IN THE SUPREME COURT OF FLORIDA

CLYDE TIMMONS,

Petitioner,

v.

BONNIE S. COMBS,

Respondent.

CASE NO.: 78,272

DOCKET NO. FROM LOWER TRIBUNAL: 90-02796

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

This case arose out of an allegation by Respondent that Petitioner, CLYDE TIMMONS, committed a tortious act against Respondent. The jury returned a verdict finding no liability on behalf of Petitioner.

Based on the jury's verdict, Mr. Timmons filed his Motion to Enter Final Judgment Including Attorney's Fees, Costs and Expenses pursuant to Section 45.061, Florida Statutes (1989). The trial court ultimately denied Mr. Timmons' request for attorney's fees after determining that attorney's fees could not be awarded pursuant to Section 45.061, Florida Statutes (1989), as said statute required that a judgment be rendered in favor of the plaintiff. It was upon this ruling that Mr. Timmons filed his timely appeal to the First District Court of Appeal.

The First District Court of Appeal affirmed the trial court's decision not to award Mr. Timmons attorney's fees pursuant to Section 45.061. It is asserted by Mr. Timmons that because the decision of the First District Court of Appeal's interpretation of Section 45.061 is in express and direct conflict with decisions of other District Courts of Appeal, this court has jurisdiction to review the decision pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

THE HOLDING OF THE FIRST DISTRICT COURT OF APPEAL THAT PETITIONER IS NOT ENTITLED TO ATTORNEY'S FEES PURSUANT TO SECTION 45.061, FLORIDA STATUTES, (1989), IS EXPRESSLY AND DIRECTLY IN CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

Fla. R. App. P. 9.030(a)(2)(A)(iv) provides that the discretionary jurisdiction of the Florida Supreme Court may be sought to review a decision of a District Court of Appeal that: "expressly and directly conflicts with a decision of another District Court of Appeal . . . on the same question of law." The Opinion of the First District Court of Appeal in Timmons v. Combs, Case No. 90-2796, filed May 14, 1991, expressly and directly conflicts with the Third District Court's Opinion in Memorial Sales, Inc. v. Pike, 16 F.L.W. D1235 (Fla. 3d D.C.A., May 7, 1991).

The First District Court in Timmons held that the defendant--Mr. Timmons--was not entitled to an award of attorney's fees pursuant to Section 45.061, Florida Statutes (1989). In Timmons, the jury determined that Mr. Timmons was without liability and based on that jury verdict, the trial court entered a final judgment awarding plaintiff no damages. Mr. Timmons had previously extended an offer of settlement to plaintiff pursuant to Section 45.061, Florida Statutes (1989). Plaintiff did not accept Mr. Timmons' offer of settlement and the jury's verdict

was at least 25% less than Mr. Timmons' offer of settlement. The First District Court in reaching its holding, relied on Norris & Associates of Naples, Inc. v. Elkins, 15 F.L.W. D3004 (Fla. 2d D.C.A., December 14, 1990), and Coe v. B & D Transp. Services, Inc., 561 So. 2d 469 (Fla. 2d D.C.A. 1990) which held that a defendant may not recover under Section 45.061 where no judgment was rendered in favor of the plaintiff.

The Third District Court of Appeal's holding in Memorial Sales, Inc. v. Pike, 16 F.L.W. D1235 (Fla. 3d D.C.A., May 7, 1991) directly conflicts with the court's holding in Timmons v. Combs. The Pike court held that Section 45.061, Florida Statutes (1989), does not require that the plaintiff obtain a judgment prior to sanctions being imposed. In reaching their decision, the court examined the plain wording of Section 45.061 which states in pertinent part, "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." (Emphasis added).

The court's ruling in Memorial also directly conflicts with a recent Third District Court of Appeal's Opinion in Westover v. Allstate Insurance Co., 16 F.L.W. D1724 (Fla. 2d D.C.A., June 26, 1991). The Third District noted that its decision was in direct conflict with the Memorial case and certified the conflict to

this Court.

