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JUN 26 1997

SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT
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CASE NO. 89,911

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

ALLEN GREEN,

Petitioner,

vs.

SUN HARBOR HOMEOWNERS' ASSOCIATION, INC.,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

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ARGUMENT AND CITATIONS OF AUTHORITY

I. MAY PETITIONER RECOVER ATTORNEYS' FEES UNDER THE FACTS AND CIRCUMSTANCES OF THE INSTANT CASE?

The Respondent has completely ignored the essence of the matter at issue here and relies instead on a strict application of the Stockman rule that a claim for attorneys' fees must be pled regardless of the particular facts and circumstances of the case at bar.

However, the fact that Stockman requires such a claim to be **pled** is exactly the reason it does not apply and should be the focus of this Court to clarify the conflict which has arisen between the Second and Fourth District Courts of Appeal.

Respondent completely glosses over the arguments raised by Petitioner that the Stockman case is factually and procedurally dissimilar to the one at bar, that its holding does not apply in this instance and that the decision in Bruce v. Barcomb, 675 So.2d 219 (Fla. 2d DCA, 1996) is exactly on point and is controlling precedent in this instance.

Here, unlike Stockman, the matter was never at issue and Green had never had to file any **pleading** in which he would be required to **plead** entitlement to attorneys' fees under the Stockman holding.

Green had only filed motions to dismiss which had never been set down for hearing by the Respondent and, as pointed out by Judge Hauser in his dissent to the majority decision appealed from in this matter, "**it is black-letter law that a motion is not a pleading**". Green vs. Sun Harbor Homeowners' Association, 685 So.2d 23 (Fla. 4th DCA, 1996), at 26.

Furthermore, Stockman is distinguishable and therefore inapplicable to the case at bar on the following grounds:

- Green's Motion for Attorneys' Fees was timely filed by Green as it came **before** entry of a Final Judgment;

- The matter was disposed of by entry of an Agreed Order to Dismiss for Failure to Prosecute which is not a Final Judgment and does **not** constitute an adjudication on the merits;

- There was no surprise to the Plaintiff below as it had admittedly received **actual notice** of Green's intention to pursue attorneys' fees if the matter was not dropped and it was also a party to the very contract under which the fees were sought and had actual knowledge of its terms and provisions.

Appellee fails to address the conflicting opinion of the Barcomb court in any way other than to refer to the certification of conflict by the Fourth District and to mention in its conclusion that somehow "unfair surprise is impermissibly approved" by that decision. No further discussion or explanation of that case is presented and it is neither distinguished nor disposed of in any way. It remains the unrefuted controlling case on point.

Where there is no other case on point within a district, decisions of other districts are controlling precedent and must be followed. Here, Barcomb is the only case exactly on point prior to the decision appealed from and the Fourth District Court should

have followed its holding which unequivocably states:

> 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 a plaintiff which is filed before the defendant is required to file an answer.**
> Barcomb, at 221 [emphasis added]

Respondent cites the case of Res Panel Refrigeration Corp. v. Bill Collins Refrigeration Services, Inc., 636 So.2d 569 (Fla. 3rdDCA, 1994) in support of its attempt to rebut Green's assertion that there already was record notice of a claim of entitlement by the prevailing party to attorneys' fees in the matter.

The Res Panel case is clearly distinguishable from the case at bar and its holding inapplicable since, unlike this case, it deals with a situation where there was a pleading filed by the defendant in which the opportunity to claim such entitlement arose but was not taken and the defendant filed a motion for fees post-judgment.

Additionally, the basis for the fees sought in Res Panel was not a reciprocal provision expressly set forth in the agreement between the parties such as we have here but, rather, was founded upon the provisions of F.S. 57.105(2), which provides for the possibility of an award of such fees to a prevailing party under a contract which only provides for unilateral fees.

