McGLINCHEY STAFFORD
Where Business & Law Intersect SM

Florida Real Property and Business Litigation Report

Volume XII, Issue 37
September 17, 2019
Manuel Farach

Fitts v. Furst, Case No. 2D18-538 (Fla. 2d DCA 2019).
Florida Statute section 196.161(1)(b) (retroactive revocation of homestead exemption and imposition of tax penalties) does not contain an intent requirement, and thus applies to homeowners who received benefits of Florida homestead exemption while also unknowingly receiving de minimus homestead exemption benefits in another state.

Baldwin v. Henriquez, Case No. 2D18-2658 (Fla. 2d DCA 2019).
The Florida Constitution requires residence in the property claimed homestead as of January 1 in order to receive the benefits of ad valorem tax exemption; Semple v. Semple, 89 So. 638 (Fla. 1921) (homestead continues when present intention to move into property), is distinguished for houses under construction.

City of Miami Beach v. Beach Blitz, Co., Case No. 3D19-0816 (Fla. 3d DCA 2019).
It is a violation of procedural due process for a reviewing tribunal to dismiss a petition for first-tier certiorari review from an administrative order; reversal is required.

OPKO Health, Inc. v. Lipsius, Case Nos. 3D19-840 and 3D19-841 (Fla. 3d DCA 2019).
Florida courts generally defer to previously filed federal or foreign state actions; the claims and actions do not have be identical for the rule to apply.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

WILLIAM DAVID FITTS and NANCY B. FITTS, Appellants, v. BILL FURST, as Sarasota County Property Appraiser, and LEON M. BIEGALSKI, as Executive Director of the Department of Revenue, Appellees.	)	Case No. 2D18-538

Opinion filed September 13, 2019.

Appeal from the Circuit Court for Sarasota County; Frederick P. Mercurio, Judge.

David A. Wallace and Amanda R. Kison of Bentley & Bruning, P.A., Sarasota, for Appellants.

Jason A. Lessinger, J. Geoffrey Pflugner, Anthony Manganiello, III, and Mark C. Dungan of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., Sarasota, for Appellee Bill Furst.

Ashley Moody, Attorney General, and Robert P. Elson, Senior Assistant Attorney General, Tallahassee, for Appellee Leon M. Biegalski.

BLACK, Judge.

William and Nancy Fitts filed a lawsuit against the Sarasota County Property Appraiser (Property Appraiser) and the Executive Director of the Florida Department of Revenue (Director) after the Property Appraiser recorded a tax lien on their home pursuant to section 196.161(1)(b), Florida Statutes (2016), and revoked their homestead tax exemption.[1] The Fittses brought the suit after the Property Appraiser determined that for approximately five years the Fittses had been benefitting from a homestead tax exemption on their Sarasota County home while simultaneously receiving the benefit of a tax exemption in Ohio based upon permanent residency there in violation of section 196.031(5). The Fittses now appeal the entry of the final summary judgment in favor of the Property Appraiser and the Director, raising five issues. We affirm in all respects and write only to address the second issue raised on appeal concerning the circuit court's interpretation and application of section 196.161(1)(b). For the reasons expressed herein, we conclude that the circuit court did not err in determining that the Fittses' Sarasota County home is subject to back taxes, penalties, and interest pursuant to section 196.161(1)(b) despite the Fittses being permanent residents of Florida who did not intend to receive the benefit of the tax exemption based upon permanent residency in Ohio.

Section 196.031(5) provides, in part, that "[a] person who is receiving or claiming the benefit of an ad valorem tax exemption or a tax credit in another state where permanent residency is required as a basis for the granting of that ad valorem tax

[1]The Fittses also lost the benefit of the "Save Our Homes" tax cap. See art. VII, § 4(d)(1), Fla. Const.; § 193.155(8), Fla. Stat. (2016).

exemption or tax credit is not entitled to the homestead exemption provided by this section." Although it is undisputed that the Fittses did not intend that their home in Ohio serve as their permanent residence and that during the time they owned that property they were permanent residents of Florida receiving a homestead exemption on property in this state, through a third-party's error they received the benefit of a permanent residency-based tax exemption on their home in Ohio for several years. The Property Appraiser became aware that the Fittses were receiving the benefit of tax exemptions in both Ohio and Florida based on permanent residency following an audit and then sent the Fittses a notice of his intent to record a tax lien on their home in Sarasota County pursuant to section 196.161(1)(b). Prior to receiving that notice, the Fittses were apparently unaware that they had been receiving a tax exemption in Ohio based upon permanent residency, the credit for which totaled approximately $560 for the five-year period at issue.[2] Because the Fittses received the benefit of a tax exemption in Ohio based on permanent residency while simultaneously receiving a homestead exemption in Florida in violation of section 196.031(5), the Property Appraiser determined that the Fittses were required to pay back taxes, penalties, and interest pursuant to section 196.161(1)(b).[3] Relying on these statutes and the undisputed facts, both parties moved

[2]The Fittses have since tendered payment to the county treasurer in Ohio for the entire sum erroneously credited to them based on the permanent residency exemption.

[3]The Fittses argued before the circuit court, as they do on appeal, that the tax exemption they received on their Ohio home was not based on permanent residency as contemplated by Florida law and that they did not "claim" or "receive" the Ohio tax exemption within the logical meaning of section 196.031(5). As previously stated, however, we find no merit in these contentions and affirm these issues without comment.

for summary judgment. Following a hearing on the motions, the circuit court entered final summary judgment in favor of the Property Appraiser and the Director.

Section 196.161, titled "Homestead exemptions; lien imposed on property of person claiming exemption although not a permanent resident," provides, in part, as follows:

> (1)(a) When the estate of any person is being probated or administered in another state under an allegation that such person was a resident of that state and the estate of such person contains real property situate in this state upon which homestead exemption has been allowed pursuant to s. 196.031 for any year or years within 10 years immediately prior to the death of the deceased, then within 3 years after the death of such person the property appraiser of the county where the real property is located shall, upon knowledge of such fact, record a notice of tax lien against the property among the public records of that county, and the property shall be subject to the payment of all taxes exempt thereunder, a penalty of 50 percent of the unpaid taxes for each year, plus 15 percent interest per year, unless the circuit court having jurisdiction over the ancillary administration in this state determines that the decedent was a permanent resident of this state during the year or years an exemption was allowed, whereupon the lien shall not be filed or, if filed, shall be canceled of record by the property appraiser of the county where the real estate is located.
>
> (b) In addition, upon determination by the property appraiser that for any year or years within the prior 10 years a person who was not entitled to a homestead exemption was granted a homestead exemption from ad valorem taxes, it shall be the duty of the property appraiser making such determination to serve upon the owner a notice of intent to record in the public records of the county a notice of tax lien against any property owned by that person in the county, and such property shall be identified in the notice of tax lien. Such property which is situated in this state shall be subject to the taxes exempted thereby, plus a penalty of 50 percent of the unpaid taxes for each year and 15 percent interest per annum. However, if a homestead exemption is improperly granted as a result of a clerical mistake or an omission by the property appraiser, the person improperly receiving the

> exemption shall not be assessed penalty and interest. Before any such lien may be filed, the owner so notified must be given 30 days to pay the taxes, penalties, and interest.

§ 196.161(1)(a)-(b). The Fittses argue on appeal that both the title to section 196.161 and the language of section 196.161(1) reflect the legislature's intent only to impose a lien on a person's property in the event that the person claiming the homestead exemption in Florida is not in fact a Florida permanent resident. Thus, the Fittses, as permanent residents of Florida, should not be subject to the severe sanctions set forth in section 196.161(1)(b). They further assert that it is inconsistent with the legislature's intent and illogical to penalize the Fittses for an error made by a third party in Ohio because the legislature has expressly stated in section 196.161(1)(b) that the penalty and interest shall not be assessed in the event that a homestead exemption is granted in this state through an error on the part of a Florida property appraiser. The Fittses contend that section 196.031(5) dictates the sanction that they should face, if any at all—the loss of the Florida homestead exemption going forward and nothing more.

We review an order granting summary judgment de novo. Heine v. Lee County, 221 So. 3d 1254, 1256 (Fla. 2d DCA 2017). Likewise, we review the circuit court's interpretation of a statute de novo. Id. As the supreme court has repeatedly held, "statutory interpretation begins with the plain meaning of the statute." Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings, 29 So. 3d 992, 997 (Fla. 2010) (citing GTC, Inc. v. Edgar, 967 So. 2d 781, 785 (Fla. 2007)). We thus begin our analysis by examining the plain language of section 196.161(1)(b), which provides that it applies to "a person who was not entitled to a homestead exemption" but "was granted a homestead exemption from ad valorem taxes." (Emphasis added.)

