097 D.A. 6-1-93

IN THE SUPREME COURT OF FLORIDA

ROBERT A. WILSON,

Petitioner,

vs.

ROSE PRINTING COMPANY,
a Florida corporation,

Respondent.
_____/

CASE NO. 80,354

REVIEW OF THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Robert A. Wilson ("Wilson") has petitioned this Court to quash a decision of the district court below that quashed an order of the circuit court that denied the motion of Rose Printing Company ("Rose") to assess costs pursuant to Florida Rule of Civil Procedure 1.420(d), following Wilson's voluntary dismissal without prejudice of his action against Rose. Rose Printing Co. v. Wilson, 602 So. 2d 600 (Fla. 1st DCA 1992). Because Wilson's statement of the case and facts is confusing, incomplete and lacking in references to the record, Rose states the case and facts as follows. Except where clearly referenced otherwise, all references are to the appendices to the parties' briefs filed in the district court, i.e., the Appendix to Initial Brief of Appellant ("Rose's App."), the Appendix to Answer Brief of Appellee ("Wilson's App."), and the Supplement to Appellant's Appendix ("Supplement to Rose's App.").

A. February and March 1990: the Complaint and the Answer

On February 22, 1990, Wilson brought an action in circuit court against Rose for the alleged breach by Rose of an employment agreement whereby Wilson was to render certain services to Rose as its General Manager. [Rose's App. at 1-2, 4.] Wilson alleged in his complaint that Rose breached the employment agreement by terminating the employment of Wilson. [Rose's App. at 1-2.] On March 16, 1990, Rose, represented by the law firm of Hogg, Allen, Norton & Blue, answered the complaint and prayed that the circuit court, among other things, assess costs and attorney fees for Rose. [Rose's App. at 13-14.] In its answer, Rose raised as an affirma-

tive defense that Wilson's termination was for good cause. [Rose's App. at 14.]

B. April Through July 1990: Rose Begins Preparing Its Defense

On April 10, 1990, Wilson served notice that his action was at issue and ready to be set for a nonjury trial. [Supplement to Rose's App. at 1-2.] On April 13, 1990, Wilson responded to and denied Rose's affirmative defense of good cause. [Rose's App. at 15-16.] On April 20, 1990, Rose served a notice for the taking of the deposition of Wilson on June 6, 1990. [Wilson's App. at 1-2.] Also on April 20, 1990, Rose served on Wilson a request for production of documents and a notice of service of interrogatories. [Wilson's App. at 3-7.] On May 8, 1990, Wilson served a notice for the taking of the deposition of Charles Rosenberg ("Rosenberg") on June 6, 1990. [Wilson's App. at 8-9.][1] On May 16, 1990, the circuit court entered an order setting Wilson's action for a nonjury trial on November 20, 1990. [Wilson's App. at 11.] On May 18, 1990, Wilson served notice of the service of responses to Rose's interrogatories. [Wilson's App. at 10.] On July 11, 1990, Rose moved the circuit court to reset Wilson's action for a jury trial. [Wilson's App. at 12-13.]

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[1] Although there is no support for his assertion in the record, in his brief on the merits, Wilson correctly identifies Rosenberg as the president of Rose. [Pet'r's Br. on the Merits at 2, 3.]

C. October and November 1990: the Discovery Deadline

On October 25, 1990, the law firm of Ervin, Varn, Jacobs, Odom & Ervin served its notice of appearance as attorneys for Rose. [Wilson's App. at 16.] Also on October 25, 1990, Rose served a notice for the taking of the deposition of Wilson on November 2, 1990. [Wilson's App. at 14-15.] On November 1, 1990, Rose withdrew its request for a jury trial. [Wilson's App. at 17.] Also on November 1, 1990, Rose served an amended notice for the taking of the deposition of Wilson on November 13, 1990. [Wilson's App. at 18-19.] On November 8, 1990, Wilson served a notice for the taking of the deposition of Rosenberg on November 13, 1990. [Wilson's App. at 20-21.]

On or about November 14, 1990, Rose and Wilson agreed upon an order resetting Wilson's trial date. [Wilson's App. at 22.] As of November 16, 1990, despite Wilson's prior notices setting the deposition of Rosenberg, Wilson had not deposed Rosenberg or conducted any other discovery. [Rose's App. at 91.][2] On that date, the circuit court entered its order setting Wilson's action for a nonjury trial on December 21, 1990. The circuit court's order also provided: "Additional discovery is allowed, but shall be completed by five (5) business days before the trial date,

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[2] Although Wilson had noticed the deposition of Rosenberg for June 6, 1990, and again for November 13, 1990, Wilson makes the assertion in his statement of the case and facts, without reference to the record, that the deposition was cancelled each time at Rose's request, and that Wilson attempted to reschedule the deposition throughout the summer and fall of 1990. [Pet'r's Br. on the Merits at 2, 3.] There is no support for this assertion in the record.

including service of responses to interrogatories and discovery requests. Interrogatories and discovery requests shall reach the attorney for the responding party on or before December 7, 1990." [Rose's App. at 17.]

