D.A. 2-5-92 047

THE SUPREME COURT OF FLORIDA

CASE NO. 77,997

MARIE Y. BIDON and

ELIZABETH MOMPLAISIR

APPELLANTS

vs

STATE OF FLORIDA,

DEPARTMENT OF PROFESSIONAL REGULATIONS,

FLORIDA REAL ESTATE COMMISSION

APPELLEE

APPEAL FROM THE DECISION OF THE

FOURTH DISTRICT COURT OF APPEAL

APRIL 24, 1991

BRIEF OF APPELLANT

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I - INTRODUCTION

Appellants' obtained a judgment in the trial court awarding them the amount of their real estate deposit, costs and attorney's fees, all in accordance with the provisions of Florida Statute, Chapter 475. The Real Estate Commission awarded them a return of their deposits only.

A timely Appeal was filed to the Fourth District Court of Appeal. Appellants argued that the conversion by the real estate broker[1] (months prior to the Legislative change of 475.484, limiting recovery effective October 1, 1988) was the controlling principle. Appellee argued that Appellants' rights "vested" after the October 1, 1988 legislative change and, therefore, the amended legislation precluded recovery beyond deposit.

The Fourth District Court of Appeal affirmed the denial of Appellants' claim beyond the deposit. They did not decide the case upon the principle of the applicability of the October 1, 1988 legislative change. Instead, they adopted the dissenting opinion of Judge Upchurch in Tucker v. State Department of Professional Regulation, 521 So2d 146 (Fla. 5th DCA 1988), ie., that "actual or compensatory damages" did not include recovery of attorney's fees.

1) The bank records reflected full conversion prior to May 31, 1988, a fact not disputed by Appellee.

Thus, a direct conflict resulted between the Districts as to whether attorney's fees were to be included in the language "actual or compensatory damages", and such determination is the linch-pin in this appeal.

If this Court finds that attorney's fees, and costs were includable within "actual or compensatory damages", as contained in this specific statute, and as found by the majority in TUCKER, then the secondary issue would be the applicability of the October 1, 1988 amendment. Counsel would rely entirely upon the brief submitted to the Fourth District Court of Appeal in furtherance of his clients' position thereon, and would pray that this Court determine that the Amendment was prospective only, and as such, applicable to wrongful acts of real estate brokers committed after October 1, 1988.

II - STATEMENT OF THE CASE AND FACTS

Appellants rely upon the statement of the case and facts as contained in the initial brief to the Fourth District Court of Appeal.

III - SUMMARY OF ARGUMENT

Actual or compensatory damages, as set forth in Chapter 475, Sections 475.482(1) and 475.484 (1)(a), include attorney's fees and costs, as found by the majority in TUCKER, for the reasons set forth in their decision and those argued herein.

IV - ARGUMENT

THE TERM "ACTUAL AND COMPENSATORY DAMAGES" AS CONTAINED IN FLORIDA STATUTE 475.484 (1)(a) PRIOR TO THE OCTOBER 1, 1988 AMENDMENT, SHOULD BE CONSTRUED TO INCLUDE RECOVERY OF ATTORNEY FEES AND COSTS.

Fair and just compensation is a fundamental principle of the law of damages, and the damages awarded should be equal to and precisely commensurate with the injury sustained. Hanna v. Martin, 49 So2d 585. (emphasis added).

The Legislature, in enacting Chapter 475, set forth specific and technical requirements for recovery against the fund, thus ensuring the need for legal counsel. Legal action against the broker is mandatory. Filing fees, service of process costs, court reporter fees, transcripts and related costs, must be incurred prior to entry of judgment.

Thus, the party sought to be protected by the legislation is required to incur substantial expenses, into the thousands of dollars, in an effort to recover their real estate deposit.

The object of compensatory damages is to make the injured party whole to the extent that it is possible to measure his injury in terms of money. Mercury Motors Express, Inc. v. Smith, (1981 FLA) 393 So2d 545; NorthAmerican Van Lines, Inc. v. Roper, 429 So2d 750.

