SUPREME COURT OF FLORIDA

CASE NO. 89,911

District Court of Appeal,
4th District - # 96-0158

ALLEN GREEN,

Petitioner,

vs.

SUN HARBOR HOMEOWNERS' ASSOCIATION, INC.,

Respondent.

PETITIONER'S INITIAL BRIEF

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A) THE MATTER WAS NEVER AT ISSUE AND NO RESPONSIVE PLEADING HAD YET TO BE FILED BY THE DEFENDANT WHEREIN ENTITLEMENT TO SUCH FEES WAS REQUIRED TO, OR COULD BE, PLED, AND;

B) THERE HAS BEEN AN AGREED ORDER OF DISMISSAL FOR FAILURE TO PROSECUTE ENTERED BUT NEITHER A FINAL JUDGMENT NOR AN ADJUDICATION ON THE MERITS HAS BEEN MADE IN THE MATTER, AND DEFENDANT'S MOTION FOR PREVAILING PARTY ATTORNEYS' FEES WAS TIMELY FILED PRIOR TO ENTRY OF A FINAL JUDGMENT, AND;

C) THERE HAS BEEN NO TRIAL OR HEARING ON THE MERITS AND NO HEARING WAS EVER HAD ON THE ORIGINAL MOTION TO DISMISS FILED BY THE DEFENDANT AND;

D) PLAINTIFF KNEW AND ACKNOWLEDGED IN ITS PLEADINGS THAT THE DECLARATION OF COVENANTS UPON WHICH IT BASED ITS SUIT PROVIDES FOR RECOVERY OF PREVAILING PARTY ATTORNEYS' FEES AND A COPY OF THE PERTINENT PORTION OF THE DECLARATION WAS ATTACHED TO ITS COMPLAINT, AND;

E) PLAINTIFF ADMITTEDLY RECEIVED ACTUAL NOTICE THAT THE DEFENDANT WOULD SEEK TO RECOVER HIS ATTORNEYS' FEES AS THE PREVAILING PARTY IF THE MATTER WAS PURSUED FURTHER AND HAS NEVER ALLEGED IT WAS SURPRISED BY GREEN'S MOTION TO RECOVER ATTORNEY'S FEES.

II. IF THE STOCKMAN PLEADING REQUIREMENT **IS** APPLICABLE IN THIS CASE, ARE THERE EQUITABLE CONSIDERATIONS IN THIS CASE TO SUPPORT AN EXCEPTION TO THE PLEADING REQUIREMENT OF STOCKMAN, OR IN THE ALTERNATIVE, DOES THE EXCEPTION SET FORTH IN STOCKMAN APPLY UNDER THE FACTUAL CIRCUMSTANCES OF THE CASE AT BAR WHICH WOULD EXEMPT GREEN FROM ITS APPLICATION?

STATEMENT OF THE CASE AND FACTS

This matter originated as an action by the Sun Harbor Homeowners' Association against Allen Green, one of its members, for alleged violations of the Declaration of Covenants of the Association. The recitation of the specific allegations of the Complaint are not germane to the issues on appeal and are not included herein as the matter was never decided on its merits but was, instead, dismissed for failure to prosecute.

The Plaintiff Association filed a Complaint January 31, 1994, for injunctive relief (R1-11), and Defendant Green filed a Motion which sought both to strike certain counts of the Complaint and to dismiss the Complaint in its entirety which Motions were filed February 23, 1994 (R12-14). The Motion to Strike sought to have certain counts of the Complaint stricken as redundant or, in the alternative, to have them incorporated into one count and also incorporated a Motion to Dismiss the Complaint on various grounds.

Defendant Green conducted discovery in the matter, set down depositions of some of the board members of the Association and served Interrogatories upon the Plaintiff Association which Interrogatories were not timely responded to, thereby requiring him to file an Ex Parte Motion to Compel Discovery (R15-16), which Motion was granted (R17).

In July of 1994, counsel for the Plaintiff Association filed his Motion to Withdraw (R18), which Motion was heard and granted August 23, 1994, (R19).

Some settlement discussions were conducted which did not come to fruition and the matter languished until October 24, 1994, when the Plaintiff Association sent a letter to Defendant Green alleging an additional violation of the Declaration of Covenants and threatened to continue the legal action against him.

Green responded through counsel by letter dated October 31, 1994, (R66-67 & R77-78), contesting the allegation of the October 24th letter and **advising the Association that Green would be seeking to recover his attorneys' fees and costs if they continued the law suit.** Plaintiff admits receiving the October 31, 1994 letter which gave notice of Green's intention to pursue attorneys' fees and costs.

Some further settlement negotiations were conducted which were also unsuccessful and the case again languished until Green filed his Motion to Dismiss for Failure to Prosecute (R20-21) on April 6, 1995. Through this point in the litigation, the Plaintiff never set down for hearing Green's Motions to Strike and Dismiss and no Answer was ever required of Green at any time during this proceeding.

After the filing of the Motion to Dismiss for Failure to Prosecute, the Association retained new counsel who immediately filed several motions, including a response to Green's Motion to Dismiss for Failure to Prosecution (R24-31), in which the October 31, 1994, letter (R66-67 & R77-78), was specifically referred to and relied upon in opposition to the motion (R25 at Paragraph 3F).

Plaintiff Association initially opposed Green's Motion to Dismiss and requested an evidentiary hearing on the Motion.

The trial court Judge granted the request and an evidentiary hearing was scheduled but before the hearing was held the Plaintiff agreed to entry of an Order of Dismissal for Failure to Prosecute, which Order was entered May 16, 1995 (R39).

Green then filed his Motion for Award of Attorneys' Fees and Costs (R45-50) on June 5, 1995, which Motion was denied by the trial court on September 29, 1995. (R83)

The Order denying Green's Motion for Attorneys' Fees was not specific as to the grounds for denial and Green filed a Motion for Reconsideration and for Clarification of the denial (R84-85), which Motion was denied October 30, 1995, with more specificity (R86).

Green timely filed his Notice of Appeal (87-89), and the Fourth District Court of Appeal affirmed the trial court in a decision dated November 20, 1996, certifying conflict between its decision and that of Bruce v. Barcomb, 675 So.2d 219 (Fla. 2d DCA 1996).

