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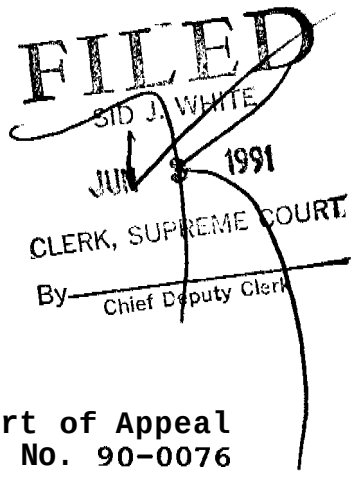

SUPREME COURT OF FLORIDA

CASE NO. 77,669

DON DAWSON, SR. and DORIS DAWSON, his wife,

Petitioners,

vs.

ABE SAADA and REGINA S. SAADA, his wife,

Respondents.

District Court of Appeal
4th District No. 90-0076

DISCRETIONARY REVIEW OF DECISION FROM
THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ANSWER BRIEF OF RESPONDENTS

THOMAS J. TIGHE, ESQ.
Florida Bar No. 352578
Lunny, Tucker, Karns & Tighe
Suite 505 - Cumberland Building
800 East Broward Boulevard
Fort Lauderdale, Florida
Telephone: (305) 467-7744

Counsel for Respondents

ABE SAADA and REGINA S. SAADA

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STATEMENT OF THE CASE AND OF THE FACTS

Respondents disagree that the evidence showed that the clerk performed all things preliminary to issuance of the deed except that of providing the sheriff with the additional notice as directed by §197.522(2), Fla. Stat. For instance, Respondents have contended that the Clerk failed to comply with 5197.542, Florida Statutes in specifying only "Courthouse Door" as the location of the tax sale. Respondents disagree that Judge Abrams indicated he was deciding the case on equitable grounds (R-90). The trial judge stated that if he were deciding on equitable grounds, he "probably might have to rule" for Respondents (R-90). Lastly, Respondents point out a misstatement in Petitioners setting out the question certified by the District Court, which referred to the "Notice Requirements of Section 197.522, Florida Statutes."

SUMMARY OF ARGUMENT

For tax deeds to be valid, the statutory notice requirements must be strictly complied with, which admittedly did not occur in this case. The statutes which Petitioners cite cannot be construed to immunize tax deeds from attack based on insufficient notice. This would make the notice provisions of Chapter 197, Florida Statutes, unenforceable, which is equivalent to there being no notice requirements, which would be unconstitutional as violating the right to due process. Precedent shows that statutes such as those on which Petitioners rely do not apply to protect tax deeds from challenge based on lack of required notice.

ARGUMENT

The caselaw firmly establishes that tax deeds not issued in compliance with the notice requirements of Section 197.522, Florida Statutes are not valid:

> The Supreme Court and the various district court of appeal have repeatedly held that strict adherence to the statutory notice requirements in relation to issuance of a tax deed is essential to the validity of the deed. Weiss v. Prudential Enterprises, Inc., 387 So.2d 457 (Fla. 1st DCA 1980).
>
> The clerk's failure to comply strictly with the statutory notice requirements in this case renders the tax deed void. Weiss, 387 So.2d at 459. (emphasis supplied).

This requirement is so strong that, in Weiss, the appellate court ruled that notice to the actual address where the owners lived was not sufficient because the applicable statute provided that the first choice for notice was the address on the deed where the owners did not live.

None of the many cases or authorities acknowledge Fla. Stat. 965.081, §197.332 and 5197.404 as protecting the validity of tax deeds as argued by the Petitioners. E.g., Montgomery V. Gipson, 69 So.2d 305 (Fla. 1954); Ozark Corporation v. Pattishall, 185 So. 333 (Fla. 1938); Wright V. Spriggs, 567 So.2d 3 (Fla. 4th DCA 1990); Kovaleski V. Tallahassee Title Company, 391 So.2d 315 (Fla. 1st DCA 1980); Edsewood Boys Ranch V. Ernst, 376 So.2d 30 (Fla. 3rd DCA 1979); Stubbs V. Cummings, 336 So.2d 412 (Fla. 1st DCA 1976); Alper V. LaFrancis, 155 So.2d 405 (Fla. 2nd DCA 1963), Florida Real Property Sales Transactions, (CLE 1978 and June, 1982

Supp.) Sec. 6.82; Real Property Title Examination and Insurance in Florida, (CLE 2d ed. 1988), Secs. 3.56 and 3.57; "Notice Requirements for Tax Sale", 16 Fund Concept 1 (Jan., 1984); "Clerks' Tax Deeds," 22 Fund Concept 49 (June 1990).

