IN THE SUPREME COURT

STATE OF FLORIDA

CASE NO. 02-1953

DALLAS G. PRICE and ANGELA F. PRICE, his Wife,

Petitioners,

vs.

AVERY L. TYLER and FLORENCE TYLER, et al,

Respondents.
/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT
Lower Tribunal Case Number: 4D01-3764

RESPONDENTS' REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

A. Pleadings

After the Petitioners purchased the trailer park in 1997 from their aunt, they complained about the manner in which the 25' Access Easement and Trapezoid was being utilized by the neighboring marina's tenant. (Tr. at 133-134) The Defendant, Mr. Tyler, was no longer operating the marina himself (Tr. at 74). The party leasing the marina at that time was also operating a transport business using tractor-trailers out of the marina (Tr. at 74-75). Petitioners specifically complained about the truck traffic using the Marina's access. (Tr. at 98-99) The Petitioners, not satisfied with the response to their objections, filed this action in June of 1998, suing for declaratory judgment as to the continuing existence of the 25' Access Easement, an injunction to terminate the Defendants use of the 25' Access Easement and damages (Count I), and for ejectment (Count II). (R. 1, 36, 63, Petitioners' Complaints). No claim was made to "Quiet Title" or for "Slander of Title". The damages sought were for the decrease in value of the Petitioners' land, due to the manner in which the Defendants' tenant was using the access road. (R. 1 at ¶31 and Wherefore Clause of Count I at (8); R. 63, Second Amended Complaint at ¶28 and Wherefore Clause of Count I at (3)). **No claim was made in the pleadings that Petitioners suffered any damages associated with any attorneys'**

fees, and there is no request for attorneys' fees in any of the complaints herein.

B. <u>Proceedings on Attorneys' Fees.</u>

In the drafts of the pretrial stipulation exchanged by the parties a few days before trial, Petitioners for the first time attempted to assert that an issue to be tried was their entitlement to attorneys' fees. Defendants objected thereto (R. 1296-1358, and specifically R. 1327, p. 9 of Defendant's draft pretrial stipulation) and again objected at the start of the trial. (Tr. at 28). No testimony on damages, or attorneys' fees, was presented at trial. Petitioners audaciously state (Init. Br. at 3) that at the commencement of the trial, the parties stipulated that evidence of attorneys' fees would be received at a separate hearing after trial! In contrast, the cited transcript demonstrates that there is no reference to a separate hearing, and Defendant's counsel specifically stated "I disagree, and they weren't pled either, judge," in response to the attempt to assert a claim for attorneys' fees for a quiet title action. Trial transcript at p. 28 (Appendix A hereto). The issue does not appear to have been raised again during the trial. The Petitioners also baldly state that before trial, the parties stipulated to adding the issue of attorneys' fees to the trial. (Init. Br. at 3). In fact, the parties did not execute a pretrial stipulation, and the Petitioners draft pretrial stipulation was not sent to Defendant's counsel until May 25, 2001, for this trial starting May 31, 2001. (R. 1296-1358). Defendant's counsel specifically objected to the attempt to insert the issue of attorneys' fees at that time, stating that the issue

was not pled, and stating that the Defendant did not consent to the trying of that issue. (R. 1327, p. 9 of Defendant's draft pretrial stipulation). In their brief to the Fourth District Court of Appeal, Petitioners acknowledged that "[t]he parties could not agree to the form of the pretrial stipulation due to this issue." (Petitioner's Brief below, at page 44, Appendix B hereto). This is in stark contrast to the assertion in their Initial Brief to this Court that prior to the trial, "the parties stipulated that evidence of attorneys' fees would be received at a separate hearing after trial." (Init. Br. at 3)

The trial court subsequently granted Plaintiffs' Motion for Attorneys Fees and Costs (R. 1378) over the objection that Petitioners had never pled for attorneys' fees, that attorneys' fees are not recoverable for ordinary real estate disputes, and that no exception was applicable to this case. (R. 1368) Contrary to Petitioners' assertion in their Initial Brief on the Merits (p.4, fn 3), the trial court did not segregate the time devoted to the (unpled) quiet title action from the other aspects of the dispute. *See* R. 1378, Final Judgment Awarding Attorney's Fees & Costs to Plaintiffs, Petitioners' Appendix 5, and R. 1393 (Transcript of 9-4-01 Hearing on Plaintiffs' Motion for Attorneys' Fees and Costs, at pages 41-43). The Petitioners' assertion to the contrary is unsupported by any record citation.

