

FLORIDA'S FIRST DISTRICT COURT OF APPEAL

PHOEBE FLANAGAN,

Appellant-Defendant,

Case No.: **1D17-5290**

v.

STATE OF FLORIDA,

Appellee-Prosecutor.

Lower Court Case
Nos. 2012 CF 4090 & 2013 CF 4071
(Fla. 1st Cir. Escambia Cty.)

**REPLY BRIEF
OF APPELLANT FLANAGAN**

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ARGUMENT

Appellant Phoebe Flanagan (“Flanagan”) argues five points in reply to the answer brief of Appellee Clerk of the Circuit Court for Escambia County, Florida (“Clerk”):

1. Affordability depends on available financial resources and excludes consideration of nonfungible “other income” that cannot be used as payment.

Florida law dictates the income a clerk should consider in setting affordable monthly payments toward court costs and fines (legal financial obligations or “LFOs”). § 28.246(4), Fla. Stat. Monthly installments are presumptively affordable unless they exceed 2% of the “net income” as defined in § 27.52(1), Fla. Stat. *Id.* “Net income,” in turn, “consist[s] of [net] salary and wages.” § 27.52(1)(a)(1), Fla. Stat. “Net income” is distinct from the “other income,” § 27.52(1)(a)(2), Fla. Stat., on which the trial court erroneously believed it could (and thus did) rely to determine affordability. Final Order, R. 196-97. Here, because Flanagan has no current employment income, she has no “net income,” and thus the \$10 monthly installments are presumptively unaffordable and unreasonable.

The Clerk attempts to rebut this presumption by focusing on Flanagan’s other income. Answer at 15-16. Flanagan’s other income may be divided into two categories, depending on its fungibility. Her fungible income consists of SSI

disability benefits. Her nonfungible income consist entirely of food stamps, medical insurance, and temporary housing support from her mother permitting Flanagan to live in a house until her mother sells it.

Initially, the Clerk set the monthly installments at \$10 calculated to approximate 2% of Flanagan's monthly receipt of the fungible \$490 in SSI disability benefits. § 28.246(4), Fla. Stat. However, the trial court correctly refused to consider these SSI disability benefits in determining whether the payment plan was affordable. Final Order, R. 196-97. Instead, it looked solely to Flanagan's "reoccurring in-kind payments" in the form of temporary housing support to determine affordability. *Id.* The Clerk now appears to agree that the affordability of Flanagan's monthly installments should not be determined based on exempt SSI disability benefits. Answer at 15-16. Instead, the Clerk argues that the monthly installments are affordable based solely on Flanagan's food stamps, medical insurance, and temporary housing support.¹ *Id.* at 9, 15-16. This argument fails because affordability turns on ability to pay.

¹ Although Flanagan's family has given her one-time gifts of a telephone and a 2002 Dodge Intrepid, which was in disrepair after years of nonuse and required Flanagan to pay \$1,500 to make it safely operable, Tr., R. 140-42, these do not count as "regular support," § 27.52(1)(a)(2), Fla. Stat., to qualify as other income. *See* Final Order, R. 196-97 (identifying only the housing as "regular in-kind support"). The Clerk appears to concede this by excluding these one-time gifts from consideration and her argument. Answer at 9, 15-16.

Because this “income” is nonfungible, Flanagan cannot use it to satisfy the monthly installments. Food stamps cannot be sold or transferred. § 414.39(2)(a), Fla. Stat. Medicaid benefits cannot be sold or transferred. *Id.* (Medicaid card cannot be fraudulently used). Although Flanagan lives in her mother’s house at no expense, no evidence suggests that her mother would permit Flanagan to rent out the house and retain the profits. Much like an invitation to dinner, her mother’s support extends to a specific person, Flanagan, and thus it is not a coupon otherwise transferable to another recipient. That Flanagan’s mother (or anyone else) could have paid the monthly installments instead of perhaps the property taxes, Answer at 24, does not change her mother’s *chosen* form of support. Flanagan still cannot monetize the housing support to remit the monthly installments. Furthermore, her mother must pay the house insurance, maintenance, and taxes, regardless of whether Flanagan lived there. Indeed, recognizing that her mother pays these homeowner expenses principally for reasons unrelated to helping Flanagan, Flanagan understands that the housing is temporary and will end not when Flanagan no longer needs help, but when her mother decides she no longer wants the house. For this reason, Flanagan maintains a storage unit. Tr., R. 126-27. The Clerk misses the mark by considering hypothetical trust funds and stock dividends. Answer at 15. Flanagan is not so fortunate. That another person who receives fungible, non-employment income could afford the monthly