The plain language does not limit section 196.161(1)(b)'s application to those persons who are not permanent residents of Florida and instead applies to anyone who—for whatever reason—is not entitled to a homestead exemption. "[W]here the language of the statute is plain and unambiguous, there is no need for judicial interpretation." State v. Bradford, 787 So. 2d 811, 817 (Fla. 2001) (quoting T.R. v. State, 677 So. 2d 270, 271 (Fla. 1996)). But as the Fittses contend, "we must give due weight and effect to the title of the section" as it "is more than an index to what the section is about or has reference to; it is a direct statement by the legislature of its intent." Aramark Uniform & Career Apparel, Inc. v. Easton, 894 So. 2d 20, 25 (Fla. 2004) (first citing State v. Webb, 398 So. 2d 820, 825 (Fla. 1981); and then quoting Webb, 398 So. 2d at 825); see also Fajardo v. State, 805 So. 2d 961, 963 (Fla. 2d DCA 2001) ("We recognize that the title of a legislative enactment, and, less frequently, the titles within codified statutes may be helpful in construing an ambiguous statute."). However, the title of a statute is not determinative. See Dep't of Revenue v. Val-Pak Direct Mktg. Sys., Inc., 862 So. 2d 1, 5 (Fla. 2d DCA 2003) (quoting Bradford, 787 So. 2d at 819). We must also consider the language of subsection (1)(a) "in order to determine whether it creates an ambiguity not otherwise apparent on the face of" section 196.161(1)(b). See State v. Peraza, 259 So. 3d 728, 732 (Fla. 2018). "This is true because '[w]here possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another.' " Id. (quoting M.W. v. Davis, 756 So. 2d 90, 101 (Fla. 2000)). The title of section 196.161 and the language of subsection (1)(a) specifically reference persons who are or were not permanent residents of this state. So to the extent that the title of section 196.161 and the language of section 196.161(1)(a) can reasonably be read to

limit the applicability of subsection (1)(b) to those who are not permanent residents of Florida making it "susceptible to more than one interpretation," it would be necessary "to utilize principles of statutory construction to ascertain legislative intent." See State Farm Mut. Auto. Ins. Co. v. Shands Jacksonville Med. Ctr., Inc., 210 So. 3d 1224, 1228-29 (Fla. 2017); accord Bautista v. State, 863 So. 2d 1180, 1185 (Fla. 2003) ("If the statutory language is unclear, we apply rules of statutory construction and explore legislative history to determine legislative intent." (first citing Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000); and then citing Weber v. Dobbins, 616 So. 2d 956, 958 (Fla. 1993))).

In Bradford, the supreme court concluded that the legislature did not intend that fraudulent intent be an element of unlawful insurance solicitation under section 817.234(8), Florida Statutes (1997), despite the fact that the title of section 817.234 was "False and Fraudulent Insurance Claims." 787 So. 2d at 818-19. In so holding, the supreme court cogently explained:

> The arrangement and classification of laws for purposes of codification in the Florida Statutes is an administrative function of the Joint Legislative Management Committee of the Florida Legislature. The classification of a law or a part of a law in a particular title or chapter of Florida Statutes is not determinative on the issue of legislative intent, though it may be persuasive in certain circumstances. Where there is a question, established principles of statutory construction must be utilized.

Id. at 819 (quoting State v. Bussey, 463 So. 2d 1141, 1143 (Fla. 1985)). We must turn, then, to the well-settled principle of statutory construction that "[t]he legislative use of different terms in different portions of the same statute is strong evidence that different

meanings were intended." Id. (quoting State v. Mark Marks, P.A., 698 So. 2d 533, 541 (Fla. 1997)).

Section 196.161(1)(a), which addresses a tax lien imposed on real property of an estate, expressly provides that if it is determined "that the decedent was a permanent resident of this state during the year or years an exemption was allowed, . . . the lien shall not be filed or, if filed, shall be canceled by the property appraiser." Had the legislature intended the penalties set forth in section 196.161(1)(b) to apply only to persons who are not permanent residents of Florida, it surely would have expressed that intent as it did in subsection (1)(a). See Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995) ("When the legislature has used a term . . . in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded."); cf. Bradford, 787 So. 2d at 819 ("[W]hile intent to defraud is not mentioned in subsection (8), it is specifically included as an element in subsections (1), (2), (3), (4), and (7) of section 817.234. Thus, this principle of statutory construction lends further support to our determination that the [l]egislature intentionally excluded fraud as an element of subsection (8). It is evident that the [l]egislature knew how to include intent to defraud as an element, and it could have easily done so with respect to subsection (8) if it so wished."). Similarly, the legislature expressed its intent that "if a homestead exemption is improperly granted as a result of a clerical mistake or an omission by the property appraiser, the person improperly receiving the exemption shall not be assessed penalty and interest." § 196.161(1)(b). Had it likewise been the intent of the legislature not to sanction persons improperly granted an exemption based

on permanent residency in another state due to an error on the part of a third party in that state, the legislature would have expressed such intent.

The legislative history of section 196.161 further supports our determination that the application of subsection (1)(b) is not limited to persons who are not permanent residents of Florida. Cf. Bradford, 787 So. 2d at 817-18. Section 192.215 was enacted in 1967 and was soon after renumbered to section 196.161. See ch. 67-134, §§ 1-4, Laws of Fla.; ch. 69-55, §§ 1-2, Laws of Fla. The title of section 196.161—"Homestead exemptions; lien imposed on property of person claiming exemption although not a permanent resident"—has remained largely unchanged since the statute's enactment, with the exception that in 1981 the phrase "permanent resident" replaced the phrase "bona fide resident." See ch. 81-219, § 12, Laws of Fla. That same year, subsection (1)(b) was added and read as follows:

> In addition, upon determination by the property appraiser that for any year or years within the prior 10 years a person who was not a permanent resident of this state was granted a homestead exemption from ad valorem taxes, that person's property which is situated in Florida shall be subject to the taxes exempted thereby, plus 15 percent interest per annum.

Id. (emphasis added). Thus, when first added, section 196.161(1)(b) was clearly intended by its plain language to apply to someone who was not a permanent resident of this state. Importantly, however, the statute was amended in 1986 and the phrase "not a permanent resident of this state" was replaced with the phrase "not entitled to a homestead exemption." See ch. 86-300, § 10, Laws of Fla. This amendment further evinces the intent on the part of the legislature that this subsection apply to anyone who is "not entitled to a homestead exemption"—for whatever reason—and not just persons

who are not entitled to a homestead exemption because they are not permanent residents of Florida. See Larimore v. State, 2 So. 3d 101, 114-15 (Fla. 2008) (concluding that "[s]ince the [l]egislature added a section [in 1999] providing for special procedures where immediate release is anticipated, and amended section 394.915[, Florida Statutes,] to state that the person 'remain in custody' rather than be 'taken into custody,' there is no longer any statutory basis on which to hold that there is no 'in custody' requirement in the Jimmy Ryce Act" despite the fact that "the title of section 394.915 remained the same, and includes the reference to 'respondent taken into custody' "); see also State v. Phillips, 119 So. 3d 1233, 1241 n.10 (Fla. 2013) (discussing the statutes at issue in Larimore and noting that "[t]he failure to amend the title of section 394.915 to conform with the [1999 amendment to the] text of that section appears to simply be an oversight on the part of the [l]egislature").

In sum, the plain language of section 196.161(1)(b) as well as the principles of statutory construction and the legislative history of the statute demonstrate that the legislature did not intend to limit the application of section 196.161(1)(b) to only those persons who are not permanent residents of Florida.

We note that very few cases expressly address section 196.161(1)(b). However, we find Mitchell v. Higgs, 61 So. 3d 1152 (Fla. 3d DCA 2011), to be instructive. See Bautista, 863 So. 2d at 1185-86 (explaining that in addition to the language, title, and history of the statute, "the state of law already in existence on the statute" must be considered when discerning legislative intent (quoting State v. Anderson, 764 So. 2d 848, 849 (Fla. 3d DCA 2000))). Mr. Mitchell was granted a homestead tax exemption on his Key West home in 1996. 61 So. 3d at 1153. In 1999,

he bought a home on Sugarloaf Key and then six years later changed his Florida driver's license and voter's registration from the Key West address to the Sugarloaf Key address. Id. However, on the voter registration change of address card Mr. Mitchell listed his Key West home as the "address of homestead exempted property." Id. at 1154. Then in 2007, Mr. Mitchell changed his driver's license and voter registration to reflect his Key West address. Id. A short time later and upon determining that the Key West home was vacant, the Monroe County Property Appraiser notified Mr. Mitchell that the homestead exemption on the Key West home had been revoked. Id. A subsequent notice advised Mr. Mitchell that he was not entitled to the homestead exemption on his Key West home for the eight-year period spanning from 1999 through 2006, during which time he owned the home on Sugarloaf Key. Id. Mr. Mitchell filed a lawsuit seeking a declaratory judgment that he was entitled to the homestead exemption from 1999 through 2007 and seeking "removal of the tax lien filed against him by the appraiser under section 196.161, Florida Statutes (2006), for the unpaid property tax, penalties, and interest (totaling approximately $28,000) over the eight years, 1999 through 2006." Id. The circuit court granted final summary judgment in favor of Mr. Mitchell as to the years 1999 through 2006 and revoked the recorded tax lien. Id. As for the 2007 tax year, the circuit court concluded following a bench trial that the property appraiser had proven that Mr. Mitchell was not entitled to the homestead exemption on the Key West home. Id.

