IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT

L.T. NO.: 17-CA-002335
DCA CASE NO.: 2D20–3663

JOSHUA MADDOX,

Appellant,

v.

BRADY J. TROMBETTA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT JOSHUA M . MADDOX

BOYD & JENERETTE, PA
KANSAS R. GOODEN
Florida Bar No.: 58707
kgooden@boydjen.com
11767 S. Dixie Hwy., #274
Miami, FL 33156
Tel: (305) 537-1238
JOANNA S. BRUNELL
Florida Bar No. 120077
jbrunell@boydjen.com
201 North Hogan Street, Suite 400
Jacksonville, Florida 32202
Tel: (904) 353-6241
Attorneys for Appellant

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INTRODUCTION

This case involves the interplay between section 768.79, Florida Statutes, and section 57.041, Florida Statutes. Section 768.79, Florida Statutes, controls when these two provisions collide. A party who recovers, but fails to meet the threshold under the offer of judgment statute, may not recover taxable costs incurred after the date of the proposal for settlement.

In its decision, the trial court disregarded binding precedent from the Florida Supreme Court and this Court addressing this interplay. It instead awarded Trombetta all of her taxable costs for the entire action. As a result, this Court should reverse and remand with directions to correct the calculation of the judgment.

STATEMENT OF THE CASE AND FACTS

This appeal arises from an April 2016 automobile accident between Trombetta and Maddox. (R. 14). In March 2017, Trombetta filed suit against Maddox for negligence and sought damages resulting from the accident. (R. 14).

Proposals For Settlement

Before trial, Maddox served two proposals for settlement on Trombetta pursuant to section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442. (R. 313-18). On November 20, 2017, Maddox served one for $30,000.00. (R. 313-14). On March 18, 2019, Maddox served another for $40,000. (R. 315-18). Trombetta did not accept either proposal. (R. 314-15).

Verdict

After a jury trial, the jury entered a verdict in the amount of $23,249.58 in favor of Trombetta. (R. 282). The verdict consisted of $23,249.58 for past medical expenses, $0.00 for future medical expenses, and $0.00 in lost income. (R. 282-83). Because the jury found Trombetta suffered no permanent injury, no damages were awarded for pain and suffering. (R. 282-83).

Maddox's Motion For Setoffs

As agreed upon by the parties pretrial, the issue of setoffs was handled post-trial. (R. 249). Maddox requested following amounts be set off from the verdict, reducing the net verdict from $23,249.58 to $12,924.47:

$8,703.55	Personal injury protection (PIP) benefits paid by or on behalf of GEICO for Plaintiff's benefit.
$714.87	Write-off from 2016 portion of Lakewood Ranch Chiropractic bill.

$838.21	Adjustment/credit from 2017/2018 portion of Lake Ranch Chiropractic bill.
$68.48	Adjustment from Dr. Robert Ford from bill from May 12, 2016 visit.
$10,325.11	**Total setoffs**

(R. 309-10).

At hearing, Trombetta agreed Maddox was "definitely" entitled to setoffs. (R. 507). The trial court granted Maddox's motion for setoffs, finding that after setoffs, the net verdict was reduced to $12,924.47. (R. 439).

Motions For Attorney's Fees And Costs

Trombetta moved to tax prevailing party costs under section 57.041, Florida Statutes. (R. 310-12). On the other hand, Maddox moved for attorney's fees and costs under section 768.79, Florida Statutes, based on the proposals for settlement. (R. 334.) These motions were addressed at a series of hearings between June 2019 and November 2020.

In June 2019, Trombetta acknowledged she had to obtain a judgment of at least $22,500 (25% less than Maddox's offer of $30,000) to avoid triggering costs and attorney's fees under section 768.79, Florida Statutes. (R. 508). She asserted that when the net verdict was added to her total taxable costs for the entire case, she would meet this threshold. (R. 508).

In response, Maddox explained that under White v. Steak & Ale of Fla., 816 So. 2d 546 (Fla. 2002), the "judgment obtained" is calculated by adding

the net verdict and only the taxable costs incurred up to the date of the proposal for settlement. (R. 348; 509-10). The taxable costs reflected on Trombetta's affidavit up to the November 20, 2017 proposal for settlement was at most $1,621.86.[1] (R. 509). As a result, the "judgment obtained" was between $14,000 and $15,000—well-below the necessary threshold for Trombetta to avoid attorney's fees and costs. (R. 510). Maddox also pointed out that several of the costs listed, such as long-distance telephone calls, postage, fax transmissions, delivery service, and computer research, were not properly taxable under the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions. (R. 335-46; 348-49; 513).

