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SID J. WHITE

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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF FLORIDA

CLYDE TIMMONS,

CASE NO. 78,272

Appellant,

vs.

BONNIE S. COMBS,

Appellee.

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INITIAL BRIEF OF

Billy Joe Walker and Verniece W. Walker

AMICUS CURIAE  
FOR APPELLEE

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An Appeal from Case No.: 90-2796  
District Court of Appeal of the State of Florida,  
First District  
(reported at 579 So.2d 840)

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STATEMENT OF THE FACTS AND CASE BACKGROUND

The facts of the appeal sub judice are fully set forth by the parties in chief. The constitutionality of Section 45.061 was not a basis for the First District decision below. However, the persistent defects in this Statute are the subject of numerous other District Court decisions; the context of these defects can best be viewed by a consideration of the Statute's constitutional essence.

Certain facts of the dispute between Amicus WALKERS and Adversary 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 (which has been the basis of a separate Amicus brief before this court dated September 10, 1990 by the Walkers in the matter of Leapai v. Milton, Florida Supreme Court case number 76,241, in which all briefs and argument are concluded, and decision is pending), are relevant hereto, and are briefly noted hereafter.

In the Walker trial matter, Trial Defendant submitted what he termed an "Offer of Judgment Pursuant to Sections 45.061 and 768.79, Florida Statutes", dated November 4, 1988 to Trial Plaintiffs Walker which 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."

Said Trial Defendant 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, either pre- or post- 1989 amendments.

In the dispute between the Trial Plaintiffs WALKERS and the Trial Defendant, WALKERS took nothing at trial. In view of the pending Fifth District appeal in Milton v. Leapai, 562 So.2d 803 (Fla. 5th DCA 1990), addressing the constitutionality of Section 45.061, the trial Court reserved ruling, after extensive argument, on the issue of the attorneys' fees claim by Trial Defendants under said Section 45.061, until final decision in the Milton appeal.

When Trial Defendant brought his request for assessment of attorney's fees and costs against Trial Plaintiff WALKER before the Trial Court in June of 1990, the WALKERS defended against same on a variety of grounds, including not just the inapplicability of said Section 45.061 because resulting from the Plaintiffs taking nothing, but also the unconstitutionality of said Section 45.061.

## ARGUMENT

### I. WHETHER JUDGMENT IN FAVOR OF A PLAINTIFF IS A PREREQUISITE TO A DEFENDANT BEING ENTITLED TO ATTORNEY'S FEES AS A SANCTION FOR PLAINTIFF HAVING REFUSED AN OFFER UNDER SECTION 45.061, FLORIDA STATUTES

Whether applicable to a statutory or rule type offer, the District Courts of this State in all but one instance, 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 not only as to Section 45.061 in Timmons below, but also in B & H Construction & Supply Co., Inc. v. District Board of Trustees, 542 So.2d 382, 387-8 (Fla. 1st DCA 1989), rev. den. 549 So.2d 1013, with respect to the predecessor of the current Rule 1.442. The First District is also in accord as to Section 768.79; Maker v. Investors Real Estate Management, Inc., 553 So.2d 298 (Fla. 1st DCA 1989). The Second District has so ruled with respect to §45.061 and §768.79 in Coe v. B & D Transportation Services, 561 So.2d 469 (Fla. 2d DCA 1990) and also with respect to both Statutes in Westover v. Allstate Insurance Company, 581 So.2d 988 (Fla. 2d DCA 1991). See also Kline v. Publix Supermarkets, Inc., 568 So.2d 929 (Fla. 2d DCA 1990). The Third District has expressed accord inclinations as to Section 768.79; Rabatie v. U.S. Security Insurance Co.,

original opinion vacated as moot after rev'd. on other grounds on reh., en banc, 581 So.2d 1327 (Fla. 3d DCA 1989), reh. den; the Third District has expressed approval of the Fifth's Milton decision, but applied to Section 768.79, in E & A Restaurants of the Keyes, Inc. v. Bernreuter, 16 F.L.W. D2920 (Fla. 3rd DCA Op. ren. 11/19/91). The Fifth District is in accord as to Section 768.79; Oriental Imports, Inc. v. Alilin, 559 So.2d 442 (Fla. 5th DCA 1990). Accord, Delta Airlines, Inc. v. August, 450 U.S. 346 (1981), as to Federal Rules of Civil Procedure, Rule 68, upon which Florida Rule 1.442 would appear to be largely premised.

