SUPREME COURT OF THE STATE OF FLORIDA

CITY OF SARASOTA, a
municipal corporation,

Appellant/Petitioner,

v.

Case No. 83,177

J. W. MIKOS, Property Appraiser
for Sarasota County, Florida,

Appellee/Respondent.

_____/

On Appeal from the
Second District Court of Appeal
in and for the State of Florida

REPLY BRIEF OF APPELLANT/PETITIONER, CITY OF SARASOTA

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

ARGUMENT

I. THE SECOND DISTRICT ERRED IN AFFIRMING SUMMARY JUDGMENT IN FAVOR OF MIKOS AND AGAINST THE CITY OF SARASOTA WHEN THE CITY'S REQUEST FOR AD VALOREM TAX EXEMPTION WAS DENIED.

A. THE CITY OF SARASOTA HAS MET ITS BURDEN OF PROOF THAT THE CITY OF SARASOTA IS ENTITLED TO AN AD VALOREM TAX EXEMPTION SINCE THE USE BY THE CHICAGO WHITE SOX OF THE CITY OF SARASOTA SPORTS COMPLEX AND THE ED SMITH STADIUM FURTHERS PUBLIC RECREATIONAL PROGRAMS AND TOURISM AND THUS SERVES A GOVERNMENTAL-GOVERNMENTAL FUNCTION.

MIKOS[1] argues that the CITY's[2] claim for exemption from ad valorem tax for the City of Sarasota Sports Complex and Ed Smith Stadium should be strictly construed against the CITY and in favor of the taxing power. Although such exemptions are generally strictly construed against the party claiming them, an exception applies when a municipality is claiming the exemption. As stated by the court in Saunders v. City of Jacksonville, 25 So.2d 648 (Fla. 1946):

> Many of our opinions have been cited to sustain the principle that exemptions from taxes are frowned upon and each claim should be strictly construed. This rule does ***not*** apply where the question is raised by a municipality asserting the exemption by virture of a statute duly passed pursuant to the

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[1] The Respondent, J. W. MIKOS, Property Appraiser for Sarasota County, Florida, the Appellee/Plaintiff below, will be referred to as "MIKOS" herein.

[2] The Petitioner CITY OF SARASOTA, the Appellant/Defendant below, will be referred to as the "CITY" herein.

> Constitution. In the latter case, exemption is the rule and taxation is the exemption, Saunders 25 So.2d at 651. (Emphasis added.)

MIKOS cites Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So.2d 498 (Fla. 1976), as an example of the application of the strict construction rule. Volusia County, 341 So.2d 498, involved a lease of public property to a private corporation from a legislativelty created racing and recreational facilities district, not a municipality. A racing and recreational facilities district created by special act of the Legislature with powers restricted to the operation of a racetrack is fundamentally different from a municipality operating under the Home Rule Powers set forth in Chapter 166, Fla.Stat.

A finding by this Court that the operation of a baseball stadium serves a governmental function is consistent with the decision of this Court in Hanna v. Sunrise Recreation, 94 So.2d 597 (Fla. 1957) which determined that the mere fact that charges were levied by a private for-profit corporation for admission to a state park did not defeat a public purpose. The facts in Hanna, 94 So.2d 597, involved property deeded to the Florida Board of Parks and Historic Memorials, an agency of the State of Florida, expressly for "State Park purposes only." The issue before the court was whether a proposed lease from the State agency to a private lessee for a term of twenty years which gave the lessee the right to construct the following recreational facilities: golf course, tennis courts, and swimming pool were "park purposes" as required by the deed. The court discussed at 94 So.2d 601 the view that park purposes include

recreational purposes such as tennis courts and outdoor exercises including golfing and baseball. The court expressly determined:

> The fact that charges will be made for use of the facilities and that a private corporation will profit therefrom are not controlling. ... And we have held that the fact that a private corporation or individual will incidentally profit from a transaction does not in itself defeat a public purpose. (Citations omitted.) Hanna, 94 So.2d at 601.

The court concluded in Hanna, 94 So.2d 597, that the uses contemplated under the proposed lease may properly be classified as park purposes. See Florida Little Major League Association, Inc. v. Gulfport Lions' Little League, Inc., 127 So.2d 707 (2nd DCA 1961).

