# In the District Court of Appeal
# Fourth District of Florida

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CASE NO. [redacted]

(Circuit Court Case No. [redacted]

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[redacted] and [redacted]

Appellants,

v.

CHASE BANK USA NA, et al.,

Appellees.

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ON APPEAL FROM THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

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## INITIAL BRIEF OF APPELLANT

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Respectfully submitted,

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## STATEMENT OF THE CASE AND FACTS

### I. Nature of the Case

This is an action brought by Plaintiff, CHASE BANK USA, N.A. to foreclose a mortgage on the home of Defendants, [redacted] and [redacted] [redacted][1]

### II. The Course of the Proceedings

Approximately six months after Plaintiff filed its Complaint, Defendants moved to dismiss the case as a sanction for litigation misconduct.[2] Among other things, Defendants demonstrated that Plaintiff's counsel sent a letter directly to Defendants—while they were represented by counsel—which encouraged them to telephone Plaintiff's counsel to discuss the debt that is the subject of this litigation. The letter falsely stated that Defendants' home was scheduled for sale during the year-end holiday season (although no judgment has ever been entered against Defendants).[3] During the hearing on Defendants' Motion for Sanctions of Dismissal, Plaintiff admitted the substance of these accusations.[4]

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[1] Appellants' Appendix to Initial Brief ("App."), Exhibit ("Exh.") 1 (Amended Complaint).
[2] App. Exh. 2 (Defendants' Motion for Sanction of Dismissal, with Exhibits A, B and C).
[3] *Id*.
[4] App. Exh. 3 (07/27/09 Hearing Transcript, p. 13, line 20 – p. 15, line 14; p. 15, line 17 – p. 16, line 4).

At the hearing, the trial court declined to enter the sanction Defendants had requested—dismissal of the action with prejudice.[5] Instead, it fashioned its own, lesser sanction of dismissal of the case without prejudice:

> The Court has reviewed Defendant's motion for sanction of dismissal with prejudice or in the alternative motion for summary judgment. The Court has, in fact, also reviewed Plaintiff's affidavit in opposition to the motion for sanctions of dismissal. I understand that came in over objections, but the Court will consider the affidavit. And the Court has also reviewed Plaintiff's response to Defendant's motion for sanctions of dismissal with prejudice or in the alternative motion for summary judgment, along with the case law attached.
>
> What the Court's going to do at this point in time is the Court's going to dismiss it without prejudice. The Court is going to dismiss the case without prejudice. If it needs to be refiled, it can be refiled at the appropriate point in time. But the Court is going to, as a sanction, dismiss the case without prejudice. So that's the order.[6]

The written order, completed contemporaneously, expressly states that the "Case is dismissed without prejudice." The order contains no indication that the Plaintiff was granted leave to amend its pleading.[7] The docket entry for this order, and the overall status of the case, were noted by the Clerk as "DISPOSED BY JUDGE."[8] The Plaintiff did not move for rehearing of this decision, nor did it seek appellate review.

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[5] App. Exh. 4 (Order on Defendants' Motion for Sanction of Dismissal) and Exh. 3 (07/27/09 Hearing Transcript).
[6] App. Exh. 3 (07/27/09 Hearing Transcript, at p. 20, lines 4 – 22).
[7] App. Exh. 5 (Defendants' Motion for Fees and Costs).
[8] App. Exhibit 6 (Court Docket).

