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IN THE SUPREME COURT OF FLORIDA

CARL A. MORITZ and SARA)
H. MORITZ, his wife,)
) Petitioners,)
))
vs.)
))
HOYT ENTERPRISES, INC.,)
))
Respondent.)

Fourth District Court
CASE NO. 89-1232
89-1525

Supreme Court
CASE NO. 77,892

PETITIONER'S BRIEF OF CONFLICT JURISDICTION

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Preface

Petitioners CARL A. MORITZ and SARA H. MORITZ, his wife were the Plaintiffs in the Trial Court. They also were Appellants in the Fourth District Court of Appeal. They alternatively will be referred to as Petitioners, the MORITZS and "Buyers." Respondent HOYT ENTERPRISES, INC. was the Defendant and Counterclaimant in the Trial Court and the Appellee in the Fourth District Court of Appeal. It alternatively will be referred to as Respondent, HOYT ENTERPRISES and "Seller - builder." The symbol "(R. ___)" refers to the Record on Appeal. The Appendix to this Brief is referred to as "(Ap. _____)".

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Issue Presented for Review

WHETHER THE DECISION OF THE DISTRICT COURT IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE SUPREME COURT AND OTHER DISTRICT COURTS ON THE SAME QUESTION OF LAW, IN DETERMINING THAT A "PREVAILING PARTY" IN CONTRACT LITIGATION IS CONCLUSIVELY DECIDED BY WHICH PARTY BREACHES THE CONTRACT, WITHOUT A CONSIDERATION OF WHICH PARTY OBTAINED RELIEF IN THE LITIGATION AND THE NATURE AND EXTENT OF RELIEF OBTAINED OR WHETHER THE CONTRACT WAS PARTIALLY PERFORMED AND CONSIDERATION RECEIVED BY THE NON-DEFAULTING PARTY WHICH WAS REQUIRED TO BE RETURNED.

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Preface

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Statement of Case and Facts

The discretionary jurisdiction of this Court is sought to review the decision of the Fourth District Court of Appeal, Opinion filed March 6, 1991, (Ap. A), re-hearing denied on April 12, 1991. (Ap. B). Petitioners' NOTICE TO INVOKE DISCRETIONARY JURISDICTION was filed April 26, 1991. (Ap. C). The decision of the Fourth District Court expressly and directly conflicts with decisions of other District Courts of Appeal and of the Florida Supreme Court on the same question of law.

This proceeding involves a real estate contract dispute. The focus of the Petition is the propriety of an award of attorney's fees under the contract and a determination of who is the "prevailing party" for such purpose.

Petitioners MORITZ were the purchasers under the real estate contract. Respondent HOYT ENTERPRISES, INC. was the builder-seller. The Petitioners deposited in excess of FIFTY-SEVEN THOUSAND (\$57,000.00) DOLLARS with HOYT ENTERPRISES toward the purchase of a home to be built by HOYT on property owned by HOYT ENTERPRISES itself. The purchasers did not close and demanded return of their deposit monies from HOYT ENTERPRISES. The demand was refused. The MORITZS subsequently initiated proceedings in the Trial Court to recover their deposit. HOYT counterclaimed, alleging failure to close and wrongfully attempting to cancel the deal. (Ap. A).

HOYT ENTERPRISES interposed an affirmative defense in the proceedings to claim the deposit as liquidated damages. The Trial

Court denied this claim by summary judgment and entered judgment on that claim in favor of the MORITZS.

During the litigation the completed home was sold by HOYT to a third party. A portion of the proceeds, which was HOYT'S money, was ordered to be held in escrow. (Ap. A, pgs. 2,5).

In it's AMENDED FINAL JUDGMENT, (Ap. C), the Trial Court eventually found Petitioners to be in breach of the contract for wrongfully attempting to cancel the transaction and awarded HOYT ENTERPRISES damages. These damages, however, were only approximately SIXTEEN THOUSAND (\$16,000.00) DOLLARS, TWENTY THOUSAND (\$20,000.00) DOLLARS with interest - substantially less than the amount of the deposit. On the other hand Petitioners MORITZ recovered from HOYT'S escrowed money their full deposit plus interest. When offset by the amount of damages, this resulted in a net recovery for the MORITZS in the litigation in excess of FOURTY-FIVE THOUSAND (\$45,000.00) DOLLARS. (Ap. A).

The contract between the parties provided that in the event of litigation arising out of the contract the prevailing party would be entitled to recover attorney's fees and costs from the other. In a post-judgment order the Trial Court found HOYT ENTERPRISES to be the prevailing party and awarded it attorney's fees and costs. The Appellate Court, in a 2-1 decision, affirmed the award of attorney's fees by finding HOYT ENTERPRISES to be the prevailing party because the Trial Court found the MORITZS to be in breach of contract. The dissenting opinion would have reversed the post-judgment award of fees and costs because the MORITZS

"... realized an affirmative judgment in their favor after Appellee's offsetting claims had been taken into consideration." On remand the dissent would have directed that fees and costs be awarded to the MORITZS as the prevailing party. This petition ensued.

