

1-6-92

IN THE FLORIDA SUPREME COURT

CASE NO.: 79,024

STATE OF FLORIDA, et al,
Appellants/Cross-Appellees,
vs.
LEWIS E. MELAHN, etc.,
Appellee/Cross-Appellant.

FILED

SID J. WHITE

JAN 3 1992

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ON CERTIFIED REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

APPELLEE/CROSS-APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Appellants' Reply and Answer Brief misconstrues both the law and Transit's position. Stating inconsequential distinctions between cases setting forth the correct rule of statutory construction where a statute explicitly contains a statement of its purposes and the present case (where the statutes at issue state the purposes for their enactment), Appellants argue that they should be allowed to *post hoc* create legislative purposes for this Court's consideration. Such is not the law.

Appellants further misstate the basis of Transit's motion for summary judgment and the proper issues before this Court in applying Ward to the facts of record. Under a correct application of Ward and the rules of statutory construction, there are no genuine issues of material fact precluding the trial court's grant of summary judgment in favor of Transit on its constitutional claim. Assuming, *arguendo*, that Appellants are permitted to go beyond the purposes stated in the discriminatory premium tax statutes at issue, there are then genuine issues of material fact concerning the non-statutory purposes which preclude summary judgment in favor of Appellants.

Because no retaliatory tax has ever been assessed against Transit, the trial court erred in granting summary judgment in favor of Appellants on the set-off issue. Even were such an imposition and set-off permissible, it is inappropriate in this case in that it permits Appellants to avoid the equities of

insurance receivership law and step outside the proper statutory order of Transit creditors.

The trial court erred further in granting Appellants' motion for partial summary judgment on the limitations issue. Section 215.26(2), Florida Statutes, is a statute of limitations which cannot bar Transit's recovery of taxes paid pursuant to unconstitutional tax statutes. Assuming that Section 215.26(2) is properly considered a statute of repose or non-claim rather than of limitations, the trial court correctly found that Transit is due a refund for the tax years 1984 and 1985.

Belatedly, Appellants assert that remand for consideration of their defenses of waiver and estoppel is necessary once this Court affirms the trial court's grant of Transit's motion for partial summary judgment and reverses its grant of Appellants' motions for partial summary judgment on the set-off and limitations issues. Having failed to assert these defenses in any of their three motions for summary judgment, Appellants have waived their right to raise these defenses before this Court.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONSIDERING PURPOSES ADVANCED BY APPELLANTS OUTSIDE THOSE STATED IN THE STATUTE AND ERRED IN MAKING FACTUAL FINDINGS REGARDING THE STATE'S PURPOSE

A. Where the Statute States its Purposes, the Court Cannot Look Outside the Statute for Other Purposes

Transit sets forth in its Initial Brief at pages 16-19 the law governing a court's consideration of a statute's purpose where the statute itself provides the legislature's reasons for enacting the statute: "Having themselves specifically declared their purpose, the Ohio statutes left no room to conceive of any other purpose for their existence." Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 530 (1959). This rule of statutory construction is reiterated in Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975), Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 682 n.3 (1981) (J. Brennan concurring) and Zobel v. Williams, 457 U.S. 55, 61 n.7 (1982).

Appellants distinguish Bowers from the present case on the ground that Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949), the case being analyzed in Bowers, concerned an ad valorem tax rather than the premium tax at issue in this case. Appellants find Weinberger and Zobel distinguishable because the level of scrutiny applicable in those cases is different than that applicable in the present case. Appellants further suggests that Kassel is to be distinguished in that it is concerned with

Commerce Clause principles rather than equal protection.

These distinguishing characteristics, however, have nothing whatsoever to do with the application of the above stated rule of statutory construction. Nowhere in any of these cases does the Court state that this rule of statutory construction is to be applied because of the subject matter of the statute at issue, the level of scrutiny under which the court is to determine the constitutionality of the statute or the particular constitutional right which a statute allegedly violates. To the contrary, the fact that this rule of statutory construction is applied by the Supreme Court to a variety of subject matters requiring various standards of review indicates that the Court, as with all rules of statutory construction, considers this rule applicable no matter the statute under review. Appellants distinguish this line of cases from the present case on grounds no more applicable than to distinguish them on the basis of the typestyle in which they are printed.

