DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JOSHUA MADDOX,

Appellant,

v.

BRADY J. TROMBETTA,

Appellee.

No. 2D20-3663

January 5, 2022

Appeal from the Circuit Court for Hillsborough County; Paul L. Huey, Judge.

Kansas R. Gooden of Boyd & Jenerette, P.A., Miami; and Joanna S. Brunell of Boyd & Jenerette, P.A., Jacksonville, for Appellant.

Brian J. Lee of Morgan & Morgan, PLLC, Jacksonville, for Appellee.

MORRIS, Chief Judge.

Joshua Maddox appeals a final order entered in favor of Brady J. Trombetta in a negligence action. On appeal, Maddox argues that the trial court erred by awarding Trombetta all of his requested

costs despite the fact that Trombetta obtained an underlying judgment that was at least 25 percent less than the amount that Maddox had offered to settle the case for in two offers of judgment. Maddox contends that Trombetta should have only been awarded his costs that were incurred up until the first offer of judgment was made, rather than all of the costs that Trombetta incurred up until the underlying judgment was rendered. We agree and therefore reverse.

Because the issue of whether a plaintiff who recovers a judgment that is at least 25 percent less than an offer made by a defendant can recover all of their (the plaintiff's) costs versus only the costs incurred until the offers of judgment were made is a purely legal issue, we employ de novo review. *Frosti v. Creel*, 979 So. 2d 912, 915 (Fla. 2008).

Section 768.79(1), Florida Statutes (2017), provides in relevant part that if a defendant files an offer of judgment that is not accepted by the plaintiff within thirty days, the defendant is entitled to reasonable costs and attorneys' fees "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." The

purpose of section 768.79 is to promote settlements by sanctioning parties who unreasonably reject settlement offers and unnecessarily continue the litigation. *See Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 649-50 (Fla. 2010); *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 222 (Fla. 2003).

Section 57.041(1), Florida Statutes (2017), provides in relevant part that "[t]he party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment."

The dispute in this case focuses on the interplay between the two statutes. Florida courts have explained that where a defendant makes a successful offer of judgment, i.e., where a plaintiff recovers a judgment that is at least 25 percent less than what was offered by the defendant, "section 768.79 . . . control[s] over section 57.041." *Dozier v. City of St. Petersburg*, 702 So. 2d 593, 594 (Fla. 2d DCA 1997); *see also Goode v. Udhwani*, 648 So. 2d 247, 248 (Fla. 4th DCA 1994) (on motion for rehearing). When the two statutes are applied in tandem, the focus is on the defendant's entitlement to his or her reasonable costs and attorneys' fees "from the date of filing of the offer," § 768.79(1), rather than the plaintiff's entitlement to all

his or her costs pursuant to section 57.041. Implicitly then, if the defendant is entitled to his or her costs incurred after the offer was filed, the plaintiff is limited to recovering costs that were incurred prior to the offer being made.

Case law supports this interpretation of section 768.79. In *White v. Steak and Ale of Fla., Inc.*, 816 So. 2d 546 (Fla. 2002), the court was presented with a slightly different issue: whether, under the offer of judgment statute, pre-offer taxable costs were included in the "judgment obtained" for purposes of determining whether the party who made an offer of judgment was entitled to attorneys' fees. However, in analyzing that issue, the court explained:

> Pursuant to th[e] statutory scheme [set forth in section 768.79], 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). The court also explained that when a party determines both the amount of the offer and whether to accept it, the party must also evaluate "not only the amount of the

potential jury verdict, but also any taxable costs, attorneys' fees, and prejudgment interest to which the party would be entitled if the trial court entered the judgment at the time of the offer or demand." *Id.* at 550 (emphasis added). Ultimately, the court concluded that the "judgment obtained" included the net judgment for damages and any attorneys' fees and taxable costs that "could have been included in a final judgment if such final judgment was entered on the date of the offer." *Id.*

We acknowledge that at least one court has criticized the Florida Supreme Court's definition of "judgment obtained" and the application of *White* to cases involving the question of whether post-settlement costs should be included in a "judgment obtained" because they were not part of the offer. *See Petri Positive Pest Control, Inc. v. CCM Condo. Ass'n*, 271 So. 3d 1001, 1006 (Fla. 4th DCA 2019); *Antunez v. Whitfield*, 980 So. 2d 1175, 1180 (Fla. 4th DCA 2008). However, both before and after the issuance of *White*, this court and others have consistently applied the principle that a plaintiff is not entitled to taxable costs incurred after the defendant files an offer of judgment. *See Mincin v. Short*, 662 So. 2d 1323, 1325 (Fla. 2d DCA 1995) (agreeing with the argument that plaintiff

was not entitled to costs incurred after offer of judgment served), *overruled on other grounds by White*, 816 So. 2d at 551; *R.J. Reynolds Tobacco Co. v. Lewis*, 275 So. 3d 747, 749 (Fla. 5th DCA 2019) (citing *White* for the proposition that "a court may only properly consider those costs that were already taxable on the date the [offer of judgment] was filed"). Even the Fourth District at one time opined that "[t]o 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 [when it enacted section 768.79]." *Goode*, 648 So. 2d at 248.

Further, when the Florida Supreme Court recently reviewed the *Petri* case, it explained in detail how, after the issuance of *White*, "the district courts have consistently excluded amounts that were not present on the date of the offer." *CCM Condo. Ass'n v. Petri Positive Pest Control, Inc.*, No. SC19-861, 2021 WL 4096926 at *3 (Fla. Sept. 9, 2021) (citing cases). The court rejected the argument that the *White* formula was "clearly erroneous," and it declined to recede from it. *Id.* at *4.

Here, the trial court should have applied the correct computation and taken Trombetta's underlying judgment amount after applicable setoffs and added his pre-offer costs. The sum would be well below the 25 percent threshold of Maddox's offers of judgment. Offsetting that sum with the undisputed amount of Maddox's post-offer attorneys' fees and costs would have resulted in Maddox being awarded a judgment in his favor. Instead, the trial court awarded Trombetta all of his costs incurred both prior to and after the offers of judgment were filed. Thus the numbers appeared to be in favor of Trombetta which resulted in his obtaining a final judgment. Because the trial court failed to follow binding case law on how to compute the cost award, the judgment was erroneous and must be reversed and remanded for a proper computation.

Reversed and remanded.

NORTHCUTT and SILBERMAN, JJ., Concur.

Opinion subject to revision prior to official publication.