IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

BILLMATRIX CORPORATION;
CHECKFREE SERVICES CORPORATION;
ITI OF NEBRASKA, INC., XP
SYSTEMS CORPORATION, and
CARREKER CORPORATION,

Appellants, Case No. 1D23-1920

vs.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellee.
_____/

FISERV PAR, INC.,

Appellant, Case No. 1D23-1968

vs.

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellee.
_____/

CONSOLIDATED REPLY BRIEF OF APPELLANTS

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REPLY ARGUMENT

The Department of Revenue's Answer Brief entirely ignores binding Florida Supreme Court precedent and precedent from this Court making clear that the requirements of section 72.011(3)(b), Florida Statutes, do not, and cannot, relate to subject matter jurisdiction. Likewise, the Department's Answer Brief fails to respond to Appellants' argument that leave to amend should have been granted, and that the Department's executive director was required to act on Appellants' request for a written waiver.

The Department's inability to rebut Appellants' arguments underscores the need for reversal of the trial court orders at issue, to prevent the Department from attempting to collect on tax assessments already determined to be illegal. The circuit court in the Billmatrix Proceeding determined more than six million dollars in tax assessments against the Appellants violated Florida statutes and Department rules, and on that basis declared the assessments invalid and illegal. Notwithstanding the fact that the Department repeatedly requested, and received, a ruling on the merits from the court below, the Department seeks to evade the trial court's ruling and collect on the illegal assessments based on

its eleventh-hour assertion that the court lacked subject matter jurisdiction over the case.[1] The Department's jurisdictional arguments fail for numerous reasons. Additionally, the Department's mission should be to collect taxes in compliance with Florida law, and not to attempt to play "gotcha" with taxpayers.

I. Binding Precedent Makes Clear Section 72.011(3)(b) Cannot Alter the Circuit Court's Constitutional Jurisdiction

The Department's Answer Brief ignores the binding Florida Supreme Court precedent in *State v. Jefferson*, 758 So. 2d 661 (Fla. 2000), which makes clear section 72.011 cannot alter constitutional subject matter jurisdiction. *Jefferson* provides quite clearly that "constitutional jurisdiction cannot be restricted or taken away" by the Legislature, and was a core focus of Appellants' Initial Brief.[2] *State v. Jefferson,* 758 So. 2d at 664; *see also* 12A Fla. Jur 2d Courts and Judges § 44 ("The state legislature

[1] The assessments were invalidated on the merits, as the court in the Billmatrix Proceeding determined the Department assessment was based on improper interpretations of administrative rules and Florida Statutes.

[2] Discussed at length on pages 33 and 35-36.

cannot restrict or take away the constitutional jurisdiction of the courts.").

The Legislature cannot eliminate or reduce the constitutional jurisdiction of the courts over tax assessment challenges, and the Department's assertion to the contrary ignores the plain language of article V, section 20, and is directly contrary to *Jefferson* (which the Department also ignores). Article V, section 20 provides that circuit courts have jurisdiction "in all cases involving legality of any tax assessment." Art. V, § 20(3), Fla. Const. Article V, section 20 also makes clear that the Legislature may only change the constitutional subject matter jurisdiction in a manner consistent with article V, sections 1-19. *Jefferson* recognized the limited instances in which the Legislature has the power to alter the jurisdiction of the courts pursuant to article V, section 1-19, none of which apply here. *Jefferson*, 758 So. 2d at 664, n.2. Interpreting section 72.011 as eliminating or restricting the circuit court's constitutional jurisdiction over tax assessments "would run counter to the important principle that statutes should be construed to avoid an unconstitutional result." *Jefferson,* 758 So. 2d at 664.