The Defendants then moved, under Rules 1.525 and 1.420(d) Fla. R. Civ. P. and § 57.041 Florida Statutes (2009), for attorney's fees and costs based upon the prevailing party fee-shifting provisions contained in the promissory note and mortgage, as well as, § 57.105(7), Florida Statutes (2008).[9]

Plaintiff argued that Defendants' motion was groundless and should be stricken because there was no judgment (of dismissal) which would trigger Rule 1.525.[10] Citing to case law in which a complaint had been dismissed with leave to amend, Plaintiff argued that the "without prejudice" language "allowed Plaintiff to continue prosecuting this case if it so chooses."[11] As such, claimed Plaintiff, there was no adjudication (which Plaintiff argued must be an adjudication "on the merits") which meant that Defendants could not be a prevailing party.[12]

Plaintiff also argued that, because Rule 1.420(d) only applies to actions dismissed under that Rule, a dismissal for sanctions (not mentioned in the Rule) would "not warrant recovery of costs."[13] And finally, Plaintiff also argued that, "while this Court did state that it dismissed Plaintiff's Complaint as a sanction…"

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[9] App. Exh. 5 (Defendants' Motion for Attorneys' Fees and Costs).
[10] App. Exh. 7 (Plaintiff's Response in Opposition to Motion for Attorneys' Fees and Costs), p. 2.
[11] *Id*. at 2.
[12] *Id*. at 5.
[13] *Id*. at 3.

it actually dismissed "because it knew that the [Defendants] had agreed to enter a loan modification agreement with Plaintiff."[14]

At the hearing, Plaintiff argued that the dismissal was merely an order, not a final appealable judgment of dismissal.[15] The trial court appeared to deny fees on that ground, although it never stated that such an interpretation of the order was in accord with its original intent:

> MR. IMMEL [defense counsel]: … The judgment is entered.
>
> THE COURT: Where?
>
> MR. IMMEL: By the order.
>
> THE COURT: Here is the court file. I want you to show me where the final judgment is.
>
> MR. IMMEL: The clerk has it listed as disposed of by judge.
>
> THE COURT: Does it have final judgment anywhere in there? I'm giving you the court file. Show me the judgment in this case.
>
> MR. IMMEL: I mean it amounts to a judgment.
>
> THE COURT: Show me the judgment. Do you have a judgment?
>
> MR. IMMEL: The order amounts to a judgment is what we're saying, Your Honor.
>
> THE COURT: And what's your basis for that?
>
> MR. IMMEL: Because it ended the case.
>
> THE COURT: It was without prejudice, right?

[14] *Id*. at 2.
[15] App. Exh. 8 (Transcript of Hearing January 21, 2010), p. 9.

> MR. IMMEL: So they can refile it. But in cases -- just because they can refile a case doesn't mean that we didn't prevail in this particular case. This case is over. We had to litigate the case. We ended up getting it dismissed. They didn't get the affirmative relief they were seeking. Therefore, we're the prevailing party. The case is over so I mean it amounts to a judgment.
>
> THE COURT: Where is the judgment? I need you to show me the judgment.
>
> MR. IMMEL: There isn't a specific judgment. The court order amounts to a judgment.
>
> THE COURT: Any additional argument, Mr. Immel?
>
> MR. IMMEL: No, Your Honor.
>
> THE COURT: I'm going to deny the motion. Thank you. Prepare an order, Miss Friedman.[16]

## III. Disposition in the Lower Tribunal

The trial court rendered an order that denied Defendants' Motion for Attorneys' Fees and Costs,[17] which is the order from which this appeal is taken.

[16] *Id.* 18-21.
[17] App. Exh. 9 (Order Denying Fees and Costs).

## SUMMARY OF THE ARGUMENT

In this case, it was undisputed that the promissory note and mortgage instruments sued upon by Plaintiff provided for recovery of attorney's fees and costs to the prevailing party, by operation of § 57.105(7), Florida Statutes (2008). Defendants were the prevailing party when they obtained an order which dismissed Plaintiff's case without prejudice to re-file (and did not merely dismiss the complaint with leave to amend). The order was a judgment of dismissal that ended this particular civil action between these parties in the trial court.

Neither the phrase "with prejudice" written on the dismissal order nor an adjudication on the merits was necessary for Defendants to be the prevailing party for purposes of an award of attorney's fees and costs.

Accordingly, this Court should reverse and vacate the lower court's ruling denying Defendants' entitlement to attorney's fees and costs. The Court should also direct the entry of an order granting Defendants' entitlement to attorney's fees and costs.

