IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1429

DANIEL C. COSTARELL,

Petitioner,

-vs-

FLORIDA UNEMPLOYMENT APPEALS COMMISSION,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON THE MERITS

HARVEY J. SEPLER
3389 Sheridan Street #450
Hollywood, Florida 33021
(954) 964-1680
Florida Bar No. 473431

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGES**

OTHER AUTHORITES

Florida Statutes

Florida Administrative Code

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1429

DANIEL C. COSTARELL,

Petitioner,

-vs-

FLORIDA UNEMPLOYMENT APPEALS COMMISSION,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

INTRODUCTION

This is the Petitioner's brief on the merits filed pursuant to this Court's acceptance of discretionary jurisdiction.

The symbol (App) will be used to refer to portions of the attached appendix.

STATEMENT OF THE CASE AND FACTS[1]

Beginning on June 2, 2002, the Petitioner DANIEL C. COSTARELL began filing claims for unemployment compensation benefits, which filings continued until October 12, 2002. (R. 1, 28).

Initially, the claims adjudicator determined that Mr. Costarell was eligible for benefits and the Petitioner began receiving compensation checks accompanied by blank claims forms (to be used for the next filing) and notices telling him when to file future claims. (R. 17, 20).

---

[1] The Petitioner represented himself at all proceedings below. The undersigned was appointed by this Court on October 21, 2004 to represent the Petitioner in this cause. On November 22, 2004, the Court granted the undersigned an extension of time due to the absence of a Record on Appeal in the case and, once the record was mailed to the undersigned, the Court ordered that the merits brief be filed by December 22, 2004 without further extension of time.

The record on appeal is sparse. For example, it does not contain materials related to the reason for termination of employment, the number, frequency and dates of compensation claims the Petitioner filed, the "determination letter" cited in the Notice of Determination, the initial determination granting benefits, the employer's appeal of the initial determination and the order entered thereon, or a complete description of the Appeal Information packet contained at (R. 12) (e.g., when and how the Petitioner obtained the packet, representations that were made to the Petitioner about it and its relationship to Florida Statutes Chapter 443).

Nevertheless, the undersigned will attempt to summarize the relevant procedural and factual context surrounding the issue certified to this Court. Many of the facts recited herein come from the findings of fact in the opinions below.

However, pursuant to an appeal brought by the Petitioner's employer, an appeals referee reversed the above determination and denied him benefits. (R. 19, 28).

Mr. Costarell appealed to the Unemployment Appeals Commission. (R. 5, 8). While the appeal was going forward, Mr. Costarell continued to file bi-weekly claims. (R. 28). However, during the appeals process, the Petitioner received four telephone calls from an unemployment compensation investigator named Fink; the investigator told him that he could be facing fraud charges, that he had been overpaid in benefits and that he would be liable for unemployment compensation monies sent to him, so he stopped filing claims. (R. 19, 28).[2/3]

Around that same time, according to the Petitioner, the checks he was receiving were no longer accompanied by blank claims forms and instructions on when to file these future claims. (R. 18, 20). This was another signal to him that he was no longer eligible for compensation and he should stop filing claims. (R. 22).

Thus, although Mr. Costarell filed claims from June 2, 2002 until October 12, 2002 (and he received compensation accordingly), he did not consistently file bi-

---

[2] The Petitioner testified at the telephonic hearing before the Unemployment Compensation Board that the investigator even sent him forms requesting repayment for monies improperly paid out in unemployment compensation. (R. 23).

[3] The appeals referee made explicit findings of fact supporting this contention. (R. 28).

weekly claims from October 13, 2002 until November 30, 2002 – i.e., during the time his case was on appeal to the Unemployment Appeals Commission. (R. 28).

On December 2, 2002, the Petitioner found employment and requested compensation for the period of time while his case was on appeal. (R. 4, 28). On July 30, 2002, the Unemployment Appeals Commission affirmed the referee's decision and found Mr. Costarell ineligible for such compensation. (R. 32).

