

IN THE SUPREME COURT,  
STATE OF FLORIDA

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CASE NUMBER 68,676  
DCA-1 No. BG-179

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THOMAS PARHAM, JR., d/b/a  
ALLIED SCREEN PRINTING,

Petitioner,

vs.

JACK PRICE, SAM PRICE,  
FLORENCE EVANS AND BARRY  
ZISSER, co-partners, d/b/a  
Z. E. P. PROPERTIES, a  
partnership,

Respondents.

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ON APPEAL FROM THE DISTRICT COURT OF  
APPEALS, FIRST DISTRICT OF FLORIDA

---

INITIAL BRIEF FOR PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

This cause was initially tried by jury pursuant to a Second Amended Complaint which was basically an action for breach of a lease agreement whereby the Petitioner counterclaimed for conversion of the equipment located on the premises. The Respondents were the landlords and the Petitioner was the tenant. In addition to the claim for rent the Respondents sued for the costs of collections and for reasonable attorney's fees pursuant to paragraph 4(h) of the lease which read as follows:

4. Tenants' Promises. Tenant shall:
  - (h) Pay reasonable attorney's fees of landlord incurred in collecting sums due on this lease, in enforcing terms of this lease or in event of default by tenant.

Paragraph 4(d) of the Second Amended Complaint alleged as follows:

- d. In paragraph 4(h) of the lease, the defendant agreed to pay the cost of collection and the attorney's fees on any part of said rental that may be collected by suit or by attorney, after same is past due. In accordance with said provision, the plaintiff(s) have been compelled to engage the legal services of the undersigned to represent them in this action.

The prayer for relief requested damages, attorney's fees, costs and interest.

As the trial Court noted in its Order Granting Attorney's Fees, no evidence was presented during the course of the jury trial as to the amount of a reasonable attorney's fee and no evidence was presented that the Respondents had obligated themselves to pay their attorneys for services. The Respondent received a favorable jury verdict in the amount of \$3,666.40 and the Petitioner received a verdict on the conversion counterclaim for \$2,500.00. Thereafter, the Court entered its Order Taxing Costs on behalf

\$11,520.00 against the Petitioner (Order Granting Plaintiff's Motion for Attorney's Fees; Consolidated Final Judgment).

Upon appeal by the Petitioner to The First District Court of Appeal, the court affirmed the trial court and upon motion for rehearing, certified the case to this court as a question of great public importance.

#### SUMMARY OF ARGUMENT

At common law, the right to recover attorney's fees as part of costs did not exist. The right to recover attorney's fees must be provided by statute or contract. The Florida Supreme Court has ruled, in accordance with common law, that the State of Florida is committed to the common law doctrine that attorney's fees cannot be taxed as costs in any cause unless authorized by contract or statute. This commitment by the high Court does not automatically require a lower tribunal to tax attorney's fees as part of costs where a statute or contract exists. It only forbids taxing attorney's fees as costs where there is no statute or contract. The Florida Supreme Court has not ruled on the issue as to whether the jury or the judge determines the amount of attorney's fees pursuant to a contractual lease provision. However, the majority of the Florida Districts hold that where attorney's fee claims are based upon contract, such claims must be pled and proved as part of damages suffered by the plaintiff, the entitlement thereto and the amount thereof should be determined by the trier of fact (absent stipulation) in the same manner as other elements of damage.

Having pled but failed to offer proof of attorney's fees to the jury, the Respondents have forever waived any and all claims to have attorney's fees assessed against the Petitioner because contractual attorney's fees must be assessed by the trier of fact and in this case the jury awarded none.

Furthermore, the Respondents were required to offer proof to the jury during trial that their client had contracted to pay attorney's fees. Since no proof was offered, Respondents waived any and all right to have Petitioner pay attorney's fees for the Respondents.

One is guaranteed the right to a jury trial by our Constitution on the issue of damages pursuant to a breach of contract action. A court should not be permitted to waive one's right to jury trial as to a portion of the damages sought for mere convenience and the saving of time and effort.

#### ARGUMENT

- I. THE CIRCUIT COURT ERRED IN TAXING AS COSTS CONTRACTUAL ATTORNEY'S FEES PURSUANT TO A PROVISION IN A WRITTEN LEASE AFTER THE JURY HAD MADE ITS FINAL DAMAGE DETERMINATION AND THE APPELLEES PLED BUT FAILED TO OFFER AT TRIAL EVIDENCE CONCERNING THEIR ENTITLEMENT TO AND AMOUNT OF ATTORNEY'S FEES SOUGHT.

It is a well settled premise in Florida that the right to recover attorney's fees will not be awarded to a successful party unless the recovery of the fee is authorized by statute or is grounded in a contract. In Codomo v. Emanuel, 91 So.2d 653 (1956), the Supreme Court of Florida recognized that

the right to recover attorney's fees as part of the costs did not exist at common law. It (right to recover) must be provided by statute or contract. Id. at 655.

