IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs.

CITY OF JACKSONVILLE, FLORIDA and CAPSIGNS, INC.,

Respondents.

_____/

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

RESPONDENT CITY OF JACKSONVILLE, FLORIDA'S
JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioners are challenging a City Charter amendment regulating billboards, which was adopted by referendum on May 26, 1987. That amendment prohibited the erection of new billboards and required the removal of some of the Petitioners' billboards after a five year amortization period. Petitioners also challenge a number of City ordinances pertaining to sign regulation adopted on and after March 11, 1987.

The Charter amendment provided for a $500 per day penalty for those billboards required to be, but not, removed by June 1, 1992. The first challenge to the Charter amendment was not filed until almost four years after the voters approved the Charter amendment and, in fact, all but one of the Petitioners waited until just weeks before the June 1, 1992 deadline before filing suit. Petitioners did not attempt to obtain a temporary injunction prior to the date fines began to accrue.

On October 27 and 28, 1992, Petitioners filed motions for temporary injunctive relief and an evidentiary hearing was held on November 23, 1992. The Court heard arguments on the motions on December 12, 1992, and on December 29, 1992, entered an order granting temporary injunctive relief to Petitioners. In addition to enjoining the enforcement of the Charter amendment and sign ordinances, the trial court's order enjoined the accrual of fines during the pendency of the action, retroactive to June 1, 1992.

On March 30, 1994, the First District Court of Appeals quashed the temporary injunction and reversed the order granting

petitioner's motions for temporary relief. The First District Court of Appeals on May 5, 1994, denied Petitioners' motion for rehearing or in the alternative for certification to this Court. On May 23, 1994, the First District Court of Appeals denied Petitioners' Motion for Stay of Issuance of Mandate Pending Further Review and on that date issued its Mandate.

SUMMARY OF ARGUMENT

The decision in the present case and the decision of this court in Florida East Coast Ry. Co. v. State, 79 Fla. 66, 83 So. 708 (1920) are not in "express and direct" conflict. The facts of the two cases are distinguishable as petitioners did not use due diligence in contesting the sign regulations despite having ample opportunity to do so.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IN THE PRESENT CASE IS NOT IN "EXPRESS AND DIRECT" CONFLICT WITH THIS COURT'S DECISION IN FLORIDA EAST COAST RY. CO. V. STATE, 79 FLA. 66, 83 SO. 708 (1920). THIS COURT DOES NOT HAVE JURISDICTION UNDER ARTICLE V, SECTION 3 (b) (3), FLORIDA CONSTITUTION.

Petitioners claim that the decision of the district court in the instant case is in "express and direct" conflict with this court's decision in Florida East Coast Ry. Co. v. State, 79 Fla. 66, 83 So. 708 (1920). This claim is completely devoid of merit as the controlling facts in Florida East Coast and the instant case are clearly distinguishable.

Under Article V, Section 3 (b) (3), Florida Constitution, this court may review a decision of a district court of appeal by

way of certiorari that expressly and directly conflicts with a decision of this Court. This Court has repeatedly emphasized that its conflict jurisdiction is discretionary. Sroczyk v. Fritz, 220 So. 2d 908, 911 (Fla. 1969); Seaboard Airline Railroad Co. v. Branham, 104 So. 2d 356, 357 (Fla. 1958); Lake v. Lake, 103 So. 2d 639, 642 (Fla. 1958).

Moreover, conflict jurisdiction is limited and restricted. District courts of appeal "are and were meant to be courts of final appellate jurisdiction . . . . Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own powers." Lake, 103 So. 2d at 642; see also Lawyers Title Insurance Corp. v. Little River Bank and Trust Co., 243 So. 2d 417, 418 (Fla. 1970); Nielsen v. Sarasota, 117 So. 2d 731, 734-35 (Fla. 1960).

The goal of this court's conflict jurisdiction is avoiding confusion in judicial opinions in the interest of ensuring stability in the law. "Our concern is with the decision under review as a legal precedent to the end that conflicts in the body of the law of this State will be reduced to an absolute minimum . . . . That is the obvious purpose of the constitutional provision and the limitations of our power to review decisions of the district court in this respect." N & L Auto Parts Co. v. Doman, 117 So. 2d 410, 412 (Fla. 1960); see also Florida Power and Light v. Bell, 113 So. 2d 697, 699 (Fla. 1959).