Contrary to the strict compliance standard established by the caselaw, Petitioners are advocating a "no compliance" standard--that a tax deed will be effective even if the statutory notice requirements are totally ignored. However, the Legislature would not create a detailed statutory scheme for notice to owners of tax sales intending the notice provisions to be simply optional, with the procedures and tax deeds issued pursuant thereto insulated from challenge by the statutes which Petitioners cite. Further, if the statutes mean what the Petitioners contend--for instance, that a Clerk can sign a deed to himself on land on which the taxes are not paid, with the owner being disabled from any challenge, then the statutory provisions are unconstitutional as depriving the property owner of his property without due process of law and being arbitrary and capricious.

The notice provisions of 5197.522 must be considered mandatory and be given priority and enforced, according to their terms, because notice is a constitutional requirement to the validity of a tax sale. In Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed2d 180 (1983), the United States Supreme Court stated the need for actual notice to those adversely affected by a tax deed sale:

> Notice by mail or other means as certain to insure actual notice is the minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party. . . Id. at 2712 (emphasis by court).

In Mennonite, the Supreme Court reversed a judgment quieting title in a tax sale purchaser. A mortgagee defended the quiet title action on the basis of insufficient notice to the mortgagee. Interestingly, the statutory scheme in Indiana contained the same type of "immunizing" statute which the Petitioners here urge, with the court relating the statute as follows:

> They may defeat the title conveyed by the tax deed only by proving, inter alia, that the property had not been subject to, or assessed for, the taxes for which it was sold, that the taxes had been paid before the sale, or that the property was properly redeemed before the deed was executed. §6-1.1-25-16. Id. at 2709

The Supreme Court allowed and upheld the mortgagee's challenge to the tax deed and defense to the quiet title action even though the grounds asserted by the mortgagee were not within the foregoing statute.

While the Petitioners want this Court to consider the statutory notice requirements just a "gratuity," initial brief at page 12, notice laws which are not mandatory nor enforceable are "mere gestures," and do not comply with Constitutional due process requirements. Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956); Stubbs v. Cummings, 336 So.2d 412, 414 (Fla. 1st DCA 1976).

Based on Mennonite, then, constitutional due process requires at least full compliance with the notice provisions of Section 197.522, which admittedly was not complied with in this case. Laws protecting tax sales from challenge apply only to irregularities which do not amount to a denial of due process, Jones v. City of Arcadia, 3 So.2d 338, 339 (Fla. 1949), with non-compliance with Section 197.522 amounting to such a due process denial. Thus, the conflict between Section 197.522, Florida Statutes, and the statutory provisions which Petitioners cite should be resolved by giving Section 197.522 primacy. Any other resolution renders the statutory tax sale scheme unconstitutional--an owner left without notice of a tax sale, which would transgress both the statute and constitutional requirements, would have no remedy. Statutes are construed in favor of rendering them constitutional. Vildibill v. Johnson, 492 So.2d 1047, 1050 (Fla. **1986).**

The Petitioners urge that the Florida Legislature passed Subsection *3* of Fla. Stat. §65.081 as the deliberate abolishment of the rights owners previously had to protect their land from a tax sale where the notice requirements were not followed. However, the enactment of Subsection *3* is ineffective to abolish an existing right without providing a reasonable alternative, Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239, 243-44 (Fla. 1977), and the Legislature passed no such reasonable alternative in enacting Subsection 3 of Fla. stat. 565.081.

Numerous out of state cases show that Fla. Stat. §65.081, 0197.332 and §197.404 cannot be applied as Petitioners argue. For instance, in Opinion of the Justices, 557 A.2d 1364 (N.H. 1989), the New Hampshire Supreme Court dealt with a legislative attempt to make good certain tax sales called into question by the earlier New Hampshire Supreme Court decision of white v. Wolfeboro, 551 A.2d 514 (1988). The legislature stated that it "affirms the validity of tax sales conducted in good faith in accordance with [the pre-White v. Wolfeboro] interpretation [of legal requirement~]~~557 A.2d at 1369. The New Hampshire Supreme Court ruled that such an attempt to insulate non-complying tax titles from challenge was not effective in view of RSA 80:39, the applicable ten-year statute of limitation. The court stated:

> With this broad statement, the legislature apparently was trying to wave a legislative wand over all tax sales to make any legal defects in them disappear. Such an attempt, insofar as it would apply to post White v. Wolfeboro tax sales, is not constitutionally permissible because it would cut off prematurely the contestability of rights granted under RSA 80:39. Id.

