SUPREME COURT OF FLORIDA

CASE NO: 81,232

DISTRICT COURT OF APPEAL
4TH DISTRICT - NO:91-2930

Original

A. PROSPERI,

Petitioner,

v.

CODE, INC.,

Respondent.

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent, CODE, INC., a building contractor, entered into a written Agreement Between Owner and Contractor, with Petitioner, PROSPERI, to make improvements on real property owned by Petitioner [R-7-91]. The parties' written agreement was not the entire contract "but contained certain terms which were the core of what was essentially a combination written and oral contract" [R-134].

Respondent submitted a Contractors Affidavit For Final Payment [R-13] on January 11, 1989 seeking payment from Petitioner in the amount of $37,538.01. Petitioner subsequently submitted a Notice Of Intent To Lien to Respondent on January 23, 1989 seeking payment of $31,898.01 on the unpaid balance [R-18]. On March 1, 1989, Respondent filed a Claim of Lien indicating that $31,898.01 remained unpaid on its contract with Petitioner [R-10].

Respondent filed a multicount suit on July 11, 1989 seeking to foreclose a mechanics lien in the amount of $31,898.01 for breach of contract for failure to pay $31,898.01, quantum meruit, and stated account [R-1-18]. Petitioner filed an Answer and Counterclaim on July 31, 1989 [R-19-27] and a second Amended Counterclaim on September 4, 1990 [R-101-122].

Following a non-jury trial, the court entered a Partial Final Judgment which found that Respondent was entitled to $31,898.01, the same amount set forth in its Claim of Lien, for

Petitioner's breach of contract [R-136]. The court denied Respondent's mechanics lien claim stating that the filing of untrue interim affidavits deprived it of its lien [R-135]. The court also denied Respondent's action for stated account finding that the account was not agreed upon by the parties and also denied Respondent's action for quantum meruit since it had an adequate remedy at law. As for Petitioner's Counterclaim the court permitted a set off against the $31,898.01, awarded to Respondent on its breach of contract claim, in the amount of $14,588.95, thereby entering an affirmative net judgment in Respondent's favor of $17,309.06 [R-134-137]. The court retained jurisdiction of the matter to enter a Final Judgment once the issue of attorneys fees had been determined.

Petitioner filed a Verified Motion For Attorney's Fee and supporting affidavits [R-151-158]. After presentation of argument by counsel on the matter the court entered an order denying Petitioner's Motion For Attorney's Fees [R-159-161]. The court held that although Respondent did not prevail on its mechanics lien it did obtain an affirmative net judgment in its favor and that because of this result Petitioner was not the prevailing party in the case and not entitled to attorneys fees under Section 713.29 [R-159]. Further, the court found that Petitioner was not entitled to recover attorneys fees under Section 713.31 for fraudulent claim of lien or as special damages since the final affidavit and claim of lien were not fraudulent or perjurious and that any false interim affidavits were not used as the basis of the lien [R-159-160].

The Petitioner moved for rehearing of the Order denying fees. [R-162-165]. Respondent filed a memorandum in opposition [R-183-185]. The trial court denied Petitioner's motion for rehearing. [R-179]. Petitioner filed a notice of appeal. [R-180].

The Fourth District Court of Appeal affirmed the trial court's denial of attorney's fees to Petitioner, [A-3] citing as authority M & P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA), rev. dismissed, 589 So.2d 294 (Fla. 1991). See also AAA Sod, Inc. v. Weitzer Corp., 513 So.2d 750 (Fla. 4th DCA 1987); General Dev. Corp. v. John H. Gossett Const. Co., 370 So.2d 380 (Fla. 2d DCA), cert. denied, 379 So.2d 205 (Fla. 1979) and certified the same question as was certified in M & P Concrete Products.

Additionally, the Fourth District Court of Appeals acknowledged this court's recent opinion in Moritz v. Hoyt Enterprises, Inc., 604 So.2d 807 (Fla. 1992) as well as the heretofore uniform approach of most courts on this issue.

Petitioner moved for rehearing of the Fourth District Court's opinion. [A-4]. Respondent filed a reply to Petitioner's motion for rehearing. [A-51]. Petitioner filed a motion to permit a reply to Respondent's reply to a motion for rehearing which was denied. [A-6]. On the motion for rehearing, the Fourth District Court of Appeal granted the rehearing in part to include an additional question as one of great public importance. [A-7].

The Fourth District Court certified the question as to whether the test of Moritz v. Hoyt for determining who is the prevailing party for the purpose of awarding attorney's fees applies to fees awarded under Section 713.29, Florida Statutes. The Appellate Court also entered an order dated November 4, 1992, granting Respondent's request for appellate attorneys' fees. [A-3A]. The mandate of the Fourth District Court of Appeal was issued on January 15, 1993. [A-8].

Petitioner filed his notice to invoke discretionary jurisdiction on January 27, 1993. [A-9].

SUMMARY OF THE ARGUMENT

The certified question presented by the Appellate Court in M & P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA 1991), appeal dismissed 589 So.2d 294 (Fla. 1991) should be answered in the negative.

Decades of precedent from Emery v. International Glass and Manufacturing, Inc., 249 So.2d 496 (Fla. 2nd DCA 1971) through the decisions of this court of C.U. Associates, Inc. v. R.B. Grove, Inc., 472 So.2d 1177 (Fla. 1985) and Fixel Enterprises, Inc. v. Theis, 524 So.2d 1015 (Fla. 1988) interpreting the legislative intent of Florida Statute Section 713.29, plainly state that attorney's fees should not be awarded to a defendant merely because he successfully defends the impression of a lien but nevertheless is found liable for contract money damages for the labor and/or materials furnished for his benefit arising out of the same transaction.

Petitioner is not entitled to recover attorney's fees pursuant to Florida Statute Section 713.31 or otherwise for his fraudulent lien/or interim affidavit theories. The trial court found that although Respondent filed false interim affidavits they were not the basis of the lien, and that the final affidavit and claim of lien were neither perjurious or fraudulent. Moreover, even though the court denied Respondent's claim of lien, which set forth $31,898.01 as due and owing for Petitioner, the court specifically found that Respondent was entitled to recover $31,898.01 as damages resulting from Petitioner's breach

of contract.

Further, Petitioner is not entitled to recover attorney's fees under Holding Electric, Inc. v. Roberts, 530 So.2d 301 (Fla. 1988) since an award of attorney's fees pursuant to that case are to be awarded when a contractor fails to comply with the requirements of Florida Statute Section 713.06(3)(d)1. In the present case Respondent fully complied with Florida Statute Section 713.06(3)(d)1 by filing a final affidavit which was neither perjurious nor fraudulent. Additionally, Petitioner is not entitled to recover attorney's fees under Florida Statute Section 713.06 in conjunction with Holding Electric, Inc., supra, since Holding is non-applicable to this matter and Florida Statute Section 713.06 does not specifically provide for an award of attorney's fees.

The certified question presented by the Appellate court, whether the test of Moritz v. Hoyt Enterprises, Inc., 604 So.2d 807 (Fla. 1992) for determining who is the prevailing party for the purposes of awarding attorney's fees, applies to fees awarded under Florida Statute Section 713.29, should be answered in the negative. The aforementioned significant precedents, including recent decisions of this court in determining who is the prevailing party for purposes of awarding attorney's fees under Florida Statute Section 713.29, as well as the legislative intent and policy considerations evolved dictate this. Even under the Moritz test, substantial arugment can be made that the Respondent prevailed by achieveing some of the benefit it sought in bringing

suit.

The order of the Fourth District Court of Appeals awarding Appellate attorney's fees to the Petitioner should be affirmed. CODE, INC., is entitled to its Appellate attorney's fees pursuant to to Florida Statute Section 713.29, where it prevailed against the Appellant's claims that Appellant was the prevailing party in the enforcement of a lien. To conclude otherwise would encourage "specious claims or defenses" contrary to Emery v. International Glass & Mfg. Inc., undermine the prevailing party issue test of Mortiz v. Enterprises, Inc. and run contrary to the "equitable approach" acknowledged by the Fourth District Court of Appeal and stated in S.C.M. Associates, Inc., v. Rhodes, 395 So.2d 632, 634 (Fla. 4th DCA 1981).