On appeal to the Fourth District Court of Appeal, the trial court's judgment was reversed regarding the continuing existence of the 25' Access Easement. Therefore, the Petitioners were not the prevailing party on the major issue in the

case.

SUMMARY OF ARGUMENT

Procedurally, Petitioners never pled for attorneys' fees, which is a requirement for an award both under the rationale of *Stockman*, and Rule 1.120(g), Florida Rules of Civil Procedure (pleading special damages). Petitioners failed to submit proof of the alleged damages caused by Appellants' use of the Trapezoid and 25' Access Easement which would authorize "curing" the damages by expending $55,595.00 in attorneys' fees, and Petitioners failed to submit proof of what portion of the attorneys' fees were devoted to this issue (both are requirements where attorneys' fees are part of the "damages", as opposed to attorney's fees awarded as costs).

Substantively, attorneys' fees are not awardable for ordinary real estate disputes. Petitioners did not plead to "Quiet Title", and even if they had, "Quiet Title" actions are no exception to the rule that attorneys' fees are not awardable except pursuant to statute or contract. Importantly, due to reversal on appeal, the Petitioners lost on their attempts to prevent Respondents from using the 25' Access Easement, and therefore they are not the prevailing party on the major claim in the case.

Where attorneys' fees are part of the "damages" suffered by a party to a real estate dispute, recovery of those damages are permitted in very limited circumstances. However, Petitioners did not plead any such "damages", and even if they had, they do not satisfy the very narrow exceptions that permit attorneys' fees as "damages":

1. **Third Party Actions**. When the relationship of grantor and grantee exists between the parties, and the grantee has to sue a third party to clear title in a separate action, the attorneys fees incurred in that separate action against the third party are recoverable against the grantor (**however, no attorneys' fees are awarded to the grantee in the lawsuit against the grantor to recover those damages**).

2. **Slander of Title Actions**. Where a party sues for slander of title, the attorneys fees incurred in clearing the title of the objectionable document are recoverable **in a slander of title action**, particularly where there is a surety bond posted by the party filing the lis pendens.

The parties herein are not grantor and grantee, and no separate suit against third parties to recover possession of premises deeded by Defendants to Petitioners occurred herein. No slander of title action was pursued herein, nor could it have been, as (a) the Statue of Limitations on the **tort** of slander of title (even if such had occurred) ran long prior to this 1998 lawsuit, as the last title document in Defendants' favor was a deed from the clerk of the Broward County Clerk's Office following a foreclosure sale in 1991; and (b) the trapezoid was not even owned by the Petitioners (or their grantor) when the only title documents in Defendants favor were recorded (in the 1980's and 1991); instead the trapezoid was owned by a third party until after suit was filed, so Petitioners had no standing to sue for an alleged slander of title.

If quiet title actions entitled the prevailing party to attorneys' fees, then every

action involving real estate would be framed in terms of a quiet title action. Ordinary trespasses, boundary line disputes, easement disputes, and any other action involving the use or ownership of real property, can easily be cast as a "quiet title" action. If quiet title actions authorized attorneys' fees, then some reference to that would be expected to be contained in the statutes covering quiet title suits (Chapter 65). Instead, the only reference is to costs. Section 65.011, Florida Statutes (2001). Petitioners suggest an extremely dangerous precedent that can explosively change real property litigation.

ARGUMENT

I. WHETHER ATTORNEYS' FEES ARE RECOVERABLE FOR AN ACTION *FOR DECLARATORY JUDGMENT, DAMAGES, AND EJECTMENT*, WHERE (1) NO CONTRACT OR STATUTE AUTHORIZES SAME, AND (2) NO PLEADING SOUGHT ATTORNEYS' FEES, AND DEFENDANTS TIMELY OBJECTED TO PETITIONERS SEEKING ATTORNEYS FEES

Attorneys' fees are not recoverable for declaratory judgment actions, damages actions, or ejectment actions, absent a contractual or statutory basis. Petitioners acknowledged they had no statutory or contractual basis for their attorneys' fee claim. (R. 1389, 8-30-01 Hearing on Motion to Strike Attorney's Fees, at 4-6, 9).

