IN THE SUPREME COURT OF THE STATE OF FLORIDA

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| IN RE AMENDMENTS TO FLORIDA SMALL CLAIMS RULES | ) ) ) | CASE NO.: SC05-146 |

RESPONSE AND COMMENT OF BRUCE J. BERMAN ON RECOMMENDATION OF TWO-YEAR-CYCLE OF THE SMALL CLAIMS RULES COMMITTEE FOR NEW RULE 7.175

The undersigned member of The Florida Bar submits the following response and comment on that portion of the biennial report of the Small Claims Rules Committee and the Executive Director of The Florida Bar proposing to adopt the text of Rule 1.525 of the Florida Rules of Civil Procedure (AMotions for Costs and Attorneys= Fees@) as Rule 7.175 of the Small Claims Rules.

Specifically, the undersigned proposes that any adoption of such rule change the presently proposed language governing the time for the filing from:

A. . . **within 30 days after filing of the judgment . . .** @ (emphasis added)

to

A. . . **no later than 30 days after filing of the judgment . . .**@ (emphasis added).

The undersigned proposed the identical amendment (of Rule 1.525) to the Civil Procedure Rules Committee, whose members approved the same in concept at its January 2005 meeting and should eventually seek such amendment here.[1]

Relevant Procedural History of Rule 1.525

Because the Small Claims proposal, by its terms, is intended solely to adopt the existing rule of civil procedure, a brief history of the adoption of that rule may be instructive.

Rule 1.525 was adopted with the 2000 amendments, effective January

[1] Ideally, if the Court were to adopt Rule 7.175 with the change proposed herein, it would, at the same time, amend Rule 1.525 for the same reasons and for consistency between the two rules.

1, 2001 (*see Amendments to Florida Rules of Civil Procedure,* 773 So.2d 1098, 1099, 1119-20 (Fla. 2000)) in response to the prior suggestion by this Court that the Civil Procedure Rules Committee consider whether there should be a specific rule to govern the timing of the filing of motions for fees and costs. *See Green v. Sun Harbor Homeowners= Ass=n, Inc.,* 730 So. 2d 1261, 1263 n. 4 (Fla. 1998).

The new rule 1.525 provided definition to a period that had previously been less certain, the case law prior to *Sun Harbor* having required that motions for fees and costs be made within a Areasonable time@ after judgment. *See, e.g., Wunderle v. Fruits, Nuts & Bananas, Inc.,* 715 So. 2d 325, 326 (Fla. 2d DCA 1998); *McAskill Publ=ns, Inc. v. Keno Bros. Jewelers, Inc.,* 647 So. 2d 1012, 1013 (Fla. 4th DCA 1994). With the new rule, no one had to struggle with the question of how long was Areasonable@; that period was now explicitly defined.

The undersigned, a 20-year member and former two-term chair of the Civil Procedure Rules Committee, who served on the Committee when it proposed the 2000 amendment to add the new rule 1.525, believes that the Committee=s intent in making such proposal, as well as the Court=s intent in its decision to adopt the new rule, were both premised upon the value of prescribing an *outside date* or *deadline,* after which no such motion could be entertained. Just as the Areasonable time@ limitation prescribed a deadline, although an uncertain one, this new rule defined that deadline in terms over which presumably no one could argue. In so doing, the Court could avert collateral litigation over what is or is not Areasonable@ under the prior standard established under the pre *Sun Harbor* case law. And by defining a deadline in reasonable proximity to judgment, the Court could also define an end to post-judgment litigation (the ostensible purpose of the prior, albeit less definitive, limitation).

The undersigned does not believe, however, that, in better defining the deadline for post judgment determination of fees and costs, it was ever the intent of

either the Committee or this Court, to prescribe a *beginning date* for filing of motions for such relief. Nor does the undersigned believe that it was ever the intent of the Committee or of this Court to prohibit or nullify a motion filed too *early*, with the effect of depriving a party of its rights to seek fees. Yet, the language of Rule 1.525 as adopted (Awithin 30 days after filing of the judgment@) has caused courts applying the rule, albeit reluctantly, to reject as untimely motions filed before the filing of judgment, with the effect of depriving parties of the right to recover fees and costs altogether. *See, e.g., Lyn v. Lyn,* 884 So.2d 181 (Fla. 2d DCA 2004); *Swan v. Dinan,* 884 So.2d 398 (Fla. 2d DCA 2004). Respectfully, such outcome serves no purpose.