On appeal, the Third District agreed with the circuit court that because Mr. Mitchell's permanent residence as of January 1, 2007, was on Sugarloaf Key he was not entitled to a homestead exemption on the Key West home that year. Mitchell, 61

So. 3d at 1154. Turning then to Mr. Mitchell's entitlement to a homestead exemption from 1999 through 2006, the Third District stated:

> Retroactive revocation of the homestead exemption (for up to ten prior years) is the subject of an express legislative enactment, section 196.161 . . . .
>
> The legislature has imposed a series of requirements for eligibility for the homestead tax exemption and a mechanism[, section 196.161,] for recovering the tax savings (plus interest and a penalty) realized by a property owner not actually entitled to claim the exemption.

Id. at 1155. The Third District reiterated that "statutes involving tax exemptions are strictly construed against the taxpayer," before concluding that section 196.161 is constitutional and enforceable as applied to Mr. Mitchell. Id. (quoting Haddock v Carmody, 1 So. 3d 1133, 1137 (Fla. 1st DCA 2009)). It was undisputed that Mr. Mitchell was a permanent resident of Florida; the only issue in dispute was which Florida home served as his permanent residence. And despite being a permanent resident of Florida, the Third District determined that Mr. Mitchell was subject to the "mechanism for recovering the tax savings (plus interest and a penalty) realized by a property owner not actually entitled to claim the exemption" found in section 196.161. See id. The Third District sympathized with Mr. Mitchell, expressing agreement with the circuit court's observation that section 196.161 seems unfair because it is not reciprocal—Mr. Mitchell is unable to receive the benefit of the homestead exemption on the Sugarloaf Key property dating back to 1999. Id. at 1155-56. But the Third District also acknowledged that "[n]owhere 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." Id. at 1156. The Third District court then reversed the final summary judgment that had been entered in favor of Mr. Mitchell. Id.

While the facts of Mitchell do not mirror those in the case before us, Mitchell nonetheless establishes that even permanent residents of Florida may be subject to the sanctions set forth in section 196.161(1)(b) if they have claimed the benefit of the homestead exemption in this state but were not entitled to do so. Moreover, the legislature has not expressed its intent to punish permanent residents of this state who are not entitled to a homestead exemption for one reason or another any less severely than those who are not permanent residents of this state but somehow managed to receive a homestead exemption on property in this state. Cf. § 196.075(9); see generally Miles v. Parrish, 199 So. 3d 1046 (Fla. 4th DCA 2016); Brklacic v. Parrish, 149 So. 3d 85 (Fla. 4th DCA 2014).

To the extent that the Fittses argue that the sanction to be imposed upon the property of Florida permanent residents who are improperly receiving a homestead exemption on property in this state while also receiving a tax exemption in another state based on permanent residency is merely the loss of the exemption pursuant to section 196.031(5), we cannot agree. That statute contains no reference to a sanction. Section 196.031(5) merely provides that persons receiving a tax exemption in another state based on permanent residency are not entitled to a homestead exemption in Florida as provided by section 196.031. While the "statute clearly prohibits an individual from receiving two residency-based tax credits," Wells v. Haldeos, 48 So. 3d 85, 86 (Fla. 2d DCA 2010), it in no way dictates the remedy or sanction that results when a person is

found to be in violation of it.[4] And simply because section 196.031(5) does not reference section 196.161(1)(b) does not mean, as the Fittses contend, that the sanctions set forth in section 196.161(1)(b) were not intended to apply to the property of persons in violation of section 196.031(5). Based on a plain language analysis, relevant case law, and to the extent necessary, canons of statutory construction and legislative history, we believe the circuit court correctly determined that section 196.161(1)(b) is applicable to the Fittses' property, though harsh as it may be. See Bystrom v. Diaz, 514 So. 2d 1072, 1074 (Fla. 1987) ("Although [the tax statutes] appear to be somewhat harsh, their meaning is clear."); see also Reinish v. Clark, 765 So. 2d 197, 209 (Fla. 1st DCA 2000) ("[I]nequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a [tax] system that is not arbitrary in its classification, are not sufficient to defeat the law." (alterations in original) (quoting Maxwell v. Bugbee, 250 U.S. 525, 543 (1919))).

We, like the circuit court, are sympathetic to the Fittses. There is a tax lien on their Sarasota County home for back taxes, penalties, and interest due to an error on the part of a third party in another state that apparently went undetected by the Fittses until they received the notice from the Property Appraiser. The tax credit they received in Ohio was negligible compared to the sanctions they now face. But the remedy for this shortcoming "lies with the legislature, not the courts." Mitchell, 61 So. 3d at 1156; see also State v. C.M., 154 So. 3d 1177, 1180-81 (Fla. 4th DCA 2015) ("Until that is effectuated by the legislature, we are bound to the letter of the law and 'must apply a

[4]The parties have not cited and we have not found any other statutory provisions which might provide the appropriate sanction or remedy in this case.

statute as [we] find it, leaving to the legislature the correction of assorted inconsistencies and inequalities in its operation.' " (alteration in original) (quoting Guilder v. State, 899 So. 2d 412, 419 (Fla. 4th DCA 2005))). And thus we encourage the legislature to amend the statutes if it does not intend the lien and penalties of section 196.161(1)(b) to apply in cases like the Fittses'.[5]

"Because we are bound by the law[s] as [they were] passed by the legislature and not allowed to add language to or fill gaps in the statute[s]," C.M., 154 So. 3d at 1181, we are compelled to affirm.

---

[5]We note that the Florida Senate and the Florida House of Representatives proposed related bills during the 2019 Regular Session that may have addressed the situation before us. Senate Bill 856 and House Bill 1151 proposed amendments to section 196.031(5), including renumbering the statute to include subsections (a) and (b), with subsection (a) providing as follows:

> (5)(a) A person or family unit who is receiving or claiming the benefit of an ad valorem tax exemption or a tax credit in another state where permanent residency is required as a basis for the granting of that ad valorem tax exemption or tax credit is not entitled to the homestead exemption provided by this section, unless the person or family unit receiving the ad valorem tax exemption or tax credit in another state demonstrates to the satisfaction of the property appraiser that the person or family unit did not apply for the exemption or credit and that the person or family unit has relinquished the exemption or credit in the other state.

Fla. CS for SB 856, § 1 (2019) (proposed amendment to FLA. STAT. § 196.031(5)); Fla. CS for HB 1151, § 1 (2019) (proposed amendment to FLA. STAT. § 196.031(5)). Here, it is undisputed that the Fittses did not apply for the exemption in Ohio and that they have relinquished the exemption in that state. Thus, it is quite possible that they could have demonstrated to the satisfaction of the Property Appraiser that they did not apply for the exemption in Ohio and that they relinquished the exemption in Ohio such that they would not be "person[s] who [were] not entitled to a homestead exemption [but] w[ere] granted a homestead exemption" subject to the penalties set forth in section 196.161(1)(b). Unfortunately, both bills were indefinitely postponed and withdrawn from consideration.

Affirmed.

VILLANTI and MORRIS, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

L. LOWRY BALDWIN and JENNIFER L. BALDWIN,

Appellants,

v.

BOB HENRIQUEZ, as Property Appraiser of Hillsborough County; DOUG BELDEN, as Tax Collector of Hillsborough County; and LEON M. BIEGALSKI, Executive Director of the Department of Revenue,

Appellees.

Case No. 2D18-2658

Opinion filed September 13, 2019.

Appeal from the Circuit Court for Hillsborough County; E. Lamar Battles, Judge.

Marie A. Borland and Robert E. V. Kelley, Jr. of Hill, Ward & Henderson, P.A., Tampa, for Appellants.

William D. Shepherd of Hillsborough County Property Appraiser's Office, Tampa, for Appellee Bob Henriquez.

Ashely Moody, Attorney General, Tallahassee, and Robert P. Elson, Senior Assistant Attorney General, Tallahassee, for Appellee Leon Biegalski.

No appearance for Appellee Doug Belden.

BADALAMENTI, Judge.

L. Lowry Baldwin and Jennifer L. Baldwin appeal from a final summary judgment in favor of Bob Henriquez, as Property Appraiser for Hillsborough County, Doug Belden, as Tax Collector, and Leon M. Biegalski, as Executive Director of the Department of Revenue, on all three counts of the Baldwins' amended complaint. In their complaint the Baldwins challenged, among other things, the Property Appraiser's denial of a homestead exemption on their residential property for tax year 2015. We hold that the Baldwins are not entitled to a homestead exemption for their residential property for tax year 2015 because they failed to maintain the subject property as their permanent residence on January 1, 2015.[1]

Factual Background

The undisputed facts are as follows: In July 2013, the Baldwins sold their residence and abandoned their homestead. On July 10, 2013, the Baldwins purchased another property with a house on it. They did not move into that house. Instead, in November 2013, the Baldwins demolished the existing house on the property and began construction on a new house on the property.[2] During the construction of the new house, the Baldwins resided at a leased condominium unit and rented a storage unit for their furniture and personal items. They were able to use the dock on the

[1]We affirm the remaining issue without comment.