Petitioners sued for declaratory judgment and damages (Count I), and for ejectment (Count II). The damages sought were for the decrease in value in the Petitioners' land, due to the manner in which the Defendants were using the access road (i.e. too much truck traffic). No claim was made that Petitioners suffered any damages associated with any attorneys' fees, and there is no request for attorneys' fees in any of the complaints herein.

No attorneys' fees are awardable for declaratory judgment actions. Chapter 86 does not provide for an award of attorneys' fees, and the case law has without exception denied any recovery of attorneys' fees in declaratory judgment actions, including those involving marketability of title. *See Village 45 Partners, LLC v. Racetrac Petroleum, Inc.*, 831 So.2d 758 (Fla. 4th DCA

2002)(reversed trial court's award of fees in declaratory judgment action regarding restrictive covenant); *Edgar v. Cape Coral Medical Center*, 664 So.2d 1068 (Fla. 2d DCA 1995); *Harris v. Richard N. Groves Realty, Inc.*, 315 So.2d 528 (Fla. 4th DCA 1975) (reversed trial court's award of fees); *Tamiami Abstract and Title Co. v. Malanka*, 185 So.2d 493 (Fla. 2d DCA 1966) (reversed trial court award of fees)(marketability of title was issue).

Ejectment has been codified by Chapter 65, Florida Statutes. That Statute does not authorize the award of attorney fees. Case law has uniformly ruled that an ejectment action does not authorize the payment of attorneys' fees, unless Florida Statutes Section 57.105 authorizes the same. *Gordon v. Bartlett*, 452 So.2d 1077 (Fla. 4th DCA 1984) (reversed trial court award of fee); *Parrino v. Ayers*, 469 So.2d 837 (Fla. 5th DCA), *rev. denied*, 479 So.2d 118 (Fla. 1985) (affirmed a Fla. Stat. §57.105 award).

Attorneys' fees are not recoverable for claims for compensatory damages, absent a statutory or contractual basis. *Sheridan v. Greenberg*, 391 So.2d 234, 236 (Fla. 3d DCA 1980). As referenced above, Petitioners acknowledged they had no statutory or contractual basis for their attorneys' fee claim.

A. **Lack of Pleading/*Stockman***

In addition, Petitioners never pled for attorneys' fees. Pursuant to the rationale of *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991), a claim for attorneys' fees must be pled. None of the Petitioners' pleadings sought attorneys' fees, either as a cost item, or as an element of damages. *Stockman*

specifically involved claims for attorneys' fees pursuant to statute or contract. *Stockman* expansively required attorneys' fees to be specifically pled, and the policy of doing so (to advise the opposing party of such a claim, so same may be considered in deciding how to respond to the lawsuit) applies equally to all claims for attorneys fees, whether based on statute, contract, or as part of a claim for damages. As *Stockman* held, a "party should not have to speculate throughout the entire course of an action about what claims ultimately may be alleged against him." *Id.* at 837. Even if attorneys' fees were recoverable for a quiet title action (which emphatically they are not), Petitioners sued for declaratory judgment, not to quiet title, and Appellants had no reason to expect an attorney's fee claim herein.

Stockman's rationale was reiterated by the Court in *Caufield v. Cantele*, 837 So.2d 371 (Fla. 2002), where the Court broadly stated that in *Stockman* "we held that a claim for attorney's fees must be pled; and, if not pled, a claim for attorney's fees is waived." *Id*. at 377. While the context, as in *Stockman*, was a contractual or statutory basis for fees, the rationale applies with equal vigor to other bases for fees.

