IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

DIAMOND AIRCRAFT INDUSTRIES, INC., a foreign corporation, Appellant, vs. ALAN HOROWITCH, Appellee.	))))))))) /	CASE NO.: SC11-1371

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPELLANT'S REPLY BRIEF ON THE MERITS

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REPLY STATEMENT OF THE FACTS

Apparently realizing the insurmountable legal hurdles he must overcome responding to the legal issues Diamond raises in this appeal, Horowitch resorts to depicting himself as an innocent consumer hoodwinked by a corporation's allegedly fraudulent practices. (ABR at 1-2, 8, 50). This portrayal was rejected by the district court and never appealed by Horowitch. The underlying facts to this separate attorney's fees appeal are now law of the case. While these facts are not relevant to deciding the legal issues at hand, Diamond outlines the district court's factual findings to correct the misperception Horowitch deliberately creates:

Horowitch, an orthopedic surgeon by profession, is also an experienced pilot. (192:2). Since he began flying in 1982, Horowitch has become a certified pilot, obtained multi-engine and instrument ratings, and logged over 3,200 hours of flying time. (192:2). He is a member of several aviation organizations and subscribes to many aviation publications. (192:2). In addition, Horowitch has experience purchasing airplanes, including single-engine planes in 1983 and 1993 and a twin-engine plane in 2003. (192:2-3). Horowitch also leases space in an aircraft hangar that he owns. (192:3).

Diamond designs, manufactures, and sells airplanes. (192:3). Diamond announced that it was embarking on projects to manufacture a very light jet (VJL). (192:3). Diamond set the projected price at the time for $850,000, however, the

specific brands and models of components to be used in the VLJ had not been determined. (192:3-4).

Horowitch signed an Order Form with Diamond to purchase a D-Jet. (192:6-7). He admitted that no one at Diamond represented to him that the price of the D-Jet was fixed at $850,000. (192:6). Horowitch testified that he understood the distinction between a "projected price" "of well under US $1 Million" and the term "set price," which did not appear on Diamond's website or on the D-Jet Order Form. (192:6). Importantly, the D-Jet Order Form stated that "[p]rice and specifications [were] subject to change without notice." (192:7). Horowitch provided Diamond a $20,000 deposit. (192:6-7).

Diamond significantly changed the D-Jet between 2003 and 2006, including new technology that made the plane safer to operate and updating outdated specifications. (192:4). Adding these components increased the D-Jet's weight, which required the D-Jet to have, among other things, a larger engine. (192:4). Adding these components also increased the D-Jet's manufacturing cost. (192:4).

Diamond announced that the new price of the D-Jet would be $1,380,000 for all customers, and offered its current customers to choose between signing a new D-Jet sales contract at the $1,380,000 price or receiving a return of their deposits and forfeiting their order positions. (192:9). Horowitch refused both options and insisted that his D-Jet Order Form set a fixed price of $850,000. (192:9).

At trial, expert testimony revealed that it is customary in the airplane manufacturing industry to take orders for planes that are merely in the concept or preproduction stage of development. (192:9). It is well-known among most buyers and sellers of new concept airplanes that there is an inevitability of change in a plane's equipment, performance, size, and cost during the design process, especially with an emerging airplane technology like the VLJ concept. (192:10). New plane manufacturers typically account for pricing uncertainties by inserting one of two clauses, one of which was similar to the one contained in Diamond's contract (i.e. that the price is subject to change without notice). (192:10).

After hearing this testimony, the district court rejected Horowitch's argument that Diamond engaged in a deceptive practice or act. (192:14-16). The district court concluded that Diamond had a good faith basis for projecting the D-Jet price well under $1,000,000 and listing a price of $850,000 subject to change without notice on the D-Jet Order Form. (192:14). The court further found that Diamond in good faith stated that the D-Jet price was subject to change without notice because a change-without-notice clause reflects the custom and practice in the airplane manufacturing industry that while orders are taken for a plane of new design, the plane's design and production costs inevitably change due to technological advancements in performance and safety, among other things. (192:15).