ARGUMENT

ISSUE I

1. IS AN OWNER WHO PREVAILS ON A COMPLAINT BY A CONTRACTOR OR A SUBCONTRACTOR TO ENFORCE A LIEN UNDER PART I, CHAPTER 713, FLORIDA STATUTES (1989), ENTITLED TO ATTORNEY'S FEES UNDER 713.29, EVEN THOUGH, IN THE SAME SUIT, THE CONTRACTOR PREVAILED AGAINST THE OWNER ON A CLAIM FOR MONEY DAMAGES FOR BREACH OF CONTRACT, BOTH CLAIMS ARISING OUT OF THE SAME TRANSACTION?

In the case sub judice, the Respondent, CODE, INC., filed a multicount law suit against the Petitioner, PROSPERI, seeking the foreclosure of a mechanics lien and damages on alternative legal theories [R1-18]. After a non-jury trial the court entered a partial final judgment wherein the Respondent had a money judgment entered in its favor. Specifically, the court found Respondent prevailed on its claim for breach of contract and was entitled to $31,898.01, the entire amount claimed, and that Petitioner was entitled to a setoff of $14,588.95 thereby resulting in a net judgment in favor of Respondent of $17,309.66 [R-134-137]. The Court denied Respondent's counts for and account stated, foreclosure of a mechanics lien and for quantum meruit because of Respondent's remedy at law [R-135-136]. The Court, in its subsequent Order found against the Petitioner on his fraudulent lien theories in his defense of the mechanics lien or his counterclaims [R-159-160].

The court reserved jurisdiction to award costs and attorneys fees [R-137]. After presentation of argument by counsel and

weighing case law the court entered an order denying the Petitioner an award of attorneys fees as a prevailing party under Florida Statute section 713.29 or as additional special damages to those awarded in the original partial judgment [R-159-161]. Further, the court specifically noted that since a money judgment had been entered in favor of CODE, INC., Petitioner was not entitled to attorney's fees as a prevailing party under Section 713.29 based on M & P Concrete Products v. Woods, 590 So.2d 429 (Fla. 4th DCA 1991.) Appeal dismissed, 589 So.2d 294 (Fla. 1991).

Petitioner sought an appeal to the Fourth District Court of Appeal, of the trial court's Order which the Appellate Court affirmed stating in pertinent part:

> "We affirm the Order of the trial court denying attorney's fees to an owner who successfully defended a mechanics lien claim but against whom a judgment or a related breach of contract action was rendered. M & P Concrete Products, Inc. v. Woods, 590 So. 2d 429 (Fla. 4th DCA), rev. dismissed, 589 So. 2d 294 (Fla. 1991). See also AAA Sod, Inc. v. Weitzer Corp., 513 So.2d 750 (Fla. 4th DCA 1987);General Dev. Corp. v. John H. Gosset Const. Co., 370 So.2d 380 (Fla.2d DCA). cert. denied, 379 So.2d 205 (Fla. 1979).

The Petitioner has sought an award of attorneys fees under Florida Statute section 713.29 as a prevailing party, even though Respondent proved its entire claim and recovered substantially more than Petitioner's defenses sought to offset, as a result of the trial court's findings in its order denying attorneys fees

that attorneys fees and costs incurred in this action directly, naturally, and proximately resulted from the filing of false interim affidavits by Respondent. However, Petitioner does not account for the fact that the court found, within the same order denying attorneys fees, that these false interim affidavits were not used as the basis of Respondent's lien and that the final affidavit, required by Florida Statute for enforcement of a claim of lien was neither fraudulent nor perjurious. [R-159-160].

Although the mechanics lien statute has been amended and modified by the Florida Legislature since its original enactment its purpose has remained to afford a contractor, laborer or materialman assurance of being compensated for their labor or services. Emery v. International Glass & Mfg., Inc., 249 So.2d 496 (Fla. 2nd DCA 1971). The court also stated that the mechanics lien statute is for the benefit of a lienor and that the primary purpose of Florida Statute section 713.29 is to prevent any diminution of the lienor's full compensation while also discouraging specious claims or defenses. Emery at 500.

The legislative intent of the mechanics' lien statute is plainly set forth at pages 499-500 of Emery

> "...It is patently the thrust of appellant's argument that since they prevailed in the mechanics' lien aspect of this "action" they are entitled to recover attorneys' fees pursuant to this section notwithstanding that they did not ultimately prevail in the legal aspect. This position is untenable.

> In the first place, the statute in question is embraced within the mechanics' lien law and should be considered in context with the purpose and other provisions thereof. In this frame of reference it was obviously not the intent of the legislature to award attorneys' fees to a defendant in a mechanics' lien merely because he successfully defends against the impression of a lien yet is nevertheless found liable in damages, in the same case, for labor and/or materials furnished for his benefit. To conclude otherwise would be anathema to the purpose of the mechanic's lien law which is to afford the laborer or materialman adequate assurance of being fully compensated for his labor or services. The entire statute is essentially for the benefit of a claimant, not a defendant; and the section providing for attorneys' fees is primarily calculated to preclude any diminution of the claimant's full compensation for which he is suing while, at the same time, discouraging specious claims or defenses."

In Sharpe v Ceco Corporation, 242 So.2d 464 (Fla. 3rd DCA 1970) the court in determining whether a claimant who recovered an amount less than claimed in its lien, as a result of a credit awarded to defendant for costs of correcting defective work was entitled to attorneys fees under Florida Statute section 713.29, it was held that the prevailing party is the party who has an affirmative judgment entered in their favor at the conclusion of the entire case. Although the Respondent, CODE, INC., is not the prevailing party for the purposes of Florida Statutes section 713.29, because they were not successful on the mechanics lien count, Petitioner cannot be held the prevailing party because at the conclusion of the entire case the Respondent had an affirmative judgment entered in its favor.

In Emery v. International Glass & Mfg., Inc., supra, the facts were similar to those in the present case. In that case, a contractor brought a multicount suit against the property owner for foreclosure of a mechanics lien and for breach of contract to which the owner counterclaimed alleging a breach of warranty of workmanship. The trial court denied the contractors mechanics lien but after allowing a setoff under the property owner's counterclaim entered a money judgment for the contractor Emery, at 497. The court held that it was not the intent of the mechanics lien statute to award attorneys fees under Florida Statute section 713.29 to a property owner merely because they are successful defending the mechanics lien portion of the action when the same property owner is ultimately found liable for damages to the lienor for damages under some other alternative legal theory in the same case, Emery, at 500.

Thus it follows from the holdings in Sharpe and Emery, supra, that notwithstanding the fact that Petitioner successfully defended the impression of Respondent's mechanics lien claim, Petitioner cannot be held to be the prevailing party under Florida Statute section 713.29 because at the conclusion of the entire case Respondent was awarded an affirmative net judgment of $17,309.06 as damages on its alternate legal claim of breach of contract by Respondent.

The Fourth District Court of Appeal followed the net judgment theory advanced in Emery, supra, in First Atlantic Buil-

ding Corporation v Neubauer Constuction Company, 352 So.2d 103 (Fla. 4th DCA 1977). In that case the court denied the contractors mechanics lien claim but awarded damages in favor of the contractor resulting from the property owners breach of contract. The court held, citing Emery, that the contractor was the prevailing party and that the property owner was not entitled to attorneys fees under Florida Statute section 713.29 merely because the owner successfully defended the mechanics lien portion of the case. Therefore, based on the law in the Fourth District, as originally enunciated in First Atlantic Building Corporation, supra, Petitioner herein cannot be deemed the prevailing party and is not entitled to attorney's fees since the court found a breach of contract on Petitioner's part and awarded an affirmative net judgment to Respondent at the conclusion of the entire case.

The Fourth District Court of Appeal has continued to follow the net judgment theory in multicount law suits involving mechanics lien actions subsequent to its holding in First Atlantic Building Corporation, supra, in the cases Magee v. Bishop Signs, Inc., 458 So.2d 1174 (Fla. 4th DCA 1984) and M & P Concrete Products, Inc. v. Woods, supra. In Magee the appellate body reversed an award of attorneys fees and the appeal therefrom as not being ripe, but specifically indicated in dicta that in a multicount suit the party who is merely successful in defending the mechanics lien portion of the case but has an

affirmative award of damages ultimately entered against them at the conclusion of the entire case is not the prevailing party thereby entitled to an award of attorneys fees pursuant to section 713.29.

