IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-520

SUNSET HARBOUR NORTH
CONDOMINIUM ASSOCIATION,
as Representative; et. al.,

Appellants,

v.

JOEL ROBBINS, Dade County
Property Appraiser,

Appellee.
_____/

Lower Tribunals:
Third District Court of Appeal,
Consolidated Case: 3D02-2316

Miami-Dade 11th Judicial Circuit,
Case: 97-28404 CA 30

BRIEF OF AMICUS CURIAE
FLORIDA ASSOCIATION OF HOMES FOR THE AGING
IN SUPPORT OF THE APPELLANTS

On Appeal from the District Court of Appeal,
Third District, State of Florida

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Table of Contents

Table of Citations

Cases
Page

Florida Statutes

Other Authorities

STATEMENT OF INTEREST

As stated in it's Motion to Appear as Amicus, Florida Association of Homes for the Aging, represents the not-for-profit segment of the housing for the aging industry. It assists the legislative and judicial branches in drafting legislation, rules, and in regulating the industry. It also monitors judicial proceedings dealing with not-for-profit homes for the aging, and when appropriate, appears as *amicus curiae* to assist the court.

This *amicus* recently appeared in that capacity in the District Court of Appeal for the Second District in the case of *Fairhaven South, Inc. v. McIntyre,* 793 So. 2d 110 (2 DCA 2001). That court adopted the position taken by this *amicus* and reversed the trial court. Subsequently, when a rehearing was sought, this *amicus* again assisted the court, bringing to its attention recently enacted legislation consistent with its decision, and opposing the rehearing, which was denied.

One of the issues before that court was a claim by the Highland County Property Appraiser that the applicable statute, Section 196.1975, was unconstitutional. The housing for the aging industry, and particularly its not-for-profit segment, must be able to rely on acts of Congress and the Florida Legislature. These laws require consistency throughout the state, a situation which would not exist if individual property appraisers, such as the Highland County Property Appraiser, were able to follow only those statutes they personally believed to be constitutional.

SUMMARY OF ARGUMENT

For nearly 100 years, the law in Florida has been that only the courts have the authority to declare statutes unconstitutional. There are only two limited exceptions to that law. The Appellee, and other property appraisers, now claim this Court has carved out a new third exception: an executive officer may initially determine a statute is unconstitutional, requiring a citizens' challenge, and then raise the issue in the challenge. This would be an effective reversal of the *Altantic Coast Line* case.

The Appellee relies on a portion of this Court's decision in *Fuchs v. Robbins*, 818 So. 2d 460 (Fla. 2002). The language they cite is clearly *obiter dictum*. The holding in the case, approving *Turner* (739 So. 2d 175 (2 DCA 1999)), expressly prohibits any such action by a property appraiser, as lacking standing.

The discussion in the decision, on which the Appellee relies, in addition to being contrary to the case's holding, is also a misreading of the Court's reasoning and rational. The Court did not intend to create a third exception, merely to point out that when one of the two exceptions applies, the executive officer may challenge the statute either offensively or defensively.

Creating the third exception would turn the *Atlantic Coast Line* case on its head. The case would be essentially reversed. Executive officers would then have the initial

authority, in all instances, to determine the constitutionality of statutes, and other forms of law, and to refuse to follow those they found offensive. In effect, this then would arm executive officers with both legislative and judicial powers, and would inflict a terrible wound on the separation of powers.

ARGUMENT

I.

PROPERTY APPRAISERS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF STATUTES, WHETHER DOING SO OFFENSIVELY OR DEFENSIVELY

The property appraisers who are now challenging the constitutionality of statutes they are charged with enforcing are doing to so under the supposed authority of *Department of Education, et al, v. Lewis*, 416 So. 2d 455, 458 (Fla. 1982). The property appraisers rely upon a brief discussion of that case in *Fuchs v. Robbins*, 818 So. 2d 460, 464 (Fla. 2002). That discussion on which they rely is *obiter dictum*. They argue it creates a third exception, where before there were only two, to the general rule prohibiting executive officers from challenging statutes, offensively or defensively.

