DA 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

REPLY BRIEF OF APPELLANT STATE OF FLORIDA

Respectfully submitted,

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TABLE OF CONTENTS

PAGES

CITATIONS OF AUTHORITY

CASES ..... **PAGE(S)**

STATUTES

OTHER AUTHORITIES

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

Appellee's Statement of the Case and Facts does not confine itself to the facts presented below at the hearing and rehearing, but diverges into narrative unsupported by record cites and blatantly argues issues of law. For example, the Appellee's discussion of the "history" of the workings of the depository system is devoid of record cites (Answer Brief, 3). Further, the appellee improperly chooses to argue in the Statement of the Case and Facts that interest which could be earned on the depository account would be "public money" (Id. at 7). Appellant addresses this assertion in the Argument portion of this Reply Brief.

These errors are compounded by Appellee's assertion that the State incorrectly represented the facts (Answer Brief, 30). The State cited to the record copiously in its Statement of the Case and Facts. The record below established that the Appellee was unable to get reimbursement from payors on eight (8) checks (T. 64-5, 83). That the Appellee was initially unable to get reimbursement from payors of a greater number of checks does not amount to a mischaracterization of the facts. The evidence remains that the Appellee received payment from payors on all but eight (8) checks. (Id.) These eight (8) checks totaled $1,063.98 (T. 73). (R. IV, Plaintiff's Exhibit No. 7). The eight (8) checks were submitted to the State's Depository Trust Fund (T. 72) and the Appellee was reimbursed for all paperless

personal checks written to the CSDA. The Appellee received a check from the Trust Fund in the amount of $913.00 or $918.00 (T. 94). The monies for which Appellee was denied Trust Fund reimbursement were payments made pursuant to Income Deduction Orders (T. 74) and these payments are not at issue in this appeal.

Because the State believes that further argument on Issues I and III will not aid the Court, the State will confine argument in its Reply Brief to the issue of whether credit has been pledged in violation of Article VII, §10, Florida Constitution.

SUMMARY OF THE ARGUMENT

The legislature intended for the CSDA to earn interest and for that interest to offset any losses a depository has after the Trust Fund becomes depleted. Because Appellee failed to place the depository funds in an interest bearing account (H. 44), the record does not show that interest would be insufficient to cover any losses due to paperless checks. Therefore, even if this Court were of the opinion that credit has been loaned or pledged, the loan or pledge is not the result of the dictates of Section 61.181(5), F.S., but because of Appellee's own actions.

Interest and fees can be pledged or loaned by Appellee without violating Article VII, §10, because interest and fees are not of the character of public funds that Article VII, §10, protects.

The primary versus incidental public purpose analysis found in some cases is neither helpful nor applicable here. Where a pledge or loan is for a governmental purpose, the pledge or loan is not violative of Article VII, §10. Assuming that the facts demonstrate a pledge or loan, the pledge or loan is for the governmental purpose of ensuring court ordered payments are timely made and expeditiously disbursed. Thus, the pledge or loan is constitutional.

Section 61.181(5), F.S. (1989), cannot reasonably be construed to allow Appellee four (4) days from payment of a check to disburse funds given the Staff Analysis of CS/HB 258, a reading of the 1989 statute itself, and the rules of statutory construction.

ARGUMENT

II.

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

1. Public Credit Has Not Been Pledged Or Loaned.

Appellee claims that Section 61.181(5) requires Appellee to pledge or loan credit in violation of Article VII, §10, because the Section requires the disbursal of funds from the CSDA before a payor's check clears, resulting in the use of funds from other payors or the use of funds from the Clerk's General Operating Account. Even if this Court were to reject the State's position and find that the public or Appellee is (1) either directly or contingently liable to pay something to somebody and (2) that there is, in fact, something to pay, Section 61.181(5), F.S., nonetheless, does not require the loan or pledge of public credit in violation of the Florida Constitution. The legislature intended that CSDA funds earn interest and that that interest be used to offset any loss that a depository may suffer because of bad checks. The Final Analysis and Economic Impact Statement of the House of Representative's Committee on Judiciary of Bill No. CS/HB 258, Florida State Archives, Series 19, Carton 1494[1] states that:

