IN THE SUPREME COURT OF FLORIDA

PUBLIC MEDICAL ASSISTANCE TRUST FUND; et. al.,

Petitioners,

vs.

FILED
SID J. WHITE
MAY 22 1997
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

Case No. 90,326

NATHAN M. HAMEROFF, M.D., et. al.,

Respondents.

______________________________/

On a Petition to Invoke Discretionary Jurisdiction
Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv)

RESPONDENTS' BRIEF AND MOTION TO DISMISS FOR LACK OF JURISDICTION

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PRELIMINARY STATEMENT

Contrary to Petitioners' assertions, this matter does not involve the same tax refund issues presented in Nemeth v. Department of Revenue, 22 Fla.L.Weekly D249A (Fla. 4th DCA January 22, 1997) (Case No. 89,909). Additionally, the Respondent class representatives in this class action challenging the constitutional validity of the Public Medical Assistance Trust Fund consist of four physician group practices organized as professional service corporations: Nathan M. Hameroff, M.D., Gateway Radiology Consultants, P.A. ("Gateway"), Bay Area Heart Center, P.A. ("Bay Area Heart"), Cardiology Specialists, P.A. ("Cardiology Specialists"), and Cardiovascular Associates, Inc. ("Cardiovascular Associates"), each and all of whom are suing individually and on behalf of a class of similarly-situated parties. They will be referred to collectively as the Respondents.

STATEMENT OF THE CASE AND OF THE FACTS

The Respondents accept the Petitioners' statement of the case as regards Florida Statute Section 395.7015 having created the Public Medical Assistance Trust Fund ("PMATF"). The Respondents have challenged the PMATF Statute as being facially unconstitutional on a number of grounds. The only defense raised by Petitioners concerns the alleged applicability of Florida's refund statute (Section 215.26) as a legislative

condition precedent to Respondents' ability to maintain this class action. Both lower courts have rejected this defense.

This request for discretionary review is based entirely upon Petitioners' perception that Florida's refund statute should act as a bar to this constitutionally-based challenge to the PMATF statute since only one of the four class representatives (Bay Area Heart) filed a refund request. Since the time of filing that refund request in April 1996, there has been no determination or response whatsoever from Florida's Agency for Health Care Administration on the filed refund request.

As part of its effort to make the refund statute the focal point of this action in the trial court and Florida's appellate courts, Petitioners have attempted to describe the certified class in terms of compliance or non-compliance with Florida's refund statute. Neither the trial court nor the First District Court of Appeal deemed such distinctions necessary or appropriate. Despite, or because of, the distinctive circumstance of each one of the four class representatives, the trial court found sufficient commonality with the putative class to support the necessary finding under Florida Rule of Civil Procedure 1.220(a)(2) that the claims of Gateway and Bay Area Heart raise questions of law and fact common to the questions of law and fact raised by the claims of each member of the class. *See*, Order Granting Plaintiffs' Motion for Class Certification (Appendix IV, Finding of Fact ¶ 8), as affirmed in Public Medical Assistance Trust Fund v. Hameroff, 689 So.2d 358 (Fla. 1st DCA 1997).

SUMMARY OF ARGUMENT

Petitioners have failed to meet the threshold requirements for discretionary jurisdiction based upon express and direct conflict. While recent decisions from the Third District in Westring v. Department of Revenue (followed in Department of Revenue v. Bauta) and the Fourth District in Nemeth v. Department of Revenue demonstrate difference approaches between these District Courts of Appeal, none of the decisions expressly and directly conflicts with the First District in Hameroff which closely followed this Court's decision in Department of Revenue v. Kuhnlein where an exception to compliance with Florida's refund statute was created for constitutionally-based challenges to taxing statutes. The decisions in Westring and Bauta did not follow or refer to Kuhnlein because they did not raise the facial unconstitutionality of the particular taxing statutes involved. Hameroff, however, does specifically invoke the Kuhnlein exception because the class action challenges the facial constitutionality of the PMATF statute. While the results in Westring and Bauta differ from Hameroff, it cannot be said that an express and direct conflict exists. Therefore, discretionary jurisdiction should be denied.

Petitioners have mistakenly urged jurisdiction in this Court based upon an alleged question of great public importance. No such question has been certified by the First District Court of Appeal in Hameroff. To the extent Petitioners rely upon a similar yet distinct certified question from the Fourth District in Nemeth, this is an improper basis to attempt to invoke this Court's discretionary jurisdiction.

ARGUMENT

PETITIONERS HAVE FAILED TO DEMONSTRATE EXPRESS AND DIRECT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR WITH THE SUPREME COURT ON THE SAME QUESTION OF LAW, THEREFORE JURISDICTION SHOULD BE REFUSED.

