

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.

4DCA CASE NO. 4D01-4662
L.T. CASE NO. CL 00-1645 AG

RALPH LEVIN and ESTELLE LEVIN,

Petitioners,

vs.

PALM COAST BUILDERS AND
CONSTRUCTION, INC., a Florida
corporation, et.al.,

Respondents.

—/

**PETITIONER'S BRIEF ON JURISDICTION IN SUPPORT
OF NOTICE TO INVOKE DISCRETIONARY JURISDICTION TO
REVIEW DECISION OF THE FOURTH DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA**

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

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	4
I. THE FOURTH DISTRICT'S DENIAL OF ATTORNEYS FEES TO THE LEVINS EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER DECISIONS WHICH HOLD THAT IT IS ERROR NOT TO AWARD FEES WHEN A LIEN IS FOUND TO BE FRAUDULENT	4
II. IN DENYING STATUTORY PUNITIVE DAMAGES PURSUANT TO <i>FLA. STAT.</i> §713.31(2)(c), THE DECISION CONFLICTS WITH OTHER DECISIONS WHICH RENDER <i>FLA. STAT.</i> §768.72 INAPPLICABLE TO STATUTORY ACTIONS AND IN CASE OF CONFLICT WITH ANOTHER STATUTORY PROVISION.	7
CONCLUSION	9
CERTIFICATE OF SERVICE	10
CERTIFICATE OF FONT SIZE AND STYLE	11

TABLE OF AUTHORITIES

Case Law	Page(s)
<i>Colen v. Patterson</i> , 436 So.2d 182(Fla. 2d DCA 1983)	6
<i>Danis Industries Corp. v. Ground Improvement Techniques</i> , 645 So.2d 420 (Fla. 1994)	5
<i>Delta Painting, Inc. v. Bauman</i> , 710 So.2d 663, 665 (Fla. 3 rd DCA 1998)	5
<i>Frazier v. Metropolitan Dade County</i> , 701 So.2d 418, 420 (Fla. 3 rd DCA 1997)	9
<i>Hudson v. Moss</i> , 653 So.2d 1071, 1072 (Fla 3 rd DCA 1995)	9
<i>Lumbermen’s Mutual Casualty Co. v. Percefull</i> , 638 So.2d 1026 (Fla. 4 th DCA 1994)	5, 6
<i>Martin v. Jack Yanks Construction Co.</i> , 652 So.2d 120, 122 (Fla. 3 rd DCA 1995)	8
<i>Moritz v. Hoyt Enterprises, Inc.</i> , 604 So.2d 807 (Fla. 1992)	5
<i>Peacock Construction Co. v. Gould</i> , 351 So.2d 394, 396 (Fla. 2d DCA 1977)	5
<i>Ponce Investments, Inc. v. Financial Capital of America</i> , 718 So.2d 280, 282 . . .	8
<i>Prosperi v. Code</i> , 626 So.2d 1360 (Fla. 1993)	5
<i>Smith v. Department of Insurance</i> , 507 So.2d 1080, 1087 (Fla. 1987)	4, 7
<i>Susman v. Schuyler</i> , 328 So.2d 30 (Fla. 3 rd DCA 1976)	6

Other Authorities

Fla. Const. Art. V §3(b)(3) 9

Fla. R. App. P. 9.030(a)(2)(A)(iv) 1, 9

Fla. Stat. §627.428 5

Fla. Stat. §713.29 5

Fla. Stat. §713.31 2, 4-9

Fla. Stat. §713.31(2)(a) 3, 4, 10

Fla. Stat. §713.31(2)(c) 5, 6, 8

Fla. Stat. §768.71 7

Fla. Stat. §768.71(3) 8

Fla. Stat. §768.72 4, 7, 8, 10

PRELIMINARY STATEMENT

Petitioners, RALPH LEVIN and ESTELLE LEVIN, will be referred to as the “LEVINS”.

Respondent, PALM COAST BUILDERS AND CONSTRUCTION, INC., a Florida corporation, will be referred to as “PALM COAST”.

