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SID J. WHITE
AUG 15 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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

AMENDED REPLY BRIEF OF PETITIONERS

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FLORIDA STATUTES:

OTHER AUTHORITIES:

Pursuant to the Court's order of August 5, 1991, petitioners submit this Amended Reply Brief to respondents' Answer Brief.

REBUTTAL TO RESPONDENTS' STATEMENT OF THE CASE AND OF THE FACTS

The Court of Appeal, Fourth District, specifically states in its opinion:

> The record reflects that the clerk failed to comply with the statutory requirement for attempting personal service of the notice of sale on resident owners by the sheriff. As a result, the tax deed is invalid and we reverse.
>
> * * *
>
> We consider the other grounds for reversal to be without merit.

This was the sole grounds for reversal, and does not include as error, as respondents' contend, that the clerk's notice specified the location for the sale only as the "Courthouse Door".

Petitioners concede their typographic error by inadvertently omitting the word "NOTICE" in setting forth the question certified to this Court.

SUMMARY OF REBUTTAL ARGUMENT

In their Summary of Argument, respondents maintain that the statutes cited as "immunizing" attacks on tax deeds based on insufficient notice would make §197, Fla.Stat., unenforceable and equivalent to no notice requirements, thus violating due process of law as guaranteed by the constitution. Respondents further state in their summary, that precedent shows that statutes such as these do not apply to protect tax deeds from challenge based on lack of required notice.

In rebuttal, petitioners agree that the immunizing statutes make the provisions in §197.522, Fla.Stat., unenforceable by the former property owner against a holder of a tax deed; however, this does not violate the former owner's right of due process of law guaranteed by the constitutions of Florida and of the United States. The constitutions prohibit the taking of property without due process. Due process is the course of legal proceedings according to rules and principals prescribed by the law. 6 Fla.Jur. Constitutional Law §313 (1965); Fla.Jur. Words and Phrases, Due Process (1965).

Respondents are asking the Court uphold the provisions of notice contained in 5197.522 as containing rights available to the former property owner, and thus supersede the jurisdictional provisions of 5197,404 and 565.081 (3) which limit the causes upon which tax deeds can be attacked by the former owner. They argue statutory interpetation [page 15 of the Answer Brief] in an attempt to resolve the conflicting provisions.

Petitioners, however, maintain that the clear and unambiguous language of §197.404 and 565.081 (3) precludes any rights available to the former property owner under 5197.522 which is directed to the clerk's duties. Due process is satisfied because 5197.404 and §65.081(3) must be construed in pari materia with §197.332, Fla.Stat., which imposes an affirmative duty on a11 property owners to know of and to pay their current and delinquent taxes when due. Because of 5197.332, Fla.Stat., Florida law is in contrast to the laws of the foreign states whose decisions are cited by respondents. The notice provisions

contained in 5197.522, Fla.Stat., are a comity to the property owner and are not a right available to him in due process of law after a tax deed is issued. This is the obvious intent of the legislature in enacting §197.404 and §65.081(3), Fla.Stat.

The clear language of 5197.404 and §65.081(3) limits jurisdiction for attacks on tax deeds either to that of taxes having been paid before the tax deed is issued or to that the land was not subject to taxation. To rule otherwise would render these statutes ineffective. To be ineffective they must violate constitutional provisions such as due process of law. If ineffective, they are constitutionally invalid, and as such must be declared unconstitutional.

Petitioners maintain that the provisions of these jurisdictional statutes do not violate due process of law to the former property owners because in Florida every property owner has a statutory duty to know of and to pay his taxes when due. He is under statutory caveat to know the due date of his taxes, to inquire as to the amount, and to know that his property can be lost if the taxes assessed thereon become delinquent.

REBUTTAL ARGUMENT

On page 6 of their answer brief respondents maintain that case law firmly establishes that tax deeds are invalid if the clerk does not strictly abide with his notice requirements under §197.522. In the cited Florida cases invalidating tax deeds, the provisions of §197.404, §65.081(3), or §197.332 [duty to know of and to pay taxes] were not brought to issue on review

nor were they considered. As a rule, appellate courts do not sua sponte consider matters not brought before them. In Florida cases where these statutes were considered, their effect was ruled as the controlling factor.

Early Florida decisions have upheld former chapter 14572, Fla.Stat., as not violating due process of law and as being constitutional. This statute has substantially the same provisions as the present §197.404. See Ridgeway v. Reese, 100 Fla. 1304, 131 so. 136 (1930) and Ridgeway v. Peacock, 100 Fla. 1297, 131 So. 140 (1930). Chapter 14572:

> . . . no sale or conveyance of real or personal property for non-payment of taxes shall be held invalid except upon proof that the property was not subject to taxation, or that the taxes had been paid previous to sale, or that the property had been redeemed prior to the execution and delivery of deed based upon certificate issued for non-payment of taxes, . . .