A. Petitioners Have Failed to Demonstrate Express and Direct Conflict With Either Another District Court or Any of This Court's Decisions.

Petitioners have failed to demonstrate an express and direct conflict with any decisions of this Court. A simple examination of the First District's decision in Hameroff reveals the complete absence of the express and direct conflict necessary before this Court can assume discretionary jurisdiction. The Hameroff decision was based entirely upon this Court's decision in Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994); *see*, Hameroff, 689 So.2d at 358. Much like the constitutionally-based challenge to Florida's auto impact fee statute which was challenged in Kuhnlein, the Hameroff court reviewed the identical arguments made by the state to attempt to defeat class certification and prevent refunds of an unconstitutional assessment. In rejecting these arguments, the Hameroff court aligned itself with this Court in Kuhnlein in creating an exception for constitutionally-based challenges to taxing statutes upon the rationale that taxpayers need not pay the fee nor request a refund since the existence of penalties for failure to pay an

allegedly unconstitutional tax is sufficient to create standing under Florida law. 689 So.2d at 359.

After addressing the standing issue, the Hameroff court also followed Kuhnlein in rejecting the state's argument that failure to comply with the refund statute would bar refunds of any tax, even one declared unconstitutional. In rejecting this argument, both the First District in Hameroff and this Court in Kuhnlein have held that sovereign immunity does not exempt the state from a challenge based on violation of the federal or state constitutions, "because any other rule self-evidently would make constitutional law subservient to the state's will." 689 So.2d at 359, citing Kuhnlein, 646 So.2d at 720, 721.

In this instance, express and direct conflict with a decision of this Court cannot be demonstrated. To invoke this Court's discretionary jurisdiction, the conflict must be express and direct, not inherent or implied. Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So.2d 888 (Fla. 1996). To demonstrate the type of express and direct conflict necessary to invoke this Court's jurisdiction, the conflict must appear "within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

In aligning itself with this Court's decision in Kuhnlein, the First District in Hameroff noted the exception to the general rule required in Devlin v. Dickinson, 305 So.2d 848 (Fla. 1st DCA 1975), and similar cases which have required the filing of refund

applications before filing suit for a tax refund. The exception applies to constitutionally-based refund actions. 689 So.2d at 359.

Similarly, no express and direct conflict with a decision of another district court of appeal can be demonstrated. When examining one source of Petitioner's alleged conflict, Westring v. Department of Revenue, 682 So.2d 171 (Fla. 3d DCA 1996), *rev. den.*, 686 So.2d 583 (Fla. 1996), there is not a single reference to Kuhnlein. Closer examination of the four corners of the Westring decision makes clear that the case was not decided within the context of the exception for constitutionally-based refund claims established in Kuhnlein and followed in Hameroff.

Another recent decision which purportedly creates conflict with Hameroff is Department of Revenue v. Bauta, Case No. 96-224 (Fla. 3d DCA April 23, 1997) which followed Westring. Both Westring and Bauta concern an interpretation of "consideration" represented by the amount of a mortgage encumbering property in post-dissolution of marriage interspousal transfers and whether documentary stamp taxes were owed under Section 201.021, Florida Statutes. Both decisions required the taxpayers to file a refund under Florida's refund statute before invoking the jurisdiction of the circuit court. Examining the four corners of each decision makes it is readily apparent that both were decided within the context of this Court's decision in State ex rel. Victor Chemical Works v. Gay, 72 So.2d 560 (Fla. 1954). Neither decision made mention of nor followed any

aspect of Kuhnlein because, seemingly, neither involved a challenge to the facial constitutionality of a taxing statute.

The final example of purported conflict with Hameroff is Nemeth v. Department of Revenue, 686 So.2d 778 (Fla. 4th DCA 1997)). In Nemeth, the taxpayers challenged the facial constitutionality of Florida's vehicle impact fee. The Fourth District reversed the trial court's dismissal of the taxpayer's constitutionally-based challenge concluding that Kuhnlein controlled, not Victor Chemical. 686 So.2d at 778. However, because it did not appear to the Fourth District that this Court, in Kuhnlein, expressly overruled that portion of Victor Chemical's holding that the right to a refund is barred if the taxpayer fails to make a timely refund claim, the Nemeth court certified that specific question to this Court as one of great public importance.

