OA 6-1-93

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

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PETITIONER'S REPLY 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

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SUMMARY OF ARGUMENT

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 other decisions from other District Courts of Appeal reject the mechanical application of the rule regarding costs against a dismissing party, especially where the voluntary dismissal is 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 especially true where the prevailing party cannot be readily determined on the merits.

The Trial Court found that the voluntary dismissal was taken in good faith based on surprise and trial strategy. This holding should not be disturbed on appeal.

ARGUMENT

ISSUE I

THE DISTRICT COURT WRONGLY 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.

Respondent, Rose Printing and the District Court continue to misconstrue the common law implications of this Court's opinion in Coastal Petroleum Company v. Mobil Oil Corporation, 583 So.2d 1022 (Fla. 1991), as evidenced by their repeated reference to decisions such as Keener v. Dunning, 238 So.2d 113 (Fla. 4th DCA 1970) and its progeny in the scenario where the moving party subsequently re-files his cause of action after a voluntary dismissal.

Initially, Wilson would note that this Court's opinion in Coastal makes no reference to the cases cited by Rose Printing and takes a fresh look at the problems posed by voluntary dismissals in Rule 1.420(d), Florida Rules of Civil Procedure. For example, the Court states:

> We agree with the District that a chilling effect should be avoided whenever possible in cases of this type. Too liberal awards of costs in similar cases may well discourage the use of voluntary dismissals, thus resulting in a greater burden on the judicial system any waste of litigant's resources. However, we also must recognize a countervailing problem: the possibility that some litigants may abuse voluntary dismissals as a way either of avoiding the payment of some cost or forcing an opponent to pay large sums of money in futile trial preparation. Both of these extremes must be avoided.

Coastal at 1024.

Next, the Court rejects the rigid application of common law principles such as the

ruling in Keener v. Dunning, if necessary to ensure fairness:

> However, we believe this argument attributes to the common law a rigidity it has never possessed. Common law is judge made law. Florida common law thus is largely the creation of this court, subject to fundamental law and the checks and balances imposed by the Constitution; and in the past, this court has not hesitated to participate in the ongoing evolution of common law principles whenever public necessity has demanded it.

Id. at 1025.

After suggesting this Court will reject rigid application of common law if necessary, the Court states:

> However, we agree that the trial court must be vigilant to avoid a chilling effect. Thus, in certain circumstances the trial court should decline to award trial-preparation costs following a voluntary dismissal.

Id. at 1025.

Continuing in this vein, in an apparent rejection of the hard and fast rules of Keener etc., the Court proposes a discretionary standard as the new rule, to wit:

> 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.

Id. at 1025.

Finally, the Court explained the reasoning behind the above rule stating:

> 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 that an advantage should accrue to either party simply because a controversy has been voluntarily dismissed or because it had actually gone to trial.

> The risk generally should be the same whether the action is tried or voluntarily dismissed, with the single exception that a voluntary dismissal will prevent the further accrual of actual costs not yet incurred. This is in keeping with the policy of encouraging the appropriate use of voluntary dismissals.

Id. at 1025.

This Court would allow the Trial Court discretion to punish a dismissing party who has acted in bad faith in egregious cases. Id. at 1026. However, the Court stated it would defer to the Trial Court who has had the opportunity to see all the activities of the opponents and is usually best situated to make this determination regarding assessment of cost. Id. at 1026.

Wilson made this argument to the Trial Court below and the Court deferred ruling on the imposition of costs based on his observation of the activities of the parties. Wilson had served interrogatories on Rose Printing to learn the names of witnesses to be called at trial and received, the Friday before trial, a list of 17 additional names. It was only then that Wilson took the drastic step of voluntarily dismissing the case on the eve of trial in order to re-establish his right to trial by jury and because the Trial Court had made clear his intention to refuse any continuance of the December 21st trial date. These strategic reasons for voluntarily dismissing a cause were adopted by the Trial Court's order denying Rose Printing's motion to assess costs. RA at 75-76.

The Trial Court's ruling is in accord with the rationale of Coastal Petroleum which intentionally harmonizes Florida common law with the federal rule stated in Phoenix Canada Oil v. Texaco, Inc., 78 FRD 445 (D. Del. 1978).

In Keener v. Dunning, supra, the District Court reversed Trial Court for deferring costs of a voluntarily dismissed action to be assessed at the conclusion of the trial on

the merits after the claim was re-filed, similar to the scenario involved here. The District Court had recognized that the taxation of costs was intended to be a matter left to the discretion of the Trial Court but then held that the assessment of costs was mandatory under the Rule 1.420(d) and cited to Goldstein v. Great Atlantic and Pacific Tea Company, 142 So.2d 115 (Fla. 3rd DCA 1962). In the Goldstein case the Plaintiff had proceeded to trial and at the close of the Plaintiff's case each Defendant moved for a directed verdict. The Trial Court announced his intention to grant both motions for directed verdict. The Plaintiff then took an involuntary non-suit. Id. at 116. The District Court affirmed the directed verdict as to one Defendant but remanded for a new trial as to the other Defendant. The Trial Court assessed costs against the Plaintiff for taking the non-suit.

Under those facts, it would be proper to assess costs against the Plaintiff as a price to continue his lawsuit under the discretionary standard of Coastal Petroleum. The stated reason for the non-suit was the fact that the trial Court had announced the Plaintiff was about to lose the case and the Defendants had already been put to the expense of a trial.

This Court should reject the rigid mechanistic application of Rule 1.420(d) in favor of favor of the rule's intended but long overlooked discretionary standard to prevent the taxation of causes from having a chilling effect on a party who voluntarily dismisses a case in good faith and re-files the action.

ISSUE II

EVEN IF THE CIRCUIT COURT'S APPLICATION OF THE LAW WAS NOT ERROR PER SE, THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY DEFERRING THE ASSESSMENT OF COSTS UNTIL THE SECOND ACTION.

In Rose Printing's second argument on appeal, they apparently concede the Trial Court may have the discretion to defer costs but assert that in this particular case, the Trial Court abused that discretion. Rose Printing argues that it has been punished by the Trial Court ruling which denied its motion to tax costs because any surprise on Wilson's part was caused by his own dilatoriness. Rose Printing relies on Passino v. Sanburn, 190 So.2d 61 (Fla. 3rd DCA 1966) for the proposition that a party may not assert surprise where its own actions contributed to that surprise. However, in Passino, the Court specifically held that it was the failure of the Defendants to attempt any discovery, including written interrogatories prior to trial, which form the basis for their refusal to allow the Defendants to claim surprise. Wilson would also note that in Passino the Trial Court, who had had the opportunity to observe the activities of the parties and was therefore best suited to make the determination as to whether surprise existed, had ruled against the Defendants. Unlike the Passino case, the Trial Court below ruled in favor of Wilson and found there were valid good faith reasons such as surprise and the desire to obtain a trial by jury, which only became significant once Wilson learned of the number of witnesses that Rose Printing intended to call. In this case, the Trial Court ruled in Wilson's favor and this finding should not be disturbed given the discretion to be afforded the Trial Court. Furthermore, Rose Printing has only suffered a temporary setback if they succeed on the trial on the merits. However, the large award of costs

and attorney's fees in favor of Rose Printing as a condition precedent to going to trial in the re-filed claim would preclude Wilson from ever litigating his rights under his employment contract which ultimately is what this lawsuit is all about.

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

By: Gary L Printy
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 Robert M. Ervin, Post Office Box 1170, Tallahassee, FL 32302, on this 31st day of March, 1993.

Gary L Printy

GARY L. PRINTY

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