Argument

Rules governing the timing of post-judgment motions for relief in Florida have historically, and consistently, focused solely upon the last day for the service or filing of such motions. Thus, for example, rule 1.530, governing the time for service of motions to alter or amend a judgment, has long provided that such motion be served Anot later than 10 days after entry of the judgment@ (emphasis added).

Similarly, rule 1.540, governing motions for relief from judgments (etc.) has long provided that motions under specified grounds be filed A. . . not more than 1 year after the judgment, decree , order or proceeding was entered or taken.@ *Id.*, at subd. (b).

The Federal Rules of Civil Procedure, from which the foregoing Florida rules were derived,[2] also prescribe solely the last day for filing of motions seeking post-judgment relief. *See, e.g.:* federal rule 52 (b) (requiring that motions to

[2] *See In re Florida Rules of Civil Procedure 1967 Revision*, 187 So. 2d 598, 630 (Fla. 1966) (Committee Note, referencing federal rules 52(b) and 59 in connection with Florida rule 1.530) and *id.*, at 631 (Committee Note to newly adopted Rule 1.540 stating: ASubstantially the same as Federal Rule 60.@).

amend judgments to alter findings be filed Ano later than 10 days after entry of judgment@) (emphasis added); federal rule 59(e) (requiring that motions to alter or amend judgments be filed Ano later than 10 days after entry of the judgment@) (emphasis added); and federal rule 60 (b) (requiring that motions for relief from judgments, orders, etc., made under specified grounds, be filed A. . . not more than one year after the judgment, decree , order or proceeding was entered or taken.@

In short, until the adoption of Florida Rule 1.525, every time limit set for post-judgment relief, both under Florida=s rules of procedure and under the federal rules from which they were derived, used the same language to provide a clear cut-off, after which relief could no longer be sought. The objective was solely to provide such deadlines.

Florida Rule 1.525, however, for the first time, and without explanation or rationale (either by the Committee or in this Court=s prior decision suggesting such consideration), used language Awithin@ 30 days after judgment, rather than Anot later than@ 30 days after judgment.

The only explanation for the Committee=s proposal can be its simple copying of the language from this Court=s opinion in *Sun Harbor*:

> Until a rule is approved for cases that are dismissed before the filing of an answer, we require that a defendant's claim for attorney fees is to be made either in the defendant's motion to dismiss or by a separate motion which must be filed within thirty days following a dismissal of the action.

*Id.*, 730 So. 2d at 1263 (emphasis added). The only explanation for the Court=s use of that language, however, must be inadvertence, inasmuch as the Court=s clear and exclusive focus was upon a cut-off date for such motions. Yet, one panel of the Second District Court of Appeal, comparing this language to that of Rule 1.530, presumed that the Court must have intended to identify a starting time or it would have used similar language to the other rule. *See Lyn v. Lyn, supra.* Nothing in the

adopting decision or underlying petition, however, supports such presumption.

A new Small Claims Rule, by copying rule 1.525, should not replicate the error in the civil procedure rule. To the contrary, a new rule 7.175 should contain the appropriate language, and rule 1.525 should be corrected to do the same. The undersigned anticipates that the Civil Procedure Rules Committee will be presenting such a correction to the Court in due course, but the failure of such proposal to be presented prior to or contemporaneously with the current proposal before the Court should not result in a replication of the uncorrected civil procedure rule.

## Conclusion

The undersigned supports the enactment of a small claims rule defining the deadline for serving motions for fees and costs, comparable to the civil procedure rule, but only if that deadline is defined in the language of the other rules for post-judgment relief, i.e., Ano later than 30 days after filing of the judgment.@

## Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing was served this 8th day of February, 2005, upon Judge Pauline Drayton, Chair of the Small Claims Rules Committee of The Florida Bar, Duval County Courthouse, 330 E Bay Street, Jacksonville Florida 32202-2921, and John F. Harkness, Jr., Executive Director of The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300.

**BRUCE J. BERMAN**
*bberman@mwe.com*
(Fla. Bar No. 0159280)
McDermott Will & Emery LLP
201 South Biscayne Boulevard, 22nd Floor
Miami, Florida 33131-4336

Tel.: (305) 347-6530
Fax:  (305) 347-6500

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