IN THE SUPREME COURT OF FLORIDA

BARBARA ARENDS,

Petitioner,

vs. CASE NO.: 91,118

JUANNA CRIBBS BALL and
WALTER C. BALL

Respondents.
_____/

INITIAL BRIEF OF PETITIONER, BARBARA ARENDS

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PRELIMINARY STATEMENT

In this brief, the parties will generally be referred to as they stood in the trial court, Respondents Juanna Cribbs Ball and Walter C. Ball having been the Plaintiffs and Petitioner Barbara Arends having been the Defendant. References to the Record on Appeal will be by the symbol "R: ." and references to the Supplemental Record[1] by the symbol "SR: ".

All emphasis herein is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This case arises out of an auto accident which occurred on August 21, 1993. (R: 1, ¶3). Shortly after suit was filed, Defendant served an Offer Of Judgment in the amount of $2,501.00. (R: 10-11).

Another Offer Of Judgment, in the amount of $7,001.00, was served approximately a week prior to trial, but was withdrawn before being accepted. (SR: 8, 9; R: 58-59).

After the jury had been selected, Plaintiffs served a Notice Of Voluntary Dismissal, which was filed on December 7, 1995. (SR: 7).

Two weeks later, on December 21, Defendant filed a Motion To Tax Costs And Assess Attorney's fees, based on the non-acceptance of the initial Offer of Judgment and the subsequent voluntary

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[1]By Motion dated October 8, 1996, Petitioner Arends moved the District Court to supplement the Record, attaching the pleadings which were sought to be added to the Record. By Order dated October 29, the First District granted that motion and accepted the attachments as a Supplemental Record. The first page of those attachments would thus be SR:1.

dismissal. (R: 62-82). That motion was later supplemented by the filing of an updated and corrected itemization of attorney's fees and costs (R: 83) and, some months later, by the filing of a Second Supplemental Notice of Filing, attaching additional billing records. (SR: 1-4).

On January 26, 1996, Judge Beverly entered an order finding that Defendant was entitled to recover attorney's fees and costs from the date of the Offer of Judgment. (R: 84-85). That order required Defendant to submit an amended bill correcting any errors in the original documents, after which the trial court would resolve the amount of attorney's fees and costs to be awarded. (R: 84).

On February 20, Plaintiffs filed a Motion To Reduce Attorney's Fees And Costs Or, In The Alternative, To Vacate Attorney's Fees and Costs. (R: 86-92). That motion took the position that the Offer of Judgment had been made unreasonably because Defendant's insurer had decided to make an offer in that amount realizing that some discovery remained. (R: 86-92).

A scant three days later, Plaintiffs filed a Notice Of Appeal. (R: 93-96). Thereafter, they moved the First District Court of Appeal to relinquish jurisdiction to the trial court for consideration of the motion to reduce or vacate the attorney's fee award. At that time, the trial court had determined that Defendant was entitled to an attorney's fee award (R: 84-85), but had not yet determined the amount of such award. The District Court denied the motion. Eventually, on July 1, 1996, Judge Beverly entered a Final

Judgment determining that $8,500.00 was an appropriate sum for attorney's fees under her prior order. Plaintiffs then filed an Amended Notice Of Appeal appealing from that judgment.

After all briefs had been filed in this case, the First District issued its opinion in MX Investments, Inc. v. Crawford, 683 So.2d 584 (Fla. 1st DCA 1996), holding that attorney's fees could not be awarded under Section 768.79, Florida Statutes,[2] following a voluntary dismissal; the District Court certified that its decision was in conflict with decisions of the Second and Fourth District Courts of Appeal.

The District Court then reversed the trial court in the instant case based on the decision in MX Investments. Subsequently, on July 22, 1997, the District Court granted a motion for certification and certified that its decision in the instant case was in conflict with the decisions of the Second District in Tampa Letter Carriers, Inc. v. Mack, 649 So.2d 890 (Fla. 2d DCA 1995), and the Fourth District in Special's Trading Co. v. International Consumer Corp., 679 So.2d 369 (Fla. 4th DCA 1996). A Notice Invoking Discretionary Jurisdiction was timely filed thereafter. By Order dated August 4, 1997, this Court postponed decision on the jurisdictional issue and established a briefing schedule.

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[2]Unless otherwise specified, all references herein to Section 768.79, Florida Statutes, are to the 1993 version of the statute.

SUMMARY OF ARGUMENT

The First District Court of Appeal correctly certified that its decision in the present case is in express and direct conflict with decisions of the Second and Fourth District Courts of Appeal on the same question of law. This Court should accept jurisdiction and resolve the conflict so that the law on this point will be uniform throughout the State.

