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FILED
SID J. WHITE
MAY 4 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SUPREME COURT OF FLORIDA
CASE NO. 79,601

FRED GANZ, etc.,
Petitioner,
VS.
HZJ, INC., etc.,
Respondent.

BRIEF OF PETITIONER ON MERITS
OF QUESTION CERTIFIED BY THIRD
DISTRICT COURT OF APPEAL AS
ISSUE OF GREAT PUBLIC IMPORTANCE

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INTRODUCTION

This is an appeal of a decision of the Third District Court of Appeal which affirmed a lower court order denying award of attorney's fees to the Defendant/Petitioner after non-jury trial pursuant to Section 57.105, Florida Statutes, despite the trial court's finding that the Plaintiff's claim was baseless in nature with there being a complete absence of a justiciable issue of law or fact.

Petitioner, FRED GANZ, Metropolitan Dade County Tax Collector was the Defendant below. He shall be referred herein as the Tax Collector.

Respondent, HZJ, INC., was the Plaintiff below. HZJ, INC., shall be referred to herein as HZJ or "the Corporation".

References to the record will be designated by the symbol "R" followed by the appropriate pagination.

STATEMENT OF THE CASE AND FACTS

HZJ, a prior owner of two parcels of real property, initiated this action to prevent the Tax Collector from selling tax certificates on the two parcels **for** delinquent taxes. (R.2-16). The trial court denied the Corporation's request **for** injunctive relief, and HZJ amended its Complaint to seek reimbursement of the monies **it** paid to purchase the sold certificates. (R.53-71). At the conclusion of the Corporation's case in a non-jury trial, the trial court entered Final Judgment in favor of the Tax Collector finding **that** the **Corporation** had failed to present and there was a complete absence of a justiciable issue of either law or fact. (R.106-107). The Tax Collector filed his post **trial** motion seeking an award of attorney's fees pursuant to Section 57.105, Florida Statutes. (R.102-105). At the hearing on said motion, the trial court acknowledged that the Corporation's cause of action was baseless and that the **Tax** Collector was entitled to attorney's fees. However, because the Tax Collector had failed to plead entitlement to an award of attorney's fees under Section 57.105, Florida Statutes, the court denied the motion citing Stockman v. Downs, 573 So.2d 835 (Fla. 1991). (R.125-126).

The Tax Collector **appealed** the order of the trial court to the Third District Court of Appeal. Although it affirmed the decision of the trial court based upon the broad holding in Stockman, the appellate court expressed its hope that this **Court** would rule that the broad language in Stockman does not

preclude an award of attorney's fees under Section 57.105, Florida Statutes, for frivolous actions and certified the following question as one of great public importance:

Does the holding in Stockman v. Downs, 573 So.2d 835 (Fla. 1991) require that entitlement to statutory attorney's fees pursuant to Section 57.105, Florida Statutes (1991) be specifically pled?

This appeal followed.

SUMMARY OF ARGUMENT

Section 57.105, Florida Statutes, requires the trial court to award a reasonable attorney's fee to the prevailing party when the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint. An award of attorney's fees under Section 57.105 is not defeated by a failure to assert entitlement in the pleading stage of litigation. This narrow exception to the general rule requiring entitlement to be pled is warranted. It is warranted because a claim or defense frequently cannot be determined to be frivolous until well past the pleading stage. The filing of an initial pleading by counsel is presumed to be filed in good faith.

The Florida Legislature has mandated that all frivolous actions are to be met with the imposition of attorney's fees. This Court should follow the plain language of the statute and issue a clarion call that in response to any civil claim determined to be totally devoid of a justiciable issue of either law or fact attorney's fees will be imposed,

ARGUMENT

I. **THE HOLDING IN STOCKMAN V. DOWNS, 573 So.2d 835 (Fla. 1991) DOES NOT REQUIRE THAT ENTITLEMENT TO STATUTORY ATTORNEY'S FEES PURSUANT TO SECTION 57.105, FLORIDA STATUTES (1991) BE SPECIFICALLY PLED.**

a. Section 57.105, Florida Statutes requires the trial court to award a reasonable attorney's fee to the prevailing party when the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint.

In the case sub judice, after a non-jury trial Final Judgment was entered in favor of the Defendant, Tax Collector. (R.106-107). The Final Judgment contained the trial court's finding that the Plaintiff, Corporation had failed to present and there was a complete absence of a justiciable issue of either law or fact. The Tax Collector filed a post-trial motion seeking attorney's fees pursuant to Section 57.105, Florida Statutes. (R.102-105).

