

DA 6-1-93

FILED
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✓ CB 19 1993
CLERK, SUPREME COURT
By _____
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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 of Florida, First District



PETITIONER'S BRIEF ON THE MERITS

✓ DOUGLASS & POWELL
Post Office Box 1674
Tallahassee, Florida 32302-1674
Telephone: (904) 224-6191
Telecopier: (904) 224-3644
ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

PAGE

Table of Citations ii

Preliminary Statement 1

Statement of the Case and Facts 2

Summary of the Argument 6

Argument 7

**WHEN A CASE IS VOLUNTARILY DISMISSED UNDER RULE
 1.420(D), FLA.R.CIV.P., THE TRIAL COURT HAS
 DISCRETION WHEN THE FACTS WARRANT TO DENY
 COSTS OR TO DETERMINE THE AMOUNT ALLOWABLE.**

Conclusion 13

Certificate of Service 14

TABLE OF CITATIONS

Cases	Page
<u>B & H Constr. & Supply Co., Inc. v. Tallahassee Community College</u> , 542 So.2d 382, 387 (Fla. 1st DCA), <u>rev. denied</u> , 549 So.2d 1013 (Fla. 1989)	8
<u>Bankers Multiple Line Ins. Co. v. Blanton</u> , 352 So.2d 81, 82 (Fla. 4th DCA 1977)	8
<u>Century Construction Corp. v. Koss</u> , 559 So.2d 611 (Fla. 1st DCA 1990)	10
<u>Coastal Petroleum Company v. Mobil Oil Corporation</u> 583 So.2d 1022 (Fla. 1991)	5,7,9,11
<u>Del Valle v. Biltmore II Condominium Association</u> , 411 So.2d 1356 (Fla. 3rd DCA 1982)	8
<u>Englander v. St. Francis Hospital, Inc.</u> , 506 So.2d 423 (Fla. 3rd DCA 1987)	8,9
<u>51 Island Way Condominium Association, Inc. v. Williams</u> , 458 So.2d 364 (Fla. 2nd DCA 1984)	10
<u>Keener v. Dunning</u> , 238 So.2d 113 (Fla. 4th DCA 1970)	10
<u>Mega Bank Telecredit of Service Center</u> , 592 So.2d 755 (Fla. 3rd DCA 1992)	9,10
<u>Phoenix Canada Oil Company v. Texaco, Inc.</u> , (D Del 1978) 78 FRD 445	10
<u>Rose Printing Company, Inc. v. Wilson</u> , 602 So.2d 600 (Fla.App. 1 Dist.1992)	5
<u>Simmons v. Schimmel</u> , 476 So.2d 1342 (Fla. 3rd DCA 1985), <u>Rev. Denied</u> 486 So.2d 597 (Fla. 1986)	8,9
<u>Williams v. Cotton</u> , 346 So.2d 1039 (Fla. 1st DCA 1977)	10

Court Rules

FED.R.CIV.P. 41(d) 10

FLA.R.CIV.P. 1.420(d) 5,7,8,10

PRELIMINARY STATEMENT

Robert A. Wilson was the Plaintiff in the Trial Court, the Appellee/Respondent in the First District Court of Appeal and the Petitioner herein. He will be referred to as Plaintiff. Rose Printing Company, Inc. was the Defendant in the Trial Court, the Petitioner/Appellant in the First District Court of Appeal and the Respondent herein. It will be referred to as Defendant. Since this was an interlocutory appeal treated as certiorari, there was no record filed with the District Court of Appeal.

For purposes of this proceeding, Plaintiff, Wilson, will refer to the separately paginated Appendix to Initial Brief of Appellant as Respondent's Appendix with the appropriate page number in parenthesis. Example: (RA-____.) The Appendix filed by the Plaintiff in the District Court of Appeal will be referred to as Petitioner's Appendix with the appropriate page number. Example: (PA-____.)

