IN THE SUPREME COURT OF FLORIDA

GARY MASSEY,

Appellant,

CASE NO. SC 07-776

ID06-3657
vs. **Lower CASE NO. 1D06-3657**

CALVIN F. DAVID,

Appellee.

APPELLANT MASSEY'S REPLY BRIEF

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NOTES AS TO USAGE

Throughout this brief the following designations are used:

1. "David" refers to defendant/appellee Calvin F. David.

2. "Massey" refers to plaintiff/appellant Gary Massey.

REPLY ARGUMENT

Massey's reply follows the organization David used in his Answer Brief.

I. THIS COURT HAS JURISDICTION BECAUSE THE DISTRICT COURT DID DECLARE §57.071 FLA. STAT. UNCONSTITUTIONAL.

David's submission that this matter is not within this Court's mandatory jurisdiction is without merit. The district court's slip opinion declares:

> Further, from our review, the Fourth District *correctly found the statute an unconstitutional intrusion of "the powers and procedure before the Florida Courts*. ("The supreme court shall adopt rules for the practice and procedure in all courts . . . ."). As the Fourth District explained, "section 57.071(2) does not create a right to recover expert witness fees, but rather sets forth the procedure for recovering under that right." Cort, 807 So.2d at 738.

(Appendix 1, Initial Brief, p. 4.) (Italics added.) *Massey v. David,* 953 So.2d 599, 601 (Fla. 1st DCA 2007). That is a plain "declaration" that the statute is unconstitutional, thereby invoking this Court's mandatory jurisdiction pursuant to Art. V §3(b)(1) Fla. Const.:

> (b) JURISDICTION. -The Supreme Court:
> (1) Shall hear appeals ...from decisions of district courts of appeal *declaring* invalid a state statute or a provision of the state constitution.

(Italics added.) The unmodified use of the word "declaring" in this section must be contrasted to the restricted term, "May review any decision of a district court of appeal that *expressly declares* a statute valid," used in §3(b) (3). (Italics added.)

The obvious intent of the judicial article is to assign this Court mandatory jurisdiction to review any district court decision which contains a declaration that a Florida statute is invalid. This jurisdiction does not require this Court to delve into the details of the case to determine whether the district court's declaration was necessary to its decision or was merely one of several alternative grounds. In short, it is the declaration that a statute is invalid that invokes the Court's jurisdiction, not the nuances of the decision. Once a district court makes such a declaration in a decision, the whole decision falls within the Court's jurisdiction. This is the reach of this Court's jurisdiction in this case.

This scope of the jurisdictional point here is analogous to the conflict jurisdictional issue resolved by *The Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988). *The Florida Star* rejected the argument that this Court must search all prior decisions to determine whether *actual* conflict exists to invoke discretionary conflict jurisdiction, and, instead, held: "[i]t is not necessary that conflict actually exist for this Court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result." *Id.*, at 288. *A fortiori*, as to this Court's *mandatory* jurisdiction, it is not necessary that the Court undertake a detailed preliminary examination to determine that the declaration was *necessary*

to the decision. Instead, the Court must find only that such a declaration *was made.* This approach insures that the state's highest court has the final say when the judiciary determines that an enactment of the co-equal legislative branch is invalid. It is also consistent with this Court's early holding that its jurisdiction to review decisions passing on the constitutionality of statutes is not to be defeated by a hyper-technical reading of the jurisdictional article. See, *Matthews v. State*, 363 So.2d 1066 (Fla.1978) (This was an earlier version of §3(b) but the hyper-technical point is not affected.)

Although the district court's opinion speaks for itself, David's Answer Brief explicitly acknowledges that it includes a statement in the nature of a *declaration* that the statute is invalid. David says, "The district court simply observed by way of dicta, or at best as an alternative holding, that had the trial judge addressed the constitutional issue and ruled consistent with the Fourth District's opinion in Cort that the statute was unconstitutional, he would have been correct." Answer Brief, at 13. (Underlining in original.) Whether the district court's "observation" constitutes "dicta" or an "alternative holding" is of no consequence to this Court's review jurisdiction: the key criterion in the constitution is that the decision included a statement "declaring" a state statute to be unconstitutional, which the decision below plainly did.

