OA 10-4-91

SUPREME COURT OF FLORIDA

STATE OF FLORIDA, et al.,

Appellants,

v.

CASE NO. 78,563
DCA NOS. 90-01618
90-01619
CONSOLIDATED
CIRCUIT CASE NO. GCG-88-2410

E. D. "BUD" DIXON, Clerk
of Court, Polk County,
Florida,

Appellee.
_____/

ON CERTIFICATION OF JUDGMENT REQUIRING
IMMEDIATE RESOLUTION FROM THE DISTRICT
COURT OF APPEAL, SECOND DISTRICT
OF THE STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT STATE OF FLORIDA

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOSEPH LEWIS, JR.
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 249580
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL - SUITE 1501
TALLAHASSEE, FL 32399-1050
(904) 488-1573

COUNSEL FOR APPELLANT

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CITATIONS OF AUTHORITY

PRELIMINARY STATEMENT

Appellant, the State of Florida, will designate references to the Record on Appeal by the letter "R" followed by the appropriate volume and page number. References to the transcript of the hearing on the Amended Complaint for Declaratory Judgment, held on February 10, 1989, will be by the letter "H" followed by the appropriate page numbers. References to the transcript of the Motion for Rehearing held on August 1, 1989, will be by the letter "M" followed by the appropriate page numbers. 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 numbers.

STATEMENT OF THE CASE AND FACTS

This appeal was initiated on behalf of the State of Florida after the lower court issued a declaratory statement adjudging that Section 61.181(5), Florida Statutes, is unconstitutional, in part, in that it requires payments made to the Child Support Depository by check to be disbursed within four (4) working days (R. III, 447-52).

On September 30, 1988, the Appellee, E.D. Dixon ("Dixon"), Clerk of the Circuit Court and County Court for Polk County, Florida, served an Amended Complaint for Declaratory Judgment. Therein, Dixon sought a declaration that Section 61.181(5), Florida Statutes, as amended in October, 1988, was unconstitutional in that the Legislature, by requiring the clerk, as Administrator of the Central Depository for the Tenth Judicial Circuit, to disburse funds to payees within two (2) days after receiving a payor's personal check, was unlawfully requiring Dixon to extend credit in the form of county funds to payors in violation of Article VII, Section 10, of the Florida Constitution (R. I, 16-24). Dixon also alleged a violation of Article III, Section 11(a)(10), prohibiting special laws and an equal protection violation. Id.

A temporary injunction order was issued enjoining the State of Florida from enforcing Section 61.181(5), Florida Statutes (R. I, 25-27) The injunction was continued until the lower court made a final determination of Dixon's Amended Complaint (R. II,

286-87). HRS' Motion to Intervene was granted (R. I, 52) and on February 10, 1989, a non-jury trial on the Amended Complaint was held. The hearing produced the following relevant testimony:

Dixon testified that he establishes the policy of the Polk County Clerk's Office (H. 33-4). The policy and practice regarding payments made by personal check to the Child Support Depository Account ("CSDA") is to wait 14 days before disbursing funds from this account (H. 30-31). Despite the October 1988, amendment to Section 61.181(5), Florida Statutes, requiring the disbursal of funds paid into the CSDA within two (2) days after the receipt of a payor's personal check, Dixon testified that his practice regarding the disbursal of funds had not changed because of the injunction (H. 19-20) issued by the lower court forbidding the State of Florida from enforcing the amended provision.

If funds have been disbursed from the CSDA and the Clerk's office subsequently receives notice that a personal check has been returned for insufficient funds, Dixon's policy is to transfer funds from the general operating account to the CSDA (H. 22).

The CSDA contains, in addition to child support, alimony and separate maintenance payments, a 3% fee assessed by law, based on the cost of operating the CSDA (H. 25). Dixon testified that he believed that this fee is transferred out of the CSDA and into the general operating fund once a month (H. 23-24). The 3% fee for 1986, 1987 and 1988 totals $394,789.00, $462,842.00 and

$505,420.00, respectively (H. 42), and in 1988, checks to the CSDA for which Dixon's office has been unable to collect totaled $2,425.85 (H. 49).

Dixon's office does not collect the 25-cent fee, imposed by Section 61.181(5), Florida Statutes, upon payments made into the CSDA by personal check (H. 26), but does assess a $10.00 penalty fee upon returned checks (H. 39). While admitting that some trust accounts earn interest (H. 46), Dixon deposits the funds of the CSDA in a non-interest-bearing account (H. 44). Dixon testified that while it is his policy to wait 14 days before disbursing funds paid into the CSDA by personal check, he waits only two days before disbursing funds paid into the CSDA by business check (H. 30-31).

Numerous complaints have been received by Dixon's office regarding the delay in receiving child support and alimony from the CSDA (H. 40). The CSDA has been in existence over 16 years and has never had a negative balance (Id.).

