

IN THE FOURTH DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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CASE No.: 4D23-2376  
L.T. CASE No.: CACE 19-20678

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SANDS HARBOR RESORT & MARINA, LLC, ET AL.,

APPELLANT,

V.

TAHA BROTHERS, INC., ET AL.,

APPELLEE.

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AN APPEAL OF A FINAL ORDER OF THE OF THE SEVENTEENTH  
JUDICIAL CIRCUIT COURT, IN AND FOR BROWARD COUNTY, FLORIDA

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**REPLY BRIEF ON THE MERITS**

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## INTRODUCTION

The first sentence in appellee’s brief is: “[t]he past rarely defines the future.” But this philosophy is antithetical to appellate jurisprudence. An appellate court’s decision on the merits of a case defines and controls future proceedings in the trial court. The “law of the case” doctrine is firmly bedded in this legal principle, and it applies to the attorney’s fees at issue in this case.

Taha’s notion that law of the case **never** applies to a discretionary attorney’s fee statute is a misstatement of the law. The “law of the case” doctrine does not turn on whether the attorney’s fee statute is discretionary or mandatory. No cases cited in Taha’s Answer Brief even suggests that it does.

Additionally, Taha has been aware that Sands Harbor has been seeking to recover its reasonable attorney’s fees incurred in defending Taha’s baseless claims since October 24, 2020. On October 12, 2020, the trial court entered an order granting substitution of undersigned counsel for Sands Harbor. (R. 778-79.) On November 24, 2020, Sands Harbor filed its Response in Opposition to Taha’s Motion for Preliminary Injunction. (R. 913.) In the response, Sands

Harbor requested the court order Taha to post a bond for the full amount of Sands Harbor's attorney's fees. (R. 913, 924.) In its Reply, Taha failed to object. (R. 1137 – 1234.) Taha had notice that Sands Harbor was seeking to recover its reasonable attorney's fees but failed to object and that is all that is required to satisfy the requirements of *Stockman v. Downs*, 573 So. 2d 835, 837 (Fla. 1991) (“The fundamental concern is one of notice”).

### **ARGUMENT**

**I. Taha's blanket assertion that law of the case is inapplicable to all discretionary attorney's fee statutes is not supported by any legal authority it cites in the Answer Brief.**

Taha places its reliance on *Pompano Masonry Corp v. Anastasi*, 125 So. 3d 210 (Fla.4<sup>th</sup> DCA 2013), to support its argument that the law of the case does not apply to an appellate court's fee award where the statutory basis for fees is discretionary. But that is not the holding of the case.

In *Pompano*, this Court addressed a distinction between two of its prior cases involving the application of law of the case to an appellate attorney's fee award.

First, in *Langer v. Fels* 93 So. 3d 1069 (Fla 4<sup>th</sup> DCA 2012) the court applied law of the case to its denial of appellate attorney's fees in the prior merits appeal because the appellate record lacked evidence to satisfy the criteria under Florida Statutes, sections 733.606 and 733.619. These statutes provided for an award of attorney's fees against a personal representative for breach of fiduciary duty and improper exercise of power.

Second, in *McNamara v. City of Lake Worth*, 956 So. 2d 509 (Fla. 4<sup>th</sup> DCA 2007), the court in the merits appeal had denied appellate attorney's fees under Florida Statute, 57.105 imposing attorney's fees as a sanction unrelated to the merits of the case. However, the appellate court did not apply law of the case because it was a sanctions based fee statute applicable to misconduct in the trial court.

The Pompano court compared the different outcomes in *Langer* and *McNamara*. The court explained that law of the case doctrine applied in *Langer* addressed statutes that provide attorney's fees as a matter of law. In other words, the court's decision to deny fees was based on applying the applicable law to the undisputed facts in the

record. Conversely, McNamara involved sanctions that centered around disputed factual issues that occurred during the initial trial court proceedings, not the record on appeal. In other words, it was a collateral issue to the merits of the case.