After this hearing, the trial court granted Maddox's motion for attorney's fees and costs under section 768.79, Florida Statutes. (R. 437-438). The order provides:

> Only costs incurred by Plaintiff up to the date of the offer of judgment are included for the purposes of calculating the amount of Plaintiff's "judgment obtained." *See Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204, 214 (Fla. 2012); *White v. Steak & Ale of Fla.*, 816 So. 2d 546, 550 (Fla. 2002). Thus, Plaintiff obtained a judgment less than 25% of Defendant's Proposal for Settlement. Accordingly, Defendant is entitled to his attorney's fees incurred from the time of serving his first Proposal for Settlement on November 20, 2017, as well as taxable costs.

[1] This number even included several non-taxable costs.

(R. 437-38). The court reserved jurisdiction as to amounts. (R. 437-38).

Nevertheless, the trial court also granted Trombetta's motion for taxable costs. (R. 442). The court requested the Plaintiff serve an amended summary omitting items which are not taxable under the Guidelines for Taxable Costs. (R. 442). Trombetta then filed an amended affidavit, which included costs incurred after November 20, 2017. (R. 444-46).

At hearing in July 2020, Maddox again argued that Trombetta should only be awarded taxable costs up to the date of the first offer. (R. 462-64). Maddox noted that—once the non-taxable costs were omitted—this would be $919.75. (R. 462). Maddox pointed to the following authorities supporting his argument:

- White v. Steak & Ale of Fla., 816 So. 2d 546 (Fla. 2002).
- Goode v. Udhwani, 648 So. 2d 247 (Fla. 4th DCA 1994).
- Dozier v. City of St. Petersburg, 702 So. 2d 593 (Fla. 2d DCA 1997).

(R. 462-64). Nonetheless, the trial court awarded Trombetta $28,486.59 in taxable costs. (R. 450; 466).

Motion For Reconsideration And Clarification

Maddox sought reconsideration and clarification because the order conflicted with binding precedent. (R. 455-45). Maddox emphasized this Court's decision in Mincin v. Short, 662 So. 2d 1323 (Fla. 2d DCA 1995),

which held that a plaintiff who recovers taxable costs as a prevailing party under section 57.041, but whose judgment obtained is at least 25% less than a defendant's offer of judgment under section 768.79, may not recover taxable costs incurred after the date of the offer. (R. 455). That is, when section 57.041 and 768.79 are at odds, the latter controls. (R. 455). Thus, Maddox asked the court to clarify and reconsider its ruling, and to find that he was entitled to his taxable costs and fees incurred from November 20, 2017, while Trombetta was entitled to her taxable costs only up to that date. (R. 451-55). Trombetta's taxable costs up to November 20, 2017, were $919.75. (R. 446; 456).

At the hearing, the trial court indicated it would "stick to [its] guns," but having read more of the case law, it could "see why there's some confusion for sure." (R. 476-77). While Maddox again pointed to this Court's binding precedent in Mincin, the trial court indicated it believed Mincin had been overruled by the Florida Supreme Court in White. (R. 481-82).

The trial court indicated that in its view, while only the pre-offer taxable costs are added to the net verdict for determining the "judgment obtained" under the offer of judgment statute, the plaintiff nonetheless recovers all of his or her taxable costs. (R. 485-87). Thus, the court indicated that while it still awarded Maddox his attorney's fees and costs, it was denying the motion

for reconsideration and clarification and was awarding Trombetta all of her taxable costs incurred throughout the case, a total of $28,486.59. (R. 486-87).

Final Judgment

After one additional hearing to determine the amount of Maddox's fees and costs, which Trombetta agreed totaled $29,797.43, the court entered a final judgment in favor of Trombetta in the amount of $11,613.63. (R. 472; 499; 559-60). This amount was calculated as follows: Net verdict of $12,924.47 + Trombetta's total costs $28,486.59 –Maddox's fees and costs $29.797.43. (R. 472; 499; 559-60). This appeal follows. (R. 552).

ISSUE ON APPEAL

Whether the trial court erroneously awarded Trombetta's taxable costs incurred after the date of Maddox's proposal for settlement, where Maddox was entitled to attorney's fees and costs under section 768.79, Florida Statutes.

SUMMARY OF ARGUMENT

The trial court erred in awarding Trombetta all of her taxable costs, including those incurred after Maddox's proposal for settlement. Under binding precedent from the Florida Supreme Court and this Court, the offer of judgment statute controls over the taxation of costs statute. A plaintiff who recovers a favorable verdict, but fails to exceed the threshold under the offer of judgment statute, is only entitled to their taxable costs up to the date of the proposal for settlement. The defendant then is entitled to attorney's fees and costs from the date of the proposal for settlement. Because the trial court erroneously awarded Trombetta all of her taxable costs, the calculation of the final judgment is incorrect and must be reversed and remanded for a corrected final judgment.