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[1] See Appendix A: Bill No. CS/HB 258 became Public Law 89-183, Laws of Florida and amended §61.181(5), F.S., to require the disbursal of payments by check within 4 working days. The State requests this Court take judicial notice, pursuant to Rule 90.202, Florida Rules of Evidence, of the Staff Analysis. This authority was uncovered after, and in response to, Amicus Green's argument, based in part on legislative history, that the 1989

> Section 3 allows the central depository 4 days in which to disburse child support payments to the obligee after receipt of payment by the obligor. A $.25 fee for the Child Support Depository Trust Fund was deleted. Since local checks must now be paid within 3 days of presentment, the depositories should encounter problems with bad checks only in cases where the check is from another region. However, after the funds in the Trust Fund are depleted, the depositories will be able to well compensate for any losses with the interest earned on child support payment accounts.

Id. (emphasis supplied)

Clearly, the legislature intended that the depository funds be placed in an interest bearing account and for the interest earned on child support payment accounts to compensate the depositories for any losses attributable to bad checks. The monthly checking account statement from January 1988 to December 1988 shows a balance ranging between a low of $360,239.41 and a high of $448,241.46 (R. IV, Plaintiff's Composite Exhibit No. 5). At a 7 percent annual interest rate, compounded monthly, the CSDA could have, and should have, earned between $2,101.00 and $2,614.00 monthly. This interest, as well as the 3 percent fee collected for operating the CSDA, would be used to cover worthless checks when and if the Trust Fund becomes depleted.

Assuming arguendo Appellee has loaned or pledged credit, such loan or pledge of credit was not the result of the dictates of Section 61.181(5), F.S., but because of Appellee's failure to

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statute should be interpreted to allow the Depository 4 days after a check clears to disburse funds. The fallacy of this interpretation is discussed infra, p.16.

comply with the legislative intent by placing the child support payments in an interest bearing account. The monthly interest earned on the child support payment accounts would have been more than sufficient to compensate for any losses attributable to worthless checks.

The earned interest and 3 percent fee also become available to cover checks for that period of time between disbursal and clearance. There is, then, no need to use other payees' money and Section 61.181(5), F.S., does not require the pledge of credit. If, at some future time, a depository shows that the interest, the 3 percent fee, and the Trust Fund are insufficient to cover bad checks, then the depository may have established the pledge or loan of credit. This was not the case below.

Amicus claims that the evidence is uncontroverted that the depository cannot confirm within four (4) days whether a check has cleared. This statement is inaccurate. When checks are local, the Expedited Funds Availability Act, 12 U.S.C. §4002(b)(1), requires that not more than one business day intervene between the day funds are deposited and the day the funds are available for withdrawal. Thus, funds are available within three (3) days. Appellee's own witness, William Traxler, Vice President of the bank handling the CSDA checking account, testified that the bank complies with the Act (T. 201) and funds are available for withdrawal within three days of deposit.

Therefore, there may be no float time to cover, or if there is a period of time between the disbursal and clearance of a payor's check, the situation is not caused by the dictates of Section 61.181(5), F.S.

Despite Dixon's claims to the contrary, interest earned on the CSDA would not constitute public money. The source of the interest is not taxes or general revenue funds, nor is the interest statutorily required to be deposited in the county treasury. Under these circumstances, the constitutional prohibition against pledging or lending public funds is not implicated.

In O'Malley v. Florida Ins. Guarantee Ass'n, 257 So.2d 9 (Fla. 1971), an unsuccessful Article VII, §10, challenge was made upon an act which established a public corporation for the public purpose of paying certain claims when insurers became insolvent. Funds used to pay these claims derived from assessments on solvent casualty insurers and from claims paid by receivers of insolvent insurers. The Supreme Court reversed the lower court's ruling and held that the Act did not violate Article VII, §10, because "such funds are not in the class of state tax revenue or general funds and do not come within the ambit of the constitutional provisions that govern the deposit and disbursement of state tax or general revenue funds". Id., at 12. The funds were derived from sources other than public sources and further, the funds were not required to be deposited in the State Treasury or to be paid out in the same manner as state tax funds. The prohibition regarding pledging public credit was not even

implicated because the funds were not funds that Article VII, §10, protects.

In the case at bar, interest, like assessments, is not of the character of funds Article VII, §10, protects. There is no requirement that the interest be deposited in the county treasury or that the interest be paid out in the same manner county tax funds are paid out. Further, the source and use of the interest is very much like the source and use of the assessments in O'Malley, supra.

