IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-783

LEWIS Y. and BETTY T. WARD, et al,

Petitioners,

v.

GREGORY S. BROWN, Property Appraiser of Santa Rosa County, et al,

Respondents.
_____/

Lower Tribunals:
First District Court of Appeal,
Case No.: 1D02-3265

Santa Rosa County 1st Judicial Circuit,
Case: 2001 CA 892

REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

The matter on appeal, in this case and before this Court, is the striking of class action allegations for having been untimely filed. The standard of review for a motion to strike requires that well-pled matters be taken as true. The amended complaint on review pled that none of the Plaintiffs or class action members were owners, or held legal or equitable title to the improvements which the property appraiser had reclassified. These allegations must be taken as true in this appeal. The trial court struck the class action allegations as being untimely under Section 194.171(2), Florida Statutes.

The trial court, in its ruling, did not address any issues relating to ownership or classification of the property. The Respondents, in their Answer Brief, seek to rely on the District Court decision as if it establishes the facts of this case despite there was not yet a record from which to determine facts. Obviously, those issues on the merits which are now pending before the trial court are not part of the appeal presently before this Court, nor were those issues part of the appeal before the First District Court. The "facts" of this appeal are contained in the amended complaint, not in dicta contained in the District Court's decision.

SUMMARY OF THE ARGUMENT

The Answer Brief of the Respondents argues many of the issues which go to the merits of the case. The merits of this case are not now before this Court. The single issue which is before this Court is whether the trial court should have struck the class allegations charging the Respondent Property Appraiser with misclassifying the putative class members' intangible leasehold interests.

The Respondents have also attempted to distinguish the cases from the other districts which are in conflict with the decision with the First District Court in this case. In doing so, they have also argued a number of other cases which actually go to the merits of this case. A supportable and sustainable analysis demonstrates that this case involves a classification meeting the traditional definition: "a systematic arrangement in groups or categories according to establish criteria."

This case does not involve a claim for exemption by the Petitioners. Petitioners acknowledge they are specifically subject to the state intangible tax on their intangible leasehold interests and have never made application for nor claimed an exemption from that or any other tax. The Respondent Property Appraiser's characterization is a gambit of circular reasoning to afford him an opening for a constitutional challenge. This, also, goes to the merits of the case which were specifically argued before the trial court in its hearings on the merits.

ARGUMENT

I. Respondents Raise and Argue, in Their Answer Brief, Issues Going to the Merits of the Case. The Single Issue Before This Court Is Whether Petitioners' Class Actions Should Have Been Struck Because They Were Untimely Under Section 194.171(2), Florida Statutes

The merits of this case are not before this Court. The merits of this case involve whether the Property Appraiser's reclassification of some 800 properties in 2001 and more than 2,000 properties in 2002 was an appropriate classification. The second issue on the merits is whether those 800 persons for 2001, and 2,000 for 2002, own their improvements, either "equitably" or "legally." Thirdly, did the property appraiser undertake his reclassification because he initially considered the statutory classification of the Petitioners' leasehold interests to be unconstitutional, and does he have standing to refuse to apply a statute because he deems it unconstitutional? None of those issues was addressed by the trial court when it made its decision to grant the Respondents' motion to strike the class action allegations as being untimely filed. Nevertheless, the Respondents in this case continue to improperly argue such merits as they did before the First District Court.

In this appeal, the amended complaint alleged, "Plaintiffs are not the equitable owners of the leased premises or improvements for purposes of ad valorem taxation. • • • None of the leases at issue provide the Plaintiffs or any of them at any time during the lease are the owners or equitable owners of the improvements. None provides that title to the improvements is ever vested in Plaintiffs at any time during the lease." The appropriate standard to review the striking of class action claims requires this Court

to confine itself to the "four corners" of the complaint, to construe the complaint favorably to the class Plaintiffs, and to accept as ***true*** all well-pled allegations in the complaint. In short, the Respondents' motion to strike operates to admit the truth of these allegations, and issues cannot be joined in a motion to strike. *See Bay Colony Office Bldg. Joint Venture v. Wachovia Mortg. Co.*, 342 So.2d 1005 (4 DCA 1977), *Staley v. Florida Farm Bureau Mut. Ins. Co.*, 328 So.2d 241 (1 DCA 1976), *Ivey v. Southern States Power Co.*, 174 So. 834 (Fla. 1937).

