IN THE SUPREME COURT OF FLORIDA

HRS DISTRICT II and
ALEXSIS RISK MANAGEMENT,

Petitioners

CASE NO. 96,801

vs.

ANN L. PICKARD,

Respondent

_____/

ON PETITION TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL OF THE FIRST DISTRICT OF FLORIDA

SUPPLEMENTAL BRIEF ON JURISDICTION OF PETITIONERS, HRS DISTRICT II AND ALEXSIS RISK MANAGEMENT

McCRANIE & LOWER, P.A.
DAVID A. MCCRANIE
One San Jose Place, Suite 32
Jacksonville, Florida 32257
(904) 880-1909
Fla. Bar No, 351520
Attorney for Petitioners

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STATEMENT OF THE CASE AND FACTS

This case is before this Court on a notice filed by HRS District II and Alexsis Risk Management (Petitioners) to invoke this Court's discretionary jurisdiction to review the decision of the District Court of Appeal of the First District of Florida in HRS District II and Alexsis Risk Management v. Pickard, 24 Fla. L. Weekly D1749 (Fla. 1st DCA July 19, 1999), rehearins denied, 24 Fla. L. Weekly D2368 (Fla. 1st DCA October 15, 1999). The issues resolved by the district court included, among others, whether this Court's decision in Escambia County Sheriff's Department v. Grice, 692 So.2d 896 (Fla. 1997), interpreting §440.20(15), Fla. Stat. (1985), should be applied to workers' compensation benefits payable before May 1, 1997, the date this Court's Grice decision was released. The facts, for purposes of this supplemental brief on jurisdiction, are as follows:

Ann L. Pickard, the claimant in this workers' compensation case, is **a** 57-year-old woman (DOB: 8/9/42) (R: 54) who **was** injured in an accident arising out of and in the course of her employment with the Department of Health and Rehabilitative Services ("HRS") on 9/23/86 (R: 33). At the time of her accident, her average weekly **wage was** $316.47, including the value of her employer-provided health insurance. She continued working for HRS following her accident, albeit part time (R: 84), until 7/28/89 (R: 67). At

that point, both she and her physicians believed that she could no longer continue working (R: 67), and she therefore resigned her employment.

She thereupon applied for in-line-of-duty disability benefits pursuant to §121.091(4), Fla. Stat. (1985), and began receiving those benefits effective August 1989 (R: 46). She also applied for social security disability benefits pursuant to 42 U.S.C. §423 and began receiving those benefits effective January 1990 (R: 7).

Other than medical benefits, the employer herein provided no workers' compensation benefits to Pickard following her resignation from employment in July 1989 (R: 116) because it contended that she had reached maximum medical improvement from her accident on 7/30/87 with a 0% impairment rating from Dr. Rohan (R: 34). Nine years later, on or about 10/17/96 Pickard filed a "Petition/Claim for Benefits" seeking, among other things, an award of "PTD [permanent total disability] from 7/30/89 to present plus supplementals." (R: 29). Prior to the actual filing of that petition, however, on 9/13/96 the employer had administratively accepted Pickard as permanently totally disabled (R: 40) and agreed that the onset date of her disability was 7/30/89 (R: 2, 42).

There was disagreement, however, over the precise amount of workers' compensation benefits owed to Pickard in view of her concurrent receipt of in-line-of-duty and social security

disability benefits since August 1989. Relying upon §440.20(15) and upon the construction of that statute eventually adopted by this Court in Grice, the employer argued that Pickard's combined benefits should be limited to 100% of her average weekly wage for all applicable periods. Pickard, on the other hand, contended that her past due workers' compensation benefits should not be affected at all by her receipt of the other disability benefits. The matter was initially heard by the Judge of Compensation Claims ("JCC") on 7/3/97 (R: 1).

After entering a preliminary order on 12/3/97 (R: 115-121) (Appendix "1"), the JCC entered the order on appeal on 3/10/98 (R: 136-143)(Appendix "2"). In that order, the JCC found that Pickard's initial social security disability benefit was $554.50 per month, or $128.95 per week, and that her initial in-line-of-duty disability benefit was $530.50 per month, or $123.37 per week (R: 140). The court then concluded that Pickard's permanent total disability benefits for all periods after 8/1/89 must be reduced to $64.15 per week so that the combination of those benefits ($64.15), her social security disability benefits ($128.95), and her in-line-of-duty disability benefits ($123.37) did not exceed 100% of her average weekly wage ($316.47) (R: 140-141). The JCC further concluded that no cost-of-living adjustments to any of Pickard's disability benefits were subject to the cap. The employer appealed

the JCC's refusal to include permanent total supplemental and other cost-of-living adjustments within the §440.20(15) cap. Pickard cross-appealed the JCC's application of the §440.20(15) cap to benefits owing since 8/1/89.