Green filed a Motion for Rehearing with the Fourth District Court of Appeal on December 2, 1996, which Motion was denied January 21, 1997.

Green then filed his Notice to Invoke the Supreme Court's discretionary jurisdiction to resolve the conflict between the Fourth and Second District Courts of Appeal, which Notice was filed February 10, 1997, and this appeal ensued.

ARGUMENT AND CITATIONS OF AUTHORITY

I. DOES THE HOLDING IN STOCKMAN V. DOWNS, 573 So.2d 835 (Fla. 1991), PREVENT RECOVERY OF ATTORNEYS' FEES BY A PREVAILING PARTY UNDER THE FACTUAL SITUATION OF THE CASE AT BAR?, WHERE:

A) THE MATTER WAS NEVER AT ISSUE AND NO RESPONSIVE PLEADING HAD YET TO BE FILED BY THE DEFENDANT WHEREIN ENTITLEMENT TO SUCH FEES WAS REQUIRED TO, OR COULD BE, PLED, AND;

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E) PLAINTIFF ADMITTEDLY RECEIVED ACTUAL NOTICE THAT THE DEFENDANT WOULD SEEK TO RECOVER HIS ATTORNEYS' FEES AS THE PREVAILING PARTY IF THE MATTER WAS PURSUED FURTHER.

The trial court denied Green's Motion for Recovery of Prevailing Party Attorneys' Fees citing this court's holding in Stockman vs. Downs, 573 So.2d 835 (Fla. 1991), in its denial.

The Fourth District Court of Appeal upheld the trial court's decision but certified conflict between its decision in this matter and that of the Second District Court of Appeal in Bruce v. Barcomb, 675 So.2d 219 (Fla. 2d DCA 1996).

The conflict between the cases which was certified by the Fourth District Court of Appeal is, in essence, the following:

Does the Stockman holding prevent recovery of attorneys' fees by a prevailing party where a motion for same is filed for the first time after entry of a dismissal but before any responsive pleading has been filed by a defendant?

In both Green and Barcomb, unlike Stockman, only motions to dismiss had been filed by the defendants and there had been no responsive pleading yet required of them as the motions had not been determined before the matter was ultimately dismissed.

The Barcomb court found that the Stockman ruling was not a bar to recovery of prevailing party attorneys' fees and stated:

> Although the defendants here could have raised their entitlement to attorneys' fees in their motion to dismiss, we find nothing in Stockman to prevent the defendant from filing a motion for fees following a voluntary dismissal by the Plaintiff which is filed before the defendant is required to file an answer. Barcomb, at 221.

The Green court majority opinion adopted a contrary position and opted for a strict application of the Stockman decision's general rule stating:

> The general rule of Stockman is that a claim for attorneys' fees must be pled. ...a party may not recover attorneys' fees unless he has put the issue into play by filing a pleading or motion seeking fees.
> Green, at 24.

In a dissenting opinion, Judge James C. Hauser differed with the majority and opined that the Barcomb approach is the correct one under the particular factual and procedural circumstances of the case at bar.

Both the trial court's denial of Green's attorneys' fee motion and the majority's opinion in Green are erroneous as a matter of law and must be reversed by this court because they misinterpret and misapply the Stockman decision, and because its application to the particular factual and procedural circumstances of this case constitutes an improper broadening of this court's ruling in Stockman.

In Stockman, this court set forth the general rule:

> A party seeking attorneys' fees pursuant to a statute or contract must **plead** entitlement to such fees. Stockman, at 838. [emphasis added]

Explicit in the rule stated above is that a request for attorneys' fees must be **pled**, and as Judge Hauser pointed out in his dissenting opinion in Green:

> ...Stockman mandates that the notice a party will be seeking attorneys' fees be contained in the form of a pleading, not a notice or a motion. It is black-letter law that a motion is not a pleading. White v. Fletcher, 90 So.2d 129 (Fla. 1956); Harris v. Lewis State Bank, 436 So.2d 338 (Fla. 1st DCA 1983); Raulerson v. Hamm, 394 So.2d 1144 (Fla. 4th DCA 1981).

As explained in Harris:

> We note that the issues of fact in any case are initially framed by the pleadings and not by motions. ...Motions, of course, are not pleadings. ... Green, at 26 citing Harris.

Stockman dealt with a factual situation which was markedly different from that of either Green or Barcomb, and is easily distinguishable from them on substantial grounds.

In Stockman, the matter was fully at issue by virtue of the defendant having filed an answer in which entitlement to attorneys'

fees could have been pled but was not. The matter went through the before a final judgment was entered. It was not until after the entire course of the litigation and entry of final judgment that the defendant filed a motion for attorneys' fees which raised the issue of prevailing party attorneys' fees for that party for the very first time.

In Green, the facts and procedural posture of the case are substantially different. Here, as in Barcomb, the matter was never at issue as no responive pleading had ever been filed nor was one yet required of the defendant. A motion to dismiss had been filed which was never set down for hearing by the Plaintiff. The Plaintiff was not diligent in pursuing its claim, and the matter was ultimately dismissed by entry of an **Agreed** Order of Dismissal for Failure to Prosecute.

There was no trial and there was never a final judgment entered and, contrary to the assertion in the appellate court's opinion, the Agreed Order of Dismissal for Failure to Prosecute brought pursuant to F.R.C.P. 1.420(b), does not constitute an adjudication on the merits.

The Fourth District Court of Appeal erroneously asserted in its opinion:

> The trial court entered an Agreed Order of Dismissal pursuant to Florida Rule of Civil Procedure 1.420(b), which operated as an adjudication on the merits. Green, at 24.

Green pointed out in his appellate brief that the Agreed Order of Dismissal for Failure to Prosecute was not an adjudication on

the merits and that this Court had already decided that very issue in the case of Zukor v. Hill, 84 So.2d 554 (Fla. 1956), but the Fourth District Court of Appeals rejected that precedent.

Zukor, a case which is exactly on point with Green, held that a dismissal for failure to prosecute under Florida Statute 45.19, was not an adjudication on the merits, even though the motion which led up to the dismissal was brought under Common Law Rule 1.35(b).

