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

PETITIONERS' INITIAL BRIEF ON THE MERITS

Keith T. Grumer, Esquire
GRUMER & LEVIN, P.A.
Attorneys for Petitioners PRICES
One East Broward Boulevard
Suite 1501
Ft. Lauderdale, Florida 33301
(954) 713-2700; (954) 713-2713 Fax

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PRELIMINARY STATEMENT

Petitioners Dallas G. Price and Angela F. Price shall be referred to as the "PRICES". Respondents Avery Tyler and Florence Tyler will be referred to as the "TYLERS". The Record on Appeal is referenced by volume and page number as Vol. ___, p. ____.

STATEMENT OF THE CASE AND FACTS

This matter is before the court on discretionary review pursuant to *Fla. R. App.* 9.030(a)(2)(A)(iv). Pursuant to an Order dated Monday, April 14, 2003, this Court accepted jurisdiction, dispensed with oral arguments and requested the filing of briefs limited only to the issue of attorney's fees. The decision below (the "Decision"), dated June 19, 2002 became final for appellate purposes by the Fourth District's order denying the Petitioners' and Respondents' respective motions for rehearing on July 26, 2002. Petitioners invoked this Court's discretionary jurisdiction on August 26, 2002.

This property dispute between neighbors is now focused on the PRICES' entitlement to attorney's fees for successfully quieting title. Charles and Ruth Snyder (Snyder), owned both parcels of a multiuse tract: The northernmost tract contained a marina ("Parcel A") and the other was dedicated as mobile home property ("Parcel B"). (Plaintiffs' Trial Ex. # 5, Vol. 9, pp 88-89) When Snyder conveyed the mobile

home property to PRICES' predecessor in title Maria Price[1] in 1962, they entered into a written agreement (the 1962 Agreement) (Trial Ex. # 6) allowing Snyder to retain an easement across the northernmost 25 feet of Parcel B (an access road). Snyder retained the easement to access a trapezoid shaped parcel (the Trapezoid) where Snyder maintained a boat lift. (A survey is provided at A.1). The 1962 Agreement provided that, upon their sale of Parcel A, SNYDER would convey the Trapezoid to Maria. However, when Snyder sold Parcel A (less the trapezoid) (Plaintiffs' Trial Ex. # 12) to the TYLERS in 1975, Snyder failed to convey the Trapezoid to Maria. (Vol. 9, pp. 126-126)

In 1984, although TYLER did not have title to the Trapezoid, he executed a "wild deed" to his own company, Marine Service and Supply, Inc. transferring a portion of the marina property and the Trapezoid. (Plaintiffs' Trial Ex. # 37) In 1989, Gustavo Passarelli ("Passarelli") purchased both Parcel A and Parcel B from the TYLERS, and Maria, respectively, subject to purchase money mortgages. When Passarelli defaulted on the respective mortgages, the TYLERS and Maria successfully foreclosed and received certificates of title. The TYLERS' certificate of title issued included the Trapezoid. (Plaintiffs' Trial Ex. # 45) In 1996, Maria sold Parcel B to

[1] Ms. Maria Price (Maria) is the PRICES' predecessor in title, and Dallas Price's aunt.

the PRICES. In 1998, Snyder conveyed the Trapezoid to the PRICES in accordance with the 1962 Agreement. (Plaintiffs' Trial Ex. # 70)

In the underlying proceeding, the PRICES sought to quiet title to the Trapezoid.[2] The TYLERS counterclaimed for adverse possession of the Trapezoid, or alternatively, to quiet title to the Trapezoid based upon the certificate of title acquired during the foreclosure action.

The PRICES' operative pleading was their second amended complaint which described the chain of title to the property and sought declaratory judgment, damages generally, and ejectment. (A.2) (Vol. 1, pp. 63-83) The complaint sought, inter alia, a declaration of exclusive title, possession and use of the Trapezoid. The complaint did not contain a separate pleading for attorneys fees. The TYLERS filed an answer, affirmative defenses and counterclaim seeking to quiet title, declaratory relief and to establish an easement and for other equitable relief. (A.3)

During the proceeding below, PRICE disclosed their only damage relating to the quiet title claim was the attorneys' fees. Prior to, and at the commencement of trial, the parties stipulated that evidence of attorneys' fees would be received at a separate hearing after trial. (Vol. 9, pp. 27-28)

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[2] Additionally, the PRICES sought to quiet title and a declaration terminating the 25 foot easement road, alleging that it was personal to Snyder and based on the merger of dominant and servient estates in *Passarelli*.

