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SUPREME COURT OF FLORIDA

ANN W. STOCKMAN,

CASE NO.: 75,635

Petitioner

vs.

GEORGE DOWNS, and
REGINA DOWNS

JD
FILED
CLERK OF COURT

RESPONDENTS' AMENDED BRIEF

On Appeal from the District Court of Appeal
of Florida, Fourth District

4th DCA Case No.: 88-3043

Respectfully submitted this 11 day of July, 1990.

[Handwritten Signature]
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STATEMENT OF THE CASE AND FACTS

This proceeding began in the lower court when STOCKMAN sued DOWNS for damages arising from alleged fraudulent representations made by DOWNS to STOCKMAN and from an alleged breach of contract by DOWNS (R. 1-6). The contract was attached to the complaint and ultimately introduced into evidence during trial (R. 177). The contract was for the sale and purchase of a single family residence, and provided among other things, that should litigation arise regarding the contract, the prevailing party would be entitled to attorney fees and costs. Plaintiff prayed for attorney fees and costs in her complaint. DOWNS answered the complaint and pled a number of affirmative defenses (R. 21-23). DOWNS did not pray for an award of attorney fees in their answer.

The matter proceeded to jury trial, and the issues of fraudulent representation and breach of contract by DOWNS were submitted to the jury. The jury found for the DOWNS' favor on 30 August 1988, and retained jurisdiction for taxation of costs and award of attorney fees on proper motion and notice (R. 132). On 29 August, DOWNS moved for assessment of fees and costs (R. 137-138). On 26 October, the trial court entered an order denying DOWNS' request for fees. On 15 November, DOWNS timely filed their notice of appeal.

On October 25, 1989, the Fourth District Court of Appeals reversed the trial court's denial of the post-judgment motion for attorney fees and directed that the Appellants be awarded attorney fees. A timely motion for rehearing and rehearing en banc was filed and on 31 January 1990, the court filed its opinion on the petition for rehearing, affirming its original decision and certifying to the

Supreme Court of Florida the following question,

"MAY A PREVAILING PARTY RECOVER ATTORNEY FEES AUTHORIZED IN A STATUTE OR CONTRACT BY A MOTION FILED WITHIN A REASONABLE TIME AFTER ENTRY OF A FINAL JUDGMENT, WHICH MOTION RAISES THE ISSUE OF THE PARTY'S ENTITLEMENT TO ATTORNEY FEES FOR THE FIRST TIME?"

SUMMARY OF ARGUMENT

DOWNS believe that attorney fees need not be requested in their answer. The action against them proceeded as an alleged breach of contract, resulting in damages to Plaintiff. The contract provided that the prevailing party was entitled to recover their reasonable attorney fees. The right to fees is a separate and collateral issue which can properly be addressed and requested for the first time after the entry of a final judgment for that is when the attorney fees provision of the contract is triggered. Before final judgment, the prevailing party cannot be known.

The Plaintiff cannot claim that she was not on notice that attorney fees would be in issue, for she requested fees under the clause of the contract providing the prevailing party was entitled to recover their reasonable attorney fees.

There is no reasonable distinction for allowing attorney fees to be raised by motion for the first time in an action based on a statute allowing attorney fees and not so allowing those attorney fees in an action based on a contract providing for the prevailing party to be awarded fees.

QUESTION CERTIFIED AS OF GREAT PUBLIC IMPORTANCE

MAY A PREVAILING PARTY RECOVER ATTORNEY FEES AUTHORIZED IN A STATUTE OR CONTRACT BY MOTION FILED WITHIN A REASONABLE TIME AFTER ENTRY OF A FINAL JUDGMENT, WHICH MOTION RAISES THE ISSUE OF THAT PARTY'S ENTITLEMENT FOR THE FIRST TIME? THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

ARGUMENT

The question as framed by the Fourth district Court of appeals does not distinguish between a motion for fees based on a statute or a provision in a contract but centers on whether a request for fees in either situation may first be raised after judgment by motion within a reasonable time.

Whether the fee request is based on a contract or a statute should not be material to the allowance of the fee if request is made within a reasonable time after final judgment. A litigant is charged with knowledge of the statutes in force at the time of the litigation and one cannot claim lack of due process or surprise when the request is made after judgment. ANN W. STOCKMAN can hardly claim surprise or lack of due process when a request for fees is made based on a contract relied upon by her, introduced into evidence by her, and on which she relied in her prayer for attorney fees had she prevailed.