In M & P Concrete Products, supra, the authority which the trial court relied on in denying Appelle's request for attorneys fees, and the most recent prior case reviewed by the appellate court involving the same issue involved herein, the court held that in a multicourt suit a property owner cannot be the prevailing party entitled to attorneys fees if an affirmative money judgment is entered against the owner regardless of the fact that the owner is successful in defending the mechanics lien portion of the suit. It is clear that the law in the Fourth District since at least 1977 is that a property owner who has an affirmative judgment entered against them, no matter the legal basis, who within the same case was successful in defending a mechanics lien claim is not a prevailing party entitled to attorney's fees under Florida Statute Section 713.29.

The net judgment theory originally set forth in Emery v. International Glass & Mfg., Inc., supra, and followed by the Fourth District in First Atlantic Building Corporation, supra, Magee, supra, and M & P Concrete Products, supra, has been followed, or referred to, in supporting the decision of the appellate court in the following cases; General Development Corporation v. John H. Gossett Construction Co., Inc., 370 So.2d 380 (Fla. 2nd DCA

1979), Schabert v. Montaltos 445 So.2d 1136 (Fla. 2nd DCA 1984), AAA Sod, Inc. v Weitzer Corporation, 513 So.2d 750 (Fla. 4th DCA 1987), Plaza Builders, Inc. v Regis, 502 So.2d 918 (Fla.2nd DCA 1987), and Ahimsa Technic, Inc. v Lighthouse Shores Town Homes Development Company, 543 So.2d 422 (Fla. 5th DCA 1989). In all of these cases, as in the present case, a contractor or laborer brought a multicount suit against a property owner seeking to foreclose a mechanics lien or money damages on alternative legal theories. In each case the mechanics lien claim was denied but the contractor/laborer was awarded an affirmative money judgment at the conclusion of the entire action thereby prohibiting the property owner, who successfully defended the mechanics lien portion of the case, from being awarded attorneys fees as the prevailing party under Florida Statute section 713.29.

The net judgment theory has been used to award a property owner attorneys fees as prevailing party under Florida Statutes section 713.29 even when the contractors claim for a mechanics lien was held valid. In Ferrell v. Ashmore, 507 So.2d 691 (Fla.1st DCA 1987), the court found a contractor entitled to a mechanics lien for the sum of $10,819.45 and the property owner entitled to money damages in the amount of $31,128.92 based on a breach of contract claim against the contractor. Since the property owner recovered a net judgment of $20,309.47 he was determined to be the prevailing party entitled to attorneys fees

under Florida Statute section 713.29 notwithstanding the fact that he unsucessfully defended the mechanics lien portion of the case. Petitioner cites Ferrell for the proposition that the question of determining who the prevailing party is pursuant to section 713.29 is fact-specific and must take into account all parties' claims against each other. Said another way, the proposition is simply, the prevailing party pursuant to section 713.29 is the party who has an affirmative net judgment awarded in their favor after all claims between the parties are resolved at the conclusion of the entire case.

Petitioner's reliance on Metro-Centre Associates v. Environmental Engineers, Inc., 522 So.2d 967 (Fla. 3rd DCA 1988), is misplaced. In that case a contractor was denied its mechanics lien claim and was awarded damages for breach of contract by the property owner which were offset against a greater award of money damages in favor of the property owner for breach of contract by the contractor. The court held that the property owner was entitled to attorneys fees because not only did it defend the mechanics lien portion of the action, but was awarded damages in a greater amount than the contractor on the conflicting breach of contract claims. To compare the results of Metro-Centre Associates with the facts before the court, Petitioner, PROSPERI, cannot be held to be the prevailing party, therefore entitled to attorneys fees pursuant to section 713.29, since he did not receive an affirmative net judgment on the parties'

conflicting breach of contract claims regardless of the fact Appellee successfully defended the mechanics lien portion of the case.

The cases of Sanfilippo v. Larry Gracin Tile Co., Inc., 390 So.2d 413 (Fla. 4th DCA 1980) and Snaidman v. Harrell,432 So.2d 809 (Fla.1st DCA 1983) which are relied upon by Respondent in seeking an award of attorneys fees are factually distinguishable from the present case. Both cases involved a suit by a contractor only seeking to foreclose a mechanics lien claim without seeking additional damages based on alternative legal theories. In both cases the trial court found that neither party was liable to the other, thereby making the owner who successfully defended the case the prevailing party entitled to attorney's fees pursuant to Section 713.29. In the present case not only did Respondent, CODE, INC., seek to foreclose a mechanics lien but it also sought damages from Petitioner under alternative legal theories on which it was successful in obtaining an affirmative net judgment against Petitioner. Therefore, Sanfilippo and Snaidman are clearly distinguishable and therefore non-applicable to the present case.

Petitioner also relies on Forest Construction, Inc. v. Farrell-Cheek Steel Company, 484 So.2d 40 (Fla. 2nd DCA 1986) to illustrate that even where a contractor fails to establish a mechanics lien but is awarded a net judgment on an alternate legal theory the property owner who successfully defended the

mechanics lien may be entitled to statutory attorneys fees. Forest Construction, Inc. is easily distinguished from the present case because not only did the property owner successfully defend the mechanics lien claim, but the claim of lien was held to be fraudulent under Florida Statute section 713.31 with the award of attorneys fees being specifically granted under Section 713.31(2)(c). In the present case Respondent's claim of lien was merely denied, it was not determined to be fraudulent. In fact, the trial court found that Respondent was entitled to $31,898.01, the exact amount originally set out in its claim of lien, from the Petitioner under Respondent's breach of contract claim. Further, the trial court in its order denying attorneys fees to Respondent stated that although interim affidavits, which were not the basis of the lien, provided by Respondent to Petitioner were false the final affidavit, required by statute, which was the basis of the lien, was not perjurious or fradulent [R-159-160].

The application of the affirmative net judgment theory has also been applied to other similar Florida Statutes which award attorneys fees to the prevailing party. In Heindel v. Southside Chrysler-Plymouth, Inc., 476 So.2d 266 (Fla.1st DCA 1985) the court in interpreting Florida Statute Section 501.2105, dealing with deceptive trade practices, held that although the plaintiff was unsuccessful in its claim under Chapter 501, the defendant could not be the prevailing party because plaintiff had received an affirmative net judgment, based on alternative legal theories,

at the conclusion of the entire case. Petitioner cites T.A.S. Heavy Equipment, Inc. v. Delint, Inc., 532 So.2d 23 (Fla.4th DCA 1988) and United Plumbing and Heating, Inc., v. Goldberger, 452 So.2d 591 (Fla. 4th DCA 1984).

The Petitioner in his Motion For Rehearing, [R-162-176] and on appeal, has relied on Holding Electric, Inc. v. Roberts, 530 So.2d 301 (Fla. 1988) to support his argument that he is entitled to attorneys fees as prevailing party because Respondent was found to have filed false interim affidavits. Holding only dealt with the narrow issue of whether failure to deliver the final affidavit required by Florida Statutes section 713.06(3)(d)1 is a fatal jurisdictional defect. The Florida Supreme Court held that the filing of a final affidavit is merely a prerequisite to maintaining a mechanics lien foreclosure action and is not a jurisdictional bar to the filing of a mechanics lien suit. Further, the Court noted that failure by the contractor to give the required final affidavit prior to instituting the lien foreclosure suit should allow the property owner an award of attorneys fees for only that portion of the action attributable to the failure to comply with Florida Statute section 713.06(3)(d)1. It should be made clear that the Florida Supreme Court merely noted that this result should occur, and did not specifically find that any such attorneys fees awarded are to be awarded pursuant to any specific provision of Florida Statutes Chapter 713 or under section 713.06 since it does not specifically provide for the award of attorneys fees.

The holding in Holding Electric, Inc. is narrow and has no application to the instant case, because as is conceded by Petitioner, and as was found by the trial court, Respondent fully complied with Florida Statute section 713.06 (3)(d)1 by providing a non-perjurious and truthful final affidavit to Petitioner prior to instituting suit. Petitioner attempts to extrapolate from the law developed in Holding Electric, Inc., that because it was found Respondent filed false interim affidavits, which were not the basis of the lien, the final affidavit filed by Respondent, which was found not to be perjurious or fraudulent, should be disregarded and determined not to have been filed under section 713.06(3)(d)1. This is an unreasonable interpretation and extrapolation which is not supported by Holding or any other case law and should therefore not entitle Petitioner to an award of attorneys fees under Holding Electric Inc.