There is no reason to create an exception to *Stockman* for attorneys' fees which are claimed as an element of damages. Any reading of the Complaint, Amendment to Complaint, or Second Amended Complaint, shows that attorneys' fees were never sought in this action by Petitioners, and Petitioners never claimed to have suffered any "damages" relating to attorneys' fees.

Further, Petitioners presented no evidence at trial regarding the "damages" of the attorneys' fees which they are now claiming. If this is, as Petitioners contend, an element of their damages (R. 1389, 8-30-01 hearing on Motion to Strike Attorney's Fees, at 5), then it was incumbent upon them to submit proof of same at the trial of this cause. *Local Mortgage Co. of Georgia v Powell*, 420 So.2d 311, 313 (Fla. 1st DCA 1982). Having failed to do so, the Petitioners have waived this claim.

In addition, Rule 1.120(g), Florida Rules of Civil Procedure, requires "special damages" to be pled. In contrast to their position before this Court, Petitioners recognized below that attorneys' fees in slander of title actions are special damages. (Fourth DCA Ans. Br. at 43-44; Appendix B hereto). Indeed, even in their Initial Brief herein (p. 7), Petitioners quote from *Glusman v. Lieberman*, 285 So.2d 29, 31 (Fla. 4th DCA 1973), as follows:

> Perhaps one might distinguish the three categories usually referred to as pure attorney's fees per se, while designating the attorneys' fees allowed in other designated types of action **as special damages** to compensate for the wrong done.

(emphasis added). *See also Bloom v. Weiser*, 348 So.2d 651 (Fla. 3d DCA 1977); *Bonded Investment and Realty Co. v. Raksman*, 437 So.2d 162 (Fla. 2d DCA 1983). The Petitioners special damage claim for attorneys' fees, as an element of compensation, were required to be pled.

Petitioners attempted to raise this claim for attorneys fees in the draft of the pretrial stipulation, prepared very shortly before trial. The Defendants objected

to same. In addition, at the commencement of trial, Petitioners attempted to claim attorneys fees as damages, to which Defendants objected, and asserted that same had not been pled. As such, Defendants have not waived this pleading defect.

II. WHETHER ATTORNEYS' FEES ARE RECOVERABLE FOR *QUIET TITLE ACTIONS* AS AN ELEMENT OF DAMAGES, ESPECIALLY WHERE NO PLEADING SOUGHT ATTORNEYS' FEES, AND DEFENDANTS TIMELY OBJECTED TO PETITIONERS SEEKING ATTORNEY'S FEES

Attorneys' fees are not awardable to resolve ordinary real estate disputes. There are only two narrow exceptions:

Third Party Actions. When the relationship of grantor and grantee exists between the parties, and the grantee has to sue a third party to clear title in a separate action, the attorneys fees incurred in that separate action against the third party are recoverable against the grantor (**however, no attorneys' fees are awarded to the buyer in the lawsuit against the seller to recover those damages**).

Slander of Title Actions. Where a party sues for slander of title, the attorneys fees incurred in clearing the title of the objectionable document are recoverable **in a slander of title action (particularly where a surety bond is posted)**.

Petitioners claim entitlement to attorneys' fees as an element of their damages for quieting title. However, in none of Petitioner's Complaints did

Petitioners seek to "quiet" title. Even assuming that Petitioners had made such a request, the cases which address the award of attorneys' fees in quiet title actions reverse awards of attorneys' fees. *Lee v. Lee*, 636 So.2d 530 (Fla.5th DCA), *rev. dismissed*, 641 So.2d 1345 (Fla. 1994); *Weisenberg v. Carlton*, 233 So.2d 659 (Fla. 2d DCA), *cert. denied*, 240 So.2d 643 (Fla. 1970). In the *Lee* case, the court clearly distinguishes between attorneys' fees for slander of title, versus attorneys' fees for quieting title. The *Lee* court reversed an award of attorneys' fees in an action seeking to quiet title and for slander of title. Even though the judgment quieting title was affirmed, no slander of title was proven, and therefore the *Lee* court reversed the award of attorneys' fees.

