IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,931

JUAN VICENTE PEREZ SANDOVAL, ET AL.

Petitioners,

vs.

BANCO DE COMERCIO, S.A., ET AL.,

Respondents.

REPLY BRIEF ON THE MERITS

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THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES WHERE THE BASIS FOR THE AWARD OF SUCH FEES WAS NOT PLED IN THE COMPLAINT

1. The Pre-Trial Stipulation of the Parties was insufficient to relieve Respondents of their burden to request attorney's fees in their pleadings.

Respondents initially rely on the pre-trial stipulation to justify the award of attorney's fees.[1] Respondents argue that the following stipulation:

> Whether Venezuelan law provides that the prevailing party in this action is entitled to recover its fees and costs.

resembles the stipulation in Brown v. Gardens by the Sea S. Condo. Ass'n, 424 So. 2d 181 (Fla. 4th DCA, 1983) referred to by the Court in its Stockman v. Downs decision found at 573 So. 2d 835 (Fla. 1991). The case was cited as an illustration of the concept that:

> Where a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees.

Stockman at 838. The stipulation in Brown was:

> Are any of the parties entitled to recovery of attorneys' fees and, if so, in what amount [?].

Id. at 183. On their faces the stipulations are different. The stipulation in the instant case was an inquiry into a question of Venezuelan law, i.e., does Venezuelan law contain a provision regarding attorney's fees to the prevailing party. The

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[1] Respondents suggest we have "mistated" or "obscured" this stipulation. (Respondent's brief at page 4). The stipulation is discussed at lengths at pages 15 through 16 of our brief on the merits.

stipulation does not pose an inquiry regarding whether the prevailing party in this case will be entitled to attorney's fees. More important, the stipulation does not indicate that the issue is whether Respondents will be entitled to fees as a remedy in this case.[2] As we have emphasized, the matter of fees being remedial in nature,[3] a stipulation posing an inquiry into the substance of Venezuelan law would be of no import since the award would have to be determined under Florida law.

Respondents also justify the trial court's action by asserting that the following unilateral statement made by their trial counsel:

> Your Honor, there are just a couple of preliminary matters I would like to refer to:
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> Consistently, with my understanding of Florida law, in the event this court determines, upon a determination of the issues in the main case, that either side is entitled to attorney's fees, it is my understanding that would be separately visited at that time and it won't be necessary to try the issues in the main case.

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[2] The length and detail of the stipulation cannot be overlooked. It contains some six legal size pages and details the facts of the case. The issues to be determined by the Court were detailed with certainty and none was phrased in the manner Respondents suggest.

The issues include the issue of whether Morelia (an entity mentioned in page 7 of our initial brief on the merits) is an indispensable party to the action. We seize the occasion to remind the Court of the observation in footnote 3 of our initial brief that it would appear that Morelia, an indispensable party, was not before the Court. Footnote 14 in Respondents' brief erroneously claims the issue was never raised.

[3] Cheek v. McGowan Electric Supply, 511 So. 2d 977 (Fla., 1987) contains a specific teaching that "the payment of attorney's fees is not part of the substantive claim". at 979.

is akin to the factual situation in Brown where the Court found the award was justified where the defendant:

> "knew, recognized and acquiesced, without objection or suggestion of surprise, prejudice or disaccommodation, that appellants were claiming fees and the contract basis for the claim."

424 So. 2d at 183. First, as we pointed out in footnote 5 of initial brief, silence of counsel can not be construed as a stipulation. Second, the appendix contains a memorandum of law filed by Petitioners in which they specifically reserved an objection to the award of fees since they were not pled, specifically pled. (A, 108-109).

Respondents final suggestion on this point is that core of the holding in Stockman is that notice alone is sufficient.[4] We do not find Stockman expressing the liberality which Respondents urge. Stockman does state that "the fundamental concern is one of notice". at 837. However, Stockman recognizes that the request for fees must be set forth in the pleadings. It is this type of notice that Stockman demands, not a request outside of the pleadings. Indeed, if Stockman were to stand for the proposition Respondents urge, i.e., that merely putting someone on notice during the pendency of the case by suggestions is sufficient, then Stockman as written, is a nullity.

