony.

The witness, Ms. Griffis, and the instructions promulgated by the Department of Revenue cited by the Respondent upon which her legal opinion was based, have no binding effect as either law or regulation as the court recognized. (R 81) Petitioner offered discovery taken in the case reflecting

that there has been no compliance with the Administrative Procedures Act (Chapter 120) in the promulgation of the rates and rules upon which the taxing authorities base their contentions in this case. (R 81)

The Respondent argues that three of the cranes did not have license tags when they were inspected and photographed by Mr. Hester. This has nothing to do with the issues in the case, as recognized in Nolan-Peeler Motors v. Wood, 128 Fla. 756, 175 So. 523 (Fla. 1937), in which the court held:

> An automobile is a motor vehicle even though not yet licensed or operated on the public highways.

Id. at 524. The issue in this case is whether the cranes are motor vehicles, not whether license tags were affixed to the cranes.

The Respondent mistakenly relies on definitions contained in Florida Statutes, Ch. 316 (1985), the Uniform Traffic Control Statute, to conclude that a crane is not a motor vehicle. Florida Statutes, §316.003(21) (1985), defines a motor vehicle as:

> Any vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails, but not including any bicycle or moped as defined in subsection (2).

Such a definition includes cranes in issue, since they are vehicles which are self-propelled. In Florida Statutes, §316.003(49) (1985), there is a definition of special mobile equipment, which includes cranes.

The Respondent believes, and the Fifth District determined,

that since special mobile equipment was separately defined, that those vehicles contained within this definition were meant to be excluded from the definition of motor vehicles. However, the definition of "special mobile equipment" merely creates a more specific definition of certain vehicles for purposes of Ch. 316 (1985), and was not meant to exclude them from the definition of motor vehicles.

Additionally, Ch. 316 (1985) is concerned with uniform traffic control, not license or taxation, and the fact that cranes come within the definition of special mobile equipment is irrelevant for purposes of whether they are subject to license taxation. In fact, §316.003 (1985) specifically states:

> The following words and phrases, when used in this chapter, shall have the meanings respectively ascribed to them in this section, except where the context otherwise requires: ...

(Emphasis supplied)

The applicable definition of a motor vehicle is contained in Ch. 320 (1985), the Motor Vehicle Licensing Act in which the preface language states:

> **320.01 Definitions, general. --** As used in the Florida Statutes, except as otherwise provided ...

Respondent believes that since the "except as otherwise provided" language in §320.01 (1985) does not say "except as otherwise provided in this Chapter," and since cranes are specifically defined in §316.003(49) (1985), that the cranes are therefore "special mobile equipment" and not motor vehicles. Such an interpretation of §320.01 (1985) is clearly erroneous.

Motor vehicles are defined throughout the Florida Statutes for various purposes, e.g., §322.01(2) (1985), §520.02(7) (1985), and §627.732(1) (1985).

Therefore, by stating "except as otherwise provided" in §320.01 (1985), the Legislature intended that when the term "motor vehicle" is defined in the Florida Statutes, it shall have the meaning as defined in §320.01 (1985), except as otherwise provided. It does not mean, as Respondent alleges, and the Appellate Court decided, that definitions such as "special mobile equipment" in §316.003(49) (1985) are to be a substitute for the definition of "motor vehicle." This reasoning has even more validity, given that definitions under Chapter 316 are specifically restricted to that Chapter.

Given that §320.01(1)(a) (1985) is the applicable definition, the subject cranes satisfy all of its requirements. The cranes are operated on the roads of this state. The cranes are designed to transport two persons, the driver and the oiler, as well as buckets, slings, booms and other equipment, and the crane or lifting portion of the machine itself. The occupants are certainly "persons" and the transported equipment is certainly "property." Finally, the cranes are propelled by other than muscular power.

Respondent then contends that since the primary function of the cranes is not the transportation of persons or property, that they are not motor vehicles. However, nowhere in the Florida Statute, §320.01(1)(a) (1985), is there a requirement that the primary purpose be transportation of persons or property,

only that the vehicle be capable of transporting persons or property. Until this definition is amended by the Legislature, the taxing authorities do not have the power to ignore the statutory definitions and to assess an ad valorem tax on any vehicle that conforms to §320.01(1)(a) (1985).

Respondent states that Florida Statutes, §320.08(5)(b) (1985), which imposes a license tax on "[a] motor vehicle equipped with machinery and designed for the exclusive purpose of well drilling, excavation, construction, spraying, or similar activity," is not applicable to this case. Respondent's contention is that this section refers only to vehicles such as trucks with a well drilling rig located in the bed.