Florida Statutes 45.19(1), provided for dismissal of an action for failure to prosecute where there had been no activity in the file for a period of one year. Common Law Rule 1.35(b), provided that a dismissal made pursuant to that rule would be deemed an adjudication on the merits unless otherwise specified in the Order of Dismissal.

The author's comments to F.R.C.P. 1.420, establish that 1.420(e), is directly derived from Florida Statutes 45.19(1) and that 1.420(b), is the successor rule to Common Law Rule 1.35(b).

Any case law explaining or construing the predecessor versions of the rules or statutes from which current rules are derived is persuasive and controling precedent in construing matters under the current version of those rules and must be followed as binding precedent absent more recent contrary law.

In Zukor, as here, the appellant took the position that the dismissal for failure to prosecute was without prejudice and was not an adjudication on the merits notwithstanding the section of the rule it was brought under, while appellee maintained the

opposite was the case.

The Zukor court agreed with the appellant, stating:

> We have held that such a dismissal under Section 45.19 supra, "is not a bar to a subsequent suit on the same subject matter in the absence of a statute, decision or rule of practice to the contrary"... We know of no statute or decision to the contrary and we hold that Rule 35(b) is not a rule to the contrary.
> Zukor, at 556 [citation omitted]

It follows, then, that F.R.C.P. 1.420(b), as the successor version of Common Law Rule 1.35(b), is not a rule to the contrary either and a dismissal under it for failure to prosecute is likewise not an adjudication.

Zukor has not been superceded or overruled on that point and has been followed by subsequent decisions of this court as well as the district courts. See Alson Manufacturing Co. v. Silvers, 95 So.2d 16 (Fla. 1957); Costin v. Malone, 402 So.2d 1257 (Fla. 1st DCA 1981); Spolter Electrical Supplies, Inc. v. Kalb, 275 So.2d 594 (Fla. 4th DCA 1972).

A motion to dismiss for failure to prosecute is an involuntary motion which must, of necessity, be brought pursuant to F.R.C.P. 1.420(b), the rule which governs such motions.

Under the holding in Zukor, a dismissal for failure to prosecute, even if brought under Rule 1.420(b), is not an adjudication on the merits and both the Fourth District Court of Appeal and the trial court were wrong on that point and erred as a matter of law in holding contrary to this court's express ruling, which is binding precedent over those courts.

Furthermore, it is well established law that a dismissal for failure to prosecute is not an adjudication **at all** and is entered without prejudice to the plaintiff so that it does not constitute a bar to the refiling of an action so dismissed. Bair v. Palm Beach Newspapers, Inc., 387 So.2d 517 (Fla. 4th DCA 1980). Spolter Electrical Supplies, Inc. v. Kalb, 275 So.2d 594 (Fla. 4th DCA 1973); Kohly v. Wallach, 580 So.2d 880 (Fla. 3rd DCA 1991); Tapper v. Taunton, 371 So.2d 595 (Fla. 1st DCA 1979); Southeast Mortgage Co. v. Sinclair, 632 So.2d 677 (Fla. 2nd DCA 1994).

The Stockman ruling is inapplicable to this case not only because of the fundamental differences between them, but also due to the limitations of the scope of the specific question answered by this court in that case, to-wit: a situation in which entitlement has not been previously **pled** by the prevailing party **prior** to the entry of a final judgment and, where a motion is made subsequent to the entry of the judgment raising the issue for the very first time and the opposing party has had no prior notice such a claim would be raised.

The specific question decided by the Stockman court which was certified to it by the Fourth District Court of Appeals was:

> MAY A PREVAILING PARTY RECOVER ATTORNEYS' 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 ATTORNEYS' FEES FOR THE FIRST TIME?

Clearly, Green does not fall within the factual or procedural parameters of Stockman, or within the scope of the specific

question answered by the Stockman court, as there has been no final judgment, much less an adjudication on the merits, and the matter of attorneys' fees was previously raised by Green although not raised in a pleading, and the association admittedly had prior actual notice of Green's intention to pursue fees.

The Fourth District Court of Appeal's majority opinion in Green has taken this court's holding in Stockman and expanded it well beyond the scope of the question answered, added aspects to it that were not contained in this court's holding in that case, and applied it to a case which does not fit the factual or procedural parameters to which it is applicable.

It is essential to an appellate review of a matter to scrutinize the factual situation and procedural posture of each individual case when making a determination as to the applicability or inapplicability of particular precedent.

If we examine the logic and reasoning expressed by this court as the basis for its decision in Stockman, as well as the facts of that case, and apply that logic and reasoning to the facts the procedural posture of the case at bar, we can readily see why it is not applicable in this situation.

The fundamental concern behind the Stockman ruling is notice to the opposing party of the claims which are being made against it and that the reason for that notice is to prevent unfair surprise:

> A party should not have to speculate throughout the entire course of an action about what claims ultimately may be alleged against him. Stockman, at 837.

The Stockman court went on to point out that raising entitlement to attorneys' fees **after** judgment fails to serve either of the stated objectives but such is not the case here.

There is a vast difference between Stockman, where the claim was raised for the very first time after all pleadings have been filed, the matter is at issue and has been fully tried and adjudicated by entry of final judgment, and the situation in Green, where the matter was never at issue, no responsive pleading had yet to be filed and no final judgment or adjudication on the merits had been entered, much less the full procedural exposition of the case through trial as occurred in Stockman, and where prior actual notice had been given and admittedly received.

The filing of a motion for attorneys' fees after entry of an Agreed Order of Dismissal where no responsive pleading had yet been filed does not run afoul of the Stockman logic and reasoning. The dismissal occurred early in the procedural aspects of this case and the association had not had to speculate "throughout the entire course of the action" about what claims would be made against it.

Also, the Plaintiff was well aware of the entitlement of a prevailing party to recover fees, had **admittedly received** actual notice of Green's intention to seek fees and had even attached a copy of the Declaration of Covenants to the Complaint which clearly sets forth the prevailing party entitlment provisions.

With respect to the issue of notice, the Fourth District Court of Appeal identified it as the main reason behind the Stockman

decision and stated in its opinion:

> The primary focus of Stockman is **actual notice** of a claim for fees, not whether the notice had to take the form of a pleading, to the exclusion of a motion. Green, at 24. [emphasis added]

While the appellant maintains that the Stockman ruling is not applicable in this case because of the cited differences, it should be noted that the notice requirement has been met in this case even if it is deemed to be applicable to the case at bar.

