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CLERK OF THE SUPREME COURT
TALLAHASSEE, FLORIDA

CASE NO. 76,241

IN THE SUPREME COURT OF FLORIDA

DENISE LEAPAI,

Appellant,

vs.

JAMES DEAN MILTON, individually
and for the use and benefit of
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Appellee.

Original

INITIAL BRIEF OF

Robert C. Keyes, Personal Representative
of the Estate of Stella Mae Walker, deceased

AMICUS CURIAE

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An Appeal from Case No.: 89-415
District Court of Appeal of the State of Florida,
Fifth District

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STATEMENT OF THE FACTS AND OF THE CASE

The facts of the captioned case are not relevant to the purposes of the Amicus Curiae in submitting this brief.

The Amicus Curiae is the defendant in the case, Walker v. Keyes, Case No. CI87-4996, Circuit Court, Ninth Judicial Circuit, Orange County, Florida. Having prevailed on the merits at trial, Keyes brought a motion for assessment of attorney's fees and costs under section 45.061 Florida Statutes (1987); however, before the trial court ruled on the motion, the Fifth District Court of Appeal declared section 45.061 Florida Statutes (1987) unconstitutional in the case of Milton v. Leapai, 15 F.L.W. 1493, (Fla. 5th DCA 1990).

The trial court, in Walker, supra, by order dated June 26, 1990, has abated further action on Keyes' motion for attorney's fees and costs until resolution of the appeal before the Supreme Court of Florida in Milton, supra.

SUMMARY OF ARGUMENT

Section 45.061 Florida Statutes (1987) is a substantive law that should be upheld as constitutional in its entirety. The procedural aspects of the statute have no bearing on the procedure for trying a law suit but are conditions precedent to the accrual of a substantive right to attorney's fees on conditions specified by the legislature. Therefore, the enactment of section 45.061 Florida Statutes (1987) does not impinge upon the Supreme Court's exclusive authority under Article V, section 2(a) of the Florida Constitution.

Even if the procedural aspects of section 45.061 Florida Statutes (1987) are unconstitutional, the remaining valid portion should stand as valid law because the legislative purpose expressed in the valid portion can be accomplished after deleting the invalid portion. Furthermore, declaring section 45.061 Florida Statutes (1987) unconstitutional will eliminate substantive rights not provided by Florida Rule of Civil Procedure 1.442 (offer of judgment) or section 768.79 Florida Statutes (1987) (offer of settlement in negligence cases) since, unlike the latter rule and statute, Section 45.061 Florida Statutes (1987) does not require that a judgment for damages be entered before the party offering judgment is entitled to attorney's fees.

ARGUMENT

I. WHETHER SECTION 45.061 FLORIDA STATUTES (1987), CONSTITUTES A RULE OF PROCEDURE SUCH THAT ITS ENACTMENT IMPINGES UPON THE EXCLUSIVE RULE-MAKING AUTHORITY OF THE SUPREME COURT OF FLORIDA UNDER ARTICLE V, SECTION 2(A) OF THE FLORIDA CONSTITUTION.

In Florida, each party to a lawsuit is required to pay its own attorney's fees unless the right of one party to collect attorney's fees from the other is provided by contract or statute. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). A court cannot award attorney's fees unless specifically authorized to do so by contract or legislative enactment. It follows, therefore, that it is within the authority of the legislature to enact laws for the awarding of attorney's fees under prescribed circumstances, and that those laws are substantive in nature. Whitten v. Progressive Casualty Insurance Company, 410 So.2d 501 (Fla. 1982). Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985).

The procedural aspects of section 45.061, Florida Statutes (1987), are not such that their enactment impinges upon the Supreme Court's exclusive rule making duties under Article V, section 2(a) of the Florida Constitution.

"Procedure is the machinery for carrying on the suit, including pleading, process, evidence and practice." Herberle v. P.R.O. Liquidating Company, 186 So.2d 280 (Fla. 1 DCA 1966).

By enacting section 45.061 Florida Statutes (1987), the legislature has not altered the procedure for trying a lawsuit.

Rather, it has provided guidelines for a court to apply in determining whether an offer of judgment was reasonably made and unreasonably rejected. In fact, a major portion of the statute describes the common practice of negotiating and stipulating to settlements prior to trial. Parties often make offers of settlement or judgment in an effort to avoid trial. When an agreement is reached, a stipulation to the settlement is placed in the record of the proceeding and court approval is sought. If a settlement is not reached, the case proceeds to an adjudication on the merits. Under these circumstances, a party whose settlement offer is unreasonably rejected is not entitled to attorney's fees from the other party at the conclusion of the trial.