The Department also mistakenly asserts that the constitutional arguments raised by Appellants were rejected in *North Port Bank v. Department of Revenue*, 313 So. 2d 683 (Fla. 1975), and *Bystrom v. Diaz*, 514 So. 2d 1072 (Fla. 1987). In fact, neither case even mentions (1) article V, sections 5 and 20 of Florida's Constitution, (2) subject matter jurisdiction, or (3) section 72.011. Instead, *Bystrom* considered challenges brought pursuant to article I, section 21 (access to courts), and article VII, section 13 (requiring payment of *uncontested property taxes* before courts can grant relief from illegally assessed taxes). *North Port Bank* addressed arguments raised pursuant to article I, section 21, equal protection, and due process, and also considered whether the statute at issue unlawfully delegated judicial authority to an administrative agency. Accordingly, the Department's reliance on *Bystrom* and *North Port Bank* is clearly misplaced, and neither case is relevant to the constitutional argument at issue here. Further, both cases were issued prior to the binding Florida Supreme Court decisions in *Jefferson* and *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179 (Fla. 1994), discussed below.

In sum, the Department's argument that section 72.011(3)(b) altered the constitutional jurisdiction of the circuit courts with respect to tax assessments contradicts the plain language of Florida's Constitution, and binding Florida Supreme Court precedent. The Department makes no attempt to rebut the actual constitutional arguments made by Appellants, and fails to explain why *Jefferson* does not require reversal.

II. Section 72.011(3)(b) Does Not Relate to Subject Matter Jurisdiction

Next, the Department entirely ignores the Florida Supreme Court's precedent in *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179 (Fla. 1994), and this Court's decision in *Viverette v. State, Dep't of Transportation*, 227 So. 3d 1274 (Fla. 1st DCA 2017). *Cunningham* and *Viverette* are discussed at length in Appellants' Initial Brief,[3] and both cases make clear that the Department's view of subject matter jurisdiction is erroneous, and application of controlling precedent requires reversal. Each case clarifies that subject matter jurisdiction relates to the power of a court to deal with the general subject matter involved in the action,

[3] Pages 38-45 in particular.

not the facts of a particular case. This Court in *Viverette* summarized the holding of *Cunningham* as follows:

> . . . in *Cunningham v. Standard Guaranty Insurance Co.*, 630 So. 2d 179 (Fla. 1994), the Florida Supreme Court reaffirmed the principle that subject matter jurisdiction is the "'power lawfully conferred to deal with the general subject involved in the action'" and "'does not depend upon the ultimate existence of a good cause of action in the plaintiff, in the particular case before the court.'" *Id.* at 181 (quoting *Malone v. Meres*, 109 So. 677, 683 (Fla. 1926)). Stated differently, "[i]t is the power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case." *Id.*

Viverette, 227 So. 3d at 1277–78.[4] Apparently unable to formulate a response to Appellants' arguments, the Department simply ignores *Cunningham* and *Viverette*, and makes no mention of either case in its Answer Brief.[5]

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[4] A litany of other cases standing for this same proposition are cited at pages 39-40 of Appellants' Initial Brief.

[5] The Department also ignores the well-reasoned 2008 Florida Bar Journal article written by Judge Stephens, which makes clear that section 72.011(3)(b) cannot relate to subject matter jurisdiction. *See* Judge Scott Stephens, *Florida's Third Species of Jurisdiction*, Fla. B.J., (March 2008). Judge Stephens' article has been cited with approval by this Court and other courts. *See Viverette*, 227 So. 3d at 1278; *14302 Marina San Pablo Place SPE, LLC v. VCP-San Pablo, Ltd.*, 92 So. 3d 320, 321 (Fla. 1st DCA 2012); *see also Klem v. Espejo-Norton*, 983 So. 2d 1235, 1238 (Fla. 3d DCA 2008); *Mannino v. Mannino*, 980 So. 2d 575, 578 (Fla. 2d DCA 2008).