The Plaintiff had **actual** notice that Green would be asserting a claim of entitlement to his attorneys' fees if the matter was pursued further by the Plaintiff.

In a letter of October 31, 1994, (R66-67 & R77-78), which Plaintiff admitted it received, Green's counsel expressly advised the association that Green would be seeking recovery of his attorneys' fees and did so in definite terms stating, "Should we be forced to continue with this lawsuit we will then be seeking damages and attorney's fees and costs from the association".

Although this notice was provided by letter, and not by a pleading or motion, it certainly constitutes **actual** notice. The association has characterized the October 31st letter as a settlement proposal and tried to gloss over it and dismiss it in that manner.

Contrary to that assertion, a perusal of the letter clearly shows it is a warning to the asociation that the alleged violation in its preceding letter is contested and gives actual notice to the association that Green would be seeking to recover his attorneys'

fees in the matter and constitutes the kind of actual notice sufficient to satisfy the notice requirement of Stockman.

Even assuming for the moment that the letter **is** a settlement proposal, it would still be admissible in support of Green's claim to entitlement to attorney's fees since the letter is not being offered into evidence to prove or disprove liability but is simply offered to show that actual notice of Green's intention to seek recovery of his fees has been given.

The fact that the actual notice of Green's intention to seek recovery of attorney's fees came in the form of a letter is not fatal to Green's subsequent motion to recover fees. The Second District Court of Appeals has indicated that a party may be put on notice in other ways than a pleading or motion sufficient to satisfy the Stockman requirement.

In Vie-A-Mer, Ltd. v. S. Toub & Associates, 684 So.2d 216, the Second District Court stated:

> The trial judge denied appellants post-judgment request for attorney's fees on the basis that it lacked jurisdiction. The argument on that issue below centered around the failure of the final judgment to "reserve jurisdiction" to award attorney's fees. However, that failure to reserve jurisdiction would not have been fatal to a subsequent motion for attorney's fees had the request for attorney's fees been previously pleaded **or if, in some other way, appellee had been put on notice of appellants' intent to pursue a request for fees**.
> Vie-A-Mer, at 217. [emphasis added]

Green clearly had provided actual notice to the plaintiff association, in some other way than by pleading or motion, of his intent to pursue a request for attorney's fees.

Thus, the concerns of lack of notice to the opposing party and of avoiding unfair surprise do not arise in this case since actual notice has been given through the October 31, 1994 letter, which the Plaintiff admitted receiving.

What's more, the Complaint filed by the Plaintiff shows on its face that the association was very well aware of the issue of entitlement to attorneys' fees by a prevailing party from the outset of the litigation as it has stated in no fewer than four places in its Complaint that the prevailing party is entitled to recover fees! (See R1-11 at paragraphs 12, 22, 33 and 44).

The Plaintiff even attached the pertinent portions of the Declaration of Covenants to the Complaint as an exhibit in which the entitlement to prevailing party fees is clearly set forth.

The association is a party to that agreement and intended to rely upon its terms to recover its fees if it prevailed and, as a party to the agreement, is deemed to be on notice of its provisions and is bound by them.

Procedurally, F.R.C.P. 1.130, provides that attachments to a complaint are deemed attached **for all purposes.** In this case, all purposes should include notice of a claim of entitlement to prevailing party's fees which is clearly set forth in the attachment and which is relied upon in the plaintiff's claim.

The plaintiff cannot honestly assert that it was surprised by Green's claim for entitlement to attorneys' fees after it had admittedly received actual notice of Green's intent to make such a claim, had expressly acknowledged the right of the prevailing party to recover fees in its Complaint and even attached to it as an exhibit those portions of the Declaration of Covenants which dealt expressly with entitlement to attorney's fees.

At the very least, an estoppel must arise under the totality of the facts and circumstances of this case preventing the association from raising an objection to the lack of record notice or pleading of the entitlement issue, which estoppel would support an exception to the application of the Stockman pleading requirement. The estoppel issue will be discussed in Point II below.

The majority opinion in Green has expanded the Stockman holding and has read into it issues which were neither presented nor determined by this Court in its holding and, in so doing, has visited upon Green the very surprise and unfairness which the Stockman court sought to avoid and which it stated was the primary focus and basis for its ruling.

Specifically, the majority opinion in Green reads into the Stockman decision requirements that the necessary notice of a claim of entitlement to attorneys' fees must be **record** notice, and that it must be made by pleading **or** motion, and that it must be made not only before final judgment but even before a dismissal is entered, even if that dismissal is not an adjudication.

Even if we accept the interpretation that the notice must be of record, that requirement has arguably been met.

First, as stated above, F.R.C.P. 1.130, made the entitlement issue a matter of record for all purposes when the Declaration of Covenant's provisions regarding the entitlement matter were attached to the Complaint by the association.

Second, the October 31, 1994, letter (R66-67 & R77-78) giving the plaintiff **actual notice** of such a claim became a matter of record in the case when it was specifically referred to and relied upon by the plaintiff in its response to Green's Motion to Dismiss for Failure to Prosecute, (See R25, at Paragraph 3F), and later by the actual filing of the letter in the record.(R66-67 and R77-78).

Is the Plaintiff to be allowed to use the letter in its own defense of the motion but then have it discounted when Green points to it in support of his motion? To allow that would hardly be in keeping with the expressed goal of avoiding unfair advantage and surprise or of doing equity.

If there is surprise and prejudice here it is to Green and not the association. Prior to the holding in Green, the only authority on point was Barcomb, upon which Green was entitled to rely. Barcomb held that Stockman does not bar recovery of prevailing party attorneys' fees in a situation such as we have here, where a dismissal was entered before the defendant was required to answer.

Under Barcomb, a motion filed even after such a dismissal is timely and is not barred by Stockman's pleading requirement.

The Barcomb court expressly stated that Stockman does not apply and disagreed with the trial court stating:

> Following an evidentiary hearing, the trial court entered an Order denying the defendant's motion for an award of attorneys' fees. The Order specifically found that the defendants had not pled a claim for attorneys' fees prior to the filing of the voluntary dismissal and that, pursuant to Stockman, they waived such a claim ...however, we do not agree that Stockman prevents the defendants here from seeking attorneys' fees pursuant to a contractual provision allowing fees to the prevailing party.
> Barcomb, at 221.

