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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

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

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STATEMENT OF THE CASE

The issue posed by this appeal is whether the statutory presumption provided for in Section 45.061 of the Florida Statues (1991) applies to this case.

On June 6, 1990, the Respondents, Thelma S. Malmberg and Gordon L. Malmberg (Malmbergs) filed a complaint for damages against Petitioner, State Farm Mutual Automobile Insurance Company (State Farm), for recovery for damages against State Farm under their uninsured motorist coverage. (R.1). On August 20, 1991, State Farm served an Offer of Judgment for $100,001.00 under all three offer of judgment provisions, Florida Rule of Civil Procedure 1.442, §768.79, Fla. Stat. (1991) and §45.061, Fla. Stat. (1991) (hereinafter referred to as The "Offer"). The Offer was rejected by the Malmbergs, and the case proceeded to trial. On February 12, 1992 the jury returned a verdict for State Farm and against the Malmbergs, (R.11), and final judgment entered in State Farm's favor. (R.13). This judgment has not been appealed.

State Farm then filed the offer, (R.15-18), and subsequently filed a motion to tax costs and attorneys fees, (R.20), together with an affidavit and supplemental affidavit in support of the motion. (R.22-29). The trial judge entered final judgments for costs only, denying State Farm's motion for attorneys fees on May 13, 1992. (R.30,32).

State Farm timely filed a Notice of Appeal on June 8, 1992, (R.64-65), and the case proceeded to the district court. The district court's decision was rendered by opinion on July 30, 1993, State Farm Mutual Automobile Insurance Company v. Malmberg, 623

So.2d 755 (Fla. 5th DCA 1993), and rehearing was denied on September 1, 1993. A notice to invoke the Discretionary Jurisdiction in this Court was timely filed on September 29, 1993 and this Honorable Court took jurisdiction of this cause on January 20, 1994. This appeal follows.

STATEMENT OF THE FACTS

This case arises out of a motor vehicle incident involving the Malmbergs and George R. Sherrets, Jr., on June 21, 1987 on N.E. 36th Avenue, Ocala, Florida. The Malmbergs were insured by State Farm, and on June 5, 1990, they filed a complaint for damages based upon State Farm's refusal to pay pursuant to their uninsured motorist coverage.

The complaint alleged that due to State Farm's refusal to pay under the uninsured motorist (UM) coverage, they had suffered bodily injury, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expenses for hospitalization, medical/nursing care and treatment, loss of earnings, and loss of ability to earn money. State Farm, while admitting coverage, denied the allegations in the complaint. (R.5).

State Farm extended an offer of judgment on August 20, 1990, (R.9-10), utilizing all three methods in making the offer in existence at the time, Florida Rule of Civil Procedure 1.442, and §§768.79 and 45.061, Fla. Stat. (1991). The Malmbergs did not respond to the offer, which was made in the amount of $100,001.00.

On February 12, 1992, the jury returned a verdict of no permanent injury, and awarded no damages to the Malmbergs. (R.11). On February 18, 1992 a final judgment was entered in favor of State Farm. (R.13).

In its motion, State Farm alleged that it incurred total costs and attorneys fees of $47,534.99. On May 13, 1992, the trial judge denied State Farm's request for attorneys fees, and entered a final

judgment for costs only in the amount of $5,218.02. This appeal follows.

SUMMARY OF THE ARGUMENT

The sole issue presented by this case is whether the statutory presumption found in §45.061(2) applies. The appellate court opinion stated that under the facts of the instant case, that the presumption did not apply. In particular, the court held that "We posit that the statutory presumption of unreasonable rejection provided by the statute (because zero is twenty-five percent less than any offer made) is not conclusive and should not apply to this case." State Farm Automobile Insurance Company v. Malmberg, 613 So.2d 755, 758 (Fla. 5th DCA 1993). This holding is at odds with the express and clear language of §45.061. Section 45.061 applies to zero verdicts, and in particular, the presumption operates for defense verdicts. The legislative history of §45.061 supports this interpretation, and does not support the court's holding.

