

IN THE SUPREME COURT  
STATE OF FLORIDA

FILED

CASE NUMBER 68,676  
DCA-1 NO. BG-179 JUN 10 1988

CLERK, SUPREME COURT

By 

Deputy Clerk

THOMAS PARHAM, JR., d/b/a  
ALLIED SCREEN PRINTING,

Petitioner,

vs.

JACK PRICE, SAM PRICE, FLORENCE  
EVANS and BARRY ZISSER, Co-partners,  
d/b/a Z.E.P. PROPERTIES, a partnership,

Respondents.

ON APPEAL FROM THE DISTRICT COURT OF  
APPEALS, FIRST DISTRICT OF FLORIDA

RESPONDENTS' ANSWER BRIEF

NED I. PRICE, ESQUIRE  
LEWIS & PRICE, P.A.  
203 Washington Street  
Jacksonville, Florida 32202  
(904) 396-3993

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DESIGNATION OF ABBREVIATIONS

The following abbreviations are used throughout this brief:

- Respondents - Jack Price, Sam Price, Florence Evans and  
Barry L. Zisser, Co-Partners, d/b/a Z.E.P.  
Properties, a partnership
- Petitioner - Thomas Parham, Jr., d/b/a Allied Screen Printing
- R - Record on Appeal

STATEMENT OF THE CASE AND OF THE FACTS

The Appellee adopts the Petitioner's view of the facts; however, for purposes of further clarification asserts as follows:

Appended to the Respondents' complaint, was a copy of the lease agreement between Respondents and Petitioner, which was the basis of this action.

The authenticity of the lease was stipulated to by the parties (paragraph 5 of the Pre-trial order) (R 149-151, 185). At the hearing on the Motion for Rehearing, counsel for the Petitioner acknowledged that the lease was admitted into evidence without objection (R-185).

The discretionary jurisdiction of this Court is being sought under Art. 5 § 4 of the Florida Constitution. The Petitioner has raised the constitutionality of his denial of a right to trial by jury on the issue of contractual attorney's fees for the first time in his initial brief to this Court.

### SUMMARY OF THE ARGUMENT

Attorney's fees may be taxed as costs only where provided by contract or statute. Where a provision of a contract provides for the award of attorney's fees, the prevailing party's failure to put on proof of the existence of attorney's fees, is not a bar to his recovery of the fees. The award of attorney's fees are costs, not an element of damages. As such they may be determined by post trial motion. The Supreme Court, the First and Fourth District Courts of Appeal, and the most recent cases from the Third District Court of Appeal, support this view.

The permissible assessment of attorney's fees pursuant to a post trial motion is the relevant issue, rather than their assessment on remand at a new trial.

Reliance on mortgage foreclosure procedure does not show the necessity of proving before the jury an obligation to pay one's own attorney.

On the issue of a constitutional right to have a jury assess attorney's fees, Petitioner has no standing to assert Respondents' rights. Furthermore, the constitutional issue Petitioner asserts was not raised in the court below. This Court's review jurisdiction should not be extended to issues raised in this Court for the first time. Lastly, there is no

constitutional right to have a jury assess attorney's fees that are taxable as costs pursuant to a contract. In fact, statutes awarding attorney's fees as costs have repeatedly been held constitutional.

Policy reasons dictate that statutory and contractual attorney's fees receive the same treatment as costs.

Respondents respectfully recommend that this Court's discretionary jurisdiction not be invoked because the issues raised are not of great public importance.



ARGUMENT

- I. THE TRIAL COURT DID NOT ERR IN TAXING AS COSTS RESPONDENT'S CONTRACTUAL ATTORNEY'S FEES, PROVIDED FOR IN A WRITTEN LEASE, WHERE SUCH ATTORNEY'S FEES HAD BEEN PROPERLY PLED AND THEN WERE GRANTED PURSUANT TO RESPONDENT'S POST TRIAL MOTION.
- A. Attorney's fees provided for by contract or statute may be taxed as costs.