By imposing upon Green a standard which did not exist at the time he filed his motion for fees and which is not mandated by Stockman, the Fourth District Court of Appeal has commited the very act which it condemned in its opinion and has "blind-sided" Green, who did not have prior notice that the Stockman pleading requirement would be expanded to be applicable in a case where a defendant has not yet had opportunity to plead.

Green justifiably believed that the only applicable authority on point was Barcomb, and had every right to believe that the Barcomb decision would be followed as controlling precedent.

Green did not have prior notice, actual or otherwise, that he had to raise his entitlement claim in any way other than through **pleading before final judgment** under the holdings of Stockman and Barcomb, and he has been unfairly surprised and prejudiced by the Fourth District Court of Appeal's expansion of the Stockman requirement to include the obligation of a litigant to give **record**

notice prior to dismissal by **either** pleading or motion even before a dismissal for failure to prosecute.

The majority opinion in Green expressed its expanded version of the Stockman rule as follows:

> The general rule is an easy one: to recover attorneys' fees in a law suit, a party must timely request them in a pleading **or motion**.
> Green, at 25. [emphasis added]

The majority opinion reasoned that the Stockman court did not intend to foreclose the use of a motion to raise the issue of attorneys' fees by focusing on language in that decision which included the word "motion" in it. However, the specific question which was answered does not include motions and neither did this court's ruling which was very clear and specific and reads:

> A party seeking attorneys' fees pursuant to statute or contract must **plead** entitlement to such fees.
> Stockman, at 838 [emphasis added]

The foregoing citation is the actual ruling of this court and clearly and explicitly states that entitlement must be **pled**, not made by motion.

The word "pleading" is a term of art which does not, as stated above, include motions. **Motions are not pleadings.** This court did not hold that the requirement must be met by either a pleading or a motion. If this court had intended that the requirement could be fulfilled by a motion, it would have so stated.

The addition of motions and record notice to the Stockman pleading requirement is the expanded interpretation of the Green majority and is not supported by this court's opinion in Stockman,

by the cases interpreting the meaning of the term "pleading", or by the Barcomb case which is the one case directly on point with the case at bar and its particular factual and procedural situation.

Another aspect of Stockman which the Fourth District Court of Appeal has misinterpreted is the issue of what constitutes a timely request for attorneys' fees. Under Stockman, a request for attorney's fees must be pled and the issue must be raised before entry of final judgment in the case.

The request made by Green in the instant case was timely in that it occurred prior to the entry of any final judgment or adjudication on the merits, as was the case in Barcomb.

In fact, one of the bases upon which the Stockman court denied Downses' claim for attorneys' fees was its untimeliness for, as it stated in its opinion:

> Downses' claim for attorneys' fees was not before the court **prior to final judgment.** Stockman, at 838.

Clearly, the holding of the majority in Green is an incorrect and unsupportable expansion of the requirements set forth by this court in Stockman and should be reversed as an error of law.

The correct interpretation of Stockman is that which was set forth by Judge Hauser in his dissent where he stated:

> ...Stockman mandates that the notice a party will be seeking attorneys' fees be contained in the form of a pleading, not a notice or a motion. ...
> in the case at bar, the plaintiff's right to recover attorneys' fees was contained in a contract, the Declaration of Covenants. Thus, the factual basis entitling the defendant to attorneys' fees could only be contained in a

> pleading, the answer, and could not be included in a motion or notice. Green, at 26.

Judge Hauser was also troubled by the unfair surprise and lack of notice to Green of the expanded requirements set forth in the majority opinion and he states:

> Prior to today it was clear that a party could not comply with Stockman by filing a motion or notice for attorneys' fees in lieu of pleading for attorneys' fees. ...
>
> Not only is the majority position contrary to all the other cases interpreting Stockman, it will create procedural confusion for both the bench and bar. The majority requires that a defendant give notice to the plaintiff prior to filing its answer that it is seeking attorneys' fees. In what form should this notice be given? Does sthe majority require that such notice be contained in the motion to dismiss? If so, then this case will be cited for the proposition that affirmative relief, not just attorneys' fees, may be sought in a motion to dismiss. This would be in direct conflict with prior case law which has held that the purpose ofo a motion to doismiss is to test the legal sufficiecy of the plaintiff's complaint. Augustine v.Southern Bell Tel & Tel. Co., 91 So.2d 320 (Fla. 1956), not to seek independent affirmative relief. Green, at 26-27.

Judge Hauser concludes his dissent with a logical suggestion which comports with both the Stockman holding and the precedent of Barcomb, when he suggests:

> Rather than creating this procedural nightmare, I respectfully suggest that we create a bright line test that in order to comply with Stockman, a party that requests attorneys' fees by either motion or notice will not be entitled to attorneys' fees if that party has failed to plead for attorneys' fees in the complaint or answer. Furthermore, a party need not plead for attorneys' fees if the time period to answer the complaint has not yet ripened. Green, at 27.

The conflict between Barcomb and Green should be resolved as suggested by Judge Hauser. Both Judge Hauser's dissent and the Second District Court of Appeal's decision in Barcomb are the logical and correct interpretations of Stockman as they apply to cases in which the factual and procedural situations are such that a defendant has not yet been required to file a responsive pleading and, therefore, could not and should not be compelled to comply with the Stockman requirement of **pleading** entitlement to attorneys' fees prior to entry of a final judgment.

The majority opinion in Green is a tortured reading of this court's decision in Stockman, is in direct conflict with prior case law, and can only lead to procedural confusion if not reversed and corrected by this court.

II. IF THE STOCKMAN PLEADING REQUIREMENT **IS** APPLICABLE TO THE CASE AT BAR, ARE THERE EQUITABLE CONSIDERATIONS WHICH WOULD SUPPORT AN EXCEPTION TO ITS APPLICATION IN THIS INSTANCE OR DOES THE EXCEPTION SET FORTH IN STOCKMAN APPLY HERE TO EXCUSE GREEN FROM THE OPERATION OF ITS PLEADING REQUIREMENT?