The opinion in *Dept. of Educ. v. Lewis* was written by Mr. Justice Boyd. In his opinion, he recognized only those exceptions from the general rule, carved out by earlier case law. He did not attempt to create a third exception. Mr. Justice Boyd stated:

> If, on the other hand, the operation of a statutes is brought into issue in litigation brought by another against a state agency or officer, the agency or officer may defensively raise the question of the law's constitutionality. 416 So. 2d, at 458.

He then cited three cases. Those cases list and discuss the three exceptions:

City of Pensacola v. King, 47 So. 2d 317 (Fla. 1950), lists the exceptions or situations, where "under which an executive or an administrative officer may challenge the constitutional validity of a legislative act . . .":

> Exception 1 – where the act requires an officer to perform duties affecting him or her personally – i.e. where he or she would have standing as a private citizen.
>
> Exception 2 – where he or she is charged with the control or disbursement of funds – e.g. the Comptroller of the State.

47 So. 2d 317, at 319

and

State ex rel. Harrell v. Cone, 130 Fla. 158, 177 So. 854 (Fla. 1937). This was an Exception 2 case in which the Comptroller, as the state's chief auditor and as the secretary to the Board of Administration, had the right to challenge the constitutionality of a legislative

appropriation proviso because his oath of office required it.

and

State ex rel. Florida Portland Cement Co. v. Hale, 129 Fla. 588, 176 So. 577 (Fla. 1937). This was another Exception 2 situation in which an officer charged with the control or disbursement or funds had raised the constitutionality of the statute. The court held that he had standing but his reasonable doubt as to constitutionality was insufficient to justify a court in striking down the statute. 176 So. 577, at 609.

In his decision in *Dept. of Educ. v. Lewis*, Mr. Justice Boyd simply stated that an executive officer could raise the constitutionality of a statute, defensively, only under one of the two exceptions recognized in the case law he cited: where the officer could have raised the issue as a private citizen (Exception 1); or if he or she was the Comptroller or other officer charged with the distribution of state funds (Exception 2). He then held that Mr. Turlington and the other members of the state Board of Education did not have standing, except as private citizens (Exception 1) in that case.[1] In *obiter dictum*, he recognized that Gerald Lewis, the Defendant and Comptroller, could have raised the constitutionality issue, but did not, under Exception 2.

[1] Interestingly, Sandy D'Alemberte appeared as a private citizen and, as such, his standing was not challenged.

The Appellee's reliance on *Dept. of Educ. v. Lewis* for creating a third exception allowing him to challenge the constitutionality of a statute simply by defying it and then raising the issue as an affirmative defense, is totally misplaced. A careful reading of this Court's *obiter dictum* in *Fuchs v. Robbins* does not support the Appellee's claim of standing. It appears that the *dictum* quoting Mr. Justice Boyd, is simply a recognition that constitutionality can be raised defensively (as well as offensively) by an executive officer ***only when one of the two exceptions exists***.

II.

THE HOLDING IN *FUCHS V. ROBBINS* WAS, "WE APPROVE THE DECISION IN *TURNER*, AND REVERSE THE DECISION IN *FUCHS*."

A scholarly discussion on how to distinguish a court's holding from that portion of the decision which is *dictum*, one cited by Florida courts, is the seminal work by Professor Goodhart in his Yale Law Journal article, "Determining the Ratio Decendi Of A Case," 40 Yale L. J. 161 (1930). It was quoted approvingly in *Adams v. Aetna Cas. & Sur. Co.*, 574 So. 2d 1142 (1 DCA 1991), at 1153, fn 10:

> The holding or *ratio decidendi* of a decision is appropriately defined as the outcome of the case on the precise points discussed in the opinion stated in terms of the facts found to be material to the court's decision. All other statements in the opinion, even though necessary to explain the reasoning or rationale by which the court reached its result[,]are *obiter dictum* and are not considered controlling president under the doctrine under stare decisis.