Petitioner and Respondents are in agreement as to the importance of this Court's holdings on attorney's fees as stated in Codomo v. Emanuel, 91 So.2d 653 at 655 (Fla. 1956):

This court is committed to the doctrine that attorney's fees cannot be taxed as costs in any cause unless authorized by contract or legislative authority. Shavers v. Duval County, Fla., 73 So.2d 684 and cases cited therein.

It is clear from this quotation that attorney's fees authorized by contract or statute may be taxed as costs by the trial court as an exercise of its discretion. Petitioner, however, asserts that attorney's fees pursuant to contract should be submitted to the jury as damages, while admitting that attorney's fees under statutory provisions can be submitted as costs to the judge.

Respondents rely on the holding in Codomo, supra, as establishing that attorney's fees, provided for by contract, are costs. Thus, in the instant case, the trial court's award

of attorney's fees as costs pursuant to a post trial motion was an action well within its discretion.

There are special situations where attorney's fees are to be considered damages, but they do not include those cases where attorney's fees are provided for by the contract upon which the action arises.

This principle is illustrated in Glusman v. Lieberman, 285 So.2d 29 (Fla. 4th DCA 1973), where attorney's fees were awarded in an action for slander of title. The Court explained that the three usual circumstances in which attorney's fees are recoverable are where authorized by contract, statute or where a fund has been created or brought into court. However, other instances occur where attorney's fees are recoverable, such as wrongful attachment, false imprisonment, malicious prosecution, and slander. Id. at 31. The Court went on to state that a distinction could be made by referring to the three usual categories (contract, statute, or a fund brought into court) as pure attorney's fees, or attorney's fees per se, while designating those attorney's fees in other types of actions as special damages to compensate for the wrong. Id. Therefore, only where attorney's fees are sought as special damages would it be necessary to prove the attorney's fees as an element of damages at trial. Glusman, Id. at 31.

B. Proof of entitlement to and amount of attorney's fees as provided by contract need not be presented at trial when properly pled and then raised in a post trial motion.

In the instant case, the Respondent sought attorney's fees as provided in paragraph 4(h) of the Lease Agreements sued upon. This is one of the usual and common circumstances where attorney's fees are sought (pursuant to provisions in a contract). Therefore, the attorney's fees in this case are taxable as costs, as established in Codomo, supra, and are not elements of damages, which would have required proof at trial. As costs, the existence of attorney's fees need not be proved at trial.

As in the case at bar, several cases have allowed the award of attorney's fees, based on contract, despite the absence of proof of their existence at trial. In Taggart Corp. v. Benzing, 434 So.2d 964 (Fla. 4th DCA 1983), a buyer prevailed in a suit for specific performance under a standard real estate contract which provided for attorney's fees to the prevailing party. The buyer did not present proof at trial on the question of attorney's fees. The court allowed the award of fees and stated that attorney's fees could be awarded after the Final Judgement.

Likewise, in Gator Shoe Corporation v. Taudte, 384 So.2d 1344 (Fla. 3rd DCA 1980), where a jury awarded \$91,492 to a

landlord in an action for breach of a lease agreement, the appellate court upheld the trial court's award of attorney's fees, pursuant to a post trial motion for their assessment, where the lease agreement provided for such an award. Although the Final Judgment in Gator Shoe reserved attorney fee determination until after trial, the fact that the trial court chose to make the reservation shows that post trial assessment of contractual attorney fees is within the trial court's discretion in the Third District.

Additionally, in Marrero v. Caverro, 400 So.2d 802 (Fla. 3rd DCA 1980), petition for review denied 411 So.2d 383 (Fla. 1981), the Court held that the "defendant's entitlement to an attorney's fee based on a contract in evidence was not defeated by failure to plead for the same as they presented the issue before the trial court by timely motion made after the judgment for the defendant . . ." Id. The Court in its opinion in Maerero relied on two cases, both of which involved statutory attorney fees. This indicates the Third District position that statutory and contractual attorney fees should be treated alike. The cases of Gator Shoe and Marrero were decided after Commodore Plaza at Century 21 Condominium Assoc., Inc. v. Cohen, 350 So.2d 502 (Fla. 3rd DCA 1977), relied upon in Petitioner's brief. They indicate that the Third District is not in total support of Petitioner's position, as he claims.