In his opinion in Codomo, Justice Terrell proclaimed,

This Court is committed to the doctrine that attorney's fees cannot be taxed as costs in any cause unless authorized by contract or legislative authority. Id. at 655.

It must be pointed out that this commitment by the high Court does not mandate attorney's fees in any and every case where there is a contract or a statute. It only forbids the taxing as costs of attorney's fees where there is no contract or statute. The Supreme Court has not ruled on this particular issue since Codomo. The question as to whether the trial court

or the jury determines the amount of attorney's fees pursuant to a contractual provision has not been ruled upon by the Supreme Court and is in dispute among the circuits. However, the majority of the districts favor the proposition that contractual attorney's fees must be considered as an item of damage which are to be presented to a jury for determination, as should any other damages arising from a breach of contract action.

River Road Construction Company v. Ring Power Corporation, 454 So.2d 38 (Fla. 1st DCA 1984); The Saints Christ Temple of the Holy Ghost v. R. Fowler, 448 So.2d 1158 (Fla. 1st DCA 1984); Newcombe v. South Florida Business Negotiators, Inc., 340 So.2d 1192 (Fla. 2nd DCA 1976); Holiday Gulf Builders, Inc. v. Tahitian Gardens Condominiums, Inc., 443 So.2d 143 (Fla. 2nd DCA 1983); Reiss v. Goldman, 196 So.2d 184, 185 (Fla. 3rd DCA 1967); Commodore Plaza at Century 21 Condominium Association, Inc. v. Cohen, 350 So.2d 502 (Fla. 3rd DCA 1977); Ronlee, Inc. v. P. M. Walker Company, 129 So.2d 175 (Fla. 3rd DCA 1961); Bowman v. Kingsland Development, Inc., 432 So.2d 660 (Fla. 5th DCA 1983); Mystery Fun House, Inc. v. Magic World, Inc., 417 So.2d 785 (Fla. 5th DCA 1982); Lhamon v. Retail Development, Inc., 422 So.2d 993 (Fla. 5th DCA 1982). A different situation prevails, of course, where attorney's fees are awardable under a statute which provides that they are to be assessed by the Court. 6 Fla. Stat. Ann. 73.091 (Supp. 1975); 18A Fla. Stat. Ann. 627.428 (1972); Newcombe v. South Florida Business Negotiators, Inc., 340 So.2d 1192 (Fla. 2nd DCA 1977); Finkelstein v. North Broward Hospital Dist., 484 So.2d 1241 (Fla. 1986).

The First District Court of Appeal in River Road Construction Company v. Ring Power Corporation, 454 So.2d 38 (Fla. 1st DCA 1984) held:

with respect to the attorney's fees question, the significant point is that Ring Power's claim for attorney's fees was based upon contract instead of statute. However, where fee claims are based upon contract, such claims must be pled and proved as part of the damages suffered by the plaintiff, the entitlement thereto and the amount thereof being determined by the trier of fact (absent stipulation otherwise by the parties) in the same manner as other elements of damage. Id. at 41.

With respect to a lease provision for attorney's fees to be paid by the opposing party, the First District case of River Road is commensurate with Districts Two, Three and Five in holding that contractual attorney's fees must be pled and proven and are always a matter for determination for the trier of fact. Furthermore, this reasoning in no way violates the commitment of the Florida Supreme Court in Codomo, supra.

In the case at bar, the Petitioner entered into a lease with the Respondents which contained a contractual provision whereby the Petitioner agreed to pay any reasonable attorney's fees that the landlord incurred in collecting sums due on the lease or enforcing the terms of the lease in the event of default by the tenant. Florida being devoid of any relevant statutory provision for the trial court to set the attorney's fees in the instant case, the majority of districts adhere to the principle of law that damages, in the form of contractual attorney's fees, must be pled and proved by the complaintant and the entitlement thereto and amount must be set by the jury in the same manner as other elements of damages. River Road Construction Company v. Ring Power Corporation, 454 So.2d 38 (Fla. 1st DCA 1984). Newcombe v. South Florida Negotiators, Inc., 340 So.2d 1192 (Fla. 2nd DCA 1976)

II. THE RESPONDENTS AFTER HAVING DULY PLED THE ISSUE OF ATTORNEY'S FEES AND HAVING FAILED TO OFFER ANY EVIDENCE TO THE JURY FOR ITS DETERMINATION CONCERNING SAID ATTORNEY'S FEES, WAIVE ALL RIGHTS THEREBY TO HAVE ANY ATTORNEY'S FEES ASSESSED AGAINST THE PETITIONER IN THE FORM OF COSTS OR PURSUANT TO A REMANDED OR NEW TRIAL.

