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 AMENDED REPLY BRIEF ON THE MERITS

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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 of Petitioner's Initial Brief on the Merits 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, 907 So. 2d 1217 (Fla. 1st DCA 2005), rehearing en banc denied July 28, 2005, (A – 1) (Fla. 1st DCA 2005) will appear as "Norris". Rule 1.442, Fla. R. Civ. P. will appear as "R. 1.442". §768.79, Fla. Stat., will appear as "§768.79". References to Respondent's Answer brief will appear as (AB - ____).

IV. SUMMARY OF THE ARGUMENT

R. 1.525, as incorporated into §768.79 by R. 1.442(g) sets a bright line, which must be strictly construed, as this statute imposes a penalty. R. 1.525, incorporated into R. 1.442(g) January 1, 2001, states that a motion for fees shall be served within 30 days after filing of the judgment.

Rules 1.442 and 1.525 procedurally implement §768.79 which authorizes attorneys' fees' awards as a penalty, and therefore, in the fee context, must be strictly construed.

§768.79(6) states: "upon motion…after entry of judgment". R. 1.525 states: "shall serve a motion…after filing of the judgment." The statute and rule mirror each other and require a judgment to award fees "after…judgment". It is the Court, not the jury that enters judgment.

Norris' holding that a jury verdict triggers entitlement and that a motion for attorneys' fees may be served "as soon as entitlement is established" (A – 3) amends the authorizing statute and implementing rules to require something other than a judgment contrary to both rule and statute to initiate a motion for fees. Thus, Norris is in direct conflict with this Court's holding in Sarkis v. Allstate, 863 So. 2d 210, 222 (Fla. 2003) which applies strict rules of construction of the statute and rule as a penalty or sanction.

Norris' substitution of "entitlement" for "judgment" violates long established precedent by interpreting R. 1.525, which is plain and unambiguous and needs no interpretation or construction.

Respondent erroneously states Norris' holding that "the party seeking fees may serve a motion as soon as entitlement is established"; and "the jury verdict triggered entitlement" (A – 3) merely presents this Court with technical procedural issue and presents no substantive issue of entitlement to fees. (AB – 2, 3, 4, 5, 10)

Norris' substitution of "verdict" for "judgment" in §768.79 and R. 1.442 clearly creates substantive issues regarding entitlement to fees.

V. ARGUMENT

1. DEFENDANT'S MOTION WAS NEITHER TIMELY NOR IN COMPLIANCE WITH R. 1.525.

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, 886 So. 2d 393 (Fla. 1st DCA 2004).

Respondent is not entitled to attorneys' fees. As phrased by Norris, the matter of law determined by the court was "entitlement" to make a motion for fees. (A – 3) Norris did not affirm the award of attorneys' fees based on Respondents' Chatlos, argument regarding the meaning of the word "within", but rather held "the jury verdict triggered entitlement." Chatlos v. Overstreet, 124 So. 2d 1 (Fla. 1960) It is the court, not the jury that determines "entitlement" by entering judgment.

§768.79(6), Fla. Stat., provides, "Upon motion made by the offeror within 30 days after the entry of judgment…, the court shall determine…."

Respondent made no §768.79(6) motion after entry of judgment. Having failed to comply with the clear unambiguous language of the statute, Respondent is not entitled to fees.

R. 1.525 provides, "Any party seeking….attorneys' fees shall serve a motion within 30 days after filing of the judgment…"

Respondent made no R. 1.525 motion after the judgment was filed and having failed to comply with the clear, unambiguous language of the rule, Respondent is not entitled to fees.

Rule 1.442(g) (2000) provided, "Any party seeking sanctions….shall do so by service of a…motion within 30 days after….the return of a verdict in a jury action."

Respondent states (AB – 6) he did not ignore R. 1.525, nor was he ignorant of the requirement, established fifteen (15) months prior to his motion. He knowingly served his fee motion prior to judgment because he "simply followed well-established precedent". Thus, by disregarding R. 1.525 and R. 1.442(g) fifteen months after their adoption, he followed forty-five year old *Chatlos, supra* and followed the 2000 version of R. 1.442(g) in moving for fees after verdict, but before judgment.

