IN THE FLORIDA SUPREME COURT

THERESA JEAN NORRIS,	:	
Petitioner,	:	
	:	CASE NO: SC05-1326
v.	:	L.T. Case No.: 1D04-3983
DARRELL TREADWELL,	:	
Respondent.	:	

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

HARRELL & HARRELL, P.A.
David R. Black
Florida Bar No. 0791911
Donald F. Black
Florida Bar No. 0227791
4735 Sunbeam Rd.
Jacksonville, FL 32257
(904) 251-1111
(904) 296-7710 (facsimile)
Attorneys for Petitioner

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III. PRELIMINARY STATEMENT

Petitioner, Theresa Norris, will be referred to as "Ms. Norris". Respondent, Darrell Treadwell, will be referred to as "Mr. Treadwell". Citations to the appendix will appear as (A - ___). Rule 1.525, Fla. R. Civ. P. will appear as "R. 1.525". The First District Court of Appeal's plurality decision in Norris v. Treadwell, 2005 Fla. App. Lexis 9727 (Fla. 1st DCA 2005) will appear as the "Norris" decision.

IV. STATEMENT OF THE CASE AND OF THE FACTS

Ms. Norris appeals the District Court of Appeals affirmance of the Order Granting Defendant's Motion to Tax Trial Costs and Assess Attorney's Fees and the Final Judgment in favor of Mr. Treadwell awarding fees and costs (A - 1) more than two years post-verdict, despite the fact that Mr. Treadwell never made a R. 1.525 motion **after** filing of judgment as required by R. 1.525.

On February 27, 2001, Mr. Treadwell's car struck the middle of Ms. Norris' car in the middle of the intersection of Lenox Avenue and Edgewood Avenue in Jacksonville, Florida.

As a result of this accident Ms. Norris sued Mr. Treadwell. On February 21, 2002, the jury found Mr. Treadwell was not negligent in this accident and the trial Court entered final judgment on June 27, 2002. (A - 6) The trial court reserved jurisdiction to rule on Mr. Treadwell's Motion to Assess Attorneys' Fees and Costs made March 8, 2002 prior to judgment.

Ms. Norris appealed to the First District Court of Appeals which affirmed the trial court's denial of a new trial and issued its mandate to the trial court on October 23, 2003. The trial court granted Mr. Treadwell's Motion to tax costs and fees on July 26, 2004 despite the fact that Mr. Treadwell **never** made a motion **within** thirty days **after** filing of the **judgment** pursuant to R. 1.525. (A – 7, 8).

Respondent's March 8, 2002 motion for attorneys' fees and costs was not heard because no judgment had been entered (A - 10) until more than two (2) years had passed since judgment and more than eight (8) months after issuance of mandate.

Ms. Norris appealed to the First District Court of Appeals which affirmed the trial courts decision in a plurality decision making the unique determination that a R. 1.525 motion was timely if filed after "entitlement." Norris v. Treadwell, 2005 Fla. App. Lexis 9727 (Fla. 1st DCA 2005) (A – 1). This petition ensued as "Norris" is in direct conflict with Swann v. Dinan, 884 So. 2d 398 (Fla. 2nd DCA 2004) on the same point of law, which leaves the jurisprudence of this state in confusion and lacking in uniformity.

V. SUMMARY OF THE ARGUMENT

The language of R. 1.525 (A- 8) as adopted by this Court sets a bright line rule which must be strictly construed. R. 1.525 states that a motion shall be served within thirty days **after** filing of the **judgment**.

Petitioner, Respondent (A- 15) and all District Courts of Appeal agree that R. 1.525 provides a thirty-day window in which to file the motion after judgment.

Petitioner, Respondent (A- 15) and all District Courts of Appeal agree that the thirty-day clock ends thirty days after filing of a judgment.

Respondent (A- 14) and the Norris plurality believe the thirty-day clock begins "as soon as entitlement is established" (A- 3).

Courts are without authority to construe unambiguous language of a rule such as "within thirty days after filing of the judgment" (A – 8).

In this case, Respondent is only entitled to attorneys' fees after filing of a **judgment**, pursuant to §768.79(6), Fla. Stat. (2001). (A- 17) The mere announcement of a jury verdict does not create an "entitlement" pursuant to §768.79(6), Fla. Stat. (2001) as it is the Court, not the jury, which enters judgment.

Entitlement to attorney's fees is in derogation of the common law and as such entitlement to attorney's fees should be narrowly construed. (A – 4) The "Norris" interpretation of R. 1.525 will focus inquiry upon: "What is a reasonable time to file a motion **before** filing a judgment?" Even if Respondent moved for an award of attorneys'

fees in his answer; he should be deemed to have failed to comply with R. 1.525. Diaz v. Bowen, 832 So. 2d 200 (2nd DCA 2002) (A – 22, 23).

