IN THE SUPREME COURT OF FLORIDA

CASE NO: 76,241

DENISE G. LEAPAI and
MABEL EKEROMA,

Appellants,

vs.

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

Appellee.
_____/

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

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

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PRELIMINARY STATEMENT

The Appellee, JAMES DEAN MILTON, individually and for the use and benefit of State Farm Mutual Automobile Insurance Company, the Plaintiff in the trial court, is referred to as "Appellee".

The Appellant, DENISE G. LEAPAI, the Defendant in the trial court and Appellant in this appeal is referred to as "Appellant".

References to the record on appeal are designated by the prefix "R___".

An Appendix consisting of the decision and opinion of the District Court of Appeal of Florida, Fifth District, involved in this appeal accompanies this brief.

STATEMENT OF CASE AND FACTS

This case arises out of an automobile accident between an automobile operated by the Appellee, James Milton, and an automobile operated by Mabel Ekeroma and owned by the Appellant, Denise G. Leapai, as registered title owner. State Farm Mutual Automobile Insurance Company paid James Milton for damages to his automobile the amount of $2,859.05. Milton's deductible was $100.00 for a total claim of $2,959.05. State Farm was subrogated to Milton's rights pursuant to a policy of insurance between them.

Appellant, Denise G. Leapai, denied that she owned the vehicle which had been operated by Mabel Ekeroma. (R6). The Department of Motor Vehicles records show that the Appellant was the record owner of the vehicle operated by Mabel Ekeroma at the time of the accident. (R8-17).

The police report completed by an officer of the Florida Highway Patrol shows that the owner of the motor vehicle operated by Ekeroma is Denise G. Leapai, the Appellant. (R8-17).

In a Motion for Summary Judgment filed by the Appellant, Appellant offered affidavits to show that the motor vehicle operated by Mabel Ekeroma had been transferred by Appellant to one Seven Ekeroma. (R19-29). As those documents are viewed in their best light, bearing in mind the records of the Department of Motor Vehicles and the report of the Florida Highway Patrol demonstrated contradictory facts, there arose a genuine issue fact to be determined through trial. Of particular significance, in this regard, the documents submitted by Defendant showed that the transfer price of the vehicle was One Dollar ($1.00). (R19-29).

Subsequently, counsel for the Appellant filed a Motion for Summary Judgment (R19-29) and an offer of One Dollar pursuant to Sections 768.79 and 45.061, Fla. Stat.

An order granting the Appellant's Motion for Summary Judgment was entered by the lower court. (R33). That order found that as a matter of law Appellant was not the owner of the 1981 Plymouth involved in the accident of February 4, 1986.

Following the hearing and granting of the Motion for Summary Judgment of January 4, 1989, the lower court entered a Final Judgment. (R39-41). This Final Judgment awarded Appellant costs and attorney's fees in the amount of $2,115.50. (R35-36). Attorney's fees were awarded based upon the provisions of Florida Statute §45.061. (R39.41).

In doing so, the lower court held that Florida Statute §768.79 does not apply because that Statute was enacted subsequent to the accrual of Appellee's cause of action. (R39-41, paragraphs 14 and 15). However, as to Florida Statute §45.061, the lower court certified the following questions to the Fifth District Court of Appeal:

> "Whether attorney's fees may be imposed as sanctions under F.S. Section 45.061 where the offer of settlement was made subsequent to the enactment of the statute but where Plaintiff's cause of action accrued prior to the enactment of the Statute."
>
> "Whether the legislature's enactment of F.S. Section 45.061 constituted the adoption of a rule of procedure in violation of Article V Section 2(a) of the Florida Constitution."

Appellee appealed the lower court's certified questions to the District Court of Appeal of Florida, Fifth District, and in addition appealed that court's entry of summary judgment for Appellant.

In ruling on the appeal, the Fifth District Court of Appeal held that Section 45.061 is unconstitutional because "its procedural aspects infringe on the exclusive rule making authority of the Florida Supreme Court". That court further affirmed the lower court's summary judgment for Appellant on the issue of ownership.

ISSUES ON APPEAL

I. THE LEGISLATURE'S ENACTMENT OF FLORIDA STATUTE §45.061 CONSTITUTED THE ADOPTION OF A RULE OF PROCEDURE IN VIOLATION OF ARTICLE V 2(a) OF THE FLORIDA CONSTITUTION.

II. ATTORNEY'S FEES MAY NOT BE IMPOSED AS SANCTIONS UNDER FLORIDA STATUTE §45.061 WHERE THE OFFER OF SETTLEMENT WAS MADE SUBSEQUENT TO THE ENACTMENT OF THE STATUTE, BUT WHERE APPELLEE'S CAUSE OF ACTION ACCRUED PRIOR TO THE ENACTMENT OF THE STATUTE.

