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IN THE SUPREME COURT

OF THE STATE OF FLORIDA

FILED
SID J. WHITE
SEP 12 1990
CLERK, SUPREME COURT
By
Deputy Clerk

RONALD VAN DEVENTER,
ELIZABETH VAN DEVENTER and
CHRISTINE VAN DEVENTER,

Petitioners,

vs.

CHRISTINIA BROWN,

Respondent.

CASE NO. 76,229

BRIEF OF RESPONDENT ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW DIRECTED TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

Christinia Brown, Respondent/Appellant/Plaintiff, agrees with the Statement of Facts as presented by Petitioners/Appellants/Defendants. (Petitioners Brief 1, 2). However, Christinia Brown would acknowledge this Court's decision is Aspen v. Bayless, ____ So.2d ____, (15 FLW 403, July 27, 1990).

SUMMARY OF ARGUMENT

This Court has had the opportunity to pass upon the issue presented in the instant case concerning whether an insurance company can collect costs from a non-prevailing plaintiff. (Aspen v. Bayless, ____ So.2d ____, (15 FLW 403, July 27, 1990). Respondent urges This Court to reconsider its decision in Aspen v. Bayless in light of the constitutional considerations raised in this brief.

This Court's holding in Aspen contravenes the Fla. Const., Article I, Section 21. The citizens of this state, and of the nation as a whole, have long recognized the right of access to the courts as fundamental to our republicanism. Faced with the specter of having to pay tens of thousands of dollars in legal costs and attorney's fees, an injured personal injury plaintiff will feel compelled to waive the right to redress in the courts.

An individual's rights guaranteed by the Fourteenth Amendment of the United States Constitution are violated when a trial court may impose legal costs and attorney's fees against a non-prevailing personal injury plaintiff. Considerations of due process and equal production mandate the reversal of Aspen because of the chilling effect the imposition of costs works on an individual's right of access to the courts. Because of the right of access to the courts is an extremely important right, the offer of

judgment rules sanctioned by This Court must fail because of strict constitution scrutiny.

In Aspen, This Court recognized an insurance company as a business venture which should be allowed to collect its legal costs and attorneys fees. However, This Court failed to recognize that an insurance company is in the business of assuming the risk of financial loss with some degree of predictability. On the other hand, an injured personal injury plaintiff has no such ability to guard against the risk of financial loss when asserting rights in the courts of this state. It is fundamentally unfair to victimize, with the risk of financial ruin, a personal injury plaintiff who has already been victimized by the negligence of another. Thus, This Court should reverse itself holding Florida Rule of Civil Procedure 1.442, Florida Statute 45.061, and Florida Statue 768.79 unconstitutional and reverse Aspen in negligence actions.

ARGUMENT

FLORIDA'S RULE OF COURT AND STATUTES PERMITTING A COURT TO AWARD LEGAL COSTS AND ATTORNEY'S FEES IN NEGLIGENCE ACTIONS VIOLATE THE RIGHT OF ACCESS TO COURTS UNDER FLORIDA'S CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A person's right of access to the Courts of this state is constitutionally guaranteed. Fla. Const., Article I, Section 21. The Florida Constitution mandates access to the courts for "any injury, and justice shall be administered without sale, denial or delay." Id. The Florida Rules of Civil Procedure and Florida Statutes pertaining to awarding legal costs and attorney's fees to a non-prevailing part denies access to the Courts to those who are unable to afford the risk of paying such costs and attorney's fees. The restrictive effect of this sanction must be liberally construed in favor of the constitutional right. G.B.B. Investments, Inc. v. Hinterkopf, 343 So.2d 899 (Fla. 3d DCA 1977).

The specter of having to pay an insurance company's legal costs and attorney's fees has a chilling effect on a personal injury plaintiff's right of access to the courts. The damages sustained by a personal injury plaintiff entitles such person to constitutional protection under Article I, Section 21. Wilson v. Lee Memorial Hospital, 65 So.2d 40 (Fla. 1953). The taxing costs and attorney's fee rule and statutes create a suspect classification based on

wealth. If the rule and statutes are allowed to stand, then only those able to afford up to tens of thousands of dollars in costs and attorney's fees will be able to invoke their fundamental right of access to the courts without the fear of financial ruin.

This Court's rationale in Aspen is flawed. Aspen was decided upon the principle that an insurance company is a business venture and for that reason should be allowed to collect monies it expends in the defense of a civil action. What The Court fails to recognize is that a personal injury plaintiff does not come into court having dealt at arm's length with the defendant prior to litigation. A personal injury plaintiff is an involuntary creditor of the defendant. Such a plaintiff is unable to guard himself from the financial risks of pursuing his legal rights guaranteed by the Florida Constitution. To permit an insurance company to collect it's legal costs and attorney's fees from the victim of an insured's negligence tramples indiscriminately and unfairly the maxim for every wrong there is a remedy. Holland for the use and benefit of Williams v. Mayes, 19 So.2d 709 (Fla. 1944).

