

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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STATE OF OKLAHOMA
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MICHAEL D. MURPHY
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KEN YAZEL, Tulsa County Assessor,)
)
Petitioner/Appellant,)
)
vs.)
)
THE WILLIAM K. WARREN MEDICAL)
RESEARCH CENTER, INC., an Oklahoma)
Not-for-Profit Corporation; and)
MONTEREAU, INC., an Oklahoma Not-for-)
Profit Corporation,)
)
Respondents/Appellees.)

Case No. SD-111643
(Companion with
Case No. SD-111502)

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STATEMENT IN SUPPORT OF CERTIORARI OF AMICUS CURIAE
THE COUNTY ASSESSORS ASSOCIATION OF OKLAHOMA AND
THE COUNTY OFFICERS AND DEPUTIES ASSOCIATION OF OKLAHOMA

Appeal from the District Court of Tulsa County
Case No. CV-2012-827
Honorable Judge Linda G. Morrissey

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AND DEPUTIES ASSOCIATION OF OKLAHOMA

November 18, 2013

Amicus Curiae, The Assessors Association of Oklahoma (the “Assessors Association”) and the County Officers and Deputies Association of Oklahoma (“CODA”), respectfully submit this Statement in Support of Certiorari to review the published decision of the Court of Civil Appeals (the “COCA”) entered on September 26, 2013.

REASONS FOR REVIEW

This is a case of first impression and one which is of great public interest to ad valorem tax beneficiaries. The importance of the public interest in this matter is also evidenced by the application of the statewide County Officers and Deputies Association of Oklahoma and the Assessor’s Association of Oklahoma to file this Statement herein. At the heart of this case is the continuing viability of all 77 county assessors to fulfill the duties placed on them in connection with the Oklahoma Constitution and ad valorem tax code. The COCA’s decision, if allowed to stand, will have a significant impact on the ability of assessors to effectively and efficiently provide revenue to counties across Oklahoma.

In effect the COCA’s decision would allow the district attorney or the Oklahoma Tax Commission to determine the issues of ad valorem tax law to the exclusion of the judicial branch of government. COCA’s decision would eviscerate the power invested in the judicial branch to say what the law is, while closing the courthouse doors and leaving no effective remedy for an assessor to fulfill his or responsibilities absent district attorney approval.

I. THE COCA’S DECISION IS CONTRARY TO THE DECISIONS OF THIS COURT WHICH PRECLUDE COURTS FROM REWRITING A STATUTE AND READING WORDS OR ELEMENTS INTO A STATUTE THAT DO NOT APPEAR ON ITS FACE.

As a representative of the public interest, “[h]eavy responsibilities . . . are placed upon the tax assessor. He is the county officer who is most largely responsible for providing revenue

upon an ad valorem tax basis. . . . He is under oath to assess All property as provided by law; . . . he is required to determine the taxable status of property which is claimed to be exempt . . .”¹

In 1941, 68 O.S. § 15.42 granted county assessors in Oklahoma an explicit statutory right to appeal from orders of County Boards of Equalization (“BOE”) to district court. *See* 1941 Okla. Sess. Laws, p. 324, § 42. For seven years after the passage of that statute, assessors, at their own cost, presumably pursued appeals *pro se* or with counsel of their choosing. In 1947, the Legislature decided to assist the assessors in complying with their heavy responsibilities by amending §15.42 so as to grant them a statutory right to counsel by placing a duty on the county attorney, and an attorney for the Oklahoma Tax Commission (“OTC”) upon request, to represent assessors in such appeals. 1947 Okla. Sess. Laws, p. 419, § 8. In addition, this amendment provided assessors with financial backing to pay for appeals.² These amendments expanded an assessor’s ability to pursue appeals, rather than imposing new restrictions.

Subsection D of § 2880.1 provides as follows:

D. In such appeals to the district court and to the Supreme Court and in requests for declaratory judgment it shall be the duty of the district attorney to appear for and represent the county assessor. The General Counsel or an attorney for the Tax Commission may appear in such appeals or request for declaratory judgment on behalf of the county assessor, either upon request of the district attorney for assistance, or upon request of the county assessor. It shall be the mandatory duty of the board of county commissioners and the county excise board to provide the necessary funds to enable the county assessor to pay the costs necessary to be incurred in perfecting appeals and requests for declaratory judgment.