Although Section 768.79, Florida Statutes (1989), did not permit a fee award following a voluntary dismissal, the statute was amended in 1990 to expressly provide for a fee award in the circumstances of this case. The Second and Fourth Districts have correctly so held. Numerous rules of statutory construction require that result, which is consistent with cases holding, in other contexts, that a defendant who has been voluntarily dismissed is a prevailing party. The First District erred in holding to the contrary.

This Court should accept jurisdiction, disapprove the decision of the First District Court of Appeal, approve the decisions of the Second and Fourth District Courts of Appeal on the same issue, and reinstate the judgment rendered by the trial court.

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS DISCRETION IN FAVOR OF ACCEPTING JURISDICTION AND RESOLVE THE CONFLICTING DECISIONS OF THE DISTRICT COURTS OF APPEAL.

In the instant case, the First District Court of Appeal held that attorney's fees could not be awarded pursuant to Section

768.79, Florida Statutes, following a voluntary dismissal without prejudice. The Second District Court of Appeal in Tampa Letter Carriers, Inc. v. Mack, 649 So.2d 890 (Fla. 2d DCA 1995), and in Tangerine Bay Co. v. Derby Road Investments, 664 So.2d 1045 (Fla. 2d DCA 1995), and the Fourth District in Special's Trading Co. v. International Consumer Corp., 679 So.2d 369 (Fla. 4th DCA 1996), and in Bliss Parking, Inc. v. Ondo, 21 F.L.W. D2484 (Fla. 4th DCA 1996), have held that attorney's fees could be awarded pursuant to Section 768.79, Florida Statutes, following a voluntary dismissal without prejudice. The First District correctly certified that its decision in the instant case was in conflict with the decisions of the Second and Fourth Districts.

Accordingly, this Court has discretionary jurisdiction under Article V, Section 3(b)(4), Florida Constitution, to review the decision of the First District Court of Appeal. This Court should accept jurisdiction in order to resolve the conflicting decisions of the various District Courts and establish a uniform rule throughout the State on this issue.

II. UNDER THE APPLICABLE VERSION OF SECTION 768.79, FLORIDA STATUTES, THE TRIAL JUDGE CORRECTLY AWARDED ATTORNEY'S FEES AFTER PLAINTIFFS FILED A NOTICE OF VOLUNTARY DISMISSAL.

The accident in this cause occurred in 1993. We note that fact because the courts have repeatedly held that which version of Section 768.79, Florida Statutes, is applicable depends on the date the cause of action accrued. Marcus v. Miller, 663 So.2d 1340 (Fla. 4th DCA 1995); Bevan v. Bean, 661 So.2d 1251 (Fla. 2d

DCA 1995); Johnson v. Fye, 654 So.2d 1233 (Fla. 1st DCA 1995); Carlow v. Blenman, 652 So.2d 479 (Fla. 2d DCA 1995).

Section 768.79, Florida Statutes (1989), contained no reference to voluntary dismissals. Rather, it referred to "the judgment obtained by the plaintiff" being at least 25% less than the offer. Accordingly, the courts held that there could be no award of attorney's fees under Section 768.79, Florida Statutes (1989), where the plaintiff had taken a voluntary dismissal. Marcus v. Miller, supra, Makar v. Investors Real Estate Management, Inc., 553 So.2d 298 (Fla. 1st DCA 1989). See also, Bevan v. Bean, supra (attorney's fees could not be awarded under the pre-1990 version of Section 768.79, Florida Statutes, where the complaint had been dismissed). The First District observed in Makar v. Investors Real Estate Management, Inc., supra, at 299:

> Unless and until the legislature amends the offer of judgment and settlement statutes to apply to voluntary dismissals, plaintiffs should be permitted to exercise their option to dismiss their cause at least once without being subjected to an assessment of attorney's fees.

The Legislature promptly responded by amending the statute. Effective October 1, 1990, Section 768.79, Florida Statutes (1989), was amended by a substantial rewording. Chapter 90-119, Sections 48, 55, Laws of Florida. It is the amended version of the statute which applies in this case, and it provides, in pertinent part (Section 768.79(6), Florida Statutes (1993)): "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: . . ." In short, the Legislature took the First District at its word and amended the statute to provide for attorney's fee awards under Section 768.79, Florida Statutes (1991), in cases where (among other circumstances) the plaintiff had taken a voluntary dismissal.

