IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,949

DISTRICT COURT OF APPEAL
1st District Case No. 95-3266

AUBREY D. WHITEHURST, JR.,
and MARY E. WHITEHURST,

Appellants,

v.

CHARLES E. CAMP and GLENDA L. CAMP,

Appellees.

APPELLANTS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

The Appellants (Whitehurst) and Appellees (Camp) entered into an Agreement for Deed whereby Whitehurst agreed to sell to Camp the subject 92 acres in Washington County for $450,000.00 (R Vol.I - 6, 45-46; App. 6). Their financing arrangement provided for a down payment and monthly payments. Upon Camp's defaults, Whitehurst filed a Complaint to foreclose (R Vol.I - 1-12; App. 1-12), and obtained an Order to Show Cause in order to pursue the "fast track" provisions of the foreclosure statute (R Vol.I - 17-18; App. 13-14). Camp filed an Answer (R Vol.I - 19-22; App. 15-18), and Amended Verified Answer (R Vol.I - 23-28; App. 19-22), denying under oath that there had been any default.

Because Camp resided on a 4 acre portion of the premises, which was otherwise commercial property, the trial Court denied the use of the fast track procedure (R Vol.I - 45-46; Vol.II - 1-16). The case then progressed until at issue for trial (R Vol.I - 35). After Camp's deposition (R Vol.I - 42-126), which their attorney tried to prevent: (R Vol.I - 38-39, 40-41), Whitehurst filed a Motion for Summary Judgment (R Vol.I - 127-128; App. 25-26). In addition, Whitehurst filed a Motion to Assess Attorney's Fees and Costs (R Vol.I - 129-130; App. 27-28), Affidavit in Support of Claim (R Vol.I - 131-132; App. 29-30), and Affidavits concerning attorney's fees and costs (R Vol.I - 133, 134, 135, 136, 137-145). Camp consented to the Summary Judgment, but opposed the assessment of all Whitehurst's attorney's fees, costs, and expenses allowed by the parties' contract.

After an evidentiary hearing concerning the issue of

attorney's fees and costs (R Vol.IV - **1-84),** the Court rendered its Summary Final Judgment of Foreclosure on July **19, 1995,** which did not allow all Plaintiffs' attorney's fees and costs (R Vol.I - **149-154; App. 46-51).** Whitehurst then filed a Limited Motion for Rehearing or Modification on this issue (R Vol.I - 166-169; App. 57-60), which was denied on August 10, **1995** (R Vol.I - **178; App. 61).** Thereafter, Whitehurst timely filed a Notice of Appeal on September **7,** 1995 (R Vol.I - **179-186;** App. 62), and afterwards timely filed their initial brief with the First District Court of Appeal. Camp never filed anything with the District Court.

The First District Court of Appeal rendered its opinion on August 14, **1996** which affirmed the trial court (App. 63-67). In addition, on the same day the District Court entered its Order denying Appellants' Motion for Attorney's Fees (App. **70).** The First District, however, certified that direct conflict exists with the Third District Court of Appeal case of Gevertz v. Gevertz, 608 So.2d **129** (Fla. 3rd DCA 1992), on the issue of post-judgment interest. Appellants then timely filed their NOTICE TO INVOKE DISCRETIONARY JURISDICTION with this Court on September **13,** 1996.

SUMMARY OF ARGUMENT

In attempting to lessen the time and expense of a "regular" foreclosure, Plaintiffs used the "fast track" procedure allowed by Section 702.10, Florida Statutes, which is authorized on non-residential property. Since the Defendants continued in possession of the substantially commercial property without performing as required in the parties' agreement, it was error for the Court to refuse to consider the requested testimony of Defendants at the hearing on the Court's Order to Show Cause, since that testimony would have shown the property to be almost all commercial and that the defaults had occurred. The denial of this caused undue delay and expense to the Plaintiffs, and was an abuse of discretion.

The parties' contract provided for an interest rate of 10% per annum. Section 55.03, Florida Statutes, provides for the State Comptroller to determine the rate of interest that shall be payable on judgments beginning the first of each year; however, the statute also provides that, "Nothing contained herein shall affect a rate of interest established by written contract or obligation." The trial Court and later the First District Court of Appeal allowing only 8% per annum interest in its Summary Final Judgment of Foreclosure was therefore a violation of the statute, and cost Plaintiffs a considerable sum in post-judgment interest.