The Petitioners' position on attorneys' fees is wrong. If every quiet title action entitled the prevailing party to attorneys' fees, then every action involving real estate would be framed in terms of a quiet title action. Ordinary trespasses, boundary line disputes, easement disputes, and any other action involving the use of real property, can easily be cast as a "quiet title" action. If quiet title actions authorized attorneys' fees, then <u>some</u> reference to that would be expected to be contained in the statutes covering quiet title suits (Chapter 65). Instead, the only reference is to costs. Section 65.011, Florida Statutes (2001).

To support their position, Petitioners cite various cases in which the courts referenced quieting title. However, all of these cases involve either (1) a grantee suing a grantor, after the grantee had to sue a third party to obtain good title; in those circumstances, the attorneys fees incurred against the third party (but not

against the grantor) are recoverable by the grantee from the grantor, as an element of damages; or (2) a party filed a lis pendens or similar document against property, and the owner successfully sued for slander of title (and/or sued to recover under the bond posted for the lis pendens).

A. Warranty Deeds/Collateral Litigation (Third Party Lawsuits)

In the instant case, there were no warranty deeds from the Defendants to the Petitioners. The Petitioners never sued any third parties to evict them from land which had been deeded to Petitioners by Defendants. In sum, there was no deed involved, and no third party lawsuits involved, in the present action.

Various appellate courts specifically denied an award of attorneys' fees in an action between a grantee and grantor, because the attorneys' fees sought therein were for the case between grantee and grantor, as opposed to between grantee and a third party:

> The instant case is distinguishable from *Needle* and other cases where grantees have been awarded attorney's fees in securing title to or possession of property from third party claimants.

J & L Enterprises v. Jones, 614 So.2d 1151, 1154 (Fla. 4th DCA), *review denied*, 626 So.2d 206 (Fla. 1993) (reversing fee award). *See also Ellis v. Flink*, 374 So.2d 4 (Fla. 1979)(Dissent to discharge of jurisdiction: "In general, the recovery of attorneys' fees as damages or costs by the prevailing party to an action is allowed only when provided for by statute or contract or when a fund has been created and brought into court. **Attorneys' fees may be a proper element of damages when they are incurred in litigation or for**

legal services other than that involved in the main action, which litigation or other legal services were made necessary by the breach or violation being sued upon." (emphasis added).

Cf. B.W.B. Corp. v. Muscare, 349 So.2d 183 (Fla. 3d DCA 1977) (attorneys fees incurred by grantee against third party, recoverable against grantor for breach of covenant of seisin); *Tibbetts v. Nichols*, 578 So.2d 17 (Fla. 1st DCA 1991) (grantee sues holdover tenant unsuccessfully, and then sues grantor for breach of covenants in warranty deed, and recovers the fees incurred in the action against the tenant); *Skipper v. McMillan*, 349 So.2d 808 (Fla. 1st DCA 1977) (grantee is not entitled to attorneys fees incurred against grantor directly, for breach of covenants in warranty deed; instead grantee can only recover against grantor the attorneys fees the buyer incurs in litigation with third parties to clear title); *Needle v. Lowenberg,* 421 So.2d 678 (Fla. 4th DCA 1982), *rev. denied,* 427 So.2d 737 (Fla. 1983) (grantee is sued in foreclosure by third party, and incurs attorneys fees and settles the foreclosure; grantee then sues grantor for breach of covenants in warranty deed, and is entitled to attorneys fees incurred in foreclosure action); *Williams v. Azar,* 47 So.2d 624 (Fla. 1950) (grantee sues third party who claims to be in adverse possession, and prevails; grantee then sues grantor for breach of covenant of seisin, and is awarded the attorneys fees incurred in the litigation with the third party); *Nelson v. Growers Ford Tractor Co.,* 282 So.2d 664 (Fla. 4th DCA 1973)(costs of independent suit to obtain possession against one holding adversely would

support award of attorneys fees).

The restrictions on attorneys' fees in the above rule are well summarized in *Skipper v. McMillan*, 349 So.2d 808 (Fla. 1st DCA 1977).

