

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

HFC COLLECTION CENTER, INC.,

Petitioner,

v.

Case No. 5D15-1177

STEPHANIE ALEXANDER,

Respondent.

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Opinion filed October 30, 2015

Petition for Certiorari Review of Decision  
from the Circuit Court for Orange County  
Acting in its Appellate Capacity.

Brett H. Burkett, and Thomas Lobello, of  
Rolfe & Lobello, P.A., Jacksonville, for  
Petitioner.

Taras S. Rudnitsky, of the Rudnitsky Law  
Firm, Longwood, for Respondent.

EDWARDS, J.

HFC Collection Center, Inc. petitions this court for a second tier writ of certiorari to quash a final order by the circuit court, sitting in its appellate capacity, affirming the county court's award of attorney's fees in favor of Stephanie Alexander. After ruling that HFC failed to prove that it was an assignee of a contract and had no authority to sue Alexander, the county court granted Alexander's motion for attorney's fees based on that same contract. HFC argued below that since no contract existed between HFC and Alexander,

there was no basis for awarding fees to her. HFC is correct. Since the circuit court applied the wrong law in affirming the county court's award of attorney's fees, we grant the petition, finding a departure from the essential requirements of the law.

### **BACKGROUND FACTS**

HFC sued Alexander to collect past due amounts she allegedly owed American Express pursuant to a credit card agreement between her and American Express. HFC claimed that it was the assignee of this American Express/Alexander agreement, and was therefore entitled to pursue American Express's collection rights against Alexander. HFC attached a copy of the credit card agreement and copies of purported assignments of Alexander's account to the complaint. Based upon its claim that Alexander failed to make timely payment, HFC demanded judgment for the outstanding, past due balance of \$8,964.97, plus interest.

Alexander answered HFC's complaint by agreeing that she had entered into a written credit card agreement or contract with American Express, but denied that the copy attached to the complaint was valid because it did not bear her signature. She asserted several defenses in her answer, two of which are relevant. First, Alexander claimed that the charges in question were not authorized by her, that she had properly notified American Express of the unauthorized nature of the charges, and because of those facts, she did not owe American Express for those charges. Second, Alexander claimed, by way of affirmative defense, that HFC lacked standing to enforce the contract between her and American Express because there were gaps in the chain of assignments, and none of the documents attached to the complaint showed any assignment of her specific account to HFC. Alexander's answer included a claim for attorney's fees and costs.

Alexander then moved for summary judgment based upon those two affirmative defenses. She pointed out that there were certain assignments from American Express to another company; however, there were no written assignments naming HFC as assignee that corresponded with her account. HFC responded by filing affidavits.

The county court determined that HFC's affidavits were insufficient because the affiant lacked personal knowledge and would not be competent to testify as to the subject matter in the affidavits. Additionally, the court held that the subject matter would not be admissible in evidence. Following a hearing, the county court granted Alexander's motion for summary judgment, finding that HFC lacked standing because it failed to offer admissible affidavit evidence to prove that it was the real-party in interest by way of assignment. The county court noted that there was a clear break in the chain of assignments from American Express, and there was absolutely nothing that showed Alexander's account debt had ever been assigned to HFC. In other words, HFC was a stranger to the credit card agreement between American Express and Alexander, and there was no contractual relationship between HFC and Alexander. HFC did not appeal the summary judgment.

Alexander then moved for attorney's fees. HFC and Alexander agreed that the credit card agreement contained a term requiring Alexander, as the cardholder, to pay all reasonable costs and attorney's fees that may be incurred by American Express. Both parties agreed that section 57.105(7), Florida Statutes (2014), transforms any such unilateral contractual attorney's provision into a reciprocal obligation whereby the prevailing party is entitled to recover reasonable fees and costs. As an alternative basis for recovering attorney's fees, Alexander asserted that the inequitable conduct doctrine

discussed in *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998), and *Moakley v. Smallwood*, 826 So. 2d 221, 225 (Fla. 2002), would apply if HFC opposed attorney's fees by asserting that the agreement upon which it had sued did not exist. HFC argued unsuccessfully to the county court that Alexander could not seek attorney's fees pursuant to a contract to which HFC was adjudicated to be a stranger. The county court found Alexander entitled to recover attorney's fees and costs based upon the credit card agreement and section 57.105(7), and awarded her \$20,371.65 in attorney's fees.

