**IN THE**
**FLORIDA SUPREME COURT**

THERESA JEAN NORRIS,

Petitioner,

v.

DARRELL TREADWELL,

Respondent.

CASE NO.:SCO5-1326

L.T. Case No.: 1D04-3983

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

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# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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**HARRIS BROWN, P.A.**
Francis J. Milon, Esquire
Florida Bar No.: 369640
12 East Bay Street
Jacksonville, Florida 32202
(904) 354-0624
Attorneys for Respondent Treadwell

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## III. PRELIMINARY STATEMENT

The Respondent, Darrell Treadwell, will utilize the same abbreviations as Petitioner in her Initial Brief. The parties will be referred to by their proper names or by reference to their status in the lower court. The decision in the court below, Norris v.Treadwell, 907 So.2d 1217 (Fla.1st DCA 2005), will be referred to as Norris.

## IV. STATEMENT OF THE CASE AND OF THE FACTS

Respondent Treadwell accepts Plaintiff's statement of the case and facts, and adds the following for clarity:

On February 21, 2002, the jury returned a verdict finding Defendant Darrell Treadwell not negligent. The Defendant served a Proposal for Settlement on October 4, 2001, and on March 8, 2002, moved for attorneys' fees and costs (R Vol. I - pp.99-107). A hearing on the motion was set but had to be canceled because no judgment had been entered. Final Judgment for Defendant Treadwell was eventually entered on June 28, 2002. The Final Judgment reserved jurisdiction to allow the court to rule on Defendant's pending motion for costs and attorneys' fees (R-Vol. I p. 116). At the time the trial judge entered final judgment, he was aware of the pending motion and reserved jurisdiction specifically to allow consideration of the motion. (R Vol. 2 pp. 1-15).7

On July 11, 2002 Plaintiff filed a Notice of Appeal (R-Vol. I pp. 110-111). The Final Judgement was affirmed and the court's mandate was entered October 23, 2003 (R-Vol. I pp. 112-114).

On June 21, 2004, a hearing was held on Defendant Treadwell's still pending motion for costs and fees (R Vol. 2 - pp. 1-15). Plaintiff argued at the hearing, as she does now, that Defendant's motion was untimely because it was filed before, and not after, entry of the Final Judgment. On July 26, 2004, a Final Judgment for costs and fees was entered (R-Vol. I p. 116). Plaintiff then took another appeal, disputing the propriety of the award of costs and fees. The judgment for costs and fees was affirmed. The First DCA certified conflict with a Second DCA case. None of theses facts are in dispute.

## V. SUMMARY OF ARGUMENT

Respondent Treadwell, after return of a jury verdict in his favor, but before entry of a final judgment, served a motion for attorney's fees and costs pursuant to a Proposal for Settlement. The sole issue presented in this appeal is whether the motion was timely served pursuant to Rule 1.525. Fla. R. Civ. P. (hereinafter, "Rule 1.525").

The procedural issue of the timeliness of the motion is the only question presented. Despite some statements in the dissent below and some argument in Petitioner's Initial Brief,

there is no substantive issue of entitlement to fees for this Court to consider.

On January 1, 2001, Rule 1.525 was amended. The amendment provided that motions seeking attorneys fees and costs shall be made within 30 days after entry of judgment. The prior rule had required such motions be made within a reasonable time.

The "reasonable time" requirement gave rise to considerable litigation over the definition of a "reasonable time" and different courts came to different conclusions. The rule was amended to eliminate confusion and to assist in bringing matters to a timely conclusion. The amended rule established a "bright line" or "deadline," setting a time limit for the service of motions for fees and costs.

The Supreme Court of Florida has held that the term "within" does not fix the first point of time, but rather the limit beyond which action may not be taken. Accordingly, a motion filed early (before entry of a final judgment) is within the time requirements of Rule 1.525 and is timely.

Petitioner Norris complains, not that Treadwell's motion was not served, or served too late, but that it was too soon. Early is not the same as too late or not at all. The trial court and the First DCA correctly found the motion timely and the judgment should be affirmed.

## VI. ARGUMENT

### POINT I

## DEFENDANT'S MOTION WAS TIMELY AND IN COMPLIANCE WITH RULE 1.525

### A. Standard of Review.

The standard of review for construction of rules is de novo. State Dept. of Transportation v. Southtrust Bank, 886 So. 2d 393 (Fla. 1st DCA 2004).

