IN THE SUPREME COURT OF THE STATE OF FLORIDA

BILL FURST, as Property Appraiser
of Sarasota County, et. al.,

Appellant,

vs.

Case No.: SC19-701
Dist. Ct. Case No.: 2D17-3973
L/T Case No.: 2015 CA 006511 NC

SUSAN K. DEFRANCES,

Appellee.
_____/

APPELLANT, BILL FURST'S REPLY BRIEF

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I. **PREFACE**

In this brief, the Appellant, BILL FURST, as Property Appraiser of Sarasota County, Florida shall be referenced as the "Property Appraiser." Appellee, SUSAN K. DEFRANCES, shall be referenced as "Appellee."

The volume and page number of the record on appeal will be indicated by the designation (R.____), followed by the appropriate volume and page number.

II. ARGUMENT

A. FLORIDA STATUTE SECTION 193.092 IS INTENDED TO ENSURE ALL REAL PROPERTY IS PROPERLY ASSESSED, AND MANDATES BACK ASSESSMENT FOR UP THREE YEARS TO COLLECT CLERICAL ERRORS; AND THE PROPER FOCUS IS ON THE NATURE OF THE MISTAKE, NOT THE RESULT OF THE MISTAKE.

The parties to this appeal agree that the error in question was a "clerical error," not an error in judgment. As a result, the clerical error is able to be corrected. The issue here is whether or not such corrections are subject to back assessment when a property is under assessed due to a clerical error. Florida Statute Section 193.092 requires Property Appraisers to retroactively correct their clerical errors and back assess for same. This is entirely consistent with the fundamental principle underlying property tax law, to wit: that everyone pays their fair share of taxes.

Narrowly defining "escaped taxation," to draw an artificial, nonsensical line between clerical errors that result in a portion of the ***value*** being "skipped," versus clerical errors resulting in specifically identifiable portions of property being entirely "skipped" finds no support as a matter of common sense, and cannot be reconciled with the fundamental premise that every taxpayer pay their fair share.

Appellee argues that when a property is "mistakenly undervalued" due to a clerical error, it is not subject to back assessment, as compared to a clerical error which results in a

property, or a definable portion thereof, "entirely" escaping taxation, which is subject to back assessment. The Appellee, however, is merely creating a distinction without a difference in an attempt to distance herself from the statutory language of "for such property as may have escaped taxation" contained in Section 193.092(1). Clerical errors can result in a property being mistakenly undervalued. Judgement errors can result in a property being mistakenly undervalued. ***The key to the analysis is the type of mistake made, not the result of the mistake.*** The Appellee is effectively attempting to utilize the result of the clerical error to limit the circumstances under which back assessments are warranted. This attempt, however, misses the point. The purpose of the back assessment statute is to make sure everyone pays their fair share. Property that is "mistakenly undervalued" does not result in everybody paying their fair share.

This Court, however, can avoid this result by simply re-affirming its decision in Korash v. Mills regarding the treatment of clerical errors that result in property being mistakenly undervalued versus judgment errors resulting in same:

> It is the *judgment* of the assessor that is involved: if he seeks to change his judgment on a valuation which properly includes all of the "real property" as defined in the Statute § 192.001(12), after certification of the tax roll, a change "reevaluating" the amount will not be allowed, in accordance with our previous holdings. If there is no new judgment being exercised, and property theretofore included is just late in being enrolled and billed, as is the circumstance here, it is a proper assessment and is payable under § 193.092 as "escaped" property. (Just be glad there is no late charge!)
>
> (Citations omitted)

The Appellee's Answer Brief does not substantively address the authorities supporting the Property Appraiser's position, and instead simply tracks the Second District Court of Appeals' flawed analysis. The Appellee acknowledges that "[t]he only case in which this Court has addressed the scope of the property appraisers' authority to issue back assessments under Florida Statute Section 193.092 was Korash v. Mills, 263 So.2d 579, 581 (Fla. 1972) . . . ." (Answer Brief at P. 8). The Appellee goes on to acknowledge that, in Korash, this "Court said 'thus we have here an instance where the principal value of the property has indeed 'escaped' taxation which is fairly within the contemplation of Fla. Stat. §193.092.'" (Answer Brief at P. 11). However, the Appellee waives this holding off, attempting to side step the clear and unambiguous language regarding ***value*** by claiming that "in the context of the entire opinion," this Court didn't mean what it said. (Answer Brief at P. 11).

