IN THE SUPREME COURT OF FLORIDA

FILED
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CLERK, SUPREME COURT
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CASE NO.: 82,468

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

-vs-

THELMA S. MALMBERG and her husband, GORDON L. MALMBERG

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

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ARGUMENT

I. INTRODUCTION AND BACKGROUND

The issue presented by the appeal below concerns an interpretation and application of Section 45.061 of the Florida Statutes (1991). Section 45.061 relates to offers of settlement. It is closely related to former §768.79, Fla. Stat. (1991), and for that reason, a determination as to jurisdiction begins with a backdrop of cases construing both statutes.

Section 45.061(1), provides that an offer of settlement may be made by either party within sixty (60) days after service of the summons and complaint. An offer not withdrawn and not accepted within forty-five (45) days shall be deemed rejected, pursuant to the express terms of the statute.

Section 45.061(2) allows for sanctions where an offer is unreasonably rejected. In considering whether an offer is "unreasonably rejected", the statute provides that the trial court shall consider all relevant circumstances of the offer. The statute goes on to state "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). The last section of the statute identifies the items considered in determining the amount of sanctions, including, 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. §45.061(3)(a).

Section 768.79 is worded similarly, but not identically, to

§45.061. The differences in the wording of the two statutes has become crucial in the interpretation of their terms.

Prior to its amendment, appellate courts were relatively unanimous in holding that §768.79 required that a judgment be obtained by the plaintiff before its provisions were triggered. Thus, in cases where a complete defense verdict was obtained, §768.79 was inapplicable. See Wilson Insurance Services v. West American Insurance Company, 608 So.2d 857 (Fla. 4th DCA 1992); Timmons v. Combs, 608 So.2d 1 (Fla. 1992). These holdings were based upon the statutory language that sanctions would be imposed if "the judgment obtained by the plaintiff is at least 25% less than the amount of the offer....".[1] As stated in Timmons, "Because the statute [§768.79] in each instance referred to the recovery of a judgment by the plaintiff, the courts have consistently construed section 768.79 to preclude the recovery of costs and attorney's fees by a defendant when the defendant obtained a judgment." Timmons at 1.

Subsequently, a divergence among the appellate courts occurred when faced with the identical issue in regard to the interpretation of the provisions of §45.061. That conflict was resolved in Timmons. In Timmons, this Honorable Court stated that §45.061 refers only to the "judgment entered", as opposed to 768.79's language of "the judgment obtained by the plaintiff." As observed by this Court, "Section 45.061 does not specify in whose favor the

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[1] Section 768.79 has subsequently been amended to allow the imposition of sanctions where a judgment has not been obtained by the plaintiff. See §768.79(1), Fla. Stat. (1991).

judgment must be entered. In the case of a defendant's judgment, the plaintiff's recovery of nothing will always be greater than twenty-five percent less than a defendant's offer of something." Id. at 2. Therefore, this Court held that §45.061 is applicable when a defense verdict is returned, thereby disapproving those line of cases which interpreted §45.061 to require a judgment in favor of the plaintiff, as in the former §768.79.

In the instant opinion, the panel recognized that §45.061 would generally be applicable, and thus reversed the trial court's order denying petitioner's motion for costs and attorneys fees pursuant to the statute. However, the panel's opinion went on to hold the statutory presumption of unreasonableness was not applicable. The panel remanded the case to the trial court for its determination of sanctions pursuant to §45.061(2), thus avoiding the statutory presumption found in the statute.

II. THE LOWER COURT'S HOLDING

In the court below, the existence of conflict is found in that portion of the opinion interpreting the applicability of the statutory presumption found in §45.061, in instances where a defense verdict is rendered. The opinion below noted that on August 20, 1991, Petitioner served an offer to settle pursuant to §45.061, §768.79, and Florida Rule of Civil Procedure 1.442. (Slip. Op. at p. 2). Subsequently, a jury trial was conducted and a verdict rendered finding that the plaintiff did not sustain a permanent injury within a reasonable degree of medical probability. While the trial court awarded costs, it denied attorney's fees, on

the basis that §45.061 precluded "fee awards in cases involving a defendant's verdict and a 'zero' award for a plaintiff." (Slip. Op. at p. 3). While the appellate court correctly observed that this portion of the order was in error, see Timmons, it proceeded to address the issue of whether the statutory presumption applied.

The court held that the presumption did not apply and remanded the case for determination as to whether the plaintiff acted unreasonably in not accepting the offer. The court went on to note 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 than any offer made) is not conclusive and it should not apply in this case. That provision was provided as a threshold or bright line point for cases where a plaintiff's verdict is obtained." (Slip. Op. at p. 6). The court went on to state that:

> If the Malmberg's 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-actions 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.