The Petitioner appealed to the Second District Court of Appeal, (R. 35), and on May 7, 2004, the court affirmed the decision of the Unemployment Appeals Commission and found that since he hadn't filed claims during that period, he was not eligible for compensation for the period of October 13-November 30, 2002. *Costarell v. Unemployment Appeals Commission*, 874 So. 2d 43 (Fla. 2d DCA 2004). The district court certified conflict with *Dines v. Florida Unemployment Appeals Commission*, 730 So. 2d 378 (Fla. 3d DCA 1999).

QUESTION PRESENTED

WHETHER THE SECOND DISTRICT COURT OF APPEAL CORRECTLY CONSTRUED FLORIDA'S UNEMPLOYMENT COMPENSATION SCHEME WHEN IT HELD THAT CLAIMANTS WHO DO NOT CONTINUE FILING CLAIMS WHILE THE CASE IS ON APPEAL ARE FORECLOSED FROM RECOVERING BENEFITS FOR THAT TIME?

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal held that Florida's unemployment statutory scheme requires that claimants continue filing claims even while their cases are on appeal. The court based its conclusion on two grounds: 1) the statutes in question are clear and unambiguous in the requirement and 2) subsequent amendments to the statutes confirm that this was the legislature's intent when enacting the prior statutes.

Well established principles of statutory construction belie the lower court's decision. First, if the statutes are clear, courts must limit their analyses to the language contained in the four corners of the statutes themselves. In this case, the statutes are clear in their omission of this requirement. That is, they spell out in great detail many other aspects of the claims filing process and by omitting this one, it must be presumed that the legislature intended not to require it.

Second, putting aside the fact that it was unnecessary and improper for the court to consult subsequent statutory amendments to establish a pre-existing legislative intent, even the amendments shed no definitive light on what the legislature intended when establishing the statutory scheme of 2002.

That being the case, the district court incorrectly read into the statutes a requirement that was not intended. Its decision should be quashed.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL INCORRECTLY CONSTRUED FLORIDA'S UNEMPLOYMENT COMPENSATION SCHEME WHEN IT HELD THAT CLAIMANTS WHO DO NOT CONTINUE FILING CLAIMS WHILE THE CASE IS ON APPEAL ARE FORECLOSED FROM RECOVERING BENEFITS FOR THAT TIME.

This case is about statutory interpretation: that is, whether the Court should look to the plain language of the unemployment compensation statutes or to outside interpretations and subsequent statutory modifications to determine if a claimant must file claims while his or her case is on appeal in order to be eligible to receive compensation during that period. What makes this case particularly intriguing – from a statutory construction perspective – is that it asks the Court to glean legislative intent from what is *not* in the statute.

As discussed earlier, the Petitioner was ultimately denied benefits because he failed to file claims while his case was on appeal.[4] The Respondent essentially argued that the failure to file claims rendered the Petitioner ineligible under the unemployment compensation statutes. Trouble is, the statutes don't say this; so, the Respondent's

[4] The Petitioner filed them before the Respondent instituted the appeal and neither the district court below, nor the Respondent, contests the grant of benefits for the time leading up to the appeal.

argument has to be that, when read in *pari materia*, the applicable statutes and the division's own regulations imply that a failure to file claims – even while the case is on appeal – renders a claimant ineligible for the period of time filings were not made.

Florida's unemployment compensation law is governed by Chapter 443 of the Florida Statutes. As found by the district court below, the relevant compensation law in this case is controlled by the 2002 statutes. *Costarell*, 874 So. 2d at 44, n. 1.

With respect to the eligibility for, and payment of, benefits under the chapter, claimants must look to Fla. Stats. 443.091 (eligibility conditions) and 443.111 (payment of benefits). The 2002 versions of those statutes provide in relevant part:

> 443.091 Benefit eligibility conditions. –
>
> (1) An employed individual shall be eligible to receive benefits with respect to any week only if the division[5] finds that:
>
> (a) She or he has made a claim for benefits with respect to such week in accordance with such rules as the division may prescribe.
>
> . . .

