OA 10-4-91

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Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Appellant,

CASE NUMBER: 78,563

vs.

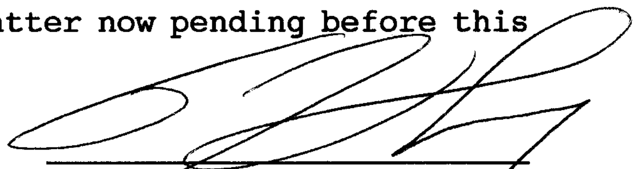
HONORABLE E. D. "BUD" DIXON, ETC.,

Appellee. /

NOTICE TO ADOPT

COMES NOW the Appellee in the above entitled action, HONORABLE E. D. "BUD" DIXON, etc., by and through his undersigned attorney, and files this his Notice to this Honorable Court requesting that this Court adopt, for purposes of the Appeal now pending in this matter, the Answer Brief filed by the Appellee when the action was pending before the District Court of Appeals for the Second District of the State of Florida.

The original of said Brief and seven (7) copies are hereby attached to this Notice, and it is requested that said Brief be filed as the Appellee Brief in the matter now pending before this Court.



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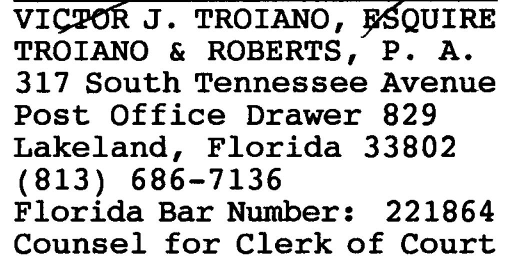
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to JOSEPH LEWIS, JR., ESQUIRE, Department of Legal Affairs, The Capitol-Suite 1501, Tallahassee, FL 32399-1050; FRED W. BAGGETT, ESQUIRE, Post Office Drawer 1838, Tallahassee, Florida 32302; STEVEN CARTA, ESQUIRE, Post Office Box 1686, Fort Myers, Florida 33902; and CHARLES L. CARLTON, ESQUIRE, 2120 Lakeland Hills Boulevard, Lakeland, Florida 33805 this 23 day of September, 1991.



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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
LAKELAND, FLORIDA

STATE OF FLORIDA, DEPARTMENT
OF HEALTH AND REHABILITATIVE
SERVICES,

Appellant,

CASE NUMBER: 90-01618
90-01619

vs.

HONORABLE E. D. "BUD" DIXON,
ETC.,

Appellee. /

ANSWER BRIEF OF APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE TENTH
JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

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PRELIMINARY STATEMENT

The Appellee, E. D. "Bud" Dixon, will adopt the same designations as stated in the initial Brief of the Appellant, State of Florida filed in this matter.

Accordingly, references to the record on Appeal will be designated by the letter "R", followed by the appropriate volume and page numbers. References to the transcript of the initial Final Hearing/Non-Jury Trial held on February 10, 1989, will be designated by the letter "H" followed by the appropriate page numbers. References to the transcript of the hearing on the Motion for Rehearing, held on August 1, 1989, will be by the letter "M" followed by the appropriate page number. References to the transcript of the Rehearing, held on October 23, 1989 and November 30, 1989, will be by the letter "T" followed by the appropriate page number. Finally, references to the various exhibits, introduced as evidence, will be made by designating the Plaintiff's exhibits as "PL", and the Defendant's exhibits as "D" each of which is then to be followed by the appropriate exhibit number as designated in the record of Appeal, and a letter "A" for those items introduced during the February 10, 1989 hearing and the letter "B" for those items introduced during the October 23 and November 30, 1989 hearings.

STATEMENT OF THE CASE AND FACTS

In responding to the Statement of the Appellant, which reflects the testimony in a light most favorable to the Appellant, the Appellee feels it necessary to explain his role with regard to the "Child Support Depository Account (CSDA)" and the numerous changes that have occurred, over the last few years, with regard to the laws which govern this responsibility which is statutorily placed upon him. Also he feels it is necessary to review all the documentary evidence which he presented during the various hearings.

The Appellee as Clerk acts as Administrator, Manager and Operator of the CSDA for receiving, recording, reporting, monitoring and disbursing alimony, support, maintenance and child support payments, as directed by Florida Statute 61.181(1)(H8). Assisting the Clerk in its operation are his Finance Department and his Enforcement Department (H9). The CSDA actually consists of over 15,000 individual accounts (H66), each account with an individual payor and individual payee. With regard to each of these individual accounts, the Appellee acts as fiduciary (H262) monitoring these accounts in the same fashion as a lawyer would monitor his trust account (H262). Once a court order is received, the CSDA Department will set up the account, assign it a number, and thereafter monitor the receipts and disbursements of each individual account. All CSDA funds are deposited and paid out of a separate non-interest bearing trust account, set up in the name of the Clerk, and maintained at the Southeast Bank in Bartow, Florida (H118). The Finance Department actually deposits all funds received

by the CSDA in this separate bank account and receives and reconciles the monthly bank statement. This Finance Department receives notice of any checks that are returned as "unpaid" for any reason and redeposits those checks in an effort to "make them good" (H118, 119). The Enforcement Department enforces child support and alimony delinquencies on accounts that are paid through the CSDA using various means, including Income Deduction Orders (H75, PL 11 "A").

The basic procedure involves the interrelation of the above-mentioned three departments. Once the CSDA has set up the individual account, after receipt of a Court Order, the CSDA maintains an individual running account of what is owed by that payor to that payee. As the payor makes payment, it is credited to the individual account and a check is cut from the CSDA bank account to the payee (H64, 119). The CSDA books are closed each day at 12:30 p.m. to allow the departments to check and balance all entries and print all checks (T10). The receipts are given to the Finance Department for deposit in the CSDA bank account and all checks are mailed out to the respective payees. The receipts are then picked up by armored car the next morning and physically taken for deposit to the CSDA bank (T11)(H118 to 119). Since the Clerk is allowed, by Florida Statute 61.181(2a), to collect a fee for this service, the CSDA contains not only money owed to payees, but the Clerk's 3% fee. These fees are removed each month and put into the Clerk's "General Revenue Account" which is public money (H24,263)(T43). The CSDA account is referred to as a "zero balance account" in that it is balanced monthly to a balance of zero. There are no funds in that account other than money

to go to specific payees and the Clerk's fee for maintaining the Depository (H22,34,120,165,223)(T15,16). No public money remains in that account since the Clerk's fees are taken out monthly (ID.). All payments by payors are paid to the respective payees, less the Clerk's statutory fees. The Clerk's statutory fees are used by the Clerk as part of its budgetary income for the operation of the Clerk's Office. Any excess in said fees, at the end of the fiscal year, are paid over to the Board of County Commissioners (H13, T43). On a weekly basis, the CSDA forwards a "delinquency list" to the Enforcement Department, and they then attempt to collect said payments by various means (PL 11 A, H75).

Prior to October 1, 1976, the above system worked with little difficulty since Florida Statute 61.181 allowed payments to the CSDA only by cash or its equivalent. The Clerk could safely issue a payment to the payee out of the CSDA bank account, immediately, knowing that the payor's funds were actually in the account. The Clerk was not forced to pay one payee with money from an unrelated payor or with public money. Then, on October 1, 1986, the statute was amended by allowing the payors to make payments to the CSDA by personal check. The Clerk now faced the possibility of making a payment to a payee, only to find out later that the payor's check was not honored. The Clerk would have to pay one payee with the money of an unrelated payor or would have to supplement the CSDA Account with funds from its own General Revenue Account, public money, to satisfy its fiduciary responsibility of maintaining the account with a "zero balance." The Legislature did give the Clerk some protection by

stating in the statute; "...Proceeds of the check need not be disbursed prior to payment of the check." Based upon that language, the Clerk's policy on personal checks was that disbursement would not be made to payees until 14 calendar days (10 work days) had elapsed, thereby giving the Clerk the opportunity to verify that the check would be honored (H21, H55, H73, H74, T9). Other Clerks adopted the same policy (H217, H232). Under this amendment, the Clerk could be certain that no payee would be paid with the funds of another payor nor were public funds needed to balance the account (H131, T17).

