IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,327

ESCAMBIA COUNTY SHERIFF'S DEPARTMENT, ESCAMBIA COUNTY RISK MANAGEMENT,

Petitioners,

vs.

THOMAS GRICE,

Respondent.

_____/

BRIEF OF AMICUS CURIAE, ORANGE COUNTY BOARD OF COUNTY COMMISSIONERS

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STATEMENT OF INTEREST

This amicus brief is filed pursuant to Florida Rule of Appellate Procedure 9.370 on behalf of the Orange County Board of County Commissioners in support of the position of the Petitioners, Escambia County Sheriff's Department and Escambia County Risk Management. Leave was granted by this Court to file a brief as amicus curiae. Orange County is a large public employer whose workers are entitled to the same combination of benefits at issue in this case and, therefore, Orange County will be directly affected by the Court's ruling in this matter.

This amicus brief is filed in conjunction with the briefs of the Petitioners and amicus curiae State of Florida. This brief is meant to supplement those briefs. This brief is intended to be read in conjunction with those other briefs and is not intended to stand on its own. Accordingly, the arguments of those other briefs are adopted by this amicus and are incorporated herein. The undersigned's intention is to prevent (or at least minimize) duplicitous arguments.

STATEMENT OF THE CASE AND FACTS

This amicus curiae accepts the statement of the case and facts submitted by Petitioners herein.

SUMMARY OF ARGUMENT

The First District's primary hesitation in affirming the offset sought by Petitioners is their interpretation and application of §440.15(9)(a) Fla. Stat. (1985). They apply the doctrine of expressio unius est exclusio alterius and conclude that if the legislature intended to create the offset affirmed below, the legislature would have expressly created such an offset as they did with the social security offset in §440.15(9)(a) Fla. Stat. (1985). However, this conclusion ignores the historical context of §440.15. The purpose of §440.15 was not to create a social security offset, but rather to take advantage of an offset allowed by federal statute. Thus, expressio unius est exclusio alterius, as applied to §440.15, is misleading and does not help reveal that statute's intent.

The First District also reversed the Judge of Compensation Claims' Order below because of the second sentence of §440.15(9)(a) Fla. Stat. (1985). This part of the statute limits the reduction of workers' compensation benefits in a social security offset so that the reduction is no greater than would have occurred under 42 U.S.C. §424(a). This amendment to the statute was to prevent any harsh result when the social security offset was taken by the State of Florida instead of by the Social Security Administration. Under the facts of this case, if an offset were to be taken by the Social Security Administration under 42 U.S.C. §424(a), that offset would actually result in

less benefits to the claimant than awarded by the judge below. Furthermore, even if the offset resulted in less benefits than an offset under 42 U.S.C. §424(a), the remedy would not be to completely eliminate the offset advocated by Petitioners, but rather to limit that offset to the amount allowable under 42 U.S.C. §424(a), resulting in total benefits equalling 80% of the average current earnings.

ARGUMENT

SECTION 440.20(15), FLA. STAT. (1985), BARS A FLORIDA WORKERS' COMPENSATION CLAIMANT FROM RECEIVING A COMBINATION OF SOCIAL SECURITY DISABILITY, PENSION AND WORKERS' COMPENSATION BENEFITS WHICH EXCEED HIS AVERAGE WEEKLY WAGE.

The First District, in its holding below, mistakenly concludes that §440.15(9)(a) Fla. Stat. (1985), the social security offset provision, prevents the offset urged by Petitioners. The social security offset provision seems to be the First District's major stumbling block to the approval of the ruling below of the Judge of Compensation Claims. This amicus respectfully submits that the First District's emphasis and application of §440.15(9)(a) Fla. Stat. (1985) is misguided and incorrect. A closer examination of the history and purpose of §440.15(9)(a) Fla. Stat. (1985) reveals no impediment to the Petitioners' position.

The First District seems to believe that there are two reasons why this social security offset statute prevents the offset awarded below by the Judge of Compensation Claims. First, the doctrine of expressio unius est exclusio alterius is invoked:

> Under a strict interpretation of the statutory framework, it appears to us that since the legislature provided for a social security offset against workers' compensation benefits, but did not include an offset based upon the receipt of state disability retirement pension benefits, it must be

> presumed that the legislature did not intend to allow such an offset.

20 Fla. L. Weekly D1863 at 1864. The mention of one thing implies the exclusion of another. Therefore, since the legislature took the initiative to create an offset of workers' compensation benefits when a claimant receives social security disability benefits, they must have intended to prohibit an offset for all other disability pension benefits.

The primary focus of any inquiry into the application of a statute is the intent of that statute. Kozak v. Kozak, 3 So.2d 120 (Fla. 1941). Certainly, one way to ascertain the intent of a statute is through the application of expressio unius est exclusio alterius. See, Thayer v. State, 335 So.2d 815 (Fla. 1976). However, this general rule of construction is merely a guideline to interpretation and does not always reflect the statute's intent. The context of the passage of that statute must be considered, as well as the interplay with other statutes.

In 1965, Congress amended the Social Security Act to allow the individual states to claim an offset of workers' compensation benefits against an injured employee's social security benefits. However, if a state does not elect to take this offset, the Social Security Administration will continue its own prior practice of offsetting social security benefits for state workers' compensation benefits received. See, McClanathan v. Smith, 186 Mont. 56, 606 P. 2d 507 (1980). This 1965 amendment was enacted to give the states the option of taking an offset

that otherwise would be taken by the Social Security Administration. The purpose of this offset was to prevent the payment of excessive combined disability benefits that would reduce a workers' incentive to return to work. Swain v. Schweiker, 676 F.2d 543 (11th Cir. 1982). The purpose of allowing states to take the offset (in lieu of the Social Security Administration taking the offset) was to prevent employers from having to pay twice for the same disability benefits. See, Lofty v. Richardson, 440 F.2d 1144 (6th Cir.), cert. denied, 404 U.S. 985 (1971). Since employers pay the costs of workers' compensation benefits and half the costs of social security, they should enjoy the benefits of that offset.