The plaintiff in the case below duly pled the cause of attorney's fees at trial but failed to offer any proof concerning entitlement to or the amount of attorney's fees incurred in enforcing the lease. Having failed to prove an element of its' pleadings, the plaintiff waived the right to subsequently request attorney's fees from the court or the jury.

In Mystery Fun House, Inc. v. Magic World, Inc., 417 So.2d 785 (Fla. 5th DCA 1982), where a lease provision provided contractually for attorney's fees, the court held:

Since Magic World did not present any evidence for the jury as to a reasonable attorney's fee as a element of damages, Magic World waived that issue. Where a jury fails to allow attorney's fees, there is no authority for the trial judge to assess attorney's fees over and above the jury verdict. Id. at 768.

It is clear in the Fifth District that the determination of the jury is final and the issue of attorney's fees is waived.

In River Road, supra, the plaintiff waived all rights to attorney's fees and interest because it accepted an offer of judgment as total payment. The trial court was thereafter precluded from assessing and taxing attorney's fees as costs because the fees were contractually an item of damages and Ring Power should not have accepted the offer of judgment if they felt said offer was insufficient. In a per curiam decision, the Florida First District Court of Appeal wrote in River Road, supra:

The fact that Ring Power may not have realized that its acceptance of the offer in that form would preclude recovery of contractual attorney's fees and prejudgment interest should avail Ring Power nothing. Ring Power is presumed to know the legal consequences of its own pleadings and its acceptance of River Road's offer of judgment. Id. at 41.

Whether there exists an offer of judgment as in River Road or an actual judgment as in the instant case, the Respondents, Z. E. P. Properties is presumed to know the legal consequences of its own pleadings, and having failed to offer even a scintilla of proof concerning attorney's fees to the jury for determination, the Respondent waived said issue and is forever barred from attempting to assess any attorney's fees against the Petitioner, Thomas Parham, Jr., d/b/a Allied Screen Printing.

III. THE RESPONDENTS WAIVED ALL RIGHTS TO HAVE ATTORNEY'S FEES ASSESSED AGAINST THE PETITIONER BECAUSE THEY FAILED TO ESTABLISH AT TRIAL THAT THE RESPONDENTS WERE CONTRACTUALLY BOUND TO PAY ANY ATTORNEY'S FEES TO THEIR OWN COUNSEL.

In order for the Respondents to claim attorney's fees in any amount, they must first prove at trial that there exists a contract between themselves and their counsel for legal services. Brett v. First National Bank of Marianna, 120 So. 554 (Fla. 1929); Rhea v. DeVault, 146 So. 643 (Fla. 1933); T. & C. Corporation v. Eikenberry, 178 So. 137 (fla. 1938). Having pled but failed to offer any proof of such contract at trial, the Respondents forever waived any and all claims to have attorney's fees assessed against the Petitioner since contractual attorney's fees must be assessed by the trier of fact and in this case the jury awarded none.

IV. WHETHER THE RESPONDENTS' CONSTITUTIONAL RIGHT TO A JURY TRIAL ON THE ISSUE OF ENTITLEMENT TO AND AMOUNT OF DAMAGES CAN BE ABRIDGED OR WAIVED BECAUSE IT IS "A WASTE OF TIME"?

The First District Court of Appeal held in River Road, supra, that contractual attorney's fees are a portion of the total damages that must be pled and proven as do all damages. The court further held that the entitlement to and amount of all damages, including contractual attorney's fees, must be set by the jury, not the judge in a post-trial hearing. The holding in River Road, supra, has not been disturbed. Despite this fact, a relevant case decided since River Road, supra, was Alan Cheek v. McGowan Electric Supply Co., 10 FLW 2012 (Fla. 1st DCA August 20, 1985), in which the same First District Court held that it now adopts the "rationale" of the Fourth District case of Taggart Corp. v. Benzing, 434 So.2d 964 (Fla. 4th DCA 1983). Taggart, supra, states that it is "a waste of time" to require each side to prove fees before the jury. The court further adopted the Taggart, supra, rationale, "that is obviously an easier task after the fact".

The case at bar was decided using Cheek v. McGowan Electric Supply, supra, as precedent. It is axiomatic that a party has a right to a jury trial in a breach of contract action on the issue of damages. Even the First District in River Road, supra, has so held. However, Cheek, supra, holds, by implication, that a party's right to jury trial on damages under contract can be waived by the court for the sake of ease and saving time. The First District predicated its decision in Cheek, supra, and the case at bar on the rationale of Taggart, supra, a Fourth District case while abandoning its own precedent in River Road which agreed with the Second,

Third and Fifth Districts.