II

THE TRIAL COURT ERRED IN AWARDING ATTORNEYS' FEES UNDER VENEZUELAN LAW WHERE THE AWARD OF ATTORNEY'S FEES IS A

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[4] Petitioners' argument is that "the real issue here is notice, not whether there was a demand for fees contained in the complaint." (Respondents' brief at page 18)

REMEDIAL PART OF THE CASE, PROCEDURAL IN NATURE AND THUS TO BE DETERMINED BY THE LAW OF FLORIDA

Respondents initial salvo on this point consists of the unexplained assertion that we are ignoring the pre-trial stipulation.[5] The assertion is wrong and overlooks the question of law that is tendered by this point. The question of law centers on the requirement that the procedural aspects of a case (including the remedies), be governed by Florida law. The trial court committed the error of determining that on a procedural aspect it was bound by Venezuelan law.

Respondents suggest that the matter of awarding attorney's fees for conflict of law purposes has been determined to be substantive and hence that it was proper to apply Venezuelan law. Respondents urge this position by referring to L. Ross, Inc. v. R. W. Roberts Construction Company, Inc., 481 So. 2d 484 (Fla. 1986). Respondents analysis is wrong. In Ross, the Court was required to interpret the retroactive application of a repealer statute where the statute removed a limitation on the amount of attorney's fees available under the statute. The statute removed a ceiling on award of attorney's fees in insurance cases and the issue was whether

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[5] We presume that Respondents are referring to that part of the stipulation where the parties agreed that:

> As to rules of law, the parties agree that Venezuelan law controls the substance of the issues of liability and obligation with respect to the Sandy Bay transaction.

The stipulation is limited to the substance of the transaction. The stipulation does not extend to the remedies to be allowed in the case. The reason is quite simple: the remedial aspects of the case are governed by Florida law. Brown v. Chase, 80 Fla. 703, 86 So. 684 (1920).

such removal could be applied retroactively so as to permit a greater award in a case filed before the enactment of the repealer. The trial court applied the limitation reasoning that the repealer could not be applied retroactively. This Court reviewed the action taken by the trial court and found it proper. It did so on the basis of a constitutional analysis. The issue being whether the statute created vested rights that could be altered by the subsequent statute. In such cases, it is usual to use the terminology "substantive" or "remedial". The analysis being that if the statute is remedial, it can be applied retroactively, whereas if a substantive or vested right is involved, then it cannot. In Ross, the statute was found to have affected a substantive right, which could not be tampered with. Ross does not stand for the proposition that the matter of the award of attorney's fees for conflict of laws purposes is to be deemed substantive. Rather, authorities of long standing indicate that the award of attorney's fees in conflict of laws cases is procedural. see Cheek, supra at Footnote 3; Security Co. of Hartford v. Eyer, 36 Neb. 507, 54 N.W. 838 (1893); Commercial National Bank v. Davidson, 18 Or. 57, 22 P. 517 (1889); Arden Lumber Co. v. Henderson Iron Works & Supply Co., 83 Ark. 240, 103 S. W. 185, 187 (1907).

Respondents also argue that the Restatement justifies their position that the matter of the award of attorney's fees was to be determined under the laws of Venezuela. Relying on their erroneous view of Ross, they first assert that since this Court has already

determined the matter to be substantive, further analysis should be foreclosed.

They also suggest that since the Restatement lists the following issues as "procedural":

(1) Proper Courts (Section 123);
(2) Form of Action (Section 124);
(3) Service of Process and notice (Section 126);
(4) Pleading and conduct of proceedings (Section 127);
(5) Pleading of set-offs, counterclaims or other defenses (Section 128);
(6) Mode of trial (Section 129);
(7) Obedience to the Court (Section 130);
(8) Enforcement of judgments (Section 131);
(9) Certain issues relating to burden of proof (Section 133);
(10) Certain issues relating to going forward with the evidence and presumptions (Section 134);
(11) Sufficiency of evidence (Section 135);
(12) Notice and proof of foreign law (Section 136);
(13) Witnesses (Section 137); and
(14) Admissibility of evidence (Section 138)

argument on the issue is also precluded. However, the very restatement concedes that the list is not meant to be exhaustive and, as Respondents point out, cautions against automatic categorization of issues as "substantive" or "procedural.

