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 REPLY BRIEF

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

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The fact that a literal definition cannot be given to the term "judgment obtained" does not mean the Legislature's use of that term should be disregarded**.** That the statute is poorly drafted does not compel Steak and Ale's asserted interpretation of that term. Steak and Ale's brief fails to explain why, even if the term cannot be literally applied in all circumstances, this compels the Steak and Ale's asserted interpretation of the term. Even if the Legislature did not intend to give the term "judgment obtained," its literal meaning, the use of that term, and the commonly used definition of that term are highly relevant to determining the Legislature's intention. This court should not, under the guise of interpretation, substitute other terms not used for the term the Legislature actually used, "judgment."

While the legislative intent is obviously the most important factor in statutory interpretation, fairness and logic are important factors in determining legislative intent. When engaging in statutory interpretation, courts should avoid the unreasonable, unfair, or illogical interpretations. The express language used in the statute should control over any alleged structure of the act in determining legislative intent.

The term "judgment obtained" should be given the uniform meaning

intended by the Legislature. The proper interpretation of the term "judgment obtained " should not depend, as Steak and Ale necessarily suggests, on whether Steak and Ale issues an offer of judgment or a proposal for settlement, or upon the party issuing it. The statute makes no such distinctions. The Legislature used a single term, and this single term should be given a single, uniform interpretation. Steak and Ale's arguments would result in the term "judgment obtained" having a different meaning and the offer of judgment statute having a different effect, depending on the wording of the offer, (judgment or settlement), and on whether the party making it was a plaintiff or defendant, and further depending on whether it was a successful or unsuccessful plaintiff. The Legislature could not possibly have intended to create such chaos in this already uncertain area of law.

The intent of the Legislature, not the intent of the offeror, should determine the meaning of the term judgment obtained. Steak and Ale's argument overlooks the dual aspects of the statute; one involving the comparison between the judgment obtained and the offer amount, and the other involving the calculation of the judgment ultimately paid/entered. They improperly focus on the intent of the offeror, rather than on the intent of the Legislature. They fail to distinguish the arguments of the Third District Court of Appeal in Perez v. Circuit City Stores, Inc., 710 So.2d 409 (Fla. 3d DCA 1998), review dismissed, 729 So.2d 390 (Fla.

1999), or the decision of the Fourth District Court of Appeal in Herzog v. K-Mart Corp., 760 So.2d 1006 (Fla. 4th DCA 2000).

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.

The fact that a literal definition cannot be given to the term "judgment obtained" does not mean the Legislature's use of that term should be disregarded. Neither does the fact that the statute is poorly drafted compel Steak and Ale's asserted interpretation of that term. White agrees with Steak and Ale's observations (Steak and Ale's Brief, p. 7-8) concerning this statute. However, those observations do not in any way shed light on the proper interpretation of the term, or assist the court in its task of determining the Legislature's intent. Steak and Ale's brief fails to explain why, even if the term cannot be literally applied in all circumstances, this compels Steak and Ale's asserted interpretation of the term. The fact that the statute cannot be literally applied as written merely means that the statute requires interpretation, and not that it should be interpreted in any particular manner. The terms actually used remain significant to determining the legislative

intent. It is well recognized that if necessary, the plain and ordinary meaning of a word can be ascertained by reference to a dictionary. Sieniaricki v. State, 756 So.2d 68 (Fla. 2000). This is what the Third District did in Perez v. Circuit City Stores, Inc., 710 So.2d 409 (Fla. 3d DCA 1998), review dismissed, 729 So.2d 390 (Fla. 1999), and this sound method should be approved by this court.