III. IT IS ERROR TO ENTER A SUMMARY JUDGMENT FOR THE REGISTERED TITLE OWNER OF A MOTOR VEHICLE WHERE THAT OWNER CLAIMS THE VEHICLE WAS SOLD FOR ONE DOLLAR AND THERE WAS NO SHOWING BY TESTIMONY OR EVIDENCE FROM THE PURPORTED BUYER THAT A BONIFIED SALE OF THE VEHICLE DID IN FACT OCCUR BEFORE A MOTOR VEHICULAR ACCIDENT.

SUMMARY OF ARGUMENT

Matters of court procedure are the prerogative of the Supreme Court of Florida and are not subject to legislative action by the Florida Legislature. A statute that provides for changes in substantive law cannot be applied retroactively to causes of action which have accrued prior to the enactment of the statute. Summary Judgment cannot be entered by a trial court when genuine issues of material fact exist. A certified title certificate from the Department of Motor Vehicles is prima facie evidence that the title rests with the person named in that title and entry of a Summary Judgment finding that ownership is in the name of another is clearly error.

ARGUMENT

I. THE LEGISLATURE'S ENACTMENT OF FLORIDA STATUTE §45.061 CONSTITUTED THE ADOPTION OF A RULE OF PROCEDURE IN VIOLATION OF ARTICLE V 2(a) OF THE FLORIDA CONSTITUTION.

The decision and opinion of the Fifth District Court of Appeal completely refutes the argument of Appellant under this point. Stripped to its essence, Appellant's argument reduces to stating (1) the Florida Legislature has the constitutional authority to enact substantive law; (2) this Court has the sole constitutional authority pertaining to judicial procedural rule making; and (3) while the Fla. Stat. §45.061 embodies both substantive and procedural matters these two aspects of the statute are severable. Appellee agrees with points (1) and (2) made by Appellant but disagrees with Point (3). There is absolutely no way that the purported substantive rights created by the legislature in §45.061 can be implemented without recourse

to the constitutionalty forbidden use of the procedural aspects of the statute. As stated by the Fifth District Court of Appeal:

> "It is a fundamental principle that a statute, if constitutional in one part and unconstitutional in another part, may remain valid except for the unconstitutional portion. However, this is dependent upon the unconstitutional provision being severable from the remainder of the statute. The severability of the statutory provision is determined by its relation to the overall legislative intent of the statute of which it is part and whether the statute, less the invalid provisions, can still accomplish this intent. Additionally, if the valid portion of the law would be rendered incomplete, or if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional. Delta Airlines, Inc. v. Department of Revenue, 455 So.2d 317 (Fla. 1984), appeal dismissed, 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 214 (1985); High Ridge Management Corporation v. State, 354 So.2d 377 (Fla. 1977). We conclude that the procedural aspects of section 45.061 encroach upon the authority of the supreme court to promulgate rules of practice and procedure and these procedural details cannot be "severed" from the substantive aspects of section 45.061. Therefore, we declare the entire law to be unconstitutional." (Emphasis ours)

Appellant does not suggest how to implement the Statute without using the procedures set forth in that Statute.

> II. ATTORNEY'S FEES MAY NOT BE IMPOSED AS SANCTIONS UNDER FLORIDA STATUTE §45.061 WHERE THE OFFER OF SETTLEMENT WAS MADE SUBSEQUENT TO THE ENACTMENT OF THE STATUTE, BUT WHERE APPELLEE'S CAUSE OF ACTION ACCRUED PRIOR TO THE ENACTMENT OF THE STATUTE.

This point should be moot for reasons set forth above. For purposes of argument the cause of action in this case arose from an accident which occurred on February 14, 1986. Florida Statute §45.061 was enacted by the Florida Legislature on July 1,

1987. To apply Florida Statute §45.061 to this case requires the retrospective application of substantive law to a cause of action already in existence. A leading case in the area of "retroactive" or "retrospective" application of newly enacted legislation is the matter of Heberle v. P.R.O. Liquidating Company, 186 So.2d 280 (Fla. App. 1st DCA 1966) in which the Court states, page 282:

> "A strict rule of statutory construction indulged in by the courts is the presumption that the legislature, in the absence of a positive expression, intended statutes or amendments enacted by it to operate prospectively only, and not retroactively. A law is retroactive or retrospective if it takes away or impairs vested rights acquired under existing laws, or if it creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."

The enactment of Florida Statute §45.061 after the cause of action had accured does indeed create a new obligation and a new duty and a restriction on access to the court to enforce an obligation. Thus, its retroactive application to that cause of action arising on February 14, 1986, should not be allowed by a Statute enacted on July 1, 1987.