The express and direct conflict between the instant case out of the First District Court of Appeal and the Third District Court of Appeal in Memorial Sales, Inc. v. Pike, 16 F.L.W. D1235 (Fla. 3d D.C.A., May 7, 1991) bestows upon this court jurisdiction to review the instant case pursuant to Fla. R. App. R. 9.030(a)(2)(A)(iv). In light of this conflict and the Third District Court of Appeal's similar conflict in Westover, it is respectfully requested that this court review the instant case and resolve the conflicts existing between the District Courts of Appeal.

CONCLUSION

As the foregoing shows, the First District Court of Appeal is in express and direct conflict with other District Courts of Appeal and jurisdiction thus exists to review the instant decision. Moreover, this court should exercise its jurisdiction to review the First District Court of Appeal's decision in the instant case primarily for one reason.

The conflict between the District Courts of Appeal has created an unfair detriment to some defendants. The obvious purpose of Section 45.061, Florida Statutes (1989), is to deter unnecessary litigation. The Third District has correctly construed Section 45.061 by allowing defendants who are determined not to be liable to recover attorney's fees and costs. However, defendants within the jurisdiction of other District Courts of Appeal are not allowed to recover attorney's fees under similar circumstances. These defendants are in an unfair position in that they prevail at trial against an obviously unfounded allegation but are not allowed to recover their attorney's fees and costs. Yet, had plaintiff been awarded $1.00 in damages, the defendant in these jurisdictions would be allowed to recover their attorney's fees and costs because a verdict would have been rendered in favor of the plaintiff.

Upon these grounds, Mr. Timmons respectfully submits that

this court has jurisdiction to review the First District Court of Appeal's decision pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv).

Respectfully submitted this 19th day of July, 1991.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, to MARTIN S. PAGE, ESQUIRE, Attorney for Respondent, 228 East Duval Street, Lake City, Florida 32055, this 19th day of July, 1991.

DARBY, PEELE, BOWDOIN & PAYNE

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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CLYDE TIMMONS,	:	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND
Appellant,	:	DISPOSITION THEREOF IF FILED.
v.	:	CASE NO.: 90-2796
BONNIE S. COMBS,	:	
Appellee.	:	
_____	:	

Opinion filed May 14, 1991.

An Appeal from the Circuit Court for Columbia County.
E. Vernon Douglas, Judge.

Rob Bowdoin of Darby, Peele, Bowdoin & Payne, Lake City, for Appellant.

Martin S. Page, Lake City, for Appellee.

PER CURIAM.

Appellant, the defendant in a lawsuit filed by appellee, who received a jury verdict of no liability followed by a final judgment in his favor, appeals, contending the trial court erred in determining that he was not entitled to recover

attorney's fees and costs under section 45.061, Florida Statutes (1989), for the appellee/plaintiff's unreasonable failure to accept an offer of settlement. Upon consideration of the briefs and arguments of the parties, we concur with the decisions of the Second District Court of Appeal in Norris & Associates of Naples, Inc. v. Elkins, 15 F.L.W. D3004 (Fla. 2d DCA, December 14, 1990), and Coe v. B & D Transp. Services, Inc., 561 So.2d 469 (Fla. 2d DCA 1990), which hold that a defendant may not recover under section 45.061 where no judgment was rendered in favor of the plaintiff.[1]

AFFIRMED.

SMITH, WIGGINTON, JJ. and WENTWORTH, S.J., CONCUR.

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[1] In an unrelated case, Mary McHughes v. Donald A. Goolsby and Marine Transit, Inc., 16 F.L.W. D906 (Fla. 1st DCA, April 4, 1991), this court reversed an award of attorney's fees, holding that section 768.79, Florida Statutes (1989), is unconstitutional for the reasons stated in Milton v. Leapi, 562 So.2d 804 (Fla. 5th DCA 1990), with respect to the Fifth District's determination that section 45.061 is unconstitutional; question certified to the Florida Supreme Court with respect to section 768.79. No issue of constitutionality has been raised in the case before us.

producing properties.

