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IN THE SUPREME COURT OF FLORIDA

ROBERT A. WILSON, CASE NO. 80,354

Petitioner,

vs.

ROSE PRINTING COMPANY, INC.
a Florida corporation,

Respondent.
_______________________________/

FILED
SID J. WHITE
SEP 16 1992
CLERK, SUPREME COURT
By________________
Chief Deputy Clerk

ON PETITION TO REVIEW
THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Robert A. Wilson ("Wilson") has petitioned this court, pursuant to article V, section 3(b)(3), Florida Constitution (1980), for review of a decision of the First District Court of Appeal. The court of appeal held that the trial court, following Wilson's voluntary dismissal of his action without prejudice, erred in failing to tax costs, including attorney fees as an element of costs, for the defendant below, the respondent herein, Rose Printing Company ("Rose").

As recited by the court of appeal, the operative facts may be summarized as follows: Wilson sued Rose for the alleged breach of a contract of employment. The contract contained the following provision: "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." Wilson voluntarily dismissed his action without prejudice pursuant to Florida Rule of Civil Procedure 1.420(a)(1)(i). Relying upon the costs provision of the contract, Rose then moved to tax costs, including reasonable attorney fees, pursuant to Florida Rule of Civil Procedure 1.420(d). Finding that Wilson's voluntary dismissal was a "strategic move," the trial court concluded that no prevailing party could be determined and denied the motion. In doing so, the trial court ordered that costs, including attorney fees, incurred in the voluntarily-dismissed action be added to and considered a part of the costs and attorney fees in a subsequent action based

upon the same claim. <u>Rose Printing Co. v. Wilson</u>, 17 Fla. L. Weekly D1591, D1591 (Fla. 1st DCA June 23, 1992).

The court of appeal observed that Wilson's voluntary dismissal was pursuant to rule 1.420(a)(1)(i). The court of appeal further observed that the first sentence of rule 1.420(d) provides: "<u>Costs in any action dismissed under this rule shall be assessed and judgment for costs entered in that action</u>." <u>Rose Printing Co.</u>, 17 Fla. L. Weekly at D1591. The court of appeal further observed that, in <u>City of Hallendale v. Chatlos</u>, 236 So. 2d 761, 763 (Fla. 1970), this court interpreted the first sentence of rule 1.420(d) to mean that costs "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). The court of appeal also noted that several court of appeal decisions are in accord with <u>Chatlos</u>. <u>Rose Printing Co.</u>, 17 Fla. L. Weekly at D1591-92.

Turning to <u>Coastal Petroleum Co. v. Mobil Oil Corp.</u>, 583 So. 2d 1023, 1025 (Fla. 1991), the court of appeal observed that, in <u>Coastal Petroleum Co.</u>, this court said:

> When a voluntary dismissal occurs after an opposing party has incurred legitimate trial-preparation expenses, we believe the trial court properly <u>may</u> entertain a motion to award costs against the dismissing party. <u>This is a matter largely left to the discretion of the trial court.</u> 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.

<u>Rose Printing Co.</u>, 17 Fla. L. Weekly at D1592. In harmonizing <u>Coastal Petroleum Co.</u> with <u>Chatlos</u> and its progeny, and with the language of rule 1.420(d), the court of appeal rejected Wilson's

suggestion that this court intended to modify the plain language of rule 1.420(d) or overrule, by implication, the long-standing rule of Chatlos and its progeny. Rather, the court of appeal concluded, this court's language in Coastal Petroleum Co. was meant simply to underscore "the discretion that a trial judge exercises when considering which costs to tax." Rose Printing Co., 17 Fla. L. Weekly at D1592.

Citing several cases, including Century Construction Corp. v. Koss, 559 So. 2d 611 (Fla. 1st DCA), review denied mem., 574 So. 2d 141 (Fla. 1990), the court of appeal also observed that "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" rule 1.420(d). The court of appeal noted Wilson's reliance upon Simmons v. Schimmel, 476 So. 2d 1342 (Fla. 3d DCA 1985), review denied mem., 486 So. 2d 597 (Fla. 1986), in which the trial court's taxation of the defendant's attorney fees against the plaintiff following a "strategic dismissal" was found to be error. The court of appeal observed, however, that in Simmons the fee award was made pursuant to a statute allowing a fee award to the prevailing party. In distinguishing Simmons, the court of appeal concluded,

> 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.

Rose Printing Co., 17 Fla. L. Weekly at D1592.

The court of appeal quashed the trial court's order denying Rose's motion to tax costs, including attorney fees as an element of costs. The court of appeal directed the trial court, upon reconsideration of Rose's motion, to apply the analysis announced in Coastal Petroleum Co. by this court. Rose Printing Co., 17 Fla. L. Weekly at D1592.

SUMMARY OF ARGUMENT

This court may only review a decision of a court of appeal that expressly and directly conflicts with a decision of another court of appeal or the supreme court on the same question of law. The court of appeal succinctly and correctly harmonized its decision with this court's decision in Coastal Petroleum Co. v. Mobil Oil Corp., 583 So. 2d 1023 (Fla. 1991). The court of appeal also correctly distinguished its decision from Simmons v. Schimmel, 476 So. 2d 1342 (Fla. 3d DCA 1985), review denied mem., 486 So. 2d 597 (Fla. 1986), and the progeny of Simmons. No conflict has been demonstrated.