David's reference to *Mystan Marine, Inc. v. Harrington*, 339 So.2d 200, (Fla. 1976), Answer Brief, p. 12, misses *Mystan*'s principle point; namely, much of this Court's jurisdiction is " to manifest a 'concern with decisions as precedents as opposed to adjudications of the rights of particular litigants.'" *Id.,* at 201. This case exemplifies that concern. Unless and until this Court corrects it, all courts in the first district are bound to follow the decision below declaring §57.071 unconstitutional. This Court possesses jurisdiction to correct that error.

Finally, in his "Statement of the Case and of the Facts" David appears to concede that Massey is "technically correct" that David did not comply with §57.071(2) and then to argue that David's non-compliance is excusable because of other information David says Massey had available to him. Answer Brief, pp. 7, 8. David did not raise this argument in the courts below; has not preserved it for review here; and has afforded Massey no opportunity to respond. Hence, the time for raising this argument has long passed. Even so, this Court's recent decision in *Campbell v. Goldman,* ___So.2d__(Fla. 2007) shows why David's "no-harm, no-foul" argument is wholly without merit. *Campbell* considered whether strict compliance with the "technical requirements" of fee applications made pursuant to rule 1.441 and §768.79 is a condition precedent to obtaining an award, and concluded: "Because the overall subject is in derogation of the common law, all

portions must be strictly construed." *Id.*, ___. The only apparent defect in the *Campbell* fee application was failure to cite the relevant statute in the motion for fees. This Court rejected the argument that this mere "technical" violation of the fee shifting provisions is excusable, applied the rule of strict compliance with statutory entitlements in derogation of the common law, and affirmed the decisions denying the award. To the extent that David has invoked the issue here, his "technical" compliance defense must also be denied on the basis of *Campbell* and decisions referred to therein.

II. §57.071 FLA. STAT. IS A CONSTITUTIONAL STATUTE PRESCRIBING WHICH EXPERT FEE COSTS ARE TAXABLE.

In its attempt to support the decision below, David's Answer Brief continues to voice the flabby analysis of *Estate of Cort v. Broward County Sheriff*, 807 So. 2d 736 (Fla. 4th DCA 2002) pertaining to the constitutionality of §57.071(2) Fla. Sta. Neither *Cort* nor the courts below have yet to address the question with the rigor that this Court always employs when a statute is challenged. In sum, the statute comes into court with a presumption of constitutionality; all doubts must be resolved in favor of validity; and, when a constitutional construction can be given a statute, courts must choose it over one that would render the statute unconstitutional. *Leapai v. Milton*, 595 So.2d 12, 14 (Fla.1992) ("We have

consistently held that statutes should be construed to effectuate the express legislative intent and all doubt as to the validity of any statute should be resolved in favor of its constitutionality"); *Cassady v. Consolidated Naval Stores Co.*, 119 So.2d 35, 37 (Fla. 1960) ("We are conscious of our duty to interpret a legislative Act so as to effect a constitutional result if it is possible to do so.")

No one can dispute that this Court has firmly established that entitlement to obtain a cost award is a matter of substance to be decided by the legislature. *Board of County Com'rs, Pinellas County v. Sawyer*, 620 So.2d 757, 758 (Fla. 1993)("Cost provisions are a creature of statute and must be carefully construed.") Although Massey submits that §57.071(2) shows on its face that it defines which expert fees may be taxed as costs, he also suggests that whether the provision constitutes substance or procedure may be tested by examining the statute and procedural rules as they relate to cost awards, first, *before* §57.071 was enacted, and then *with* the addition of §57.071(2).

As to substance, all the decisions agree that §92.231(2) Fla. Stat. was the initial statute authorizing expert fee cost awards. In relevant part, that statute provides:

> (2) Any expert or skilled witness who shall have testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such

witness in an amount agreed to by the parties, and the same shall be taxed as costs.