[2]Prior to demolishing the house on the property, Jennifer Baldwin held one book club meeting in that house.

premises of the subject property while their new house was being constructed. When it became obvious that the construction would not be completed by the end of 2014, the Baldwins pitched a tent on the subject property on December 26, 2014, and spent the night on the subject property. Jennifer Baldwin spent one additional night in the tent later that week. As of January 1, 2015, the Baldwins' driver's licenses and voter registration cards reflected the address of the subject property where the new house was being constructed. The new house received a temporary Certificate of Occupancy on June 9, 2015, and the Baldwins moved into their new home on June 11, 2015. Finally, on January 8, 2016, the new house received a final Certificate of Occupancy.

The Baldwins timely applied for homestead exemption and transfer of homestead assessment difference (the Save Our Homes portability benefit) for their new property for tax year 2015. They received a notice of disapproval from the Property Appraiser informing them that their application was denied because the subject property was not the Baldwins' permanent residence as of January 1, 2015. Next, the Baldwins petitioned to the Value Adjustment Board (VAB) seeking a reversal of the Property Appraiser's denial. The VAB agreed with the Property Appraiser and denied their petition. Finally, the Baldwins filed a complaint in the circuit court seeking a declaration that they were entitled to claim homestead exemption for property tax purposes for tax year 2015. They also sought a declaration that they were entitled to a transfer of the Save Our Homes portability benefit.

The parties filed competing motions for summary judgment. The Baldwins argued that their inability to physically occupy the premises as of January 1, 2015, was not determinative of their ability to claim the property as homestead because they

manifested an intent to use the property as their permanent residence. The Property Appraiser, conversely, argued that initial physical occupancy of the homestead property by the taxpayer or a dependent of the taxpayer was required to secure a homestead tax exemption.

The trial court found that initial physical occupancy is not required to establish entitlement to a homestead exemption from ad valorem taxes. Instead, the trial court explained, "it is one factor to consider in conjunction with several others when determining whether an applicant has established a permanent residence at the property for which he seeks the exemption." It further explained that "the determination of permanent residency is not based on the parties' intent alone." The trial court recognized that although the Baldwins undoubtedly intended for the subject property to become their permanent residence at some point in the future, the Baldwins had not yet made the subject property their permanent residence as of January 1, 2015. Ultimately, the trial court found "insufficient indicia of permanent residence at the subject property at the time of assessment to support a homestead exemption." The Baldwins timely appealed.

Because the facts were not in dispute and the issue before the trial court was purely legal, we review the court's entry of summary judgment de novo. Karayiannakis v. Nikolits, 23 So. 3d 844, 845 (Fla. 4th DCA 2009).

Florida's Homestead Exemption

The Florida Constitution defines and protects homestead in three different ways.[3] Chames v. DeMayo, 972 So. 2d 850, 853 (Fla. 2007). First, the constitution provides homesteads with a tax exemption (article VII, section 6). Id. Second, the constitution protects the homestead from forced sale by creditors (article X, section 4(a)). Id. Third, the constitution restricts the homestead owner's ability to alienate or devise the homestead property (article X, section 4(c)). Id.

The constitutional provision providing for a tax exemption for homestead property is found in article VII of the Florida Constitution. It provides a $25,000 tax exemption for property on which the owner maintains his or her permanent residence. Art. VII, § 6(a), Fla. Const. A separate constitutional provision, known as the "Save Our Homes" amendment, provides that the annual change in property tax assessments on homestead exempt property is limited to three percent of the prior year's assessment. See art. VII, § 4(d)(1)(a), Fla. Const.; Zingale v. Powell, 885 So. 2d 277, 279 (Fla. 2004). A homeowner may transfer the benefit accrued under the Save Our Homes constitutional amendment (also referred to as the homestead assessment difference) to

---

[3]Because the homestead provisions found in article VII and article X of the Florida Constitution are separate and distinct, the "principles relating to one do not necessarily govern the other." Crain v. Putnam, 687 So. 2d 1325, 1326 (Fla. 4th DCA 1997); see also Phillips v. Hirshon, 958 So. 2d 425, 427 n.3 (Fla. 3d DCA 2007) ("It is well appreciated in the case law concerning homestead that the definition of homestead property for Article VII, section 6 purposes is not the same as Article X, section 4 of the Florida Constitution."). Indeed, while the protections afforded by the homestead exemption in article X are liberally construed, see Taylor v. Maness, 941 So. 2d 559, 562 (Fla. 3d DCA 2006), the homestead exemption in article VII is strictly construed against the taxpayer, see Grisolia v. Pfeffer, 77 So. 3d 732, 736 (Fla. 3d DCA 2011) ("The strict construction applicable to the Tax Exemption stands in contrast to the liberal construction of the homestead exemption from forced sale at issue here."); see also DeQuervain v. Desguin, 927 So. 2d 232, 236 (Fla. 2d DCA 2006) ("[B]ecause the homestead exemption provides relief from an ad valorem tax, we must construe the statute strictly against [the taxpayer].").

a new homestead established within two years of abandonment of the prior homestead. See Nikolits v. Neff, 184 So. 3d 538, 539 (Fla. 4th DCA 2015) (citing art VII., § 4(d)(8), Fla. Const.).

There is no self-executing right to the "Save Our Homes" three percent tax cap. Haddock v. Carmody, 1 So. 3d 1133, 1136 (Fla. 1st DCA 2009) (citing Zingale, 885 So. 2d at 284-85). "Taxpayer eligibility for the Save Our Homes tax limitation is based on entitlement to the homestead exemption under Article VII, section 6." Id. "[A] successful application for a homestead application is necessary both to obtain the exemption and to qualify for the cap." Id. (quoting Zingale, 885 So. 2d at 285). Here, because the Baldwins abandoned their prior homestead in 2013, they had to establish a new homestead within two years—by 2015—to transfer the property tax benefit they accrued under the Save Our Homes amendment. In other words, a determination of the Baldwins' entitlement to a homestead exemption for tax year 2015 also determines their ability to transfer the Save Our Homes portability benefit.

Discussion

On appeal, the Baldwins argue that the trial court misapplied the law by focusing too heavily on their lack of physical occupancy of the subject property. They maintain that they are entitled to a homestead exemption for their property even though they were unable to physically occupy the subject property as of January 1, 2015, because they manifested an intent to establish a permanent residence on the subject property and did specific acts in furtherance of this intent. Specifically, they assert that they manifested their intent to establish residence on the subject property by changing their licenses and voter registration cards and abandoning their prior homestead. In

support, they rely heavily on our supreme court's decision in Semple v. Semple, 89 So. 638 (Fla. 1921). There, our supreme court explained that

> [w]here it is clearly the manifest intention of the owner to occupy the premises immediately as a home, and this intention is evidenced by specific acts and doings that are not compatible with a different intention, and there is nothing done by the claimant showing a different intention, or that is inconsistent with the asserted intention to make the place his homestead, the homestead character will attach.

Id. at 639. Finally, they emphasize Florida's public policy in favor of preserving the homestead and assert that denying them a homestead exemption under these facts undermines that policy.[4]

At the heart of this case is a taxpayer's entitlement to an ad valorem exemption from property taxes, which emanates from the Florida Constitution. Therefore, "[w]e are called on to construe the terms [of] the people, and we are to effectuate from the people, and we are to effectuate their purpose from the words employed in the document." Ervin v. Collins, 85 So. 2d 852, 855 (Fla. 1956). In so doing, "[w]e are obligated to give effect to [the] language [of a constitutional amendment] according to its meaning and what the people must have understood it to mean when they approved it." Benjamin v. Tandem Healthcare, Inc., 998 So. 2d 566, 570 (Fla. 2008) (second and third alterations in original) (quoting City of St. Petersburg

[4]"The public policy furthered by a homestead exemption is to 'promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law.' " Chames, 972 So. 2d at 853-54 (quoting McKean v. Warburton, 919 So. 2d 341, 344 (Fla. 2005)). "Those aspects of homestead directed at property taxation provide financial relief for owners of property who qualify for homestead status." Kelly v. Spain, 160 So. 3d 78, 82 (Fla. 4th DCA 2015).

v. Briley, Wild & Assocs., 239 So. 2d 817, 822 (Fla. 1970)). As such, we begin with an analysis of the plain language of the applicable constitutional provisions. Id.; see Endsley v. Broward County, 189 So. 3d 938, 941 (Fla. 4th DCA 2016) ("When construing a statute or constitutional provision, we should first look to the plain meaning of the words used."). When the language of the constitutional provision is clear and unambiguous and conveys a clear and definite meaning, the constitutional provision must be given its plain and obvious meaning. Endsley, 189 So. 3d at 941.