Even where funds are held by a state entity, rather than a public corporation, funds may fall outside of the ambit of funds protected by Article VII, §10. In State v. Florida State Improvement Comm., 158 Fla. 743, 30 So.2d 97 (Fla. 1947), revenue certificates were issued by the Florida State Improvement Commission to finance the construction of an office building for use by the Industrial Commission. The certificates were backed with funds collected by the Industrial Commission to administer the Workman's Compensation Act. The source of the fund was a levy upon employers. The monies were deposited in the State Treasury and administered by the State Treasurer. Despite this, the court states that, "...we can conceive of no theory by which these funds could be called state funds..." Id. at 99. The court reasoned that the State held the monies as a custodian, in trust,

for the Industrial Commission to administer. These funds never reached the State Treasury as State funds and were never available for the general purposes of the State.

Dixon, as the administrator of the depository, holds the 3 percent fee and interest merely as a custodian, just as the State Treasurer held funds in Florida State Improvement Commission, supra. These monies can be pledged or loaned without implicating Article VII, §10.

Appellee has cited no legal authority for the proposition that interest earned on the CSDA would constitute public money and that interest is the sort of public money Article VII, §10, protects. Appellee readily admits that the funds in the CSDA, with the exception of the 3 percent fee, are not public funds. It is incongruous to argue that the funds in the CSDA belong to payees, yet the interest earned on payees' funds belongs to the public. Generally, interest earned on a fiduciary or trust account does not belong to the trustee or custodian. The Appellee's bold assertions to the contrary do not alter this rule, nor does the opinion testimony of George Haynie or Appellee's witnesses. Whether funds constitute public money or public money of the character Article VII, §10, protects is as question of law and the case law of O'Malley, supra, and Florida State Improvement Commission, supra, suggests that interest and fees, like levies and assessments, are not public funds of the character Article VII, §10, protects.

The State pointed out in its Initial Brief that Section 61.181(5), F.S. and Section 28.243(10), F.S., insulates Appellee and his office from liability for dishonored checks. Dixon asserts in response that he is responsible for worthless checks because the CSDA bank account is in his name and that he is responsible for this account as a fiduciary (Appellee's Answer Brief, 30). There is a distinction between Dixon's duty as a fiduciary and the issue of whether he or his office is liable for worthless checks. Fiduciary duties entail dealing fairly and honestly with funds. Appellee Dixon has not cited to any authority holding that fiduciary duties entail liability for worthless checks when acting honestly and there has been no evidence to suggest that Appellee has acted in any way other than honestly and honorably regarding the CSDA.

Moreover, even if there were statutes which generally imposed liability upon the signatory of a bank account, where a specific statute insulates an individual from liability for worthless checks, the specific statute governs under the rule that a specific statute governing a particular subject is controlling over a general statutory provision. Adams v. Culver, 111 So.2d 665 (Fla. 1959). Statutes specifically and explicitly exempt Appellee and his office from liability for worthless checks. See, Section 61.181(5), F.S., and Section 28.243(1),

F.S. Therefore, no liability, contingent or direct, is imposed upon the public of Polk County.

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

Amicus Green suggests that the public purpose test is irrelevant, stating that where a pledge of credit to a private person is unconnected to revenue bonds, a per se violation of Article VII, §10, exists. Appellee suggests that the cases relied upon by the State are inapplicable because the facts of the cases relied upon concern bond validation. Admittedly, the State has relied on many bond validation cases, but reliance on these cases is a necessity because virtually all cases construing Article VII, §10, are bond validation cases. Not only is reliance on bond validation cases necessary, it is appropriate because the constitutional principles developed in these cases apply to cases that do not concern bond validation.

In Williams v. Turrentine, 266 So.2d 81 (Fla. 4th DCA 1972), rev'd on other grounds, 291 So.2d 572 (Fla. 1974), the court stated that, "[a]lthough concededly, many of the cited cases were concerned with the issuance of certain types of revenue bonds... these factual differences do not minimize the significance of the principles set forth in these cases". Id., at 86. See also, O'Neill v. Burns, 198 So.2d 1 (Fla. 1967)

(where the public purpose analysis of Article VII, §10, is applied to an appropriation of a sum of money by the legislature). Moreover, no cited case limits the public purpose test to bond validation cases and it is the State's position that the public purpose test is a function of the constitutional provision itself. Article VII, §10, prohibits the State and counties, among other political subdivisions, from giving, lending or using its credit to aid any corporation or person. Where the State or counties give, lend or use their credit for a public purpose, the credit is by definition not to aid a corporation or person. Therefore, when a pledge or loan of credit is for a public purpose, the pledge or loan is not in violation of Article VII, §10.

