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IN THE SUPREME COURT OF FLORIDA

DENISE LEAPAI,

Appellant,

vs.

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

Appellee.

CASE NO. 76,241

original

INITIAL BRIEF OF

Billy Joe Walker and Verniece W. Walker

AMICUS CURIAE
FOR APPELLEE

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

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA CASES

FEDERAL CASES

FLORIDA STATUTES

FLORIDA COURT RULES

FEDERAL COURT RULES

STATEMENT OF THE FACTS AND CASE BACKGROUND

The facts of the matter sub judice are not relevant to this Amicus Curiae Brief.

However, this Brief must further amplify certain of the representations made by Amicus KEYES in this matter, relevant to the dispute between Amicus WALKERS and Amicus KEYES in the matter of Walker v. Keyes, Case No. CI 87-4996, Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida. In that matter, KEYES submitted what he termed an "Offer of Judgment Pursuant to Sections 45.061 and 768.79, Florida Statutes", in which he offered

> "...to settle this matter by paying Plaintiff in full settlement of this lawsuit, the sum of twenty thousand and no hundredths dollars ($20,000.00), including court costs and pre-judgment interest.".

KEYES later acknowledged that his only basis for any recovery whatsoever would be under Florida Statutes Section 45.061, and abandoned any claim to relief under Section 768.79. No Offer of Judgment whatsoever was made in compliance with Florida Rules of Civil Procedure, Rule 1.442.

KEYES has a distinctive situation from the parties sub judice: when KEYES brought his request for assessment of attorney's fees and costs before the WALKER/KEYES trial court in June of 1990, the WALKERS defended against same on a variety of grounds, including both the unconstitutionality of Section 45.061 and the insufficiencies of the offer under its

terms (controverted by KEYES), the insufficiencies of the alleged offer under Rule 1.442 (admitted by KEYES), and the insufficiency of the alleged offer under Section 768.79 (admitted by KEYES).

In the dispute between the WALKERS and KEYES, KEYES prevailed, in that the WALKERS took nothing at trial.

ARGUMENT

AMICUS WALKERS' RESPONSE TO AMICUS KEYES' ARGUMENT I

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.

This Court, in its adoption of the amended Rule 1.442, declined to address the constitutionality of the substantive aspects of Florida Statutes Section 45.061, but certainly agreed with the Civil Rules Procedure Committee that the Statute in fact infringed upon the duty of the court in procedural detail. In re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So.2d 442 (Fla. 1989). In the Fifth District Opinion in the matter sub judice below, the District Court concluded that the procedural aspects of Section 45.061 encroached upon the court's procedural responsibilities, could not be severed, and the entire law was unconstitutional. Milton v. Leapai, 562 So.2d 803 (Fla. 5th DCA 1990). This is not a unique concept in our jurisprudence. Delta Airlines, Inc. v. Department of Revenue, 455 So.2d 317 (Fla. 1984), appeal dis., 474 U.S. 892 (1985).

Amicus KEYES' arguments as to this point offer nothing new not already fully addressed and argued by the Appellant and Appellee. The Fifth District below rejected the A.G. Edwards & Son, Inc. v. Davis, 559 So.2d 235 (Fla. 2d DCA

1990), authority cited herein by KEYES.

To the point, both the Richardson v. Honda Motor Company, Ltd., 686 F.Supp. 303 (M.D. Fla. 1988), and Hemmerle v. Bramalea, Inc., 547 So.2d 203 (Fla. 4th DCA 1989) cases cited by KEYES, as well as the A.G. Edwards decision, all preceded this Court's opinion in In re: Amendment to Rules to Civil Procedure, Rule 1.442, supra. While even in the ordinary situation, a district court of appeal is not bound by a decision of a sister district court [see McDonald's Corporation v. Department of Transportation, 535 So.2d 323 (Fla. 2d DCA 1988)], in the matter sub judice, the persuasiveness of A.G. Edwards had little value given the superseding observations of this Court.

While Amicus KEYES would argue that this Court should strive to uphold the constitutionality of Section 45.061 by finding some method of removing it from constitutional infirmity, this Statute, like all others in derogation of the common law, must be strictly construed. Inference and implication cannot be substituted for clear expression. Dudley v. Harrison, McCready & Company, 127 Fla. 687, 173 So. 820 (1937).

Interestingly, even in Edwards, supra, that district court did not find any defense for Section (1) of Florida Statutes Section 45.061; as more fully set forth below, Amicus KEYES never complied with the provisions of Section (1).

AMICUS WALKERS' RESPONSE TO AMICUS KEYES' ARGUMENT II

> 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.

Amicus KEYES suggests that Florida Statutes Section 45.061 "could" still stand and produce an intended legislative result if all admittedly procedural aspects of the Statute are removed. However, in fact the only remaining portion would merely be the bald stipulation that any party would be entitled to attorney's fees if the court finds that an offer of settlement or judgment was unreasonably rejected by the other party. This is clearly not what was intended by the Legislature.

There is no "general" prevailing party right to attorney's fees in Florida, and there is no indication whatsoever in Section 45.061 that the Legislature intended to create one. Neither the title of the Statute, nor the multitude of procedural requirements necessary to prevail under it including time limits, designation of the offer, specific requirements of the offer necessary to invoke the Statute, and method for determining an award suggest an intent to create a "general" right to attorney's fees. It would not have taken much for the Legislature to make its

position on this point clear, as it did in the case of contract attorney's fees rights within Florida Statutes Section 57.105(2).

