OA 11-5-92

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,253

METROPOLITAN DADE COUNTY,

Petitioner,

vs.

JONES BOATYARD, INC.,

Respondent.
_____/

REPLY BRIEF OF PETITIONER, METROPOLITAN DADE COUNTY

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I.

THIS COURT HAS ALREADY HELD THAT SO LONG AS AN OFFER OF JUDGMENT IS MADE AFTER THE ENACTMENT OF AN ATTORNEY FEE STATUTE, SUCH OFFER IS VALID, WHICH IS CONSISTENT WITH THE CASE AT BAR.

Respondent, Jones Boatyard (hereinafter referred to as "Jones") attempts to argue that Metropolitan Dade County (hereinafter referred to as "Dade County") is not entitled to attorney fees even though Dade County's offer of judgment was made in November, 1989, after the enactment date, July 1, 1986, of § 768.79, Florida Statutes. Despite Dade County's extensive discussion in its initial brief of Leapi v. Milton, 595 So.2d 12 (Fla. 1992), Jones attempts to summarily dismiss Leapi in two sentences by stating that the court in Leapi limited its ruling to § 45.061, Florida Statutes, and did not address § 768.79, Florida Statutes. Jones concludes that "Metropolitan Dade County's offer of judgment was made pursuant to § 768.79 which distinguishes Leapi from the case at bar." (Jones Brief at 4). Instead, Jones relies on Reinhardt v. Barc, 564 So.2d 1233 (Fla. 5th DCA 1990), and Mudano v. St. Paul Fire & Marine Insurance Co., 543 So.2d 876 (Fla. 4th DCA 1987). Both of these cases were decided prior to this court's decision in Leapi. Further, much of the dicta in Reinhardt as it pertains to § 45.061 and § 768.79, Florida

Statutes was overruled in Leapi.[1/] The court held in Reinhardt that "Section 768.79 and section 45.061 took effect July 1, 1986 and July 7, 1987 respectively. They should not be applied (in any event) to causes of action which accrued before their effective dates." Id. at 1235. Leapi makes clear that the only critical event is the making and rejection of the offer of judgment.

Jones chooses not to discuss the rationale of Leapi which is clearly relevant to the case at bar. First, in Leapi the prevailing party moved to tax costs and fees in accordance with the provisions of § 45.061 and § 768.79, Florida Statutes (1987) and Rule 1.442, Florida Rules of Civil Procedure. Nowhere in the opinion does Leapi hold that attorney fees were not applicable under § 768.79. Furthermore, the Court noted that the statute was not being applied retroactively since the right to recover attorney fees does not attach until the offer and rejection of the offer occurred. The Court concluded that since the offer had been adopted after the act had been adopted by the Legislature the statute was not being applied retroactively.

Likewise, in the case at bar, the offer of judgment was made subsequent to the enactment of § 768.79, Florida Statutes, since the offer was not made until 1989. By holding

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1/ Reinhardt dealt with the issue of whether a prevailing party may seek costs pursuant to Florida Rule of Civil Procedure 1.442, which is not an issue in the case at bar.

Dade County's offer valid, this Court would not in any manner be applying the statute retroactively.

It is important to note that Jones implicitly accepts Dade County's argument contained in its initial brief that the term "cause of action" referred to in § 768.71 as it relates to attorney fees is when the offer of judgment is made and rejected by the opposing party. Page 279 of Black's Law Dictionary (4th ed. 1968) defines "cause of action" as "one thing for one purpose and something different for another." Since the evil attempted to be avoided by the Legislature is to prevent a statute from being applied retroactively, such is not the case in this instance.

II.

THIS COURT CAN ALSO CONSIDER DADE COUNTY'S OFFER OF JUDGMENT PURSUANT TO § 45.061, FLORIDA STATUTES.