Lastly, the holding conflict with Timmons v. Combs, 608 So.2d 1 (Fla. 1992), and several district court of appeal cases. These line of cases hold that where a defendant makes an offer, and it is rejected by the plaintiff and a verdict of no damages is returned, the statutory presumption found in §45.061 is applicable.

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

Section 45.061 is one of two offer of judgment statutes. Although now repealed, it applies to this case. The statute allows for offers of settlement to made by either the plaintiff or defendant, and further provides the offer remain open for forty-five (45) days until accepted or rejected. §45.061(1).

After entry of judgment, an offeror whose offer was rejected may file the offer of judgment and move for sanctions under the statute. §45.061(2). If the court determines that the offer was rejected unreasonably it may impose a sanction, which would include costs and expenses, attorneys fees, investigative expenses, expert witness fees and other expenses related to preparation for trial incurred after the making of the offer. §45.061(3).

The statute goes on to state that "an offer shall be presumed to have been unreasonably...rejected by a plaintiff if the judgment entered is at least twenty-five percent less than the offer rejected." §45.061(2). In the instant case, State Farm properly filed and moved for attorneys fees as a sanction under Section 45.061, seeking the aid of the presumption granted to it by virtue of the provisions of Section 45.061(2). The Appellate Court held in its opinion that the presumption did not apply and remanded the case to the trial court for a determination as to whether the Malmbergs' rejection of State Farm's offer was reasonable. The issue then, is whether the Appellate Court was correct in ignoring

the presumption found in Section 45.061(2), due to the fact that a defense verdict was obtained.

B. THE HOLDING BELOW

The Fifth District Court of Appeal holding can be best understood with a short background discussion with regard to the trial court ruling on State Farm's motion for attorneys fees. The trial court refused to award any attorneys fees based upon its perception that State Farm was not entitled to an award of attorneys fees based on a "zero" verdict.

State Farm appealed the order, arguing that it was entitled to an attorneys fee award. The appellate court reversed with reference to the denial of the motion and remanded the case to the trial court for a determination as to the imposition of sanctions.

However, the District Court of Appeal went on to hold that a portion of §45.061(2) creating a presumptive right to fees did not apply to this case:

> For guidance in making this determination on remand, we posit that the statutory presumption of unreasonable rejection provided by the statute (because zero is twenty-five percent 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.

Malmberg, at 758. (Footnote omitted).

The court went on to state that:

> 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.

Id. at 759.

The holding of the District Court of Appeal is at odds with the statutory language of §45.061 and the case law interpreting that statute.

C. THE PROVISIONS OF §45.061 CONFLICTS WITH THE HOLDING BELOW

The statute's language lies of course, at the heart of the issue of whether its presumption of unreasonableness applies to "zero" verdict cases. Initially, as observed by the court below, there is no dispute that the statute applies to this case. Id. n.5, at 757.

The statute provides that once an offer has been made and not accepted, that upon motion, the court may impose a sanction upon the offeree, if "the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation...." §45.061(2). The court shall consider all "relevant circumstances" in making a determination of whether an offer was unreasonably rejected.

However, §45.061(2) goes further to state "An offer shall be presumed to have been unreasonably rejected...by a plaintiff if the judgement entered is at least twenty-five percent less than the offer rejected."

The issue presented by this appeal is whether this presumption

is triggered when a zero verdict is returned. Initially, it is clear that §45.061's language does not differentiate between judgments obtained by the plaintiff, or judgments obtained by the defendant. See Timmons v. Combs, 608 So.2d 1 (Fla. 1992). On the contrary, the statute is clearly worded and applies to all judgments entered that are twenty-five percent greater than the offer rejected.

1. The Statute Clearly Creates a Presumption of Unreasonableness When an Offer is Twenty-Five Percent Greater than the Verdict Obtained

The well settled rule of statutory construction is that "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction: the statute must be given its plain and obvious meaning." A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 1144, 137 So. 157, 159 (Fla. 1931). Thus, the plain language of the statute governs.