---

[5] Reference to the "division" in the 2002 statute indicates the Division of Unemployment Compensation. Currently, unemployment compensation claims are received and reviewed by the Agency for Workforce Innovation and the Unemployment Appeals Commission. *See* Fla. Stat. 443.012 (2004); *see also* Unemployment Compensation, 55A Fla. Jur. 2d § 135 (2004).

> 443.111 Payment of benefits. --
>
> (1) MANNER OF PAYMENT. – Benefits shall be payable from the fund in accordance with such rules as the division may prescribe, subject to the following requirements:
>
> (b) Each claimant shall report in the manner prescribed by the division to certify for benefits which are paid and shall continue to report at least biweekly to receive unemployment benefits and to attest to the fact that she or he is able and available for work, has not refused suitable work, and, if she or he has worked, to report earnings from such work.

Neither statute explicitly mentions whether claimants, whose claims have been rejected and who are appealing the denial of benefits or whose claims have been accepted but the state is appealing the grant of benefits, must continue to file claims while the disputed claims are being resolved. Even so, the district court below found the general filing requirements in section 443.091 (a), Florida Statutes (2002) to be clear and binding on this case. Furthermore, to bolster its conclusion, the court held that subsequent modifications to the statutes show that the legislature always intended for claimants to continue filing even while their cases are on appeal. 874 So. 2d at 44.

Section 443.091 (a) provides only that bi-weekly claims need to be filed in order for a claimant to be eligible for benefits. If the claimant fails to file as required, he is considered ineligible to receive benefits. Again, the 2002 version of the statute makes no reference to filing claims while on appeal.

Section 443.091 (a), when read in conjunction with section 443.111, addresses the general need for the department to, essentially, be placed on notice that the claimant is eligible to work, is able to work, and is seeking compensation benefits for the period of time that he or she is out of work. The department understandably must know if the claimant is seeking benefits, is eligible for them, and is doing those things necessary to secure employment and, thus, terminate his need for compensation.

Because the statutes do not address whether a claimant's must file claims during the time his or her case is on appeal, how should this Court construe the legislative intent with respect to filing during the appeals period?

A. Plain Language of Statute Controls

It is well settled that where a statute is plain on its face, its very words and provisions import the full intent of the legislature when enacting the statutory scheme. In this sense, it is improper for a court to look outside of the plain language of the statute to determine its intent and scope.

For example, in *Lamont v. State*, 610 So. 2d 435, 437 (Fla. 1992), this Court reiterated one of the paramount rules of statutory construction:

> Where, as here, the language of a statute is clear and unambiguous the language should be given effect without resort to extrinsic guides to construction. As we have repeatedly noted,

> "[e]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.
>
> *St. Petersberg Bank & Trust Co. v. Hamm*, 414 So.2d 1071, 1073 (Fla.1982) (quoting *Van Pelt v. Hilliard*, 75 Fla. 792, 798, 78 So. 693, 694 (1918)).[6]

See also see State Farm Mut. Auto. Ins. Co. v. Kuhn, 374 So. 2d 1079, 1080-81 (Fla. 3d DCA 1979) ("where words used and grammatical construction employed in a statute are clear and they convey a definite meaning, the legislature is presumed to have meant what it said and therefore, it is unnecessary to resort to the rules of statutory construction"), *dismissed*, 383 So. 2d 1197 (Fla. 1980).

In this case, while the statutes and the relevant portions of Florida's Administrative Code, Title 60BB, spell out precisely when claims are to be initiated, where to file claims and how often they must be filed, what information is to be

---

[6] The *St. Petersburg Bank* decision went on to state:

> The second district's inability to "believe that the legislature could have intended for its statute to be read in such a way as would permit the outcome portrayed in the hypothetical" is insufficient to overcome the plain meaning of the statutory language.