STATEMENT OF THE CASE AND FACTS

Robert A. Wilson, Plaintiff, sued Defendant, Rose Printing Company, Inc. for breach of employment contract on February 22, 1990, and demanded trial by jury. (RA-1.) The Defendant filed its answer and affirmative defenses on March 19, 1990. (RA-13.) The Defendant was initially represented by Mark E. Levitt and John T. Jaszczak of Hogg, Allen, Norton & Blue, in Tampa, Florida. (RA-14.)

On April 10, 1990, Plaintiff noticed the case for trial and on April 13, 1990, filed his response to Defendant's affirmative defenses. (RA-15.)

Defendant noticed Plaintiff's deposition for June 6, 1990 (PA-1), and filed a request for production on April 24, 1990. (PA-3, 7.) On May 8, 1990, Plaintiff noticed the President of Defendant, Charles Rosenberg, for deposition to be held on June 6, 1990. (PA-8.) On May 18, 1990, Plaintiff answered Defendant's interrogatories. (PA-10.)

The depositions of Charles Rosenberg and Plaintiff were cancelled to be re-set at a mutually convenient time after request of Defendant's counsel, John T. Jaszczak. Attempts were made to re-schedule Rosenberg's deposition throughout the summer and fall of 1990, which was to be accompanied by production whenever an agreed date could be made. No dates were ever afforded and Rosenberg's deposition was not taken until it was noticed the third time, and taken on December 7, 1990. On May 21, 1990, the Court entered an order setting the case for trial on November 20, 1990. (PA-11.) The Defendant, through its attorneys, Hogg, Allen, Norton & Blue, filed a motion to re-set the trial, stating they had relied on Plaintiff's request for a jury trial and therefore wanted a jury trial. (PA-12.)

Plaintiff had no objection to a non-jury trial as the only issue in the case at that

time was breach of contract with the principal issue being whether Plaintiff had resigned or was fired. (RA-60.)

On October 25, 1990, Defendant engaged the services of its current law firm, Ervin, Varn, Jacobs, Odom & Ervin, which filed a notice of appearance. (PA-16.) A notice of taking the deposition of Plaintiff was served on November 2, 1990. (PA-14.) On November 1, 1990, Hogg, Allen, Norton and Blue moved to withdraw as counsel and on the same day Defendant withdrew its motion to re-set the cause for jury trial (PA-17) and filed an amended notice of taking deposition of Plaintiff, setting the deposition on November 13, 1990. (PA-18.)

On November 8, 1990, Plaintiff filed a notice of taking deposition of Charles Rosenberg, President of Defendant, to be held on November 13, 1990. (PA-20.) This deposition was continued at Defendant's request. However on November 13, 1990, Defendant took Plaintiff's deposition requesting Rosenberg's deposition be re-scheduled. A meeting was held between Plaintiff's counsel and Defendant's new counsel and the Court which resulted in a letter of November 20, 1990, with a proposed order from Defendant's lawyer setting trial. (PA-22.)

An order setting the trial dated November 16, 1990, filed November 20, 1990 was entered scheduling the trial as a non-jury trial on December 21, 1990. The order allowed additional discovery but required it to be completed by five business days before trial with interrogatories to be answered and served on the attorney for the responding party on or before December 7, 1990. (PA-23.) On November 30, 1990, Plaintiff filed a request to produce and a notice of re-scheduling the deposition of Charles Rosenberg for December 7, 1990. On December 3, 1990, Defendant set the second deposition of

Robert Wilson for December 4, 1990, and December 7, 1990, filed its notice of production of documents. On December 6, 1990, Plaintiff filed interrogatories requesting the names of the witnesses and nature of their testimony (RA-22) and on December 7, 1990, Defendant filed a second set of interrogatories and second request for production of additional documents. (RA-29-36.) As of December 7, 1990, Defendant had deposed Plaintiff twice within three weeks. Plaintiff finally was able to take the deposition of Defendant's President, Rosenberg, on December 7, 1990.