Summary of Argument

This court and other District Courts of Appeal have established that in contract cases the "prevailing party" is the one in whose favor an affirmative judgment is rendered. It is immaterial whether there is recovery of the entire amount as long as there is some recovery. Petitioners recovered from the seller's money being held in escrow the majority of their deposit monies after the seller's damages from the Petitioners breach was offset. Litigation by the Petitioners was necessary to recover any part of the deposit monies.

The decision of the District Court is in conflict with prior District Court decisions that hold that a party who obtains the greater award of contested funds is the "prevailing party" for attorneys fees purposes. It is also in conflict with cases that hold that if a party is forced to file a lawsuit for return of a real estate deposit, although he is not successful in obtaining the entire deposit, he nevertheless is the "prevailing party."

The District Court applied a standard in contract actions that a breach by one party automatically makes the other party the prevailing party if litigation ensues. This standard is in conflict with earlier cases of the Supreme Court and other District Courts

of Appeal. A party whose contract has been breached by another party, may not act with impunity or be discharged from future obligations under the contract where consideration has been paid by the breaching party and that consideration exceeds any damages incurred.

Point on Appeal

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS ON THE SAME QUESTION OF LAW, BECUASE IT DETERMINES THAT A "PREVAILING PARTY" IN CONTRACT LITIGATION IS CONCLUSIVELY DECIDED BY WHICH PARTY BREACHES THE CONTRACT, WITHOUT CONSIDERING WHICH PARTY OBTAINED RELIEF IN THE LITIGATION AND THE NATURE AND EXTENT OF THE RELIEF OBTAINED OR WHETHER THE CONTRACT WAS PARTIALLY PERFORMED AND CONSIDERATION RECEIVED BY THE NON-DEFAULTING PARTY WHICH WAS REQUIRED TO BE RETURNED UNDER THE CONTRACT.

There is a substantial body of law in contract cases that the prevailing party is the one in whose favor an affirmative judgment is rendered. See, e.g., Fixall Enterprises, Inc. vs. Theis, 524 So.2d 1015, 1016-17 (Fla. 1988), Casavan vs. Land O'Lakes Realty, Inc., 542 So.2d 371 (5th DCA Fla. 1989), Daniels vs. Arthur Johannessen, 496 So.2d 914 (2nd DCA Fla. 1986). The rule is the same involving statutory mechanics lien foreclosures. See, e.g., Peter Marich & Assoc., Inc. vs. Powell, 365 So.2d 754 (2nd DCA Fla. 1978), Sharp vs. Ceco Corp., 242 So.2d 464 (3rd DCA Fla. 1970). It is immaterial whether there is recovery of the entire amount sought in the complaint, Peter Marich & Assoc., Inc., supra, at 756, as long as something is recovered. Malagon vs. Solari, 566 So.2d 352, 353 (4th DCA Fla. 1990)(and cases cited therein).

The MORITZS recovered an affirmative judgment in their favor in the Trial Court. Their recovery was from HOYT'S money in escrow

from the sale of HOYT'S property to a third party. Regardless of how the result is characterized by the District Court majority, HOYT was not entitled to retain the entirety of the MORITZ'S deposit. HOYT wasn't even entitled to retain the majority of it, only the amount of its damages. HOYT kept all of the deposit, nevertheless, which necessitated the MORITZ'S initiation of litigation to recover any part of it.

The decision of the District Court is in direct and express conflict with rules of law provided in Fixel Enterprises, Inc., supra, and the other cases cited herein above. One of these other cases that is particularly determinative of the issue is Cassavan, supra. That case involved a real estate transaction where the broker was paid a deposit of approximately \$11,000.00. When the deal fell through the broker filed an interpleader action to determine who was entitled to the monies. The buyer and seller then cross-claimed against each other for the deposit, damages and other relief. Although the jury found that the buyers, the Cassavans, had breached the real estate contract, nevertheless, the Appellate Court determined that the buyers were the "prevailing parties" because they were entitled to a greater award out of the interpleaded funds than the seller. This was so even though the seller recovered some portion of the deposit as damages for the buyers breach of contract. Id. at 374.

Daniels, supra, is instructive, as well. In that case there was a real estate contract where the seller was given a \$25,000.00 deposit in connection with the construction of a custom home. The contract entitled the buyers to return of their deposit less "all

costs relating to design, engineering, permits and surveys" if the parties failed to agree on final plans and specifications or if the buyers could not sell their home located elsewhere. Id. at 915. When neither of the two contingencies were satisfied the buyers demanded return of their deposit. When the matter could not be settled, litigation ensued.

