SUPREME COURT OF FLORIDA

CASE NO. : 89,623
DCA CASE NO. : 95-4099

MX INVESTMENTS, INC.,
d/b/a DAYS INN 1-75,

Petitioner,

vs.

WILLIAM D. CRAWFORD and
JOAN F. CRAWFORD,

Respondent.

FILED
SID J. WHITE
FEB 26 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONER'S INITIAL BRIEF

BOEHM, BROWN, RIGDON,
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By: _____
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PRELIMINARY STATEMENT

All record references will be designated at "R._____." "R" refers to record on appeal as tabulated by the Circuit Court in its index to record on appeal in the appeal below.

STATEMENT OF THE CASE AND FACTS

This case originated in the Circuit Court for Alachua County, with a complaint for personal injury made by the Respondent against the Petitioner. (R.1-3). Subsequently, on June 1, 1994 and October 21, 1994 Petitioner filed offers of judgment, pursuant to S768.79 of the Flarida Statutes (1995). (R.11-15). Respondent did not accept the offer. Subsequently, the Respondent filed a notice of voluntary dismissal without prejudice pursuant to Florida Rule of Civil Procedure 1.420. (R.8). The Petitioner moved to tax attorneys fees and costs based upon S768.79.

The trial court denied the motion to tax costs. Petitioner appealed the trial court's order to the First District Court of Appeal. The First District Court of Appeal affirmed the trial court's ruling, although it recognized, and certified conflict with cases from other district courts of appeal which allowed fees to be taxed after a voluntary dismissal. The first district denied rehearing and rehearing en banc. The Petitioner then timely filed a notice to invoke the jurisdiction of this Honorable Court. This court accepted jurisdiction, and sent out an order for briefing schedule. This appeal follows.

SUMMARY OF THE *ARGUMENT*

The district court of appeal opinion holding that attorney fees pursuant to **S768.79** of the Florida Statutes **(1991)** should not be imposed after a voluntary dismissal is taken by the plaintiff, is an incorrect interpretation of **5768.79.**

Section **768.79** was **amended** specifically to include all instances were a defendant has prevailed, either by verdict, or dismissal. The amendment was accomplished by the legislature specifically in response to cases that interpreted the earlier statute in a manner in which a defendant was prohibited from seeking fees unless the plaintiff had obtained a judgment.

The district court of appeal opinion ignores the effect of the amended statute, and further conflicts with the weight of authority. Thus, the statute should be interpreted to allow a defendant to recover fees for a voluntary dismissal.

ARGUMENT

Whether the District Court erred in holding that attorneys fees would not be recovered by a defendant under *S768.79* where a plaintiff had voluntarily dismissed their case.

I. INTRODUCTION

The simple issue in this case is whether the district court's interpretation of the amended version of **S768.79** is correct, as the facts are undisputed, and require little analysis. Simply put, the plaintiff, had taken a voluntary dismissal pursuant to Florida Rule of Civil Procedure 1.420, during the time that the amended version of **S768.79** was in effect. In order to decide this question, petitioner submits that a short discussion of the earlier version of **S768.79** is appropriate.

II. PRE-AMENDMENT TREATMENT OF $768.79

The discussion of Florida Courts treatment of **768.79** before it was amended, gives a clear understanding of the effect and intent of the amendment to that statute. Originally, *S768.79* was enacted as part of Florida's Tort Reform Act. As such, it was designed to encourage the parties to realistically evaluate and settle cases, by providing for a penalty for parties that unnecessarily litigated cases. Eagleman V. Eagleman, **673 So.2d 946** (Fla. 4th DCA **1996).** Thus, **the** statute was designed to penalize a party that was recalcitrant or unwilling to compromise, by providing for an award of attorneys fees to the other party making the offer, provided certain conditions were met, namely that the offer be made in good faith, and that the judgment exceeds 25% of the original offer, or where the plaintiff obtained a judgment at least **25%** less than the

defendant's offer. §768.79(1).

Specifically, the language of §768.79 provided as follows, in part:

> In any action to which this part applies, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer if the judgment obtained by the plaintiff is at least 25 percent less than such offer....

Subsequently, Florida courts had interpreted this section to mean in essence, that the statutory provisions would be activated only where the plaintiff had obtained a judgment. In instances where a defendant obtained a judgment, courts interpreted the statute so as to prohibit an award of fees. See Makar v. Investors Real Estate Management, Inc., 553 So.2d 298 (Fla. 1st DCA 1989).

III. THE AMENDED STATUTE

Apparently recognizing the anomaly of a situation where a complete success would deny a defendant an award of attorneys fees, the Florida legislature amended §768.79, in 1990, as follows:

> In any civil action for damages filed in the court of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by him or on his behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer....

The amended statute further provides that the court is to make this determination upon motion made within 30 days after inter alia, a voluntary dismissal. §768.79(6). (Emphasis supplied).

