IN THE FLORIDA SUPREME COURT

SANDRA FROSTI,

Appellant/Petitioner,

v. Case No. SC07-122

LA VERNE CREEL, as personal representative of the estate of WILLIAM H. HOUK,

Appellee/Respondent.

______________________________________/

PETITIONER'S INITIAL BRIEF ON THE MERITS
ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioner, Sandra Frosti, will be referred to as "Frosti". Respondent, Laverne Creel, as personal representative of William Houk will be referred to as "Creel." Rule 1.442 and 1.525, Fla. R. Civ. P. will appear as "R. 1.442" and "R. 1.525" respectively. The decision affirming the trial court Order Denying Plaintiff's Motion for Attorney's Fees, *Frosti v. Creel,* 943 So.2d 1023 (2nd DCA 2006) will appear as *Frosti v. Creel*.

STATEMENT OF CASE AND FACTS

The facts surrounding this appeal are simple and straightforward. Plaintiff ***served*** a proposal for settlement on the defendant in the amount of $17,999 on March 22, 2001 and a Notice of Filing was filed with the Clerk (R-7) specifically as required by the rule, R. 1.442. Long after the offer had expired, a second proposal was ***served*** in the amount of $24,999 on June 3, 2004 with the Notice filed with the Clerk (R-85). A jury trial was held in which a verdict was returned in favor of the Plaintiff in the amount of $94,470.66.

On August 18, 2004 both original proposals were filed for the sole purpose of enforcement and sanction. (R-168) The Notice of Filing contained the following language:

"COMES NOW Plaintiff, SANDRA FROSTI, by and through her undersigned counsel, and gives this its notice that on this date the Proposals for Settlement previously served upon counsel for Defendant, HOUK, as provided in Florida Statutes Section 768.79 and Fla. R. Civ. P. 1.442 are being filed as required by aforesaid Rule and Statute for ***enforcement and sanction.***"

Thereafter, Plaintiff filed a timely Motion for Attorney Fees and Costs pursuant to Florida Statutes Section 768.79 and Fla. R. Civ. P. 1.442 and Florida Statute Section 57.104. A hearing was held on Plaintiff's Motion for Attorney Fees and Costs and an Order entered by the court denying Plaintiff's motion related to fees. It is this Order Denying Plaintiff's Motion for Fees dated June 21, 2005 from which this appeal is taken (R-252-254).

Ms. Frosti appealed to the Second District Court of Appeal which affirmed the trial court's decision. This petition ensued as *Frosti v Creel* is in direct with *Mills v. Martinez, 909 So. 2d 340 (5th DCA 2005).*

The facts also include that an erroneous Judgment that was executed on September 20, 2004 was vacated, due to a failure of the trial court to transmit copies of the judgment to the parties pursuant to Fla. R. Civ. P. 1.080 (h), by Order dated April 7, 2005 (R- 247). A second judgment was entered and again a timely Motion for Attorney Fees and Costs was served. Costs were awarded to the Plaintiff as a result of Plaintiff's timely motion for Attorney Fees and Costs.

SUMMARY OF ARGUMENT

Fla. R. Civ. P. 1.442 "(d) *Service and Filing.* --A proposal shall be served on the party or parties to whom it is made but shall not be filed unless

necessary to enforce the provisions of this rule." Additionally, "(i) *Evidence of Proposal.* -- Evidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions. It is important to note that nothing in either provision speaks to the timing of the filing of the proposals. Clearly, the rule does not address any timing issue, the only directive relates to the ***purpose*** for filing, that purpose being for ***enforcement and sanction***. The proposals for settlement were filed at a time after the proposals had expired and after a jury verdict was returned. It was after the return of the verdict when entitlement had already accrued. The proposals were filed for the express purpose of ***enforcement and sanction***. The language in these portions of the rule have remained unchanged from the time the cause of action accrued until the time enforcement and sanction were sought, in spite of changes that were made to other portions of the rule (R. 1.442 (d) and (i)).

There was simply no violation of any rule or statute and the cases relied on by the court do not apply. Additionally, there was nothing for the court to strictly construe.

STANDARD OF REVIEW

The standard of review is *de novo* review as the issues presented by this appeal are purely legal issues. See *Execu-Tech Bus. Sys. v. New Oji Paper Co.,* 752 So. 2d 582 (Fla.2000).

