18 pgs
36 pgs

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Case No.: 76,241
DCA Case No.: 89-415

DENISE G. LEAPAI and
MABEL EKEROMA,

Appellant/Defendant,

vs.

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

Appellee/Plaintiff.

APPELLANT'S APPEAL BRIEF

ERIC W. LUDWIG, ESQUIRE
Eric W. Ludwig, P.A.
111 North Orange Avenue
Suite Ten Nineteen
Orlando, Florida 32801
(407) 425-0442
Florida Bar No. 328776
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF FACTS AND OF THE CASE

This case involves a subrogation claim brought in the County Court, in and for Orange County, Florida, by James Dean Milton, to recover damages paid to Mr. Milton by State Farm as a result of an automobile accident which occurred February 4, 1986. (R. 1-2)

The suit was instituted against the Defendant/Appellant, Denise G. Leapai, based upon the allegation that Ms. Leapai was the record owner of the automobile involved in the accident and therefore liable for damages caused by the permissive use of her vehicle by her Co-defendant, Mabel Ekeroma. (R. 1-2)

On November 7, 1988, the Defendant made an offer of settlement to the Plaintiff, pursuant to Florida Statute §45.061, which offer was rejected. (R. 35-6)

Defendant then moved for summary judgment and filed her affidavit demonstrating that she had sold and conveyed the motor vehicle and had endorsed and delivered the Certificate of Title for said vehicle to Mr. Seven Ekeroma on December 6, 1985. Ms. Leapai also filed the Affidavit of Betty C. Thorn, notary public, who had notarized her signature on the Original Certificate of Title on December 6, 1985, attesting to that fact. (R. 19-29)

On January 4, 1989, the trial court entered Summary Judgment in favor of Ms. Leapai and against the Plaintiff. (R. 33) The Defendant then filed a Motion to Tax Costs and for an award of attorney's fees pursuant to Florida Statute §45.061. (1987). (R.35-6) Following a hearing on February 8, 1989, Final Judgment was entered in favor of the Defendant, Leapai, and against the

Plaintiff, Milton, and the trial court awarded attorney's fees to the Defendant, in the amount of $1,737.50. (R.39-41) The trial court then certified the following questions to be of great public importance pursuant to Fla.R.App.P. 9.030(b)(4)(A):

> "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."
>
> "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 STATUE."

Plaintiff appealed from the Final Judgment and, on May 31, 1990, the Fifth District Court of Appeal issued its opinion declaring Florida Statute §45.061 unconstitutional, reversing the trial court's award of attorney's fees, and affirming the trial court's entry of Summary Judgment.

On June 27, 1990, Appellant filed her Notice of Appeal and invoked the jurisdiction of this Court pursuant to Fla.R.App.P. 9.030(a)(1)(A)(ii).

SUMMARY OF ARGUMENT

Florida Statute §45.061 (1987) was enacted by the legislature with the specific intent, and for the specific purpose, of encouraging settlements in the resolution of disputes and to provide for the substantive right to recover attorney's fees from litigants who unreasonably rejected an offer of settlement.

The right to recover attorney's fees is a substantive right within the legislature's prerogative. Although the legislature in implementing this right may have encroached upon this Court's exclusive rule making authority, the provisions for the manner and mode of making an offer of settlement can be severed from the statutory scheme, thereby preserving the statute's constitutionality.

Florida Statute §45.061 was not applied retroactively in this case since the substantive right to recover attorney's fees attaches not to the cause of action (which admittedly predates the adoption of the statute), but rather the right attaches to the unreasonable rejection of an offer of settlement. Here, Defendant's offer was made well after the effective date of the statute.

I.
WHETHER FLORIDA STATUTE §45.061 (1987) VIOLATES ARTICLE V, §2(a) OF THE FLORIDA CONSTITUTION

During the 1987 Florida Legislative Term, the legislature considered two bills, HB-0321 and SB-866, for the express purpose of enacting legislation to encourage settlement of disputes; to lower litigation costs; and to reduce the fiscal impact of litigation on the court system. (See Committee Reports and legislative history attached in Appendix.)

These two bills were considered by the legislature and resulted in the enactment of Florida Statute §45.061 (1987), which became law on July 1, 1987, and which reads as follows:

> " (1) At any time more than 60 days after the service of a summons and complaint on a party but not less than 60 days (or 45 days if it is a counteroffer) before trial, any party may serve upon an adverse party a written offer, which offer shall not be filed with the court and shall be denominated as an offer under this section, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 45 days unless withdrawn sooner by a writing served on the offeree prior to acceptance by the offeree. An offer that is neither withdrawn nor accepted within 45 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude the making of a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this section.
>
> (2) If, upon a motion by the offeror within 30 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including:

(a) Whether, upon specific request by the offeree, the offeror had unreasonably refused to furnish information which was necessary to evaluate the reasonableness of the offer.

(b) Whether the suit was in the nature of a "test-case," presenting questions of far-reaching importance affecting nonparties.