D. December 1990: Wilson Begins Preparing His Case

On November 30, 1990, Wilson served on Rose a request for production of documents. The request was hand-delivered and requested that the documents be produced on December 5, 1990. [Rose's App. at 18-19.] The requested documents were produced by Rose on December 5, 1990, the date requested. [Rose's App. at 27-28.] Also on November 30, 1990, Wilson served a notice for the taking of the deposition of Rosenberg on December 7, 1990. The notice was hand delivered. [Rose's App. at 20-21.] The deposition of Rosenberg was taken on December 7, 1990, the date for which it was noticed. [Rose's App. at 91.]

On December 6, 1990, Wilson served on Rose a notice of service of interrogatories accompanied by his first set of interrogatories to Rose. The notice and interrogatories were delivered by mail. [Rose's App. at 22-24.] Wilson's notice stated: "In accordance with Rule 1.340, Florida Rules of Civil Procedure, the defendant, ROSE PRITING [sic] COMPANY, INC., is required on or before December 17, 1990, to answer plaintiff's First Set of Interrogatories numbered one through two . . . ." [Rose's App. at 22.] Wilson's first set of interrogatories stated: "Defendant, ROSE PRINTING COMPANY, INC., will please answer the following interrogatories in

writing under oath on or before December 17, 1990 . . . ." [Rose's App. at 23.]

An unsworn copy of Rose's responses to Wilson's first set of interrogatories was served on Wilson by hand delivery on December 17, 1990, the deadline imposed by Wilson for responding. The original of Rose's sworn responses to Wilson's first set of interrogatories was served on Wilson by hand delivery the following day. [Rose's App. at 38.]

E. December 1990: Ask, and It Shall Be Given You

Among other things in his first set of interrogatories to Rose, Wilson for the first time requested the names and addresses of the witnesses Rose intended to call at the trial and, as to each witness, a brief summary of what Rose intended to prove. [Rose's App. at 23.] In response, Rose listed seventeen witnesses. [Rose's App. at 39, 41.]

Also in response, Rose stated that it intended to prove the employment and circumstances leading to the employment of Wilson as General Manager of Rose; the terms of the employment; breaches by Wilson of the employment agreement and the termination of Wilson for cause; the failure of Wilson to produce sufficient gross receipts; the personal dishonesty and intentional misconduct of Wilson in the discharge of his duties; the violation by Wilson of the confidentiality requirements of the employment agreement; the incompetent operation and mismanagement of Rose by Wilson; the willful and deliberate disregard by Wilson of Rose's established credit extension policies; the deliberate, false or negligent

preparation by Wilson of Rose's financial plan and Wilson's misrepresentation to Rose that the plan was sound; statements by Wilson to Rose employees that Wilson intended to take over Rose; the violation or attempted violation by Wilson of the non-compete provisions of the employment agreement; Wilson's general operating style and management of Rose; and, thus, that the termination of Wilson was justified by his own acts. [Rose's App. at 39, 42-44.]

F. December 1990: Rose Continues to Prepare Its Defense

On December 1, 1990, Rose served a notice for the taking of the deposition of Wilson on December 7, 1990. The notice was hand delivered. [Rose's App. at 25-26.] The deposition of Wilson was taken on December 7, 1990, the date for which it was noticed. [Rose's App. at 91.]

On December 7, 1990, Rose served on Wilson a notice of service of interrogatories accompanied by Rose's second set of interrogatories to Wilson. [Rose's App. at 31-36.] As did Wilson's notice of service of interrogatories, Rose's notice and second set of interrogatories required a response by December 17, 1990. [Rose's App. at 31, 33.] Wilson did not object to the interrogatories but, nevertheless, failed to respond to the interrogatories. [Rose's App. at 91.]

Also on December 7, 1990, Rose served on Wilson its second request for production of documents. The request was hand delivered. [Rose's App. at 29-30.] As did Wilson's notice of service of interrogatories, Rose's request required a response by December 17, 1990. [Rose's App. at 29.] Wilson did not object to the request

but, nevertheless, failed to produce the requested documents. [Rose's App. at 30, 37.]

G. December 1990: Wilson's Voluntary Dismissal

On December 18, 1990, Wilson hand delivered to the circuit court a letter, the body of which was as follows:

> The defendant yesterday furnished us the names of 16 witnesses not previously disclosed allegedly to testify on matters not previously raised.
>
> For that reason we have voluntarily dismissed the cause under FRCP Rule 1.420(a)(1), without prejudice.
>
> Therefore the trial set for December 21, 1990, is no longer required.

[Rose's App. at 47.]