By enacting section 45.061 Florida Statutes (1987), the legislature has permitted a party whose offer of settlement or judgment was unreasonably rejected to collect attorney's fees from the party that rejected the offer, provided: (1) the offering party makes the offer in a reasonable manner, and (2) the court finds that the offer was unreasonably rejected. It follows, therefore, that the "procedures" set forth in section 45.061 Florida Statutes (1987), are not "machinery for carrying on the suit" nor are they designed to enforce rights or obtain redress for their invasion. Herberle v. P.R.O. Liquidating Company, supra. Richardson v. Honda Motor Company, Ltd., 686 F.Sup. 303 (M.D. Fla. 1988). To the contrary, the so-called procedures are merely conditions precedent to the accrual of the right to attorney's fees. As to the reasonableness of the offer, the conditions are:

(1) that the offer is made more than 60 days after the service of a summons and complaint but not less than 60 days (or 45 days if it is a counter-offer) before trial; and (2) that the offer remain open for 45 days. The balance of the statute guides the court in its inquiry into the unreasonableness of a rejection of an offer. Therefore, the so-called procedures set forth in section 45.061 Florida Statutes (1987) are not "rules for the practice and procedure in courts" as contemplated by Article V, section 2(a) of the Florida Constitution. In fact, unless it becomes necessary to enforce the provisions of the statute, the court is not involved in, and the proceedings are completely unaffected by the transactions contemplated by the statute. §45.061(1) Fla. Stat. (1987).

Relevant to the dichotomy of opinion in the District Courts of Appeal on the constitutionality of section 45.061 Florida Statutes (1987), is the case of Durring v. Reynolds, Smith & Hills, 471 So.2d 603 (Fla. 1st DCA 1985), wherein the court stated:

"It is axiomatic that where a statute is fairly susceptible of two interpretations, one of which would render the statute unconstitutional, the court should avoid the unconstitutional interpretation and adopt a construction that leaves the statute valid; 'It is elementary that a statute is clothed with a presumption of constitutional validity and if fairly possible, a statute should be construed to avoid not only an unconstitutional interpretation but also one which even casts grave doubts upon the statute's validity.'" See also Spencer v. Hunt, 109 Fla. 248, 147 So.2d 292 (1933).

The Supreme Court of Florida has also stated:

"It is incumbent on this court, when reasonably possible and consistent with constitutional rights to resolve all doubts as to the validity of a statute in favor of its constitutional validity and if possible, a statute should be construed in such a manner as would be consistent with the constitution; that is, in such a way as to remove it farthest from constitutional infirmity." Carter v. Sparkman, 335 So.2d 802 (Fla. 1976).

"We are required to look for a reason to uphold the act and to adopt any reasonable view that will do so." Tyson v. Lanier, 156 So.2d 833 (Fla. 1963).

WHEREFORE, the Amicus Curiae respectfully urges this Court to uphold section 45.061 Florida Statutes (1987) as constitutional in its entirety.

II. WHETHER THE PROCEDURAL ASPECTS OF SECTION 45.061 FLORIDA STATUTES (1987), IF UNCONSTITUTIONAL CAN BE SEVERED FROM THE REMAINING VALID PORTION OF THE STATUTE, THUS PERMITTING THE VALID PORTION TO STAND AS A COMPLETE ACT OF THE LEGISLATURE.

Once a statute has been found to be unconstitutional in part, the court must further determine whether the invalid portions can be severed from the statute, thus allowing the remaining valid portions to stand. High Ridge Management Corp. v. State, 354 So.2d 377 (Fla. 1977). The Supreme Court of Florida has set forth guidelines to follow in making this inquiry. A statute may remain valid after excising the unconstitutional portion if (1) the legislative purpose expressed in the valid portion can be accomplished after deleting the invalid portion, (2) the valid and invalid portions are not so inseparable that the legislature would

not have passed one without the other, (3) the results anticipated by the legislature remain unchanged after severance, and (4) an act, complete in itself, remains after severance of the invalid portions. Eastern Airlines, Inc. v. Department of Revenue, 455 So.2d 311 (Fla. 1984); Presbyterian Homes of Synod of Florida v. Wood, 297 So.2d 556 (Fla. 1974).

If section 45.061 Florida Statutes (1987) is stripped of all provisions that are conceivably procedural in nature, the statute could stand valid and, in and of itself, produce the result intended by the legislature. Without its procedural aspects, the statute states that a party is entitled to attorney's fees if the court finds that its offer of settlement or judgment has been unreasonably rejected by the other party. The intended result is to decrease the cost of litigation and the waste of judicial assets by sanctioning parties for unreasonably refusing to settle disputes. As discussed in this brief's first issue, supra., such a statute would be substantive law, not unlike many other statutes passed by the legislature that award attorney's fees to various classes of litigants.

Section 45.061 Florida Statutes (1987) is in substance very similar to section 57.105 Florida Statutes which permits the court to award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or the defense of the losing party. §57.105(1) Fla.Stat. As discussed in this brief's first issue, supra., statutes of this nature have long been

upheld as constitutional by Florida courts. Whitten, supra., at 504. It follows, therefore, that section 45.061 Florida Statutes (1987) may be stripped of all procedural aspects and still stand as a valid law. As such, the statute would not alter the results intended by the legislature that a party be awarded attorney's fees if a court determines that its offer of settlement or judgment was unreasonably rejected by the other party.