The parties' contract provided that the Defendants, upon their default, would pay "all costs and expenses of collection of said monies by foreclosure or otherwise, including attorneys'

fees.... Plaintiffs agreed to pay their attorney $175.00 per hour, which the trial Court did not find to be excessive. The evidence presented by Plaintiffs showed conclusively that this hourly rate was normal and reasonable, considering all factors required to be considered in assessing attorney's fees. In contrast, the Defendants' expert witness was not familiar with what attorneys in the general area have been charging for attorney's fees per hour. The Defendants' attorney charged them $150.00 an hour in the case, including travel time, but he was not aware of the normal hourly rates charged by lawyers in real estate practice; however, he knew of lawyers charging as much as $200.00 an hour. The trial Court's drastic reduction of the number of hours expended by Plaintiffs' attorney, not allowing the proper hourly rate, as well as not allowing all the costs and expenses of Plaintiffs in pursuing the action against Defendants, was a direct violation of the parties' contract provision requiring the Defendants to pay all costs and expenses of collection, as well as contrary to settled case law on the subject. And, the First District's approval perpetuated the error.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING THE "FAST TRACK" PROCEDURE AUTHORIZED BY SECTION 702.10, FLORIDA STATUTES.

The Plaintiffs' sworn Complaint to foreclose the subject: Agreement for Deed specifically alleged that the Defendants had failed to make the annual payment due on December 1, 1994, the monthly payment due January 1, 1995, and all subsequent monthly payments, plus failed to pay the monthly fire insurance premium due on January 1, 1995, and all subsequent payments, as well as failed to pay the taxes due on the property (R Vol.I - 1-12; **App.** 1-12). Although Defendants filed their sworn Answer (R Vol.I - 19-22; App. 15-18) and Amended Verified Answer and Affirmative Defenses (R Vol.I - 23-28; App. 19-22), specifically denying these allegations, at the hearing on May 2, 1995, on the Court's Order to Show Cause (R Vol.I - 17-18; **App.** 13-14), the Court refused to allow Defendants to testify concerning the nature of the subject property, i.e., whether it was residential or commercial, as well as about the alleged defaults (R Vol.II - 9-14) (later, Defendants admitted in deposition to virtually all of the defaults alleged by Plaintiffs).

The Plaintiffs, residents of Arizona, were straight forward with their sworn allegations of specific defaults and their desire to expedite the procedure under section 702.10, Florida Statutes (R Vol.II - 1-5). If the Court had allowed Defendants' testimony, it would have been clear that the property was overwhelmingly and substantially commercial, that they only

resided on one small (4 acre) parcel of it, as well as the fact that they had defaulted as alleged. The denial of this requested testimony was an abuse of discretion and consequently caused the Plaintiffs much undue delay and expense. Since the statute has apparently never been interpreted, this Court's opinion of a trial Court's authority to refuse to consider proffered evidence on the issues in connection with the use of the fast track procedure is needed.

Essentially, Section 702.10, Florida Statutes, allows for a "fast-track" procedure whereby the Court, ex parte, reviews the plaintiff's verified complaint to see that a cause of action to foreclose on non-residential real property is made, and enters an order to the defendant to show cause why a final judgment of foreclosure should not be entered in a speedy fashion. After service of the Order to Show Cause, a hearing is set not sooner than 20 days. Section 702.10(2), in pertinent part, provides that:

> (d) If the court finds that the mortgagor has not waived the right to be heard on the order to show cause, the court: shall, at the hearing on the order to show cause, consider the affidavits and other showings made by the parties appearing and make a determination of the probable validity of the underlying claim alleged against the mortgagor and the mortgagor's defenses. If the court determines that the mortgagee is likely to prevail in the foreclosure action, the court shall enter an order requiring the mortgagor to make the payment described in paragraph (e) to the mortgagee and provide for a remedy as described in paragraph (f). However, the order shall be stayed pending final adjudication of the claims of the parties if the mortgagor files with the court a written undertaking executed by a surety approved by the court in an amount equal to the unpaid balance of the mortgage on the property, including all principal, interest, unpaid taxes, and insurance premiums paid by the mortgagee.

(e.s.)

> (e) In the event the court enters an order requiring the mortgagor to make payments to the mortgagee, payments shall be payable at such intervals and in such amounts provided for in the mortgage instrument before acceleration or maturity. The obligation to **make** payments pursuant to any order entered under this subsection shall commence from the date of the motion filed hereunder. The order shall be served upon the mortgagor no later than 20 days before the date specified for the first payment. The order may permit, but shall not require the mortgagee to take all appropriate steps to secure the premises during the pendency of the foreclosure action.
>
> (f) In the event the court enters an order requiring payments the order shall also provide that the mortgagee shall be entitled to possession of the premises upon the failure of the mortgagor to make the payment required in the order unless at the hearing on the order to show cause the court finds good cause to order some other method of enforcement of its order.