Also on December 18, 1990, Wilson filed a notice of voluntary dismissal, which stated: "PLEASE TAKE NOTICE that pursuant to Rule 1.420(a)(1), Florida Rules of Civil Procedure, the plaintiff does hereby voluntarily dismiss the above-styled cause without prejudice." [Rose's App. at 48.]

H. Prevailing Party Entitled to Costs, Including Attorney Fees

The employment agreement at issue in Wilson's action contains the following provision: "10.02 Attorney's fees. In connection with any litigation arising out of this agreement the prevailing party shall be entitled to recover all costs incurred, including reasonable attorney's fees for such litigation and any subsequent appeals." [Rose's App. at 11.]

I. Rose's Motion to Assess Costs

Pursuant to Florida Rule of Civil Procedure 1.420(d), Rose moved the circuit court for an assessment of costs against Wilson, including expert witness fees, and for the entry of a judgment awarding the costs to Rose. [Rose's App. at 49-54.][3] Rose's motion requested that the assessment and judgment for costs include attorney fees, as provided in the employment agreement. [Rose's App. at 11, 50, 52.] Accompanying the motion was Rose's bill of costs for $27,037.25, including $4,632.20 in costs and attorney fees for Hogg, Allen, Norton & Blue; $14,840.40 in costs and attorney fees for Ervin, Varn, Jacobs, Odom & Ervin; and $7,372.35 in fees for Rose's accounting-expert witness. [Rose's App. at 55-56.][4]

J. Wilson's Memorandum in Opposition

In his opposing memorandum, Wilson complained that Rose "served unsworn answers to interrogatories only four (4) days before trial on December 17, 1990," and that "[t]he answers . . . provided the names of 16 witnesses, not previously disclosed

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[3] Wilson makes the assertion in his statement of the case and facts that Wilson refiled his action on February 4, 1991, and then asserts that, on January 10, 1991, Rose made his motion to assess costs. [Pet'r's Br. on the Merits at 4.] It should be noted that, despite Wilson's confusing chronology, Rose moved to assess costs in the first action nearly a month before Wilson filed his second action.

[4] Wilson makes the assertion in his argument, without reference to the record, that Rose has "candidly admitted . . . in both lower courts" that the "sole reason" Rose has moved to assess costs is to "kill" Wilson's ability to continue his litigation. [Pet'r's Br. on the Merits at 11.] There is no support for this assertion in the record.

. . . to testify on matters not previously raised." [Rose's App. at 60-61.] Wilson further complained that "[t]hese issues correlated deposition testimony given by Mr. Rosenberg on December 7, 1990, which brought forth new issues regarding non-performance on the part of Mr. Wilson and required determining the credibility of witnesses." [Rose's App. at 61.] Wilson further complained that "Rose's tactics represented an attempt to surprise Plaintiff's counsel and undeniably violated [the circuit court's] order. This change of the posture of the case required a jury trial to resolve the evidence . . . ." [Rose's App. at 61.][5] Wilson then asserted

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[5] Similarly, in his argument before the district court below, Wilson sought to justify his voluntary dismissal as follows:

> If defendant had taken these positions earlier, or if first counsel in discussions with plaintiff's counsel had revealed this position, then plaintiff would have insisted on a jury trial as originally requested.
>
> As the case progressed there appeared to be little in the way of sharply conflicting stories until 5:25 p.m. four days before the scheduled trial. The lack of sharp conflict led plaintiff into agreeing to a non-jury trial.
>
> . . . .
>
> . . . [The voluntary dismissal] allowed plaintiff to refile for a jury trial on the sharply conflicting issues raised by new counsel for the defendant.

[Am. Answer Br. of Appellee at 10-11.]

In fact, Wilson indicated his desire to have a nonjury trial almost from the beginning of this litigation. On April 10, 1990, less than two months after Wilson filed his complaint, after Rose had raised its affirmative defense of good cause, and before Wilson had first noticed the deposition of Rosenberg, Wilson served a "Notice for Non-Jury Trial" which stated, "[T]his cause is at issue and ready to be set for a non-jury trial." [Supplement to Rose's App. at 1-2.] After the circuit court complied, it was Rose who later requested a jury trial and then withdrew that request. [Wilson's App. at 11-13, 17.]

that he was "indeed, surprised," but admitted that he did not seek a continuance because Rose "refused to stipulate to a continuance." [Rose's App. at 61.]