[2]Even assuming that there was no formal inspection of the property within three years prior to assessment, this emission does not amount to noncompliance with section 193.011 on these facts.

[3]Section 193.011, Florida Statutes (1989), states that in arriving at just valuation the property appraiser shall take into consideration the following factors:

(1) The present cash value of the property...;
(2) The highest and best use to which the property can be expected to be put in the immediate future and the present use of the property;
(3) The location of said property;
(4) The quantity or size of said property;
(5) The cost of said property and the present replacement value of any improvement thereon;
(6) The condition of said property;
(7) The income from said property; and
(8) The net proceeds of the sale of the property....

* * *

Torts—Attorney's fees—Defendants who obtained verdicts in their favor after having made offer of settlement are entitled to recovery of attorney's fees and costs incurred between date settlement offer was filed and date court entered verdicts—Defendants not precluded from recovery because of fact that costs and attorney's fees were paid by liability insurance company

MEMORIAL SALES, INC., a Florida corporation and MIRROR LAKE CORPORATION, a Florida corporation, Appellants, vs. DAVID L. PIKE and MARY JANE PIKE, his wife, Appellees. 3rd District. Case No. 90-1772. Opinion filed May 7, 1991. An Appeal from the Circuit Court of Dade County, Ronald M. Friedman, Judge. Knecht & Knecht, P.A., Michael C. Knecht and Spencer A. Emison, for appellants. Kimbrell & Hamann, John W. Wylie and Anthony Upshaw, for appellees.

(Before SCHWARTZ, C.J., JORGENSON and GODERICH, JJ.)

(PER CURIAM.) The defendants, Memorial Sales, Inc. [Memorial] and Mirror Lake Corporation [Mirror], appeal the final order denying their motion to tax attorney's fees and costs. We reverse.

The plaintiffs, David and Mary Pike, filed a personal injury action against the defendants. On May 12, 1989, the defendants filed an offer of settlement pursuant to section 45.061, Florida Statutes (1987), in the amount of $2,501.00, which the plaintiffs rejected. On September 27, 1989, the trial court granted Memorial's motion for directed verdict. The jury entered a verdict for Mirror. The defendants filed a motion to tax costs and attorney's fees against the plaintiffs pursuant to section 45.061, seeking those costs incurred between the date the offer was filed and the date the court entered the verdicts. The trial court denied the motion because the plaintiffs had not obtained a judgment and because the defendants were not the real parties in interest since the defendants' insurance carrier had paid all costs and legal fees incurred in defending the action.[1] The parties stipulated that taxable costs in the amount of $2,500.00 and taxable attorney's fees in the amount of $18,000.00 are reasonable. The defendants appeal.

The defendants contend that they are entitled to recover their costs and attorney's fees because they obtained verdicts in their favor after the plaintiffs unreasonably rejected their settlement offer. We agree.

The trial court relied on *Rabatie v. U.S. Security Ins. Co.*, __ So.2d __ (Fla. 3d DCA, Case Nos. 88-2229, 88-2503, opinion filed July 25, 1989) [14 FLW 1753], *rev'd, on other grounds, on rehearing en banc*, __ So.2d __ (Fla. 3d DCA, opinion filed October 16, 1990) [15 FLW 2590], in determining that the defendants were not entitled to attorney's fees since the plaintiffs had not obtained a judgment. In *Rabatie*, this court, in interpreting section 768.79(1)(a), Florida Statutes (1987),[2] stated that "there must be a judgment for the plaintiff . . . in order to award attorney's fees to the defendant." *Rabatie*, 14 FLW at 1753. The trial court's reliance on section 768.79(1)(a) as construed in *Rabatie* is misplaced. Unlike section 768.79(1)(a), section 45.061(2)(b), Florida Statutes (1987),[3] does not require that the plaintiff obtain a judgment prior to sanctions being imposed. Thus, the rationale contained in *Rabatie* is not applicable to the instant case.