This lawsuit resulted from the action of the Legislature in the 1988 Legislative Session. Effective October 1, 1988, the Legislature again amended Florida Statute 61.181(5). The Clerk could no longer hold payments to the payee until the proceeds of the payor's check was received by the CSDA Account. Now, "payment shall be made by the Depository to the obligee (payee) within <u>two (2) working days</u> after the Depository receives the obligor's (payor's) remittance." The Clerk no longer had the protection previously afforded on personal checks. At the time of disbursement to the payee, the Clerk had no knowledge whether the check is good. Even if the check is good, the funds normally will not be available in the CSDA checking account for six (6) or more working days after the deposit. (H130, H191, H215, H242). If the check if returned unpaid, the CSDA checking account is short those funds until the check is collected (H132, H133).

Finally, effective October 1, 1989, the statute was amended again. Now on payments to the CSDA in cash or its equivalent, the Clerk must pay the payee within two days of receipt. However on

payments to the CSDA by check, the Clerk has to pay the payee in four (4) days of receipt.[1] Although it appears that this may benefit the Clerk by giving him more time to determine whether or not a check has cleared, the amendment also takes away some prior protections. They deleted the .25 fee meaning this trust fund will no longer be funded with any contributions other than the initial "seed money" used when it was created. The amendment also deletes that portion of the statute which allowed the Clerk to hold a check, until the Clerk knew it was good, if the check represented payment for four (4) or more months of support or was given to avoid contempt or to purge from jail. Although this amendment did extend the time for disbursing on personal checks, all of the testimony clearly indicates that four (4) days is still not enough time. This is supported not only by the testimony presented but the documentary evidence presented as well.

With his responsibilities outlined in statute, and considering the changes brought about by the amendments, the Appellee (Clerk) contends that to comply with the statute would require him to violate Article VII, Section 10 of the Florida Constitution in that he is required to give or lend or use his credit to aid an individual or private purpose. As proof, the Appellee put on the uncontroverted testimony of numerous witnesses and volumes of uncontroverted documentary evidence. Even the Appellant's witnesses did not dispute

1. For a discussion on how the language of the statute actually permits the Clerk to disburse only after the check is honored, see Point II of the Amicus Brief of Charlie Green, Clerk of Lee County, Florida.

the representations made by the Plaintiff's witnesses. In fact, the witnesses of the Appellants, on cross examination, confirmed the allegations of the Appellee.

The first witness of the Appellee was Mr. Dixon, the Clerk of the Court of Polk County. He confirmed that the Clerk's fees are public money and are deposited into the Clerk's "General Revenue Account." At the end of the year any surplus in that account is paid to the Board of County Commissioners (H13). His testimony was also confirmed by the Appellant's witness, Mr. Haynie of the State Comptroller's Office (H263). It was his office policy to wait 14 calendar days or 10 working days, after receipt of a payment by personal check from a payor, before he made payment to a payee (H21, H55). In the event the Clerk's Office is notified that a check is bad, after payment was made to the payee on that particular account, the CSDA will be reimbursed out of the General Revenue Account to maintain a "zero balance" (H22). In the year 1988, even holding payments for 14 days after receipt of a personal check, the Clerk's Office was still unable to collect some $2,426.85 on personal checks that were never made good. However, due to the Clerk's policy of not paying out for 14 days, the Clerk's Office was not out any money since they did not have to reimburse the CSDA out of the General Revenue Account. Also, no individual payee was paid with the money from another payor (H48 and H49).

Additionally, contrary to what the Appellant has said in his statement of the facts in the case, Mr. Dixon testified that the only trust account that he maintained, which accumulated interest, was the

Court Registry and interest is specifically allowed on that account under Florida Statute 28.33 (H44, H46, H61). He was not aware of any statute, or rule or regulation from the comptroller's office, which allowed him to collect interest on this CSDA trust account. The inference made by the Appellant on this issue was that the Clerk could use the interest to offset any losses incurred.

The Appellee contends that even if the Clerk were allowed to collect interest on this account, such interest would be public funds just the same as the statutory 3% fee. The same question would then arise since the Clerk would be using "public money" for the private purpose of extending credit to those payors giving bad checks to the CSDA.

The Appellee put on the testimony of Mr. Corley who is the Supervisor of the CSDA (H63). He said that in 1988, the CSDA consisted of 14,962 individual payor/payee accounts (H66). In the year 1988, the CSDA of Polk County will collect over $17,000,000 in child support and alimony payments, exclusive of the court fees (H67). He introduced a Deposit Collection Summary (PL4A) which broke down the payments, received by the CSDA into cash, personal checks, money orders, and payroll checks. In the year 1988, the Polk County CSDA processed 11,023 personal checks (H83) which constituted approximately 1.167 million dollars of funds received by the CSDA (H84). Finally he testified to an increase in the number of personal checks received in the last four months of 1988 as opposed to the first several months. They have gone from 6 1/2% of the collections to 7.23% of the collections (H86), indicating that as more people find out that the payee will receive their money within a few days of payment,

regardless of whether the Clerk knows if the check is good, more people will begin paying by personal check and the exposure to the Clerk will increase and the extension or lending of the credit will increase.

The Clerk then put on the testimony of Mr. Murphy, the Finance Director of the Clerk's Office. He oversees the CSDA bank account (H117) and the General Revenue Account (H118). He reconciles the bank statements and keeps track of all the money going in and out of these accounts (H117). He confirmed that the CSDA bank account is balanced to zero each month (H120, H121). He said that the Clerk's Office will not know that a personal check is bad within two (2) days from receipt (H139). From the time he deposits the check to the CSDA bank account, it takes six (6) or seven (7) days before he would find that the check was bad (H130). If he redeposits the check, it will take another six (6) or seven (7) days before he knows after the second depositing (H132). The Appellee introduced all of the bank statements for the CSDA bank account for the months of January through December, 1988 (PL 5A). By examining them the court could determine the number of checks that were returned for insufficient funds each month, each statement designating those checks as "deposited item returned paperless" (H122 to H124). When he was going to give the number of checks that had been returned during the year 1988, the court would not allow that testimony as relevant (H125). The Clerk introduced copies of all of the checks that were returned for "insufficient funds" during the months of July through December, 1988 (PL 9A). Mr. Murphy testified that by examining each of these checks, the court could determine when

the check was received by the CSDA, when it was deposited to the CSDA bank account, and when the Clerk was first advised that the check was bad. (H128 through H129). The Clerk then introduced copies of all personal checks from 1988 that still remained unpaid as of the date of the hearing, February 10, 1989 (PL 7A). By examining them, the court could determine when the check was received by the Depository (CSDA), the number of times and dates that the checks were deposited to the CSDA bank account, and how long it took for the Clerk's Office to be advised that the checks were bad (H136 through H139). Mr. Murphy's testimony and the exhibits that were introduced gave a clear indication of what would happen to the Clerk and his General Revenue Account in the event the Clerk was compelled to comply with the amended statute. Obviously, since the Clerk's Office was under a Temporary Injunction, there was no distribution being made to the payees and consequently there were no funds that had to be taken out of the Clerk's General Revenue Account in order to reimburse the CSDA Account. However, were the Injunction to be lifted, the CSDA would have made payment to the payees on all of the checks that were returned for insufficient funds and, on those checks that were not made good until after the second depositing, the Clerk's Office would have had to reimburse the CSDA Account out of its General Revenue Account. In the opinion of the Appellee, this would involve a clear question of credit and clear extension of credit by the Clerk's Office.