Petitioner also attempts to read Holding Electric, Inc., supra, in conjunction with Florida Statute section 713.06 to argue that he is entitled to an award of attorneys fees. There are two deficiencies in Petitioner's argument. First, the Florida Supreme Court merely noted that attorneys fees may be awarded in the limited situation where a contractor fails to comply with the requirements of section 713.06(3)(d)1. Second, Florida Statute section 713.06 does not provide for the award of attorneys fees in any situation or circumstances. It is clear from the findings of the trial court that not only Respondent comply with section 713.06(3)(d)1, but that that the required affidavit under that

section was neither prerjurious or fraudulent. Since Respondent complied with section 713.06(3)(d)1 and there is no provision for attorneys fees in section 713.06 the denial of attorneys fees to Petitioner is proper.

Petitioner also cites Holding Electric, Inc., supra, to illustrate that the purpose of Florida Statute section 713.06(3)(d)1 is to protect the property owner against the risk of having to pay for the same services twice, and to provide the owner an opportunity to make proper payment prior to suit being filed. In the present case Respondent fully complied with section 713.06(3)(d)1 by filing a final affidavit which the court found was neither perjurious or fraudulent. Once the final affidavit was filed the purpose of the Statute was met. Specifically, once the final affidavit and claim of lien were provided to Petitioner, he had an opportunity to verify the accuracy and truthfulness of the affidavit prior to paying Respondent. Upon being given this opportunity Petitioner opted to withhold payment thereby resulting in litigation. If Petitioner so chose he could have paid the amount claimed and brought an original action for breach of contract against Respondent.

Petitioner cites T.A.S. Heavy Equipment, Inc. v. Delint, Inc., 532 So.2d 23 (Fla.4th DCA 1988) and United Plumbing and Heating, Inc., v. Goldberger, 452 So.2d 591 (Fla. 4th DCA 1984) for the proposition that..."in multi-count complaints asserting lien claims as well as counterclaims by the owner for breach of

contract or quasi-contract claims, the owner who prevails in the lien foreclosure is entitled to fees even if he does not prevail on his counterclaim."

In T.A.S., supra, Delint, Inc. prevailed on both T.A.S.'s complaint to foreclose its lien and on its counterclaim. In United Plumbing, supra, Goldenberger successfully defended United's claims against him such that no money judgment was obtained against him unlike the case sub judice.

Petitioner seeks equity by citing S.C.M.-Associates, Inc., v. Rhodes, 395 So.2d 632, 634 (Fla. 4th DCA 1981). In S.C.M. the court concluded the owner, Rhodes, was the prevailing party because his offer to pay S.C.M. $8,119.50 at closing with no strings attached declined by S.C.M. was greater than the $3,280.40 obtained as a result of suit. At footnote 2, the court made further argument in equity in favor of Rhodes:

> "2. While we need not rest our decision on this point, a good argument can be made that when the legislature amended section 713.29 in 1977 (Ch. 77-353, section 11, Laws of Fla.) to refer to the taxing of attorney's fees "as allowed in equitable actions," it intended for the courts to have more discretion in deciding who is the prevailing party. In this case, even if Rhodes had not made his unconditional offer at closing, he might reasonable contend that he was the "equitably" prevailing party because he prevailed with respect to more than three-fourths of the money in issue."

Having prevailed with respect to more than three-fourtns of the money in issue Rhodes might reasonably contend "equitably" he was the prevailing party. In the case at bar Prosperi not only

failed with respect to three-fourths of the money in issue but failed to even successfully defend half.

Further, it should be noted, in reviewing this "equitable" contention, the court applied the principles of the net judgment rule in which a party obtained the greater flow of money in issue.

Additionally, cases which are factually similar to the present case such as Emery, First Atlantic Building Corporation, and M. P. Concrete Products, Inc., supra, have described a net judgment theory relating to the award of attorneys fees pursuant to Florida Statutes Section 713.29 in multicount lawsuits which involve at least one count to foreclose a mechanics lien. A two-step test seems to have been developed by the courts. Although not explicitly stated in any case the test asks; 1) was the contractor successful on its mechanics lien portion of the suit or was the property owner successful in its defense of the mechanics lien portion of the suit, and 2) did the successful party in the mechanics lien portion of the case also receive an affirmative net judgment at the conclusion of the entire case. Based on this unwritten test a property owner may only be entitled to attorneys fees as prevailing party under Section 713.29 when he has successfully defended the mechanics lien portion of the case and has had an affirmative net judgment awarded in his favor at the conclusion of the entire case.

Applying the unwritten two-step test the Petitioner, PROSPERI, cannot be awarded attorneys fees as prevailing party under Section 713.29 regardless of the fact that he successfully

defended the impression of a mechanics lien because the trial court found Respondent, CODE, INC. was entitled to $31,898.01, the exact amount set forth in its claim of lien, on Respondent's breach of contract, with a final affirmative net judgment awarded to Respondent in the sum of $17,309.06. Under these factual circumstances and the unwritten two-step test, most recently used by the Fourth District Court in M & P Concrete Products, Inc., supra, the denial of attorneys fees to the Petitioner is proper.

Decades of precedent interpreting the legislative intent of Florida Statute 713.29 plainly state that attorney's fees should not be awarded to a Defendant merely because he successfully defends the impression of a lien but nevertheless is found liable for contract money damages for the labor and/or materials furnished for his benefit arising out of the same transaction. The certified question posed by the Appellate Court should be answered in the negative.

ISSUE II

DOES THE TEST OF MORITZ V. HOYT FOR DETERMINING WHO IS THE PREVAILING PARTY FOR THE PURPOSES OF AWARDING ATTORNEY'S FEES APPLY TO FEES AWARDED UNDER SECTION 713.29, FLORIDA STATUTES.

In the instant case the Fourth District Court of Appeal rendered a decision affirming the trial court's denial of Petitioner's attorney's fees. In its decision, the Appellate Court stated its rationale:

> "We affirm the order of the trial court denying attorney's fees to an owner who successfully defended a mechanics lien claim but against whom a judgment on a related breach of contract action was rendered. M & P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA), Rev. dismissed, 589 So.2d 294 (Fla. 1991). See also AAA Sod, Inc. v. Weitzer Corp., 513 So.2d 750 (Fla. 4th DCA 1987); General Dev. Corp. v. John H. Gossett Construct. Co., 370 So.2d 380 (Fla. 2d DCA), Cert. denied, 379 So.2d 205 (Fla. 1979).

Also in its decision the Appellate Court acknowledged the recent opinion of this court in Moritz v. Hoyt Enterprises, Inc., 604 So.2d 807 (Fla. 1992) holding that the test for determining who is the prevailing party for purposes of awarding attorney's fees in a contract action is "to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court".

Further, in its decision the Appellate Court also noted the significant authority for the test it applied for determining who is the prevailing party for purposes of awarding attorney's fees pursuant to Florida Statutes Section 713.29. The Appellate Court

Stated:

> "However, given the heretofore uniform approach of most courts on this issue, we are loath to upset this precedent without guidance from our higher authority."

Indeed, the affirmative net judgment test has been the overwhelming approach applied by the courts in determining who is the prevailing party for purposes of awarding attorneys' fees pursuant to Florida Statutes Section 713.29.

