OA 3-2-92

SUPREME COURT OF FLORIDA

CASE NO. 78,272
DISTRICT COURT OF APPEAL
FIRST DISTRICT NO. 90-2796

CLYDE TIMMONS,

Petitioner,

v.

BONNIE S. COMBS,

Respondent

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CITATIONS

Other citations:

Section 45.062, Florida Statutes (1987)
Section 768.79, Florida Statutes (1987)
Rule 1.442, Florida Rules of Civil Procedure
Rule 1.530, Florida Rules of Civil Procedure

STATEMENT OF THE CASE AND OF THE FACTS

This is an action by Respondent, as Plaintiff, against Petitioner, as Defendant, for compensatory and punitive damages based upon the intentional tort of assault alleged to have been committed by Defendant against Plaintiff.

On November 16, 1988, Respondent filed her initial Complaint, alleging that Petitioner committed an intentional assault upon her by willfully driving his automobile at her in such a manner as to reasonably place her in fear of receiving great bodily harm and injury. She sought both compensatory and punitive damages (ROA, pages 1 and 2). On December 9, 1988, Respondent filed an Amended Complaint by which she added, as Count II, an action based upon simple negligence on the part of the Petitioner in the operation of his automobile and sought only compensatory damages for emotional distress caused by the same acts of the Petitioner as set forth in Count I.

Answer was filed as to Count I (assault), denying the allegations material to that action and asserting as an affirmative defense, negligence on the part of the Plaintiff. The affirmative defense was subsequently striken (ROA, page 50 and 50A, pages 65 and 55, paragraph 5). A Motion to Dismiss was made as to Count II (negligence) upon the grounds that that Count alleged negligent assault, which

in law is contradictory, and that there were no allegations of impact or other physical injury to support an action for emotional distress (ROA, pages 6 and 7).

On March 29, 1989, Respondent voluntarily dismissed the negligence count of her Amended Complaint (ROA, page 12) and noticed the case at issue and ready for trial as to the assault count (ROA, page 11). Petitioner moved for Summary Judgment (ROA, page 41) which was denied (ROA, pages 65 and 66, paragraph 4). After much intervening activity not material to the appeal, the cause, as thus postured, went to trial before a jury that, on February 23, 1990, returned its verdict for the Petitioner, Defendant (ROA, pages 114 and 115).

During the course of the litigation, the Petitioner made the following offers to settle the Respondent's claim:

> Offer of Judgment pursuant to Florida Statute 768.79 (for $101.00), served January 5, 1989, filed with the lower Court January 6, 1989 (ROA, page 10)
>
> Offer of Settlement pursuant to Florida Statute 45.061 (for $101.00), served January 5, 1989, filed with the lower Court May 1, 1990 (ROA, page 133)
>
> Offer of Settlement (45.061), or in the Alternative, Offer of Judgment (768.79), or in the Alternative, Offer of Judgment (Rule 1.442)(again for $101.00), served March 29, 1989, filed with the lower Court March 31, 1989 (ROA, pages 13 and 14)
>
> Offer of Judgment pursuant to Florida Statutes 768.79 (for $1,001.00) served and filed with lower Court July 26, 1989 (ROA, page 24)

Each of the offers were refused by the Respondent.

On April 3, 1990, Petitioner filed his Motion to Enter Final Judgment Including Attorneys' Fees, Costs and Expenses (ROA, pages 116 through 118), based on the verdict having been in favor of the Petitioner and reciting the making of each of the offers to settle, including the last offer of July 26, 1989, under Section 768.79, Fla.Stat.(1989).

Hearing on the motion was held before the lower Court on April 23, 1990 (See "Judge's notes", ROA, pages 123 and 124), and was followed by memoranda of the parties for their respective positions on whether Petitioner's attorneys' fees were awardable (ROA, pages 120 through 122, and pages 134 through 140). The lower Court rendered its Final Judgment on May 1, 1990 (ROA, pages 141 and 142), awarding attorneys' fees and expenses to Petitioner in the sum of $8,266.87 for Respondent's failure to accept the offer made January 6, 1989, under Section 45.061, Fla.Stat.(1989), which offer was filed with the lower Court on May 1, 1990 (ROA, page 133).

Respondent timely filed Motion for Rehearing or to Alter or Amend Final Judgment under Rule 1.530, F.R.C.P. (ROA, page 143), and, over Petitioner's objection, hearing was held on that motion June 26, 1990 (See "Judge's notes, ROA, pages 155 through 157). On August 28, 1990, the lower Court rendered its Amended Final Judgment (ROA, pages 170 through 172) in favor of Petitioner and awarded him costs

usually recoverable by a prevailing party, but denied attorney's fees and other expenses, relying in that regard upon Coe v. B & D Transportation Services, Inc., 561 So.2d 469 (Fla. 2nd DCA, 1990).