Thus, the portion of the *Per Curium* opinion in *Fuchs v. Robbins*, discussing (somewhat out of context) Mr. Justice Boyd's statements (in the *Lewis* case) about raising constitutionality defensively, is pure *dictum*. This Court's holding is contained in the last line of the opinion, approving the decision in *Turner v. Hillsborough Aviation Authority*, 739 So. 2d 175 (2 DCA 1999), and reversing the opinion in *Fuchs v. Robbins*, 738 So. 2d 338 (3 DCA 1999).

III.

THE *TURNER* DECISION SPECIFICALLY PROSCRIBES A PROPERTY APPRAISER DEFYING A STATUTE AND THEN CHALLENGING IT AFTER FORCING THE TAXPAYER TO SUE.

The *Turner* court specifically addressed the issue where a property appraiser refused to apply a taxing statute, forcing the taxpayer to sue, and then sought the court's approval, by claiming unconstitutionality, of his action.

> We find this argument works its way around a circle that begins with Turner refusing to apply the exemption and ends with Turner asking the court to uphold his denial, which of course, requires that the court find the VAB violated the State Constitution by granting the exemption. 739 So. 2d 175, 179.

The court concluded that:

> > • • • [I]f the property appraiser had followed the law initially, as *State ex rel. Atlantic Coast Line Railway Co.* dictates he is obligated to do, the taxpayer would not have been forced to petition the VAB in separate litigation and motion. It both defies logic and violates the rule [of common law] to suggest that Turner can ignore the law by denying an exemption based on his belief that it is unconstitutional then be allowed to ask the court to approve his disobedience by upholding his denial.
>
> • • •
>
> Until this statute was declared unconstitutional, it was presumed constitutional, and all property appraisers had a duty to apply it.

Turner 739 So. 2d, at 178-179.

We recognize that the *Turner* decision, which this Court approved, is in conflict with the Appellee's view of the *dictum* in this Court's opinion in *Fuchs v. Robbins*, discussing the *Dept. of Educ. v. Lewis* case. Where a holding and another portion of the decision are in conflict, that other portion is, by definition, *dictum* as carefully explained in the *Aetna* case.

However, there is no conflict if this Court's discussion of Mr. Justice Boyd's discussion in *Dept. of Educ. v. Lewis* is recognized as only capsulizing the law in the cases he cites, and not as creating new law in conflict with existing case law elsewhere relied on by this Court. The issue is resolved by acknowledging that all Mr. Justice Boyd intended in his *dictum* was that constitutionality of a statute could be raised offensively or defensively, by an executive officer, only where one of the three exceptions existed. Hence, there is no conflict and the *dictum* is really not problematic.

IV.

CREATING A NEW EXCEPTION WILL COMPLETELY OVERTURN THE RULE THAT ONLY THE COURTS HAVE THE AUTHORITY TO DECLARE STATUTES UNCONSTITUTIONAL.

The exclusive right of the judiciary to decide on the constitutionality of acts of the legislative branch has not been more eloquently stated than in the decision by Mister Chief Justice Browne in *State ex rel. Atlantic Coast Line R. Co. v. State Board of Equalizers*, 84 Fla. 592, 94 So. 681 (Fla. 1922):

> The doctrine that the oath of office of a public official requires him to decide for himself whether or not an act is unconstitutional before obeying it will lead to strange results, and set at naught other binding provisions of the Constitution.