As to rules of procedure, the version of Fla. R. Civ. P 1.525 applicable to this case provides:[1]

> **Rule 1.525. Motions for Costs and Attorneys' Fees**
> Any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal.

Taken together, these two provisions define the entitlement and prescribe the procedure for obtaining a cost award. First (substance), the expert testimony must be used at trial, and, second (procedure), the claimant must serve a motion for costs within 30 days of the judgment. It is in this context that the later-enacted §57.071(2) must be construed. The statute reads:

> §57.071(2). *Expert witness fees may not be awarded as taxable costs unless* the party retaining the expert witness furnishes each opposing party with a written report signed by the expert witness which summarizes the expert witness's opinions and the factual basis of the opinions, including documentary evidence and the authorities relied upon in reaching the opinions. Such report shall be filed at least 5 days prior to the deposition of the expert or at least 20 days prior to discovery cutoff, whichever is sooner, or as otherwise determined by the court. .....

(Italics added.) The dispositive question is: which provision does §57.071(2) amend? The entitlement to a fee prescribed by §92.231? Or the procedure to claim a fee prescribed by Rule 1.525?

The most cursory inspection establishes that the statute modifies the characteristics of *which* expert witness fees may be taxed. Initially, §92.231(2) had authorized taxation of expert witness fees only for experts "who shall have testified in any cause." The effect of §57.071(2) is to further limit the entitlement to a cost award for expert witness fees. Two substantive criteria must now be satisfied: the expert "shall have testified," *and* "the party retaining the expert witness [must have furnished] each opposing party with a written report signed by the expert witness" within the designated time periods. The legislature's intended purpose is plain enough: to limit the expert witness fees that may be taxed in a cost award. Hence, §57.071(2) imposes more substantive restrictions on which fees may be taxed as costs.

By contrast, §57.071(2) has no effect whatsoever upon Rule 1.525. That rule does only one thing, which is to prescribe the procedure for claiming a cost award to which a party is *otherwise* entitled. The rule prescribes two procedural criteria: (1) the claimant must serve a motion "seeking a judgment seeking a judgment taxing costs" and (2) the claimant must serve the motion "no later than

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[1] *In re Amendments to The Florida Rules of Civil Procedure,* 917 So.2d 176, 177 (Fla.2005) amended the statement to strike the word "within" and replace with the phrase "no later than 30 days."

30 days after filing of the judgment..... ." That rule does not undertake to define which costs are awardable; only a procedure for claiming those that are.

Plainly, §57.071(2) *does not* purport to change the procedural requirement of *serving a motion* and *it does not* purport to change the prescription of when the motion must be filed. In sum, §57.071(2) provides additional criteria to define which expert witness fees are taxable, and *doe not* prescribe a rule of practice and procedure.

Indeed, David's Answer Brief agrees with this analysis. David states:

> Instead, section 57.071(2) alters the procedure for perfecting the substantive right for recovery of expert witness fees as taxable costs authorized by section 92.231(2), by imposing time requirements for the furnishing and filing of expert reports, *which requirements ultimately determine whether one is entitled to recover under that right."*

Answer Brief, p. 19. (Italics added.) David, thus admits, that §57.071(2) determines the *entitlement* to fees. Where he goes wrong is to characterize the criteria that define the entitlement to be procedural rather than substantive.