The circuit court in its appellate capacity upheld the county court's award finding that HFC sued based upon a contract that contained an attorney's fee award provision, which was made reciprocal by section 57.105(7). It also found that HFC was estopped from challenging the award of attorney fees by arguing that no contract existed between it and Alexander. HFC timely petitioned for second-tier certiorari review to this court.

#### **STANDARD OF REVIEW**

A district court of appeal may review by writ of certiorari a decision by the circuit court sitting in its appellate capacity. Fla. R. App. P. 9.030(b)(2)(B). To prevent the abuse of this procedure as a "second appeal," the standard of review is limited. *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000). On certiorari review, the district court may only determine two issues: (1) whether procedural due process was afforded; and (2) whether there was a departure from the essential requirements of law. *Id.* HFC does not claim that it was denied procedural due process, thus the only issue before this Court is whether the circuit court applied the correct law when it affirmed the county court's award of attorney's fees and costs to Alexander.

## **ABSENCE OF CONTRACT BETWEEN THE PARTIES**

There is no dispute that there was a contract between American Express and Alexander, namely the written credit card agreement; however, HFC was adjudicated to be a stranger to that contract. The county court's determination that HFC was not the assignee of the credit card agreement between American Express and Alexander means that there was never a contract between HFC and Alexander. In *Bank of New York Mellon v. Mestre*, 153 So. 3d 953 (Fla. 5th DCA 2015), the bank's attempt to foreclose on a mortgage was halted when the trial court determined that the signatures on the loan documents were not those of the Mestres and were forgeries. Under those circumstances, we held that no legal obligations were ever created between the parties; therefore, the Mestres could not recover attorney's fees based upon those same loan documents. *Id.* at 956; see also *Novastar Mortg., Inc. v. Strassburger*, 855 So. 2d 130, 130 (Fla. 4th DCA 2003) (holding that mortgage could not serve as basis for award of attorney's fees to person who was not party to mortgage).

In *Surgical Partners, LLC, v. Choi*, 100 So. 3d 1267 (Fla. 4th DCA 2012), the court dealt with a situation where there was a signed employment agreement between the medical association and physician. The physician obtained summary judgment and avoided the association's enforcement of the contract by successfully arguing that the agreement never became effective because a condition precedent had not been performed by the medical association. *Id.* at 1268. After the summary judgment was affirmed on appeal, the physician sought and was awarded attorney's fees under that same employment agreement. *Id.* at 1268-69. The Fourth District reversed because, despite the physical existence of the contract, it never became legally effective and could

not be enforced by either party. *Id.* at 1286. "The doctor simply cannot avoid a liquidated damages provision by claiming the agreement never came into effect or was unenforceable, and at the same time be entitled to attorney's fees under the same agreement." *Id.* at 1268. If there is no contract between the parties which would entitle one to recover attorney's fees in the first place, "there is no basis to invoke the compelled mutuality provisions of" section 57.105(7). *Fla. Med. Cent., Inc. v. McCoy*, 657 So. 2d 1248, 1252 (Fla. 4th DCA 1995). The same holds true here, meaning that Alexander cannot employ section 57.105(7) to enforce the attorney's fees provision of the credit card agreement against HFC, after proving that HFC never became a party to that contract. Thus, the circuit court departed from the essential requirements of the law by applying the wrong law when it upheld the county court's award of attorney's fees.