As stated at (AB – 6), Respondent did not rewrite R. 1.525 or §768.79. Respondent simply did not follow the clear, unambiguous language of §768.79 and R. 1.442. Norris, in violation of all precedent, rewrote both the statute and rule by holding (A – 3) "the party seeking fees may serve a motion as soon as entitlement is established." Thus Norris substitutes "entitlement" for "judgment" in §768.79, R. 1.525 and R. 1.442.

There is nothing harsh, painful or inequitable (AB – 7) in requiring Respondent to comply with the clear, unambiguous language of the rule and statute in moving for fees after judgment. As the award of such fees is a sanction and should be strictly construed. The legislature determined in §768.79(6) that a judgment entitles a party to move for fees. Without §768.79 and R. 1.442, Respondent would pay his own fees. Where is the inequity in requiring Respondent to strictly comply with §768.79 and R. 1.442?

Norris is in conflict with every District Court of Appeal and this Court (AB – 7) in not strictly construing §768.79 and R. 1.442 awarding fees as a sanction or penalty. *Sarkis, supra*.

A. §768.79, R. 1.442(G), and R. 1.525 Must Be Strictly Construed.

Respondent urges a liberal construction of procedural rules at (AB – 9). Procedural rules implementing common law rights such as an appeal from a judgment have been liberally construed. However, rules implementing §768.79 are strictly construed.

Respondent, to be entitled to fees, must strictly comply with §768.79, R. 1.525 and R. 1.442 as the authorization of such fees is a sanction.

§768.79 is implemented by R.1.442. Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 278 (Fla. 2003). In enforcing R. 1.442(c) (3), this Court stated: "This language must be strictly construed because the offer of judgment and rule are in derogation of common law rule that each party pay its own fees."

In Sarkis v. Allstate, 863 So. 2d 210, 218-223 (Fla. 2003), this Court analyzed §768.79 and R. 1.442. ID. at 218 – 223. Awarding attorneys' fees pursuant to §768.79 is a sanction. Because it is a sanction, §768.79 and R. 1.442 must be strictly construed. ID. at 218. The statute, §768.79, authorizing attorneys' fees is to be strictly construed. ID. at 223.

This Court has followed this precedent in strictly construing §768.79 and R. 1.442. Lamb v. Matetzschk, 906 So. 2d 1037, 1040 (Fla. 2005). If R. 1.442(c) is to be strictly

construed, then logic dictates R. 1.442(g) should be strictly construed especially since R. 1.442(g) incorporates R. 1.525 implementing §768.79(6).

While R. 1.442(c)(3) requires offers of multiple offerors to apportion, R. 1.442 also provides: "a proposal…shall be served no earlier than 90 days after service of process…No proposal shall be served later than 45 days before the date set for trial." Applying this Court's strict construction of §768.79 as a penalty statute; an offer served within 45 days of trial was untimely and a nullity. Schussel v. Ladd Hairdressers, Inc., 736 So. 2d 776 (Fla. 4th DCA 1999). An offer served before 90 days after service was untimely and nullity. Grip Dev., Inc. v. Coldwell Banker Residential Real Estate, Inc., 788 So. 2d 262 (Fla 4th DCA 2000). Grip required "precise, strict, enforced time requirements". Furthermore, because R. 1.442 is a punitive measure, it should be construed in favor of the party being sanctioned. Loy v. Leone, 546 So. 2d 1187 (Fla. 5th DCA 1989).

R. 1.442(d) provides: "an offer…..shall not be filed unless necessary to enforce the provisions of this rule." Therefore, a premature filing of the offer prior to judgment nullifies the offer. Bottcher v. Walsh, 834 So. 2d 183 (Fla. 2nd DCA 2002); Browning v. Scott, 884 So. 2d 298 (Fla. 2nd DCA 2004).

Respondent (AB – 9) does not address the issue that §768.79 and R. 1.442 are sanctions in authorizing fees and must be strictly construed as this Court and the Second and Fourth District Courts of Appeal have done. Respondent creates a myth (AB – 3) that "early is not the same as….not at all". A premature filing is a nullity as it violates

§768.79, R. 1.525, R. 1.442 and precedent requiring strict construction as no judgment exists to initiate the filing of a motion for fees as a sanction as required by both rule and statute.