It appears the statute makes it mandatory for the Court to hear and consider all available evidence at the hearing on the Order to Show Cause, The purpose of the procedure seems to be clear: allow a relatively shorter and less expensive way to foreclose. As a result of the Court refusing to allow any testimony of the Defendants at the hearing, Plaintiffs were denied possession of their property as well as a requirement that Defendants continue to pay as provided by the parties' contract and statute. The later-admitted defaults of Defendants (in deposition) could have been shown to the Court at the May 2, 1995, show cause hearing instead of allowing the Defendants to stonewall the case for several months on frivolous issues (R Vol.I - 19-22, 23-28, **36-**37, 74, 75, 76, 77, 79, a0, 82, 87, aa, 89, 91, **93, 95, 97, 99, 103, 106, 110, 155-159;** Vol.II - 1-16; Vol.III - 1-16; Vol.IV **-** 1-84).

As the Record clearly reflects, the Defendants unreasonably delayed and stonewalled the case for several months, resulting in much more work and expense than would have been necessary had the fast track procedure been used, which is one of the purposes, if not the only purpose, of the statute (R Vol.IV - 12-14). The actions of Defendants and their attorney is a classic example of perjury and unethical conduct that this Court envisioned in rendering its decision in *Whitten v.* Progressive *Casualty Insurance* Company, 410 So.2d 501, 505 (Fla. 1982). The Court there, in discussing the assessment of attorney's fees and costs pursuant to section 57,105, Florida Statutes, which allows the assessment of attorney's fees and costs when there is a complete absence of a justiciable issue of law or fact, stated:

> The purpose of section 57.105 is to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities. Such frivolous litigation constitutes a reckless waste of judicial resources as well as the time and money of prevailing litigants. (citations omitted)

Here, there simply was no rhyme or reason for the actions taken (by Defendants, their attorney, and the trial Court) that caused substantial delay and expense to the Plaintiffs. Defendants' stonewalling the case in an apparent (successful) attempt to stall the proceeding was frivolous litigation and constituted a clear "reckless waste of judicial resources as well as the time and money" of the Plaintiffs. When a party abuses the judicial system through conduct which results in needless litigation and legal fees, he cannot avoid the consequences of paying for the

additional work made necessary. *Mettler v. Mettler*, 569 So.2d 496 (Fla. 4th DCA 1990). (See ***pp. 22-23*** *herein* ***for*** *some specifics* ***of*** *Defendants'* ***frivolous*** *actions.)*

It appears that there have been no appellate court decisions interpreting section 702.10, Florida Statutes, and, therefore, this is a case of first impression. under the facts sub judice, however, it is submitted that the trial Court erred in not following the procedure provided in the statute by not considering the requested testimony of Defendants at the hearing, and thereby allowing Defendants to stonewall the case. Two questions are presented: (1) whether a trial court, in the situation such as sub judice, should allow the use of the statute when a small portion of the foreclosed property is residential and the balance and great majority of the property is commercial, and (2) Whether a trial court must hear and consider proffered evidence at the hearing on the order to show cause? The suggested answer to these questions is "yes."

ARGUMENT

ISSUE II

WHETHER THE LOWER COURTS ERRED IN SETTING THE POST-JUDGMENT INTEREST RATE AT 8% PER ANNUM.

The parties' Agreement for Deed provided for interest to be paid on the balance of the purchase price at the rate of 10% per annum (R Vol.I - 5-9; App. 5-9). However, the trial Court's Summary Final Judgment of Foreclosure only allowed interest to accrue postjudgment on the total sum due at the rate of 8% per annum pursuant to section 55.03, Florida Statutes, "and the parties' Agreement for Deed." (R Vol.I - 149-154; App. 46-51).

Section 55.03, Florida Statutes, states:

> (1) On December 1 of each year beginning December 1, 1994, the Comptroller of the State of Florida shall set the rate of interest that shall be payable on judgments or decrees for the year beginning January 1 by averaging the discount rate of the Federal Reserve Bank of New York for the preceding year, then adding 500 basis points to the averaged federal discount rate. The Comptroller shall inform the clerk of the courts and chief judge for each judicial circuit of the rate that has been established for the upcoming year. The initial interest rate established by the Comptroller shall take effect on January 1, 1995, and the interest rate established by the Comptroller in subsequent years shall take effect on January 1 of each following year. Judgments obtained on or after January 1, 1995, shall use the previous statutory rate for time periods before January 1, 1995, for which interest is due and shall apply the rate set by the Comptroller for time periods after January 1, 1995, for which interest is due. Nothing contained herein shall affect a rate of interest established by written contract or obligation. (e.s.)