But the *Pompano* court did not hold that law of the case is inapplicable to a discretionary attorney's fee statute. The court merely held that an award of appellate attorney's fees as a sanction is not binding law of the case because it required special fact-finding unrelated to the merits. *Id.* at 212. That is not the case here.

In fact, the analysis in *Pompano* supports Sands Harbor's position that law of the case is applicable. It illustrates that the law of the case applies when the court's decision on the appellate fee award is reached by applying the controlling law to the undisputed facts on the record.

**II. Taha has been on Notice of Sands Harbor's Attorney's Fee Claim Since November 24, 2020 and that is All that is Required to Satisfy Stockman.**

Taha has been on notice that Sands Harbor would be seeking its reasonable attorney's fees in defending Taha's baseless claims since at least November 24, 2020. The Record establishes the

following with respect to Taha's notice of Sands Harbor's attorney's fee claim.

**A. Sands Harbor Provided Taha Notice that it was Seeking Attorney's Fees on November 24, 2020.**

On October 12, 2020, the trial court entered an order granting substitution of undersigned counsel for Sands Harbor. (R. 778-79.) On November 24, 2020, Sands Harbor filed its Response in Opposition to Taha's Motion for Preliminary Injunction. (R. 913.) In the response, Sands Harbor requested the court order Taha to post a bond for the full amount of Sands Harbor's attorney's fees. (R. 913, 924.) In its Reply, Taha did not object or otherwise claim that Sands Harbor had somehow waived entitlement to its reasonable attorney's fees. (R. 1137 – 1234.)

**B. Sands Harbor Again Provided Taha Notice that it was Seeking Attorney's Fees on April 29, 2021.**

On April 29, 2021, Sands Harbor filed its Motion for Summary Judgment. (R. 2104 – 2327.) In the Motion, Sands Harbor requested its reasonable attorney's fees. "Counter-Defendants further request, pursuant to statute, an award for reasonable attorneys' fees and costs incurred in the defense of this matter." (R. 2106.) In its Response, Taha did not object or otherwise claim that Sands Harbor

had somehow waived entitlement to its reasonable attorney's fees. (R. 2704 - 2789.)

In its Answer Brief, Taha cites several cases for the proposition that failure to file a response objecting to a demand for attorney's fees made in a summary judgment motion is not a waiver of *Stockman*. (AB. at 13.) See e.g. *Taylor v. T.R. Props., Inc. of Winter Park*, 603 So.2d 1380, 1381 (Fla. 5<sup>th</sup> DCA 1992); *Lenahan v. Lenahan*, 327 So.3d 353 (Fla. 3d DCA 2021). Importantly, however, as Taha acknowledges, the basis for those holdings was that there was no requirement in the Florida Rules of Civil Procedure that would require a party to respond in any way to that demand prior to the hearing on the motion for summary judgment. (AB. at 13-14.) But Florida Rule of Civil Procedure 1.510 was amended in 2021. Under the amended Rule, the non-movant is required file a response at least twenty (20) days prior to the time set for hearing. Fla. R. Civ. P. 1.510(c)(5). Here, Taha filed its required Response and did not object Sands Harbor's fee claim. (R. 2704 - 2789.) Accordingly, Taha waived any *Stockman* argument.

**C. Taha Acknowledged it was on Notice that Sands Harbor was Seeking Attorney’s Fees in its Own Unopposed Motion for Entry of Final Judgment.**

On November 18, 2021, Taha filed an Unopposed Motion for Entry of Final Judgment. (R. 4902.) In the Motion, Taha states that Sands Harbor requests “that the Final Judgment provide that the Court retains jurisdiction to determine entitlement to attorneys' fees, if any, and to award any taxable costs due to Counter-Defendants.” (R. 4903.)<sup>1</sup> Taha had notice that Sands Harbor was seeking entitlement to fees and did not object. In doing so, Taha’s acquiescence waived any *Stockman* argument.