Similarly, the Appellee acknowledges that the decisions of the First and Third District Courts of Appeal, in Robbins v. First Nat'l Bank, 651 So.2d 184 (Fla. 3d DCA 1995), and Straughn v. Thompson, 354 So.2d 948 (Fla. 1st DCA 1978), support the Property Appraiser's position in this case. The Appellee disregards these holdings as well, claiming that "[u]nfortunately, the First and Third District Courts of Appeal have issued opinions in which they

appear to ignore the requirements of section 193.092." (Answer Brief at P. 9). The Appellee does not attempt to distinguish these authorities, electing instead to simply claim that the courts were wrong because they did not rule in a manner consistent with how the Appellee reads Section 193.092. The Appellee does the same side step with McNeil Barcelona Assocs., Ltd. v. Daniel, 486 So.2d 628 (Fla. 2d DCA 1986), claiming that this Court should ignore it because the Opinion on appeal in this case "effectively overruled it." Answer Brief at P. 9. There is no attempt to analyze the authorities supporting the Property Appraiser's position. Rather the authorities are simply rejected out of hand with the suggestion that they should be ignored because they do not benefit the Appellee.

After failing to meaningfully address the relevant case law, the Appellee encourages this Court to interpret Section 193.092 as the Second District did in the Opinion on appeal. The Appellee argues that the phrase "escaped taxation" is to be strictly and narrowly construed to apply only when a definable, physical, portion of a parcel of property or an improvement is erroneously omitted in its entirety from an assessment. The relevant statutes and Florida Administrative Code provisions at issue have been thoroughly briefed by the Property Appraiser in his Brief and the Property Appraisers' Association of Florida, Inc. in its Amicus Brief. There is no rational justification for treating clerical

errors of omission or commission in the context of Computer Aided Mass Appraisal software systems any differently than other clerical errors for purposes of applying Section 193.092.

Conceptually, the entire tax code is designed to establish that all taxpayers pay their fair share of the economic burdens of government. This Court, in its 2006 decision in Smith v. Krosschell, 937 So. 2d 658, 663 (Fla. 2006), re-confirmed that Florida's tax statutes should be interpreted in order to comport with:

> the basic purpose of taxation: "That all taxpayers share in proportion to their assessments, the support of their government and the protection and services afforded to their property and to themselves, and that none bears an added or unfair burden by reason of other taxpayers not paying their just share."
>
> (Quoting Korash v. Mills, 263 So.2d 579,582 (Fla. 1972)).

As the Property Appraisers' Association of Florida, Inc. observed in its Amicus Brief, this long-established maxim of property taxation jurisprudence calls for the assessment at 100% of a property's just value. See, Amicus Initial Brief at P. 2-3, citing 192.001(1), 192.042, Fla. Stat. (2019); Article VII, Florida Constitution; Dist. Sch. Bd. of Lee Cty. v. Askew, 278 So.2d 272, 275 (Fla. 1973); Dep't of Revenue v. Markham, 426 So.2d 555, 557 n.2 (Fla. 1982); Burns v. Butscher, 187 So.2d 594, 594 (Fla. 1966); Walter v. Schuler, 176 So.2d 81 (Fla. 1965); Dep't of Revenue v. Johnston, 442 So.2d 950, 950 (Fla. 1983). These general principles aren't aspirational; they are mandates to Florida's Property

Appraisers. Every dollar of just value that is not included in a proper assessment shifts an undue burden of government onto other taxpayers.

Both the Second District and the Appellee attempt to utilize the Fourth District Court of Appeal's decision in Okeelanta Sugar Refinery, Inc. v. Maxwell, 183 So.2d 567 (4th DCA 1966), to suggest that the Property Appraiser is not authorized to back assess after the tax roll is certified. Again, however, this Court has already answered that question in this context in Korash:

> We are mindful of the historical cutoff point of certification of tax roll which gives stability to taxation and of the enunciations in Okeelanta, supra, and similar cases on this subject, but we distinguish in the instance here where the "escape" is so clear and ascertainable, and those cases where increases in value attempted after the improvements had at least in part been considered and contemplated, were not allowed.

Factually, Appellee is no different than the taxpayer in Korash. The "escape" on Appellee's real property was so clear and ascertainable that she cannot claim prejudice. She knew or should have known what her tax bill was in the prior year, knew she did not make any improvements or changes, and knew or should have known her property was undervalued by millions of dollars.[1] The Appellee stands before this Court and claims that if she pays the taxes based upon the back assessment, she is being treated unfairly. The reality, however, is that Section 193.092 was drafted with the

[1]According to public records, the Property Appraiser assigned a just value to Appellee's property of $2,449,400.00 in 2013 and the erroneous just value of $302,400.00 in 2014.

intent to allow back assessments for up to three years when property appraisers discover ad valorem value which should have been assessed, and was not assessed. There is simply no basis for the Second District's interpretation of the statute to allow ad valorem assessment to escape taxation and go uncollected because the real property is "mistakenly undervalued," due to a clerical error as compared to an error in judgment. This is particularly true here, just as it was in Korash, where the "escape" is so clear and ascertainable.