As discussed in detail in Appellants' Initial Brief, the courts below do not lack the "power lawfully conferred to deal with the general subject involved." *See Cunningham*, 630 So. 2d at 181. Rather, circuit courts clearly have the power to deal with the general subject of tax assessments, as demonstrated by the trial court's denial of the Department's motion to dismiss, and issuance of final judgment, as to Fiserv Auto (one of the consolidated plaintiffs in the Billmatrix Proceeding). Instead, the court's order of dismissal as to the remaining plaintiffs below was dependent not on the general subject involved, but the specific facts applicable to each plaintiff, in direct contravention of *Cunningham* and *Viverette*. *See Viverette*, 227 So. 3d at 1277–78; *Cunningham*, 630 So. 2d at 181.

The Department also fails to provide any explanation for how section 72.011(3)(b) can relate to subject matter jurisdiction given that true subject matter jurisdiction cannot be waived, but section 72.011(3)(b) expressly provides that its requirements can be waived. *See Polk County v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997) (recognizing that subject matter jurisdiction "cannot be created by waiver, acquiescence or agreement of the parties.");

Cobb v. State ex rel. Hornickel, 187 So. 151, 155 (Fla. 1938) (a court which lacks jurisdiction "to adjudicate the class of cases to which the particular case belongs" lacks jurisdiction to adjudicate such cases even if the parties stipulate to the court's jurisdiction). Indeed, the plain language of section 72.011(3)(b) provides twice that its requirements are subject to waiver. *See* § 72.011(3)(b) (". . . unless this requirement is waived in writing"). Accordingly, the Department's argument that the provisions of section 72.011(3)(b) relate to subject matter jurisdiction is directly contradicted by the statute's plain language, as well as the Florida Supreme Court's decisions in *Sofka* and *Cobb*.

Notably, in contrast to the provisions of section 72.011(3)(b), which expressly recognize they are subject to waiver, the requirements of section 72.011(3)(a) *do not* state they are subject to waiver. Such a distinction finds support in Florida's Constitution, as article VII, section 13, of Florida's Constitution states:

> SECTION 13. Relief from illegal taxes.—Until payment of all taxes which have been legally assessed upon the property of the same owner, no court shall grant relief from the payment of any tax that may be illegal or illegally assessed.

The provisions of section 72.011(3)(a), and article VII, section 13, do not apply here, as the Appellants challenged the entirety of the tax assessments issued to the Billmatrix and Fiserv PAR parties, and the trial court determined that the entirety of the tax assessment as to the Billmatrix Parties was illegal. Accordingly, the only applicable provision of section 72.011(3) is subsection (b), and subsection (b) cannot, as a matter of law, relate to subject matter jurisdiction. Again, apparently unable to explain the clear contradiction between its argument that the requirements of section 72.011(3)(b) relate to subject matter jurisdiction, and the fact that section 72.011(3)(b) expressly states its requirements are subject to waiver, the Department simply ignores Appellants' argument entirely.

The Department's argument that the requirements of section 72.011(3)(b) are only waivable pursuant to a specific procedure also does not withstand scrutiny. The Department argued below that *only* the executive director had the authority to waive the requirements of section 72.011(3)(b), and that the Department's deputy general counsel lacked such authority. After Appellants

provided evidence that the Department's general counsel, and deputy general counsel, had previously waived such requirements on behalf of the Department, the Department recognized for the first time in its Answer Brief that the executive director could delegate his waiver authority under section 72.011(3)(b), and suggested that the executive director had apparently previously delegated his authority to the Department's general counsel and deputy general counsel. Ans. Br. at 14-15. The Department maintains, however, that its deputy general counsel's waiver of the section 72.011(3)(b) requirements in these cases is irrelevant because the waiver was not in writing.

There remains a flaw in the Department's new argument, however. None of the eight "written waivers" issued by the Department's general counsel's office state the executive director is waiving the requirements of section 72.011(3), and none of the waivers state that the general counsel's office is authorized to waive the requirements pursuant to a delegation of authority. Rather, the written waivers state only that "the Department" is waiving the requirements of section 72.011(3). Accordingly, while the Department urges strict compliance with the requirement that

section 72.011(3)(b) be "written," the Department ignores entirely the fact that none of the waivers it issued in other cases strictly comply with the Department's own rules or interpretation of the section 72.011(3)(b), as none of the waivers were issued by the executive director, and none of the waivers even state they were issued by a designee under his authority.