The Appellee then called two employees of Polk County's Clerk's office to testify. James Corley, the supervisor of the CSDA (H. 63), testified that his department creates an individual account for each person receiving payments from the CSDA (H. 65). In 1988, 5.82% of the payments into the CSDA were by personal check, representing $1.167 million (H. 84). When payment into the CSDA is by personal check, the clerk's office has disbursed

funds from the CSDA to the payee in less than 14 days in one instance out of 6,000 or 7,000 payments (H. 93).

Peter Murphy, the finance director of Polk County Clerk's Office (H. 117) testified that he balances the CSDA to zero every month (H. 121). Murphy has received notice that a check to the CSDA has failed to clear within 6 or 7 days from its receipt at the clerk's office, but not within 2 or 3 days (H. 129-30). Murphy testified that it is very rare that the clerk's office cannot collect on bad checks (H. 157) and that it is the policy of Dixon's office to wait 14 days to distribute funds from the CSDA to payees, even when the office has received notice that the check to the CSDA has already cleared (H. 198).

The funds in the CSDA are on deposit at the Southeast Bank of Bartow (H. 175). Lyle Walker, the vice-president of the Southeast Bank of Bartow is responsible for the CSDA (H. 174-5). Walker testified that he could not assure Dixon whether a check had cleared within two business days after its deposit (H. 181). Walker testified that he was familiar with the Expedited Funds Availability Act (H. 176) and that he complied with the Act's mandates (H. 178), which require checks written on accounts within the State of Florida to be credited to an account within three business days and checks written on non-local or out-of-state accounts to be credited within seven business days (H. 178-9). Walker testified that the CSDA has never had a negative balance (H. 182).

William Traxler, the Vice President of Community National Bank at Bartow (H. 186), testified that in his opinion, the Expedited Funds Availability Act exposes banks to potential losses because banks are required to credit accounts with funds before the bank has received notice of whether a check is good (H. 190). Traxler conducted a survey for ten days, finding that he received notice of whether a check cleared within 4 to 5 business days (H. 191).

Dixon then called Geraldine Brooks and Jerry Alphonso to testify regarding the CSDA in Lee and in Hillsborough Counties. Brooks, the supervisor of the CSDA in Lee County (H. 212), testified that prior to October, 1988, Lee County did not disburse funds paid into the CSDA by personal check until 15 days had elapsed from the date of deposit of the check. Complaints had been made because of this practice (Id.).

Since October, 1988, the Lee County Clerk's Office has complied with Section 61.181, Florida Statutes, disbursing funds within two days (H. 217-8, 230-1). From October, 1988, through January, 1989, the CSDA has received 3,152 payments by personal check, three of which were initially returned (H. 224). The Lee County Clerk's Office was able to collect on these checks and has suffered no monetary losses since complying with Section 61.181, Florida Statutes (H. 218).

Brooks testified that funds are transferred to the CSDA from the fee account when funds have been disbursed to payees prior to the clerk's office receiving notice that a check to the CSDA has not cleared (H. 221-2). The computer program utilized by Lee County Clerk's Office is designed to separate the 3% fee charged for operating the CSDA from the child support payments (H. 223-4). Brooks testified that the 25-cent fee is collected on checks for child support (H. 212), and that the CSDA is balanced to $8,000.00 every month, the hold amount left remaining in the CSDA (H. 223).

Jerry Alphonso, Chief Deputy Clerk of Hillsborough County (H. 231), testified that prior to October, 1988, his office did not disburse funds to payees from the CSDA until ten days had elapsed from the date of the deposit of the personal check. Since October, 1988, Hillsborough County has disbursed funds within two days (Id.) as required by Section 61.181, Florida Statutes. Since October, 1988, 52 checks remain uncollected (H. 233) and Alphonso guessed that it would take two weeks to receive notice that a check had been returned for insufficient funds (H. 236).

The State of Florida called Donna Wimberly, Deputy Clerk of Leon County Clerk's Office and supervisor of the department handling the CSDA for the Leon County area (H. 239). She testified that funds are distributed within two days of receipt

in compliance with Section 61.181, Florida Statutes (H. 242), and that 6% of the payments into the CSDA are by personal check (H. 240). The 25-cent fee on checks for child support is collected by the CSDA in Leon County (H. 245). Wimberly estimated that it takes about 14 days to learn whether a payment into the CSDA by check has cleared (H. 242).

At no time has the Leon County Clerk's Office transferred funds from a general operating account to the CSDA (H. 241). Although a technical shortage in the CSDA exists when a check to the CSDA is returned, the Leon County Clerk's Office does not reimburse the CSDA (H. 253). At all times, there were sufficient funds in the CSDA to cover any checks returned for insufficient funds (H. 246).

The State then called George Haynie, the Director of Accounting and Auditing of the State of Florida's Office of the Comptroller (H. 246-7). His department maintains the Child Support Depository Trust Fund (H. 248). The Trust Fund is designed to absorb the losses occasioned by checks returned for insufficient funds (H. 266). The Child Support Depository Administrator can apply to the Trust Fund to recover the amount of dishonored checks (H. 248) as well as the costs associated with attempting to collect dishonored checks (H. 249).

The Trust Fund is funded by $100,000.00 seed money from the Legislature and the 25-cent fee on child support checks paid into

the CSDA (H. 267). One claim had been submitted to the Trust Fund for the amount of $311.25 (H. 269).