AAA Sod, Inc. v. Weitzer Corporation, 513 So.2d 750 (Fla. 4th DCA 1987); Ahisma Technic, Inc. v. Lighthouse Shores Town Homes Development Company, 543 So.2d 422 (Fla. 5th DCA 1989); C.U. Associates, Inc. v. R.B. Grove, Inc., 472 So.2d 1177 (Fla. 1985); Emery v. International Glass & Mfg., Inc., 249 So.2d 496 (Fla.2nd DCA 1971); Ferrell v. Ashmore, 507 So.2d 691 (Fla. 1st DCA (1978); First Atlantic Building Corporation v. Neubauer Construction Company, 352 So.2d 103 (Fla. 4th DCA 1977); Fixed Enterprises, Inc. v. Theis, 524 So.2d 1015 (Fla.1988); Forest Construction, Inc. v. Farrell Cheek Steel Company, 484 So.2d 40 (Fla. 2nd DCA 1986); General Development Corporation v. John H. Gossett Construction Co., Inc., 370 So.2d 380 (Fla. 2nd DCA 1979); Holding Electric, Inc. v. Roberts, 530 So.2d 301 (Fla. 1988); M & P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA 1991), appeal dismissed 589 So.2d 294 (Fla. 1991); Magee v. Bishop Signs, Inc., 458 So.2d 1174 (Fla. 4th DCA 1984); Metro-Centre Associates v. Environmental Engineers, Inc., 522 So.2d 967 (Fla. 3d DCA 1988); Plaza Builders, Inc. v. Regis, 502 So.2d 918 (Fla. 2nd DCA 1986); Sanfilippo v. Larry Gracin Tile Co., Inc., 390 So.2d 413 (Fla. 4th DCA 1980);Schaubert v. Montaltos, 445 So.2d 1136 (Fla. 2nd DCA 1984); Sharpe v. Ceco Corporation, 242 So.2d 464 (Fla. 3rd DCA 1970); S.C.M. Associates, Inc. v. Rhodes, 395 So.2d 632, 634 (Fla.4th DCA 1981); Snaidman v. Harrell, 432 So.2d 809 (Fla. 1st DCA (1983), T.A.S. Heavy Equipment, Inc. v. DeLint, Inc., 532 So.2d 23 (Fla. 4th DCA 1988); United Plumbing and Heating, Inc. v. Goldberger, 452 So.2d 591 (Fla. 4th DCA 1984). See also Heindel v. Southside Chrysler-Plymouth, Inc., 476 So.2d 266 (Fla.1st DCA 1985).

In fact, this court has acknowledged the affirmataive net judgment test for determining who is the prevailing party for purposes of awarding attorney's fees pursuant to Florida Statutes Section 713.29 C. U. Associates, Inc. v. R.B. Grove, Inc., 472 So.2d 1177 (Fla.1985). Fixel Enterprises, Inc. v. Theis, 524 So.2d 1015 (Fla. 1988).

In C. U. Associates, Inc., supra, this court acknowledged that the party recovering the affirmative judgment pursuant to Florida Statutes Section 713.29 must recover an amount exceeding that which was earlier offered in settlement of the claim. It should also be noted that this court expressly approved S.C.M. Associates, supra, for this same proposition.

In Fixel Enterprises, Inc., supra, this court reaffirmed the affirmative judgment test of C.U. Associates, Inc.:

> "In C.U. Associates, this court held that in order to be a "prevailing party" entitled to the attorney's fees under Section 713.29, Florida Statutes (1981), a litigant, in an action to enforce a mechanics' lien, "must have recovered on an amount exceeding that which was earlier offered in settlement of a claim. 472 So.2d at 1179."

Further, in Fixel Enterprises, Inc., supra, this court acknowledged that the test for determining who is the prevailing party for purposes of awarding attorney's fees pursuant to contract may be very different from the test for determining who

is the prevailing party under Florida Statutes Section 713.29.

In Fixel Enterprises,Inc. this court addressed the following certified question:

> IS THE DEFINITION IMPOSED UPON THE TERM "PREVAILING PARTY" AS USED IN SECTION 713.29, FLORIDA STATUTES, IN C.U. ASSOCIATES v. R.B. GROVE, INC. 472.So.2d 1177 (Fla. 1985), TO BE EXTENDED BEYOND THE CONTEXT OF THAT STATUTE.

This court answered the question in the negative and concluded that the definition of prevailing party adopted in C.U. Associates, Inc., supra, for Florida Statute Section 713.29 is not applicable to the definition of prevailing party as used in a contract.

In doing so, this court looked to the underlying policy considerations of Section 713.29 to "encourage settlement of disputes before resorting to litigation" and concluded that "None of these policy considerations are implicated in the instant case".

The policy considerations for the determination of who is the prevailing party for the purposes of awarding attorney's fees under Florida Statutes Section 713.29 are further stated in Emery, supra, at page 500:

> In this frame of reference it was obviously not the intent of the legislature to award attorneys' fees to a defendant in a mechanics' lien foreclosure merely because he successfully defends against the impression of a lien yet is nevertheless found liable in

> damages, in the same case, for labor and/or materials furnished for hisi benefit. To conclude otherwise would be anathema to the purpose of the mechanics' law which is to afford the laborer or materialman adequate assurance of being fully compensated for his labor or services. The entire statute is esseentially for the benefit of a claimant, not a defendant; and the section providing for attorneys' fees is primarily calculated to preclude any diminution of the claimant's full compensation for which he is suing while, at the same time, discouraging specious claims or defenses.

The policy considerations of Moritz v. Hoyt, supra, were very different. The authority cited for determing who was the prevailing party in that contract action was Hensley v. Eckhart, 461 U.S.424 (1983) and Nadeau v. Helgemore, 581 F. 2nd 271, 278-279 (1st Circuit 1978), both of which dealt with the award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C., Section 1988.

The First Circuit noted in Nadeau at 280 that the purpose of granting attorney's fees in civil rights actions is "to encourage injured individuals to seek judicial relief".

The purpose of the Civil Rights Attorney's Fees Awards Act, amending 42 USCS Section 1988, is to assure that private enforcement remains viable to citizens who have little or no money with which to hire an attorney, Pennsylvania v. O'Neill, (1977, ED Pa) 431 F Supp 700, 16 BNA FEP Cas 787, 14 CCH EPD paragraph 7699, affd without op (CA 3 Pa) 573 F2d 1301, 23 BNA FEP Cas 485, 24 CCH EPD paragraph 31212, and to attract competent counsel to insure full enforcement of federal civil rights,

Sherrill v. J.P. Stevens & Co. (1977, WD NC) 441 F Supp 846, 21 BNA FEP Cas 1624, 15 CCH EPD paragraph 8004, affd without op (CA4 NC) 594 F2d 858, 22 BNA FEP Cas 840.

The policy considerations of Nadeau and Hensley as cited as authority for Moritz or other precedent related to 42 U.S.C. 1988 of providing access to the courts for indigents has no application to the policy considerations of Emery, C.U. Associates, Inc. or Fixel Enterprises, Inc., such as encouraging settlement of disputes before resorting to litigation and providing a contractor with full compensation pursuant to Florida Statute Section 713.29.

The affirmative judgment test originally proferred in 1971 in Emery and uniformly followed by most courts including this court in the recent cases of C.U. Associates, Inc. and Fixel Enterprises, Inc. is plainly the overwhelming authority for determining who is the prevailing party for purposes of awarding attorney's fees pursuant to Florida Statutes Section 713.29. The policy considerations implicated in the Moritz rationale of Hensley, Nadeau or other authority addressing prevailing party attorney's fees under 42 U.S.C. 1988 are not those implicated under the mechanics' lien statute. The definition imposed upon the term "prevailing party" as used in Section 713.29, Florida Statutes, in C.U. Associates, Inc. v. R.B. Grove, Inc., 472 So.2d 1177 (Fla 1985) and as stated in Fixel Enterprises, Inc. is not necessarily the definition of "prevailing party" under contract

actions due to the different policy considerations.

The Petitioner argues that "In the instant case, there can be no argument that Prosperi in fact prevailed on the significant issues tried before the court". Assuming arguendo, that the heretofore uniform approach of most courts on this issue, from Emory through Fixel Enterprises, Inc., was abandonded and the test of Moritz was applied, there can be substantial argument that CODE, INC., the Respondent, in fact prevailed on the significant issues before the court.

The trial court found that the Respondent prevailed on its claim for breach of contract and was entitled to $31,898.01, the entire amount claimed, and awarded to the Petitioner on its counterclaim a partial setoff of Petitioner's entitlement for construction defects, $1,100.00 of attorney's fees as special damages and two months' rent in the amount of $14,588.95 for a net judgment in favor of Respondent of $17,309.66. The trial court specifically found in favor of the Respondent on the Petitioner's counterclaim for defects in electrical wiring [R-143-137]:

> "The Court notes that there was an architect, a mechanical and an electrical engineer involved in this action and that the engineers and architect were reporting directly to the owner and were not under the control of the Plaintiff/Counterdefendant. Therefore, defects in electrical wiring were not proven by the greater weight of the evidence to have been attributable to the contract between the Plaintiff and the Defendant and the costs of their repair will not be awarded to the Defendant/Counterplaintiff."

