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CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,253

METROPOLITAN DADE COUNTY,

Petitioner,

vs.

JONES BOATYARD, INC.,

Respondent.

BRIEF OF PETITIONER

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By

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And

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PRELIMINARY STATEMENT

The Appendix of Metropolitan Dade County is attached hereto and contains the instant decision of the Third District Court of Appeal in Jones Boatyard, Inc. v. Metropolitan Dade County, Case Nos. 90-1981 and 90-1087 (A-1) and the December 17, 1991 order of the Third District which denied a motion for re-hearing (A-2).

STATEMENT OF THE CASE AND FACTS

In November of 1989, Metropolitan Dade County filed an offer of judgment in amount of \$19,999.00. In 1985, Dade County acquired legal title to the subject vessel and its equipment pursuant to criminal forfeiture proceedings. In August of 1985, Metropolitan Dade County discovered the equipment was missing from the yacht when it was sold at auction. Dade County subsequently filed its Complaint. The jury returned a verdict in favor of the Plaintiff, Metropolitan Dade County, on all issues, in the amount of \$47,000.00. Final Judgment was entered in favor of Metropolitan Dade County in the amount of \$47,000.000 plus \$16,250.00 for attorney fees.

The Third District Court of Appeals found that at the time of the loss, which had to be no later than August 6, 1985, there was no statute which permitted attorney fees in this circumstance. However, the Third District held that its decision created direct conflict with A.G. Edwards and Sons

Inc. v. Davis, 559 So.2d 235 (Fla. 2d DCA 1990).

Specifically, the Court held:

As to the sixth point, which goes to the validity of the award of attorney's fees as a result of an offer of judgment, we find that at the time of the loss, which had to be no later than August 6, 1985, there was no statute which permitted attorney fees in this circumstance. Section 768.79 which was enacted in 1986 and became effective on July 1, 1986. The Second District Court of Appeal has construed the statute as permitting an award of fees if the offer of judgment was subsequent to the effective date of §768.79. A.G. Edwards and Sons, Inc. v. Davis, 559 So.2d 235 (Fla. 2d DCA 1990). The 5th DCA has held to the contrary. Rainhardt v. Bono, 564 So.2d 1233 (Fla. 5th DCA 1990).

We align ourselves with the opinion and decision of Rainhardt v. Bono, supra, and thereby this opinion and decision will create direct conflict with A.G. Edwards and Sons, Inc. v. Davis, supra, of the Second District Court of Appeal.

See A-1, Jones Boatyard v. Metropolitan Dade County, Third DCA Case Nos. 90-1981 and 90-1087 (Fla. 3d DCA, November 5, 1991), at p.3 (emphasis added).

SUMMARY OF ARGUMENT

The Second District Court of Appeal's opinion is in direct and express conflict with those of the First and Third District Courts of Appeal on the issue of whether an offer of judgment is valid where it was filed after the enactment date of the statute but where the cause of action accrued prior to the effective date of the statute. The Second District held that the only event crucial to operation of the statute, is the date the offer of judgment was made. In the case at bar,

Metropolitan Dade County filed its offer of judgment in 1989, clearly after the enactment of the offer of judgment statute.

This Court has conflict jurisdiction. The Court should exercise its jurisdiction because the holding in A.G. Edwards is in direct conflict with that of the instant case. It is only upon the making of an offer of settlement that the respective rights and duties are aligned according to the requirements of the statute. A.G. Edwards. The crucial date therefore is when the offer of judgment was made relative to the enactment of the statute and not the date of the cause of action. The Third District's opinion, in direct conflict with A.G. Edwards, expressly and directly rejected the holding of Edwards.

ARGUMENT

THE THIRD DISTRICT'S DECISION IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THOSE OF THE SECOND AND FOURTH DISTRICT COURTS OF APPEAL.