Haynie testified that the CSDA is a trust account (H. 262). Haynie indicated that interest can properly be earned on trust accounts (H. 260) with the clerk's office retaining the interest and then turning the excess interest over to the County Commissioners (H. 263). Haynie characterized such interest and the fees the clerk's office collects for administering the CSDA as public money (H. 263).

Based on the evidence, the lower court rejected Dixon's claims, ordered the temporary injunction set aside and upheld the constitutionality of Section 61.181, Florida Statutes (R. III, 404-412). In rejecting the claim that Section 61.185(5) required the pledging of credit in violation of Article VII, Section 10, the lower court stated that

> [t]he plaintiff did not present sufficient evidence to support the plaintiff's contention that §61.181(5) required him to violate this constitutional provision, that there was an imminent necessity for the plaintiff to have to improperly "pledge credit". The plaintiff was unable to show, by the nature of the projected activity of the account and checks processed therein, any contractual agreement with the depository bank, any order of the court or other legal premise, or any other applicable evidence, that the plaintiff could comply with the statute only by improperly pledging credit. The plaintiff did not show that a present, justiciable controversy exists in order for the court to address this constitutional issue by

> means of the declaratory judgment sought by the plaintiff.

Id. (emphasis in original).

Dixon filed a Motion for Rehearing on May 4, 1989 (R. III, 413-417) arguing that the lower court's order of April 25, 1989, was contrary to the evidence presented with regard to the issue of pledging credit (R. III, 414), and further, that the lower court's order was in error in that an actual controversy need not exist in order for the court to render a declaratory judgment. Id. The State and HRS both filed Responses in Opposition to the Motion for Rehearing (R. III, 418-22 and 424-25), and on August 1, 1989, the lower court held a hearing on the issue of whether to grant Dixon a rehearing (M. 1-46).

At this motion hearing, counsel for Dixon noted that Section 61.181, Florida Statutes, had been amended in 1989, lengthening the time from two (2) to four (4) days within which the disbursal of funds paid into the CSDA by personal check must be made (M. 5). The 1989 amendments also deleted the requirement that the CSDA collect 25-cents on child support checks to be paid into the Child Support Depository Trust Fund (M. 6).

The lower court stated that it was interested in the existence of a present controversy (M. 16). Counsel for Dixon then stated that since May 1, 1989, Dixon's office has complied with Section 61.181, Florida Statutes (M. 9). Eight (8) personal

checks have been returned a second time and funds have been transferred from the general revenue account to the CSDA for the amount of these eight (8) checks (M. 11-12). Subsequent to this transfer of funds, six (6) of the eight (8) checks were made good (M. 22), leaving Dixon with two (2) checks with which to apply to the Child Support Depository Trust Account for reimbursement.

The lower court granted the Motion for Rehearing, limiting the rehearing to one issue, namely, whether "Section 61.181(5) is unconstitutional, in whole or in part, in that it requires [Appellee Dixon], a public entity, to give or lend its credit to aid individuals in violation of Article VII, Section X, of the Florida Constitution" (R. III, 426-27).

At the rehearing, held on October 23, 1989, and on November 30, 1989, the court noticed all proceedings held prior to the rehearing (T. 6). The rehearing produced the following relevant facts for this appeal:

Richard Melvin Weiss, the Chief Deputy Clerk of Polk County (T. 6-7), testified that the Clerk's office maintains three funds or accounts -- the budgetary fund, the general operating account, containing fees paid to the Clerk's office and the child support depository account ("CSDA"), containing the domestic relations payments (T. 8).

Prior to May 1, 1989, the Clerk's practice was to wait ten (10) working days before disbursing funds for child support, separate maintenance and alimony paid into the CSDA by personal check (T. 8-9). When a check paid into the CSDA is returned as unsatisfied a second time, the policy prior to May 1, 1989, was

to transfer money to the CSDA from the general operating account (T. 15-16). This transfer of funds from the general operating account to the CSDA had occurred occasionally prior to May 1, 1989 (T. 17).

Since May 1, 1989, the practice has been to disburse the funds paid into the CSDA by personal check within 24 hours (T. 9). Since May, 1989, the transfer of funds from the general operating account to the CSDA has occurred more frequently because the disbursal of funds is made prior to notice that the check has been dishonored (T. 17)

Eight (8) checks have been written by the clerk's office transferring funds from their general operating account to their CSDA since May 1, 1989 (T. 21). The reason a check is written each time the clerk's office disburses funds which have been returned twice as unsatisfied is so that, during the audit, documentation will exist for each disbursement from the general fund (T. 22).

Despite the knowledge that Section 61.181(5), Florida Statutes, allows four days for disbursal, Weiss testified that disbursal of funds is made within 24 hours (T. 18). The reason stated for this policy is that the bank where the CSDA funds are deposited could not, within four days, notify the Clerk's office whether the personal check had been dishonored, and since other payments to the Clerk's office are disbursed within 24 hours of receipt, the office "decided that it would be best just to handle all of [the payments] that way" (T. 18, 19).

