PRACTICE & PROCEDURE

Practice & Procedure: Appellate—Class Certification

City of Tampa v. McAfee,
896 So. 2d 943 (Fla. 2d Dist. App. 2005)

An appellate court does not have jurisdiction to hear an appeal from a non-final order granting summary judgment, but the court can review the order to the extent that it grants an injunction. Additionally, an order granting certification as a class representative must be supported by specific findings of fact and conclusions of law.

FACTS AND PROCEDURAL HISTORY

The City of Tampa enacted a motor vehicle impound ordinance, permitting the police to temporarily seize and impound a vehicle if there was probable cause to believe that the vehicle was used in the commission of a drug crime or prostitution. The ordinance contained provisions for a preliminary hearing at which the City was required to establish probable cause for the impoundment, and for a final hearing at which the City was obligated to prove by a preponderance of the evidence that the vehicle was used in the commission of a drug crime or prostitution. If the City was able to meet its burden, the ordinance provided for the imposition of a $500 civil penalty, plus towing and storage fees. If the City was unable to meet its burden at the final hearing, the vehicle was returned without the imposition of fees or costs.

On December 17, 2002, Richard McAfee was arrested and charged with possession of marijuana. The car he was allegedly driving at the time of his arrest was impounded pursuant to the ordinance. McAfee filed suit in 2003, alleging that enforcement of the ordinance was unconstitutional, primarily because it was preempted by the Florida Contraband Forfeiture Act. McAfee moved for certification as a class representative for all individuals against whom the ordinance had been enforced since its enactment. He also filed a motion for summary judgment on all issues. The trial court granted both motions. In granting the motion for summary judgment, the trial court also issued an injunction against future enforcement of the ordinance. The City appealed.

ANALYSIS

The Order Granting Summary Judgment

The trial court's order granted McAfee's motion for summary judgment and enjoined the City from enforcing the ordinance. In affirming this order in part, the Second District Court of Appeal held that it did not have jurisdiction to review the issue because the order was a non-final order granting summary judgment. However, the court did find that it had jurisdiction to review the portion of the order granting the temporary injunction. A temporary injunction may be granted only if there is a risk of "irreparable harm," no legal remedy is available, there is a substantial likelihood that the petitioner will succeed on the merits, and the injunction would serve the public interest. Fla. R. Civ. P. 1.610(a)(1)(A). The court noted that, in light of precedent from two other Florida district courts, McAfee was likely to prevail on the merits of the case, but the court declined to rule on the merits of McAfee's challenges due to lack of jurisdiction. *See City of Miami v. Wellman*, 875 So. 2d 635 (Fla. 3d Dist. App. 2004) (holding similar ordinances invalid based on preemption by the Florida Contraband Forfeiture Act); *Mulligan v. City of Hollywood*, 871 So. 2d 249 (Fla. 4th Dist. App. 2003).

The Order Granting Class Status

Because of the serious implications of a class action suit, an order granting class certification must be supported by both findings of fact and conclusions of law. Fla. R. Civ. P. 1.220(d)(1). The Second District reversed the trial court's holding on this issue and remanded for a new hearing. The class certified by the trial court's order was "[a]ll owners of motor vehicles impounded pursuant to Section 14-27 of the Tampa Code of Ordinances since its inception." *McAfee*, 896 So. 2d at 946. The court found the order defective because it lacked any specific findings of fact to justify the certification. The court held that because of the unique circumstances of McAfee's arrest and the diversity of individuals he wished to represent in the class (including those who had made no claim within four years of payment), McAfee may not have been an appropriate class representative. In addition, this class was particularly unusual as it included individuals who had been arrested for drug- or prostitution-related offenses, and who may have had no interest in publicizing their identities. For these rea-

sons, the Second District reversed the grant of the motion for class certification and remanded the issue for a hearing to determine the factual and legal appropriateness of a certification and McAfee's fitness as a representative.

SIGNIFICANCE

McAfee, while it declines to address the merits of the plaintiff's claims against the ordinance, resolves the issue of summary judgment and injunctive relief in a manner consistent with other Florida courts. Also, this case is significant because it discusses the issues related to certification as a class representative. The case also reinforces the rule of civil procedure mandating that class certifications be supported by findings of fact and conclusions of law.

RESEARCH REFERENCES

- 3 Fla. Jur. 2d *Appealable Orders, Judgments, Decisions and Decrees* §§ 51–85 (2004).
- 39 Fla. Jur. 2d *Prerequisites of Class Actions* §§ 36–43 (2004).

Casey G. Reeder

Practice & Procedure: Discovery

Asset Management Consultants of Virginia, Inc. v. City of Tamarac,
913 So. 2d 1179 (Fla. 4th Dist. App. 2005)

Under Florida Rule of Civil Procedure 1.370, a matter is deemed conclusively established if a party fails to respond to a request for admission within the established time limit. A court may grant relief from the technical admission and allow a party to file a belated answer to the request for admission, provided such relief will not result in prejudice to the party seeking the admission. The court may properly deny such relief, however, if the party opposing the admission does not file the motion for belated answers until after the hearing on summary judgment has taken place.

