IN THE SUPREME COURT OF FLORIDA

WILLIAM J. WHITE,

Petitioner,

vs.

Case No. SC01-96
Lower Court No. 2D99-5043

STEAK AND ALE OF FLORIDA, INC.,
d/b/a Bennigans,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

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

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PREFACE

Petitioner, William J. White, will be referred to as "White" or as "Petitioner." Respondent, Steak and Ale of Florida, Inc., d/b/a Bennigans, will be referred to as "Steak and Ale" or as Respondent.

Citations to the record will be indicated by an "R," followed by a page number. This Brief will utilize the same page numbers as the Index to the Record on Appeal in the District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

(a) INTRODUCTION

Petitioner William J. White, Plaintiff in the trial court, seeks review of a decision of the Second District Court of Appeal which affirmed a Final Judgment entered in favor of Respondent, Steak and Ale of Florida, Inc. d/b/a Bennigan's, which was based upon the trial court's ruling that White was liable to Steak and Ale for costs and attorney's fees pursuant to an Offer of Settlement served prior to trial. This ruling was, in turn, based upon the trial court's determination that White was not entitled to add to his verdict the amount of costs he incurred prior to the date of Steak and Ale's Offer of Settlement. If such taxable costs were added to White's verdict amount, White would have exceeded the Offer of Settlement threshold and not been liable to Steak and Ale for Steak and Ale's costs and

attorney's fees pursuant to its Offer of Settlement.

The Second District's affirmance was based upon the authority of Mincin v. Short, 662 So.2d 1323 (Fla. 2d DCA 1995). The Second District certified that its decision was in conflict with Perez v. Circuit City Stores, Inc., 721 So.2d 409 (Fla. 3dDCA 1998), review dismissed, 729 So.2d 390 (Fla.1999). Mincin held that a party's taxable costs incurred prior to an offer of judgment could not be added to a party's recovery when determining liability pursuant to an offer of judgment; Perez held that such costs should be considered when making that determination. The Second District and the Third District thus differ in their interpretation of the term "judgment obtained" as used in Florida Statute Section 768.79(6)(a).[1]

(b) STATEMENT OF THE CASE

White filed a personal injury lawsuit against Steak and Ale and Theodore W. Reed, III (hereafter "Reed") as a result of an altercation that took place on Steak and Ale's premises on December 16, 1993. The Complaint alleged that Reed

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[1]"If a defendant serves 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, including investigative expenses, and attorney's fees... incurred from the date the offer was served, and the court shall set off such costs and attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff."

negligently and/or intentionally struck White, causing injuries.[2] The Complaint further alleged that Steak and Ale was negligent in the maintenance of its premises, which negligence contributed to the occurrence of White's injuries.

On or about August 27, 1996, Steak and Ale served an Offer of Settlement and Dismissal Pursuant to Florida Statutes, Section 768.79 on White in the amount of $15,000.00 (R. 1). This offer was not accepted, and the case proceeded to trial.

On or about December 18, 1998, the jury rendered its verdict (R. 3-5). The jury apportioned 15 percent of the liability to Steak and Ale and found White 85 percent comparatively negligent. The jury awarded White $28,500.00 for past medical expenses, $10,000.00 for future medical expenses, and a total of $15,000.00 for past and future pain and suffering and other non-economic damages. The total damages awarded to White were $53,500.00 (R. 5). Therefore, White's net verdict, after reduction for 85 percent comparative negligence, was $8,025.00.

Thereafter, Steak and Ale filed a Motion for Entitlement to Attorney's Fees and Costs (R. 6-9), seeking the imposition of attorney's fees and costs on White pursuant to Steak and Ale's $15,000.00 Offer of Settlement and Dismissal, and a Motion to Enter Final Judgment (R. 10-11) based upon its alleged entitlement to

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[2]White settled with defendant Reed prior to trial.

costs and attorney's fees pursuant to the Offer of Settlement.

