IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

WILLIAM J. WHITE,	:	
	:	
Petitioner,	:	
	:	
v.	:	CASE NO. SC01-96
	:	
STEAK AND ALE OF FLORIDA, INC., a foreign corporation, d/b/a BENNIGAN'S,	:	
	:	
Respondent.	:	

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

With the following additions, Respondent, Steak and Ale of Florida, Inc.,[1] accepts as generally accurate the statement of the case and facts set forth in Petitioner's Initial Brief:

After a reduction to account for White's 85% comparative negligence, the jury's award to White totaled $8,025.00. (V1:137-38)[2] In support of his motion to tax costs as the prevailing party, White filed an affidavit stating that he had incurred $32,515.59 in costs. (V1:27-30) Of that total, White sought $4,243.61 for costs allegedly incurred prior to service of Steak and Ale's offer of settlement. (V1:25)

In granting White's motion to tax costs, the trial court found that all $4,243.61 was taxable. (V1:134) "In so doing," the trial court felt compelled to point out, "the court uses it's [sic] broad powers of discretion on these matters to determine such items as the expert fees, depositions not used at trial were reasonably necessary under the circumstances of this case." (V1:134)

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[1]Respondent, Steak and Ale, Inc., is referred to in this brief as "Steak and Ale." Petitioner, William J. White, is referred to as "White." All other individuals and entities are referred to by name.

[2]Citations to the Record on Appeal are indicated by a "V," followed by the volume and page numbers of the Record to which each citation refers.

The trial court did not enter a judgment in favor of White. Instead, pursuant to section 768.79, Florida Statutes, the trial court entered judgment in favor of Steak and Ale for the amount of Steak and Ale's attorney fees and costs, reduced by the amounts White was entitled to as damages and pre-offer costs. (V1:137-39)

SUMMARY OF THE ARGUMENT

The decisions of the trial court and the Second District Court of Appeal in this case were based solely on an interpretation of section 768.79, Florida Statutes. Thus, assuming that this Court decides to exercise jurisdiction over this case, the issue before this Court is whether the Legislature intended courts to take into account the taxable costs a plaintiff allegedly incurred prior to service of a defendant's proposal for settlement in determining whether that defendant is entitled to recover post-proposal attorney fees and costs under section 768.79, Florida Statutes.

The Second District correctly concluded that the definition of "judgment obtained" in section 768.79 does not include a plaintiff's pre-proposal costs. None of the arguments advanced by White refutes the Second District's conclusion.

First, White argues that the issue can be resolved by resort to a literal, dictionary definition of "judgment." However, under the statutory scheme contemplated by section 768.79, the Legislature clearly did not intend the term "judgment obtained" to carry its literal, dictionary meaning.

Second, White argues that the Second District's interpretation is illogical and unfair. To the extent that it does not relate to legislative intent, White's argument is irrelevant. Indeed, White's proffered interpretation is contrary to the Legislature's clear intent to treat unsuccessful and marginally successful

plaintiffs the same, and to limit a court's discretion to negate a party's mandatory entitlement to attorney fees and costs.

In any event, White is simply incorrect. Because Steak and Ale's proposal for settlement did not in any way concede that White was entitled to an award of costs, it is not illogical to exclude costs from the definition of "judgment obtained." Similarly, White's proffered interpretation, and not the Second District's, is unfair insofar as it allows marginally successful plaintiffs to avoid liability for fees and costs under section 768.79.

Third, White argues that other fee-shifting statutes support his interpretation of section 768.79. In fact, to the extent that they are relevant at all, these statutes support the Second District's interpretation. Section 45.061, Florida Statutes, for example, expressly includes taxable costs in its definition of "judgment obtained." Similarly, for purposes of section 627.428, Florida Statutes, an insurer's offer to settle includes, by operation of law, damages **and** taxable costs.

Section 768.79 does not expressly include pre-proposal costs in its definition of "judgment obtained," and only deems offers made under its auspices to include "all damages." These differences in statutory language are significant.