The decision of this court in Florida East Coast and that of the district court in the case at bar do not create confusion or inconsistency in the law because the facts in each case are different. There is no danger that by leaving both decisions "on the books together with other decisions on the same subject there will be irreconcilable statements of the law . . . ." Sroczyk, 220 So. 2d at 911. For this court to take jurisdiction, the district court's decision would have to have effectively overruled Florida East Cost. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). That simply did not occur.

Review by this court is triggered when a court announces a rule of law that conflicts with a previously announced rule or when a court applies a rule of law in a case with substantially the same controlling facts as a previous case and reaches a different result. Nielsen, 117 So. 2d at 734. "Under the second situation the controlling facts become vital . . . ." Id.; see also Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975).

Petitioners claim that the district court in the instant case produced a result in conflict with the result previously reached by this court in Florida East Coast. The facts of the two cases, however, are clearly distinguishable and "[i]f the two cases are distinguishable in controlling factual elements . . . then no conflict can arise." Kyle, 139 So. 2d at 887; see also Kaylor v. Kaylor, 500 So. 2d 530 (Fla. 1987).

Florida East Coast involved administrative orders promulgated by the Railroad Commissioners of the State of

Florida. The rules required that before any railroad operating in the state could increase specified rates, the proposed rate increases must be submitted and approved by the Railroad Commissioners. The Commissioners simultaneously adopted penalty provisions for violations of the regulations without providing a mechanism for testing their validity. As a result, the railroad incurred substantial penalties while preparing to challenge the constitutionality of the regulations. The failure to provide an opportunity to test the regulations prompted this court to hold that the railroad could not be subjected to the penalties while the regulations' validity was at issue. Florida East Coast, 83 So. at 716.

This court did recognize the power of the state to impose substantial penalties as long as there was opportunity to test the accompanying regulations. "A state has power to impose penalties sufficiently heavy to secure obedience to orders of public utility commissions after they have been found lawful or after the parties affected have had ample opportunity to test the validity of administrative orders and failed to do so." Id. at 715 (emphasis added); Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651, 667 (1915); Ex parte Young, 209 U.S. 123, 146 (1908).

This court set out the conditions under which the state does not have the power to impose heavy fines.

> [I]f the defendant reasonably and in good faith regarded the rule, for the violation of which the fines here sought to be enforced were imposed, as an unconstitutional violation of its property rights, it had the privilege of testing the validity of the rule in the courts. And, if the defendant proceeded in good

> faith and with due diligence to make the test . . . heavy fines cannot lawfully be imposed for violations pending such test, where the fines are so onerous as to intimidate the defendant in exercising its right to contest the validity . . . .

Florida East Coast, 83 So. at 715-16 (emphasis added).

In the present case, these prerequisites for staying accrual of penalties are not satisfied. Petitioners had five years in which to test the validity of the sign regulations before they were subject to any penalty whatsoever, and failed to exercise their privilege. Waiting five years is not due diligence, and the lack of due diligence is a complete bar to the relief petitioners seek. Id.

In Florida East Coast, this court relied on the opinion of the United States Supreme Court in Wadley, where the railroad refused to comply with new regulations when it received notice of their promulgation, rather than contesting the new regulations. Two months later the Commission instituted enforcement proceedings against the railroad for penalties of $5,000 per day. The Supreme Court held that by waiting two months, the railroad had failed to exercise due diligence and the penalties could be imposed. Wadley, 235 U.S. at 668.

The court answered the question whether a "penalty can be collected for the violation of an order not known to be valid at the date of the disobedience sought to be punished" by stating that "there is no room to doubt the power of the state. . . to impose a penalty for acts of disobedience committed after the carrier had ample opportunity to test the validity of

administrative orders and failed to do so." Id. If two months is ample opportunity then clearly five years is an abundance of ample opportunity.

In support of its due diligence requirement in Florida East Coast, this court also relied on St Louis, Iron Mountain and Southern Ry. Co. v. Williams, 251 U.S. 63 (1919) and Gulf-Colorado and Santa Fe Ry. Co. v. State of Texas, 246 U.S. 58 (1918). In Williams the United States Supreme Court upheld penalties of between $50.00 and $300.00 per violation where it found the railroad had not taken advantage of the opportunity provided to test the statute's validity. "[W]here such an opportunity is afforded . . . and the carrier fails to avail itself of the opportunity, it then is admissible, so far as due process of law is concerned, for the state to enforce adherence to the rate by imposing substantial penalties for deviations from it." Williams, 251 U.S. at 65.