If the courts should decide that the Legislature possesses no power to impose time restrictions on the exercise of substantive statutory rights, then they have their work cut out to invalidate a large number of Florida statutes. Among those are: the Chapter 95 statutes of limitations (whose only function is to time limit substantive rights);§194.171(prescribing 60 day windows for challenging tax

assessments); § 559.929(4)(prescribing a 120 day window for filing travel injury claims); §733.702(1)(setting a 30 day time frame for creditors to file claims against estates); §760.11 (setting a 365 day time frame to file claim discrimination claims); §440.185(1)(requiring workers' compensation claimants to notify employers of injuries within 30 days);and, §768.28(6)(a)(requiring persons to give a public body notice of intent to sue as a condition precedent to filing an action). Such a judicial revolution seems unlikely. For example, *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979) considered the statutory notice requirements in §768.28(6)(a) and held: "*Compliance with that subsection of the statute is clearly a condition precedent to maintaining a suit.*" *Id*., at 1022, 3. See also, *Warren v. State Farm Mut.*, 800 So.2d 1090 (Fla. 2005). By parity of reasoning, compliance with §57.071(2) notice requirements "is clearly a condition precedent" to perfecting entitlement to an expert fee cost award.

> Finally, the district court's statement that "even if " §57.071(2) were valid, it does not apply to this case[2] is plainly erroneous. Because the district court initially raised the question of when §57.071(2) was initially enacted *sua sponte* in oral argument with no briefing and no notice, it is not surprising

[2]The statement is: "Moreover, even if, as urged by Massey, the statute is substantive, it still would not apply in this case. The disputed section was added in 1999, effective October 1999, well after the cause of action in this case arose." Initial Brief, App. 1, p. 5, *Massey*, 953 So.2d at 602

> that it got the wrong answer. Although §57.071(2) was enacted after this cause of action arose, it is not disputed that it was in effect *before* David contracted the expert witness fees at issue here. Accordingly, this Court's decision in *Leapai v. Milton*, 595 So.2d 12 (Fla.1992) supplies the rule as to which law applies. There, this Court considered whether the §45.061 attorney fee shifting provisions applied to the cause of action that arose *before* it was enacted and concluded: Having found the statute constitutional as modified by our rule, we next must address the question of whether section 45.061, Florida Statutes (1987), is constitutional as applied. In this instance, we agree with Leapai that the statute was not applied retroactively because *the right to recover attorney fees attaches not to the cause of action, but to the unreasonable rejection of an offer of settlement.* As noted in our statement of facts, the offer and rejection of the offer occurred after the act had been adopted by the legislature.

Id., at15. (Italics added.) *Metropolitan Dade County v. Jones Boatyard, Inc.*, 611 So.2d 512, 513 (Fla .1993) distinguished the application of §45.061 in *Leapai* and the rule to be applied to offer-of-judgment statute §768.79. In making that distinction, *Metropolitan Dade County* found it decisive that §768.79 is a section within a the Damages part of the Florida statutes, all of which is governed by this provision: "This part applies only to causes of action accruing on or after July 1, 1986, and does not apply to any cause of action arising before that date." §768.71(2). Based upon that express limitation, this Court held that §768.79 attaches to the cause of action and not the making of the offer. By contrast, because §45.061 was a part of "a distinct independent statute under the civil procedure chapter of the Florida Statutes," this Court held that its application was

not tied to the cause of action, as is §768.79, but attaches to its use. 611 So.2d at 514. Similarly, because §57.071(2) is a part of "a distinct independent statute under the court costs chapter of the Florida Statutes," its application is tied to the use of the expert witness testimony and not to the cause of action.

The foregoing and Massey's Initial Brief establish that both the district court below and *Cort* wrongly concluded that §57.071(2) is a procedural statute. Massey respectfully submits that this Court must overrule them, reverse the decision below, and remand to eliminate costs that do not satisfy §57.071(2).

III. THE DISTRICT COURT ERRED NOT TO DIRECT ENTRY OF A JUDGMENT FOR MASSEY ON THE PHASE I VERDICT.

(A) The District Court Erred Not to Order Judgment for Massey on the Phase I Verdict.