Petitioners rely heavily on the First District Court of Appeals' decision in River Road Construction Co. v. Ringpower Corp., 454 So.2d 38 (Fla. 1st DCA 1984). This reliance is misguided for several reasons.

First, the facts of the instant case and River Road are distinguishable. The trial court in the instant case in its "Order Denying Motion for Rehearing of Order Granting Motion for Attorney's Fees" (R. 184-185), correctly noted that:

[f]irst of great significance in River Road was the failure of the plaintiff's complaint to contain a properly pled claim for attorney's fees. Second in the River Road case, no document was attached to the complaint indicating a basis for the entitlement to attorney's fees. Third, in River Road, the trial court, at the hearing on the plaintiff's motion to tax costs and attorney's fees, reversibly erred in receiving into evidence River Road's credit application since it had not been attached to the complaint or admitted into evidence at trial. That improperly admitted credit application provided for the payment of attorney's fees and accordingly, was the basis for the court's award of attorney's fees to Ring Power. (R. 184)

In the present case, the Respondents properly pled their entitlement to attorney's fees in paragraph 4(d) of their Second Amended Complaint, which was based on paragraph 4(h) of the lease sued upon. In addition, the Respondents properly attached a copy of that lease to the complaint. The trial court also found it significant that the authenticity of the

lease was stipulated to by the parties (see paragraph 5 of the pre-trial order) (R. 149-151, 185)

While River Road has not been specifically overruled, the 1st DCA has more recently decided Cheek v. McGowan Electric Supply Co., 483 So.2d 1373 (Fla. 1st DCA, 1985), cert. pending, which it considered dispositive of the issue, decided in Respondent's favor, in this case. (See Respondent's Appendix, p. 1). The appellate court in Cheek upheld the trial court's award of attorney's fees and stated that "attorney's fees predicated upon a provision in a contract may be awarded upon proof presented after final judgment." Cheek, at 1380 quoting Taggart, supra.

Petitioner claims that the majority of the District Courts of Appeal favor his position. However, the First District in Cheek and the Fourth District in Taggart support Respondents' position, as do the later cases of Marrero and Gator Shoe in the Third District.

This Court has held that the award of attorney's fees as a taxable cost is permissible where provided for by contract. In the present case, since the attorney's fees awarded were provided for by contract, they constituted a taxable cost arising out of the action and thus did not have to be presented to the jury. Therefore, the award of attorney's fees post trial was not erroneous.

II. RESPONDENTS DID NOT WAIVE THEIR RIGHT TO PETITION THE TRIAL COURT FOR THE TAXATION OF ATTORNEY'S FEES AS COSTS PURSUANT TO A TIMELY POST-TRIAL MOTION.

Petitioner's second issue is basically a restatement of Issue I. Again, it is well established with regard to Florida case law and Florida Supreme Court decisions that contractually provided for attorney's fees are taxable as costs. Petitioner relies on the Fifth District Court of Appeal case Mystery Fun House, Inc. v. Magic World, Inc., 417 So.2d 785 (Fla. 5th DCA 1982). Respondents admit that the position take on this issue in the Fifth District Court of Appeal is opposite from that which they assert. Respondents again cite Cheek, supra, from the First District, Taggart, supra, from the Fourth District and Gator Shoe, supra and Marrero, supra, from the Third District Court of Appeal in support of their position. (Mystery Fun House, supra, relies on cases in the Third District which preceded Gator Shoe and Marrero). Attorney's fees pursuant to contract are not damages to be presented to the jury. There is no waiver of right to attorney's fees by the absence of proof on this issue at trial. Attorney's fees are properly raised as costs in a post trial motion.

