IN THE SUPREME COURT
STATE OF FLORIDA

CASE NUMBER 68,646
DCA-1 No. BG-179

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

REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

See Petitioners Initial Brief.

SUMMARY OF ARGUMENT

Contractual attorney's fees are a bargained for exchange which must be pled and proved at trial, like all other elements of damage. The contract in question did not authorize that attorney's fees be taxed as costs, there was no pertinent statute or stipulation by the parties. Moreover, the term "costs" is not generally understood as including attorney's fees. Furthermore, since the Respondents did not prove at trial their obligation to pay for their own legal services, such attorney's fees are waived.

Petitioner further asserts it's own standing to claim constitutional rights to a jury trial on attorney's fees as damages as the issue did not arise until after Petitioner's brief was filed with the First District Court on July 5, 1985 whereupon said Court denied its' own precedent and adopted the rationale of the Fourth District Court of Appeals and impliedly denying Petitioner his constitutional rights.

ARGUMENT

REPLY TO RESPONDENTS ISSUE I. "WHETHER 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.

In England, it is customary for the prevailing party to recoup expended attorney's fees after pursing a cause. However, American common law has never allowed attorney's fees. If a states' legislature determines that their states' public policy is to allow attorney's fees in certain instances, such attorney's fees are allowed pursuant to an appropriate statute. The legislature, in essence, provides the attorney's fees and the Court is the officer who carries out the statutory mandate. Since such fees are public policy, they need not be proved before the jury.

When, however, two private parties bargain and covenant that if their bargain is broken, certain damages will ensue, the ensuing party is obligated to prove, by the appropriate burden of proof, all damages which are recoverable pursuant to the mutual contract. In essence, the contractual attorney's fees are a bargained for exchange, which must be pled and proven as do all other damages pursued as a result of a breach of the contract. River Road Construction Company v. Ring Power Corporation, 454 Sc. 2d 38 (Fla. 1st DCA 1984).

The case of Codomo v. Emanual, 91 So. 2d 653 (Fla. 1956), which is so heavily relied upon by Respondents, does not, per se, authorize contractual attorney's fees, it only forbids the taxing as costs attorney's fees in the absence of a contract, or statute. The Respondent's read the appropriate language from Codomo in an inverted form, as if to say that attorney's fees are to be taxed as costs in all cases where there exists a contract or statute. This inverted reading does not follow this

high Court's ruling in Wiggins v. Wiggins, 446 So. 2d 1078, (Fla. 1984) where Justice Boyd stated:

> Florida Rule of Civil Procedure 1.420(d) provides for the assessment of costs upon the dismissal of an action. The rule does not , however, contemplate the assessment of attorney's fees, Moreover the term "costs" is not generally understood as including attorney's fees. State ex rel. Royal Insurance Co. v. Barrs, 87 Fla. 168, 99 So. 668 (1924). However, when the legislature has specifically defined attorney's fees as part of the costs, then the assessment of attorney's fees after a case has been voluntarily dismissed is within the purview of Rule 1.420(d). City of Hallandale v. Chatlos, 236 So. 2d 761 (Fla. 1970); Gordon v. Warren Heating & Air Conditioning, 340 So. 2d 1234 (Fla. 4th DCA 1976). Thus at the time the Randle v. Eastman case was decided, this Court recognized that a trial court could retain jurisdiction to award attorney's fees after a voluntary dismissal, at least in cases where attorney's fees were defined by statute as part of the costs. Id. at 1079.

Attorney's fees are clearly not costs in a contract situtaion, absent a statute stating such. They can, however, become costs if, in the body of the contract, the attorney's fees are bargained for as costs pursuant to damages for breach or, if the parties (or their attorney's) stipulate that such contractual attorney's fees are to be taxed as costs in a post-trial hearing. When Codomo, supra, states, " that attorney's fees cannot be taxed as costs in any cause unless authorized by contract..." the contract itself must authorize the taxing as costs attorney's fees, otherwise common law prevails and attorney's fees are not allowed.

In the case at bar, there is not statutory authority for attorney's fees to be taxed as costs nor did the contract authorize attorney's fees as costs. In the contract pursuant to this cause, the parties bargained that any attorney's fees would be damages and as such should have been pled and proved as were the other elements of damages.

The Respondents also rely heavily upon Gator Shoe Corporation v. Taudte, 384 So. 2d 1344 (Fla. 3rd DCA 1980) and Marrero v. Cavero, 400 So.

