IN THE SUPREME COURT
OF FLORIDA

CASE NO.: 70,704

FIXEL ENTERPRISES, INC.,

Petitioner,

vs.

PETER M. THEIS and
DEBRA L. THEIS,

Respondents.

PETITIONER'S BRIEF

Borden R. Hallowes
3947 Boulevard Center Drive
Suite 1
Jacksonville, Florida 32207
(904) 396-7205

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CITATIONS

STATEMENT OF JURISDICTION

This appeal before this Court comes from the First District Court of Appeal and jurisdiction is based on Appellate Rule 9.030 (a)(2)(A)(V).

STATEMENT OF THE CASE AND FACTS

This appeal seeks review of a question certified by the First District Court of Appeal. This case arises from the performance of a construction contract wherein the Petitioner had contracted to build the Respondents' home. As a result of alleged negligence, the Respondents instituted suit. The claim for damages throughout the litigation was in excess of $10,000.00. At the time of trial, the amount had grown to approximately $18,000.00.

After discovery had been substantially completed, but prior to trial, the Petitioner offered to the Respondents a sum of Twenty Five Hundred Dollars ($2,500.00) in settlement of the entire case. As stated in the Affidavit of the Petitioner's president, these negotiations were conducted shortly after his deposition and in an effort to dispose of the entire case. (App.-16

In response to the initial suit for breach of contract and negligent workmanship, the Petitioner had filed a counterclaim for the recovery of monies for additional work. The settlement offer was intended to resolve the counterclaim also. This was refused.

On the morning of the trial, further negotiations were attempted and at this time the Petitioner offered Fifteen Hundred Dollars ($1,500.00) to dispose of the entire case and again this was refused. The entire case was tried over a period of two days and at its conclusion, a verdict was rendered in favor of the Respondents in

the sum of One Thousand Dollars ($1,000.00). As a result thereof, final judgment for the Respondents in accordance with that verdict was entered. (App.-13)

The claim for attorney fees and costs is based on paragraph eleven of the contract. (App.-7) The contract in question was the standard real estate Deposit Receipt and Purchase and Sale Agreement, which functionally was not the type of contract that would have best served the parties in this matter, but which was nevertheless the contract that the parties agreed to. This contract provided:

> "11. Attorney Fees and Costs. In connection with any litigation arising our of this agreement, the prevailing party shall be entitled to recover all costs incurred, including reasonable attorney fees."

On the basis that the Petitioner believed that the Respondents were not the prevailing party, it filed its Affidavit (App.-16) opposing the motion of the Respondents for costs and attorney fees. (App.-14)

The Trial Court, after hearing arguments and reviewing the motion and affidavits, determined that the Respondents were entitled to costs and attorney fees and so ordered on July 18, 1986. (App.-19)

An appeal was taken to the First District Court of Appeal and on May 14, 1987, their opinion was filed which affirmed the Trial Court; in that opinion the Court certified to the Supreme Court the question of whether the definition of "prevailing party" as appearing in Section 713.29 of the Florida Statutes should be extended to cases outside Chapter 713, Florida Statutes. It appears that the First District Court of Appeal did not want to venture beyond

the boundaries of C. U. Associates, Inc. vs. R. B. Grove, Inc., 472 So. 2d 1177 (Fla. 1985). Acting on the Certified Question, your Petitioner moved this Court to invoke its discretionary jurisdiction.

CERTIFIED QUESTION

IS THE DEFINITION IMPOSED UPON THE TERM "PREVAILING PARTY" AS USED IN SECTION 713.29, FLORIDA STATUTES IN C. U. Associates, Inc. vs. R. B. Grove, Inc., 472 So. 2d 1177 (Fla. 1985), TO BE EXTENDED BEYOND THE CONTEXT OF THAT STATUTE.

SUMMARY OF ARGUMENT

The District Court of appeal failed to decide the issue of attorney Fees and cost on the basis of the ordinary meaning of Prevailing Party and rather held to the hardline of too strict a construction of the Mechanics Lien Statute. The Prevailing Party as so defined in the contract in question as well as in section 713.29, should be treated identically.

ARGUMENT

The basis of an award of attorney fees and the costs to the Respondents is founded in the language of the contract. This contract, a standard real estate contract, clearly stated that only the Prevailing Party was entitled to costs and attorney fees. Contractually, language awarding the Prevailing Party attorney fees and costs is different than contractual language that allows the recovery of attorney fees. Such would be the case with a promissory note providing that the holder may recover reasonable attorney fees incurred int he collection of the note; however it does not provide that in the event the maker is successful in defeating this claim, that he would be entitled to such an award. In other words, there is nothing in the language of the promissory note that provides that either party will get attorney fees depending on who won or who

prevailed.

Such is not the case with this contract because the basis of awarding attorney fees is that the person must be designated and determined to be the prevailing party. There were two cases in Florida holding that where a party recovers a money judgment in an amount less that that offered prior to trial or prior to the verdict itself, he would not be considered a prevailing party, and therefore would not be entitled to attorney fees. These cases were S.C.M. Associates, Inc. vs. Rhodes, 395 So. 2d 632 (D. C. 2) and Monde Investments 2, Inc. vs. R. D. Taylor-Made Enterprises, Inc., 344 So. 2d 871 (D. C. 4). While these cases involved a review of Section 713.29, Florida Statutes, they still are relevant and decisive. The question decided by these cases was the definition of a prevailing party. It's not coincidental that the language of the Mechanic's Lien Statute allowing attorney fees and costs and the language in paragraph eleven of the contract in the instant case both provided that reasonable attorney fees and costs may be recovered by the prevailing party. Actually, the language of both the Statute and paragraph eleven are almost identical. It is not a matter of right, but rather a matter of prevailing in the lawsuit.