To eliminate this uncertainty and reiterate the explicit language which creates a thirty-day clock for a party to file a R. 1.525 motion after filing a judgment, Petitioner requests this Court reverse the holding of "Norris" and adopt the R. 1.525 interpretation of Swann v. Dinan, 884 So. 2d 398 (Fla. 2nd DCA 2004) (A – 19) that is certified to be in direct conflict with "Norris." (A - 3)

VI. ARGUMENT

1. R. 1.525 ESTABLISHES A THIRTY-DAY TIME PERIOD AFTER JUDGMENT HAS BEEN ENTERED IN WHICH A PARTY MUST FILE A MOTION FOR COSTS AND ATTORNEYS FEES

Standard of Review. Review as to an issue involving construction of the rules of civil procedure is de novo. Dep't of Transp. V. Southtrust Bank, 2004 Fla. App. LEXIS 17299 (Fla. 1st DCA 2004).

Respondent failed to comply with the mandatory language of R. 1.525. As a result, the entry of final judgment awarding costs and fees should be reversed. Respondent filed a motion for costs and attorney's fees before judgment was entered. The rule itself defines the starting point within which a motion should be filed, as "after the filing of judgment." (A – 8)

This Court has held, "The award of statutory authorization for attorney fees is to be strictly construed" Sakis v. Allstate Ins. Co., 863 So. 2d 210, 223 (Fla. 2003). Since, the award of attorney's fees is in derogation of the common law, the statute and R. 1.525 must be given its plain and ordinary meaning and strictly construed. (A – 4)

Courts are not at liberty to construe unambiguous language; nor are they permitted to add to a statute language not placed therein at adoption B.C., Petitioner v. Fla. Dept. of Children and Families, 887 So. 2d 1046 (Fla. 2004). The "Norris" plurality had no need to construe the word "judgment" in R. 1.525 or §768.79(6), Fla. Stat. (2001). Under any recognized rule of construction the Norris plurality could not construe "entitlement" or verdict as a judgment or add the word "entitlement" or verdict to R. 1.525.

The word "within" as used in R. 1.525 creates the allowable period of time for a party to file a R. 1.525 motion after judgment has been entered. There is no ambiguity regarding the beginning of the time period for a R. 1.525 motion. Logic dictates that there is no R. 1.525 motion to file until there is a judgment as §768.79(6), Fla. Stat. (2001) requires a judgment to entitle a party to fees and costs. The Rule states:

> "Any party seeking a judgment taxing costs, attorney's fees or both shall serve a motion **within** 30 days **after** filing of the **judgment**." R. 1.525 Emphasis added

Furthermore, §768.79(6), Fla. Stat. (2001) provides:

> "Upon motion made by the offeror within 30 days after the entry of judgment…"

§768.79(6), Fla. Stat. (2001) requires the entry of judgment for the entitlement of costs and attorneys' fees. The Third DCA in Business Success Group, Inc. v. Argus Trade Realty Investments, Inc., 898 So. 2d 970 (3rd DCA 2005), stated:

> "An award of attorneys' fees is not ripe for review or hearing until the entry of judgment."

As a result, the "Norris" decision is also in direct conflict with §768.79(6), Fla. Stat. (2001) and the Third DCA decision of *Business Success Group*. §768.79(6), Fla. Stat. (2001) does not entitle a party to move for attorneys' fees until a judgment has been entered.

If the "Norris" decision were allowed to stand, entitlement to attorneys' fees and costs would be left in a state of confusion. This situation would present itself, when

Courts heard §768.79(6), Fla. Stat. (2001) motions prior to the entry of judgment or as the "Norris" court determined, "as soon as entitlement is established."

The phrase "after filing of the judgment" is a key focal point in this case. The word "after" as used in R. 1.525 is used to modify the phrase "filing of the judgment." The dictionary definition of "after" is "a: behind in place or b: subsequent to in time or order." (Merriam – Webster online Dictionary August 12, 2005). As a result, the function of the word "after" as a preposition in Rule 1.525 creates the understanding that the thirty day requirement is subsequent in time to the filing of the **judgment**.

When reading R. 1.525 in its entirety, it is clear that the thirty-day clock begins "after the filing of judgment" and ends "within" thirty days. Consequently, the thirty-day requirement in R. 1.525 indicates an enclosure or containment of time. The thirty-day window begins the moment after the filing of the judgment and ends at the expiration of the thirtieth day. Respondent is only "entitled" to attorneys' fees after entry of a judgment [See §768.79(6), Fla. Stat. (2001)]. Respondent never filed a R. 1.525 motion after judgment.