## STANDARD OF REVIEW

The threshold legal issue concerning entitlement to attorney's fees is reviewed *de novo*. *First Union Nat. Bank v. Turney*, 839 So. 2d 774, 776 (Fla. 1st DCA 2003) . Whether an attorney fee claim falls under a rule or an exception to that rule presents a legal issue subject to *de novo* review. *Save on Cleaners of Pembroke II Inc. v. Verde Pines City Ctr. Plaza LLC*, 14 So. 3d 295, 297, n. 4 (Fla. 4th DCA 2009). Here, the threshold legal issue is whether this case presents an exception to the rule that, when a statute or contract provides fees to the prevailing party and the case is dismissed without prejudice, a defendant is the prevailing party entitled to collect such fees. *See Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A.*, 971 So. 2d 955, 956 (Fla. 5th DCA 2007) (When entitlement to fees is based on the interpretation of contractual provisions, or a statute, as a pure matter of law, the appellate court undertakes a *de novo* review.).

While an award of costs is sometimes reviewed under an abuse of discretion standard (*see Wyatt v. Milner Document Prods., Inc.*, 932 So. 2d 487, 489 (Fla. 4th DCA 2006)) those decisions involve cases where, unlike this case, it was unclear which party prevailed. *See Sorrentino v. River Run Condominium Ass'n*, 925 So. 2d 1060 (Fla. 5th DCA 2006) (abuse of discretion standard used for cases "where both sides fought to a draw and neither won or lost").

## JURISDICTION

### I. This Court Has Jurisdiction to Review the Order Denying Attorney's Fees Because It Was Subsequent to a Final Order.

Plaintiff's primary argument against the award of attorney's fees was that Defendants cannot be prevailing parties in an action that had not yet ended. According to Plaintiff, the trial court's order dismissing Plaintiff's case was not a final "judgment."[18]

If Plaintiff were correct, and no judgment of dismissal had ever been entered, the order denying fees would be merely interlocutory and this Court would have no jurisdiction to entertain this appeal. But because Plaintiff was not correct, and the judgment of dismissal was final and appealable, this Court has jurisdiction to review the subsequent attorney fee order.

#### A. The trial court's order was a final judgment of dismissal because it did not grant leave to amend the complaint.

It is beyond dispute that a dismissal need not be "with prejudice" to be final and appealable. *Silvers v. Wal-Mart Stores, Inc.*, 763 So. 2d 1086, 1086 (Fla. 4th DCA 1999) (denying motion to dismiss appeal). The test to determine whether an order is final is not whether it contains "magic" language, but whether it disposes of the case and brings an end to the judicial labor in the particular action being

[18] App. Exh. 7 (Plaintiff's Response in Opposition), p. 2, 3, 5; App. Exh. 8 (01/21/10 Hearing Transcript, p. 11, line 12 – p. 12, line 19).

dismissed. An order may be a final judgment of dismissal, even though it states that the dismissal is "without prejudice" and even though the underlying cause of action may be re-filed as a new case.

In *Carlton v. Wal-Mart Stores, Inc.*, 621 So. 2d 451 (Fla. 1st DCA 1993), the court clarified that a dismissal without prejudice to amend the complaint is to be distinguished from a dismissal without prejudice to re-file the case—the latter being a final, appealable order:

> While the dismissal is "without prejudice," it is clear that it is "without prejudice" to file another, separate, action, rather than "without prejudice" to file an amended complaint in the first action. We believe that, because the dismissal ends the judicial labor in the first action, the dismissal is sufficiently "final" to permit an appeal.

*Id*. at 452; see also, Bretton C. Albrecht, *Jumping the Gun: Premature Appeals in Civil Cases*, 84 Fla. B. J. 42 (March 2010) ("When the dismissal is without prejudice to file a new and distinct action—not simply an amended complaint in the same case—the order is final.")