However, self-propelled cranes clearly fit within the definition of §320.08(5)(b) (1985). The foregoing establishes that they are "motor vehicles" as defined in §320.01(1)(a) (1985). Further, the subject vehicles are "equipped with machinery" because affixed to them is the crane apparatus. Finally, the cranes are designed for the exclusive purpose of assisting in the moving of heavy objects at construction sites.

Respondent further states that §320.08(5)(b) (1985) is inapplicable because truck-mounted machinery is specifically excluded from the definition of special mobile equipment in §316.003(49) (1985). As stated above, however, §316.003(49) (1985) is totally irrelevant and has no application to this case.

Respondent's final contention against §320.08(5)(b) (1985) is that since none of the cranes were charged the $32.50 charge

for their identification tag, as provided in §320.08(5)(b) (1985), and instead charged $34.75 in Tax Class Code 94, that they are not within §320.08(5)(b) (1985). The fact that a discrepancy exists between the $34.75 that the taxing authorities are assessing, and the $32.50 that they should be charging, is not relevant to any issue before this Court, except, perhaps, that the taxing authorities do not comply with the statute as required. Additionally, the Tax Class Code 94, is a publication promulgated by the Department of Revenue, and therefore does not substitute or supersede the requirements of Florida Statutes, §320.08(5)(b) (1985). The Legislature chose to tax these cranes at $32.50 (or $34.75) as a license fee and the tax administrative authorities proceeded to tax and license these vehicles pursuant to the Tax Class Code 94. The taxing authorities are therefore barred by the constitutional prohibition of Article VII, §1(b) of the Florida Constitution from imposing on these same vehicles an ad valorem tax. The Supreme Court of Florida specifically held in Nolan-Peeler Motors v. Wood, 128 Fla. 756, 175 So. 523 (Fla. 1937):

> Only one form of taxation of a motor vehicle is authorized. That is the form of a license tax. An ad valorem tax is not in the form of a license tax. Hence, it is beyond the authority of the Legislature to levy such a tax upon motor vehicles.

Id. at 524. In the above cited case, some of the vehicles were neither operating, nor licensed, and the Supreme Court nevertheless held the constitutional exemption applied.

None of the cases cited by the Respondent in its Answer Brief are relevant or persuasive as to the issues involved.

In M.J.S. v. State, 453 So.2d 870 (Fla. 2d DCA 1984), a defendant in a juvenile delinquency case was charged with trespass relating to a construction backhoe. In that case, the Second District held that the backhoe did not constitute trespass to a "conveyance" within the meaning of Florida Statutes, §810.08 (1985). Respondent attempts to cite this factually unrelated case to ours because the determination by the Second District held that the construction backhoes were not motor vehicles, since they were defined as "special mobile equipment" in §316.003(49) (1985). However, as stated above, the definition under this section is irrelevant for purposes of this case. Additionally, the construction backhoes were never licensed by the state, and were never issued motor vehicle tags as were the cranes involved herein.

Respondent next cites Sherman v. Reserve Insurance Company, 350 So.2d 349 (Fla. 4th DCA 1977), which involved an interpretation of an automobile insurance policy. Sherman held that all of the elements prescribed in §320.01 (1985) must be met before an item is a "motor vehicle." Since the Petitioner has established in the foregoing that the cranes in issue satisfied all of the statutory requirements of Florida Statutes, §320.01 (1985), this case is, in fact, supportive of Petitioner's position.

Respondent argues that Forbes v. Bushnell Steel Construction Company, 76 So.2d 268 (Fla. 1954), is authority for support of Respondent's position. While the case did involve the issue herein, there was no disposition of that issue by the Supreme Court of Florida, the court remanding the case for

the submission of further evidence as to the cranes' design and use of the highways. The reason the court in Forbes remanded was for a determination of whether the vehicles in issue had as their primary purpose the transportation of persons or property, which is a factor that is not contained within §320.01 (1985). Forbes is also not applicable because the critical issue in the case at bar was not even considered, to-wit: the application of Florida Statutes, §320.08(5)(b) (1985).

Respondent next cites Green v. Pederson, 99 So.2d 292 (Fla. 1957). Green involved a question of sales or use taxes and their exemption for motor vehicles that did not operate on public roads. The vehicle in Green almost exclusively operated on private property. The court held that since the vehicle occasionally traversed the public highways on special occasions, that this alone would not bring it within the purview of the Motor Vehicle License Act. In the instant case, the testimony at the trial court as to the cranes in issue revealed that a majority of their time and operation is devoted to transportation on the state's roadways. This is why these cranes, and not the trackless trains in Green, were required to pay a license tax. It can hardly be argued that if these trackless trains ventured frequently onto the state's roadways, they would be assessed a license tax and thus exempt from ad valorem taxation.

