SUPREME COURT OF FLORIDA

EDWARD B. CAUFIELD, et al.,	*	
	*	
Petitioners,	*	
	*	CASE NO.: 1999-95
vs.	*	5TH District - No. 98-2960
	*	District Court of Appeal
CANTELE, GINO, et al.,	*	
	*	
Respondents.	*	
	*	

* *

PETITIONERS'
AMENDED INITIAL BRIEF

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CERTIFICATE OF TYPE SIZE AND STYLE

Petitioners hereby certify that the type size and style of the Initial Brief of Appellants is Arial 14.

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PREFACE

Petitioners, EDWARD B. CAUFIELD and ROSE CAUFIELD, shall be referred to as CAUFIELDS and Respondents, GINO CANTELE and ARMANDO CANTELE, shall be referred to as CANTELES.

References to the record shall be identified by the letter R. followed by the page number (R. __).

STATEMENT OF THE CASE AND FACTS

On September 9, 1993, EDWARD and ROSE CAUFIELD (CAUFIELDS) entered into a written contract with GINO CANTELE for the sale and purchase of an RV park in Hernando County. Closing of the contract occurred on September 30, 1993, and title to the RV park was conveyed to GINO and ARMANDO CANTELE (CANTELES) even though only GINO CANTELE had executed the contract. (R.1-48)

In 1995, the CANTELES sued the CAUFIELDS for damages arising out of the CANTELES' purchase of the RV park from the CAUFIELDS. In a one count complaint, the CANTELES alleged that the sewer plant serving the park had been represented to them by the CAUFIELDS as being in "great shape" but that after their purchase of the RV park, the CANTELES learned the plant was allegedly in violation of Florida law, and that they were required to spend substantial sums to bring the plant into compliance. The complaint further alleged the CAUFIELDS intentionally concealed the status of the plant and misrepresented material facts concerning the plant. (R. 1-48)

In the last paragraph of the complaint, the CANTELES requested an award of attorney's fees pursuant to the contract for sale and purchase of the RV park, a copy of the contract being

attached to the complaint and incorporated into the complaint by reference. Paragraph 9 of the contract provides:

> In connection with any litigation arising out of this contract, the prevailing party shall be entitled to recover all costs incurred, including reasonable attorney's fees…(R.1-48)

The CAUFIELDS moved to dismiss the complaint because it pled separate elements of breach of contract and fraud in the same count, failed to state a cause of action in contract for ARMANDO since only GINO was a party thereto, and failed to state a cause of action in fraud, since the complaint alleged the CANTELES had inspected the property before purchasing it. The CAUFIELDS also prayed for attorney's fees in a "wherefore" clause at the end of the motion:

> Defendants pursuant to Stockman v. Downs, 573 So. 2d 835 (1991) pray[s] (sic) for attorney fees. (R.49-50)

The CAUFIELDS also filed a Motion to Strike the complaint for various alleged defects, and at the end of said motion, included a plea for attorney's fees identical to the one quoted above. (R.51-52)

Both parties requested a jury trial, and the cause was set for trial. The trial court held a hearing on the Motions to Dismiss and to Strike. In a 1996 order, the court recited that the CANTELES had announced that their single count complaint was to be treated solely as a claim for intentional misrepresentation. The court then ordered: "the single count complaint shall be considered and solely treated as a complaint based upon a theory of intentional misrepresentation and a prayer for monetary damages for correcting alleged latent defects in the wastewater treatment plant." The balance of the motions were denied and the CAUFIELDS were ordered to file a responsive pleading within 20 days.

In their responsive pleading and affirmative defenses, the CAUFIELDS alleged the CANTELES had conducted an in depth inspection of the property before entering into the contract. They also alleged that paragraph 14 of the contract provided the buyers had made a complete inspection of the property, and were relying on their own inspection and not representations made

by the sellers, as well as a number of other defenses. In the pleading, the CAUFIELDS further stated: "Defendants have been compelled to employ the undersigned attorney and Plaintiffs are obligated to pay Defendants' attorney's fees." (R. 73-76)

On September 8, 1997, CANTELES filed a response to the Affirmative Defenses generally denying the Affirmative Defenses. (R. 85)

On February 13, 1998, the Court entered an Amended Order setting the case for pretrial conference and jury trial and setting a pretrial conference for June 8, 1998, and a trial for June 22, 1998. (R. 114-117)

On March 17, 1998, an order was entered allowing CANTELES' attorney to withdraw as counsel.

