

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED

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MAR 1 1985

CLERK, SUPREME COURT

By Chief Deputy Clerk

**L. ROSS, INC., a
Florida Corporation,**

Petitioner,

CASE NO. _____

-vs-

**R. W. ROBERTS CONSTRUCTION
COMPANY, INC., TRANSAMERICA
INSURANCE COMPANY, B.E. McCALL
and THOMAS ADAIR,**

Respondent.

APPEAL FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, L. ROSS, INC., seeks the discretionary jurisdiction of this Court to review the decision of the Fifth District Court of Appeal in this cause¹ which expressly and directly conflicts with the decision of the Fourth District Court of Appeal² on the same question of law. At issue is the application of an attorney's fee statute, §627.756 Fla. Stat. (Supp. 1982).

On December 17, 1981, Petitioner filed an amended complaint for damages, costs, and attorney's fees upon a construction bond pursuant to §255.05 Fla. Stat. (1981) as a result of the Respondents' failure to perform under a construction contract (R 28-33). In December of 1983, the Defendant insurance company, Transamerica, stipulated and agreed that a judgment be entered against it for the sum of FIFTY-FOUR THOUSAND FOUR HUNDRED SEVENTY-NINE DOLLARS and Sixty-Two Cents (\$54,479.62) (R 1, 13, 125). This judgment entitled the Petitioner to recover attorney's fees from Transamerica pursuant to §627.756 and §627.428 Florida Statutes, and the Petitioner accordingly submitted evidence on the question of fees (R 1-27).

The undisputed testimony below established reasonable fees in the amount of

1. A conformed copy of the opinion is attached hereto as Appendix "A", pursuant to Rule 9.120(d) Fla. R. App. P.

2. American Cast Iron Pipe Company v. Foote Brothers Corporation, 458 So.2d 409 (Fla. 4th DCA 1984). A copy of the opinion is attached hereto as Appendix "B".

TWENTY-ONE THOUSAND FIVE HUNDRED SEVENTY-TWO DOLLARS and Five Cents (\$21,572.05) (R 8).

At the time this action was filed, §627.756 Fla. Stat. provided for the payment of a reasonable sum as attorney's fees, but the fees were limited to a maximum of 12.5% of the judgment. On October 1, 1982, more than a year before the settlement was reached in this case, the 12.5% cap was repealed.³ However, the trial court refused to apply the amended statute as it existed on the date of the judgment, and limited the attorney's fee award under the old statute because the action was filed prior to the modification of the statute. Accordingly, the Petitioner was awarded roughly one third of what was shown to be a reasonable fee.⁴

Petitioner appealed the amount of the attorney's fees award and the Fifth District affirmed. This appeal follows.

3. Chapter 82-243, Florida Laws.

4. The court awarded \$6,809.95, as opposed to \$21,572.05 which was found to be reasonable.

ISSUE ON APPEAL

**WHETHER THE OPINION OF THE FIFTH
DISTRICT EXPRESSLY AND DIRECTLY
CONFLICTS WITH A DECISION OF
ANOTHER DISTRICT COURT OF APPEAL.**

ARGUMENT

THE OPINION OF THE FIFTH DISTRICT
EXPRESSLY AND DIRECTLY CONFLICTS
WITH A DECISION OF ANOTHER DISTRICT
COURT OF APPEAL.

Article V, §3(b)(3) of the Constitution of the State of Florida provides that the Supreme Court:

May review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district or of the supreme court on the same question of law.

In the opinion of the Fifth District Court of Appeal in this cause, the court stated:

We view our decision to be consistent with Parrish v. Mullis, 458 So.2d 401 (Fla. 1st DCA 1984), and acknowledge direct conflict with American Cast Iron Pipe Company v. Foote Brothers Corporation, 458 So.2d 409 (Fla. 4th DCA 1984).

Thus, the Fifth District clearly set forth a basis for jurisdiction under Art. V, §3(b)(3) Fla. Const., and the following is a brief review of the substance of the conflict.

American Cast Iron Pipe Company v. Foote Brothers Corporation, 458 So.2d 409 (Fla. 4th DCA 1984), involved the same statute (§627.756 Fla. Stat.), the same issue and an almost identical factual background as the case at bar. In American Cast Iron, the plaintiff filed a suit to foreclose a mechanics lien prior to the 1982 amendment of §627.756 Fla. Stat. and the repeal of the 12.5% cap on attorney's

fees. During the pendency of the suit, the 12.5% cap was removed, but the trial court nevertheless limited the fees to 12.5% of the judgment pursuant to the old statute. On appeal, the Fourth District reversed and remanded the cause with instructions to award attorney's fees according to the amended statute.

The well-reasoned opinion of the Fourth District examined the traditional rules of statutory construction set forth in Senfeld v. Bank of Nova Scotia Trust Co., 450 So.2d 1157 (Fla. 3d DCA 1984), and concluded that, as a general rule, a statutory amendment may not be applied retroactively, but a "remedial" statute is a noted exception to this rule. The court opined:

Remedial statutes include statutes which confer a remedy, "and the remedy is the means employed in enforcing a right or in redressing an injury," . . . those which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, . . . those which do not affect vested rights or create new obligations, . . . and those which affect only the measure of damages for vindication of a substantive right, . . . (citations omitted). (emphasis supplied) 458 So.2d 410.