The Department also glosses over the fact that in the Billmatrix Proceeding the Department admitted in writing the trial court had jurisdiction, and such writing constitutes a written waiver of the requirements of section 72.011(3)(b) by the Department's general counsel's office.[6] In its attempt to explain away its admission that the trial court had jurisdiction in the Billmatrix Proceeding, the Department engages in revisionist history. For example, when the Department's answer admitted that "[t]his Court *has jurisdiction in this action* pursuant to section 72.011(4)(a), Florida Statutes," the Department asserts that it only

[6] The Department affirmed that the counsel who oversaw the Billmatrix Proceeding (presumably including its answer) is the same counsel responsible for processing section 72.011(3)(b) waivers. BR 240.

meant that *venue* was proper in the circuit court. BR 10-11 , 43; Ans. Br. at 2-3 (emphasis added). The absurdity of the Department's position is demonstrated by the fact that it actively litigated the *Billmatrix* proceeding for three years after filing its answer, did not reference lack of jurisdiction as an affirmative defense, and also admitted venue was proper via an entirely separate paragraph of its answer.[7] Further, the Department expressly admitted in its answer that the trial court had jurisdiction over the Billmatrix Proceeding pursuant to section 86.011, Florida Statutes, but argued in its Motion to Dismiss that the same requirements of section 72.011(3)(b) would deprive the

[7] The Department's contention that it did not seek substantive relief prior to its motion to dismiss is contradicted by the record. Ans. Br. at 4. The Department's 2020 answer in the Billmatrix Proceeding expressly requested declaratory relief in favor of the Department (BR 44), and the Department repeatedly requested a ruling on the merits from the trial court in other filings. *See, e.g.,* BR 69 ("The Department in good faith requires a binding precedent in this case, arbitration will not produce results, and the grounds identified by the Department are "other good cause [] shown" under Rule 1.700(b)(4), Florida Rules of Civil Procedure, from non-binding arbitration. This matter should be heard before the Court."); BR 80 (same); BR 204 ("The Department is seeking judicial guidance with a ruling on this corporate income tax apportionment issue. The Department wants a prompt resolution, the ability to complete the limited discovery request, and confirms its request will not delay the current trial date.").

court of jurisdiction over an action brought under section 86.011 if it related to tax assessments. *See* BR 10-11, 43, 330. The Department ignores this contradiction in its attempt to rewrite history.

The Department's evolving position on its answer and admission the trial court had jurisdiction in the Billmatrix Proceeding is disingenuous and absurd. Surely the Department did not waste taxpayer resources by actively litigating the *Billmatrix* proceeding for years despite believing all along the circuit court lacked subject matter jurisdiction over the proceeding. Nevertheless, accepting the Department's assertions leads to the conclusion that the Department wasted judicial and taxpayer resources litigating the Billmatrix Proceeding for three years to see how the merits of the trial court proceeding would develop, before deciding whether it would assert the trial court lacked subject matter jurisdiction throughout the pendency of the case. While the trial court expressed "consternation" with the actions of the Department for this reason, the more simple explanation is the Department waived the requirements of section 72.011(3)(b), admitted jurisdiction under both section 72.011 and

86.011 in its answer, and only attempted to reverse course at the eleventh-hour in an attempt to avoid an adverse merits ruling.

In sum, the requirements of section 72.011(3)(b) cannot, and do not, relate to subject matter jurisdiction, and even if they did, the requirements of section 72.011(3)(b) were waived by the Department as is specifically contemplated by the plain language of the statutory section.

III. The Trial Court's Orders Contradict Binding Precedent

While the Department ignores the binding Florida Supreme Court precedent in *Jefferson* and *Cunningham,* and this Court's decision in *Viverette*, it implores this Court to apply its decision in *Department of Revenue v. Nu-Life Health & Fitness Center.*, 623 So. 2d 747 (Fla. 1st DCA 1992). *Nu-Life* was decided before *Jefferson, Cunningham,* and *Viverette*, and application of *Nu-Life* here as urged by the Department would contradict such precedent.