Taggart, supra, can be distinguished in several ways. First, Taggart, supra, was a non-jury trial while Cheek, supra, and the case at bar were both jury trials. Secondly, Chief Judge Letts wrote in Taggart, supra:

Uncertain as to the solution thereof, most experienced trial lawyers, unless they stipulate otherwise, put on their proof for attorney's fees during the course of the trial. They thus treat the fee issue just as if they were any other item of damages, expressly to avoid the specter that here materialized. This particular trial judge was formerly just such an experienced trial lawyer and his reaction to the failure of proof and lack of an ordered pretrial conference was not only understandable, but indeed we thought it correct until reading the recorded decisions for ourselves. Even after doing that, we still feel that maybe the trial judge should be correct, but under existing case law he apparently is not (emphasis added). Id. at 965.

The Fourth District Court of Appeal admitted that they felt the trial court's ruling was correct but for the sake of stare decisis, the court would reverse what they felt to be the correct decision. After what appears to be an apology for having to follow poorly decided case law, the court states:

We do not perceive this to be an unhappy result. To require each side to be put to the proof when both cannot prevail is a waste of time. Furthermore, one of the factors to be considered in arriving at the amount of a reasonable fee is the outcome. That is an easier task after the fact (emphasis added). Id. at 966.

The court attempts to explain why its decision has a satisfactory result while the reasoning to achieve this result was based on previous cases that were poorly decided. The court then advises the losing party how to have their case heard by this high court, as to imply they were asking to have

their stare decisis line of cases reversed so they would no longer be obligated to follow them. Id. at 966.

The foregoing rationale in Taggart, supra, was used by the First District to decide McGowan, supra, while ignoring its own precedent in River Road, supra. It is not expedient to use a case from another district as your rationale when the case relied upon admitted within the body of the decision that it was erroneous but only for the sake of stare decisis was the case decided.

It is the contention of the Petitioner that contractual attorney's fees are part and parcel of the total damages sought in the instant case by the Respondents. The Petitioner is guaranteed a jury trial on the issue of damages pursuant to a breach of contract action by our Constitution in Article I, Subsection 22. A court should not be permitted to violate one's right to jury trial concerning a portion of the damages sought merely because it is a waste of time and an easier task after the trial. At trial, the Respondents pled contractual attorney's fees as part of their damages but did not offer any proof to the jury of their entitlement to fees or the amount sought.

Therefore, the court below should be reversed without remand or new trial.

#### CONCLUSION

The District Courts of Appeal have consistently refined their opinion concerning contractual attorney's fees with respect to a written lease. The overwhelming authority in Florida holds that contractual attorney's fees pursuant to a written lease must be pled and proved at

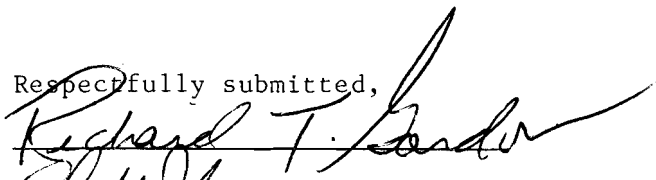
trial and the entitlement thereto and the amount sought must be set by the jury because contractual attorney's fees are an element of damages as are all other damages arising from a breach of contract action. Furthermore, this in no way violates the commitment of the Florida Supreme Court in Codomo v. Emanuel, 91 So.2d 653 (1956), to forbid taxing as costs attorney's fees where there exists no contract or statute.

Furthermore, one's right to a jury trial for damages in a breach of contract action, cannot be abridged or waived by the court as a matter of convenience or saving time.

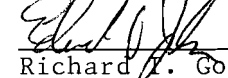
Since the attorney's fees were pled but no evidence offered at trial for the jury to consider, the Respondents are forever barred from seeking any attorney's fees from the Petitioner.

For all the foregoing reasons, the taxing as costs attorney's fees against the Petitioner by the trial court and affirmed by the appellate court below should be reversed without remand or new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

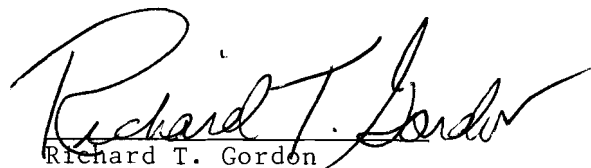
I HEREBY CERTIFY that a copy of the foregoing instrument was furnished to:

Sid J. White, Clerk  
Supreme Court of Florida  
Supreme Court Building  
Tallahassee, Florida 32301

Demere Mason, Esquire  
3100 University Boulevard, South  
Suite 101  
Jacksonville, Florida 32216

Robert O'Quinn, Esquire  
630 American Heritage Building  
Jacksonville, Florida 32202

by U. S. Mail this 23<sup>rd</sup> day of May, 1986.



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