Respondents have argued the ***merits*** of their case in the Answer Brief. They have argued "facts" which are expressly contradictory to the well-pled facts which must be taken as true in this appellate proceeding. Petitioners request that this Court, *sua sponte*, strike all such arguments or that this Court disregard them.

II. The Review of the Cases Governing the Timeliness of Tax Challenges Demonstrates the Conflict Which the First District Decision Has Created

The Respondents continue to argue that there is no conflict, direct or otherwise, between the decision of the First District Court in this case and *Pepperidge Farm*, *Florida Government Utilities Authority*, *BankUnited Financial*, *Sartori*, or *Sohn*.[1] Their argument consists of a series of alternatives: the cases were all based on refund cases, **or** they were inadvertent mistakes of fact with no judgment involved, **or** they did not involve "exemptions." In fact, some of these cases did involve refunds, but

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[1] *Pepperidge Farm v. DOR, et al*, 847 So.2d 575 (2 DCA 2003); *Florida Government Util. Auth. v. Day*, 784 So.2d 494 (5 DCA 2001); *BankUnited Financial Corp., et al v. Markham, et al*, 763 So.2d 1072 (4 DCA 1999); *Sartori v. DOR*, 714 So.2d 1136 (5 DCA 1998); *DOR v. Sohn*, 645 So.2d 249 (1 DCA 1995).

several did not. All of these cases involved errors of omission or commission. None of the cases involved exemption, and neither does this case.

Failing to find any real basis for distinguishing these cases, Respondents simply argue that the cases distinguishing classification and assessments were "wrongly decided." They argue there should be "only one law" and that it should be the 60-day time bar of Section 194.171(2), Florida Statues. Such a determination by this Court would require that this Court nullify a number of statutory provisions which Respondents have found to be inconvenient. Overturning the overwhelming majority of court decisions which are contrary to Respondents' position would be almost a secondary result.

The distinction between the ***classification*** of all properties on a tax roll into appropriate arrangements of groups or categories and the ***assessment*** of individual parcels of property by assigning specific values is a distinction the Respondents choose to avoid. ***Classification*** is defined as an: "a systematic arrangement in groups or categories according to established criteria."[2] An ***assessment*** is the annual assignment of a value to an individual parcel of property which may or may not be adjusted to reflect that parcel's entitlement to a whole or partial exemption. §192.001(2), Fla. Stats. This case does not include a contest to the assignment of value to any of the leaseholds nor to whether such properties are entitled to an

[2] Webster's New College Dictionary, Seventh Edition (1965). *See also*, Webster's New World Diction of America English, Third College Edition (1988). *See also*, §195.073(1)(i), Fla. Stats., and Rule 12D-8.008(2)(b), F.A.C.

exemption. In fact, they are not. §§196.199(2)(b), 199.023(1)(d), Fla. Stats.[3]

The sole question submitted to the trial judge and on appeal in this case was Respondents' motion to strike the class action allegations which the Petitioners had added by way of an amended complaint. This amendment was filed after the 60-day time period of Section 194.171(2) had run, even though the original complaint was filed within the 60 days. The Petitioners have consistently argued that that 60-day time bar does not apply because their challenge was to the misclassification by the Property Appraiser of the 800-plus leaseholds at Navarre Beach which contained language stating, "title to such improvements [placed on the property by the tenant] will vest in the County (the landlord) at the termination of the lease." The (approximately) 1200 other leases at Navarre Beach which contain language providing that the improvements would "vest forthwith" in the County were not reclassified in 2001. By dividing up all 2,000-plus leases in public lands on Santa Rosa Island in Santa Rosa County into two groups or categories, based entirely on whether the lease language called for "vesting at termination" or "vesting forthwith," is by any definition a classification of the property. This classification, cannot be an assessment. The assignment of individual values (or absence of value for whatever reason) requires a second step which must be applied individually to each separate parcel. The Property Appraiser did take that second step for each individual parcel. In no instance, is that second step (his