The question presented is whether a trial Court is required to assess interest at the parties' written contractual rate, post-judgment, or the annual rate assessed by the Comptroller of the State of Florida? Obviously, the 2% difference sub judice

amounts to a substantial sum per year ($8,686.34), considering the total amount of the judgment of $434,316.88 (R Vol.I - **151;** App. 48). According to the emphasized words contained in the above statute, the Court below was required to assess the interest rate at 10%, the parties' contractual rate, but it only allowed 8% pursuant to Section 55.03, Florida Statutes, and then the First District agreed. This was error.

The Third District Court of **Appeal** in the case of Gevertz v. *Gevertz,* 608 So.2d 129 (Fla. 3rd DCA 1992), agreed **with** Appellants' analysis of this postjudgment interest rate issue, There, the trial court acted similarly to the one below in the case at bar. However, the Appellate Court unanimously reversed, and stated:

> The note, which expressly incorporates the mortgage, is unambiguous to the applicable prejudgment and post-judgment interest rates on the unpaid mortgage debt.. Therefore, since there was no ambiguity as to the applicable prejudgment and postjudgment interest rates, the trial court's application of any interest rate other than five and a half percent (5%) constitutes a rewriting of that provision. The trial court erred in rewriting an unambiguous provision, At page 131.

The First District's opinion under review directly conflicts with the Third District's view. **And,** the Fifth District has recently aligned itself with the First District. In Roger's ***Cushions, Inc.,*** v. *Baroody,* 21 F.L.W. D2117 (Fla. 5th DCA, opinion filed September 27, 1996), although noting that the issue concerned the effect of the statutory language that "Nothing contained herein shall affect a rate of interest established by written contract or obligation, the Court ruled," ...[W]e agree with the recent opinion of the First District in Whitehurst v.

Camp, 21 F.L.W. D1831 (Fla. 1st DCA, August 14, 1996)...."

Since the parties' contractual rate of 10% per annum was unambiguous, and the quoted phrase of Section 55.03 likewise is unambiguous, both the trial court and First District Court of Appeal were in error by not: allowing the parties' contractual rate to apply postjudgment. This Court should settle the conflict between the district courts by requiring the application of the clear intent of the legislature.

ISSUE III

WHETHER THE LOWER COURTS ERRED IN THEIR RULINGS ON ATTORNEY'S PEES AND COSTS

The parties' Agreement for Deed provided that the Defendants/Appellees, as the purchasers of the subject property, upon their default, would pay "all costs and expenses of collection of said monies by foreclosure or otherwise, including attorneys' fees...." (R Vol.IV - 65; Vol.I - 8-9; App. 8-9). However, the trial Court did not require that they comply with this provision, by assessing substantially less than what the Plaintiffs actually incurred. And, the First District agreed. This was error,

The agreement between Plaintiffs and their attorney was for attorney's fees to be paid at the rate of $175.00 per hour (R Vol.IV - 70, 71). They did everything they could so as not to incur all the expenses of this litigation, but the Defendants insisted on using their stonewalling, perjury, and unethical tactics, thereby delaying the case and requiring Plaintiffs to incur those additional expenses (R Vol.IV - 72). Plaintiffs even attempted to short-circuit the usually long and drawn out foreclosure action by using the fast track statute of section 702.10, Florida Statutes (R Vol.IV - 66, 67). As a direct result of Defendants' litigious attitude and actions, they should have been required to fully comply with their contract by paying "all costs and expenses of collection of said monies by foreclosure or otherwise, including attorney's fees...." (R Vol.IV - 65; Vol.I - 8-9; App. 8-9), including the appeal to the district court, For

the Courts not to require this was error.

Plaintiffs' attorney provided the Court with his Affidavit concerning his and his paralegal's hours, the Plaintiffs' costs and expenses, as well as Affidavits of attorneys Green and Swearingen, real estate practitioners (R Vol.I - 137-145; App. 35-43), as the law requires, *Florida* Patient's Compensation *Fund* v. *Rowe*, 472 So.2d 1145 (Fla. 1985). Defendants agreed for the Court to **consider those** Affidavits rather than have **live** witnesses at the hearing (R Vol.IV - 50-54). Actually, more time was expended by Plaintiffs' attorney, who had been practicing 23 years, and his paralegal, than was indicated in the documents (R Vol.IV - 57, 58, 73).