So far as we are aware, the present issue has only been addressed in six appellate decisions involving the post-1990 version of the statute. In four of those six cases, the District Court has held that a notice of voluntary dismissal does not preclude an award of attorney's fees under Section 768.79, Florida Statutes. Only the First District has held to the contrary.

In Tampa Letter Carriers, Inc. v. Mack, 649 So.2d 890 (Fla. 2d DCA 1995), the Second District reversed an order denying a motion for attorney's fees under Section 768.79, Florida Statutes. The court pointed out that the 1993 version of the statute contained language addressing a voluntary dismissal, and observed that otherwise a plaintiff could use the voluntary dismissal rule to thwart an opposing party's entitlement to attorney's fees.

In Tangerine Bay Co. v. Derby Road Investments, 664 So.2d 1045 (Fla. 2d DCA 1995), the Second District once again reversed an order denying entitlement to fees under Section 768.79, Florida Statutes, after a voluntary dismissal, based on its prior opinion in Tampa Letter Carriers, Inc. v. Mack, supra.

The Fourth District has joined the Second District in this holding. In Special's Trading Co. v. International Consumer Corp., 679 So.2d 369 (Fla. 4th DCA 1996), the Fourth District addressed

the issue presently before this Court, noted the 1990 amendments, and reversed an order denying fees under Section 768.79, Florida Statutes, where the offeree had taken a voluntary dismissal. The court pointed out that to deny attorney's fees based on the voluntary dismissal, when no judgment had been entered, would make the legislative adoption of a specific statutory reference to voluntary dismissal futile. The District Court specifically rejected the claim that the absence of a judgment when there has been a voluntary dismissal precludes any entitlement to fees, and stated that it was in complete agreement with the Second District's decision in Tampa Letter Carriers. One week following the First District's contrary decision in MX Investments, Inc. v. Crawford, 683 So.2d 584 (Fla. 1st DCA 1996), the Fourth District reiterated its position in Bliss Parking, Inc. v. Ondo, 21 F.L.W. D2484 (Fla. 4th DCA 1996).

In MX Investments and in the present case, the First District reached the opposite result. The First District in MX Investments noted its invitation in Makar v. Investors Real Estate Management, Inc., supra, for the Legislature to amend the statute if the Legislature intended the statute to apply following a voluntary dismissal, and recognized that the Legislature had, in fact, amended the statute by including voluntary or involuntary dismissals. The First District nonetheless refused to hold the statute applicable. In effect, the First District reasoned that the Legislature had not gone far enough in the 1990 amendments to change the result. Referring to the Legislature's addition of an

express reference to voluntary or involuntary dismissals as "no more than a procedural prerequisite for a determination of entitlement," the First District held that "entitlement to fees under the amended statute still requires the entry of a judgment." (emphasis in original). In so holding, we submit, the First District erred by failing to give effect to the clear legislative intent.

Although an involuntary dismissal under Rule 1.420(b), Florida Rules of Civil Procedure, may result in the entry of a judgment, a voluntary dismissal under Rule 1.420(a), Florida Rules of Civil Procedure, does not. If the voluntary dismissal is without prejudice, plaintiff is free (subject to any applicable limitation period) to re-file. If the voluntary dismissal is the second voluntary dismissal of the action, the notice of dismissal acts as an adjudication on the merits. Rule 1.420(a)(1), Florida Rules of Civil Procedure. Accordingly, no judgment would ever be entered following a voluntary dismissal even if it terminates the action forever in defendant's favor. Thus, no judgment is entered following any voluntary dismissal, and the First District's decision makes the Legislature's express inclusion of voluntary dismissals in Section 768.79, Florida Statutes, utterly meaningless.

The First District's focus on the perceived necessity of a judgment would result in Section 768.79, Florida Statutes, being inapplicable even if a plaintiff had twice taken the case to trial and twice announced a voluntary dismissal following the jury charge

conference but prior to the jury's retiring to deliberate -- even though the claim would be forever barred in that situation. That result is not only incompatible with the Legislature's purpose in initially enacting the statute, it entirely disregards the Legislature's express inclusion of voluntary dismissals within the statute's scope when the statute was amended in 1990.

The purpose of the statutory provision is to serve as a penalty when the parties do not act reasonably and in good faith in settling lawsuits. Goode v. Udhwani, 648 So.2d 247, 248 (Fla. 4th DCA 1994). Patently, it would be unreasonable to twice take the same case to trial and twice voluntarily dismiss it immediately prior to the jury retiring -- yet the First District's decision would permit a plaintiff to do so and nonetheless escape the statutory sanctions.