installments, does not change the fact that Flanagan does not have such fungible income.

Ultimately, affordability turns on a person's available resources—what she can use to satisfy a debt. Flanagan lives a modest life with basic necessities. Tr., R. 127. Other than her SSI disability benefits, she currently has no available resources or income she can use to pay the monthly installments. Because her food stamps, medical insurance, and house support are nonfungible, they are unavailable to satisfy a debt. Because this income cannot be used to pay the monthly installments, it cannot be used to determine affordability—whether Flanagan has the ability to pay them. The trial court erred by determining Flanagan's financial reach and what monthly installments she can afford by considering unavailable income that cannot be converted and used to pay them.

2. The Clerk targets Flanagan's only usable income—her SSI disability benefits.

Flanagan's only source of fungible income is SSI disability benefits. Final Order, R. 195 (noting no other fungible income source). Likewise, the sole source of the \$1,400 in her bank account, Answer at 4, is from SSI disability benefits. Tr., R. at 137, 150. Therefore, although the explicit terms of the payment plan do not require she pay the monthly installments from her SSI disability benefits, Answer at 17, n.5 & 18-19, in reality, these benefits are the only source that could be used

to remit monthly installments. Consequently, the Anti-Attachment Clause's, 42 U.S.C. § 407(a), prohibition of enforcing a money judgment by compelling payment from SSI disability benefits, applies to all of Flanagan's fungible income. Following the argument in Flanagan's Initial Brief at 19-30, this Court should conclude that the Anti-Attachment Clause prohibits the Clerk from conditioning Flanagan's driver's license on payment of monthly installments from her SSI disability benefits.

3. The Clerk exercises discretion to suspend a driver's license.

The Florida Department of Highway Safety and Motor Vehicles (DMV) must suspend a driver's license when the Clerk notifies it that a driver has failed to pay LFOs. § 322.245(5)(a), Fla. Stat. Thus, because the Clerk's notification results in the suspension, the Clerk effectively causes the license suspension. *See Chirillo v. Granicz*, 199 So. 3d 246, 249 (Fla. 2016) (ruling an action is the proximate cause of a result when the result is the foreseeable consequence and naturally flows from the action). This Court should reject the Clerk's hyper-technical disclaimer of responsibility that the Clerk does not suspend a person's license. Answer at 19. The Clerk causes the suspensions.

Yet, no law requires the Clerk to notify the DMV of unpaid LFOs and cause the driver's license to be suspended. The Clerk has a choice. Unlike subsection 322.245(3), Fla. Stat., which mandates the Clerk to notify the DMV of unpaid

LFOs in traffic and criminal traffic cases, subsection (5) relating to felony LFOs contains no similar mandate.² It only instructs the DMV what it must do, if a clerk decides to notify the DMV.

The Clerk oddly relies on the statute’s *title* to argue that she must suspend Flanagan’s driver’s license when LFOs are unpaid. Answer at 21. However, a statute’s title—in explicit contraction of the statute’s actual text—does not define legal mandates. *Brooks v. Brooks*, 164 So. 3d 162, 164 (Fla. 2d DCA 2015) (ruling a title “does not override the text of the statute,” but may only inform its ambiguous meaning). Because § 322.245(5)(a), Fla. Stat., clearly creates a duty only for the DMV, reliance on the statute’s title is misplaced. Had the Florida legislature wanted to require the Clerk to notify the DMV of unpaid felony LFOs, it would have used the same “shall” language it used to mandate notification of unpaid tickets: “the clerk of the court *shall* electronically notify the department of such failure within 10 days.” § 322.245(3), Fla. Stat. (emphasis added). That § 322.245(5)(a), Fla. Stat., specifies that the DMV should immediately suspend the driver’s license “when” notified, Answer at 21-22, cannot be read to impose a duty for the Clerk to transmit such notification.

