9-22

IN THE SUPREME COURT OF FLORIDA

ROBERT A. WILSON,

Petitioner,

vs.

CASE NO. 80,354

ROSE PRINTING COMPANY, INC.,
a Florida corporation,

Respondent.

On Review from the District Court
of Appeal, First Judicial District, State of Florida

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PETITIONER'S BRIEF ON JURISDICTION

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PAGE

Table of Citations

Statement of the Case and Facts 1

Summary of the Argument 4

Argument 5

The Decision of the First District Court of Appeal in this Case Expressly and Directly Conflicts with the Decision of This Court in Coastal Petroleum Company v. Mobil Oil Corporation, 583 So.2d 1022 (Fla.1991) and the Decision of the Third District Court of Appeal in Simmons v. Schimmel, 476 So.2d 1342, (Fla. 3rd DCA 1985), Review Denied 486 So.2d 597 (Fla.1986); Englander v. St. Francis Hospital, Inc., 506 So.2d 423 (Fla. 3rd DCA 1987); Mega Bank Telecredit of Service Center, 592 So.2d 755 (Fla. 3rd DCA 1992).

Conclusion 9

Certificate of Service 10

TABLE OF CITATIONS

Cases	Page
Century Construction Corp. v. Koss, 559 So.2d 611 (Fla. 1st DCA 1990)	8
Coastal Petroleum Company v. Mobil Oil Corporation 583 So.2d 1022 (Fla. 1991)	4, 5
Del Valle v. Biltmore II Condominium Association, 411 So.2d 1356 (Fla. 3rd DCA 1982)	7
Englander v. St. Francis Hospital, Inc., 506 So.2d 423 (Fla. 3rd DCA 1987)	4, 5, 6, 7
Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988)	6
51 Island Way Condominium Association, Inc. v. Williams, 458 So.2d 364 (Fla. 2nd DCA 1984)	8
Keener v. Dunning, 238 So.2d 113 (Fla. 4th DCA 1970)	8
Mega Bank Telecredit of Service Center, 592 So.2d 755 (Fla. 3rd DCA 1992)	4, 5, 6, 7
Rose Printing Company, Inc. v. Wilson, 17 FLW 1591 (Fla. 1st DCA June 23, 1992)	5, 6, 7
Simmons v. Schimmel 476 So.2d 1342 (Fla. 3rd DCA 1985), Review Denied 486 So.2d 597 (Fla. 1986)	4, 5, 6, 7
Stuart Plaza Ltd. v. Atlantic Coast Development Corp. of Martin County, 493 So.2d 1136 (Fla. 4th DCA 1986)	8

STATEMENT OF THE CASE AND FACTS

The respondent employer was the Defendant in the trial court in a civil action filed by former employee filed by the Petitioner, a former employee. After Plaintiff voluntarily dismissed his action without prejudice on December 18, 1990, the Respondent filed a Motion to Tax Costs on January 10, 1991. On February 4, 1991, Petitioner refiled his action and this case is pending in Circuit Court.

The Motion to Tax Costs was denied by the Circuit Court on April 17, 1991. The Order denying Motion to Tax Costs made specific findings of fact that:

> (A) "The dismissal of this case was now 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;
>
> (B) "Under the circumstances of this case, no prevailing party can be determined at this time, and
>
> (C) "There has been no trial of this case. The Court deems it improper to award expert witness fees. The Order also stated that Court denied Respondent's Motions to Tax Costs because the Court deems it improper, pursuant to Rule 1.420(d), Fla. R. Civ. P., to award costs at this time, and further stated that the costs and fees incurred by both parties in the dismissed action would be added to and considered a part of the fees and costs expended for preparation of the refiled case."

An appeal was filed. The Respondent appealed to the First District Court of Appeal to review the trial court order denying Respondent's Motion to Tax Costs and on June 23, 1991, the District Court entered an opinion in quashing the trial court's order and remanding the case to the trial court for reconsideration of Respondent's Motion to Tax Costs in a manner consistent with this Court's analysis announced in Coastal Petroleum Company v. Mobil Oil Corporation.