STATEMENT OF THE CASE AND FACTS

This is a petition to invoke the discretionary jurisdiction of this Court pursuant to *Fla. R. App. P. 9.030(a)(2)(A)(iv)*. The decision below (“DECISION”) dated February 12, 2003 became final for appellate purposes by virtue of the Fourth District’s order denying LEVINS’ motions for rehearing, rehearing *en banc*, and clarification entered April 10, 2003. The LEVINS timely filed a notice to invoke the discretionary jurisdiction of this Court on May 9, 2003.

This case resolved a construction dispute between the LEVINS, as the homeowner, and the general contractor, PALM COAST, concerning the construction of a single family residence in Palm Beach Gardens, Florida.

PALM COAST and the LEVINS entered into a contract for the purchase and sale of a home site and construction on August 26, 1998. (The “Contract”). The Contract was atypical in that PALM COAST had already commenced construction and the LEVINS purchased the lot with the shell of the home almost complete.

Throughout the construction, the LEVINS provided PALM COAST with punch lists of items that required correction prior to the distribution of draws payable under the Contract. Based upon the representations of PALM COAST representatives that the repairs would be completed, and prior to the completion of the repairs to the LEVINS' satisfaction, the LEVINS released the monies in accordance with the draw schedule.

The claim of lien contained improper non-liable items in forms of charges for labor, services, or materials which did not permanently improve the property; charges which lacked written change orders, and failed to apply credits due the LEVINS under the Contract.

PALM COAST initially filed suit against the LEVINS for breach of contract and unjust enrichment. After discovering that PALM COAST had recorded a lien against the property, the LEVINS commenced a separate action pursuant to *Fla. Stat.* §713.31 seeking to strike the lien and recover the statutory damages available. The actions were later consolidated for all purposes. PALM COAST later amended its initial complaint to include a claim for lien foreclosure.

After conclusion of an extensive trial, the trial court entered a final judgment awarding PALM COAST certain damages under the Contract less a credit for sums due the LEVINS and in favor of the LEVINS striking the lien. The trial court found

that PALM COAST's lien was fraudulent because it included non-liable items such as pool upkeep charges, lawn maintenance charges, homeowner's association fees and utility charges. The trial court further found the lien was a willful exaggeration under *Fla. Stat.* §713.31(2)(a) as the lien contained items that were not liable "by any stretch of the imagination."

Although the trial court awarded the LEVINS attorneys fees for prevailing on the lien issue, it did not award those fees as compensatory damages under the statute. The trial court also declined to award the LEVINS punitive damages under the statute. The LEVINS appealed these issues, and PALM COAST cross appealed. The Fourth District affirmed all aspects of the judgment. The Appellate Court concluded that whether the lien was a willful exaggeration under the statute was an issue of fact, affirming the trial court's conclusion that the items were not liable and that the lien was fraudulent thus rejecting in full PALM COAST's cross appeal. The Appellate Court further declined to extend the trial court's ruling to award punitive damages or to award attorneys' fees as compensatory damages. The Court awarded PALM COAST fees for the appellate proceedings.

SUMMARY OF THE ARGUMENT

The Decision expressly and directly conflicts with decisions of other courts and this Court awarding attorneys' fees to a party that successfully strikes a lien as fraudulent. The failure of the Appellate Court to award the LEVINS appellate fees also is in direct conflict.

The Decision directly conflicts with *Smith v. Dept. of Insurance*, 507 So.2d 1080, 1087 (Fla. 1987) by creating a new procedural requirement to exercise the statutory right to punitive damages under *Fla. Stat. §713.31*. The Decision also expressly and directly conflicts with decisions of other courts by failing to impose punitive damages under *Fla. Stat. §713.31(2)(a)*. The imposition of *Fla. Stat. §768.72* conflicts with other decisions yielding to the more specific statutory provision.