Respondents also attempt to provide an analysis of the issue utilizing the considerations noted in comment a to Section 122. We have provided a similar analysis in our initial brief and do not wish to rehash it. We will, nonetheless, address the analysis offered by Respondents.

Respondents argue that:

> Because SANDOVAL's actions were taken as an officer, shareholder and director of Venezuelan corporations, one must assume that he shaped his actions with reference to the local law of Venezuela. SANDOVAL could hardly be surprised that Venezuelan law would dictate his ultimate liability to the Respondents...Indeed, had SANDOVAL shaped his actions with regard to the law of another

> state, he might have included a choice of law provision in the applicable documentation, which he apparently did not.

The argument must fail. The transaction involved a Panamanian company and the closing was held in Panama suggesting that consideration was given to the laws of Panama and most important their tax laws. Additionally, lack of a choice of law provision in the documents indicates that no consideration at all was given to applying any particular law. Finally, we find it rare for Respondents to hint that a choice of law provision in a contract would make any difference where the entire predicate for liability rests not upon documents but rather upon the obligations Respondents acclaim were imposed by Venezuelan law.

Respondents also argue that application of Venezuelan law will affect the outcome of the case. We don't disagree with this. Petitioners are being required to pay attorney's fees when no thought was given to the matter at closing in 1982. But, that alone does not turn the question into a "substantive" one.

Additionally, the reasoning that the public policy of Florida does not militate against the award in this case is erroneous. Florida law does permit the award of attorney's fees. However, this has been the product of specific legislative fiat in particular limited areas. The public policy reflected by such laws is that an award of fees will be permitted only in certain cases after a particular result or finding.[6] There is no comparable

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[6] For example, an award of fees under Section 57.105 (Fla. Stat. 1990) requires a specific finding, see. Whitten v. Progressive Case Ins. Co., 410 So. 2d 501 (Fla. 1982). No

doctrine awarding fees to al litigants who become a "prevailing party" as view espoused by Article 274 of the Venezuelan Code of Civil Procedure. The lack thereof indicates that public policy mandates no such award; an award so made would actually run contrary to such policy.

Respondents also rely on two Fourth District cases to assert that our courts have considered whether attorney's fees are substantive or procedural for conflict of laws purposes and have resolved the matter to be substantive. Respondents refer the Court to Pan American Life Insurance Company v. Fuentes, 258 So. 2d 8 (Fla. 4th DCA, 1971) and Confederation Life Association v. Alvarez, 276 So. 2d 95 (Fla. 4th DCA, 1973). Both of these cases deal with statutory construction and have nothing to do with conflict of laws. The cases determined that attorney's fees were not recoverable by the Plaintiffs under the statute permitting the award of fees to a prevailing plaintiff in an action on an insurance policy. The cases so hold because the policies in question were not delivered in the United States; they were delivered in Cuba and Section 627.401(1) (Fla. Stat. 1969) required such a delivery for an award to be authorized. The cases do not stand for the seeming proposition that Cuban law controlled the award of fees. To the contrary, the Courts noted that the remedial

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equivalent finding can be made or found in this case where there were many disputed issues. Indeed, the meandering allegations of the complaint and amended complaint were disputed and more than 90% of it was not proven

aspects of the case, i.e., the award of attorney's fees, was to be governed by the laws of the State of Florida.

The labyrinth of Venezuelan law that the trial Court was required to travel (and which we suggest the trial Court got lost in) exposes the undue burden that is imposed if foreign law is to be considered. For example, the text of the Venezuelan Code of Procedure which was aired before the trial judge was changed in 1986 when a new code was adopted. Under the prior version, Article 274 of the Code states that:

> The party who is totally defeated in a proceeding or in an incident of a trial shall be ordered to pay the court costs...the court may exempt the party from same when it appears that the party has had reasonable motives...to bring the litigation.