Whether a dismissal was "without prejudice" to re-file the case or "without prejudice" to amend the complaint is determined by examining the context of the order. *Hinote v. Ford Motor Co.*, 958 So. 2d 1009, 1010 (Fla. 1st DCA 2007). In this case, conspicuously absent from the written order and the transcript of the hearing was any language indicating that Plaintiff had leave to amend or how much

time was allotted for Plaintiff to do so. *Carnival Corp. v. Sargeant*, 690 So. 2d 660, 661 (Fla. 3d DCA 1997) (holding that an order of dismissal without prejudice was final where the order notably did not grant leave to amend). Indeed, granting leave to amend the complaint would be nonsensical because the dismissal was not based upon a defect in the complaint, but upon a sanction. There simply was no problem identified in the complaint itself that could be resolved by an amendment.

Nor can there be any confusion as to whether the order merely granted a motion to dismiss in contrast to actually dismissing the action, because here, the order denied Defendants' motion to dismiss. The trial court decided to impose its own sanction—a dismissal without prejudice—and directed the entry of a separate ruling in the order.[19] *See World On Wheels of Miami, Inc. v. Int'l Auto Motors, Inc.*, 569 So. 2d 836, 837 (Fla. 3d DCA1990) (where dismissal with prejudice was too severe, court had discretion to impose lesser sanctions, including a dismissal without prejudice). The language added at the direction of the trial court expressly stated that the case was dismissed, not merely that some *sua sponte* motion to dismiss had been granted.

And, if any doubt remained as to the trial judge's intentions, her explicit and unmistakable ruling on the record spoke in terms of re-filing the case, not amending the complaint:

[19] App. Exh. 3 (07/27/09 Hearing Transcript, at p. 20, line 16 –p. 21, line 8).

> The Court is going to dismiss the case without prejudice. If it needs to be refiled, it can be refiled at the appropriate point in time. But the Court is going to, as a sanction, dismiss the case without prejudice. So that's the order.[20]

Given the trial court's express intent to sanction Plaintiff for its misconduct, it cannot be supposed that the intended sanction entailed nothing more than mailing out another (presumably identical) complaint.

Therefore, the trial court's dismissal order was, indisputably, a judgment of dismissal – a final, appealable order. *Bd. of County Comm'rs of Madison County v. Grice*, 438 So. 2d 392, 394 (Fla. 1983) ("An order on a motion to dismiss may not be final, but an order which actually dismisses the complaint is."); *Eagle v. Eagle*, 632 So. 2d 122, 122-23 (Fla. 1st DCA 1994) ("An order dismissing a case or complaint "without prejudice" is sufficiently final to permit an appeal if the case is disposed of by the order and no issues remain for judicial determination."); *Ender v. Mercer*, 7 So. 2d 340, 341 (Fla. 1942) (recognizing the court had previously held that "[a]n order dismissing the case was a final judgment").

### B. The trial court had no jurisdiction to reconsider its dismissal order.

Because the trial court's intent to dismiss the case with finality was so clear, its commentary at the attorney fee hearing suggesting a belief that the dismissal

[20] App. Exh. 3 (07/27/09 Hearing Transcript, at p. 20, lines 18 – 22).

was not final can only be attributed to confusion or a desire to reverse its own decision. Even if the trial court had changed its mind, however, it had lost jurisdiction to modify its judgment of dismissal. *Corvette Country, Inc. v. Leonardo*, 997 So. 2d 1272, 1273-74 (Fla. 4th DCA 2009) (trial court lacked jurisdiction to vacate order dismissing case without prejudice, more than ten days after judgment had been entered).

## ARGUMENT

### I. Defendants Were Entitled To Recover Their Attorney's Fees as the Prevailing Party.

Once this Court determines it has jurisdiction—that the order denying fees followed a final order of dismissal—there remains only one, self-evident issue to determine: Whether Defendants prevailed in the case that was dismissed.