As discussed at length in Appellants' Initial Brief, *Nu-Life* did not involve any express or implied waiver by the Department of the provisions of section 72.011(3)(b). Rather, in stark contrast to the proceedings below, the *Nu-Life* docket demonstrates the

Department moved to dismiss for lack of jurisdiction immediately after the operative complaint was filed.

The Department hangs its hat on *Nu-Life's* passing references to subject matter jurisdiction, but *Nu-Life* does not actually analyze whether the requirements of section 72.011(3)(b) relate to subject matter jurisdiction, does not consider how such requirements could possibly relate to subject matter jurisdiction given that the statute itself indicates they are waivable, and does not determine whether interpreting section 72.011(3)(b) as relating to subject matter jurisdiction violates the provisions of article V, section 20.

Any references in *Nu-Life* to section 72.011(3)(b) pertaining to "subject matter jurisdiction" were misnomers, as made clear by the Florida Supreme Court's subsequent decision in *Cunningham,* and this Court's decision in *Viverette*. *Cunningham* is particularly instructive, as the Court in *Cunningham* considered a 1992 decision from this Court (the same year *Nu-Life* was issued) that referred to a different statutory requirement as being one of "subject matter jurisdiction." The Florida Supreme Court reversed, and clarified the meaning of subject matter jurisdiction,

making clear that statutory requirements such as the one at issue *do not* relate to subject matter jurisdiction. *Cunningham*, 630 So. 2d at 182.

Likewise, the Florida Supreme Court's decision in *Jefferson*, decided eight years after *Nu-Life*, clearly controls to the extent it conflicts with *Nu-Life* and makes clear that section 72.011 cannot alter the constitutional subject matter jurisdiction of circuit courts. Given the binding Florida Supreme Court precedent cited herein and in the Initial Brief, as well as this Court's decision in *Viverette,* reliance on *Nu-Life* to hold the requirements of section 72.011(3)(b) relate to subject matter jurisdiction would be error.

IV. Leave To Amend Should Have Been Granted.

The Department also ignores entirely Appellants' argument that leave to amend should have been granted, and likewise ignores this Court's precedent establishing that amended complaints relate back to the filing of the original complaint. Even assuming that the Department's repeated waivers of the requirements of section 72.011(3)(b) are of no effect, and that the requirements of the section relate to subject matter jurisdiction, the trial court's dismissal orders should have been without

prejudice and with leave to amend to cure any alleged jurisdictional defects.

As discussed on pages 59-63 of Appellants' Initial Brief, amended complaints relate back to the time of filing the original complaint. *See Brooks v. Interlachen Lakes Ests., Inc.*, 332 So. 2d 681, 682 (Fla. 1st DCA 1976). Section 72.011(3)(b) refers to tendering into the registry of the court "with the complaint" the amount of the contested assessment, and filing "with the complaint" a cash bond or a surety bond for the amount of the contested assessment. § 72.011(3)(b), Fla. Stat. Nothing in the statutory section states that the filing can only be made with the "initial" complaint, or prohibits the filing of an amended complaint complying with such requirements, and the Department cites no authority for a contrary proposition.

Brooks is particularly instructive, as the case addressed a trial court's dismissal for lack of subject matter jurisdiction based on a plaintiff's failure to comply with the analogous requirements of section 194.171, Florida Statutes, which stated "*Before a taxpayer may bring an action to contest a tax assessment, he shall pay to the collector the amount of the tax which he admits in good*

faith to be owing. The collector shall issue a receipt for the payment, and the taxpayer shall file the receipt with the complaint." *Brooks,* 332 So. 2d at 682 (emphasis added). In reversing the dismissal for lack of subject matter jurisdiction, this Court held that the filing of an amended complaint relates back to the filing of the initial complaint, and the requirements of section 194.171 could therefore be satisfied with the filing of the amended complaint. *Id.* at 682. The requirements of section 72.011(3)(b) can likewise be satisfied with the filing of an amended complaint here, even assuming they were not waived by the Department.

