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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

APPELLANT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

On November 13, 1988, Appellant, Clyde Timmons, a building contractor, was driving on a graded road in a rural residential area to a site where he was building a home. As he proceeded to the building site, he passed Appellee, Bonnie S. Combs, who was riding a horse in the opposite direction from that which Mr. Timmons was traveling. There were two riding students with Mrs. Combs who were also riding their horses in the same direction as Mrs. Combs. Mr. Timmons was accompanied by his wife and infant grandchild.

After Mr. Timmons had inspected the building project, he left the site and drove his vehicle back over the roadway which he had used in traveling to the building site. Mrs. Combs and her two students had reversed the direction of their travel and were riding back toward Mr. Timmons as he left his building project. As the vehicle driven by Mr. Timmons approached Mrs. Combs, she held up her hand with her palm toward Mr. Timmons in an attempt to order him to stop. Mr. Timmons did not stop and proceeded down the roadway and left the area.

At this point in the chronology there is a dispute between the parties as to what occurred. Mr. Timmons' position was that he had moved to the right-hand side of the road and proceeded on to his next destination. Mrs. Combs' position was that Mr.

Timmons had assaulted her with his vehicle and that she thought he was trying to kill her. At the trial, the parties, Mrs. Timmons, the two riders with Mrs. Combs, and other witnesses testified. It is not necesssary to go into the details of the testimony or the arguments of the parties. For purposes of this appeal, the only relevant fact is that the jury returned a verdict which found that Mr. Timmons did not commit an assault upon Mrs. Combs. (ROA 114).

On November 16, 1988, three days after the alleged incident, Appellee filed her Complaint alleging that Mr. Timmons had assaulted her with a deadly weapon. The complaint was filed by her attorney by whom she was employed as a legal secretary. Appellee sought compensatory and punitive damages from Mr. Timmons. (ROA 01). Later, an Amended Complaint (ROA 03), was filed by Appellee. The Amended Complaint realleged an assault with a deadly weapon in Count I and in Count II alleged that Appellant had negligently operated his motor vehicle in an attempt to strike Appellee.

After the Amended Complaint was filed an attorney retained by the insurer for Mr. Timmons filed a motion to dismiss Count II of the amended complaint on the ground that there had been no impact. The author of this brief was also representing Mr. Timmons as his private counsel as the insurer had no respon-

sibility for representing Mr. Timmons under the original Complaint and Count I of the Amended Complaint, both of which alleged an intentional act.

On January 5, 1989, Appellant filed an Offer of Settlement Pursuant to Section 45.061, Florida Statute (1989) for $101.00 (ROA 133). On that same day, Appellant also filed an Offer of Judgment Pursuant to Section 768.79, Florida Statute (1989) for $101.00 (ROA 10).

On March 28, 1989, Plaintiff-Appellee filed her Notice of Voluntary Dismissal of Count II of Plaintiff's Amended Complaint (ROA 12), and filed her Notice to Set for Trial (ROA 11). The following day, March 29, 1989, Appellant-Defendant filed additional offers by way of a pleading titled Offer of Settlement (§45.061), Or, In The Alernative, Offer of Judgment (§768.79), Or, In The Alternative, Offer of Judgment (Rule 1.442). The offers of settlement under both statutes and the rule of civil procedure were for $101.00.

On June 28, 1989, Appellee-Plaintiff made a counter-offer of settlement under Section 45.061, Florida Statute (1989) for $1,500.00 (ROA 25).

On August 3, 1989, the court entered its Order Granting Motion For Leave To Withdraw As Counsel which released the attorney retained by the insurer from any futher responsibility in the

case. (ROA 35) The matter proceeded forward with Darby, Peele, Bowdoin & Payne acting as Defendant-Appellant's counsel.

A trial date was set for October 5, 1989. Prior to trial, counsel for Plaintiff-Appellee made an oral motion for continuance which was granted (ROA 69). An Amended Order Setting Case For Jury Trial was entered and the matter was rescheduled for trial on December 28, 1989 (ROA 70). The matter was again continued and was reset for trial on February 22, 1990 (ROA 72).

The case was presented to the jury for deliberation on the second day of trial. The jury verdict found that Appellant-Defendant had not committed an assault upon Appellee-Plaintiff (ROA 114).