A rehearing was denied on July 21, 1992 and the Petitioner's Notice to Invoke the Discretion of this Court was timely filed on August 19, 1992.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V §3(b)(3) Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

SUMMARY OF THE ARGUMENT

In this case, the district court of appeal held that the trial court may never exercise its discretion to tax costs and attorney's fees after a voluntary dismissal without prejudice even where the trial court has specifically found that the voluntary dismissal was for valid strategic reasons and the action was promptly refiled. The decision of the district court directly conflicts with the decision of this Court in Coastal Petroleum Company v. Mobil Oil Comp., 583 So.2d 1022 (Fla.1991) wherein the Court held that the trial court may entertain a motion to impose costs a dismissing party but this decision to assess costs, is a matter largely left to the discretion of the trial court. Secondly, the decision of the district court to mechanically apply the language of one of the rules that conflicts with Simmons v. Schimmel, 476 So.2d 1342, (Fla. 3rd DCA 1985), Review Denied 486 So.2d 597 (Fla. 1986), Englander v. St. Francis Hospital, Inc., 506 So.2d 423 (Fla. 3rd DCA 1987) and Mega Bank v. Telecredit Service Center, 592 So.2d 755 (Fla. 3rd DCA 1992) wherein that District Court rejected the mechanical application of the rule regarding costs against the dismissing party where the voluntary dismissal was a matter of trial strategy and the court could not determine who the prevailing party is. Thus, the Petitioner contends that the decision of the district court expressly and directly conflicts with previous decisions of this court and the Third District Court of Appeal.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN COASTAL PETROLEUM COMPANY V. MOBIL OIL CORP., 583 So.2D 1022, (FLA. 1991) AND SIMMONS V. SCHIMMEL, 476 So.2D 1342, (FLA. 3RD DCA 1985), REVIEW DENIED, 486 So.2D 597 (Fla. 1986), ENGLANDER V. ST. FRANCIS HOSPITAL, INC., 506 So.2D 423 (FLA 3RD DCA 1987), and MEGA BANK V. TELECREDIT SERVICES CENTER, 592 So.2D 755 (FLA. 3RD DCA 1992).

In Rose Printing Company, Inc. v. Wilson, 17 FLW 1591, (Fla. 1st DCA June 23, 1992), the Court held Fla.R.Civ.P. 1.420(d) absolutely prohibits a trial court from denying a motion to tax costs against a dismissing party even where the order contains specific factual findings to explain the exercise of discretion. This rigid, mechanical application of Rule 1.420(d) to the facts of this case can not be squared with this Court's holding in Coastal Petroleum Company v. Mobil Oil Corp., 583 So.2d 1022 (Fla. 1991) and Simmons v. Schimmel, 476 So.2d 1342 (Fla. 3rd DCA 1985), Rev. Denied 486 So.2d 597 (Fla. 1986), Englander v. St. Francis Hospital, Inc., 506 So.2d 423 (Fla. 3rd DCA 1987), and Mega Bank v. Telecredit Services Center, 592 So.2d 785 (Fla. 3rd DCA 1992). The Petitioner respectfully requests that this court should grant discretionary review and resolve the conflict by quashing the decision of the First District Court of Appeal.

In Coastal Petroleum, this Court held:

> When a voluntary dismissal occurs after an opposing party has incurred legitimate trial preparation expenses, we believe the trial court properly may entertain a motion to award costs against the dismissing party. This is a matter largely left to the discretion of the trial court. As a general rule, we believe these costs should not exceed the amount that reasonably would have been awarded had the precise same expenditure occurred in litigation that actually went to trial.

Id. at 1025.

The District Court opinion recognized that this language conflicted with its view of the discretion before the trial court but dodged the issue by explaining that this Court

did not really mean to say what it did. The District Court opinion expressly and directly addressed the question of law, i.e. the scope of discretion of Florida trial court under Rule 1.420(d) and held that the trial court has no discretion. This court has jurisdiction. Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988).

