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SUPREME COURT OF FLORIDA

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

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

Petitioner,

vs.

WILLIAM D. CRAWFORD and
JOAN F. CRAWFORD,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

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ARGUMENT

WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT ATTORNEYS FEES WOULD NOT BE RECOVERED BY A DEFENDANT UNDER 5768.79 WHERE A PLAINTIFF HAD VOLUNTARILY DISMISSED THEIR CASE

I. ANALYSIS OF RESPONDENT'S ANSWER BRIEF

The Respondent's answer brief is somewhat confusing as to the position they have taken. Initially, Respondents appeared to argue that the statute does not provide for an award of attorneys fees based upon a voluntary dismissal due to the fact that the statute continues to require that a judgment be obtained by the plaintiff (Respondent's Brief at p.2,3,4,5). Specifically, Respondents argue that "Petitioner ignores the plain language of the statute [Section 768.791 which explicitly and unmistakably requires a 'judgment obtained by the plaintiff' as a prerequisite to an award of attorneys fees." (Respondent's Brief at p.3).

At other times, Respondents appear to agree that the statute was in fact amended to correct this oversight, as pointed out in petitioner's initial brief in 1990, but that an award of attorneys fees after a voluntary dismissal is barred, as the statute requires a judgment on the merits. (Respondent's Brief at p.4). The Respondents argue that "Since plaintiff's voluntarily dismissed their claim and the trial court did not render a judgment on the merits, the trial court is without jurisdiction to award attorneys fees pursuant to §768.79."

Lastly, Respondents appear to argue, as indicated above, that the trial court cannot entertain a motion to tax attorneys fees under Florida Rule of Civil Procedure 1.420. Again, the

Respondents argue that "subsection (d) of that rule [1.420] provides only for the imposition of costs, but is silent as to an entitlement to attorneys fees." (Respondent's Brief at p.2). Petitioner will discuss each argument individually.

11. THE TRIAL COURT MAY AWARD AWARD ATTORNEYS PEES AFTER A VOLUNTARY DISMISSAL

Despite Respondent's suggestion to the contrary, the trial court, as a threshold matter, may award attorneys fees after a voluntary dismissal. Rule 1.420(d), provides as follows, "Costs in any action: dismissed under this rule shall be assessed and judgment for costs entered in that action." According to Respondent, "As this court is well aware, upon voluntary dismissal, the trial court looses jurisdiction as to all matters except the imposition of costs. It is without power to enter a defendant's judgment in the main case. It may only enter a cost judgment in favor of the defendant." (Respondent's Brief at p.3)(Emphasis brief's).

Petitioner disagrees with this statement. This Honorable Court, recently has had occasion to address the issue of whether attorneys fees would be awarded under an employment agreement providing for attorneys fees to the "prevailing party", after a voluntary dismissal. Wilson v. Rose Printing, Inc., 624 So.2d 257 (Fla. 1993). In Rose Printing, this Court indicated that "Further, this Court has consistently held that where agreement of the parties provide that the term "costs" includes attorney's fees such fees are taxable under rule 1.420(d)." Rose Printing at 258. Clearly, Section 768.79(1) provides that for an award of costs and

attorneys fees. This Court has also held that "A determination on the merits is not a prerequisite to an award of attorneys fees where the statute provides that they will inure to the prevailing party.'' Thornber v. Citv of Fort Walton Beach, 568 So.2d 914, 919 (Fla. 1990). See also Boca Airport, Inc. v. Roll N Roaster, Inc., 22 Fla. L. Weekly D602a (Fla. 4th DCA Mar. 5, 1997).

111. THE AMENDED STATUTE APPLIES WHERE A VOLUNTARY DISMISSAL IS TAKEN

As stated above, Respondents argue that $768.79 does not apply to this particular factual situation. Somewhat surprisingly, Respondents appear to argue that the statute "unmistakenly" requires a judgment to be obtained by the plaintiff before an attorneys fee can be awarded under 5768.79. (Respondent's Brief at p.3). Therefore, according to Respondent, since a cost judgment was entered under rule 1.420, this was not a judgment in favor of the plaintiff. As stated in the initial brief, this situation existed prior to 1990. After 1990, the statute was amended to read as follows,

> In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within thirty (30) days, the defendant shall be entitled to recover reasonable costs and attorneys 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 of judgment if the judgment is one of no liabilitv or the judgment obtained by the plaintiff is at least seventy-five percent less than such offer, and the court shall set off such costs and attorneys fees against the award.