Funds paid into the CSDA are deposited in the bank the day after receipt at the Clerk's office (T. 11).

The policy regarding returned checks was and is to notify the payor that the check had been returned and that a $15.00 statutory fee was due; the check is then deposited with the bank a second time (T. 22).

On cross-examination, Weiss testified that in addition to the payment to the custodial parent, the CSDA includes a 3% fee, up to $5.00, of the payment to the custodial parent (T. 26). During 1988, the fees in the CSDA totaled $505,420.00 (T. 27, R. IV, Defendant's Exhibit No. 1). Weiss testified further that a large percentage of the $505,420.00 collected during 1988 derived from the 3% fee collected under Section 61.181, Florida Statutes, designed to cover the costs incurred by the CSDA in receiving, reporting and disbursing child support, alimony and maintenance payments (T. 28).

The procedure of the Clerk's office regarding the 3% fee is to deposit the fee into the CSDA and then transfer the total amount of the fees received in one month out of the CSDA and into the general operating account at the end of each month (T. 30).

Eight percent of the payments in the CSDA are in the form of personal checks (T. 33), totaling $1.5 million (T. 73). Of the $1.5 million paid into the CSDA, the Clerk's office was unable to get reimbursement from the payor on eight (8) checks (T. 34) and the Clerk's office had made a request to the State's Comptroller Office for reimbursement out of the Child Support Depository Trust Fund for these eight checks (T. 31-2).

On redirect examination, Weiss testified that the 3% fee was public money and was turned over to the Board of County Commissioners at the end of the year (T. 43).

Peter Murphy, an employee of the Polk County Clerk's Office in the Finance Department (T. 52), testified that since May 1, 1989, eleven (11) checks to the CSDA had been returned a second time (T. 63, 83), and that the eleven checks totaled $1,063.98 (T. 73). Murphy testified that the Clerk's office had transferred money from its general operating account to the CSDA for these eleven (11) checks (T. 63). Subsequently, three (3) of the eleven checks were made good (T. 64-5, 83) by the payor. The remaining eight (8) checks had been submitted to the State's Depository Trust Fund (T. 72) and the Clerk's office had been reimbursed from this fund in the amount of $918.00 (T. 73). The checks for which the Clerk's office did not receive reimbursement were not personal checks paid into the depository under Section 61.181(5), Florida Statutes (T. 84), but were payments made pursuant to Income Deduction Orders (T. 74).

Closing arguments were made and the lower court issued a Declaratory Judgment adjudging Section 61.181(5), Florida Statutes, unconstitutional in that it requires payments made to the Child Support Depository by check to be disbursed within four (4) working days as violative of Article VII, Section 10 of the Florida Constitution. The State of Florida timely filed a Notice of Appeal (R. V, 462-3).

On September 6, 1991, the District Court of Appeal, Second District, upon its own motion, certified pursuant to Article V, Section 3(b)(5) of the Constitution of Florida, that the Order of the trial court passes upon a question of great public importance requiring immediate resolution by this Court. This Court accepted jurisdiction on September 10, 1991.

SUMMARY OF ARGUMENT

The lower court abused its discretion when it granted Dixon a rehearing on the basis of events that occurred at least two (2) months after the initial hearing. Such evidence did not present the lower court with newly discovered evidence, but new evidence, and as such, failed to provide the lower court with a proper basis upon which to grant a rehearing.

Moreover, the lower court erred when it held that Dixon pledges public credit when funds are disbursed from the CSDA prior to the recovery of funds paid into the CSDA by check. The essence of pledging credit in violation of the constitution is the imposition of some new liability. No new liability has been imposed upon Dixon or Polk County because the fees Dixon imposes and collects for operating the CSDA more than cover the costs associated with operating the CSDA. Furthermore, even if the costs associated with operating the CSDA exceeded the fees collected, no unconstitutional pledging of credit would have occurred because Dixon, his office and Polk County taxpayers are insulated from liability.

Finally, if this Court construes the facts to have been such that a pledging of credit has occurred, the loan or pledge is for a public purpose and thus a violation of Article VII, Section 10 has not been shown.

ARGUMENT

I.

GRANTING DIXON'S MOTION FOR REHEARING CONSTITUTES REVERSIBLE ERROR

While the lower court stated in its order that it would grant a rehearing based on Dixon's Motion, the Defendants' responses and on the argument of the hearing (R. III, 462), neither Dixon's Motion for Rehearing (R. III, 413-17) nor the argument presented at the motion hearing (M. 1-46) provide a basis upon which a rehearing could properly be granted.

In Dixon's Motion for Rehearing, Dixon asserts that the denial of relief on the issue of pledging credit is contrary to the evidence presented at the hearing on the Amended Complaint for Declaratory Judgment. Dixon's motion then recites the testimony of his witnesses and the state's witnesses, arguing that this testimony demonstrates that Dixon would be required to pledge credit were he to comply with Section 61.181(5), Florida Statutes.