Appellant-Defendant filed his Motion To Enter Final Judgment Including Attorney's Fees, Costs and Expenses (ROA 116). On April 30, 1990, the court entered its Final Judgment (ROA 141), and held that Appellant-Defendant, was entitled to an award of attorney's fees, costs, and expenses as Defendant's Offer Of Settlement Pursuant To Section 45.061, Florida Statute (1989) was rejected unreasonably (ROA 141). Accordingly, the Final Judgment provided for a recovery by Appellant-Defendant from Appellee-Plaintiff of attorney's fees, court costs, and expenses.

Thereafter, on May 7, 1990, counsel for Plaintiff filed Plaintiff's Motion For Rehearing Or To Alter Or Amend Final

Judgment (ROA 143). The motion alleged that the final judgment was contrary to the statutory and case law of Florida, was contrary to the law as applied to the facts in the case, and that the judgment was not supported by any evidence produced at the hearing held on Defendant's Motion To Award Fees And Costs. A hearing was held on Plaintiff's motion for rehearing on June 26, 1990. Two cases relied upon by Plaintiff-Appellee at the hearing on her motion were not published at the time Plaintiff filed her motion. See, Coe v. B & D Transportation Services, Inc., 561 So.2d 469 (Fla. 2d DCA 1990), and Kline v. Publix Supermarkets, Inc., 568 So.2d 929 (Fla. 2d DCA 1990).

On August 28, 1990, the court entered its Amended Final Judgment (ROA 170). The court reversed itself and held that attorney's fees and court costs could not be awarded under Section 45.061, Florida Statute (1989) as said statute required that a judgment be rendered in favor of the plaintiff. The trial court relied upon the Coe, supra decision even though the court indicated its recognition that the legislature intended to allow recovery in cases of this type.

Appellant filed his Notice Of Appeal with the First District Court of Appeal on September 11, 1990. After consideration of the parties' briefs and oral arguments, the First District Court

of Appeal filed its opinion on May 14, 1991. The Court's opinion was a per curiam affirmation of the trial court's Amended Final Judgment. The First District Court of Appeal based its ruling, as did the trial court, on the Second District Court of Appeal's opinion in Coe v. B & D Transportation Services, Inc., 561 So.2d 469 (Fla. 2d DCA 1990).

On May 23, 1991, Appellant filed his Motion For Rehearing And Certification with the First District Court of Appeal. The basis of Appellant's motion was the recent Third District Court Of Appeal's opinion, Memorial Sales, Inc. v. Pike, 16 F.L.W. 1235 (Fla. 3d DCA May 7, 1991). The court in Memorial held that Section 45.061, Florida Statutes (1989) does not require that the Plaintiff obtain a judgment prior to sanctions being imposed. Id. The Third District Court of Appeal's ruling in Memorial conflicts with the Second District Court of Appeal's ruling in Coe, supra. The First District Court Of Appeal denied Appellant's Motion For Rehearing And Certification by its order dated June 17, 1991.

On July 18, 1991, Appellant filed his Notice To Invoke Discretionary Jurisdiction with this Court. After consideration of the parties' Briefs on Jurisdiction, this Court accepted jurisdiction of this case and directed the parties to file their briefs on the merits.

SUMMARY OF ARGUMENT

Plaintiff brought suit against Defendant alleging an intentional assault with a deadly weapon. The jury returned a verdict which found that Defendant did not assault Plaintiff. Thereafter, Final Judgment was entered in favor of Defendant. The Defendant had filed an offer of judgment pursuant to Section 45.061, Florida Statutes (1989). The trial court, in its Final Judgment, ruled that the offer of judgment had been unreasonably rejected and applied the sanctions set forth in Section 45.061, Florida Statutes (1989), which sanctions were the award of attorney's fees and costs.

After the entry of Final Judgment, Plaintiff filed a Motion For Rehearing Or To Alter Or Amend Final Judgment pursuant to Fla.R.Civ.P. 1.530. At the hearing on Plaintiff's motion, the trial court reversed its position as to the effect of Section 45.061, Florida Statutes (1989) and held that Defendant-Appellant was not entitled to attorney's fees because judgment had not been rendered in favor of Plaintiff-Appellee, relying on Coe v. B & D Transportation Services, Inc., 561 So.2d 469 (Fla. 2d DCA 1990).

Since the trial court entered its Amended Final Judgment, the Third District Court of Appeal has decided the case of Memorial Sales, Inc. v. Pike, 16 F.L.W. 1235 (Fla. 3d DCA May 7, 1991). The court in Memorial held that Section 45.061 Florida Statutes

(1989) did not require that a Plaintiff obtain a judgment prior to sanctions being imposed. The Memorial decision is in direct conflict with the court's decision in Coe v. B & D Transportation Service, Inc., 561 So.2d 469 (Fla. 2d DCA 1990).