Jones also ignores the entire body of caselaw that Dade County cites in its initial brief which stands for the proposition that a pleading will be considered what it is in substance even though it is mislabeled. DeMendoza v. Board of County Commissioners, 221 So.2d 797 (Fla. 3rd DCA 1969); Chison v. Richey, 91 So.2d 811 (Fla. 1957); Scarfone v. Marin, 442 So.2d 282 (Fla. 2nd DCA 1983) (major and casual plea must be determined, not by its title, but by its contents and by the actual issues in dispute); Circle Financial Co. v. Peacock, 399 So.2d 81 (Fla. 1st DCA 1981). Jones does not in any manner discuss any of these cases but chooses evidently to dispose of this body of caselaw by the statement that "the

demand for judgment propounded by Metropolitan by its terms is exclusively a creature of Florida Statute § 768.79." Jones Brief at 5. It is apparent that Jones was well aware that Dade County was attempting to make a valid offer of judgment. In fact, Jones Boatyard had previously made an offer of judgment pursuant to § 768.79, Florida Statutes, in this case on November 28, 1989. (R. 172). It was only in response to Jones' offer of judgment that Dade County filed its offer of judgment. (R. 210). Jones was in no way prejudiced since it in fact believed that it had filed a valid offer of judgment. Furthermore, the two attorney fee statutes are almost identical in their application in that they both require in this case that the Plaintiff obtain a judgment 25% greater than its offer in order to be entitled to attorney fees.[2/]

This Court should consider substance over form and to the extent that it finds that the motion was mislabeled under § 768.79, Florida Statutes, it should treat Dade County's Motion for Attorney Fees under any valid offers of judgment which existed at the time Dade County made its offer. Since this Court ruled in Leapi that so long as the offer of judgment is made after the enactment of § 45.061, Florida

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2/ Jones filed Timmons v. Combs, 17 F.L.W. S443 (Fla. July 10, 1992), in a notice of supplemental authority. Timmons is inapplicable to the case at bar. Timmons only holds that in the narrow factual circumstance where there is a jury verdict of no liability that § 45.061, Florida Statutes, and § 768.79, Florida Statutes, treat the entitlement to attorney's fees differently. This is not an issue in the case at bar, since Dade County obtained a judgment in its favor as a plaintiff.

shown. Jones' argument carried to the logical extreme is essentially an admission that its own lawyer, David Horr, who is both trial and appellate counsel, acted unreasonably when he in fact made an offer of judgment under § 768.79, Florida Statutes. Mr. Horr in his brief did not in any manner indicate that he acted unreasonably when he made its offer under § 768.79, Florida Statutes. Instead, the Court should take note that the attorney fee statutes that have evolved under § 45.061, §768.79, Fla. Stat. and § 1.442, Fed.R.Civ.P., are very confusing as to their application. Indeed, the Florida Bar in Distasio, Offers of Judgment: The Confusion Continues, 64 Fla. Bar. J. 20, 20-24 (December 1990), indicated how confusing it is for the practicing attorney to understand the three offers of judgment. The author stated "Many attorneys will probably stop filing officers of judgment out of frustration. When offers are made, instead of encouraging settlement an increase in litigation will occur to determine the validity of the offer." Id. at 24. The better view and the view which this Court should accept is that Dade County reasonably did in fact rely on Jones' offer of judgment in believing that such offer was valid and is therefore estopped from claiming that such offer is invalid. This is especially true when in fact at least § 45.061, Fla. Stat., was valid at the time Dade County made its offer of judgment.

especially true when § 45.061, Fla. Stat., at least was valid at the time Dade County made its offer of judgment.

CONCLUSION

Dade County requests that this Court reverse the Third District Court of Appeals insofar as it holds that Dade County's offer of settlement was invalid. Furthermore, this Court should uphold the trial court's determination that Jones should pay for Dade County's attorney fees and remand this cause to the trial court to determine the amount of attorney fees it is entitled to pursuant to its appeal of this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 30th day of July, 1992, mailed to: DAVID J. HORR, ESQUIRE, Rodriguez, Horr, Aronson & Blanck, P.A., 9350 South Dixie Highway, Suite 1550, Miami, Florida 33156; and WILLIAM BOERINGER, ESQUIRE, at Hayden and Milliken, P.A., 5915 Ponce de Leon Blvd., Suite 63, Miami, Florida 33146-2477.

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