K. The Circuit Court's Order Denying Rose's Motion to Assess Costs

The circuit court denied Rose's motion to assess costs as follows:

> THIS CAUSE came on before the court upon Defendant ROSE PRINTING COMPANY's Motion to Tax Costs, filed on January 10, 1991. After considerating the motion, Plaintiff's Memorandum of Law in Opposition to the motion, and being otherwise fully advised in the premises, the court hereby finds:
>
> 1. This cause was voluntarily dismissed by Plaintiff on December 18, 1990. The suit has been refiled under case number 91-485;
>
> 2. The dismissal of this case was not based upon the merits of the case, but rather was a strategic move to avoid surprise at trial due to Defendant's disclosure of several previously undisclosed witnesses four days before trial;
>
> 3. Under the circumstances of this case, no prevailing party can be determined at this time.
>
> 4. Because there has been no trial of this case, the court deems it improper to award expert witness fees;
>
> Based upon the foregoing it is hereby ORDERED and ADJUDGED that:
>
> a) Defendant's Motion to Tax Costs is DENIED because the court deems it improper, pursuant to Rule 1.420(d), Florida Rules of Civil Procedure, to award costs at this time;
>
> b) The costs and fees incurred by both parties [in] case number 90-840 shall be added to and considered a part of the cost[s] and fees expended for the preparation of case number 91-485.

[Rose's App. at 75-76.]

L. The Decision of the District Court Below

Before the district court below, Rose argued that (1) the circuit court erred in denying Rose's motion to assess costs pursuant to rule 1.420(d) and (2) even if the circuit court's application of the law were not error per se, the circuit court abused its discretion by punishing Rose for Wilson's dilatoriness. [Initial Br. of Appellant at 10-14; Reply Br. of Appellant at 1-11.] Addressing only the first issue, and relying on long-standing precedent of this Court and the district courts, the district court below concluded that the circuit court's denial of Rose's motion to assess costs was a departure from the essential requirements of law.

In doing so, the district court below also concluded that this Court, in Coastal Petroleum Co. v. Mobil Oil Corp., 583 So. 2d 1022 (Fla. 1991), by referring to a trial court's discretion in entertaining a motion to assess costs, did not intend to modify the plain language of rule 1.420(d), or overrule the long-standing precedent of this Court and the district courts. Rose Printing Co., 602 So. 2d at 603. Finally, the district court below, again relying on the long-standing precedent of this Court and the district courts, concluded that attorney fees, where a statute or contract makes them an element of costs, should be included in an assessment pursuant to rule 1.420(d). Rose Printing Co., 602 So. 2d at 604. Wilson petitioned this Court for review of the decision of the district court below, and review has been granted.

SUMMARY OF ARGUMENT

The first sentence of Florida Rule of Civil Procedure 1.420(d) requires the trial court to assess the defendant's costs where, as in the present case, the plaintiff has taken a voluntary dismissal pursuant to Florida Rule of Civil Procedure 1.420(a). In Coastal Petroleum Co., this Court simply made it clear that, in so assessing costs, the trial court's discretion is limited to determining which expenses reasonably would have been necessary for an actual trial. Rule 1.420(d) is clear, and this Court and district courts following this Court have stated unequivocally, that once a plaintiff has elected, pursuant to rule 1.420(a), to dismiss his action voluntarily, rule 1.420(d) requires that costs be assessed immediately and judgment entered therefor for the defendant.

Further, where, as in the present case, the parties have agreed that costs include attorney fees, the defendant's attorney fees must be assessed against the plaintiff as a part of costs under rule 1.420(d). Finally, even if the circuit court's application of the law were not error per se, the circuit court abused its discretion by punishing Rose for Wilson's eleventh-hour attempt to conduct discovery, and his arbitrary and unilateral decision to avoid the trial of his action by voluntarily dismissing it.

The decision of the district court below should be approved.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE CIRCUIT COURT'S DENIAL OF ROSE'S MOTION TO ASSESS COSTS PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.420(d) WAS A DEPARTURE FROM THE ESSENTIAL REQUIREMENTS OF LAW

In its relevant part, Florida Rule of Civil Procedure 1.420 provides:

> **(a) Voluntary Dismissal.**
>
> **(1) By Parties.** . . . [A]n action may be dismissed by plaintiff without order of court (A) before trial by serving, or during trial by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment, or if none is served or if the motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision, or (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action.
>
> . . . .
>
> **(d) Costs.** Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action.

Fla. R. Civ. P. 1.420(a)(1), (d) (emphasis added).

Despite Wilson's reliance on the second sentence of rule 1.420(d) and its federal counterpart, Federal Rule of Civil Procedure 41(d) [Pet'r's Br. on the Merits at 8, 10-11], they are not relevant. The second sentence of rule 1.420(d) only comes into play in a second action based upon the same claim as the first action:

> If a party who has once dismissed a claim in any court of this State commences an action based upon or including the same claim against the same adverse party, the court shall make such order for the payment of costs of the claim previously dismissed as it may deem proper and shall stay the proceedings in the action until the party seeking affirmative relief has complied with the order.