At the hearing on the rehearing motion, the lower court stated that it was interested in the existence of a present controversy (M. 16) and allowed Dixon to rely on events that occurred subsequent to the February 10, 1989, hearing on the Amended Complaint for Declaratory Judgment, namely that from May 1, 1989, through mid-July, 1989 (M. 19), Dixon's office transferred funds from the general operating account to the CSDA to cover eight checks that had been returned as unsatisfied (M. 11-12).

Reliance on this evidence to grant a motion for rehearing is improper. Where a party moves for a rehearing based on new evidence, rather than newly discovered evidence, granting a rehearing is improper. See, Noor v. Continental Casualty Co., 508 So.2d 363 (2d DCA 1987). The only argument or evidence Dixon offered at the motion hearing concerned new evidence, that is, evidence of events that occurred at least two months after the hearing on the Amended Complaint for Declaratory Judgment concluded. In Dixon's motion, he presented no newly discovered evidence, but simply reargued the evidence presented at the initial hearing. When a motion for rehearing merely sets forth matters that have been previously considered by the trial court, as does Dixon's Motion for Rehearing, the motion should be denied. See, Diamond Cab Co. of Miami v. King, 146 So.2d 889 (Fla. 1962).

The purpose of a rehearing is discussed in Cole v. Cole, 130 So.2d 126 (1st DCA 1961). Therein the court notes that:

> The nature of a rehearing is revealed in several opinions of the Supreme Court of Florida in which that court has had occasion to define a rehearing. A rehearing is a second consideration of a cause for the sole purpose of calling to the attention of the court any error, omission, or oversight that may have been committed in the first consideration. Lake v. State, 1930, 100 Fla. 373, 129 So. 827, 131 So. 147. A petition for a rehearing is a means afforded by rule to present to the court some point which it overlooked or failed to consider by reason whereof its judgment is erroneous. Atlantic Coast Line R. Co. v. City of Lakeland, 1927, 94 Fla.

> 347, 115 So. 669. A prime function of a petition for rehearing is to present to the trial court some point which it overlooked or failed to consider, which renders the decree inequitable and erroneous. Hollywood, Inc. v. Clark, 1943, 153 Fla. 501, 15 So.2d 175. A petition for rehearing of a suit in equity is available for correction of error apparent on face of record. Braznell v. Braznell, 1939, 140 Fla. 192, 191 So. 457, and Hollywood, Inc. v. Clark, supra. The Supreme Court in the last-mentioned case also recognized the rule that a petition for rehearing of a suit in equity is available for the purpose of obtaining the court's permission to introduce newly-discovered evidence.

Id. at 130.

The limited circumstances under which a rehearing is properly granted is also noted in Florida Jurisprudence.

> A prime function of the motion is to present to the court some point that it overlooked or failed to consider that renders the decree inequitable and erroneous. It is also available for correction of an error of law apparent on the face of the record, and for obtaining the court's permission to introduce newly discovered evidence.

38 Fla.Jur.2d, New Trial, Section 89 (footnotes omitted).

The lower court's order notes that the rehearing is granted on the basis of the motions and on the argument (R. III, 426), but neither Dixon's motion nor Dixon's argument presented the lower court with newly discovered evidence or a point the lower court overlooked or sought to correct an error of law on the record. Dixon's motion merely regurgitated the testimony

presented at the hearing on the Amended Complaint and the argument made at the rehearing concerned events that occurred months after the hearing on the Amended Complaint concluded.

While the lower court is allowed some discretion in whether to grant a rehearing, the court's discretion is not unbridled. See, Monarch Cruise v. Leisure Time Tours, 456 So.2d 1278 (3d DCA 1984). If granting the rehearing is unreasonable, the ruling should not stand. Id. For the reasons detailed above, the lower court acted unreasonably when it granted Dixon's Motion for Rehearing and therefore, the ruling should be reversed.

II.

SECTION 61.181(5), FLORIDA STATUTES, REQUIRING DIXON TO DISBURSE FUNDS PAID INTO THE CSDA BY PERSONAL CHECK WITHIN FOUR (4) DAYS OF RECEIPT, IS NOT VIOLATIVE OF ARTICLE VII, SECTION 10.

Dixon argued, and the lower court found that because funds paid into the CSDA by check are not recovered by Dixon within four (4) days, Dixon is compelled to use funds from unrelated payors or to reimburse the CSDA from the general revenue account when Dixon disburses funds to payees within four (4) days (R. III, 449-50). The lower court held that Dixon gives public credit or lends public funds to insure the successful handling of the CSDA, thus violating the constitutional prohibition regarding the pledging of credit (R. III, 447-52).

1. **Public Credit Has Not Been Pledged Or Loaned.**

The issue of whether credit has been pledged in the context

of the Child Support Depository has not been discussed in Florida case law, so the State must rely on cases discussing the pledging of credit in other contexts.

To find that Article VII, Section 10, has been violated, the court must first find that public credit has been loaned or pledged. In order to have a loan or use of public credit, "the public must be either directly or contingently liable to pay something to somebody". Nohrr v. Brevard County Educational Fac. Auth., 247 So.2d 304, 309 (Fla. 1971). The word "credit" implies the imposition of some new financial liability. Id. See also, State v. Housing Finance Authority of Polk County, 376 So.2d 1158 (Fla. 1979).