The affidavits of the two attorneys, who do extensive real estate practice in the Fourteenth Judicial Circuit, including Washington County, provided that $175.00 per hour was a reasonable rate for Plaintiffs' attorney's services (R Vol.I - 133, 134; App. 31, 32). And, those two attorneys considered all the factors required by law in assessing attorney's fees, which are: the time and labor required; the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly; the likelihood that the acceptance of the particular employment will preclude other employment by the attorney; the fee customarily charged in the locality for similar services; the amount involved and the result obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the attorney

performing the services; and whether the fee is fixed or contingent. ***Florida Patients' Compensation Fund v. Rowe***, *supra.* In other words, they considered much more than just an hourly rate and number of hours expended.

In contrast, the Defendants' expert did not consider all these factors, but only time spent and hourly rate (R Vol.IV - 47, 73, 74). The Plaintiffs' Limited Motion for Rehearing or Modification, which pointed out the deficiencies in the Court's Judgment concerning the costs and expenses and attorney's fees, was summarily denied (R Vol.I - 178; App. **61).** The Court only allowed $300.00 as total costs and expenses (compared to the sum of $657.75 actually expended), which did not include: $87.50 for the Court Reporter for the Final Hearing; $57.50 for the Court Reporter fee on June **1, 1995;** Sheriff's service **of** $40.00; Clerk's Fee of $12.00; Court Reporter Fees of $85.25 for May 9, **1995;** Sheriff's service fee of $40.00; filing fee of $80.50; recording Lis Pendens Fee of $10.50; nor any of the $900.00 expenses incurred by Plaintiffs by the Defendants requiring Plaintiffs to travel to and from Florida and Arizona simply for his deposition, even though it could easily have been done by telephone as provided by the rules. Of course, costs are generally recoverable by the prevailing party. ***Collins*** v. Holland, 409 So.2d 1097 (Fla. 3rd DCA 1982); ***River Road Construction Company v. Ring Power Corporation,*** 454 So.2d ***38*** (Fla. 1st DCA 1984); § 57.041, Fla. Stat. This was an abuse of discretion, especially in light of Plaintiffs being the prevailing parties. A party who recovers judgment in legal

proceedings is entitled as a matter of right to recover his costs, and the trial judge has no discretion to deny those. *Governing Board of St. Johns River Water Management District v. Lake Pickett Ltd.*, 543 So.2d 883 (Fla. 5th DCA 1989); *Weitzer Oak Park Estate Ltd. v. Petto*, 573 So.2d 990 (Fla. 3rd DCA 1991).

In addition, the 27.7 hours the Court allowed for Plaintiffs' attorney's hours was woefully insufficient because that number did not include the 5-7 hours expended after July 5, 1995, including the final hearing date; the 5.3 hours for attending depositions which had not been canceled, the Defendants even improperly failing to obey a Subpoena for their attending the deposition; as well as a minimum of 3 hours to conclude the foreclosure sale and finish up the case. In other words, the Court, in going against the parties' contract, improperly disallowed 13-15 hours of actual expended time of Plaintiffs' attorney as a result of Defendants' stonewalling the case, which resulted in this additional work and expense.

A two hour hearing was held on the issue of attorney's fees, costs and expenses (R Vol.IV - 1-84). Defendants' attorney was not present, but appeared by telephone (R Vol.IV - 3-4). Defendants had attorney William J. Mongoven testify as an expert (R Vol.IV - 5-50), and his testimony showed the following:

1) The Court did not qualify him as an expert witness (R Vol.IV - 5-6).

2) He has practiced law 45 years, including working with mortgage foreclosure cases in Washington County, but has not practiced full time the last 2 years (R Vol.IV - 5, 31).

3) Including himself, there were 3 attorneys in Chipley that were competent to handle this type litigation (R Vol.IV - 9).

4) The attorney fee rates for the local attorneys for mortgage foreclosure work ranged from $100 to $125 an hour (R Vol.IV - 10), with the $125.00 rate starting "several" years ago (R Vol.IV - 31), and for at least the last 2 years he was not aware of what attorneys in the general area have been charging for attorney's fees per hour (R Vol.IV - 32).

5) It has been normal for the past 45 years for clients in the Fourteenth Judicial Circuit to employ a lawyer 40 to 50 miles away to handle cases (R Vol.IV - 29), and it was reasonable for the Plaintiffs to employ their attorney, in Blountstown, to represent them in this proceeding (R Vol.IV - 30, 31).

6) He had no idea at what hourly rate Defendants paid their attorney (R Vol.IV - 32).

