

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

FILED

SID J. VANCE

OCT 8 1990

CLERK, SUPREME COURT
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PINE ISLAND LUMBER, INC., and
JOSE RODRIGUEZ,

Petitioners,

v.

CASE NO. 76,265

MICHAEL FESTA and TAMARA FESTA,

Respondents.

REPLY BRIEF OF PETITIONERS

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

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ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT A DEFENDANT WHO IS COVERED BY LIABILITY INSURANCE MAY NOT RECOVER COSTS IF THE INSURANCE CARRIER HAS PAID THOSE COSTS.

Petitioners suggest that it is inappropriate to raise new issues in the Respondents' brief in a case which is before the Florida Supreme Court on a certified question. In the trial court, Respondents never argued or took the position that the Rule and the statute were unconstitutional. They did not argue that the statute was unconstitutional in general or as it specifically applies to their situation. On appeal to the Second District Court of Appeal, Respondents never raised any constitutional questions. This argument is first raised in this case after this Court has accepted jurisdiction based upon a certified question, and after Petitioners have filed their initial brief on the merits. Although Petitioners recognize that this Court may consider any issue affecting the case at its discretion once it has accepted jurisdiction, Petitioners assert that the issues should have been raised and considered at the trial level to assure that they were not waived. See *Cantor v. Davis*, 489 So.2d 18 (Fla. 1986); *Dickinson v. Stone*, 251 So.2d 268 (Fla. 1971); *Palm Beach County v. Green*, 179 So.2d 356 (Fla. 1965). It should be noted that the Respondents have not argued that an award of

costs and fees would constitute fundamental error under the circumstances in this case.

These new arguments are similar to the arguments raised in *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), modified on other grounds sub nom, *Standard Guaranty Insurance Company v. Quanstrom*, 555 So.2d 828 (Fla. 1990). In *Rowe*, the Florida statute which provided for an award of attorney's fees to the prevailing party in medical malpractice actions was challenged as unconstitutional. The plaintiff in *Rowe* contended that the statute violated the access to courts provision of the Florida Constitution by "chilling" litigation that would otherwise be instituted by victims of medical malpractice. It was also argued that the assessment of attorney's fees constituted a "penalty" offensive to our system of justice. This Court rejected the constitutional arguments. The assessment of attorney's fees against an unsuccessful litigant imposes no more of a penalty than other costs of proceedings which are more commonly assessed. 472 So.2d at 1149. It was pointed out that rather than deterring plaintiffs from litigating, the statute could actually encourage plaintiffs to proceed with well-founded malpractice claims that would otherwise be ignored because they were not economically feasible under the contingent fee system. *Id.* The statute may function to encourage a party carefully to consider the likelihood of success before

bringing an action, and similarly would encourage a defendant to evaluate the same factor in determining how to proceed once an action is filed. As difficult as the result may be in applying the statute in certain cases, it was concluded that the statute was constitutional.

The Rule and statutes under consideration in the instant case are functionally identical to the statute which this Court considered in *Rowe*. The only difference is the fact that the prevailing party in connection with offers of judgment is determined by factors which more accurately reflect reality. Where a party values a case at a certain amount and offers to settle at that amount, the identity of the prevailing party in a subsequent verdict and judgment should be determined by the amount at which the party had been willing to settle. A party who receives an offer of judgment in the amount of \$50,000, and who rejects that offer is not the prevailing party if the jury awards him only \$25,000. Even though he recovers a judgment, he recovers less than the amount at which the parties valued the case. The defendant under that set of circumstances valued the case at \$50,000, while the plaintiff valued the case in excess of that amount. The potential for the award of attorney's fees under such circumstances will prompt parties to evaluate the merits of their cases very realistically. The starting point for determining the

identity of the prevailing party should be the amount at which the opposing party was willing to settle the case.

The Rule and the statutes may encourage a party carefully to consider the relative merits of a case when accepting or rejecting an offer of judgment, and they similarly should encourage a defendant to make a realistic assessment of the case in determining how to proceed.

As this Court noted in *Rowe*, the assessment of attorney's fees against an unsuccessful litigant imposes no more of a penalty than other costs of proceeding which are more commonly assessed. 472 So.2d at 1145. It can be argued that rather than deterring plaintiffs from litigating, the offer of judgment concept could actually encourage plaintiffs to proceed with well-founded claims that would otherwise be ignored because they are not economically feasible under the contingent fee system. A defendant who refuses to make a realistic evaluation of the merits in a case would be placed at risk.

Although the courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the court because of the constitutional guarantee of access, there may be reasonable restrictions prescribed by law. *Bystrom v. Diaz*, 514 So.2d 1072, 1075 (Fla. 1987). In any event, the offer of judgment concept does not affect access to courts. A plaintiff is free to file a lawsuit in order to obtain access to the courts. The offer of judgment

concept will not affect a party unless it is utilized. At that point in the proceedings, the parties are prompted to make a very serious, objective evaluation of the merits of their positions. A party who makes such an assessment of his or her position will not be affected by the offer of judgment concept. It is only those parties who refuse to evaluate their cases realistically who run the risk of having attorney's fees assessed against them. That risk exists only for the time subsequent to the offer of judgment.

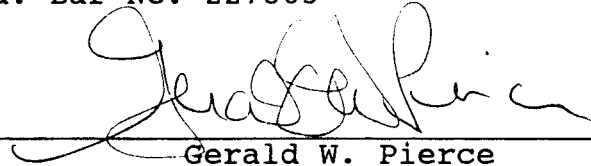
CONCLUSION

Petitioners, Pine Island Lumber, Inc., and Jose Rodriguez, request that the decision of the District Court be quashed, and that this case be remanded for further proceedings consistent with this Court's opinion in *Aspen v. Bayless*.

Respectfully submitted,

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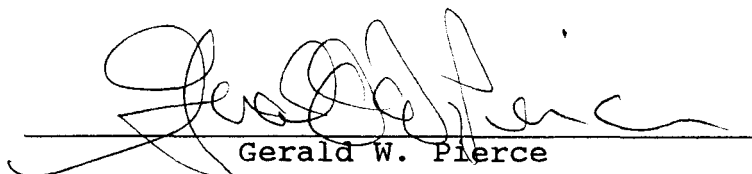
By



Gerald W. Pierce

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to RICHARD PURTZ, ESQUIRE, Post Office Box 2366, Fort Myers, Florida, 33902, by regular United States Mail this 4th day of October, 1990.


Gerald W. Pierce