REPLY ARGUMENT

I. SECTION 501.2105, FLORIDA STATUTES, ENTITLES A PREVAILING DEFENDANT TO AN ATTORNEY'S FEE AWARD IN A CASE IN WHICH A PLAINTIFF BRINGS AN UNFAIR TRADE PRACTICES CLAIM UNDER THE FDUTPA, BUT THE DISTRICT COURT DECIDES THAT THE SUBSTANTIVE LAW OF A DIFFERENT STATE GOVERNS THE UNFAIR TRADE PRACTICES CLAIM, AND THE DEFENDANT ULTIMATELY PREVAILS ON THAT CLAIM.

To avoid the fee provision in FDUTPA, Horowitch claims FDUTPA was not applied to his claim. (ABR at 12, 14). While the district court ultimately ruled that FDUTPA did not apply to the ***merits,*** the court applied it to the ***case*** for 7 months, through the eve of the scheduled trial. The court did so because Horowitch asked the court to apply it. There can be no distinction between applying FDUTPA to the case or the merits for purposes of determining attorney's fees. If this were the rule, then a party who perceives it might not win on the merits of a fee based statutory claim could dismiss it prior to trial and then, if it lost on its remaining claims, insist that because the court never "applied" the fee based claim to the merits, fees were unavailable to the prevailing party.

Horowitch's reliance upon *Florida Hurricane Protection and Awning, Inc., v. Pastina*, 43 So. 3d 893 (Fla. 4th DCA 2010) (*en banc*), for his argument is misplaced. (ABR at 13). *Pastina* solely addressed the reciprocity requirement of Section 57.105(7) and does not remotely address the question before this Court.

Horowitch asserts that a plain reading of the statute precludes Diamond's request for fees because FDUTPA does not expressly state that it is to be applied to another state's law. (ABR at 14). Those are not the facts here. If Horowitch had never brought a claim against Diamond under FDUTPA, Diamond would agree with Horowitch. But FDUTPA fees are available for the FDUTPA claim Horowitch brought and lost.

Horowitch attacks the case law Diamond cites. Horowitch argues the cases do not address the specifics of this case under FDUTPA. (ABR at 15). Diamond has not held them out to do so. Indeed, the Eleventh Circuit certified its questions to this Court because of the absence of binding authority. Rather, Diamond cited *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601 (9th Cir. 2010), for the analogous proposition that even when a court ultimately concludes that a statutory cause is not the governing law, a party's pursuit of it until told it does not apply triggers the prevailing party's right to claim attorney's fees under it.

Horowitch claims that Diamond incorrectly cites *Brown v. Gardens by the Sea South Condominium Association*, 424 So. 2d 181, 184 (Fla. 4th DCA 1983) and *Rustic Village, Inc. v. Friedman*, 417 So. 2d 305, 306 (Fla. 3d DCA 1982), given that in *Gibson v. Courtois*, 539 So. 2d 459, 460 (Fla. 1989), this Court rejected that a party subjects itself to attorneys' fees merely by pleading a claim for them. (ABR at 16-17). That is not Diamond's argument and *Gibson* is

distinguishable. *Gibson* involved a legal determination that no contract existed and no legal obligations attached so there was no enforceable contract to enforce a fee claim. Diamond cites *Brown* and *Rustic Village* for the unremarkable proposition that where a party does much more than simply plead a statutory claim for attorney's fees but actually litigates it -- as Horowitch actively did here for 7 months -- Florida courts order the losing party to pay attorney's fees.

II. IF SECTION 501.2105, FLORIDA STATUTES, APPLIES UNDER THE CIRCUMSTANCES DESCRIBED IN THE PREVIOUS QUESTION, IT APPLIES TO THE ENTIRETY OF THE LITIGATION.

Horowitch's sole defense to paying attorney's fees for the entire litigation is his assertion that there is a clear line of demarcation from when he stopped pursuing his FDUTPA claim and started pursuing his ACFA claim. (ABR at 21-22). As such, he maintains that Diamond cannot satisfy the statutory requirement to show that after the summary judgment order, Horowitch sought a remedy for an "act or practice involving a violation of FDUPTA." (ABR at 21-22).