Additionally, the language of Florida Statute §45.061 contains no clear legislative expression or language to create a retrospective application of the Statute. It is a well established rule in Florida that the retrospective application of substantive law must be clearly expressed by the legislature. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983) the Court stated on page 323:

> "It is a well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively."...

> "This rule applies with particular force to those instances where retrospective operation of the law would impair or destroy existing rights."

To impose upon the Appellant, Plaintiff in the lower court, an obligation of additional costs, e.g. attorney's fees, investigation fees, etc., is clearly the imposition of a new duty and thus admittedly a substantive application of law; therefore, the Statute should not be applied to a cause of action which pre-dated the passage of this legislation. The principle concerning the establishment of substantive laws in the matter of court sanctions is discussed in Love v. Jacobson, 390 So.2d 782 (Fla. 3d DCA 1980) page 783:

> "Appellee contends that the rights afforded by the statute are procedural rather than substantive and are therefore retroactive. We disagree. The right afforded by the statute is not, as appellee suggests, the right to file a frivolous suit; it is, instead, a right to recover attorney's fees when a justiciable issue as described in the statute is absent. That right did not exist prior to the enactment of Section 57.105, Florida Statutes (Supp.1978). We disagree with appellee's argument that because the statute appears under the heading of court costs, it presents only a new procedural device for obtaining recovery. See generally, Allen v. Dutton, 384 So.2d 171 (Fla. 5th DCA 1980). In our view, a new right has been created and the award of attorney's fees is not retroactive under the statute."

Likewise, on July 1, 1980, the Florida Legislature enacted Florida Statute §768.56 granting a court the right to impose the cost of attorney's fees against an unsuccessful plaintiff in medical malpractice cases. The District Court of Appeal of Florida for the First District discussed this Statute in the case of Parrish v. Mullis, 458 So.2d 401 (Fla. App. 1st DCA 1984). The court in that case stated, on page 402, that the

litigant's right to an attorney's fee is a substantive right.

Further, the court held that because the cause of action accrued prior to enactment of the statute the statute did not apply retroactively. The court stated further on page 402:

> "A litigant's right to an attorney's fee is a substantive right and a law creating that right may only be applied prospectively. Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982); Love v. Jacobson, 390 So.2d 782 (Fla. 3d DCA 1980). When appellant's cause of action accrued, she was not burdened with the potential responsibility to pay the successful party's attorney's fees and costs, and appellee was not entitled to that right. The right and responsibility were later created by the legislature in order that malpractice plaintiffs, faced with this burden, "will seriously evaluate the merits of potential medical malpractice claim." Chapter 80-67, Laws of Florida. In the instant case, it would be manifestly unfair to argue that plaintiff could have filed her lawsuit earlier to avoid operation of the statute, when, in February of 1980, she was totally unaware of the statute; it did not exist. Therefore, we hold that section 768.56 may not be retroactively applied to a cause of action which accrued prior to its effective date."

> III. IT IS ERROR TO ENTER A SUMMARY JUDGMENT FOR THE REGISTERED TITLE OWNER OF A MOTOR VEHICLE WHERE THAT OWNER CLAIMS THE VEHICLE WAS SOLD FOR ONE DOLLAR AND THERE WAS NO SHOWING BY TESTIMONY OR EVIDENCE FROM THE PURPORTED BUYER THAT A BONIFIED SALE OF THE VEHICLE DID IN FACT OCCUR BEFORE A MOTOR VEHICULAR ACCIDENT.

This issue is submitted in addition to the constitutional questions concerning §45.061, Fla. Stat., pursuant to Lawrence v. Florida East Coast Railway Co., 346 So.2d 1012 (Fla. 1977); Confederation of Canada Life Insurance Co. v. Vega Y Armina, 144 So.2d 805 (Fla. 1962).

It is well established in Florida that a hearing on a motion for summary judgment is not a substitute for a trial. The purpose of summary proceedings is to determine whether or not there is a genuine issue of material fact to be determined and the resolution of such factual issues is not to be decided in a summary proceeding. The lower court is required to use great caution in precluding the constitutional right to trial by granting summary judgment.

In the case at bar, the record shows clearly that Appellee submitted sufficient documentary proof of Appellant's ownership of the motor vehicle involved in the February 4, 1986, accident. (R8-17). Appellant, in a similar fashion, submitted affidavits tending to show that she had relinquished ownership of this vehicle. (R19-29)(R30-31). The sufficiency of this evidence could only be tested through trial and the disposition of this issue through a hearing on a Motion for Summary Judgment is clearly erroneous. The transfer of a motor vehicle, a 1981 Plymouth, for One Dollar ($1.00) on its face raises inferences that there indeed was not a legal transfer of ownership and certainly not enough to overcome the presumption of ownership created by the fact that Defendant was registered title owner at the time of the accident. This is especially so where no evidence was submitted from the alleged buyers of the Appellant's automobile that a bonified sale had occurred.