ARGUMENT

I. THE FOURTH DISTRICT'S DENIAL OF ATTORNEYS FEES TO THE LEVINS EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER DECISIONS WHICH HOLD THAT IT IS ERROR NOT TO AWARD FEES WHEN A LIEN IS FOUND TO BE FRAUDULENT

A. The Appellate Court Overlooked LEVINS Entitlement to Appellate Attorneys' Fees: PALM COAST cross appealed, challenging the trial court's findings of fraudulent lien, and lost. The appellate court affirmed that finding, yet denied the LEVIN's Motion For Attorneys Fees and granted PALM COAST's Motion For

Attorney's Fees in *toto* (the "ORDER"). The DECISION and the ORDER expressly and directly conflict with *Delta Painting, Inc. v. Bauman*, 710 So.2d 663,665 (Fla. 3rd DCA 1998) (“Based upon our affirmance of the lower court’s determination that Delta’s lien was fraudulent, we likewise conclude that the Baumans were entitled to their reasonable attorneys’ fees and costs.”). See *Fla. Stat. §713.31*. *Fla. Stat. §713.29* also compels this result as the LEVINS were the prevailing party on all lien issues. *Peacock Construction Co. v. Gould*, 351 So.2d 394, 396 (Fla. 2d DCA 1977).

Although not expressed in its order granting the fees, the Court likely engaged in a “prevailing party” analysis under *Moritz v. Hoyt Enterprises, Inc.*, 604 So.2d 807 (Fla. 1992) and *Prosperi v. Code*, 626 So.2d 1360 (Fla. 1993). Concluding that the LEVINS did not prevail on the significant issues on appeal, the Court failed to apply the express one way provision of *Fla. Stat. §713.31(2)(c)* and this Court decisions in *Danis Industries Corp. v. Ground Improvement Techniques*, 645 So.2d 420 (Fla. 1994); and *Lumbermen’s Mutual Casualty Co. v. Percefull*, 638 So.2d 1026 (Fla. 4th DCA 1994).

The Fourth District previously held that the test set forth in *Mortiz* and *Prosperi* did not apply to one-sided attorneys’ fee statute provisions like *Fla. Stat. §627.428*, which entitled only the insured or beneficiary to recover attorneys’ fees but not the insurer. See *Lumbermen’s, supra*. *Fla. Stat. §713.31(2)(c)* is identical; it is also a

one-way attorneys' fee provision that entitles owners or other defrauded parties, but not the lienor, to an award of fees. Because attorneys' fees under *Fla. Stat.* §713.31(2)(c) cannot be awarded to either side, the prevailing party test is inappropriate.

B. The Appellate Court and Trial Court Erred in Failing to Award Attorneys Fees as Pecuniary Damages: Attorneys' fees are not part of the trial court's discretion but are a part of the mandatory damages required under *Fla. Stat.* §713.31. As the statute is worded, these fees are not ancillary to the claim, but are part of the pecuniary losses and are intended to compensate the aggrieved party for having to remove the fraudulent lien. Attorneys' fees may be awarded as pecuniary damages in slander of title and quiet title proceedings. See *Colen v. Patterson*, 436 So.2d 182(Fla. 2d DCA 1983) and *Susman v. Schuyler*, 328 So.2d 30 (Fla. 3^d DCA 1976). These cases illustrate that attorneys' fees are not ancillary damages, but are considered part of the pecuniary damages awarded in slander of title cases. *Fla. Stat.* §713.31 treats the wrongful imposition of a lien similarly, and the failure to include the LEVINS' attorneys' fees as part of their pecuniary loss was error by both the trial and appellate courts.

II. IN DENYING STATUTORY PUNITIVE DAMAGES PURSUANT TO FLA. STAT. §713.31(2)(c), THE DECISION CONFLICTS WITH OTHER DECISIONS WHICH RENDER FLA. STAT. §768.72 INAPPLICABLE TO

STATUTORY ACTIONS AND IN CASE OF CONFLICT WITH ANOTHER STATUTORY PROVISION.

The Appellate Court's refusal to award punitive damages under *Fla. Stat.* §713.31 is an impermissible expansion of *Fla. Stat.* §768.71. *Smith v. Dept. of Insurance*, 507 So.2d 1080, 1087 (Fla. 1987) (“We interpret this act [*Fla. Stat.* §768.71] as applying only to claims for personal injury and property damage, both tort and contract”). The Appellate Court improperly created a new procedural requirement prior to obtaining punitive damages under a statute which expressly provides for them.