Fla. R. Civ. P. 1.420(d). Rule 41(d) is similar to the second sentence of rule 1.420(d). Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445 (D. Del. 1978), relied upon by Wilson, only addresses rule 41(d). Indeed, there is no federal equivalent of the first sentence of rule 1.420(d) requiring assessment of costs in the first action. Phoenix Canada Oil Co. is, therefore, inapposite. Wilson also cites several cases which do not involve the assessment of costs following a voluntary dismissal, and those cases are also inapposite. See B&H Constr. & Supply Co. v. District Bd. of Trustees, 542 So. 2d 382 (Fla. 1st DCA), review denied mem., 549 So. 2d 1013 (Fla. 1989); 51 Island Way Condominium Ass'n v. Williams, 458 So. 2d 364 (Fla. 2d DCA 1984), review denied mem., 476 So. 2d 676 (Fla. 1985); Del Valle v. Biltmore II Condominium Ass'n, 411 So. 2d 1356 (Fla. 3d DCA 1982).

The first sentence of rule 1.420(d) is not discretionary: "Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action." Fla. R. Civ. P. 1.420(d) (emphasis added). This Court recognized this in City of Hallandale v. Chatlos, 236 So. 2d 761 (Fla. 1970), in which this Court held, "We construe [rule 1.420(d)] to mean that costs, including attorneys' fees,[6] are to be assessed and judgment entered for them in the same action which is the subject of voluntary

[6] The action in Chatlos was within the ambit of a statute which provided, "The petitioner shall pay all reasonable costs of the proceedings in the circuit court, including a reasonable attorney's fee to be assessed by that court," and thus attorney fees were a part of costs. Chatlos, 236 So. 2d at 736 (emphasis added).

dismissal under [rule] 1.420(a)," Chatlos, 236 So. 2d at 763 (emphasis added), quoted in Troutman Enters. v. Robertson, 273 So. 2d 11, 13 (Fla. 1st DCA 1973).

Thus, in Keener v. Dunning, 238 So. 2d 113 (Fla. 4th DCA 1970), the trial court was reversed when, as in the present case, it attempted to defer the assessment of costs in a voluntarily dismissed action until final disposition of a subsequent action based upon the same claim, id. at 114. In Keener, the district court stated,

> In our opinion, the trial judge erred by not either taxing in whole or in part or disallowing the specified cost items. Where a cause is voluntarily dismissed by a plaintiff under Rule 1.420(a) . . . and a motion is filed in the cause to tax costs, the trial judge should specifically rule in that cause on the taxability of each cost item sought to be taxed. Thereafter, the trial judge should enter a judgment assessing against the dismissing party those items of costs determined to be taxable. He has, however, no authority to defer a ruling on costs pending the outcome of other actions. In our opinion such is the necessary implication of Rule 1.420(d) . . . .

Keener, 238 So. 2d at 114 (emphasis added), quoted in Troutman Enters., 273 So. 2d at 12-13.

Likewise, in Gordon v. Warren Heating & Air Conditioning, Inc., 340 So. 2d 1234 (Fla. 4th DCA 1976), the district court held that the defendant

> should have been awarded costs and attorney's fees[7] immediately following dismissal of the first action. The trial court has no authority to defer a ruling on costs pending the outcome of another action. *Keener v. Dunning*, 238 So. 2d 113 (Fla.4th DCA 1970). [Rule]

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[7] Again, the action was within the ambit of a statute which assessed attorney fees as a part of costs. Gordon, 340 So. 2d at 1235.

> 1.420(d) states unequivocally that, "Costs in any action dismissed under this rule shall be assessed and judgment for costs entered *in that action*."

Gordon, 340 So. 2d at 1235 (emphasis added).

Likewise, in Allstate Insurance Co. v. Jasiecki, 549 So. 2d 816 (Fla. 2d DCA 1989), review denied mem., 560 So. 2d 233 (Fla. 1990), the district court held,

> [W]hen a plaintiff voluntarily dismisses an action, rule 1.420(d) requires the trial court to tax in whole or in part or disallow each of the specified cost items submitted by the defendant, depending upon the trial court's determination of the reasonableness of the amount of a particular item and the necessity for incurring it. . . . We are unaware of any authority permitting the trial court to automatically disallow costs for items which the defendant will continue to be able to use in ongoing litigation refiled by the plaintiff. The first sentence in rule 1.420(d) states that "[c]osts in any action dismissed under this rule shall be assessed and judgment for costs entered in that action." The remainder of rule 1.420(d) does not qualify the first sentence.

Allstate Ins. Co., 549 So. 2d at 817 (emphasis added). On the other hand, in Williams v. Cotton, 346 So. 2d 1039 (Fla. 1st DCA), cert. denied mem., 354 So. 2d 988 (Fla. 1977), cited by Wilson, there was no error where the defendants chose not to move the trial court to assess costs for the first action until the completion of the second action. Id. at 1040.