With these fundamental principles in mind, we now examine the applicable constitutional provisions. First, the Florida Constitution provides that [e]very person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon . . . upon establishment of right thereto in the manner prescribed by law. Art. VII, § 6(a), Fla. Const. (emphasis added). Here, the Baldwins owned legal title to the real estate for which they are claiming an exemption. They are accordingly entitled to an exemption if they "maintain[ed] thereon" their "permanent residence."

We first address what it means to "maintain" the permanent residence of the owner. Because the word "maintain" is not defined in the constitution or the statutes implementing the provision, we find it instructive, but not necessarily dispositive, to consult dictionary definitions to discern its plain and ordinary meaning. See Jefferson v. State, 264 So. 3d 1019, 1026 (Fla. 2d DCA 2018). "[M]aintain" is defined as "[t]o continue in possession of (property, etc.)," and "[t]o care for (property) for purposes of operational productivity or appearance; to engage in general repair and upkeep."

Maintain, Black's Law Dictionary (10th ed. 2014); see also The American Heritage Dictionary, 1058 (10th ed. 2014) (defining "maintain" as "[t]o keep in an existing state; preserve or retain" and "[t]o keep in a condition of good repair or efficiency"). Obviously, the thing which one "preserves" or "continue[s] in possession of"—the residence—must already be in existence before it can be maintained. One cannot keep "in a condition of good repair" a residence that has not yet been constructed. In other words, the plain and ordinary language of our constitution leads us to the inescapable conclusion that a taxpayer cannot "maintain" or "continue in possession of" his or her "residence" until the property that he or she is "maintaining" actually constitutes the taxpayer's "residence." Here, the Baldwins never maintained their residence on the subject property until the new structure was completed in June 2015.

Next, we turn to the plain and ordinary meaning of the constitutional phrase "permanent residence." Although the Florida Legislature has defined "permanent residence" in the statutes implementing this constitutional provision, see § 196.012(17), Fla. Stat. (2014), we examine the text of this self-executing constitutional provision to discern its plain and ordinary meaning, see Zingale, 885 So. 2d at 282 ("Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language." (quoting Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n, 838 So. 2d 492, 501 (Fla. 2003))); see also Fla. Dep't of Rev. v. City of Gainesville, 918 So. 2d 250, 257 (Fla. 2005) ("[T]he

statutory definition does not control the construction of the term 'municipal or public purposes' in the constitutional provision.").[5]

"Residence" is defined in part as "bodily presence as an inhabitant in a given place." Residence, Black's Law Dictionary (10th ed. 2014) (emphasis added); see also The American Heritage Dictionary, 1493 (10th ed. 2014) (defining "residence" as "[t]he place in which one lives; a dwelling"). Thus, the plain and ordinary understanding of the word "residence" means "a dwelling" in which one has "bodily presence as an inhabitant." A not-yet-completed structure that has never been physically occupied by the owner does not fit within this plain and ordinary understanding of the term "residence." There is one modifier of the term "residence" in the provision—the residence must be the taxpayer's "permanent" residence. "Permanent" is defined as "[n]ot expected to change in status, condition, or place." Permanent, The American Heritage Dictionary, 1314 (10th ed. 2014). Therefore, the structure that the taxpayer inhabits must not change in "status" as the taxpayer's home. Here, before the residence for which the Baldwins are claiming an exemption can become the Baldwins' "permanent residence," the Baldwins must physically live in a dwelling on the property. However, the Baldwins did not physically live in a dwelling on the subject property until June 11, 2015.

---

[5]Although instructive, we are not bound by the definition of "permanent residence" provided by the legislature. This is because article VII, section 6(a) is self-executing, and as such, we do not need the legislature's aid to discern its meaning. See Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960) (defining a self-executing provision of the Florida Constitution as one which "lays down a sufficient rule by means of which the right . . . may be determined, enjoyed or protected without the aid of legislative enactment"); see also Gainesville, 918 So. 2d at 257 (explaining that the supreme court is not bound by the legislature's definition of a self-executing constitutional provision).

Further, though not dispositive in our analysis of this self-executing constitutional provision, the Florida Legislature defines "permanent residence" as

> that place where a person has his or her true, fixed, and permanent home and principal establishment to which, whenever absent, he or she has the intention of returning. A person may have only one permanent residence at a time; and, once a permanent residence is established in a foreign state or country, it is presumed to continue until the person shows that a change has occurred.

§ 196.012(17); see also Karayianakis, 23 So. 3d at 846 ("The Florida Legislature's construction of these constitutional provisions guides our analysis."). This definition is consistent with the plain and ordinary understanding of the phrase as it is used in the constitutional provision passed by the people of our state. The legislature's use of the word "establishment," again, suggests a dwelling that the homeowner physically occupies. See The American Heritage Dictionary, 608 (10th ed. 2014) (defining "establishment" as "[a] place of residence or business with its possessions and staff"). Because taxpayers may reside in multiple structures, the definition explains that the residence must be "permanent" in that it is the place that the taxpayer "has the intention of returning" "whenever absent." § 196.012(17).

Accordingly, based on the plain and ordinary meaning of the constitutional provision providing the homestead exemption, to "maintain" "the permanent residence" on a piece of property, a taxpayer must preserve and continue in possession of a dwelling that the taxpayer physically occupies as a home and intends to return to whenever absent. Based on the plain and ordinary meaning of the operative constitutional provision, we are compelled to hold that the Baldwins are not entitled to a homestead exemption for their residential property for tax year 2015 because they did

not maintain their permanent residence on the property until June 11, 2015, the date that they moved onto the subject property and the first time they physically occupied a house on that property. Cf. Dep't of Rev. v. Pelsey, 779 So. 2d 629, 632 (Fla. 1st DCA 2001) ("[A]ctual occupancy is essential to a homestead claim."). Because they are not entitled to a homestead exemption for tax year 2015, they are also not entitled to a transfer of the homestead assessment difference.

This conclusion is not contradicted by the supreme court's holding in Semple or Florida's public policy of preserving the home. In Semple, the supreme court emphasized that the homestead character will attach to property where the owner manifests an intention to "occupy the premises immediately as a home." 89 So. at 639 (emphasis added). In emphasizing the intent aspect of the Semple court's holding, the Baldwins ignored the temporal component. The Baldwins clearly intended to occupy the premises as a home, but only at some undeterminable point in the future after construction was completed. Because the Baldwins did not use or occupy the property as a home until six months into the year for which they were claiming the exemption, they did not manifest an intent to "occupy the premises immediately as a home." Id. at 639 (concluding that homestead character did not attach to property where the property was not "in the actual use and occupancy" of the person claiming homestead exemption until "two months after" the date on which the property was conveyed by deed); cf. § 196.031(1)(a) ("A person who, on January 1, has the legal title or beneficial title in equity to real property in this state and who in good faith makes the property his or her permanent residence . . . is entitled to an exemption from all taxation . . . ." (emphasis added)); see also Clements v. Farhood, No. 5:17CV213-RH/GRJ, 2018 WL 850086, at

*2 (N.D. Fla. Feb. 12, 2018) ("[Semple] is still cited from time to time, but never for the proposition that a lot without a livable residence can be homestead if only the owner intends to build a house and live there at some point in the future.").

As for the Baldwins' reliance on Florida's public policy to protect the home, the Florida Constitution "[d]oes not establish an absolute right to a homestead exemption." Horne v. Markham, 288 So. 2d 196, 199 (Fla. 1973). Indeed, the constitutional provision affords the right only to those who establish the right "in the manner prescribed by law." Art. VII, § 6(a), Fla. Const. Further, this policy is less compelling in the context of providing a homeowner an exemption from taxes than in the context of protecting a homeowner from a forced sale of his or her property. See S. Walls, Inc. v. Stilwell Corp., 810 So. 2d 566, 571 (Fla. 5th DCA 2002) ("The public policy underlying the homestead exemption from forced sale is clearly more compelling than the public policy underlying the tax exemption. The homestead exemption should ensure more protection from forced sale than it receives from the tax exemption." (quoting In re Dean, 177 B.R. 727, 730 (Bankr. S.D. Fla. 1995))). Finally, where we can discern the constitutional provision's plain, ordinary, and unambiguous meaning, we cannot modify the will of the people in their passage of the constitutional provision based on policy considerations. Cf. McDonald v. Ronald, 65 So. 2d 12, 14 (Fla. 1953) ("Where the legislature's intention is clearly discernible, the court's duty is to declare it as it finds it, and it may not modify it or shade it, out of any consideration of policy or regard for untoward consequences.").

We stress that our holding today is limited to the facts of this case. See § 196.015 ("Intention to establish a permanent residence in this state is a factual

determination to be made, in the first instance, by the property appraiser."). We sympathize with the Baldwins' loss of the homestead portability benefit due to circumstances largely beyond their control. This court is mindful of the financial implications of this decision to the Baldwin family. The text of our constitution passed by the people of our state, however, compels this decision.