Dixon has not shown that either he, his office, or Polk County, Florida, is either directly or contingently liable for worthless checks to the CSDA. Section 61.181(5), Florida Statutes, provides that Dixon cannot be held personally liable if a check is dishonored by a bank, and Section 28.243(1), Florida Statutes, insulates Dixon's office from liability on checks. There has also been no showing that the taxpayers of Polk County are responsible for worthless checks paid into the CSDA.

Not only has Dixon failed to show that either he, his office, or Polk County is "liable to pay something to somebody", Dixon has failed to show that the mandates of Section 61.181, Florida Statutes, create "something" to pay. Any costs

associated with the CSDA -- including worthless checks -- are designed to be covered by the fees imposed by Section 61.181(2), Florida Statutes. This subsection provides that:

> [t]he depository shall impose and collect a fee for receiving, recording, reporting, disbursing, monitoring, or handling alimony or child support payments as required under this section . . ..

Section 61.181(2), Florida Statutes.

In 1988, Dixon's office, as administrator of the CSDA, collected $505,420.00 in fees (H. 49, T. 27 R. IV, Defendant's Exhibit No. 1). Since May, 1989, eight (8) worthless checks have been paid into the CSDA, totaling approximately $1,000.00[1] (T. 21, 34).

While an argument might be made for the unconstitutional pledging of credit if evidence had been presented to indicate that the costs associated with handling the CSDA were in excess of the fees collected, no such evidence was produced. In fact, the evidence presented was that the fees collected for handling the CSDA far exceed the costs associated with the CSDA, with the excess turned over to the county on a yearly basis (T. 43). It is ironic that Dixon claims and the lower court held that Dixon

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[1] Dixon's office has received reimbursement for all worthless personal checks paid into the CSDA from the State's Depository Trust Fund (T. 73, 84).

is compelled to pledge or loan credit in disbursing funds from the CSDA, when the CSDA appears to be a money-generating operation for the county.

Lending further support to the proposition that credit need not be pledged by the requirement that funds be disbursed within four (4) days of receipt by the CSDA is found in the House of Representatives Committee on Judiciary Staff Summary, SS/HB 114 and 158 (R. IV, Defendant's Exhibit 3). Under the section dealing with the effect of proposed changes, it is noted that "[t]he depository may impose a flat fee based on the reasonable cost of operation . . .". The fiscal impact statement specifically notes that:

> [t]here are no intended public expenditures contained in this bill. The fees imposed upon the child support obligor are designed to offset any additional costs that will arise from the implementation and operation of the depositories and income deduction program.

It appears that Dixon and the lower court have assumed that worthless checks for which the depository is unable to collect upon are not a cost associated with the CSDA for which fees have been imposed and collected. This assumption is unwarranted.

The language of Section 61.181(2), Florida Statutes, regarding the imposition of fees is comprehensive. It provides that the fees are designed to cover the cost associated with "receiving, recording, reporting, disbursing, monitoring, [and]

handling alimony or child support payments as required by this section . . .". Section 61.181(2), Florida Statutes (emphasis added).

When the legislature employs comprehensive language, the legislative intent is presumed to include everything embraced in such comprehensive language. Florida State Racing Commission v. McLaughlin, 102 So.2d 574 (Fla. 1958). Worthless checks are simply one of the costs associated with disbursing child support payments within four (4) days as required by Section 61.181, Florida Statutes.

When the issue of whether a statute violates the constitution arises in a new context, it can be helpful to examine the purpose of the particular constitutional provision. The purpose of Article VII, Section 10, is to protect public funds from being exploited in assisting or promoting private ventures. Bannon v. Port of Palm Beach District, 246 So.2d 737, 741 (Fla. 1971). In Bannon, the Supreme Court states:

> The rationale of this constitutional dictate was examined in depth in Bailey v. City of Tampa, 92 Fla. 1030, 111 So. 119 (1926):
>
> > "The reason for this amendment was that, during the years immediately preceding its adoption, the state and many of its counties, cities, and towns had by legislative enactment become stockholders or bondholders in, and had in other ways loaned their credit to, and had become interested in the

> organization and operation of, railroads, banks, and other commercial institutions. Many of these institutions were poorly managed, and either failed or became heavily involved, and, as a result, the state, counties, and cities interested in them became responsible for their debts and other obligations. * * * Hence the amendment, the essence of which was to restrict the activities and functions of the state, county, and municipality to that of government, and forbid their engaging directly or indirectly in commercial enterprises."

Id., (emphasis added).

The requirement that Dixon, as administrator of the CSDA disburse funds within four (4) days of receipt does not involve the depository, the Clerk's office, or Polk County directly or indirectly in a commercial enterprise. The purpose of the speedy disbursal of funds is strictly and properly one for the government. This purpose is so that child support payments will be placed in the hands of custodial parents without delay. (R. IV, Defendant's Exhibit 3). The ultimate aim is so that child support payments will expeditiously find their way to the children of Florida, resulting in a substantial reduction in public assistance for children (R. IV, Defendant's Exhibit 4). This is clearly and strictly a governmental function.

