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SID J. WHITE

JAN 7 1992

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CLYDE TIMMONS,

Appellant,

v.

BONNIE S. COMBS,

Appellee.

CASE NO.: 78,272

DISTRICT COURT of APPEAL

FIRST DISTRICT NO.: 90-2796

*Rec'd*

PETITIONER'S REPLY BRIEF TO INITIAL BRIEF  
OF BILLY JOE WALKER AND VERNIECE W. WALKER  
AMICUS CURIAE FOR APPELLEE

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ISSUE 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.

Petitioner adopts its arguments advanced in both his Brief On The Merits and Reply Brief To Repondent's Answer Brief filed in this appeal.

ISSUE II

WHETHER SECTION 45.061 FLORIDA STATUTES (1987), 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.

Petitioner objects to any argument regarding this issue as the constitutionality of Section 45.061, Florida Statutes (1989) is not an issue in this appeal. (See footnote 1 of the First District Court of Appeal's opinion in Timmons v. Combs, Case No. 90-2796.) An appellate level court should not address an issue which was not raised at the trial court level. Dover v. Worrell, 401 So.2d 1322 (Fla. 1981).

Without waiving his objection, Petitioner would rely on the

holdings in A.G. Edwards & Sons, Inc., v. Davis, 559 So.2d 235 (Fla. 2d DCA 1990) and Hammerle v. Bramalea, Inc. 547 So.2d 203 (Fla. 4th DCA 1989) to argue that Section 45.061, Florida Statutes (1989) is constitutional.

### ISSUE III

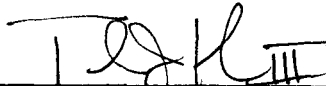
WHETHER THE PROCEDURAL ASPECTS OF SECTION 45.061 FLORIDA STATUTES (1987), IF UNCONSTITUTIONAL CAN BE SEVERED FROM THE REMAINING VALID PORTION OF THE STATUTE, THUS PERMITTING THE VALID PORTION TO STAND AS A COMPLETE ACT OF THE LEGISLATURE.

Petitioner adopts its argument advanced pursuant to Issue II. Because Section 45.061, Florida Statutes (1989) has been determined to be constitutional (see A.G. Edwards & Sons, Inc. and Hammerle, supra), there is no need to sever any portion of the statute.

CONCLUSION

The decision of the District Court of Appeal, First District, in the instant case should be reversed and the decisions in Memorial Sales, Inc. v. Pike, 579 So.2d 778 (Fla. 3d DCA 1991) and Winn Dixie Stores, Inc. v. Elbert, 16 FLW 2954 (Fla. 4th DCA November 27, 1991) respectively, should be adopted by this Court as the Law of Florida.

Respectfully submitted,



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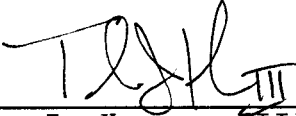
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by U.S. mail, to MARTIN S. PAGE, Esquire, Attorney for Appellee, 228 East Duval Street, Lake City, Florida 32055 and TERRENCE WILLIAM ACKERT, Esquire, Attorney for Amicus Curiae, Walkers, 201 E. Pine Street, Suite 1402, Orlando, Florida 32801, this 6<sup>th</sup> day of January, 1992.

DARBY, PEELE, BOWDOIN & PAYNE

BY: \_\_\_\_\_

  
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