IN THE SUPREME COURT OF FLORIDA

NAEGELE OUTDOOR ADVERTISING CO., INC., SAM E. NEWEY, LES LOGGINS ADVERTISING & PUBLIC RELATIONS, INC., et al.

Petitioners,

vs.

Case No. 83,734
(DCA No. 93-381)

CITY OF JACKSONVILLE, FLORIDA and **CAPSIGNS, INC.**,

Defendants.

RESPONDENT CAPSIGNS, INC.'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This case involves a challenge to a City Charter Amendment adopted on May 26, 1987 (the "1987 Charter Amendment") and ten city ordinances, the first of which was adopted on March 11, 1987. Under the 1987 Charter Amendment, a portion of the petitioners' billboards were required to be removed after a 5-year amortization period. The petitioners took full advantage of the grace period allowed by the 1987 Charter Amendment, but then failed to remove the subject billboards when the 5-year amortization period expired.

Petitioners and their predecessors in interest delayed until 1991 and 1992 before filing their challenges to the 1987 Charter Amendment. The 1987 Charter Amendment provided a $500 per day fine for those billboards which were not removed by the expiration of the 5-year grace period. The petitioners now contend that the $500 per day fine is excessive, although they offer no evidence as to the amount of revenue generated by the affected billboards during the 5-year grace period or thereafter.

On October 27 and 28, 1992, petitioners filed their motions for temporary injunctive relief pursuant to Rule 1.610, Florida Rules of Civil Procedure. On November 23, 1992, an evidentiary hearing was held, on December 12, 1992 the court heard closing arguments, and on December 29, 1992 the court entered an order granting all of the temporary injunctive relief sought by petitioners. Among the broad relief granted the petitioners on December 29, 1992 was an injunction against the accrual of fines

during the pendency of the action retroactive to June 1, 1992. However, the December 29, 1992 order granting the petitioners' motions for temporary injunctive relief was flawed in that it failed to specify sufficient factual findings to support the entry of a preliminary injunction.

SUMMARY OF ARGUMENT

The subject decision and the Florida East Coast decision are not wholly irreconcilable so as to create an "express and direct conflict." Furthermore, the cases are factually distinguishable inasmuch as the petitioners did not act with due diligence in pursuing their claims against the 1987 Charter Amendment.

ARGUMENT

THE SUBJECT DECISION IS NOT WHOLLY IRRECONCILABLE WITH THE DECISION IN FLORIDA EAST COAST RY. CO. V. STATE, 79 FLA. 66, 83 SO. 708 (1920), SO AS TO CREATE AN "EXPRESS AND DIRECT" CONFLICT.

The petitioners now seek judicial review of the First District Court of Appeal's March 30, 1994 decision based upon allegations that the decision is in "express and direct conflict" with the Florida Supreme Court's decision in Florida East Coast Ry. Co. v. State, 79 Fla. 66, 83 So. 708 (1920).

The First District Court of Appeal did not recognize any conflict with Florida East Coast in its March 30, 1994 decision. More importantly, in Florida East Coast, this court held that only if the defendant proceeded with due diligence to challenge a

contested rule, then fines could not be imposed pending such test where the fines are so onerous as to intimidate the defendant from exercising its rights. 83 So. at 715-716.

In the case at bar, there was no determination that the petitioners have proceeded with due diligence to test the validity of the 1987 Charter Amendment. To the contrary, the First District Court of Appeal observed that "only as the fourth year came to a close did the first of the plaintiffs below file in Circuit Court to block action by the City." The remaining petitioners waited until the end of the fifth year before commencing their actions. Even then, the petitioners delayed in seeking injunctive relief to prospectively and retroactively enjoin the accrual of fines.

In essence, the billboard industry has sought to secure the full benefit of a 5-year amortization period, and only then mount a constitutional challenge. Petitioners erroneously suggest that their challenge (delayed for four to five years) has been made with "due diligence." A delayed challenge is frequently employed in billboard litigation with the effect of extending the period of time that the billboards may continue to generate revenue before their eventual removal. See, e.g., Naegele Outdoor Advertising Co. v. Durham, 844 F.2d 172 (4th Cir. 1988). Such a tactic should not find favor under Florida law as it encourages intentional delay. A sign owner is in a position to challenge a sign law such as the one incorporated into the 1987 Charter Amendment upon its enactment. In a case very similar to the ones

at bar, National Advertising Co. was held to be time barred from bringing an action where it waited more than 3 years after the enactment of a sign law containing 5-½ year grace period (here, the grace period was 5 years). The court noted that because the law had a specific and immediate impact upon the primary use of the property, National Advertising Co. was in a position to challenge the law upon its enactment. National Advertising Co. v. City of Raleigh, 947 F.2d 1158, 1166 (4th Cir. 1991).[1] The petitioners or their predecessors in interest were similarly in a position to bring their challenge in 1987.

Where a case involves substantially the same controlling facts, then discretionary review may be invoked if the application of a rule of law produces a different result from the earlier decision. However, the controlling facts become "vital" and "of utmost importance" in making that determination. Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960); Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). As a result, conflict jurisdiction is restricted to decisions which are "wholly irreconcilable" and which form "patent irreconcilable precedents." Williams v. Duggan, 153 So. 2d 726, 727 (Fla. 1963); Florida Power & Light Co. v. Bell, 113 So. 2d 697, 6799 (Fla. 1959). If the cases are "factually distinguishable," a petition for discretionary review will be dismissed. Kaylor v.

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[1] Although the same National Advertising Company was one of the original appellees in these consolidated cases, it subsequently settled with the appellants and its appeal was dismissed on May 13, 1994.

Kaylor, 500 So. 2d 530, 531 (Fla. 1987); Wilson v. Southern Bell Telephone and Telegraph Co., 327 So. 2d 220, 221 (Fla. 1976).

By the failure to mount challenges to the 1987 Charter Amendment with "due diligence," this case is factually distinguishable from Florida East Coast and the two cases are not wholly irreconcilable so as to create the type of "conflict" necessary for this court's discretionary review.

The Florida Rules of Civil Procedure have provided (and continue to provide) the petitioners with an opportunity to obtain injunctive relief. However, in order to be entitled to such injunctive relief, the petitioners must satisfy the traditional four-prong test, requiring a showing of (1) the likelihood of irreparable harm, (2) the unavailability of an adequate remedy at law, (3) a substantial likelihood of success on the merits, and (4) a consideration of the public interest. This procedure does not run afoul of the petitioners' constitutional rights, but rather sets forth the framework within which those rights may be exercised in a given factual situation.

Petitioners are resorting to this court's discretionary review in an effort to obtain a second appeal. This approach is not allowed as certiorari is not to be employed as "an added escape route" to reach the objective of a second appeal. Karlin v. City of Miami, 113 So. 2d 551, 553 (Fla. 1959); Lawyers Title Insurance Corp. v. Little River Bank & Trust Co., 243 So. 2d 417 (Fla. 1970) (alleged misapplication of a procedural rule insufficient to invoke discretionary jurisdiction).

CONCLUSION

There is not a "direct and express" conflict between the First District Court of Appeal's March 30, 1994 decision and this court's 1920 decision in Florida East Coast. In any event, this case is factually distinguishable from the Florida East Coast decision inasmuch as the petitioners have failed to act with due diligence in the pursuit of their constitutional claims.

Dated this 7th day of June, 1994.

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