This Court recently opined in Sebring Airport Authority v. McIntyre, 623 So.2d 541 (Fla. 2nd DCA 1993), aff'd, No. 82,489 (Fla. August 11, 1994), that a public purpose is not served when the Sebring International Raceway leases public property to operate an automobile racetrack for profit. The distinction drawn by the Court between a proprietary function and a governmental function was as follows:

> Proprietary functions promote the comfort, convenience, safety, and happiness of citizens, whereas government functions concern the administration of some phase of government. Black's Law Dictionary 1219 (6th Ed. 1990). Sebring, Slip.Op. at 4.

It is the CITY's position that public recreation being provided by a municipally owned baseball stadium is incorporated within the phrase "administration of some phase of government." It is not uncommon for municipalities to have a department solely devoted to public recreation (i.e. maintenance, policing, traffic control, landscaping, supervision for special events, placement of permanent seating, and the like). A public

park may provide comfort, convenience, safety, and happiness to the citizens of the city and also constitute some phase of the administration of government. In fact, public parks and recreation are one of the public facilities along with roads, water and sewer service subject to the concurrency requirements on a state wide basis as set forth in §163.3180, Fla.Stat. (1993). The Legislature determined in the Growth Management Act (Chap.163, Part II, Fla.Stat. 1993) that parks and recreation are as fundamental as roads, sewer and water service to the operation of government. In contrast, automobile racetracks designed solely for the staging of professional races have not been traditionally seen as such. Baseball is a national past time participated in and/or appreciated by a large segment of the population as evidenced by the national uproar over the current baseball strike. The baseball stadium is operated by the CITY as part of its governmentally operated parks and recreation program and thus serves a governmental function. The operation of the stadium has not been assumed by the Chicago White Sox as was the case in Sebring, No. 82,489, wherein due to financial difficulties the operation of the race was assumed by the Raceway (2DCA App. 24, 71).

B. THE CASES RELIED UPON BY MIKOS ARE FACTUALLY DISTINGUISHABLE FROM THE LEASE OF A MUNICIPAL STADIUM TO A BASEBALL TEAM FOR SPRING TRAINING.

The principal case relied upon by MIKOS is Williams v. Jones, 326 So.2d 425 (Fla. 1975), in which the court determined that uses described as barber shops, plumbing businesses, beauty shops, laundries, rental cottages or rental units, motels, restaurants, and campgrounds were governmental-proprietary functions and do not

qualify for tax exemption. It is the position of MIKOS that the above enumerated uses are synonymous with the operation of a municipal stadium. There is a fundamental difference between the operation of a beauty shop and a municipal stadium. Additionally, MIKOS speculates that the court in Williams, 326 So.2d 425, determined that the promotion of tourism was not a valid public purpose, and yet there is absolutely no finding or discussion in the opinion of the court in Williams, 326 So.2d 425, as to whether any or all of the enumerated uses promoted tourism or whether the parties in Williams even made the argument to the court that the promotion of tourism was a valid public purpose.

The second primary case argued by MIKOS is Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So.2d 498 (Fla. 1976). Specifically, MIKOS argues that the Daytona Beach Race Track and the CITY's Stadium charge a fee for spectator admissions to sporting events to earn owner profits. The fundamental difference between these two situations is that the Daytona Beach Racing and Recreational Facilities District leased all 448 acres to a private corporation who undertook to construct a racetrack facility at its own expense as the principal consideration for the leasehold. The racetrack facility was owned by the private corporation and its sole function was to make a profit for the private corporation. In contrast, in the case at bar, the evidence presented by the CITY clearly describes the Stadium as being owned and operated by the CITY OF SARASOTA with numerous public recreational programs occurring at the Stadium in addition to the games of the

Chicago White Sox, Ltd. (2DCA App. 21-22).[3] MIKOS further argues that in his opinion tourism is brought to the Daytona Beach area as a result of the racetrack and therefore the CITY's argument that the Chicago White Sox lease promotes tourism is invalid. Once again a close review of the opinion in Volusia County v. Daytona Beach Racing and Facilities District, 341 So.2d 498, reveals that there is absolutely no reference to the promotion of tourism in the opinion. Further there is no indication in the opinion that either an argument as to tourism was presented to the court or that the court considered this issue.