"[T]he party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees." *Moritz v. Hoyt Enter., Inc.*, 604 So. 2d 807, 809-10 (Fla. 1992) (agreeing with the test for determining the prevailing party for purposes of attorney's fees set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983)); *Kapila v. AT&T Wireless Servs., Inc.*, 973 So. 2d 600, 602 (Fla. 3d DCA 2008) (quoting same legal principle from *Moritz*); *Shaw v. Schlusemeyer*, 683 So. 2d 1187, 1188 (Fla. 5th DCA 1996)(same). In the instant case, there was only one significant issue in the case: Plaintiff's claim of foreclosure against Defendants' home.

Defendants undeniably defeated Plaintiff's only claim of foreclosure in this case by having obtained dismissal of Plaintiff's claim and, thereby, reached the prevailing result in the litigation. *See Baratta v. Valley Oak Homeowners Ass'n at the Vineyards, Inc.*, 891 So. 2d 1063, 1065 (Fla. 2d DCA 2004) (providing

defendant became the prevailing party entitled to recover attorney's fees when plaintiff's claim was dismissed for failure to prosecute).

### A. Since a voluntary dismissal would have entitled Defendants to attorney's fees, an involuntary dismissal—particularly as a sanction—must also entitle Defendants to fees.

It is black-letter law that when a plaintiff takes a voluntary dismissal of a case, if there exists a contractual or statutory basis for an award of attorney's fees, the defending party is entitled to such an award because that party prevailed in the action when the case was dismissed. *Alhambra Homeowners Ass'n v. Asad*, 943 So. 2d 316 (Fla. 4th DCA 2006) (affirming prevailing party attorney's fee award to defendant after plaintiff took a voluntary dismissal without prejudice)); *see also Stuart Plaza Ltd. v. Atlantic Coast Dev. Corp. of Martin County*, 493 So. 2d 1136, 1137 (Fla. 4th DCA 1986) ("Initially, we point out that when a plaintiff takes a voluntary dismissal the defendant is the prevailing party."); *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990) (same); *Casarella, Inc. v. Zaremba Coconut Creek Pkwy. Corp.*, 595 So. 2d 162, 163 (Fla. 4th DCA 1992) ("It is well-settled that when a plaintiff takes a voluntary dismissal the defendant is deemed the prevailing party and therefore is entitled to attorney's fees if the contract authorizes an award of attorney's fees.").

The notion that an involuntary dismissal should have a lesser penalty than a voluntary dismissal, is not only illogical, but flies in the face of established case law. *Frazier v. Dreyfuss*, 14 So. 3d 1183, 1184-85 (Fla. 4th DCA 2009) (affirming award of attorney's fees where trial court involuntarily dismissed action for failure to arbitrate) (relying on *Alhambra*); *State, Dept. of Transp. v. ABS Prop. P'ship*, 693 So. 2d 703, 705 (Fla. 2d DCA 1997) ("We find no meaningful distinction between voluntary and involuntary dismissal as to the issue of attorney's fees."); *Stout Jewelers, Inc. v. Corson*, 639 So. 2d 82, 84 (Fla. 2d DCA 1994) ("Since rule 1.420(d) contemplates both voluntary and involuntary dismissals, we see no reason why this interpretation should not be applied to a situation involving an involuntary dismissal of a plaintiff's case."); *see also*, Author's Comment, Rule 1.420 ("Paragraph (d) of this rule applies to any dismissal.").

### B. Defendants are entitled to attorney's fees even though the final judgment of dismissal is not an adjudication on the merits.

Given that even a voluntary dismissal will support an award of attorney's fees, Plaintiff's argument that there must be an adjudication on the merits before a defendant is entitled to fees is clearly erroneous. The fact that the final judgment of dismissal in this case is not an adjudication "on the merits" is, therefore, irrelevant to the fee issue. *See Thornber v. City of Ft. Walton Beach*, 568 So. 2d

914, 919 (Fla. 1990); *Alhambra Homeowners Ass'n v. Asad*, 943 So. 2d 316, 318-19 (Fla. 4th DCA 2006).