Mr. Walker Lyle, the Vice President of Southeast Bank, where the Clerk maintains the CSDA bank account testified. He confirmed

that the CSDA bank account is set up in the name of the Clerk's Office and in the event that account ever had a debit balance, the Clerk's Office would be liable (H180). Mr. Lyle also testified that the bank cannot advise the Clerk, within two (2) days from deposit, whether a check is good (H181). Supplementing his testimony, was Mr. Dexter Traxler, the Vice President of Community National Bank of Bartow, Florida. He said their bank took a survey and found that it was taking four (4) to five (5) business days, after the date of deposit to their institution, to have the check returned to them (H191). The Clerk cannot deposit the check to the CSDA bank account until one (1) day after receipt because by the time they post all of the checks to the various accounts, write all of the checks to the payees, make up the deposit and balance the accounts, it is after 2:00 p.m. and any business brought to the bank after 2:00 p.m. is credited to the next day's business (H119). Additionally Mr. Traxler testified that when the bank receives the returned check, the returned check is sent to the Clerk's Office with a notice, by mail, which takes an additional day for the Clerk to receive that notice (H193). Finally he confirmed that there is no way, on either local or non local personal checks, that a bank could notify the Clerk's Office within two (2) days that a check is bad. It is physically impossible to do it that fast (H193).

To let the court know that the same problems were being encountered in other counties where the statute was being followed and distribution was being made to payees within two (2) days, the Appellee put on the testimony of Geraldine Brooks, the Supervisor of

the Child Support Depository of Lee County (H211), and Mr. Jerry Alphonso, the Chief Deputy Clerk of Hillsborough County (H231). Mrs. Brooks testified that not only is she the Supervisor of the CSDA of Lee County, but she also has 26 years experience as a bank vice president (H217). In Lee County they were following the statute as amended on October 1, 1988, and they were charging the .25 fee required. They are not collecting that .25 fee on any payments other than child support payments and if the payment received does not have the .25 fee included, they take the .25 out of the child support payment. (H212 through H214). She said that on local checks, it is taking five, six or seven days for them to be notified (H214 and H215). On out of state checks, they did a random sampling of four checks, all of which bounced, one of these checks took 14 days before their office found out that the check was bad (H216). Prior to October 1, 1988, their office was following the same procedure as the Clerk's Office in Polk County in that they were not disbursing on personal checks for 15 calendar days from the date of receipt (H217). At the time of the hearing on February 10, 1989, they were eventually able to collect on all of the bad checks that they had received since October, 1988. The Appellant characterizes that portion of her testimony as being indicative that Lee County was not having a problem. However the Appellant ignores that fact that although the checks were eventually collected, there was a period of time, from the date the payee was paid until the date the checks were collected, that the CSDA of Lee County was technically short those funds and that account had to be reimbursed out of the Clerk's General Revenue

Account. In fact, Mrs. Brooks testified that one of the personal checks was deposited to their CSDA in October, 1988 in the amount of $2,062.81 (H219, H220). On that check they did disburse to the payee within two (2) days and they did not collect until the end of January, 1989. That was a check written on a local bank, and during the time the Clerk's Office was attempting to collect the check, they did, reimburse the CSDA out of the Clerk's General Revenue Account (H221). Similar to the Appellee, they, too, reimbursed the CSDA out of the General Revenue Account for bad checks because their account is also balanced on a monthly basis to zero (H223). Over the last four months, the Lee County CSDA received a total of 3,152 personal checks totalling $466,208. Of those checks, three turned out to be returned for insufficient funds and those three checks totalled $6,763.07. Finally, they did not know within two (2) days of deposit, whether any of those 3,000 checks were good (H224). Mr. Alphonso, the Chief Deputy Clerk of Hillsborough County, confirmed that his county was complying with the statute and that, prior to the amendment, they did not make disbursement on the personal checks for ten (10) working days (H232). They, too, collected the .25 fee mandated by the Statute but if the fee was not included in the check, they, too, deducted the fee from the child support payment (H233). From October, 1988 through January, 1989, their CSDA received 93 checks that were returned for insufficient funds totalling 19,509.59. As of the date of the hearing on February 10, 1989, 52 of those checks still remained uncollected totalling 11,708.34. On all 93 checks, disbursement was made to the payee within the two days from receipt. Of those 52 checks that they

still had not collected on, two (2) had been received in October, 1988, three (3) in November, 1988, twelve (12) in December, 1988 and 35 in January, 1988 (H234, H235). He said that on local checks it takes two weeks before they discover whether or not those checks are bad (H236).

The Appellant began their testimony with Donna Wimberly, the Supervisor of the CSDA in Leon County (H239). They do not reimburse the CSDA out of the General Revenue Account on bad checks (H241). Most of the time, they can recover their bad checks after they run the checks through a second time. The Appellant makes mention of this fact in his statement of the case but, once again, he ignores the fact that the payee has been paid with funds that are not in the CSDA account. Supporting the testimony presented by the Appellee's witnesses, Mrs. Wimberly admitted that it usually takes 14 days for them to receive the notification of bad checks and as a result, their CSDA account is technically short of those funds for at least a 12 day period and that they have technically paid one person's support obligation with money paid into the account by another person (243). She confirmed that they, too, considered their CSDA to be a trust type account (H244) and that it has taken up to six (6) months for them to collect on some bad checks (H245). Finally, as with Hillsborough and Lee County, she indicated that if personal checks they receive do not include the .25 fee, it is taken out of the support check (H245). They then put on the testimony of Mr. George Haynie, the Director of Accounting for the State Comptroller's Office (H247). He said that his office is responsible for maintaining the Child Support Depository

Trust Fund established under Florida Statute 61.182 (H248). They will reimburse the Clerks for collection expenses as long as the Clerks used reasonable efforts to collect on the checks. He said that they will not reimburse the Clerks for compensation of any of the Clerk's employees, office space, office supplies, or office equipment even those expenses may be related to the collection of these bad personal checks (H249 through H251). He could not explain why the .25 fee was only required on checks for child support, but he did indicate, much to the surprise of the court, that if the payor does not include the .25 fee, the CSDA should refuse to accept the check (meaning no money will be sent to the payee) or ignore the .25 fee (meaning the fee will not be sent to the Child Support Depository Trust Fund) (H265). He stated that under no circumstances could the .25 fee be deducted out of the support payment being sent to the payee (H226) which is in direct conflict with what was being done in Hillsborough, Lee and Leon Counties. He supported the Appellees witnesses by indicating that the CSDA is a fiduciary-type account, a trust fund account similar to an attorney's escrow account (H262). In his opinion, the Clerks could collect interest on this account, but he has not given any opinion on that to any Clerks other than the Clerk of one particular county (H262). But any money made by those accounts, be they fees or interest, would be public money (H263) and you cannot lend public money for a private purpose (H264). He said that the Child Support Depository Trust Fund was designed to prevent the Clerk from absorbing the loss of bad personal checks, with public money

(H266).[2] Finally, the Appellant put on John Durrant, Assistant State Attorney. He is responsible for handling bad check criminal prosecutions in Polk County (H273). He did indicate that they would prosecute on bad checks, received by the CSDA, if the checks met certain criteria (H276). Mr. Durrant's testimony is irrelevant in that, regardless of whether the Clerk can ultimately collect on the check through various means, the Clerk and the General Revenue Account are still pledging or lending their credit to cover these bad checks until the recovery is made. He further testified, on cross-examination by the Appellee, that they would not prosecute on many of these checks because, under Florida Statute, certain identifying information must be on the check or they must have a witness who can identify the person who signed the check (H280).
Since the Clerk has no way of regulating what is put on these checks, the State Attorney's Office would not be able to prosecute (H281).