Furthermore, Petitioner relies again on River Road, yet cites a passage involving Ringpower's failure to plead entitlement to attorney's fees. Respondents did, however,

properly plead entitlement to attorney's fees. For this reason and the fact that Cheek preempts River Road in the First District, reliance upon River Road is misplaced.

Petitioner phrases Issue II to address whether the right to attorney's fees is waived pursuant to remand or a new trial. However, Petitioner offers no authoritative argument specifically addressing this issue. Furthermore, assessment of attorney's fees pursuant to a post trial motion is the relevant issue in the instant case, not assessment of fees on remand or or at a new trial. Given the previous argument asserting that contractual attorney's fees are taxable as costs, such a post trial assessment is proper.



III. THE ABSENCE OF PROOF TO THE JURY THAT RESPONDENTS WERE CONTRACTUALLY BOUND TO PAY ATTORNEY'S FEES TO THEIR OWN COUNSEL DOES NOT ESTABLISH WAIVER OF THE RIGHT TO HAVE ATTORNEY'S FEES ASSESSED AGAINST THE PETITIONER IN A POST TRIAL MOTION.

The cases that Petitioner cites were decided approximately fifty years ago and involved mortgage foreclosure proceedings, as well as the assessment of solicitor's fees, Brett v. First National Bank of Marianna, 120 So.554 (Fla. 1929); Rhea v. DeVault, 146 So. 643 (Fla. 1933); T & C Corporation v. Eikenberry, 178 So. 137 (Fla. 1938). Foreclosure procedure is not readily applicable to a breach of contract action. However, in attempting to apply foreclosure procedure here, it should be noted that the cited cases do not preclude assessment of fees in subsequent proceedings. Specifically, these cases preclude recovery where the pleadings do not allege payment of fees, where a litigant affirmatively states that he is not bound to his attorney or where fees were assessed without any evidence as to their amount.

Furthermore, a subsequent decision, Sellars v. First National Bank, 193 So. 819 (Fla. 1940), holds that pleadings may override the necessity of proof at trial of an obligation to pay one's attorney. Lastly, the second sentence of Petitioner's two sentence argument addressing Issue III is merely a reiteration of a legal conclusion previously

presented, and states that attorney's fees must be pled and proved at trial. This has been thoroughly addressed in the first issue argued.

IV. THE RESPONDENTS' CONSTITUTIONAL RIGHT TO A JURY TRIAL ON THE ISSUE OF ENTITLEMENT TO AND AMOUNT OF DAMAGES WAS NOT ABRIDGED.

The Petitioner does not have standing to assert the constitutional rights of Respondents in the absence of a special relationship. Adversaries in a contract dispute are not in the type of relationship that would establish standing for one party to assert another's constitutional rights.

Assuming that Petitioner meant to assert his own constitutional rights, the constitutional issue is not properly raised for other reasons.

The Petitioner did not claim any denial of constitutional rights in his appeal to the First District Court of Appeal. Therefore, this Court's scope of review should not be extended to issues not adjudicated or raised in the lower court. (3 Fla.Jur.2d, Appellate Review §512, p. 680.)

Petitioner asserts that the assessment of attorney's fees as costs in a post trial motion is motivated solely by a desire for time saving at the expense of his constitutional right. Respondents admit that basic constitutional rights cannot be abridged by procedures solely motivated by a policy of judicial efficiency. However, in this case, the presentation of evidence to the jury of contractual attorney's fees as damages has never been established as a constitutional right.

Petitioner's argument that judicial efficiency is abridging his constitutional right to a jury trial on damages is therefore inapplicable. The Petitioner's argument gains no validity by applying the River Road classification of attorney's fees as damages to the dicta of two cases which clearly classify contractual attorney's fees as costs; Taggart, supra and Cheek, supra.

Petitioner makes the unjustified claim that Taggart, supra, was an admittedly erroneously decided case based only upon stare decisis. This is absolutely false. Judge Lett supported his opinion with precedent and persuasive policy arguments.