The effect of Section 768.79, Florida Statutes, is to penalize a party who unreasonably imposes on the time and resources of the judicial system (as well as those of the opponent) by requiring that party to recompense some part of the fees and costs his or her unreasonable impositions have inflicted on the opponent. To permit a plaintiff to escape that sanction by the simple expedient of taking a voluntary dismissal a week or two before trial would eviscerate the legislative purpose. A plaintiff who became convinced that his claim was baseless could simply dismiss, never to refile, and forever avoid the consequences of an unreasonable rejection of an offer of judgment.

Indeed, under the First District's reasoning, it would appear that even if plaintiff refiled, the fees incurred as a result of the unreasonable refusal of an offer of judgment in the voluntarily - dismissed first case could not be recovered. The offer of judgment in the first case would be mooted by the voluntary dismissal and, in any event, would not be an offer of judgment made in the second case so as to permit a fee award in the second case. An offer of judgment made in the second case would only permit recovery of fees subsequently incurred, not those incurred in the prior case. In short, the First District's decision permits a plaintiff to take a meritless case to the verge of jury deliberations, and then abandon it with impunity -- and to do so not once, but twice. That result is antithetical to the legislative purpose of this statute. Moreover, it ignores the Legislature's intent in enacting the 1990 amendments.

The result reached by the Second and Fourth District Courts of Appeal is correct, and should be approved by this Court. As noted above, the courts have held that the pre-1990 version of the statute did not permit an award of attorney's fees where plaintiff had taken a voluntary dismissal. The First District in Makar specifically noted that until the Legislature changed the law, it would continue to so hold. The Legislature took the First District at its word, and amended the statute to specifically provide, in subsection (6), for the assessment of attorney's fees following a voluntary dismissal. Although the Second and Fourth Districts have given effect to the clear legislative intent, the First District

has not, concluding that the Legislature did not go far enough in the statutory amendments.

It is presumed that changes in a statute were made for a purpose. Ryder Truck Rental, Inc. v. Bryant, 170 So.2d 822 (Fla. 1964); Sunshine State News Co. v. State, 121 So.2d 705 (Fla. 3d DCA 1960). Clearly, the legislative purpose here was to permit a fee award under Section 768.79, Florida Statutes, following a voluntary dismissal.

Moreover, a statute must be so construed as to give meaning to every word and phrase, giving effect to all provisions of the enactment and not treating any portion as mere surplusage. State v. Gale Distributors, Inc., 349 So.2d 150 (Fla. 1977); State v. Zimmerman, 370 So.2d 1179 (Fla. 4th DCA 1979). The courts will not presume that the Legislature intended to enact a useless piece of legislation. Sharer v. Hotel Corp. of America, 144 So.2d 813 (Fla. 1962); State v. Zimmerman, supra. Those rules of construction require that the Legislature's specific inclusion of voluntary dismissals as a circumstance under which a fee award may be made under Section 768.79, Florida Statutes, be given effect and not be treated as mere surplusage.

The primary guide to statutory interpretation is the intent of the Legislature, since that is the essence and vital force behind the law. Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905 (Fla. 1969); Tyson v. Lanier, 156 So.2d 833 (Fla. 1963); Dade Federal Savings & Loan Assoc. v. Miami Title And Abstract Division, 217 So.2d 873 (Fla. 3d DCA 1969). Any statutory

construction which would operate to defeat the object of the statute should be avoided. Becker v. Amos, 105 Fla. 231, 141 So. 136 (1932); Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918). Here, the Legislature clearly intended to permit an attorney's fee award after a voluntary dismissal. The First District's construction would defeat that intent, and hence must be rejected.

Legislative intent is to be gleaned primarily from the statutory language, and an interpretation which leads to a result not intended by the Legislature will not be adopted. State v. Hodges, 506 So.2d 437 (Fla. 1st DCA 1987), rev. den., 515 So.2d 229 (Fla. 1987). The courts will not construe a statute in such a manner as to reach an illogical or ineffective conclusion when another construction is possible. Gracie v. Demming, 213 So.2d 294 (Fla. 2d DCA 1968). Here, the Legislature intended to expand the reach of Section 768.79, Florida Statutes, and it would be illogical to hold to the contrary and render the legislative intent ineffective.

In the present case, there can be no doubt what the Legislature intended to do: to permit attorney's fees to be assessed under Section 768.79, Florida Statutes, after the filing of a notice of voluntary dismissal. This Court should approve the decisions of the Second and Fourth Districts, and disapprove the instant decision of the First District, thereby giving full effect to that legislative intent.