> "If the plaintiff can show that the Defendant's breach of contract has caused litigation involving the plaintiff in the payment of counsel fees, court costs, and the amount of a judgment, and shows further that such expenditure is reasonable in amount and could not have been avoided by him by reasonable and prudent effort, he can recover damages against the defendant measured by the amount of these expenditures. ***The rule just stated does not deal with the cost of litigation with the defendant himself***."
>
> Florida cases on the subject allow the recover of attorneys' fees by the covenantee expended by him in a separate action. Thus a covenantee has been allowed to bring an action against his covenantor for attorney fees and costs expended necessary to quiet title in a separate action necessary to remove an inchoate right of dower in real estate conveyed to the covenantee. In another case the Supreme Court held that the covenantee could maintain an action against a covenantor seeking the taxable costs and reasonable attorney's fees paid by the covenantee in bringing a quiet title action against third parties who were in adverse possession of the property at the time the property was conveyed to the covenantees. More recently the Third District Court of Appeal held that covenantees, sued by attorneys that had represented them in a quiet title action brought by them against a third party who held an interest in property conveyed to the covenantees, could file a third party complaint against their covenantors for attorney fees owed by them in the quiet title suit which was caused by the covenantors' breach of the covenant of seisin.
>
> We have been unable to find any cases which allow the assessment of costs and attorneys fees in a primary action brought by the covenantee against the covenantor for breach of covenants.

Skipper, 349 So.2d at 809 (italics by court, quoting from 5 Corbin Contracts Section 1037, pages 225-226 (1964); underlining added).

In conclusion, there is no deed from the Defendants to the Petitioners herein, and there was no separate lawsuit by the Petitioners against any third parties to "cure" any breaches of any covenants in such warranty deeds. There is no relationship of Grantor and Grantee between the parties. This very limited exception allowing attorneys fees does not apply in this case.

B. Slander of Title/ Lis Pendens Bonds

Attorneys' fees can be recoverable in cases where a party sues for slander of title to clear title to property, or in cases permitting recovery under a bond posted as part of the lis pendens. *Cf. Glusman v. Lieberman,* 285 So.2d 29 (Fla. 4th DCA 1973) (party files affidavit in public records, claiming ownership to land; true owner prevails in slander of title action, and court holds that damages in slander of title include attorneys fees to remove cloud on title); *Saporito v. Madras*, 576 So.2d 1342 (Fla. 5th DCA 1991) (contract buyer records lis pendens against property, and also files a lis pendens bond; court rules that lis pendens was improper, and held that the cost of removing a lis pendens is an element of damages **that can be recovered against the lis pendens bond**); *Susman v. Schulyer*, 328 So.2d 30 (Fla. 3d DCA 1976) (slander of title action; attorneys fees awarded to owner of property under authority of *Glusman*); *Haisfeld v. ACP Florida Holdings,* 629 So.2d 963 (Fla. 4th DCA 1993) (contract buyer files suit and lis pendens, with a lis pendens bond; seller wins, and **seeks to enforce the bond filed for the lis pendens;** court finds "bad faith" filing of lis pendens, and awards attorneys fees against

the bond); *Atkinson v. Fundaro*, 400 So.2d 1324 (Fla. 4th DCA 1981)(fees and costs incurred to discharge lis pendens are recoverable); *Colen v. Patterson*, 436 So.2d 182 (Fla. 2d DCA), *rev. denied*, 438 So.2d 831 (Fla. 1983) (fees awarded for a slander of title action); *Maass v. Christensen*, 414 So.2d 255 (Fla. 4th DCA 1982) (fees awarded for a slander of title action).

Petitioners cite *Club on the Bay, Inc. v. City of Miami Beach*, 439 So.2d 325 (Fla. 3d DCA 1983), *rev. denied*, 449 So.2d 264 (Fla. 1984), for the proposition that attorney's fees are awarded for "slander and other quiet title cases"; however, that case does not specify the basis for the attorneys' fee award, and specifically references a written lease entered after extensive negotiations and lawsuits, which Respondents respectfully suggest was a likely source of the right to attorneys' fees.