The next case argued by MIKOS is Walden v. Hillsborough County Aviation Authority, 375 So.2d 283 (Fla. 1979), in which MIKOS argues that the use of governmental property by private enterprise for the purpose of making a profit does not entitle leaseholds to exemption from ad valorem taxation. The factors constituting public recreation present in the case sub judice were not before the court in Walden, 515 So.2d 283.

MIKOS cites Markham v. MacCabee Investments, Inc., 343 So.2d 16 (Fla. 1977), arguing that a theater company leasing a theater from a municipality is analogous to the lease of the Stadium by the Chicago White Sox. What MIKOS does not mention is that MacCabee Investments, Inc. had the sole and exclusive right to operate the theater for the staging of shows for seven years. MIKOS argues that the Chicago White Sox have the sole and exclusive use of portions of the Stadium during spring training games and

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[3] References to the Appendix of the CITY's Initial Brief before the Second District shall be made by use of letters "2DCA App." followed by the appropriate page.

therefore the situation is identical to the facts in Markham, 343 So.2d 16. This is simply not the case. There are numerous public park and recreation activities occurring at the Stadium in addition to the games of the Chicago White Sox including football games and soccer games of local youth teams as well as baseball games of five high school teams (2DCA App. 21-22). The CITY has subsidized the cost of the operation of the Stadium from its General Fund each year because revenues generated by the Stadium are not sufficient to cover the operating expenses of the facility (2DCA App. 24). The amount of this subsidy has been approximately $200,000.00 (2DCA App. 24, 71).

One of the principal cases relied upon by MIKOS is City of Orlando v. Hausman, 534 So.2d 1183 (5th DCA 1988), rev.den. 544 So.2d 199 (Fla. 1988). The case of City of Orlando, 534 So.2d 1183, is not applicable simply because the issue in that case was not whether the tenant's use of the leased property was for a municipal or public purpose. The City of Orlando argued that §196.199(2)(b), Fla.Stat., was applicable to subject the tenants to ***only*** intangible personal property taxation. The issue was not a claim of tax exemption but rather the type of tax payable.

The recent decision of the Florida Supreme Court in Capital City County Club v. Tucker, 613 So.2d 448 (Fla. 1993), involved the lease of municipally owned property for purposes of operating a ***private*** golf course. The sole issue was whether the imposition of real estate taxes on the fair market value of the land and the imposition of intangible taxes on the leasehold interest constituted a double taxation of the property. The court concluded that it did not constitute double taxation. Therefore the court in Capital City County Club, considered an entirely different issue than the one in the case at bar.

C. THE LEASE OF THE CITY OF SARASOTA SPORTS COMPLEX AND THE ED SMITH STADIUM BY THE CHICAGO WHITE SOX SERVES A PURPOSE WHICH WOULD BE A VALID SUBJECT FOR THE ALLOCATION OF PUBLIC FUNDS.

MIKOS mischaracterizes the CITY's argument by stating that it is the CITY's position that because funds from a general obligation bond issue were used to construct the Stadium facility, then the Stadium property is automatically tax exempt. The basis for the CITY's argument is found in the criteria of §196.199(2)(a), Fla.Stat., where reference is made to §196.012(6), Fla.Stat., defining a governmental, municipal, or public purpose or function to include when a lessee is demonstrated to perform a function or serve a purpose which would otherwise be a valid subject for the allocation of public funds. The CITY has already established that the financing of the Stadium by the sale of general obligation bonds was a valid expenditure of public funds (2DCA App 4, 18). MIKOS argues that while it is not a proper expenditure of public funds to construct a baseball stadium, it is not a proper expenditure of public funds to actually use the baseball stadium to stage baseball games. This argument constitutes a distinction without a difference.

MIKOS relies upon Brandes v. City of Deerfield Beach, 186 So.2d 6 (Fla. 1966), to argue that tourism does not benefit the public. A close review of the opinion in Brandes, 186 So.2d 6, indicates that it contains absolutely no reference to the promotion of tourism. Further, there is no reference to whether the court even considered tourism as an issue.