Finally, White argues that the "trend and weight of authority" support his interpretation. Again, this argument is largely irrelevant for purposes of determining legislative intent. The fact that the Legislature has not corrected this "trend" is, at

best meaningless. If anything, the Legislature's failure further to amend section 768.79 confirms that the Second District's interpretation of that statute is correct.

In sum, the Legislature did not intend courts to consider a plaintiff's pre-proposal costs in determining whether a defendant is entitled to post-proposal fees and costs under section 768.79. This Court should therefore either approve the Second District's decision in this case, or decline to exercise its discretionary jurisdiction over this case.

ARGUMENT

THE SECOND DISTRICT CORRECTLY CONCLUDED THAT THE TERM "JUDGMENT OBTAINED" IN SECTION 768.79(6)(a), FLORIDA STATUTES, DOES NOT INCLUDE THE COSTS A PLAINTIFF ALLEGEDLY INCURRED PRIOR TO SERVICE OF A DEFENDANT'S PROPOSAL FOR SETTLEMENT

Entitlement to attorney fees under section 768.79, Florida Statutes, is obviously a creature of statute. As this Court recently observed, "'legislative intent is the pole star by which we must be guided in interpreting the provisions'" of a statute. City of Clearwater v. Acker, 755 So. 2d 597, 600 (Fla. 2000) (quoting Parker v. State, 406 So. 2d 1089, 1092 (Fla. 1981)). Thus, should this Court exercise its discretionary jurisdiction over this case, this Court's task is to determine whether the Legislature intended courts to take into account the costs a plaintiff allegedly incurred prior to service of a defendant's proposal for settlement in determining whether that defendant is entitled to recover post-proposal attorney fees and costs under section 768.79.[3]

The Second District correctly determined that the Legislature intended to exclude a plaintiff's pre-proposal costs from the definition of "judgment obtained" for purposes of determining entitlement to attorney fees and costs under section 768.79.

[3]As White correctly points out (Petitioner's Initial Br., at 7-8), this issue is a purely legal issue and is therefore subject to de novo review. See, e.g., Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376 (Fla. 5th DCA 1998).

See White v. Steak & Ale, Inc., 25 Fla. L. Weekly D2856 (Fla. 2d DCA 2000). White's arguments to the contrary are unpersuasive.

White first suggests that the issue can be resolved with a literal, dictionary definition of "judgment." (Petitioner's Initial Br., at 8-9) However, the literal meaning of a statute is not controlling when it would lead to an unreasonable result, or one at odds with legislative intent. See, e.g., Dearson v. Department of Corrections, 705 So. 2d 1374 (Fla. 1998); State v. Iacovone, 660 So. 2d 1371 (Fla. 1995); Byrd v. Richardson-Greenshields Secs., Inc., 552 So. 2d 1099 (Fla. 1989).

The Legislature could not possibly have intended to use "judgment obtained" in its literal sense. Section 768.79 plainly contemplates that, in some cases (like the present case), there will be **no** judgment entered in favor of the plaintiff because the defendant's post-proposal attorney fees and costs will exceed the plaintiff's minimal recovery. See §§ 768.79(1), 768.79(6)(a), Fla. Stat. The statute nevertheless requires a court to determine whether the "judgment obtained" by such a plaintiff is less than 75% of the defendant's offer. See id. § 768.79(6)(a).

Even in cases where the plaintiff's damages award exceeds the defendant's post-proposal attorney fees and costs, literal use of the term "judgment obtained" does not make sense. The "judgment obtained" by a plaintiff depends on whether the defendant is entitled to post-proposal attorney fees and costs. If the defendant is not entitled to attorney fees and costs under section

768.79, then the plaintiff will recover **all** taxable costs. See § 57.041, Fla. Stat. However, if the defendant **is** entitled to attorney fees and costs under section 768.79, then the plaintiff will recover only **pre-proposal** taxable costs. See Mincin v. Short, 662 So. 2d 1323 (Fla. 2d DCA 1995); Goode v. Udhwani, 648 So. 2d 247 (Fla. 4th DCA 1994).