ARGUMENT

WILSON HAS FAILED TO DEMONSTRATE EXPRESS AND DIRECT CONFLICT WITH A DECISION OF THIS COURT OR ANOTHER COURT OF APPEAL ON THE SAME QUESTION OF LAW; THEREFORE, THIS COURT SHOULD REFUSE TO EXERCISE ITS DISCRETION

Wilson asserts two grounds upon which he argues this court should exercise its discretion to review the decision of the court of appeal in Rose Printing Co. v. Wilson, 17 Fla. L. Weekly D1591 (Fla. 1st DCA June 23, 1992). Wilson first asserts that the court of appeal failed to harmonize its decision with Coastal Petroleum

Co. v. Mobil Oil Corp., 583 So. 2d 1023 (Fla. 1991). Wilson then asserts that the court of appeal failed to distinguish its decision from Simmons v. Schimmel, 476 So. 2d 1342 (Fla. 3d DCA 1985), review denied mem., 486 So. 2d 597 (Fla. 1986), and the progeny of Simmons. Pursuant to article V, section 3(b)(3), Florida Constitution (1980), this court may only review a decision of a court of appeal that expressly and directly conflicts with a decision of another court of appeal or the supreme court on the same question of law. Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980).

Following Florida Rule of Civil Procedure 1.420(d), City of Hallendale v. Chatlos, 236 So. 2d 761 (Fla. 1970), and several court of appeal decisions that are in accord with Chatlos, the court of appeal concluded that a trial court must assess costs in any action dismissed under Florida Rule of Civil Procedure 1.420(a) and enter judgment for those costs. In doing so, however, the court of appeal observed that this court, in Coastal Petroleum Co., 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., 17 Fla. L. Weekly at D1591-92. The court of appeal 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., 17 Fla. L. Weekly at D1592 (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 courts of appeal 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 court of appeal 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. No conflict has been demonstrated.

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 court of appeal also concluded that, where a statute or contract defines costs to include attorney fees, the attorney fees should be taxed as an element of costs under rule 1.420(d). In doing so, however, the court of appeal noted the "strategic dismissal" theory espoused in Simmons and its progeny. The court of appeal distinguished Simmons and its progeny by observing that, in Simmons, the fee award was made pursuant to a statute allowing a fee award to the prevailing party. The court of appeal also noted that the court of appeal 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., 17 Fla. L. Weekly at D1592.

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, 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 v. Warren Heating & Air Conditioning, Inc., 340 So. 2d 1234 (Fla. 4th DCA 1976), the action was within the ambit of a

statute which taxed attorney fees as a part of costs to be awarded to the prevailing party. Id. at 1235. Thus, the court of appeal 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 the case has been voluntarily dismissed is within the purview of Rule 1.420(d)." Wiggins, 446 So. 2d at 1079. Thus, in Century Construction Corp., the court of appeal held, "[i]t is well established that attorney's fees are properly awarded after a voluntary dismissal where such award is provided for by statute or agreement of the parties." Century Construction Corp., 559 So. 2d at 612.

In Simmons, the court of appeal 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.

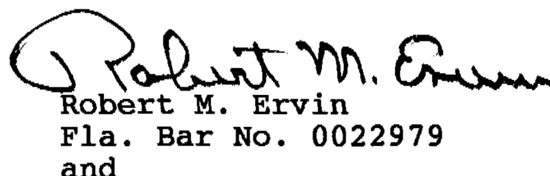
Simmons, 476 So. 2d at 1342 n.3. Likewise, the court of appeal in the present case correctly concluded that when a statute or contract defines costs to include attorney fees, Simmons and its progeny are not applicable, and the attorney fees should be taxed

just like other costs under rule 1.420(d). The court of appeal, therefore, correctly distinguished its decision from Simmons and the progeny of Simmons. No conflict has been demonstrated.

CONCLUSION

This court should refuse to exercise its discretion where, as here, the petitioner has failed to demonstrate that the court of appeal's decision establishes a point of law contrary to a decision of this court or another court of appeal. See Florida Star v. B.J.F., 530 So. 2d 286, 289 (Fla. 1988).

Respectfully submitted,



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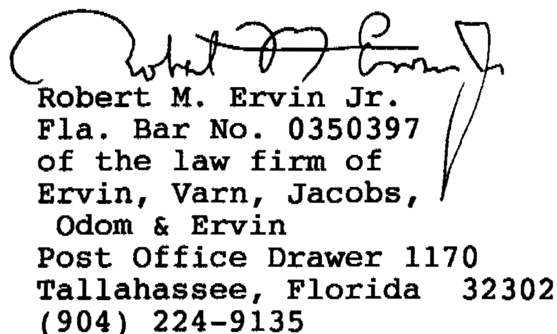

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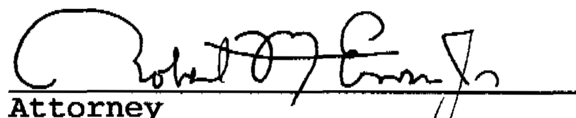

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