

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.

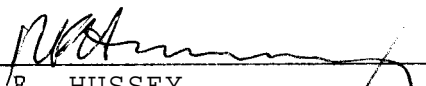
PETITIONER'S AMENDED REPLY BRIEF

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

4th DCA Case No.: 88-3043

Respectfully submitted this 25th day of July, 1990.

HUSSEY & HUSSEY, P.A.

By: 
RICHARD F. HUSSEY
Attorney for Petitioner
1540 E. Commercial Blvd.
Fort Lauderdale, FL 33334
(305) 771-7500

PETITIONER'S REPLY AND REBUTTAL TO
RESPONDENT'S AMENDED ANSWER BRIEF

Petitioner urges this Honorable Court to accept the analysis and reasoning espoused in the recent case of Bowman vs. Corbett, 556 So.2d 477 (Pla. 5th DCA 1990). Therein, the 5th District Court of Appeal recognized the distinctions between Pinkelstein vs. North Broward Hospital District, 484 So.2d 1241 (Pla. 1986), Cheek vs. McGowan Electric Supply Co., 511 So.2d 977 (Pla. 1987), and Altamonte Hitch & Trailer Service vs. U-Haul-, 498 So.2d 1346 (Fla. 5th DCA 1986).

Like this case, Bowman involved litigation between parties to a real estate contract that contained a provision for the recovery of attorney's fees to the prevailing party. The Bowman Court stated, at page 479:

"Harmonizing the reasoning and language of Pinkelstein and Cheek leads us to conclude that a contractual right to the recovery of attorney's fees is a substantive right which is ancillary to the main substantive right (the breach of contract. cause of action). However, a contractual right to an award of attorney's fees is not a freestanding substantive right which may be pled for the first time after rendition of the Final Judgment in the main breach of contract claim . . . Although proof of the amount of reasonable attorney's fees may be presented for the first time in a post-Judgment hearing, the claim for attorney's fees must first be pled; unlike a procedural remedy, a substantive right cannot be raised for the first time and determined pursuant to a post-Judgment Motion. Cf. Xanadu of Cocoa Beach, Inc. vs. Lenz, 504 So.2d 518 (Pla. 5th DCA 1987).

"The prevailing parties in both Pinkelstein and Cheek pled their claim for attorney's fees. That is an important distinguishing factor as the prevail& Defendants in this case did not plead their right to recover attorney's fees under the contract. Normally in law, a party who fails to plead a right (cause of action) when under applicable Court Rule of Procedure it should be pleaded, is deemed to have waived that right." [Emphasis added.]

Like the prevailing Defendants in Bowman, the DOWNSSES failed to plead entitlement or include a prayer for attorney's fees in their initial pleadings. That failure precluded recovery of fees in Bowman and should likewise preclude recovery by the DOWNSSES herein.

Respondents argue that a litigant is charged with knowledge of the statutes in force at the time of litigation. Similarly, a litigant is charged with knowledge of the prevailing case law in force at the time of litigation. During the instant litigation, "the overwhelming bulk of the cases" held it was "necessary to request attorney's fees in the parties' basic pleadings when claiming under a contract.." Brown vs. Gardens by the Sea South Condo Association, 424 So.2d 181, 182 (Fla. 4th DCA 1983).

Petitioner was justified in relying upon the prevailing case law in determining that attorney's fees was not an issue. If the DOWNSSES wanted to preserve their right to recover attorney's fees, they should have observed the prevailing case law and included an appropriate prayer and basis for recovery in their Answer and Affirmative Defenses. To charge Petitioner with the consequences of the DOWNSSES' failure is unfair. She proceeded to Trial on the breach of contract claim only because the issues as framed by the pleadings did not include the risk of becoming liable for the DOWNSSES' attorneys fees. Remember that, unlike the Brown case, waiver or estoppel does not apply because there was no recognition in any of the pre-Trial proceedings that the DOWNSSES' defense included a claim for attorney's fees. Raising attorney's fees as an issue for the first time after Judgment is

not just poor practice. It violates fundamental notions of due process.

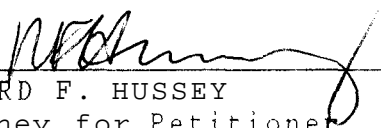
This Court has the opportunity to make the "better practice" of pleading entitlement a prerequisite to the recovery of attorney's fees by a prevailing party in a contract action. The First, Second, Fifth, and, until recently, the Fourth District Courts of Appeal have *so* held. It should be the uniform accepted practice and procedure throughout this State.

Due process requires notice of all relief sought. The cost of litigation and who may pay it is of utmost concern to all of today's litigants. If one faces the risk of paying an opponent's attorney's fees, notice of that risk ought to be required in the initial pleadings of the party seeking that relief. Where fees are sought pursuant to contract, a substantive right is involved, not merely a procedural remedy.

For the reasons stated herein and in Petitioner's Initial Brief, Petitioner urges this Honorable Court to reverse the Fourth District Court of Appeal and reinstate the Trial Judge's Order denying the DOWNSSES' Motion for Attorney's Fees.

Respectfully submitted this 25th day of July, 1990.

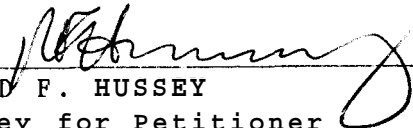
HUSSEY & HUSSEY, P.A.

By: 
RICHARD F. HUSSEY
Attorney for Petitioner

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 Respondents, 1401 E. Atlantic Boulevard, Pompano
Beach, Florida 33060, on this 25th day of July, 1990.

HUSSEY & HUSSEY, P.A.

By: 
RICHARD F. HUSSEY
Attorney for Petitioner
1540 E. Commercial Blvd.
Fort. Lauderdale, FL 33334
(305) 771-7500