Respondent cites Adams Construction Equipment Company v. Hausman, 472 So.2d 467 (Fla. 5th DCA 1985), for the proposition that the cranes may or may not be taxable as tangible personal

property. In Adams, the issue was whether heavy construction equipment held for rental was exempt as inventory under the personal property tax laws and the Fifth District held properly that equipment held for rental as opposed to sale is not "inventory." Whether personal property held for rental or sale is inventory and therefore exempt, is totally irrelevant to the issues herein.

Respondent cites Attorney General Opinion 55-113, which also does not address the questions involved herein. The issue in that Opinion was whether earth-moving machines used solely for off-highway work were required to have license plates as motor vehicles pursuant to Ch. 320 (1985), and the Opinion answered in the negative. The machines in the case at bar are specifically required, since they frequently travel on the highways to be licensed, and were, in fact, licensed by the Petitioner as motor vehicles so as to entitle them to operate on the public roads.

Respondent attempts to analogize golf carts to the self-propelled cranes. Attorney General Opinion 064-8 stated golf carts were not entitled to registration as motor vehicles, since a motor vehicle is required to conform to all applicable standards and regulations to traffic on roads. This Opinion implies that motor vehicles are those vehicles which must conform to traffic regulations. Therefore, since the self-propelled cranes are required to, and in fact do, conform to the traffic standards, that they are motor vehicles. This logic actually has merit in that a vehicle that frequently

traverses the roadways and conforms to all traffic regulations should be considered a motor vehicle the same as automobiles, trucks, etc.

Respondent contends that two cases cited by the Amicus Curiae brief are irrelevant to the present action. In Haveman v. Board of County Road Commissioners, 96 N.W.2d 153, 356 Mich. 11 (1959), the court found that a piece of road machinery equipment that consists of a turntable swing mounted upon a truck bed with a shovel or bucket on the end of the boom, was a motor vehicle within the meaning of a statute providing for the right of action against a political subdivision for damages resulting from negligent operation by a municipal employee of a motor vehicle. Respondent contends that since the vehicle in Haveman is a truck upon which was mounted a crane, that this vehicle is substantially different from Petitioner's self-propelled cranes, and therefore irrelevant. The fact that the court in Haveman found a vehicle such as a truck with a totally separate mounted crane to be a motor vehicle, supports Petitioner's position that a totally integrated, self-propelled crane, with thus more of the characteristics of a motor vehicle than the vehicle in Haveman, should be considered a motor vehicle.

In Donahue Construction Company v. Transport Indemnity Company, 86 Cal.Rptr. 632, 7 Cal.App.3d 291 (1970), the court found that a self-propelled crane, such as the one in issue, since it could be propelled, moved or drawn upon the highway, was a motor vehicle within the Motor Vehicle Code. Respondent

contends that since the real question involved in Donahue was the interpretation of an insurance policy, that this case is irrelevant. It is interesting to note that Respondent then proceeds to cite four cases, none of which concern the issues involved in this action. Therefore, under Respondent's reasoning, Petitioner agrees that the following cases are irrelevant to the issues involved herein.

Respondent cites In the Matter of Ferro Contracting Company, 380 F.2d 116 (3d Cir. 1967), a bankruptcy matter. The issue involved in that case was the validity of a lien upon a front end loader, bulldozer and backhoe. Clearly, these three pieces of construction machinery are different in both form and operation than self-propelled cranes which are capable of traversing the highways at relatively long distances to and from construction sites. The court in Ferro properly held that recording under the Uniform Commercial Code with respect to this equipment was sufficient to give the bank a valid lien, since this equipment was clearly not subject to the New Jersey Motor Vehicle Certificate of Ownership Laws.

In In re Ramco Well Service, Inc., 32 B.R. 525 (Bkrtcy. 1983), the court held that oil well work-over rigs were special mobilized equipment. This case is inapposite since the court found that the rigs were special mobilized equipment under a statute similar to Florida Statutes, §316.003(49) (1985) defining special mobile equipment, which has been established previously in this Brief, do not have any application to whether the cranes are motor vehicles within Ch. 320 (1985), the Motor

Vehicle Licensing Act. Further, Ramco was decided on the basis of bankruptcy laws and the Oklahoma Commercial Code and had nothing to do with taxation or licensing.