Florida took advantage of this offset provision in 1973 when the legislature created Subsection (9) of §440.15.

Expressio unius est exclusio alterius is not applicable to §440.15(9)(a) Fla. Stat. (1985) because the purpose of this statute was not to create an offset, but rather to take advantage of an offset allowed by federal law. Had §440.15(9)(a), Fla. Stat. (1985) not been enacted, the Social Security Administration would have continued to take the offset themselves. Thus, the legislature was reacting to a federal law. There was no intention to create a statute listing each and every benefit for which an offset was permissible. There is nothing to suggest that §440.15(9)(a), Fla. Stat. (1985), was intended to be an all-inclusive provision on workers' compensation offsets. The focus of §440.15(9)(a), Fla. Stat. (1985), was solely on social

security benefits. Such a specific statute was necessary to utilize the offset that the federal government had offered. There was no such necessity to enact a similar statute with regard to state disability retirement benefits. There is no provision in the Florida Retirement System to offset benefits if workers' compensation benefits are also being received. Thus, unlike the social security offset, there is no need for a statute to specifically mention benefits under the Florida Retirement System. Section 440.20(15), Fla. Stat. (1985) is sufficient to trigger the offset. Therefore, the application of expressio unius est exclusio alterius here is misleading and does nothing to illuminate the intent of §440.15(9)(a), Fla. Stat. (1985).

The other reason for the First District's finding that the social security offset provision prevents the offset sought by Petitioners concerns the second sentence of §440.15(9)(a), Fla. Stat. (1985) which states:

> However, this provision shall not operate to reduce any injured worker's benefits under this chapter to a greater extent than such benefits would have otherwise been reduced under 42 U.S.C. §424(a).

This part of §440.15 was added in 1975. The purpose of this amendment was to eliminate any punitive effect upon claimants whose Florida offset of social security disability exceeded the offset that would have been applied under federal law. Patrick Fruit Co. v. Boykins, I.R.C. Order 2-3904 (September 11, 1979).

The effect was to give the claimant a combination of social security and workers' compensation benefits equal to 80% of the average weekly wage or 80% of the average current earnings, whichever was greater. A. C. Scott Construction & Paving Co., Inc. v. Miller, I.R.C. Order 2-3906 (September 11, 1979).

To use this provision to prevent any offset of social security benefits violates its intent. This amendment merely seeks to remedy any harsh result in allowing the state to assume the offset that the Social Security Administration had previously taken in cases of dual benefits. As the Petitioners and Amicus State of Florida illustrate in their briefs, the Respondent actually receives more in benefits under the Order of the Judge of Compensation Claims below than he would if the Social Security Administration was allowed to take their offset. Therefore, this provision does not prevent the offset advocated by the Petitioners, at least under the facts of this case.

In other cases, it is theoretically conceivable that the offset formula advocated in this case would result in a greater offset than allowed under federal law. However, if this were to occur, the remedy would not be to completely scrap the offset formula, but rather to limit the offset to the amount allowable under 42 U.S.C. §424(a), so that total benefits equal 80% of the average current earnings.

For example, in our case, the claimant would receive the following benefits per the Order of the Judge of Compensation Claims below:

$167.36	Weekly pension benefits
163.85	Weekly social security benefits
+252.67	Weekly WC benefits after offset
$583.88	100% AWW

However, what would happen if the claimant's average current earnings were $750.00 making 80% of his average current earnings to be $600.00 (instead of $349.48)? In that case, interpreting the application of 42 U.S.C. §424(a) liberally in favor of the Respondent, the offset awarded by the Judge of Compensation Claims below may violate §440.15(9)(a) Fla. Stat. (1985) because it may reduce benefits to a greater extent than benefits would have been reduced under 42 U.S.C. §424(a). In that case, the benefits under 42 U.S.C. §424(a) would be reduced to $600.00 weekly (80% of the fictitious ACE) while the Judge's Order reduced benefits to $583.88 weekly.

$167.36	Weekly pension benefits
163.85	Weekly social security benefits
+268.79	Weekly WC benefits after offset
$600.00	80% of the fictitious ACE

Under such a scenario, the remedy is not to eliminate the offset entirely, but rather to restrict its application so that the reduction in benefits would be no greater "than such benefits would have otherwise been reduced under 42 U.S.C. §424(a)." §440.15(9)(a) Fla. Stat. (1985). In other words, the offset would be limited so that the claimant's total social security, state disability pension and workers' compensation benefits would be $600.00 a week (80% of the fictitious ACE).

CONCLUSION

For the foregoing reasons, the offset awarded by the Judge of Compensation Claims was justified by §440.20(15) Fla. Stat. (1985). Accordingly, the certified question should be answered in the affirmative and the decision of the First District Court of Appeal should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular mail to David A. McCranie, Esquire, 9424 Baymeadows Road, Suite 220, Jacksonville, FL 32256, James F. McKenzie, Esquire, 905 East Hatton Street, Pensacola, FL 32503 and Michael J. Valen, Esquire, 316 South Baylen Street, Suite 500, Pensacola, FL 32501 on this 20th day of November, 1995.

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