Section 57.105, Florida Statutes provides in pertinent part:

(1) The court shall award a reasonable attorney's fee to be paid to the prevailing party . . . in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; (emphasis added).

The phrase "a complete absence of a justiciable issue of either law or fact raised by the losing party" has been interpreted to mean a total or absolute lack of a justiciable

issue, which is tantamount to a finding that the action is frivolous. Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982). Once this prerequisite finding is made by the court, an award of attorney's fees is mandated by Section 57.105, Fla. Stat. Whitten, 410 So.2d at 505.

The trial court in its order denying attorney's fees to the Tax Collector (R.125-126) specifically recognized the well-settled law that once a determination has been made that there is a complete absence of a justiciable issue of law or fact, the award of attorney's fees to the prevailing party who properly moves for such fees under Section 57.105, Florida Statutes, is required. The court further reiterated that indeed the Corporation had failed to present and there was a complete absence of a justiciable issue of either law or fact, and that the Corporation's lawsuit was baseless. (R.125-126).

- b. An award of attorney's fees under Section 57.105, Florida Statutes, is not defeated by a failure to plead entitlement to said costs.

Despite the trial court's finding that the Corporation's lawsuit was frivolous and its recognition of the mandate of Section 57.105, Florida Statutes, the court nonetheless denied the Tax Collector's motion for attorney's fees because the Tax Collector had not pled entitlement to attorney's fees under Section 57.105, citing Stockman v. Downs, 573 So.2d 835 (Fla. 1991).

The Tax Collector appealed the order of the trial court to the Third District Court of Appeal arguing that the trial court's reliance on Stockman was misplaced. Although it affirmed the decision of the trial court based upon the broad holding in Stockman, the appellate court expressed its hope that this Court would make an exception to the Stockman rule for Section 57.105 attorney's fees and certified the following question as one of great public importance:

Does the holding in Stockman v. Downs, 573 So.2d 835 (Fla. 1991) require that entitlement to statutory attorney's fees pursuant to Section 57.105, Florida Statutes (1991) be specifically pled?

The answer to the certified question must be in the negative.

This Court in Stockman eliminated the distinction between the necessity for pleading entitlement to attorney's fees when the claim was based on contract as opposed to statute. The Court held that a claim for attorney's fees, whether based on statute or contract, must be pled. The creation of a uniform standard resulted from the Court's concern about notice:

Modern pleading requirements serve to notify the opposing party of the claims alleged and prevent unfair surprise. 40 Fla. Jur. 2d Pleadings § 2 (1982). . . . 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.

The Stockman Court's concern and subsequent holding was directed to those statutes where attorney's fees and expenses may be awarded or are a necessary element of a claimant's cause of action or a defense. In those situations, a party's

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decision on whether to pursue a claim, dismiss it or settle will depend on the existence or non-existence of a possible motion for attorney's fees by its opponent. In cases arising under a contract or a statutory claim for relief, notice of potential fees could bear directly on strategy. A party may in fact drop a well-founded claim or defense, or settle, if notified that an opponent will be seeking attorney's fees after judgment.

All parties, however, are on continuous notice that attorney's fees may be awarded under Section 57.105 in *any civil action*. The purpose of Section 57.105 is to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards against parties who engage in these activities. Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982). Prior to filing suit as well as from the outset, a party is aware, and remains mindful at all times throughout the action, that if it proceeds to waste the resources and time of the court and opposing party by raising nothing but frivolous issues a penalty will be rendered in the form of attorney's fees under Section 57.105. Sachs v. Hoglund 397 So.2d 447 (Fla. 3d DCA 1981). Thus, unlike situations involving particular contract *clauses* or specialized statutes, there is no possibility of unfair surprise or speculation under Section 57.105; upon a finding by the court of a "complete absence of a justiciable issue of either law or fact" the statute mandates an award to the prevailing party in

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any civil suit. Notice is inherent in and manifestly clear from the language of the statute.

Section 57.105 does not create an independent cause of action that may necessitate indicating whether or not one intends to seek attorney's fees. Rather, **it** is a standing unequivocal warning that must affect the decision to **bring**, defend or appeal any action. Since the award is explicit in **the** statute, a party should not **be** required to plead entitlement thereto before a case has unfolded to the point where an adverse litigant can identify a claim as frivolous.