2. EVERY FLORIDA DISTRICT COURT OF APPEAL HAS UPHELD THE STRICT LANGUAGE OF R. 1.525 TO INSURE PREDICTABILITY AND CONSISTENCY WITH THE SOLE EXCEPTION OF THE NORRIS PLURALITY

Standard of Review. Review as to an issue involving construction of the rules of civil procedure is de novo. Dep't of Transp. V. Southtrust Bank, 2004 Fla. App. LEXIS 17299 (Fla. 1st DCA 2004).

The mandatory language of R. 1.525 has been followed by all District Courts of Appeal except "Norris". Each District has numerous rulings regarding the application of the end of the thirty day window of time for parties to file a R. 1.525 motion. This is evidenced by Courts continuously holding, after the 2001 amendment, that R. 1.525 "must be enforced if it is to remain the bright line rule as intended by the Florida Rules of Civil Procedure Committee and adopted by the Supreme Court."

See: Dep't of Transp. v. Southtrust Bank, 886 So. 2d 393 (Fla. 1st DCA 2004); Lyn v. Lyn, 884 So. 2d 181 (Fla. 2nd DCA 2004); E & A Produce Corp. v. Superior Garlic Int'l Inc., 864 So. 2d 449 (Fla. 3rd DCA 2003); Yachting Promotions Inc., v. Broward Yachts, Inc., 876 So. 2d 624 (Fla. 4th DCA 2004); Wentworth v. Johnson, 845 So. 2d 296 (Fla. 5th DCA 2003).

Since the amendment to R. 1.525, a few trial courts attempted to change the starting time of the thirty-day clock set by R. 1.525 to allow motions made before entry of a judgment as exceptions to R. 1.525. Until the "Norris" decision, all such trial court decisions have been reversed.

The Second District Court in *Lyn*, supra, held that a wife in a dissolution of marriage action failed to comply with R. 1.525 when she filed a notice of hearing for attorneys' fees based on a reservation of jurisdiction made prior to entry of judgment. In reversing the trial court ruling because she failed to file a R. 1.525 motion **after** entry of **judgment**, the *Lyn* court stated:

> "These results may seem inequitable under the specific circumstances of each case. They are undoubtedly examples of the type of growing pains that occur whenever attorneys do not immediately adjust their practices to

> significant change in procedural law. As tempted as we are to relieve these pains in individual cases, they cannot be relieved at the expense of the plain language of the rule and the rule's intent to create predictability and consistency in post judgment requests for attorney's fees" (A - 27)

The *Lyn* court specifically rejected Respondent's "too-soon" argument (A – 16) by stating:

> "(Lyn) argues the motion for attorneys' fees….should be treated as premature, but timely, …..R.1.525 specifically requires that the motion for fees and costs be served 'within thirty days after filing of the judgment'… In light of this language, we decline to create the ambiguity that would undoubtedly flow from the concept of a premature….motion." (A – 28).

In *Yachting Promotions*, supra, (A - 30) the plaintiff asserted that the proper time from which to calculate the beginning of the R. 1.525 thirty-day clock was from the issuance of the mandate. The trial court in *Yachting Promotions* ignored the clear language of Rule 1.525 and created a "special rule" designating the issuance of the mandate as the beginning of the thirty- day clock. The Fourth DCA in reversing the trial court's ruling stated:

> "The rule is extremely clear, in order to be timely, the motion had to be filed 'within 30 days after filing of the judgment' . . . Rule 1.525 was created to establish a bright-line rule to resolve the uncertainty surrounding the timing of these posttrial motions . . . There can be no bright line if trial courts are permitted to elect a starting point for the thirty-day clock to begin to run."

"Norris" has created a new starting point as soon as "entitlement" is established (A – 3) for the thirty-day clock to begin to run. By so holding "Norris" created a debate, avoided by the Lyn (A – 28), Diaz (A – 21), Swann (A – 19) and Yachting Promotions

(A - 30) which hold the judgment begins the thirty-day clock, as to "entitlement". Is entitlement the announcement of a jury verdict?; its recordation?; the denial of a new trial motion?; the issuance of mandate?; the denial of a Rule 1.540, Fla. R. Civ. P. motion; remittitur; additur; the notice of a hearing on fees?; or some other event prior to or subsequent to the filing of the judgment.