The evidence produced at the hearing and the rehearing merely showed that Dixon had his people remove the fees collected for operating the Child Support Depository from the CSDA and

place these fees into the general operating account (T. 30). The evidence also showed that when a cost of operating the CSDA occurred, namely, a worthless check to the CSDA was returned, Dixon's office transferred money out of the general operating account and back into the CSDA (T. 21).

That funds have been transferred from one account to another has no constitutional significance.[2] That funds may not be recovered by Dixon within four (4) days is, similarly, of no constitutional significance. Because the fees collected to operate the CSDA more than cover the costs associated with operating the CSDA, no new liability has been created. The imposition of a new liability for which the political subdivision is liable is the essence of the pledging of credit in violation of Article VII, Section 10. See, Nohrr, supra. Furthermore, there was no evidence presented at the hearing or the rehearing that Dixon, his office, or Polk County taxpayers would be responsible for such costs if they did, in fact, exceed the cost of operating the Child Support Depository. Therefore, the lower court erred when it held that credit had been pledged.

2. If This Court Finds That Credit Has Been Loaned Or Pledged, The Purpose Of The Pledge Or Loan Is A Public One.

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[2] Dixon claims that the transfer of funds is a necessity because the CSDA maintains a zero balance despite the lack of authority for the claim that the account must maintain a zero balance and despite the testimony of one of Dixon's witnesses at the hearing, Geraldine Brooks, the supervisor of the CSDA in Lee County, that she keeps $8,000.00 into CSDA over and above any obligations to payees (H. 212, 223).

While the lower court conceded that the expeditious payment of child support and alimony is a matter of great public concern (R. III, 451), it nonetheless held a portion of Section 61.181, Florida Statutes, unconstitutional. Id.

In reference to the four (4) day disbursal from the CSDA, the Court notes that:

> [t]he Defendants argue that this method of handling the Clerk's Depository is appropriate since the legislature has declared the prompt payment of support and alimony to be a public purpose thereby warranting the expenditure of public funds or the extension of public credit. As evidence of the Legislature's declaration of public purpose, the Defendants introduced two Legislative Staff Analyses, one written on April 4, 1984 and the other written on May 9, 1988. To further support their position, Defendants argue that the Legislature's determination of "public purpose" is definitive and therefore any expenditure of public funds or lending of public credit is for a valid public purpose. But O'Neill v. Burns, 198 So.2d 1 (Fla. 1967) holds that:
>
> > Only when there is some clearly identified and concrete public purpose stated within the statute as a primary objective and a reasonable expectation that such purpose will be substantially and effectively accomplished, may the State or its subdivisions disburse, loan or pledge public funds or property to nongovernmental entities, and there must be some control retained by the public authority to avoid frustration of the public purpose.

(R. III, 450).

The lower court then adjudged Section 61.181(5) unconstitutional, concluding that "[i]n this instance, the Court

finds that there is no clearly identified and concrete public purpose stated in the statute at issue" (R. III, 451).

The lower court has misquoted O'Neill and misconstrued the law. In O'Neill, the Supreme Court did not hold that a public purpose or objective must be stated within the statute before public funds may be loaned or pledged. In O'Neill, the court quoted approvingly the chancellor writing that:

> He correctly stated: "It is only when there is some clearly identified and concrete public purpose as the primary objective and a reasonable expectation that such purpose will be substantially and effectively accomplished, that the state or its subdivision may disburse, loan or pledge public funds or property to a non-governmental entity such as a non-profit corporation," and further, that "There must be some control retained by the public authority to avoid frustration of the public purpose."

O'Neill, supra, at 4.

Not only did O'Neill not hold that the legislature's objective of a public purpose must be stated within the statute, a review of other Supreme Court cases on the issue of public purpose reveals that the legislature's objective of serving a public purpose need not be stated in the statute. See, Linscott v. Orange County Indus. Def. Auth., 443 So.2d 97 (Fla. 1983); State v. Orange County Indus. Def. Auth., 417 So.2d 959 (Fla. 1982); State v. Housing Finance Auth. of Polk County, supra.

It is settled that if the primary objective of the expenditure of public funds is a public purpose, public funds may be constitutionally expended. O'Neill, supra; Linscott, supra; State v. Orange County, supra; Housing Finance, supra.

The evidence of the legislature's objective to serve the public by the expeditious disbursal of funds from the CSDA, as required by Section 61.181(5), Florida Statutes, is found in the Staff Analyses of House Bill No. 116 and CS/HB 114 and 158 (R. IV, Defendant's Exhibit 4 and 3, respectively). Noted therein is that the purpose of the CSDA and the expeditious disbursal of funds from the CSDA is to ensure that child support payments will be placed in the hands of custodial parents without delay so that there will be a substantial reduction in public assistance payments for children. Id. While the expeditious disbursal of child support may incidentally benefit the custodial parent and the child, an incidental benefit to a private party will not negate a public purpose objective. State v. City of Miami, 379 So.2d 651 (Fla. 1980; State v. Orange County, supra.