### C. None of Plaintiff's case law supported Plaintiff's arguments in opposition to an award of attorney's fees.

The cases cited by Plaintiff are inapplicable, either because they do not address attorney's fees at all, or because they arise in the context of a dismissal with leave to amend the complaint.

For example, in *Shaw v. Schlusemeyer*, 683 So. 2d 1187 (Fla. 5th DCA 1996), the appellate court reversed an order awarding prevailing party attorney's fees where the trial court had dismissed plaintiff's complaint, with leave to file an amended complaint. *Id*. at 1187-88. In reversing an award of attorney's fees, the Fifth District concluded the defendant had not prevailed in the case because plaintiff was granted leave to amend:

> [i]n the instant case, the dismissal of Mr. Shaw's complaint was without prejudice and he was granted leave to amend the complaint. … Importantly, the instant dismissal order did not bring the litigation to an end. In fact, by its very terms, the order afforded Mr. Shaw an opportunity to correct what the trial court viewed as a technical defect in his complaint. Under these facts, it was error to award Ms. Schlusemeyer prevailing party attorney's fees.

*Id*. at 1188.

Contrary to *Shaw v. Schlusemeyer*, 683 So. 2d 1187 (Fla. 5th DCA 1996), the Plaintiff in this case was not granted leave to amend its complaint, when the trial court involuntarily dismissed the case, which then brought an end to this particular litigation in the trial court.

Likewise, Plaintiff cited *JB Int'l, Inc. v. Mega Flight, Inc.*, 840 So. 2d 1147 (Fla. 5th DCA 2003), representing that the court in that case "refus[ed] to award fees," when, in fact, the case mentioned nothing about fees. It merely articulated a principal irrelevant to this case (and with which Defendants do not disagree) that a dismissal without prejudice is not *res judicata* as to matters being heard and determined in a subsequent suit.

Plaintiff also cited and relied upon *CPI Mfg. Co. v. Industrias St. Jack's S.A. DE C.V.*, 870 So. 2d 89 (Fla. 3d DCA 2003), another case that did not mention fees. Again, the case was cited for an irrelevant point which is not in dispute: that a dismissal without prejudice is not a final adjudication on the merits.

All of the case law decisions Plaintiff cited and relied upon to oppose Defendants' claim for recovery of attorney's fees should have been rejected by the lower court and, should now be rejected by this Court.

### D. Plaintiff did not dispute that the note and mortgage required borrower to pay fees and costs, or that §57.105(7) shifts those fees and costs to the prevailing party.

Plaintiff did not dispute that the note and mortgage sued upon by Plaintiff provided for recovery of attorney's fees by the Mortgagee and Note Holder:

> Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

Mortgage, ¶ 22.[21]

> (E) Payment of Note Holder's Costs and Expenses
>
> If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

Note, ¶ 7.(E).[22]

Florida statutory law provides that, if the contract upon which a party brings an action provides for recovery of fees to one party, the court may award fees to either party that prevails.

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.

[21] App. Exh. 1 (Mortgage attached to Amended Complaint).
[22] App. Exh. 1 (Note attached to Amended Complaint).

§ 57.105(7), Fla. Stat. (2009). And while Plaintiff may have disputed whether Defendants were a prevailing party such that fee entitlement under this statute was triggered, it did not dispute that the statute operates to make the fee-shifting provisions of the note and mortgage reciprocal.

Clearly, once Plaintiff's case was dismissed without leave to amend the complaint, Defendants were entitled to recover attorney's fees (and costs) as the prevailing party, regardless of whether the case was dismissed with or without prejudice to re-file and regardless of whether it was adjudicated on the merits.

### E. Rule 1.420(d) provided a separate basis for an award of costs and fees.

Rule 1.420(d) Fla. R. Civ. P. provides that costs are to be assessed immediately after a dismissal is entered by the trial court issuing the dismissal. *Caufield v. Cantele*, 837 So. 2d 371, 376 (Fla. 2002); *McKelvey v. Kismet, Inc.*, 430 So. 2d 919, 921-22 (Fla. 3d DCA 1983); *Wilson v. Rose Printing Co.*, 624 So. 2d 257, 258 (Fla. 1993) ("this Court has consistently held that where a statute or agreement of the parties provides that the term 'costs' includes attorneys' fees such fees are taxable under rule 1.420(d)").