STANDARD OF REVIEW

Since this case involves statutory interpretation and a pure question of law, this Court's review is de novo. Frosti v. Creel, 979 So. 2d 912, 915 (Fla. 2008); Cornfeld v. Plaza of the Ams. Club, Inc., 306 So. 3d 1136, 1139 (Fla. 3d DCA 2020); Miller v. Fla. Ins. Guar. Ass'n, 200 So. 3d 200, 203 (Fla. 2d DCA 2016).

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY AWARDED TROMBETTA ALL OF HER TAXABLE COSTS DESPITE MADDOX'S ENTITLEMENT TO FEES AND COSTS UNDER SECTION 768.79, FLORIDA STATUTES.

As noted above, this case involves the interplay between section 57.041, Florida Statutes, and section 768.79, Florida Statutes.

Section 768.79, Florida Statutes, provides in pertinent part:

> 1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award.
> . . .
> (6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

> (a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff

§ 768.79(1), (6), Fla. Stat.

"[S]ection 768.79 generally creates a right to recover reasonable costs and attorney fees when a party has satisfied the terms of the statute and rule. It provides a sanction against a party who unreasonably rejects a settlement offer." Attorneys' Title Ins. Fund, Inc. v. Gorka, 36 So. 3d 646, 649 (Fla. 2010). Accord § 768.79(1), Fla Stat. (describing statute as a penalty). "This is a sanction levied against the rejecting party for unnecessarily continuing the litigation." Sarkis v. Allstate Ins. Co., 863 So. 2d 210, 222 (Fla. 2003).

On the other hand, section 57.041, Florida Statutes, provides: "The party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment. . . ." § 57.041(1), Fla. Stat. Notably, it is the party who recovers a *judgment* that is entitled to costs. The statute

does not state the prevailing party at trial or the party who obtains a verdict. See Wolfe v. Culpepper Constructors, Inc., 104 So. 3d 1132, 1137 (Fla. 2d DCA 2012).

Several courts, including this one, have interpreted the interplay between the two statutes. For instance, in White v. Steak & Ale of Fla., 816 So. 2d 546 (Fla. 2002), the Court explained:

> Pursuant to this statutory scheme, if a defendant properly serves an offer on a plaintiff who rejects the offer, then an amount 25% less than the offered amount constitutes the judgment threshold. If the plaintiff later obtains a judgment that is at or below this threshold, then the defendant may recover any attorneys' fees and taxable costs incurred after the plaintiff rejected the offer, and the ***plaintiff is entitled only to the taxable costs incurred before receiving the offer***.

Id. at 549 (emphasis added).

In Goode v. Udhwani, 648 So. 2d 247 (Fla. 4th DCA 1994), the Fourth District reversed an order awarding costs to the Appellee (i.e. plaintiff) for those incurred after service of the proposal for settlement. Id. at 248. The Court held that section 768.79, Florida Statutes, "controls over" section 57.041, Florida Statutes. Id. The Court explained:

> Appellee states that the statutes must be read in pari materia, which she contends leads to the result that while appellant can recover her costs from the date of the offer of judgment through the trial, appellee can recover all of her costs through trial. We think that such a result was not intended by the legislature. The purpose of section 768.79 was to serve as a penalty if the parties did not act reasonably and in good faith in settling lawsuits. The

> statutory language even refers to "the penalties of this section." To allow a plaintiff who has not been successful under section 768.79 to still recover costs incurred after the offer was filed would negate at least part of the penalty which the legislature intended to impose.

Id. (citations omitted).

In Mincin v. Short, 662 So. 2d 1323 (Fla. 2d DCA 1995)[2], the plaintiff obtained a verdict that did not meet the required threshold of the defendant's proposal for settlement. Id. at 1324. However, the trial court denied the defendant's motion for attorney's fees and costs and awarded the plaintiff all of her taxable costs for the entire action. Id. On appeal, this Court relied on Goode and held that the defendant was entitled to attorney's fees and costs. Id. at 1325. The Court also held that the plaintiff was not entitled to taxable costs which occurred after the proposal for settlement was served. Id. See also Dozier v. City of St. Petersburg, 702 So. 2d 593, 594 (Fla. 2d DCA 1997) ("Both Mincin and Goode involved successful offers of judgment tendered by the defendants because the results obtained were at least twenty-five percent less than the defendants' offers. Thus, as to costs, section 768.79 would control over section 57.041 in those cases.").