There should be no distinction in the treatment of attorney's fees awarded on the basis of contract or statute. Constitutional challenges to statutorily awarded attorney's fees have been unsuccessful. [See eg. Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985)]. The Florida legislature has enacted more than seventy statutes authorizing the courts to award attorney fees in specific types of actions. See Rowe at 1148]. Statutory attorney's fees are awarded post trial by the Judge.

Very compelling policy reasons support this post trial award of costs by the Judge. Notice of obligation to pay

attorney's fees is provided in both instances. Under a statute, notice is generally imputed, but by contract it is actual notice. The Petitioner in this case entered the contract with full knowledge of the ramifications of unsuccessful litigation. As a party to the contract, he bargained for and received valuable consideration. He realized that the contract provision was a usual cost of doing business. He incurred the risk willfully in exchange for pecuniary gain.

If it is maintained that attorney's fees are to be submitted to the jury as damages it would logically lead to the presentation to the jury of other costs, such as expert witness fees, trial exhibit costs, witness travel costs, filing fees, etc.

If attorney's fees are presented to the jury for determination, the jury would have to be empanelled for an extensive period. Attorney's fees are generated after the verdict and continue post trial. Furthermore, proving the existence and amount of each sides' attorney's fees prior to rendering of a verdict, where only one side will receive their costs is inefficient and burdensome. See Taggart, supra.

To create a difference in the treatment of statutory and contractual attorney's fees would have no merit. The above-listed policy reasons support the treatment of both

statutory and contract attorney's fees as costs. There is no infringement of the constitutional right to jury trial in the award of contractual attorney's fees post trial, and there are extremely compelling policy reasons in support of the present practice.

V. THE SUPREME COURT OF FLORIDA NEED NOT INVOKE ITS DISCRETIONARY JURISDICTION IN THIS CASE.

Article V, Section 3(b)(4) of the Florida Constitution and Rule 9.030(a)(2)(A)(v) of the Appellate Rules empower the Supreme Court of Florida with discretionary jurisdiction over a question certified to be of great public importance. Unfortunately, the District Court of Appeal has not phrased the precise question that it has certified. According to Rupp v. Jackson, 238 So.2d 86 (Fla. 1970):

Presentation of a precise question enhances the probability that we (the Supreme Court of Florida) will pass upon the specific question in mind below; furthermore, preciseness may contribute significantly to our decision whether to pass upon the merits of the case at all, a decision which remains solely within our prerogative under the Constitution. Rupp at 89.

Because no precise question is presented, the determination of whether the issue is of great public importance is more difficult.

Considering the issues argued in this brief, it is doubtful whether a great public interest is involved in their resolution. The Supreme Court has allowed the trial court discretion in the assessment of attorney's fees as costs. Codomo, supra. This is a commonly recognized principle in Florida. Furthermore, the ramifications of a ruling on this question would have no large scale effect on the public, but

rather would uphold or modify certain procedural aspects in a limited number of contract disputes. The "great public interest" standard in the past has invoked jurisdiction on issues which are largely unsettled or unclear and result in widescale ramifications. Resolution of this case would not have widespread ramifications. The issues involved herein have been well settled by the Supreme Court of Florida, (Codomo, supra). Lastly, no precise question is presented. Respondents respectfully recommend that this Court not invoke its discretionary jurisdiction to this case.



CONCLUSION

The Respondents respectfully submit that this Court need not exercise its discretionary jurisdiction in this case. Should this Court desire to consider this case, the decision of the First District Court of Appeals below should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to each of the following, by mail, this 17th day of June, 1986:

Richard T. Gordon, Esquire  
Edward P. Jackson, Esquire  
512 West Adams Street  
Jacksonville, Florida 32202

Demere Mason, Esquire  
3100 University Boulevard  
Suite 101  
Jacksonville, Florida 32216



---

NED I. PRICE, ESQUIRE  
203 Washington Street  
Jacksonville, Florida 32202  
(904) 396-3993  
Attorney for Respondent