The District Court opinion states that the trial court order "noted the refiling of Wilson's case, found the voluntary dismissal was a strategic move to avoid surprise at trial and concluded that under the circumstances, no prevailing party could be determined." Rose Printing Company, Inc. v. Wilson, 17 FLW 1591 (Fla. 1st DCA June 23, 1992).

The opinion cites Simmons v. Schimmel and the "strategic dismissal" theory relied on by the Petitioner. Id. at 1592. In Simmons and Englander the "prevailing party" was entitled to attorney's fees by statute. The Court in Simmons and Englander held that the trial court cannot find a prevailing party can be determined simply because of a voluntary dismissal.

In Mega Bank, the court considered a contract for indemnification which included a provision requiring "An award of attorney's fees and costs to the prevailing party". The contract in Mega Bank was substantially identical to the contract here which provided: "... 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." Petitioner specifically notes that in the Mega Bank case, the trial judge had granted the non-dismissing party attorney's fees and costs. As stated in the opinion, "In support of its' argument that the trial court was correct in the award of attorney's fees and costs, Telecredit alleges that, because Mega Bank voluntarily dismissed the case, Telecredit was the "prevailing party" below. This

is clearly incorrect." Mega Bank supra at 755.

Here the trial court agreed with the rationale of the court in Simmons, Englander and Mega Bank on this point of law in holding that: "Under the circumstances, no prevailing party could be determined." Rose Printing, supra at 1591.

However, the First District rejected this point of law and held that the trial court erred in not determining the Respondent was the prevailing party when the Plaintiff voluntarily dismisses an action under 1.420(a)(1)(II). This holding expressly and directly conflicts with the Simmons, Englander and Mega Bank holding on the same point of law. The clear result of the holding of the First District Court below is that a trial court must always determine the non-moving party in a voluntary dismissal situation is the prevailing party.

Rule 1.420(d), provides, in pertinent part:

> "If a party who has once dismissed a claim ... 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 seeks affirmative relief has complied with the Order." Emphasis supplied.

The district courts of appeal are split as to what discretion this language leaves to the trial court when entertaining a motion to award costs against dismissing party. As noted above, the Third District Court of Appeal allows the trial court discretion. Simmons, supra, Del Valle v. Biltmore II Condominium Association, 411 So.2d 1356 (Fla. 3rd DCA 1982) and Mega Bank v. Telecredit Service Center, 592 So.2d 755 (Fla. 3rd DCA 1992). Other district courts have held there is no discretion under the

Rule. See Century Construction Corp v. Koss, 559 So.2d 611 (Fla. 1st DCA 1990), Stuart Plaza Ltd. v. Atlantic Coast Development Corp. of Martin County, 493 So.2d 1136, (Fla. 2nd DCA 1986), and 51 Island Way Condominium Association, Inc. v. Williams, 458 So.2d 364 (Fla. 2nd DCA 1984). In Keener v. Dunning, 238 So.2d 113 (Fla. 4th DCA 1970), the Fourth District announced its ruling that a trial court has no authority, hence no discretion to defer its costs even where the trial court may find it necessary to prevent undue advantage from accruing to one party simply because of a voluntary dismissal.

In this case, the Petitioner was confronted with sharply conflicting issues raised by new counsel for the Respondent four days before trial. The trial court had previously stated that there would be no continuance granted in the case so the Petitioner voluntarily dismissed his claim and refiled it within the Statute of Limitations in order to reclaim his right to a jury trial.

The sole reason the Respondent insists on a fee and cost award is to kill the Plaintiff's ability to continue his suit. This is precisely what this court feared in Coastal, the ability of the non-dismissing party to use a large cost award to chill the use of voluntary dismissals. The trial court below fashioned a ruling which protected both parties from undue advantage. The trial court should be permitted discretion for the reasons stated in Coastal:

> "The trial court, having had an opportunity to see all of the activities of the opponents, usually is best situated to make this determination."

Id. at 1026.

CONCLUSION

This Court recognizes that the purpose of allowing a trial court discretion in the imposition of costs after a voluntary dismissal is to ensure fairness. The opinion of the First District Court of Appeal in this case absolutely prohibits the exercise of discretion. There is also conflict between the district courts of appeal on this point of law. Therefore, this Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of Petitioner's argument.

