

43
FILED

SID J. WHITE

NOV 15 1994

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

015
**IN THE SUPREME COURT
STATE OF FLORIDA**

CANAVERAL PORT AUTHORITY,

Petitioner,

vs.

FLORIDA DEPARTMENT OF REVENUE,
JIM FORD, as Brevard County
Property Appraiser, and ROD
NORTHCUTT, as Brevard County
Tax Collector,

Respondents.

§
§
§
§
§
§
§
§
§
§
§
§

SUPREME COURT NO.

84743

FIFTH DISTRICT
COURT OF APPEAL
CASE NO.: 93-2422

**ON REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT**

PETITIONER'S BRIEF ON JURISDICTION

HAROLD T. BISTLINE, ESQUIRE
Florida Bar No. 0337218
PATRICIA K. OLNEY, ESQUIRE
Florida Bar No. 0269166
STROMIRE, BISTLINE, MINICLIER,
McDERMOTT & GRIFFITH
Post Office Box 8248
1970 Michigan Avenue, Bldg. E
Cocoa, Florida 32924-8248
(407) 639-0505

Attorneys for Petitioner,
CANAVERAL PORT AUTHORITY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii - iii

STATEMENT OF THE CASE 1 - 4

SUMMARY OF ARGUMENT ON JURISDICTION 4

ARGUMENT ON JURISDICTION

I. THIS COURT SHOULD TAKE JURISDICTION OF THIS CASE PURSUANT TO ARTICLE V, § 3(b)(3) OF THE FLORIDA CONSTITUTION AS THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL CONFLICTS, INTER ALIA, WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN SARASOTA-MANATEE AIRPORT AUTHORITY v. MIKOS, 605 So. 2d 132 (Fla. 2d DCA 1992), ON THE SAME QUESTION OF LAW. 5 - 8

II. THIS COURT SHOULD TAKE JURISDICTION OF THIS CASE PURSUANT TO ARTICLE V, § 3(b)(3) OF THE FLORIDA CONSTITUTION AS THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL FOUND § 196.199(4), FLA. STAT., TO BE CONSTITUTIONALLY VALID AS APPLIED, THEREBY OVERTURNING THE TRIAL COURT'S EXPRESS DETERMINATION THAT THE CANAVERAL PORT AUTHORITY ENJOYS IMMUNITY UNDER THE FLORIDA CONSTITUTION FROM THE TAXES IMPOSED BY § 196.199(4). 9 - 10

CONCLUSIONS 10

CERTIFICATE OF SERVICE 11

APPENDIX

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Andrews v. Pal-Mar Water Control District</u> 388 So. 2d 4 (Fla. 4th DCA 1980) <u>rev. denied</u> , 392 So. 2d 1371 (Fla. 1980)	7, 9
<u>Crossley v. State</u> 596 So. 2d 447 (Fla. 1992)	6
<u>Dickinson v. City of Tallahassee</u> 325 So. 2d 1 (Fla. 1975)	9
<u>Ford Motor Co. v. Kikis</u> 401 So. 2d 141 (Fla. 1981)	6
<u>Jenkins v. State</u> 385 So. 2d 1356 (Fla. 1980)	6
<u>Nielsen v. City of Sarasota</u> 117 So. 2d 731 (Fla. 1960)	6
<u>Orange County v. Department of Revenue</u> 605 So. 2d 133 (Fla. 5th DCA 1992)	9
<u>Sarasota-Manatee Airport Authority v. Mikos</u> 605 So. 2d 132 (Fla. 2d DCA 1992) <u>rev. denied</u> , 617 So. 2d 320 (Fla. 1993)	<i>passim</i>
<u>State ex rel. Charlotte County v. Alford</u> 99 So. 2d 571 (Fla. 1957)	9
<u>The Florida Star v. B.J.F.</u> 530 So. 2d 286 (Fla. 1988)	10
 <u>Constitution and Statutes</u>	
1968 Florida Constitution	1
Article V, § 3(b)(3), Florida Constitution	<i>passim</i>
Chapter 311	2, 8
Chapter 315	3
§ 189.403	7