In its published decision, the COCA effectively held that the failure, unwillingness or inability of a district attorney to fulfill its duty to represent an assessor under § 2880.1(D) somehow extinguishes an assessor’s right to appeal under § 2880.1(A), thereby preventing the

¹ *Glass v. Carmelite Sisters of St. Therese of the Infant Jesus*, 1972 OK 60, ¶12, 496 P.2d 798, 800-01.

² 1947 Okla. Sess. Laws, p. 419, § 8; 68 O.S. Supp.1965 § 2461(d); 68 O.S. § 2880.1(D).

assessor from fulfilling his or her duties in connection with the assessment and collection of ad valorem tax. There simply is not, nor has there ever been, any language in what is now § 2880.1 suggesting that an assessor's right to appeal is conditioned upon the district attorney's review of a tax case and that district attorney's willingness to appear in such appeals on the assessor's behalf.³ The COCA's decision is plainly contrary to the decisions of this Court holding that courts are "not free to rewrite the statute" and must "vigorously resist reading words or elements into a statute that do not appear on its face."⁴

II. THE COCA'S DECISION EXTINGUISHING ASSESSOR'S RIGHT TO APPEAL IS CONTRARY TO THE DECISIONS OF THIS COURT CONSTRUING 68 O.S. § 2880.1 AND ITS' PREDECESSORS, § 15.42 AND § 2461.

The COCA's ruling that an assessor's right to appeal is cut off by the refusal or failure of someone *other than the assessor* to fulfill his or her duties is also contrary to the decisions of this Court construing the statute and its predecessors. As early as 1956, this Court held that "[t]he intention of the Legislature, by the enactment of 68 O.S.1951 § 15.42 [now § 2880.1], was to provide for a speedy and adequate remedy by appeal to District Court by either party from the action of the Equalization Board." *Chapman v. Tulsa Used Lumber and Wrecking Co.*, 1956 OK 208, ¶9, 299 P.2d 787, 791. Since *Chapman*, this Court has vigorously protected the right to appeal. In fact, this Court has already addressed the issue of whether a non-assessor official's failure to fulfill his or her § 15.42 (now § 2880.1) duties has an impact on the right of appeal.

³ Tellingly, on at least four occasions, this Court has decided appeals under § 2880.1 or its predecessor statutes where no district attorney had entered an appearance. See *Forston v. Heisler*, 1959 OK 122, 341 P.2d 252; *In re Assessment for the Year 2000 of Certain Property Owned by Oneok Field Services Gathering, LLC*, 2001 OK 116, 38 P.3d 900; *In re 2005 Tax Assessment of Real Property Owned by BMI Const. Co., L.L.C.*, 2008 OK 7, 187 P.3d 196; *Assessor of Roger Mills County v. Unit Drilling Co.*, 2011 OK 4, 247 P.2d 1170.

⁴ See e.g. *Okla. City Zoological Trust, v. State of Okla. ex rel. Pub. Empl. Rel. Bd.*, 2007 OK 21, ¶6, 158 P.3d 461, 464 (quotations omitted).

In *Appeal of National Bank of Commerce of Tulsa*, 1957 OK 203, ¶0, 316 P.2d 175, 178, the taxpayer filed in district court a notice of appeal from a BOE decision and the county clerk did not timely prepare and certify the transcript until almost three months after the notice of appeal was filed. *Id.* at ¶2, at 177. This Court affirmed the trial court’s denial of a motion to dismiss based on the clerk’s delay in preparing and filing the transcript, holding that *the delay of the county clerk in preparing and filing the transcript would not deprive a taxpayer of its appeal* if the required notice was timely. *Id.* at ¶8, at 177-78.

Several years later, in *Forston v. Heisler*, 1959 OK 1222, 341 P.2d 252, this Court reversed a trial court that had dismissed an appeal. In support of such reversal, the Court stressed that statutes giving and regulating the right of appeal are remedial and should be liberally construed in furtherance of the right of appeal. *Id.* at ¶¶9, 11-15, at 255-56. Finding “no question” that § 15.42 was remedial, the Court held that the assessor had the right of appeal from the order of the BOE. *See id.*

Twelve years later, in *Glass v. Carmelite Sisters of St. Therese of the Infant Jesus*, 1972 OK 60, 496 P.2d 798, this Court faced the issue of whether a county assessor may appeal an adverse decision of a board of tax-roll corrections to the district court. In light of the heavy statutory duties and responsibilities imposed upon assessors in representing the public interest in providing revenue upon an ad valorem tax basis, the *Glass* Court was “of the view that it would be contrary to the public interest to deny him the right of appeal.” *Id.* ¶¶12, 14, at 800-01.