CANTELES failed to appear at the pretrial conference. (R. 126-127)

On June 11, 1998, an Order to Show Cause was issued by the Court ordering CANTELES to show cause as to why they should not be sanctioned for failure to appear at the pretrial conference. (R. 126-127)

On June 19, 1998, CANTELES filed a Notice of Voluntary Dismissal. (R. 128)

On July 17, 1998, CAUFIELDS filed a Motion to Tax Cost and Award Attorney Fees. They relied upon a paragraph of the purchase contract providing for attorney's fees to the prevailing party and pointed out that the CANTELES sought attorney's fees under the same provision. The CAUFIELDS argued that they pled for attorney's fees as required by <u>Stockman</u> in their earlier motions and answer, and that they had also orally proclaimed their entitlement to fees at the hearing where the CANTELES announced a voluntary dismissal. (R. 129-130)

On September 28, 1998, an Order Denying Defendants' Request for Attorney Fees was entered by the Court. The order denied the attorney's fees request for two reasons: first because the CAUFIELDS failed to plead their entitlement to fees as required by <u>Stockman v. Downs,</u> 573 So. 2d 835 (Fla. 1991) and second, because the cause of action was not based on the contract, but was for the tort of intentional misrepresentation. (R. 145)

CAUFIELDS filed an appeal from the Order Denying Attorney Fees. On appeal, CAUFIELDS argued that the litigation had arisen out of the contract for the sale of the RV park so as to entitle them to an award of attorney's fees pursuant to the prevailing party clause of the contract. CAUFIELDS also argued that they had sufficiently pled for an award of attorney's fees pursuant to Stockman v. Downs.

The Fifth District affirmed the Order Denying Attorney Fees on the grounds that : (1) the CAUFIELDS had failed to plead their entitlement to fees as required by Stockman v. Downs, 573 So. 2d 835 (Fla. 1991), and (2) the cause of action was not based on the contract but was for the tort of intentional misrepresentation.

The Fifth District also held that the proper method of review of an order granting or denying attorney's fees after a voluntary dismissal should be by plenary appeal pursuant to Florida Rules of Appellate Procedure 9.030 (b) (1) (A), rather than by petition for certiorari pursuant to Rule 9.030 (b) (2). In so doing the Fifth District acknowledged that its decision was in conflict with the decisions of other appellate courts on the same issue of law and certified conflict pursuant to Rule 9.030 (a) (2) (A) (vi).

The CAUFIELDS then filed a timely Notice to Invoke the Jurisdiction of this Court.

SUMMARY OF ARGUMENT

There are three points raised in this appeal.

The proper method to review orders denying or granting attorney's fees following a voluntary dismissal is by plenary appeal pursuant to Florida Rule of Appellate Procedure 9.030 (b) (1) (A) and not by petition for certiorari pursuant to rule 9.030 (b) (2).

In order to recover attorney's fees a claim for such must be pled. The purpose of the requirement is to put the opposing party on notice of the claim for attorney's fees.

Attorney's fees should be recoverable under a prevailing party clause in a contract for the sale and purchase of real estate regardless of whether the underlying cause of action is sounded in contract or in tort. An action for failure to disclose, fraudulent inducement, and intentional misrepresentation all arise out of the contract between the purchaser and seller and form the basis for an attorney's fee award under the contract. The Supreme Court's rationale in Katz v. VanDerNoord dictates such a conclusion. Such a conclusion is necessary in order to fairly and uniformly accommodate the concept of justice sought to be served in Katz.

ARGUMENT

POINT I

THE PROPER METHOD OF REVIEW OF AN ORDER GRANTING OR DENYING ATTORNEY'S FEES, AFTER A VOLUNTARY DISMISSAL, IS BY PLENARY APPEAL, NOT PETITION FOR CERTIORARI

The Fifth District decision held that the proper method of review of an order granting or denying attorney's fees, after a voluntary dismissal, is by plenary appeal pursuant to Florida Rule of Appellate Procedure 9.030 (b) (1) (A). In so holding the Fifth District certified conflict with the decisions of other districts which had determined that the proper method of review is by petition for certiorari.