#### **ESTOPPEL BARS ALEXANDER, NOT HFC**

As an alternative or additional ground for affirming the county court's award of fees and costs to Alexander, the circuit court found that HFC, having based its suit on assignment of the credit card agreement, was estopped from denying the existence and enforceability of that agreement and its attorney's fees provision, even after the county court granted summary judgment. That ruling was also the application of the wrong law. "In judicial proceedings, a party simply is not estopped from asserting a later inconsistent position (if that it can be called), *unless* the party's initial position was *successfully* maintained." *Leitman v. Boone*, 439 So. 2d 318, 322 (Fla. 3d DCA 1983) (emphasis in original). "One cannot seriously contend that a litigant cannot claim there is a contract and say to a court, 'if, however, you find against me on my claim, then based on that finding, you cannot award attorneys' fees to my opponent.'" *Id.* at 319. HFC did not

*successfully* maintain that there was a contract between it and Alexander, and thus HFC is "not estopped from thereafter maintaining that since there is no contract, no attorneys' fees can be awarded." *Id.* Here, as in *Leitman*, it was the county court rather than the plaintiff who found that no contract existed. Therefore, HFC is "not estopped from relying upon that adverse ruling and asserting any position consistent with the ruling." *Id.* at 323. On the other hand, Alexander is indeed estopped from relying on the credit card agreement to recover attorney's fees after she successfully maintained that HFC was not a party to that agreement. It is Alexander, rather than HFC, that has *successfully* asserted irreconcilably inconsistent positions in this litigation.<sup>1</sup>

Estoppel would have applied against HFC if it had been able to prove that Alexander's account had been validly assigned to HFC, but then lost the case because Alexander prevailed upon her first defense that the charges were unauthorized and she had properly notified American Express. Under those nonexistent, hypothetical facts, HFC's assigned rights under the agreement would have been established; thus, HFC certainly could not then alter course to avoid payment of attorney's fees by disavowing the assigned agreement's terms and conditions. See *Leitman*, 439 So. 3d at 323 (acknowledging similar outcome on similarly hypothetical, nonexistent facts).

The lower court's reliance upon *MCG Financial Services, L.L.C., v. Technogroup, Inc.*, 149 So. 3d 118 (Fla. 4th DCA 2014), is misplaced. In *MCG*, the plaintiff sued defendants on a written contract that mistakenly referred to a different company and did not identify or refer to the defendants. *Id.* at 119. Without objection, the contract was

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<sup>1</sup> "Heads I win; tails I win; and if the coin falls in a crack and remains upright, I win then, too." *Leitman*, 439 So. 2d at 325 n.1 (Schwartz, J. dissenting).

admitted into evidence and all parties stipulated that the defendants were the real parties in interest despite not being named in the contract. *Id.* The defendants in *MCG* prevailed at trial by proving that they had already paid all sums due to a collection agency. *Id.* at 120. After that portion of the case, the plaintiff in *MCG* obtained new counsel who asserted that defendants could not seek attorney's fees under that same contract because the defendants were not named in the contract. The court of appeal found that plaintiff was estopped to assert a position inconsistent with what it successfully urged before, which position was also inconsistent with the stipulated evidence at trial. *Id.* at 121. Here, Alexander succeeded in proving there was no contract between HFC and her. Where there is no contract between the parties, there can be no contractually-based award of attorney's fees.

#### **NO FINDING OF INEQUITABLE CONDUCT**

Alexander argued that she would also be entitled to attorney's fees against HFC based upon the inequitable conduct doctrine which was discussed in *Bitterman*, 714 So. 2d at 365. We need not discuss this claim as there is no express finding by the county court of inequitable conduct or bad faith; therefore, this doctrine cannot serve as the basis for awarding fees in this case. *Moakley*, 826 So. 2d at 227.

#### **ON REMAND**

For the reasons set forth above, we find that the circuit court departed from the essential requirements of the law by applying the wrong law in upholding the county court's award of \$20,371.65 as attorney's fees in favor of Alexander. Likewise, the award of \$6,700 for Alexander's attorney's fee expert is also set aside. Accordingly, we grant the petition, quash the circuit court's final order, and instruct it to enter an order reversing

the county court's award of attorney's fees, expert witness fees, and prejudgment interest to Alexander. The circuit court's award of appellate attorney's fees to Alexander is also quashed for the same reasons. HFC did not contest the county court's award of \$700.90 as taxable costs to Alexander, thus, that portion of the county court's order and judgment on attorney's fees and costs is undisturbed.

PETITION GRANTED; ORDER QUASHED; REVERSED AND REMANDED WITH INSTRUCTIONS.

PALMER and LAMBERT, JJ., concur.