IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

CITY OF BROOKSVILLE,

Petitioner,

vs. Case No.: 5D17-1139

HERNANDO COUNTY,

Respondent.

On Petition for Second-Tier Writ of Certiorari
To the Circuit Court of the Fifth Judicial Circuit
In and for Hernando County, Florida
The Honorable Donald E. Scaglione, Circuit Judge, Presiding

SUPPLEMENTAL BRIEF OF THE RESPONDENT IN RESPONSE TO AMICUS, THE FLORIDA LEAGUE OF CITIES

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QUESTIONS PRESENTED

1. A district court lacks second-tier certiorari jurisdiction if the applicable circuit court ruling has not resulted in a "miscarriage of justice." An erroneous circuit court ruling that has a binding precedential effect on county courts or other lower tribunals can constitute a miscarriage of justice. The amicus curie argues in its brief that the Circuit Court's first-tier certiorari decision below, due to its negative precedential effect, will result in a miscarriage of justice. The Circuit Court's ruling, however, is an unpublished, non-precedential order. Accordingly, has the amicus curie established that this Court has second-tier certiorari jurisdiction in this case?

2. The amicus curie raises an argument in its brief that Petitioner raised in the first-tier proceedings below, but abandoned in this Court. Does the amicus curie have standing to raise this argument?

3. The amicus curie argues that the Circuit Court erred by not validating the powers-of-attorney that are at issue in this case pursuant to the Florida Power of Attorney Act. That Act excludes from its scope the type of powers-of-attorney that are at issue in this case and Petitioner cannot qualify as an agent under its terms. Furthermore, the amicus curie does not identify a clearly established principal of law the Circuit Court violated. Has the amicus curie established that the Circuit Court deprived Petitioner of procedural due process or failed to apply the correct law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Respondent, HERNANDO COUNTY ("the County"), files this Supplemental Brief pursuant to the Court's Order of May 19, 2017, which authorized the Florida League of Cities ("the League") to file an amicus brief in support of the Petition for Writ of Certiorari ("the Second-Tier Petition") that was filed by Petitioner, CITY OF BROOKSVILLE.

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

The League implies in its brief that this Court has the ability in this case to create new law and to correct mere legal errors that may have been committed in the proceedings below. In reality, this Court's jurisdiction and standard of review are very narrow.

As the County describes in more detail in its response to the Second-Tier Petition,[1] a district court only has jurisdiction to grant a second-tier petition for certiorari if the circuit court's ruling violated a clearly established principle of law that has resulted in a miscarriage of justice.[2] Should this Court choose to exercise its discretion to consider the Second-Tier Petition, this Court's scope of review will be

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[1]Response of Hernando County to Petition for Writ of Certiorari at 20-21.

[2]See *Futch v. Florida Dep't of Highway Safety & Motor Vehicles*, 189 So. 3d 131, 132 (Fla. 2016); *Florida Parole Comm'n v. Taylor*, 132 So. 3d 780, 783 (Fla. 2014); *Nader v. Fla. Dep't of High. Saf. & Motor Veh.*, 87 So.3d 712, 717 (Fla. 2012).

limited to determining "whether the circuit court afforded procedural due process and whether the circuit court applied the correct law, or, as otherwise stated, departed from the essential requirements of law."[3]

SUMMARY OF ARGUMENT

While the League's amicus brief ostensibly supports Petitioner, it actually demonstrates that this Court lacks subject-matter jurisdiction to grant the Petition for Writ of Certiorari.

No one disputes that this Court will have second-tier certiorari jurisdiction only if the Circuit Court, in its ruling, violated a clearly established principal of law that has resulted in a miscarriage of justice.

Remarkably, the League does not argue that the Circuit Court violated a clearly established principal of law. Instead, the League asks this Court to create new law by either "harmonizing" Fla. Stat. § 171.044 with the Florida Power of Attorney Act or by adopting the reasoning from a 38-year-old Wisconsin appellate court opinion. This Court, however, lacks jurisdiction to create new law in a second-tier certiorari proceeding.

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[3] *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1092 (Fla. 2010) (Internal Quotation Marks Omitted).

That being said, the Florida Power of Attorney Act does not apply to the facts of this case, so the Circuit Court would have erred if it had applied it.

