IN THE SUPREME COURT OF THE STATE OF FLORIDA

L. ROSS, INC., a
Florida Corporation,

Petitioner,

vs. CASE NO. 66,607

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

Respondents.

APPEAL FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

Petitioner, L. ROSS, INC., files this Reply Brief and responds to the arguments in TRANSAMERICA's Answer Brief in the order which they were presented.[1]

In POINT I, TRANSAMERICA asserts that the trial court never expressly ruled that the 12.5% fee cap imposed by §627.756, Fla. Stat. (1981) was applicable. Petitioner respectfully responds that the record could not be clearer. There was a motion for attorney's fees which the court ruled upon by awarding exactly 12.5% of the judgment, and this ruling is the subject of appeal.

POINT II of TRANSAMERICA's Brief asserts that the "choice of law" concerning the amount of attorney's fees is determined at the time the suit is filed and, since there was a 12.5% limitation at the time this suit was filed, the trial court properly applied the limitation. Petitioner responds that the right to a "reasonable attorney's fee" has been available to Petitioner during all times relevant to this cause of action. Moreover, the clear language of the statute provides that the right to attorney's fees does not "accrue" until there is a judgment or recovery. Thus, the statute is not being applied retroactively, but is being applied as of the date of the final judgment, as it existed on the date of the final judgment.

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[1]Although TRANSAMERICA does not delineate its arguments as POINTS I through V, Petitioner has so numbered these arguments for purposes of clarity.

POINT III involves the question of vested rights. There is clearly no "contractual right" involved in this action, and TRANSAMERICA's long quotation of the opinion of the Fifth District Court of Appeal in this case does not support TRANSAMERICA's argument that the 12.5% fee cap is a "substantive" right.

POINT IV responds to TRANSAMERICA's claim that the Legislature intended only a prospective application of §627.756 by providing for an effective date of the statute. Petitioner asserts that a plain reading of the statute shows that, at best, there is no legislative directive regarding the retroactive application of the statute, and perhaps the modification of the statutory language itself reflects an intent by the Legislature to apply the revised statute to pending litigation.

Finally, POINT V responds to TRANSAMERICA's unsupported claim that Petitioner is not entitled to the full hourly fee which was shown by the evidence to be a reasonable fee. TRANSAMERICA's argument in this point is neither supported by the evidence nor the law and is wholly irrelevant in this appeal.

A R G U M E N T

POINT I

THE RECORD ON APPEAL CLEARLY INDICATES THAT THE TRIAL COURT APPLIED THE ORIGINAL VERSION OF §627.756, FLORIDA STATUTES.

TRANSAMERICA's first argument is that the trial court never made an "express ruling" that the original version of §627.756, Florida Statutes was applied in this case. According to TRANSAMERICA, "ROSS's failure to secure an express ruling from the trial court in this case requires affirmance of the lower court's ruling." (Answer Brief of Respondent, Page 7) However, TRANSAMERICA does admit that, at the hearing on the motion for attorney's fees, argument was made by counsel for both parties as to whether the original or the revised statute was to be applied, and that the court expressly reserved ruling on this issue. (Answer Brief of Respondent, Page 4) Thus, the issue was clearly before the court, and the only question is whether the court, in awarding exactly 12.5% of the judgment, also applied the original version of §627.756.

If there is any doubt as to whether the trial court intended to apply the original statute or the amended statute, the proper remedy would be to remand this action to the trial court for clarification. See, Lewis v. Gramil Corp., 94 So.2d 174 (Fla. 1957). However, an appellate court will ascertain, if it can, the unstated findings which support a trial court's conclusion, and decide the case as though the findings were stated. Hill v. State, 358 So.2d 190, 194 (Fla. 1st DCA 1978);

Jacquin-Florida Distilling Company v. Reynolds, Smith and Hills, etc., 319 So.2d 604 (Fla. 1st DCA 1975).

The record clearly indicates that there was a motion for attorney's fees before the trial court, and that the only issue was the amount of fees which were due to the Petitioner. The evidence revealed that a reasonable hourly fee was $21,572.05, and TRANSAMERICA asserted that the maximum allowable fee was 12.5% of the judgment, or $6,809.95. Although the trial court did not specifically state that §627.756, Florida Statutes (1982) was not applicable, and that the original version of that statute must be applied, there is absolutely no other rational reason why the trial court would award exactly 12.5% of the judgment unless he was, in fact, applying the original statute.

Petitioner submits that the ruling of the trial court conclusively establishes that the court did, in fact, rule on the question of the retroactive application of the statute. If there were room for confusion, or if there was a separate motion which had never been ruled upon, as was the case in the authorities cited by TRANSAMERICA, then perhaps TRANSAMERICA would have some grounds to complain. But where the only issue involved at the hearing, and the only issue involved in the appeal surrounds a 12.5% cap on attorney's fees, and when the court awarded exactly 12.5% of the judgment, it stretches the imagination to conclude, as TRANSAMERICA argues, that the court did not rule on the applicability of the revised statute.