Attorney fees in Florida are sometimes awarded by Statute such as Florida Statute Section 627.438 and 627.756. Your Petitioner would suggest that the basis for recovery of attorney fees in cases such as this as well as contractual cases such as promissory notes to banks and lending institutions is founded on the fact that the person recovers, not that it is a prevailing party because that phrase is not used. In order to be awarded attorney fees, that person must recover something.

There was a conflict among the decisions of the District Courts when the case of C.U. Associates, Inc. vs. R. B. Grove, Inc., 472 So. 2d 1177 (Fla. 1985) was decided in the Third District. Because of that conflict, the Supreme Court of Florida entertained jurisdiction and decided in the Grove Case that the Third District Court of Appeal incorrectly awarded attorney fees and costs. In that case, Grove had brought an action to foreclose a Mechanic's Lien against C.U. Associates. Prior to trial, C.U. Associates offered to pay Grove the unpaid balance, but rejected the obligation to pay interest. This offer was turned down by Grove and a trial ensued. At the conclusion of the trial, Grove was awarded the exact amount of the unpaid balance of the original contract, but was not awarded any interest. The trial court awarded Grove's attorney fees as the prevailing party and the Third District Court of Appeal affirmed. The Supreme Court of Florida reversed the Third District Court of Appeal's decision and held that in order for a prevailing party to be entitled to the award of attorney fees, he must have been awarded an amount greater than that which earlier had been offered in settlement.

The Supreme Court went on to hold that the only requirement placed upon the party tendering a settlement is to show that there had been a bona fide good faith settlement offer that had been refused. Formal tender of the settlement amount was not required. In the Grove Case, it was remanded to establish proof that the offer had been made and made in good faith. In the instant case, the offer and its' good faith was demonstrated to the Court in the Affidavit of the president of the Petitioner. The Court awarded the Respondents' attorney Three Thousand Dollars ($3,000.00) as attorney fees and assessed costs at Seven Hundred Ninety-Six Dollars ($796.00). In the Respondents' motion to tax costs and assess attorney fees, the

claim for total costs itself was only Thirteen Hundred Seventeen Dollars & 75/100 ($1,317.75). So even considering the full costs, taxable or not, plus the verdict, the total amount was only Twenty Three Hundred Seventeen Dollars & 75/100 ($2,317.75) which was less than the offer tendered on the Monday, a week before trial.

In the Grove Case, the Supreme Court made the following statement:

> "To award attorney fees and costs when any judgment is won, without reference to earlier, bona fide good faith offers to settle the claim, allows the Plaintiff a free throw of the dice in any attempt to squeeze the last penny out of the claim."

In the case of Burnett & Johnson vs. Senn, 93 S.C. 316, 76 S.E. 820, the Court held that where the Defendant in a suit against him for $500.00 offered to pay the Plaintiff $37.00, together with approximately $16.00 in accrued interest, did not have to pay costs to the Plaintiff because the Plaintiff in that situation was not the prevailing party. The Plaintiff refused that offer and the case was tried before a jury and the jury found for the Defendant. On appeal, the Supreme Court established that the Plaintiff was in fact entitled to the exact amount offered by the Defendant, not its original claim of $500.00. Since it was only entitled to recover that which had been offered prior to the trial by the Defendant, then the Court held that the Plaintiff was not a prevailing party. In the case of McCrary vs. New York Life Insurance Co., C.C.A. Neb., 84 F2d 790, the Defendant tendered the full amount due prior to trial and the Court held that tendering the full amount due or recovered will ordinarily defeat the right to recover costs, since under such circumstances the Plaintiff is not the "prevailing party".

The Petitioner realizes that the cases supporting the position that the Respondents were not the prevailing party were cases decided

under th language of the Mechanic's Lien Act. However, when you remove form over substance and go to the very basis of what this Court did in the Grove Case, it does not seem important when the language is basically the same, that one is found in a contract and the other is found in a Statute. The point made by this Court in the Grove Case is simply that the Plaintiff should not be allowed a free throw of the dice in any attempt to squeeze the last penny out of the claim. Your Petitioner believes that the language is so similar and that the substantive law denying attorney fees in the Grove Case should be followed in this case.

In the very context of its definition, the Collegiate Dictionary states that one of the definitions of prevailing is to win out. It is hard to conceive that one receiving a verdict in an amount less than what was originally offered should be considered a winner. It stands to reason that the Respondents in this case are not the prevailing parties and accordingly they should not be allowed to recover costs and attorney fees.

CONCLUSION

It seems only realistic, that a prevailing party is not one that merely wins a jury verdict, but one that receives more than he would have gotten by settlement offer. In the case of receiving less at the hands of the trier of fact than was offered before the trial does not seem to place one in a position of having prevailed. It is respectfully submitted that the lower Court's order should be reversed and that an order be entered establishing that the Respondents in this cause were not the prevailing party.

Borden R Hallowes

Borden R. Hallowes
3947 Boulevard Center Drive
Suite 1
Jacksonville, Florida 32207
(904) 396-7205

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the aforegoing has been furnished by U. S. Mail to Robert Gorden, Esquire, 8842 Goodby's Executive Drive, Jacksonville, Florida 32217, this 30 day of June, 1987.

Reese Waters

Borden R. Hallowes

Borden R. Hallowes