Further, the League's argument that the Circuit Court's ruling constitutes a miscarriage of justice by virtue of its precedential value makes no sense. The Circuit Court's ruling, as an unpublished trial court order, has no precedential value. Accordingly, the Circuit Court's ruling will not bind any county courts or other inferior tribunals.

ARGUMENT

I. THE LEAGUE'S AMICUS BRIEF DEMONSTRATES THAT THIS COURT LACKS SUBJECT-MATTER JURISDICTION.

The Florida Supreme Court recently held in *Futch v. Florida Department of Highway Safety & Motor Vehicles* that a district court only has jurisdiction to grant a second-tier certiorari petition if the circuit court's ruling has resulted in a miscarriage of justice.[4] The League claims that the Circuit Court's ruling will have a negative, statewide precedential effect.[5] This argument lacks merit, however, because the Circuit Court's ruling has no precedential value.

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[4]See *Futch*, 189 So. 3d at 132.

[5]Amicus Brief at 11-14.

While the binding, precedential effect of an erroneous circuit court ruling can create a miscarriage of justice, a non-precedential ruling "will generally not merit certiorari review in the district court, even if the district court might disagree with the result."[6]

No Florida court has ever held that a circuit court's first-tier certiorari ruling on an annexation challenge has precedential value. Further, unpublished decisions, such as the Circuit Court's ruling in this case, have no precedential value.[7] Accordingly, only Petitioner and the County will be bound by the Circuit Court's ruling, and only to the extent that judgment by estoppel bars the relitigation of issues that were actually adjudicated in a prior proceeding.[8]

II. THE FLORIDA POWER OF ATTORNEY ACT DOES NOT APPLY TO THIS CASE.

Despite the League's argument to the contrary, the Florida Power of Attorney Act does not apply to the powers-of-attorney that are at issue in this case.

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[6] *Dep't of Highway Safety & Motor Vehicles v. Alliston*, 813 So. 2d 141, 145 (Fla. 2nd DCA 2002). See also *Progressive Specialty Ins. Co. v. Biomechanical Trauma Ass'n, Inc.*, 785 So. 2d 667, 668 (Fla. 2nd DCA 2001) (denying writ because erroneous circuit court ruling " will have no adverse precedential affect upon future cases").

[7] See *Gawker Media, LLC v. Bollea*, 170 So.3d 125, 133 (Fla. 2nd DCA 2015).

[8] See *Park v. City of W. Melbourne*, 927 So. 2d 5, 9 (Fla. 5th DCA 2006).

A. SINCE PETITIONER RAISED, BUT THEN ABANDONED THIS ARGUMENT, THE LEAGUE LACKS STANDING TO ARGUE IT AS AN AMICUS.

Petitioner made this argument in the first-tier certiorari petition,[9] however, it did not include this argument in its Second-Tier Petition.[10]

As a result, the League, as *amicus curie*, lacks standing to make this argument. *Amici* neither have standing to raise issues not available to the parties, nor may they inject issues not raised by the parties.[11] As the Second DCA noted, a "court cannot grant relief on an issue raised by the amicus brief but not by the appellant."[12]

B. THE FLORIDA POWER OF ATTORNEY ACT DOES NOT APPLY TO POWERS-OF-ATTORNEY THAT ARE AT ISSUE IN THIS CASE.

Presumably, Petitioner abandoned the argument because the Florida Power of Attorney Act does not apply to the powers-of-attorney that the property owners gave to Petitioner.

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[9]Respondent's Appendix at Tab 12, pp. 124-25.

[10]Second-Tier Petition, *passim*.

[11]See *Acton v. Ft. Lauderdale Hospital*, 418 So.2d 1099, 1101 (Fla. 1st DCA 1982), approved, 440 So. 2d 1282 (Fla. 1983). See also *Turner v. Tokai Fin. Serv., Inc.*, 767 So.2d 494, 496, n. 1 (Fla. 2nd DCA 2000); *Keating v. State*, 157 So.2d 567, 569 (Fla. 1st DCA 1963).

[12]*Nationwide Mut. Ins. Co. v. Chillura*, 952 So. 2d 547, 553, n. 7 (Fla. 2nd DCA 2007).