(Slip. Op. at p. 7).

The foregoing language forms the crux of the Petitioner's argument

for conflict jurisdiction. It is the Petitioner's position that the lower court's decision rejecting the statutory presumption on the grounds that the presumption was designed only as a "threshold" where a plaintiff's verdict is obtained, expressly and directly conflicts with several cases and this Honorable Court's decision in Timmons as discussed below.

III. THE CONFLICT BETWEEN THE HOLDING IN THE COURT BELOW AND OTHER CASES

The conflict in the instant case, centers around differing interpretations of the following language in §45.061(2), "An offer shall be presumed to be unreasonably rejected by a plaintiff if the judgment entered is at least 25% less than the offer rejected....". While the court below acknowledged that the zero verdict was 25% less than the $100,001 offer, the court held that the statutory presumption of unreasonableness was not applicable. (Slip. Op. at page 6). In particular, the court held that the presumption applies only to instances where a plaintiff's verdict was obtained. (Id.)

This interpretation of that statutory language conflicts with the court's interpretation of the same language under the same circumstances in Gross v. Albertson's Inc., 591 So.2d 311 (Fla. 4th DCA 1991). In Gross, appellants argued that the trial court erred in entering a judgment for attorneys fee's and costs where a defense verdict was obtained after a $200.00 offer of judgment was filed. The appellate court affirmed the order, applying the statutory presumption. In rendering the decision, the court relied heavily on the legislative intent of the statute. On the subject

of legislative intent, the court stated:

> In a portion of the debate of House Bill 321 which became section 45.061, Florida Statutes, the following exchange occurred towards the end of the discussion:
>
> -Thank you Mr. 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.
> -Mr. McQuinn 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 314.

Therefore, in Gross, the court, after researching the legislative history, held that the statutory presumption applied in cases where a defense verdict is obtained. Thus, the holding below directly conflicts with the holding in Gross with regard to the triggering of the statutory presumption.

The holding also conflicts with Memorial Sales, Inc. v. Pike, 579 So.2d 778 (Fla. 3rd DCA 1991). In Pike, the defendant appealed

the trial court's denial of the motion for sanctions under §45.061, after a defense verdict was returned. The court reversed the trial court, holding that §45.061 does not "require that the plaintiff obtain the judgment prior to sanctions being imposed." Pike at 779-780. Pike went on to hold 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. Consequently, the defendants are entitled to recover the costs and attorney's fees which the parties have already stipulated to as reasonable.

Id. at 780.

Similarly, in Lennar Corporation v. Muskat, 595 So.2d 968 (Fla. 3rd 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. See also Collection Chevrolet, Inc. v. Value Rent-A-Car, Inc., 595 So.2d 98 (Fla. 3rd DCA) approved 608 So.2d 3 (Fla. 1992). On the contrary, the instant case was remanded to the trial court for determination of whether the plaintiff's rejection of the offer was unreasonable, as opposed to a determination as to whether the presumption was rebutted. The district court's rejection of the presumption found in §45.061 expressly and directly conflicts with the decisions rendered in Pike, Gross, and Muskat.

Additionally, this decision conflicts with Timmons v. Combs,

608 So.2d 1 (Fla. 1992). In Timmons, this Honorable Court noted §45.061 "is worded somewhat differently" than §768.79. Unlike §768.79, §45.061 refers only to the judgment entered, and "does not specify in whose favor the judgment must be entered." Id. at 2. Thus, the plaintiff is not required to obtain a judgment before the provisions of the statute come into play. Timmons, at 2. This Court, in approving Gross, when on to hold "Further, in Gross, the court quoted from a portion of the debate on House Bill 321 which became §45.061 to demonstrate that the legislators intended to provide a recovery where the defendant's offer was rejected and a defense verdict was returned." Timmons, at 2. Thus, as pointed out by Timmons and Gross, the legislature intended that the presumption apply to defense verdicts. These cases are at odds with the holding in the court below, where the panel refused to apply the presumption.

CONCLUSION

The decision of the Fifth District Court of Appeal conflicts with decisions of several other district courts, and this Honorable Court in that the Fifth District Court of Appeal held in the decision below that the statutory presumption of unreasonableness does not apply to where a defense verdict is obtained. The cases cited above clearly stand for the presumption that the statutory presumption is applied in the case where a defense verdict is returned.