It is only when the statute is ambiguous that resort be had to gleaning from the legislative intent, the statute's meaning. "Inquiry into legislative intent may begin only where the statute is ambiguous on it's face." Streeter v. Sullivan, 509 So.2d 268,271 (Fla. 1987).

Section 45.061(2) is abundantly clear on its face. The presumption of an unreasonable rejection by the plaintiff of a defense offer applies when the judgment entered is less than twenty-five percent of the offer. No ambiguity appears in the statutory language. The lower court opinion did not devote any

analysis to the statutory language, preferring to couch the rationale for its holding in broad policy statements. The basis of the court's opinion lies in its observation that "This statute should not operate to deprive plaintiff's of their right to seek resolution of their causes-of-action in the courts of this state. Malmberg, at 759. The statement's implicit assumption is that the statutory presumption would operate to deprive the plaintiff of their rights due to the fact that in cases involving defense verdicts, the plaintiff is faced with the choice of either accepting substantially less than their damages, or risk being sanctioned with a defense verdict.

The court, in order to alleviate this perceived injustice, has substituted a "reasonableness" standard for the statutory presumption, found in §45.061 by stating that "The next crucial determination is whether, at the time the offer was made, the offeree acted unreasonably in not accepting it." Malmberg, at 758. (Emphasis Court's). The district court has in Malmberg, eliminated the presumption of unreasonableness in cases where liability is the issue, and, in addition, has reduced the statute to a sole comparison of whether the offer was reasonable in light of the damages. See O'Neil v. Wal-Mart Stores, Inc., 602 So.2d 1342 (Fla. 5th DCA 1992). In O'Neil, Judge Harris, expressly commented on this issue, "To apply a statute enacted for the apparent purpose of making both the plaintiff and defendant realistically evaluate damages to cases decided on liability, seems to be based on an apples/oranges analysis." O'Neil, at 1344, (Harris J., concurring)(Emphasis court's). This interpretation of the

"apparent purpose" of §45.061, began by the District Court in O'Neil and continued in Malmberg, is not supported by wording of the statute as discussed above, or in the legislative intent of §45.061, expressed through its legislative history.

2. The Legislative History of §45.061

The legislative intent behind the statute was discussed at length in Gross v. Albertson's, Inc., 591 So.2d 311 (Fla. 4th DCA 1991). In Gross, the appellate court quoted at length from the legislative history of Section 45.061. In particular, the court stated as follows:

> At oral argument we requested that the parties provide us with the legislative history behind §45.061, Florida Statutes, to determine whether any legislative intent could be ascertained which would assist us in interpreting whether or not the 'judgment entered' would include a judgment in favor of a defendant. The parties have admirably complied with this and have given us tapes of the legislative hearings. In a portion of the debate of House Bill 321 which became 45.061, Florida Statutes, the following exchange occurred towards the end of the discussion:
>
> > -Thank you Mister Chairman, my name is Eric Tilton, Academy of Trial Lawyers and we do support the bill. We believe that this will discourage litigation actually more to the point it will discourage delays in litigation (inaudible). It seems to me that you could make a one line amendment that would say if the defense has made an offer and there's a defense verdict in the case the Plaintiff can't (inaudible), or the Defendant is entitled to fees and costs. That would be easy to do.
> >
> > -Mister McQuin whispered in my ear that maybe your alternative is to offer a dollar and if you offer the dollar that's going to be more than

25%.

> -That's right. We have to agree on that. So you don't want an amendment? I don't think that we need an amendment.
>
> -All you need is to offer a dollar.

> It appears that the legislators considered the very situation present here, that is, where the defense makes an offer and a defense verdict is returned. The legislature concluded that it would be covered by the existing version of Section 45.061. Thus, the legislative history confirms the interpretation that we give to the statute today.