§ 189.4035	7
§ 194.171	1
§ 194.181	1
§ 194.181(5)	9
§ 196.199(4)	<i>passim</i>
§ 311.09	2
§ 311.09(3)	2
§ 315.11	1, 3

STATEMENT OF THE CASE

The Canaveral Port Authority seeks review of the decision of the Fifth District Court of Appeal (see Appendix A) which reversed the ruling of the Brevard County Circuit Court that the Canaveral Port Authority is constitutionally immune from ad valorem taxation of its fee interest in its real property comprising the seaport known as Port Canaveral. Suit by the Port Authority was originally brought pursuant to § 194.171, Fla. Stat., against the Florida Department of Revenue, the Brevard County Property Appraiser, and the Brevard County Tax Collector. As the Fifth District noted in its opinion, the Department of Revenue was named as a party pursuant to § 194.181, Fla. Stat., which requires the inclusion of this agency as a defendant when the assessment or collection of any tax is contested on state constitutional grounds.

At issue in this case was the assessment by the Brevard County Property Appraiser for the first time in 1992 of ad valorem taxes on the fee interest of the Port Authority in its real property owned as part of its statutory mandate to operate, maintain, and control the deepwater regional seaport known as Port Canaveral. In its original complaint the Port Authority alleged that it is, inter alia, a political subdivision of the state which is immune from taxation under the 1968 Florida Constitution or which is exempt from taxation pursuant to § 315.11, Fla. Stat., which exempts certain port facilities from taxation.

The case was tried in the Brevard County Circuit Court before the Honorable Charles M. Holcomb who rendered a Final Judgment in favor of the Port Authority finding it to be an independent special

district and a political subdivision of the state which is immune from taxation, so that § 196.199(4), Fla. Stat., (which authorizes ad valorem taxation of real property leased to certain non-governmental lessees) cannot apply. A copy of the trial court's Final Judgment is included at Appendix B to this Brief. In reaching its judgment the trial court considered testimony and other evidence on the nature of the Canaveral Port Authority and Port Canaveral, the broad region beyond Brevard County that Port Canaveral serves, and its functions as one of Florida's twelve statutorily¹ recognized deepwater international seaports (including its unique role in the nation's space program). See Appendix A, p. 3 and Appendix B, p. 11-13.

The trial court also reviewed the constitutional authority for the creation of political subdivisions of the state and the cases which have addressed the distinction between immunity and exemption from taxation. It reviewed in detail the decision of the Second District in Sarasota-Manatee Airport Authority v. Mikos, 605 So. 2d 132 (Fla. 2d DCA 1992), rev. denied, 617 So. 2d 320 (Fla. 1993), and posed the same question considered controlling by that court, i.e., whether the entity at issue on which taxes are sought to be imposed is under all of the circumstances a political subdivision

¹See Chapter 311, Fla. Stat., and § 311.09 establishing the Florida Seaport Transportation and Economic Development Council within the Department of Transportation and designating Port Canaveral as one of twelve deepwater international seaport members of the Council. The Council is charged with preparing a 5-year plan which addresses developing port facilities and an intermodal transportation system, enhancing international trade, promoting cargo flow, increasing cruise passenger movements, and providing economic benefits to the state. See § 311.09(3), Fla. Stat.

of the state, more in the nature of a county than a municipality, which is therefore immune from taxation. As did the Second District in Sarasota-Manatee, the trial court in the case at bar found that the Canaveral Port Authority, under the applicable legislation and the evidence presented to it, was a political subdivision of the state more in the nature of a county and thus immune from ad valorem taxation of the fee interest in its real property. See Appendix B, p. 13. Because of its finding of immunity, the trial court did not reach the question also presented of exemption from taxation under § 315.11, Fla. Stat.