Section 768.79(1). (Emphasis supplied).

Thus, it is clear that a defendant is entitled to fees, as stated in the initial brief, after a defense verdict or judgment of no liability after 1990. Certainly a cost judgment and a judgment of dismissal, even without prejudice fits this definition under the amended statute.

Respondent is incorrect that the statute is silent a8 to voluntary dismissals. Section 768.79(6), was also amended in 1990 to read, in pertinent part, "Upon motion made by the offeror within thirty (30) days after the entry of judgment or after a voluntary or involuntary dismissal....". (Emphasis supplied). Thus, despite Respondent's argument to the contrary, the statute clearly refers in subsection 6 to voluntary or involuntary dismissals.

Respondent, elsewhere in the brief, acknowledges the above language, but argues, as the appellate court wrote in Crawford, that portion of the statute does not relate to entitlement to fees. The appellate court in Crawford interpreted the language as follows, "We construe the 'voluntary and involuntary dismissal' language contained 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." Crawford at slip. op. at p4. (citations omitted)(emphasis court's). Respondent essentially adopts this holding as the basis for their argument that fees are not awarded under **S768.79** after a voluntary dismissal.

As pointed out by Respondent, in its brief, Crawford essentially held that judgment as contained in **S768.79,** can only

mean a judgment on the merits. Respondents assert that Petitioner's interpretation that attorneys fees can be awarded **under S768.79** after a voluntary dismissal, is completely lacking any "legal, factual, statutory basis" (Respondent's Brief at **p.3).** However, there is abundant caselaw supporting Petitioner's interpretation. In fact, Respondent has attempted to distinguish Tampa Letter Carriers, Inc. **v. Mack, 649** so.2d **8890** (Fla. 2d **DCA** 1995), Tangerine Bay Company v. Derby Road Investments, **664** So.2d 1045 (Fla. 2d DCA 1995), and Specials Trading Company v. International Consumer Corporation, 679 So.2d 369 (Fla. 4th DCA 1996) in their brief. All of the above cases allow attorneys fees to be awarded after voluntary dismissals.

Respondents attempt to distinguish Mack on the basis that Mack did not specify under what circumstances an award of attorneys fees after a voluntary dismissal "might occur". (Respondent's Brief at p.6). Respondents suggest that **Mack** "Most probably contemplates a second dismissal which would then operate as an adjudication on the merits, possibly giving rise to an entitlement to fees." (Respondent's Brief at p.6). This is incorrect, as Mack expressly acknowledged that the plaintiff in that case filed **one** voluntary dismissal, stating that the plaintiff "filed a notice of voluntary dismissal withaut prejudice." Mack at 891. Thus, Mack is directly applicable to the instant case, since the Respondent's whole argument is based upon the notion that a voluntary dismissal, would not operate as a judgment under the rule. In addressing this very issue, the appellate court in **Mack** stated as follows

> We further conclude that simply because a case is terminated by a voluntary dismissal, either with or without prejudice, a defendant's entitlement to fees is not eliminated under **857.105** or **S768.79.** Again, **§768.79(6)** contains language specifically addressing a voluntary dismissal. Otherwise, a plaintiff could use the voluntary dismissal rule (Florida Rule of Civil Procedure 1.420) to thwart an opposing party's entitlement to attorneys fees under either **S57.105** or **S768.79.**

Mack at 891.

This reasoning of course, was applied under identical circumstances in Tangerine Bay Company. Clearly, Mack is correct in that if the Respondent's interpretation of the statute is accepted, that the purpose of the rule as enumerated at length in the initial brief, would be defeated, and plaintiff then be given a carte blanche to engage in protracted litigation, secure in the knowledge that they would not be liable for an assessment of fees after filing one voluntary dismissal.