The court's decision in Coe, supra was erroneous in that the court failed to properly analyze and interpret its previous decisions and decisions from other District Courts of Appeal. Previous court decisions held that in order for a defendant to recover attorney's fees pursuant to an offer of judgment filed under Section 768.79, Florida Statutes, judgment must be entered in favor of the plaintiff. See Kline v. Publix Supermarkets, Inc., 568 So.2d 929 (Fla. 2d DCA 1990) and Rabatie v. U.S. Security Insurance Company, 14 F.L.W. 1753 (Fla. 3d DCA Aug. 4, 1989). However, Appellant in the instant case has pursued attorney's fees pursuant to his offer of judgment filed under Section 45.061, Florida Statutes (1989).

Section 45.061, Florida Statutes (1989) does not require that plaintiff obtain a judgment, as required by Section 768.79, Florida Statutes (1989) but only that the judgment entered by the court be at least twenty-five percent less than the offer rejected. This distinction between the two statutes was recognized by the First District Court of Appeal in Makar v. Investors Real Estate Management, Inc., 553 So.2d 298 (Fla. 1st

DCA 1989).

This court is requested to reverse the trial court's Amended Final Judgment based upon Coe v. B & D Transportation Services, Inc., 561 So.2d 469 (Fla. 2d DCA 1990) by adopting the Third District Court of Appeal's ruling in Memorial Sales, Inc. v. Pike, 16 F.L.W. 1235 (Fla. 3d DCA May 7, 1991).

ARGUMENT

WHETHER A DEFENDANT IN A CIVIL ACTION IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES PURSUANT TO SECTION 45.061, FLORIDA STATUTES (1989) WHEN THE JURY RETURNS A VERDICT OF NO LIABILITY ON BEHALF OF DEFENDANT

In 1987, the Legislature of the State of Florida adopted Sections 45.061 and 768.79, Florida Statutes. These statutes provided sanctions for parties who unreasonably rejected offers of settlement. The statutes clearly were designed to encourage settlement dicsussions and to provide a deterent and sanction against parties who persisted in pursuing frivilous litigation at the expense of the responding party. Prior to the enactment of these statutes, a Plaintiff could reject offers of settlement and proceed to a jury trial without any concern or exposure for the expenses and losses caused to the Defendant who was being required to defend a frivilous action.

In an effort to deter a continuation of the instant case, Appellant filed an Offer of Settlement pursuant to Section 45.061, Florida Statutes (1989) on January 5, 1989. (ROA 133) This offer was unreasonably rejected by Appellee. The case proceeded to trial with the jury returning a verdict of no liability on behalf of Appellant. The trial court then entered its Amended Final Judgment on August 28, 1990. In its Amended Final

Judgment, the trial court held that Appellant was not entitled to attorney's fees pursuant to Section 45.061, Florida Statutes, (1989) relying upon the holding of Coe v. B & D Transportation Services, Inc., 561 So.2d 469 (Fla. 2d DCA 1990).

In order to understand the relationship between Section 45.061, Florida Statutes and the court's ruling in Coe, the difference between Section 45.061 and Section 768.79, Florida Statutes should be examined. Section 768.79 provides:

> In any action to which this part applies, if a defendant files an offer of judgment which is not accepted by the plaintiff within thirty (30) days, 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 twenty-five percent less than such offer, and the court shall set-off such costs and attorney's fees against the award. (emphasis added)

Section 45.061(2), Florida Statutes provides:

> An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least twenty-five percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least twenty-five percent less than the offer rejected. (emphasis added)

Clearly, the language in Section 768.79, Florida Statutes (1989) referring to a judgment obtained by the plaintiff is not found in Section 45.061, Florida Statutes (1989). The latter

refers only to the entry of a judgment, which obviously can be in favor of either a plaintiff or a defendant.

The Third District Court of Appeal has recognized the difference in language between Section 45.061, Florida Statutes (1989) and Section 768.79, Florida Statutes (1989) in Memorial Sales, Inc. v. Pike, 16 F.L.W. 1235 (Fla. 3d DCA May 7, 1991). Memorial involved a personal injury claim by Plaintiffs. The Defendant filed an offer of settlement pursuant to Section 45.061, Florida Statutes (1987) which the plaintiffs rejected. The jury returned a verdict for one of the defendants. Defendants then filed a Motion To Tax Costs And Attorney's Fees against Plaintiffs pursuant to Section 45.061. The trial court denied the motion on the grounds that Plaintiffs had not obtained a judgment. Id.

