IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO.: 82,468

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Petitioner, vs. THELMA S. MALMBERG and her husband, GORDON L. MALMBERG, Respondents.	5DCA CASE NO.: 92-01491 MARION L.T. CASE NO.: 90-2443-CA-C

RESPONDENTS' ANSWER BRIEF

BOND, ARNETT & PHELAN, P.A.
Attorneys for Respondents
101 S.W. Third Street
Post Office Box 2405
Ocala, FL 34478-2405
Telephone: (904) 622-1188

By: _____
M. Thomas Bond, Jr.
(Florida Bar No. 0172222)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

References to the record will be in the form (R.).

SUMMARY OF THE ARGUMENT

The issue presented by this case is whether the statutory presumption found in §45.061(2) is conclusive and should be the sole factor to be considered. The Appellate Court opinion states that under the facts of the instant case, the presumption is not conclusive. The Appellate Court found that "For guidance in making this determination on remand, we posit that the statutory presumption of unreasonable rejection provided by the statute (because zero is 25% less that any offer made) is not conclusive and should not apply in this case." State Farm Mutual Automobile Insurance Company v. Malmberg, 623 So.2d 755 (Fla. 5th DCA 1993)

This holding is consistent with the rest of the language of §45.061 in that the Statute directs the trial judge to consider "all of the relevant circumstances at the time of the rejection". §45.061(2), Fla. Stat. (1991)

Petitioner contends that, since the Petitioner received a verdict in its favor, the statutory presumption should be conclusive. If this were true, there would be no need for "unreasonably rejected" language in §45.061 nor the language requiring the Court to consider "all of the relevant circumstances at the time of the rejection". (emphasis supplied) §45.061(2), Fla. Stat. (1991)

ARGUMENT

I. WHETHER THE APPELLATE COURT ERRED IN HOLDING THAT THE STATUTORY PRESUMPTION OF UNREASONABLENESS OF SANCTIONS PURSUANT TO §45.061 IS NOT APPLICABLE WHEN A ZERO VERDICT IS RENDERED.

A. INTRODUCTION

The issues in this case deal with the application of Section 45.061. This Statute applies to offers of settlement which may be made by either party with the offers to remain open for forty-five (45) days unless withdrawn or accepted within the forty-five (45) days. An offer that is neither withdrawn nor accepted within forty-five (45) days shall be deemed rejected. §45.061(1)

If after entry of judgment the Court determines that an offer was rejected unreasonably, it may impose appropriate sanctions. In making this determination the Court shall consider all of the relevant circumstances at the time of the rejection. §45.061(2), Fla. Stat. (1991) "Specifically, the statute suggests relevant circumstances may include:

> (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 nonparties.

§45.061(2), Fla. Stat. (1991). The statute further provides:

> An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25% 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% less than the offer rejected.

§45.061(2), Fla. Stat. (1991)."

The Appellate Court in its opinion does not err in its application of the statutory presumption of unreasonableness, but indicates that the trial court shall first look to whether an offer of settlement was in fact made by the offeror and whether it met the requirements of Section 45.061. The second inquiry is whether the offer was, in fact, rejected by the offeree or whether it must be deemed to have been rejected by inaction on the part of the offeree.

The next determination is whether, at the time the offer was made, the offeree acted unreasonably in not accepting the offer.

The Petitioner contends the issue is whether the Appellate Court erred in ignoring the presumption found in Section 45.061 (2), due to the fact a defense verdict was obtained. However, the Appellate Court did not ignore the presumption found in Section 45.061(2), but found the presumption not to be conclusive and looked to "all of the relevant circumstances at the time of the rejection" §45.061(2)

B. THE HOLDING BELOW

The Fifth District Court of Appeal's holding is consistent with the statutory language of §45.061 and the case law interpreting this Statute.

The statutory presumption of unreasonableness when an offer is twenty-five percent greater than the verdict obtained is not the sole factor to be considered in determining if an offer of settlement is unreasonable rejected.

The Petitioner contends that because §45.061(2) creates the presumption of unreasonableness, the rejection of an offer by a plaintiff if the judgment entered is at least twenty-five percent less than the offer rejected, that the rejection creates a conclusive presumption. If this were true, there would be no need for the other provisions of §45.061 which require the court to consider all relevant circumstances at the time an offer is rejected. Because the Statute requires an offer to be unreasonably rejected, the District Court of Appeal went on to look at all relevant circumstances of this case and in its holding stated:

> "For guidance in making this determination on remand, we posit that the statutory presumption of unreasonable rejection provided by the statute (because zero is 25% less than any offer made) is not conclusive and it should not apply in this case. That provision was designed as a threshold or bright line point for cases where a plaintiff's verdict is obtained. Here the verdict clearly indicates (as well as the substantial amount offered by State Farm to settle) that damages was not the problem in this case. The issues here were (1) causation--whether the 1987 accident caused Thelma's injuries; or (2) permanency--whether Thelma's injuries were permanent." State Farm, 623 So.2d at 758.