To the contrary, declaring the entire statute unconstitutional will eliminate a valid public policy intended by the legislature. By enacting section 45.061 Florida Statutes (1987), the legislature intended that attorney's fees be awarded to a party whose offer of judgment was unreasonably rejected. This statute is the only means whereby a defendant-offeror may realize the benefits intended by the legislature in enacting this statute. It is the only means whereby a defendant-offeror can collect attorney's fees from the plaintiff when the judgment is in favor of the defendant-offeror. Both Florida Rule of Civil Procedure 1.442 and section 768.79 Florida Statutes (1987) require a judgment in favor of the plaintiff before costs and attorney's fees will be awarded to the defendant-offeror. Kline v. Publix Supermarkets, Inc., 15 F.L.W. 1320 (Fla. 2d DCA 1990); B & H Construction Supply Co., Inc. v. District Board of Trustees of Tallahassee Community College, Florida, 542 So.2d 382 (Fla. 1st DCA 1989).

Under section 45.061 Florida Statutes (1987), only the reasonableness of the rejection is considered in determining whether an award of attorney's fees will be made, assuming the

offer was made according to the terms of the statute. Under the statute, a judgment merely creates a presumption of unreasonableness if the judgment entered is at least twenty-five percent greater than the offer rejected, if rejected by a defendant, and at least twenty-five percent less than the offer rejected, if rejected by a plaintiff. Therefore, under section 45.041 Florida Statutes (1987), a defendant who expects to win at trial but nevertheless is inclined to expedite the matter by making an offer of judgment may be entitled to attorney's fees if the offer is rejected even if a judgment is not entered in favor of the plaintiff. Under this same scenario, the defendant would not be entitled to attorney's fees under Florida Rule of Civil Procedure 1.442 or section 768.79 Florida Statutes (1987). Kline v. Publix Supermarkets, Inc., supra; B & H Construction Supply Co., Inc. v. District Board of Trustees of Tallahassee Community College, Florida, supra. Therefore, declaring section 45.061 Florida Statutes (1987) unconstitutional will eliminate substantive rights intended by the legislature and would further frustrate the public policy expressed by the statute that litigants be encouraged to expedite the resolution of lawsuits in order to reduce expenses and preserve the precious time of the judiciary.

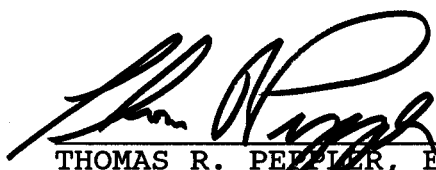
CONCLUSION

The Fifth District Court of Appeal erred in declaring section 45.061 Florida Statutes (1987) unconstitutional as an impingement on the exclusive rule-making authority of the Supreme Court of Florida. The statute is substantive and creates a new right for recovery of attorney's fees that is not provided by any other rule or statute.

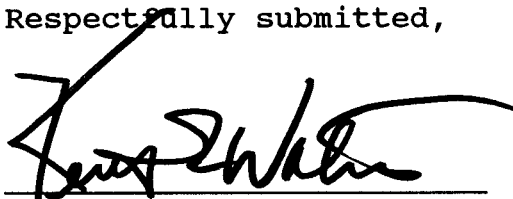
Declaring section 45.061 Florida Statutes (1987) unconstitutional will eliminate a substantive right and run afoul of the intended purposes of the legislature that litigants spare the valuable resources of the judiciary and attempt to settle their disputes without a trial. These purposes can be accomplished either by recognizing that the statute is not procedural or by permitting the unequivocally substantive portion of the statute to stand as valid law after excising all aspects of the statute that are conceivably procedural in nature.

WHEREFORE, the Amicus Curiae, Robert C. Keyes, respectfully requests that section 45.061 Florida Statutes (1987) be declared constitutional in its entirety or, in the alternative, that the unequivocally substantive portions be permitted to stand as valid law.

Respectfully submitted,



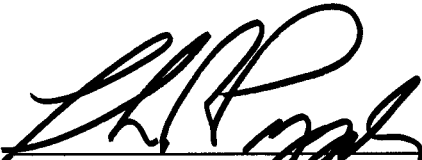
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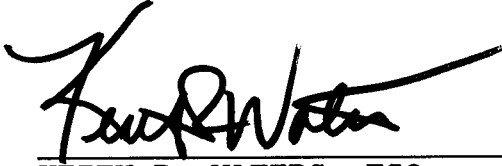
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to Robert W. Leblanc, Esq., 3222 Corrine Drive, Orlando, FL 32803, and Eric W. Ludwig, Esq. and Michael J. Appleton, Esq., 111 N. Orange Ave., Suite 1275, Orlando, FL 32801, on this 17th day of July, 1990.



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