In spite of all the above evidence, the court felt that, since the Clerk was under a Temporary Injunction and not distributing to the payees within the statutory period, until such time as the Clerk's Office complied with the statute, they could not show a technical present controversy. The Clerk's argument on this issue will be discussed in detail in the Argument section of this Brief. In any event, the lower court lifted the Temporary Injunction and initially ruled against the Clerk for the above-described reasons (R406). The

2. This is indicative that, in the opinion of the State Comptroller's Office, until such time as the Clerk is reimbursed out of the Child Support Depository Trust Fund, he has absorbed the loss with public money in violation of Artilce VII, Section 10 of the Florida Constitution.

Clerk filed a Motion for Rehearing and began to comply with the disbursement requirements of Florida Statute 61.181(5), disbursing to the payees prior to the time the Clerk knew that the check from the payor was good. The Clerk began complying on May 1, 1989 (T9). The court granted a Rehearing (R426) and stated that when it entered its Order of April 26, 1989 (R406), the court intended for the Clerk to later demonstrate to the Court what occurred with the personal checks after the Clerk began complying with the Statute (M4,M9). The Appellant's Statement of the Facts mischaracterizes the arguments at the Hearing on the Motion when he states that, on Page 9 of his initial Brief, eight (8) personal checks had been returned a second time (M11, M12). It was also stated at the Hearing that the Clerk had received over 50 bad checks, from May 1, 1989 through June 31, 1989 and, on almost every check, it took at least six (6) or seven (7) days before the Clerk found out that the check was bad (M9, M10). Of those 50 checks, eight (8) were not made good until after they were redeposited a second time (M11). Therefore, the extension or pledging of credit occurred on over 50 checks and, on eight (8) of them, public funds had to be expended to reimburse the CSDA out of the Clerk's General Revenue Account.

At the Rehearing, the Clerk introduced evidence which supported the testimony presented at the initial hearing. Mr. Richard Weiss, the Chief Deputy Clerk of Polk County, Florida stated that since May 1, 1989, when the injunction was lifted, the Clerk has verified that it takes over a week to find out if a check is bad and, therefore, since the money has already been disbursed to the payee in

accordance with the statute, the Clerk's Office has had to reimburse the CSDA out of the Clerk's General Revenue Account (T17). He said the Clerk has been disbursing to the payees within 24 hours of receipt of the personal check instead of the statutory four (4) days because the Clerk's Office will not know within four (4) days whether the check is good and therefore it is more convenient to disburse within 24 hours (T19). Also he points out that the Clerk can't deposit the personal check to the CSDA bank account until the day after receipt by the CSDA so, the Clerk has already used one (1) of its four (4) days before the check even gets to the CSDA bank (T19). To emphasize the magnitude of the problem, Mr. Weiss said that 8 1/2% of the funds received by the CSDA were paid by personal checks which is 250,000 personal checks annually representing over a $1,500,000 (T33, T41). He said that the 3% fees are public money that goes into the expenses of operating the Clerk's Office. Any excess funds, are paid to the Board of County Commissioners and this would include not only the 3% fees but also any other funds received by the Clerk's Office. The 3% fees, themselves, are not separately paid to the Board of County Commissioners as represented on Page 12 of the Appellant's Initial Brief.

The Appellee once again put on the testimony of Mr. Murphy. The first exhibit introduced under Mr. Murphy's testimony included copies of 108 personal checks that were returned for insufficient funds (PL 1B). On these 108 checks, Mr. Murphy had made copies of both sides of the checks, and these were the insufficient fund personal checks that were received by the CSDA from May 1, 1989

through October, 1989. In all of these cases, it took over four (4) days, after depositing the check to the CSDA bank account, before the Clerk found out that the checks were bad (T53 through T58). The next exhibit was a list, compiled by Mr. Murphy, of those 108 checks (PL 2B). It listed each check by month, showing the date the Clerk received the first notice that the check was bad, the CSDA (DRD) number, the amount of the check, and the date it was redeposited to the bank the second time. It also lists which of these checks came back bad a second time and resulted in the Clerk having to reimburse the CSDA out of the General Revenue Account (T58 through T63). Of these checks redeposited a second time, the Clerk had to reimburse the CSDA on 11 of them because they were bad even after the redeposit (T63). The next exhibit was a summary of those 11 checks that had to be reimbursed to the CSDA out of the Revenue Account (PL 3B). Of these 11, three (3) were paid by the payor eventually and eight (8) were never paid, thereby requiring the Clerk to request reimbursement from the State Trust Fund (T63 through T65). Actual copies of the 11 checks, with all supporting documents, were submitted to the court (PL 4B, 5B), and this allowed the court to examine each check and see the date the checks were received by the CSDA and when the CSDA bank found out that the check was dishonored. The exhibits also included a copy of the Clerk's check written out of the General Revenue Account to the Depository to show the date that the Clerk had made payment (T67). Mr. Murphy also presented a letter from the State Attorney's Office refusing to prosecute on a CSDA check due to the identification problems described at the prior hearing (PL 6B).

No testimony or evidence was presented by the Appellants to rebut the effect of the testimony and evidence presented by the Appellees. Closing Arguments were made, and the court issued its ruling declaring the statute unconstitutional, in part, in that required that on payments made to the CSDA by personal check, distribution had to be made to the payee within four (4) days from the date of receipt, regardless of whether or not the CSDA had confirmed that the personal check was good.

SUMMARY OF ARGUMENT

The Lower Court acted reasonably and within its broad discretion in granting a Rehearing to the Appellee, in accordance with Florida Rule of Civil Procedure 1.530. Further, the taking of additional testimony was also within the broad discretion of the Court, trying the case without a jury, and is permissible under Florida Rule of Civil Procedure 1.530.

Based on the testimony and documentary evidence presented by the Court, most of which was uncontroverted by the Appellants, the Trial Court was justified in finding that Florida Statute 61.181(5) is unconstitutional, in part, in that it requires the Appellee, on receiving payments from a participating payor by personal check, to disburse the funds to a participating payee within four days of receipt of the personal check. The court had sufficient evidence to support the finding that this arbitrary time period for disbursement, when applied to situations involving payments being made by personal checks, resulted in the pledging of expenditure of public funds by the Appellee, who is charged with the responsibility of operating the CSDA, a trust account, in accordance with Florida Statute 61.181. Also, based upon the testimony and evidence presented, the court appropriately found that this pledging or extension of public credit, or public funds, was for a private purpose and that there was no clearly identified and concrete public purpose stated in the statute at issue.

Finally, the court did not err in failing to limit this decision to the Appellee Clerk of the Court of Polk County, Florida.

ARGUMENT
I

GRANTING DIXON'S MOTION FOR REHEARING DID NOT CONSTITUTE REVERSIBLE ERROR

The Appellee's Motion for Rehearing (R413), together with the arguments presented at the Motion Hearing (M1 through 46) and the Court Order (R406) does provide a proper basis for the granting for the Appellee's Motion for Rehearing, especially when taking into consideration the nature of the relief requested (Declaratory Judgment) and all the evidence and testimony presented at the initial Hearing.