The rule and statutes permitting the taxing of costs and attorney's fees fail to recognize the disparity of economic resources between an individual and an insurance company. Furthermore, it is fundamentally and patently unfair to victimize for a second time a personal injury

plaintiff who has already been victimized by the negligence of another. Because of the chance of economic ruin, many injured persons will not exercise their constitutional right of redress. The end result is an unwarranted windfall to the insurance industry.

Petitioners correctly point out that the rule and statutes permitting the taxing of costs and attorney's fees were designed to encourage settlements. (Petitioner's Brief, P 8). However, the rule and statutes also have the opposite effect because an insurer can play the averages in soft tissue injury cases where the plaintiff must prove a permanent injury. Florida Statute 627.737. For instance, Florida's No-Fault Law requires a plaintiff to prove a threshold injury, one of which is a permanent injury. In the majority of soft tissue cases, permanent injury must be proved by the plaintiff.

In all too many circuits in this state, insurance companies, through their defense attorneys, can obtain a medical opinion of no permanency from a defense oriented medical doctor under Florida Rule of Civil Procedure 1.360. Thus, even where a plaintiff has clear and convincing evidence of permanency, an insurance company can create a jury question on this issue. Taken in concert with the mythical insurance crisis created by the insurance industry, the insurance industry has created a situation where not only must a personal injury plaintiff expend

thousands of dollars in preparation of his own case, but also face a situation where the insurer stands a good chance of winning at trial. Thus, the industry will reap a windfall in soft tissue injury cases because injured plaintiffs with soft tissue injuries will not wish to risk their own further financial harm.

Under this climate, an insurance company will not be afraid to litigate such cases because of the prejudicial public opinion they have created against plaintiffs with soft tissue injuries. In the end, the insurance industry does not merely recapture costs expended, but also gains a windfall because fewer individuals will be willing to litigate their claims.

Petitioner's argument that it is unfair for a personal injury plaintiff to collect costs when they have not paid the same and an insurance company to not be able to collect costs is without merit. Petitioner's assertion fails to recognize that a personal injury client of a law firm remains obligated to pay those costs even when those costs are advanced by the law firm. Rules of Professional Conduct 4-1.5. An insured under an insurance policy shares no like obligation. In effect, an insurance company is allowed an indirect award of costs and attorney's fees on behalf of a party who has incurred no liability to pay those costs and attorney's fees.

This Court's holding in Aspen also contravenes the Fourteenth Amendment to The United States Constitution. The chilling effect created by the specter of having to pay substantial legal costs and attorney's fees has a chilling effect upon the important fundamental right of access to the courts. Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

In Boddie, the court held requiring indigents to pay court costs and fees of sixty dollars in order to sue for divorce unconstitutional. Id. Justice Harlan noted that "it is to the courts [that] we ultimately look for the implementation of a regularized, orderly process of dispute settlement. [It] is upon this premise that This Court [put] flesh upon the due process principle." The court went on to hold that absent a sufficient countervailing justification, that paying a mere sixty dollars is the equivalent of denying the opportunity to be heard. Id.

This Court's holding in Aspen denies a personal injury plaintiff the opportunity to be heard. Although Boddie involved the right to divorce, the rationale also applies to the instant case. In personal injury actions, an injured plaintiff must resort solely to the courts for redress of uncompensated economic and all non-economic damages. Thus, under Boddie, Florida Rule of Civil Procedure 1.442, Florida Statute 45.061 and Florida Statute 768.79, must be held unconstitutional.

Only compelling state interests will justify intrusions upon the right of access to the courts. Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983). Clearly, allowing an insurer to collect its legal costs and attorney's fees is not a compelling state interest.

Application of the rule and statutes cited herein to personal injury claims is unwarranted where the defendant is insured. For the constitutional considerations raised above, Christinia Brown asks This Court to reverse itself and disallow the undeserved windfall gained by the insurance industry under Aspen.

CONCLUSION

Both The Florida Constitution and The United States Constitution require a finding that Florida Rule of Civil Procedure 1.442, Florida Statute 768.79 and Florida Statute 45.061 are unconstitutional. For the foregoing reasons, Respondent, Christinia Brown, asks This Court to uphold the District Court's decision and reverse This Court's decision in Aspen.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Respondent on the Merits has been furnished by United States Mail to GERALD W. PIERCE, ESQUIRE, Post Office Box 280, Fort Myers, Florida 33902, this 11th day of September, 1990.

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