Respectfully submitted,

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By: _____
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I HEREBY CERTIFY that a copy of the foregoing has been furnished by Hand Delivery to Honorable Robert M. Ervin, Post Office Box 1170, Tallahassee, FL 32302, on this 28 day of August, 1992.

W. DEXTER DOUGLASS

f:\cl\2563\2563.pjb

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

ROSE PRINTING COMPANY, INC.,
a Florida corporation,

Appellant,

vs. CASE NO. 91-1593

ROBERT A. WILSON,

Appellee.

INDEX TO APPENDIX

Opinion filed June 23, 1992. Appeal from the Circuit Court for Leon County, Charles McClure, Judge. Rose Printing Company, Appellant v. Robert A. Wilson, Appellee. 1

Order Denying Motion to Tax Costs 2

tions. However, we find the constructibility doctrine to be inapplicable to the facts of the case at bar. Even assuming that the clearing and grubbing portion of the contract was inconstructible as planned insofar as the equipment required was a minimum of twelve feet in width, such was not a latent defect in the job specifications. Appellant P&J had availed itself of the opportunity to inspect the job site, knew of the site conditions, knew of the type of equipment it would subsequently use at the site, and knew that its equipment of choice would clear an area in excess of ten feet in width. P&J submitted its bid in contemplation of these facts, and cannot now claim the existence of a latent defect in the job specifications such as would warrant the application of the implied warranty of constructibility.[2]

We are likewise unpersuaded by appellant's argument that it is entitled to payment for the area actually cleared because the contract is a unit price contract predicated on payment for work actually performed. More precisely, the instant contract contemplates payment for work actually performed *within the parameters of the job specifications*. To be sure, a unit price contract provides for payment of the actual amount of work done or material supplied where the precise amounts needed are not known at the inception of the project. In the instant case, however, the only variable contemplated by the job specifications was the length of the area to be cleared and grubbed, not the width of such area. Furthermore, appellant was possessed of a contractual means to assert its claim for payment for work performed outside the specified ten-foot wide area. Appellant could have sought written authorization for payment for such work, in effect, a reformation of the contract, under a contractual provision providing for such a reformation where it appears necessary. In fact, under the terms of the contract, appellant is precluded from seeking payment for work performed outside the contractual specifications without first seeking a written reformation of the contract. Therefore, appellant's claim is barred by the express terms of the contract.

The material facts necessary to resolution of the instant case are not disputed. The trial court correctly granted summary final judgment in favor of appellee DOT.

AFFIRMED. (SHIVERS, MINER and WOLF, JJ., CONCUR.)

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[1]United States v. Spearin, 248 U.S. 132 (1918).

[2]Furthermore, we do not construe the trial court's order to bar appellant's claim under the doctrine of sovereign immunity because it is based on an implied covenant of the contract rather than an express term of the contract. Such a view would be erroneous. See Champagne-Webber, Inc. v. City of Fort Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988). Rather, we construe the trial court's order to bar appellant's claim because it is outside both the express and implied conditions of the contract.

* * *

Civil procedure—Costs—Voluntary dismissal—Trial court departed from essential requirements of law when it denied defendant's motion to tax costs in connection with voluntarily dismissed action and ruled that costs and fees incurred in the dismissed action would be added to and considered a part of the cost and fees expended for the preparation of subsequently refiled case—Fact that plaintiff's voluntary dismissal was a "strategic decision" is irrelevant to defendant's motion to tax costs in instant case involving an employment agreement which reflected parties' intent to treat attorney's fees as taxable costs to be awarded the prevailing party in any litigation arising out of the agreement

ROSE PRINTING COMPANY, INC., a Florida corporation, Appellant, v. ROBERT A. WILSON, Appellee. 1st District. Case No. 91-1593. Opinion filed June 23, 1992. Appeal from the Circuit Court for Leon County, Charles McClure, Judge. Robert M. Ervin and Robert M. Ervin, Jr. of the law firm of Ervin, Varn, Jacobs, Odom & Ervin, Tallahassee, for Appellant. W. Dexter Douglass of Douglass, Cooper, Coppins & Powell, Tallahassee, for Appellee.