David commences his argument as follows: "As the district court correctly recognized, this issue was not properly before it on the cost appeal since it had already been decided adverse to Massey in his main appeal." Answer Brief, p. 21. David's statement must be contrasted with what the district court actually said, namely: "The panel considering the main appeal in this case *essentially* decided this issue when it affirmed the judgment for David." Initial Brief, App. 1, p. 6; *Massey*, 953 So.2d at 603. (Italics added.) The decision appealed to this Court, however, did not indicate how the parallel *per curia affirmed* decision, which affirmed the judgment for David from the Phase II trial, required a conclusion that

any particular issue here had been "essentially decided." *Id*. In *Department of Legal Affairs v. District Court of Appeal*, 434 So.2d 310 (Fla.1983), this Court acknowledged that "there is no limit to the grounds that may prompt a per curiam opinion," quoting *Newmons v. Lake Worth Drainage District*, 87 So.2d 49, 51 (Fla. 1956), and then stated:

> We reiterate that such a decision is not a precedent for a principle of law and should not be relied upon for anything other than res judicata.

Department of Legal Affairs, 434 So.2d at 313. Thus, Massey's Phase II trial, which produced a judgment for David and ended in a *per curiam affirmed* decision, cannot now be re-litigated. Nothing else has been concluded. By contrast, the substance of Massey's appeal in this Court is an order that denied his motions for fees and costs to enforce the *Phase I verdict*, Initial Brief, App. 9-1, and the Final Judgment awarding David costs. Initial Brief, App. 8. These orders were not appealed to the merits panel, which entered its *per curiam affirmed* decision well after this appeal was perfected. The basis of that Phase II *per curiam affirmed* decision is legally unknowable. *Nimmons v Lake Worth Drainage District*, 86 So.2d 49, 51 (Fla. 1956)("In fine, there is no limit to the grounds that may prompt a per curiam opinion.") Even if some unknown issue embedded within it would be the "law of the case" if it had been expressed, this Court has repeatedly held that "law of the case" from below does not bind it - the highest precedential

court in the state - to follow erroneous law. *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1267 (Fla. 2006).

Instead of relying on David's suggested uncertain basis of decision, the district court proceeded to address Massey's entitlement to a Phase I cost and fee judgment directly on the merits. Here too it fell into the same error as did the trial court; namely, to accept David's argument that *Sure Snap Corp. v. Baena,* 705 So.2d 46 (Fla. 3rd DCA 1197) is "on point." Initial Brief, App. 1, p. 6; *Massey*, 953 So.2d at 603. The error is not that *Sure Snap Corp.* is wrong on the law as applied to its *own* facts. The error is that the facts in *this case* are distinctly different from those in *Sure Snap*. In *Sure Snap* the jury was asked two questions: (1) Was the lawyer negligent? and (2) Did the plaintiff suffer any damage? The *Sure Snap* jury answered: (1) **Yes**, and (2) **NO**! By contrast, the Phase I jury in *this case* was asked: (1) Did David breach his fiduciary duties and was he negligent? and (2) Did David's wrongs cause Massey to be damaged? The Phase I jury answered: (1) **YES!**(negligence) **YES**!(breach of fiduciary duty) and (2) **YES**!(caused damage). Hence, the Phase I jury in *this* case made a finding *for Massey* on the precise point the *Sure Snap* plaintiff foundered: Massey *did suffer damage caused by David*. (The Phase I jury also found that David breached his fiduciary duties to Massey, an issue not involved in *Sure Snap*. Although there

seems to be no decision of this Court directly on point, the better rule would be that proof of damages for breach of fiduciary duty does not require actual damages for a judgment for at least nominal damages and, perhaps, punitive damages.)

The trial judge repeatedly acknowledged that the Phase I jury found that Massey had suffered damages, but chose to categorize them as non compensatory and thus, in his view, not the basis for a judgment. Initial Brief, pp. 18, 19. The district court apparently agrees. Massey respectfully submits that this interpretation of the nature of the damages the Phase I jury found Massey suffered from David's wrongs is erroneous. In Phase I Massey adduced scientific evidence to prove that Massey was repeatedly exposed to dangerous chemical emissions (V76: 1324-1389); medical and scientific evidence to prove that this exposure was the medical cause of his injuries (V77: 1395-97; 1409); and evidence to prove that Massey's economic damages alone were at least $6.5 million, which was far more than the unwanted settlement (V44: 924). At David's insistence the trial court instructed the Phase I jury that it must find that David's negligence and breach of fiduciary duty were the legal cause of damages before it could return a verdict for Massey. In view of this instruction and the evidence, Massey made this closing argument to the Phase I jury:

> Suppose this case had gone to the jury and the jury had returned only $3,000,000, which was the figure, one of the figures that was given to Mr.