In other words, a court must determine a defendant's entitlement to attorney fees and costs under section 768.79 before it determines the plaintiff's entitlement to costs under section 57.041. As a result, there will be no literal "judgment obtained" by a plaintiff until after a defendant's entitlement to attorney fees and costs under section 768.79 has been determined. A literal interpretation of "judgment obtained" is therefore unworkable under the statutory scheme at issue in this case.[4]

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[4]By contrast, it **is** possible to use a literal definition of "judgment obtained" in cases involving a successful **plaintiff's** entitlement to post-proposal attorney fees and costs. In such cases, there will **always** be a "judgment obtained" by the plaintiff. Moreover, because the plaintiff will always be entitled to recover **all** taxable costs, the "judgment obtained" by the plaintiff can be determined (and even entered) before entitlement to fees under section 768.79.

It is important to note that Perez v. Circuit City Stores, Inc., 721 So. 2d 409 (Fla. 3d DCA 1998), review dismissed, 729 So. 2d 390 (Fla. 1999), was just such a case. To the extent that a literal interpretation of "judgment obtained" is possible in cases involving a successful plaintiff's entitlement to attorney fees and costs under section 768.79, but **not** possible in cases involving a defendant's entitlement, Perez does not necessarily conflict with the Second District's decision in the present case.

White next contends that the Perez court's interpretation of section 768.79 is more "reasonable and logical" than the Second District's interpretation in the present case. Specifically, White argues that costs are not "incidental" in the context of section 768.79, and that it is "logic[al] and fair[]" to take a plaintiff's pre-proposal costs into account when determining a defendant's entitlement to post-proposal attorney fees and costs under section 768.79. (Petitioner's Initial Br., at 9-11)

First, White's arguments deviate from the issue in this case: whether the **Legislature** intended courts to consider pre-proposal costs in determining a defendant's entitlement to post-proposal fees and costs. If the Legislature did not so intend, White's arguments are irrelevant.

There are indications that, in fact, the Legislature did not intend courts to consider a plaintiff's pre-proposal costs in determining a defendant's entitlement to post-proposal attorney fees and costs. For one thing, section 768.79 makes no distinction between plaintiffs who recover nothing and plaintiffs who recover less than 75% of the amount of a defendant's proposal; in fact, the statute expressly combines the two categories. See § 768.79(1), Fla. Stat. For example, section 768.79 makes no distinction between a plaintiff who rejects a $100 proposal and recovers only $50, and a plaintiff who rejects the same offer but recovers nothing.

By injecting costs into "judgment obtained," however, Perez v. Circuit City Stores, Inc., 721 So. 2d 409 (Fla. 3d DCA 1998), review dismissed, 729 So. 2d 390 (Fla. 1999), treats the two differently: the plaintiff recovering $50 may be able to escape liability for attorney fees (because his recovery will include his pre-proposal costs), while the plaintiff recovering nothing cannot. The Second District's decision in this case, on the other hand, treats both plaintiffs the same. Thus, unlike Perez, the Second District's interpretation of section 768.79 honors the Legislature's directive to treat both unsuccessful plaintiffs and marginally successful plaintiffs the same.

In addition, in enacting section 768.79, the Legislature intended to create a **mandatory entitlement** to attorney fees, see, e.g., TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606 (Fla. 1995); under section 768.79, the **only** discretion afforded to courts by the Legislature is the discretion to determine that a proposal was made in bad faith. See § 768.79(7)(a), Fla. Stat.

Including pre-proposal costs in "judgment obtained," however, reintroduces another -- statutorily unauthorized -- measure of discretion. Under the Perez court's interpretation, the discretion to determine taxable costs can also effectively determine entitlement to fees. The Second District's interpretation, by excluding costs from the definition of "judgment obtained," insures that entitlement to fees under section 768.79 remains just that -- an entitlement.