(ALLEN, J.) Rose Printing Company, Inc., hereinafter Rose, the defendant below, appeals an order denying its motion to tax costs against Robert A. Wilson, the plaintiff below, following Wilson's voluntary dismissal without prejudice of his lawsuit. Wilson urges us to dismiss this appeal for want of jurisdiction and argues alternatively that the order should be affirmed on the merits. We treat Rose's appeal as a petition for writ of certiorari, *see Chatlos v. City of Hallandale*, 220 So.2d 353, 354 (Fla. 1968), *Barry A. Cohen, P.A. v. LaTorre*, 595 So.2d 1076 (Fla. 2d DCA 1992); *Coastal Petroleum Co. v. Mobil Oil Corp.*, 550 So.2d 158, 159 (Fla. 1st DCA 1989), *rev'd on other grounds*, 583 So.2d 1022 (Fla. 1991); *Keener v. Dunning*, 238 So.2d 113, 114 (Fla. 4th DCA 1970); and *Craft v. Clarembeaux*, 162 So.2d 325, 327 (Fla. 2d DCA 1964), reject Wilson's jurisdictional argument, and quash the trial court's order.

Wilson was formerly employed as Rose's general manager pursuant to a written employment agreement. In February 1990, Wilson sued Rose, alleging that Rose had breached the agreement by firing him without paying various sums due under the agreement's severance and compensation provisions. Wilson attached a copy of the employment agreement to his complaint, the relevant portion of which provides: "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 answer prayed for dismissal of the complaint and taxation of costs and attorney's fees against Wilson. The parties engaged in discovery and the case was ultimately set for trial on December 21, 1990. On December 18, Wilson filed a notice of voluntary dismissal.

Thereafter, Rose filed a motion to tax costs and attorney's fees against Wilson, relying upon Rule 1.420(d), Florida Rules of Civil Procedure, and the costs provision of the employment agreement. Wilson urged the court to deny the motion, arguing that since he had refiled his complaint against Rose and commenced another case, the court should "carry over the Defendant's alleged costs, including attorney's fees, to the Plaintiff's second action." Alternatively, Wilson argued that his voluntary dismissal was a strategic move and therefore, Rose was not the prevailing party within the meaning of the agreement's costs provision. The court noted the refiling of Wilson's case, found that his voluntary dismissal was a strategic move to avoid surprise at trial, and concluded that, under the circumstances, no prevailing party could be determined. The court's order reads in relevant part:

> [I]t 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 90-480 shall be added to and considered a part of the cost and fees expended for the preparation of case number 91-485.

Wilson voluntarily dismissed his case pursuant to Rule 1.420(a)(1)(i) which, but for certain exceptions not relevant here, permits a plaintiff to dismiss his case without prejudice at any time before a hearing on a motion for summary judgment, before retirement of the jury, or before submission of a nonjury case to the court for decision. Rule 1.420(d) provides:

> *Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that 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.

(emphasis added). In *City of Hallandale v. Chatlos*, 236 So.2d 761, 763 (Fla. 1970), the supreme court interpreted the first sentence of this rule "to mean that costs, including attorney's fees, are to be assessed and judgment entered for them in the same action which is the subject of voluntary dismissal under

R.C.P. 1.420(a)." In *Keener v. Dunning*, 238 So.2d 113, 114 (Fla. 4th DCA 1970), the court found error in the trial judge's decision to defer ruling upon the defendant's motion to tax certain costs when the motion was filed after the plaintiff's voluntary dismissal and the judge deferred ruling thereon pending resolution of the plaintiff's refiled case. The court explained:

> Where a cause is voluntarily dismissed by a plaintiff under Rule 1.420(a)(1), F.R.C.P., 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.

Keener, 238 So.2d at 114.