This Court reached the same conclusion in *Hilltop Ranch, Inc. v. Brown,* 308 So. 2d 124 (Fla. 1st DCA 1975), which was cited in *Brooks*. In addressing the same requirements at issue in *Brooks,* the Court stated in *Hilltop Ranch*:

> **even if we were to hold that the payment of the taxes within the 60 days allowed for filing a complaint were a jurisdictional prerequisite, which we decline to do at this time, we find that appellant complied with the requirement when it filed its amended complaint which related back to the time of filing the original complaint**.

Hilltop Ranch, Inc., 308 So. 2d at 126 (emphasis added). Accordingly, both *Brooks* and *Hilltop Ranch* held that amended

complaints relate back to the time of filing the original complaint, even in the context of tax statutes, and this Court affirmed the principle of relation back *even as to jurisdictional prerequisites*. *Id.* at 682 (emphasis added). The same principles must apply here, and the Department's inability to formulate any response to this argument is telling.

V. The Trial Courts Erroneously Determined They Lacked Jurisdiction To Consider Alternative Security Arrangements.

Aside from a passing reference to the Fourth District's decision in *Department of Revenue v. Swago T-Shirts, Inc.*, 877 So. 2d 761 (Fla. 4th DCA 2004), the Department also fails to address the absurdity presented by its argument that section 72.011(3)(b) provides a trial court subject matter jurisdiction to hear a tax assessment challenge where a motion for alternative security arrangement is filed, but only if a party files such a motion at the same time it filed its initial complaint. Section 72.011(3)(b) permits a trial court to approve an alternative security arrangement in lieu of posting a bond or tendering into the court registry the disputed amount of the contested assessment. While the statute references a bond being filed "with the complaint,"

section 72.011(3)(b) *does not* state that a security arrangement approved by the court must be filed with the complaint, nor could it be, as there is no mechanism for the court to approve such a security arrangement prior to the case even being filed and assigned to a judge.

The Fifth District has expressly held that a motion for alternative security arrangement can be filed after the complaint is filed, as there is no magic to such motion being filed on or before the date the initial complaint is filed. *Don's Sod Co. v. Dep't of Revenue*, 661 So. 2d 896, 901 (Fla. 5th DCA 1995).[8] The filing of a motion cannot convey subject matter jurisdiction on a court where it does not exist, and it is absurd to suggest a court which lacks subject matter jurisdiction over a case has jurisdiction to consider a motion which would allow the court to vest itself with subject matter jurisdiction. Further, as detailed in Appellants' Initial Brief, if a motion for alternative security arrangement is filed with a complaint, and subsequently denied, the trial court would

[8] This Court cited *Don's Sod* with approval in *PageNet, Inc. v. State Dep't of Revenue*, 896 So. 2d 824, 827 (Fla. 1st DCA 2005).

presumably immediately be divested of subject matter jurisdiction without a plaintiff having any ability to post a bond. This approach defies common sense.[9]

CONCLUSION

Appellants respectfully request this Court reverse the final judgments of dismissal, remand for further proceedings, and grant such other relief as is just and proper.

[9] The Department likewise fails to respond to Appellants' argument that the Department's executive director, or his designee, had a non-discretionary duty to act on, and issue, a written waiver to Appellants pursuant to section 72.011(3)(b) and Florida Administrative Code Rule 12-3.007, as discussed on pages 63-65 of Appellants' Initial Brief.

Respectfully submitted this 30th day of April, 2024.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the type size and style used in this brief is double-spaced 14-point Bookman Old Style, and that this brief contains 3,992 words, calculated pursuant to Florida Rule of Appellate Procedure 9.045(e).

/S/ JAMES A. MCKEE