[2] The Florida Supreme Court overruled Mincin *in part* on different grounds—that the "judgment obtained" under section 768.79, Florida Statutes, is limited to the amount of damages awarded by the jury. White v. Steak & Ale of Fla., 816 So. 2d 546, 550 (Fla. 2002). When a case is overruled in part on unrelated grounds, the remainder of its ruling remains good law.

Likewise, in Horn v. Corkland Corp., 518 So. 2d 418 (Fla. 2d DCA 1988), this Court held that a plaintiff is only entitled to taxable costs up to the date of the proposal for settlement and the defendant is entitled to those incurred after the proposal for settlement is served.[3]

In this case, after applicable setoffs, the verdict was reduced to $12,924.47. The trial court was then required to look at plaintiff's pre-offer costs, which were $919.75. As a result, the judgment obtained was $13,844.22. White, 816 So. 2d at 551 ("Thus, in calculating the 'judgment obtained' for purposes of determining whether the party who made the offer is entitled to attorneys' fees, the court must determine the total net judgment, which includes the plaintiff's taxable costs up to the date of the offer. . . ."). This was well-below the threshold required for Trombetta to "beat" Maddox's proposal for settlement.

Thus, the trial court was required to award Maddox attorney's fees and costs from the date of the first proposal for settlement. Trombetta did not dispute reasonableness or the hourly rate, and agreed to an amount of $29,797.43. (R. 559-60).

[3] This case was decided under a prior version of Florida Rule of Civil Procedure 1.442.

And, this is where the trial court went astray. The trial court should have offset $13,844.22 (verdict – setoff + preoffer taxable costs) with $29,797.43, the amount of fees and costs awarded to Maddox (and incurred after the proposal for settlement). A judgment of $15,953.21 in favor of Maddox should have been entered accordingly.

This is what subsection (6) of section 768.79, Florida Statutes, requires. § 768.79(6), Fla. Stat. It is also what the Florida Supreme Court and this Court requires. See White, 816 So. 2d at 549; Mincin, 662 So. 2d at 1324-25. Section 768.79, Florida Statutes, controls here.

Instead, the trial court failed to follow the text of section 768.79, Florida Statutes, and binding precedent from the Florida Supreme Court and this Court. It awarded Trombetta all of her taxable cost from the inception of the lawsuit through trial. The trial court then offset those two amounts. This resulted in a judgment in favor of Trombetta for $11,613.63. This created a substantial windfall for Trombetta.

Accordingly, this Court should reverse and remand with directions for entry of judgment in favor of Maddox in the amount of $15,953.21.

CONCLUSION

The trial court erroneously awarded Trombetta all of her taxable incurred after service of the proposal for settlement. Trombetta was only entitled to pre-offer taxable costs.

WHEREFORE, Appellant JOSHUA MADDOX respectfully requests this Court to reverse and remand with directions for entry of judgment in favor of Maddox in the amount of $15,953.21.

BOYD & JENERETTE, P.A.

/s/ Kansas R. Gooden
KANSAS R. GOODEN
Florida Bar No. 058707
kgooden@boydjen.com
11767 S. Dixie Hwy, #274
Miami, FL 33156
Tel: (305) 537-1238
JOANNA S. BRUNELL
Florida Bar No. 120077
jbrunell@boydjen.com
201 North Hogan Street, Suite 400
Jacksonville, Florida 32202
Tel: (904) 353-6241
Counsel for Appellant

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished via EPORTAL to: **Christopher Spath, Esq.,** Morgan & Morgan, Tampa, P.A., 201 N. Franklin St., 7th Floor, Tampa, FL 33602 (cspath@ForThePeople.com); **Geogymon George, Esq.,** Law Offices of Robert J. Smith, 101 E. Kennedy Blvd. Suite 2125, Tampa, FL 33602, tampalegal@allstate.com, tampalegal@allstate.com, **Brian J. Lee, Esquire**, Morgan & Morgan, P.A., 76 S Laura St, Suite 1100, Jacksonville, FL 32202, blee@forthepeople.com, this 3rd day of May, 2021.

/s/ Kansas R. Gooden
KANSAS R. GOODEN
JOANNA S. BRUNELL

CERTIFICATE OF COMPLIANCE

In accordance with Florida Rule of Appellate Procedure Rule 9.210(a)(2)(B), the undersigned counsel hereby certifies that this brief complies with the font and word requirements of the Rule: Arial 14-point font and does not exceed 13,000 words.

/s/ Kansas R. Gooden
KANSAS R. GOODEN
JOANNA S. BRUNELL