In Gulf-Colorado the penalty was $100 per offense and had accumulated to $22,400. Gulf-Colorado, 246 U.S. at 60. The Supreme Court again held that an opportunity was provided to test the regulations and because "[t]he railroad saw fit to await proceedings against it, and although the case in all its aspects is somewhat extreme, the judgement must be affirmed." Id. at 62.

Petitioners simply sat on their rights for five years while receiving income from the billboards in question. Even after filing suit, Petitioners did not act with due diligence to seek any hearing on their legal challenges.

The original Complaint, filed by Petitioner Naegele over a hear before fines began to accrue, alleged that "the City has taken the position that the purported Charter amendment is valid and effective, and asserts that it intends to enforce the provision of the purported Charter amendment." Other Petitioners' complaints filed before the June 1, 1992, date contained identical language. The five year amortization period provided ample opportunity for Petitioners to test the sign regulations with no risk of penalties. They instead chose to sit quietly and collect revenues from their billboards. They not only waited until the eleventh hour before seeking relief -- they waited until the clock had already struck midnight.

Petitioners' due process rights do not "establish a constitutional right to risk-free litigation under all possible circumstances. Due Process requirements are met by a statutory scheme that provides an opportunity for testing the validity of an ordinance without incurring the prospect of debilitating penalties." Danish Health Club, Inc. v. Town of Kittery, 562 A. 2d 663 (Me. 1989).

In addition to Petitioners' lack of due diligence that distinguishes the present case from Florida East Coast, the penalties assessed against petitioner are not "so onerous as to intimidate the defendant in exercising its right to contest the validity of the administrative rule." Florida East Coast, 83 So. at 715-16.

In Gulf-Colorado, 246 U.S. at 62, the Supreme Court, in 1917, found a $100.00 fine for each failure of a railroad to stop at a particular station as not excessive. In 1915, the Supreme Court upheld a penalty of $5,000 per day. Wadley, 235 U.S. at 666-67. In Brown and Williamson Tobacco Corp. v. Engman, 527 F.2d 1115 (2nd Cir. 1975) cert. denied, 426 U.S. 911 (1976), the Second Circuit Court of Appeals found a $10,000 per violation fine not excessive. The court in Brown and Williamson noted that the appellants had an opportunity to test the orders' validity prior to the penalties they were seeking to have stayed began to accrue. Id. at 1119. The court said that the due process right consists of the right to contest the validity of an order "without necessarily having to face ruinous penalties if the suit is lost." Id. (emphasis added). In the instant case, although the sign regulations carry $500.00 per day penalties, petitioners had five years to contest the validity of the sign regulations without "necessarily" facing any penalties.

The Brown and Williamson court also validated the use of severe cumulative penalties. "[I]t very plainly was the view of Congress that such cumulative penalties might be the only way to enforce . . . orders in the face of profitable, repeated or continuing violations." Id. at 1120. The court noted that otherwise violators might figure in penalties as merely a cost of doing business. Id. In the present case, Petitioners continue to violate the sign regulations after profiting from the five-

year amortization period and waiting until the period was near expiration to file suit.

Each case is to be judged on its own facts, "[t]here being no definitely fixed rules or standards for determining what are and what are not excessive fines." Amos v. Gunn, 94 So. 615, 641 (Fla. 1922). The statute in Amos carried a maximum fine for a first offense of $200.00 and 90 days imprisonment, and a $500.00 to $5,000.00 fine for a second offense. "This is not manifestly or clearly an excessive penalty." Id.

CONCLUSION

Petitioners are looking to this court for a second appeal. ". . . [E]very man is entitled to his day in court. He is vouchsafed a fair trial and he is secured a fair hearing on an appeal which he may take as a matter of right. But he is not entitled to two appeals." Lake, 103 So. 2d at 642.

The present case is not in express and direct conflict with Florida East Coast. The facts of the two cases are materially at variance and the decision in the present case does not effectively overrule Florida East Coast. The Petitioners failed to exercise due diligence in testing the sign regulations which clearly distinguishes this case from Florida East Coast. This court should refuse to exercise its conflict jurisdiction.

Dated this 24 day of June, 1994.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the persons listed below by U.S. Mail this 24 day of June, 1994.

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