414 So. 2d at 1073.

included in each claim, what type of benefits are available to an eligible claimant, even what happens to a claim during a national emergency, there is no mention about whether the claimant must continue to file once his claim has been granted or denied and is being challenged before an appeals court.[7]

Indeed, the absence of any mention of this matter in what is a clear and unambiguous statute can only be interpreted as an intent not to include it within the scope of the statutory reach. *See Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976):

> It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation those not expressly mentioned.

See also PW Ventures, Inc. v. Nichols, 533 So. 2d 281, 282 (Fla. 1988).

That being the case, given the clear directives of the statutes in question, it must be presumed that, under the 2002 statutory scheme, the legislature intended not to require the filing of claims during the appeals period.

---

[7] The Petitioner notes that although Fla. Stat. 443.111 (1)(a) generally directs claimants to the administrative rules for processing unemployment compensation claims ("[b]enefits shall be payable from the fund in accordance with such rules as the division may prescribe, subject to the following requirements . . .") in view of the absence of administrative rules covering the precise issue raised in this case, the statute's general reference is of little help in resolving the matter.

B. Gleaning Legislative Intent

In an effort to bolster its conclusion, the district court looked behind the four corners of the statutes (to subsequent modifications to the 2002 compensation statutes) to hold that the legislature must have intended that claims be filed during the appeals period.

> Moreover, the legislature's recent amendment to sections 443.091 and 443.111 reinforces our conclusion that its original intent was to require claimants to continue to file for benefits during the pendency of any appeal. See ch. 2003-36, § 23, 25, Laws of Fla. ("Each claimant must continue to report regardless of any appeal or pending appeal relating to his or her eligibility or disqualification for benefits.").

874 So. 2d at 44.

It is true that in 2003, the legislature amended section 443.111 (1)(b) to include the provision that claimants must file during the time their case is on appeal ("Each claimant must continue to report regardless of any appeal or pending appeal relating to her or his eligibility or disqualification for benefits"). It is also true that neither the bill, the legislative analysis of it nor the resulting statute stated that this amendment was intended to be retroactive or that it reflected a pre-existing legislative intent to expand the scope of reporting beyond that contained in the language of the statute itself. *See Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996) ("It is a

well established rule of statutory construction that, in the absence of an express legislative statement to the contrary, an enactment that affects substantive rights or creates new obligations or liabilities is presumed to apply prospectively").

The amendment was enacted in response to two Third District Court of Appeal cases: *Dines v. State*, 730 So. 2d 378 (Fla. 3d DCA 1999) and *Savage v. Macy's East, Inc.*, 719 So. 2d 1208 (Fla. 3d DCA 1998), *rev. denied*, 729 So. 2d 391 (Fla. 1999).[8] In fact, this Court granted review in this case based on certified conflict with *Dines*.

In *Savage*, the district court was faced with the issue of whether a claimant's failure to file for benefits during the time he was appealing an adverse decision from the Unemployment Appeals Commission rendered him ineligible for compensation during that time.[9] When the Florida Department of Labor and Employment Security refused to pay benefits for the period of the appeal (because Savage hadn't filed claims during

---

[8] Citing to *Dines* and *Savage*, the Senate staff analysis of the amendment to section 443.111 wrote: "The committee substitute effectively overturns an appellate court's rulings interpreting current law as requiring the payment of benefits to claimants when a denial is reversed even when the claimant did not certify for benefits while the appeal was pending." Senate Staff Analysis and Economic Statement, Report on Bill No. CS/SC 1448 (2003) at 11.

[9] The Unemployment Appeals Commission denied employee Savage's claims because his behavior on the job had been ruled to be disqualifying misconduct. Savage appealed to the district court who reversed the commission's determination and ordered that his claims be granted. 708 So. 2d 689.

that time), the district court was forced to decide if the compensation statute required such claims and, irrespective of this, whether this would be a useless procedural act that did no more than give the department a "catch-22" for avoiding such benefits.