> Playhouse. How much would Mr. Massey have gotten under those circumstances with the $3,000,000 recovered? And the answer I think, if you'll do the math, take the $3,000,000, subtract the fees that are prescribed in the rule, subtract the $100,000 that Merkel and Magri already had, you see, and you will find that Mr. Massey would have recovered $1,700,000 with only a $3,000,000 recovery.

(V83: 1473-74.) Based on the evidence, the instruction, and the arguments, the Phase I jury returned the verdict:

> Was there negligence on the part of the Defendant, Calvin F. David, *which was a legal cause of damage to Plaintiff*, Gary Massey? Answer. **yes.**
> Did Defendant, Calvin F. David, breach his fiduciary duty to Plaintiff, Gary Massey, *that resulted in damages* to Gary Massey? Answer. **yes.**

(V23: 3785.) (Bold and italics supplied). David repeatedly attacked this verdict, arguing Massey had not adequately proved that a trial in the underlying case would have returned a larger verdict than the amount of the settlement. (V22: 3727-41; V38: 3915; V79: 1420-22: V82: 1456-1458). David also explicitly admitted: "*As a result of the bifurcation, Plaintiff does not have to prove the* amount of damages, but.... must still "prove that had the [underlying] suit been properly handled, [plaintiff] could have recovered substantially greater damages than the settlement amount." (V38: 3813.) All David's motions were denied and the Phase I verdict is final and un-appealed. (V22: 3935-36.)

The foregoing demonstrates that the Phase I jury did NOT make a finding that "the client ' *would not have been successful in the underlying civil suit*," Answer Brief, p. 21(Italics added), as did the jury in *Sure Snap*. Even, however, if

the trial judge were correct to construe the Phase I verdict as *no more than* a verdict that David deprived Massey of his *right of a trial,* such a verdict invokes application of this Court's holdings in *Tampa Electric Co. v. Ferguson*, 118 So. 211 (Fla. 1928), *Ault v. Lohr,* 538 So.2d 454 (Fla. 1989), and *Lassiter v. International Union of Operating Engineers*, 349 So.2d 622, (Fla. 1977). *Lassiter* summed them up: "Nominal damages are awarded to vindicate an invasion of one's legal rights where, although no physical or financial injury has been inflicted, the underlying cause of action has been proved to the satisfaction of a jury." *Id.*, at 626, 7. This doctrine, which this Court has repeatedly reaffirmed, and not the different facts of *Sure Snap*, govern this case.

(B) & (C) The District Court Erred Not to Reverse, Remand, and Direct the Trial Court to Enter Cost and Fee Judgments for Massey.

Massey's Initial Brief establishes that this Court's precedents require that he be awarded costs and fees on the basis of the Phase I verdict.

CONCLUSION

For the reasons stated herein and in his Initial Brief, Massey respectfully submits that this Court should hold that §57.071(2) is not unconstitutional and remand with directions that the courts below apply it in cost awards and enter an order awarding Massey fees and costs for the relief he obtained in Phase I.

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies with his signature below that this brief is prepared in Times New Roman type font size 14.

CERTIFICATE OF SERVICE

I certify that a copy of this amended brief was mailed this 2nd day of July 2007 to John A. DeVault, III, Esq, The Bedell Building, 101 East Adams Street, Jacksonville, Fl. 32202, John H. Pelzer, Esq., P.O. Box 1900, Ft. Lauderdale, Fl. 33302 and by email to Robert C. Widman, Esq., 245 N Tamiami Trail, Suite E, Venice, Fl. 34285. The brief was sent by email to e-files@flcourts.org.

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