In an effort to avoid the clearly stated rule that a court cannot consider purposes created by counsel where the statute at issue itself states its purposes, Appellants suggest that this Court should consider, together with the goals stated by the 1982 legislature in passing the statute at issue, the policy goals voiced by the 1988 legislature. The 1988 legislature's stated policies, however, are no indication of legislative intent in 1982. Ellsworth v. Insurance Co. of North America, 508 So.2d 395, 398 (Fla. 1st DCA 1987). Consideration of the 1988 legislature's

stated policy, moreover, is particularly inappropriate in light of the three year time span within which it could review and react to the 1985 Ward decision.

**B. The Trial Court Erred in Making
Factual Findings Regarding the
State's Purpose**

Appellants contend that the error asserted by Transit in the trial court's factual findings because of the existence of genuine issues of material fact regarding Appellants' alleged purposes should not be allowed by this Court because Transit moved for summary judgment below asserting that there was no genuine issue of material fact. Appellants' Reply and Answer Brief at 15-16. As Appellants correctly point out, this rule applies where it is the same issue being addressed both below and on appeal.

However, even the issues before the trial court on motions for summary judgment did not remain the same. After Transit moved for partial summary judgment on the constitutionality of Florida's discriminatory premium tax, Appellants filed their motion for summary judgment on the same issue, asserting that purposes outside of those found in the statutes at issue were legitimate and that the discriminatory statutes were rationally related to these asserted purposes. Transit, in response, argued that the trial court could not consider the asserted non-statutory purposes in light of the legislative purposes stated in the statute itself. Transit conceded, however, that if the court were to consider the asserted purposes, there exist genuine issues of material fact concerning the legitimacy of the asserted purposes and the

rational relationship of the discriminatory taxes to the asserted purposes. (R. at 544, 551-52).

As was before the trial court, one of the issues on appeal is whether this Court should consider alleged purposes outside the purposes stated in the statutes at issue. Rules of statutory construction applied by the United States Supreme Court do not allow such considerations. Should this Court conclude otherwise, Transit, as it did below, directs this Court to the facts of record on this issue which show that the evidence concerning the legitimacy of Appellants' asserted non-statutory purposes is strongly disputed. As set forth in Transit's Answer and Initial Brief at pages 22-26, the affidavits of Mr. Melahn, Director of Insurance of the State of Missouri, and Mr. Thomas Bond, former Commissioner of Insurance of the State of Texas, create genuine issues of material fact concerning the legitimacy of the non-statutory purposes asserted by Appellants.

In addition to the affidavits of Mr. Melahn and Mr. Bond, their deposition testimony further supports the lack of any legitimate purpose to Florida's discriminatory premium tax statutes. Rather than encourage the relocation of insurance businesses to Florida, the most that would result from the discriminatory tax scheme is the formation of subsidiaries to do business in Florida (R. at 836-837, deposition of Mr. Bond). Assuming that this result occurs, the cost of forming the subsidiaries would create serious economic problems for the insurance companies that chose this route. (R. at 838, deposition

of Mr. Bond).

Additionally, Mr. Melahn testified that the discriminatory premium tax would not induce insurance companies to redomesticate or to domesticate in Florida. (R. at 951, deposition of Mr. Melahn). Because the discriminatory premium tax would not induce companies to move to Florida, the tax cannot be rationally related to any alleged purpose of increased regulatory control (R. at 976, deposition of Mr. Melahn). Nor does the State of Florida, in practice, have any greater regulatory control over domestic insurance businesses than it has over foreign insurance businesses. (R. at 982, deposition of Mr. Melahn).

Appellants' error in their assertion that the trial court did not err in making its findings of fact concerning the legitimacy of Appellants' asserted purposes and the discriminatory tax statutes' rational relation to these purposes is based on their incorrect reading of Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985). To clearly point out Appellants' misreading of Ward, and therefore the grounds on which Transit moved the trial court for summary judgment, it is necessary to point out the particular posture of the issues before the Supreme Court.

The appellant insurance companies in Ward waived their right to an evidentiary hearing on the issue of whether the statute's classification bore a rational relationship to the two purposes found to be legitimate by the Alabama trial court. Ward, 470 U.S. at 874. Having conceded that the classification was rationally related to the asserted state purposes, the only issue before the

Supreme Court was whether the purposes found below to be legitimate could be asserted by a state without violating the Equal Protection Clause. Ward, 470 U.S. at 886 (Justice O'Connor dissenting).

The Ward Court did not hold that a state's purpose for the statutes it enacts of developing new business within the state is in and of itself not a legitimate purpose. Ward, 470 U.S. at 879. The Court pointed out, however, "that promotion of domestic business by discriminating against foreign corporations. . ." has not previously been found by the Court to be a legitimate state purpose. Id. (emphasis in original). The Court went on to hold, specifically, that "promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose." Ward, 470 U.S. at 880.