ARGUMENT

I. THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR ATTORNEY FEES BASED ON PREMATURE FILING OF PROPOSALS FOR SETTLEMENT

The Court erred in relying on *Bottcher v. Walsh,* 843 So. 2d 183 (Fla. 2DCA 2002) and *Browning v. Scott,* 884 So. 2d 298 (2DCA 2004) as neither decision control the issues presented by this appeal. Florida Rule of Civil Procedure 1.442 provides "(d) *Service and Filing.* --A proposal shall be served on the party or parties to whom it is made but shall not be filed unless necessary to enforce the provisions of this rule." Additionally, "(i) *Evidence of Proposal.* -- Evidence of a proposal or acceptance thereof is admissible only in proceedings to enforce an accepted proposal or to determine the imposition of sanctions." It is important to note that nothing in either provision speaks to the timing of the filing of the proposals. Clearly, the rule does not address any timing issue, the only directive relates to the purpose for filing, that purpose being for enforcement and sanction. That is exactly what was done by Frosti, the proposals were filed for ***enforcement and sanction*** after a significant verdict was entered in favor of the Plaintiff.

The cases related to the timing under R. 1.442 all relate to portions of the rule that specify well defined exacting time periods which are clear and unequivocal. For example in *Schussel v. Ladd Hairdressers, Inc., 736 So.*

2d 776 (Fla. 4th DCA 1999) provision required that any offer be made not later than 45 days before trial might begin. The Fourth District Court of Appeal was interpreting a *bar* date for offers set forth in R. 1.442 (b). The rule also provides that a proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant and a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced. The Second district relies on *Schussel* to support its decision in *Bottcher*. The Fourth District held that since the proposal was served in violation of the time requirements of the Rule, that the proposal for settlement was simply unenforceable. There was no way to resolve the timing issue and the time had passed to serve another proposal. The Fourth District did not rule that the proposal was void.

It is difficult to discern where the Second District derived the draconian sanction of rendering a proposal for settlement void as it did in *Frosti v. Creel*, but it is clear that the sanction did not come from *Schussel.* If there were some technical violation of the R. 1.442 by Frosti then the appropriate remedy would have been to strike the proposal form the record, not to render it void. Frosti would have had an opportunity to file the proposal within the period prescribed by the Second District's view, whenever that is.

R. 1.442 also provides that any party seeking sanctions pursuant to applicable Florida law, based on the failure of the proposal's recipient to accept a proposal, shall do so by serving a motion in accordance with R. 1.525. What is clear is that absolutely nothing in either Rule prohibits the filing of the valid proposals for settlement after the return of the jury verdict. Certainly, there are no clearly defined time parameters set forth in R. 1.442 that specifically dictate when a proposal can be or should be filed.

What was the intent of the framers of the Rule when they required that the proposals not be filed when the offer was made? The only logical purpose would be to prevent the finder of fact from discovering what settlement offers have been made so as to prevent them from being influenced by the offers. Additionally, if a proposal was filed before the trial on the merits the press or the general public could access and publish the information and possibly influence the outcome of the case. These dangers are not present after the return of the jury verdict.

Prior versions of the Rule also support this general interpretation. In R. 1.442 (g) (2000), a party seeking sanction must serve a Motion for Fees and Costs **within 30 days after** entry of the judgment in a non-jury action and **the return of the verdict in a jury action**. (emphasis added) Both of

these occasions represent the time after which the finder of fact has finished deliberations and made a final determination. R. 1.442 (2000) did not include any reference to R. 1.525 as the amendment to R. 1.442 and the adoption of R. 1.525 was effective January 1, 2001. Most importantly R. 1.442 (d) and (i) (2000) contain the same language as the current Rule and remain unchanged.

The cases cited by Creel and relied upon by the court merely demonstrate that filing a proposal ***at the time of service is premature***. The trial court in its opinion relied on two cases which are easily distinguished from the case at bar. The trial court's assertion contained in its Order that these cases, *Bottcher* and *Browning*, clearly indicate that a "prejudgment filing" of the proposal will preclude an award of fees is also erroneous, as these cases do not support this conclusion. The trial court and the district court failed to recognize this flaw in the trial court's Order. *Bottcher v. Walsh, 843 So. 2d 183 (Fla. 2DCA 2002)*, while decided in 2002, it involved interpretation of a prior version of R. 1.442 (2000) which required that a party seeking sanction (attorney fees) shall serve a motion within 30 days after the return of the verdict in a jury action. The undisputed facts in *Frosti v. Creel* make it clear that both the proposals for settlement and the initial Motion for Attorney Fees were filed within this time. The trial court is

clearly in error in basing its denial of fees to *Frosti v. Creel* on the *Bottcher* decision. In any event, *Bottcher* does not stand for the proposition that a ***prejudgment*** filing of a proposal for settlement precludes the award of fees. *Bottcher* simply stands for the proposition that a proposal for settlement that is served at the same time it is filed in premature and thus, in the view of the Second District, void.