The Fifth District Court of Appeal rejected the trial court's conclusion and declined to follow the rule of law applied by the Second District in Sarasota-Manatee. It concluded instead that the Canaveral Port Authority is not a political subdivision of the state and is not immune from taxation. Having reached this determination, the Fifth District then addressed the question of exemption under Chapter 315 and § 315.11 and concluded that the real properties at issue were not exempt under that statute based on its interpretation of such terms as "market" and "recreational facilities" in the statute as not applying to private enterprises that derive from port business, even if those businesses compliment the facilities of the port. See Appendix A, p. 10-12. Upon receipt of the Fifth District's decision the Canaveral Port Authority filed, inter alia, a timely Motion for Rehearing which was subsequently denied on October 7, 1994. A Notice to Invoke the

Discretionary Jurisdiction of this Court was thereafter filed with the Fifth District Court of Appeal on November 3, 1994.

S-Y OF ARGUMENT

The decision of the Fifth District Court of Appeal is in express and direct conflict with the earlier decision in Sarasota-Manatee Airport Authority v. Mikos, 605 So. 2d 132 (Fla. 2d DCA), rev. denied, 617 So. 2d 320 (Fla. 1993), decided on substantially the same controlling facts and viewed by the trial court herein as dispositive. The Fifth District failed to apply the rule of law set forth in that earlier decision and instead determined that the Canaveral Port Authority is not a political subdivision of the state which is immune from taxation under the Constitution through the erroneous application of an alternative analysis. Under these circumstances this Court has jurisdiction over this cause pursuant to Article V, § 3(b)(3) of the state Constitution.

As an additional or alternative basis for jurisdiction this case can and should be reviewed under Article V, § 3(b)(3) since the trial court's Final Judgment found the Canaveral Port Authority to be immune from taxation, so that § 196.199(4), Fla. Stat., was invalidly applied. The Fifth District's reversal of this ruling necessarily found that the statute was constitutionally valid as applied. Consequently, jurisdiction in this Court exists on this basis as well and should be exercised to resolve the important issue of how governmental agencies are determined to be political subdivisions of the state which are immune from taxation.

ARGUMENT

I. THIS COURT SHOULD TAKE JURISDICTION OF THIS CASE UNDER ARTICLE V, § 3(b)(3), FLORIDA CONSTITUTION, AS THE DECISION OF THE FIFTH DISTRICT CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT IN SARASOTA-MANATEE AIRPORT AUTHORITY v. MIKOS ON THE SAME QUESTION OF LAW.

The Canaveral Port Authority seeks review of the decision of the Fifth District which Petitioner submits is in express and direct conflict with the decisions of other district courts of appeal, most notably the decision of the Second District Court of Appeal in Sarasota-Manatee Airport Authority v. Mikos, 605 So. 2d 132 (Fla. 2d DCA 1992), rev. denied, 617 So. 2d 320 (Fla. 1993). An examination of the Final Judgment rendered herein and overturned by the Fifth District (or even the portions referenced by the Fifth District) clearly demonstrates this conflict, for the trial court treated the decision in Sarasota-Manatee as controlling, while the Fifth District tried to avoid the Second District's analysis and its rule of law applied to substantially the same controlling facts as those presented in the case at bar. Under these circumstances, this Court can and should exercise jurisdiction over the present case under Article V, § 3(b)(3) of the Florida Constitution in order to resolve the conflict between the appellate courts on this important question of governmental tax immunity and how it applies to governmental entities that are technically neither counties (which are immune) nor municipalities (which are not immune).

Numerous decisions from this Court since the constitutional revisions of 1980 have outlined this Court's jurisdiction to resolve conflicting appellate decisions. See e.g., Jenkins v.

State, 305 so. 2d 1356, 1359 (Fla. 1980). While conflict jurisdiction is limited, it does exist where the district court does not identify a direct conflict but instead discusses the legal principles on which its decision is based. See Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981). Jurisdiction also exists when a district court reaches a different result on substantially the same controlling facts as a prior decision. Crossley v. State, 596 So. 2d 447, 449 (Fla. 1992); Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla. 1960). Under these decisions this Court has jurisdiction to resolve the conflict between the Second District in Sarasota-Manatee and the decision of the Fifth District herein.