Wherefore, the petitioner prays that this Honorable Court grant review of the district court decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 8th day of October, 1993 to: M. THOMAS BOND, JR., ESQUIRE, Post Office Box 2405, Ocala, FL 32678.

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CASE NO.:

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Petitioner,

-vs-

THELMA S. MALMBERG and her husband,
GORDON L. MALMBERG

Respondents.

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1993

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,

Appellant,

v.

CASE NO. 92-1491

THELMA S. MALMBERG, et al.,

Appellees.

_____/

Opinion filed July 30, 1993

Appeal from the Circuit Court
for Marion County,
Victor J. Musleh, Judge.

Randy Fischer and Pamela Bounds Olsen
of Boehm, Brown, Rigdon, Seacrest & Fischer, P.A.,
Ocala, and Francis J. Carroll, Jr., of Boehm, Brown,
Rigdon, Seacrest & Fischer, P.A., Daytona Beach,
for Apellant.

M Thomas Bond, Jr. of Bond, Arnett & Phelan, P.A.,
Ocala, for Appellees.

SHARP, W., J.

State Farm Mutual Automobile Insurance Company appeals from a post-judgment order which denied it an award of attorney's fees pursuant to sections 45.061 and 768.79, Florida Statutes (1991), and to Florida Rule of Civil Procedure 1.442, and which awarded it $5,218.02 in costs under the prevailing party statute.[1] State Farm argues it was entitled to an attorney's fee award even though the jury returned a defense verdict, because under the

[1] § 57.041, Fla. Stat. (1991).

circumstances of this case, it is clear that the plaintiffs below (Thelma and Gordon Malmberg) unreasonably rejected State Farm's offer to settle the case for $100,001. We agree in part, and remand this cause for further proceedings.

In June of 1987, Thelma Malmberg had an automobile collision with George Sherrets, Jr. State Farm insured both vehicles. With State Farm's approval, the Malmbergs settled with Sherrets for the maximum amount due under his liability policy with State Farm.

In June of 1990, the Malmbergs sued State Farm under the uninsured motorist provisions of their policy with State Farm. Thelma sought damages for her permanent injuries suffered in the accident with Sherrets, and Gordon sought damages for loss of consortium. On August 20, 1991, State Farm served the Malmbergs with an offer to settle the case for $100,001, provided the offer was accepted within thirty days. The offer was made pursuant to sections 45.061 and 768.79, Florida Statutes (1991), and Florida Rule of Civil Procedure 1.442.

Apparently the settlement proffered by State Farm was not accepted.[2] Nor does the record contain any counteroffers by the Malmbergs, or additional offers by State Farm. The cause proceeded to a jury trial, which produced a verdict for State Farm. The verdict contains the express finding that Thelma did not sustain a permanent injury within a reasonable degree of medical probability as a result of the 1987 accident.

In due course, State Farm moved for an award of costs and attorney's fees. The court awarded $5,218.02 in costs against the Malmbergs, but it

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[2] Perhaps it was rejected *de hors* the record on appeal.

denied any attorney's fee award, without any findings. On the record at the hearing on attorney's fees and costs, the trial judge stated he thought sections 45.061 and 768.79 precluded attorney's fee awards in cases involving a defendant's verdict and a "zero" award for a plaintiff.

After the order in this case was entered, various appellate decisions regarding the application of sections 45.061 and 768.79 were decided. They hopefully have clarified this decidedly murky area of the law of Florida. Unfortunately, they came too late to assist the trial judge in this case.

We agree with the Malmbergs that rule 1.442 and section 768.79 afford no basis for an award of attorney's fees in this case. In *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992), the Florida Supreme Court held that section 768.79, prior to its amendment effective October 1, 1990, did not permit an award of attorney's fees to a defendant where no judgment had been rendered in favor of a plaintiff. *See Curenton v. Chester*, 576 So. 2d 969 (Fla. 5th DCA 1991). Section 768.79 has been amended to allow attorney's fee awards to prevailing defendants, but that amendment expressly provides the statute only applies to policies issued or renewed after October 1, 1990. Since the Malmbergs' accident occurred in 1987, obviously their insurance policy with State Farm predates the amendment.

Timmons also held that pursuant to section 45.061, the jury need not return a verdict for the plaintiff in order for a defendant, who made an offer of settlement, to be awarded attorney's fees.[3] It reaffirmed that section

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[3] *See also Johnston v. Kloster Cruise, Ltd.*, 604 So. 2d 572 (Fla. 4th DCA 1992); *O'Neil v. Wal-Mart Stores, Inc.*, 602 So. 2d 1342 (Fla. 5th DCA 1992); *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).