In the instant case, the plaintiffs rejected an offer of $2,501.00 and were awarded nothing. Pursuant to section 45.061, this creates the presumption that the plaintiffs unreasonably rejected the defendants' offer of settlement. Consequently, the defendants are entitled to recover the costs and attorney's fees which the parties have already stipulated to as reasonable.

Based on our determination of the first contention raised, we do not need to address the defendants' remaining contention that section 45.061 is unconstitutional as interpreted by the trial court.

Reversed.

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[1]The portion of the order denying the defendants' motion based on the fact that their insurer paid their costs and attorney's fees is erroneous. The Florida Supreme Court has ruled that an insured defendant could recover litigation costs even though they had been paid by his liability insurer. Aspen v. Bayless, 564 So.2d 1081 (Fla. 1989).

[2]Section 768.79(1)(a), Florida Statutes (1987), states, in pertinent part: "the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer if the *judgment obtained by the plaintiff* is at least 25 percent less than such offer...." (emphasis added).

[3]Section 45.061(2)(b), Florida Statutes (1987), states, in pertinent part, that "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."

* * *

Torts—Accountants—Malpractice—Where accountant enters into settlement agreement in malpractice action brought by former clients for allegedly negligent preparation of clients' income tax return, and Internal Revenue Service subsequently refunds to former clients the full sum which was lost due to accountant's alleged negligence, settlement agreement may be vacated upon motion of accountant on ground of unjust enrichment

SHARFF, WITTMER & KURTZ, P.A. and JAMES D. GRAINGER, Appellants, vs. JOSEPH M. MESSANA and RUTH B. MESSANA, Appellees. 3rd District. Case No. 90-1256. Opinion filed May 7, 1991. An Appeal from the Circuit Court of Dade County, Philip Cook, Judge. Hinshaw, Culbertson, Moelmann, Hoban & Fuller (Boca Raton) and Donna Waters Romero, for appellants. Ruden, Barnett, McClosky, Smith, Schuster & Russell and James R. George, for appellees.

(Before SCHWARTZ, C.J., and HUBBART, and GERSTEN*, JJ.)

(PER CURIAM.) This is an appeal by the defendants Sharff, Wittner & Kurtz, P.A. and James D. Grainger from a final order denying their motion to set aside a settlement agreement in an accountant's malpractice action. We reverse upon a holding that where, as here, (a) an accountant enters into a settlement agreement in a malpractice action brought against him by his former clients for allegedly negligent preparation of the clients' income tax return, and (b) the Internal Revenue Service subsequently refunds to the former clients the full sum which was lost due to the accountant's alleged negligence, the subject settlement agreement may be vacated upon motion of the accountant on the ground of unjust enrichment.

Plainly, under the above circumstances, the former clients have received a recovery from the accountant for damages which the said clients have subsequently been reimbursed for; this being so, the clients should not in good conscience be allowed to keep this windfall recovery. Indeed, unjust enrichment as an action "exists to prevent the wrongful retention of a benefit...in violation of good conscience and fundamental principles of justice or equity," *Challenge Air Transp., Inc. v. Transportes Aereos Nacionales, S.A.*, 520 So.2d 323, 324 (Fla. 3d DCA 1988), and has been employed to prevent similar-type windfall recoveries. For example, in *Circle Finance Co. v. Peacock*, 399 So.2d 81 (Fla. 1st DCA), *rev. denied*, 411 So.2d 380 (Fla. 1981), the doctrine was used to prevent a finance company from retaining both a deed transferring the mortgagors' interest in their home and the

Insurance—Attorney's fees—Error to award attorney's fees in favor of defendant on basis of refusal of offer of judgment where judgment was entered in favor of plaintiff—Conflict certified

SUSAN WESTOVER, Appellant, v. ALLSTATE INSURANCE COMPANY, an Illinois corporation, Appellee. 2nd District. Case No. 90-02735. Opinion filed June 26, 1991. Appeal from the Circuit Court for Lee County; R. Wallace Pack, Judge. Steven D. Holmes of Lusk, Drasites & Tolisano, P.A., Cape Coral, for Appellant. Nancy A. Lauten of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tampa, for Appellee.