Even if the Legislature did not intend to give the term "judgment obtained" its literal meaning, the use of that particular term, and the commonly used definition of that term, are highly relevant to determining the Legislature's intention. Steak and Ale essentially argues that the Legislature intended the term "judgment obtained" to mean "verdict obtained," or "damages obtained." This court should not, under the guise of interpretation, substitute other terms not used for the term the Legislature actually used. A court construing a statute cannot invoke a limitation or add words to the statute not placed there by the Legislature. Chaffee v. Miami Transfer Co., Inc., 288 So.2d 209 (Fla 1974). Restricting the term judgment to mean verdict or damages would improperly limit the statutory language. Even if the term cannot be literally applied in all circumstances, this court should give great weight to the fact that the word "judgment" was used, and interpret this term as closely as possible to the common definition of judgment, which unlike the term verdict or damages includes costs.

While the legislative intent is obviously the most important factor in statutory interpretation, fairness and logic are important factors in determining legislative intent. A fair and reasonable interpretation must be given to all laws with due regard for the ordinary acceptation of the language employed and the object sought to be accomplished thereby. Johnson v. Presbyterian Homes of Synod of Florida, Inc., 239 So.2d 256 (Fla. 1970). Courts are obligated to avoid construing a particular statute so as to achieve an absurd or unreasonable result. Carawan v. State, 515 So. 2d 161 (Fla. 1987). The law favors rational, sensible construction of statutes. City of Boca Raton v. Gidman, 440 So. 2d 1178 (Fla. 1983). The arguments advanced by the Third District Court of Appeal in Perez and by the trial court in this case, which acknowledge the superior logic and fairness of White's interpretation of the statute, are more compelling than Steak and Ale's. These arguments merely suggest that the Legislature intended to treat unsuccessful and marginally successful plaintiffs alike and to limit a court's discretion in determining entitlement to fees and costs under the statute. They stray from the issue at hand, the proper meaning of the term "judgment obtained," and read into the statute concepts which not even the Second District (in the case sub judice or in Mincin v. Short, 662 So.2d 1323 (Fla. 2d DCA 1995)) ever expressed or relied upon as a basis for its decisions.

Nothing in the structure of the act suggests a legislative intent to treat such plaintiffs alike. Instead, the express terms used suggest the opposite. The very use of the term "judgment obtained" permits an interpretation which allows these two types of plaintiffs to be treated differently. Further, the term "judgment obtained" is itself defined in terms of "judgment"; ("judgment obtained" means the amount of the "net judgment entered"... See §768.79 (6), Fla.Stat.). The Legislature did not define the term judgment obtained as "verdict" or "damages," terms which would have treated the two classes of plaintiffs alike by expressly excluding costs from the comparison amount. The express language of the statute must control over the purported structure of the act as an indicator of legislative intent.

The same term is used in all cases, whether the plaintiff recovers nothing or something. There is no "directive" to treat marginally successful and unsuccessful plaintiffs alike (Brief at page 10), but there is the uniform use of a single statutory term in all the sections cited concerning liability under the statute. Likewise, the "mandatory entitlement" to attorneys fees referred to by Steak and Ale (Steak and Ale's Brief at page 10) depends upon the definition of the subject term, not the other way around. When liable under the term, however defined, fees and costs are mandatory, and White suggests nothing different. The definition to be applied is the issue.

The term "judgment obtained" should be given the uniform meaning intended by the Legislature. Steak and Ale attempts to respond to the Third District's "apples to apples" argument by contending (Brief at pages 11-12) that the offer it made was different from the type of offer made in Perez, because the Plaintiff in Perez made an offer of "judgment" and Steak and Ale made a proposal for "settlement." Steak and Ale even argues that the two proposals are materially different, even though made under the same statute. Steak and Ale filed a document entitled "Offer of Settlement and Dismissal Pursuant to Florida Statutes, §768.79," so Steak and Ale cannot avoid the application of the term "judgment obtained" in that statute to its offer. Again, Steak and Ale is reading into the statute distinctions which are simply not there in an effort to justify its opposition to the persuasive arguments of the Third District in Perez. The proper interpretation of the term "judgment obtained" should not depend, as Steak and Ale necessarily suggests, on whether a party issues an offer of "judgment" or a proposal for "settlement." The statute makes no such distinction. The Legislature used a single term, and this single term should be given a single, uniform interpretation wherever it is applied.