After a two-day non-jury trial, the trial court entered a Final Judgment Quieting Title (A.4) (Vol. 6, pp. 1176-1179) restoring the PRICES' title in the Trapezoid. The trial court found that by virtue of the 1962 Agreement, the PRICES held equitable title to the Trapezoid and reaffirmed SNYDER's 1998 conveyance of legal title by Snyder. The trial court awarded attorney's fees to the PRICES as part of their damages in the quiet title action.[3] (A.5) (Vol. 7, pp. 1378-1379)

The Fourth District Court of Appeal reversed that portion of the judgment awarding attorney's fees to the PRICES but affirmed the judgment insofar as it quieted title to the Trapezoid. *Tyler v. Price*, 821 So.2d 1121 (Fla. 4th DCA 2002) The Fourth District held that attorney's fees were not awardable as damages in a quiet title action (as distinguished from a slander of title action) and that the PRICES' failure to specially plead attorney's fees prior to trial barred entitlement. (the Decision) *Tyler* at 1126. (A.6)

SUMMARY OF THE ARGUMENT

The District Court of Appeal erred in reversing the trial judge's award of attorneys' fees and court costs to the PRICES arising from their quiet title claim. Attorneys' fees are part of the compensatory damages suffered by a party and the

[3] The trial court segregated the time devoted to the quiet title action from the other aspects of the dispute.

nature of the fees is an inherent part of the claim.

Quiet title actions have always authorized the award of fees as an element of damages in Florida. Although several cases, including the District Court below, have attempted to distinguish slander of title from quiet title actions, the claims arise from the same wrong, to wit: the recordation of a document effecting the marketability of real or personal property. Removing the cloud from the marketability of property is the inherent damage to such action.

Because the attorneys' fees are compensatory, they need not be specially pled. This Court's requirement, as articulated in *Stockman v. Downs,* 573 So.2d 835 (Fla. 1991) for the pleading of attorneys fees arising out of a contract or statute does not apply. Similarly, as compensatory damages, they need not be specially pled under *Fla. R. Civ. P.* 1.120(g).

ARGUMENT

I. AS ATTORNEY'S FEES ARE PART OF THE PECUNIARY LOSS SUFFERED IN QUIET TITLE ACTIONS, THE PARTY THAT SUCCESSFULLY QUIETS TITLE IS ENTITLED TO RECOVER THEIR ATTORNEY'S FEES AS COMPENSATORY DAMAGES AND, AS SUCH, THERE IS NO REQUIREMENT TO SPECIALLY PLEAD ENTITLEMENT.

A. Attorneys' Fees Are Part of the Pecuniary Loss in Quiet Title Actions

Attorney's fees are inherent as part of the organic claim in any quiet title action.

The award of attorney's fees are not ancillary to the proceeding or to the damages, as contrasted with attorney's fees awarded in contract or statutory actions. In many instances, the attorney's fees are the only damages a party suffers in removing a cloud from a chain of title. While Florida courts consistently uphold awards of attorney's fees as compensatory damages in slander of title actions, the Decision below is part a group of inconsistent rulings in the quiet title claims. The distinction, between slander of title and other quiet title actions implicit in the Decision, is without merit under Florida law and should be eliminated.

An action for quiet title lies if a person or corporation, not the rightful owner of land, has any conveyance or other evidence of title, or asserts any claim, or pretends to have any right or title, that may cast a cloud on the title of the true owner. RALPH E. BOYER, FLORIDA REAL ESTATE TRANSACTIONS, § 130.01 (1991). Slander of title actions remedy the "uttering and publication of the slanderous words by the defendant, the falsity of the words, malice and special damages." *Donald M. Patterson, Inc. v. Bonda*, 25 So.2d 206, 208 (Fla. 4DCA 1983) *citing* 50 AM.JUR. 2d Liable and Slander Section 541 (1970); *further citations omitted*. However, in slander of title actions, malice is presumed if the disparagement is false and is not privileged. *Lehman v. Goldin*, 36 So.2d 259 (Fla. 1948) (adopting Restatement §§624, 625 and 626); *Gates v. Utsey*, 177 So.2d 486 (Fla. 1st DCA 1965), see also

Maass v. Christensen, 414 So.2d 255, 258 (Fla. 4th DCA 1982). These causes of action have the same origin, an interloping claim in an owner's chain of title that affects its marketability, and should have the same damages.