We make no claim that the Legislature has provided an example of perfect statutory clarity here. Obviously, it has not. Two points are clear from the 1990 amendments, however: (1) that the

Legislature intended a fee award to be available following a notice of voluntary dismissal; and (2) that the Legislature intended that if, at the time of the motion, the amount of the offer of judgment was greater than 25% more than what plaintiff obtained, defendant would be entitled to fees. Obviously, plaintiff has obtained nothing when it takes a voluntary dismissal. The $2501.00 offer of judgment in the present case is patently in excess of 25% more than nothing. Thus, the Legislature clearly intended for defendant to receive a fee award in situations such as this.

When interpretation problems arise because of inconsistent provisions within a statute, the last expression of the legislative will prevails. State v. Hodges, supra. See also, to like effect, State v. Parsons, 569 So.2d 437 (Fla. 1990); Askew v. Schuster, 331 So.2d 297 (Fla. 1976); Kiesel v. Graham, 388 So.2d 594 (Fla. 1st DCA 1980), rev. den., 397 So.2d 778 (Fla. 1981). Here, the most recent expression of the legislative will is that a fee award should be available following a voluntary dismissal. The Second and Fourth District Courts of Appeal have given effect to that legislative intent, and this Court should hold that they were correct in doing so.

Moreover, such a result would be consistent with numerous cases holding, in other contexts, that a defendant is a "prevailing party" when plaintiff files a notice of voluntary dismissal. See, for instance, Stuart Plaza, Ltd. v. Atlantic Coast Development Corp. of Martin County, 493 So.2d 1136 (Fla. 4th DCA 1986) (defendant a prevailing party for purposes of attorney's fee provision of

lease when plaintiff takes voluntary dismissal); Hatch v. Dance, 464 So.2d 713 (Fla. 4th DCA 1985) (defendant a prevailing party for purposes of attorney's fee provision of agreement when plaintiff voluntarily dismisses complaint); McKelvey v. Kismet, Inc., 430 So.2d 919 (Fla. 3d DCA 1983), rev. den., 440 So.2d 352 (Fla. 1983) (defendant a prevailing party for purposes of attorney's fee provision of the contract when court dismissed one count of complaint and plaintiffs voluntarily dismissed other count); Dolphin Towers Condominium Assoc., Inc. v. Del Bene, 388 So.2d 1268 (Fla. 2d DCA 1980) (defendant a prevailing party for purposes of fee award under Section 718.303, Florida Statutes, when plaintiff takes voluntary dismissal); Gordon v. Warren Heating & Air Conditioning, Inc., 340 So.2d 1234 (Fla. 4th DCA 1976) (defendant a prevailing party for purposes of fee provisions of mechanic's lien statute when plaintiff voluntarily dismisses action). See also Heidle v. S&S Drywall And Tile, Inc., 639 So.2d 1105 (Fla. 5th DCA 1994) (defendant a prevailing party for purposes of Section 713.29 attorney's fees where case dismissed for lack of prosecution); MacBain v. Bowling, 374 So.2d 75 (Fla. 3d DCA 1979) (voluntary dismissal does not preclude award of fees for frivolous litigation under Section 57.105, Florida Statutes).

The only authority we have found to the contrary (other than the First District's decisions in MX Investments and in this case) is Puig v. Pasteur Health Plan, Inc., 640 So.2d 101 (Fla. 3d DCA 1994), which held that when plaintiff voluntarily dismissed his claim, there was no prevailing party for purposes of an attorney's

fee statute. Not only is Puig contrary to the great weight of the decisions cited above, but the case it cites as authority for its holding, Wilson v. Rose Printing Co., Inc., 624 So.2d 257 (Fla. 1993), does not support it. In Wilson, this Court held that where the parties have agreed that prevailing party's attorney's fees are to be treated as costs, they would be awarded under Rule 1.420 even though there has been no determination on the merits.

CONCLUSION

For all the reasons set forth above, the Court should accept jurisdiction in this cause, disapprove the decision of the First District Court of Appeal in the instant case, approve the decisions of the Second and Fourth District Courts of Appeal on this issue, and reinstate the Final Judgment entered by the trial court.

Respectfully submitted,

BROWN, OBRINGER, SHAW, BEARDSLEY & DECANDIO
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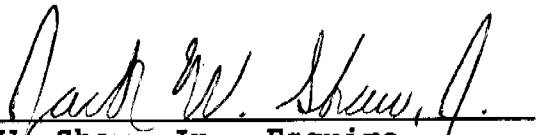

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jefferson W. Morrow, Esquire, Attorney for Respondents, 1301 Gulf Life Drive, Suite 2501, Jacksonville, FL 32207, by U.S. Mail, this 12th day of August, 1997.

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