IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-611

Florida Bar No. 184170

ROSE G. CAMPBELL,)
)
Petitioner,)
)
v.)
)
CLIVENS GOLDMAN,)
)
Respondent.)
_____)

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION
ROSE G. CAMPBELL

(With Appendix)

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POINT ON APPEAL

THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION IN THIS CASE AND *PIPPIN* AND *McMULLEN OIL*; AND MOREOVER THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THIS OPINION AND NUMEROUS CASES INCLUDING THE SUPREME COURT'S RECENT OPINIONS IN ***LAMB*, *WILLIS SHAW*, *SARKIS*, AND *MORSANI***, AS TO WHETHER ATTORNEY'S FEES STATUTES ARE IN DEROGATION OF COMMON LAW AND MUST BE STRICTLY COMPLIED WITH.

STATEMENT OF THE FACTS AND CASE

The Fourth District certified conflict in this case. The facts are that the plaintiff filed a Proposal for Settlement which did not state that it was being made pursuant to the applicable statute, § 768.79, Fla. Stat. The trial judge applied the existing law and held that the Proposal was invalid.

This was appealed to the Fourth District, and the Fourth District held that it was valid, but certified conflict with the First District's Opinion in Pippin, infra, and the Second District's Opinion in McMullen Oil Company, infra. Both of these cases specifically hold that when a Proposal for Settlement does not cite the statute it was being made under, it is invalid, since attorney's fees statutes are in derogation of common law and must be strictly construed.

An 11-page specially concurring Opinion urged that the Florida Supreme Court change its well-settled rule that attorney's fees statutes are in derogation of common law and must be strictly construed. The specially concurring Opinion also certified conflict.

Accordingly, this case is before this Honorable Court on certified conflict.

SUMMARY OF ARGUMENT

The Fourth District certified conflict in this case with the First District's Opinion in Pippin v. Latosynski, 622 So. 2d 566 (Fla. 1st DCA 1993) and the Second District's Opinion in McMullen Oil Company, Inc. v. ISS International Service System, Inc., 698 So. 2d 372 (Fla. 2d DCA 1997).

The specially concurring Opinion agreed that there was conflict with those cases, and stated it would also certify conflict with the Fourth District's Opinions in Grip Development, Inc. v. Coldwell Banker Residential Real Estate, Inc., 788 So. 2d 262 (Fla. 4th DCA 2000); Jaffrey v. Baggy Bunny, Inc., 733 So. 2d 1140 (Fla. 4th DCA 1999); Cohen v. Arvin, 878 So. 2d 403 (Fla. 4th DCA 2004).

The basic facts are that the plaintiff filed a Proposal for Settlement, but did not state that it was being made pursuant to § 768.79, Fla. Stat. This Honorable Supreme Court in a long line of cases has held that statutes awarding attorney's fees are in derogation of the common law and must be strictly complied with. Pippin and McMullen Oil applied that rule of law and held that, if a proposal does not cite the statute it was being filed under, it is invalid.

Nonetheless, the Fourth District held that it was not necessary to cite the statute, upheld the Proposal for Settlement, and certified conflict with Pippin and McMullen Oil. Therefore, there clearly is express and direct conflict.

Implicit in the holding of the Fourth District is that a Proposal for Settlement does not need to strictly comply with an attorney's fee statute to be valid, so the Opinion of the Fourth District tacitly is in express and direct conflict with the long line of cases from the Supreme Court which hold that attorney's fees statutes are in derogation of common law, and must be strictly complied with. Lamb v. Matetzschk, 906 So. 2d 1037 (Fla. 2005); Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276 (Fla. 2003); Sarkis v. Allstate Insurance Company, 863 So. 2d 210 (Fla. 2003); Major League Baseball v. Morsani, 790 So. 2d 1071 (Fla. 2001). In fact, the specially concurring opinion urged the Supreme Court to reverse its long-standing holding that attorney's fees statutes are in derogation of common law and must be strictly construed, saying: "I repeat, it is also incoherent" (Opinion, p. 6).