In fact, no right to obtain any relief under the Statute vests until satisfaction of the procedural requirements. Thus, as is the case with Amicus KEYES, an offeror under the Statute cannot recover unless he complies with the time limits, designates his offer under the Statute, and offers to settle the claim for a specific sum or property, and to enter into a stipulation dismissing the claim or allowing judgment to be entered (a requirement never met by KEYES). Florida Statute Section 45.061(1). Furthermore, any judgment entered must be less than 25% of the offer rejected [id, Section(2)(b)]; in the case of Amicus KEYES, there was no money judgment at all, and he is barred from recovery, though he attempts to raise this issue as an argument favoring Appellant.

It may be that Amicus KEYES' attempts to inject the latter into the proceedings improperly interjects an issue not raised by one of the parties, and such argument by Amicus KEYES ought be struck as irrelevant and immaterial. Acton v. Fort Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982); Keating v. State ex rel. Ausebel, 157 So.2d 567 (Fla. 1st DCA 1963).

Even if not, its argument is in error. In fact, the First District Court of Appeal has previously found that any

offer (there under the Rule) that did not specify that any offeror was permitting judgment to be taken against it, was insufficient as a matter of law. B & H Const. & Supply Co., Inc. v. District Board of Trustees, 542 So.2d 382, 387-8 (Fla. 1st DCA 1989) rev. den. 549 So.2d 1013.

Further, whether applicable to a statutory or rule type offer, the courts of this State, and the Supreme Court of the United States, have been consistent in rejecting an offeror's right to recover where there is a judgment for the defendant-offeror. The First District has so ruled in B & H Const., supra with respect to the predecessor of the current Rule 1.442. The Second District has so ruled with respect to Florida Statutes Section 768.79(1), whose language is similar to Section 45.061, and in so doing applied the same standard in dicta to the new Rule 1.442; Kline v. Publix Supermarkets, Inc., 15 F.L.W. D1320, op. filed 5/9/90, reh. den. 7/2/90, mandate issued 7/27/90 (Fla. 2d DCA 1990). The First District is in accord also as to Section 768.79(1); Maker v. Investors Real Estate Management, Inc., 553 So.2d 298 (Fla. 1st DCA 1989). The Third District is in accord as to Section 768.79; Rabataie v. U.S. Security Insurance Co., 14 F.L.W. 1753, op. filed 7/25/89, reh. pending (Fla. 3d DCA 1989). The Second District is in accord as to both 45.061 and 768.79; Coe v. B & D Transportation Services, 561 So.2d 469 (Fla. 2d DCA 1990). Accord Delta Airlines, Inc. v. August, 450 U.S. 346 (1981), as to Federal Rules of Civil Procedure 68, upon which Florida Rule 1.442 would appear to be largely premised.

The attempt by Amicus KEYES to suggest any distinction as to the requirements of judgment with respect to Section 45.061, and Rule 1.442, and Section 768.79, is both an argument without foundation, and an attempt to interject a new issue in the litigation between the parties sub judice.

CONCLUSION

Amicus KEYES has attempted to inject new issues into the litigation between the parties sub judice by going beyond the question of whether or not Section 45.061 of the Florida Statutes is constitutional, based on its procedural aspects and/or whether the admittedly procedural aspects can be severed from the alleged non-procedural aspects. Primarily, the new issues sought to be injected by Amicus KEYES include both the suggestion that an offeror defendant is not barred from a recovery under Section 45.061 in the event of a judgment for defendant, and that somehow a right to recover under an offer can be invoked without application of specific procedural requirements; in any case, his argument on these points is opposed to the accumulated wisdom of both Florida and Federal courts.

Even if such an attempt to inject new issues is proper, the authority offered by Amicus KEYES predates this Court's opinion in In re: Amendment to Rules of Civil Procedure, Rule 1.442, which strongly suggests the unconstitutionality of Section 45.061 by recognizing the existence of procedural conflicts. There can be no severing of the procedural aspects of Section 45.061 and leave any statutory mandate resembling in any fashion that which was intended by the Legislature.

WHEREFORE, Amicus WALKERS, by and through the undersigned attorney, respectfully pray that this Court issue

its Order and opinion finding Section 45.061 of the Florida Statutes unconstitutional, and otherwise affirm that certain Order of the Fifth District Court of Appeals of the State of Florida, now on appeal to this Court in the matter sub judice.

RESPECTFULLY SUBMITTED this 10th day of Oct, 1990, at Orlando, Orange County, Florida.

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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/Hand Delivery this 10th day of Oct, 1990, to: Michael J. Appleton, Esquire and Eric W. Ludwig, Esquire, 111 N. Orange Avenue, Suite 1275, Orlando, Florida 32801, co-counsel for Leapai; James O. Driscoll, Esquire, 3222 Corrine Drive, Orlando, Florida 32803, attorney for Milton; and Thomas R. Peppler, Esquire and Keith R. Waters, Esquire, Bogin Firm, P.O. Box 2807, Orlando, Florida 32802, co-counsel for Robert C. Keyes.

Terrence William Ackert, Esq.