Contrary to White's assertion, a legislative intent not to include a plaintiff's pre-proposal costs in the determination of a defendant's entitlement to attorney fees and costs under section 768.79 is not illogical or unfair. First, White is incorrect that a plaintiff's pre-proposal costs are "incidental" to litigation only for jurisdictional purposes. Section 768.79 was intended to encourage the early termination of litigation, see, e.g., Abbott & Purdy Group, Inc. v. Bell, 738 So. 2d 1024, 1027 (Fla. 4th DCA 1998), not its incidents. See also § 768.79(2), Fla. Stat. ("The offer shall be construed as including all **damages** which may be awarded in a final judgment.") (emphasis added).

More importantly, it is not illogical or unfair to exclude pre-proposal costs when determining entitlement to fees and costs under section 768.79. White's argument is that pre-proposal costs **must** be included in the determination because pre-proposal costs were "included" in Steak and Ale's proposal for settlement. This argument was condensed by the Third District to, "Apples must be compared to apples." Perez, 721 So. 2d at 411.

The Third District's aphorism must be understood in context. Perez involved a plaintiff's $6,000 **demand for judgment** to a defendant. See id. at 410. That is, the plaintiff in Perez demanded that the defendant agree to entry of a $6,000 judgment. Entry of that judgment would obviously entitle the plaintiff to an award of costs. See § 57.041, Fla. Stat. Similarly, in Herzog v. K-Mart Corp., 760 So. 2d 1006 (Fla. 4th DCA

2000), the defendant offered to have judgment entered against it, thus admitting that the plaintiff would be entitled to costs.

This case does not involve a demand for judgment or an offer of judgment. Steak and Ale made a **proposal for settlement** to White. (V1:1-2) Steak and Ale's proposal contemplated, not entry of judgment against Steak and Ale, but a voluntary dismissal by White. (V1:1)[5]

A proposal for settlement is materially different from an offer or demand for judgment. By providing for entry of judgment, the latter two contemplate that the plaintiff is **entitled** to an award of costs. A proposal for settlement that does not provide for entry of judgment makes no such concession.

Thus, Steak and Ale's proposal for settlement did not in any way admit that White was entitled to costs. As a result, Steak and Ale did not offer any specific sum of money to cover those costs. It is therefore perfectly logical, under the Third District's "apples-to-apples" analysis, not to consider those costs in determining whether Steak and Ale is entitled to attorney fees and costs under section 768.79.[6]

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[5]An offer under section 768.79 need not provide for entry of judgment against the offeror. See, e.g., Abbott & Purdy Group, 738 So. 2d at 1027.

[6]The fact that Perez involved a demand for judgment further suggests that Perez does not necessarily conflict with the Second District's decision in this case. Likewise, Herzog is distinguishable because that case involved an offer of judgment, and not a proposal for settlement.

Similarly, the Second District's interpretation is not unfair to plaintiffs. Indeed, any unfairness would come from White's proffered interpretation, under which plaintiffs could avoid liability for attorney fees and costs under section 768.79 by incurring as many taxable costs as possible close to the beginning of a suit. Actual damages, on the other hand, are not subject to such manipulation.

White next argues that other statutes suggest that the Legislature intended courts to include pre-proposal costs in determining a defendant's entitlement to fees and costs under section 768.79. (Petitioner's Initial Br., at 11-12) White points in particular to sections 45.061 and 627.428, Florida Statutes.

Section 45.061, Florida Statutes, actually confirms that the Legislature intended to **exclude** pre-proposal costs from the definition of "judgment obtained." As noted by the Third District in Perez, section 45.061 expressly defines "judgment obtained" as "the total amount of money damages awarded **plus the amount of costs and expenses reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer.**" See Perez, 721 So. 2d at 412 (quoting § 45.061, Fla. Stat.) (emphasis added).

Section 45.061 demonstrates that, when the Legislature wants to include costs in a fee-shifting statute, it knows how to do so. The fact that the Legislature did not amend section 768.79 when it enacted section 45.061 a year later, see ch. 87-249, § 1, Laws of Fla., is therefore significant.