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[3] The Respondent Property Appraiser claims that the improvements on these leaseholds are "owned" by the lessees. This goes to the merits of the case and is presently pending a decision from the trial judge. Alternatively, the Property Appraiser's contention that the lessees are fee simple owners of the entire property is also pending a decision from the trial judge.

assessment), being contested in this lawsuit.

The Respondents' argument that the cases which have recognized classification challenges are distinguishable from this case cannot stand close scrutiny. For example, Respondents argue that these cases were all brought under Section 197.182, Florida Statutes, a refund statute which specifically contains a four year statute of limitations. For several of the cases, this is simply not so. *Sohn* was not a refund case under 197.182; nor was *BankUnited Financial Corp.*; nor was *Florida Government Utilities Authority*. *Sartori* and *Pepperidge Farms* were both cases in which the taxpayer had paid its tax under protest and was seeking a refund under Section 197.182, well after the 60-day time period had run.

In *Sohn, Sartori*, and *BankUnited*, the Department of Revenue had argued that *Department of Revenue v. Stafford*, 646 So.2d 803 (4 DCA 1994) was controlling. Respondents also have placed great emphasis on that case in their Answer Brief. But *Stafford* was not a classification case. It was a case involving an individual assessment challenge. The taxpayer in that case put forth the theory of alternative remedies for an assessment contest: 1) partial payment within 60 days under Section 194.171(2), **or** 2) full payment followed by a refund action within four years (under §197.182). The *Stafford* court held that a contest of an individual assessment, regardless of whether full or partial payment is made, is subject to the 60-day time bar of 194.171(2). The *Sohn, Sartori*, and *BankUnited* courts all recognized and discussed the difference between the assessment contest in *Stafford* and the classification challenges with which they were dealing.

The Respondents have also argued that the classification cases are somehow

distinguishable because they involved admitted and inadvertent mistakes of fact. The property appraisers in *Sohn* and *Sartori* admitted to having made "errors of omission or commission." The property appraisers in all the other cases denied making "errors of omission and commission" and vigorously defended their classification.

Respondents also argue in their Answer Brief that drawing distinctions between a misclassification challenge and individual assessment contests is tantamount to resurrecting the discredited distinction between "void" and "voidable" assessments. Not so. This Court, in the case on which Respondents reply, simply recognized that a 1983 amendment to Section 194.171 clearly made the 60-day time period a jurisdictional statute of non-claim. *Markham v. Neptune Hollywood Beach Club,* 527 So.2d 814 (Fla. 1988). Previously, prior to 1983, this Court had ruled that the 60-day limit was only a statute of limitation and that an assessment not specifically authorized by law was ***void*** and therefore could be contested outside the 60-day statutes of limitations. *See Lake Worth Towers v. Gerstung*, 262 So.2d 1 (Fla. 1972). This Court in *Neptune Hollywood Beach Club*, held that any contest to an individual assessment, whether void or voidable, was legislatively determined to be subject to the 60-day time bar. Thus, the holding of this Court and of the *Stafford* court is that, whether partial or full payment is made in an assessment contest, or whether the contest is to a simple overassessment or to an unauthorized assessment, the 60-day rule of Section 194.171(2) applies.

The classification cases, on the other hand, recognize that different time limits apply where a challenge to the classification of property occurs under Section 197.122, or Section 197.182, or some other statute.