7) He had not attended any seminars in the last 2 years concerning real estate practice, but the Court would not allow any inquiry into his attendance of any continuing legal education seminars (R Vol.IV - 38).

8) He never reviewed the Plaintiffs' attorney's file (R Vol.IV - 11).

9) Other than two minutes immediately before the hearing, he never discussed the case with Plaintiffs' attorney (R Vol.IV - 11-12), and only spent an hour going through the Court file (R Vol.IV - 12).

10) He said travel time for Plaintiffs' attorney was not reasonable as a charge (R Vol.IV - 9-10, 27, 48), but admitted he charges for travel time he spends on a case (R Vol.IV - 28-29, 47), and was not familiar with any appellate court rulings concerning attorneys' travel time (R Vol.IV - 46, 49-50).

11) He was not aware of any authority for allowing a jury trial in a foreclosure case, and he had never had a jury trial in such a case (R Vol.IV - 20).

12) He agreed that the case was in fact at issue under the rule at the time Plaintiffs' attorney filed the Notice that the case was at issue (R Vol.IV - 25).

13) His opinion was it would take 24 to 26 hours to do the work that Plaintiffs' attorney did (R Vol.IV - 10-11).

14) He said it was not necessary and appropriate to have a hearing on the speedy foreclosure once a sworn answer and affirmative defenses had been filed (R Vol.IV - 6), and if a proposed order is prepared but not used by the Court, then the time spent preparing it should not be charged for (R Vol.IV - 7-8).

15) He said the purpose of the "fast track" procedure in foreclosure cases was to "speed up the procedure and eliminate costs involved in it," including attorney's fees (R Vol.IV - 12-13), and said he knew no reason other than to save attorney's fees and costs for the Plaintiffs to bring the case under that procedure (R Vol.IV - 13-14).

16) The purpose of the rule allowing a deposition to be

taken via telephone was to save costs (R Vol.IV - 16).

17) He was not aware of any specific double billing entries of the Plaintiffs' attorney's time records (R Vol.IV - 35).

Defendants' attorney was also questioned, and the following was disclosed:

1) He has only been a member of the bar since 1989 and is a member of the law firm of Johnston, Harris, Gerde, and Jelks P.A. (R Vol.IV - 59). The rates of the firm vary from client to client and is upwards of $165.00 an hour (R Vol.IV - 60).

2) He was not aware of the normal hourly rates charged by lawyers in the Panama City area that practice in real estate and travel throughout the Circuit (R Vol.IV - 60, 61), but he knew of lawyers charging as much as $200.00 an hour (R Vol.IV - 61).

3) He charged the Defendants $150.00 an hour, and this included traveling to and from Chipley and Panama City (R Vol.IV - 62, 63).

The Court would not allow any questioning of Mr. Mongoven on the following: the interpretation of the fast foreclosure statute; the reasonableness of the Defendants requiring Plaintiff to travel 4,000 miles just to give a deposition; fees charged by other attorneys in the area in real estate practice; Defendants' lawyer's practice and legal activities; or about the number of hours Defendants' attorney spent on the case. The Judge ruled as irrelevant the questions to Mr. Mongoven concerning the issue of the alleged oral modification of the parties' written contract,

and the demand for a jury trial in a foreclosure case (R Vol.IV - 15, 17, 20, 22, 33, 34, 38, 39, 63, 64), and would not allow any questioning concerning appellate decisions on the issues presented (R Vol.IV - 46, 47). It reasonably appears that Mr. Mongoven, as Defendants' expert witness, should have been subject to cross examination on the subjects pertinent to his direct examination. To not allow this was error. *Johnson v.* Reynolds, 97 Fla. 591, 121 So. 793 (1929).

When a trial court is confronted with the question of assessing attorney's fees when a party has a contract with the attorney, the first question is not what a reasonable fee might be in the absence of any fee contract between the claiming party and his attorney, but whether the actual fee agreement against which the claimant seeks indemnity is unreasonable, i.e., whether the agreement is excessive. If the fee is not excessive, and it is enforceable by both parties thereto pursuant to their contract, that fee should be awarded, Trustees of *Cameron-Brown* v. *Tavormina*, 385 So.2d 728 (Fla. 3rd DCA 1980); *Pavlik v. Acousti Engineering* Company of *Fla.*, 448 So.2d 638 (Fla. 4th DCA 1984). Under Florida law, a party entitled to indemnity may recover as part of his damages reasonable attorneys' fees and costs which he is compelled to pay as a result of litigation he maintains. *Fontainebleau Hotel Corporation* v. *Postol*, 142 So.2d 299 (Fla. 3rd DCA 1962); *Jemco, Inc. v.* United *Parcel Service, Inc.*, 400 So.2d 499 (Fla. 3rd DCA 1981). Here, the trial Court did not find the Plaintiffs' agreement with their attorney (to pay $175.00 per hour) to be unreasonable. And, Defendants did

not challenge its reasonableness. Indeed, in light of the unchallenged evidence of Plaintiffs' expert witnesses, real estate practitioners, such would be unlikely. Therefore, since that agreement on fees was reasonable, the trial Court's denying the requested assessment, and the appellate court affirmance, was error.