The Second District Court of Appeal has recently reviewed the issue of attorneys' fees for slander of title cases, and concluded that attorneys' fees are awardable for slander of title actions only where a bond was posted in conjunction with the lis pendens which formed the basis for the slander of title action. *Tampa Bay 1, L.L.C. v. Lorello Cypress Family Limited Partnership*, 821 So.2d 434 (Fla. 2d DCA 2002). In *Tampa Bay 1*, the court reversed an award of attorneys' fees for the successful discharge of a lis pendens, because no bond had been posted. *Tampa Bay 1* distinguished *Haisfield* and *Saporito*, as each of those cases involved bonds that had been posted. Thus, under *Tampa Bay 1*, a slander of title action does not authorize the award of

attorneys' fees, unless a bond is involved.

No slander of title claim was brought herein.[1] There is no lis pendens bond which can be "called on" to pay attorneys' fees. The exception permitting attorneys' fees in slander of title actions does not apply herein.

Each of the cases cited by Petitioners are either slander of title actions (often involving a lis pendens and associated lis pendens bond), or independent third party actions necessitated by a breach of warranty. None involved a situation even remotely close to the subject case, which are two neighbors arguing over 40-year old documents executed by predecessors in title.

C. Lack of Pleading/Stockman

Just as the rationale of *Stockman* applies to a claim for attorneys' fees for declaratory judgment and damages, it also applies to a claim for attorneys' fees based on (an alleged) quiet title action. As referenced under Issue I above, *Stockman* expansively required a request for attorneys' fees to be specifically pled, and the policy of doing so (to advise the opposing party of such a claim, so same may be considered in deciding how to respond to the lawsuit) applies

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[1] Nor could Petitioners have brought a slander of title claim: (A) The last document indicating Defendants' ownership of the disputed property was the deed into the Defendants from the clerk of the court, recorded in 1991, and this suit was not filed until 1998; and (B) as noted in the Final Judgment Quieting Title (Petitioner's Appendix 4), the trapezoid remained titled in a Mr. Snyder until after this suit was filed. Therefore, only Mr. Snyder could have a claim for some unspecified "slander of title". Petitioners purchased the trailer park with at least constructive notice of these title issues, and cannot assert a slander of title that allegedly occurred many years before they owned the trapezoid.

equally to all claims for attorneys fees, whether based on statute, contract, or as part of a claim for damages. Petitioners claim the attorneys' fees as part of their damages for quieting title. No quiet title claim was pled, and no claim for attorneys' fees as part of Petitioners' damages was pled. Even if attorneys' fees were clearly permitted for a mere "quiet title" action, any reading of the complaints herein would not show any reference to "quieting title", and the pleadings never placed the Defendants on notice that an attorneys' fee claim was a possibility. Under the rationale of *Stockman*, the claim for attorneys' fees had to be pled. Rule 1.120(g), Florida Rules of Civil Procedure, likewise requires this "special damage" to be pled.

Also as summarized in Issue I above, Petitioners presented no evidence at trial regarding the "damages" of the attorneys' fees, which they are now claiming. Further, no waiver of this issue occurred, as Petitioners attempted to raise this claim for attorneys' fees shortly before trial in a draft pretrial stipulation, and at trial, and both efforts were objected to timely by the Defendants.

III. WHETHER THE ATTORNEYS' FEES AWARDABLE IN A PROPERTY DISPUTE *AS AN ELEMENT OF DAMAGES* MAY EXCEED THE DECREASE IN VALUE TO THE PROPERTY (I.E. MAY THE PETITIONER SPEND $60,000 TO CURE $1000 IN DAMAGES)

If one analyzes the attorneys' fee award as an element of damages (as Petitioners request), then typical damage precepts apply. The award must reasonably relate to the actual damages, and the damages must be proven. In

this case, the "damages" for continuing to use an access road that has been used for 40 years certainly appear to be either minimal or non-existent. In any event, Petitioners had the burden to demonstrate the damages, and they presented no evidence on that issue.

The recovery of attorneys' fees is limited to the "proportionate value of the strip" at issue. *Hillsboro Cove, Inc. v. Archibald*, 322 So.2d 585, 586 (Fla. 4th DCA 1975). Therefore, the impact in value to the 25' Access Easement, and the Trapezoid, is the "cap" on the attorneys' fees damages recoverable by Petitioners. This makes sense, as it is unreasonable to spend $60,000 to clear title to a strip of land valued at $1000. *Id.* In this regard, Petitioners must submit proof to the trial court of the value of the strip involved. Petitioners did not submit any proof of such damages.