In Fla. Stat. § 709.2103(2), the Legislature excludes from the Florida Power of Attorney Act's scope, "[a] power created on a form prescribed by a government . . . for a governmental purpose." The powers-of-attorney that are at issue in this case fall squarely into that exception. Petitioner is a government[13], it provided the property owners with the powers-of-attorney forms that are at issue in this case[14] for the purpose of protecting its ability to annex the properties in case the property owners subsequently file for bankruptcy, become insolvent, or lose the capacity to execute a petition for voluntary annexation.[15]

Additionally, the Legislature, in Fla. Stat. § 709.2103(4), excludes from the Florida Power of Attorney Act's scope "[a] power created by a person other than an individual." Only one of the five powers-of-attorney that are at issue in this case was executed by natural persons. As the League notes, of the others, "[t]hree are churches, and one is a governmental agency."[16]

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[13]Fla. Stat. § 165.031(3).

[14]Appendix to Second-Tier Petition at pp. 76, 96, 149, 172, & 200.

[15]Second-Tier Petition at 9. See also Amicus Brief at 4 (arguing that powers-of-attorney allows a municipality to "plan and extend utilities . . . relying on the knowledge that the properties served will also be paying taxes").

[16]Amicus Brief at 14.

C. PETITIONER IS INELIGIBLE TO BE AN AGENT UNDER THE FLORIDA POWER OF ATTORNEY ACT.

Assuming *in arguendo* that the Florida Power of Attorney Act applied to the facts of this case, the powers-of-attorney that the property owners executed would be void *ab initio*. A municipality is ineligible to serve as an agent under the Florida Power of Attorney Act.

Pursuant to Fla. Stat. § 709.2105(1), "The agent must be a natural person who is 18 years of age or older or a financial institution that has trust powers, has a place of business in this state, and is authorized to conduct trust business in this state." While the term "natural person" is self-explanatory, the Legislature defines a financial institution as "a state or federal savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust company representative office, credit union, or an agreement corporation operating pursuant to s. 25 of the Federal Reserve Act, 12 U.S.C. ss. 601 et seq. or Edge Act corporation organized pursuant to s. 25(a) of the Federal Reserve Act, 12 U.S.C. ss. 611 et seq."[17]

[17]Fla. Stat. § 655.005(1)(i).

Petitioner is neither a natural person nor a financial institution with trust powers. Instead, it is a municipality, an entity that cannot be an agent under the Florida Power of Attorney Act.

D. THE LEAGUE MISSTATES THE HOLDING OF THIS COURT'S OPINION IN DINGLE V. PRIKHDINA.

The League, on page 7 of its Brief, cites this Court's opinion in *Dingle v. Prikhdina*[18] as holding that "the owner of real property in Florida has an absolute right to appoint an agent to act according to a specific grant of power-of-attorney or as agent." At no point in the *Dingle* opinion, however, does this Court make such a holding. Instead, this Court held that an agent could not make a gift of a corporation's real property when the applicable power of attorney "clearly included the power to convey real property, however, it did not specifically authorize its use to make a gift."[19]

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[18]*Dingle v. Prikhdina*, 59 So. 3d 326 (Fla. 5th DCA 2011).

[19]*Dingle*, 59 So. 3d at 328.

III. THE LEAGUE CANNOT IDENTIFY ANY CLEARLY ESTABLISHED PRINCIPALS OF LAW THAT THE CIRCUIT COURT VIOLATED IN THE PROCEEDINGS BELOW.

Even if the Florida Power of Attorney Act could be applied to the facts of this case, the Circuit Court's failure to do so cannot constitute a violation of a clearly established principal of law.

The League tacitly concedes throughout its brief that there is no existing rule, statute, constitutional provision, or controlling case law that required the Circuit Court to apply the Florida Power of Attorney Act in the proceedings below, to wit:

- "There is no statute that limits or prohibits the use of a power of attorney to authorize the execution of a petition to annex property."[20]
- "While there is no Florida case on point regarding the use of a power-of-attorney appointing someone other than the property owner to petition for annexation, Petitioner correctly points to a Wisconsin decision that is directly on point and analogous to Florida's law of voluntary and involuntary annexations."[21]

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[20]Amicus Brief at 3.

[21]Amicus Brief at 7 citing *Town of Medary v. City of La Crosse*, 273 N.W.2d 310 (Ct. Ap. Wis. 1979).