This Court has discretionary jurisdiction 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. Florida Constitution, Article V, §3(b)(3); Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

The Third District held in its opinion that at the time of the loss of the equipment on the boat which was the basis of a bailment and negligence action, that there was no statute which permitted attorney fees. The Third District recognized

that "this opinion and decision will create direct conflict with A.G. Edwards and Sons, Inc. v. Davis, supra of the Second District Court of Appeal." A-1, at 3. A.G. Edwards explains that the attorney fee statutory cannot be retroactively applied. However, that court held that the "operative event, the only event crucial to operation of the statute, is the making of an offer of settlement. Only upon the making of an offer of settlement are the respective rights and duties of the parties aligned according to the requirements of the statute, and at that time both parties are free to respond or not to the policies embodied in the statutory scheme without reference to any earlier events." Id. at 237. In A.G. Edwards, the offer of settlement was made on June 19, 1988, after the enactment of the attorney fee statutory. Likewise, in the present case, the offer of judgment was made in November 1989, well after the enactment of the attorney fee statute.

The Fourth District Court of Appeal has also held that the attorney fee statute is substantive but that the triggering event is not the accrual of the cause of action but rather the making of the offer of settlement. Hammerle v. Bramalea, 547 So.2d 203 (Fla. 4th DCA 1989). The court in Hammerle explained that appellant therein argued that because the cause of action arose and the litigation commenced before the effective date of the statute, the attorney fee statute does not apply. Although the Hammerle court recognized the attorney fee statute is substantive, it held that the only

operative event, crucial to the operation of the statute, is the making of an offer of settlement. Id. at 204. Because both the Second and Fourth Districts have held that the operative event of the attorney fee statutes is the making of the offer or demand for settlement and not when the cause of action accrues, their holdings create direct and express conflict with the Third District and Fifth District. Therefore, this Court should decide this issue to resolve the conflicts among the District Courts of Appeal.

As a matter of public policy, the better view is that the attorney fee statutes should have as their operative event the date the offer of settlement was made and not the date the cause of action accrues. Until an offer of judgment is made, neither party is potentially liable for attorney fees. It is only when an offer of judgment is made that the respective rights and duties of the parties according to the requirements of the statute are triggered and that the parties can become potentially liable for attorney fees. The whole purpose of the statutes is that when an offer of settlement or demand for judgment is made that the parties are able to consider the offer. The statutes encourage settlement by creating "penalties" if the party unreasonably rejects such an offer. This Honorable Court should accept jurisdiction and adopt the holding of A.G. Edwards and Sons and Hammerle and hold that if the offers of judgment are made after the effective dates of the attorney fee statutes then these statutes are viable and

therefore the trial court's assessment of attorney fees in the case at bar should be upheld.

CONCLUSION

There is a direct conflict in Florida between the District Courts of Appeal as to which event is crucial to the operation of the attorney fee statutes, the date of the cause of action or the date of the making of an offer of settlement. The view of A.G. Edwards and Sons and Hammerle is the better view. This Court should exercise its jurisdiction over this cause and reverse the decision of the Third District Court of Appeal only as to the issue of attorney fees. Because there is no direct and express conflict as to the underlying judgment as a result of the jury verdict, the Supreme Court should not exercise jurisdiction over that part of the case.

Respectfully submitted,

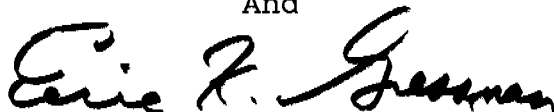
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 16 day of January, 1992, mailed to: DAVID J. HERR, ESQ., at Rodriguez, Herr, Aronson & Blanck, P.A., 9350 South Dixie Highway, Suite 1550, Miami, FL 33156; and HAYDEN and MILLIKEN, P.A., 5915 Ponce de Leon Blvd., Suite 63, Miami, FL 33146-2477.

Eric R. Herrman
Assistant County Attorney

IN THE SUPREME COURT OF FLORIDA

CASE NO.

METROPOLITAN DADE COUNTY,

Petitioner,

vs.

JONES BOATYARD, INC.,

Respondent.

METROPOLITAN DADE COUNTY'S
APPENDIX

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INDEX TO APPENDIX

1. Third District Court of Appeal
Decision in Jones Boatyard, Inc. v.
Metropolitan Dade County, Third DCA
Case Nos. 90-1981 and 90-1087 A-1

2. Order denying motion for re-hearing
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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1991

JONES BOATYARD, INC.,
Appellant,
vs.
METROPOLITAN DADE COUNTY,
Appellee.