The Respondents have also suggested that those cases that have held that classification challenges are not subject to the 60-day time bar of Section 194.171(2) were "wrongly decided." This has been the consistent theme of the Department of Revenue in its continuously harking back to the *Stafford* case as being controlling in all instances. *See*, *Sohn*, *Sartori*, and *BankUnited*. In this case, the Property Appraiser has gone so far as to contend that even where the action was timely initiated, the certification of a class of aggrieved taxpayers must also occur before the end of the 60 days. That is part of the question before this Court and is likewise controlled by the cases dealing with classification challenges as opposed to assessment challenges.

Essentially, the Respondents ask this Court to overturn the decisions issued by the several district courts in *Sohn*, *Sartori*, *BankUnited*, *Florida Governmental Utilities*, and *Pepperidge Farm*. Further, they seek nullification, by this Court, of all statutory statutes of limitation or statues of non-claim which are greater than 60 days. Florida's ad valorem taxing scheme has been established by legislative action over the course of time. *Collier County v. State*, 733 So.2d 1012, 1014 (Fla. 1999). That scheme has continually recognized that errors of omission or commission by property appraisers and tax collectors may be corrected at any time under Section 197.122 and that refunds of improperly paid ad valorem taxes can be granted within the four year period of Section 197.182. But, under the Respondents' theory, there could never be relief for an ad valorem tax imposition, except under Section 194.171; i.e. within 60 days of the property appraiser's certification.

III. The Respondents Rely on Obsolete Case Law and

Attempt to Argue Cases That Go to the Merits

The Respondents place great reliance on *Williams v. Jones*, 326 So.2d 425 (Fla. 1975) arguing that it is controlling. This argument is flawed in two respects. First, the case upheld the right of the Florida legislature, by enacting a general law in 1971, to reclassify the previously untaxable leasehold interests in publicly owned land on Santa Rosa Island lying in Escambia, Santa Rosa, and Okaloosa Counties. The legislature had done so by providing that any lease having a duration of 99 years or longer would be taxed as if the lessee held the fee simple interest in the property. Because all of the leaseholders on Santa Rosa Island had 99 year leases, that general act made their property subject to local ad valorem taxes for the first time.[4] This was contrary to the contractual arrangement under which they had acquired the leases and they challenged the law as impairing their contractual rights. The *Williams v. Jones* Court upheld the right of the legislature to make such a statutory reclassification.

In 1976, special acts were passed to provide relief to the Santa Rosa Island lessees who were being subjected to both rental payments and ad valorem taxes on the same property. One such act allowed a set-off against the rental payments due to the county for ad valorem taxes paid.[5] This Court found that special act was prohibited by the constitution. *Archer v. Marshall*, 355 So.2d 781 (Fla. 1978). The same year, two other special acts[6] were passed which required the county to pay back all ad valorem taxes collected since the enactment of the 1971 law. Those special acts were

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[4] Ch. 71-133, Laws of Florida
[5] Ch. 76-361, Laws of Florida

[6] Chs. 76-368 and 76-371, Laws of Florida

also found unconstitutional. *AM FI Investment Corporation v. Kenny, et al*, 367 So.2d 415 (Fla. 1978). Both these cases related to Escambia County.[7] The difficulty with relying on these cases is that the 1971 law was repealed just nine years later, in 1980, insofar as the holding in all three of these cases are concerned. First, the 1980 law reclassified all leasehold interests in property owned by governmental entities as intangibles, and made them subject to the state intangible tax. Second, the 1980 act changed the presumption which had made the Santa Rosa leaseholds taxable as real estate, by making the presumption 100 years. All the Santa Rosa leases are for 99 year or less.

It was the legality of the 1971 tax imposition which these three cases addressed and upheld. When the legislature reclassified, once again in 1980, the 1971 law and the cases upholding it ceased to be controlling or cogent.

Nevertheless, the Respondents have placed heavy reliance on these cases. They argue, in their Answer Brief, these cases stand for the proposition that this Court should continue to treat the Santa Rosa properties as being exempt despite specific legislation to the contrary.