The meaning of the underlined language was developed through expert testimony and we have mentioned it at page 11 of our initial brief. Nonetheless, the underlined language was deleted by the 1986 code. This change was viewed by Respondent's expert as removing the discretion given a trial judge in Venezuela to determine if there were reasonable motives and exonerate the payment of costs and fees. (A, 37-39) In his view the taxing of fees and costs was now mandatory. However, Article 9 of the 1986 code specifies that acts and events that have not been adjudicated yet will be regulated by prior law. and Respondents expert specifically acknowledged this. (A, 36-37) This was not a matter of interpretation as the very text of the Code states this fact. (A, 37) Nonetheless, the trial judge was supplied by Respondents' expert with a peroration concluding that the present code might

apply. This left an American judge with the burden of wandering through this inconsistent testimony. This burden need not be imposed if Florida law is applied.

III

THE TRIAL COURT ERRED IN AWARDING INTEREST ON THE BASIS OF VENEZUELAN LAW WHERE THE LIABILITY AGAINST PETITIONERS DID NOT ARISE AS A MERCANTILE OBLIGATION WHICH WAS DEMANDABLE IN NATURE

There was only one source to support the award of interest at the rate of 12 percent in this case.[7] The source was Article 108 of the Venezuelan Commercial Code. This authorizes the award of interest on mercantile debts of a liquid and demandable sum. It does not require the assistance of an expert to read this text. Its meaning is plain and simple; the award is authorized only for mercantile debts of a liquidate and demandable sum. It does not require an inquiry of a factual nature to determine that the award contained in the judgment was not a mercantile debt of a liquid and demandable sum. Hence, we disagree with Respondents that we are advancing a greater weight of the evidence type of argument. Rather, we are stating that there is no factual or legal basis for concluding that the award of interest under this particular section of the Venezuelan code was authorized.

We must point out that Respondents also attempt to justify the application of the section by relying on language from a decision

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[7] The parties agreed that Venezuelan law applied on the issue of interest.

of a Venezuelan Court[8] which states that "bank operations" are "objectively commercial". Had the decision been presented properly before the trial court we do not think we would have trouble with this concept. Respondents theory of the case has been that this transaction was a "fraud of massive proportions"[9] not that it was a "banking operation". Thus, the case does not provide any support for their position.

We must likewise, point, out that Respondents brief contains a reference to a treatise entitled "La Reparación de los Daños por el Juez" (The award of Damages by the Court). We find ourselves in a difficult position by the very act of referring to this treatise because we find that foreign law must be proven like a "fact". The treatise was not mentioned as evidence in the trial court. Nonetheless, it is now used as a form of argument. Respondents treat this as if it were Prosser, Williston or Corbin on Contracts. We suggest that the argument should be disregarded or stricken as it constitutes argument based upon facts outside the record. see Kingston v. Quimby, 80 So. 2d 455 (Fla. 1955) ("the absence from the record of both pleading and proof of foreign law

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[8] The case was not provided by any expert. Moreoever, their expert explained that decisions or jurisprudence under Venezuelan law only apply to the particular case under review and not to other cases. (A, 44) ("Not even the jurisprudence of the Supreme Court is obligatory only within the parameters of the case where it was decreed.")

[9] Respondents' brief at page 2.

precludes...consideration of contentions in briefs based upon foreign law.").[10]

IV

THE TRIAL COURT ERRED IN GRANTING A REMEDY WHICH RESCINDED THE SALE OF STOCK BY PEREZ AND SANDY BAY BUT WHICH DID NOT CONDITION SUCH JUDGMENT UPON THE DELIVERY OF THE STOCK INVOLVED IN THE SALE TO RESPONDENTS AND THUS DID NOT RESTORE THE PARTIES TO STATUS QUO

Respondents' position on this point is that to require a delivery of the stock to Petitioners in exchange for payment of the amount awarded is wrong because it would permit Respondents to benefit from their alleged wrongdoing.[11] What Respondents fail to see is the injustice or lack of equity that the judgment creates. Respondents also fail to see how the judgment is not in accordance with law.