It has been established that the Stockman pleading requirement does not apply in all cases and that each case needs to be examined to see if the criteria exists which would make Stockman applicable before a party's demand for attorneys' fees is denied in any particular case for failure to comply with it.

For example, in Ganz v. HZJ, Inc., 605 So.2d 871 (Fla. 1992), this court held that the Stockman pleading requirement is not

applicable in a situation where attorneys' fees are sought pursuant to Florida Statutes Chapter 57.105(1), and a party seeking fees under that provision need not specifically plead such entitlement before entry of a final judgment in the case in order to recover same. See also National Environment Products Ltd., Inc. v. Falls, 678 So.2d 869 (Fla. 4th DCA 1996), citing Ganz.

It has been held that equitable considerations may apply which support an exception from the application of the Stockman pleading requirement in a particular case. See Max Dial Porsche Audi, Inc. v. Kusher, Inc., 596 So.2d 156 (Fla. 4th DCA 1992); Laguna Palms Properties, Ltd. v. Long, 622 So.2d 557 (Fla. 3d DCA, 1993).

In Coffey v. Evans Properties, Inc., 585 So.2d 960 (Fla. 4th DCA 1991), the court stated:

> As we read Stockman v. Downs, 573 So.2d 835 (Fla. 1991), the absence of a prior pleading containing a claim for attorneys' fees is **without an estoppel** from conduct or the failure to object, fatal to an award of fees. Coffey, at 962.

In addition to the reasons set forth in point one above, there are ample reasons for this Court to determine, on equitable grounds, that there should be an exception to the application of the Stockman pleading requirement here, even if it is found to be applicable in this case.

The association should be estopped from asserting the procedural pleading requirement of Stockman, if it is deemed to be applicable in this case, by the application of equitable principles to the totality of the facts and procedural posture of the case.

To begin with, it is a well established equitable maxim that if you seek equity you must be willing to do equity.

Here, the association is not willing to do equity and comes before the court, in essence, with unclean hands.

The association is a party to the Declaration of Covenants upon which it brought the action in the first place and upon which it also intended to rely to recover its attorney's fees if it were a prevailing party in the matter.

The association cannot equitably argue that it would be entitled to recover its attorneys' fees pursuant to that document but then turn around and argue that the defendant, when he became the prevailing party, should not be entitled to recover attorneys' fees under the same provisions simply because he did not actually plead or make such a claim by motion prior to the matter being dismissed for lack of prosecution.

This is especially true where it was the association's own lack of diligence which left the case in the procedural posture where Green did not yet have to file a responsive pleading in which the entitlement claim could be pled and which ultimately led up to the dismissal for failure to prosecute!

What's more, the association was clearly aware and on notice of the fact that the Declaration of Covenants provided for prevailing party attorneys' fees by virtue of its being a party to the agreement in the first place and also by expressly acknowledging prevailing party entitlement to fees in its complaint.

The association has neither denied it was aware of the possibility that Green might make such a claim nor has it asserted that it was surprised by his making of a claim for fees.

Rather, it has stated that he should not recover them based solely upon the Stockman pleading requirement.

It is uncontested that the association had actual notice of Green's intention to seek recovery of his attorneys' fees if the matter was pursued further, which notice was provided to the association by the letter of October 31, 1994, (R66-67 and R77-78) and which letter the association has acknowledged receiving.

The association even relied upon that letter and specifically referred to it in its response to Green's motion to dismiss for failure to prosecute (R25 at Paragraph 3F), in its attempt to defend against that motion.

The Fourth District Court of Appeal has found that prior actual knowledge of a claim to attorney's fees would eliminate the element of surprise and prejudice and in U.S. Fidelity & Guaranty v. Martin County, 669 So.2d 1065 (Fla. 4th DCA, 1996), stated:

> The county knew that it could be liable for attorney's fees if the final order was sustained on appeal. Therefore, the principal policy reason for requiring a motion for fees to be made within a reasonable time after final judgment, mainly the surprise and prejudice to the paying party, is not present in this case. U.S. Fidelity, at 1067.

There can be no surprise or prejudice to the association in this case. The association knew about the previling party attorney's fees provision, was a party to the agreement and had

admittedly received actual prior notice of Green's intention to pursue his fees and costs. There are ample grounds upon which this court can find adequate notice to eliminate surprise.

It is significant, as pointed out by Judge Hauser in his dissent, that it was the association's own lack of diligence which led to the dismissal for failure to prosecute in the first place and that the association ultimately agreed to entry to the Order of Dismissal in hopes of circumventing the provisions of the Declaration of Covenants concerning prevailing party attorney's fees.

It would now be inequitable to reward the association for its lack of due diligence and punish Green for his diligent defense and his justifiable reliance upon the case law as it then existed, especially where the plaintiff admittedly had actual prior notice of Green's intention to pursue attorneys' fees.

There is no surprise to the association here and the court, in essence, has been enlisted in the association's plan to avoid liability under the declaration of covenants. The court should not allow itself to be so exploited.

This court, in equity, must also consider the element of unfair surprise, prejudice and lack of notice to Green.

Prior to the Green holding, there had been no case law which put litigants on notice that entitlement of fees had to be **either** pled **or** raised by motion of record, even before a dismissal is entered in the matter.

Green has been prejudiced by the unfair surprise of being retroactively held to a previously non-existent requirement which the expanded interpretation of Stockman has now imposed upon him.

While the Stockman holding **did** put litigants on notice of the **pleading requirement** prior to the entry of a **final judgment**, there was no such prior notice which apprised litigants of the non-pleading notice requirement conjured up by the Fourth District Court of Appeal in its holding in Green.

Barcomb was the only authority on point prior to Green, and it held that there was no requirement to raise the entitlement issue prior to a party's having to actually file a responsive pleading.

Under the facts and circumstances of this case, the association cannot truthfully maintain that it is surprised that a claim of entitlement to prevailing party attorneys' fees has been made based on the very agreement it is a party to and upon which it intended to rely to recover its fees if it prevailed.

Neither can it honestly maintain that it never had any notice that Green would seek to pursue recovery of his fees.

It acknowledges that it received the October 31, 1994, letter at the time it was sent and even relied upon it as a defense in its response to Green's motion to dismiss for failure to prosecute but now seeks to avail of itself of a procedural technicality to avoid having to pay that which it would have demanded had **it** been a prevailing party.