The jury found that the buyers were entitled to receive approximately \$15,000.00, or sixty percent (60%) of their deposit. The seller was entitled to the remainder. The jury also found that the seller had not breached the contract. Id. The Appellate Court in Daniels observed that the buyers were forced to initiate legal action to obtain return of the deposit and held that they "prevailed" in the lawsuit and were entitled an award of attorneys fees and costs. This was in spite of the fact that the sellers had not breached the contract. Id.

As Cassavan indicates, the party who obtains the greater award of the contested funds is the "prevailing party."¹ That obviously is the MORITZS in this case. Daniels supports the same conclusion and even suggests that if a party is forced to file a lawsuit for a return of a real estate deposit, although he is not successful in obtaining the entire deposit, he nevertheless is the "prevailing party" for the purposes of an award of fees and costs. Both cases

¹ This approach also was utilized in Williams vs. Dolphin Reef Limited, 455 So.2d 640 (2nd DCA Fla. 1984), Albiez vs. Wilkerson, 546 So.2d 1112 (2nd DCA Fla. 1989), Flemming vs. Urdl's Waterfall Creations, Inc., 549 So.2d (4th DCA Fla. 1989).

illustrate that in this case the Court below was in error in using a finding of which party was in material breach of contract to determine the prevailing party for the purposes of a fees and costs award.

The District Court in this case did not apply the standard enunciated in Fixell, Cassavan, Daniels and other cited authority which would have produced a different result in the District Court. By failure to do so, the decision is in express and direct conflict with such cases. Mancini vs. State, 312 So.2d 732, 733 (Fla. 1975). The conflict is of such a magnitude that the decision of the District Court would have the effect of overruling these earlier cases if it were followed as precedent. See, Kyle vs. Kyle, 139 So.2d 885, 887 (Fla. 1962). Instead of following established authority, the decision of the District Court announces a rule of law that the standard to apply in contract cases, for the purposes of an award of attorneys fees, is that if one party breaches a contract this automatically causes the other party to be the "prevailing party" if litigation ensues. (See, Ap. A, dissenting opinion p. 6).

This rule cannot be the standard to be applied in circumstances such as are involved in the instant case. A breach of contract by one party may not result in the other party being damaged at all.² Thus, in cases where no damages have been incurred

² For example, the general damages recoverable on the buyers breach of a real estate contract is the difference, if any, between the agreed purchase price and the actual value of the property at the time of breach. See, Stewart vs. Mehrlust, 409 So.2d 1085, 1086 (2nd DCA Fla. 1982). If there is no difference or the value is greater than the contract price, there are no damages.

and a deposit has been paid by the buyer to the seller, the entire deposit must be returned. If damages have been sustained in an amount less than the amount of the deposit monies, then there is an obligation to return the difference between the deposit monies and the amount of damages. In either case in an action by the buyer resulting in recovery of deposit monies there should be an adjudication that the buyer is the "prevailing party" for attorneys fees purposes.

The District Court opinion establishes a rule of law that when one party breaches a contract the other party may act with impunity and is discharged from future obligations under that contract. The cited portion of Rinehart vs. Miller, 548 so.2d 1176 (4th DCA Fla. 1989), found by the District Court to be similar to the instant case, holds that the breach by one party to a contract releases the other party from performing any future contractual obligation. Certainly this cannot be the law as it applies to contracts which are partially executed by one party by paying consideration in the form of a real estate deposit to a non-defaulting party . It also can't be the law that if a breaching party files a suit on a contract pursuant to which he obtains recovery and is successful after deduction of any damages, that party still must pay the non-breaching parties attorneys fees and costs while obtaining what he was entitled to in the first place.

Conclusion

The court should exercise it's discretion, grant jurisdiction and entertain this case on the merits. The decision of the District Court is in express and direct conflict with prior decisions of the District Courts and the Supreme Court of this state on the same question of law. That conflict should be resolved. The decision of the District Court does not follow existing precedent pertaining to a determination of who is the "prevailing party" for the purposes of an award of attorney's fees. A party to a contract, even one who has breached the contract, should not be discouraged and penalized by having to pay the non-breaching parties' attorney's fees in successful litigation resulting in an affirmative judgment for the defaulting party, after any damages occasioned by the breach have been offset.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to John L. Avery, Esquire, Suite 500, 1001 North U.S. Highway One, Jupiter, Florida 33477 this 6th day of May, 1991.

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Appendix to Petitioners' Brief on Conflict Jurisdiction


EXHIBIT

DOCUMENT

- A District Court Opinion - filed March 6, 1991
- B District Court Order denying Petitioners' Motion for Re-hearing - dated April 12, 1991
- C Petitioners' Notice to Invoke Discretionary Jurisdiction - filed April 26, 1991
- D Trial Court's Amended Final Judgment - dated April 14, 1989

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