The law is clearly established that a Motion for Rehearing is addressed to the sound discretion of the Court, and its rulings thereon will not be disturbed unless an abuse of discretion is clearly shown. Batteiger vs. Batteiger(1959 Fla APP D3) 109 So 2d 602. The Trial Court has broad discretion to grant a Rehearing in order to consider matters it may have overlooked or failed to consider, if it renders a decree that it is inequitable or erroneous, and to correct any error, if the court is convinced it has erred. Richmond vs. State Title & Guaranty Co.(1989, Fla App D3) 553 So 2d 1241. Ortiz vs. Ortiz(1988 Fla App D3) 211 So 2d 243. Cole vs. Cole(1961 Fla App D1) 133 So 2d 126. All of these cases are in direct conflict with the statement in Argument I of the initial brief of Appellant, State of Florida, who states, on Page 18, that the court is allowed some discretion. It is clear that the Appellate standard is whether the Trial Court abused the broad discretion: If reasonable men could differ as to the propriety of the Trial Court's action, then there can

be no abuse of discretion. Crosby vs. Fleming & Sons, Inc.(1984 Fla App D1) 447 So 2d 347. Appellant cites the case of Monarch Cruise vs Leisure Time Tours 456 So 2d 1278 (3d DCA 1984) for the proposition that some discretion is allowed in granting a Rehearing. A reading of the case, however, clearly indicates that the case stands for the proposition that the court does have broad discretion in granting a Motion for Rehearing and, if reasonable men could differ as to the propriety of the action taken by the Trial Court, the action is not unreasonable and there can be no finding of abuse of discretion. In the case sub judice, the granting of the Rehearing was reasonable and certainly within the reasonable discretion of the court under the circumstances of this case.

In the Appellee's Motion for Rehearing (R413), the Appellee attempted to point out the error in the Lower Court's interpretation of the Declaratory Judgment Statute, Florida Statute 86.011, in that the court required in its Order (R406) the showing of "imminent necessity" or "present controversy." That statute, in part, states that "...any Declaratory Judgment rendered pursuant to this chapter may be rendered by way of anticipation with respect to an act not yet done or, in any event, which has not yet happened and, in such a case, the judgment shall have the same binding effect with respect to that future act or event, and the rights or liability to arise therefrom, as if that act or event had already been done or had already happened before the judgment was rendered." Florida Statute 86.051. At no point in the statute does it require an "imminent necessity" or a "present controversy" as the court indicated in its Order (R406). In

fact, the Supreme Court ruled, in a case involving a request for a Declaratory Judgment on a Legislative enactment authorizing the expenditure of public money, that the right to use the declaratory decree statute does not depend on the existence of an actual controversy but depends on whether the movant shows he is in doubt as to the existence or non existence of some right, status, immunity, power or privilege, and that he is entitled to have such a doubt removed. Rosenhouse vs. 1950 Spring Term Grand Jury, In and For Dade County, et al. 56 So 2d 445(Fla 1952). This Second District Court of Appeal has followed this decision when it stated that there need not exist an actual present right of action, but "the appearance of ripening seeds of controversy is sufficient." Platt vs. General Development Corp. 122 So 2d 48 (1960 Fla App D2). See also James vs. Golson. 92 So 2d 180 (Fla 1957). The Florida Declaratory Judgment Act is prospective. Overman vs. State Board of Control. 62 So 2d 96 (Fla 1952). The Appellee, at the Hearing on the Motion for Rehearing, made argument that the court misinterpreted the requirements under the Declaratory Judgment Statute (M5, M8, M9). Therefore, based upon the law and misunderstanding of it as contained in the Court's Order (R406), the Appellee was entitled to a Rehearing. The evidence presented at the initial hearing clearly showed that in Polk County, where the statute was not being followed due to the entry of a Temporary Injunction, the Clerk would have had to extend credit of public funds if they were required to disburse on those personal checks prior to receipt of notice that the checks were good. In fact, in its ruling (R406), the court held that "a decision might be close

as to whether the Clerk would be pledging credit by any of the activities which the Clerk asserted might be necessary to cover any shortage in the CSDA account." The Appellee had also presented testimony of representatives from two other counties, Lee and Hillsborough, who testified that they were following the statute and, as a result of early disbursement to payees, they were having to reimburse their CSDA out of their General Revenue Account (H221 through 224, H231 through 236). Therefore the court entered its initial Order under the misunderstanding that the Declaratory Judgment law required us to show a present controversy as to our particular CSDA (M16). The Declaratory Judgment statute simply does not require that. The Appellee clearly was entitled to a Rehearing due to the error in the court's interpretation of the Declaratory Judgment law.

A Trial Court may grant a new trial on grounds other than those stated in the Motion for Rehearing, if reasonable notice is given to the parties, and they are allowed to be heard. Kaufman vs. Sweet Corp, et al. 144 So 2d 515(1962 Fla App D3). The court, at the hearing on the Motion for Rehearing, specifically addressed this issue and found no prejudice to the other parties since they would have the opportunity to contest the Appellee's evidence at the Rehearing itself (M17). The court felt that what we had previously was an evidentiary hearing, and the court was going to allow a subsequent hearing to present additional testimony, at which time the Appellant's could object (M18). At the hearing on the Motion for Rehearing, the Appellants were advised of the nature of the testimony that would be presented at the Rehearing, if granted, and they had adequate

opportunity to prepare for that Rehearing which was held approximately three months later. At the actual Rehearing on October 23, 1989, there were no objections, by the Appellants, to the introduction of any of the additional testimony or evidence presented.

Appellant contends that the Rehearing was improper since the Clerk was intending to present new evidence, rather than newly discovered evidence. He cites the case of Noor vs. Continental Casualty Co., 502 So 2d 363 (2d DCA 1987) for that proposition. A reading of that case, however, indicates that it does not stand for that principal of law. Under the circumstances of that particular case, the court held that the denial of the Rehearing was not an abuse of discretion where the Appellant had an opportunity to request a continuance of the hearing on a Motion for Summary Judgment in order to obtain additional evidence, but failed to do so. The Appellant also cites the case of Diamond Cab Company of Miami vs. King, 146 So 2d 889 (Fla 1962) as standing for the proposition that when a Motion for Rehearing merely sets forth matters previously considered by the Trial Court, the Motion should be denied. However it does not stand for this proposition. The case simply states that a Rehearing is not a procedure for rearguing of an old case merely because the losing party disagrees with the judgment. In the case sub judice, the Clerk's Motion for Rehearing does not reargue old evidence but points out to the court that it did not properly apply the law of the Declaratory Judgment statute to the facts. The Appellee argued that no present controversy was needed for a Declaratory Judgment action to lie. Therefore this particular case cited by the Appellants is not