An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected. For the purposes of this section, the amount of the judgment shall be the total amount of money damages awarded plus the amount of costs and expenses reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer for which recover is provided by operation of other provisions of Florida law.

(3) In determining the amount of any sanction to be imposed under this section, the court shall award.

(a) The amount of the parties' costs and expenses, including reasonable attorneys' fees, investigative expenses, expert witness fees, and other expenses which relate to the preparation for trial incurred after the making of the offer of settlement; and

(b) The statutory rate of interest that could have been earned at the prevailing statutory rate on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment.

The amount of any sanction imposed under this section against a plaintiff shall be set off against any award to the plaintiff, and if such sanction is in an amount in excess of the award to the plaintiff, judgment shall be entered in favor of the defendant and against the plaintiff in the amount of the excess.

(4) This section shall not apply to any class action or shareholder derivative suit or to matters relating to dissolution of marriage, alimony, nonsupport, eminent domain, or child custody.

(5) Sanctions authorized under this section may be imposed notwithstanding any limitation on recovery of

> costs or expenses which may be provided by contract or in other provisions of Florida law. This section shall not be construed to waive the limits of sovereign immunity set forth in §768.28."

During the pendency of the appeal to the Fifth District Court of Appeal, this Court considered the Civil Procedure Rules Committee of the Florida Bar's petition for an amendment to Fla.R.Civ.P. 1.442, in light of the perceived confusion and conflict generated by the enactment of Florida Statute §768.79 and Florida Statute §45.061.

On July 27, 1989, this Court issued its opinion in The Florida Bar re: Amendment to Fla.R.Civ.P. Rule 1.442 (Offer of Judgment), 550 So.2d 442, (Fla. 1989). In its consideration of the Petition, this Court found that the procedural details of Florida Statute §45.061 impinged upon the Court's duty to adopt uniform rules of procedure governing the Courts of the state and then adopted a new rule effective January 1, 1990. In so doing, this Court held

> ". . . to the extent the procedural aspects of the new rule 1.442 are inconsistent with . . . §45.061, the rule shall supersede the statute."

The Court declined to rule upon the constitutionality of the substantive aspects of the statute.

A litigant's right to recover attorney's fees is a substantive right. Whitten v. Progressive Casualty Insurance Company 410 So.2d 501, (Fla. 1982). This Court recognized the substantive aspect of a litigant's right to recover attorney's fees in its consideration of the petition of the Rules of Civil Procedure Rules Committee when it stated:

> "The proposal submitted by the Committee raises a serious question of whether this Court impinges upon the legislative prerogative to enact substantive law if we adopt a "procedural sanction" of this type. While we agree that this Court has authority to create rules imposing sanctions and requiring payment of costs and attorney's fees when a party violates the rules, it is not so clear that a sanction is "procedural" when it imposes a "fine" based on a percentage on an unaccepted offer, especially when a party may have done nothing more serious then guessing wrong about a jury verdict." Id. at 442.

It is a fundamental principle in statutory construction that the Court should, if at all possible, construe statutes so as to find them constitutional. VanBibber v. Hartford Acc. & Indem. Co. 439 So.2d 880, (Fla. 1983) Statutes should be construed to effectuate the express legislative intent and all doubt as to the validity of any statute should be resolved in favor of its constitutionality. McKibben v. Mallory 293 So.2d 48 (Fla. 1974). It is also a fundamental principle of statutory construction that if a statute is constitutional in one part and unconstitutional in another, the constitutional portion of the statute may remain in effect. This principle is dependent, however, upon the unconstitutional provision(s) being severable from the remainder of the statute. The severability of the unconstitutional statutory provision is determined by its relationship to the overall legislative intent of the statute and whether the statute, less the unconstitutional provision, can still accomplish the legislative intent. High Ridge Management Corp. v. State 354 So.2d 377 (Fla. 1977); Lasky v. State Farm Ins. Co. 296 So.2d 9 (Fla. 1974)

In enacting Florida Statute §45.061, the legislature very clearly expressed its intent in the two bills considered separately by the house and the senate, as well as by the language used in the final statute. (See legislative history in Appendix).

The legislative purpose of encouraging the settlement of disputes is accomplished by providing a mechanism whereby the unreasonable rejection, by either party, of an offer of settlement creates a substantive right to recover attorney's fees incurred by the offeror. To the extent that the mode and manner of implementing the statute encroach upon the Court's authority to regulate the practice and procedure of the Court's of this state, such provisions can be severed from the statutory scheme. The result is a statute creating a substantive right to recover attorney's fees at the conclusion of litigation, when one party, or the other, has unreasonably rejected an offer of settlement. Such a right is virtually indistinguishable from the substantive right created by Florida Statute §57.105, which allows for the recovery of attorney's fees when the Court finds a complete absence of justiciable issue of law or fact in any litigation, and which statute has been declared constitutional by this Court. Whitten, supra.