Like the Second District in Sarasota-Manatee, the trial court in the present case considered the Canaveral Port Authority's controlling legislation, along with evidence regarding the nature of Port Canaveral, its activities, and its impact as one of twelve Florida international seaports, and found that the Canaveral Port Authority, like the Sarasota-Manatee Airport Authority, is an independent special district and a political subdivision of the state more in the nature of a county than a municipality. This conclusion having been reached, the same result followed, i.e., the Canaveral Port Authority was held to be immune from ad valorem taxation under § 196.199(4), Fla. Stat., of its fee interest in its real property, without regard to whether that property is used for a statutorily exempt purpose. See Appendix B, p. 2-3, 5-6, 11-13.

In the decision in Sarasota-Manatee, the Second District review under alia, the act creating the authority and its

treatment as an independent special district under § 189.403, Fla. stat., and found the authority immune from taxation despite legislative references to exemption. 605 So. 2d at 133-134. The trial court herein agreed with this analysis,² -- which is also found in Andrews v. Pal-Mar Water Control District, 388 So. 2d 4, 5 (Fla. 4th DCA 1980), rev. denied, 392 So. 2d 1371 (Fla. 1980), on which both the Second District and the trial court herein relied -- and explained, "Placing a 'bear' sign on a cage containing a rabbit does not change the nature of the animal in the cage." See Appendix B, p. 6. The critical question instead was whether the entity was more in the nature of a county than a municipality.

The Fifth District, on the other hand, tried to distinguish the decision in Sarasota-Manatee because the legislature there had called the authority a "political subdivision," while no such express label has yet been given to the Canaveral Port Authority. See Appendix A, p. 5-6. A careful review of the Second District's decision, however, reveals that the legislature's "political subdivision" label was no more dispositive than was its reference to the property as exempt. Indeed, had the "political subdivision" label (which is the only factor that appears to take the present case out of the Sarasota-Manatee rule of law) been critical then there would have been no need for the Second District (or any future court) to consider any factors other than the legislative label, and the dispositive question posed and answered by the

²Like the Airport Authority, the Canaveral Port Authority is an independent special district under § 189.4035, Fla. Stat. See Appendix B, p. 10 which follows admissions in the trial court.

Second District would have been superfluous. Under the Fifth District's approach, the analysis used by the Second District and the question of whether the governmental entity was more in the nature of a county than a municipality need not be considered, for the important question that allowed the Fifth District to avoid Sarasota-Manatee was what sign the legislature had hung on the cage. Of course, in the case of the Canaveral Port Authority, the legislature has failed to hang any sign at all, so the question then becomes (to follow the trial court's analogy) whether the rabbit is still a rabbit even if its cage has no sign.

The conflict with the decision in Sarasota-Manatee is also clear from a review of the inquiry which the Fifth District did use when it considered whether various entities claiming immunity had been acting as a branch of the general administration of state policy. Critical to the conclusion reached by the Fifth District was its unsubstantiated finding that the Canaveral Port Authority is not part of a centralized, statewide system of port management and operation. This statement, however, overlooks the impact of Chapter 311, Fla. Stat., and the special role played by Florida's twelve international seaports named in that act. Thus the analysis that the Fifth District did use instead of the Sarasota-Manatee analysis was flawed when applied to the Canaveral Port Authority and should have given way to the inquiry conducted by the Second District and by the trial court herein, which could only result in the affirmance of the Final Judgment under the evidence presented.

II. THIS COURT SHOULD TAKE JURISDICTION OF THIS CASE UNDER ARTICLE V, § 3(b)(3), FLORIDA CONSTITUTION, AS THE DECISION OF THE FIFTH DISTRICT FOUND § 196.199(4) TO BE VALID AS APPLIED, THEREBY OVERTURNING THE TRIAL COURT'S EXPRESS DETERMINATION THAT THE **CANAVERAL** PORT AUTHORITY IS IMMUNE UNDER THE FLORIDA CONSTITUTION FROM TAXES IMPOSED BY § 196.199(4).