POINT II

THE RIGHT TO ATTORNEY'S FEES UNDER §627.756, FLORIDA STATUTES (1982) DOES NOT ACCRUE UNTIL THE ENTRY OF A FINAL JUDGMENT.

In TRANSAMERICA's second argument, it was stated that:

> [W]hen ROSS's cause of action accrued, Transamerica was not burdened with the potential responsibility to pay ROSS's 'reasonable' attorney's fees, and ROSS was not entitled to that right; the only burden was to pay a statutory cap of 12.5% of the total recovery. (Answer Brief of Respondent, Pages 11-12).

This is a misstatement of the law. The original and the amended version of §627.756 applies §627.428, which, in turn, requires the court to award "a reasonable sum" as attorney's fees. The only variation in the amended statute is that there is no longer a minimum and a maximum fee which can be awarded. Thus, regardless of when the cause of action accrued in this case, Petitioner has always had the right to a reasonable attorney's fee.

The clear language of the statute provides that the award of attorney's fees does not become relevant until there is a judgment entered. In Wollard v. Lloyd's and Companies of Lloyd's, 439 So.2d 217 (Fla. 1983), this court specifically held that an out of court settlement by an insurance company would not operate to divest a plaintiff of his right to the statutory attorney's fees simply because there was no judgment entered in the case. Although Wollard specifically disapproved of American Home Assurance Company v. Keller Industries, 347 So.2d 767 (Fla. 3d DCA 1977), and the entry of a final judgment

may not be jurisdictional, it remains a statutory requirement, and the award of attorney's fees is contingent upon the recovery by the plaintiff. Thus, unless there is a judgment or a substantial settlement by the insurance carrier, there can be no award of attorney's fees.

In Gibson v. Walker, 380 So.2d 531 (Fla. 5th DCA 1980), which was specifically cited by the Wollard court, the plaintiff received the settlement from the carrier shortly after filing suit, but the matter was pursued through final judgment on the issue of interest and attorney's fees. The trial court allowed attorney's fees only to the point of the settlement payment from the insurance company and disallowed fees which subsequently accrued. In reversing the trial court, the Fifth District concluded that the appellant was entitled to attorney's fees accrued through the final judgment. Thus, it was not appropriate to apply the statute at the time the suit was filed, or at the time the settlement was actually received. Rather, the statute was found to apply at the time of the final judgment in that case.

If the right to attorney's fees was created after the underlying cause of action accrued, perhaps then there would be grounds for examining the retroactive application of the statute. However, in this case, the right to a reasonable attorney's fee was in existence when the cause of action accrued and the removal of the 12.5% fee cap was effective prior to the settlement of this case.

The purpose of the statute is to discourage litigation

and encourage prompt disposition of valid insurance claims. Gibson v. Walker, supra, at 533; Salter v. National Indemnity Co., 160 So.2d 147 (Fla. 1st DCA 1964). If TRANSAMERICA had taken this policy into consideration and settled the suit before Petitioner was required to bring the case almost to trial, then the settlement would have been entered prior to the effective date of the statute and the 12.5% fee cap would have applied. However, TRANSAMERICA voluntarily procrastinated in evaluating the merits of Petitioner's claim, and required Petitioner to expend a large amount of attorney time in prosecuting this suit before TRANSAMERICA finally offered to settle the case on the eve of trial. It was at this point that the right to attorney's fees accrued and the statute became applicable.

Accordingly, the trial court should have applied the amended statute, as it existed on the date of the final judgment, and awarded the Petitioner's attorney's fees without imposing the 12.5% limitation.

POINT III

THE REMOVAL OF THE 12.5% FEE CAP DOES NOT AFFECT TRANSAMERICA'S VESTED RIGHTS.

TRANSAMERICA's third argument claims that, if the court applies the revised statute, this would constitute "a legislative impairment of contract" in violation of the Florida Constitution. (Answer Brief of Respondent, Page 13) However, TRANSAMERICA fails to acknowledge that the right to attorney's fees in this case is not based on contract, but it is a statutory penalty imposed by the Legislature. Union Indemnity Company v. Vetter, 40 F.2d 606, 609 (5th Cir. 1930); United States v. Smith Engineering and Construction Company, 240 F.Supp. 189, 191-92 (N.D. Fla. 1965); United States Fire Insurance Company v. Dickerson, 90 So. 613, 616 (Fla. 1921); American National Insurance Company v. de Cardenas, 181 So.2d 359, 361 (Fla. 3d DCA 1965).