### B. Argument:

Respondent Treadwell served a motion for attorneys' fees and costs 15 days after return of the jury verdict, but before entry of a final judgment. The only issue presented in this appeal is whether the motion was timely pursuant to Rule 1.525. Petitioner makes the technical argument that the rule creates a narrow 30 day window of opportunity which starts upon entry of final judgment and ends 30 days thereafter. The trial court and the First DCA rejected a narrow and technical reading of the rule and found Treadwell's motion timely. Norris.

The procedural issue of the timeliness of Defendant Treadwell's motion for fees and costs is the only argument that Petitioner Norris raised in the trial court (R Vol.2 pp 1-15) or in the appellate court below. The dissent below made reference to Section 768.79(6), Fla. Stat., the substantive right to attorneys' fees and strict construction of statutes in derogation of the common law. Petitioner has used these references in her Initial Brief to now suggest that the

decision below conflicts with the statute and decisions interpreting it.

These arguments serve no purpose. There is no issue herein regarding a substantive right to attorneys' fees. The only issue raised is procedural.

On January 1, 2001, Rule 1.525 was amended to put a time limit of 30 days on the service of motions for costs and attorneys fees. The predecessor rule had required only that such motions be made within a "reasonable time." The amendment to the rule was designed to resolve uncertainty concerning the timing of post-trial motions and to bring them to a timely conclusion. Wentworth v. Johnson, 845 So. 2nd 296 (Fla. 5th DCA 2003); McFarland & Son, inc. v. Basel, 877 So. 2nd 964 (Fla 5th DCA 2004).

The rule as amended requires that a party moving for costs and/or fees, "...shall serve a motion within 30 days after filing of the judgment..."

The Supreme Court of Florida has held that the term "within" means "not longer in time than" or "not later than". "Within" does not fix the first point of time, but the limit beyond which action may not be taken. Chatlos v. Overstreet, 124 So. 2d 1 (Fla. 1960). In Chatlos, the Court considered a statute which provided that suit "...be instituted within sixty days from the time the assessment shall become final..." Suit was commenced before the assessment became final. The lower court dismissed the suit for lack of jurisdiction. The Supreme Court ruled that the correct interpretation of the

time requirement, “within sixty days” was as a deadline for action and not as a prohibition upon an early action.

Although Chatlos dealt with interpretation of a statute, its holding has been followed in the interpretation of a rule of procedure. In Bradford Builders Inc. v. Phillips Petroleum Co., 154 So. 2d 189 (Fla. 2nd DCA 1963), the court followed Chatlos and held that “within” means “not later than” in interpreting a rule of civil procedure.

Accordingly, a motion for costs and fees served before entry of a final judgment is “within” the time requirements of Rule 1.525 and is timely. Respondent did not, as Petitioner contends in her brief, either ignore or seek to rewrite the rule. Respondent simply followed well-established precedent.

The two Second DCA cases upon which Plaintiff relies deal with motions filed before entry of final judgment and hold that Rule 1.525 is to be interpreted as restricting such motions to a 30 day window. Lyn v. Lyn, 848 So. 2d 181 (Fla. 2nd DCA 2004); Swann v. Dinan, 884 So. 2d 398 (Fla. 2nd DCA 2004). Interestingly, both the Lyn and Swann courts acknowledged that their holdings might seem harsh, painful and even “inequitable”. The inequity would have been avoided by following the controlling precedent of Chatlos and their own precedent in Bradford.

Plaintiff further contends that the First DCA has also strictly interpreted Rule 1.525, and cites to Ulico Casualty Co. v. Kennedy, 821 So. 2d 452 (Fla. 1st DCA 2002) and Atkins v. Eris, 873 So. 2d 1264 (Fla. 1st DCA 2004). In Ulico, the

motion was filed 47 days late. In Atkins, the successful party sought costs, but the motion in question requested only attorneys' fees. The court held the motion could not serve as the basis for an award of costs. The motion was served prior to entry of final judgment, and the court specifically declined to address the issue of timeliness of the motion. Accordingly, Atkins did not decide whether a motion served before entry of final judgment would be timely under Rule 1.525.

Norris argues in Point 2 of her brief that the court below, in affirming the judgment for fees and costs, was in conflict with "every" other District Court of Appeal. Her argument is not suppported by the citations. Other than the Second DCA holding in Swann v. Dinan, 884 So. 2d 398 (Fla. 2nd DCA 2004), which was certified as in conflict with Norris and the similar Second DCA holding in Lyn v. Lyn, 884 So. 2d 181 (Fla. 2nd DCA 2004), Norris is either consistent with, or not in conflict with, the rulings in the other districts.

