IN THE SUPREME COURT
IN AND FOR THE STATE OF FLORIDA

CASE NO. 79,470

THIRD DISTRICT CASE NO. 91-1008

VALUE RENT-A-CAR, ING.,

Petitioner,

vs.

COLLECTION CHEVROLET, INC.,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION AND MERITS

Petition from the Third District Court of Appeal

Submitted by:

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PRELIMINARY STATEMENT

This is an Appeal pursuant to Article V, Section 3(b)(3) of the Florida Constitution, from a decision of the Third District Court of Appeal rendered January 28, 1992.

The decision below is asserted to expressly and directly conflict with a decision of another District Court of Appeal on a similar question of law.

For simplicity, Petitioner VALUE RENT-A-CAR shall be referred to throughout as "VALUE" and the Respondent COLLECTION CHEVROLET, INC. shall be referred to as "COLLECTION".

All references to the Appendix shall be abbreviated "A. __."

STATEMENT OF THE CASE AND FACTS

THE CASE

This is the third appeal stemming from VALUE's commencement of an action claiming negligence and breach of a bailment contract against COLLECTION due to the loss of an automobile left in COLLECTION's exclusive possession.

In the first proceeding, VALUE appealed an order granting summary judgment in favor of COLLECTION, claiming that there was an issue of material fact sufficient to defeat the summary judgment and entitling VALUE to a trial on the issues. Finding that a material issue of fact as to the circumstances under which the automobile and keys disappeared from COLLECTION's lot, the Third District Court of Appeals reversed and remanded. Value Rent-A-Car, Inc. vs. Collection Chevrolet, Inc., 543 So.2d 803 (Fla. 3rd DCA 1989).

The case proceeded to jury trial, and after the jury returned a verdict in favor of COLLECTION, the trial court entered a final judgment in favor of COLLECTION. VALUE appealed, claiming that it was entitled to a directed verdict based upon COLLECTION's failure to explain the disappearance of the vehicle. The Third District Court of Appeals disagreed, holding that COLLECTION's reasonable security methods were reasonably sufficient as a matter of law to overcome the evidentiary presumption of negligence. Value Rent-A-Car, Inc. vs. Collection Chevrolet, Inc., 570 So.2d 1376 (Fla. 3rd DCA 1990).

COLLECTION sought attorneys' fees, having previously filed an offer of settlement pursuant to § 45.061, Fla. Stat. (1987). The trial court determined that COLLECTION was entitled to attorneys' fees under the statute, but declared the statute unconstitutional. On the authority of Leapai v. Milton, 17 FLW 61 (Fla. January 23, 1992) the Third District overturned the trial court's

finding of unconst tutionality an(found that § 45.061 was valid and enforceable.

The Third District Court of Appeal went on to hold that it would apply the statute when, as here, the case results in an outright judgment for the defendant rather than one for the plaintiff for less than the offer. However, the court acknowledged that its decision conflicts with Timmons **v.** Combs, 579 So.2d 840 (Fla. 1st DCA 1991), review granted, 587 So.2d *470* (Fla. 1991) and Westover v, Allstate Ins, Co., 581 So.2d 988 (Fla. 2nd DCA 1991). Collection Chevrolet. Inc, vs. Value Rent-A-Car. Inc., 17 FLW at 359 (Fla 3rd DCA January 28, 1992).[1] This Court previously noted the issue in Leapai, 17 FLW at 62, **but** declined to resolve the matter as it was not before the court.

THE FACTS

The opinion of the Third District Court of Appeal offers, essentially, the facts of the case.

> VALUE's agent went to COLLECTION to pick up the car after the repairs were to have been completed, but the car and keys were missing. Metro-Dade police subsequently recovered the car, stripped and heavily damaged. In its answer to VALUE's complaint, COLLECTION admitted that the car had been **left** with it for repairs, **but** denied that it was negligent or careless in safeguarding the car or in preventing its theft.

Value Rent-A-Car, Inc. vs. Collection Chevrolet. Inc., 543 So.2d at 804 (Fla. 3rd DCA 1989).