This is precisely what the third district court held. Citing to its own precedent discussing bureaucratic "catch-22's" to deny benefits, *see Perkins v. State Dep't of Health and Rehabilitative Servs*, 538 So. 2d 1316, 1317 (Fla. 3d DCA 1989), and to the scores of cases finding that the Department and the Commission improperly denied employment compensation benefits, *see* citations listed at 719 So. 2d at 1209 n. 2, the district court held that "ordering continuing claims to a tribunal which has already rejected the claimant's eligibility amounts to the prohibited requirement of performing a series of useless acts." 719 So. 2d at 1209. It is unnecessary, the court held, for the claimant to keep filing claims when the department or the commission has already rejected prior claims on the same basis.

The following year, the third district again addressed the issue. In *Dines*, the court applied *Savage* to hold that the failure to file claims during the time that he is appealing the denial of benefits is a mere technicality and entirely harmless because he should have been granted benefits in the first place. The court went on to hold that the requirement that claimants file bi-weekly claims is advisory or directory only and that in the absence of prejudice to the Commission or the employer, the failure to file such

claims is, essentially, a case of administrative harmless error. 730 So. 2d at 379.

Without question, consulting outside or background materials to determine legislative intent is an accepted procedure when construing ambiguous statutory provisions. However, this should only be performed where the underlying statutes are ambiguous.[10] To do otherwise, usurps the legislative function. As this Court cautioned:

> Surely, the purpose of all rules relating to the construction of statutes is to discover the true intention of the law. But such rules are useful only in case of doubt and should never be used to create doubt, only to remove it. Where the legislative intent as evidence by a statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute, and the courts need only give effect to plain meaning of its terms. Alligood v. Florida Real Estate Commission [156 So. 2d 705 (Fla. 2nd DCA 1963)]. This Court, in Van Pelt v. Hilliard, held:
>
> 'The Legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed, so that the act read by itself or in conjunction with other statutes pertaining to the same subject is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. . . . Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology

[10] As stated in Fla. Stat. 443.031 (2002), any ambiguity in the statutes must be construed in favor of the claimant.

> of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. If a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of justice, propriety, and policy of its passage. Courts have then no power to set it aside or evade its operation by forced and unreasonable construction. If it has been passed improvidently the responsibility is with the Legislature and not the courts. Whether the law be expressed in general or limited terms, the Legislature should be held to mean what they have plainly expressed, and consequently no room is left for construction . . . 78 So. at 694-95.

State v. Egan, 287 So. 2d 1, 4-5 (1973).

C. Conclusion

Florida has established a clear and unambiguous statutory scheme for filing unemployment compensation claims. That scheme, according to the 2002 statutes, did not require that claimants file claims during the period their cases are on appeal. It was both unnecessary and improper for the court below to consult subsequent statutory amendments to support its own belief as to what the legislature must have wanted. Having done so, even these modifications do not shed light on prior legislative intent.

Whether this Court bases its decision on statutory construction grounds or on substantive arguments (like those contained in the third district cases discussed above),

the decision of the Second District Court of Appeal must be quashed.[11]

CONCLUSION

For the foregoing reasons, the Petitioner submits that the decision of the Third District Court of Appeal should be quashed and unemployment compensation benefits for the time the Petitioner's case was on appeal should be awarded.

Respectfully submitted,

HARVEY J. SEPLER
3389 Sheridan Street #450
Hollywood, Florida 33021-3606
(954) 964-1680

BY:_____
HARVEY J. SEPLER
Florida Bar No. 473431

CERTIFICATE OF FONT SIZE

The undersigned certifies that this brief uses only the Times New Roman 14-point type size.

---

[11] Decisions on statutory interpretation are subject to a *de novo* standard of appellate review. *See BellSouth Telecommunications , Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to John D. Maher, Deputy General Counsel, Unemployment Appeals Commission, Webster Building, Suite 300, 2671 Executive Center Circle, W., Tallahassee, Florida 32399-0681, this 20th day of December, 2004.

_____

HARVEY J. SEPLER

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1429

DANIEL C. COSTARELL,

Petitioner,

-vs-

FLORIDA UNEMPLOYMENT APPEALS COMMISSION,

Respondent.

APPENDIX

INDEX