The COCA’s overly restrictive interpretation of the statutes at issue cannot be reconciled with this Court’s previous opinions.⁵

⁵ It should also be noted that the Legislature, since *Appeal of National Bank*, has also made clear that “*the validity of any assessment . . . shall not be affected* because of any

III. THE COCA'S INTERPRETATION RENDERS 68 O.S. § 2880.1 UNCONSTITUTIONAL AND IS CONTRARY TO THIS COURT'S DECISIONS REQUIRING STATUTES TO BE CONSTRUED IN A MANNER THAT RENDERS THEM CONSTITUTIONAL.

The COCA's interpretation of § 2880.1 allows taxpayers to be represented by counsel of their choosing without any impact on their right to appeal yet extinguishes assessors' right to appeal if they are not represented by the district attorney or Oklahoma Tax Commission attorney. Referencing Section 51, Article V and Section 6, Article II of the Oklahoma Constitution, this Court has repeatedly emphasized that interpreting a statute as allowing an appeal to one party without allowing it *upon equal terms* and without discrimination to the other party would render such statute unconstitutional.⁶ In fact, this Court in *Forston* relied upon this rationale when it found that the trial court committed reversible error in dismissing a § 15.42 appeal from a BOE order increasing the amount of homestead exemption over that allowed by the assessor.⁷

Under the COCA's interpretation, § 2880.1 would not allow an appeal on equal terms because it places a limitation on the assessor's right to appeal that is not placed on the taxpayer's right to appeal. The impact of depriving assessors of their choice of counsel to represent them in appeals cannot be overstated. The choice of a legal practitioner is "critical" and "can have profound effects on the ultimate outcome of litigation" because "[p]ersonal qualities and professional abilities differ from one attorney to another."⁸ This Court has long recognized the importance of a party litigants' fundamental right to be heard by counsel of its choosing.⁹

insufficiency, informality or delay in the performance of *any duty* imposed upon *any official*, board or commission." 68 O.S. § 2943 (emphasis added).

⁶ See *Forston, supra*, at ¶¶16-25, at 256-58; *City of Tulsa v. Bd. of Trustees of Police Pension*, 1963 OK 267, ¶8, 387 P.2d 255, 258-59.

⁷ See *Forston, supra*, at ¶¶16-25, at 256-58.

⁸ *Phillips, supra*, at ¶12, at 904-05 (italics in original).

⁹ *Id.*; *Miami Bus. Serv., LLC v. Davis*, 2013 OK 20, ¶11, 299 P.3d 477, 483.

In *State of Oklahoma ex rel. Gene C. Howard v. Oklahoma Corporation Commission*, 1980 OK 96, 614 P.2d 45, the Oklahoma Supreme Court specifically addressed the Oklahoma Corporation Commission's right to be represented by in-house attorneys even though state law placed a duty on the attorney general to represent the commission in that proceeding. Drawing upon Section 6, Article II of the Oklahoma Constitution and the right to choose one's attorney, the court denied a motion to dismiss in a situation strikingly similar to that in this case. In *Howard*, an original action for a writ of mandamus was filed to require the Corporation Commission to comply with certain statutory provisions which the Attorney General had held in an opinion to be invalid. *Id.* at ¶1, at p. 47. The Commission was represented in the action by its own in-house attorneys. *Id.* at ¶2. Section 20 of Article IX of the Oklahoma Constitution provides that appeals from certain orders of the Commission may be taken to this Court only and that "in all appeals to which the State is a party it shall be represented by the Attorney for the Corporation, and the Attorney General, or his duly authorized representative." *Id.* at ¶7, at 48. 74 O.S.1979Supp. § 18c implicitly allowed the Commission to appoint its own-in house counsel.

