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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 REPLY BRIEF

BOEHM, BROWN, RIGDON,
SEACREST & FISCHER, P.A.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

ARGUMENT

I. THE PRESUMPTION FOUND IN §45.061 APPLIES TO THIS CASE

A. INTRODUCTION

The respondents concede the applicability of §45.061, but argue that the Fifth District Court of Appeal correctly held that the presumption does not apply in this case. In making this argument, respondents mischaracterize the holding of the appellate court with regard to the applicability of the presumption. Initially, §45.061 expressly states "an offer shall be presumed to have been unreasonably rejected by the 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).

Respondent argues that the lower court "did not ignore the presumption" but instead "looked beyond" the presumption (Respondent's Brief at pages 6,10), in accordance with the statute. The respondents maintain that the statute requires, the trial court to make a determination of whether "the offeree acted unreasonably in not accepting the offer." (Respondent's Brief at page 6). Respondent goes on to state that the district court correctly held that the presumption is one factor, among others, to be considered when addressing the question of reasonableness. Respondent's argument misses the mark, both in regard to the holding of the district court, and the manner in which presumptions operate.

B. THE DISTRICT COURT HOLDING REFUSED TO APPLY THE PRESUMPTION OF UNREASONABLENESS IN CASES WHERE THERE IS A DEFENSE VERDICT ENTERED

Contrary to respondent's implications, the district court opinion very clearly negated the operation of the presumption of unreasonableness found in the statute, where there is a defense verdict. The court went on to state with regard to the presumption "For guidance in making the determination on remand, we posit that the statutory presumption of unreasonable rejection provided by the statute (because zero is 25% less than the offer made) is not conclusive and it should not apply in this case." 623 So.2d at 758 (Emphasis supplied). Thus, contrary to respondent's interpretation of the opinion, it is quite clear that the district court has nullified the presumption in instances where a zero verdict has been obtained. Instead, the district court stated that in determining the reasonableness of the respondent's rejection, the trial court, on remand, should take into account "many facts and circumstances". Malmberg, 632 So.2d at 758. "[I]f the Malmbergs had a reasonable chance to prevail at trial on liability and their provable damages could 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." 623 So.2d at 759.

Thus, the lower court held that the presumption created by the statute did not apply, by allowing the trial court to entertain any number of facts on the issue of reasonableness.

The district court based its holding on its reasoning that "That provision [§45.061(2)] was designed as a threshold or bright line point where a plaintiff's verdict is obtained." 623 So.2d at 758. The district court has thus put its own judicial gloss upon the statutory language found in §45.061. The presumption, as quoted above, does not provide for any distinctions in cases where it operates. In other words, the presumption operates in every case where a offer was 25% more than the verdict.

This Honorable Court has already noted that the presumption would apply in these circumstances in Timmons v. Combs, 608 So.2d 1 (Fla. 1992). Significantly, the lower court did not see fit to discuss this aspect of Timmons. Malmberg's interpretation of the statutory presumption is at odds with the statutory language, and a uninterrupted line of cases stemming from this court, and various other district court of appeal decisions.

C. THE RESPONDENT HAS THE BURDEN TO OVERCOME A PRESUMPTION

The respondent's argument that the presumption is only one "factor" to be taken into account in determining reasonableness, ignores the nature and function of presumptions. Contrary to respondent's assertion that a presumption can be a "factor", a presumption is defined as "an assumption of fact which the law makes from the existence of another fact or group of facts found or otherwise established." §90.301(1), Fla. Stat. (1991). As stated by one commentator, a presumption "compels the trier of fact to find the presumed fact if it finds certain basic facts to be present." C. Ehrhardt, Florida Evidence Section 301.01. (1993).

Thus, as applied to §45.061, if the trial court finds that the rejected offer was 25% less than the verdict, then it must presume that the offer was rejected unreasonably. The trial court, contrary to the Fifth District opinion, is not free to disregard the presumption.

