

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

1108 ARIOLA, LLC, et al.,

Plaintiffs

vs.

CASE NO: 2004-CA-002290
DIVISION: J

CHRIS JONES, PROPERTY
APPRAISER FOR ESCAMBIA COUNTY,
FLORIDA, and JANET HOLLEY, TAX
COLLECTOR FOR ESCAMBIA COUNTY,
FLORIDA,

Defendants.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR
MOTION TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES
CHALLENGING THE CONSTITUTIONALTY OF
CERTAIN FLORIDA STATUTES**

In their Fourth, Fifth, Sixth, Seventh, and Eighth Affirmative Defenses to the Complaint filed herein by Plaintiffs, Defendants assert that if the court were to interpret §§ 196.199(2)(b) and 199.023, Florida Statutes (2004) in the manner requested by Plaintiffs, such interpretation would violate the Florida Constitution and the United States Constitution.

Regardless of the crafty wordsmanship utilized by the Defendants in drafting these Affirmative Defenses, they constitute a challenge by the Defendants to the constitutionality of the cited statutes.

In their Reply, Plaintiffs have moved to strike the foregoing Affirmative Defenses on the grounds that the Defendants lack standing to challenge the constitutionality of Sections 196.199 and 199.023 of the Florida Statutes.

GENERAL RULE

In Florida, the courts have long observed four (4) basic principals regarding the constitutionality of Florida Statutes and the right to challenge the constitutionality of such statutes:

(1) Florida Statutes are presumed to be constitutional.

(2) The right to declare an act unconstitutional is purely a judicial power, and cannot be exercised by officers of the executive department under the guise of the observance of their oath of office to support the constitution.

(3) State officers and agencies must presume legislation affecting their duties to be valid, and do not have standing to challenge the constitutionality of such legislation.

(4) The courts will not listen to an objection made to the constitutionality of a statute by a party whose personal or property rights it does not affect.

See State ex rel. Atlantic Coast Line Ry. Co. v. State Board of Equalizers, 84 Fla. 592, 94 So. 681 (1922); Barr v. Watts, 70 So. 2d 347 (Fla. 1953); Department of Education v. Lewis, 416 So. 2d 455 (Fla. 1982); and Fuchs v. Robbins, 818 So. 2d 460 (Fla. 2002).

The rationale for these principals is sound. The Florida Supreme Court in State ex rel. Atlantic Coast Line Ry. Co. v. State Board of Equalizers, cited with approval the following language from State ex rel. New Orleans Canal and Banking Co. v. State Auditor, 47 La. Ann. 1679, 18 South 746:

“. . . executive officers of the state government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the Constitution. Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as, constitutional and legal, until their unconstitutionality or illegality has been judicially established; for in a well-regulated government obedience to its laws by executive officers is absolutely essential and of paramount importance. Were it not so, the most inextricable confusion would inevitably result and 'produce such collisions in the administration of public affairs as to materially impede the proper and necessary operations of government.' 'It was surely never intended that an executive functionary should nullify a law by neglecting or refusing to execute it.' . . . ”

As stated by the Florida Supreme Court in Barr v. Watts:

"The people of this state have the right to expect that each and every such state agency will promptly carry out and put into effect the will of the people as expressed in the legislative acts of their duly elected representatives. The state's business cannot come to a stand-still while the validity of any particular statute is contested by the very board or agency charged with the responsibility of administering it and to whom the people must look for such administration."

The general rule that has been observed by Florida courts for years is that public officials do not have standing to challenge the constitutionality of state statutes.

THE 'PUBLIC FUNDS' EXCEPTION

The only exception adopted by the Florida Supreme Court to the general rule that a public official lacks standing to challenge the constitutionality of a statute is known as the "public funds" exception.

The "public funds" exception was first adopted by the Florida Supreme Court in State ex rel. Harrell v. Cone, 177 So.2d 854 (Fla. 1937). The rationale underlying this exception is that a public official charged with the responsibility of protecting public funds should have the right to challenge the constitutionality of a statute which requires that official to disburse public funds to the detriment of the public.