94 So. 681, at 683.

The *Atlantic Coast Line* case has become the lodestar case in Florida, reserving to our courts the right to rule on the constitutionality of statutes. It is cited in every case in which a member of the executive branch has taken upon himself the exercise of this exclusively judicial power. It was cited (and relied upon) twice by this Court in *Fuchs v. Robbins*, op. cit. Like the present case, the taxing authorities in *Atlantic Coast Line* ignored an act of the legislature and when challenged, defensively claimed the act was unconstitutional. The Supreme Court held that a statute is deemed constitutional until a court rules otherwise, that no court having ruled the act in *Atlantic Coast Line* unconstitutional, the defense was untrue and the taxing authorities were

obliged to follow the law until a court had ruled. Later, this Court refined the doctrine to require adherence to the law by the executive branch until a final appellate decision has held otherwise. *Deltona Corp. v. Bailey*, 336 So. 2d 1163 (Fla. 1976). See also, *Division of Alcoholic Beverages and Tobacco, etc. v. Tampa Crown Distributors, etc.*, 745 So. 2d 418 (1 DCA 1999).

The practical application of the doctrine prevents the appalling concept of various members of the executive branch simply refusing to comply with legislative acts because they question their constitutionality. Thus, the Governor might refuse to follow competitive bidding laws in his capacity as head of the Department of Transportation or as head of the Department of Management Services; the Commission of Agriculture could ignore the law relating to acts governing the eradication of citrus canker; a county supervisor of election could require party declaration in nonpartisan races; or a property appraiser could impose taxes upon statutorily exempt nonprofit homes for the aging. When such action is imposed, many, probably most, of those deprived of the benefit of the law will never find recompense. Not everyone has the wherewithal to undertake the substantial expense of suing public officials. Even fewer have the means to pursue their rights if the official can ask the court, by raising an affirmative defense that the law is unconstitutional, to justify that official's flaunting the law.

For some reason, property appraisers have on occasion set themselves up as the arbiters of what constitutes good tax legislation and granted themselves the

authority to declare certain legislation of which they disapprove as unconstitutional.[2] For example, the Highland County Property Appraiser took offense at the legislative determination to grant a homestead exemption to elderly persons permanently residing in not-for-profit homes for the aging. The homestead exemption was granted as a form of renters' relief under Section 196.1975, Florida Statutes, thereby forcing the home and its elderly residents (retired missionaries) to sue him. *Fairhaven South, Inc. v. McIntyre*, 793 So. 2d 110 (2 DCA 2001). The Highlands County Property Appraiser, as part of his defense for refusing to follow the statute, claimed defensively that it was unconstitutional. His claim of unconstitutionality was based upon his assertion that only he, and not the legislature, could determine what constituted a charitable function or activity. While the appellate courts ultimately rejected his theory, the home and its residents were dragged through many years of extremely expensive litigation.

The Appellee in this action is not alone in claiming this Court permits property appraisers to challenge the constitutionality of statutes simply by raising the issue in some form of defensive pleading.[3] They acknowledge that this Court, in *Fuchs v. Robbins*, has prohibited them from challenging the constitutionality offensively, but has specifically authorized them to do so defensively.

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[2] See David M. Richardson, *Florida's Imperial Property Appraiser*, 48 Fla. Law Rev. 723 (Sept. 1996).

[3] See, for example, *Florida Power & Light Co. v. Mastroianni*, Case No. 99-07418 (4th Cir. Ct. (Duval)).

A ruling in this Court upholding this position of the Appellee will not be limited just to property appraisers. Every executive officer at both the state and local level will be free to refuse to apply any statute, Florida Administrative Code rule, or ordinance. If challenged, their actions will be justifiable simply by raising the issue of constitutionality at that point. Of course, a court may ultimately rule against them, but only after both sides have sustained significant litigation expenses. Such a holding, by this Court, would constitute a new form or nullification and create the "strange results" recognized and prohibited by the *Atlantic Coast Line* case nearly 100 years ago.

CONCLUSION

An executive officer cannot overcome his or her lack of standing to challenge the constitutionality of a statute simply by refusing to follow or apply the statute and then raising the issue, when challenged, by way or a defensive action or pleading.

Respectfully submitted this _____ day of May, 2003.

_____
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