The amended statute clearly applies to judgments rendered in favor of the defendant. Thus, several subsequent district courts expressly held that the revised, or amended version of **S768.79** provided for an award of attorneys fees after a voluntary dismissal. See Tampa Letter Carriers, Inc. v. Mack, **649** So.2d **890** (Fla. 2d **DCA 1995).**

IV. THE PRESENT DECISION

In the opinion below, the appellate court held that a defendant would not be entitled to an award of attorneys fees under **S768.79**, after the plaintiff filed a voluntary dismissal, despite the statutory change. MX Investments, Inc. v. Crawford, Case No. **95-4099**. The appellate court held that "Our opinion in Makar v. Investors Real Estate Management, Inc., 553 So.2d **298** (Fla. **1st DCA 1989),** controls this case." (Slip. op. at p.2). As stated above, the court in Makar, interpreting the statute as it existed before amendment in **1990,** held that the finding of liability in favor of the plaintiff was required before a defendant was entitled to attorneys **fees.**

Despite acknowledging in **Crawford,** that **S768.79** was amended, the court stated that its holding in Makar was not madified by the change. The court stated "We construe the 'voluntary and involuntary dismissal' language in subsection (b) to be no more than a procedural prerequisite for a determination of entitlement. Actual entitlement to fees under the amended statute still requires the entry **of** a judgment." (Slip. op. at p.4) (Emphasis Courts). The court went on to state that "because there was no judgment entered following the voluntary dismissal in this case, the plain

language of §768.79 precludes an award of attorneys fees." (Slip. op. at p.5).

The decision below, has, misapprehended both the effect of a voluntary dismissal and the effect of the statutory amendments on prior caselaw. Initially, the court has overlooked that provision of Florida Rule of Civil Procedure 1.420, which addresses voluntary dismissals. Rule 1.420 specifically provides that a cost judgment be entered against a party who takes a voluntary dismissal, and further provides that the plaintiff cannot proceed forward until that cost judgment is satisfied. This procedure is mandatory. Thus, in contrast to the appellate opinion, there would be, and in fact was, in the instant case, a cost judgment entered. As defined by Section 768.79(6)(b), the term "judgment obtained" means the amount of the net judgment entered, plus any post-offer collateral source payments received or due as of the date of the judgment, **plus** any post-offer settlement amounts by which the verdict was reduced. Thus, taken the undisputed facts in this case, the judgment obtained by the plaintiff (Respondent) was more than ***25%*** less than the offers made by the defendant. (Petitioner). Further, the statute specifically states that the trial court is to **make** this calculation after a motion **filed** by the defense within thirty days after a voluntary dismissal.

Therefore, Makar, and the other cases holding that there must be a judgment in favor of the plaintiff, have been effectively superseded by the amended statute. Clearly, the version of 768.79, which was in effect as of the date of the offers, contemplate an award of attorneys fees wherever a judgment obtained by the

plaintiff is less than 25% of the offer, and the statute further explicitly states that the motion for attorneys fees is to be made within thirty days after a voluntary dismissal. Thus, the lower court was in error in refusing to reverse the trial court's denial of attorneys fees.

V. ANALYSIS OF THE DECISION

It is clear that the appellate court has misconstrued the effect of the amended statute. Actually, the appellate court in the lower case, has negated the statute, by in effect, holding that the statute does not apply to voluntary dismissals despite explicit language to the contrary. Initially, it should be pointed out that the amended statute operates on two levels as earlier pointed out by this Court in TGI Fridavs, Inc. v. Dvorak, 663 So.2d 606 (Fla. 1995). In that case, this Court indicated that the right to an award turns only on the difference between the amount of a rejected offer and the amount of a later judgment. Thus, the triggering mechanism for the provisions of the statute, in the context of this case, is when the judgment does not exceed 75% of the offer. Therefore, Crawford conflicts with Dvorak, when it holds that §768.79(6) only provides a "procedural" requirement.

As indicated in the statute, the determination is made by the trial court upon motion by the defendant after a jury verdict, or after a voluntary or involuntary dismissal. Clearly, at that point, the calculation, as indicated above, would take place, attorneys fees awarded, and judgment entered. See §768.79(6). Therefore, the "judgment" referred to by Crawford, is a judgment, which would be obtained by a defendant in any case, whether

terminated by a voluntary dismissal or otherwise. Further, voluntary dismissal under Rule 1.420, always contemplates a cost judgment being entered by the trial court. The Crawford analysis is flawed, as the clear operation of the rule would contemplate a judgment being entered. Further, Crawford relied upon cases, which it recognized, that pre-dated the amendment to the statute. The better reasoned opinions from several districts recognize and apply the statutory amendments so as to allow an award of attorney fees. See Special's Trading Co. v. International Consumer Corp., 679 So.2d 369 (Fla. 4th DCA 1966); Tangerine Bav Co. v. Derby Road Investments, 664 So.2d 1045 (Fla. 2d DCA 1995) rev. dism., 669 So.2d 250 (Fla. 1996); Makar. The interpretation given by Crawford effectively negates the statute which provides that a trial court must consider a request for fees after a voluntary dismissal upon motion after a voluntarv dismissal. §768.79(6).

CONCLUSION

The Crawford opinion is misplaced. The analysis is based on language that does not exist under the statute as amended. It further is based upon cases which pre-dated the amendment as well. The better and more logical view is that expressed in the cases which have conflicted with this case, and held that attorneys fees are awardable when a voluntary dismissal is taken.

'ICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 24th day of February, 1997 to: Michael R.N. McDonnell, Esquire, 1165 8th St. S., Naples, FL 33940.

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