In Sarkis, the Florida Supreme Court succinctly stated this precedential law:

> "...It is the long-standing precedent of this Court that statutes and rules authorizing attorney fees or imposing penalties are to be strictly construed as written and not extended by implication."
>
> Sarkis, 224.

It should be noted that Lamb, Willis Shaw Express, and Morsani were unanimous opinions, and there was one dissent in Sarkis on a different ground, which did not dispute the rule of law that attorney's fee statutes are in derogation of common law and must be strictly complied with.

Due to the express and direct conflict with Pippin and McMullen Oil Company, as well as the conflict with the Supreme Court's firmly established rule of law that attorney's fees statutes are in derogation of common law and must be strictly complied with, this Honorable Court should accept jurisdiction, and reconcile the conflict as to whether attorney's fees statutes are in derogation of common law, and there must be strict compliance.

A public policy reason for this rule is that strict construction is necessary in order to know if a party is liable for attorney's fees. If strict compliance were not required, there would be endless litigation over how far from a statute a party could deviate and still be entitled to attorney's fees. Attorney's fees would be recoverable in that trial court litigation and on appeal, since it involves entitlement to attorney's fees. A "bright light" rule of law means that the litigants know for certain whether they will be liable for, or entitled to attorney's fees at the conclusion of the litigation.

ARGUMENT

THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION IN THIS CASE AND *PIPPIN* AND *McMULLEN OIL*; AND MOREOVER THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN THIS OPINION AND NUMEROUS CASES INCLUDING THE SUPREME COURT'S RECENT OPINIONS IN ***LAMB*, *WILLIS SHAW*, *SARKIS*, AND *MORSANI***, AS TO WHETHER ATTORNEY'S FEES STATUTES ARE IN DEROGATION OF COMMON LAW AND MUST BE STRICTLY COMPLIED WITH.

The facts in this case were that the plaintiff filed a Proposal for Settlement which did not comply with Rule 1.442 and § 768.79, Fla. Stat., since it did not reference that it was being made under § 768.79, Fla. Stat. The Fourth District held that this was a technical violation of the attorney's fees statute and attorney's fee rule, and this would be overlooked, and the Proposal was nonetheless valid. The Fourth District also certified conflict with Pippin, supra, and McMullen Oil Company, supra.

The facts in Pippin were that a party filed a Proposal for Settlement, and did not cite

§ 768.79, Fla. Stat. and the First District held that the proposal was invalid. Therefore, there

clearly is direct and express conflict between the Opinion in the present case and Pippin.

The Fourth District also certified conflict with McMullen Oil Company, Inc. v. ISS International Service System, Inc., supra. In McMullen Oil, a Proposal for Settlement was made which referred to "all applicable Florida Statutes and the Florida Rules of Civil Procedure." The Second District cited the rule of law that statutes authorizing awards of attorney's fees are in derogation of common law and must be strictly complied with, and therefore held it was invalid. Therefore, there clearly is express and direct conflict.

Derogation of Common Law

This opinion which holds that a Proposal for Settlement is valid even though it did not strictly comply with the statute, is also in express and direct conflict with legions of Florida cases, which hold that attorney's fees statutes are in derogation of common law, and there must be strict compliance. The specially concurring opinion urged that this rule of law which has been repeatedly reaffirmed by the Florida Supreme Court, should be overturned.

The Florida Supreme Court has repeated this rule of law four times in the last three years, and it would seem that it is so firmly established that it does not need debate. Allowing this Opinion to stand, would overturn dozens of other cases which have disallowed attorney's fees in various factual situations because there was not strict compliance with the applicable statute.

This rule of law was most recently reaffirmed by the Florida Supreme Court in the case of Lamb v. Matetzschk, supra. A Proposal for Settlement did not differentiate between the parties, and the Florida Supreme Court held that it was invalid because § 768.79, Fla. Stat. and Rule 1.442 are in derogation of the common law rule that each party pays its own fees, and therefore there must be strict compliance.