We approved this language from *Keener* in *Troutman Enterprises, Inc. v. Robertson*, 273 So.2d 11, 12 (Fla. 1st DCA 1973). Similarly, in *Field v. Nelson*, 380 So.2d 547 (Fla. 2d DCA 1980), the court determined that, after a voluntary dismissal, a trial judge has no authority to defer the defendant's collection of costs pending the conclusion of the plaintiff's refiled suit and no authority to refuse to stay the second action, notwithstanding Rule 1.420(d)'s "as it may deem proper" language. *See also, McKelvey v. Kismet, Inc.*, 430 So.2d 919, 920-21 (Fla. 3d DCA) (under Rule 1.420(d), costs are to be assessed immediately after a dismissal is entered and any subsequent suit on the same claim must be stayed until all of the costs awarded in the initial suit are paid), *rev. denied*, 440 So.2d 352 (Fla. 1983); *Gordon v. Warren Heating & Air Conditioning, Inc.*, 340 So.2d 1234, 1235 (Fla. 4th DCA 1976) (a trial judge has no authority to defer a ruling on costs pending the outcome of another action and if a new action is brought on the previously dismissed claim, the judge must stay the proceedings until its order for payment of costs is complied with); and *Roundtree v. Hartford Accident and Indemnity*, 327 So.2d 882, 883 (Fla. 3d DCA 1976) (costs must be assessed in the dismissed action, not in a second action brought on the same claim).

In light of these authorities, we conclude that the judge's denial of Rose's motion to tax costs was a departure from the essential requirements of law, as was his decision to add to the costs and fees of the refiled action, those costs and fees Rose incurred in defense of this suit. We have not overlooked *Coastal Petroleum Co. v. Mobil Oil Corp.*, 583 So.2d 1023, 1025 (Fla. 1991), in which the supreme court said:

> When a voluntary dismissal occurs after an opposing party has incurred legitimate trial-preparation expenses, we believe the trial court properly *may* entertain a motion to award costs against the dismissing party. *This is a matter largely left to the discretion of the trial court.* As a general rule, we believe these costs should not exceed the amount that reasonably would have been awarded had the precise same expenditures occurred in litigation that actually went to trial.

(emphasis added). We reject Wilson's suggestion that, by referring to the trial judge's discretion to entertain a motion to award costs after a voluntary dismissal, the supreme court intended to modify the plain language of Rule 1.420(d) or overrule, *sub silentio*, the long-standing rules represented by *Chatlos*, *Keener* and the other decisions discussed above. In our view, the court's language was meant to simply underscore the discretion that a trial judge exercises when considering which costs to tax.

Although Rule 1.420(d) does not contemplate the assessment of attorney's fees and the term "costs" is not generally understood to include such fees, *Wiggins v. Wiggins*, 446 So.2d 1078, 1079 (Fla. 1984), it has long been clear that when a statute or contractual agreement defines costs to include attorney's fees, the fees should be taxed just like other costs under the Rule. *See, e.g., Century Constr. Corp. v. Koss*, 559 So.2d 611, 612 (Fla. 3d DCA), *rev. denied*, 574 So.2d 141 (Fla. 1990); *Stuart Plaza, Ltd. v. Atlantic Coast Dev. Corp.*, 493 So.2d 1136, 1137 (Fla. 4th DCA 1986); *McKelvey*, 430 So.2d at 922; and *Gordon*, 340 So.2d at 1235, *cited with approval in, Wiggins*, 446 So.2d at 1079.

The employment agreement in this case reflects the parties' intent to treat attorney's fees as taxable costs to be awarded the prevailing party in any litigation arising out of the agreement. *Cf. Gordon*, 340 So.2d at 1235. Thus, the trial judge erred when he denied Rose's motion to tax the fees and deferred any assessment of the fees until the disposition of Wilson's refiled suit. We note Wilson's reliance upon *Simmons v. Schimmel*, 476 So.2d 1342, 1345 (Fla. 3d DCA 1985), *review denied*, 486 So.2d 597 (Fla. 1986), and the "strategic dismissal" theory developed therein, but find his reliance misplaced. In *Simmons*, the court observed that the plaintiff's voluntary dismissal was a strategic move and it found error in the judge's taxation of the defendant's attorney's fees against the plaintiff. Interpreting section 768.56, Florida Statutes (1981), which authorized an award of fees to the prevailing party in a medical malpractice action, the court held:

> Thus, although a formal merits determination is not necessary to support a fee award made pursuant to a statute allowing the award to the prevailing party, there must be some end to the litigation on the merits so that the court can determine whether the party requesting fees has prevailed.