Plaintiff argued that Rule 1.420(d) does not apply because it provides for an award of costs only in actions dismissed "under this rule" and because dismissal as

a sanction is not specifically mentioned in the Rule.[23] Leaving aside that the Author's Comment states that Rule 1.420(d) "applies to any dismissal," the dismissal in this case does fit within the Rule since it governs dismissals for an adverse party's failure "to comply with these rules." Defendants had argued for dismissal based upon a failure to comply with (among others) Rule 1.080(b) Fla. R. Civ. P.[24]

Plaintiff relied upon *Junkas* v. *Union Sun Homes, Inc.*, 412 So. 2d 52 (Fla. 5th DCA 1982) as holding that costs would not be awarded "where dismissal was not covered by the Rule [1.420]."[25] *Junkas*, however, did not involve a dismissal at all, much less one not covered by the Rule 1.420. The *Junkas* case was tried before a jury and was adjudged upon a directed verdict in favor of the defendant. *Id*. Ultimately, the court held that the fee of an expert who never testified is not a taxable cost. *Id*.

Once again, the case law Plaintiff cited to oppose Defendants' claim for recovery of costs under Rule 1.420(d) should have been rejected by the lower court and should now be rejected by this Court. In any event, if the Court determines that Defendants are contractually entitled to fees (with the help of § 57.105(7), Fla.

[23] App. Exh. 7 (Plaintiff's Response in Opposition), p. 3.
[24] App. Exh. 2 (Defendants' Motion for Sanction of Dismissal), p. 4.
[25] App. Exh. 7 (Plaintiff's Response in Opposition), p. 3.

Stat. (2009)), this Court need not reach the issue of whether Defendant are also entitled to fees under Rule 1.420(d).

### F. Section 57.041 Florida Statutes provided a separate basis for an award of costs and fees.

Section 57.041 Florida Statutes (2009) also provides that "[t]he party recovering judgment shall recover all his or her legal costs and charges…" The courts use the prevailing party standard to determine entitlement to costs under this statute. *Granoff v. Seidle*, 915 So. 2d 674, 677 (Fla. 5th DCA 2005); *see Wyatt v. Milner Document Prods., Inc.*, 932 So. 2d 487, 490 (Fla. 4th DCA 2006) (providing trial costs are governed by section 57.041, Florida Statutes, "which hinges on whether the party seeking to tax costs is considered the prevailing party").

Plaintiff cited the Third District's decision in *Cheetham v. Brickman*, 861 So. 2d 82 (Fla. 3d DCA 2003) for the principle that "only a prevailing party who recovers a judgment is entitled to recover costs under section 57.041."[26] *Id*. at 83. Of course, Defendants have recovered a judgment in this case—a judgment of dismissal. Moreover, *Cheetham* merely stands for the unremarkable proposition

[26] App. Exh. 7 (Plaintiff's Response in Opposition),p. 3.

that an award of costs must be made to the winning party, not the losing party. Here, Defendants were the winning party.

Once more, the case law Plaintiff cited to oppose Defendants' claim for recovery of costs under Section 57.041 Florida Statutes (2009) is unavailing. In any event, if the Court determines that Defendants are contractually entitled to fees (with the help of § 57.105(7), Fla. Stat. (2009)) or under Rule 1.420(d), this Court need not reach the issue of whether Defendant are also entitled to fees under Florida Statutes § 57.041

.

## CONCLUSION

The lower court's ruling denying Defendants an award of attorney's fees and costs should be reversed and vacated and this case remanded to the trial court with directions to enter an order granting entitlement to attorney's fees and costs in favor of Defendants and against Plaintiff.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this March 29, 2010 to all parties on the attached service list.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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