2d 802 (Fla. 3rd DCA 802). While it is true that both of these cases were decided after Commodore Plaza at Century 21 Condominum Assoc., Inc. v. Cohen, 350 So.2d 502 (Fla. 3rd DCA 1977) as stated in Petitioner's initial brief, and while it is also true that these two cases allow attorney's fees in a post-trial hearing, neither case is dispositive because Marrero was not a jury trial as in the instant case and Gator Shoe states:

> By stipulation of the parties, the cause was submitted to a jury as to the amount of rent due and damages sustained by the landlord, with a reservation that the Court would determine the amount of attorney's fees subsequent to the jury trial. Id. at 1346.

Thus, while Gator Shoe, supra, doesn't effect the case at bar, it falls squarely within the rule of Codomo, supra, providing that a contract, followed by a stipulation of the parties may authorize attorney's fees to be taxed as costs. Outside of a statute defining attorney's fees as costs, Wiggins, supra, a contract authorizing attorney's fees to be taxed as costs, Codomo, supra, or by stipulation of the parties, Gator Shoe, supra, attorney's fees must be pled and proved as an element of damage as are all other damages. Since the Respondents offered no proof of attorney's fees, the jury award below must stand as the total of all damages sustained by the Respondents.

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

Provided that contractual attorney's fees are not costs ncr are they pled and proved at trial, the Respondents forever waive their right to reassert such damages, as they would waive the right to any other element of damage. Had the Respondents pled lost rent as damages but failed at trial to offer any proof of the amount or entitlement to lost rent, such damages would not be allowed and would be subject to directed verdict against the Respondents.

In the case of contractual attorney's fees as damages, if the jury allows none, there is no authority for the trial judge to assess attorney's fees over and above the jury verdict. Mystery Fun House, Inc. v. Magic World, Inc., 417 So. 2d 785 (Fla. 5th DCA 1982). The Respondents should not now be allowed to ask for retrial or remand to allow the trial judge or jury to consider attorney's fees.

REPLY TO RESPONDENTS ISSUE 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.

While is is true that the cases relied upon by Petitioner are approximately 50 years old, they have not been overturned. When seeking attorney's fees as an element of damages, one must first prove a predicate, i.e. a contract to pay for legal services to your own attorney.

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

Petitioner does not attempt to assert standing for Respondents. Petitioner does have standing to assert the right to a jury trial in this cause and require the Respondents to meet their burden of proof. In so demanding a jury trial the Petitioner had a right to have all elements of damage heard by the jury. At the time of appeal, River Road Construction Company v. Ring Power Corporation, 454 So. 2d 38 (Fla. 1st DCA 1984) was controlling. River Road, supra, held that contractual attorney's fees must be proved before the jury. Without overturning River Road, supra, the First DCA decided not to follow its' own precedent but chose in Alan Cheek v. McGowan, 10 FLW 2012 (Fla. 1st DCA Aug. 20, 1985) to adopt the rationale of the Fourth DCA in Taggart Corporation v. Benzing, 434 So. 2d 964 (Fla. 4th DCA 1983) which admitted within the body of the opinion that it was wrongly decided but was done so only because of precedent.

Since the First DCA did not follow its' own precedent, the question

of denial of constitutional right to a jury trial on contractual attorney's fees as damages did not arise in Petitioner's brief because Cheek, supra, was not decided until after the brief was filed with the First DCA (brief filed July 5, 1985).

Therefore, since the First DCA denied Petitioner's right by implication to a jury trial on damages next to the filing of this Supreme Court brief, the issue is properly and timely made and should be allowed.

The Respondents admit in their initial brief (page 14) that a constitutional right cannot be abridged by procedures solely motivated by a policy of judicial efficiency. That is the very reason that the First DCA decided Cheek, supra, in which it stated, "...it is a waste of time...that is obviously an easier task after the fact." There can be no other reason for this rationale but judicial efficiency.

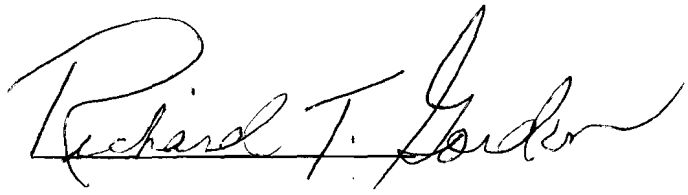
REPLY TO RESPONDENTS ISSUE V. THE SUPREME COURT OF FLORIDA NEED NOT INVOKE ITS DISCRETIONARY JURISDICTION IN THIS CASE.

The First DCA certified its' holding to this high Court as presenting a question of great public importance. The holding on motion for rehearing is the precise question which needs this Courts answer for guidance as the circuits are sorely divided.

CONCLUSION

The Petitioner respectfully submits that this Court exercise it's discretionary jurisdiction and for all the foregoing reasons reverse the First District Court of Appeal below without remand or retrial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing instrument was furnished to:

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this 7th day of July, 1986, by U. S. Mail.

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