The Appellee also argues that because the governing statutes would not permit her to retroactively correct an over-assessment, it would be unfair to allow the Property Appraiser to retroactively correct an under-assessment. See, Answer Brief at P. 14. There are several problems with that argument. First, the Appellee's initial premise that there is no mechanism available to correct overpayments is facially inaccurate. Section 197.122, Florida Statutes, provides:

> (3) A property appraiser may also correct a material mistake of fact relating to an essential condition of the subject property to reduce an assessment if to do so requires only the exercise of judgment as to the effect of the mistake of fact on the assessed or taxable value of the property.
>
> * * *
>
> (b) The material mistake of fact may be corrected by the property appraiser, in the same manner as provided by law for performing the act in the first place only within 1 year after the approval of the tax roll pursuant to s. 193.1142. If corrected, the tax roll becomes valid ab initio and does not affect the enforcement of the collection of the tax. If the correction results in a refund of taxes paid on the basis of an erroneous

> assessment included on the current year's tax roll, the property appraiser may request the department to pass upon the refund request pursuant to s. 197.182 or may submit the correction and refund order directly to the tax collector in accordance with the notice provisions of s. 197.182(2). Corrections to tax rolls for previous years which result in refunds must be made pursuant to s. 197.182.

Furthermore, there is no requirement that a taxpayer have the same recourse as the Property Appraiser, for obvious reasons. The court in Mitchell v. Higgs, 61 So. 3d 1152, 1156 (Fla. 3d DCA 2011), rejected a similar reciprocity argument. In Mitchell, the court faced a claim by a taxpayer that Florida Statute Section 196.161 (which allows for retroactive revocation of an exemption) was unfair. The taxpayer argued that Section 196.161 unfairly cut off the taxpayer's right to retroactively claim an exemption while the reciprocal was not true of the property appraiser, who could retroactively correct omissions (subject to statutory limitations). In response the Mitchell court observed:

> the trial court correctly observed that the revocation statute seems unfair . . . Nowhere is it written, however, that the legislature must enact reciprocal rules as they relate to exemptions. The remedy for the lack of reciprocity lies with the legislature, not the courts.

As is clear from the Mitchell holding, the Appellee's protestations concerning a lack of reciprocity in the tax statutes do not warrant relief. The pragmatic purpose behind this is obvious: A taxpayer need only examine the property that taxpayer owns. The Property Appraiser examines and reviews every parcel in the county. It is necessary that the Property Appraiser have a little additional time

to review and locate errors, and then back assess for up to 3 years as allowed under the Statute, in order to ensure each taxpayer pays its fair and equitable share.

CONCLUSION

The Opinion directly undermines the ability of Florida Property Appraisers to properly assess properties at their appropriate just values, forcing other taxpayers to make up the short fall. In this case, the true value of the Property was, and is, far in excess of $2,000,000.00. It is undisputed that the Property Appraiser's initial 2014 assessment for millions less was the result of a clerical error that occurred as a result of the Property Appraiser's conversion from one mass appraisal software package to another. There is no question that the error was of the type that the Property Appraiser is expressly authorized and required to correct under Section 193.092.

Section 193.092 compels Property Appraisers (using the mandatory word "shall") to retroactively correct assessments "[w]hen it shall appear that ***any*** ad valorem tax might have been lawfully assessed or collected upon any property in the state, but that such tax was not lawfully assessed or levied." (Emphasis added). The word "any" in its ordinary usage does not suggest a limitation to a specifically identifiable portion of property. To the contrary, where a clerical error results in an erroneous undervaluation of a parcel of property, "ad valorem tax [which]

might have been lawfully assessed or collected upon any property in the state . . . was not lawfully assessed or levied" due to the error. This is clearly correctable retroactively under Section 193.092. The Second District reversibly erred in holding to the contrary. The Property Appraiser therefore respectfully requests that this Court reverse the Second District Court of Appeal and re-instate the trial court's ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 31st day of December, 2019 by Electronic Mail to Sheri L. Johnson, Esq. at sjohnson@johnsonlegalfl.com; Bora Kayan Esq. at bkayan@scgov.net; and Robert P. Elson, Esq. at Robert.Elson@myfloridalegal.com, Jon.Annette@myfloridalegal.com and Lisa.Ryder@myfloridalegal.com.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply Brief of the Appellant satisfies the requirements of Florida Rules of Appellate Procedure 9.210(a)(2).

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