In its latest opinion, the Third District Court of Appeal summarizes the relevant proceedings to this Court:

> On April *29,* 1988 COLLECTION tendered an $8,350.00offer **of** judgment to VALUE pursuant to § 45.061, Fla. Stat. (1987). The offer was not accepted and the case ended with a jury verdict and judgment for COLLECTION which

[1] **A. 1.**

was affirmed on appeal. (Footnotes and citations omitted).

Collection Chevrolet. Inc. vs. Value Rent-A-Car. Inc., 17 FLW at 359 (Fla. 3rd DCA January 28, 1992).

There is no other basis for COLLECTION to claim an entitlement to attorneys' fees.

I. THIS COURT SHOULD EXERCISE ITS DISCRETIONARY CONFLICT JURISDICTION SINCE THE DISTRICT COURTS HAVE REACHED CONFLICTING CONCLUSION ON THE IDENTICAL ISSUE, AND THE THIRD DISTRICT COURT OF APPEAL HAS EXPRESSLY ACKNOWLEDGED THE DIRECT CONFLICT.

This Court's discretionary jurisdiction includes review of all decisions which are asserted to expressly and directly conflict with a decision of another district court of appeal on a similar question of law.[2] In this case, the Third District Court of Appeal acknowledged that its decision conflicts with the decisions of two other jurisdictions.[3] This Court has already accepted jurisdiction to review Timmons v. Combs, 579 So.2d 840 (Fla. 1st DCA 1991), review granted 587 So.2d 470 (Fla. 1991), on the issue involved in this case.

In this case[4] and in Memorial Sales. Inc. v. Pike, 579 So.2d 778 (Fla. 3rd DCA 1991) the Third District Court of Appeal has held that § 57.061(2)(b) does not require that the parties seeking to obtain sanctions obtain a favorable verdict, but rather that the verdict ultimately obtained by the party declining the offer be at least 25% less than such offer.

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[2]Article 5, § 3(b)(3), Florida Constitution.

[3]Timmons V. Combs, 579 So.2d 840 (Fla. 1st DCA 1991), review granted, 587 So.2d 470 (Fla. 1991); Westover v. Allstate Ins. Co., 581 So.2d 988 (Fla. 2nd DCA 1991).

[4]A. 1.

The First District in Timmons v. Combs[5] and the Second District in Westover v. Allstate Ins. Co.[6] has held that the entry of the judgment in favor of the party unreasonably rejecting the offer of judgment is a prerequisite to the party making the offer seeking sanctions.

As already noted, this Court currently has before it Timmons v. Combs, So.2d 840 (Fla. 1st DCA 1991), review granted 587 So.2d 470 (Fla. 1991) (argued March 2, 1992). Additionally, both the Second District in Westover, and the Third District in this case have certified that their opinions were in direct conflict with other decisions of district courts of appeal of this State.

This Court should exercise its discretionary jurisdiction as the district courts of appeal have rendered decisions which are expressly and directly in conflict on identical questions of law.

II. BECAUSE § 45.061 FLA. STAT. (1987) AWARDS ATTORNEYS FEES IN DEROGATION OF THE COMMON LAW AND DOES NOT EXPRESSLY PROVIDE FOR FEES IN THE CASE OF AN OUTRIGHT VERDICT FOR THE OFFEROR, THE THIRD DISTRICT COURT OF APPEAL WAS WITHOUT AUTHORITY TO AWARD ATTORNEYS FEES.

Although an interpretation denying attorneys' fees under these circumstances would seemingly defeat the purpose of the statute, statutory attorneys' fees are in derogation of the common law and are subject to strict construction. Because the statute currently before this Court does not provide for attorneys' fees when, as in this case, there is an outright verdict for the party making the offer, this Court is powerless to make such an award.

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[5]579 So.2d 840 (Fla. 1st DCA 1991), review granted 587 So.2d 470 (Fla. 1991).

[6]581 So.2d 998 (Fla. 2nd DCA 1991).