In summary, because the Baldwins did not maintain the subject property as their permanent residence on January 1, 2015, they are not entitled to a homestead tax exemption on the property for tax year 2015. Because they do not qualify for the homestead exemption, they also are not entitled to a transfer of their homestead portability benefit. We affirm the trial court's grant of final summary judgment in favor of the Property Appraiser.

Affirmed.

LaROSE, J., Concurs.
CASANUEVA, J., Concurs with opinion.

CASANUEVA, Judge, Concurring.

I fully concur with the court's opinion. I write only as a point of caution for those who may be impacted by this decision directly or indirectly, including building contractors, property owners, and practitioners representing them, who may wish to address in their contracts the potential impact of a construction delay on the Save Our Homes benefit.

This case illustrates an issue that may result from an extended construction period where a homeowner decides, often for economic reasons, to sell one homestead property prior to constructing or remodeling a new homestead residence. In this case, that extended construction period prevented the Baldwins from transferring the Save Our Homes benefit to their new home, despite their continued intent to establish it as their homestead.

One would be hard pressed to list all possible points of construction delay that could occur between permitting and a certificate of occupancy. As one example, our state, being a peninsula surrounded by the Atlantic Ocean and the Gulf of Mexico, is often the site of hurricane landfalls. Floridians know that a shortage of building supplies can result from multiple hurricane landfalls. In 2004, our state was buffeted by several hurricanes, and construction was severely impacted. An aerial view of our state demonstrated the proliferation of roof tarps of differing hues.

Interruptions causing construction to extend beyond the anticipated completion date can and do occur.[6] Understanding this reality, builders and

[6]The Baldwins' affidavits state that their agreement with the builder contained a requirement that a certificate of occupancy be issued by December 22,

practitioners may be wise to consider this eventuality in the construction contract, where the risk of loss can be addressed, particularly keeping in mind the potential loss of a taxpayer benefit.

2014, but it became evident in the Fall of 2014 that the new house would not be completed by the end of 2014.

Third District Court of Appeal

State of Florida

Opinion filed September 11, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-0816
Lower Tribunal No. 19-22

City of Miami Beach,
Petitioner,

vs.

Beach Blitz, Co.,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, Appellate Division, Ivonne Cuesta, Carlos Guzman, and Oscar Rodriguez-Fonts, Judges.

Carlton Fields, P.A., and Richard J. Ovelmen, Enrique D. Arana, Todd M. Fuller and Scott E. Byers, for petitioner.

Saul Ewing Arnstein & Lehr LLP and Phillip M. Hudson, III and Hilda Piloto, for respondent.

Before SALTER, FERNANDEZ and LINDSEY, JJ.

SALTER, J.

The City of Miami Beach ("City") petitions for a writ of (second-tier) certiorari quashing an unelaborated order of dismissal by the appellate division of the circuit court of Miami-Dade County. That order dismissed the City's petition for a writ of (first-tier) certiorari taken from the City's Board of Adjustment's ("BOA's") decision reversing the City Planning Director's determination regarding the allegedly unlicensed operation of the respondent's ("Beach Blitz's") package liquor store. We grant the petition and quash the order, concluding that the appellate division panel's summary dismissal was a departure from the essential requirements of law.

Procedural Background

The underlying dispute is whether Beach Blitz's liquor store is a "legally established nonconforming use" under the City's Code of Ordinances ("City Code"). In May 2018, Beach Blitz formally requested from the Planning Director a determination that the store was a legal nonconforming use. Shortly thereafter, the Planning Director determined the property does not fulfill the necessary criteria for a legal nonconforming use under the City Code. Beach Blitz appealed that determination to the BOA.

Following an evidentiary hearing, the BOA reversed the Planning Director's determination. In its final administrative order, the BOA explained:

> The [BOA] . . . finds, based on the information and documentation presented to the [BOA], and based on the argument of counsel and

> testimony of the parties, that with regard to the request to reverse the decision of the Planning Director regarding the legal non-conforming status of the package liquor store, [Beach Blitz's] appeal is hereby GRANTED, and the decision of the Planning Director is hereby REVERSED.

As a result of the BOA's reversal, the City sought certiorari review in the circuit court appellate division, complaining the BOA "departed from the essential requirements of the law in reversing the Planning Director's determination that Beach Blitz was not a lawful nonconforming use." In response, Beach Blitz filed a motion to dismiss, seeking "a summar[y] deni[al] as [the City] fail[ed] to establish a departure from the essential requirements of law." Following these submissions, the circuit court appellate division issued an unelaborated order granting Beach Blitz's motion to dismiss the City's petition.[1]

The City's second-tier certiorari petition was then timely filed in this Court.

Analysis

In its present petition, the City advances two arguments: (1) "[T]he Florida Rules of Appellate Procedure do not authorize the dismissal of a petition on the

[1] Beach Blitz's motion sought, in the alternative, to expedite briefing and resolution of the circuit court certiorari proceeding. The circuit court appellate division initially granted that motion without specifying whether it was dismissing or expediting the petition case. The following day, the appellate division issued an order to show cause and directed the filing of a response and reply. The order to show cause was docketed, however, as a dismissal closing the case. The City filed a motion for clarification; on June 3, 2019, the appellate division entered the form order challenged now, purporting to grant the City's motion for clarification, but granting Beach Blitz's motion to dismiss without further elaboration.

merits on the motion of a respondent"; and (2) "[T]he Planning Director correctly applied the applicable law in determining that Beach Blitz was not a legal nonconforming use." The City's first argument has merit, but for the reasons which follow, we decline to consider the City's second argument.

The BOA's review of determinations made by an administrative official charged with the enforcement of zoning ordinances is quasi-judicial in nature. When the BOA rules on an application, the parties may twice seek review in the court system, as explained in Miami-Dade County v. Omnipoint Holdings, Inc., 863 So. 2d 195, 198-99 (Fla. 2003). See also City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982).

"First-tier" review requires the circuit court to determine "(1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence." Miami-Dade Cty., 863 So. 2d at 199 (citations omitted). In other words, petitioners are "entitled to consideration of whether the administrative agency followed its laws and regulations, and whether the agency's findings are supported by competent substantial evidence." Osborn v. Bd. of Cty. Comm'rs, 937 So. 2d 1119, 1120 (Fla. 3d DCA 2006).

"Second-tier" certiorari review may then be pursued in this Court. See Miami-Dade Cty., 863 So. 2d at 199. This Court's review, however, is much more limited

in such a case: we consider only whether the circuit court "(1) afforded procedural due process, and (2) applied the correct law." Id.

Applying these principles to the circuit court appellate division's order granting Beach Blitz's motion to dismiss, we have already noted that the order did not address any of the claims raised by the City in its first-tier petition. Instead of determining whether the City was afforded procedural due process, whether the essential requirements of law were observed, and whether the BOA's findings were supported by substantial competent evidence, the appellate division simply dismissed the petition. This ruling amounted to "a violation of a clearly established principle of law resulting in a miscarriage of justice" and thus, constituted a departure from the essential requirements of law. Id. (citations omitted).

We also find persuasive our sibling district courts' decisions in Bush v. City of Mexico Beach, 71 So. 3d 147 (Fla. 1st DCA 2011), and Brasota Mortgage Co. v. Town of Longboat Key, 865 So. 2d 638 (Fla. 2d DCA 2004).

In Bush, the petitioners sought second-tier review of the circuit court's order dismissing their first-tier petition, in which they challenged the City of Mexico Beach's denial of their lot-splitting application. 71 So. 3d at 148-49. The First District granted certiorari relief because the circuit court "did not address the substantial due process issues raised" in the petition and thus, "did not engage in the three-prong review required" by the Florida Supreme Court. Id. at 148. According

to the First District, the circuit court's failure to engage in the three-prong review "constituted a violation of a clearly established principle of law resulting in a miscarriage of justice and, therefore, a departure from the essential requirements of law." Id. (internal quotation marks and citations omitted).

Similarly, in Brasota Mortgage, the petitioner sought second-tier review of the circuit court's order dismissing its first-tier petition, in which the petitioner sought review of the planning and zoning board's denial of its request for approval of a subdivision plat. 865 So. 2d at 639-40. In its dismissal order, the circuit court concluded that "the Petitioner has failed to demonstrate a preliminary basis for relief," citing to Florida Rule of Appellate Procedure 9.100(h) and two decisions that set forth the standard of review in second-tier certiorari proceedings. Id. at 640. Because the circuit court order did not set forth reasons for the dismissal, other than a conclusory sentence and citations to inapplicable authority, the Second District granted the second-tier petition. Id. The Second District held the circuit court "did not apply the correct law" when it failed to analyze the petition under the three-prong standard of review set forth by the Florida Supreme Court. Id.

In the present case, because the circuit court appellate division did not address the claims raised in the City's petition under the three-prong review required by the Florida Supreme Court, the circuit court departed from the essential requirements of the law and the dismissal order must be quashed.

