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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 REPLY BRIEF

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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 PART OF DEFENDANT.

Appellee argues that an analysis of the wording of Section 45.061, Florida Statutes (1989) leads to the conclusion that the statute requires that judgment be entered in favor of a plaintiff before a defendant may recover attorney's fees. Appellee supports her argument by pointing out that Section 45.061(2) does not mention a "judgment for the defendant". The obvious flaw in Appellee's argument is that Section 45.061(2) does not mention a "judgment for the plaintiff" either. The pertinent part of Section 45.061(2) reads:

> 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. (emphasis added)

If one accepts Appellee's argument that Section 45.061(2) must mention judgment for the defendant before defendant is entitled to attorney's fees then, as a matter of consistency, one must accept that Section 45.061(2) must mention judgment for the plaintiff before concluding that Section 45.061(2) requires "judgment in favor" of plaintiff before a defendant is entitled to attorney's fees. Because the wording of Section 45.061(2) does not specify a judgment for plaintiff or defendant, one must look

to the requirement in the statute concerning the amount of the offer as compared to the amount of the judgment entered by the Court in order to determine the intent of the statute.

The Fourth District Court of Appeal in the recent case of Winn Dixie Stores, Inc. v. Elbert, 16 FLW 2954 (Fla. 4th DCA November 27, 1991) analyzed the plain language of Section 45.061(2) and concluded that the statute does not require that judgment be entered in favor of plaintiff before a defendant is entitled to an award of attorney's fees. The court confirmed that a verdict awarding a plaintiff nothing is certainly 25 percent less than any offer which would activate the applicable portion of the statute. Id. The court also recognized the same common sense argument that Appellant has advanced throughout this appeal. The court recognized that, "it is unreasonable to think that the legislature in enacting either or both of these statutes (45.061 and 768.79) intended to award attorney's fees in the event of a verdict of $1.00 where an appropriate offer had been filed but not in the case of a 'defense verdict' with an appropriate offer". Id at 2954. Further, it seems extremely unfair that a defendant can make an offer pursuant to Section 45.061 which is not accepted and then obtain a judgment of no liability but cannot collect fees, while at the same time, if a plaintiff makes an offer which is not accepted and gets a judgment in its favor, the plaintiff can collect attorney's fees.

Appellee argues that the clear intent of Section 45.061(2) is

to apply only to cases where the plaintiff recovers judgment, without providing this Court with any citations indicating the true intent of the Florida Legislature. The true intent of the Legislature is clear when one analyzes the 1990 amendment to Section 768.79. After several District Courts of Appeal interpreted Section 768.79 to require that plaintiff obtain a judgment before defendant is entitled to an award of attorney's fees, the legislature amended Section 768.79. Kline v. Publix Supermarkets, Inc., 568 So.2d 929 (Fla. 2d DCA 1990); Mujica v. Turner, 582 So.2d 24 (Fla. 3d DCA 1991); Oriental Imports, Inc. v. Alilin, 559 So.2d 442 (Fla. 5th DCA 1990) The pertinent portion of 768.79 now reads as follows:

> The defendant shall be entitled to recover reasonable costs and attorney's fees incurred by him or on his behalf....if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer....(emphasis added)

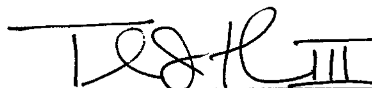
It is clear that the Florida legislature intended that Section 768.79 apply to those cases in which a judgment of no liability is entered. The legislature did not amend Section 45.061 which deals with similar circumstances as Section 768.79 although, the legislature is presumed to have knowledge of prior existing laws. State v. Dunmann, 427 So.2d 166 (Fla. 1983). It is arguable therefore that the legislature concluded that the wording of Section 45.061 was sufficiently clear to apply to those cases in which a judgment of no liability is entered by the court.

Appellant has stated his position regarding the First District Court of Appeal's misplaced reliance on the erroneous decision in Coe v. B & D Transporation Services, Inc., 561 So.2d 469 (Fla. 2d DCA 1990) and will not re-argue that point here. Appellant respectfully urges this Court to interpret Section 45.061, Florida Statutes (1989) according to the plain language of the statute. This Court should adopt the interpretation of Section 45.061 found 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).

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. vs. Pick, 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 sumbitted,



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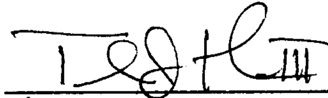
CERTIFICATE OF SERVICE

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 23ND day of December, 1991.

DARBY, PEELE, BOWDOIN & PAYNE

BY: 

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