In a recent case, Alwani v. Slocum, 540 So.2d 908 (Fla. 2d DCA 1989), the appeals court affirmed loss of property on a tax sale on consideration of the property owner's duty to know of his taxes and inquire of same. The court relied on 5197.332 and 5197.404, Fla.Stat.(1985), which were construed pari materia [p.910]. The court cited Mullin v. Polk County, 76 So.2d 282 (Fla.1954) which relied on the taxpayer's duty to inquire if he did not receive a tax receipt on payment of his taxes. The Alwani court [p.910] affirmatively disregarded the effect of Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), which was cited by respondents sub judice, and Mulane v. Central Hanover

Bank & Trust Co,, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) stating that the cases did not concern a lack of notice to a taxpayer who knows that taxes are unpaid.

Contrary to the contention of respondents, in citing Menonite, on pages 7 and 8 of their brief, actual notice is not necessary in Florida to those adversely affected by a tax sale. The taxpayer is under obligation to know the tax status of his property. The Alwani court further stated that Pratt v. Pope, 78 Fla. 270, 82 So. 805 (1919) antedated the statutes placing the responsibility upon owners of Florida land to protect their own interests.

The Alwani court quoted from D.L.R., Inc. v. Murphy, 508 So.2d 413, 416 (Fla. 5th DCA 1987):

> . . . because the tax collection procedure meets constitutional due process and is established by statutory law, the fairness question is for the legislature, not for the judiciary.

In County of Volusia v. Passantino, 364 So.2d 730 (Fla. 1st DCA 1978), cited by the Alwani court, it was held that the former owner is not entitled to relief on theory that he believed he was paying taxes on all the lots in question. This was based on the owner's duty to know taxes are due and payable thereon annually as provided by 5197.011 (now 5197.332) in pari materia with the other statutes. BOYER, Acting Chief Judge, specially concurring, stated [p.734]:

> Justice is not here accomplished. Were we allowed to challenge or change the law I would dissent. Howeve, the statutory law and case law cited by Judge Mills is clear. No provision is made for a citizen to rely upon erroneous statements nor actions of the government nor

> its functionaries. Reluctantly, I have no alternative but to concur'.

In Florida, notice is not a constitutional requirement to the validity of a tax sale as stated by respondents in their answer brief [p.7]. It is the clerk's statutory duty to send notice to the addressess, if any, appearing on the instruments of record but receipt of same is not required. In Florida, by enactment of 5197.332, placed the duty on the property owner to ascertain his taxes and pay them and not on the clerk to notify him, All notifications are a comity, including that of sending tax bills yearly, By enacting §197.404 and §65.081(3) the legislature effectively limited jurisdiction for causes on the validity of tax deeds to that of the taxpayer's having complied with his duty of paying his taxes. It is not the constitutional obligation of the state to notify him as stated in Mennonite which was not concerned over lack of notice to a taxpayer who should know his taxes are unpaid. Alwani v. Slocum, cited supra. Mennonite is concerned with "a party's ability to take steps to safeguard its interests" which does not relieve a state of its obligation, In Florida the law hinges on the taxpayer's duty to safeguard his interests.

The New Hampshire, Pennsylvania and Indiana cases cited and quoted from in the answer brief [pp.10,11] do not concern themselves with a statutory duty of the taxpayer as in Florida.

On page 9 of the answer brief, respondents cite Walker & LeBerge, Inc. V. Halligan, 334 So.2d 239 (Fla.1977) as requiring the legislature to provide a reasonable alternative when

an existing right, such as notice, is abolished. The reasonable alternative is provided by §197.332, for the taxpayer to comply with his duty in the payment of his taxes when due.

In the answer brief [p.15] respondents cite Florida cases on statutory construction. They cite E.G.[sic] Adams v. Culver, 111 So.2d 665 (Fla.1959) as stating that "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 statue, such as 565.081 (2) [sic (3)], . . " The actual verbage of Adams [p.667]:

> In this situation "'the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if *any*,'" [emphasis added]

The quote is from Stewart v. De Land-Lake Helen, etc., 71 Fla. 158, 71 So. 42 (1916) quoting from an earlier case. The statutes in question, sub judice, do not contain repugnant provisions. §197.522(2) refers to the clerk's duties preceding tax sales and §65.081(3) to jurisdiction for causes attacking tax deeds by former owners. If interpeted in conjunction with §197.332, repugnancy vanishes. §65.081(3) completely limits causes which can be brought. This 1916 case thoroughly discusses statutory interpetation and further states in its syllabus:

> If two statutes may operate upon the same subject without positive inconsistency or repugnancy in the practical effect and consequences, they should each be given the effect designed for them, unless a contrary intent clearly appears.
>
> * * *
>
> unless legislation duly passed be clearly contrary to some express or implied prohibition

> contained in the Constitution, the courts have no authority to pronounce it invalid.
>
> * * *
>
> The courts are bound to uphold a statute, unless it is clearly made to appear beyond a reasonable doubt that it is unconstitutional.

The earlier case in which the Stewart court based its reasoning, and quoted from, is Moodie v. Bryan, 50 Fla. 293, 39 So. 929 (1905) wherein the court refused to declare a statute unconstitutional because [p.964]: "nothing less than an abiding conviction in our minds, beyond a reasonable doubt, would warrant us in declaring it unconstitutional."