If the payment bond in question provided that TRANSAMERICA would pay the "statutory attorney's fee," then there would be a possible argument that the 12.5% limitation imposed by §627.756 on the date the contract was executed would apply. On the other hand, if the payment bond had provided simply for the payment of a "reasonable fee," then the 12.5% limitation would not have applied even under the original statute because the contractual obligation to pay fees is totally separate from the statutory penalty. R. W. King Construction Company, Inc. v. City of Melbourne, 384 So.2d 654 (Fla. 5th DCA 1980); Joseph v. Houdaille-Duval-Wright Company, 213 So.2d 3 (Fla. 3d

DCA 1968).

In the case at bar, there is no contractual provision for fees and the award is completely a legislative penalty on a derelict insurance company. Accordingly, there is no "vested" property right which can be attributable to the contract in question.

TRANSAMERICA also inserted a lengthy quotation from the opinion of the Fifth District Court in this case in support of the proposition that the removal of the 12.5% fee cap increases a substantive obligation, therefore it is a substantive obligation and cannot be imposed retroactively. However, TRANSAMERICA has never addressed the distinction between a statute which creates the right to attorney's fees and a statutory amendment which removes certain limitations on a preexisting attorney's fee statute. The Fourth District Court in American Cast Iron Company v. Foote Brothers Corporation, 458 So.2d 409 (Fla. 4th DCA 1984), clearly makes this distinction and should be followed by this Court.

POINT IV

REMEDIAL STATUTES MAY BE APPLIED RETROACTIVELY.

TRANSAMERICA sets forth a number of arguments under the theory that there is a clear legislative expression that §627.756 is to apply prospectively only. TRANSAMERICA first claims that the Legislature, in providing for an effective date for the massive revision of the Insurance Code, set forth "a clear and express legislative intention that the revisions contained in Chapter 82-243, Acts of Florida, [sic] including the revisions to §627.756, Florida Stat. [sic] (1982), should have prospective application only after October 1, 1982." (Answer Brief of Respondent, Page 16) Petitioner respectfully asserts that if there was a clear expression by the Legislature that this statute be applied prospectively only, then there would not be two opinions by separate District Courts of Appeal reaching opposite conclusions from the same facts.

A comparison of the language contained in the original and the revised version of §627.756 suggests that the Legislature contemplated a retroactive application of the statute. Prior to October 1, 1982, §627.756 provided that the attorney's fees statute, §627.428, "shall also apply to suits brought by . . . subcontractors . . . ." (Emphasis added) As a matter of statutory construction, the word "shall" connotes that the statute applies prospectively only. Stone v. Town of Mexico Beach, 348 So.2d 40-44 (Fla. 1st DCA 1977). The amended statute now reads "§627.428 applies to suits brought by . . . subcontractors . . . ." By elimination of the word "shall,"

the amended statute, on its face, states that the right to attorney's fees provided by §627.428 applies to suits which have been brought by subcontractors as of October 1, 1982. Thus, the amended statute contains a legislative expression that the statute, as amended, applies to actions pending as of the effective date of the statute.

Legislative expression that a statute operate retroactively, however, is not mandatory for a statute to operate retroactively. Walker and LaBerge, Inc. v. Halligan, 344 So.2d 239, 242 (Fla. 1977); Love v. Jacobson, 390 So.2d 782, 783 (Fla. 3d DCA 1980). In the absence of any clear legislative expression, remedial statutes, or statutes which affect only the measure of damages, are applied retroactively because no vested right exists in any mode of procedure. Walker and LaBerge, Inc. v. Halligan, supra, at 243; Love v. Jacobson, supra, at 783; see, also, City of Lakeland v. Catinella, 129 So.2d 133 (Fla. 1961); McCord v. Smith, 43 So.2d 704 (Fla. 1949); Department of Transportation v. Cone Brothers Contracting Company, 364 So.2d 482 (Fla. 2d DCA 1978); Grammer v. Roman, 174 So.2d 443 (Fla. 2d DCA 1965).

Although the general rule is that a statute will be deemed to operate prospective only absent clear legislative intent, and even a clear expression of retroactivity by the Legislature will be ignored if the statute impairs vested rights, it is well-established that "neither of these rules of statutory construction applies where the statute is solely remedial or procedural." Senfeld v. Bank of Nova Scotia Trust Company,

450 So.2d 1157, 1164-1165 (Fla. 3d DCA 1984). As has been repeated numerous times by Petitioner, the only change in the statute in question was the amount of the recovery which may be had in a petition for attorney's fees; a clear example of a "remedial" statute.

Moreover, the assertions by the Fifth District and TRANSAMERICA to "ex post facto" legislation is totally irrelevant in this case because ex post facto laws only relate to criminal matters. Seaboard System Railroad, Inc. v. Clemente, 467 So.2d 348, 357 (Fla. 3d DCA 1985).