Initially, we must consider that the Third District concluded that the Venezuelan banking laws applied in this case were not penal. Perez Sandoval v. Banco de Comercio, 566 So. 2d 828 (Fla. 3d DCA, 1990). Thus, the liability imposed did not have penal or punitive overtones. Had the law which was applied carried penal characteristics, its application would have been precluded. see The

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[10] The same consideration should be given to the argument found at page 30 of Respondents' brief which relies upon Article 1090 of the Commercial Code and footnote 11. None of these matters were presented in the trial court and their presentation should not be condoned.

[11] Respondents state that 1.5 million dollars used in the purchase by Petitioners originated from a loan which "has never been repaid". (Respondent's brief at page 35). The record does not support this statement. This is pure assertion by Respondents from a source outside the record and should be stricken. Hastings v. Hastings, 45 So. 2d 115 (Fla. 1950); Permenter v. Bank of Green Cove Springs, 136 So. 2d 377, 379 (Fla. 1st DCA, 1962).

Antelope, 10 Wheat (23 U.S.) 66, 123, 6 L. Ed. 268 (1825) ("The Courts of no country, or sovereign, execute the penal laws of another"). To the contrary, the laws utilized resulted in restitution and indemnity to Respondents. The very judgment ordered "the return of the U. S. $12,500,000 in profit which Defendant Perez admittedly received." (R, 496).

Additionally, the Sandy Bay transaction involved the purchase of stock in a company whose assets had a value of 30 or 45 million dollars. (T, 66). The value of the drill owned by the company alone was worth ten million dollars. (T, 66). Respondents acquired the company for sixteen million dollars and they still own it.

The judgment now permits Respondents to keep this company, receive a payment of 12.5 million dollars together with interest and Petitioners receive nothing. This is not a form of rescission, it is a form of punishment. However, this is not what was contemplated by the laws which were applied (which were not penal in nature) nor is what was actually contemplated by the judgment which ordered restitution and whose purpose was to undo the transaction.

Respondents offer that the stock is still not paid for completely. This could be a conditioning aspect of the judgment. Such argument nonetheless overlooks the fact that by paying 12.5 million dollars Petitioners would be paying almost 75 per cent of the purchase price; the judgment could be adjusted accordingly. see

Mar-Char Enterprises, Inc. v. Charlie's The Lakes Restaurant, Inc., 451 So. 2d 930, 931 fn. 1 (Fla. 3d DCA, 1984), rev. den. 461 So. 2d 113 (Fla. 1985) (in a rescission case a trial court has "the ability to order an accounting and fashion other ancillary remedies if necessary").

Respondents also maintain that Florida law prohibits the conditioning aspects of the judgment that we urge. Respondents thus rely on Local No. 234 of United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry v. Henley & Beckwith, Inc., 66 So. 2d 818 (Fla. 1953); D & L Harrod Inc. v. U.S. Precast Corp., 322 So. 2d 630 (Fla. 3d DCa, 1975) and Spiro v. Highlands General Hospital, 489 So. 2d 802 (Fla. 2d DCA, 1986) and argue that these authorities apply. Our riposte to this is first that we must now overlook that Respondents were the plaintiffs to this action. Respondents were the Defendants. It appears that the principle which does not permit a wrongdoer to obtain the fruits of an illegal contract arises where the wrongdoer or party engaging in illicit conduct seeks affirmative relief. For example in Local 234, the plaintiff was seeking rights under a contract which the law characterizes as illegal. To the same effect is D & L. Harrod,Inc., involving a trucker seeking to enforce a contract in violation of regulatory law and Spiro, which

involved a dentist seeking to engage in practice for which he was not licensed.

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I HEREBY CERTIFY that a true and correct copy of the above and foregoing was on this 22nd day of July, 1991, served upon Raquel Rodriguez, Greenberg, Traurig, et al., 1221 Brickell Avenue, Miami, Florida 33131.

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