Following rule 1.420(d), Chatlos and the several district court decisions that are in accord with Chatlos, the district court below concluded that a trial court must assess costs for the defendants in any action dismissed under rule 1.420(a) and enter judgment for those costs. In doing so, however, the district court below observed that this Court, in Coastal Petroleum Co. v. Mobil Oil Corp., 583 So. 2d 1022 (Fla. 1991), stated that a "trial court properly may entertain a motion to award costs against a dismissing

party" and "[t]his is a matter largely left to the discretion of the trial court." Rose Printing Co. v. Wilson, 602 So. 2d 600, 603 (Fla. 1st DCA 1992). The district court below harmonized Coastal Petroleum Co. with the plain language of rule 1.420(d), and with Chatlos and its progeny, by concluding that the language quoted from Coastal Petroleum Co. was meant simply to underscore "the discretion that a trial judge exercises when considering which costs to tax." Rose Printing Co., 602 So. 2d at 603 (emphasis added).

It is well established that rule 1.420(d) requires a trial court to assess costs for the defendant immediately following a voluntary dismissal and, in doing so, to determine the reasonableness of the amount of a particular item and the necessity for incurring it. In Coastal Petroleum Co., this Court simply made it clear that, in so assessing costs, a trial court is required to determine which expenses reasonably would have been necessary for an actual trial. Coastal Petroleum Co., 583 So. 2d at 1025. The trial court's discretion in awarding costs under rule 1.420(d) is limited to determining "the amount that reasonably would have been awarded had the precise same expenditures occurred in litigation that actually went to trial." Coastal Petroleum Co., 583 So. 2d at 1025 (emphasis added). In exercising its discretion, "the trial court should reconstruct a trial strategy that a reasonable party would have developed in an actual trial, and it should award costs on the basis of that strategy." Id. (emphasis added). "The risks [of being assessed for costs] generally should be the same whether

the action is tried or voluntarily dismissed." Id. at 1026 (emphasis added).

Rule 1.420(d) is clear, and this Court and district courts following this Court have stated unequivocally, that once a plaintiff has elected, pursuant to rule 1.420(a), to dismiss his action voluntarily, rule 1.420(d) requires that costs be assessed immediately and judgment entered therefor for the defendant. The district court below succinctly and correctly harmonized its decision, as well as the plain language of rule 1.420(d), and Chatlos and its progeny, with this Court's decision in Coastal Petroleum Co. The decision of the district court below should be approved.

Following Century Construction Corp. v. Koss, 559 So. 2d 611 (Fla. 1st DCA), review denied mem., 574 So. 2d 141 (Fla. 1990), and several other decisions, the district court below also concluded that, where a statute or contract defines costs to include attorney fees, the attorney fees should be assessed as an element of costs under rule 1.420(d). See Bankers Multiple Line Ins. Co. v. Blanton, 352 So. 2d 81, 82 (Fla. 4th DCA 1977) (stating that attorney fees are not assessable under rule 1.420(d) unless made a part of costs by statute or contract); see also Stuart Plaza, Ltd. v. Atlantic Coast Dev. Corp., 493 So. 2d 1136, 1137 (Fla. 4th DCA 1986) (holding that a trial court has jurisdiction to assess attorney fees following a voluntary dismissal where attorney fees are authorized by statute or contract, but not addressing whether attorney fees must have been made an element of costs).

In so concluding, however, the district court below noted the "strategic dismissal" theory espoused in Simmons v. Schimmel, 476 So. 2d 1342 (Fla. 3d DCA 1985), review denied mem., 486 So. 2d 597 (Fla. 1986), and its progeny. The district court below distinguished Simmons and its progeny by observing that, in Simmons, the fee award was made solely pursuant to a statute allowing a fee award to the prevailing party, and was not made pursuant to a statute or contract which made attorney fees a part of costs. The district court below also noted that the district court in Simmons expressly recognized the inapplicability of the "strategic dismissal" theory to cases, such as the present one, in which attorney fees are simply an element of costs. Rose Printing Co., 602 So. 2d at 604.

In Chatlos, the action was within the ambit of a statute which provided that costs included reasonable attorney fees. Chatlos, 236 So. 2d at 763. Thus, in Chatlos, this Court held, "We construe [the first sentence of rule 1.420(d)] to mean that costs, including attorneys' fees, are to be assessed and judgment entered for them in the same action which is the subject of voluntary dismissal under" rule 1.420(a). Chatlos, 236 So. 2d at 763 (emphasis added). Likewise, in Gordon, the action was within the ambit of a statute which assessed attorney fees as a part of costs to be awarded to the prevailing party. Id. at 1235. Thus, the district court in Gordon concluded that the defendant "should have been awarded costs and attorney's fees immediately following dismissal of the first action." Id. (emphasis added). In Wiggins v. Wiggins, 446 So. 2d

1078 (Fla. 1984), this Court held, "[W]hen the legislature has specifically defined attorney's fees as part of the costs, then the assessment of attorney's fees after a case has been voluntarily dismissed is within the purview of Rule 1.420(d)." Wiggins, 446 So. 2d at 1079.