Finally, TRANSAMERICA asserts that the state Legislature cannot "make such legislation effective retroactively so as to interfere with the 'vested rights' of a private party." (Answer Brief of Respondent, Page 18) However, nowhere in TRANSAMERICA's Brief is it argued that the removal of the 12.5% fee cap is not a remedial amendment. Moreover, TRANSAMERICA has not, and indeed cannot, make the claim that this statutory modification of a preexisting remedy in fact impairs any vested right which TRANSAMERICA has, other than the hollow claim relating to contract rights which was previously discussed.

Accordingly, the statutory amendment in question is a well-established exception to the rule against retrospective application of statutes, and the Fifth District should be reversed. City of Lakeland v. Catinella, supra, at 136.

POINT V

REASONABLE FEES MAY BE DETERMINED BY THE COMPETENT EVIDENCE RECEIVED AT THE ATTORNEY'S FEE HEARING.

TRANSAMERICA's final argument is an attempt to limit TRANSAMERICA's exposure to the full application of the attorney's fee statute. TRANSAMERICA claims that Petitioner is not entitled to recover the reasonable fees incurred in the prosecution of this case, and the trial court should segregate the attorney's time and award fees which relate only to TRANSAMERICA's obligation on the surety bond. However, TRANSAMERICA's attempt to rebut the evidence as to a reasonable attorney's fee in this argument is purely speculative and is not based on any matter in the record. (See R-19)

Additionally, TRANSAMERICA's argument that the time spent on the different counts must be segregated, makes assumptions which are not applicable to this case. Although the Amended Complaint did contain one count for slander and TRANSAMERICA did file a Counterclaim, these matters were never litigated and Petitioner's attorney testified that he was unable to identify any time spent in the prosecution or defense of these actions. (R-19) The cases cited by TRANSAMERICA on this matter, deal with the recovery of attorney's fees on matters which had actually been litigated, rather than merely pleaded. Therefore, there is no basis in the evidence to support TRANSAMERICA's argument that Petitioner should be awarded anything less than the fee which the expert witness testified was a reasonable fee. (R-8)

TRANSAMERICA also overlooks the fact that the Counterclaim was based on various allegations regarding conduct pertaining to the construction project which was the subject of the action under the bond. Even if any time was attributed to work on the Counterclaim, Petitioner's expert witness testified that a prudent plaintiff would be required to consider the allegations of a counterclaim in order to recover under the bond. (R-7, 10) Moreover, several courts have noted that legal services rendered in defense of a counterclaim related to the primary action upon which there is an entitlement of attorney's fees, are properly considered in determining a reasonable fee. Erickson Enterprises, Inc. v. Lewis Wohl and Sons, Inc., 422 So.2d 1085, 1086 (Fla. 3d DCA 1982); Peacock Construction Company v. Gould, 351 So.2d 394, 395-96 (Fla. 2d DCA 1977).

Finally, the law is clear that Petitioner may recover for clerical work. Dade County v. Oolite Rock Company, 348 So.2d 902 (Fla. 3d DCA 1977).

In summary, TRANSAMERICA presented no evidence to rebut the evidence submitted by Petitioner as to the amount of a reasonable fee. TRANSAMERICA's argument that Petitioner's fee should be reduced because of different counts pleaded by the parties is without merit and, likewise, is not supported by the evidence.

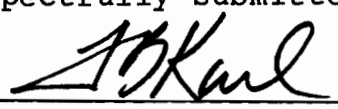
CONCLUSION

The limitation in former §627.756 was eliminated before Petitioner became entitled to attorney's fees, therefore, the statute is not being applied retroactively.

Moreover, statutes are either procedural or substantive. If procedural, a statute is applied retroactively to pending cases upon its enactment. If substantive, a statute is applied to actions which accrued after its enactment. Former §627.756 is a procedural statute and the amendment to the statute in 1982 should be applied retroactively because (1) legislative expression that the statute applies retroactively appears on the face of the amended statute; (2) the statute is not substantive, no "right" in the statute vested in TRANSAMERICA before said right was repealed, and the statute created no new obligation on the part of TRANSAMERICA; and (3) the statute is penal in nature and, therefore, applies to all pending cases upon its enactment or modification.

Accordingly, this Court should reverse the decision of the Fifth District Court of Appeal and adopt the decision of the Fourth District in American Cast Iron Company v. Foote Brothers Corporation, 458 So.2d 409 (Fla. 4th DCA 1984).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and authentic copy of the foregoing has been furnished by mail to WILLIAM L. MIMS, JR., ESQUIRE, Post Office Box 753, Orlando, FL 32802, this 1st day of August, 1985.

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