Further, the attorneys' fees awardable must be related specifically to the services rendered to clear title, as opposed to other services rendered in the case. *Local Mortgage Co. of Georgia v. Powell*, 420 So.2d 311 (Fla. 1st DCA 1982). Because this is a compensatory damage, and not a cost, Petitioners have the burden to prove which of the attorney's fees were related to curing the alleged damages to the Trailer Park, and cannot simply claim all of the attorneys fees incurred. *Id.* The *Powell* trial court awarded fees "for prosecuting the case as a whole" because the fees on the slander of title count were based on the same facts involved in the other counts, and "it is impractical, if not impossible, to attempt to separate them." *Powell* specifically rejected this

argument:

> This argument might have validity if directed to a statutory or contractual fee. Services in proving such collateral matters as agency would be pertinent. As previously noted, however, we are not here reviewing a fee awardable on the basis of a statutory or contractual right. We are instead concerned with an element of damages which must be based on services rendered to *remove the cloud cast upon a title which formed the basis of the claim for slander of title.*

Id. at 314 (italics by the court)(underlining supplied) (permitting award of attorneys fees for breach of covenant of seizin, but reduced the attorneys fees from $49,850.61 down to the value of the strip at issue, $6,011.88). In this case, the Petitioners and their expert each testified that they could not identify the fees devoted to the unpled request to quiet title (as opposed to injunctive relief, damages, defending the counterclaim, etc.), and therefore there is no reason to remand this issue for further proceedings. Here, Petitioners acknowledge that they cannot distinguish the attorneys' fees *incurred as part of their damages,* from their attorneys' fees incurred in prosecuting this case, or responding to Defendants' counterclaims, or from any other services performed. (R. 1393-1394, September 4, 2001 Hearing on Plaintiffs' Motion for Attorneys' Fees and Costs, at 28-29, 34). In this regard, it is important to note that much of this case concerned the allegedly noxious *manner* in which the Defendants had been using the access road, as opposed to whether the access road was legally existent. Indeed, it cannot be overemphasized that the reason the Petitioners prevailed at the trial court

on their main claim (to eliminate Defendants' usage of the 25' Access Easement) was not even pled by Petitioners (i.e., merger was not pled). Fortunately, the Fourth District Court of Appeal reversed the merger finding. In their pleadings, Petitioners sought to eliminate defendants' usage of the 25' access easement because of the way defendants had been using the easement. In contrast, the trial court found the easement had been eliminated due to a merger of title, a theory not pled by Petitioners. To allow Petitioners to recover virtually all of their attorneys' fees as an element of "damages", when most of the attorneys' fees were incurred for services other than to "quiet title", is not permissible. *Local Mortgage Co. of Georgia v. Powell*, 420 So.2d 311 (Fla. 1st DCA 1982). Moreover, the trial court's ruling on the easement was reversed on appeal, and Petitioner plainly cannot receive attorneys' fees for an issue they lost.

CONCLUSION

Petitioners suggest a dangerous and potentially explosive precedent to be set in this case. Quite similar to the explosion of "civil theft" which suddenly permeated ordinary business disputes after the civil theft legislation in the 1980s authorized attorneys' fees in such cases, one can rest assured that suddenly all real estate disputes will involve "quieting title." The fact that attorneys fees were suddenly recoverable for what otherwise were ordinary business disputes was a primary component of the explosion of the civil theft actions, and the same will be true if this Court concludes that ordinary real estate disputes, if they are

called “quiet title actions,” entitle the prevailing party to attorneys fees.

The decision of the Fourth District Court of Appeal, on the attorneys' fee issue, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Keith T. Grumer, Esq., Grumer & Levin, P.A., 1 East Broward Blvd., Ste. 1501, Fort Lauderdale, FL 33301, counsel for Plaintiff, this _____ day of June, 2003.

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CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned counsel certifies that the type size and style used in this brief is 14 point Times New Roman.

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