In *Bottcher* the matter of ***premature filing was conceded*** by Walsh's counsel, as it was without question filed prematurely in violation of the rule. First, it was filed before the offer had expired and second no verdict or judgment had been returned and as such there was absolutely no possible way for it to have been filed for enforcement or sanction. The second case cited by the court is *Browning v. Scott, 884 So. 2d 298 (2DCA 2004)*. The *Browning* case is likewise decided based on the prior version of R. 1.442 (2000) and in that case as in *Bottcher,* Mr. Scott ***conceded that his proposal was filed prematurely.*** Neither *Bottcher* nor *Browning* serves as a proper foundation for denial of attorney fees to Frosti.

Falling afoul of the premature filing *Bottcher* admonition can happen to the most accomplished of practitioners like Creel's Board Certified Civil trial counsel, Jeffrey Adams, Esquire in the instant case. The record herein

reveals that Mr. Adams, like counsel in *Bottcher* and *Browning* filed Creel's proposal at the same time they were served (R-50). In contrast, Frosti properly ***served*** her proposals for settlement within all of the prescribed time deadlines, hoping for early resolution of this matter, but finding none. The proposals were rejected by the Defendant's by the passage of time and they had accrued into a substantive right to recover attorney fees pending only the outcome at trial. (*See, Kaufman v Smith, 693 So. 2d 133 (4DCA 1997).* Frosti plodded through the veritable mine field of changes to the Statute and Rule and case law interpretation which took place from 1996 when the cause of action accrued through 2004 when she was forced to trial which resulted in a favorable verdict of $94,470.66. The verdict was well beyond the amount requested in the $17,999 or $24,999 proposals for settlement she had demanded. She had crossed the finish line and won the race. At that juncture, it was not too early to file a Motion for Attorney Fees, and it was not premature to file the proposals for settlement which outline the basis for an attorney fee award.

The Court Commentary attendant to the adoption of R.1.525 provides, "This rule only establishes a time requirement to serve motions for costs, attorneys' fees, or both and in no way affects or overrules the pleading requirements outlined by this Court in *Stockman v. Downs, 573 So. 2d 835*

(Fla. 1991)." *Stockman,* provides an interesting perspective with regard to when it is appropriate to plead the basis for attorney fees. In its analysis this Court stated, "Our review of the case law leads us to the conclusion that the better view is the one expressed in our earlier cases-a claim for attorney's fees, whether based on statute or contract, must be pled. The fundamental concern is one of notice. Modern pleading requirements serve to notify the opposing party of the claims alleged and prevent unfair surprise. 40 Fla.Jur.2d *Pleadings* § 2 (1982). Raising entitlement to attorney's fees only after judgment fails to serve either of these objectives." While it is not possible to plead the issue of attorney fees based on Fla. Stat. 768.79 or R. 1.442 in the complaint or answer, it appears incumbent to file the statutory basis for attorney fees as soon as possible, based on the principles announced in *Stockman.* Obviously, by filing the proposals for settlement after the verdict was obtained Frosti complied with that mandate and the Defendant should have no cause for complaint. The Court Commentary is also explicit in that R. 1.525 only establishes the time requirements for serving the Motion for Fees and Costs. It does not establish any requirements for filing of proposals for settlement in the court record.

The trial court next relies on *Lyn v. Lyn, 884 So. 2d 181*, which concerns a premature filing of a Motion for Attorneys Fees (not a proposal

for settlement) under R. 1.525 under what this Honorable Court has dubbed a bright-line rule. As this Court is aware, *Lyn* case does not address the issue of filing of an expired proposal for settlement after a jury verdict is returned. Rather, it stands for the proposition that one must file a motion for attorney fees within 30 days after entry of the judgment as is required by R.1.525. It would appear that the *Lyn* line of cases has been implicitly overruled by this Court's discharge of jurisdiction, after accepting jurisdiction, in *Norris v Treadwell*, *934 So. 2d 1207 (2006)* and the adoption of the revised rule which clarified this Court's interpretation of the Rule to mean "no later than". *See* R. 1.525(2006). It would appear that the bright-line that was established by 1.525 is the latest point in time to file such a motion, and not the strict position espoused by the Second District creating a narrow 30-day window in which to file a motion after entry of a judgment.