The Third District Court of Appeal held that "unlike Section 768.79(1)(a), Section 45.061(2)(b), Florida Statutes (1987) does not require that the Plaintiff obtain a judgment prior to sanctions being imposed." Accordingly, the Defendants were entitled to recover the costs and attorney's fees which the parties had previously stipulated as reasonable. Id.

Based on the Third District Court of Appeals ruling in Memorial, Appellant, Clyde Timmons, is entitled to recover

costs and reasonable attorney's fees from Appellee, Bonnie S. Combs, pursuant to Section 45.061, Florida Statutes (1989).

It is anticipated that Appellee will again attempt to rely on the Second District Court of Appeal's opinion in Coe v. B & D Transportation Services, Inc. 561 So.2d 469 (Fla. 2d DCA 1990). This Court will remember that the trial court relied on Coe when it entered its Amended Final Judgment. However, it is clear that the Second District Court's ruling in Coe is an erroneous decision and not supported by the plain language of Section 45.061, Florida Statutes (1989).

Until the erroneous decision was rendered in Coe, the courts of this state had carefully distinguished between Section 45.061 and Section 768.79, Florida Statutes, and the requirement in Section 768.79, that there be a judgment in favor of a plaintiff had been applied only to cases in which an award of attorney's fees had been made under Section 768.79. Prior to the Coe decision, no court had ever required that there be a judgment in favor of the plaintiff in order for a defendant to recover attorney's fees under Section 45.061, Florida Statutes (1989) The reason is simple. As pointed out above, Section 45.061, Florida Statutes (1989) does not require a judgment in favor of the plaintiff.

The original case to apply the requirement of a judgment in

favor of the plaintiff was Rabatie v. U.S. Security Insurance Company, 14 F.L.W. 1753 (Fla. 3d DCA Aug. 4, 1989). In Rabatie, the plaintiff had sued his insurer over a coverage question. The insurer had made an offer of judgment under Section 768.79, Florida Statutes (1987). The Third District Court of Appeal held that the trial court erred in entering an award of attorney's fees in favor of the defendant/insurer because a judgment had not been entered in favor of the plaintiff as required by the plain language of Section 768.79, Florida Statutes (1989). Id. at 1753.

The First District Court of Appeal was the first court to discuss the difference between Sections 768.79 and 45.061, Florida Statutes in Makar v. Investors Real Estate Management, Inc., 553 So.2d 298 (Fla. 1st DCA 1989). In Makar, the court emphasized, that Section 768.79 required a "judgment obtained by the plaintiff". The court further emphasized, that Section 45.061 required only an "entry of judgment". Id. at 299.

The Makar decision was followed by Kline v. Publix Supermarkets, Inc., 568 So.2d 929 (Fla. 2d DCA 1990) which cited to Makar as authority. In Kline the defendant, Publix Supermarkets, Inc. had judgment entered in its favor and against the plaintiff, Virginia Kline, and sought atttorney's fees pursuant to an offer of judgment which had been made pursuant to Section 768.79, Florida Statutes (1987). The trial court denied

a recovery of attorney's fees and the issue was appealed to the Second District Court of Appeal of Florida. The Second District Court of Appeal upheld the trial court and relied upon the decisions in Rabatie, supra and Makar, supra and specifically held that Section 768.79, Florida Statutes (1987) does not provide for attorney's fees where the defendant prevails in the underlying action and, that in order for a defendant to recover costs and attorney's fees under Section 768.79, there must be a "judgment for the plaintiff". Id. at 1320. Although Kline also spoke to the issues of the award of attorney's fees under Fla.R.Civ.P. 1.442, the court did not deal with nor rule upon whether attorney's fees would have been awardable in the case under Section 45.061, Florida Statutes (1987) if an offer had been made under that statute.

As set forth in the Statement of the Case and Facts, Final Judgment for attorney's fees, costs, and expenses was entered in favor of Appellant-Defendant (ROA 141). Thereafter, Plaintiff-Appellee filed her Motion for Rehearing Or To Alter Or Amend Final Judgment on May 7, 1990 (ROA 143). The decisions in Kline, supra and Coe, supra were not published until May 9, 1990, and May 25, 1990, respectively. Nevertheless, the trial court in this action reversed its ruling and entered its Amended Final Judgment relying upon the Coe, supra decision, which decision

cited to Kline, supra as controlling precedent. It is the position of Appellant that the trial court relied upon an erroneous decision as Coe, supra can clearly be shown to be an incorrect interpretation of statutory and case law.