The deference accorded the legislature's determination of what constitutes a public purpose is great. Wald v. Sarasota County Health Facilities, etc., 360 So.2d 763 (Fla. 1978); Nohrr, supra; Price v. City of St. Petersburg, 158 Fla. 705, 29 So.2d 753 (Fla. 1947). It is only when the legislature's determination

of what constitutes a public purpose is so clearly erroneous as to be beyond the power of the legislature, may a court declare the legislature's determination invalid. Wald, supra.

In the case sub judice, the lower court improperly disregarded the deference the legislature's determination of public purpose is entitled to, finding that the disbursal of funds from the Child Support Depository within four (4) days of receipt does not benefit the public, but only the individual payor and payee. Such a finding is only proper when the court finds that the legislative determination of public purpose was so clearly wrong as to be beyond the power of the legislature. See, Id. The lower court made no such finding and Dixon made no such argument.

Furthermore, such a narrow interpretation of who would receive the benefit is disfavored as a construction that may unnecessarily render Section 61.181, Florida Statutes, unconstitutional. It is well established that courts must construe a statute to uphold it, rather than invalidate it, if there is any reasonable basis for doing so. Dept. of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla. 1983), appeal dismissed; Southeast Volusia Hospital District v. Florida Patient's Compensation, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984).

Here, there is more than a reasonable basis for construing the portion of Section 61.181, Florida Statutes, that requires disbursal from the Child Support Depository within four (4) days as benefiting the public rather than solely the individual payor or payee. As stated earlier, the purpose of the expeditious disbursal of funds is so that support payments will be placed in the hands of custodial parents without delay so that there will be a reduction in the necessity for public assistance for the children of Florida (R. IV, Defendant's Exhibits 3 & 4).

Even if this Court interprets the portion of Section 61.181, Florida Statutes, that requires disbursal within four (4) days as requiring Dixon to pledge or loan public funds, the purpose of this pledge or loan is to benefit the public and therefore no violation of Article VII, Section 10, of the Florida Constitution has occurred.

III.

THE LOWER COURT ERRED WHEN IT FAILED TO LIMIT ITS HOLDING TO THE CENTRAL DEPOSITORY FOR THE TENTH JUDICIAL CIRCUIT OF POLK COUNTY.

While a statute may validly be applied to one state of facts and invalidly applied to another state of facts, it is the court's duty to enforce the statute in those cases where it can constitutionally be applied. State v. Hill, 372 So.2d 84 (Fla. 1979); Ex parte Wise, 141 Fla. 222, 192 So. 872 (Fla. 1940).

Sub judice, the State of Florida called Donna Wimberly, Deputy Clerk of Leon County Clerk's Office and supervisor of the department handling the CSDA for the Leon County area (H. 239). She testified that funds are distributed within two days of receipt in compliance with Section 61.181, Florida Statutes (H. 242), and that 6% of the payments into the CSDA are by personal check (H. 240). The 25-cent fee on checks for child support is collected by the CSDA in Leon County (H. 245). Wimberly estimated that it takes about 14 days to learn whether a payment into the CSDA by check has cleared (H. 242).

At no time has the Leon County Clerk's Office transferred funds from a general operating account to the CSDA (H. 241). Although a technical shortage in the CSDA exists when a check to the CSDA is returned, the Leon County Clerk's Office does not reimburse the CSDA (H. 253). At all times, there were sufficient funds in the CSDA to cover any checks returned for insufficient funds (H. 246).

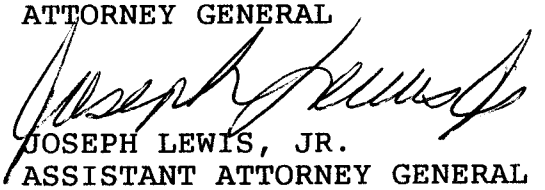
Since the Leon County CSDA has complied with the statute without having to pledge public credit, an interpretation upholding the constitutionality of the statute was available to the trial court. Therefore, at most, the trial court could have found Section 61.181, Florida Statutes, unconstitutional as applied to Dixon.

CONCLUSION

The lower court abused its discretion in granting the rehearing and erred when it declared Section 61.181(5), Florida Statutes, unconstitutional, in part, in that it requires funds to be disbursed from the Child Support Depository within four (4) working days. For the foregoing reasons, the Appellant, State of Florida, respectfully requests this Honorable Court to reverse the trial court and hold that the statute is constitutional.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JOSEPH LEWIS, JR.
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 249580

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, FL 32399-1050
(904) 488-1573
Counsel for State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **VICTOR J. TROIANO, ESQUIRE**, Troiano & Roberts, P.A., Post Office Drawer 829, 317 South Tennessee Avenue, Lakeland, Florida 33802; **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**, Carlton and Carlton, P.A., 2120 Lakeland Hills Boulevard, Lakeland, Florida 33805, this 20th day of September, 1991.

JOSEPH LEWIS, JR.

dixon.supbrf/joe