Based on the foregoing it is respectfully submitted that Florida Statute §45.061 (1987) constitutionally creates a substantive right for the recovery of attorney's fees. Although the statute embodies procedural aspects for its implementation, those procedural aspects, to the extent that they

unconstitutionally conflict with this Court's mandate, are severable from the language creating the substantive right, without offending the constitution.

II.
WHETHER FLORIDA STATUTE §45.061 (1987) IS CONSTITUTIONAL AS APPLIED

A declaration that the substantive aspects of Florida Statute §45.061 creating a right to recover attorney's fees are constitutional does not end the inquiry in this appeal.

It is well settled that a newly created substantive right cannot, except under very limited circumstances, be given retroactive effect. Whitten v. Progressive Casualty Insurance Company 410 So.2d 501 (Fla. 1982).

Plaintiff below has taken the position that in the event that Florida Statute §45.061 is determined to be substantive and is constitutional, it cannot be applied properly to the instant cause of action which accrued prior to the effective date of the statute.

The issue as framed by the Plaintiff, misses the mark. Assuming that this Court finds that Florida Statute §45.061 creates a substantive right to recover attorney's fees and that such statute is constitutional, it is clear under Florida law that such a right cannot have retroactive effect. Whitten; supra; Parrish v. Mullis 458 So.2d 451 (Fla. 1st D.C.A. 1984); and Love v. Jacobson 397 So.2d 782 (Fla. 3rd D.C.A. 1980)

But, in order to determine whether applying the statutes to this cause would result in a retroactive effect, the analysis should focus on the events giving rise to a party's claim for attorney's fees. In each of the cited cases above, the disputed statutes giving rise to the claim for attorney's fees attached to the cause of action. In Love, and in Whitten, the issue was the

constitutional application of Florida Statute §57.105. In Parrish, the issue was the constitutional application of Florida Statute §768.56 providing for attorney's fees to the prevailing party in a medical malpractice action. In each of those instances, the right to recover attorney's fees created by the statute attached to the cause of action per se and ripened only upon the ultimate determination in those actions. As the Court stated in Parrish, Supra,

> "When the Appellant's cause of action accrued, she was not burdened with the potential responsibility to pay the successful parties attorney's fees and costs. . . In the instant case, it would be manifestly unfair to argue that Plaintiff could have filed her lawsuit earlier to avoid the operation of the statute, when, in February of 1980, she was totally unaware of the statute; it did not exist." Id. at 402

The rational for finding an unconstitutional, retroactive application of the statute to the facts in Parrish is clear from the above-quoted passage. To hold otherwise would have allowed disparate treatment for Plaintiffs who were otherwise similarly situated, based solely on when their suits were filed rather than when the injuries giving rise to their claims were sustained and their causes of actions accrued. In the case, sub judice, the substantive right to recover attorney's fees does not attach to the cause of action per se. Rather the substantive right to recover attorney's fees is triggered by a party's unreasonable rejection of an offer of settlement.

Identical reasoning to that set forth above was expressed by the Second District Court of Appeal in A.G. Edwards & Sons, Inc. v. Davis 559 So.2d 235, (Fla 2nd D.C.A. 1990), in holding the

statute here under review both constitutional, and constitutional as applied, and by the Forth District Court of Appeals in Hemmerle v. Bramalea, Inc. 547 So.2d 203, (Fla. 4th D.C.A. 1989).

CONCLUSION

Florida Statute §45.061 (1987) created a substantive right for a litigant to recover attorney's fees from a party who has unreasonably rejected an offer of settlement. In order to implement the substantive right, the legislature provided the mode and manner for making offers of settlement. The legislature's implementation of the substantive right impinged upon the Supreme Court's exclusive rule making authority, in violation of the Constitution. However, the mode and manner of implementing the substantive right is severable from the right itself which passes constitutional muster.

Assuming that this Court finds the statute constitutional in creating a substantive right to attorney's fees, Appellant submits that the statute was correctly and properly applied on the instant facts. The right to attorney's fees, as a substantive right, attaches not to the cause of action, but is triggered by the unreasonable rejection of an offer of settlement. In this instance, Appellant's offer and Plaintiff's rejection occurred subsequent to the effective date of the statute.

Based on the foregoing, Appellant respectfully urges this Court to reverse the decision of the Fifth District Court of Appeal, and to declare Florida Statute §45.061 (1987) constitutional, and constitutional as applied in this case and to affirm the final judgment entered by the trial court.

Very respectfully submitted,

Eric W. Ludwig

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail/hand delivery to James O. Driscoll, Esquire, 3222 Corrine Drive, Orlando, Florida 32803, this 17th day of July, 1990.

ERIC W. LUDWIG, ESQUIRE
Eric W. Ludwig, P.A.
111 North Orange Avenue
Suite TEN NINETEEN
Orlando, Florida 32801
(407) 425-0442
Fla. Bar No. 328766
ATTORNEY FOR APPELLANT

SUMMARY OF EXHIBITS

Legislative History of F.S. §45.061

A. House of Representatives Committee on Judiciary Staff Analysis

B. Senate Staff Analysis and Economic Impact Statement

C. CS for SB 866

D. HB 321