The certified question in Nemeth, however, is not the "same question of law" decided in Hameroff. The precise question certified in Nemeth (not present in Hameroff) concerns the "non-claim" effect the refund statute may have, if applicable, to bar the refund of a tax ultimately held to be unconstitutional. The issue of standing -- which is present in Hameroff -- was nowhere addressed in Nemeth. Under these circumstances, it cannot be said that any conflict exists and certainly not one which is express and direct.

Even assuming, for the sake of argument, that Kuhnlein did not eviscerate Victor Chemical's holding concerning the non-claim aspect of the refund statute, this particular question of law has not yet surfaced in the Hameroff proceedings where none of the

substantive constitutional issues have been addressed. Clearly, the most significant aspect of the First District's Hameroff decision relied upon Kuhnlein and held that fulfilling the state's refund procedures is not a condition precedent to bringing a constitutionally-based refund action. 689 So.2d at 359. It was this ruling which effectively affirmed the trial court's class certification order. The First District's decision in Hameroff is not the proper vehicle to address the full ramifications of Florida's refund statute, even in the context of constitutionally-based refund actions, since the decision itself does not conflict with any other district court or Florida Supreme Court decisions.

To the extent Petitioners' anxiously desire to have this issue revisited by this Court, the proper means and opportunity for doing so should be within the context of the certified question in Nemeth, although it is apparent that Kuhnlein has already receded from Victor Chemical such that further review in this Court would be superfluous and redundant.

B. Despite Petitioners' Vague References, No Question of Great Public Importance Has Been Certified in This Case.

There has been no certification by the First District Court of Appeal in Hameroff of any question of great public importance. Petitioners initially sought to invoke this Court's jurisdiction by making specific reference to Rule 9.030(a)(2)(A)(v), which is improper since the text of Petitioners' Notice described an alleged or perceived conflict between the First and Third District Courts of Appeal with no description of any question certified to be of great public importance (*See*, Notice to Invoke Discretionary Jurisdiction,

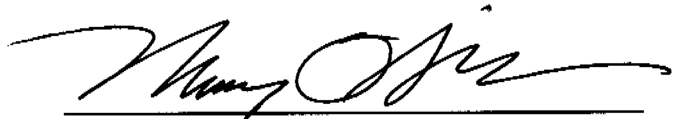
Appendix VIII). Nevertheless, Petitioners perpetuated further confusion through two additional references to a supposed question of great public importance in their Brief on Jurisdiction. Petitioners (Brief at 3) cite specifically to Rule 9.030(a)(2)(A)(iv) and (v) and, shortly before concluding, Petitioners also urge that, "[t]o the extent that Kuhnlein casts doubt on what has long been accepted, the resolution of this doubt is of great public importance." (Petitioners' Brief at 9).

Despite Petitioners' confusing references to a question of great public importance, this requested review is actually based entirely upon Petitioners' perception and allegations that there is direct conflict between district courts of appeal, specifically the First in Hameroff, the Third in Westring, and the Fourth in Nemeth. As demonstrated hereinabove, the absence of conflict jurisdiction with the First District's Hameroff decision cannot be cured through some vague and unsupportable reference to a question of great public importance. While difference results were reached in Westring and Nemeth, neither can be urged to create conflict with the First District's Hameroff decision as Nemeth and Hameroff followed the Kuhnlein exception, while Westring did not address it. Nor, for that matter, can the Fourth District's certified question of great public importance in Nemeth be made applicable to our facts and issues without the same certification having been made by the First District in Hameroff.

CONCLUSION

For all of the foregoing reasons, Respondents' respectfully request that this Court enter its order refusing jurisdiction and dismissing Petitioners' Notice for failure to demonstrate express and direct conflict with a decision of another district court of appeal or the Supreme Court on the same question of law concerning the Kuhnlein exception to compliance with Florida's refund procedures when taxpayers bring constitutionally-based refund actions, as aforesaid, and grant such other and further relief as this Court deems just and appropriate under the circumstances.

Respectfully submitted,



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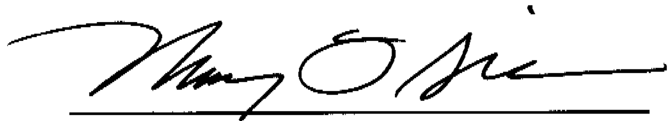
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by ☑ U.S. Mail, ☑ facsimile and/or ☐ hand delivery to CYNTHIA A. MIKOS, Esquire, Jacobs, Forlizzo & Neal, 510 Vonderburg Road, Suite 3005, Brandon, FL 33511 and to ERIC J. TAYLOR, Esquire, Office of the Attorney General, State of Florida, The Capitol, Special Projects, Tallahassee, Florida 32399-1050, this 19th of May, 1997.



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