This case does not involve the disbursement of public funds. It involves the decision of Defendant Jones, as Property Appraiser of Escambia County, and Defendant Holley, as Tax Collector of Escambia County, to ignore the plain language of Sections 196.199 and 199.023, Florida Statutes, and the interpretation of those statutes by this court and the First District Court of Appeal in Bell v. Bryan, 505 So. 2d 690 (Fla. 1st DCA 1987), rev. den. 513 So. 2d 1060 (Fla. 1987), and Bell v. Bryan, 519 So. 2d 1024 (Fla. 1st DCA 1988). It involves the appraisal of Plaintiffs' leasehold improvements as real property and the levying of real property taxes on the appraised value of those improvements. For a period of more than 16 years, Plaintiffs' leasehold improvements, pursuant to Sections 196.199 and 199.023, Florida Statutes, and Bell v. Bryan, supra, had been recognized to be intangible personal property. Prior to 2004, for a period of more than 16 years, the county officials did not rely on any real property taxes being collected from the Plaintiffs on their leasehold improvements to support the county's budget. There was no threat to the county's funds that could justify Defendants' decision in 2004 to challenge the constitutionality of these statutes.

As stated by the Florida Supreme Court in Barr v. Watts, to utilize the "disbursement of public funds exception" the public official must be faced with the necessity of protecting the public funds and it must be a matter of urgent and vital public interest. The Court stated, "But in the absence of such controlling public necessity, we think the public interest will be best served by channeling all such attacks on the validity of statutes through the duly-elected public officer whose duty it is to protect the public interest in this respect – the Attorney General of this state."

The facts in this case do not support the Defendants' attempt to make an "end run" around the general rule denying public officials standing to challenge the constitutionality of a state statute. The statutes in question do not require any public official to disburse public funds and the challenges to the statutes' constitutionality are not for the urgent purpose of protecting any public funds that would otherwise be disbursed thus causing immediate harm to a public body.

The "public funds" exception simply does not apply to the facts of this case.

THE 'DEFENSIVE POSTURE' EXCEPTION

Dicta in Fuchs v. Robbins and Department of Education v. Lewis, suggests there is another exception, known as the "defensive posture" exception, to the general rule. According to dicta in these two cases, the so called "defensive posture" exception may also allow a public official to challenge the

constitutionality of a State statute if the operation of the statute is brought into issue in litigation brought by another against the public official. However, the Florida Supreme Court has never adopted this "defensive posture" exception. It has only been mentioned through dicta in the two aforementioned cases. In both Fuchs v. Robbins and Department of Education v. Lewis, the public officials initiated the litigation and in both of those cases, the Florida Supreme Court held the public officials lacked standing to challenge the constitutionality of the statutes in question. The only contribution of the dicta in Fuchs v. Robbins and Department of Education v. Lewis, was to create confusion regarding the issue.

The dictum in Fuchs v. Robbins, is also perplexing in view of the fact that the Florida Supreme Court in Fuchs reversed the Third District Court of Appeal's decision in Fuchs v. Robbins, 738 So. 2d 338 (Fla. 3d DCA 1999) in which the appraiser's standing to challenge the constitutionality of a state statute was upheld, and approved the Second District Court of Appeal's decision in Turner v. Hillsborough County Aviation Authority, 739 So. 2d 175 (Fla. 2d DCA 1999), in which the appraiser's standing to challenge the constitutionality of a state statute was rejected. It is significant that in approving Turner, the Florida Supreme Court approved the Second District's rejection of the appraiser's argument that he was in a defensive posture because he was defending his appraisal of the property in question. As the Second District Court of Appeal noted, "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 . . ."

The Court concluded that it was the appraiser who initiated the challenge to the constitutionality of the statute by refusing to grant the exemption.