Thus, the statutes argued by the Petitioners in this case can also not function as a "magic wand" making legal defects in tax sales disappear.

In Re: Consolidated Return Of Tax Claim Bureau, 461 A.2d 1329 (PA. Cmwlth. 1983), shows a court recognizing the existence of a statute completely immunizing tax deeds from any challenge, but

then refusing to apply it where the statutory requirements for the tax sale have not been complied with. That court stated:

> We begin with Section 607(g) of the Real Estate Tax Sale Law (Law), Act of July 7, 1947, P.L. 1368, as amended, 72 P.S. § 5860.607(g) which provides that where a tax sale is confirmed absolutely, the sale shall not be inquired into judicially thereafter by the person in whose name the property was sold or by any other person. This Court has uniformly held on many occasions, however, that where the sale has not been conducted in strict accord with the provisions of the Law the sale will be set aside. Id. at 1330.

The Supreme Court of Indiana refuted that state's attempt to immunize tax sales from challenges in Little v. Ritchey, 174 N.E.2d 52 (Ind. 1961). In that case, the recipient of a tax deed argued that he was protected by an Indiana statute providing as follows:

> The deed or conveyance of the land sold shall be conclusive evidence that the sale was regular and according to the requirements of law, and shall convey to the purchaser a clear and indefeasible title to the real estate sold. [Burns Ann, St. §64-2203 (1951 Repl.)] Id. at 52.

The Indiana court refused to enforce the above statute in the manner as requested by the tax deed purchaser:

> We are dealing here with a conclusive presumption. In such a case the legislature cannot constitutionally declare a tax deed conclusive evidence of a fact and thus deprive the court of the right to inquire behind the instrument as to its regularity. Id. at 54 (emphasis by court).

Sections 197.404 and 65.081(3) attempt to reach the same result as the statute which the Indiana court refused to apply--the foreclosure of otherwise valid legal challenges to a tax deed. This court should make the same refusal as the Indiana court did.

Frequently, courts have confronted legislative attempts to make tax deeds uncontestable after a certain period of time. In Chapin v. Aylward, 464 P.2d 177 (Kan. 1970), the Supreme Court of Kansas dealt with a statute it described as follows:

> K.S.A. 79-2804b provides that all actions to open, vacate, modify or set aside any tax foreclosure judgment or any sale made thereunder, must be commenced within twelve months after the date of confirmation of the sale, and that such time limitation is to be construed as a condition precedent to the bringing of any such action and not as a statute of limitations. Id. at 179.

The Kansas court ruled that this statutory twelve-month time limitation did not bar a challenge brought later than twelve months based on failure to give the legally required notice. Id. at 182. Lilly v. Duke, 376 S.E.2d 122 (W.Va. 1988), City of Boston v. James, 530 N.E.2d 1254 (App.Ct. Mass. 1988) and Town of Sharon, v. Kafka, 468 N.E.2d 656 (App.Ct. Mass. 1984) also make this same holding that a time limit to challenge tax deeds, which in the latter case was described as "designed to limit the right as well as the remedy," Id. at 658, will not apply where the challenge is based on a lack of notice amounting to the denial of due process.

Petitioners interestingly attempt to adapt the tort concept of "contributory negligence"--claiming that Respondents did not use sufficient care to assure that their real estate taxes were paid--as a defense to Respondents' defense of non-compliance with the statutory notice provisions. To deal simply with this contention, Respondents would point out that Petitioners did not raise this issue in a reply to Respondents' affirmative defenses in the trial court, and so cannot raise this issue now. Further, Petitioners' argument makes no sense. If failure to pay real estate taxes means no notice need be given to the "negligent" owners, why did the Legislature go to such lengths in formulating a detailed and complex statutory scheme for notices to these "negligent" owners?

Additionally, the courts have refuted the "contributory negligence" approach of Petitioners. The Supreme Court in Mennonite, supra, stated:

> [A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. 103 S.Ct at 2712.

Neither, then, should the government's statutory obligation to give notice be relieved because the persons to be notified did not pay their taxes.

In Re: Consolidated Return Of Tax Claim Bureau, supra, also disposes of Petitioners' argument that because of the Respondents' alleged "contributory negligence" they should be punished by the loss of their property sold without compliance with the statutory

provisions. The Pennsylvania court stated that the state's tax sale law was "never meant to punish taxpayers who omitted through oversight or error to pay their taxes." 461 A.2d at 1332.