This is a convenient change in position. In his pleading below, Horowitch asserted that the court should allow him to pursue both his FDUTPA and ACFA claim because the same facts supported these statutory claims. (See "This Court has broad discretion to allow Horowitch to plead such [an ACFA] claim in the alternative on essentially the same facts as alleged in his amended complaint" at 48:9 and "All of these acts constitute unfair trade practices as contemplated by

both the Arizona and Florida [statutes]" at 100:19 and 105: 5-6). Until the district court's interlocutory ruling was made final by the judgment, the FDUPTA claim remained in the case because the same act or practice that founded his FDUTPA claim founded his ACFA claim. In short, Diamond defended against FDUPTA when it defended against ACFA until the day the district court entered a final judgment.

Horowitch resorts to blaming the district court for his pursuit of the FDUTPA claim. He complains that the district court delayed ruling on Diamond's motion to dismiss the FDUTPA claim. (ABR at 21, 24). He questions how he can be responsible for the fees Diamond incurred defending against the FDUTPA claim when the district court caused his FDUTPA claim to linger on.

This position is belied by both the facts and fairness. Horowitch's liability for attorney's fees is not logically related to any delay in the district court's ruling on Diamond's motion to dismiss because Horowitch asked the court for exactly what he got. Each time Diamond raised the argument that Horowitch could not pursue the FDUTPA claim, he sought to avoid that ruling. (46:1; 48:1-9; 93:20-21; 100:14, n.8, 15-20; 105:5-6, 38). To assert any delays were caused by the district court considering his position equates to the tale of the child who killed his parents pleading to the court for mercy because he is now an orphan.

III. SECTION 768.79, FLORIDA STATUTES, APPLIES TO CASES THAT SEEK EQUITABLE RELIEF IN THE ALTERNATIVE TO MONEY DAMAGES; AND, EVEN IF IT DOES NOT GENERALLY APPLY TO SUCH CASES, THERE IS AN EXCEPTION FOR CIRCUMSTANCES IN WHICH THE CLAIM FOR EQUITABLE RELIEF IS SERIOUSLY LACKING IN MERIT.

Horowitch argues that Section 768.79 cannot be applied to cases in which equitable claims are sought. (ABR at 26). Horowitch ignores dozens of Florida intermediate appellate court decisions which have said otherwise for almost two decades. *See e.g*. *DiPompeo Const. Corp. v. Kimmel & Associates, Inc.*, 916 So. 2d 17, 19 (Fla. 4th DCA 2005); *Novastar Mortgage, Inc. v. Strassburger*, 855 So. 2d 130, 131 (Fla. 4th DCA 2003); *Stewart v. Tasnet, Inc.*, 718 So. 2d 820, 821-822 (Fla. 2d DCA 1998); *Burtman v. Porchester Holdings, Inc.*, 680 So. 2d 631, 632 (Fla. 4th DCA 1996); *Nelson v. Marine Group of Palm Beach, Inc.*, 677 So. 2d 998 (Fla. 4th DCA 1996); *V.I.P. Real Estate Corp. v. Fla. Executive Realty Mgmt. Corp.*, 650 So.2d 199, 201 (Fla. 4th DCA 1995). While Horowitch asserts these cases are all distinguishable (ABR at 37-40), they certainly provide support for a rule of law that permits the application of Section 768.79 to lawsuits seeking both money damages and alternative equitable relief.

The rub was not created by this long line of cases but by one single case, *Palm Beach Polo Holdings, Inc. v. Equestrian Club Estates Property Owners Ass'n, Inc.*, 22 So. 3d 140 (Fla. 4th DCA 2009). While Horowitch claims that

Palm Beach Polo controls, his reasons to support the *Palm Beach Polo* rationale are unavailing.