That said, however, the parties have expended considerable effort here arguing the merits of whether Beach Blitz's liquor store is a "lawful nonconforming use" under the City Code. The parties fail to discern the difference between the standard of review applicable to the circuit court and this Court. More specifically, "[o]nce the district court determine[s]—from the face of the circuit court order—that the circuit court ha[s] applied the wrong law, the job of the district court [h]as ended." Fla. Power & Light Co. v. City of Dania, 761 So. 2d 1089, 1093 (Fla. 2000). If this Court were to address the merits of the petition, including those arguments pertaining to the Planning Director and the BOA, it would "usurp the first-tier certiorari jurisdiction of the circuit court." Id. Instead, this Court quashes the unelaborated dismissal order, so that the circuit court appellate division can apply the three-prong standard of review as directed by the Florida Supreme Court.

The City's petition is granted and the order quashed.[2]

[2] As is our normal practice in such cases, we withhold the formal issuance of a writ, trusting that the appellate division will comply with the required first-tier review of the City's circuit court petition.

Third District Court of Appeal

State of Florida

Opinion filed September 11, 2019.

Nos. 3D19-840 and 3D19-841
Lower Tribunal Nos. 18-32843 and 18-37190

OPKO Health, Inc., et al.,
Petitioners,

vs.

Frank Lipsius, etc., and Louis T. Alexander, etc.,
Respondents.

Writs of Certiorari to the Circuit Court for Miami-Dade County.

Akerman LLP, and Gerald B. Cope, Jr.; King & Spalding LLP, and Rebeca M. Ojeda (Atlanta, GA), for petitioners.

Hernandez Lee Martinez, LLC, and Eric A. Hernandez and Jermaine A. Lee; The Weiser Law Firm, P.C., and James M. Ficaro and Brett D. Stecker (Berwyn, PA); RM Law PC, and Richard A. Maniskas (Berwyn, PA), for respondents.

Before SALTER, MILLER, and GORDO, JJ.

ON MOTION FOR REHEARING

GORDO, J.

Upon considering Respondents' Motion for Rehearing, this Court withdraws its previous opinion filed June 19, 2019, and substitutes the following opinion in its place:

FACTUAL & PROCEDURAL BACKGROUND

OPKO Health, Inc. ("OPKO"), petitions this Court for certiorari review of the trial court's order denying their motion to stay proceedings in Lipsius v. Frost, and Alexander v. Frost.[1] The undisputed facts are set out as follows by the lower court in its Order on Defendants' Motion to Dismiss, and/or Stay the Case:[2]

> On September 7, 2018, the U.S. Securities and Exchange Commission ("SEC") filed a complaint against OPKO, the Company's Chief Executive Officer ("CEO") and Chairman of the Board of Directors (the "Board"), defendant Frost, and a myriad of others, alleging that these defendants participated in an elaborate "pump and dump" insider stock selling scheme, netting Frost and his co-conspirators millions of dollars (the "SEC Action"). The SEC Action alleged that Frost and his associates executed a scheme whereby they used Frost's reputation as a successful healthcare investor in order to artificially inflate the stock prices of companies in which they had invested, and then liquidated their own positions in those stocks. After the filing of the SEC Action, OPKO's stock price tumbled by nearly 30% and trading in OPKO stock was temporarily halted.
>
> On December 27, 2018, the Company announced the settlement of the SEC Action. In connection with the settlement, the Company announced that it had "agreed to an injunction from certain violations

[1] The two cases have not been consolidated below; however, the trial court issued a single order pertaining to the two cases. Thus, this Court has ordered a consolidation for all appellate purposes.

[2] Lipsius v. Frost, et al., No. 2018-032843 CC 44 (Fla. 11th Cir. Ct. 2019); Alexander v. Frost, et al., No. 2018-037190 CC 44 (Fla. 11th Cir. Ct. 2019).

> of the Securities Exchange Act of 1934 (the "Exchange Act"); a $100,000 penalty; and will perform certain undertakings related to the Exchange Act." Defendant Frost, meanwhile, agreed "to injunctions from certain violations of the Securities Act of 1933 and the Exchange Act; approximately $5.5 million in penalty, disgorgement, and prejudgment interest; and a prohibition, with certain exceptions, from trading in penny stocks."

Following the SEC Action, multiple federal securities class actions and derivative actions were filed in federal and state courts. The first action initiated in Florida, Steinberg v. OPKO Health, Inc. ("Federal Securities Action"), was filed on September 14, 2018, in the Southern District of Florida.[3] This class action suit was brought on behalf of a class of OPKO investors alleging that OPKO, Frost and other officers made false or misleading statements and failed to disclose alleged market manipulation at issue in the SEC Action.

On September 27, 2018, the first of the Florida derivative suits was filed in the Circuit Court for the Eleventh Judicial Circuit of Florida by Frank Lipsius, on behalf of OPKO, seeking damages caused by a breach of fiduciary duties by OPKO's directors. Service was not perfected until November 9, 2018. Meanwhile, on November 2, 2018, Louis Alexander filed an almost identical derivative complaint in the Florida circuit court. The Florida derivative suits allege the OPKO directors breached their fiduciary duties by allegedly allowing there to be misstatements and

[3] A consolidated class action complaint was later filed in this action in the Southern District.

misrepresentations made in OPKO's SEC filings and failing to disclose their involvement in the "pump and dump" scheme.

Additionally, multiple derivative suits were filed in Delaware court. Tunick v. Frost ("Delaware Derivative Action"), the first Delaware derivative suit,[4] was filed on October 15, 2018, in the Delaware Supreme Court. Service was perfected on October 23, 2018.

Petitioners filed a motion in the Florida circuit court to dismiss, or, in the alternative, to stay Lipsius and Alexander pending the resolution of the Federal Securities Action and the Delaware Derivative Action. Petitioners asserted that comity principles dictate that the derivative suits should follow, rather than precede, the direct suits involving substantially similar parties and claims. Petitioners argued a stay is warranted because the derivative actions seek relief that is contingent on the outcome of the related litigation. Petitioners further contended it would be prejudicial and impractical for OPKO to simultaneously defend against the federal securities class actions while also contesting derivative claims based on the same core allegations. Petitioners also asserted that allowing the Florida derivative suits to proceed at the same time as the Federal Securities Action would force OPKO to litigate inconsistent positions at the same time. Upon resolution of the Federal

[4] Additional derivative actions were filed in the Delaware Court after Tunick. These cases have all been consolidated.

Securities Action, Petitioners sought a stay pending resolution of the Delaware Derivative Action arguing Delaware has a stronger interest in adjudicating cases involving Delaware companies and Delaware law.

Respondents argued that the Federal Securities Action involves distinct causes of action, names only some of the same individuals as defendants and therefore does not preclude recovery in the derivative suits. Respondents contended a stay would cause the derivative suits to remain unresolved for years and would still have to be litigated after resolution of the Federal Securities Action. Respondents conceded there was a slight overlap of issues and that both the Federal Securities Action and the Florida derivative suits stemmed from the SEC action and involved most of the same facts. Yet, Respondents proposed coordinating discovery for overlapping issues and maintained a stay should be denied.

During the hearing on the motion to stay, the trial court heard extensive legal argument regarding which case should be allowed to proceed first. The court recognized these actions created a "hodgepodge of legal conflict because of how many jurisdictions all these cases have fallen into." Nonetheless, the lower court denied the motion finding that the principle of priority in Florida dictated that a stay in favor of the Delaware Derivative Action be denied. Notably, the lower court did not apply this principle to determine whether a stay was warranted pending resolution of the Federal Securities Action. Rather, the trial court reasoned there

was insufficient evidence that the resolution of the Federal Securities Action would resolve many of the issues in the derivative suits. These petitions followed.

STANDARD OF REVIEW

Certiorari review is warranted when the petitioning parties demonstrate the contested order constitutes "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case[,] (3) that cannot be corrected on postjudgment appeal." Bd. of Trs. of Internal Improvement Trust Fund v. Am. Educ. Enters., LLC, 99 So. 3d 450, 454 (Fla. 2012) (quoting Reeves v. Fleetwood Homes of Fla., Inc., 889 So. 2d 812, 822 (Fla. 2004)).

LEGAL ANALYSIS

"Although a trial court has broad discretion to order or refuse a stay of an action pending before it, it is nonetheless an abuse of discretion to refuse to stay a subsequently filed state court action in favor of a previously filed federal action which involves the same parties and the same or substantially similar issues. This rule is based on principles of comity." Fla. Crushed Stone Co. v. Travelers Indem. Co., 632 So. 2d 217, 220 (Fla. 5th DCA 1994) (citations omitted). Comity principles dictate that "[w]here a state and federal court have concurrent jurisdiction over the same parties or privies and the same subject matter, the tribunal where jurisdiction first attaches retains jurisdiction." Shooster v. BT Orlando Ltd. P'ship, 766 So. 2d 1114, 1115 (Fla. 5th DCA 2000) (citing Wade v. Clower, 114 So. 548, 551 (Fla.