Further, MIKOS cites to a section of the Baseball Facility Lease providing that the CITY is responsible for real estate, personal property, and other taxes and assessments relating to the Stadium as evidence that the parties contemplated that the property might be taxed. However, the CITY by assuming responsibility for such payment, did not waive its right to claim a tax exemption or concede that the Stadium was taxable.

II. THE ORIGINAL LEGISLATIVE INTENT OF §196.012(6), FLA.STAT., AS CLARIFIED BY THE AMENDMENT IN HOUSE BILL 2557 IS THAT RECREATIONAL FACILITIES SERVE A GOVERNMENTAL, MUNICIPAL, OR PUBLIC FUNCTION EVEN THOUGH SAID AMENDMENT OPERATES PROSPECTIVELY.

MIKOS mischaracterizes the CITY's argument by stating that the CITY is attempting to have House Bill 2557 operate retroactively. The CITY does not dispute that House Bill 2557 operates prospectively given that Section 59 provides:

> Section 59. Effective upon this act becoming law and **applying to the 1994 and subsequent tax rolls**, subsection (6) of section 196.012, Florida Statutes, is amended to read:
>
> .....

It is the CITY's position that House Bill 2557 amended §196.012(6), Fla.Stat., to clarify the original legislative intent to include the recreational facilities enumerated (i.e. sports facility with permanent seating and stadium) as governmental, municipal, or public purposes or functions. The fact that House Bill 2557 is prospective in application does not make the CITY's argument any less persuasive. MIKOS' attempt to ignore this clarification of legislative intent fails to consider that the Supreme Court was faced with a similar situation in State, ex rel. Szabo Food Services, Inc. of N.C. v. Dickinson,

286 So.2d 529 (Fla. 1974). In Szabo, 286 So.2d 529, the statutory amendment was effectuated through Chapter 71-360, Laws of Florida (Sup.Ct.App. 47-54)[4] which states:

> The tax imposed by this Act on coin-operated vending machines and on cable television shall take effect on October 1, 1971, and all other provisions of this Act shall take effect on July 1, 1971 (Sup.Ct.App. 53).

Thus in both Szabo, 286 So.2d 529, and the case sub judice the statutory amendments were to begin on a date certain. The Supreme Court in Szabo, 286 So.2d 529, did not determine that this language in any way limited its conclusion that the amendment was a clarification of what the law always had been.

III. THE FLORIDA SUPREME COURT LACKS JURISDICTION TO DETERMINE THE CONSTITUTIONALITY OF THE AMENDMENT OF §196.012(6), FLA.STAT., CONTAINED IN HOUSE BILL 2557, AS REQUESTED BY MIKOS.

MIKOS requests this Court to determine the constitutionality of the amendment to §196.012(6), Fla.Stat., contained in House Bill 2557 for the first time as part of the CITY's appeal to this Court. MIKOS' position that §196.012(6) as amended by House Bill 2557 is subject to constitutional objection was neither briefed nor argued before the trial court or the Second District Court of Appeal. MIKOS' argument regarding the constitutionality of House Bill 2557 is procedurally barred by the fact that it was not raised before the trial court or Second District. See Penn v. Florida Defense Finance & Accounting Service Center Authority, 623 So.2d 459 (Fla. 1993). In fact House Bill 2557 became law on June 3, 1994, which was over six months after the Second District

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[4] References to the Appendix filed by the CITY OF SARASOTA with its Initial Brief will be prefixed by the letters "Sup.Ct.App." followed by the appropriate page.

rendered its opinion in the case sub judice (Supp.Ct.App. 5,3). This principle of appellate review has been stated as:

> It is a familiar canon of appellate review that appellate courts are loath to rule upon issues not directly ruled upon by the trial court. 2 Fla.Jur.2d *Appellate Review*, §299. Courts prefer that the constitutionality of a statute be considered first by a trial court. Dickinson v. Stone, 251 So.2d 268 (Fla. 1971).
> Glendale Federal Savings & Loan Association v. State of Florida Department of Insurance, 485 So.2d 1321 at 1325 (Fla. 1st DCA 1986).