relevant to the issues. More relevant to the case sub judice is the case Kash N Karry vs. Garcia, 221 So 2d 786 (2d DCA 1969) which points out the distinction between Florida Rule of Civil Procedure 1.530 and Florida Rule of Civil Procedure 1.540. FRCP 1.540, which deals with obtaining relief from judgments, decrees and orders, states that a court can relieve a party from the effect of a Final Judgment decree or order for the following reasons:..."(2) newly discovered evidence which, by due diligence, could not have been discovered in time to move for new trial or rehearing." FRCP 1.530, dealing with Motions for Rehearing, states that "on a Motion for Rehearing on matters heard without a jury, including Summary Judgment, the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment." In that case after entry of a Summary Final Judgment, the Appellee filed two Motions, one under Rule 1.530, on the basis of excusable neglect, and one under Rule 1.540, on the basis of newly discovered evidence. The Trial Court had set aside the Summary Judgment and the Appeal ensued. The Second DCA noted that a Rehearing was not proper because the Motion was not timely filed and that Rule 1.540 could not lie because the evidence was not newly discovered but was available at the time of the hearing. However, it considered both motions in "para materia" since the Trial Judge did not specify the motion or ground ruled upon. The Second DCA stated that had the Appellant used "newly discovered evidence" as a basis for a Motion for Rehearing under Rule 1.530, the Appellant would not have had to meet the technical tests of "newly discovered evidence" under Rule 1.540. The court stated that almost any additional evidence, whether newly

discovered or not, is sufficient for a timely Motion for Rehearing if, in the opinion of the Trial Judge, it presents a triable issue of material fact. But since the Motion was timely presented, the DCA could not offer relief under Rule 1.530, and they reversed and remanded on another basis, but the case does point out that, in a Motion for Rehearing under Rule 1.530, almost any evidence is acceptable. So, as stated at the Hearing on the Motion for Rehearing, the Trial Court indicated that when it entered its original Order, it anticipated that the Clerk would tell the court what happened after the Temporary Injunction was lifted (M4). The court felt that it still needed to hear if, after lifting the Temporary Injunction, there was a present controversy (M9). The Order contemplated that when the Clerk complied with the statute, the Clerk may then present evidence that, as to the Clerk, they could show a present controversy and a Hearing or continuation of the prior Hearing would be required on the new evidence (M13). The court invited the Clerk to show evidence of a present controversy (M16), and there was no prejudice to the Defendants since they could object or contradict the evidence at the Rehearing itself (M17). Therefore, based on Florida Rules of Civil Procedure 1.530 and the court's contemplation as to what was required or what evidence it wanted to hear, this evidence presented certainly constitutes a basis for a rehearing. In cases tried without a jury, the Trial Court is authorized, in granting a Motion for Rehearing, to set aside a judgment and to take additional testimony. Pensacola Chrysler Plymouth, Inc. vs. Costa. 195 So 2d 250 (1st DCA 1967). Therefore the actions of the Trial Court, in granting the Rehearing,

were justified in accordance with Rule 1.530 of the Florida Rules of Civil Procedure and were certainly within the broad discretion of the Trial Court, acting without a jury, especially in a Declaratory Judgment action where it avoided the refiling of a new action by the Appellee.

ARGUMENT
II
SECTION 61.181(5), AS AMENDED 10/1/88 AND 10/1/89 IS VIOLATIVE OF ARTICLE VII, SECTION 10 OF THE FLORIDA CONSTITUTION

Responding to the State's initial Brief, it should be noted that the factual representations made by the State are incorrect when compared with the transcripts of the testimony and the documentary evidence.

The State claims Dixon failed to show he was liable for worthless checks to the CSDA. The State further claims that Florida Statute 61.181(5) and Florida Statute 28.243(1) insulate Dixon from liability and that there was no showing that the taxpayers are ultimately responsible for these worthless checks. Neither of these statutes insualte Dixon from liability. There is no question that the Clerk is charged with the responsibility of operating the CSDA. In order for him to receive payment from one payor and disburse to specific payees, the Clerk obviously needs to set up a bank account in his name. Since the account is in his name, he is ultimately responsible for that account (H180). Since this is in the nature of a trust account, he has a fiduciary responsibility to each participant in the CSDA (H262). Finally, since he sends checks to the payees, the Clerk is liable to those payees for the amounts of those checks FS 673.401. The Appellee's Statement of Facts shows that witness after witness, including Appellant's own witnesses, confirmed that this is a fiduciary account and a zero balance is maintained to prevent one payee from being paid with funds of an unrelated payor (H243). The statute, as amended, creates a liability for the Clerk that did not

exist when he was maintaining this account prior to the 1988 Amendment. Prior to that time, only cash or its equivalent was accepted and, when amended on 10/1/86, personal checks could be accepted, but the Clerk was not obligated to disburse until the check was made good.

With the 1988 and 1989 Amendments, the Clerk must disburse on personal checks before the funds are in the CSDA. Whether the check is returned as good or whether it is returned as dishonored, the funds will not be in the CSDA when payment is made. Therefore, the payee is either being paid with funds deposited by other payors or with public funds, since the Clerk must place its own public funds into said account to overcome the shortage until the check is collected. Since the CSDA account is maintained in the name of the Clerk, the Clerk is pledging his credit, the credit of public funds, to that account in the event of a shortage of the account (H180). Remember that the CSDA account is in the nature of a trust account, composed of many individual trust accounts. With the exception of the Clerk's fees, the only funds in said account are funds deposited by one payor designated to a specific payee. These funds are to be immediately written out to the respective payee. There can be no shortage in this type of account. The Legislature tried to offer some protection to the Clerk in the statute by stating that on all personal checks received for child support, a .25 fee must be added. This fee is sent to the Child Support Depository Trust Fund (CSDTF) which was established by the Legislature under the amended statute. The fund is administered by the State Comptroller. Supposedly, the Clerk can

apply to said fund for reimbursement for uncollected personal checks on child support. However the following are the inadequacies of the protection which the Legislature attempted to afford to the Clerk:

A. No provision is made for the enforcement of the .25 fee required. If not paid, the Legislature would not want this sum deducted from the payee's child support and, since the .25 fee itself is not child support, it may not be enforceable by the Court (H265).

B. The State Comptroller does not have to reimburse the Clerk until he makes "a satisfactory showing that diligent effort has been made to collect the funds" (H249 through 251). There is no definition of what constitutes a diligent effort. Also there is no time period as to when the CSDTF is required to reimburse the Clerk. Therefore the CSDA can be short for months until the entire collection procedure and claim procedure is completed. During this period, the Clerk's funds are being pledged or public money is being used to reimburse the CSDA.

C. The CSDTF only applies to personal checks for child support. There is no provision in the statute concerning personal checks for alimony and maintenance. Since the Clerk is obligated to write out a check for alimony or maintenance to the payee within the same two (2) working days after a payor's personal check is received, the Clerk won't obtain reimbursement if those personal checks are returned unpaid. Public funds must be used to reimburse the CSDA in this situation in order to balance out the shortage in the account. The Appellant's witness, Mr. Haynie, indicates that it is his

interpretation that the Fund will be able to reimburse the Clerk for all unpaid checks (H254 and H258) and reasonable and necessary collection costs. However he indicates that this definition does not include reimbursement to the Clerk for compensation of the Clerk's employees, office space, office supplies, office equipment, or any administrative costs involved in submitting the claim (H249 through 251). Further he felt that the Clerk could refuse to accept a check without the fee or they could simply ignore the fee and not collect it (H265). Obviously if the Clerk refuses to accept a check without the .25 fee, this would surely be to the detriment of the payee which the statute is intended to benefit. If the Clerk ignores the .25 fee, then they will not be able to supplement the Child Support Depository Trust Fund.