**
**
** CASE NOS. 90-1981
90-1087
**
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NOV 5 2 53 PM '91

Opinion filed November 5, 1991.

Appeals from the Circuit Court for Dade County, Frederick
N. Barad, Judge.

Rodriguez, Horr, Aronson & Blanck and David Horr, for
appellant.

Robert A. Ginsburg, County Attorney, and Evan Grob and
Eric K. Gressman, Assistant County Attorneys.

Before BARKDULL, HUBBART and NESBITT, JJ.

BARKDULL, Judge.

Jones Boatyard, Inc. appeals an adverse judgment in the
amount of \$47,000.00 based on a jury verdict and also the award
of attorney's fees to the successful plaintiff. For factual
background of this case see Schmidgall v. Jones Boatyard, Inc.,
526 So.2d 1042 (Fla. 3d DCA 1988).

In 1985, Dade County acquired legal title to a boat pursuant to criminal forfeiture proceedings. In August 1985, Metro Dade County discovered equipment was missing from the yacht when it was sold at auction. The plaintiff/appellee subsequently filed its complaint.

In November 1989, Metro Dade filed an offer of judgment in the amount of \$19,999.00. On the trial's first day, the plaintiff/appellee made an ore tenus motion in limine which was granted by the trial court. The appellant claims this precluded the defense from introducing crucial evidence. The jury was instructed on bailment and was told that after the plaintiff met its burden of proof on bailment, the burden was upon the defendant to explain the loss. The jury returned a verdict in favor of the plaintiff, Metro Dade, on all issues in the amount of \$47,000.00. Final judgment favoring Metro Dade was entered in the amount of \$47,000 plus \$16,250 for attorney's fees. This appeal followed.

The appellant contends that the trial court erred in: (1) granting Metropolitan's unwritten and unnoticed motion in limine just prior to trial, (2) failing to direct a verdict on the issue of a bailment as the required element of exclusivity was missing, (3) failing to direct a verdict on the issue of negligence, (4) failing to strike/exclude Metropolitan's expert witness testimony based on an improper measure of damages, (5) its instructions to the jury, and (6) awarding attorneys's fees pursuant to Florida Statute 678.79 involving a case of action arising before July 1, 1986.

We find no merit in the errors urged as to points one through five. C.W.B. Enterprises, Inc. v. K.A.T. Equipment Corp., 449 So.2d 354 (Fla. 3d DCA 1984); Fruehauf Corporation v. Aetna Insurance Co., 336 So.2d 457 (Fla. 1st DCA 1976); Marine Office-Appleton & Cox Corp. v. Aqua Dynamics, Inc., 295 So.2d 370 (Fla. 3d DCA 1974); J & H Auto Trim Co., Inc. v. Bellefonte Insurance Co., 677 F.2d 1365 (11th Cir. 1982). As to the sixth point, which goes to the validity of the award of attorney's fees as a result of an offer of judgment, we find that at the time of the loss, which had to be no later than August 6, 1985, there was no statute which permitted attorney's fees in this circumstance. Section 768.79 was enacted in 1986 and became effective on July 1, 1986. The Second District Court of Appeal has construed the statute as permitting an award of fees if the offer of judgment was subsequent to the effective date of §768.79. A.G. Edwards & Sons, Inc. v. Davis, 559 So.2d 235 (Fla. 2d DCA 1990). The 5th DCA has held to the contrary. Reinhardt v. Bono, 564 So.2d 1233 (Fla. 5th DCA 1990).

We align ourselves with the opinion and decision of Reinhardt v. Bono, supra, and thereby this opinion and decision will create direct conflict with A.G. Edwards & Sons, Inc. v. Davis, supra, of the Second District Court of Appeal. Therefore, we strike from the final judgment here under review that provision awarding attorney's fees to the successful plaintiff, and as amended, we affirm the final judgment under review.

Affirmed as amended.

EG

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1991
DECEMBER 17, 1991

JONES BOATYARD, INC.,
Appellant(s),

** CASE NO. 90-01981
90-01087

vs.

METROPOLITAN DADE CO.,
Appellee(s).

** LOWER
TRIBUNAL NO. 87-46248

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By: *Ellie M. Brown*
Deputy Clerk

cc: David J. Horr
William B. Milliken
/NB

Evan Grob