Section 627.428, Florida Statutes, has no bearing on the issue in the present case. To determine entitlement to attorney fees and costs under section 627.428, a court must determine whether an insured is the "prevailing" party. See DeSalvo v. Scottsdale Ins. Co., 705 So. 2d 694, approved, 748 So. 2d 941 (Fla. 1999). Under section 768.79, however, the Legislature has already made that determination by providing that a defendant is entitled to post-proposal attorney fees and costs when the plaintiff recovers less than 75% of the amount of the defendant's offer. See § 768.79(6)(a), Fla. Stat.

Moreover, under section 627.428, an insurer's offer includes, by operation of law, damages **and** taxable costs. See DeSalvo, 705 So. 2d at 697. An offer under section 768.79, on the other hand, is "construed as including all **damages**."[7]

In sum, section 768.79, while serving the same general purpose as the statutes cited by White, does not contain the same direction to include pre-proposal costs in determining entitlement to attorney fees and costs. This difference in legislative language is significant.

Finally, White argues that the "trend and weight of authority" supports his position. (Petitioner's Initial Br., at 15-16) Again, to the extent that this "trend" differs from the legislative intent behind section 768.79, it is irrelevant.

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[7]Prejudgment interest is an element of damages. See McGurn v. Scott, 596 So. 2d 1042, 1044 (Fla. 1992). Costs are not. See id.

The only "legislative history" in White's "trend" argument is that the Legislature has not corrected the Perez court's interpretation of section 768.79. This fact is, of course, meaningless, since the Legislature has also not altered the interpretation of section 768.79 announced in Mincin v. Short and Williams v. Brochu, 578 So. 2d 491 (Fla. 5th DCA 1991). Indeed, any inference to be drawn from legislative acquiescence favors the Second District's decision in this case. The Legislature has had over five years to supersede Mincin and almost ten years to supersede Brochu, but only two years to supersede Perez.[8]

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[8]Without further explanation, White alludes to the fact that section 768.79 was amended in 1990. (Petitioner's Initial Br., at 8 n.5) The 1990 amendment to section 768.79 simply defined "judgment obtained" to include post-offer collateral source payments and settlement amounts. See ch. 90-119, § 48, Laws of Fla. The amendment did not address whether pre-proposal costs are to be included in the term "judgment obtained."

The substantive difference in the pre-1990 and post-1990 versions of section 768.79 has no bearing on this case. See Perez, 721 So. 2d at 411 n.3, 412 (recognizing that the two versions of the statutes are "substantially similar" and certifying conflict with Mincin). However, the fact that the statute was amended is important.

The amendment demonstrates not only that section 768.79 was under consideration in 1990, but that the Legislature actually took the trouble to define "judgment obtained." In addition, the Legislature dealt with section 45.061 -- a statute which expressly defines "judgment obtained" to include taxable costs -- **in the same session law**. See ch. 90-119, § 22, Laws of Fla. The Legislature nevertheless did not take this opportunity to include pre-proposal costs in section 768.79's definition of "judgment obtained."

CONCLUSION

As the foregoing demonstrates, the Legislature did not intend courts to consider a plaintiff's pre-proposal costs in determining whether a defendant is entitled to post-proposal attorney fees and costs under section 768.79. The Second District's decision in the present case is entirely faithful to this legislative intent. Moreover, the Second District's interpretation of section 768.79 does not necessarily conflict with Perez.

Steak and Ale therefore asks that this Court approve the Second District's decision in this case, or, alternatively, that this Court decline to exercise its discretionary jurisdiction over this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to Counsel for Petitioner, **JOSEPH A. EUSTACE, JR., Esquire**, 1802 North Morgan Street, Tampa, Florida 33602; and to Counsel for Amicus Curiae, **TOM THOMPSON, Esquire**, Post Office Box 15158, Tallahassee, Florida 32317, on March _____, 2001.

_____
Charles Tyler Cone, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2), and that this brief is printed in Courier New 12-point font, a monospaced typeface with 10 characters per inch.

_____
Charles Tyler Cone, Esquire