The respondent has argued that the petitioner has advocated that the statute requires a conclusive presumption. Although no constitutional challenge has been made by the respondent, petitioner recognizes that this Honorable Court has held that conclusive presumptions are constitutionally invalid. Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987). Thus, petitioner has not argued that the presumption is conclusive. However, it is certainly a rebuttable presumption. Rebuttable presumptions have generally fallen into two separate categories in Florida, the "bursting bubble" or vanishing presumption, or a presumption affecting the burden of persuasion. Caldwell v. Division of Retirement, 372 So.2d 438 (Fla. 1979); §90.303, Fla. Stat. (1991); §90.304, Fla. Stat. (1991).

With regard to a bursting bubble or vanishing presumption, courts have held that when credible evidence comes into the case contradicting the basic fact or facts giving rise to the presumption, the presumption vanishes and the issue is determined on the evidence just as though no presumption has ever existed. Caldwell at 440 (quoting Nationwide Mutual Insurance Co. v. Griffin, 222 So.2d 754, 756, (Fla. 4th DCA 1969)). However, even under these circumstances a substantial reason must be advanced

before the presumption disappears. Baughman v. Vaughn, 390 So.2d 750, 751 (Fla. 5th DCA 1980). On the other hand, the second type of presumption does not automatically disappear. "It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case." Caldwell at 440. Regardless of the type of the presumption, it is the opposing party's burden to come forward with sufficient evidence. Gross v. Albertson's Inc., 591 So.2d 311 (Fla. 4th DCA 1991). The issue is whether the presumption is a "bursting bubble" or one affecting the burden of proof.

As stated earlier, Florida recognizes both the "bursting bubble" presumption, and the presumption shifting the burden of proof. Valcin. In Florida, presumptions which shift the burden of proof in civil proceedings have primarily included expressions of social policy. In the instant case, the issue exists as to whether the presumption found in §45.061 is a "bursting bubble" presumption, or a presumption affecting the burden of proof.

The intent behind the offer of judgment statute is to deter unnecessary litigation. In fact, the committee expressly included attorneys fees as a sanction, in order to strengthen the deterrent effect of rejecting an offer. The Florida Bar re: Amendment to Rules of Civil Procedure, Rule 1.442, 550 So.2d 442 (Fla. 1989). The deterrent effect of the rule would be extremely diluted if the presumption could be dissipated simply by the plaintiff introducing evidence that the value of the claim exceeded the offer. Thus,

the presumption created in the instant case, in order to discourage litigation, should shift the burden of production and persuasion to the losing party.

In any event, assuming that the presumption is one of a "bursting bubble", the reasons advanced by the party overcoming the presumption must still be substantial and reasonable. Baughman v. Vaughn, 390 So.2d 750, 751 (Fla. 5th DCA 1980). The record is totally devoid of any substantial reason advanced to overcome the presumption found in the statute.[1] In the event that the respondents cannot carry their burden, a finding of unreasonableness occurs as a matter of law thus dispensing with the need of the trial court to make express findings as to unreasonableness. Gross. Lastly, the Malmberg court stated that if the court finds the offer was unreasonably rejected, then it "may impose an 'appropriate' sanction as provided by section 45.061." Malmberg 623 So.2d at 759. This is a misinterpretation of the statute. Section 45.061(3) states in pertinent part as follows, "In determining the amount of any sanction to be imposed under this section, the court shall award...."(Emphasis supplied). Thus, if the presumption applies, the court must award a sanction.

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[1] Since the trial court denied petitioner's motion to impose sanctions pursuant to §45.061 in the first instance, there is no record below that would justify ignoring the presumption. Although respondents appear to argue that the district court evaluated this case on its own, and found substantial reasons for ignoring the presumption, it is a basic tenet of appellate practice that appellate courts are not fact finding tribunals. Thus, on remand, the trial court should conduct a hearing in order to determine if the respondents can offer enough evidence to overcome the presumption.

CONCLUSION

The petitioner requests that this Honorable Court quash that portion of the District Court opinion with regard to its holding that the presumption of §45.061 does not apply, as being in conflict with the statute and case law interpreting the statute.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 1st day of April, 1994 to: M. THOMAS BOND, JR., ESQUIRE, Post Office Box 2405, Ocala, FL 32678.

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