Petitioner appealed to the District Court of Appeal, First District of Florida, which rendered its decision June 17, 1991, affirming the Trial Court's judgment (579 So.2d 840). Almost concurrent with the rendition of that opinion was the opinion of the District Court of Appeal, Third District in Memorial Sales, Inc. v. Pike, 579 So.2d 778, by which the latter Court held contrary to the decision in the instant case and the decisions of the Second District. The Petitioner then sought review of the instant case based upon the discretionary "conflict" jurisdiction of this Court.

SUMMARY OF ARGUMENT

An examination of the overall wording of Section 45.051, Fla.Stat.(1987), reveals that it is not applicable to instances where, as here, verdict was rendered in favor of the defendant-offeror. For its applicability it is necessary that the plaintiff recover judgment in plaintiff's favor before sanctions involving attorney's fees and other costs may be invoked by an offeror (be he defendant or plaintiff). In so holding, the District Court of Appeal, First District, recognized the similar holdings of the District Court of Appeal, Second District. The contrary holding of the District Court of Appeal, Third District, in Memorial Sales is erroneous and must be overruled.

ARGUMENT

WHETHER THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, ERRED IN AFFIRMING THE TRIAL COURT'S JUDGMENT DENYING PETITIONER/DEFENDANT'S ATTORNEYS' FEES SOUGHT UNDER SECTION 45.061, FLA.STAT.(1987).

The District Court of Appeal, First District, after being presented with briefs and oral arguments similar to those now being tendered to this Court, held that the language of Section 45.061 did not admit to a construction awarding attorney's fees to a prevailing defendant-offeror against a non-prevailing plaintiff-offeree. In so holding, that Court aligned itself with the District Court of Appeal, Second District, as announced in Coe v. B & D Transportation Services, Inc., 561 So.2d 469 (Fla. 2nd DCA, 1990) and Norris & Associates Of Naples, Inc. v. Elkins, 570 So.2d 1386 (Fla. 2nd DCA, 1990) (and later reaffirmed by the Second District in Westover v. Allstate Insurance Company, 581 So.2d 988, subsequent to the instant decision.)

However, because the District Court, Third District, in Memorial Sales, Inc. et al. v. Pike, 579 So.2d 778 (Fla. 3d DCA, 1991), expressly held to the contrary, conflict arose. The Third District found that the language of Section 45.061 did not exclude an offeror-defendant, which enjoyed a directed verdict in its favor, from recovering attorney's fees from the plaintiff-offeree. That Court did not recognize nor treat the conflicting views of its sister District Courts, the Second District (holding the section

inapplicable) and the Fifth District (holding the section unconstitutional).

In the instant case, the First District Court agreed with the Respondent that an analysis of the wording of Section 45.061 leads to the conclusion that it requires that the plaintiff recover judgment before the defendant-offeror may recover attorney's fees, as does Section 768.79 (Makar v. Investors Real Estate Management, Inc., 553 So.2d 298 (Fla. 1st DCA, 1989)) and Rule 1.442, F.R.C.P. (Kline v Publix Supermarkets, Inc., 568 So.2d 929 (Fla. 2nd DCA, 1990) as to present form of that rule and B & H Construction v. Tallahassee Community College, 542 So.2d 382 (Fla. 1st DCA, 1989) rev.den. 549 So.2d 1013, as to the former form of the rule).

As pertinent here, Section 45.061(2) provides:

> An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 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 25 percent less than the offer rejected. For the purposes of this section, the amount of the judgment shall be the total amount of money damages awarded plus the amount of costs and expenses reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer for which recovery is provided by operation of other provisions of Florida law. (emphasis supplied)

It does not mention a judgment for the defendant and clearly such is not contemplated by that section. This conclusion

is further supported by the opening phrase of subsection (2) of Section 45.061:

> "(2) If, upon motion by the offeror within 30 days after entry of judgment, the court determines that an offer was rejected unreasonably, * * * " (Emphasis supplied)

It would be logically contradictory to read into this portion, together with the portion quoted above it, that a judgment for damages and costs is to first be entered for the prevailing defendant, who only then may move for award of attorney's fees and other expenses. The clear intent is that this section is to apply only to instances where the plaintiff (or counter-plaintiff) recovers judgment.