The question of the constitutionality of § 196.199(4), Fla. Stat., as applied to the Canaveral Port Authority was squarely presented to the trial court, where the inclusion of the Department of Revenue as a party defendant was based solely on the requirement of § 194.181(5), Fla. Stat., that this agency be made a defendant when the collection of any tax is contested on state constitutional grounds. The immunity of the state and its political subdivisions from taxation has been said to flow directly from the Constitution and not be subject to the "ever-transitory and fleeting benevolence of the legislature." See Orange County v. Department of Revenue, 605 So. 2d 1333, 1334 (Fla. 5th DCA 1992).³ While the Fifth District did not couch its decision in terms of the validity of § 196.199(4) as applied, it recognized that the constitutional question served as the basis for the inclusion of the Department of Revenue as a party. See Appendix A, p. 3. Thus the statute was necessarily found by the Fifth District to be valid as applied to the Canaveral Port Authority, since without such a determination the Final Judgment finding immunity could not have been reversed.

³In Orange County v. Department of Revenue the Fifth District noted that it is well established that the state and its political subdivisions are immune from taxation because there is simply no power given in the Constitution to tax them. 605 So. 2d at 1334, citing, inter alia, Dickinson v. City of Tallahassee, 325 So. 2d 1 (Fla. 1975); State ex rel. Charlotte County v. Alford, 107 So. 2d 27 (Fla. 1958); Andrews v. Pal-Mar Water Control District Department of Revenue, 388 So. 2d 4 (Fla. 4th DCA 1980).

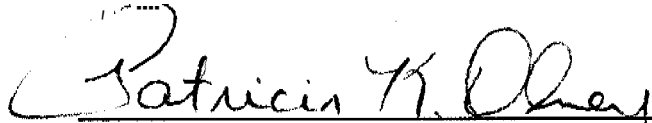
A similar situation arose in The Florida Star v. B.J.F., 530 So. 2d 286, 287 (Fla. 1988), where this Court found jurisdiction under Article V, § 3(b)(3) when the trial court had denied a motion to dismiss and upheld the constitutionality of the statute at issue, but the district court had affirmed without directly addressing the constitutional challenge. It is respectfully submitted that the case at bar is comparable since the Fifth District clearly rejected the trial court's finding of constitutional immunity. Under these circumstances this Court can and should exercise jurisdiction to review the decision of the Fifth District on this recurring issue of the constitutional immunity of governmental agencies.

CONCLUSIONS

Under the foregoing authorities and Article V, § 3(b)(3) of the Florida Constitution, this Court has jurisdiction to review the decision of the Fifth District and should exercise that jurisdiction to resolve its conflict with the decision of the Second District in Sarasota-Manatee Airport Authority v. Mikos as well as to address the important issue of how immunity from taxation is determined to apply where governmental agencies may be political subdivisions of the state but are neither counties nor municipalities. For these reasons the Petitioner, Canaveral Port Authority, would urge this Court to grant review in this action and allow the parties to address the case on the merits.

Respectfully submitted,

STROMIRE, BISTLINE, MINICLIER,
McDERMOTT & GRIFFITH

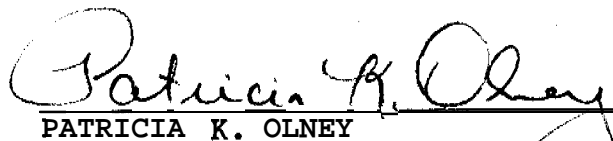


HAROLD T. BISTLINE
Florida Bar No. 0337218
PATRICIA K. OLNEY
Florida Bar No. 0269166
1970 Michigan Avenue, Bldg. E
Post Office Box 8248
Cocoa, Florida 32924-8248
(407) 639-0505

Attorneys for Petitioner
CANAVERAL PORT AUTHORITY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Brief on Jurisdiction and Appendix has been furnished by U. S. Mail to JOE TEAGUE CARUSO, Attorney for Respondent JIM FORD, Post Office Box 541271, Merritt Island, Florida 32954-1271; Respondent ROD NORTHCUTT, 400 South Street, Titusville, Florida 32780; and JOSEPH C. MELLICHAMP, III, Attorney for Respondent FLORIDA DEPARTMENT OF REVENUE, Office of the Attorney General, The Capitol - Tax Section, Tallahassee, Florida 32399-1050, this 14th day of November, 1994.



PATRICIA K. OLNEY