Id. at 313-314.

In Gross, the appellate court held that the statute applies to a situation involving a defense verdict, which holding has been subsequently approved by this Honorable Court in Timmons. The Court in Gross further held that

> Since the judgment was entered for the defendant, thus entitling the plaintiff to no damages, the [$200.00 Offer of Judgment] is more than 25% greater than what appellant's recovered and therefore the statutory presumption is satisfied.

Gross, at 313.

Thus, the clear wording of the statute, and its legislative history, indicate that the presumption is triggered upon an offer exceeding the judgment entered by twenty-five percent, regardless of whether the judgment entered is for the defendant. This is in contrast to the holding of the District Court of Appeal, which held the presumption did not apply where a defense verdict was entered.

D. THE LOWER COURT OPINION CONFLICTS WITH THE HOLDINGS OF OTHER CASES

In addition to Gross, this Honorable Court considered the

identical issue in Timmons. In Timmons, the Court had before it the issue of whether a defense verdict entitled a defendant to fees and costs under §45.061 and under §768.79, Florida Statutes (1989). The Court held that because §768.79 referred to recovery of a judgment by the plaintiff, the statute precluded recovery of costs and attorneys fees by a defendant when the defendant obtained a judgment. However, in addressing §45.061, this Court held

> Section 45.061, which applies to most court actions, is worded somewhat differently. It permits the award of attorneys fees and costs if the court determines that an offer of settlement is unreasonably rejected. An offer is presumed to be unreasonably rejected by a defendant if the judgment entered is at least twenty-five percent greater than the offer. An offer is presumed to have been unreasonably rejected by the plaintiff if the judgment entered is at least twenty-five percent less than the offer.

Id. at 2.

The court went on to hold that §45.061, applies in instances where a defense verdict was rendered. In so holding, this Court approved the holding in Gross, and in Memorial Sales, Inc. v. Pike, 579 So.2d 778 (Fla. 3d DCA 1991). In Pike, the appellate court held as well that §45.061 applied to defense verdicts, and further, that the presumption applied. In particular, the court held that

> In the instant case, the plaintiffs rejected an offer of $2,501.00 and were awarded nothing. Pursuant to section 45.061, this creates the presumption that the plaintiff's unreasonably rejected the defendant's offer of settlement.

Id. at 780. See Buchanan v. Allstate Insurance Company, 19 Fla. L. Weekly d54 (Fla. 1st DCA December 28, 1993). ("In the instant case, because the Buchanans' rejected Allstate's $10,000 offer and

a judgment was entered for Allstate upon the jury's verdict, Allstate was entitled to attorney's fees as a sanction for the Buchanans' unreasonable rejection of the offer"). Similarly in Lennar Corporation v. Muskat, 595 So.2d 968 (Fla. 3d DCA), rev. den. 606 So.2d 1165 (Fla. 1992), the court held that a defendant was entitled to sanctions pursuant to §45.061 after a defense verdict, stating, "On the merits, we conclude that the presumption of unreasonable rejection created under those circumstances was not rebutted as a matter of law...." Id. at 969. Thus, the cases addressing this issue, all applied the presumption under identical circumstances. These cases, all recognize, interpret, and apply section 45.061's presumption. Collection Chevrolet, Inc. v. Value Rent-A-Car, Inc., 595 So.2d 98 (Fla. 3d DCA) approved, 608 So.2d 3 (Fla. 1992).

CONCLUSION

The District Court of Appeal opinion refusing to apply the presumption found in §45.061 is contrary both to the statutory language, the legislative history, and the weight of authority of judicial opinions interpreting the statute, including an opinion from this Honorable Court.

Therefore, the petitioner requests that this Honorable Court quash that portion of the opinion refusing to apply the presumption and remand this case for a hearing as to the award of attorney fees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 14th day of February, 1994 to: M. THOMAS BOND, JR., ESQUIRE, Post Office Box 2405, Ocala, FL 32678.

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