In its opinion dated 7/19/99 (Appendix "3"), the district court on cross-appeal declined to apply §440.20(15) and this Court's construction of that statute in Grice "retroactively to August 1, 1989" because of its conclusion that "the effect of this new application [Grice] is to reduce claimant's benefits . . ." 24 Fla. L. Weekly at D1750. The district court did not indicate, however, when the §440.20(15) cap could begin to be applied. n motion for rehearing or clarification and for rehearing en banc (Appendix "4"), the district court clarified its decision and held that the §440.20(15) cap may be applied only to benefits "paid on and after May 1, 1997, the date the Grice decision was released by the Florida Supreme Court." 24 Fla. L. Weekly at D2368.

A timely notice to invoke the discretionary jurisdiction of this Court on the basis of the certified question was filed on 10/21/99. On 12/20/99, following this Court's decision in Citv of Clearwater v. Acker, 24 Fla. L. Weekly S567 (Fla. December 9, 1999), Petitioners filed a motion for leave to assert an alternative basis for jurisdiction, to wit, "express and direct conflict." (Appendix "5"). That motion was granted by this Court

on 1/18/00 (Appendix "6"), and Petitioners were granted leave to file this supplemental brief on jurisdiction.

SUMMARY OF ARGUMENT

The district court's refusal to apply §440.20(15), as construed by this Court in Grice, to workers' compensation benefits owed since 8/1/89 expressly and directly conflicts with the decisions of this Court holding that the judicial construction of a statute, unless declared by the opinion to have prospective effect only, is to have retrospective as well as prospective application. Accordingly, this Court should exercise its discretion and accept jurisdiction over this cause pursuant to Art. V, §3(b)(3), Fla.Const.

ARGUMENT

THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE RULE OF LAW ANNOUNCED BY THIS COURT IN FLORIDA FOREST AND PARK SERVICE V. STRICKLAND, 18 So.2d 251 (Fla. 1944); MELENDEZ V. DREIS & KRUMP MANUFACTURING COMPANY, 515 So.2d 735 (Fla. 1987); AND CITY OF MIAMI V. BELL, 634 So.2d 163 (Fla. 1994).

The general rule concerning the application of judicial decisions in the area of civil litigation is that such decisions are to have retrospective as well as prospective application. International Studio Apartment Association, Inc. v. Lockwood, 421

So.2d 1119 (Fla. 4th DCA 1982). That is, generally speaking, unless declared by the opinion to have prospective effect only, the judicial construction of a statute will be deemed to relate back to the enactment of the statute. Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944). This rule applies with equal force in cases where the decision in question overrules a previous judicial construction of the same statute. Melendez v. Dreis & Krump Manufacturing Company, 515 So.2d 735 (Fla. 1987).

An exception to the general rule applies, however, where a retrospective application of the overruling decision would affect vested contract rights. As stated by this Court in Strickland,

> Where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation. (Emphasis added).

18 So.2d at 253.

This "Strickland" exception was at issue in a series of workers' compensation cases involving the City of Miami. In 1973, the City of Miami passed a local ordinance which restored to City the complete, dollar-for-dollar credit for workers' benefits against a public employee's pension benefits which had been taken away by the Florida Legislature's 1973 repeal of §440.09(4), Fla.

Stat. (1953) The validity of that ordinance was subsequently upheld both by the Third and First District Courts of Appeal. Hoffkins v. City of Miami, 339 So.2d 1145 (Fla. 3rd DCA 1976) cert. den., 348 So.2d 948 (Fla. 1977); City of Miami v. Knight, 510 So.2d 1069 (Fla. 1st DCA), rev. den., 518 So.2d 1276 (Fla. 1987). Nevertheless, because of "the recurrent nature of the issue presented," the First District eventually certified the issue involved to this Court. Barragan v. City of Miami, 517 So.2d 99 (Fla 1st DCA 1987).