Respondents believe that the Fourth District failed to see a difference in when the request for fees was first raised in a request based on contract or one based on a Statute. Brown v. Gardens by the Sea South Condominium Association, 424 So. 2d 181 (Fla. 4th DCA 1983). The prior law was that there was a difference and Brown followed the

..

reasoning, opining that it was for the Supreme Court to make the decision that there is no difference between a claim for fees based on contract or statute as to when it must be raised. That decision has, we believe, been made in Finkelstein v. North Broward Hospital District, 484 So .2d 1241 (Fla. 1986). Finkelstein holds that the claim for fees is a collateral claim which can be raised after judgment.

The basis of the trial court's denial of DOWNS' prayer for fees is that those fees were not requested by DOWNS in the answer nor was that issue tried by acquiescence of the parties.

The district courts have differed as to the necessity of pleading for attorney fees as a prerequisite to their award. This district, in the case of Brown v. Gardens by the Sea South Condominium Association, 424 So. 2d 181 (Fla. 4th DCA 1983), has held that in order to recover fees in a contract action, those fees must be requested. That court recognized no such requirement when fees were claimed under a statute but was troubled by that difference, stating

"Upon reflection we can not originate or find a rationale that meaningfully supports the distinction made by the courts between the necessity for pleading entitlement when based on contract vs. statute. We would prefer that the treatment be made uniform, one way or the other. However, mindful of our limited office and the authorities that have long maintained the distinction, we leave such resolution, if it is to be done, to the Supreme Court."

The Court also recognized what it characterized as an exception to the necessity of requesting attorney fees in a pleading

on an action based on a contract, allowing fees to the prevailing party. They cite from the case of Marrero v. Caverro, 400 So. 2d 802 (Fla. 3rd DCA 1981),

"Defendants' entitlement to an attorneys fee based on a contract in evidence was not defeated by its failure to plead for same as they presented the issue before the trial court by timely motion made after judgment of the defendants - although it would have been better practice for the defendants to have pled for said attorney fees in their answer."

Since the Marrero case and the Brown case spoken to above, the Florida Supreme Court we believe has resolved this conflict in Finkelstein v. North Broward Hospital District, 484 So. 2d 1241 (Fla. 1986). Finkelstein adopts the United States Supreme Court's Ruling in White v. New Hampshire Department of Employment Security, 455 U.S. 433, 102 Sup. Ct. Repr. 1162, which held,

"Regardless of when attorney fees are requested, the Court's decision of entitlement to fees will therefore require inquiry separate from the decision on the merits, an inquiry that cannot even commence until one party has prevailed."

Finkelstein states at page 1243,

"Therefore, we adopt the United States Supreme Court's reasoning and holding in White and conclude that a post judgment motion for attorney fees raises a 'collateral and independent claim' which the trial court has continuing jurisdiction to entertain within a reasonable time notwithstanding that the litigation of the main claim may have been concluded with finality."

The latest authority, found by DOWNS, with this issue at its

heart is Protean Investors, Inc. v. Travel Etc., 519 So. 2d 7 (Fla. 3rd DCA 1987). This case reaffirmed the Third District's holding in Marrero supra and recognized Marrero's conflict with Brown supra but opined,

"However in light of subsequent Supreme Court rulings in Cheek and Finkelstein, we question the continuing validity of the foregoing decision."

The Fourth District in Brown supra was troubled by not being able to find a rationale to support the distinction made by the courts between the necessity for pleading entitlement (to fees) when based on contract vs. statute. This court in Brown left the resolution of that matter to our own Supreme Court.

The Florida Supreme Court has found a post judgment motion for attorney fees raises a "collateral and independent claim". **As** such a claim, we believe it can be raised post judgment for the first time as was done in the lower court.

CONCLUSION

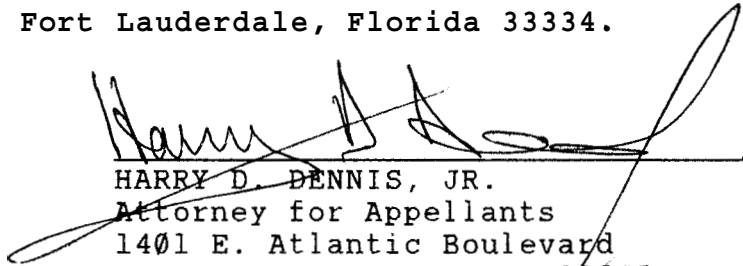
The certified question should be answered in the affirmative and the Fourth District Court of Appeals' decision affirmed.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 11 day of July 1990, to: RICHARD F. HUSSEY, ESQ., of Hussey & Hussey, attorneys for Petitioner, 1540 E. Commercial Boulevard, Fort Lauderdale, Florida 33334.


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