IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC02-2721

DELTA PROPERTY MANAGEMENT, INC.,
Petitioner,

vs.

PROFILE INVESTMENTS, INC.,

Respondent.
_____/

1DCA Case No. 01-3181

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

I

THE CASE

This case expressly and directly conflicts with the Fourth District's decision in Baron v. Rhett, No. 4D02-3475, 2003 WL 21077608 (Fla. 4th DCA May 14, 2003), which certified conflict on the very issue under review pursuant to Fla. R. App. P. 9.030(a)(2)(A)(vi). Both this case and Baron involve the forfeiture of real property as a result of the clerk's due process failure to obtain an updated owner "name and address" statement from the tax collector for notice purposes.

In Mennonite Board of Missions v. Adams, 462 U.S. 791, 800 (1983), the United States Supreme Court mandated that when an owner is in danger of forfeiting property, "[n]otice by mail or other means as certain to ensure actual notice is the minimum constitutional precondition ... if [the owner's] name and address are reasonably ascertainable." Relying on Mennonite, this Court in Dawson v. Saada, 608 So. 2d 806 (Fla. 1992), held that even though the relevant statute "imposes an affirmative duty on all property owners to know of and to pay their current and delinquent taxes ... 'knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending.'" Id. at 810; Mennonite, 462 U.S. at 800. Dawson concluded that "[t]he duty imposed upon owners of Florida land by section 197.332 does not relieve the state of its constitutional obligation to inform interested parties of the pendency of a tax sale." Dawson, 608 So. 2d at 810. These controlling authorities are at the very heart of this case.

Petitioner is a small family-owned Florida corporation. Respondent is in the business of buying property forfeited through tax sales. In this case, petitioner forfeited a piece of commercial real property valued at over $1 million because it inadvertently failed to pay its 1997 property taxes. As evidence of petitioner's inadvertence, the taxes for years both before *and after* were timely paid. The problem in this case arose because notice of the tax sale was not sent to petitioner at its address listed on the "latest assessment roll" as required by Florida Statutes § 197.502(4)(a). Despite unrefuted evidence that notice was *not* sent to petitioner in accordance with this statute, the trial court ruled in favor of respondent, thereby condoning the forfeiture. The First District affirmed in a 2-to-1 decision, with a nine-page dissent authored by Judge Ervin detailing the due process and statutory deficiencies in the majority's analysis. The First District's decision is an appendix to this amended brief and is designated as (A.).

II
THE FACTS

The operative fact in the case is that notice "as certain to ensure actual notice" of a tax sale was not given by the constitutional officers charged with that responsibility. While it is true that the clerk did "mail" a notice, it was ***not*** mailed to the address on the latest assessment roll, as required by statute. The following chronology sets forth the problem.

On July 1, 1999, the ***1999*** assessment roll was certified. In December of 1999, petitioner provided the tax collector with its ***new*** address. On May 30, 2000, the tax collector provided the clerk with petitioner's ***old*** address, as it appeared on the 1999 assessment roll. (A. 2) Then on July 1, 2000, the ***new*** assessment roll was certified containing petitioner's updated address. (A. 4) Even though this new tax roll had been certified, the clerk sent the notice of tax sale on September 4, 2000, to petitioner at its outdated 1999 address. (A. 2) The clerk did not look at petitioner's address on the latest assessment roll or ask the tax collector to do so. Compounding the problem, the clerk put the wrong name on the notice to the mortgagee. Both notices were then returned "undeliverable". (A. 6) At the September 27, 2000 tax sale, petitioner lost its property. (A. 2)

On appeal, petitioner argued that the tax sale was void for want of compliance with § 197.502(4)(a), requiring notice to be mailed to petitioner's address as it appeared on the "latest assessment roll." Had the clerk done so, petitioner would have received notice at its correct address appearing on the roll, certified in July of ***2000*** -- two months prior to the sale.

In a shocking opinion which does not even mention much less discuss due process, the majority observed that the 2000 tax roll reflecting petitioner's accurate address may well have been completed and "available to the clerk" when the notice was mailed. (A. 5) However, it concluded that the clerk "perform[s] a purely ministerial function when providing notice of an upcoming tax sale" and therefore "had no duty to look beyond the tax collector's [May] statement" which accurately reflected information from the ***1999*** tax roll when submitted to the clerk. (A. 5-6) The court tacitly said that despite the strictly construed statute, the clerk had no duty at any time to verify the address on the 2000 tax roll.

In a vigorous dissent, Judge Ervin appropriately focused on the vested property rights that were forfeited as a result of the tax sale and determined that the majority opinion could not be reconciled with § 197.502(4)(a), with Dawson, or with due process.

Dispatching the majority's erroneous conclusion that the "ministerial" clerk was required to do no more under the circumstances of this case, he concluded:

> To me, a reasonable interpretation of [the statutory notice procedures] is that the clerk is simply directed to request the tax collector, once he is aware that the information contained in a statement may no longer be current ***because it was based on a tax roll since superseded***, to supply him with a supplemental statement reflecting any updated materials.

(A. 15-16; emphasis added) Because the clerk -- a constitutional officer -- did not give notice "as certain to ensure actual notice" as required by Mennonite and followed by Dawson and Baron, further review is sought.

SUMMARY OF ARGUMENT

Discretionary jurisdiction exists because the First District's decision expressly and directly conflicts with a decision of the Fourth District on the precise issue under review. Furthermore, the decision in this case affects ***two*** classes of constitutional officers -- tax collectors and clerks of court. In light of the constitutional implications and far-reaching effect of the lower court's decision as set forth in Judge Ervin's dissent, the Court is urged to accept jurisdiction. See Fla. R. App. P. 9.030(a)(2)(A)(iii) & (iv).