In response to Plaintiff's interrogatories the Defendant served unsworn answers four days before the trial on December 17, 1990, listing numerous witnesses on newly announced matters. Later the sworn answers to interrogatories were filed and copies furnished three days before trial. (RA-60.)

Plaintiff, faced with an entirely new set of issues and newly revealed alleged sharp conflicts of testimony by employees and directors of Defendant, sought agreement from Defendant for a continuance which was denied. The Court had previously stated it would under no circumstances continue the trial. (RA-61, 75.) Therefore, Plaintiff elected to take a voluntary dismissal and re-file the case to obtain a jury trial and full discovery. Notice of voluntary dismissal was filed on December 18, 1990. (RA-47-48.)

On February 4, 1991, Plaintiff refiled the case as Case No. 91-485. On January 10, 1991, Defendant filed a motion to tax costs and enter judgment in its favor against Plaintiff and attached time records claiming expenses and attorney's fees for original counsel, Hogg, Allen, Norton & Blue in the amount of \$4,824.50, and for Ervin, Varn, Jacobs, Odom & Ervin for the period of time from October 25, 1990 to January 10, 1991, in the amount of \$14,840.40, together with a (PA-24-48) claim for fees from the

accounting firm of Betts, Rogers & Schenk of \$7,372.35. (RA-49-56.)

The Court considered the motion to tax costs and entered its order on April 17, 1991, where it found:

Dismissal of this case was not based upon the merits of the case, but was rather a strategic move to avoid surprise at trial due to Defendant's disclosure of several previously undisclosed witnesses four days before trial.

In the section of the order entitled "ORDERED AND ADJUDGED" the Court stated:

(a) Defendant's motion to tax costs is denied because the Court deems it improper pursuant to Rule 1.420(d), Fla.R.Civ.P., to award costs at this time;

(b) The costs and fees incurred by both parties in Case No. 90-840 shall be added to and considered a part of the costs and fees expended for the preparation of Case No. 91-485.

(RA-75-76).

On May 17, 1991, Defendant appealed to the First District Court of Appeal to review the Trial Court order denying Defendant's motion to tax costs and on June 23, 1992, the District Court entered an opinion quashing the Trial Court's order remanding the case to the Trial Court for reconsideration of Defendant's motion to tax costs in a manner consistent with the Court's opinion in Rose Printing Company, Inc. v. Wilson, 602 So.2d 600 (Fla.App. 1 Dist.1992). The rehearing was denied on July 22, 1992, and Plaintiff's notice to invoke the jurisdiction of this Court was timely filed on August 19, 1992.

On January 25, 1993, this Court entered an order accepting jurisdiction and setting oral argument.

SUMMARY OF THE ARGUMENT

In this case, the District Court of Appeal held that the Trial Court may never exercise its jurisdiction to tax costs and attorney's fees after a voluntary dismissal without prejudice, even when the trial court had specifically found that the voluntary dismissal was for valid strategic reasons and the action was promptly refiled. In Coastal Petroleum Company v. Mobil Oil Corporation, 583 So.2d 1022 (Fla.1991), this Court held that the Trial Court may entertain a motion to impose costs against a dismissing party but this decision to assess costs is a matter largely left to the discretion of the Trial Court. This holding and decisions from other District Court of Appeals reject the mechanical application of the rule regarding costs against a dismissing party, especially where the voluntary dismissal was a matter of trial strategy. The better rule would be to allow the Trial Court the discretion to tax costs, to defer taxation of costs, or to take other action it may deem proper where the Court finds the voluntary dismissal was taken in good faith as a matter of trial strategy. This is particularly true where the prevailing party can not be readily determined.

ARGUMENT

WHEN A CASE IS VOLUNTARILY DISMISSED UNDER RULE 1.420(D), FLA.R.CIV.P., THE TRIAL COURT HAS DISCRETION WHEN THE FACTS WARRANT TO DENY COSTS OR TO DETERMINE THE AMOUNT ALLOWABLE.