White filed his own Motion to Tax Costs as the prevailing party (R. 12-13). White also filed Plaintiff's Response to Defendant's Motion for Entitlement to Attorney's Fees and Costs and to Defendant's Motion to Enter Final Judgment (R. 14-26). Attached to this motion was Exhibit A, which listed the taxable costs incurred by White prior to the date of Steak and Ale's Offer of Settlement (R. 25). This motion argued, among other things, that the trial court should add to White's net verdict the amount of taxable costs White incurred prior to Steak and Ale's Offer of Settlement when making its determination as to White's liability for costs or fees pursuant to Steak and Ale's Offer of Settlement, relying upon Perez v. Circuit City Stores, Inc., supra.[3]

The trial court rendered two post-trial orders as a result of these motions: an Order Granting Plaintiff's Motion To Tax Costs (R. 133-134), an Order Granting Fees and Costs to Defendant (R. 135-136). The Order Granting Plaintiff's Motion to Tax Costs taxed costs in favor of the Plaintiff as the prevailing party, but limited

[3]Specifically, White argued that the $4,243.00 in taxable costs incurred by White prior to the Steak and Ale's Offer of Settlement should have been added to White's net verdict of $8,025.00. If these two amounts were added together, they would total $12,268.00. This amount would exceed the Offer of Settlement threshold of $11,250.00 (75 percent of $15,000.00). As such, White would not be liable for Defendant's costs and attorney's fees pursuant to its Offer of Settlement.

those costs to those incurred prior to Defendant's Offer of Settlement in the amount of $4243.61. The Order Granting Fees and Costs to Defendant found that the Defendant was entitled to recover fees and costs from the Plaintiff in the amount of $96,487.59 pursuant to its Offer of Settlement, rejecting Plaintiff's argument that his pre-offer costs of $4,243.00 should be considered. The trial court expressly declined to follow Perez v. Circuit City Stores, Inc., supra.

The trial court then rendered a final judgment in favor of Defendant in the amount of $98,624.40 based on the two above-referenced rulings (R. 137-139).[4] Plaintiff timely filed his Notice of Appeal of this Final Judgment (R. 140-144). On December 15, 2000, the Second District Court of Appeal affirmed the final judgment based upon the authority of Mincin v. Short, supra. The Second District certified that its decision was in conflict with Perez v. Circuit City Stores, Inc., supra.

Petitioner timely petitioned this court for discretionary review pursuant to Fla.R.App.P. 9.030(a)(2)(A)(vi) to resolve the certified conflict between the decisions of the Second and Third District Courts of Appeal.

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[4]The court added Plaintiff's non-economic damage recovery of $2,250.00 to the taxable costs in the amount of $4,243.61, and deducted the total of $6,493.61 from the Defendant's fee and cost award of $96,487.59. After the addition of pre-judgment interest, the court arrived at the figure $98,624.40.

SUMMARY OF ARGUMENT

This Court should resolve the conflict between the decisions of the Second and Third District Courts of Appeal by adopting the holding of Perez v. Circuit City Stores, Inc., 721 So.2d 409 (Fla. 3d DCA 1998), review dismissed, 729 So.2d 390 (Fla. 1999), which requires a court to consider pre-offer costs when interpreting the term "judgment obtained" contained in Section 768.79, Florida Statutes.

Perez represents the appropriate interpretation of the term "judgment obtained" as used in the context of offers of settlement under Florida Statute Section 768.79(6)(a). Perez does not improperly restrict the definition of the term "judgment obtained" to the amount of damages awarded alone. Mincin does so restrict the term "judgment obtained," and so effectively substitutes the term "verdict" for "judgment," contrary to the express terms and intent of the statute. The Perez interpretation is more reasonable and logical in the settlement context in which the term "judgment obtained" is used, because that interpretation takes into account the risks and costs of litigation in that context, while the Mincin interpretation, which is derived from others contexts, does not. The Perez

interpretation is consistent with other analogous statutes which have the same statutory purpose as Florida Statute Section 768.79, which is to encourage settlements. As such, the Perez interpretation serves the underlying purpose of the statute, while Mincin does not. The recent weight and trend of authority is in favor of the Perez interpretation, and against the Mincin interpretation. The Perez interpretation accurately expresses the Legislative intent, because the Legislature has not acted to amend the term "judgment obtained" in Section 768.79(6)(a) in the years since Perez was decided.

This court should approve the Perez decision, reverse the decision of the Second District Court of Appeal in this matter, vacate the Final Judgment entered by the trial court, and remand with instructions that the trial court add Plaintiff's pre-offer costs to his verdict amount, find that the Plaintiff is not liable for Defendant's costs and fees pursuant to its Offer of Settlement, and enter a Final Judgment in favor of the Plaintiff as the prevailing party for damages all of his taxable costs, both pre- and post-offer.