Plaintiffs urge this Court to consider the concurring opinion by Justice Bell in Sunset Harbour Condominium Ass'n, et al. v. Robbins, WL 1577040 (Fla.), 30 Fla. L. Weekly S548 (Fla. 2005), in which he cleared up the confusion regarding the dictum in the Florida Supreme Court's opinion in Fuchs v. Robbins. Justice Bell found there is no adequate support in Florida case law for the defensive posture dictum in Fuchs v. Robbins, and that such a defense is contrary to the Court's holding in State ex rel. Atlantic Coast Line Ry. Co. v. State Board of Equalizers. Plaintiffs trust that after the Court reviews the analysis of this "exception," the Court will concur with Justice Bell that, "There is no defensive posture exception to the Atlantic Coast Line rule." The Florida Supreme Court's dictum in Fuchs suggesting otherwise simply has no authority or persuasive force behind it, and should be disregarded altogether.

As pointed out by Justice Bell, as support for its dictum in Fuchs v. Robbins, that there is a "defensive posture" exception to the general rule, the Florida Supreme Court cited the Court's prior dictum in Department of Education v. Lewis, and in Department of Education v. Lewis, the Florida Supreme Court cited as support for its dictum the cases of City of Pensacola v. King, 47 So.2d 317 (Fla. 1950); State ex rel. Harrell v. Cone, 130 Fla. 158, 177 So. 854 (1937); and State ex rel. Florida Portland Cement Company v. Hale, 129 Fla. 588, 176 So. 577 (1937). However, these three cases involved the disbursement of public

funds and the decisions in those cases was based on the "public funds" exception to the general rule, not on any "defensive posture" exception.

In Barr v. Watts, the Florida Supreme Court expressly rejected the use of dicta in King and Cone, as support for a defensive posture exception. The Court stated:

"It is true, as contended by the respondents, that there is dictum in the cases of City of Pensacola v. King, Fla. 47 So.2d 317, and State ex rel. Harrell v. Cone, 130 Fla. 158, 177 So. 854, which might be construed as an approval of the respondents' theory; but a careful reading of those cases will reveal that, in each such case, there was involved a disbursement of the public funds in the administration of the Act in question - so that these cases could have turned on this one point alone. Nor did this court in either of these cases recede from the rule adopted in the Board of Equalizers case, which we quoted above."

As a matter of textbook law, dictum is without force as a judicial precedent. The Florida Supreme Court in F.B. v. The State of Florida, 852 So.2d 226 (Fla. 2003), reminded the courts that:

"Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this Court recedes from the express holding."

The last express holdings of the Florida Supreme Court on the issue of whether a public official who is a defendant in a case has standing to challenge the constitutionality of a state statute is found in State ex rel. Atlantic Coast Line Ry. Co. v. State Board of Equalizers and Barr v. Watts. State ex rel. Atlantic

Coast Line Ry. Co. v. State Board of Equalizer, was an action brought by the Atlantic Coast Line Railway Company against a State Board, the Board of Equalizers of the State of Florida. The railway company was challenging the appraised value of its property for taxation purposes. The Board of Equalizers, the defendants (respondents), refused to hear the railway company's petition based on its determination that the statutes being relied upon by the railway company were unconstitutional. The public officials were clearly in a "defensive posture", but the Florida Supreme Court expressly held the Board of Equalizers had no standing to challenge the constitutionality of the statutes in question.

In Barr v. Watts, the relator sued the State Board of Bar Examiners to allow the relator to take the examination for admission to the Bar. Again, this was a case where the public officials were in a "defensive posture". In defense of its denial of the realtor's application to take the Bar examination, the State Board of Bar Examiners challenged the constitutionality of the statute under which the relator claimed she was entitled to take the Bar examination. The Florida Supreme Court expressly held that the public officials lacked standing to challenge the constitutionality of the subject statute. The Court stated:

"Under the circumstances, we do not feel bound by the dictum in the cited cases relied upon by respondents, and re-affirm the rule of State ex rel. Atlantic Coast Line Railroad Co. v. State Board of Equalizers, supra, that is, that the 'right to declare an act unconstitutional . . . cannot be exercised by the officers of the executive department under the guise of the observances of their oath of office to support the Constitution' ."

In view of the Florida Supreme Court's statement in F.B. v. State of Florida, any subsequent contrary dicta statements by the Court in Fuchs v. Robbins, and Department of Education v. Lewis, are not controlling and this Court is to apply the express holdings of the Florida Supreme Court in State ex rel. Atlantic Coast Line Ry. Co. v. State Board of Equalizers and Barr v. Watts.