Decisions awarding attorneys' fees as compensatory damages in quiet title cases are numerous and recognize that the attorneys fees are part of the inherent damages of the claim. In *Glusman v. Leiberman*, 285 So.2d 29 (Fla. 4th DCA 1973), the court recognized that there are circumstances where attorneys' fees are recoverable other than those authorized by contract statute or when a fund has been created or brought into the court:

> 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.

Glusman at 31. Claims supporting fees as damages include wrongful attachment and malicious prosecution. *Glusman,* at 31; see also *Williams v. Azar,* 47 So.2d 624, 627 (Fla. 1950) (attorneys fees are recoverable as the cost expended in an ejectment action); *B.W.B. Corp. v. Muscare*, 349 So.2d 183, 185 (Fla. 3rd DCA 1977) (in quiet title actions for breach of covenant of seisin attorneys fees are recoverable as cost of the action); *Haisfeld v. ACP Florida Holdings, Inc*., 629 So.2d 963, 967 (Fla. 4th DCA 1993) (attorneys fees incurred in removing lis pendens and clearing title are a

recoverable element of damages).

Susman v. Schuyler, 328 So.2d 30 (Fla 3rd DCA 1976) completes the nexus between the *Lehman* decision, *supra* adopting the Restatement of Torts §§624, 625 and 626 and Restatement of Torts §633 which defines the costs of litigation as part of the pecuniary loss in quiet title actions. *Susman,* at 32. citing *Glusman* at 31. The Restatement of Torts recognizes fees as an element of damages in the following manner:

> Section 633(1)(b) Pecuniary Loss
>
> (1) The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to . . . .
>
> (2) The expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon the vendebility or value by disparagement.

Restatement of Torts Section 633(1)(b)(1977).

Decisions awarding attorneys' fees as compensatory damages in slander and other quiet title cases, as part of the cost of removing the cloud from title, are numerous. *Saporito v. Madras*, 576 So.2d 1342 (Fla. 5th DCA 1991) (relying upon *National Surety Company v. Willys-Overland, Inc.*, 103 Fla. 738, 138 So.24 (1931), wherein the court recognized the trend of decisions upholding an award of attorney's fees as damages in suits to quiet title or remove a cloud from title); *Williams v. Azar,*

47 So.2d 624, 627 (Fla. 1950); *Susman v. Schuyler*, 328 So.2d 30 (Fla. 3d DCA 1976); *Club on the Bay, Inc. v. City of Miami Beach*, 439 So.2d 325 (Fla. 3d DCA 1983); *Haisfeld v. ACP Florida Holdings, Inc.*, 629 So.2d 963, 967 (Fla. 4th DCA 1993); *Maass v. Christensen*, 414 So.2d 255, 258 (Fla. 4th DCA 1982);*Colen v. Patterson*, 436 So.2d 182, 183 (Fla. 2nd DCA 1983); *but see Tampa Bay One, L.L.C. v. Lorello Cypress Family Limited Partnership*, 821 So.2d 434, 436 (Fla. 3d DCA 2002) (distinguishing *Saporito* and *Hasfield* upon recovery from a surety bond); *Lee v. Lee*, 636 So.2d 530 (Fla. 5th DCA 1994).

In the proceedings below, TYLER recorded in the public record a wild deed affecting the PRICES' ability to convey the Trapezoid. Until the commencement of this action, the PRICES suffered no other damages. The expenses of removing the instrument from the chain of title were incurred before any other damages were suffered. The attorneys' fees incurred in bringing the PRICES' quiet title action fit within the pecuniary losses defined by the restatement and supporting case law.

Special damages are defined by *Fla. R. Civ. P.* 1.120(g): "When items of special damages are claimed, they shall be specifically stated." Because attorneys' fees are nothing more than general damages incurred in removing erroneous documents from a chain of title, they are not special damages and need not be pled.

General damages in quiet title actions include the litigation expense of removing

"the doubt cast upon the vendability or value by disparagement." *Glusman v. Leiberman*, 285 So.2d 29, 31-32 (Fla. 4th DCA 1973) (adopting the Restatement's definition of pecuniary loss to include the expense of litigation). *Maass, supra*. *but see Bloom v. Weiser*, 348 So.2d 651, 653 (Fla. 3rd DCA 1977) (an award of attorneys' fees in a slander of title action is proper as special damages to compensate the wrong committed.)

Courts confuse the distinction between general damages and special damages as they originate from compensatory damages. General damages are defined as those that the law presumes actually and necessarily result from the alleged breach of contract or wrong. Special damages are those that are the natural, but not the necessary result of an alleged breach or wrong. Special damages include loss of business, loss and sale of a business as a result of personal injury, loss of earnings or earnings capacity, and interest exceeding the statutory rate. See HENRY P. TRAWICK, JR., FLORIDA PRACTICE AND PROCEDURE § 6-22 n.3 (2003 Ed).