The Fifth District's decision is directly and expressly in conflict with the decisions of other districts. See Green Tree Vendor Services Corp. v. Lisi, 732 So. 2d 422 (Fla. 1st DCA 1999); Barry A. Cohen, P.A. v. LaTorre, 595 So. 2d 1076 (Fla. 2d DCA 1992); O.A.G. Corp. v. Britamco Underwriters, Inc., 707 So. 2d 785 (Fla. 3rd DCA 1998); Oakwood Plaza, L. P. v. D.O.C. Optics Corp., 708 So. 2d 959 (Fla. 4th DCA) rev. denied, 725 So. 2d. 1107 (Fla. 1998); Kelly v. Tworoger, 705 So. 2d 670 (Fla. 4th DCA 1998). To illustrate however that confusion and inconsistency exists among the districts on this issue, the Fourth District in Hatch v. Dance, 464 So. 2d 713 (Fla. 4th DCA 1985) and the Fifth District in Department of Environmental Protection v. Gibbins, 696 So. 2d 888 (Fla. 5th DCA 1997) assumed, without discussion, that it is proper to review by appeal a trial court's order denying or awarding attorney's fees after a voluntary dismissal of a lawsuit.

The method of review, certiorari or plenary appeal, can make a difference in the procedural and substantive outcome on the same issue of law. For example, the time in which to seek review can vary for certiorari and appeals. See Green Tree Vendor Services Corp. v. Lisi, 732 So. 2d 422 (Fla. 1st DCA 1999); Shelnutt v. Citrus County, 660 So. 2d 393 (Fla. 5th DCA 1995). Further, an

appellate court has discretion to deny certiorari petitions but not appeals. Compare Fla. R. App. P. 9.030 (b) (1) and 9.030 (b) (2). See also State v. Furen, 118 So. 2d 6 (Fla. 1960); South Atlantic S. S. Co. of Delaware v. Tutson, 139 Fla. 405, 190 So. 675 (1939). The scope of review is also more limited in certiorari cases than in plenary appeals. See Kelly v. Tworoger, 705 So. 2d 670, 673 (Fla. 4th DCA 1998).

This court should affirm the Fifth District's holding that a plenary appeal is the proper method of review of orders denying or awarding attorney's fees following the voluntary dismissal of a case. Such orders determine the substantive rights of a party to attorney's fees[1] with finality with no more judicial labor is contemplated.[2] Following the entry of an order awarding such attorney's fees, levy and execution may be obtained. Blethen v. Henry, 661 So. 2d 56 (Fla. 2nd DCA 1995). Although the lawsuit may be later refiled following a voluntary dismissal, the ruling is final as to the attorney's work related to the dismissed suit. McKelvey v. Kismet, Inc., 430 So. 2d 919 (Fla. 3rd DCA), rev. denied, 440 So. 2d 352 (Fla. 1983).

There is a compelling need for this court to exercise its discretionary jurisdiction to provide clarity and uniformity as to the proper method of review of orders granting or denying attorneys fees, after voluntary dismissal.

POINT II

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[1] See Bowman v. Corbett, 556 So. 2d 477 (Fla. 5th DCA 1990)

[2] See Kippy Corp. v. Colburn, 177 So. 2d 193 (Fla. 1965); Nichols v. Michael D. Eicholtz Enterprises, Inc. 706 So. 2d 70 (Fla. 5th DCA 1998); City of Tallahassee v. Big Bend PBA, 703 So. 2d 1066 (Fla. 1st DCA 1997).

ENTITLEMENT TO ATTORNEY'S FEES MUST BE PLED SO AS TO PLACE THE OPPOSING PARTY ON NOTICE OF THE CLAIM

This Court in Stockman v. Downs, 573 So. 2d 835 (Fla. 1991), resolved some conflicts between the courts of appeal regarding the necessity to plead for attorney's fee in contract cases as well as cases in which attorney's fees are provided for by statute. In Stockman this court simply held "that a claim for attorney's fees, whether based on statute or contract, must be pled". This court, in explaining its rationale for the decision, said that "(t)he fundamental concern is one of notice." This court further noted that modern pleading requirements serve to notify the opposing party of the claims alleged and prevent unfair surprise.

In the instant case the CAUFIELDS initially responded to the one count complaint by filing a Motion to Dismiss and a separate Motion to Strike. In both of these initial pleadings CAUFIELDS prayed for attorney's fees pursuant to Stockman v. Downs. CAUFIELDS met the criteria set by this court in Stockman by putting CANTELES on notice that they were seeking attorney's fees. Further, after the complaint was confirmed by court order as solely being a claim for intentional misrepresentation, the CAUFIELDS filed their answer and affirmative defenses and again pled at the end of the pleading

that "(CAUFIELDS) have been compelled to employ the undersigned attorney and (CANTELES) are obligated to pay (CAUFIELDS') attorney's fees." Thus, even after the complaint was determined to be an action for intentional misrepresentation, CAUFIELDS again put CANTELES on notice that they were seeking to recover attorney's fees from CANTELES. From the very first pleading filed by CAUFIELDS, through and including the filing of their answer and affirmative defenses, CANTELES were placed on notice that CAUFIELDS were claiming attorney's fees against them. Accordingly, the Fifth District erroneously concluded "there is nothing in the record to have put them on notice the CAUFIELDS still continued to seek an attorney's fee award."