The Trial Court should be permitted the discretion to allow or disallow costs in whole or in part where the Plaintiff voluntarily dismisses an action in good faith based on valid strategic reasons which were found to exist by the Trial Court. The Trial Court is most familiar with the history of the case and the Plaintiff's basis for its action. Here the Court was aware of all the facts concerning the unfairness faced by the Plaintiff which in part was caused by Defendant's acts.

In Coastal Petroleum Company v. Mobil Oil Corporation, this Court stated:

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.

* * *

This rule will require the trial court, in an appropriate hearing, after argument and presentation of appropriate evidence by both sides, to determine exactly which expenses would have been reasonably necessary for an actual trial, including expert witness preparation costs.

* * *

We believe this rule is necessary to balance the policies we have elaborated above. An opposing party usually should not be entitled to an extraordinary cost award merely because of the fact of the voluntary dismissal. Simultaneously, we do not believe an advantage should accrue to either party simply because a controversy has been voluntarily dismissed or because it has actually gone to trial. (Emphasis added)

Here Plaintiff voluntarily dismissed an action on December 18, 1990, three days before trial and promptly re-filed the action on February 4, 1991. Rule 1.420(d), Florida Rules of Civil Procedure, which is applicable, provides in pertinent part:

If a party who has once dismissed a claim . . . commences an action based upon or including the same 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 added)

Other cases have established a rule that when the voluntary dismissal was for strategic purposes as found by the Trial Court here, the Trial Court in its discretion could deny costs as did the Trial Court here. See Simmons v. Schimmel, 476 So.2d 1342 (Fla. 3rd DCA 1985), Rev. Denied, 486 So.2d 597 (Fla. 1986); Del Valle v. Baltimore II Condominium Association, 411 So.2d 1356 (Fla. 3rd DCA 1982); and Englander v. St. Francis Hospital, Inc., 506 So.2d 423 (Fla. 3rd DCA 1987).

Defendant's sole basis for recovering attorney's fees in the present case is §10.02 of the Employment Agreement. To be sure, no other rule or statute cited in the Defendant's motion provides authorization for a recovery of attorney's fees, including Rule 1.420(d), Fla.R.Civ.P. "Attorney's fees are not taxable fees under Fla.R.Civ.P. 1.420(d) unless made a part of costs by contract or statute." Bankers Multiple Line Ins. Co. v. Blanton, 352 So.2d 81, 82 (Fla. 4th DCA 1977).

Section 10.02 of the Employment Agreement allows the recovery of attorney's fees by a "prevailing party." However, "a contractual attorney's fee provision must be strictly construed." B & H Constr. & Supply Co., Inc. v. Tallahassee Community College, 542 So.2d 382, 387 (Fla. 1st DCA), rev. denied, 549 So.2d 1013 (Fla. 1989). In addition, the

term "prevailing party" is not defined within the Employment Agreement. The term should therefore be interpreted in a way which is consistent with its use in statutes and related case law. See Englander, supra.

In Mega Bank Telecredit of Service Center, 592 So.2d 785 (Fla.3rd DCA 1992), 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.

In the Mega Bank case, the trial judge had granted a non-dismissing party's attorney's fees and costs. The Third DCA reversed. The Defendant there contended as stated at page 755:

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. (Emphasis added)

The Circuit Court in Wilson v. Rose 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 can be determined at this time" (RA-75), and therefore no fees or costs should be awarded (at this time).

The split in the District Courts of Appeal as to what discretion the trial court has when entertaining a motion to award costs against a dismissing party was resolved in Coastal Petroleum which is inconsistent with the non-discretionary rule in the holdings

of such cases as 51 Island Way Condominium Association, Inc. v. Williams, 458 So.2d 364 (Fla. 2nd DCA 1984); Century Construction Corp. v. Koss, 559 So.2d 611 (Fla. 1st DCA 1990); and Keener v. Dunning, 238 So.2d 1113 (Fla. 4th DCA 1970); but see, Williams v. Cotton, 346 So.2d 1039 (Fla. 1st DCA 1977), holding that Rule 1.420(d) contemplates, and orderly procedure clearly permits the matter of assessing costs to await the determination of the second action.