Although not directly on point, it is interesting to note that this Court, the Florida Supreme Court, in adopting the current Rule 1.442, F.R.C.P., effective January 1, 1990, was trying to resolve confusion in the provision of Section 768.79, and 45.061, Fla.Stat. (1987), and its then existing Rule 1.442. The Florida Bar Re: Amendment to Rules, 550 So.2d 442 (Fla. 1989). The Court was presented various proposals for sanctions for refusal to accept offers of settlement and, indeed, was urged by the Board of Governors of the Florida Bar:

> "to retain the current rule of sanctions but to extend the coverage to all parties" (550 So.2d at page 442; emphasis supplied).

Yet, expressing that the new rule adopted by that decision reflected "the major components of the Statutes in question"

(550 So.2d at p. 442), this Court nonetheless made that rule applicable only to instances in which judgment is recovered by the Plaintiff. 1.442(1)(B)(i) & (ii), F.R.C.P. (1990), and see Kline v Publix Supermarkets, Inc., 568 So.2d 929 (Fla. 2nd DCA, 1990).

Accordingly, the decision of the District Court of Appeal, First District, in the instant case should be affirmed and the decision of the District Court, Third District, in Memorial, supra, should be overruled.

COMMENT

Although not necessary to the determination of the decision here sought to be reviewed, the undersigned, as a practicing member of the trial Bar of Florida and as an officer of this Court, feels constrained to mention to the Court the current status, in the various Districts, of decisional law pertaining to the three devices by which attorneys' fees may be sought for the failure of an offeree to settle.

As stated above, there seems at this point to be uniformity with regard to Rule 1.442; that is, that it is unquestionably constitutional and that it applies only to instances where the plaintiff recovers judgment. Kline and Norris, supra, Second District, B & H Construction, supra, First District. However, as to Sections 768.79 and 45.061, Fla.Stat., the picture is somewhat different.

The First District in Hughes v. Goolsby, 578 So.2d 348 (Fla. 1st DCA, 1991) held 768.79 Fla.Stat. (1989) unconstitutional for the reasons stated in Milton v. Leapai, 562 So.2d 804 (Fla. 5th DCA, 1990) with respect to the Fifth District's determination that section 45.061 is unconstitutional. The First District certified its finding to this Court, but the party in that case offended by the decision chose not to seek review of the question certified. Therefore, in the First District, Section 768.79 is no

longer applicable in any case. The other districts do not appear to have treated the question of the constitutionality of 768.79, but have uniformly held it applicable only where the plaintiff recovers judgment. See, for example, Rabatie v. U.S. Security Ins. Co., 581 So.2d 1327 (Fla. 3d DCA, 1989, reh.den. July 2, 1991); Kline, supra.

With regard to Section 45.061, the picture is one of total chaos. The Fifth District, in Milton, supra, held it unconstitutionally infringed upon the rule-making power of this Court and struck it. It certified the question to this Court where it now stands under docket number 76,241. Counsel for one of those parties informs us that oral argument was had on December 3, 1990.

The Second District has specifically rejected the argument that 45.061 unconstitutionally infringes on the Court's authority (A. G. Edwards & Sons, Inc. v. Davis, 559 So.2d 235 (Fla. 2nd DCA, 1990)), but holds it applicable only where plaintiff recovers judgment. Coe, Norris, and Westover, supra.

The Third District, as stated above, held in Memorial that the section was applicable in a case where the defendants had verdicts in their favor, but avoided the constitutionality question in that case.

In the instant case, the First District, in its footnote at page 841 of 579 So.2d referred to its holding as

to Section 768.79 in Hughes, but stated that the constitutionality question had not been presented in the instant case. However, it is clear from that Court's reliance in Hughes on the rationale of the Fifth District, expressed in Milton as to 45.061, in holding 768.79 unconstitutional, that the First District would hold similarly with regard to 45.061 when that issue is properly before that Court. Since the Supreme Court now has the instant case and the Milton v. Leapai case pending before it, the opportunity to clarify and resolve these differences among the Districts is most invitingly presented and it is hoped that this Court will accept that opportunity for the benefit of the Bar.

CONCLUSION

The decision of the District Court of Appeal, First District, in the instant case should be affirmed and the decision of the District Court of Appeal, Third District, in Memorial Sales, Inc. et al. v. Pike, 579 So.2d 778 (Fla. 3d DCA, 1991), should be overruled.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on the Merits has been furnished by hand delivery, this 5th day of December, 1991, to THOMAS J. KENNON, III, ESQUIRE, Attorney for Petitioner, Post Office Drawer 1707, Lake City, Florida 32056-1707.

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