In Simmons, the district court stated:

> We note that the line of cases emanating from Gordon v. Warren Heating & Air Conditioning, 340 So. 2d 1234 (Fla. 4th DCA 1976) are not applicable in the present case. The attorney's fee statute involved in Gordon expressly provided that the fees were to be taxed as costs. See § 713.29, Fla. Stat. (1975). The attorney's fee statute involved in the present case does not contain a provision making the fees a part of costs. See § 768.56, Fla. Stat. (1981). Since the attorney's fees in the present case are not made a part of costs by the statute, they are not taxable costs under Rule 1.420(d). . . and Gordon and its progeny are not applicable.

Simmons, 476 So. 2d at 1342 n.3. See Mega Bank v. Telecredit Serv. Ctr., 592 So. 2d 755, 755 (Fla. 3d DCA 1992) (holding, in a case where an agreement provided for an award of costs and attorney fees to the prevailing party, and attorney fees were, therefore, not made a part of costs, that it was error to assess attorney fees under rule 1.420(d)).

Moreover, as explained in Englander v. St. Francis Hosp., Inc., 506 So. 2d 423 (Fla. 3d DCA 1987) (en banc), a case relied upon by Wilson, the determining factor in Simmons actually was not whether the voluntary dismissal was for "strategic reasons," but whether the defendant "would have prevailed on the merits" but for the voluntary dismissal. Therefore, even assuming the circuit court was correct in attempting to follow Simmons, the circuit

court erred by applying the wrong test. Englander, 506 So. 2d at 424 & n.2.

The district court below correctly concluded that where a statute or contract defines costs to include attorney fees, Simmons and its progeny are not applicable, and the attorney fees should be assessed as costs under rule 1.420(d). The agreement between Rose and Wilson expressly defined costs to include attorney fees. The district court below, therefore, correctly distinguished its decision from Simmons and the progeny of Simmons. The decision of the district court below should be approved.

II. EVEN IF THE CIRCUIT COURT'S APPLICATION OF THE LAW WERE NOT ERROR PER SE, THE CIRCUIT COURT ABUSED ITS DISCRETION BY PUNISHING ROSE FOR WILSON'S DILATORINESS

Even if the circuit court's application of the law were not error per se, the circuit court's refusal to assess costs, including attorney fees as a part of costs, cannot be justified by the facts of this case. On March 16, 1990, Rose raised in its answer an affirmative defense that Wilson's termination was for good cause, and Wilson responded to and denied the defense. [Rose's App. at 13-16.] Yet Wilson served no interrogatories, nor did he conduct any other discovery, until November 30, 1990. On that day, barely three weeks before the scheduled trial date, Wilson served a request for production. On December 6, 1990, just two weeks before the scheduled trial date, Wilson served his first set of interrogatories on Rose, requesting the names of witnesses and the nature of their testimony. [Pet'r's Br. on the Merits at 4.]

Rose responded, within the deadline imposed by Wilson, by naming seventeen witnesses and stating how Rose intended to show, through their testimony, that Wilson's termination was for good cause. [Rose's App. at 39, 41-44.] Wilson characterizes this as "unfair." [Pet'r's Br. on the Merits at 7.] Wilson previously has consistently argued to the circuit court and the district court below that this was "a total change of position of defendant" which "impermissibly surprised" Wilson. [Rose's App. at 61; Am. Answer Br. of Appellee at 10, 11.] Wilson has characterized this as "unfair," "a surprise" and "a total change of position" despite the fact that nine months earlier Rose had raised good cause as an

affirmative defense in Rose's answer to Wilson's complaint, and Wilson had responded to and denied the defense. [Rose's App. at 13-16.]

In fact, the "surprise" or "unfairness" of which Wilson has complained is not that Rose changed its position. Everything given to Wilson in response to his last-minute discovery requests was relevant to the issue raised by Rose's affirmative defense of good cause asserted nine months earlier. The "surprise" or "unfairness" of which Wilson has complained is simply that Rose had not previously revealed to Wilson the evidence with which Rose intended to prove Rose's affirmative defense. In fact, Wilson went so far as to argue before the district court below that "[t]he communications between plaintiff's lawyers and defendant's lawyers afforded many opportunities over several months to alert counsel [for Wilson] of these extensive matters." [Am. Answer Br. of Appellee at 11.]

It is rudimentary that one of the primary purposes of discovery is to discover evidence relevant and pertinent to the triable issues pending before the court. Reynolds v. Hofmann, 305 So. 2d 294, 295 (Fla. 3d DCA 1974); Jones v. Seaboard Coast Line R.R., 297 So. 2d 861, 863 (Fla. 2d DCA 1974). It has been Wilson's apparent contention, however, that the burden is not on the party wishing to know to ask, but on the party who knows to divulge voluntarily. Wilson chose to rely not on the rules of discovery, but on some uncited rule of revelation.