45.061 is constitutional,[4] to the extent it provides a substantive right to attorney's fees. Further, it held that rule 1.442 only controls the procedural aspects of how an offer of judgment must be made, and it provides no substantive right to claim an award of attorney's fees.

Thus section 45.061 appears to be solely controlling in this case.[5] Section 45.061 became effective July 2, 1987, after the date of the Malmbergs' accident, but as the supreme court clarified in *Leapai v. Milton*, 595 So. 2d 12 (Fla. 1992), the key to the operation of the statute is the unreasonable rejection of an offer of settlement. The offer of settlement is the triggering mechanism for section 45.061, not the date the accident occurred. *Metropolitan Dade County v. Jones Boatyard, Inc.*, 611 So. 2d 512 (Fla. 1993). State Farm made the offer of settlement in this case in 1991, after section 45.061 became effective.[6]

When an offer of settlement is made in compliance with the provisions of section 45.061, the party who makes the offer can move for attorney's fees, costs, and expenses. If the court determines that the offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose "an appropriate sanction on the offeree." § 45.061(2), Fla. Stat. (1991). The sanction to be imposed is an award of "[t]he amount of the parties' costs and expenses, including reasonable attorneys' fees, investigative expenses, expert witness fees, and other

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[4] *See also Leapai v. Milton*, 595 So. 2d 12 (Fla. 1992).

[5] The parties to this appeal do not argue section 45.061 is inapplicable to this case. They only argue that it was not properly applied below.

[6] The Florida Legislature has repealed section 45.061 for causes of action accruing after October 1, 1990. § 45.061(6), Fla. Stat. (1991); *Timmons v. Combs*, 608 So. 2d 1 (Fla. 1992).

expenses which relate to the preparation for trial, incurred after the making of the offer of settlement." (emphasis added). § 45.061(3)(a), Fla. Stat. (1991).

In deciding whether an offeree unreasonably rejected an offer of settlement, 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). 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).

When a motion for sanctions is made pursuant to section 45.061, a hearing relating to these concerns should be held, and the trial judge should support an imposition of sanctions or a refusal to do so, with findings. *See Johnston v. Kloster Cruise Ltd.*, 604 So. 2d 572 (Fla. 4th DCA 1992); *O'Neil v. Wal-Mart Stores, Inc.*, 602 So. 2d 1342 (Fla. 5th DCA 1992); *Winn Dixie Stores, Inc. v. Elbert*, 590 So. 2d 15 (Fla. 4th DCA 1991). The preliminary determination involves a two-part inquiry. The first inquiry is 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 crucial determination is whether, at the time the offer was made, the offeree acted unreasonably in not accepting it. Many facts and circumstances might be relevant, depending upon the particular case, and the situation in which the offeree found himself, and what he reasonably knew about the case at the time the offer was made. As the statute suggests, if the offeror withheld information about the case from the offeree so that the offeree was not in a position to analyze the merits of the case and the offer, a rejection would not be unreasonable. In this case, the fact that State Farm insured both the Malmbergs and the tortfeasor, might be relevant on that issue.

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.[7] 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.

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[7] § 45.061(2), Fla. Stat. (1991).

To resolve the motion in this case, the trial judge will have to evaluate the liability aspects of the Malmbergs' lawsuit, as reasonably known to them when the offer was made in 1991. To merit an award of fees to State Farm, the offer must be found to be one the Malmbergs reasonably should have been expected to accept. As the fourth district stated in *Winn Dixie*, "[t]he 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." *Winn Dixie*, 590 So. 2d at 16.

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.

If the court finds the offer was unreasonably rejected, then it "may" impose an "appropriate" sanction as provided by section 45.061. But, only those attorney's fees, costs, and expenses incurred after making the offer are awardable. *Hemmerle v. Bramalea, Inc.*, 547 So. 2d 203 (Fla. 4th DCA 1989), *rev. denied*, 558 So. 2d 18 (Fla.), *cert. denied*, 496 U.S. 926, 110 S.Ct. 2620, 110 L.Ed.2d 641 (1990). In this case, State Farm has already recovered all of its costs, so any sanction must be limited to an award of attorney's fees.

Accordingly, we reverse the trial court's order denying State Farm attorney's fees, and we remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

HARRIS, CJ., and PETERSON, J., concur.

I hereby certify that the above and foregoing is a true copy of instrument filed in my office.

FRANK J. HABERSHAW, CLERK
DISTRICT COURT OF APPEAL OF
FLORIDA, FIFTH DISTRICT

Per Bobbie L. Fleming
Deputy Clerk