Applying the theories of HANNA, MERCURY MOTORS EXPRESS, INC., and NORTH AMERICAN VAN LINES, INC. to this case, and accepting the legislative intent in enacting 475.482(1) as their

desire to provide "as reimbursement to any person or corporation adjudged by a court of competent jurisdiction to have suffered monetary damages" *** (emphasis added), the inescapable conclusion is that the totality of the injured party's economic loss, to the statutory maximum provided for, was that intended by the Legislature.

Black's Law Dictionary, Fourth Edition, defines the word REIMBURSE as follows:

> "To pay back, to make restoration, to repay that expended; to indemnify or make whole" (emphasis added)

To repay that expended, necessarily incurred by virtue of the legislation itself, includes those costs and attorney's fees heretofore referred to.

Turning now to the issue of the conflict between the Districts, the Appellant's would argue that Judge Upchurch's dissent should be rejected since it is bottomed upon but two cases, Dickson v. Feiner's Organization, Inc., 200 So2d 269 (Fla 4th DCA 1967), and Hoffman v. Barlly, 97 So2d 355 (Fla 3d DCA 1957), both of which are inapposite, as well as a blanket statement that "it was never intended to indemnify a person for ALL his losses" etc. Both cases stand for the singular proposition that attorney's fees are not recoverable in the absence of statutory authority or contract.

That no statutory authority exists, is undeniable. That the fund is not a contractual indemnitor is refutable. To indemnify is defined in Black's law Dictionary as follows:

> INDEMNITY. To give security for the reimbursement of a person in case of an anticipated loss falling upon him. (emphasis added)

The interrelationship between the theory of indemnity and the legislative use of the word "reimbursement" as previously defined is inescapable. The majority's analogy is neither "convenient" nor "inappropriate", as claimed by Judge Upchurch, but is instead, factually and descriptively apropos.

Further, to posit that the legislation did not intend to indemnify a person for all his losses, means that somewhere within the legislation is a restriction upon reimbursement, other than the maximum allowable amount per claim. Such restrictive language was never quoted in the dissenting opinion, nor does it readily appear to the discerning eye.

Interestingly enough, Judge Upchurch states "However, it was never intended to indemnify a person for all his losses arising from the action of a broker or salesman." (emphasis added). If the theory of indemnity is only a "convenience" of the majority, why would Judge Upchurch give it any credence by acknowledging its existence, albeit limiting its application. Again, something that is "inappropriate", as the term is used by the dissenting Judge, is so in totality, not in partiality.

The majority opinion, in contrast, sets forth the basis for its decision by reference to the general rule for recovery of damages, thereafter grafting upon such the recognized exceptions, and then proceeding to support its position by reference to specific case authority. The cases cited are not only more definitive in nature, but are certainly more current.[2] The case of

2) Dissent cites a 1957 and 1967 case versus 1982 and later cases for the majority.

NorthAmerican Van Lines, Inc., v. Roper, 429 So2d 750 (Fla 1st DCA 1983) is on point. On the issue of an exception to the general rule on attorney's fees, the court, citing Baxter's Asphalt, Etc. v. Liberty County, 406 So2d 461, 467 (Fla 1st DCA 1981) said:

> "where the wrongful act of the defendant has involved the claimant in litigation with others, and has placed the claimant in such relation with others as makes it necessary to incur expenses to protect its interest, such costs and expenses, including reasonable attorney's fees upon appropriate proof, may be recovered as an element of damages."

The majority decision in TUCKER is the more reasoned analysis and should be followed. Prospective application of the October 1, 1988 amendment, affecting rights of claimants for acts committed after that date, should be the interpretation of the legislative intent.

RESPECTFULLY SUBMITTED,

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V - CONCLUSION

The majority opinion in TUCKER should prevail as its reasoning, analysis and timeliness are all superior to that of the dissenting judge.

The dissent's adherence to a rote restatement of an ancient rule of law, and his need to rely upon cases some 20 to 30 years old in doing so, without reflection upon the clear and unmistakeable exceptions carved from such rule by more modern thinking appellate jurists, substantially dilutes the impact of his position and warrants rejection thereof.

The application of the October 1, 1988 amendment should be prospective only.

VI - CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant was served by mail on JOSELYN M. PRICE, ESQUIRE, Assistant Attorney General, Attorney for Appellee, 400 West Robinson, Suite 212, Orlando, FL, 32801, this 31st day of October, 1991.

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