A reading of the statute shows the dilemma created for the Clerk and demonstrates his fiduciary responsibility. Section 3(A) of the statute states that "the Depository shall collect and distribute all support payments, paid into the Depository to the appropriate party. On payments by personal check, there is no collection until the check is made good and there can be no distribution until there is collection. Also, unpaid payments are not paid into the Depository until the personal check is made good. A check is nothing more than a promise to pay. It is an order to a specific bank to pay a specific sum of money, drawn on that bank, and payable on demand. FS 673.104(1)and(2b). Therefore, until the check is paid by the drawee bank, there is no payment into the Depository. The check can also be revoked or withdrawn by the payor until it is presented to the drawee

bank FS 674.403. Finally, the statute requires payment to the appropriate party. If the particular payors funds are not available when payment is made to the particular payee, then that payee is being paid with funds from an unrelated payor. The Clerk is not complying with the statute since he is not paying the appropriate party with funds from the appropriate payor. In order to satisfy this dilemma and avoid breach of his fiduciary duty, the Clerk must reimburse the CSDA out of his revenue account, which is public money.

As far as the Appellant's argument that the 3% fee can be used to pay for any bad checks, that argument must fail for several reasons:

1. The Clerk has been allowed to collect that same fee even before the statute was amended, when the Clerk was collecting only cash in the CSDA.

2. This fee is designed to offset the administrative costs incurred by the Clerk in monitoring the account, not offset losses.

3. If the Legislature intended for the 3% fee to cover the Clerk's losses, it would not have created the CSDTF under FS 61.182.

4. The 3% fee is public money, as testified to by the Appellant's own witnesses from the Comptroller's Office (H263).

The State argues that since the Clerk collected over $500,000 in 3% fees, and since they have had only eight (8) worthless checks from May, 1989 to October, 1989, which were eventually reimbursed by the CSDTF, the Clerk has no loss. Factually this is not accurate.

The eight checks were ones that the Clerk was never able to collect on and eventually had to resort to filing a claim with the CSDTF (Appellant fails to mention that the Fund refused to reimburse the entire claim: T72 through T74). Also, from May, 1989 through October, 1989, there were 108 checks that were returned for insufficient funds of which the Clerk was eventually able to make all of them good but these eight. The Appellant ignores that fact that on these 108 checks, the Clerk did pledge his credit until the checks were made good and, of the 11 of them which were not made good until after the second deposit, the Clerk actually loaned money from the General Revenue Account to the CSDA. The Clerk is clearly pledging credit even on checks honored by the drawee bank, if the funds for that payor are not in the CSDA when payment is made to the payee.

The State argues that the 3% fees received by the Clerk far exceed the costs of operating the CSDA. In support of that statement, he cites T43. A reading of T43, the testimony of Richard Weiss, makes no such statement. Mr. Weiss merely stated that the 3% fee goes into the General Revenue Account with all other fees collected by the Clerk for the various functions that they perform. After all Clerk's expenses are paid out of that account, the excess, <u>if any</u>, is paid to the Board of County Commissioners. There is no evidence whatsoever to support the State's naked assertion that the CSDA is a money-generating operation. The State cites, as further support for its proposition that the Clerk need not pledge credit, the Judiciary Staff Summary of the House of Representatives (RIV, D3). However these staff analyses are not relative to the issues for which the Appellant

cites them. Further, the ultimate question of "public purpose" is a judicial question to be determined by a court of competent jurisdiction, DOT vs. Fortune Federal Savings & Loan 532 So2d 1267 (FLa 1988), Wilton, et al vs St. John's County, 123 So 527 (Fla 1929).

The State claims the case of Bannon vs. Port of Palm Beach 246 So2d 737(Fla 1971) says that the purpose of Article VII, Section 10 is to protect public funds from being exploited in assisting or promoting private ventures. However this case actually stood for the principle that the purpose is to prevent public funds from being exploited in private ventures when the public would benefit only on an incidental basis. If that case were applied to the case sub judice, it would clearly justify our ruling which found that the benefit of the amended statute is to private persons and the public is only being incidentally benefited.

Finally the State argues that the ultimate aim of the statute is to see that child support payments are placed in the hands of custodial parents without delay thereby substantially reducing the public assistance for children. They produced no evidence whatsoever, during the trial, to indicate that there was any relationship between early payment of funds to the payees and any increase in public assistance for children. Also, if that truly were the goal of the statute, that same goal was being accomplished prior to the amendment when cash only, or its equivalent, were allowed to be paid to the CSDA. Obviously when the Clerk receives cash or its equivalent, it could make payment to the payee on the same day. There is simply no rationale for requiring the Clerk to pay, on personal checks, prior

to confirmation that the funds have been received. It is important to note that even if the Clerk is permitted to refrain from paying the payee until the payor's check is good, the only late disbursement to the payee will be on that first payment made by check. All subsequent payments even if made by personal check, will be received by the payee at regular intervals (i.e. every month).

Assuming that the lower court was correct in determining that public credit or funds were being extended, the next question is whether this is for a valid, public purpose. Addressing these issues, the court found that there was no clearly identified and concrete public purpose as a primary objective of the statute, as required by O'Neill vs. Burns 198 So2d 1(Fla 1967). Our Trial Court made a distinction between a public purpose and a matter of public interest or concern. It specifically recognized that a public purpose may incidentally benefit some private persons as stated in the case of Williams vs. Turrentine 266 So2d 81(4th DCA 1972). However the court found in this case that there simply was no significant or identified public purpose. The court found that any benefit was to the individual payor and the individual payee. It did not even benefit the other participants in the CSDA, let alone the large segment of people not involved in the CSDA. The court recognized that the same purpose could be accomplished by requiring payment to payees only when the funds of the payor are received.

Both the H.R.S. and the State cite numerous Supreme Court cases in support of their argument that this is a matter of public purpose. At first glimpse the array of Supreme Court cases seem

impressive. However close examination of all of the cases relied upon by the Appellants reveals that the cases can all be distinguished with very little similarity to the case at bar. All of their cases deal with the constitutionality of construction project funding with public revenue bonds, otherwise known as bond validation cases. These cases pose no liability to the State or any of its agencies and there clearly is no extension of public credit. In fact, some of the cases deal with certain revenue projects which are specifically exempted from the constitutional prohibition under Article VII, Section 10(C). None of their cases involve a situation where a public entity is extending or pledging credit to a private person, as is the situation in the case at bar. The following are the distinguishing factors of all the cases cited by the Appellant:

A. H.R.S. states that the determination of the public purpose in FS 61.1(5) is presumed valid and should not be rejected unless clearly erroneous. He cites <u>State vs. Housing Finance Authority of Polk County.</u> 376 So 2d 1158(Fla 1979). However there is no determination of public purpose in FS 61.181, as there was in the case cited. Also the case cited is a bond validation case and did not involve the expenditure of public funds for private purposes.

B. As support for the proposition that Depositories can be used to receive and disburse money, Appellants cite the case of <u>O'Mally vs. Florida Insurance Guaranty Assn.</u> 257 So2d 9(Fla 1971). There is absolutely no relevance between that case and the case at bar. In that case, the Guaranty Association was a quasi-public corporation created specifically to receive fees from mandatory

participants to pay claims of insureds with insolvent insurers. No public money was spent, and there is no liability to the State or any of its agencies. In our case no separate agency was created and the liability was placed on the Clerk. The CSDA collects funds from one specific payor and passes it on to a specific payee. The Clerk merely acts as a conduit and is not paying claims for someone but rather is acting as a conduit for the passage of claims from one payor to a specific payee. Also our case involves the extension of public credit or payment of funds to payees prior to receipt of payments from their payors.

C. H.R.S. cites State vs Reedy Creek Improvement District 216 So2d 202(Fla 1968). This is a bond validation proceeding with no relevance. It involved a statute that had a specific declaration of public purpose, and the court found, in that case, a benefit to the public at large. In our case, there is no public benefit only a private benefit to individual payors and payees. Also there is no statement of public purpose in our authorizing statute.