The burden, however, was entirely on Wilson to avail himself of the discovery tools available to him. Wilson should not have been heard to complain of "surprise" when he failed to propound even a single interrogatory until two weeks before the scheduled trial date. As explained in Passino v. Sanburn, 190 So. 2d 61 (Fla. 3d DCA 1966), cert. denied mem., 196 So. 2d 927 (Fla. 1967),

> [I]n the absence of resort to appropriate discovery proceedings, or voluntary agreement, one party is under no duty nor obligation to furnish information to his adversary, and a party is not required to prepare his adversary's case. It is pertinent to note that in the case sub judice the defendants failed to avail themselves of the most obvious and customary discovery process, written interrogatories. The record is devoid of any oral or written request by the defendants for the names and addresses of any persons, experts or otherwise, believed by the plaintiffs or their attorney to have knowledge concerning the facts or claims alleged in the Complaint.
>
> . . . .
>
> In order for surprise, as that term is used in its legal sense, to be a ground for relief, a party must have exercised reasonable diligence to protect himself from such surprise and the consequences thereof.

Id. at 63 (emphasis added).

A review of the facts shows that (1) despite the circuit court's discovery deadline, which fell on a Friday, and which apparently was to protect the parties, Wilson waived the circuit court's deadline, and the protection, by imposing a deadline of December 17, 1990, the following Monday, for Rose to answer Wilson's first set of interrogatories; (2) Rose responded to Wilson's interrogatories within the deadline imposed by Wilson; and (3) Wilson, on the other hand, failed to respond or object to any of Rose's most recent written discovery requests, simply ignoring

them and crying "foul" when Rose complied with Wilson's discovery requests. If, in serving unsworn answers within the deadline imposed by Wilson, there was a technical violation of the circuit court's discovery order, the "violation" was invited by Wilson and acquiesced in by Wilson; nor was Wilson in any way prejudiced or impinged by Rose's "violation." Wilson should not have been heard to complain of prejudice when Rose fully complied with the deadline imposed by Wilson, and Wilson completely failed to respond or object to Rose's written discovery requests.

Nor should Wilson have been heard to complain of "unfair" or "surprise tactics" when Rose merely responded to a discovery request, included in Wilson's first set of interrogatories, which Wilson had never before bothered to propound. Furthermore, as can be seen from Rose's responses, the so-called "matters not previously raised" were merely the supporting evidence for Rose's previously-raised affirmative defense that Wilson was terminated for good cause. Although Wilson asserts, without record support, that he had previously attempted to depose Rosenberg, he has not explained why he failed simply to resort to the obvious and customary discovery process of written interrogatories to discover Rose's witnesses and the matters about which they would testify. See Passino, 190 So. 2d at 63; Fla. R. Civ. P. 1.976 app. form 1 para. 17. Certainly Rose was not required earlier to volunteer such information when it had not been requested by Wilson. If the response to Wilson's interrogatories concerning witnesses and their testimony came on the eve of trial, it was because the question was

first asked on the eve of trial. Wilson should not have been heard to complain of "surprise" when the "surprise," if any, was caused by Wilson's own dilatoriness.

The only "evidence" before the circuit court that Wilson was "surprised" was a December 18, 1990, letter to the circuit court, from Wilson, which stated, "The defendant yesterday furnished us the names of 16 witnesses not previously disclosed allegedly to testify on matters not previously raised." [Rose's App. at 47.] In fact, as Wilson himself later admitted in his response to Rose's motion to assess costs, these "new issues" had already been revealed in the deposition of Rosenberg on December 7, 1990, nearly two weeks prior to Rose's timely responses to Wilson's first set of interrogatories. [Rose's App. at 61.] Yet Wilson saw no need to dismiss voluntarily his action on December 7, 1990, waiting instead until the eve of the scheduled trial. To the extent that the circuit court may have had, for the sake of argument, any discretion in deciding whether to entertain a motion to assess costs pursuant to rule 1.420(d), the circuit court abused that discretion where, as here, there is no evidence of any misrepresentation by Rose or of any failure by Rose to respond fully to discovery. See Passino, 190 So. 2d at 63.

Nor, even were Wilson "surprised," was he precluded from asking the court to grant a continuance, either on December 7, 1990, or December 18, 1990, a step Wilson apparently considered not worth the effort of taking, before he took the more drastic, arbitrary and unilateral step of voluntarily dismissing his action.

Even if the circuit court's application of the law were not error per se, the circuit court abused its discretion by punishing Rose for Wilson's eleventh-hour attempt to conduct discovery, and his arbitrary and unilateral decision to avoid the trial of his action by voluntarily dismissing it. The decision of the district court below should be approved.

CONCLUSION

For the foregoing reasons, the decision under review should be approved.

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