In authorizing punitive damages for the recording of a fraudulent lien, the legislature created a substantive right. In *Smith* this Court, found that *Fla. Stat.* §768.72 is substantive because it sets forth the standard for establishing a claim for punitive damages in tort and contract actions. The Decision expressly and directly conflicts with *Smith* because the Appellate Court has improperly applied *Fla. Stat.* §768.72 to impose a procedural pleading restriction in a statutory action.

Even if the imposition of *Fla. Stat.* §768.72 is constitutional, the Appellate Court failed to yield under *Fla. Stat.* §768.71 to the lien statute. *Fla. Stat.* §713.31 requires the award of punitive damages in every instance wherein a fraudulent lien is found.¹ *Ponce Investments, Inc. v. Financial Capital of America*, 718 So.2d 280,

¹ *Fla. Stat.* §713.31(2)(c), provides in pertinent part, “the lienor who files a fraudulent lien *shall* be liable to the owner or the defrauded party in damages, which

282 (where the evidence clearly establishes that the purchasers's lien was fraudulent the sellers were "entitled to a discharge of the lien and to damages as set forth in *Fla. Stat.* §713.31(2)(c); *Martin v. Jack Yanks Construction Co.*, 652 So.2d 120, 122 (Fla. 3rd DCA 1995) (contractor's attempt to place lien for non-lienable items entitled homeowner to punitive damages *as a matter of law* under the authority of *Fla. Stat.* §713.31(2)(c) (emphasis added)). The Appellate Court overlooked *Fla. Stat.* §768.71(3)² which renders *Fla. Stat.* §768.72 inapplicable in the case of a conflict with another statutory provision.

In the proceedings below, the LEVINS invoked the statutory remedies of *Fla. Stat.* §713.31 in their action to strike the lien. The LEVINS ultimately proved, and the District Court affirmed, that the lien was fraudulent as it contained items that were not lienable under any circumstances. *Fla. Stat.* §713.31 requires an award of punitive damages in every such instance.

In contrast, *Fla. Stat.* §768.72 applies to civil actions where punitive damages are discretionary. The punitive damages statute requires additional proof of *scienter*, an element that is already present once a finder of fact has concluded that a lien was

shall include. . .punitive damages. . ." (Emphasis added).

² *Fla. Stat.* §768.71(3) provides "if a provision of this part is in conflict with any other provision of the Florida statutes, such other provision *shall* apply." (Emphasis added).

fraudulent. *Fla. Stat.* §713.31 expressly excludes the finding of a fraudulent lien in cases of a good faith mistake, thereby making the *scienter* element an integral part of the damage claim.

The Appellate Court erred in failing to yield to the more specific provision of *Fla. Stat.* §713.31. In failing to do so, it conflicts with the Third District Court of Appeal in its decisions of *Frazier v. Metropolitan Dade County*, 701 So.2d 418, 420 (Fla. 3rd DCA 1997); *Hudson v. Moss*, 653 So.2d 1071, 1072 (Fla 3rd DCA 1995).

CONCLUSION

In accordance with *Fla. R. App. P.* 9.030(a)(2)(A)(iv) and *Fla. Const. Art. V* §3(b)(3), this Court may exercise discretionary jurisdiction to review any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law".

The Decision expressly and directly conflicts with decisions of other courts and this Court awarding attorneys' fees to a party that successfully strikes a lien as fraudulent. The failure of the Appellate Court to award the LEVINS appellate fees also is in direct conflict.

The Decision expressly and directly conflicts with decisions of other courts in failing to impose punitive damages under *Fla. Stat.* §713.31(2)(a). The imposition of *Fla. Stat.* §768.72 conflicts with other decisions yielding to the more specific statutory

provision.

The LEVINS respectfully request that this court accept jurisdiction in this case based upon the express and direct conflict created by the Decision of the Fourth District Court of Appeal. This Court should accept jurisdiction to resolve the conflict and preserve uniformity of the law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ____ day of May, 2003, to: GLENN S. CAMERON, ESQ., Cameron & Davis, One Clearlake Centre, Suite 1601, 250 Australian Avenue South, West Palm Beach, Florida 33401.

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

By: _____
KEITH T. GRUMER

CERTIFICATE OF FONT SIZE AND STYLE

Counsel for Petitioner hereby certifies that this brief was typed in Times New Roman 14- point font.

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

By: _____
KEITH T. GRUMER