D. Both H.R.S. and the State cite the case of Nohrr vs. Brevard County Educational Facilities Authority 247 So2d 304(Fla 1971) for the premise that, in order to have a loan of public credit, the public must be directly or contingently liable to pay something to somebody. In Nohrr, a bond validation case, the Legislature had a specific statement of public purpose, and this is not present in our statute. The law allowed various counties to assist colleges to assist colleges obtain financing in order to develop their facilities. The creating statute specifically provided for exemption of liability

for the State and the bonds were non-recourse meaning that they would be paid solely by the revenues generated from the project. Clearly there was no liability or exposures to the public and no expenditure of public funds. Also the public purpose was clearly stated as required by O'Neill (ID). In our case, no public purpose is stated, no exclusion of liability is indicated, and we are clearly involved in an extension of public credit of funds. Also, as a result of the amendment, the Clerk is faced with a new liability that he did not previously have.

E. The State takes issue with the Trial Court's interpretation of O'Neill vs. Burns 198 So2d 1(Fla 1967). The holding in O'Neill is relevant to our case because it does require a "clearly identified and concrete public purpose as a primary objective and a reasonable expectation that such purpose will be substantially and effectively accomplished" in order to constitute a public purpose. The lower court specifically found that there was no public purpose in our case. The court stated that although the statute dealt with matters of public interest or public concern, there was no identifiable and concrete and public purpose. Once again the court also noted that the public purpose, if any, could have been met by other means that would not make the Clerk liable.

F. Appellants cite several cases for the proposition that public purpose need not be stated in the statute. Once again all of these cases can be distinguished and some even support the Trial Court's finding in our case:

i.) Linscott vs. Orange County Industrial Development Authority 443 So2d 97 (Fla 1983). This is another bond validation case involving non-recourse bonds, and the court specifically stated that with non-recourse bonds, there is no public credit pledged. The court stated that if public credit is involved, you need to show a paramount public purpose. The statute involved in that case clearly contained a specific legislative finding of public purpose.

ii.) State vs. Orange County Industrial Development Authority 417 So2d 959(Fla 82). Another non-recourse revenue bond case. The court noted that the Florida Industrial Development Financing Act specifically contained a statement of public purpose, and the project in that case was specifically exempted under Article VII, Section 10(C) of the Florida Constitution. No expenditures of public funds were involved in that case.

G. The State also cites the above cases as stating that if a public purpose exists, then public funds can be used. However the cases say that there must be a showing of paramount public purpose, not an incidental public purpose.

H. The State argues in its Brief that, in the case sub judice, any private benefit is incidental. However the Trial Court found, to the contrary, that the private benefit was the main benefit.

I. The State cites the case of State vs. City of Miami 379 So2d 651(Fla 80) for the proposition that an incidental benefit to a private party will not negate a public purpose. Once again the case cited is not relevant since it involves the issuance of revenue bonds which, of course, do not involve an extension of public credit. As

in Linscott (ID), since there was no public credit due to the fact that these were non-recourse bonds, all the court had to find was a public purpose, not a paramount public purpose. In that particular case, the court did find that there was a public purpose and only an incidental private benefit. Once again the Trial Court in our case found that the private benefit was paramount and it was only an incidental public benefit.

J. The State cites some cases show that deference must be given to a legislative finding of public purpose. Once again we have no legislative finding of public purpose in FS 61.181. The cases they cite, Wald vs. Sarasota County Health Facility 360 So2d 763(Fla 78), Nohrr (Supra) and Price vs. City of St. Petersburg 29 So2d 753(Fla 47), are all bond validation cases where the authorizing statute eliminated public liability. Two projects were specifically excluded under Article VII, Section 10(C) of the Constitution and in all cases the court found paramount public purpose.

K. Finally, the State cites two cases for the proposition that the court must uphold the statute if it has any reasonable basis for doing so. In the case sub judice, the court specifically found no rational or reasonable basis for the amendment to the statute. The case cited by the Appellant, Department of Insurance vs. Southeast Volousia Hospital District 438 So2d 815 (Fla 83), merely said that where an interpretation upholding the constitutionality of a statute

was available, the Supreme Court must uphold.[3]

In sum, the Trial Court has found that there was an extension of public credit created by FS 61.181(5) and that public credit was for private purposes. The court found that there was no public purpose to the statute, but that the statute only dealt with an incidental matter of public interest.

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3. For an interpretation that would uphold the constitutionality of the statute, see Point II of the Amicus Brief of Charlie Green, Clerk of Lee County.

THE LOWER COURT DID NOT ERR IN THE SCOPE OF THE RULING

The Appellant has cited several cases reporting to State that the court should limit its ruling to Polk County since the Leon County witness said that they were having no problem with complying with the statute. Once again this is a mischaracterization of the facts.

First of all, not only did Polk County testify as to the problems they were having with the amended statute, but witnesses from Lee County and Hillsborough County also testified that they, too, were pledging credit and advancing funds from their General Revenue Accounts as a result of the amendment requiring them to disburse prior to knowing that the personal checks were good.

Also, Donna Wimberly testified that she did not have a problem with the statute since they were not transferring funds from the General Revenue Account to the CSDA. The Appellant uses this comment as a basis for the proposition that there were sufficient funds in the Leon County CSDA. However the State failed to mention that Leon County voluntarily elected not to reimburse the CSDA out of their General Revenue Account and, if they were not reimbursing the CSDA from the General Revenue Account, they were in fact paying one payee with the payments of unrelated payor (H243). Ms. Wimberly clearly stated that since it took over 14 days to know if a check was good (H242), their CSDA account is technically short these funds for at least 12 days (H243). Also she testified that they consider their CSDA to be a trust account (H244). In spite of that, they do not

reimburse their CSDA account even though it has taken up to six months to collect some checks (H245).

Therefore, the problem is not local, and the evidence shows that in these counties and probably all others, the amended statute calls for the Clerk to pledge or extend the credit of his office and public funds on personal checks.

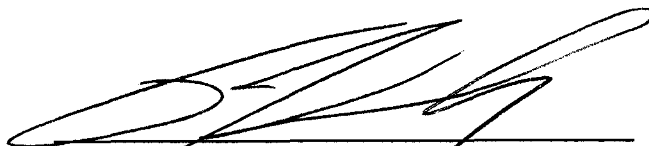
CONCLUSION

The lower court did not abuse its broad discretion in granting a Rehearing. Further the lower court was correct in finding that the statute, as amended, involved the pledging of public credit or the use of public funds for private purposes. Finally, the court did not err in failing to limit the scope of its ruling.

As stated by the Second DCA in the case of Tsavaris vs. NCNB National Bank 497 So2d 1338 (Fla 2d DCA 1986), an Appellate Court is not entitled to reverse simply on the basis that a decision is against the weight of the evidence. It should not retry the case or reweigh conflicting evidence. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an Appellate tribunal. In this Appeal, the Appellants ask this Appellate Court to retry and reweigh the substantial amount of evidence, both testimony and documentary, presented to the lower court in a case that has spanned a period of over two years. Consequently, for that reason and the other reasons stated in this Answer Brief, the ruling of the lower court must be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to JOSEPH LEWIS, JR., ESQUIRE, Department of Legal Affairs, The Capitol-Suite 1501, Tallahassee, FL 32399-1050; FRED W. BAGGETT, ESQUIRE, Post Office Drawer 1838, Tallahassee, Florida 32302; STEVEN CARTA, ESQUIRE, Post Office Box 1686, Fort Myers, Florida 33902; and CHARLES L. CARLTON, ESQUIRE, 2120 Lakeland Hills Boulevard, Lakeland, Florida 33805 this 28th day of February, 1991.



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