Moreover, although Respondents suggest that it is the Petitioner and several other district court cases who have misconstrued the statute, Petitioner respectfully suggests, that it is actually the Crawford court and Respondent who have engrafted an additional definition upon **S768.79.** The term "judgment" as contained in **5768.79,** is not restricted to judgment on the merits. The term "judgment" is addressed in **5768.79(6),** "The term 'judgment obtained' means the amount of the net judgment entered, plus any postoffer, collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced." Clearly, a judgment after a

voluntary dismissal fits the definition of judgment and would entitle Petitioner to attorneys fees. Since, as this Honorable Court has pointed out in TGI Friday's, Inc. v. Dvorak, **663** So.2d 606 (Fla. 1995), the right to an award of attorneys fees turns only on the difference between the amount of the rejected offer and the amount of the later judgment, then Petitioner would be entitled to attorneys fees. It is actually the Respondent who has added their own definition to the word judgment to mean only judgment on the merits. In addition, Respondent's interpretation would have the added effect of eliminating the language relating to voluntary or involuntary dismissal found in **§768.79(6).** This issue was specifically addressed in Special's Trading Company, where the court held as follows

> To eliminate unnecessary, further appeals in this case, however, we proceed to address the substantive issue, i.e. whether a party can avoid liability under section **768.79** for offer **of** judgment attorney's fees by simply dismissing his claim before suffering an adverse adjudication. While concededly the act of filing a voluntary dismissal would vindicate the purpose of the act to encourage the early disposition of civil actions for damages, just as a formal settlement through the offer would do, we do not construe statutes on their purposes but on their text. Miele v. Prudential-Bache Securities, Inc., **656** So.2d **470** (Fla. 1995)(legislative intent must be determined primarily from statutory text). It is thus to the text of the statute that we refer to answer the question here.
>
> Subsection ***(6)*** of the section **768.79,** Florida Statutes (1995), provides in part as follows:
>
> '**(6)** Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

> (a) If a defendant served an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs and...attorney's fee....'
>
> Under the remainder of the statutory text, entitlement is tied to the amount of the judgment obtained. To deny attorney's fees, however, to the offeror when the offeree voluntarily dismisses his claim, when no judgment has been entered, would make the adoption of the highlighted text futile.
>
> We are not authorized to construe statutes in a way that makes their text meaningless. City of Pompano Beach v. Caaalbo, 455 So.2d 468 (Fla. 4th DCA 1984), rev. denied, 461 So.2d 113 (Fla. 1985), cert. denied, 474 U.S. 824, 106 S.Ct. 80,88 L.Ed.2d 65 (1985). We reject the notion that the absence of a judgment when there has been a voluntary dismissal precludes any entitlement to fees under this section.

Special's Trading Company, 679 So.2d at 370.

Thus, the statute contemplates an award of attorney fees after a voluntary dismissal. Section 768.79(6) refers to voluntary dismissals, and a judgment under Rule 1.420(d) clearly satisfies the requirements of S768.79. If Respondent's interpretation of the statute were adopted, the language relating to voluntary dismissals would be nullified.

CONCLUSION

The district court of appeal's interpretation of the statute so as to require a judgment on the merits is flawed. It is well settled in Florida law that a voluntary dismissal under Rule 1.420, makes the non-moving party a "prevailing party for purposes of an award of costs and fees." The intent of ***5768.79*** is to compel parties to realistically evaluate cases and to sanction parties, who refuse to do so. To allow a plaintiff to voluntarily dismiss a case once without fear of an award of attorneys fees, would allow plaintiffs to extend litigation needlessly, in the hopes of attempting to secure some favorable resolution. This would thwart the purpose of the statute and create a situation that the statute was in fact designed to prevent. Further, the language relating to voluntary dismissals would be rendered a nullity if attorneys fees were held not to be awardable under **S768.79**. Thus, **Mack** should be approved and Crawford disapproved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 25th day of April, 1997 to: Michael R.N. McDonnell, Esquire, 1165 8th St. S., Naples, FL 33940.

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