The court denied the Respondent's claim for foreclosure of a mechanics' lien due to the Respondent's filing of false interim payment affidavits. However, the court also found in the same order that these false interim affidavits were not used as the basis of Respondent's lien and that the final affidavit, required by Florida Statute for the enforcement of a claim of lien, and the claim of lien were neither fraudulent nor perjurious thereby finding against the Petitioner on his fraudulent lien theories in the defense of the mechanics' lien or his counterclaim [R-159-160].

The court denied the Respondent's count for quantum meruit, not because the Respondent failed to prove the merits of its claim but because Petitioner had an adequate remedy at law in its mutually exclusive alternate count for breach of contract in which it proved its entire claim. [R-136].

The court denied the Respondent's claim for account stated because this account was not agreed upon by the parties although the Respondent proved the entire amount of the account claimed.

In Hensley the prevailing party test noted by this court in Mortiz was stated:

> ...The test is whether the party succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in 'bringing suit'. "Id at 433 (quoting Nadeau v. Helgemore, 581 F.2d 275, 278-79 (1st Cir. 1978).

Respondent proved its entire claim for breach of contract in the amount of $31,898.01 and even after deducting the

Petitioner's setoff of $14,588.95 still obtained $17,309.06 of the benefit it sought in bringing suit.

On the other issues both parties failed in their actions under the mechanics' lien statute; Petitioner failed to prove his count for fraudulent lien and Respondent failed to prove its count for foreclosure of mechanics' lien.

Thus, there is substantial argument to be made that the Respondent's success in obtaining a substantial judgment in its favor prevailed even under the Moritz test by achieving some of the benefit it sought in bringing suit.

Petitioner cites Ferrel v. Ashmore, 507 So.2d 691 (Fla. 1st DCA 1987) in support of its argument for the Moritz test. Petitioner's reliance is misplaced as Ferrell in fact is supportive of the affirmative net judgment test. See pages 15 and 16 of this Brief.

Petitioner cites Newson v. Dean Witter Reynolds, Inc., 588 So.2d 1076 (Fla. 1st DCA 1990) in support of its claim for attorney's fees under Florida Statute Section 713.29. This is an unreasonable extrapolation. Unlike Florida Statute Section 713.29, the mechanics' lien statute, Florida Statute Section 517.211(6) specifically provides legislatively "that the court shall award reasonable attorney's fees to the prevailing party unless the court finds that the award of such fees would be unjust." Further, under no circumstances can this statute be read to award attorney's fees

as the Petitioner requests, but merely to deny attorney's fees to a prevailing party.

Petitioner's reliance on B & H Sales, Inc. v. Frisco Corporation, 341 So.2d 105 (Fla. 2nd DCA 1977) is tenuous at best. B & H Sales, Inc. addressed Florida Statute Section 713.22(1) which deals with the Statute of Limitations of an action and not attorney's fees under the mechanics' lien statute. In that case the court determined that "The amended complaint amounted to no more than a correction of a misnomer, and therefore, related back to the original pleading as provided by Fla. R. Civ. Pr. 1.190(c)". Thus, the appellant's claim was not barred by the Statute of Limitations.

Petitioner relies on the filing of false interim affidavits (which were not used as the basis of Respondent's lien and the final affidavit, required by Florida Statute for enforcement of a claim of lien, and the claim of lien were neither fraudulent or perjurious) for its request for attorney's fees as the prevailing party under Florida Statute Section 713.29. This reliance is misplaced. As the trial court in its order denying attorney's fees noted,neither Florida Stautes Section 713.29 or the common law provide for an award of attorney's fees in this circumstance. [R-160].

In conclusion, the affirmative judgment test originally cited in 1971 in Emery and followed informally by the courts including this court in C. U. Associates, Inc. and

Fixel Enterprises, Inc. is the overwhelming approach applied by the courts in determining who is the prevailing party for purposes of awarding attorney's fees pursuant to Florida Statutes Section 713.29.

The test has evolved in response to the policy considerations implicated under the mechanics' lien statute while the policy considerations of Moritz came from authority under 42 U.S.C. 1988 proferred to allow indigents access to the courts in civil rights actions. The definition imposed upon the term "prevailing party" as used in Section 713.29, Florida Statute, in C.U. Associates, Inc. and as stated in Fixel Enterprises, Inc. is not necessarily the definition of "prevailing party" under contract actions due to the different policy consideration, or for that matter, is not applicable to cases arising under 42 U.S.C. 1988.

Substantial precedent indicates that the Respondent is the prevailing party for the purposes of awarding attorney's fees under Florida Statutes Section 713.29, but even under the Moritz test it is arguable Respondent succeeded in its claim for breach of contract and obtained some of the benefit it sought in bringing the suit, a $17,309.06 judgment against Petitioner.

The cases proferred by Petitioner requesting attorney's fees in "equity" are unreasonable extrapolations for which neither Florida Statutes Section 713.29 nor the common law provide relief.

For these reasons, the certified question of the Apellate courts should be answered in the negative.

ISSUE III

CODE, INC. IS ENTITLED TO ITS APPELLATE ATTORNEY'S FEES WHERE IT PREVAILED AGAINST APPELLANT'S CLAIMS THAT APPELLANT WAS THE PREVAILING PARTY IN THE ENFORCEMENT OF A LIEN.

In the case at bar, the after concluding that the Respondent, CODE, INC., was the prevailing party at trial, the trial court rendered an order finding that the Petitioner, PROSPERI, was not enititled to attorneys's fees pursuant to M & P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA 1991), rev. dismissed, 589 So.2d 294 (Fla. 1991). [R-159].

PROSPERI appealed the sole issue of its entitlement to attorney's fees as the prevailing party in the enforcement of a lien. The Fourth District Court of Appeal affirmed the order of the trial court [A-3] and also granted the motion of CODE, INC. for appellate attorney's fees. [A-3A].

PROSPERI's grounds for requesting attorney's fees as stated in his initial Brief issues on appeal were:

ISSUE I

The denial of attorney's fees, to which Appellant is entitled under Section 713.29, Fla. Stat. (1989) as the prevailing party in Appellee's mechanics' lien claim, based solely on Appellee's recovery of damages against Appellant for breach of contract, is clearly erroneous and manifestly unjust where, as here, the trial court found that Appellant's breach of contract directly, naturally, and proximately resulted from Appellee's own fraudulent conduct prior to filing the claim of lien.

ISSUE II

> PROSPERI is entitled to an award of attorney's fees pursuant to Florida Statute Section 713.06(3)(d)1 and Holding Electric Co. v. Roberts, 530 So.2d 301 (Fla. 1988).

These grounds were no more than a restatement of his counterclaims that the attorney's fees and costs incurred in this action directly, naturally, and proximately resulted from the filing of false interim affidavits of Respondent. However, as found by the trial court, these false interim affidavits were not used as the basis of Respondent's lien and that the final affidavit, required by Florida law for enforcement of a claim of lien was neither fraudulent nor perjurious. [R-159-160].

Florida Statute Section 713.29 provides that:

> "In any action brought to enforce a lien under part I, the prevailing party shall be entitled to recover a reasonable fee for the services of his attorney for trial and appeal, to be determined by the court, which shall be taxed as part of his costs, as allowed in equitable actions."

Under this statute, the prevailing party must be awarded an attorney's fee. Unlike Fla. Stat. Section 713.76(2), Fla. Stat. Section 713.29 does not require the prevailing party to obtain a judgment.

Respondent properly filed its Motion for Attorney's Fees as entitled to Florida Statute Section 713.29 and pursuant to Fla. R. App. P. 9.400 [A-3A].

Rule 9.400(b) provides that "A motion for attorneys fees may be served not later than the time of service of the reply

brief and shall state the ground on which recovery is sought. The assessment of attorney's fees may be remanded to the lower tribunal. If attorneys fees are assessed by the Court, the lower tribunal may enforce payment."

Having prevailed on Petitioner's appeal of his sole issue that he was the prevailing party in the enforcement of a lien under the mechanics' lien statute due to his false interim affidavit theories, Respondent should be awarded attorney's fees pursuant to statute.