Justice Bell wrote an excellent concurring opinion in Sunset Harbour Condominium Ass'n, et al. v. Robbins, which removes the confusion created by the dicta in Fuchs v. Robbins and Department of Education v. Lewis, and returns the Court to the well reasoned rule that public officials lack standing to challenge the constitutionality of a State statute, and that there is no "defensive posture" exception to the general rule. Plaintiffs urge this Court to accept Justice Bell's well founded analysis of this issue.

Even if this Court is unwilling to follow Justice Bell's reasoning, Plaintiffs request the Court to consider the fact that it is they, not the Defendants, who are in an imposed defensive posture in this case. It was the Property Appraiser and Tax Collector who took the offensive in this case.

Section 199.023(1), Florida Statutes, expressly states, in part, that:

199.023 Definitions. -- As used in this chapter:

(1) "Intangible personal property" means all personal property which is not in itself intrinsically valuable, but which derives its chief value from that which it represents, including, but not limited to, the following:

.....

(d) Except for any leasehold or other possessory interest described in s. 4(a), Art. VII of the State Constitution or s. 196.199(7), all leasehold or other possessory interests in real property owned by the United States, the state, any political subdivision of the state, any municipality of the state, or any agency, authority, and other public body corporate of the state, which are undeveloped or predominantly used for residential or commercial purposes and upon which rental payments are due.

and Section 196.199(2)(b), Florida Statutes expressly states that:

Except as provided in paragraph (c), the exemption provided by this subsection shall not apply to those portions of a leasehold or other interest defined by s. 199.0123(1), subject to the provisions of subsection (7). **Such leasehold or other interest shall be taxed only as intangible personal property pursuant to chapter 199 if rental payments are due in consideration of such leasehold or other interest.**

(Emphasis supplied).

In Bell v. Bryan, *supra*, this Court and the First District Court of Appeal rejected the Property Appraiser's and Tax Collector's position that the leaseholders "owned" the leasehold improvements and affirmed the plain language of Sections 196.199 and 199.023 of the Florida Statutes. Notwithstanding the plain language of the statutes and the decisions in Bell v. Bryan, the Property Appraiser in 2004 questioned the constitutionality of the statutes and appraised the Plaintiffs' leasehold improvements as real property and the Tax Collector levied real property taxes on those improvements.

The Plaintiffs are simply defending their interests by objecting to the Defendants' actions. If the Defendants had not refused to abide by the clear

dictates of the statutes and prior court rulings, there would be no litigation. As the Second District Court of Appeal stated in Turner, for the appraiser to argue that he is in a defensive posture after he initiated the litigation by refusing to apply the exemption in that case is to engage in circuitous reasoning. The same is true in this case.

If public officials charged with the responsibility of appraising property for purposes of taxation and levying taxes on such property are allowed to circumvent the general rule prohibiting them from challenging the constitutionality of Florida's taxation statutes by claiming that they are acting defensively, the general rule will be rendered meaningless. The public official can simply ignore the taxation statutes' provisions by imposing an illegal tax or denying a legislatively allowed exemption, and when the taxpayer seeks judicial relief, the public official will defend by challenging the constitutionality of the statute because he is in a "defensive posture." Such a practice would result in the inextricable confusion that the Florida Supreme Court warned against in State ex rel. Atlantic Coast Line Ry. Co. v. State Board of Equalizers.

**STATEMENTS MADE BY CHRIS JONES, PROPERTY APPRAISER FOR
ESCAMBIA COUNTY**

Although the Defendants have challenged the constitutionality of the subject statutes in their Fourth, Fifth, Sixth, Seventh and Eighth Affirmative Defenses, Defendant Jones recognized he had no authority to do so when his deposition was taken.

On page 28 (lines 15-17) of his deposition, in response to a question about how he views his obligations as property appraiser if he considered laws enacted by the Legislature to be unconstitutional, Defendant Jones stated:

"I don't think I can challenge the law if it's unconstitutional. I don't think it's within my power to challenge the constitutionality of the law."