ARGUMENT

This court should adopt the holding of Perez v. Circuit City Stores, Inc., 721 So.2d 409 (Fla. 3d DCA 1998), review dismissed, 729 So.2d 390 (Fla. 1999), which requires a court to include a party's pre-offer costs when interpreting the term "judgment obtained" contained in Section

768.79(6)(a), Florida Statutes.

(a) STANDARD OF REVIEW

This issue involves the interpretation of a statute, and as such involves a question of law which is subject to de novo review. Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So.2d 376 (Fla. 5th DCA 1998).

(b) ARGUMENT

According to Perez v. Circuit City Stores, Inc., 710 So.2d 409 (Fla. 3d DCA 1998), review dismissed, 729 So.2d 390 (Fla. 1999), a trial court is required to add costs incurred before an offer of judgment is made when determining the amount of judgment obtained by a prevailing plaintiff. The Perez court interpreted Section 768.79(6)(a), which defines the term "judgment obtained", to include a prevailing party's pre-demand costs.[5]

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[5]The Perez court acknowledged conflict with decisions of the Second and Fifth Districts in Mincin v. Short, 662 So.2d 1323,1325 (Fla. 2d DCA 1995), and Williams v. Brochu, 578 So.2d 491,493 (Fla. 5th DCA 1991). However, the Perez court distinguished both Williams and Brochu as interpreting an earlier version of the demand for judgment statute. Perez at 411, citing Mincin at 1324, n.1 and Williams at 492, n.1.

The Perez court observed that although the earlier version was substantially similar to the current version, the term "judgment obtained" was not defined until 1990. Perez at 411, n.3, citing Ch. 90-119 Section 48 Laws of Florida, effective October 1, 1990.

The earlier version of the offer of judgment statute, which was involved in Williams and Brochu, and distinguished in the Perez case, would not apply to the instant case. Rather, the 1990 version, which was relied upon in Perez, would

The Perez interpretation of Section 768.79 (6)(a) does not improperly restrict the statutory term "judgment obtained" to "verdict obtained", as would the Mincin interpretation of that term. The Perez court properly reasoned that Mincin would define the term "judgment obtained" as being limited to "the amount of the judgment for damages awarded by the jury." Perez at 411, citing Mincin at 1325, and Williams v. Brochu, 578 So.2d 491, 493 (Fla. 5th DCA 1991). The Perez court properly noted that the amount of the judgment for damages awarded by a jury is a "verdict," not a "judgment." Perez at 411, citing Black's Law Dictionary 1559 (6th ed. 1990). The two terms cannot be equated. Id. The statute in question uses the term judgment, rather than verdict, so the Perez interpretation is more consistent with the express terms of the statute.

The Perez interpretation is more reasonable and logical in the settlement context in which the term "judgment obtained" is being used. The Perez case points out that both Mincin and Brochu, supra, derive their interpretation of the term "judgment obtained" from cases holding that costs are incidental to an action for jurisdictional purposes, which did not involve the settlement context. Perez

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apply to this case, because this cause of action accrued on December 16, 1993, after the effective date of the 1990 version. Twiddy v. Roca, 677 So.2d 387 (Fla. 2d DCA 1996)(court must apply offer of judgment statute in effect at time cause of action accrued).

correctly pointed out that while costs may be incidental for jurisdictional purposes, they are not incidental for settlement purposes. Perez at 411. Because the relevant context in which this statute will be applied is the settlement context, the basis of the Mincin decision is inapplicable to this case. Its interpretation therefore is inapplicable and incorrect .

After distinguishing the legal basis for the Mincin interpretation, the Perez court persuasively explained why costs must be considered in the settlement context. In order for a Plaintiff to preserve entitlement to attorney's fees, the demand must include costs. An offer of judgment, the court said, ought to fairly account for the risks of litigation, the costs and fees at stake, and other components of uncertainty that sophisticated persons assay when deciding whether to settle. The Perez court then noted the logical correlation between the amount demanded and the amount a Plaintiff would have to recover to trigger entitlement to attorney's fees under the offer of judgment statute: the higher the demand, the higher the judgment threshold. Perez at 411.

The Perez court then concluded:

> "It would be inherently unfair to force the plaintiff to include costs in his demand for judgment, and consequently in setting the judgment threshold, and not to include them in determining whether that threshold has

> been met. Apples must be compared to apples." Id.