To do otherwise would allow the Petitioner to repeatedly raise its issue that it was the prevailing party in the enforcement of a lien with the possibility of being awarded attorney's fees under the statute while denying the prevailing Respondent to same relief after prevailing on the same issue. It encourages "specious claim or defenses" contrary to Emery v. International Glass & Mfg. Inc., 249 So.2d 496 (Fla. 2nd DCA 1971). It undermines the the prevailing party issue test of Moritz v. Hoyt Enterprises, Inc., 604 So.2d 807 (Fla. 1992) and runs contrary to the "equitable approach" acknowledged by the Fourth District Court of Appeal [A-3], and stated in S.C.M. Associates, Inc. v. Rhodes, 395 So.2d 632-634 (Fla. 4th DCA 1981). The cases Kittel v. Kittel, 210 So.2d 1 (Fla. 1967) and Israel v. Lee, 470 So.2d 861 (Fla. 2nd DCA 1985) cited by Petitioner as conflicting with the order of the Fourth District may be distinguished in that in both cases there was no prevailing party or other statute for trial or appeal by which

either Mr. Kittel or Mr. Israel could be found liable.

Thus, the order granting attorney's fees of the Fourth District to the Respondent, CODE, INC., should be affirmed.

CONCLUSION

The significant precedent of Emery v. International Glass & Mfg., Inc., 249 So.2d 496 (Fla. 2nd DCA 1971) through this court's decisions of C.U. Associates, Inc. v. R.B. Grove, Inc., 472 So.2d 1177 (Fla. 1985) and Fixel Enterprises , Inc. v. Theis, 524 So.2d 1015 (Fla. 1988) dictate that the question certified by the Fourth District Court of Appeal should be answered in the negative.

That same significant precedent as well as the legislative intent and policy considerations evolved dictate that the test articulated in Mortiz v. Hoyt Enterprises, Inc., 604 So.2d 807 (Fla. 1992) does not apply to attorney's fees awarded under Florida Statutes Section 713.29 and the question certified by the Fourth District Court should be answered in the negative. Otherwise, this court should find the Respondent to be the prevailing party under the Moritz test.

The order of the Fourth District Court of Appeal granting appellate attorney's fees to Respondent should be affirmed as Respondent prevailed against Appellant's claims that Appellant was the prevailing party in the enforcement of a lien.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Paul Safran, Esquire, Alagia Day Marshall, et al., Suite 204,265 Sunrise Avenue, Palm Beach, Florida 33480 this 29 day of March, 1992.

NADEL ASSOCIATES, P.A.
12300 Alternate A1A, Suite 106
Palm Beach Gardens, FL 33410
(407)622-9353

RICHARD D. NADEL
FLORIDA BAR NO.: 391247
ATTORNEY FOR RESPONDENT

✓ EXHIBIT ONE

_____ EXHIBIT TWO

_____ EXHIBIT THREE

_____ EXHIBIT FOUR

_____ EXHIBIT FIVE

_____ EXHIBIT SIX

_____ EXHIBIT SEVEN

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

A. PAUL PROSPERI

Appellant(s),

vs.

CODE INC.,

Appellee(s).

CASE NO. 91-02930

L.T. CASE NO CL 89-6831 AN
PALM BEACH

November 4, 1992

BY ORDER OF THE COURT:

ORDERED that the motion for attorney's fees filed by Richard D. Nadel, counsel for appellee, is hereby granted, and pursuant to Fla.R.App.P. 9.400(b), upon remand of this cause th amount thereof shall be assessed by the trial court upon due notice and hearing, subject to review by this court under Fla.R.App.P. 9.400(c). 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 o the fee.

ORDERED, Appellant's February 3, 1992, motion for appellate attorney's fees is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK.

cc: Paul Safran, Jr.
Paula Revene
Richard D. Nadel
Milton T. Bauer, Clerk

/MG

_____ EXHIBIT ONE


EXHIBIT TWO

_____ EXHIBIT THREE

_____ EXHIBIT FOUR

_____ EXHIBIT FIVE

_____ EXHIBIT SIX

_____ EXHIBIT SEVEN

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH
DISTRICT

4th DCA CASE NO: 91-02930

A. PAUL PROSPERI,

Appellant,

v.

CODE, INC.,

Appellee.
_____/

APPELLANT'S MOTION FOR REHEARING

Appellant, A. PAUL PROSPERI, by and through his undersigned counsel, hereby moves for rehearing of the Court's Opinion filed on November 4, 1992 and its Order granting Appellee's Motion for Appellate Attorney's Fees on the following grounds:

I. In granting Appellee, CODE, INC.'s motion for attorney's fees, the Court has overlooked or misapprehended the law governing fees awardable under Section 713.29, Fla. Stat. In this case, Appellee, CODE, INC., is not entitled to recover his appellate attorney's fees pursuant to Section 713.29, Fla. Statutes where: a) CODE did not prevail in his mechanic's lien claim at trial but merely obtained a judgment against Prosperi in a contract claim; and where b) CODE has no contractual or other legal basis authorizing the recovery of his attorney's fees.

II. The recently decided case of Moritz v. Hoyt Enterprises, __ So.2d __, 17 FLW 465 (Fla. July 23, 1992), compels reversal of the trial court's order denying fees to PROSPERI and remand of this case to the trial court with directions for the trial judge to determine PROSPERI's entitlement to fees in light of Moritz. This Court's failure to apply that case misapprehends the Moritz case which nowhere limits itself to cases involving attorney's fees sought pursuant to a contract and which, furthermore, cites cases involving **statutory** awards of attorney's fees as legal authority for its holding.

III. This Court has certified in this case the same question certified to the supreme court in M & P Concrete

Products, Inc. v. Wood, 590 So.2d 429 (Fla. 4th DCA), rev. dismissed, 589 So.2d 294 (Fla. 1991). PROSPERI respectfully requests that the certified question be revised to reflect that CODE's breach of contract claim (and eventual judgment thereon) arose from CODE's own fraud, a fact that completely distinguishes this case from the M & P Concrete Products line of cases that merely address the application of the net judgment rule to the determination of a fee award absent any fraud by the party benefitting from the application of that rule.

IV. PROSPERI requests that the Court certify an additional question to determine whether the supreme court intended that Moritz v. Hoyt Enterprises be limited to cases involving attorney's fees awarded under a contract or whether it applies equally to the entitlement of fees pursuant to section 713.29, Florida Statutes (1991).

I. APPELLEE, CODE, INC., IS NOT ENTITLED TO RECOVER HIS APPELLATE ATTORNEY'S FEES PURSUANT TO SECTION 713.29, FLORIDA STATUTES.

After PROSPERI filed his Initial Brief on February 3, 1992, CODE moved for appellate attorney's fees pursuant to Fla. R. App. P. 9.400(b) based on section 713.29, Florida Statutes (1991) authorizing the award of attorney's fees to the prevailing party in a mechanic's lien foreclosure action. On page 6 of his Reply Brief, PROSPERI objected to CODE's motion for appellate fees on the grounds that CODE had not prevailed in its mechanic's lien foreclosure claim and is not otherwise entitled to fees under the contract. This Court granted CODE's motion for fees citing only Fla. R. App. P. 9.400 as authority for the award.

Fla. R. App. P. 9.400 provides for an award of appellate attorney's fees to the prevailing party on appeal only if otherwise authorized by substantive law. In re Estate of Crosley, 384 So.2d 274 (Fla. 4th DCA 1980); Israel v. Lee, 470 So.2d 861 (Fla. 2nd DCA 1985). Florida law authorizes the award of attorney's fees only

where authorized by statute, or by contract, or where the attorney's services create or bring a fund or other property into the court. Kittel v. Kittel, 210 So.2d 1 (Fla. 1967); Israel v. Lee, supra, at 862. CODE fails to qualify for fees under any of those categories where: 1) it is undisputed that CODE failed to prevail in his mechanic's lien claim pursuant to Chapter 713; 2) the contract does not provide for an award of attorney's fees; and 3) no common fund was created by the services of CODE's attorney.

Although section 713.29 authorizes the award of attorney's fees for trial and appeal, such fees are only awardable to a party who prevails in a mechanic's lien foreclosure action. In this case, both the trial court and this court acknowledge that CODE did not prevail in Count I of his Complaint for foreclosure of a mechanic's lien. On the contrary, the court denied CODE's lien claim based on his filing of fraudulent affidavits for payment.