When there is a contract providing for an award of attorney's fees, the purpose of such an award is as follows: "A fee money award is payable by one party to another as an indemnity for fees reasonably contracted or incurred, not by one party to the other's lawyer, either as a debt or a penalty." ***Boxg-Warner Acceptance Corporation v.*** *Philco* ***Finance*** *Corporation*, 356 So.2d 830 (Fla. 1st DCA 1978); ***Walker*** v. ***Senn***, 376 So.2d 410 (Fla. 1st DCA 1979), cert. *denied* 388 So.2d 1119; ***Brett v. First National Bank*** of ***Marianna,*** 120 So. 554 (Fla. 1929). This Court, as long ago as 1920, in ***United States Savings Bank v.*** *Pittman*, 80 Fla. 423, 86 So, 567 (1920), stated its policy toward attorney's fees in a foreclosure case:

> In foreclosure proceedings in our state, the fee allowed the mortgagee for the services of his solicitor in the proceedings is intended as an indemnity to the mortgagee for expenditures necessarily made or incurred *to* protect his interest. (cite omitted) (e.s.)

Therefore, Plaintiffs were entitled by the terms of their contract to be indemnified by the Defendants for all their attorneys' fees incurred, which were reasonable.

If a contract provides for a fee amount lower than what the court determines to be reasonable, the mortgagee's recovery of attorney's fees is limited to the smaller amount, ***Pezzimenti v.***

Cirou, 466 So.2d 274 (Fla. 2d DCA 1985), rev. *dismissed* 475 So.2d 695, but, as here, where the amount is reasonable, and indemnification is the goal, a higher fee is awardable.

A party's selection of counsel from a community 60 miles from the site of litigation is not unreasonable, and the party's attorney's travel time is properly awardable. ***Wright*** **v.** ***Wright***, *577* So.2d 1355 (Fla. 1st DCA 1991), rev. dismissed 587 So.2d 1331. Regardless of Defendants' expert's testimony that such travel time is not properly awardable against the opposing party, he was candid that he did charge for his travel time, as did Defendants' attorney, and it was reasonable (and has been for 45 years) for Plaintiffs to employ counsel 50 miles from Washington County (R Vol.IV - 29).

It is permissible to award attorney's fees based upon additional work made necessary by a party's litigious conduct. ***Ugarte*** **v.** Ugarte, ***608*** So.2d 838 (Fla. 3rd DCA 1992); *Mettler* ***v. Mettler***, 569 So.2d 496 (Fla. 4th DCA 1990). Sub judice, it is submitted that Defendants' litigious attitude and conduct seriously prejudiced Plaintiffs by, inter alia, requiring them to expend considerable sums in attorneys' fees, costs, and expenses that otherwise were unnecessary. Some examples of Defendants' litigious activities include the following:

1) Denying under oath the Plaintiffs' default allegations and then admitting such denials were not truthful (R Vol.I - 19-22, 23-28, 42-121; App. 15-18, 19-22).

2) Opposing the fast track foreclosure procedure so as to lessen the expense of litigation (R Vol.II - 1-16).

3) Demanding a jury trial in the foreclosure case when the applicable statute and case law clearly prohibit such (R Vol.III - 1-16). § 702.01, Fla. Stat.; ***Padgett v. First Federal Savings and Loan Association of Santa Rosa County,*** 378 So.2d 58 (Fla. 1st DCA 1979); ***Bradberry v. Atlantic Bank of St. Augustine, 336*** So.2d 1248 (Fla. 1st DCA 1976).

4) Demanding that Plaintiffs travel 4,000 miles round trip for a deposition, when the rules clearly allow less expensive methods. Fla.R.Civ.P. 1.310, 1.320. (R Vol.IV - 16).

5) Refusing to obey a Witness Subpoena for their deposition (R Vol.1 - 114-116).

6) Contending the case was not at issue for trial purposes when it clearly was, according to their expert (R Vol.IV 25).