The Fourth District reasoned that the right to attorney's fees existed under §627.756 Fla. Stat. prior to the filing of the suit, and the change in the statute merely affected the amount of the recovery. Thus, the court held that "the amendment to Section 627.756 is a remedial statute which may be applied retroactively . . ." 458 So.2d 410.

In the case at bar, the Fifth District found that the classification of a statute as remedial is not relevant because it will be "viewed as remedial or penal depending on whose ox is being gored."⁵ The court reasoned that the controlling

5. Opinion, page 2.

question is whether the statutory amendment is procedural, and thus subject to retroactive application, or substantive, and limited to prospective application. This reasoning is based upon Parrish v. Mullis, 458 So.2d 401 (Fla 1st DCA 1984).

Parrish v. Mullis involved §768.56 Fla. Stat. (1983), an attorney's fee statute enacted prior to the filing of the suit in that case, which granted attorney's fees to prevailing defendants in personal injury cases. The court found that it would be unfair to require the plaintiff to pay the attorney's fees in that case because her cause of action accrued prior to the effective date of the statute. The court found that: "A litigant's right to attorney's fee is a substantive right, and a law creating that right may only be applied prospectively." Id. at 402. Accordingly, when the plaintiff's cause of action accrued, there was no attorney's fee provision, and therefore she could not subsequently be burdened with that obligation.

The Fifth District herein found that the amendment to §627.756 created "a new right to attorney's fees" and thus, "a new substantive right".⁶ The court stated that:

The right [to an attorney's fee] is not merely a new or different remedy to enforce an already existing right and is, for that reason, not merely procedural.

Likewise, a statute, such as section 627.756, Florida Statutes (1983), which extends the application of an existing statute which itself created substantive rights and obligations (such as section 627.428) to an additional class of prospective parties creates as to the newly affected class of parties, substantive rights in the additional class of potential plaintiffs (owners, laborers, materialmen and subcontractors) and substantive obligations upon the additional class of potential defendants (sureties). (emphasis supplied).

6. Opinion, page 3, citing, among other cases, Parrish v. Mullis, 458 So.2d 401 (Fla 1st DCA 1984).

Thus, the central theme of the court's opinion was that the amendment to §627.756 created additional rights to a "newly affected class" of individuals. However, the amendment to the statute does not add any new class of parties because the previous statute applied to the same "owners, subcontractors, laborers and material men".⁷

The court further reasoned that the right to attorney's fees is ancillary to the underlying cause of action and the right to attorney's fees therefore "always accrues at the time the other, underlying cause of action accrues."⁸ (Cf. Davis v. Williams, 239 So.2d 503 (Fla. 1st DCA 1970).) Accordingly, the rule of this case is that the 12.5% cap on attorney's fees will be applied to all actions which accrued prior to October 1, 1982, regardless of when the suit was filed.

At the time the cause of action accrued in the case at bar, the right to reasonable attorney's fees existed, but that right was qualified, or limited to 12.5% of the judgment. The amendment to §627.756 Fla. Stat. merely removed an artificially imposed cap on what a reasonable fee would be. Thus, there is no "newly affected class" and there is no "new right to attorney's fees" created by the amendment.

Accordingly, the opinion of the Fifth District, which finds the amendment of §627.756 Fla. Stat. to create a new substantive right, directly conflicts with the finding of the Fourth District which found the amendment to be remedial and

7. See §627.756 Fla. Stat. (1981).

8. Opinion, page 3.

subject to retroactive application. The law in Florida as of this date is unclear. Circuit Courts in the Fifth District will be required to apply the 12.5% cap on attorney's fees for all cases which "accrued" prior to October 1, 1982, but those Circuit Courts in the Fourth District will only be limited by standards of "reasonableness" in awarding fees. Courts in all other jurisdictions will apply the statute as they see fit. The end result of this confusion will be a disproportionate impact of this statute upon some litigants.

Notwithstanding the fact that it is manifestly unfair to artificially set a cap on a "reasonable" attorney's fee without examining the complexity of the individual lawsuit, (such as in the case at bar where the plaintiff received only one third of its reasonable fee), the uncertainty of the application of this law will discourage future settlement. Defendant sureties will not be able to accurately assess their exposure to attorney's fees, and plaintiffs will not know if their costs of litigation will be covered.

This confusion over the application of §627.756 Fla. Stat. continues to affect litigants whose right to bring suit accrued prior to October 1, 1982, and there is thus a compelling need for this Court to take jurisdiction of this cause and clarify the law in Florida.

CONCLUSION

Based upon the foregoing argument, the Petitioner respectfully requests this Court to accept jurisdiction of this cause pursuant to Article V of the Constitution of the State of Florida, and review the case on the merits.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to H. DAVID LUFF, ESQUIRE, P.O. Box 753, Orlando, Florida 32802, this 26TH day of February, 1985.



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