Rule 1.442 (g) was amended to incorporate Rule 1.525 January 1, 2001. State Farm v. Horkheimer, 901 So. 2d 329 (4th DCA 2005). In Horkheimer, Appellee did not comply with R. 1.442(g) prior to the amendment by making a motion for fees within 30 days of the jury verdict. However, the initial judgment was reversed on appeal and a new judgment entered after reversal and remand. The court noted in dicta that Appellees' motion for fees was made prior to the entry of the new judgment after reversal and remand; and was therefore deemed timely. Horkheimer did not address strict construction of §768.79 and R. 1.442.

This Court should hold in reversing and remanding Norris that §768.79 and R. 1.442 are a sanction and therefore must be strictly construed. Creating special rules such as the Norris entitlement rule (A – 3) not only returns the courts to an era in which the time for filing §768.79(6) and R. 1.442 motions would again be uncertain but violates long established precedent that §768.79 and R. 1.442 must be strictly construed. How can Norris establish a jury verdict as entitlement to attorneys' fees when §768.79(6); Rule 1.442(g); and R. 1.525 all require entry of a judgment to initiate a motion for an award of fees?

B. Norris Violates Fundamental Rules Of Statutory Construction

Norris has created a special rule which not only fails to take into consideration the clear language of R. 1.525, R. 1.442 and § 768.79; but, also violates fundamental rules of statutory construction.

In adopting R. 1.525, this Court stated "this rule only establishes time requirements for serving such motions." Amendments to the Florida Rules of Civil Procedure, 773 So. 2d 1098 (Fla. 2000). R. 1.525, states such motion "shall" be served within 30 days after filing of the judgment.

When the language (of a rule) to be construed is clear and unambiguous, and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984).

R. 1.442(g) incorporating R. 1.525 provides that a party seeking fees: "shall serve a motion within 30 days after filing of the judgment". Respondent has no need to define "within". Norris had no cause to interpret R. 1.525 (AB – 3).

Legislative intent is the polestar that guides a court's statutory construction analysis. State v. Rife, 789 So. 2d 288 (Fla. 2001). In determining that intent, this court looks first to the statute's plain meaning. Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996).

§768.79(6) provides that the trial court shall determine fees "upon motion made…within 30 days after the entry of judgment". R. 1.525 mirrors §768.79(6). The clear intent of both the statute and rule is to require a judgment to initiate a motion for

fees. Moreover, rules promulgated by this Court which deal with the same subject matter should be construed together and in light of each other. CPI Mtg. Co. v. Industrious St. Jacks, S.A., 870 So. 2d 89 (Fla. 3rd DCA 2003). Norris rewrites §768.79(6); Rule 1.442(g) and R. 1.525 to substitute verdict for judgment to initiate a motion for attorneys' fees prior to judgment. (AB– 3)

The Norris holding is contrary to every court decision requiring strict construction as well as the foregoing rules of construction. The First District Court of Appeal overstepped the authority granted to Florida appellate courts with its interpretation of R. 1.525. Rule 1.525 as written, is clear and unambiguous. Consequently, R. 1.525 should not have been interpreted at all. Unfortunately, the First District Court of Appeal in Norris exceeded its authority in "interpreting" the rule and as a result, Norris should be reversed and remanded.

VI. CONCLUSION

Respondent, never having filed a motion for attorneys' fees after judgment, has not satisfied any of the requirements of R. 1.525, §768.79, or R. 1.442 and therefore is not entitled to fees. R. 1.525 and §768.79 specifically state that a party shall file his motion within 30 days after the filing or entry of the judgment. R. 1.525 must be strictly construed in the context of R. 1.442(g) and §768.79.

The body of precedent requiring R. 1.442 and §768.79, authorizing an award of attorneys' fees as a sanction, is totally ignored by Norris' holding "the jury verdict triggered entitlement" and "the party seeking fees may serve a motion as soon as entitlement is established." (A - 3). §768.79(6) and R. 1.525 both define the filing of a judgment as the benchmark and beginning point for the entitlement for penalty attorney fees.

As a result of Norris' substitution of "entitlement" for "judgment" in this case as opposed to following the clear language of § 768.79, R. 1.442 and R. 1.525, Norris violated fundamental rules of statutory construction.

Petitioner requests the Court to vacate the final judgment of attorneys' fees and costs and remand with instructions that the trial court enter judgment denying Respondent's motion for attorneys' fees and costs as Respondent did not comply with §768.79, R. 1.525 nor R. 1.442.

VII. 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 November 28th, 2005.

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VIII. 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.

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