The answer brief quotes from Mikos v. Ringling Bros.-Barnum Bailey, 497 So.2d 630, 632 (Fla.1986). *To* complete respondents' quotation:

> The courts are not taxing authorities and cannot rewrite the statute. Moreover, a taxing statute should be construed in the light most favorable to the taxpayer. [emphasis added]

Respondents further cite Lykes Bros, Inc. v. Bigby, 21 So.2d 37 (Fla.1945) which involves conflicting statutory provisions. The statutes sub judice are not conflicting if interpeted in pari materia. From Garner v. Ward, 251 So.2d 252, 255 (Fla.1971):

> It is an accepted maxim of statutory construction that a law should be construed together with and in harmony with any other statute relating to the same subject matter or having the same purpose, even though the statutes were not enacted at the same time.

The intent of the legislature in enacting §197.404 and §65.081(3) is deduced from the clear language. No exceptions are made. All other causes are excluded. From Dobbs v. Sea

Isle Hotel, 56 So.2d 341, 342 (Fla.1952):

> We have oft-times held that the rule "Expressio unius est exclusio alterius" is applicable in connection with statutory construction. This maxim, which translated from the Latin means: express mention of one thing is the exclusion of another, is definitely controlling in this case. The legislature made one exception to the language of the statute of limitations. We apprehend that had the legislature intended to establish other exceptions it would have done *so* clearly and unequivocally.

In the statutes limiting jurisdiction for causes against tax deeds, the legislature excepted only the payment of taxes before issuance of the deed and if the land was not taxable. It would have been a simple matter to include the clerk's having abided by his duties prescribed in §197.522. It did not. It is apparant that 5197.522 was intended as a comity. From Orr v. Trask, 464 So.2d 131, 135 (Fla.1985), wherein Dobbs was cited:

> Courts should be loath to intrude on the powers and prerogatives of the other branches of government and, when necessary to do *so,* should limit the intrusion to tha necessary to the exercise of the judicial power.

The language in 5197.404 and §65.081(3) is clear. From Stern v. Miller, 348 So.2d **303**, 308 (Fla.1977):

> However, we cannot construe the statutory provisions so "liberally" as to reach a result contrary to the clear intent of the legislature. The act must be construed to be consistent with the objectives sought to be accomplished. Klepper v. Breslin, **83** So.2d 587 (Fla.1955).

In rendering its decision in our case sub judice, the Court is asked to consider its reasoning on statutory interpetation in its recent landmark decision of Public Health Trust of Dade County **v.** Lopez, 531 So.2d 946 (Fla.1988) wherein the Court

affirms the logic and quotes from Holly v. Auld, 450 So.2d 217 (Fla.1984) quoting from A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157, 159 (1931):

> [W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpetation and construction; the statute must be given its plain and obvious meaning.

The Holly court further opined [p.219]: "It has also been accurately stated that courts of this state are

> without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power, American Bankers Life Assurance Company of Florida v. Williams, 212 So.2d 777, 778 (Fla. 1st DCA 1968)" [Emphasis by the Holly court]

The intent of the legislature is expressed in clear language in 5197.404 affirmed by the enactment of §65.081(3), Fla.Stat., which contain no exceptions other than those spelled out in Unambiguous terms. They require no interpetation of conflicting provisions contained in §197.522 as respondents urge. In Florida, the enactment of §197.332 places the duty on the property owner to protect his own interests; rendering the notice requirements of 5197.522, in which receipt is not mandatory, to be a comity to the property owner, The owner of Florida property does not have a right to notice by which due process may be violated as claimed by respondents,

The decisions of the United States Supreme Court, cited by respondents, applied the laws of other states, which laws do not concern themselves with the duty imposed in Florida by

§197.332, Fla.Stat. Due process is a constitutional right to the procedure to be followed in the taking of property. The procedure in Florida does not require notice to the property owner. It is the property owner's duty to know of his tax delinquency and to inquire as to the status of his property, Procedure of law is followed when the statutes in question are construed in pari materia.

To construe the duty of the clerk imposed by §197.522 as a right of the property owner instead of a comity would construe the clear language of 5197.404, §65.081(3) and §197.332 to be ineffective and to conclude that the legislature, who has imputed knowledge of all its statutes and the court decisions regarding same, had no reason to enact them. Its clear language must either be upheld or declared unconsitutional. To be unconstitutional, a provision of the constitution must be violated. Property owners have no constitutional right to avoid their duty clearly stated in §197.332 which must be enforced or declared unconstitutional,

Lastly, contrary to respondents' contentions (page 13 of the answer brief) the issue of contributory negligence was invoked at trial and appeal by the petitioners' asserting respondents' duties under §197.332, Fla.Stat.

CONCLUSION

§65.081(3), §197.332, 5197.404 and 5197.522 carry pari materia provisions. They do not conflict, and they do not violate due process of law guaranteed by the constitution.

Statutes can limit jurisdiction of causes and relief available on breach of duty. Different standards should not apply because these statutes involve taking property for delinquent taxes. The Court should uphold their clear provisions, reverse the appeals court and affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that copy hereof, Amended Reply Brief of Petitioners, was furnished by mail to the parties on the SERVICE LIST following on this August 13, 1991.

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