The principles of fairness and the avowed goal of avoiding unfair surprise and prejudice must, in equity, be applied equally both ways.

This court also acknowledged that there would be situations where an exception to the Stockman pleading requirement would come into play and enunciated one such exception it its opinion, stating:

> However, we recognize an exception to the rule announced today. Where a party has notice that an opponent claims enttilement 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 association admittedly had actual notice of Green's claim of entitlement to attorney's fees, although contained in a letter and not a pleading or motion, but proceeded to pursue the matter and relied upon the very letter giving it notice of the claim in its attempt to defend against the motion to dismiss.

This is exactly the kind of situation in which an estoppel should arise under the exception to the Stockman pleading requirement and constitutes a waiver by the association of any objection to the failure to plead if this court finds that the pleading requirement is applicable to a situation where there has not yet been an opportunity to plead by Green.

Finally, this Court should also consider judicial economy in determining this matter. If this court upholds the appellate and

trial court decisions, Green still has the right to bring an independent breach of contract action to recover his attorneys' fees pursuant to the terms of the contract since, under the reasoning of the trial and appellate courts, the issue of entitlement to attorneys' fees was not timely raised prior to the dismisal and was, therefore, not before the court and was never adjudicated.

Green is not barred from bringing a claim on that issue pursuant to the terms of the agreement between the parties, and, consequently, Green may now make demand on the association for payment of his attorneys' fees as the prevailing party in the trial court, pursuant to the terms of the Declaration of Covenants.

Upon the association's refusal to pay same, he may then bring an independent action to recover attorneys' fees for the association's breach of the terms of the Declaration of Covenants.

Such an action would not be barred by the Doctrine of Res Judicata since the matter was not adjudicated by the dismissal as it was not an issue before the court prior to the entry of the order of dismissal and could not therefore have been adjudicated.

However, it would be in the greater interest of clarification of the conflict between the Barcomb and Green holdings, as well as that of judicial economy, to have this court decide this matter here and now.

For the foregoing equitable reasons, as well as those legal reasons set forth in point one above, this Court should reverse the

Fourth District Court of Appeal and the trial court's denial of Green's motion for attorney's fees and adopt the reasoning of the Second District Court of Appeal and that set forth in Judge Hauser's dissent, and hold that a party need not plead an entitlement claim for attorneys' fees if the time period to answer the complaint has not yet ripened.

SUMMARY OF ARGUMENT

The holding of Stockman v. Downs, is inapplicable to this case and does not bar recovery of attorneys' fees by the prevailing party since the Stockman case is distinguishable from the specific factual circumstances and procedural posture of the case at bar and the holding in Bruce v. Barcomb, the only case squarely on point, should control.

Furthermore, the specific question decided in Stockman shows clearly that Green does not fall within its parameters and is distinguishable on those grounds as well.

Stockman applies to cases where the matter is fully at issue, both sides have had opportunity to file their pleadings and thus had an opportunity to **plead** entitlement to attorneys' fees. It does not concern a case in which there has been no responsive pleading required of a defendant due to the plaintiff's lack of diligence and the matter is not at yet at issue.

The specific question answered by Stockman limits the application of its holding to the factual situation set forth in the question itself, to-wit: where a motion for recovery of prevailing party attorneys' fees is brought **after** final judgment has been entered in a case, which motion raises the issue of that party's entitlement to attorneys' fees for the very first time.

The question answered and the ruling in Stockman also specifically set forth how such a demand for attorneys' fees is to be made and unequivocably state that such entitlement must be **pled**.

Stockman is not controlling here for a number of reasons. Unlike Stockman, the case at bar was never at issue and no responsive pleading was yet required of Green wherein he could plead entitlement. There has been no final judgment entered in the matter nor even an adjudication on the merits.

The Plaintiff was not diligent in the prosecution of the matter and there was no trial on the merits. Not even the original motions to dismiss and strike were ever set down for hearing and the matter was ultimately dismissed by entry of an agreed order of dismissal for failure to prosecute which, under the existing case law, does not constitute an adjudication and is without prejudice.

Green's motion for attorneys' fees was timely filed even under the Stockman criteria as it was filed before entry of a final judgment in the matter.

The association had actual notice of Green's claim to entitlement to prevailing party attorneys' fees by virtue of the

letter dated October 31, 1994, which the association admitted receiving and in which Green's attorney advised the association in no uncertain terms that Green would pursue recovery of his attorneys' fees in the matter.

The association has not only admitted it received the letter but also specifically referred to it in its response to Green's motion to dismiss for failure to prosecute and relied upon it in its defense in opposition to that motion.

The paramont concern of the Stockman holding was that parties have notice of a claim of entitlement to prevailing party attorneys' fees in order to avoid unfair surprise and prejudice to the paying party. The Fourth District Court of Appeals has held that **actual notice** is what is required and has even held that prior knowledge on the part of the paying party alleviates the concern for surprise and prejudice.

The Association is a party to the declaration of covenants, the agreement under which it brought the action. The declaration provides for the recovery of attorneys' fees by a prevailing party and the association, as party to the declaration, is deemed to have notice of its provisions and is bound by them.

Additionally, the entitlement to recovery of attorneys' fees was cited in four separate places in the association's complaint and a copy of the pertinent portions of the declaration were even attached to the complaint and became a part thereof for all purposes pursuant to F.R.C.P. 1.130.

The association was unarguably on actual and constructive notice of the provision for the recovery of prevailing party attorneys' fees and also that Green would be seeking to recover his fees if he prevailed. The association does not deny it received a notice contained in the October 31, 1994, letter and knew of the declaration's provisions when it filed its complaint but it now attempts to avoid liability by hiding behind the Stockman pleading requirement which does not, and should not, apply in this instance by virtue of the substantial differences between that case and the one at bar as well as the equitable considerations to be taken into account.

Green maintains that Barcomb, a case exactly on point, should be controlling precedent in this matter. In Barcomb, the defendant filed a motion for attorneys' fees after entry of a dismissal but prior to its having to file an answer, which motion was denied by the trial court. While the denial of fees was upheld by the Second District Court of Appeals on other grounds, the Barcomb court disagreed with the trial court on the applicability of Stockman to a situation where there has not been a responsive pleading filed.