In 1989, sixteen (16) years after its enactment, this Court declared the ordinance invalid under §§166.021(3)(c) and 440.21, Fla. Stat. (1987). Barragan v. City of Miami, 545 So.2d 252 (Fla. 1989). (Notwithstanding this declaration, this Court, consistent with its previous holding in Brown v. S.S. Kresge Company, 305 So.2d 191 (Fla. 1974), also held that the combination of workers' compensation and pension benefits must not exceed 100% of the employee's weekly wage).

Because the ordinance had been adopted in 1973, the City for sixteen (16) years had apparently underpaid many of its workers based upon its reliance upon the ordinance, and in fact once the ordinance was declared invalid by this Court, many of these workers began to file claims seeking recoupment of the alleged underpayments. The question therefore arose as to the retroactive

application of Barraqan.

The first case to address this question was City of Daytona Beach v. Amsel, 585 So.2d 1044 (Fla. 1st DCA 1991). (It appears that the City of Daytona Beach had adopted a provision similar to the Miami ordinance in its pension fund). The First District held that Barraqan must be given a retroactive application and that the affected workers must be allowed to recoup any underpayments. In so doing, the district court held that the general rule regarding the retrospective application of judicial decisions, not the "vested rights" or "Strickland" exception, should apply. 585 So.2d at 1046.

The same result was reached by the First District in City of Miami v. Bell, 606 So.2d 1183 (Fla. 1st DCA 1992). In that case, the City, in reliance upon its ordinance and upon the contracts which it had negotiated with its employees, had reduced the claimant's monthly pension benefits dollar-for-dollar by the amount of his permanent total disability benefits for the period from 9/24/87 (the date permanent total disability commenced) until 8/1/89 (approximately two weeks after this Court denied rehearing in its Barraqan decision). 606 So.2d at 1184. Relying upon its Amsel decision, the First District again held that Barraqan must be given retroactive effect. Nevertheless, the district court certified to this Court the question whether the City was liable

for penalties on the underpayments. 606 So.2d at 1189.

In City of Miami v. Bell, 634 So.2d 163 (Fla. 1994), however, this Court reversed the District Court's decisions regarding the retroactive application of Barraqan. This Court determined that vested contract rights of the parties would be affected by a retrospective application of Barraqan, and therefore the exception to the general rule should apply. 634 So.2d at 166.

In contrast to Bell, however, Grice did not involve any vested contractual rights. No prior decision had ever interpreted §440.20(15) in such a manner as to allow the combination of workers' compensation, social security disability, and disability pension benefits to exceed 100% of the average weekly wage. Moreover, Grice did not declare invalid any ordinance or statute, nor did it overrule any previous construction of an ordinance or statute by this Court.

Furthermore, notwithstanding the district court's statements to the contrary, Petitioners herein have never set forth any argument "suggesting that Grice interpreted §440.20(15) in a manner contrary to existing law." 24 Fla. L. Weekly at D1750. Rather, Petitioners maintain that in Grice this Court interpreted §440.20(15) in a manner consistent with its prior decisions, i.e., capping all employer-provided benefits at 100% of the average weekly wage.

The unstated premise underlying the district court's refusal to apply the Grice holding in the case at bar to unpaid workers' compensation benefits from August 1, 1989 is that, prior to Grice, an injured worker had either a contractual or a statutory right to receive more than 100% of his AWW and that such a right was taken **away** by this Court. That premise is incorrect. Grice holds that an injured worker never had such a right to begin with, not that he had such a right which must be taken away.

This Court's Grice opinion did not declare that it was to have prospective effect only. It did not affect any vested contract rights. Accordingly, the general rule concerning retrospective application of judicial decisions, not the exception, should apply. That is, the Grice holding should relate back to the time of the enactment of §440.20(15), Fla. Stat., in 1977. See Ch. 77-290, §5, Laws of Fla.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court to exercise its discretion and accept jurisdiction in the case at bar pursuant to Art. V, §3(b)(3), Fla.Const.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to R. Jeremy Solomon, P. 0. Box 13937, Tallahassee, FL 32317, attorneys for respondent, by U.S. Mail this 29th of February, 2000.

David A. McCranie

DAVID A. MCCRANIE