

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 79,470

VALUE RENT-A-CAR, INC., :

Petitioner,

vs. :

COLLECTION CHEVROLET, INC., :

Respondent. :

DISCRETIONARY REVIEW OF A DECISION OF
THE THIRD **DISTRICT** COURT OF **APPEAL**,

ANSWER BRIEF OF RESPONDENT,
COLLECTION CHEVROLET, INC.

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INTRODUCTION

This jurisdictional and answer brief is filed on behalf of the respondent, Collection Chevrolet, Inc.

STATEMENT OF THE CASE AND FACTS

Collection Chevrolet accepts Value Rent-a-Car's statement of the case and facts insofar as it adopts and accepts the opinions of the district court of appeal. Collection Chevrolet will also rely upon the fact that Value Rent-a-Car never raised the "defense verdict" issue in either the trial court or the district court of appeal.

JURISDICTIONAL ARGUMENT

In its opinion below, the district court notes the conflict between the First District and the Third and Fourth District Courts of Appeal on the applicability of Section 45.061 to an outright judgment for the defendant. The court says at page three of its opinion, "we *acknowledge* conflict . . . (e.s.)" In Lennar Corporation v. Muskat, 17 FLW D351 (Fla. 3d DCA January 28, 1992), decided the same day as this case, the district court

expressly held that Section 45.061 applies when judgment is entered for the defendant. On this issue, "we again *certify* conflict(e.s.)"

There is a subtle but important distinction between acknowledgment of conflict and certification of conflict. Although the district court reiterates its previous holding that Section **45.061** applies when there is an outright judgment for the defendant, it was not an issue raised or preserved by Value Rent-a-Car. For this reason, this Court should exercise its discretion and decline jurisdiction to review this case. For example, in Leapai v. Milton, 595 So.2d 12 (Fla. 1992), this Court did not address the "defense verdict" issue because it was not presented by the parties to the proceeding. Here as in Leapai, the constitutionality of Section **45.061** was the only issue presented or addressed by the parties. On this issue, there is no conflict. Resolution of conflict should occur in those other cases presently pending review in this Court, where the issue was properly raised and preserved below.

SUMMARY OF ARGUMENT AND ARGUMENT

Section 768.79, Florida Statutes (1989), has been interpreted by the district courts of appeal as precluding an award of attorney's fees when a defendant makes an offer of judgment and later obtains an outright judgment for the defendant. The legislature amended the statute in 1990 to cure this anomalous and inequitable result. Chapter 90-119, §48, Laws of Florida. See, Mujica v. Turner, 582 So.2d 24 (Fla. 3d DCA), rev. den., 592 So.2d 681 (Fla. 1991); Winn Dixie Stores, Inc. v. Elbert, 590 So.2d 15 (Fla. 4th DCA 1991). Both the Third and Fourth District Courts of Appeal have recognized that the

wording of Section 45.061, Florida Statutes (1989) differs from the "old" Section 768.79, and permits an award of attorney's fees when a defendant **makes** an offer of judgment and later obtains an outright judgment for the defense. Gross v. Albertson's, Inc., 591 So.2d 311 (Fla. 4th DCA 1991); Winn Dixie Stores, Inc. v. Elbert, 590 So.2d 15 (Fla. 4th DCA 1991); Memorial Sales, Inc. v. Pike, 579 So.2d 778 (Fla. 3d DCA 1991); Lennar Corporation v. Muskat, 17 FLW D351 (Fla. 3d DCA January 28, 1992). **As** noted by the Fourth District in Elbert:

It is unreasonable to think that the legislature in enacting either or both of these statutes 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. [590 So.2d at 16].

This Court should give Section 45.061, Florida Statutes (1989), a reasonable interpretation consistent with the obvious legislative intent. See, also, Mujica v. Turner, 582 So.2d at 25-26, Cope, J., concurring:

Under the plaintiffs' interpretation, the statute penalizes those whose claim had some merit while exempting those whose claim had none. We should interpret the statute in a way consistent with its intent, and so as to avoid illogical or absurd results. The cases relied on for the contrary view are not well reasoned and should not be followed. [582 So.2d at 26].


This case is a good example of when and why sanctions should be available when a reasonable offer of settlement is refused. Value Rent-A-Car refused Collection Chevrolet's offer of settlement and put Collection Chevrolet to the expense of a jury trial, three appeals, and now a petition for review.

CONCLUSION

This court should decline jurisdiction to review an issue neither raised nor preserved below. On the merits, the interpretation of Section 45.061 embraced by the Third and Fourth District Courts of Appeal should be approved and affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served upon THOMAS J. CALDWELL, ESQ., Biscayne Building, Suite 624, 19 West Flagler Street, Miami, Florida 33130 and KEITH T. GRUMER, ESQ., 111 Northeast First Street, Suite 500, Miami, Florida 33132, this 12th day of May, 1992.

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