In Coe v. B & D Transportation Services, Inc., 561 So.2d 469 (Fla. 2d DCA 1990) a final summary judgment had been entered in favor of the defendant and the court had awarded costs and attorney's fees to the defendant. The court affirmed the summary judgment with regard to liability and the judgment for a general award of costs to the defendant under the statute relating to court costs, Section 57.041, Florida Statute. The court then proceeded to commit error in its ruling relating to the award of attorney's fees.

The defendant in Coe had served offers of judgment on the plaintiff. From the decision it is clear that the offers of judgment were made under both Sections 45.061 and 768.79, Florida Statutes. The final paragraph of the Coe decision contains the patent error of the decision:

> This court recently held in Kline v. Publix Supermarkets, Inc., Nos. 89-00345 and 89-01182 (Fla. 2d DCA May 9, 1990) [15 FLW D1320], that before a defendant is entitled to an award of attorney's fees and costs pursuant to an offer of judgment, there must be a judgment rendered in favor of plaintiff.

> Because judgment was not rendered in favor of the plaintiff below, we reverse the order finding [defendant] entitled to attorney's fees. Id. at 1442.

The error is obvious. The Kline, supra decision did not give any consideration to Section 45.061, Florida Statutes (1987). The authorities relied upon in Kline for the proposition that Section 768.79, Florida Statutes (1987) required a judgment in favor of the plaintiff, did not hold or imply, in any fashion , that Section 45.061, Florida Statutes (1989) would also require a judgment for the plaintiff. See, Rabatie v. U.S. Security Insurance Company, 14 F.L.W. 1753 (Fla. 3d DCA Aug. 4, 1989) and Makar v. Investors Real Estate Management, Inc., 553 So.2d 298 (Fla. 1st DCA 1989). In fact, in Makar, the First District Court of Appeal specifically indicated the distinguishing language regarding this point when it emphasized and italicized the requirement that Section 768.79, Florida Statutes (1987) required "judgment obtained by the plaintiff" while Section 45.061, Florida Statutes (1987) required only the "entry of judgment". Id. at 299.

The Coe, supra decision is inconsistent with the clear language of Section 45.061, Florida Statutes (1989) and there is no precedent for adding the requirement of the plaintiff obtaining a judgment in the application of Section 45.061. The

Second District Court of Appeal has attempted to insert additional language into Section 45.061 which is improper.

Speculation as to how the error in Coe, supra could have occurred would serve no useful purpose. The Coe decision was entered in error and is an incorrect statement of the law. As such, this Court should reverse the trial court's Amended Final Judgment in light of the Third District Court of Appeal's opinion in Memorial Sales, Inc. v. Pike, 16 F.L.W. 1235 (Fla. 3d DCA May 7, 1991) and should reverse the opinion of the First District Court of Appeal.

CONCLUSION

The Amended Final Judgment entered herein was entered upon the trial court's determination that it was bound by the ruling in Coe v. B & D Transportation Services, Inc., 561 So.2d 469 (Fla. 2d DCA 1990), as there was no contrary decision of the First District Court of Appeal or the Supreme Court of Florida.

Since the entry of the Court's Amended Final Judgment, the Third District Court of Appeal has decided the case of Memorial Sales, Inc. vs. Pike, 16 F.L.W. 1235 (Fla. 3d DCA May 7, 1991). The court's holding in Memorial demonstrates that Appellant is entitled to recover attorney's fees pursuant to Section 45.061, Florida Statutes (1989) under the instant circumstances. The court in Memorial, contrary to the decision in Coe, held that a Plaintiff need not obtain a judgment before Defendant can recover attorney's fees pursuant to Section 45.061. As previously argued, the court's decision in Coe was erroneous as the court disregarded the obvious differences between Sections 768.79 and 45.061, Florida Statutes and attempted to insert language into Section 45.061.

This Court should reverse the trial court's Amended Final Judgment and hold that Section 45.061, Florida Statutes does not require the entry of a judgment in favor of the Plaintiff before a Defendant is entitled to attorney's fees and costs.

Respectfully submitted this 13th day of November, 1991.

DARBY, PEELE, BOWDOIN & PAYNE

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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 Appellee, 228 East Duval Street, Lake City, Florida 32055, this 13th day of November, 1991.

DARBY, PEELE, BOWDOIN & PAYNE

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