The Barcomb court specifically found that Stockman was **not** applicable in such an instance and does not apply where a defendant has not had to plead because the time for the filing of a responsive pleading has not yet ripened.

Green maintains that the Stockman holding should never have been applied in this case and he also asserts that the Fourth

District Court of Appeal has improperly expanded the Stockman ruling to include matters that were not a part of the ruling and that additional criteria have been read into the Stockman holding by an extremely expansive and fanciful reading of that decision by the Fourth District Court of Appeal.

Nowhere in Stockman is there a requirement that the notice required be record notice and no where does it require that the requisite notice be given any other way than by pleading, which pleading must be made before entry of a final judgment.

Stockman simply does not apply where there has yet to be a final judgment entered or where the opportunity to plead entitlement has not yet ripened.

On equitable grounds, Green maintains that the Stockman case should not be applied here even if it is applicable under the factual and procedural circumstances of the case at bar.

As stated above, the association had actual notice that Green would be seeking to recover his attorneys' fees although the actual notice was not provided through a pleading or a motion. There is casse law in the Second District which supports notice given in other ways than by pleading or motion.

Furthermore, it is clear that the association knew from the outset that the declaration of covenants provided for recovery of **prevailing party** attorneys' fees and cited its provisions in four separate places in its complaint as well as actually attaching a copy of the pertinent portions of the declaration to its complaint.

Thus, there is no surprise here to the association as it had actual and constructive notice of the prevailing party attorneys' fee entitlement issue and it should now be estopped from asserting the Stockman pleading requirement as a bar to Green's recovery of his attorneys' fees as the prevailing party.

The issue of surprise and prejudice to the paying party does not exist in this instance.

However, the issue of surprise and unfair prejudice to Green **does** exist and, in equity, th Stockman pleading requirement should not be applied in this case if it is, in fact, deemed to be applicable.

Prior to the Fourth District's holding in Green, the only authority on point was that of Barcomb which held that Stockman pleading requirement is not applicable in the factual situations such as exist here and Green was entitled to rely upon that case as precedent.

Furthermore, the additional criteria which was added to the Stockman holding by the Fourth District's opinion in Green, constitutes new criteria which were not in existence at the time the agreed order of dismissal for failure to prosecute and Green's motion for attorneys' fees were filed. Thus, it is inequitable to hold Green to a standard which not only is unsupported by the Stockman decision but was also not in existence and of which he had not prior notice, actual or otherwise.

The goal of avoiding unfair surprise and prejudice should cut both ways and Green should not be "blind-sided" by the application of an expanded version of Stockman where even the original version would not be applicable under the factual and procedureal circumstances of the case at bar.

Green maintains that both the Fourth District Court of Appeal and the trial court erred as a matter of law in denying his motion for recovery of attorneys' fees as it was filed prior to entry of any final judgment and before he could even plead entitlement to attorneys' fees since the matter was dismissed for failure to prosecute even before the time within which he had to file a responsive pleading has ripened.

Green should not be penalized for the lack of diligence on the part of the plaintiff and neither should this court award the plaintiff for its failure to diligently act by imposing the Stockman pleading requirement on Green.

For both legal and equitable reasons, this Court should reverse the Fourth District Court of Appeal and the trial court and award Green his attorneys' fees both in the trial court and the appellate courts and hold that the ruling in Barcomb and the suggestion of Judge Houser in his dissent are the logical and correct interpretations of Stockman in a case involving such a situation as exists here.

CONCLUSION

Both the trial court and the Fourth District Court of Appeal erred in denying Green's motion for attorneys' fees on the authority of Stockman v. Downs.

The Stockman pleading requirement does not apply in the instant case because here, the matter was never at issue and the time within which a responsive pleading had to be filed had not ripened and, consequently, Green could not **plead** an entitlement to attorneys' fees before the matter was dismissed.

Stockman is also inapplicable because tGreen's motion for attorney's fees was made prior to entry of a final judgment

Unlike Stockman, there has been no trial or hearing on the merits nor even a hearing on the original motions to dismiss and strike filed by the defendant and the plaintiff has not been diligent in the prosecution of the matter which lead up to the dismissal of the action for failure to prosecute.

The paramont issue in Stockman, that of notice to the opposing party of the claim of entitlement to attorneys' fees, has been met in this case and there can be no surprise or unfair prejudice to the association under the facts and circumstances of this case.

The association had both actual and constructive notice of both the issue of entitlement of prevailing party attorneys' fees and Green's claim to same by virtue of its acknowledgment in its pleadings of the issue of entitlement and also by admitting the

receipt of the letter of October 31, 1994, in which is was clearly set forth that Green would seek to recover his attorneys' fees if the matter was pursued. The receipt of this letter constitutes **actual** notice of Green's intention to seek attorneys' fees and such actual notice is sufficient to allay the concerns of surprise and unfair prejudice to the paying party.

Although the Stockman decision is not applicable on factual and procedural grounds, if this court deems it to be applicable in this case there are equitable considerations which support an exception to the pleading requirement of Stockman and the association should be equitably estopped from asserting an objection to the lack of a pleading raising entitlement to attorneys' fees. It was the association's own lack of diligence which put the case in the procedural posture where the time to file a responsive pleading had not yet ripened and it is Green and not the association which is being unfairly surprised and prejudiced by application of an expanded version of Stockman.

This court should find that Barcomb is controlling precedent in this matter and reverse both the Fourth District Court of Appeal and the trial court and should implement the suggested solution of Judge Hauser in his dissent in Green and establish a "bright line rule" for courts to apply in a situation such as this.

The court should also award to Green his attorneys' fees, both in the trial court and the appellate court as the prevailing party in this matter pursuant to the declaration of covenants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U. S. Mail this 28th day of April, 1997, to: MONICA I. SALIS, ESQUIRE, Attorney for Respondent, 800 Corporate Drive, Suite 510, Ft. Lauderdale, Fl. 33334.

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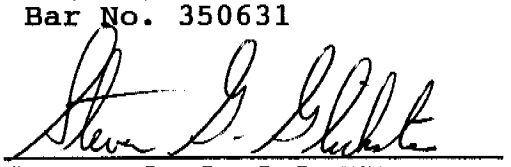
BY: 
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