Summary Judgment should not be entered where genuine issues of material fact exist. In the case of Johnson v. Studstill, 71 So.2d 251, 252 (Fla. 1954) this Honorable Court reversed the lower court entry of summary judgment in a case virtually on "all fours" to the case at bar. The issue was

ownership of a motor vehicle, and this Court held that it was error to determine the material fact of ownership by reviewing submitted affidavits only. The Court in that case quoted from a Federal Court case, page 252:

> "Judge Fahy, speaking for the Court of Appeals for the District of Columbia in Dewey v. Clark, 1950, 86 U.S.App. D.C. 137, 180 F.2d 766 at page 772, summarizes the points to be considered in ruling on a motion for summary judgment, as follows:
>
> "(1) Factual issues are not to be tried or resolved by summary judgment procedure; only the existence of a genuine and material factual issue is to be determined. Once it is determined that there is such an issue summary judgment may not be granted; (2) In making this determination doubts (of course the doubts are not fanciful) are to be resolved against the granting of summary judgment; (3) There may be no geniune issue even though there is a formal issue. Neither a purely formal denial nor, in every case, general allegations, defeat summary judgment. On this point the cases decided by this court must rest on their own facts rather than upon a rigid rule that an assertion and a denial always preclude the granting of summary judgment. Those cases stand for the proposition that formalism is not a substitute for the necessity of a real or genuine issue. Whether the situation falls into the category of formalism or genuineness cannot be decided in the abstract; (4) If conflict appears as to a material fact the summary procedure does not apply unless the evidence on one or the other hand is too incredible to be accepted by reasonable minds or is without legal probative force even if true; (5) To support summary judgment the situation must justify a directed verdict insofar as the facts are concerned."

Likewise, Harris v. Mosteller, 271 So.2d 214 (Fla. 2d DCA 1973), involves the issue of ownership of a motor vehicle, in

which the appellants filed a letter from the Florida Division of Motor Vehicles showing that appellee was still the owner. By affidavit, the appellee filed a receipt for $35.00 allegedly showing a transfer of title. The trial court granted a motion for summary judgment in favor of appellee. On appeal the District Court of Appeal reversed and stated, page 215:

> "We have reviewed the evidence supporting and opposing the affidavits for summary judgment; and, in our opinion, there was a genuine issue of material fact to be proven regarding the ownership of the automobile. Therefore, a summary judgment was improper based upon the evidence before the court.
>
> For these reasons the summary judgment is reversed."

A title certificate showing ownership of the motor vehicle is prima facie evidence of ownership of that motor vehicle by the Appellant. Evidence tending to prove the contrary should be subjected to the rigors of a trial.

Finally, in Monroe v. Appelton, 419 So.2d 356 (Fla. 2d DCA 1982) the court reversed a lower court's entry of summary judgment and stated, page 357:

> "It is well settled that a summary judgment is not a substitute for a trial and caution should be exercised in foreclosing a party from the benefit of a trial. The function of the court in passing on a motion for summary judgment is simply to determine whether a genuine issue exists and whether such issue is material; it does not determine the issue. Ham v. Heintzelman's Ford, Inc., 256 So.2d 264 (Fla. 4th DCA 1971). A party should not be deprived of his full day in court by summary proceedings if the record indicates that he has a bona fide potential cause of action or defense."

and at page 357:

> "Where affidavits submitted pursuant to a motion for summary judgment show that there is a genuine issue of material fact, the

the court may and should look beyond the issues presented in the pleadings."

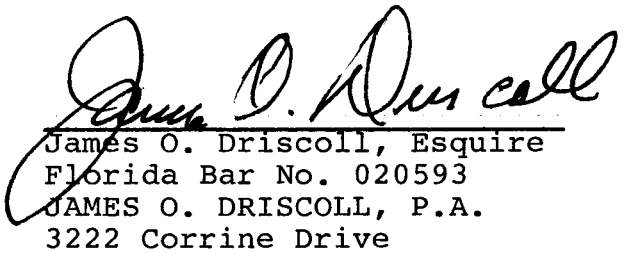
CONCLUSION

For the reasons contained herein Appellee respectfully requests that this Honorable Court:

1. Affirm the Fifth District Court's holding that §45.061, Fla. Stat., is unconstitutional; and

2. Reverse the Fifth District Court of Appeal's affirmance of the summary judgment for Appellant and remand this case on that point to the District Court directing that that Court remand this case to the trial court for a trial on this issue.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail delivery to Eric W. Ludwig, Esquire, 111 N. Orange Avenue, Suite 1019, Orlando, Florida, 32801; and to Michael J. Appleton, Esquire, 111 N. Orange Avenue, Suite 1019, Orlando, Florida, 32801, this 27TH day of July, 1990.

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