Respondent also ignores the fact that F.R.C.P. 1.130(b), specifically provides that any exhibit attached to a pleading is considered a part thereof for all purposes and, consequently, the attachment by the plaintiff of those portions of the Declaration of

Covenants providing for an award of attorneys' fees to the prevailing party constitutes record notice of such a claim to entitlement to whichever party should prevail and it is a part of the record **for all purposes.**

Finally, assuming Stockman does apply here, we have the essential issue underlying the Stockman rule; that of notice.

It is undisputed that Respondent had actual notice of both the provisions of the Declaration of Covenants providing for the award of attorneys' fees to the prevailing party and of the intention of Green to seek recovery of his fees if the matter were pursued further as was set forth in the letter of October 31, 1994, admittedly received by the Respondent.

Under the particular facts and circumstances of the case at bar, Respondent had actual notice sufficient to satisfy the concerns of the Stockman court to avoid surpise and, on that basis alone, the Stockman holding should not be a bar to Green's recovery of his attorneys' fees as the prevailing party both in the trial court and the appellate courts.

One need only look at the totality of the facts and circumstances of this case to see that **there is no surprise here.** Respondent admits it received the October 31, 1994 letter, attached part of the Declaration of Covenants to its Complaint providing for award of prevailing attorneys' fees and recited in four separate places in its Complaint that the prevailing party is entitled to recover its fees.

II. HAS THE NOTICE REQUIREMENT OF STOCKMAN BEEN FULFILLED?

Respondent again starts out with the mistaken premise that the Stockman holding applies to the instant case and that the **pleading** requirement has not been met. It is actual notice that is required and such actual notice need not be in a pleading.

Respondent makes a tortured reading of Stockman in an attempt to support its position that there must be **record** notice of a claim for attorneys' fees before such an award may be granted. Respondent does this by interpreting the Stockman court's citing of specific cases in which there was record notice as an explicit indication that the notice requirement must be of record.

However, nowhere in the Stockman decision is there a finding that there must be record notice of a claim to entitlement for attorney's fees before such an award can be made. In fact, the correct reading of Stockman with respect to the notice aspect is that there must be **actual notice** to the opposing party, not record notice. (See Green, at 24).

Furthermore, later interpretations of Stockman have held that notice may be given in ways which need not be of record so long as there has been **actual notice** given. (See Vie-A-Mer, Ltd. vs. S. Toub & Associates, 684 So.2d 216 (Fla. 2d DCA, 1996), at 217.

The two cases cited by Respondent as support for its position that Stockman requires record notice are inapplicable to the case at bar and are clearly distinguishable from it.

In Mainlands of Tamarac by Golf Unit No. 4 Assoc., Inc. vs. Morris, 388 So.2d 226 (Fla. 2d DCA 1980), the defendant had filed

a pleading and answered the Complaint but had not pled entitlement to attorneys' fees. During trial the parties entered into a stipulation on the record that the attorney's fees issue would be heard post-trial. Clearly, there had been opportunity to plead entitlement by the defendant in his Answer, and unlike the situation in the case at bar, there had also been a judgment entered in that case before the attorney's fee issue was addressed.

Significantly, the failure to **plead** entitlement was not held to be a bar in Mainlands as **there was actual notice** to the opposing party by virtue of the stipulation entered into between the parties on the record and the trial court's denial of fees was reversed.

Obviously, factors other than a simple failure to **plead** entitlement are considered in these cases by the courts and they include actual notice of a claim even if it is not contained in a pleading.

Brown vs. Gardens By the Sea South Condo Association, 424 So.2d 181 (Fla. 4th DCA 1983), the other case cited in the Stockman decision upon which Respondent relies, is not factually on point with the case at bar and is distinguishable but is instructional and helpful in the determination of this matter.

Brown is another case in which, unlike the instant case, there were defensive pleadings filed but no claim of entitlement to attorneys' fees was raised until after final judgment was entered. The trial court denied an award of attorneys' fees but the Fourth District Court of Appeals reversed that denial despite the fact that entitlement had not been pled.