It is also respectfully argued that at least two district courts have erroneously extended this court's holding in Stockman by applying a narrow and highly technical standard which far exceeds the notice standard set forth in Stockman. See United Pacific Ins. Co. v. Berryhill, 620 So. 2d 1077 (Fla. 5th DCA 1993) and Dealers Inc. Co. v. Haidco Inv. Enterprises, Inc., 638 So. 2d 127 (Fla. 3rd DCA 1994) wherein Stockman is cited in support of the premise that a party seeking attorney's fees must plead the "correct entitlement" for attorney's fees. Stockman simply held that a claim for attorneys fees must be pled. Stockman did not hold that a party seeking attorney's fee must plead the "correct entitlement" for attorney's fees. These

cases, mandating strict adherence to a highly technical pleading requirement are in conflict with the notice standard for pleading set forth in Stockman.

CAUFIELDS pled for attorney's fees in their Motion to Dismiss, Motion to Strike, and in the Answer and Affirmative Defenses. In so doing the CAUFIELDS put CANTELES on notice at every pleading stage in the proceeding that they were claiming attorney's fees against the CANTELES. CANTELES cannot claim that they were surprised by CAUFIELDS claim for attorney fees.

POINT III

AN ACTION FOR DAMAGES FOR FAILURE TO DISCLOSE AND FOR MISREPRESENTATION ARISES OUT OF THE CONTRACT FOR SALE AND PURCHASE OF REAL PROPERTY.

CAUFIELDS adopt the brief of amicus curiae, The Academy of Florida Trial Lawyers, filed in this cause on this point on appeal. CAUFIELDS however supplement the argument as hereinafter set forth.

The contract for the sale of the RV park provides:

> In connection with any litigation arising out of this contract, the prevailing party shall be entitled to recover all costs

> incurred, including reasonable attorney's fees……

It is well established that an award of attorney's fees pursuant to a statutory or contractual provision is proper and appropriate following a voluntary dismissal inasmuch as the dismissal results in the defendant being the prevailing party. Hatch v. Dance, 464 So. 2d 713, (Fla. 4th DCA 1985); Bowman v. Corbett, 556 S. 2d 477 (Fla. 5th DCA 1990).

In determining whether or not a prevailing party clause in a contract for attorney's fees is applicable, it is generally necessary to determine if the action involves "litigation arising out of the contract." Historically, the various district courts have applied a simplistic rule in determining when litigation arises out of the contract. Effectively that rule has been applied based upon whether or not the litigation involved a contract action as opposed to a tort action. See Hopps v. Smith, 520 So. 2d 673 (Fla. 5th DCA), rev. denied, 529 So. 2d 695 (Fla. 1988); Dickson v. Dunn, 399 So. 2d 447 (Fla. 5th DCA 1981).

The simplistic rule distinguishing between contract actions and tort actions was applied by the Fourth District in Location 100, Inc. v. Gould S.E.L. Computer Systems, Inc., 517 So. 2d 700 (Fla. 4th DCA 1987). There the court held that attorney's fees incurred in defense of a fraudulent inducement claim could not be awarded under an attorney's fee provision in the contract. Location 100 relied on Dickson v. Dunn, 399 S. 2d 447 (Fla 5th DCA 1981),

which stated that a claim for fraudulent misrepresentation "arose out of the alleged misrepresentation inducing (one party) to enter into the sales contract and not out of the contract itself."

Notably, this court in Katz v. VanDerNoord, 546 S. 2d 10476 (Fla. 1989) announced a modification to the prior simplistic, but rigid rule. In Katz, this court held that a purchaser under a real estate contract who prevailed in litigation against the sellers could recover an attorney's fee award under the contract even though the contract was rescinded as a result of the litigation. This court said:

> It would be unjust to preclude the prevailing party to the dispute over the contract which led to its rescission from recovering the very attorney's fees which were contemplated by that contract.