The offer of settlement statute[7] is but one of three different methods by

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[7] Section 45.061 Fla. Stat. (1987) provides:

(1) At any time more than 60 days after the service of a summons and complaint on a party but not less than 60 days (or 45 days if it is a counteroffer) before trial, any party may serve upon an adverse party a written offer, which offer shall not be filed with the court and shall be denominated as an offer under this section, to settle a claim for money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 45 days unless withdrawn sooner by a writing served on the offeree prior to acceptance by the offeree. An offer that is neither withdrawn nor accepted within 45 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude the making of a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this section.

(2) If, upon a motion by the offeror within 30 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including:

(a) Whether, upon specific request by the offeree, the offeror had unreasonably refused to furnish information which was necessary to evaluate the reasonableness of the offer.

(b) Whether the suit was in the nature of a "test-case," presenting questions of far-reaching importance affecting non parties.

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.

(3) In determining the amount of any sanction to be imposed under this section, the court shall award:

(a) The amount of the parties' costs and expenses, including reasonable attorneys' fees, investigative expenses, expert witness fees, and other expenses which relate to the preparation for trial, incurred after the making of the offer of settlement; and

(b) The statutory rate of interest that could have been earned at the prevailing statutory rate on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment.

The amount of any sanction imposed under this section against a plaintiff shall be set off against any award to the plaintiff, and if such sanction is in an amount in excess of the award to the plaintiff, judgment shall be entered in favor of the defendant and against the plaintiff in the amount of the excess.

(4) This section shall not apply to any class action or shareholder derivative suit or to matters relating to dissolution of marriage, alimony, nonsupport, eminent domain, or child custody.

which a party can make an offer of judgment or settlement. In addition to the subject statute, there is also Florida Rule of Civil Procedure 1.442, and in appropriate cases Florida Statute § 768.79 applies to all causes of action for personal injury ox property damage arising on or after July 1, 1986. All three statutes were adopted with the same intent: By unreasonably failing to accept the proposed offer of judgment or settlement, the rejecting party has unreasonably delayed and increased the cost of the litigation.

However, statutes awarding attorneys' fees are in derogation of the common law. As such, they are subject to strict interpretation and only the relief provided for is the relief which can be granted. Whitten v. Proeressive Casualtv Ins. Co., 410 So.2d 501 (Fla. 1982) (interpreting § 57.105), citing Kittel v. Kittel, 210 So.2d 1 (Fla. 1968).

Section 45.061(2)(b) provides that an offer "shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25% less than the offer rejected." Section 45.061(2)(b) Fla. Stat. (1987).

Although a judgment entered in favor of the defendant should be considered to fall within the category defined in the statute, the statute does not expressly provide for it. Granted, the statute may be inarticulately drafted, but that is the statute, and the rules of legislative interpretation restrict this Court from expanding that statutory language.

In the absence of statutory language expressly providing for attorneys' fees under these circumstances, the award of attorneys' fees by the Third

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(5) Sanctions authorized under this section may be imposed notwithstanding any limitation on recovery of costs ok expenses which may be provided by contract or in other provisions of Florida law. This section shall not be construed to waive the limits of sovereign immunity set forth in s. 768.28. (6) This section does not apply to causes of action that accrue after the effective date of this act.

DIstrict Court of Appeal was in error. The decision of the First and Second District, denying attorneys' fees under these circumstances, is the correct interpretation of the law.

CONCLUSION

The issues raised in this Petition are already before this Court. Timmons v. Combs, 579 So.2d 840 (Fla. First DCA 1991), review granted 587 So.2d 470 (Fla. 1991) (argued March 2, 1992). The Third District Court of Appeal has acknowledged that its decision in this case conflicts with the Timmons decision, as well as the Second District's decision in Westover v. Allstate Ins. Co., 581 So.2d 988 (Fla. 2nd DCA 1991). Because the decisions of different districts are asserted to expressly and directly conflict with each other, this Court has jurisdiction to review this petition.

This is a case of statutory interpretation: Because the statute is in derogation of the common law and does not expressly provide for attorneys' fees in these circumstances, attorneys' fees cannot be awarded. The Third District Court of Appeal is in error and should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of April, 1992 to: JAMES C. BLECKE, ESQ., Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida 33130 and THOMAS J. CALDWELL, ESQ., Biscayne Building, Suite 624 19 West Flagler Street, Miami, Florida 33130.

Respectfully submitted,

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