While acknowledging that the overwhelming majority of cases require entitlement to fees to be raised, "**in the basic pleadings**", the Brown court found that there are exceptions.

The Brown court cited Marrero vs. Cavero, 400 So.2d 802 (Fla. 3d DCA 1981) for the proposition that entitlement to attorneys' fees need not be pled if the contract under which the claim is made is part of the record or evidence, although the court said it is considered better practice to plead such entitlement in an answer. Brown, at 183.

A document becomes a matter of record for all purposes when attached to a pleading. (See F.R.C.P. 1.130)

The Brown decision also instructs us that courts may look at "special considerations" in determining whether fees may be awarded absent actual pleading of a claim to them, and that failure to plead such a claim is not fatal even if made post-judgment. See Brown, at 183-184.

Thus, the two cases cited by Respondent not only fail to support its position that notice must be of record, they also bolster Petitioner's position that the "special circumstances" of the case at bar must be reviewed in determining whether Stockman applies at all and, if it does, whether there is an exception applicable to it which would allow the award of attorneys' fees notwithstanding a failure to plead the entitlement to them.

Respondent raises a number of hypothetical issues which amount to mere "smoke and mirrors" and which will not be addressed as they are not pertinent to the issues on appeal here.

At Footnote 1, Page 10, Respondent cites the case of Blattman vs Williams Island Associates, 592 So.2d 269 (Fla. 3d DCA 1991) [incorrectly cited as Blackman], as standing for the proposition that an offer to compromise or settle cannot form the basis for relief for any party and Respondent maintains that this case precludes the use by Green of the October 31, 1994 letter (R66-67 & R77-78), as notice of his intent to pursue attorneys' fees.

Respondent's position starts with the incorrect supposition that the October 31, 1994, letter was a settlement offer. A common sense reading of the plain language of the letter shows that it is not a settlement offer at all but, rather, is a clear warning that Green intends to pursue recovery of prevailing party attorneys' fees if the matter is pursued further.

It is clearly the kind of actual notice contemplated by the Stockman court. It is not inadmissible as a settlement offer nor is it being offered into evidence as such. Neither is the relief sought based upon that letter. Rather, the fees are sought on the basis of the contract between the parties and the letter was merely notice by Green of his intention to pursue same.

Respondent would have the October 31, 1994 letter excluded because it is clear proof that the Respondent had **actual notice** of Green's intentions and Respondent has never denied receiving it.

Indeed, actual notice is one of the "special considerations" which this court should examine in resolving the conflict certified to it and which constitutes an exception to the Stockman rule.

As to Respondent's implied assertion that Green did not assert the correct basis for his attorney's fee claim, one need only read the motion for fees (R45-50) to see that the correct contractual provision for the award was clearly set forth therein.

Respondent maintains that it only acquiesced to entry of an Agreed Order of Dismissal for Lack of Prosecution after its counsel determined that no claim for attorney's fees had been pled and agreed to the Order on that basis. This argument is self-serving and again completely overlooks the essence of this casse, to wit: no pleading was yet required of the Defendant in which he had to **plead** anything at all.

It cannot be emphasized enough that no pleading ever had to be filed in this matter by Petitioner and none was required at that procedural stage of the litigation! That is precisely why Stockman does not apply to the case at bar and is the reason behind the Barcomb decision which is the controlling precedent.

Once the matter had been dismissed by the Agreed Order, Petitioner was then free to file his claim for attorneys' fees and was not precluded by the Stockman ruling from recovering them as Respondent had **actual notice** of his claim and there had never been a pleading filed in which Green had failed to raise the issue.

If there was any unfair surprise at all, it was to Green when he was denied fees based upon an erroneous reading and application of the Stockman decision and a refusal of the trial and appellate courts to follow the precedent set by Barcomb and award him fees.

III. IS AN ORDER OF DISMISSAL FOR FAILURE TO PROSECUTE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.420 AN ADJUDICATION ON THE MERITS?