In Yachting Promotions, Inc. v. Broward Yachts, Inc., 876 So. 2d 624 (Fla. 4th DCA 2004), the trial court denied a motion for attorneys' fees, finding the motion too late and not timely. The appellate court reversed, noting that since no judgment had been entered, the 30 days had not started to run.

Similarly, in E & A Produce Corp. v. Superior Garlic International, Inc., 864 So.2d 449 (Fla.3rd DCA 2003), no

judgment had been entered, and the court found that Rule 1.525 did not apply.

In Gulf Landings Assoc.,Inc. v. Hershberger, 845 So. 2d 844 (Fla.2nd DCA 2003), no motion for fees was ever filed. In Wentworth v. Johnson, 845 So. 2d 296 (Fla. 5th DCA 2003), the motion for fees was served 61 days after entry of final judgment.

In State Dept. of Transportation v. Southtrust Bank, 886 So.2d 393 (Fla. 1st DCA 2004), the court held that a judgment based upon a motion to enlarge, served with a late motion for fees, would be upheld upon a showing of excusable neglect.

In Braxton v. Morris, 2005 WL 1277816 (Fla.1st DCA 2005), the First DCA held that the reservation of jurisdiction in a final judgment did not constitute an automatic extension of time to file a motion under Rule 1.525.

Accordingly, none of the cases cited by Plaintiff/Petitioner to support the proposition that the Norris court decision below was a "unique determination", at variance with the other districts, actually support that proposition.

Notably, the 4th DCA has recently reached the same conclusion as Norris and held that a motion for fees and costs served before entry of judgment was within thirty days, and hence timely. State Farm v. Horkheimer, 901 So.2d 329 (Fla. 4th DCA 2005).

Petitioner makes numerous references to the "bright line" of Rule 1.525, as do several of the cases cited in the Initial

Brief. Consistent with precedent, the “bright line” is a deadline, which expires 30 days after the entry of judgment. The “bright line” does not describe a window.

The rules are to be construed to secure the just, speedy and inexpensive determination of every action. Rule 1.010, Fla. R. Civ. P. Procedural rules should be given construction calculated to further justice, not frustrate it. Singletary v. State, 322 So.2nd 551 (Fla. 1974). Construction should not become so technical as to obscure the intended purpose of the rules: that a case be decided on its merits. Pruitt v. Block, 437 So.2d 768 (Fla.1st DCA 1983).

In its opinion below, the First DCA recognized that Norris was making a “technical argument” for a “...very narrow window...” The court also recognized that the problem addressed by the amendment to the rule was the uncertainty created by excessive tardiness in filing motions for fees and costs.

We do not deal here with a case in which no motion has been served, or in which a late motion has been served. We have a motion served, in Petitioner’s view at least, too soon. Petitioner argues that an early motion should be a nullity, to be treated as if no motion was served. This argument depends upon an interpretation of Rule 1.525 which would say that the rule establishes, not a deadline, but a narrow, 30 day window, for service of a motion. This Court has rejected such an interpretation and held that the term “within” sets a deadline and not a starting point or a window. The rule should

be construed in a manner consistent with this Court's holding in Chatlos, and in accordance with the principle of deciding a case on its merits, rather than a technicality. The ruling below should be affirmed.

## VII. CONCLUSION

Early is not the same as late or not at all. Defendant Treadwell served his motion before, not after, a deadline, in a manner consistent with well-established precedent.

The trial judge and the First DCA considered the argument Petitioner now makes, rejected it, and properly awarded costs and
fees to the Defendant. These rulings followed well-established law and should be affirmed.

## VII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to David R. Black,Esq., 4735 Sunbeam Poad, Jacksonville, FL 32257, by U.S. Mail, this _____ day of September, 2005.

## CERTIFICATE OF COMPLIANCE

This brief has been printed in Courier New 12 Point, as

required by Rule 9.210 (a)(2), Fla. R. App. P. An electronic copy has been provided in accordance with AO 04-84.

**HARRIS BROWN, P.A.**

_____
Francis J. Milon
Florida Bar No.: 369640
12 East Bay Street
Jacksonville, FL 32202
(904) 354-0624
Attorneys for Respondent Treadwell