It is not appropriate that these arguments appear in this appeal which deals only with Respondents' motion to strike. The amended complaint which was before the trial court, the First District Court, and this Court in this case, specifically pled that no exemption was sought nor claimed. Those allegations must be taken as being true.

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[7] Unlike Santa Rosa County, Escambia County continues to comply with the 1980 legislative classification of Section 196.199(2)(b) and 199.023(1). See also, *Bell v. Bryan*, 505 So.2d 690 (1 DCA 1997).

Therefore, arguing this matter in this proceeding goes to the merits of the case, and is inappropriate. Accordingly, the Court is requested to strike or disregard all such arguments contained in the Answer Brief.

The Respondents' theme that the Petitioners are seeking an exemption is continued by their reliance on a number of cases that stand for the proposition that a contest of ***an*** exemption denial is an ***assessment,*** falling under Section 194.171.[8] As we stated in our Initial Brief, we agree a contest of the denial of an exemption application is an ***assessment*** subject to the 60-day time bar of Section 194.171(2).

This continuing mischaracterization is but one more example of the Respondents going beyond the narrow procedural issue contained in the appeal of their motion to strike class action allegations, and seeking an appellate ruling on the merits of the case.

The controlling case law on the merits of this case was not briefed nor argued before the First District Court by the Petitioners who limited themselves to the relatively narrow procedural issue on appeal. By allowing only the Respondents to argue the merits, the District Court lacked the opportunity to fully consider the present state of this case law.

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[8] For example, *DOR v. Eastern American Technologies Corporation*, 762 So.2d 1044 (5 DCA 2000) (a separate §194.171 action must be filed for each year where there is a continuous denial of an exemption); *Nikolits v. Ballinger*, 763 So.2d 1253 (4 DCA 1999) (denial of a homestead exemption is subject to an assessment contest under §194.171); *Palmer Trinity Private School v. Robbins*, 681 So.2d 809 (3 DCA 1996) (a separate challenge must be brought for each year); *Hall v. Leesburg Regional Medical Center*, 651 So.2d 231 (5 DCA 1995) (denial of an exemption is an assessment subject to §194.171); and *Davis v. Macedonia Housing Authority*, 641 So.2d 131 (1 DCA 1994) (an exemption denial contest, even when paid in full, falls under §194.171).

Accordingly, we request that all arguments going to the merits of this case, such as whether the applicable statutes are constitutional, or whether the Petitioners "own" the improvements should be stricken from the Answer Brief, or should be disregarded.

CONCLUSION

This case is before this Court on an order striking class action allegations because the amended complaint was not filed within the 60-day time for filing an assessment contest under Section 194.171. This action is not an assessment contest but a challenge to the misclassification of the Petitioners' intangible leasehold interests. Petitioners pled that the Property Appraiser had misclassified the putative class members' intangible leasehold interests. Classification challenges are not subject to the 60-day nonclaim limitation on Section 194.171(2) and, therefore, the trial court was not time barred from hearing the class allegations. The standard of review in this appellate proceedings does not involve a determination on the merits; the merits remain to be decided by the trial court. The decision of the First District Court is in express and direct conflict with decisions of other districts on the same question of law. These decisions expressly recognize that misclassifications by a property appraiser are not "assessments" and are not subject to the strictures of Section 194.171. This statute governs contests of assessment, while misclassification is considered "an error of commission or omission" correctable under Section 197.122. The class action allegations in this case were timely brought. The decision of the District Court should be reversed and vacated and the order of the trial court striking the class action

allegations should be reversed and the matter should be remanded with directions to reinstate the class action allegations and for the trial court to proceed under Rules 1.220 and 1.221, Florida Rules of Civil Procedure, together with any other relief the Court deems appropriate.

Respectfully submitted this 17th day of September 2003.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is presented in 14-point Times New Roman and complies with the font requirements of Rule 9.210.

_____

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CERTIFICATE OF SERVICE

I FURTHER CERTIFY that a true and correct copy of this Objection has been furnished by U.S. Mail this 17th day of September, 2003 to the attached Service List:

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