Steak and Ale further improperly mixes two separate concepts in its attempts to distinguish Perez and defeat the Third District's persuasive arguments. Steak

and Ale contends it never "conceded" or "admitted" it owed costs to White due to the form of its offer, and points out that the Plaintiff in Perez, unlike White, was a prevailing Plaintiff (that is, a plaintiff imposing fees on a defendant/offeree). But there are two distinct concepts and calculations in this statute: first, the comparison to determine whether attorneys fees and costs are owed or may be recovered, and second, the amount of the judgment finally entered, after the first issue is decided. Steak and Ale's arguments concern only the second issue, and ignore the first, and the first is what this case is about. It matters not to the legislative intent whether Steak and Ale intended to offer to "pay" costs in its proposal for settlement, because the first calculation, the comparison of the judgment obtained to the proposal amount, does not involve payment of any kind. Likewise, the fact that "in Herzog the Defendant offered to have judgment entered against it" (Brief at page 12), allegedly "admitting" that the Plaintiff was entitled to costs, in no way "admits" the Plaintiff would be entitled to costs, since no payment of costs is involved in the comparison calculation. The payment is the amount of the offer/proposal only, if and when accepted. Thus, neither the form of the offer nor the position of the offeree should determine the proper interpretation of the term. It is the legislative intent, not the offeror's intent, which is at issue.

In any event, the relevant point is that Steak and Ale's proposal, and all of

the other offers involved in this discussion, necessarily include an offeree's costs, for the simple reason that if they are accepted, the amount of the offer is the amount that will be received by the offeree. There will be no additional of costs thereafter, regardless of the form of the offer or the context in which it is made. The offeree must include all of its costs in that amount. This is the essence of the "apples to apples" argument of the Third District in Perez, and it involves the comparison calculation, and not the payment calculation. Steak and Ale's arguments overlook the two aspects of the statute in question, and this undermines all of its arguments against including costs in the interpretation of the term "judgment obtained."

Finally, Steak and Ale contends that other fee-shifting statutes do not support White's asserted interpretation of the term "judgment obtained"in §768.79, Fla. Stat. However, Steak and Ale merely points out the obvious differences in the terminology of the various statutes referenced, without which this case would not have arisen. Steak and Ale fails to address the Third District's argument in reliance on these statutes in Perez, which is that statutes having the same purpose should be interpreted in the same manner. Steak and Ale utterly fails to explain why §768.79, Fla. Stat., has a different purpose than the others referenced or why it should be interpreted differently. Thus, Steak and Ale necessarily suggests that the

outcome of an offer of judgment (or "proposal for settlement") would depend on the particular form of the offer, or the statute referenced therein. Yet, Steak and Ale gives no explanation as to why the Legislature would intend such a result.

CONCLUSION

Steak and Ale's arguments ignore the common definition of the term "judgment" and fail to explain why it should be disregarded. They would result in the term "judgment obtained" having a different meaning and the offer of judgment statute having a different effect, depending on the wording of the offer (judgment or settlement) and on whether the party making it was a plaintiff or defendant and further depending on whether it was a successful, marginally successful, or unsuccessful plaintiff. The Legislature could not possibly have intended to create such chaos in this already uncertain area of law. These arguments should be rejected.

Instead, the subject term should be given a single, uniform meaning, in order to promote uniformity of operation in all cases in which it is applied. It should be given the interpretation given to the term as used in other statutes with the same purpose. It should be given the reasonable and logical meaning and should include the amount of pre-offer costs incurred.

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; and Thomas R. Thompson, Esquire, P.O. Box 15158, Tallahassee, FL 32317-5261 this _____ day of March, 2001.

CERTIFICATE OF TYPEFACE COMPLIANCE

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

_____
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