² § 322.245(5), Fla. Stat., applies to misdemeanors and felonies and specifically Flanagan’s felony convictions. *Id.* (concerning “criminal offense other than those specified in subsection (1)”).

Therefore, Clerk has a choice to notify the DMV of Flanagan's unpaid LFOs and cause the suspension of her driver's license. Thus, the Clerk compels Flanagan to pay monthly installments on the threat of suspension of her driver's license for nonpayment.

4. Flanagan's enforceable proposed payment plan satisfies the legal requirement for reinstatement.

Florida law directs the reinstatement of a driver's license when Clerk notifies the DMV that the driver has enrolled in a payment plan. § 322.245(5)(b)(2), Fla. Stat. Flanagan proposed a payment plan that defers monthly installments "until Flanagan has a source of income other than SSI disability benefits." Flanagan's Motion, R. 95. The Clerk argues that such a payment plan amounts to an illusory promise. Answer at 10. However, despite the Clerk's contentions, *id.*, a conditional promise to pay is a valid contract. And the payment plan agreement is enforceable. If Flanagan fails to make monthly installments once she has non-exempt income, the Clerk may again suspend her driver's license. Furthermore, although generally a promise to pay a current debt does not count as new consideration for a contract, Answer at 10, it is all that § 322.245(5)(b)(2), Fla. Stat., requires for reinstatement. Therefore, Flanagan's proposed payment plan is enforceable and satisfies the legal requirements for reinstatement.

5. Flanagan's inability to perform community service is irrelevant.

The Social Security Administration's determination that Flanagan was eligible for SSI disability benefits necessarily includes a determination that Flanagan is disabled and unable to work.³ 42 U.S.C. § 1382; 42 U.S.C. § 1382c. Nevertheless, Clerk faults Flanagan, Answer at 11-12, for failing to perform community service in lieu of paying the LFOs. *See* § 938.30(2), Fla. Stat. (permitting the trial court to convert LFOs to community service). However, nothing requires Flanagan to request that the trial court convert her LFOs into an obligation to perform community service. § 938.30(2), Fla. Stat.; U.S. Const. amend. XIII. The trial court has not ordered Flanagan to perform community service. Furthermore, it is doubtful that satisfying the LFOs with community service is a viable option for Flanagan. Escambia's Community Service Program approves limited non-profit agencies at which she could perform the work. Many of the service opportunities involve manual work. No suitable service opportunity may exist for everyone. Ultimately, Flanagan's inability to perform community service is irrelevant to whether the Clerk complied with her duty to enroll Flanagan on an affordable payment plan. § 28.246(4), Fla. Stat.

³ Flanagan's current doctors have said nothing about whether she can work. Answer at 4. However, this does not mean they believe she is able to work.

CONCLUSION

Flanagan is poor, disabled, and survives on meager assistance from her family and our social safety net. The Clerk unreasonably conditions her continued ability to lawfully drive to the grocery and doctors' appointments on paying a portion of her SSI disability to satisfy a debt. This violates Florida law. It violates federal law. It violates fundamental fairness.

This Court should reverse the trial court's ruling and remand with instructions to review the payment plan without consideration of nonfungible "other income" or her SSI disability benefits, which are protected by the Attachment Clause.

Dated: Oct. 8, 2018

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished today to the following person(s) by email:

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CERTIFICATE OF COMPLIANCE

I certify that I used 14 point New Times Roman font in this brief; and therefore, it complies with the font requirements of Fla.R.App.P 9.210(a)(2).

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