ARGUMENT
I
GROUNDS FOR JURISDICTION

A. Express and Direct Conflict

The decision in this case expressly and directly conflicts with the Fourth District's decision in Baron v. Rhett, No. 4D02-3475, 2003 WL 21077608 (Fla. 4th DCA May 14, 2003). In that case, the owner lost his property by way of a tax sale as a result of the clerk of the court failing to mail him a copy of the notice thereof. Id. at *1. Instead, the clerk had mailed the notice to the former owner. Id. This occurred because the clerk had prepared the notice based on owner name/address information contained in a statement received from the tax collector in April 2001, but the clerk did not actually prepare and mail the notice of tax sale until some five months in September 2001, at which point the information was outdated. Id. The trial court entered a final judgment nullifying the tax sale and ruling that the clerk could not rely on stale information in discharging its statutory and constitutional duty to provide notice of a tax sale to an owner. Id. at *3-4.

In affirming the final judgment, the Fourth District in Baron specifically looked to Judge Ervin's dissent in this case and relied on basic principles of due process in Mennonite, concluding that:

> We agree with Judge Ervin, adopt the reasoning of his dissent, and certify conflict with Delta Property Management v. Profile Investments, 830 So. 2d 867 (Fla. 1st DCA 2002). .... We hold that when the clerk fails to schedule a tax sale and mail notice thereof within a reasonable time after the filing of an application for a tax deed, and a new tax roll assessment intervenes during such period of delay, the clerk must obtain an updated statement from the tax collector for notification purposes under section 197.522(1)(a), Florida Statutes.

Baron, 2003 WL 21077608 at *3-5. Since the Fourth District's holding is explicitly contrary to the ruling in this case, this Court clearly possesses jurisdiction to review the matter.[1]

B. Classes of Constitutional Officers

The decision under review interprets the procedures regarding the constitutionally mandated "notice" when real property is at risk of being forfeited in a tax sale -- procedures which are implemented through the joint efforts of the clerks of the circuit courts *and* tax collectors throughout the state. See Fla. Stat. §§ 197.502(4)(a) & 197.522(1). In Tyson v. Lanier, 156 So. 2d 833, 835 (Fla. 1963), this Court accepted jurisdiction over a decision interpreting a statute concerning the property tax assessment "[s]ince tax assessors are constitutional officers and it affects their duties." Tyson, 156 So. 2d at 835; cf. Bystrom v. Whitman, 488 So. 2d 520 (Fla. 1986). Similarly, the Court accepted jurisdiction in Taylor v. Tampa Electric Co., 356 So. 2d 260 (Fla. 1978), because the decision under review directly affected clerks of the circuit court statewide. Since both the tax collectors and clerks of the circuit court are positions created by the Florida Constitution in every county, see Art. VIII, § 1(d), Fla. Const., the decision in this case necessarily affects *two* classes of constitutional officers. Jurisdiction therefore exists on this alternative basis.

II
JURISDICTION SHOULD BE EXERCISED

As both Dawson and Baron emphasize, the statutory procedures governing notices of tax sales are not just procedural niceties, but rather are specifically designed to protect a property owner's due process rights. See generally U.S. CONST. amend. XIV, § 1; Art. I, § 9, Fla. Const. These decisions are based on Mennonite, in which the United States Supreme Court emphasized the essential due process considerations attendant to real property rights, explaining:

> In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed 865 (1950), this Court recognized that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, *a State must provide notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.* ... [T]his [is an] elementary and fundamental requirement of due process ....

Mennonite, 462 U.S. at 795 (emphasis added).[2] The court went on to hold that a means *certain* to ensure *actual* notice is the *minimum constitutional precondition in any proceeding which will adversely affect liberty or property.* Id. at 798. When the United States Supreme Court tells a state constitutional officer to provide certainty in notifying a property owner that he or she is about to forfeit property rights, the high court is not equating that mandate with a "purely ministerial function." The circumstances of this case do not even come close to satisfying the Mennonite standard.

Tax sales are not obscure procedures. They are conducted routinely and can have a devastating economic impact on property owners. *Tax sale procedures which comport with due process are therefore essential.* The majority below has misconstrued the 1985 amendments to the notice statutes by wrongfully imposing only a *ministerial* duty on the very constitutional officers charged with giving notice rather than requiring those officers to use a means reasonably certain to result in actual notice, as required

by Mennonite and followed by Dawson and Baron.

CONCLUSION

As Mennonite and its progeny teach, tax sales are *not* intended to create a trap for the unwary or to permit a forfeiture where the government *through its own shortcomings* fails to notify both the owner and the mortgagee that property is about to be forfeited. The lower court's failure to recognize this point or to apply due process principles has far-reaching implications, as Judge Ervin recognized in his dissent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this ____ day of June, 2003 to: Alan Weiss, Esquire, Post Office 52687, Jacksonville, FL 32201-2687; Edward P. Jackson, Esquire, 516 West Adams Street, Jacksonville, FL 32202 and William S. Graessle, Esquire, 219 Newnan Street, 4th Floor, Jacksonville, FL 32202.

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

The undersigned hereby certifies that the font of this brief is Courier 12.

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[1] Moreover, the First District's ruling cannot be reconciled with this court's ruling in Dawson which provides that mailing notice to an owner under § 197.522(1) is *mandatory*. Dawson, 608 So. 2d at 808.

[2] In Mennonite, a purchaser of property at a tax sale brought suit to quiet title. An Indiana statute required that notice be given to the owner by certified mail, but there was no provision for notice by mail or personal service to the mortgagee. After the two-year redemption period similar to the Florida provision, the plaintiff bought the property, then sued to quiet title. The mortgagee claimed that it had not received constitutionally adequate notice, but the trial and appellate courts rejected the argument. The United States Supreme Court accepted review and reversed the Indiana decision.