- "Unless there is some affirmative statement by the Legislature prohibiting or preempting the use of a power of attorney to grant such a consent, this Court should rule that the use of a power-of-attorney to evidence a landowner's consent to voluntary annexation complies with § 171.044, Florida Statutes."[22]
- "Similarly, the Court should harmonize the 1974 Municipal Annexation or Contraction Act . . . with the 2011 Florida Power of Attorney Act . . . by giving effect to each."[23]
- "Nowhere in the Florida Power of Attorney Act did the Legislature prohibit, create an exception, or preempt the use of powers of attorney for the authorizing of filing any application, petition, form, zoning request, land use request, utility service application, or annexation form. Nor is there any prohibition to the use of powers of attorney under the Municipal Annexation or Contraction Act. Indeed, the only limitations and criteria found regarding the use of powers of attorney can be found in [the Florida Power of Attorney

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[22]Amicus Brief at 8.

[23]Amicus Brief at 10. Tellingly, none of the three cases cited by the League cites are second-tier certiorari cases. See *Woodgate Dev. Corp. v. Hamilton Inv. Trust*, 351 So. 2d 14 (Fla. 1977) (direct certiorari review by Supreme Court of a circuit court's ruling); *Floyd v. Bentley*, 496 So. 2d 862 (Fla. 2nd DCA 1986) (mandamus); *City of Indian Harbour Beach v. City of Melbourne*, 265 So. 2d 422 (Fla. 4th DCA 1972) (plenary appeal).

Act]. Those limitations and criteria do not include a prohibition against the use of powers of attorney under § 171.044, Fla. Stat."[24]

Without changing the meaning of the above-quoted passages, one could rephrase them as, "While no controlling case law, statutes, rules of court, administrative rules, or constitutional provisions required the Circuit Court to have held that Petitioner's petitioning of itself to annex parcels as the attorney-in-fact for the parcel's owners, it would have been better if the Circuit Court had done so." To quash the Circuit Court's order, this Court would need to create new law in this case. That dooms the League's argument, as "[l]ogically, the circuit court could not have violated the essential requirements of law when the principle of law had never existed."[25]

The Circuit Court below applied the correct general law, the Municipal Annexation and Contraction Act, to a novel set of facts. "In such a situation, the law at issue is not a clearly established principle of law.[26]

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[24]Amicus Brief at 10-11 (some internal citations omitted for clarity).

[25]*Custer Med. Ctr.*, 62 So.3d at 1094.

[26]*Nader*, 87 So.3d at 723 ("[C]ertiorari jurisdiction cannot be used to create new law where the decision below recognizes the correct general law and applies the correct law to a new set of facts to which it has not been previously applied.").

Further, the presumption of validity that courts apply to annexations enacted by the Legislature does not apply to municipality-enacted annexations. As the Florida Constitution vests the power to alter municipal boundaries in the Legislature,[27] courts presume that Legislature's special acts are valid in recognition of the separation of powers.[28] When municipalities adjust their own boundaries, however, they can only exercise a power delegated to them by the Legislature. Accordingly, courts review annexation ordinances to ensure that the municipalities enacted them "in strict accord" with the Municipal Annexation or Contraction Act,[29] as it expressly preempts all other means of municipal annexation.[30]

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[27]Fla. Const. art. VIII, § 2(c).

[28]Compare *City of Auburndale v. Adams Packing Ass'n*, 171 So. 2d 161, 163 (Fla. 1965) (holding that annexation is exclusively a legislative function that cannot be exercised by the judiciary) with *State ex rel. Bower v. City of Tampa*, 316 So. 2d 570, 571 (Fla. 2nd DCA 1975) ("the Legislature . . . must have determined the area in question to be amenable to municipal benefits . . . ."). See also *Gillete v. City of Tampa*, 57 So. 2d 27, 29 (Fla. 1952).

[29]*Smith v. Ayres*, 174 So. 2d 727, 729 (Fla. 1965). See also *McGeary v. Dade County*, 342 So. 2d 549, 551 (Fla. 3rd DCA 1977); *Town of Mangonia Park v. Homan*, 118 So. 2d 585, 588 (Fla. 2nd DCA 1960).

[30]Compare Fla. Stat. § 171.022 with *City of Ormond Beach v. City of Daytona Beach*, 794 So. 2d 660, 661, n.1 (Fla. 5th DCA 2001) rehearing denied.

CONCLUSION/RELIEF REQUESTED

The County requests that this Court either dismiss or deny the Second-Tier Petition, and grant such other and further relief as this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 2017, a true and correct copy of the foregoing was sent by e-mail to all persons listed on the attached Service List.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App . P. 9.100.

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