Assuming, arguendo, that (1) Dixon has pledged or loaned funds, (2) the pledge or loan is a pledge or loan of public funds that Article VII, §10, protects and (3) that Dixon or the citizens of Polk County are liable for the pledge or loan, the pledge is for a paramount public purpose or governmental purpose. The purpose is to ensure the expeditious disbursal of funds to ensure that child support payments will be placed in the hands of custodial parents without delay. (See, R. IV, Defendant's Exhibits 3 and 4.) The governmental or public purpose is explicitly stated in the staff analysis and staff analyses are commonly relied upon by courts to aid in determining legislative

intent to interpret statutes. See, Auto-Owners Ins. Cov. Prough, 463 So.2d 1184 (Fla. 2d DCA 1988) (where court relied upon a Staff Analysis to determine that the intent of legislature in amending a statute was to institute prior public policy).

Amici claim that even if the depository itself serves a public purpose, the 1989 amendment requiring disbursal from the depository within four (4) days does not serve a public purpose because it results in harm due to the risk of dishonored checks and further that the benefits are minimal, accruing only for the first payment.

Firstly, the argument is irrelevant to the issue of whether the statute passes constitutional muster. The issue of whether the legislature chooses to benefit payees for the first month of payment or for some months or for all months is an issue directed toward the wisdom of the amendment and, as such, an improper issue for the courts. See, Dutton Phosphate Co. v. Priest, 67 Fla. 370, 65 So. 282 (1914) (considerations of policy, including the necessity and wisdom of a statute are determined by the legislature and not the courts).

Secondly, the assertion that payees are benefited for only the first payment is fallacious as it assumes that payments made by payors are always timely. This assumption is not supported by the record and is unwarranted. Thirdly, there is strong evidence that the 1989 amendment itself was for a public or governmental

purpose. The 1989 act amending Section 61.181(5), F.S., is titled "An act relating to support" and nine of the eleven sections concern child support or insurance for children or some other payment for children. Thus, there is strong evidence of the legislative intent to serve a governmental or paramount public purpose in the 1989 amendment itself.

Appellee and Amici claim that the public purpose of Section 61.181(5), F.S., is incidental and that the primary purpose of the Section is private, accruing to either the payees or payors. Although there is case law that addresses the public purpose issue on the basis of an incidental versus primary purpose analysis, this sort of analysis clouds the true issue in the case at bar. The essence of Article VII, §10, is to restrict the activities and functions of the State or counties to that of government. Bannon v. Port of Palm Beach Dist., 246 So.2d 737 (Fla. 1971); Bailey v. City of Tampa, 92 Fla. 1030, 111 So. 119 (1926). The statute creating the depository itself and amendments allowing payments by check and requiring the expeditious disbursal of funds are functions of the government as the government. The government is not acting to assist specific individuals in some private venture for profit, but to ensure that court-ordered payments to children and former spouses are timely made and disbursed.

This sort of public or governmental benefit is analogous to the aid given in the educational support of students. Aid for the educational support of students has been routinely upheld against Article VII, §10, challenges. See, State v. Florida State Racing Comm., 70 So.2d 375 (Fla. 1953); Overman v. State Bd. of Control, 62 So.2d 696 (Fla. 1952); State v. Board of Control, 66 So.2d 209 (Fla. 1953); Nohrr v. Brevard County Educ. Fac. Auth., 247 So.2d 304 (Fla. 1971). Where credit is pledged or loaned for educational purposes, the aim is not to benefit students as individuals, although students do receive some benefit, but to aid in the governmental function of education. In the case at bar, the aim of the legislation is not to benefit individual payors or payees, but to aid in the governmental function of ensuring court ordered payments are timely made and disbursed.