7) Contending the parties' contract had been orally modified, knowing such was not the truth and, without fraud, was not legally allowable. (R Vol.I - 72, 87, ***88, 89, 90). Milton v. Burton,*** 79 Fla. 266, 84 So. 147 (1920); ***Paradise Beach Homes, Inc. v. South Atlantic Lumber Company,*** 118 So.2d 825 (Fla. 1st DCA 1960); ***Evans v. Borkowski,*** 139 So.2d 472 (Fla. 1st DCA 1962); ***C. H. Robinson Company v. L & M Brokerage Company, 344*** So.2d 894 (Fla. 1st DCA ***1977); Sears v. James Talcott, Inc.***, 174 So.2d 776 (Fla. 2d DCA 1965); ***Central Bank & Trust Company v. Diaz, 442*** So.2d 1005 (Fla. 3rd DCA

1983) ; *Carlon, Inc. v. Southland Diversified Company,* 381 So.2d 291 (Fla. 4th DCA 1980); ***Polk v. Crittenden,*** 537 So.2d 156 (Fla. 5th DCA 1989).

Even the trial Court acknowledged that Defendants' tactics attempted to slow down and stall the case (R Vol.IV - 24-25). Surely, especially in light of Defendants' agreement to pay all Plaintiffs' attorneys' fees, costs, and expenses if they defaulted, Plaintiffs were entitled to full indemnity from the Defendants. To do otherwise was error.

To add insult to injury, the First District Court also denied Appellants' request for attorney's fees on appeal (App. 70). This also was error. Appellants' Motion For Attorney's Fees (App.68-69) filed with the District Court cited Section 59.46, Florida Statutes, which provides that when a contract provides for the payment of attorney's fees to the prevailing party, it shall be construed to include the payment of attorney's fees on appeal. But, also was cited Section 57.105, Florida Statutes, providing that fees should be awarded to a prevailing party when there is a complete absence of a justiciable issue of either law or fact raised by the losing party. As stated herein, there was absolutely no issue of law or fact at the trial level, and Appellees Camp did not even contest anything whatsoever on appeal. Therefore, Appellants were entitled to an award in the appellate process.

The recent case of Fly ***High Family Limited Partnership v. Celestin,*** 21 F.L.W. D1906 (Fla. 3rd DCA, opinion filed August 21, 1996), is instructive, That was an appeal from a trial court's

denial of a request for contractual attorney's fees and costs, and the Third District reversed. Reversal was based upon the authority of ***Rice v. Campisi***, 446 So.2d 1120 (Fla. 3rd DCA 1984, review denied 456 So.2d 1182 (Fla. 1984). The court held that there had been no showing that the foreclosure action, though unsuccessful by the application of equitable principals, was not prosecuted upon a good faith belief that the appellees were responsible for the default. Similarly, there has been no showing, and there is none, that the Appellants did not prosecute in absolute good faith their foreclosure action. In fact, the stonewalling of Appellees Camp throughout the trial level of the litigation showed that they acted with bad faith. The issues raised by Appellants on appeal, though unsuccessful to date, were likewise prosecuted in good faith. Similar to the parties' contractual provision concerning their interest rate, their contract also provided that Appellees Camp would pay "<u>all</u> costs and expenses of collection of said monies by foreclosure or otherwise, including attorneys' fees,..," (App. 8). The Appellate Court should have granted Appellants' request for attorney's fees on appeal. To deny it was error.

CONCLUSION

Only those portions of the trial Court's Summary Final Judgment (R Vol.1 - 149-154; App. 46-51) should be reversed that pertain to the awarding of attorney's fees, costs, and expenses, and the cause remanded with directions that the trial Court enter a Supplemental Final Judgment providing for the assessment against Defendants of all the additional fees, costs and expenses; requiring post-judgment interest at the parties' contractual rate of 10%; direct that the fast track foreclosure procedure is applicable if the foreclosed property is substantially commercial; and direct that a trial Court must permit testimony on the applicable issues at the hearing on an Order to Show Cause pursuant to Section 702.10, Florida Statutes. In addition, Appellants should be awarded all their attorney's fees, costs and expenses incurred at all appellate levels.

RESPECTFULLY SUBMITTED this 14th day of October, 1996.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded to Charles E. Camp and his wife, Glenda L. Camp, P. 0. Box 310, Vernon, FL 32462, and Barry Kalmanson, Esq., 500 N. Maitland Ave., Ste. 305, Maitland, FL 32751 by regular U. S. Mail this 14th day of October, 1996.

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Appendix

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