Respondent also cites Koehring Company v. Adams, 452 F.Supp. 635 (D.C. Wis. 1978), which involved the question of whether a manufacturer of mobile construction equipment is subject to the rule-making authority of the Department of Transportation and the National Highway Safety Traffic Administration and their motor vehicle safety standards, an issue totally unrelated to the instant action. The subject federal statute defined motor vehicle as a vehicle used primarily on the public streets and roadways. 15 U.S.C. §1391(3). The court went on to analyze whether the construction equipment involved was used "primarily" on the streets and highways. There is no requirement in Florida Statutes, §320.01(1)(a) (1985), that a vehicle be operated primarily for the transportation of persons or property over the highways; it only requires that a vehicle be capable of transporting persons or property over the state roads, which, in fact, the cranes are. Therefore, Koehring's analysis and reasoning are irrelevant.

Respondent finally cites In re Browning Crane & Shovel Company, 133 F.Supp. 653 (D.C. Oh. 1955), a bankruptcy case in which the issue was lien priority. Browning was decided under specific Ohio statutes exempting truck cranes from requirements regarding title to motor vehicles and has no application to the issues to be decided herein.

Respondent fails to adequately address Department of

Revenue v. Florida Boaters Association, 409 So.2d 17 (Fla. 1981), which was cited by Petitioner in its initial Brief. In Florida Boaters, this Court found unconstitutional a legislative attempt at defining a "live-aboard vessel" so as to eliminate the exclusion from an ad valorem taxation accorded to a "boat" under Article VII, §1(b) of the Florida Constitution. The Court reasoned that an exclusion from ad valorem taxation, as applied to a "boat," may not be denied to floating structures that are used, or capable of being used, for transportation or navigational purposes on water, and the statutory definition of a live-aboard vessel failed to address this.

Respondent, in his Answer Brief, states that Florida Boaters is inapplicable for two reasons. First, Florida Boaters addressed boats, and this case is concerned with motor vehicles. However, boats are exempt from ad valorem taxation under Article VII, §1(b) of the Florida Constitution, the same provision exempting motor vehicles, and therefore since there are no Florida cases addressing exemption from ad valorem taxation with respect to motor vehicles, analogous cases dealing with boats are useful and relevant. Respondent's second reason is that the cranes in question are not capable of transporting persons and property over the roads of Florida, and that the sailboat in Florida Boaters was capable of transportation on water. It has already been established that these cranes are capable of transporting persons or property over the state roads. Further, the fact that a sailboat is a "boat" within Article VII, §1(b) of the Florida Constitution, and therefore

exempt from ad valorem taxation, if capable of transportation over the water, should apply equally to the cranes which are capable of transporting persons or property over the roadways.

Boats are not required to prove that they are primarily, as opposed to incidentally, capable of transportation over the water. As the court in Land v. Department of Revenue, 510 So.2d 606 (Fla. 3d DCA 1987), rev. denied., 518 So.2d 1276 (1987), a case which the Respondent failed to address, decided that only those boats that are incapable of propelling themselves and have none of the indicia of a "boat" are considered not to be within the definition of a "boat" within Article VII, §1(b). Similarly, only those motor vehicles which are incapable of transportation of persons or property should be the only vehicles which should not be within the definition of "motor vehicles" under Article VII, §1(b).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Fifth District Court of Appeal be reversed. The cranes involved herein are motor vehicles within Florida Statutes, §320.01 (1985), licensed as such under Florida Statutes, §320.08(5)(b) (1985), and therefore exempt from ad valorem taxation under the Florida Constitution, Article VII, §1(b).

Respectfully submitted,

CHARLES EVANS DAVIS, ESQUIRE, of
Fishback, Davis, Dominick & Bennett
170 East Washington Street
Orlando, Florida 32801-2397
Phone No. (407) 425-2786
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and authentic copy of the foregoing has been furnished by mail to STEVEN R. BECHTEL, ESQUIRE, P. O. Box 2854, Orlando, FL 32802; and to GAYLORD A. WOOD, JR., ESQUIRE, 304 S.W. 12th Street, Ft. Lauderdale, FL 33315, this 20th day of June, 1988.

CHARLES EVANS DAVIS, ESQUIRE, of
Fishback, Davis, Dominick & Bennett
170 East Washington Street
Orlando, Florida 32801-2397
Phone No. (407) 425-2786
Attorneys for Petitioner
FLORIDA BAR LAWYER NO. 018161