Appellee does not directly challenge the point that a public purpose determination need not be stated in the statute itself for the purpose of the statute to be deemed a public one, nor does the Appellee challenge the point that the legislature's determination of public purpose is entitled to great deference. Instead, Appellee states that there is no legislative determination of public purpose stated in Section 61.181(5), F.S., inferring that there is nothing for the Court to defer to in the case at bar. It is well settled law that legislative

intent is the controlling factor in the interpretation of statutes. Tyson v. Lanier, 156 So.2d 833 (Fla. 1963). When there is an express determination of legislative intent stated in the statute itself, the courts address only whether the legislature has the power to enact such a law. State v. Hodges, 506 So.2d 438 (Fla. 1st DCA 1987). Where legislative intent is not explicitly stated, a court must first determine the legislative intent and then address whether the legislature has the power to enact such a law. Legislative intent can be implied and as an aid to determining legislative intent, the court can look to the title of the act, its Sections and Staff Analyses. As previously noted by Appellant, the Staff Analyses, the title of the 1989 Act amending Section 61.181(5), F.S., and its Sections, all indicate a public or governmental purpose. Therefore, assuming, arguendo, that public credit has been loaned or pledged, the pledge or loan is for a governmental or paramount public purpose.

Amici's argument that Section 61.181(5), F.S. (1989) should be construed so that Dixon must disburse funds within four (4) days of payment of a check, rather than four (4) days from the date when a check is received by the depository is without merit. Statements regarding bad checks and losses found in the Final Analysis and Economic Impact Statement of the House of Representative Committee on Judiciary of Bill NO. CS/HB 258 clearly indicate that the legislature intended depositories to

disburse funds within four (4) days of receipt by the depository. The Final Analysis states:

> [s]ince local checks must now be paid within three days of presentment, the depositories should encounter problems with bad checks only in cases where the check is from another region. However, after the funds in the Trust Fund are depleted, the depositories will be able to well compensate for any losses with the interest earned on child support payment accounts.

That the legislature considered that depositories would have losses due to bad checks necessarily negates the contention that the legislative intent of the 1989 amendment to Section 61.181(5), F.S., is to allow depositories four (4) days from the day a check clears to disburse funds. Additional evidence that the legislature intended depositories to disburse within four (4) days of receipt of a check is found in the reference to the requirement that local checks be paid within three (3) days of presentment. As noted earlier, banking laws require that funds deposited by local check be available for withdrawal within three (3) days. Section 61.181(5), F.S., allows depositories four (4) days to disburse funds, giving the depository one extra day to process checks.

Not only is Amici's assertion regarding the "proper" construction of Section 61.181(5), F.S. (1989), contradicted by the Staff Analysis, Amici's interpretation is contrary to settled rules of statutory construction. The rule permitting departure

from the letter of a statute is sanctioned only when there are cogent reasons for believing the letter of the statute does not accurately reflect legislative intent. State v. Tunnicliffe, 98 Fla. 831, 124 So. 279 (Fla. 1929). Neither Appellee nor the Amici have asserted cogent reasons for believing that Section 61.181(5), F.S. (1989), does not mean what it says. If the legislature had intended by the 1989 amendment to do anything other than give depositories two (2) more days to disburse funds, it surely would have indicated such intent in the statute itself or in the Staff Analysis. Moreover, where the language of a statute is precise, the courts are without the power to restrict or extend the language. Graham v. State, 472 So.2d 464 (Fla. 1985). The language of Section 61.181(5), F.S. (1989), is precise in its requirement that funds be disbursed within four (4) days of receipt into the depository, not four (4) days from the date when the depository account receives notice that a check was cleared.

One major principle remains. When the major question is one that concerns the general welfare, constitutional questions should be approached from the pragmatic rather than the legalistic point of view. The Constitution "was not intended to bind like a straight jacket but contemplated experimentation for the common good". State v. State Board of Administration, 157 Fla. 360, 25 So.2d 880, 884 (Fla. 1946). Constitutional mandates

are wise in proportion to the manner in which they respond to the public welfare and should be construed to effectuate that purpose when possible. In light of these canons of construction, Section 61.181(5), F.S., should be construed to require disbursal within four (4) days of receipt of a check.

CONCLUSION

The trial court erred when it declared Section 61.181(5), F.S. (1989), unconstitutional in that it requires funds to be disbursed from the CSDA within four (4) working days. For the foregoing reasons, the State respectfully requests this Honorable Court to reverse the order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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