The Lamb case was decided in 2005, and in 2003, the Supreme Court decided two other cases, and specifically held that attorney's fees statutes are in derogation of common law and must be strictly construed, Willis Shaw Express, Inc. v. Hilyer Sod, Inc., supra, and in Sarkis v. Allstate Insurance Company, 863 So. 2d 210 (Fla. 2003).

In Willis Shaw, the Supreme Court said again enunciated this long-standing rule of law:

> ...This language must be strictly construed because the offer of judgment statute and rule are in derogation of the common law rule that each party pay its own fees. *See Major League Baseball v. Morsani*, 790 So.2d 1071, 1077-78 (Fla. 2001)("[A] statute enacted in derogation of the common law must be strictly construed...."); *Dade County v. Pena*, 664 So.2d 959, 960 (Fla. 1995)("[I]t is also a well-established rule in Florida that 'statutes awarding attorney's fees must be strictly construed.' *Gershuny v. Martin McFall Messenger Anesthesia Professional Ass'n*, 539 So.2d 1131, 1132 (Fla. 1989)."). A strict construction of the plain language of rule 1.442(c)(3) requires that offers of judgment made by multiple offerors must apportion the amounts attributable to each offeror.
>
> Willis Shaw, 278-279.

In Sarkis, the Supreme Court again addressed whether there must be strict construction of § 768.79, Fla. Stat. and Rule 1.442, and held there must be strict construction:

> The reason that the statute and rule are to be strictly construed is not because either is ambiguous but because the statute authorizes and the rule implements an award of attorney fees and because the assessment of attorney fees pursuant to the statute and rule is a sanction. It is the long-standing precedent of this Court that statutes and rules authorizing attorney fees or imposing penalties are to be strictly construed as written and not extended by implication. Since neither the statute nor the rule authorizes a fee multiplier, an authorization for the use of a multiplier would have to be by implication in violation of both long-standing and very recent precedent of this Court. *See*, majority op. At 223.
>
> Sarkis, 224.

A landmark case in which the Florida Supreme Court applied the "deeply rooted, centuries old tenet of the common law" and held it applied in Florida, that statutes which are in derogation of common law must be strictly construed, is Major League Baseball v. Morsani, supra. The Florida Supreme Court held:

> Second, as noted above, equitable estoppel is a deeply rooted, centuries old tenet of the common law. On the other hand, fixed time limitations for filing suit, i.e., statutes of limitations, were unknown at common law and are a creature of modern statute. This Court has held that a statute enacted in derogation of the common law must be strictly construed and that, even where the Legislature acts in a particular area, the common law remains in effect in that area unless the statute specifically says otherwise:
>
> > The presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard. Unless a statute unequivocally states that it changes the common law, or is so repugnant to the common law that the two cannot coexist, the statute will not be held to have changed the common law.
>
> Major League Baseball, 1077-1078.

Therefore, there is clearly express and direct conflict with the rule of law that attorney's fees statutes are in derogation of common law and must be strictly complied with, and if there is not strict compliance attorney's fees can not be recovered.

An important reason for this rule of law is that a litigant should know if he will be liable or entitled to fees at the conclusion of the litigation. If strict compliance is not the rule of law, a party can never know whether a proposal would be valid or not, and this would require endless litigation as to how far a party can deviate from the requirements of a statute and still be entitled to, or liable for fees.

Therefore, the public policy clearly dictates that there must be strict compliance with attorney's fee statutes, so that there can be certainty in the law as to whether attorney's fees will be owed at the conclusion of the litigation.

CONCLUSION

There is express and direct conflict between the decision in the present case and Pippin and McMullen Oil, supra, as well as being in express and direct conflict with Lamb; Willis Shaw; Sarkis; and Morsani, supra.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12th day of April, 2006 to:

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CERTIFICATION OF TYPE

It is hereby certified that the size and type used in this Brief is 12 point Courier, a font that is not proportionately spaced.

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