In *Gulf Landings,* supra (A – 36), Plaintiff prevailed in the trial court and the court reserved jurisdiction to determine both the entitlement and amount of attorney fees which might be awarded. Although Plaintiff noticed a hearing on fees, Plaintiff did not file a R. 1.525 motion within thirty days after the filing of judgment. About two months after the entry of judgment the trial court awarded costs and fees to the Plaintiff because the court had reserved ruling on the motion. In reversing the trial court the Second DCA stated:

> "With some reluctance, we must reverse this order. Although Gulf Landings (Defendant) was aware of the claim for attorney's fees . . .and therefore could not have been prejudiced by the procedures used by both Mr. Hershberger (Plaintiff) and the trial court, Rule 1.525 was created to establish a bright-line rule governing the timeliness of post trial motions for costs and attorney fees." (A - 36)
>
> "These circumstances cannot overrule the plain language of Rule 1.525. Special rules for such circumstances would simply return the courts to an era in which the time for the filing of these motions would again be uncertain." Gulf Landings Ass'n. v. Hershberger, 845 So.2d 344, 346 (Fla. 2nd DCA 2003) (A - 36)

Similarly, Respondent who prevailed at the trial court filed his R. 1.525 motion prior to the entry of judgment and then relied upon his untimely and out-of-rule motion to request the award of costs and attorney's fees. Respondent has never filed a R. 1.525

motion after the entry of judgment. The "special rule" created by "Norris" which allows a motion to be served as soon as entitlement is established, should be reversed as rewriting the plain language of R. 1.525 and recreating uncertainty.

Just 22 days prior to "Norris" in Braxton v. Morris, 2005 Fla. App. Lexis 8112 (Fla. 1st DCA 2005), the *Braxton* court held a R. 1.525 motion must be complied with unless by motion filed pursuant to Rule 1.090(b), Fla. R. Civ. P., the movant seeks to extend the thirty day period provided by R. 1.525. In this case, the Respondent did not request a Rule 1.090(b) Fla. R. Civ. P. enlargement of time

"Norris" is certified to be in conflict with the decision of Swann v. Dinan, 884 So. 2d 398 (Fla. 2nd DCA 2004). In *Swann*, the jury in the underlying automobile negligence case returned a verdict of no liability. As a result of the verdict the Defendant was entitled to file a motion to tax attorney's fees and costs pursuant to a previously served proposal for settlement after entry of judgment in compliance with §768.79(6), Fla. Stat. (2001). The Defendant, as Respondent did, filed his R. 1.525 motion after the verdict and prior to the entry of judgment. The *Swann* Court enforced the bright line rule this Court established in R. 1.525 by reversing the trial courts order. The Court held:

> "The rule required a party seeking fees and costs to serve a motion within 30 days after the filing of the judgment." "… we once again conclude that as unpleasant as it is to strictly enforce Rule 1.525, it must be enforced if it is to remain the "bright line rule as intended by the Florida Rules of Civil Procedure Committee and adopted by the Supreme Court." (A - 20)

R. 1.525 established a thirty-day clock which begins to run after the entry of

judgment and ends in thirty days.

VII. CONCLUSION

Petitioner, never having filed a R. 1.525 motion after filing of the judgment, has failed to comply with R. 1.525. The rule specifically states that a party shall file his motion within thirty days after the filing of the judgment. Petitioner submits that "after" creates a thirty-day clock in which a R. 1.525 motion should be filed "within" thirty days after judgment. Respondent's failure to comply with the rule is fatal to his claim. The language of R. 1.525 is plain and unambiguous. Its language requires no interpretation. R. 1.525 and §768.79(6), Fla. Stat. (2001) are in derogation of common law and should be strictly construed. There is no "entitlement" to attorneys' fees without a judgment.

It is the court, not the jury, which enters judgment. Respondent made no Rule 1.090(b) motion to enlarge time. The "Norris" "entitlement" decision will create chaos and destroy a rule expressly designed to create a bright line.

This Court should rule in accordance with the clear unambiguous words of R. 1.525 and the rules of statutory construction and adopt the reasoning of Swann v. Dinan, 884 So. 2d 398 (Fla. 2nd DCA 2004) and disapprove the "entitlement" rule adopted by the Norris plurality.

VIII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to **FRANCIS J. MILON, ESQUIRE**, 12 E. Bay Street, Jacksonville, FL 32202, on August _____, 2005.

HARRELL & HARRELL, P.A.

David R. Black
Florida Bar No. 0791911
Donald F. Black
Florida Bar No. 0227791
4735 Sunbeam Rd.
Jacksonville, FL 32257
(904) 251-1111
(904) 296-7710 (facsimile)
Attorneys for Petitioner

IX. CERTIFICATION OF COMPLIANCE

This brief has been printed in Times New Roman 14-point type, as required by Fla. R. App. P. 9.210(a). An electronic copy of brief has been provided in accordance with AO04-84.

HARRELL & HARRELL, P.A.

David R. Black
Florida Bar No. 0791911
Donald F. Black
Florida Bar No. 0227791
4735 Sunbeam Rd.
Jacksonville, FL 32257
(904) 251-1111
(904) 296-7710 (facsimile)
Attorneys for Petitioner

X. APPENDIX

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