FACTS AND PROCEDURAL HISTORY

Asset Management Consultants of Virginia, Inc. (AMCI) brought suit against the City of Tamarac, challenging the constitutionality of a city ordinance. During discovery, the City served a request for admission on AMCI, pursuant to Florida Rule of Civil Procedure 1.370. Under this rule, AMCI had thirty days to either answer or object to the request, and if a response was not timely made, the court could deem the matters "admitted," or conclusively established. Approximately three weeks after receipt of the request, AMCI's counsel moved to withdraw from the case. One month after the motion to withdraw was filed, the trial court allowed counsel to end representation of AMCI.

AMCI never responded to the request, and the City subsequently filed a motion for summary judgment based solely on the evidence that was "deemed admitted" by AMCI's failure to timely file its response. Several months before the summary judgment hearing, AMCI obtained substitute counsel. AMCI thereafter sought permission from the court to file a belated response to the request, but this motion was not filed until the date of the summary judgment hearing, after the hearing had concluded. The trial court ultimately denied AMCI's motion and granted summary judgment in favor of the City. AMCI appealed.

ANALYSIS

When a party fails to timely respond to a Rule 1.370 request for admissions, the matter is deemed conclusively established in the pending action "unless the court on motion permits withdrawal or amendment of the admission." Fla. R. Civ. P. 1.370(b). The rule permits the court to allow withdrawal or amendment when doing so would promote disposition on the merits, unless the party obtaining the admission can establish prejudice. The Fourth District Court of Appeal admitted that a liberal standard is normally applied to such motions to amend, to allow "disposition on the merits, rather than on technical admissions," but further stated that "even that standard has its limits." *Asset Mgt. Consultants,* 913 So. 2d at 1181.

The Fourth District referred to *Singer v. Nationwide Mutual Fire Insurance Co.*, in which the court upheld an order for summary judgment based on technical admissions. 512 So. 2d 1125, 1126 (Fla. 4th Dist. App. 1987). Although the party in *Singer*

never filed a motion for relief from the admissions, the opinion emphasized the prejudice suffered by a party that relies on technical admissions for a significant length of time and then files for summary judgment based on those admissions. *Id.* at 1126, 1129. The court believed that, in the instant case, the City was similarly prejudiced by AMCI's failure to move to file a belated response until the day of the summary judgment hearing. Although courts prefer to make decisions on the merits, the Fourth District held that the facts in this case supported the trial court's denial of AMCI's motion for relief.

Courts usually permit withdrawal or amendment if the technical admission is contradicted by the evidence. *Love v. Allis-Chalmers Corp.*, 362 So. 2d 1037, 1039 (Fla. 4th Dist. App. 1978). However, the Fourth District pointed out that there was no such contradictory evidence in this case. Furthermore, the court noted that the record provided no explanation for why AMCI's counsel waited until the day of the summary judgment hearing to file its motion for relief. AMCI argued that the delay was caused by its difficulties in obtaining substitute counsel, but the court stated that the timing did not support that contention. The court stated that there was ample time both before initial counsel withdrew, and after substitute counsel entered, for AMCI to file a motion for relief.

The court further emphasized the importance of upholding a trial court's discretion regarding the application of procedural rules, because the trial court interacts with the parties and is in a better position to evaluate procedural situations. Because the record contained no facts requiring the trial court to excuse AMCI's noncompliance with Rule 1.370, the Fourth District held that there was no abuse of discretion.

SIGNIFICANCE

Normally, trial courts apply a very liberal standard for granting a motion to amend or withdraw an admission under Rule 1.370. The rule does not specify a time within which a motion for relief must be filed, but many courts will allow the motion to be made until the time of the proceeding at which the admission is to be considered. *Asset Management Consultants* considers the limits of this liberal standard, and identifies one scenario under which a

trial court may be justified in denying a motion for relief from technical admissions.

This case underscores the importance of timely response to a request for admission. It also illustrates the necessity of filing a motion for relief from technical admissions as soon as possible after the need for such relief arises. After *Asset Management Consultants*, a practitioner who waits until the day of a summary judgment hearing to file a motion for relief runs a very real risk of denial of that motion.

RESEARCH REFERENCE

- 19A Fla. Jur. 2d *Discovery and Depositions* §§ 76, 78 (2004).

Paula P. Bentley

Practice & Procedure: Home Venue Privilege

School Board of Osceola County v. State Board of Education,
903 So. 2d 963 (Fla. 5th Dist. App. 2005)

In a suit between two governmental entities, the home venue privilege belongs to the defendant. Also, the "sword-wielder" doctrine exception is not available to governmental entities.

FACTS AND PROCEDURAL HISTORY

The School Board of Osceola County (OCSB) filed a suit against the State Board of Education seeking declaratory and injunctive relief. OCSB sought to have Florida's charter school statute declared unconstitutional and to enjoin the Board of Education from taking certain actions under the statute. The Board of Education moved to change venue to Leon County in accordance with the home venue privilege because its principal office and headquarters were located in Leon County. The trial court granted the change in venue and OCSB appealed.