This Court's decision in Katz, was cited by the Fourth District in Kelly v. Tworoger, 705 So. 2d 670 (Fla. 4th DCA 1998) in support of its decision holding that attorney's fees were recoverable under a prevailing party provision of a contract in a damage action based upon non-disclosure of latent defects. The Fourth District distinguished its decision from Location 100, Inc. and thus did not proclaim a conflict with either it or other fraudulent misrepresentation cases. However the Court did question whether or not Location 100 remains good law in light of Katz. The Fourth District noted that:

> (a)lthough Katz spoke of an attorney's fee provision in the context of a rescission action, its rationale is equally applicable to an action at law for fraudulent misrepresentation. The same deceptive conduct might justify relief under either cause of action. If the attorney's fee provision of a contract is to be construed objectively, it would seem that "litigation arising out of this contract" should include, in addition to breaches and nonperformance of the contract, those situations where the party was fraudulently induced into entering the contract because such conduct is morally more repugnant than a simple breach. The distinction drawn by Dickson and Location 100 --- that a misrepresentation inducing a contract does not "arise" out of the contract --- is at odds with the concept of justice that underlies the holding in Katz. (Emphasis added)

The facts in the instant case further establish why the rationale behind both the Katz and Kelly decisions should be applied to both contract actions and to intentional misrepresentation actions inasmuch as both "arise out of the contract".

First, the single count complaint initially sought relief based upon a mixed theory of breach of contract and tortuous intentional misrepresentation. It was only after an extensive period of litigation that CANTELES elected to treat the complaint solely as an action for intentional misrepresentation. Prior to the trial court confirming that the single count was to be treated solely as

an action for intentional misrepresentation, CAUFIELDS were compelled to defend an action for breach of contract. The CAUFIELDS prevailed in their defense of the contract action by effectively have said claim dismissed. CAUFIELDS should be entitled to the benefit of the contractual provision for attorney's fees in defending the action and in having the claim effectively dismissed.

Second, the parties had made the very issues raised by the CANTELES in their intentional misrepresentation action a subject of their contract with each other. The contract provided that "buyers have made a complete inspection of the property and know what they are buying". The contract also provided that "no agreements or representations, unless incorporated in the contract shall be binding upon any of the parties." Since the parties made the disputed issues in the litigation as the very subject of their contract, it is apparent that the litigation of these issues "arise out of the contract".

Third, the CANTELES did not seek to rescind the contract based upon intentional misrepresentation; instead, they sought to enjoy the benefit of their contractual bargain while at the same time seeking damages based on a theory of intentional misrepresentation. The effect of such a strategic approach is to actually seek to modify the terms of the contract by reducing the purchase price. In effect, CANTELES sought to keep the RV park, yet reduce the price they paid for it. As such the action seeking to effectively

modify the purchase price of the contract was an action "arising out of the contract".

Fourth, the CAUFIELDS' affirmative defenses raised contractual elements as the basis of their defense to the action. The CAUFIELDS affirmatively contended that CANTELES were barred from recovering damages under their complaint by virtue of the very terms and conditions of the contract between the parties. The totality of the pleadings in the litigation made the terms and conditions of the contract an intregal component of the litigation. Regardless of whether or not CANTELES' complaint was ultimately considered an action for intentional misrepresentation, the totality of the pleadings resulted in the action involving a claim "arising out of the contract".

Fifth, the CANTELES attached the contract to their complaint and incorporated its terms by reference. CANTELES also asked for attorney's fees pursuant to the contract. Such remained the status of the pleadings even after the single count was determined to be solely an action for intentional misrepresentation. The contract continued to be incorporated into the complaint and the CANTELES continued to request attorney's fees pursuant to the contract, CAUFIELDS were compelled to continue with their defense against a complaint which incorporated the contract by reference and which sought attorney's fees pursuant to the contract. Accordingly the action continued to be one "arising out of the contract".

CAUFIELDS are entitled to recover their attorney's fees as prevailing parties in an action for intentional misrepresentation or nondisclosure inasmuch as the action was one "arising out of the contract." Furthermore, the allowance of attorney's fees is consistent with the concept of justice announced by this Court in Katz.

CONCLUSION

This Court should invoke its discretionary jurisdiction based upon the certified conflict from the district court.

Furthermore, this Court should affirm the Fifth District decision as to the method of appeal. However, this Court should reverse on the issue of attorney's fees and remand for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. regular mail this 20th day of January, 2000 to: **DONALD R. PEYTON, ESQUIRE, Peyton Law Firm, P.A.**, 7317 Little Road,

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