(HALL, Judge.) The appellant, Susan Westover, challenges the final judgment entered in favor of the appellee, Allstate Insurance Company, in her action for uninsured motorist benefits. We affirm that judgment. She also challenges the separate final judgment awarding Allstate attorney's fees and costs. We affirm the award of costs but strike that part of the judgment awarding Allstate attorney's fees.

Allstate filed a motion to tax attorney's fees and costs pursuant to sections 45.061,[1] 57.041, and 768.79, Florida Statutes (1987), and Florida Rule of Civil Procedure 1.442. The trial court granted the motion without reference to the rule or any of the statutes. We affirm the award of costs to Allstate as it is the prevailing party under section 57.041. We strike the award of attorney's fees because judgment was not entered in favor of Westover. Entry of judgment in favor of the plaintiff is a prerequisite to the defendant seeking sanctions against the plaintiff for refusing an offer made pursuant to sections 768.79 and 45.061 and rule 1.442 *Kline v. Publix Supermarkets, Inc.*, 568 So. 2d 929 (Fla. 2d DCA 1990) (section 768.79 and rule 1.442); *Coe v. B & D Transportation Services, Inc.*, 561 So. 2d 469 (Fla. 2d DCA 1990) (sections 768.79 and 45.061).

We certify that our holding in this case brings us in direct conflict with the Third District insofar as section 45.061 is concerned. In *Memorial Sales, Inc. v. Pike*, 16 F.L.W. D1235 (Fla. 3d DCA May 7, 1991), the Third District held that section 45.061 does not require the entry of a judgment in favor of the plaintiff before the defendant may seek sanctions for the refusal of the offer.

Reversed and remanded. (SCHOONOVER, C.J., and THREADGILL, J., Concur.)

[1]Westover contends that Allstate's offer of settlement pursuant to section 45.061, Florida Statutes (1987), was void because the instant cause of action occurred on February 21, 1987, and section 45.061 did not become effective until July 2, 1987. It is not the date the cause of action occurred, but the date the offer is made that triggers the operation of section 45.061. Hemmerle v. Bramalea, 547 So. 2d 203 (Fla. 4th DCA 1989), *review denied*, 558 So. 2d 18 (Fla.), *cert. denied*, __ U.S. __, 110 S.Ct. 2620, 110 L.Ed. 2d 641 (1990); A.G. Edwards & Sons, Inc. v. Davis, 559 So. 2d 235 (Fla. 1990).

* * *

Eminent domain—Attorney's fees—New hearing required because of failure to set forth required specific findings—Court awarded fee may not exceed fee agreement between attorney and client—Order awarding fees must expressly determine number of hours reasonably expended and reasonable hourly rate for type of litigation involved—Lodestar fee may be increased or decreased by specific dollar amount to reflect unusual success or failure in case

LEE COUNTY, a political subdivision of the State of Florida, Appellant, v. STELLA TOHARI, Appellee. 2nd District. Case No. 90-02955. Opinion filed June 28, 1991. Appeal from the Circuit Court for Lee County; R. Wallace Pack, Judge. James G. Yeager, Lee County Attorney, and John J. Renner, Assistant County Attorney, Fort Myers, for Appellant. Michael C. Tice of Blair & Tice, P.A., Fort Myers, for Appellee.

(GREENBERND, Judge.) Lee County appeals an order awarding attorney's fees against it in this eminent domain action. We reverse the award and remand for a new hearing because the order does not set forth all of the specific findings required by *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985), *modified*, *Standard Guarantee Insurance Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).