In City of Boston v. James, supra, it was argued that "the owners brought trouble on themselves by failing to pay the taxes, or to leave a forwarding address, or to establish. . . an address at which service might be made." 530 N.E.2d at 1257. That court dismissed such a "contributory negligence" argument, stating:

> Such shifting of responsibility is inadmissible even when the persons deprived of notice are sophisticated and knowledgeable. Id.

Coming closer to home, the Florida case of Kovaleski v. Tallahassee Title Company, 391 So.2d 315 (Fla. 1st DCA 1980) shows that in tax deed situations, the risk of non-compliance with the statutes is not borne by the owner, but by the tax deed purchaser:

> Acquiring land through tax deed is risky business, not for the faint-hearted. To protect landowners from the drastic consequences of being too long delinquent in paying their property taxes, the legislature has fashioned, and it tinkers with frequently enough to unnerve the experts, a complex and sometimes inscrutable statutory process which must be followed to the letter. Unless all the i's are dotted and all the t's are crossed, the tax deed which emerges from the process is no good. Id. at 316. (emphasis supplied).

Petitioners fail in their various arguments and authority. Two of the salient cases cited by Petitioners, Thompson v. City of Key West, 82 So.2d 749 (Fla. 1955) and Goodman v. Carter, 27 So.2d

748 (Fla. 1947) date from a time when the statutory notice provisions were stated to be "directory only." Goodman, 27 So.2d at 749; Thompson, 82 So.2d at 751. Florida Statutes Chapter 197, the statutory law which presently applies to tax deed sale, no longer contains any language that any provision therein is "directory only."

Regarding Petitioners' arguments about the significance of the recent addition of Subsection (3) to 565.081 in 1974, the provision of §197.522(2) on which Respondents rely--that the clerk shall provide to the sheriff notice of the tax sale for service pursuant to Chapter 48--was even more recently added to the statutes, in 1981. When two statutory provisions conflict, the latest prevails. Lykes Bros., Inc, v. Bigby, 21 So.2d 37, 39 (Fla. 1945). Statutes involving taxes "should always be construed in the light most favorable to the tax payer." Mikos v. Ringling Bros. - Barnum & Bailey, 497 So.2d 630, 632 (Fla. 1986). Additionally, a statute dealing with specific requirements, such as §197.522(2), Florida Statutes, will operate as an exception to or qualification of a more general statute, such as §65.081(2), Florida Statutes. E.G. Adams v. Culver, 111 So.2d 665 (Fla. 1959).

Respondents submit that the District Court was correct in gauging the legislative intent regarding the disputed statutes: "It is unlikely that the legislature would seek to immunize the

government from complying with the legislature's own notice requirements." (District Court Opinion, page 5.)

CONCLUSION

This Court should decline to exercise its discretionary jurisdiction, or, alternatively, affirm the decision of the District Court of Appeal, Fourth District.

* * *

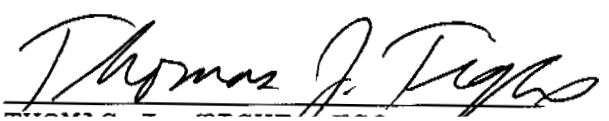
CERTIFICATE OF SERVICE

1 HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondents was furnished and served by U.S. Mail on this 31st day of May, 1991 to the following:

ERNEST A. ALEXAS, ESQ.
Attorney for Petitioners
2170 S.E. 17th Street, Suite 302
Fort Lauderdale, Florida 33316
Telephone: (305) 522-5544
Fla. Bar No. 001140

ROBERT A. BUTTERWORTH, Attorney General,
c/o Jean Wilson, Assistant Attorney General,
Florida Department of Revenue,
Department of Legal Affairs, Tax Section
Capitol Building
Tallahassee, Florida 32399-1050

JOHN J. COPELAND, JR., County Attorney for Broward County,
c/o James A. Thomas and Larry E. Lyman-Johnson,
Assistant County Attorneys
Suite 423 - Governmental Center
115 South Andrews Avenue
Fort Lauderdale, Florida 33301



Florida Bar No. 352578
Attorney for Respondents
Lunny, Tucker, Karns & Tighe
Suite 505 - Cumberland Bldg.
800 East Broward Boulevard
Fort Lauderdale, Florida 33301
Telephone: (305) 467-7744

ca.24