ANALYSIS

Government defendants in Florida are entitled to a home venue privilege, which allows them to be sued in the county where they are headquartered. *Fla. Pub. Serv. Commn. v. Triple*

"A" Enters., Inc., 387 So. 2d 940, 942 (Fla. 1980). This privilege helps defray costs to governmental entities involved in litigation. *Id.* at 943. When, as in this case, the litigation is between two governmental entities, the privilege belongs to the defendant. In arguing its case, OCSB cited two lawsuits between governmental entities where venue lay outside the defendant's home venue. *See Sch. Bd. of Escambia County v. State*, 353 So. 2d 834 (Fla. 1977); *State v. Bd. of Pub. Instruction of Pasco County*, 176 So. 2d 337 (Fla. 1965). The Fifth District Court of Appeal, however, noted that the cited cases involved a waiver of home venue privilege and held that while a defendant may opt to waive its home venue privilege, the cases cited by OCSB should not be construed as requiring venue outside the defendant's home county.

OCSB next argued that because the Board of Education's actions threatened constitutional rights, the "sword-wielder" doctrine should apply. The "sword-wielder" doctrine operates as an exception to the home venue privilege when an individual's constitutional rights are threatened. In such circumstances, a suit may be brought in the county where the alleged constitutional violation occurred, regardless of where the governmental entity is headquartered. *Triple "A" Enters.*, 387 So. 2d at 942. The Fifth District, however, noted that the "sword-wielder" doctrine was available only to individuals. The court reasoned that because OCSB was a school board and not an individual, the "sword-wielder" doctrine exception was inapplicable.

The "sword-wielder" doctrine also may apply when the litigated state action is confined to a specific county. *Carlile v. Game & Fresh Water Fish Commn.*, 354 So. 2d 362, 365 (Fla. 1977). This exception is intended to allow for direct judicial intervention when a plaintiff's constitutional rights are threatened by an official state action in a specific county. *Id.* In the instant case, OCSB argued whether the Board of Education's actions under the charter school statute violated its constitutional rights. The Fifth District, however, noted that the primary purpose of OCSB's suit was to determine that the charter school statute itself was unconstitutional. The court reasoned that because the charter school statute applies to the entire state, any impact in Osceola County was incidental to the statewide impact of declaring the statute invalid. The court concluded that this "sword-wielder" doctrine

exception was also inapplicable, and affirmed the trial court's ruling.

SIGNIFICANCE

School Board of Osceola County clarifies the interaction between the home venue privilege and the "sword-wielder" doctrine when the plaintiff and defendant are both governmental entities.

RESEARCH REFERENCE

- 56 Fla. Jur. 2d *Venue* § 49 (2005).

Shannon A. Treadway

Practice & Procedure: Preservation of Error

Clear Channel Communications, Inc. v. City of North Bay Village,
911 So. 2d 188 (Fla. 3d Dist. App. 2005)

The mere questioning of a witness during a hearing before a local governing board is not sufficient to preserve an issue for appellate review. If a practitioner wishes to preserve legal errors for appeal, he or she must file a sufficiently specific objection before the local tribunal.

FACTS AND PROCEDURAL HISTORY

Following an unfavorable decision on a resolution before the City Commission of North Bay Village, Clear Channel Communications, Inc. and Fane Lozman sought review of the decision in court. The circuit court, acting in it appellate capacity, held that the mere questioning of a witness during a city commission's hearing was not enough to preserve a legal challenge for appeal. Clear Channel and Lozman appealed.

ANALYSIS

Appellate courts may review only questions that were before the lower tribunal and that were resolved unfavorably for the appealing party. *State v. Barber*, 301 So. 2d 7, 9 (Fla. 1974). Furthermore, objections must be made in a manner sufficient to alert the lower tribunal of the alleged error. *Ferguson v. State*, 417

So. 2d 639, 641 (Fla. 1982). The rationale for requiring a timely and specific objection is to provide an opportunity to rectify the error and to avoid the use of a challenge as a strategic maneuver on appeal. *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 185 (Fla. 3d Dist. App. 2005).

Clear Channel and Lozman contended that their questioning of a witness during the City Commission hearing was sufficient to preserve their issues for appeal. However, because an objection was not made during the hearing on the resolution, the City Commission was not placed on notice of the potential error. Using this rationale, the Third District Court of Appeal held that the circuit court correctly applied the law when it ruled that the questioning of a witness was inadequate to maintain an issue for appellate review.

SIGNIFICANCE

Clear Channel alerts practitioners to the procedure with which they must comply in order to preserve an issue for appellate review when before a city or county governing board. The case clarifies that in order to preserve a legal challenge for appeal the parties must file a proper objection with the local body just as if in a court of law. Merely questioning a witness during a public hearing will not adequately preserve an alleged error for appeal.

RESEARCH REFERENCE

- 2 Fla. Jur. 2d *Administrative Law* §§ 229, 230 (Westlaw database updated Jan. 2006).

Diana M. Delgado