

067

SUPREME COURT OF FLORIDA

ANN W. STOCKMAN

CASE NO.: 75,635

Petitioner,

4TH DCA NO.: 88-3043

vs.

FLORIDA BAR NO.: 370088

GEORGE DOWNS and REGINA DOWNS,

Respondents.

FILED
JUL 23 1990
CLERK OF COURT

PETITIONER'S AMENDED INITIAL BRIEF

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

4th DCA Case No.: 88-3043

Respectfully submitted this 10th day of July, 1990.

HUSSEY & HUSSEY, P.A.

By: [Signature]
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PREFACE

This Amended Brief is submitted pursuant to this Court's Order of July 3, 1990, and on behalf of Petitioner, ANN W. STOCKMAN, who appeals the decision of the Fourth District Court of Appeal rendered January 31, 1990, with Mandate issued on February 16, 1990. The Fourth District's Opinion reversed the Trial Court's Order denying Respondent's post-Judgment Motion for Attorney's Fees. In response to Petitioner's Motion for Re-Hearing, the Court of Appeal certified the following question to the Supreme Court as a matter of great public importance:

MAY A PREVAILING PARTY RECOVER ATTORNEY'S 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 THAT PARTY'S ENTITLEMENT TO ATTORNEY'S FEES FOR THE FIRST TIME?

In this Amended Brief, the Petitioner will be referred to as STOCKMAN and the Respondents as the DOWNSSES.

STATEMENT OF-THE CASE AND OF THE FACTS

STOCKMAN sued the DOWNSSES for fraud and breach of contract. The Jury returned a Verdict in favor of the DOWNSSES. After entry of the Final Judgment, the DOWNSSES brought a Motion for Attorney's Fees.

The DOWNSSES failed to plead entitlement nor seek Attorney's Fees in their Answer and Affirmative Defenses and further failed to identify Attorney's Fees as an issue in their Pre-Trial Catalogue. The issue of Attorney's Fees was raised for the first time by the DOWNSSES in their post-Judgment Motion for Attorney's Fees. The Trial Court denied the DOWNSSES Motion, citing Brown vs. Gardens by the Sea, 424 So.2d 181 (Fla. 4th DCA 1983) as authority.

The DOWNSSES timely filed their appeal of the Trial Court's Order denying their Motion for Attorney's Fees. The Fourth District Court of Appeal reversed the Trial Court in its Opinion filed October **25**, 1989. STOCKMAN filed a Motion for Re-Hearing and Motion for Re-Hearing En Banc on November 8, 1989.

On January 31, 1990, the Fourth District Court of Appeal issued an Opinion affirming its reversal of the Trial Court's Order and certified the following question to the Supreme Court:

MAY A PREVAILING PARTY RECOVER ATTORNEY'S 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 THAT PARTY'S
ENTITLEMENT TO ATTORNEY'S FEES FOR THE FIRST TIME?

STOCKMAN timely filed a Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

Attorney's Fees may not be recovered by a prevailing party in a suit on a Contract unless that party has sought recovery of Attorney's Fees in the party's initial pleadings.

POINTS ON APPEAL

Whether Attorney's Fees may be recovered by a prevailing party in a suit on a Contract where that party raises the issue of entitlement to Attorney's Fees for the first time in a Motion filed after entry of Final Judgment.

ARGUMENT.

ATTORNEY'S FEES MAY NOT BE RECOVERED BY A
PREVAILING PARTY IN A SUIT ON A CONTRACT UNLESS THAT
PARTY HAS SOUGHT RECOVERY OF ATTORNEY'S FEES IN THE
PARTY'S INITIAL PLEADINGS.

STOCKMAN adopts the law and argument asserted in the following previously filed pleadings:

1. Answer Brief dated February 6, 1989, attached to STOCKMAN's Appendix to Amended Initial Brief as item number 1.
2. Notice of Supplemental Authority dated February 9, 1989, attached to STOCKMAN's Appendix to Amended Initial Brief as item number 2.
3. Motion for Re-Hearing and Motion for Re-Hearing En Banc dated November 8, 1989, attached to STOCKMAN's Appendix to Amended Initial Brief as item number 3.