Constitutional issues are waived unless they are first presented in the trial court. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). The only exception to the raise-it-or-waive-it rule is for fundamental error. The court in Fleischer v. Fleischer, 586 So.2d 1253 (Fla. 4th DCA 1991), described what constitutes fundamental error:

> "Fundamental" error, in this sense, refers to error that goes to the very heart of the judicial process, not to mistakes as to which arguably correct law or rule to apply, or as to the application of such a rule of law to the facts in the case. 586 So.2d at 1254

MIKOS does not argue in the Answer Brief that fundamental error exists in the case sub judice so as to justify an exception to the rule. Furthermore, House Bill 2557 is being utilized by the CITY in its argument as to the legislative intent which goes to the application of the statutory exemption and thus is not of such a nature to be "fundamental" as defined by the court in Fleischer, 586 So.2d 1253.

It is not necessary to a determination of the case sub judice that this Court consider the constitutionality of the amendment to §196.012(6), Fla.Stat., set forth in

House Bill 2557. This principle was enunciated in McKibben v. Mallory, 293 So.2d 48 (Fla. 1974), as:

> It is a fundamental principle that courts will not pass upon the constitutionality of a statute where the case before them may be disposed of upon any other ground. 293 So.2d at 51

The issue in the case sub judice can be decided by determining whether the use by the Chicago White Sox of the Stadium to further public recreation and tourism serves a governmental-governmental function, without reaching the constitutional issue.

It is the CITY's position that while this Reply Brief does not constitute a full and complete briefing of the constitutionality of the amendment to §196.012(6), Fla.Stat., the following is presented to rebut the cases cited by MIKOS.

Specifically, MIKOS cites Archer v. Marshall, 355 So.2d 781 (Fla. 1978), which involved a special act reducing the rent payable by leaseholders on Santa Rosa Island by an amount equal to the ad valorem taxes they paid. In contrast, the amendment to §196.012(6), Fla.Stat., is based upon the valid exemption in §196.199(2)(a), Fla.Stat. (1993), for lessees who serve or perform a governmental, municipal, or public purpose. There was no underlying valid exemption upon which to base the rent reduction invalidated in Archer, 355 So.2d 781.

The second case cited by MIKOS is Am Fi Investment Corp. v. Kinney, 360 So.2d 415 (Fla. 1978), which involved a special act allowing for a retroactive rebate of ad valorem taxes to leaseholders on Santa Rosa Island paid by them for 1972 through 1974. For the reasons stated above, the decision in Am Fi is clearly distinguishable from the case sub judice where there is already a valid tax exemption set forth in

§196.199(2)(a), Fla.Stat., for lessees who perform municipal, governmental, or public purposes.

The final case cited by MIKOS is Lykes Brothers, Inc. v. City of Plant City, 354 So.2d 878 (Fla. 1978), which involved an attempt by Plant City to exempt a leasehold from ad valorem tax by contract. The lease itself called for tax exoneration. Clearly the factual situation in Lykes is distinguishable from the statutorily based exemption in the case sub judice.

CONCLUSION

For the foregoing reasons, summary judgment was improperly entered in favor of MIKOS. The CITY OF SARASOTA respectfully requests this Court to remand the case to the trial court with directions to enter summary judgment in favor of the CITY OF SARASOTA, declaring that the CITY OF SARASOTA is entitled to a 100% tax exemption for the 1990 tax year and thereafter, consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served a true and correct copy of the foregoing upon Attorneys for Appellee/Respondent John C. Dent, Jr. and Robert K. Robinson; Dent, Cook & Weber; 1844 Main Street, Sarasota, Florida 34236; and upon Attorneys for Amicus, Michael S. Davis, P.O. Box 2842, St. Petersburg, Florida 33731, and Harry Morrison, General Counsel, Florida League of Cities, P.O. Box 1757, Tallahassee, Florida 32302, by U.S. mail this 19th day of August, 1994.

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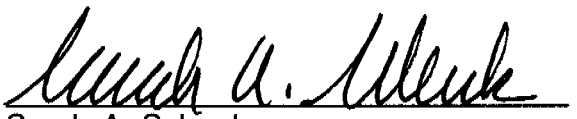

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