Bruce J. Berman highlighted the intention of the Civil Procedure Rules Committee in enacting the 2000 amendments, "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 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". Berman goes on to say, that " 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 right to seek fees. Yet, the language of R. 1.525 as adopted (within 30 days of filing of the judgment) had 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, eg 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."

The Fifth District Court of Appeal addressed the issue of "too early" in the case of *Martin Daytona Corporation v. Strickland Construction Services*, *921 So. 2d 1220 (5DCA 2006)*. In that case the Court observed that "Cases decided by the First, Third, and Fourth District Courts construing the initial version of R. 1.525 held that the Rule set an outside deadline for serving a Motion for Attorney's Fees and Costs and that

motions served prior to entry of the judgment were timely. *See Byrne-Henry v. Hertz Corp.,* 927 So.2d 66, 68 (Fla. 3d DCA 2006); *Swift v. Wilcox,* 924 So.2d 885, 887 (Fla. 4th DCA 2006) ("[W]e hold that Rule 1.525 'establishes the latest point at which a prevailing party may serve a motion for fees and costs.' ") (quoting *Norris v. Treadwell,* 907 So.2d 1217, 1218 (Fla. 1st DCA 2005), *review dismissed,* 934 So.2d 1207 (Fla.2006))."

The Second District is the only district that held a contrary view which appears to have been overruled as stated above. The Fifth District took the view that courts are free to consider subsequently enacted legislation in determining the meaning of a statute.

Frosti was caught up in the Second District's restrictive interpretation of R. 1.525 as Judge Rondolino clearly sets forth in his Order, …" the Court finds the motion for fees was invalid and cannot be used to support the prematurely filed Offer of Judgment. As a result, the holdings in *Bottcher* and *Browning* require a rejection of the Plaintiff's claim for fees based upon it." It would appear that had Judge Rondolino had the benefit of the most recent case law and the Committee's intent in adopting the rule that the outcome would have been different.

Clearly, R. 1.442 addresses the issue of enforcement of the sanction through R. 1.525 but neither Rule sets forth when the proposal may be filed. Additionally, the actual filing of the proposal under R. 1.442 section (d) is simply a ministerial act as the Rule further provides under R. 1.442 section (i) that evidence of the proposal is only ***admissible*** only in a proceeding to enforce an accepted proposal or to determine the imposition of sanctions. In Frosti the proposals were properly admitted into evidence in accordance with this Rule at the hearing on the Motion for Attorney Fees that is the subject of this appeal. Frosti's actions were clearly in accord with the provisions of both R. 1.442 and R. 1.525.

Norris v Treadwell, 907 So. 2d 1217 (1DCA 2005), *review dismissed, 934 So. 2d 1207 (Fla. 2006)*, provides the first appellate decision concerning when entitlement to fees begins under Fla. Stat. 768.79 and R. 1.442. *Norris* is a R. 1.525 case, and the district court held, "The party seeking fees may serve a motion as soon as entitlement is established. The motion, however, must be served no later than 30 days after filing of the judgment. Here, the jury verdict triggered entitlement." (*Id.*) While the Court in that opinion acknowledges the conflict with *Swann v. Dinan, 884 So. 2d 398 (2DCA 2004)* on the issues surrounding R. 1.525, the analysis with regard to the issue of entitlement remains unchallenged. The acknowledgement of when

entitlement begins, after the return of the verdict, further bolsters the contention that the filing of the proposals for settlement post verdict was not at all premature. Like *Lyn*, it is difficult to fathom that *Swann* remains viable precedent.