On remand, three matters warrant special attention. First, "in no case should the court-awarded fee exceed the fee agreement reached by the attorney and his client." *Rowe*, 472 So. 2d at 1151; *Perez-Borroto v. Brea*, 544 So. 2d 1022 (Fla. 1989); *Miami Children's Hosp. v. Tamayo*, 529 So. 2d 667 (Fla. 1988). Based on the record on appeal, it appears that this cap may have been violated by the trial court's award. The record contains a statement from the law firm of Stewart & Keyes, P.A., indicating total outstanding fees of $16,850. This amount was based on hourly rates of $175 and $150. Because the required findings are ambiguous, we cannot determine the amount actually awarded for these services. It appears likely, however, that the trial court accepted the hours recorded in the document but assessed the lodestar fee at $250 per hour rather than the rates contained within the statement. If the statement is not simply a computer-generated mistake but actually reflects the fee agreement between the attorneys and the client, then the fee award cannot exceed the agreement.

Second, it is well established that an order awarding fees must expressly determine the number of hours reasonably expended on the litigation and the reasonable hourly rate for the type of litigation involved. *Abdalla v. Southwind, Inc.*, 561 So. 2d 468 (Fla. 2d DCA 1990); *Baskin v. Guardianship of Baskin*, 535 So. 2d 306 (Fla. 1988), *review denied*, 544 So. 2d 199 (Fla. 1989). These two factors are then multiplied to determine the basic lodestar fee. *Rowe.* Contrary to the landowner's contention, this requirement applies to a fee awarded in an eminent domain proceeding. *Quanstrom*; *City of Orlando v. Kensington*, 16 F.L.W. D1392 (Fla. 5th DCA May 23, 1991); *see generally In re Platt*, 16 F.L.W. S237, S240 (Fla. April 4, 1991). In this case, the order does not fully accomplish this task.

Finally, the trial court's order awarded $25,000 for "the benefit obtained." The benefit resulting to a client is an important factor in determining an appropriate attorney's fee in an eminent domain proceeding. § 73.092, Fla. Stat. (1989). The County argues that this factor should be considered only in the calculation of the lodestar fee and not as a final adjustment of that fee. We disagree.

In *Quanstrom* and *Rowe*, the supreme court recognized that the lodestar fee can be adjusted upward or downward for both a contingency risk factor and a "results obtained" factor. *Quanstrom*, 555 So. 2d at 831; *Rowe*, 472 So. 2d at 1151. Much of the case law in this area has focused on issues relating to the contingency risk factor. It is clear that the contingency risk factor operates as a multiplier to the lodestar. The results obtained factor, however, is not based on a contingency and there is no reason for this factor to act as a multiplier. Instead, it seems clear that the trial court is authorized to increase or decrease the lodestar fee by a specific dollar amount to reflect the attorney's unusual success or failure in the case. *Glades, Inc. v. Glades Country Club Apartments Ass'n*, 534 So. 2d 723 (Fla. 2d DCA 1988), *review dismissed*, 571 So. 2d 1308 (Fla. 1991); *Fashion Tile & Marble, Inc. v. Alpha One Const. & Assocs., Inc.*, 532 So. 2d 1306 (Fla. 2d DCA 1988).

In the exceptional case in which an adjustment of the lodestar fee is authorized based on the result obtained, the trial court is required to make express findings to justify its decision. *Fashion Tile*; *Beisswenger v. Omicron Constr. & Dev. Co.*, 552 So. 2d 240 (Fla. 4th DCA 1989). For purposes of appellate review, the trial court "should indicate that it has considered the relationship between the amount of the fee awarded and the extent of success." *Rowe*, 472 So. 2d at 1151. In this case, the order does not contain any findings to support the conclusion that a result fee of $25,000, over and above the lodestar fee, is appropriate.[1]

Reversed and remanded. (CAMPBELL, A.C.J., and FRANK, J., Concur.)

[1]We grant the defendant's motion for attorney's fees on appeal, even though the only issue on appeal concerns the defective award of attorney's fees in the