Likewise, the trial court in this case also recognized the logic and fairness of the Perez interpretation. Circuit Judge Rondolino favored the application of the Perez case, but felt he was bound by the Second District's previous decision in Mincin, supra. Judge Rondolino stated, "This court is bound by the law of its district in spite of the fact that the logic of Perez is more appealing" (R. 134). In his Order Granting Fees and Costs to the Defendant, Judge Rondolino further stated:

> "There is certainly something to be said for the logic of considering pre-offer costs since without it the comparisons of true net recovery/payment seem like apples and oranges. This aspect is well recognized in the Perez opinion, which addresses the fairness issue for two paragraphs. Yet in spite of this court's fondness for statutory analysis grounded in equity, there exists no compelling change in the law nor factual distinction upon which to distinguish Mincin, which controls in this district" (R136).

Clearly, therefore, the trial court believed that Perez was the more appealing and more logical opinion, but believed it was prohibited from applying the Perez case because of what he considered binding Second District precedent. The Third District was not so bound, and adopted Perez. This Court is not so bound, and it should adopt the Perez interpretation as well.

The Perez decision is consistent with other analogous statutes which share the same statutory purpose of encouraging settlements, and which involve the issue of whether costs should be considered when determining entitlement to attorney's fees. For example, the Perez court noted that other demand for judgment statutes required "evenhanded comparisons," meaning the inclusion of costs in both the amount of the offer setting the threshold, and in the determination of whether the threshold has been met. Perez cited Section 45.061, Florida Statutes (1997), and Section 627.428, Florida Statutes, as examples of statutes which require pre-demand costs to be included in the "judgment" for purposes of determining entitlement to attorney's fees. Perez at 411-412. The Perez court also noted that this was the case in other states as well. Perez at 412, n. 4, and cases cited therein. It is true that Section 45.061 contains express language defining a judgment obtained under that statute as including costs and expenses reasonably incurred, and that such language is absent from Section 768.79. However, as stated in Perez at 412, Section 768.79 should be interpreted in the same manner as Section 45.061 to produce a uniformity of result since both statutes have the same purpose. The Perez court stated: "Because Section 768.79 serves the same purpose as these

statutes [45.061 and 627.428], we follow the same reasoning." Id.[6]

The recent trend of authority is in favor of the Perez interpretation of Section 768.79. For example, the Fourth District Court of Appeal recently decided Herzog v. K-Mart Corp., 760 So.2d 1006 (Fla. 4th DCA 2000).[7] The Fourth District in Herzog instructed the trial court how to calculate on remand whether Herzog would be liable for K-Mart's fees and costs. At footnote 3, the Herzog court stated as follows:

> "K-Mart's offer was 'inclusive of costs.' Appellant's taxable pre-offer costs, to which they are entitled under Section 57.041, Florida Statutes, apparently are yet to be determined. **When determined, those costs added to the adjusted verdict will produce the amount, for comparison purposes under Section 768.79, of the 'judgment obtained.'** See Scottsdale Insurance Co. v. DeSalvo, 748 So.2d 941 (Fla. 1999); Perez v. Circuit

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[6]The Perez court cited DeSalvo v. Scottsdale Ins. Co, supra, in support of its argument that Section 627.428 is analogous to Section 768.79, and should be interpreted in the same manner. DeSalvo was subsequently approved by the Supreme Court, and cited recently in Herzog. See, infra.

[7]In Herzog, the trial court had denied Defendant K-Mart's motion for attorney's fees and costs based on an offer of judgment under Florida Statute Section 768.79. Herzog at D1009. According to the Fourth District, the trial court denied K-Mart's motion for fees and costs because the trial court believed the offer was ineffective to invoke the sanctions of Section 768.79, Florida Statutes, because it was a joint offer which did not specify the amount offered to each individual plaintiff. Id. The Fourth District in Herzog reversed the trial court's denial of K-Mart's motion for fees and costs because the statute in effect in that case did not require the amount attributable to each person to be specified.

City Stores, Inc., 721 So.2d 409 (Fla. 3d DCA 1998), rev. dismissed, 729 So.2d 390 (Fla. 1999)."

Thus, at the present time, both the Fourth District (Herzog) and the Third District (Perez) approve the addition of pre-offer costs in determining whether a party is liable for attorney's fees and costs under Florida Statute Section 768.79.[8]

In addition to being the most recent precedent on this issue, Herzog is also significant because it involved an offer of settlement which, like the offer by Steak and Ale in the instant case, was inclusive of costs. (See R. 1, which offered a sum certain of money "in exchange for a complete dismissal with prejudice against the Defendant, Steak and Ale of Florida, Inc., d/b/a Bennigan's"). The statute should therefore be interpreted and applied to Steak and Ale's offer as it was in Herzog.