In moving the trial court for summary judgment, Transit asked only that the court apply the law of Ward to the Florida premium tax statutes. The purposes behind these statutes were undisputed in that they were clearly set forth in the statute itself.

In granting Transit's motion for summary judgment on this issue, however, the trial court gratuitously made additional findings of facts concerning the purposes created by Appellants and concerning the discriminatory statutes' rational relation to these asserted non-statutory state purposes.

Under the case law on statutory interpretation, cited above, and Ward, the material facts necessary to determining the issues

Transit presented in its motion for summary judgment indeed are undisputed. On appeal, however, Transit must also address the trial court's unnecessary fact findings entered as surplusage to its legally correct grant of Transit's motion for summary judgment.

II. THE TRIAL COURT ERRED IN GRANTING APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE SET-OFF ISSUE

Appellants argue at length the application of equitable factors in the trial court's grant of summary judgment in favor of appellants on the set-off issue. In granting this motion, the trial court found that it is appropriate to reduce the refund of taxes paid by Transit pursuant to the premium tax statutes found to be unconstitutional by the retaliatory taxes Transit supposedly would have had to pay had it not paid the premium taxes assessed.

First, it must be kept in mind that no retaliatory taxes were assessed against Transit during the years 1980 to 1985 pursuant to Florida's retaliatory tax statute, Section 624.429, Florida Statutes. No statutory or legal authority permits a reduction of a refund due as a result of an unconstitutional tax. Under Florida law, the Department of Revenue is permitted to reduce a refund due a taxpayer only to the extent of any billings not subject to protest under Section 213.21. However, Transit has never had a retaliatory tax assessed against it under Section 624.429 for the relevant years. Appellants are, in essence, seeking a judicial imposition of retaliatory taxes which have never been assessed by the proper Florida administrative authorities. Until such time as a retaliatory tax has been

assessed against Transit, there is nothing which can be used as a set-off against the refund due Transit for taxes paid pursuant to the unconstitutional premium tax statutes.

Moreover, no such tax can now be imposed. Any claim for assessment of taxes in Florida is subject to the application of the statute of limitation contained in Section 95.091, Florida Statutes. Section 95.091 provides that no tax may be assessed later than five years from the latter of the date the tax or the return was due. Section 95.091(3)(a), Florida Statutes. Transit did not conduct any business in Florida after 1985. The last time that any tax or return was due was in 1986. It is now 1992, and no retaliatory tax has yet been assessed against Transit.

Even if a retaliatory tax could be judicially imposed after the running of the statute of limitations, imposition of such a tax as a set-off is not appropriate in this case. By imposing and setting off a retaliatory tax against the tax refund due Transit, the trial court impermissibly permitted Appellants to avoid the carefully considered statutory order for distribution of Transit's assets. Mo.Rev.Stat. § 375.700(1).

Appellants, citing no supporting case law, argue that Mr. Melahn's status as receiver of Transit is of no concern and that equitable considerations support imposition of a retaliatory tax set-off. Appellants ignore the facts that the Missouri insurance receivership statutes, an enactment of a thoroughly and carefully developed uniform scheme, has already taken into account the comprehensive body of legal and equitable considerations

concerning the proper handling of an insurance company's assets once the company is no longer able to operate successfully. Contrary to the equitable principles selected by Appellants, a complete consideration of all factors supports the uniform statutory scheme as adopted in Mo.Rev.Stat. § 375.700(1) for the proper distribution of Transit's assets.

III. THE TRIAL COURT ERRED IN GRANTING APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE LIMITATIONS ISSUE BECAUSE SECTION 215.26 DOES NOT BAR TRANSIT'S CONSTITUTIONAL CHALLENGE.

Appellants attempt to limit Transit's right to a refund of taxes paid under Florida's unconstitutional premium tax structure by arguing that Section 215.26(2) is applicable to Transit's claim for refund and bars any claim for refund not submitted within three years of the date that the taxes were paid. In making this argument, Appellants carefully ignore well-established Florida precedent that a challenge to a tax statute on constitutional grounds, because it asserts that the law is void, may be instituted at any time without regard to statutes of limitation. Lakeworth Towers v. Gerstung, 262 So.2d 1 (Fla. 1972). Appellants seek to circumvent this rule through the unsupported characterization of Section 215.26 as a statute of repose or non-claim and not as a statute of limitation.