Respondent's assertion that "there is no historical analysis of this rule that can substantiate ignoring the plain meaning of its words", is clearly wrong as there **is** such an analysis and, as Petitioner pointed out in his Initial Brief, it was made by this court in Zukor vs. Hill, 84 So.2d 554 (Fla. 1956).

Respondent does not address the Zukor case at all and simply relies upon its incorrect and unsupported statement, quoted above, to support its position that the Order of Dismissal for Failure to Prosecute in this case constitutes an adjudication on the merits.

Contrary to Respondent's statement, this court specifically held that a dismissal for failure to prosecute, even though brought under the predecessor to Rule F.R.C.P. 1.420(b), is not an adjudication on the merits and is not a bar to a subsequent action on the same subject matter. Zukor, at 556.

As for historical analysis, both the legislative history of this Rule and the author's comments to F.R.C.P. 1.420, show that Rule 1.420(e) is directly derived from F.S. 45.19(1), while 1.420(b), is the successor to Common Law Rule 1.35(b).

Thus, the case law applicable to the predecessor versions of these rules is binding precedent in construing matters under the more recent versions of the rules unless there is later case law to the contrary.

The current version of the rules in question track, almost verbatim, the language of the earlier versions. There have been no

substantial changes in them and neither has there been any subsequent case law which overrules or rescinds Zukor.

In any event, the courts will look to the substance of what is sought in a pleading or motion and have the power to provide the appropriate relief even where a party has mistakenly brought a matter before it under an inappropriate rule or has pled an incorrect cause of action.

Although undersigned counsel wishes to the contrary, he must admit that what he says is not automatically deemed to be law on any particular subject merely by virtue of his having said so.

Likewise, neither the parties nor their counsel may decide what is the law and the Respondent flatters Petitioner's counsel by implying that, because he made an erroneous statement in his Motion for Attorneys' Fees, that that statement is now the law in the matter. Notwithstanding his erroneous statement, a dismissal for failure to prosecute is not an adjudication on the merits. It is, however, a determination of a prevailing party for the purposes of an award of attorneys' fees and the Petitioner is clearly the prevailing party here and is entitled to recover his reasonable attorneys' fees for all portions of this case from its inception through appeal, even under the Stockman holding.

CONCLUSION

The Stockman case is factually and procedurally dissimilar to the one at bar and, for that reason, it does not apply here. The decision in Bruce vs. Barcomb, which is exactly on point, is controlling precedent in this instance.

However, even assuming that Stockman does apply, there are special circumstances, exceptions and equitable considerations which exempt Green from the Stockman pleading requirement. The Respondent had actual notice of the Petitioner's intention to seek recovery of his attorneys' fees as the prevailing party, both by virtue of receipt of the October 31, 1994 letter and by Respondent's attachment of the contractual provisions of the Declaration of Covenants to its pleading, thereby making it a matter of record for all purposes. (See Marrero v. Cavero)

Additionally, the "special considerations" of the case at bar and equitable considerations as set forth in Petitioner's Initial Brief show that the Stockman pleading requirement does not apply to this case and this court should reverse the Fourth District and trial courts with directions to award attorneys' fees on all levels to Green as the prevailing party. There was clearly actual notice here and the Respondent cannot truthfully claim unfair surprise under the particular facts and circumstances of this case.

The Order of Dismissal entered in the trial court for failure to prosecute was not an adjudication on the merits under the holding of Zukor v. Hill, notwithstanding the fact that it was

brought pursuant to Florida Rule of Civil Procedure 1.420(b) and, consequently, any attorneys' fee motion brought by Green prior to a final judgment being entered in the matter is timely and is not barred by Stockman.

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U. S. Mail this 23RD day of JUNE, 1997, to: MONICA I. SALIS, ESQUIRE, Attorney for Respondent, 800 Corporate Drive, Suite 510, Ft. Lauderdale, Fl. 33334.

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