Although a number of cases awarding attorneys fees in the quiet title actions call the fees "special damages", the cases do not identify any requirement that they be specially pled. See for example *Glusman, supra*; *Bloom*, *supra*; *Tampa Bay*, *supra*. As argued *infra*, distinctions exist between attorneys fees based upon a contract or statutory right and fees awarded as damages in an action to remove a cloud on title.

Susman, *supra*; *Local Mortgage Co. of Georgia v. Powell*, 420 So.2d 311 (Fla. 1st DCA 1982). This distinction is no longer accounted for in any of the cases after *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991) and the undersigned has been unable to find any cases requiring attorneys fees be pled where sought as general, compensatory damages.

B. Stockman v. Downs Does Not Apply

This Court's holding in *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991) and its progeny do not require the PRICES' specially plead their entitlement to attorneys' fees, because the fees sought in this action arise as part of the pecuniary loss, rather than as an ancillary damage to compensate the prevailing party under the contract. *Stockman* merely held: "a party seeking attorney's fees pursuant to statute or contract must plead entitlement to such fees." *Stockman*, at 383. *Stockman* does not apply.

The purpose of the *Stockman* rule is notice. *Stockman*, at 837. Notice is not required when attorneys' fees are a matter of the pecuniary damages suffered by a party, as by definition, the attorneys' fees are part of the compensatory damages.

Further, *Stockman* is not an absolute. This Court acknowledged: "where a party has notice that an opponent claims entitlement to attorneys' fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, the party waives any objection to the failure to plead a

claim for attorneys' fees." *Stockman* at 383. In *Caufield v. Cantele*, 873 So.2d 371 (Fla. 2002), this Court declined to extend *Stockman* to impose stricter requirements for pleading claims for attorneys' fees down to the specific statutory provisions. "We hold that a specific statutory or contractual basis for a claim for attorneys' fees need not be specifically pled, and that failure to plead the basis of such a claim will not result in a waiver of the claim." *Caufield,* at 377.

At no time has this Court extended *Stockman* to circumstances where attorneys' fees are part of the pecuniary loss of a claim. The decision below is the first instance, that the PRICES have been able to find, where *Stockman* has been applied to such a claim. The appellate court below wrongfully extended *Stockman* to this different class of attorneys' fees, because *Stockman* only applies to attorneys' fees originating from a statute or contract.

TYLER was on notice of the PRICES' intention to claim attorneys' fees as their only pecuniary loss in bringing their quiet title claim in this case. The PRICES disclosed that their financial damages were restricted to attorneys' fees as to the quiet title claim in discovery. Prior to trial, the parties stipulated that any attorneys' fee claim would be heard at the conclusion of the evidentiary portion. Although no notice of the attorneys' fee claim was required under *Stockman*, the TYLERS knew of the PRICES' intention to seek fees as part of their pecuniary loss. The District Court's

application of *Stockman* as to the PRICES' attorneys' fee claim was inappropriate and must be reversed. Pre-*Stockman* decisions preserve attorneys fees under these circumstances. *See*, *Brown v. Gardens by the Sea South Condominium Assoc*., 424 So.2d 181, 183-84 (Fla. 4th DCA 1983); *Mainlands of Tamarac by the Gulf Unit No. Four Assoc., Inc. v. Morris*, 388 So.2d 226, 227 (Fla. 2d DCA 1980).

CONCLUSION

The Decision of the District Court of Appeal, Fourth District reversing the trial judge's award of attorneys fees must be reversed and remanded with instructions to reinstate the judgment and to award appellate attorneys fees. As attorney's fees are part of the pecuniary loss suffered in quiet title actions, the party that successfully quiets title is entitled to recover their attorney's fees as compensatory damages and, as such, there is no requirement to specially plead entitlement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ____ of May 2003 to: THOMAS R. BOLF, ESQ., Ruden, McClosky, Smith, Schuster & Russell, P.A., 200 East Broward Blvd., 15th Floor, Fort Lauderdale, Florida 33302.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the initial brief complies with the type-volume limitation as the brief is written in 14 point font and 3635 words.

GRUMER & LEVIN, P.A.
Attorneys for Petitioner
One East Broward Boulevard
Suite 1501
Ft. Lauderdale, Florida 33301
(954) 713-2700 (Broward)
(954) 713-2713 (Fax)

By: _____
KEITH T. GRUMER
Fla. Bar No. 504416