Horowitch adopts the *Palm Beach Polo* reasoning that if Section 768.79 applies to equitable claims, then parties cannot evaluate the offer of judgment, and it could not be used by plaintiffs. (ABR at 28, 33-34). This is untrue as shown by application of the facts to this case. Horowitch contended that he was entitled to receive a $1,380,000 airplane for $850,000. Diamond offered him $40,000 in its offer of judgment. If Horowitch recovered money damages against Diamond, then the $40,000 offer could be compared against any money damages he received to determine if the offer of judgment were triggered. Likewise, and much easier to determine, if Horowitch prevailed on his specific performance claim and obtained the $1,380,000 plane for $850,000, he would have effectively netted $530,000 through this lawsuit. Diamond's $40,000 offer could have been just as easily compared against this amount to determine if the offer of judgment were triggered.

It's not complicated to make these calculations; parties and courts must make much more complicated calculations every day in determining whether an offer of judgment has been triggered. See e.g. *Lamb v. Matetzschk*, 906 So. 2d 1037 (Fla. 2005) (approving use of joint proposal for settlement that differentiates between the parties and stating that although it may take "some creative drafting"

the court was "confident that the lawyers of this State can and will draft an offer that will satisfy the requirements of the rule").

In sum, Horowitch is simply wrong that the offer of judgment statute cannot apply when equitable relief is sought in the alternative. As shown above, plaintiffs can certainly evaluate the offer and the mathematics behind such an evaluation is not "impossible." *Palm Beach Polo* is thus distinguishable because it did not address an alternative equitable claim that was measurable in money damages. Indeed, the Fourth District, which issued *Palm Beach Polo*, said it best when it held in *Nelson*, 677 So. 2d at 999:

> the only matter at issue was money.... As evidenced both by the real issues in dispute and the counterclaim which clearly framed this case as an action for damages, the offer of judgment statute properly applied.

Here, the real issue was always money. The only issue was what price Horowitch would pay for the D-Jet if he wanted it rather than his deposit returned.

Horowitch argues that Diamond could have pursued other avenues to ensure its right to attorney's fees, such as serving a motion under Section 57.105 for the filing of a frivolous motion, making a new offer, or restricting its offer to the claim for money damages. (ABR at 29-30). None are palatable substitutes. Section 57.105 requires a finding that the claim is frivolous, a standard Diamond is not obligated to prove when enforcing its offer of judgment. Filing a subsequent offer after the court ruled against Horowitch on his claim for specific performance

would deprive Diamond of all attorney's fees it incurred prior to that date. Restricting its initial offer to just the claim for money damages would rob Diamond of one of the main goals of an offer of judgment—to end the litigation.

Horowitch finally complains that there should be no exception under Section 768.79 when meritless equitable claims are asserted because his claim was not meritless. (ABR at 34). Other than to say it would create "many new problems," Horowich provides no reasoning why this Court should reject such an exception. (ABR at 29, 31). Indeed, Horowitch does not suggest that either Diamond or the Eleventh Circuit's public policy reasons supporting such an exception is unfounded. Horowitch thus does not dispute that such an exception would prevent the insertion of baseless equitable claims for the purpose of avoiding the application of the offer of judgment statute.

The Eleventh Circuit did not ask this Court to determine whether Horowitch's equitable claim is meritless. The Eleventh Circuit has already determined this issue.[1] Because strong public policy supports such an exception,

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[1] The Eleventh Circuit stated:

> If a plaintiff could simply "tack on" an equitable claim in the alternative to his claims for damages and thereby preclude the application of the statute, then he could avoid the application of the statute through artful pleading. ***This risk is particularly acute in a case like this one, in which the equitable claim is so lacking in merit***: the jet in question is not a unique good and

this Court should answer the certified question in the affirmative and allow the Eleventh Circuit to apply this Court's rule of law.