Simmons, 476 So.2d at 1345, *cited with approval in, Thornber v. City of Ft. Walton Beach*, 568 So.2d 914, 919 (Fla. 1990). *See also, Englander v. St. Francis Hosp., Inc.*, 506 So.2d 423, 424 (Fla. 3d DCA 1987) (en banc); *Mega Bank v. Telecredit Serv. Center*, 592 So.2d 755 (Fla. 3d DCA 1992); and *Goldstein v. Richter*, 538 So.2d 473, 475 (Fla. 4th DCA 1989). *But see, Dam v. Heart of Florida Hosp., Inc.*, 536 So.2d 1177, 1178 (Fla. 2d DCA 1989); and *Vidibor v. Adams*, 509 So.2d 973, 974 (Fla. 5th DCA 1987) (rejecting *Simmons*). Because the fee award in this case flows from the parties' agreement to treat fees as taxable costs, and not from a statute awarding attorney's fees to the prevailing party, *Simmons* and its progeny have no application. Indeed, the *Simmons* court recognized the inapplicability of its rule to cases like this one. *See Simmons*, 476 So.2d at 1345, n.3.

Finally, in response to Wilson's assertion that an award of fees and costs under these circumstances will have a chilling effect upon a plaintiff's right to voluntarily dismiss his case, we note our agreement with *McArthur Dairy, Inc. v. Guillen*, 470 So.2d 747, 749 (Fla. 3d DCA 1985), in which the court held that a plaintiff who has once voluntarily dismissed his case and paid costs to the defendant as a prerequisite to maintaining a second action against him on the same claim, may recover from the defendant some of the costs paid upon prevailing in the second action. As explained in *Guillen*, 470 So.2d at 749:

> We therefore hold that a plaintiff is entitled to recover those costs paid to a defendant which would have been expended by the defendant even if the case had not been voluntarily dismissed *ab initio*. Correlatively, we think it only fair, and thus hold, that where the plaintiff's voluntary dismissal causes a duplication in the defendant's costs, the plaintiff is not entitled to those costs, since the defendant would not have incurred them but for the voluntary dismissal. Thus, for example, if the plaintiff's action is voluntarily dismissed after the defendant has expended trial witness fees and like costs relating to the trial, such costs, because they must be expended again at a second trial, are a consequence of the voluntary dismissal and should not be recovered by the plaintiff, notwithstanding that the plaintiff ultimately prevails. On the other hand, if the defendant has been paid for the cost of taking a witness deposition, a cost which need not be incurred again in preparation for the second action, the prevailing plaintiff should recover this cost which he has been forced to pay to the defendant.

See also, Muniz v. Samero, 534 So.2d 848, 849 (Fla. 5th DCA 1988).

Accordingly, we grant the petition for writ of certiorari and quash the trial judge's order denying Rose's motion to tax costs. Upon reconsideration of Rose's motion, the trial judge should apply the analysis announced by the supreme court in *Coastal Petroleum*, 583 So.2d at 1025-26. (SMITH and ZEHMER, JJ., CONCUR.)

* * *

Rec. 4/18/91 75

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CASE NUMBER: 90-840

ROBERT A. WILSON,

Plaintiff,

vs.

ROSE PRINTING COMPANY,
INC., a Florida Corporation,

Defendant.

_____/

ORDER DENYING MOTION TO TAX COSTS

THIS CAUSE came on before the court upon Defendant ROSE PRINTING COMPANY'S Motion to Tax Costs, filed on January 10, 1991. After considering 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 case number 90-840 shall be added to and considered a part of the cost and fees expended for the preparation of case number 91-485.

DONE and ORDERED this 8-12 day of April, 1991.

Charles D. McClure
Chief Judge

cc: W. Dexter Douglas, Esq.
Robert M. Ervin, Esq.