The flaw in Appellants' argument, however, is demonstrated by this Court's analysis and holding in Markham v. Neptune Hollywood Beach Club, 527 So.2d 814 (Fla. 1988). In Markham, this Court clarified the distinction between statutes of limitation and statutes of repose or non-claim. The Court did not depart from

the well-established rule that a statute of limitation will not preclude a constitutional challenge to the validity of a statute.

The underlying premise of the Court's analysis in Markham was that a non-claim statute is jurisdictional in nature and a trial court lacks jurisdiction to consider a suit contesting a tax assessment unless filed within the time frame prescribed by the statute. Id. at 815. Based upon the express language of Section 194.171 as employed by the legislature in subsection (6), the Court found that the statute was jurisdictional and that compliance with the statute's requirements as a prerequisite to claim. Because the statute was found to be jurisdictional in nature, it was considered to be a non-claim statute, thus operating to bar plaintiff's claim for relief.

Section 215.26 does not contain any language similar to that found in subsection (6) of Section 194.171.¹ Appellants have cited no cases finding Section 215.26 to be jurisdictional in nature. Absent a "clear expression of legislative intent" to make the statute jurisdictional, Section 215.26 should not be treated as a non-claim statute. Rather, Section 215.26 must be read as a statute of limitation which cannot bar Transit's constitutional

¹Subsection (6) specifically provides:

The requirements of subsections (2), (3) and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met. A court shall lose jurisdiction of a case when a taxpayer fails to comply with the requirements of subsection (5).

Section 194.171(6), Florida Statutes.

challenge to the premium tax law.

Assuming, *arguendo*, that this Court finds Section 215.26, Florida Statutes, to be a statute of repose rather than a statute of limitation and thus applicable to Transit's claim for refund of premium taxes, the trial court's holding that a refund would be due for all taxes paid for the tax years 1984 and 1985 is correct. Under Section 624.509(1), the premium tax was due and payable on March 1 of each year for premiums received during the preceding calendar year. In other words, the premium tax for the year 1985 was due on March 1, 1986; the premium tax for 1984 was due on March 1, 1985. Pursuant to Section 524.509(3), Florida Statutes, Transit paid quarterly installments of the estimated premium tax. However, the actual tax obligation was not assessed until March 1 of the following year. Accordingly, until Transit's tax return was prepared and filed, it would have been impossible to determine Transit's entitlement to a refund for tax paid prior to that time.

IV. THE COURT CAN PROPERLY DETERMINE ALL ISSUES PRESENTED WITHOUT REMAND

In point VI of Appellants' Reply and Answer Brief, Appellants argue that in the event this Court affirms the trial court's ruling that the premium tax statutes were unconstitutional and reverses the trial court's ruling on the set-off of retaliatory taxes, the case should be remanded to the trial court for consideration of the defenses of waiver and estoppel. While Appellants raised these defenses in their Answer, they were never


the basis of a motion for summary judgment.² Appellants filed three separate motions for summary judgment. Two were based upon affirmative defenses.³ Clearly, if Appellants wished to assert these defenses as a basis for the trial Court's ruling, they could have included them in their summary judgment motions. Appellants' brief on this point is nothing more than a belated attempt to avoid a final ruling on the merits of the case. No remand is necessary. Appellants, by their failure to raise these defenses in the summary judgment motions, have waived any right to assert additional defenses.

²In an effort to raise these defenses prior to the trial court's ruling, appellants filed a supplemental memorandum with the court on October 14, 1991, just four days before the hearing on all pending motions. (R. at 632) Transit was not afforded any opportunity to respond to the memorandum and these defenses were not raised during oral argument on the motions.

³Appellants' motions for summary judgment on the basis of affirmative defenses were filed on March 22, 1991, nearly seven months before the trial court's final hearing on summary judgment. Other than the arguments contained in appellants' supplemental memorandum, appellants never argued either of these defenses as a basis for summary judgment.


Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to ROBERT A. BUTTERWORTH and LEE ROHE, Tax Section, The Capitol, Tallahassee, Florida 32301; and to DANIEL C. BROWN and PAUL R. EZATOFF at Katz, Kutter, Haigler, Alderman, Davis, Marks & Rutledge, P.A., First Florida Bank Building, 215 South Monroe Street, Suite 400, Tallahassee, Florida 32301, this 3d day of January, 1992.


Patrick J. Farrell, Jr.