However, in Memorial Sales, Inc. v. Pike, 579 So.2d 778 (Fla. 3d DCA 1991), the Third District found that the language of Section 45.061(2)(b) in its 1987 version was sufficiently distinctive from Section 768.79(1)(a) in its 1987 version, to justify distinguishing its Rabatie, supra decision, and to find that there need not be a judgment for plaintiff in order to award attorney's fees to defendant under Section 45.061. Based on such determination, the Memorial Sales, Inc. court declined to address the constitutionality of Section 45.061. However both the Fifth District in Milton v. Leapai, 562 So.2d 804 (Fla. 5th DCA 1990) (now on appeal to this Court in Case No. 76,241), and the First District in Hughes v. Goolsby, 578 So.2d 348 (Fla. 1st DCA 1991), have both observed that Section 45.061 is in fact unconstitutional; in Hughes, the First observed that the



Milton reasoning applies equally to Section 768.79. Additionally, the Second District has determined Section 45.061(1) unconstitutional; A.G. Edwards & Son, Inc. v. Davis, 559 So.2d 235 (Fla. 2d DCA 1990).

While the court in Memorial Sales, Inc. in determining a distinction between Section 768.79 and Section 45.061, focused on that portion of the sentence in Section 45.061(2)(b) stating that "...an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25% less than the offer rejected(.)", the balance of said paragraph includes the following, "(F)or the purposes of this section, the amount of the judgment shall be the total amount of money damages awarded...." (italics added). Neither the First, Second, or Fifth detect any functional distinction between Section 45.061 and Section 768.79.

II. WHETHER SECTION 45.061 FLORIDA STATUTES, 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.

The pending Milton from the Fifth District supra appeal as to the constitutionality of Section 45.061, the decision of the First District in Hughes applying the Milton reasoning to Section 768.79, the decision of the Second District in A.G. Edwards, and the dicta regarding constitutionality of the Third District in Memorial, supra suggest a

constitutional review of Section 45.061.

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 observed its concurrence 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). The Fifth District in its Milton Opinion (now before this Court in Supreme Court case number 76,241) 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 804 (Fla. 5th DCA 1990). Such procedural incapacities, and their result, are 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). The reasoning of the Fifth has been specifically adopted by the First District in Hughes v. Goolsby, 578 So.2d 348 (Fla. 1st DCA 1991), as applied to the similar language contained in Section 768.79. The Second District concludes at least a portion of Section 45.061 infringes upon this Court's procedural responsibility; A.G. Edwards, supra. As set forth in Part III below, these procedural infirmities cannot be severed.

III. WHETHER THE PROCEDURAL  
ASPECTS OF SECTION 45.061

FLORIDA STATUTES, 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.

One District Court has severed certain procedural aspects of Section 45.061(1) determined unconstitutional in order to preserve Section (2). A.G. Edwards & Son, Inc. v. Davis, 559 So.2d 235 (Fla. 2nd DCA 1990). The Fifth District in Milton rejected the A.G. Edwards & Son, Inc., approach and by extension, so has the First in Hughes, supra.

It is interesting to note that 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 the Second District in the A.G. Edwards decision, all preceded this Court's opinion in In re: Amendment to Rules to Civil Procedure, Rule 1.442, supra. The persuasiveness of A.G. Edwards has little value given the superseding observations of this Court. 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).

"Rewriting" Section 45.061 by adding or subtracting procedural factors will not yield what the legislature intended. 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. E & A Restaurants, supra. 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 in the abstract. See, Id. 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, 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. Florida Statute Section 45.061(1). Furthermore, any judgment entered must be for money damages totaling less than 25% of the offer rejected [id, Section(2)(b)]; in the case sub judice (as well as before the Walkers Trial Court), there was no money judgment at all.

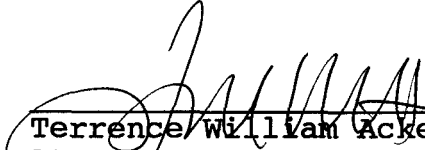
## CONCLUSION

The primary issues sought to be addressed by the Appeal inevitably must 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 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.

The accumulated wisdom of Florida and Federal Courts urges determinations that an offeror-defendant cannot obtain an attorneys' fee sanction in the event of a defense judgment, that the procedural requirements of Section 45.061 cannot be severed from the balance of the statute, and that the statute itself is unconstitutional. No severing of the procedural aspects of Section 45.061 will 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 First District Court of Appeals of the State of Florida, now on appeal to this Court in the matter sub judice.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of Dec.,  
1991, 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 4<sup>th</sup> day of Dec., 1991, to: Martin S. Page, Esquire, Attorney at Law, 228 E. Duval Street, Lake City, FL 32055, Attorney for Appellee and William R. Bowdoin, Esquire, Darby, Peele, Bowdoin & Payne Firm, 327 N. Hernando Street, P.O. Box 1707, Lake City, FL 32056, Attorney for Appellant.

  
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