**D. Conclusion.**

The fact that prior counsel for Sands Harbor did not make a demand for attorney’s fees in its pleadings, is of no moment. Taha asks this Court to place form over substance and to ignore the fundamental concern of *Stockman*. “Where a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the

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<sup>1</sup> This was prior to this Court’s Order granting Sands Harbor’s motion for appellate attorney’s fees which established entitlement as the law of the case.

failure to plead a claim for attorney's fees.” *Stockman v. Downs*, 573 So. 2d 835, 838 (Fla. 1991) citing *Brown v. Gardens by the Sea S. Condo. Ass'n*, 424 So.2d 181 (Fla. 4th DCA 1983) (defendant's failure to raise entitlement to attorney's fees until after judgment was not fatal to claim where the issue of attorney's fees was raised at pretrial conference and plaintiff's pretrial statement listed defendant's entitlement to fees as an issue); *Mainlands of Tamarac by Gulf Unit No. Four Ass'n, Inc. v. Morris*, 388 So.2d 226 (Fla. 2d DCA 1980) (parties' stipulation during trial that the question of attorney's fees would be heard subsequent to final hearing would permit recovery of attorney's fees despite failure to plead entitlement to fees).

As detailed above, Taha was put on notice multiple times that Sands Harbor was seeking entitlement to fees and Taha repeatedly waived any objection it may have had to a technical failure to plead. Taha concedes that it approved, without objection, the language of the proposed trial judgment retaining jurisdiction to determine entitlement to attorney's fees. (AB. at 4.) *Stockman's* fundamental concern of notice – that Sands Harbor would be seeking prevailing party attorney's fees under the same statutes Taha was seeking fees

– was clearly met. *See also Storob v. Sphere Drake Insurance*, 730 So. 2d 375 (Fla. 3d DCA) (reversing denial of attorney’s fee award, finding that the “waiver” exception set forth in *Stockman* applied because appellee's legal counsel consented to the reservation of jurisdiction as to attorneys' fees in the proposed order, thereby demonstrating that the appellee was aware fees were an issue in the case); *Federal Auto Insurance, Inc. v. Business Acquisitions Brokerage, Inc.*, 839 So.2d 767 (Fla. 4th DCA 2003) (holding that the *Stockman* exception applies where a party agrees to a proposed order which expressly reserves jurisdiction on the issue of attorney's fees).

Here, the fundamental concern of *Stockman* – notice – was met. Taha has not, and cannot, claim that it was not on notice of Sands Harbor’s fee claim. Taha was on notice and failed to object. Taha’s reliance on *Stockman* is misplaced and disingenuous. Taha ignores the fundamental concern of *Stockman*, hoping to avoid the price of bringing its baseless claims – responsibility for Sands Harbor’s reasonable attorney’s fees.

## CONCLUSION

For the foregoing reasons, Appellant asks this Honorable Court to reverse the Final Order and remand with instructions for the trial court to enter an order finding that Sands Harbor is entitled to its reasonable attorney's fees in this matter and to hold a hearing to determine the amount.



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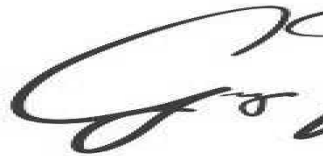
**CERTIFICATE OF SERVICE**

I certify that on this 12th day of June, 2024 a true and correct copy of the foregoing has been furnished by electronic transfer via the Florida Court E-Filing Portal to:

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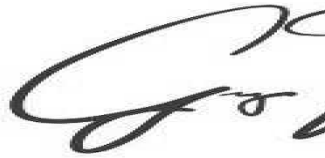


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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Reply Brief on the Merits complies with the font requirements of Florida Rule of Appellate Procedure 9.045 and the word count requirements of Florida Rule of Appellate Procedure 9.210.

A handwritten signature in black ink, appearing to read "G. Hatch, III", written in a cursive style.

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