The corresponding Federal Rule of Civil Procedure, Rule 41(d), states:

Cost of a previously-dismissed action. If a Plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of cost of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

The federal rule affords the trial court wide discretion to fashion the appropriate remedy where an action has been voluntarily dismissed and the Defendant has incurred costs and attorney's fees. The object of the rule, aside from the securing of a payment of costs, is to prevent vexatious suits made possible by the ease with which a Plaintiff may dismiss under some practices. This is the same purpose underlying the Florida rule. Federal courts have been reluctant to stay an action until payment of costs where the action has been brought in good faith if the Plaintiff is financially unable to pay the former costs. For example, in Phoenix Canada Oil Company v. Texaco, Inc., (D Del) 1978) 78 FRD 445, the Court noted the Plaintiff claimed a financial hardship and concluded that the suit did not appear to be vexatious given Plaintiff's financial condition. Potential financial hardship in the absence of evidence of bad faith were found to weigh heavily against the assessment of costs. The Court refused to stay the action after

considering that if the Plaintiff succeeded on the merits in the present action, Defendant would be permitted to submit to the Court a bill of costs from the prior action which to the extent approved would serve as a set-off against Plaintiff's recovery.

The financial burden on a discharged and unemployed person claiming improper termination and breach of employment contract was properly considered by the trial court below, thereby accepting the rationale of Phoenix, supra.

The sole reason the Defendant insists on a fee and cost award in this case, is to kill the Plaintiff's ability to continue his suit. This has been candidly admitted by Defendant in both lower courts.

This is precisely what the Trial Court sought to prevent, i.e., the ability of the non-dismissing party to use a large cost award to chill the use of voluntary dismissals, especially where there has been no prejudice to the non-dismissing party due to the prompt re-filing of the suit.

The Trial Court fashioned a ruling which protected both parties from undue advantage. The Trial Court should be permitted this discretion for the reasons this Court 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.

There is no rational presumption that trial judges will tolerate abuse of voluntary dismissals.

If discretion is removed in this case the rule of law becomes a sharp instrument for a Defendant using a huge fee award against a lesser endowed Plaintiff, to prevent


a fair adjudication. Justice being the goal in all trials, the discretion of the trial courts in preventing unfairness should be memorialized. Plaintiff requests this Court to do so.

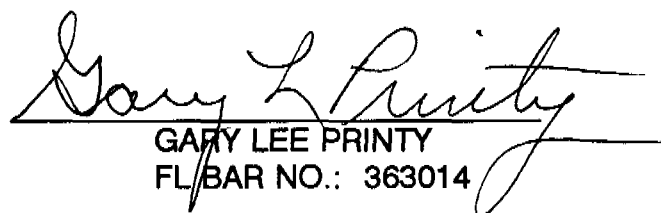
CONCLUSION

Under the holdings of this Court and other Courts of Appeal, the Circuit Court's application of sound discretion should be affirmed. After all, it is the Trial Court which could and did judge the actions of the parties leading up the voluntary dismissal. It is the duty and obligation of the Trial Court to ensure the parties are treated fairly under all circumstances and a fair resolution of a disputed issue is achieved. If there is no discretion fairness could be denied in this case and the bureaucratic approach of "by the book" once again could result in a weakening of the administration of justice.

Respectfully submitted,


DOUGLASS & POWELL
Post Office Box 1674
Tallahassee, Florida 32302-1674
Telephone: (904) 224-6191
Telecopier: (904) 224-3644
ATTORNEYS FOR PETITIONER

By 
W. DEXTER DOUGLASS
FL BAR NO.: 0020263


GARY LEE PRINTY
FL BAR NO.: 363014

CERTIFICATE OF SERVICE

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 19th day of February, 1993.


W. DEXTER DOUGLASS

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