In Winn Dixie Stores, Inc. v. Elbert, 590 So.2d 15 (Fla. 4th DCA 1991), the Fourth District, stated:

> "The statute should not be interpreted to compel a plaintiff to either "throw in the towel" or face a substantial attorney's fee award if in a close case the jury finds no liability."

In the case of the Malmbergs, State Farm admitted liability, but not causation. The verdict contains the express finding that Thelma Malmberg did not sustain a permanent injury within a reasonable degree of medical probability as a result of the 1987 accident.

In the opinion of the District Court of Appeal,

> "In this case, if the Malmbergs had a reasonable chance to prevail at trial on liability and their provable damages could reasonably have exceeded the offer by a sufficient amount to make going to trial (in lieu of accepting the offer) a reasonable course of action, then the trial court should find that they did not unreasonably reject State Farm's offer and that sanctions are not appropriate. This statute should not operate to deprive plaintiffs of their right to seek resolution of their causes-of-action in the courts of this state. Sanctions should be reserved to punish unreasonable actions by litigants in refusing a reasonable and fair offer to settle, thereby causing unnecessary expense and delay." State Farm, 623 So.2d at 759.

C. THE PROVISIONS OF §45.061 DO NOT CONFLICT WITH THE HOLDING BELOW

The statutory language of §45.061 sets out the circumstances the trial court should look to in determining whether sanctions should be imposed.

The statute provides the trial court "shall" look to all relevant circumstances at the time of rejection and if it

finds the offer was unreasonably rejected, then it "may" impose an appropriate sanction. §45.061.

In the instant case, the question was not of damages suffered by the Respondents, but a question of causation as to the Respondent, Thelma S. Malmberg's injuries. The damages sustained by the Respondents was reflected in Petitioner's Offer of Judgment in the amount of $100,001.00 (R.15-18), in addition to the $50,000.00 which the Petitioner had already paid on behalf of the tortfeasor (R.23). Because of the severity of the damages, the Respondents should reasonably be able to reject an offer of judgment without taking attorney's fees to the level of a prevailing party theory. Because of the fact that this case was decided on causation and not on the question of damages, the Court should look as to whether the offer was unreasonably rejected.

The District Court of Appeal correctly looked to all of the relevant circumstances at the time of the rejection of the offer. See O'Neil v. Wal-Mart Stores, Inc., 602 So.2d 1342 (Fla. 5th DCA 1992) In O'Neil, Judge Griffin in commenting on the statutes states:

> "By its terms, however, the statutory presumption is not absolute and the trial court is required by the statute to consider all of the relevant circumstances at the time of the rejection."

D. THE LOWER COURT OPINION IS CONSISTENT WITH THE HOLDING OF OTHER CASES

This Honorable Court, in Timmons v. Combs, 608 So.2d 1 (Fla. 1992) found that §45.061 applied in instances where a

defense verdict was rendered. In so holding, this Court approved the holding in Gross v. Albertsons, Inc., 591 So.2d 311 (Fla. 4th DCA 1991) and in Memorial Sales, Inc. v. Pike, 579 So.2d 778 (Fla. 3d DCA 1991). However, in each of these decisions the courts did not make the statutory presumption conclusive. In Gross the court indicates that the party rejecting the offer has the burden to overcome the presumption. Gross at 314.

This Honorable court, in Leapai v. Milton, 595 So.2d 12 (Fla. 1992) indicates that the key to the operation of the Statute is the unreasonable rejection of an offer of settlement.

In each of these cases the courts looked to the application of §45.061 and the presumption of unreasonable rejection; and, in each case, there is no indication that the presumption is conclusive. The District Court of Appeal has complied with the requirements of §45.061 and by the language in the Statute has the right to look beyond the mere findings of the zero verdict rendered in determining entitlement to attorney's fees.

CONCLUSION

The District Court of Appeal opinion correctly applied §45.061 in looking at all relevant circumstances at the time of the rejection of the offer of settlement.

Wherefore, the Respondents request that this Honorable Court affirm the opinion of the District Court of Appeal and remand this case to the trial court for hearing consistent with the District Court of Appeal's opinion.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief has been furnished by U.S. Mail this 9th day of March, 1994, to Francis J. Carroll, Jr., Esquire, of BOEHM, BROWN, RIGDON, SEACREST & FISCHER, P.A., Attorneys for Petitioner, Post Office Box 6511, Daytona Beach, FL 32122.

BOND, ARNETT & PHELAN, P.A.
Attorneys for Respondents
Post Office Box 2405
Ocala, FL 34478-2405
Telephone: (904) 622-1188
Telefax: (904) 622-1125

By _____
M. Thomas Bond, Jr.
(Florida Bar No. 0172222)

MTBjr:dsz