STOCKMAN also refers this Honorable Court to the cases of Millard vs. Brannan, 553 So.2d 1248 (Fla. 2nd DCA 1989) and Bowman vs. Corbett, 556 So.2d 477 (5th DCA 1990). These cases hold that a prevailing party may not recover Attorney's Fees where entitlement and a prayer for same are not asserted in that party's initial pleadings.

The DOWNSSES and the Fourth District Court of Appeal urge that STOCKMAN cannot claim surprise since she prayed for Attorney's Fees in her Complaint. However, the DOWNSSES' pleadings are devoid of any reference to Attorney's Fees. It was never an issue raised nor even referred to until after Trial.

Except for the cases out of the Third District, all of the cases relied upon by the Court of Appeal involved entitlement based on statute, or based on the prevailing party's prayer for

Attorney's Fees in the initial pleading. However, the DOWNSSES did not assert entitlement to Attorney's Fees until they brought their post-Judgment Motion for Attorney's Fees wherein they introduced the issue of Attorney's Fees for the first time. Further, any entitlement they may have to Attorney's Fees is not based on statute.

Attorney's fees are never a collateral issue to a litigant. The amount of fees and ability to pay are compelling factors as a litigant continually evaluates his or her case while it progresses through discovery toward Trial. Fee considerations are critical, often pivotal, in determining the risks and benefits to settling, settling portions, or proceeding to Trial.

Because the DOWNSSES never raised Attorney's Fees as an issue until after Trial, STOCKMAN's continuing re-evaluations of her case as it progressed never included the potential risk of having to pay the DOWNSSES' Attorney's Fees. Had that issue been asserted and the risk been known, STOCKMAN's strategy for handling the case would have been completely different. Two Counts were alleged against the DOWNSSES: (1) Fraud and (2) Breach of Contract. If the DOWNSSES' Answer and Affirmative Defenses had included allegations seeking Attorney's Fees, STOCKMAN could have and would have proceeded to Trial on the Fraud Count alone, dropped the Count for Breach of Contract, and not risked the possibility of having to pay the DOWNSSES' Attorney's Fees. If STOCKMAN had prevailed at Trial as the Plaintiff, her damages would have been the same under the Fraud and Breach of Contract Counts. She would have lost nothing by dismissing the Breach of Contract claim.

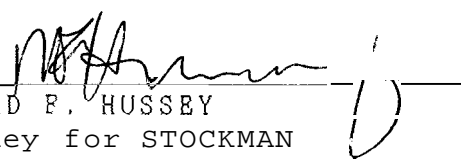
CONCLUSION

Due process requires notice of what relief a party is seeking. STOCKMAN relied upon the omission of allegations and a prayer for Attorney's Fees in assuming it was not an issue. She proceeded to Trial based on that assumption. It would be unfair now for the DOWNSSES to **be** allowed to raise Attorney's Fees as an issue for the first time after Trial. A prevailing party in a suit on a Contract should not be entitled to recover Attorney's Fees unless that party's initial pleadings included allegations of entitlement and a prayer for Attorney's Fees.

The Appellate Court's decision ought to be reversed and the Trial Judge's Order denying the DOWNSSES' Attorney's Fees should be reinstated.

Respectfully submitted this 10th day of July, 1990.

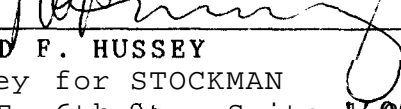
HUSSEY & HUSSEY, P.A.

By: 
RICHARD F. HUSSEY
Attorney for STOCKMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the fore-
going has been furnished by mail to Harry D. Dennis, Jr.,
attorney for the DOWNSSES, 1401 E. Atlantic Boulevard, Pompano
Beach, Florida 33060, on this 10th day of July, 1990.

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