Furthermore, Herzog cites to this Court's decision Scottsdale Insurance Co. v. DeSalvo, 748 So.2d 941 (Fla. 1999), decided under Section 627.428, Florida Statutes, pursuant to which an insured is entitled to recover attorney's fees and costs in the event that it is the prevailing party in a suit against its insurer. In Scottsdale Insurance Co. v. DeSalvo, the Supreme Court held that an insured who

[8]Indeed it appears that Herzog was interpreting the pre-1990 version of Florida Statute Section 768.79, since the cause of action in Herzog accrued in November 1988. Herzog at 1007. Thus, even the pre-1990 version, upon which Mincin v. Short, 662 So.2d 1323 (Fla. 2d DCA 1995) was based, is now being interpreted differently than it was in Mincin.

is awarded some recovery, but fails to recover more than an insurer's greatest offer of settlement, may recover the portion of its attorney's fees and costs incurred through the date of the first offer of settlement which exceeds the recovery amount.

Herzog and Perez both recognize that these statutes are analogous. In both situations, attorney's fees and costs are recognized as an inherent part of the litigation process. They were recognized in the Scottsdale Insurance Co. case by allowing the insured to recover attorney's fees and costs incurred at least through the date of the first offer of settlement which exceeded the recovery amount, and should be recognized in the instant case by allowing White to add to his verdict the costs incurred at least through the date of the filing of the Steak and Ale's Offer of Settlement in August of 1996.

The Perez case relied on the District Court result in Scottsdale. Now the Fourth District in Herzog has adopted the Perez case and expressly cited as support the Supreme Court result in Scottsdale. Thus, Supreme Court precedent supports the authority upon which White's arguments are based.

The sequence of these decisions is important as well. All of the cases cited above (with the sole exception of Williams v. Brochu, supra), have been decided subsequent to the Mincin decision. Thus, numerous courts have had the

opportunity to consider the correctness of the Mincin court's interpretation of Section 768.79, and all have declined to adopt that interpretation. Even the trial court in this case, bound by District Court precedent to follow Mincin, expressed disapproval of Mincin and praised Perez. This court should approve this trend of authority and adopt Perez as well.

The recent trend and weight of authority cited above compels the conclusion that the Perez interpretation of Florida Statute Section 769.79 accurately reflects the legislative intent of that law. The Perez interpretation will promote uniformity of construction and application among these statutes with similar purposes. There is no reasonable basis to argue that such statutes with similar purposes should be interpreted differently from each other, and so differ in their application and effect. Indeed, the Florida legislature has had ample opportunity to amend Section 768.79(6)(a) to overrule the Perez interpretation of the existing language since that case was decided in 1998, but it has never done so. Nor has the legislature ever expressly defined that provision as not including pre-offer costs. The failure of the legislature to respond by changing the language upon which the Perez case was based is a clear indication that the Perez case accurately sets forth legislative intent. And, of course, this Court's primary goal in interpreting this or any other statute is to effectuate the legislative intent. Racetrac Petroleum, Inc. v. Delco Oil,

Inc., supra (the primary and overriding consideration in statutory interpretation is that a statute should be construed and applied so as to give effect to the evident intent of the legislature).

CONCLUSION

This court should approve the Third District's holding the Perez case, and hold that Petitioner White must be allowed to add his pre-offer costs to his verdict amount when determining whether he is liable to Respondent Steak and Ale for costs and attorney's fees under the Offer of Settlement. Wherefore, Appellant William White prays that this court will reverse the Second District's decision in this matter, vacate the Final Judgment entered in favor of Respondent Steak and Ale, and remand this case with instructions that the trial court add Petitioner's pre-offer costs to his verdict amount, and find that the Plaintiff is not liable for Defendant's costs and fees pursuant to its Offer of Settlement, and enter a Final Judgment in favor of the Plaintiff as the prevailing party for damages all of his taxable costs, both pre- and post-offer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Charles Tyler Cone, Esquire, P.O. Box 1438, Tampa, FL 33601 this _____ day of February, 2001.

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this brief is written in 14 point Times New Roman typeface.

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APPENDIX