IV. UNDER SECTION 768.79, FLORIDA STATUTES, AND RULE 1.442, A DEFENDANT'S OFFER OF JUDGMENT IS VALID IF, IN A CASE IN WHICH THE PLAINTIFF DEMANDS ATTORNEY'S FEES, THE OFFER SATISFIES ALL CLAIMS BUT FAILS TO SPECIFY WHETHER ATTORNEY'S FEES ARE INCLUDED AND FAILS TO SPECIFY WHETHER ATTORNEY'S FEES ARE PART OF THE LEGAL CLAIM.

Contrary to Horowitch's implication, Diamond accepts that the offer of judgment statute is strictly construed. (ABR at 42). Instead, Diamond suggets that a strict construction analysis permits a court, under the specific facts of this case, to find that a reference to "all claims" includes an attorney's fees claim and thus satisfies the strict construction requirement.

The issue here is unlike *Campbell v. Gordon*, 959 So. 2d 223 (Fla. 2007) where the offer did not contain a reference to the authority under which it was made. Strict construction required that the offer contain the required information, but it did not. Nothing else in the offer could be used to satisfy that requirement.

The issue here differs because Diamond complied with the statute's mandate related to referencing attorney's fees -- it was simply subsumed within the

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Horowitch therefore cannot obtain specific performance to force its sale. *See* Fla. Stat. § 672.716(1) (adopting the Uniform Commercial Code position that "[s]pecific performance may be decreed where the goods are unique or in other proper circumstances") (emphasis added).

reference to settling "all claims." So, unlike *Campbell* where nothing in the offer itself could satisfy the mandates for disclosing the authority under which it was made, the Diamond offer complied with the statute's mandate.

If this Court agrees that a strict construction analysis could accommodate these specific facts, then Horowitch's complaint that the offer was ambiguous and could not be evaluated likewise fails. (ABR at 47-49). "All claims" means all claims. Horowitch has not suggested why a claim for attorney's fees differs from any other type of legal claim and would not fall within this language. Notably, Horowitch fails to address Diamond's reliance on *Liggett Group, Inc. v. Davis*, 975 So. 2d 1281 (Fla. 5th DCA 2008), to support this point. *Liggett Group* makes clear that a reference to "all claims" is sensibly understood to include an attorney's fees claim. Horowitch presumably ignores *Liggett Group* because it was decided after *Campbell* and undermines his position that Diamond and the Eleventh Circuit rely solely on pre-*Campbell* decisions.[2]

Horowitch drastically mischaracterizes Diamond's position that Horowitch should be estopped from arguing that attorney's fees were part of the case and must be mentioned in the offer of judgment while simultaneously arguing that

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[2] Horowitch maintains that Diamond's "reliance" on *Unicare Health Facilities Inc. v. Mort*, 553 So. 2d 159, 161 (Fla. 1989), and *George v. Northcraft*, 476 So. 2d 758, 759 (Fla. 5th DCA 1985), is misplaced. (ABR at 43-44). Diamond relies on neither. Rather, Diamond highlighted the Eleventh Circuit's emphasis that these decisions helped create the confusion surrounding the issue at hand.

FDUTPA does not apply to this case for purposes of Diamond's FDUTPA fee claim. (ABR at 46-47). By misstating the issue Diamond raised (IBR at 34), Horowitch justifies his inconsistent position by arguing he was entitled to evaluate the offer at the time it was made and that, at the time it was made, he had a pending FDUTPA claim with an attendant attorney's fee claim. *Id.*

With all due respect, the disingenuousness of this argument is clear on its face. Horowitch cannot avoid FDUTPA's attorney's fee provision by claiming FDUTPA does not apply to this case while simultaneously applying it to defeat Diamond's offer of judgment. Although Florida law permits parties to take alternative positions, Florida courts simply do not permit this type of "gotcha" litigation. *Salcedo v. Asociacion Cubana, Inc.*, 368 So. 2d 1337, 1339 (Fla. 3d DCA 1979) ("Today, we might say that the courts will not allow the practice of the "Catch-22" or "gotcha!" school of litigation to succeed.").

CONCLUSION

For all the foregoing reasons, this Court should answer the certified questions as Diamond requests.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HERBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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