Moreover, Stockman has no applicability to the instant case as there is no requirement that a party be placed on notice of an award of potential court costs. Indeed, **court costs are** an incident to the action and need not be claimed in the proceedings. Trawick, Fla. Prac. and Proc., §25-12 (1990). **A trial** court may proceed to award costs not included in the final judgment even after a notice **appealing the final** judgment has been filed. Roberts v. Askew, 260 So.2d 492 (Fla. 1972); 3 Fla.Jur.2d, Appellate Review §31 (1978).

Attorney's fees can be considered **costs** when made so by statute. State ex rel. Royal Insurance Company v. Barrs, 87 Fla. 168, 99 So. 668 (1924); Giacheffi v. Johnson, 308 So.2d 143 (Fla. 2d DCA 1975); Cf. McBain v. Bowling,

374 So.2d 75 (Fla. 3d DCA 1979).^{1/} As explained by the Fifth District Court of Appeal in Allen v. Estate of Dutton, 384 So.2d 171 (Fla. 5th DCA 1980), an award of attorney's fees under Section 57.105, Florida Statutes, is an award of court costs:

[t]he Legislature in enacting chapter 78-275, Laws of Florida (Supp. 1978) clearly promulgated a new section to be known as section 57.105, Florida Statutes. The heading of chapter 57 in the statute books is "Court Costs." By specifically incorporating this new provision for attorney's fees in chapter 57, it is obvious that the Legislature intended to treat this award as part of the only subject matter therein, court costs. We therefore hold that attorney's fees when properly awarded under Section 57.105, Florida Statutes (Supp. 1978) may be awarded as part of court costs.

384 So.2d at 174.

Finally, it is extremely difficult, if not impossible, for a party to plead in good faith its entitlement to attorney's fees under Section 57.105, Florida Statutes, before the case has been terminated. This was explained by the Third District Court of Appeal in Autorico, Inc. v. Government Employees Ins. Co., 398 So.2d 485 (Fla. 3d DCA 1981), a case

^{1/} Attorney fees may be assessed as costs against the party and his attorney when there is a complete absence of a justiciable issue of law or fact raised by the losing party. Trawick, Fla. Prac. and Proc. §25-12 (1990).

decided **before** Stockman, which allowed statutory attorney's fees to be raised by post-judgment motion^{2/};

There is certainly no way for a litigant to know in advance whether the adverse party will raise nothing but frivolous issues in a civil case and, therefore, to plead in good faith its entitlement to attorney's fees under Section 57.105, Florida Statutes (1979). Indeed, we think it is best to presume good motives on the part of one's adversary even on what appears to be an open and shut **case**. It is only after the **case** has been terminated that a sensible judgment can be made by a party as to whether the adverse party raised nothing but frivolous issues in the cause, and, if so, to file an appropriate motion . . . seeking an entitlement to . . . attorney's fees under Section 57.105, Florida Statutes (1979).

398 So.2d at 486. The foregoing reasoning is correct and should be adopted by this Court. Moreover, the reasoning of Autorico is in accord with Fla. R. Jud. Admin. 2.060(d).^{3/}

2/ In the case at bar, the Third District Court of Appeal reluctantly concluded that the broad holding in Stockman means that Autorico is no longer good law.

3/ Fla. R. Jud. Admin. 2.060(d) provides ". . . The signature of an attorney shall constitute a certificate by him that he has read the pleading or other paper; that to the best of his knowledge, information, and belief there is good ground to support it; and that is not interposed for delay."

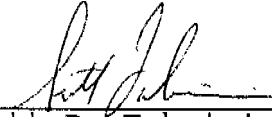
CONCLUSION

In the instant case, the Tax Collector was entitled to an award of attorney's fees under Section 57.105, Florida Statutes because the trial court found after trial that the Corporation's claim completely devoid of any justiciable issue of law or fact and baseless in nature. The holding in Stockman v. Downs, 573 So.2d 835 (Fla. 1991) does not require that entitlement to statutory attorney's fees pursuant to Section 57.105, Florida Statutes (1991) **be** specifically pled.

Based on the foregoing authorities and argument, the trial court erred when it denied the Tax Collector's Motion for Award of Attorney's Fees. This Court should answer the certified question in the negative and remand this cause to the trial court for an award of attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 30th day of April, 1992, mailed to:
JORGE L. FORS, P.A., 814 Ponce de Leon Blvd., Suite 505, Coral Gables, FL 33134.


Assistant County Attorney