Plaintiffs agree that the Defendants do not have the power (or authority) to challenge the constitutionality of the statutes in question.

Again, on page 134 (lines 22-25) and page 135 (lines 1-4) of his deposition, Defendant Jones denies he is challenging the constitutionality of the statutes in question. Defendant Jones indicates the only reason he placed the Plaintiffs' leasehold improvements on the tax rolls is he determined the Plaintiffs were the equitable owners of the leasehold improvements in reliance on Judge Rasmussen's decision in the Navarre Beach leaseholders case, Ward v. Brown, Case No. 01-892 in the Circuit Court in and for Santa Rosa County, Florida. In reviewing the issues raised by the Defendants in their Answer and Affirmative Defenses, the following exchange took place with counsel for the Plaintiffs posing the question and Defendant Jones answering the question (page 134, lines 22-25 and page 135, lines 1-4):

"Q. Two issues have been raised, equitable ownership and unconstitutionality of the statutes.

A. I've never said anything was unconstitutional. I do believe that I am following current law and case law in the fact that I've placed the improvements on

Santa Rosa Island on the tax roll in regards - - in light of the recent decision and that they do have equitable ownership. That I would agree."

Since, according to Defendant Jones, the constitutionality or unconstitutionality of the subject statutes is not an issue in this case, the Affirmative Defenses challenging the constitutionality of the statutes should be stricken.

**STATEMENTS MADE BY JANET HOLLEY, TAX COLLECTOR
FOR ESCAMBIA COUNTY**

The statutes which the Defendants indicated to be unconstitutional in their Fourth, Fifth, Sixth, Seventh and Eighth Affirmative Defenses are Section 196.199 and Section 199.023, Florida Statutes.

In her deposition, (page 23, lines 4-25, and page 24, lines 1-3), the Defendant, Janet Holley, stated that she was not familiar with those statutes. And when she was questioned further about the constitutionality of those statutes, the following exchange took place with counsel for the Plaintiffs posing the question and Defendant Holley answering the question (page 24, lines 8-12):

"Q. Are you making any claim that those statutes then that you are not really familiar with are unconstitutional?

A. I don't think I know enough to even answer that question."

Given the statements of both Defendant Jones and Defendant Holley, Plaintiffs submit that the Defendants' affirmative defenses challenging the constitutionality of the statutes in question should be stricken.

CONCLUSION

The Defendants are without standing to challenge the constitutionality of §§ 196.199 and 199.023, Florida Statutes (2004).

This case does not involve the disbursement of public funds, thus that exception to the general rule is unavailable to the Defendants.

The dictum in Fuchs v. Robbins, supra, regarding a "defensive posture" exemption was clarified by Justice Bell in his concurring opinion in Sunset Harbour Condominium Ass'n, et al. v. Robbins, supra. Under Florida law, there is no "defensive posture" exception that would allow the Defendants to challenge the constitutionality of the statutes in question.

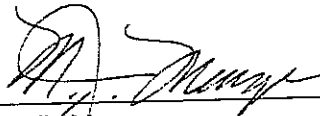
Defendant Jones denies that it is his intent to challenge the constitutionality of the statutes in question and admits that he has no standing to do so. Defendant Holley is not even familiar with the statutes she claims in the Affirmative Defenses are unconstitutional.

It would be a waste of judicial time and cost Plaintiffs additional time and money to prepare for, argue and consider constitutional challenges which the Defendants lack standing to raise.

For the foregoing reasons, Plaintiffs pray for the entry of an Order striking the Fourth, Fifth, Sixth, Seventh, and Eighth Affirmative Defenses pled by the Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Plaintiffs' Memorandum in Support of Their Motion to Strike Defendants' Affirmative Defenses Challenging the Constitutionality of Certain Florida Statutes, has been furnished to Elliott Messer and Thomas M. Findley, of Messer, Caparello & Self, P.A., 215 S. Monroe Street, Suite 701, Tallahassee, FL. 32302, by U.S. mail, this 24th day of October, 2005.



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