The Attorney General filed a motion to dismiss contending that the Commission could only be represented by his office. *Id.* at ¶3, at 47. Denying the motion, this Court stated:

The foregoing language of Article IX s 20 does not bar Commission's attorneys from appearing for it. It clearly is implicit from the language of 74 O.S.1971 s 18c that the . . . Commission may appoint its own in-house counsel.

Likewise, the right to be represented by counsel ordinarily should include the right to make a choice, if timely exercised, of attorneys whose views are consonant with one's own or who at least will present the client's interests.

...

If then, the Commission may be brought into court . . . , Sections 6 and 7 of Article 2 of our State Constitution, . . . under any concept of affording it any semblance of even-handed justice, must require that it be represented if it so desires, by counsel who can and will ably and conscientiously express its views to

the tribunal. . . . Commission may properly be represented in this case by its own in-house counsel (employee-attorneys).¹⁰

Contrary to the teaching of the *Howard* case, the COCA needlessly interpreted conflict between § 2880.1 and other statutes in a manner contrary to the decisions of this Court. *Powers*, supra, at ¶28, at 1078 (“When we examine statutes there is a presumption that they are constitutional and we construe them, if at all possible, to be consistent with constitutional provisions.”); *Sharp*, supra, at ¶11, at 840 (“If possible, statutes are to be construed so as to render them consistent with one another.”).

In 1992, the same year that § 2880.1 was made operative and the duty to appear for and represent the county assessor in such appeals was shifted from the county attorney to the district attorney,¹¹ the Legislature created an exception to the district attorney’s duty to prosecute or defend civil actions or proceedings affecting the county by amending 19 O.S. § 215.4 and enacting 19 O. S. § 215.37M.¹² Up until that time, § 215.4 required district attorneys to prosecute or defend *all* civil actions or proceedings in which any county in his or her district was interested or a party.¹³ Since the changes in 1992, however, district attorneys have been excused from prosecuting or defending civil actions or proceedings in which a county in their district is interested or a party when the district attorney and the board of county commissioners agree that legal representation in such civil case may be provided by contract with a private attorney. *Id.*

The fact the Legislature created an exception to the district attorney’s duty to prosecute and defend civil actions or proceedings affecting the county later in the same year that the

¹⁰ *Id.* at ¶21-25, at 49-50.

¹¹ See 1989 Okla. Sess. Laws, c. 321, § 17, operative Jan. 1, 1992.

¹² 19 O. S. §§ 215.4, 215.37M; 1992 Okla. Sess. Laws, c. 316, § 59, eff. July 1, 1992; 1992 Okla. Sess. Laws, c. 327, § 9, eff. July 1, 1992; 1992 Okla. Sess. Laws, c. 316, § 61, eff. July 1, 1992.

¹³ See 1965 Okla. Sess. Laws, c. 256, § 4; 1967 Okla. Sess. Laws, c. 265, § 3 emerg. eff. May 8, 1967.

Legislature first placed the duty on the district attorney to appear for and represent the assessor in BOE appeals powerfully demonstrates that the Legislature did not intend for an assessor's right to appeal to be contingent upon an attorney with a particular title appearing on the assessor's behalf. The COCA's conclusion that an assessor's appeal must be dismissed in the absence of the district attorney's appearance cannot be reconciled with 19 O.S. § 215.4 or 19 O. S. § 215.37M, which were not even mentioned in the opinion.¹⁴ The COCA's decision is contrary to this Court's decisions holding that to arrive at the legislative intent, all other enactments upon the same subject must be considered and, when possible, construed together harmoniously.¹⁵

The COCA also needlessly found conflict between § 2880.1 and 19 O.S. § 527. In 2005, the Legislature provided assessors additional flexibility in ensuring that they comply their heavy responsibilities. Prior to 2005, § 527 permitted only sheriffs in counties with at least 450,000 persons to employ a general counsel. The Legislature, however, amended § 527 to give assessors in every county explicit statutory "authority to employ a general counsel, either in-house as a staff attorney or through an outside law firm, to advise or *represent that officer* and his or her office *in the performance of the official duties of that office.*"¹⁶ The COCA's opinion, which brushed aside § 527 by characterizing § 2880.1(D) as a "specific statutory exception to the general statute set out in § 527," is not supported by either statute. Section 2880.1(D) merely speaks to the *district attorney's* duty to appear in appeals for the assessor, but not to exclusion of an assessor's other counsel.