1927)). "It is well-settled that when a previously filed federal action is pending between substantially the same parties on substantially the same issues, a subsequently filed state action should be stayed pending the disposition of the federal action." Beckford v. Gen. Motors Corp., 919 So. 2d 612, 613 (Fla. 3d DCA 2006) (citing Wade, 114 So. 548; Oviedo v. Ventura Music Grp., 797 So. 2d 634 (Fla. 3d DCA 2001)).

"Florida law is clear that, 'the causes of action do not have to be identical . . . [i]t is sufficient that the two actions involve a single set of facts and that resolution of the one case will resolve many of the issues involved in the subsequently filed case.'" Pilevsky v. Morgans Hotel Grp. Mgmt., LLC, 961 So. 2d 1032, 1035 (Fla. 3d DCA 2007) (quoting Fla. Crushed Stone Co., 632 So. 2d at 220). Here, Respondents concede the derivative actions stem from the same nucleus of facts as the pending Federal Securities Action. Moreover, the Florida actions involve many of the same parties as the Federal Securities Action, including: OPKO Health, Inc., Phillip Frost, Adam Logal, and Juan F. Rodriguez. Respondents even acknowledge the actions have overlapping issues and that it would preserve judicial resources to coordinate discovery.

A stay is warranted where the verdict and judgment in the Federal Securities Action is likely to "materially affect the viability of some of the [Petitioners'] claims in the Florida lawsuit," or lead to inconsistent outcomes. Benihana of Tokyo, Inc.

v. Benihana, Inc., 129 So. 3d 1153, 1155 (Fla. 3d DCA 2014). This Court has previously granted certiorari for a lower court's failure to stay proceedings where jurisdiction attached in a concurrent jurisdiction involving substantially similar parties and issues, subjecting Petitioner to "duplication of efforts and costs, as well as the possibility of inconsistent judgments." J.M. Smucker Co. v. Rudge, 877 So. 2d 820, 822 (Fla. 3d DCA 2004); see Pilevsky, 961 So. 2d at 1035 ("Resolution in the New York action of whether Morgans breached the management contract . . . [and] whether Morgans acted to the Shore Club's detriment in dealing with its vendors will resolve most, if not all, [of the related] issues in the Florida action . . . ."); State v. Harbour Island, Inc., 601 So. 2d 1334, 1335 (Fla. 2d DCA 1992) ("While the two cases are not identical, the disposition of the federal case will resolve many of the issues raised in the state action."). Because the outcome of the Federal Securities Action is likely to resolve some questions of fact or materially affect the viability of some claims for breach of fiduciary duty by the directors involved, the trial court abused its discretion by failing to stay the subsequently-filed derivative actions pending resolution of the Federal Securities Action.[5]

[5] The federal judge presiding over Lee v. Frost, a derivative suit pending in the Southern District of Florida, issued an order staying the case in favor of the Federal Securities Action. The federal district court concluded that the "shareholder derivative action should be stayed pending resolution of the . . . direct federal securities actions as the outcome of those actions will not only materially affect Plaintiff's damages, but will also materially affect the underlying facts and the form

Next, we examine the denial of a stay pending resolution of the Delaware Derivative Action. In its order, the trial court applied the principle of priority to find that the Florida derivative suits should first proceed because Lipsius was filed first.

"If courts of different states have concurrent jurisdiction over the same parties and subject matter, the 'principle of priority' may be applied as a matter of comity." Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Ainsworth, 630 So. 2d 1145, 1147 (Fla. 2d DCA 1993) (citing Siegel v. Siegel, 575 So. 2d 1267 (Fla. 1991)). Pursuant to this principle, "the court which *first exercises its jurisdiction* acquires exclusive jurisdiction to proceed with that case." Siegel, 575 So. 2d at 1272 (emphasis added) (quoting Bedingfield v. Bedingfield, 417 So. 2d 1047, 1050 (Fla. 4th DCA 1982)). "It is the well established law of Florida that where two courts have concurrent jurisdiction of a cause of action, the first court to exercise jurisdiction has the exclusive right to hear all issues or questions arising in the case." Royal Globe Ins. Co. v. Gehl, 358 So. 2d 228, 229 (Fla. 3d DCA 1978). "[A] trial court abuses its discretion when it fails to respect the principle of priority." Hirsch v. DiGaetano, 732 So. 2d 1177, 1178 (Fla. 5th DCA 1999).

Florida courts do not apply a bright-line "first-filed" test to resolve questions of competing jurisdiction in concurrent jurisdictions. The principle of priority

---

of the claims Plaintiff may bring in this shareholder derivative suit." Lee v. Frost, et al., Case No. 1:18-cv-24765-UU (S.D. Fla. 2018).

hinges on the court's exercise of jurisdiction in an action. However, "[i]t is true that no Florida court appears to have addressed the question of exactly what the supreme court meant by the term 'the court which first exercised its jurisdiction' in Siegel." In re Guardianship of Morrison, 972 So. 2d 905, 909 (Fla. 2d DCA 2007).

When applying the principle of priority, Florida courts have often referred to the "first-filed" case. Significantly, in such cases, the exercise of jurisdiction was not at issue. For example, in this Court's decision in Polaris Pub. Income Funds v. Einhorn, 625 So. 2d 128 (Fla. 3d DCA 1993), we considered "[t]he pivotal question [of] whether the Florida action [was] so similar in parties and issues as to be unnecessarily duplicative of the prior-filed New York State proceedings." Id. at 129. As it was undisputed that the New York court had previously exercised jurisdiction over the matter (which was also filed prior to the Florida action), we determined the trial court abused its discretion in denying a stay of the Florida proceedings. Similarly, in Pilevsky, the issue before us was whether the action pending in the prior-filed case in New York involved both substantially similar parties and substantially similar issues such that a stay of the subsequently-filed Florida case was warranted. 961 So. 2d at 1034. Again, the question of which court was the first to exercise jurisdiction was not before us when we determined the trial court abused its discretion by refusing to stay the Florida action.

In cases where the exercise of jurisdiction was at issue, Florida courts have appropriately applied the principle of priority in favor of the first court to exercise jurisdiction. To determine priority, Florida courts have compared the actions taken in a foreign jurisdiction with the actions taken in a pending Florida action. See Perleman v. Estate of Perelman, 124 So. 3d 983 (Fla 4th DCA 2013) (remanding for the trial court to issue a stay pending the resolution of the Pennsylvania probate proceeding because Pennsylvania was the first state to exercise jurisdiction by issuing a notice, which got "the ball [] rolling" in Pennsylvania before a petition was filed in Florida); In re Guardianship of Morrison, 972 So. 2d 907 (remanding for a stay pending the resolution of the New Jersey proceedings because the New Jersey court first exercised jurisdiction by issuing an order to show cause, which occurred prior to the filing of the petitions in Florida); Shooster, 766 So. 2d 1114 (concluding that under Florida procedural law the federal court exercised jurisdiction over the cause with the earlier service of process where the federal action was filed and served in the United States District Court for the Southern District of Florida before the Florida circuit court); Merrill Lynch, 630 So. 2d 1145 (concluding that as a matter of comity the Florida court should have stayed the action in view of the New York court's prior exercise of concurrent jurisdiction by issuing an order to show case).

In Florida, the Supreme Court has established that "[w]hen two actions between the same parties are pending in different circuits, jurisdiction lies in the circuit where service of process is first perfected." Mabie v. Garden St. Mgmt. Corp., 397 So. 2d 920, 921 (Fla. 1981) (citing Martinez v. Martinez, 15 So. 2d 842 (Fla. 1943)). Importantly, "Mabie unequivocally rejects the concept that the suit first filed prevails." Fasco Indus., Inc. v. Goble, 678 So. 2d 916, 917 (Fla. 5th DCA 1996).

Here, the trial court abused its discretion by refusing to stay Lipsius and Alexander based on its reasoning that Lipsius was the first derivative action filed. The "principle of priority" dictates that the first court to exercise jurisdiction retains the exclusive right to hear the questions and issues arising from the case. Because we have established that the Federal Securities Action has priority and a stay of the Florida actions is warranted pending its resolution, we need not address the question of priority between the Florida and Delaware courts.

Nonetheless, we observe that the Delaware court exercised its jurisdiction over the cause before the Florida court. The Delaware Derivative Action was filed on October 15, 2018, and service was perfected on October 23, 2018, more than two weeks before service was perfected in the Lipsius action. On the record before us, it is clear "the ball [was] rolling" in Delaware before Florida. Thus, the lower court

abused its discretion by denying the stay of the Florida action pending the resolution of the Delaware Derivative Action.

CONCLUSION

We conclude that the trial court's failure to stay the Florida actions in favor of the Federal Securities Action, or in the alternative, the Delaware Derivative Action departed from the essential requirements of the law resulting in material injury irremediable on plenary appeal. Accordingly, we grant the petition, quash the circuit court order denying Petitioners' motion to stay and deny as moot Petitioners' pending motions in this Court for a stay of the circuit court cases (in anticipation that the trial court will grant a stay of the Lipsius and Alexander actions).