The Fifth District Court of Appeal addressed the issue of premature filing of the proposal for settlement in *Mills v. Martinez, 909 So. 2d 340 (5DCA 2005). Mills* presents another situation where it was ***conceded that the proposal was prematurely filed***. (*Id.)* The proposal was filed some two years before the trial. The *Mills* opinion set forth the following analysis: 'While *Rule 1.442* is punitive in nature, its purpose is to sanction a party who unreasonably refuses to settle by shifting the payment of attorney's fees'. See *Loy v. Leone, 546 So. 2d 1187 (Fla. 5DCA 1989)*. 'Procedural rules should be given a construction calculated to further justice, not to frustrate it.' *Singletary v. State, 322 So. 2d 551 (Fla. 1975)*; see also *Eastwood v. Hall, 258 So. 2d 269 (Fla. 2d DCA 1972)* and Fla. R. Civ. P. 1.010 (2001)(citation added). 'When it appears that rigid enforcement of procedural requirements would defeat the great object for which they were established, the trial judge should relax them, if it can be done without injustice to any of the parties'. *In re Rutherfurd's Estate, 304 So. 2d 517, 520 (4DCA 1974).*

> ‘Generally, where the word 'shall' refers to some required action preceding a possible deprivation of a substantive right, the word is given its literal meaning.’ *Stanford v. State,* 706 So. 2d 900, 902 (Fla. 1st DCA 1998*)* (relying on *S.R. v. State,* 346 So. 2d 1018, 1019 (Fla. 1977*)*, and *Neal v. Bryant,* 149 So. 2d 529, 532 (Fla. 1962*))*. In *Neal*, we explained that in its normal usage, "shall" has a mandatory connotation. Id. Only when a particular provision relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the statute's directions are given merely with a view to the proper, orderly and prompt conduct of business is the provision generally regarded as directory. Id. (quoting *Reid v. Southern Dev. Co.*, 52 Fla. 595, 42 So. 206 (1906)).

DeGregorio v. Balkwill, 853 So. 2d 371, 374 (Fla. 2003) (citations omitted) (emphasis added).

We believe *Mills*' error in prematurely filing her proposal to settle to be such an immaterial matter.” *Mills v. Martinez, 909 So. 2d 340 (5DCA 2005)*.

The *Mills’* court also included a discussion of the federal decisions, “In *United States v. James Daniel Good Real Property, 510 U.S. 43, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993)*, the Supreme Court stated that ‘if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.’ *Id. at 63* (citations omitted). The Court reasoned that, when Congress had included various "promptness" requirements in certain statutes but included no penalty for failure to meet those

requirements, the Court would not impose its own sanction of dismissal. *Id. at 64-65*. n4 We find that analysis to be compelling here, because it furthers, not frustrates, the purpose of the rule and statute. We believe *Mills's* violation of *R. 1.442(d)* was immaterial and certainly not prejudicial. The trial court followed *Bottche*r, as it was required to do. However, we disagree with *Bottcher* because such an interpretation of the rule defeats its very purpose." *Mills v. Martinez, 909 So. 2d 340 (5DCA 2005).*

Petitioner acknowledges the conflict with *Bottcher* in some of the cited cases, but the facts in the present appeal do not conflict with either *Bottcher* or the R. 1.525 bright-line cases. Likewise, the only appellate level decision that is controlling holds entitlement to attorney fees begins after the jury returns its verdict. *Norris v Treadwell, 907 So. 2d 1217 (1DCA 2005).* Finally, the reasoning in *Mills v. Martinez, 909 So. 2d 340 (5DCA 2005)* represents the better view of when entitlement to fees based on a proposal for settlement begins.

The trial court is also incorrect in the assertion that the Motion for Attorney Fees and Costs filed on September 13, 2004 was premature (R-184).

For all of the reasons cited herein it is respectfully submitted that the trial court and the District Court erred in denying Plaintiff's Motion for Attorney Fees and Appellant

requests reversal of this Order Denying Plaintiff's Motion for Fees and remand of this action to the trial court with direction to enter a judgment awarding attorney's fees to Frosti.

CONCLUSION

For the reasons stated, Sandra Frosti, Petitioner respectfully requests this Honorable Court reverse the Order Striking the Plaintiff's proposals for settlement and reverse the Order Denying Plaintiff's Motion for Attorney Fees and to remand the matter to the trial court with direction to award the Petitioner Attorney's Fees and Appellate Attorney's Fees attendant to this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Scot Samis, Esquire and Jennifer Card, Esquire P.O. Box 1511 St. Petersburg, Florida 33731, this 30th day of July 2007.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief of Appellee satisfies the requirements of Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2) and is submitted in Times New Roman 14-point font.

WILLIAM J. CAPITO