

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402**

July 28, 2004

CASE NO.: 4D03-1677
L.T. No. : 96-12946 CACE03

MARK B. PERLMAN, DAVID K.
BRENNER, ETC., ET AL.

v.

ABEL & ZIMMERMAN

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

ORDERED that the appellee Abel & Zimmerman's motion for attorney's fees filed November 25, 2003, is granted under contract against Brenner. On remand the trial court shall set the amount of the attorney's fees to be awarded for this appellate case. If a motion for rehearing is filed in this court, then services rendered in connection therewith, including but not limited to preparation of a responsive pleading, shall be taken into account in computing the amount of the fee.

ORDERED that the motion for costs filed by Scott A. Ferris is hereby denied without prejudice to seek costs in the trial court.

ORDERED that the appellants David Brenner and J.J. Shear Jewelers, Inc.'s motion for attorney's fees and costs is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

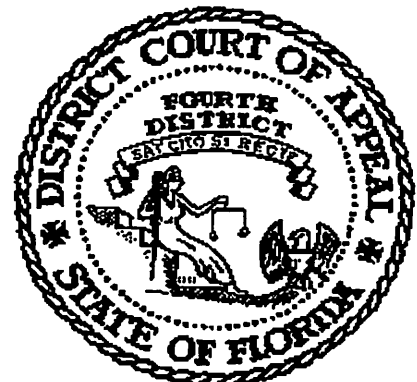
Howard Forman, Clerk
Scott A. Ferris

Stephane Dupont

Mark Perlman

lc

Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal



IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
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JULY TERM 2004

**MARK B. PERLMAN, DAVID K.
BRENNER**, individually, and **J.J. SHEAR
JEWELRY, INC.**, a Florida corporation,

Appellants,

v.

ABEL & ZIMMERMAN,

Appellee.

CASE NO. 4D03-1677

Opinion filed July 28, 2004

Appeal from the Circuit Court for the
Seventeenth Judicial Circuit, Broward County;
Patti Englander Henning, Judge; L.T. Case No.
96-12946 CACE (03).

Mark Perlman of Mark Perlman, P.A.,
Hallandale Beach, for appellants.

Scott A. Ferris of Law Offices of Scott A.
Ferris, P.A., Miami, for appellee.

PER CURIAM.

Defendants and counsel raise several issues involving the assessment of attorney's fees under section 57.105, Florida Statutes (1995). The first is that the trial court could not have awarded attorney's fees under the 1995 version of the statute, because the statute in that form required that there be a complete absence of justiciable issue of law and fact as to the entire action or defense. *Muckenfuss v. Deltona Corp.*, 508 So. 2d 340 (Fla. 1987). The trial court found that the defense in this case was frivolous, and appellants argue that because the trial court had directed a verdict against the plaintiff on the RICO claim, it follows that the entire defense was not frivolous.

The trial court rejected that argument because the RICO claim was simply an alternative theory to the fraud and civil theft claims, and plaintiff prevailed on both of those claims. We are unable to say that the trial court erred in this reasoning, particularly where, as in this case, we have not been furnished with a copy of the transcript of the trial. We therefore affirm the award of section 57.105 fees.

We reverse, as appellee concedes we should, the amount of prejudgment interest, to be recalculated from July 30, 2001. We also reverse the order holding the appellant in civil contempt because there was no purge provision, and the fine was unsupported by evidence of an injured party's actual loss. *JPG Enters., Inc. v. Viterito*, 841 So. 2d 528 (Fla. 4th DCA 2003).

We affirm the denial of attorney's fees to appellants under section 772.104(1), Florida Statutes (1995). Contrary to appellants' argument, a fee award under this statute is not mandatory, but rather dependent on the trial court finding that the claim was without substantial fact or legal support. There was no such finding in this case and, without a transcript of the trial, we cannot determine that the denial of fees was error. Affirmed in part and reversed in part.

POLEN, KLEIN and GROSS, JJ., concur.

**NOT FINAL UNTIL DISPOSITION OF ANY
TIMELY FILED MOTION FOR REHEARING.**

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