¹⁴ Opinion, ¶22 (emphasis added).

¹⁵ *In re Blain*, 1946 OK 238, ¶14, 172 P.2d 795, 799; *McNeill v. City of Tulsa*, 1998 OK 2, ¶9, 953 P.2d 329, 332.

¹⁶ 2005 Okla. Sess. Laws, c. 356, § 1, eff. Nov. 1, 2005 (emphasis added).

IV. THE COCA'S ATTEMPT TO ARTICULATE THE PUBLIC POLICY BEHIND § 2880.1(D), UNTETHERED FROM THE LANGUAGE OF THE STATUTE, IS CONTRARY TO THE DECISIONS OF THIS COURT.

Lacking statutory language supporting its decision, the COCA turned to what it saw as the “public policy” of § 2880.1(D). The COCA interpreted subsection D as creating a system of checks and balances designed to promote uniformity and predictability of public tax policy by “requiring the General Counsel of the Tax Commission to coordinate and chose those cases which should be appealed and which should not.” Along the same lines, according to the COCA, “requiring the district attorney to represent Assessor in an appeal provides a first level of objective, independent review of Assessor’s attempts to levy a tax. . . .” The COCA’s analysis is not only contrary to *Chapman*, where this Court held that “[t]he intention of the Legislature . . . was to provide for a speedy and adequate remedy by appeal,”¹⁷ it is also at odds with the decisions of this Court holding that “[t]he legislative intent is determined from the language of the statute in light of its general purpose.” *Sharp v. Tulsa County Election Bd.*, 1994 OK 104, ¶9, 890 P.2d 836, 840.

Subsection D, which provides representation and financial backing to assessors, provides no support for the COCA’s finding that these provisions were intended to promote “certainty, stability, uniformity and predictability of public tax policy.” The COCA has also grossly mischaracterized and overstated the OTC’s involvement in ad valorem tax appeals pursuant to § 2880.1.¹⁸ Section 2880.1(D) does not even arguably *require*, much less permit, the General

¹⁷ *Chapman, supra*, at ¶9, at 791.

¹⁸ It should be noted that out of the numerous decisions of this Court addressing appeals under § 2880.1 and its predecessor statutes, the OTC was involved in only a handful of such cases. *See Forston v. Heisler*, 1959 OK 122, 341 P.2d 252; *Home-Stake Prod. Co. v. Bd. of Equal. of Seminole County*, 1966 OK 115, 416 P.2d 917; *County Bd. of Equal. of Kay County v. Frontier Grain Co.*, 1969 OK 82, 454 P.2d 317; *Appeal of Billings Community Elevator, Inc.*, 1972 OK 113, 510 P.2d 953.

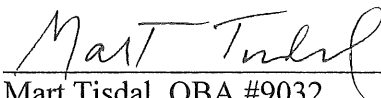
Counsel of the OTC to somehow “coordinate and chose those cases which should be appealed” under § 2880.1. (Opinion, ¶14).

Moreover, the COCA’s conclusion that the Legislature, by requiring the district attorney to *represent* the Assessor, intended to provide some sort of “first level of objective, independent review of Assessor’s attempts to levy a tax” is totally contrary to the very “nature of the attorney-client relationship in our adversarial system of justice, where an attorney acts as the *personal agent of the client.*” *Arkansas Valley State Bank v. Phillips*, 2007 OK 78, ¶12, 171 P.2d 899, 904 (emphasis added). All attorneys must generally “*abide by a client’s decisions concerning the objectives of representation*” and, as advocate, must “*zealously assert[] the client’s position.*” 5 O.S.2011, ch. 1, app. 3-A, Preamble & Rule 1.2 (emphasis added). The COCA’s decision, in effect, exempts district attorneys from these duties contrary to the Oklahoma Rules of Professional Conduct approved by this Court. *Id.*; *In re App. of Okla. Bar Ass’n to Amend Okla. R. of Prof. Conduct*, 2007 OK 22, 171 P.3d 780.

CONCLUSION

For the foregoing reasons, the Assessors Association and CODA respectfully support granting certiorari to review the published decision of COCA.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the Amicus Curiae Application of The County Assessors Association of Oklahoma and The County Officers and Deputies Association of Oklahoma for Leave to File a Statement in Support of Certiorari was mailed this 18th day of November, 2013 to

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