Since CODE's only success at trial was obtained in Count II for breach of contract, CODE would not have been entitled under section 713.29 to recover his attorney's fees at trial since he was defeated in his lien foreclosure claim. In fact, contrary to CODE's counsel's representation to this Court at Oral Argument, CODE never even moved for attorney's fees at trial. [1] It follows that CODE is likewise not entitled under section 713.29 to recover his fees simply for defending PROSPERI's appeal of the trial court's denial of PROSPERI's own Motion for Attorney's Fees.

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[1] The Record on Appeal contains no motion or any reference whatsoever to a request by CODE for fees in the trial court pursuant to §713.29 or on any other basis.

This issue was expressly addressed in, and is controlled by, M & P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA), rev. dismissed, 589 So.2d 294 (Fla. 1991). In M&P, the owner was the prevailing party in the subcontractor's lien claim but the subcontractor nonetheless obtained a judgment against the owner in a contract claim. This Court held:

> Under these circumstances the owner cannot be the prevailing party and, therefore, is not entitled to attorney's fees under the statute. Of course, the subcontractor is not entitled to attorney's fees either because he failed to recover on his lien claim.

M & P Concrete Products, Inc. v. Woods, supra, at 429 (emphasis added).

Based on the foregoing, PROSPERI respectfully requests that this Court vacate its Order granting CODE's Motion for Appellate Attorney's Fees and enter an Order denying said motion.

In the event that, either upon rehearing or upon remand, PROSPERI is determined to be the prevailing party pursuant to section 713.29, Florida Statutes (1991), PROSPERI hereby requests that his Motion for Appellate Attorney's Fees be granted.

II. THE ISSUE OF PROSPERI'S ENTITLEMENT TO ATTORNEY'S FEES SHOULD BE REMANDED TO THE TRIAL COURT PURSUANT TO MORITZ V. HOYT ENTERPRISES, INC., 17 F.L.W. 465 (Fla. July 23, 1992) FOR THE TRIAL COURT TO DETERMINE FROM THE RECORD WHICH PARTY PREVAILED ON THE SIGNIFICANT ISSUES TRIED BEFORE THE COURT.

After the briefs had been submitted and Oral Argument had occurred in this case, the Florida supreme court issued its opinion in Moritz v. Hoyt Enterprises, Inc., 17 F.L.W. 465 (Fla. July 23, 1992). PROSPERI filed a Notice of Supplemental Authority to direct

this Court's attention to Moritz but he was not authorized via that Notice to argue the implications of Moritz on the instant case. Accordingly, this Motion for Rehearing offers the only opportunity available to PROSPERI to argue the applicability of Moritz to the case at bar.

In its per curiam opinion affirming the trial court's denial of PROSPERI's Motion for Attorney's Fees, this Court recognized the potential relevance of the Moritz holding but refused to apply Moritz because whereas, Moritz involves a request for attorney's fees pursuant to a contract, the instant case involves a request for fees pursuant to a statute. PROSPERI respectfully submits that this Court's limitation of Moritz to cases involving fees awardable under a contract is not supported, either directly or indirectly, by the Moritz opinion which contains neither an express nor even an implied suggestion that its holding is limited to cases involving fees sought under a contract.

On the contrary, in articulating the test to be used in determining who is the prevailing party for purposes of an award of attorney's fees, Moritz cited as authority the U. S. Supreme Court's opinion in Hensley v. Eckerhart, 461 U.S. 424 (1983) and the First Circuit's opinion in Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978), both of which involved the award of fees pursuant to a **statute**. (42 U.S.C. §1988).

Given the supreme court's citation to two **statutory** fee award cases as authority for its holding in Moritz which involved a **contractual** fee issue, the supreme court clearly does not make the

distinction that this court has made in determining prevailing parties for purposes of fee awards.

Moreover, the refusal to apply the Moritz rationale to the court's ruling in the instant case creates a grossly inequitable result in that it forces PROSPERI to underwrite the significant legal fees he incurred in the defense of CODE's unsuccessful lien foreclosure as well as CODE's breach of contract action, which, although partly successful, was found by the trial court to have arisen solely as a consequence of CODE's own fraud in serving upon PROSPERI a series of knowingly and willingly false affidavits of payment upon which PROSPERI justifiably could not rely. This inequity need not be condoned by this Court particularly in view of its own acknowledgement on page 2 of its Opinion, citing S.C.M. Associates v. Rhodes, 395 So.2d 632, 634 n.2 (Fla. 2nd DCA 1981), that there is room in section 713.29 for the equitable approach to prevailing party fee determinations mandated in Moritz.

III. PROSPERI RESPECTFULLY REQUESTS THAT THE QUESTION CERTIFIED IN THIS CASE BE REVISED TO REFLECT THE TRIAL COURT'S FINDING THAT CODE'S BREACH OF CONTRACT CLAIM (AND RECOVERY) AROSE FROM CODE'S OWN FRAUD.

This Court has certified in this case the same question certified to the supreme court in M & P Concrete Products, Inc. v. Wood, 590 So.2d 429 (Fla. 4th DCA), rev. dismissed, 589 So.2d 294 (Fla. 1991). PROSPERI respectfully requests that the certified question be revised to reflect that CODE's breach of contract claim (and eventual net judgment thereon) arose from CODE's own fraud, a fact that completely distinguishes this case from the M & P Concrete Products line of cases that merely address the application

of the net judgment rule to the determination of a fee award absent any fraud by the party benefitting from the application of that rule.

The trial court expressly found that it was CODE's fraud in filing false payment affidavits that caused PROSPERI's justifiable unwillingness to rely on, and pay, the sum demanded in the Final Affidavit. It was from that scenario that CODE's claim against PROSPERI for breach of contract arose. PROSPERI's wnwillingness to pay the amount indicated in the Final Affidavit was justified by the trial court's award to PROSPERI of $14,588.95 on his counterclaim against CODE for breach of contract, a sum that is nearly 50% of the amount for which CODE sued PROSPERI.

By mandatorily applying the net judgment rule simply because CODE's breach of contract damages resulted in a net judgment in favor of CODE without regard to the fact that CODE's net judgment would not have arisen but for its own fraud, this Court allows CODE to escape liability for PROSPERI's attorney's fees and costs which the trial court found "directly, naturally, and proximately, resulted from the filing of the false affidavits" [R 160]. The application of the net judgment rule under these circumstances paves the way for an unscrupulous contractor to extort payment from an owner based on inflated and fraudulent affidavits. Where an owner, although justified in not paying the full amount demanded, cannot afford the legal fees needed to assert set-offs and counterclaims in the contractor's inflated lien foreclosure suit, he will have no choice but to pay the amount demanded by the

contractor since, under the net judgment rule, he will be responsible for his own attorney's fees unless he is able to obtain a setoff for more than 50% of the amount sought by the contractor in a breach of contract action. Likewise, so long as such a contractor knows that he can recover against an owner in a breach of contract claim more than 50% of the damages for which he sued the owner, there is no deterrent for him not to file engage in fraudulent conduct (prior to filing a valid Final Affidavit) since even he loses his lien foreclosure claim, he will be spared, by application of the net judgment rule, from paying the owner's attorney's fees. Clearly, that result was not the Legislature's intent in authorizing the award of fees pursuant to section 713.29.

III. PROSPERI RESPECTFULLY REQUESTS A REVISION OF THE QUESTION CERTIFIED IN THIS CASE TO REFLECT THE TRIAL COURT'S FINDING THAT CODE'S BREACH OF CONTRACT CLAIM AND JUDGMENT AGAINST PROSPERI AROSE FROM CODE'S OWN FRAUD.

This Court has certified the same question in this case as it certified in M & P Concrete Products v. Woods, 590 So.2d 429 (Fla. 4th DCA 1992). PROSPERI respectfully submits that the question certified in M & P Concrete Products does not accurately frame the issue presented here in that the M & P case did not involve fraud by the contractor who recovered a net judgment against the owner. Given the trial court's express findings in his Order denying fees [R 160] that "but for the filing of false affidavits, Prosperi would have continued to have made all payments due under the contract...," that [PROSPERI] was justifiably not willing to rely on the figures provided by CODE [in the Final Affidavit] and that "the greater weight of the evidence has proven that the attorney's

fees and costs incurred in this action directly, naturally, and proximately, resulted from the filing of the false affidavits," the facts of this case are completely distinguishable from the M&P Concrete Products line of cases in which no fraud was attributed to the party who benefitted from the application of the net judgment rule.

So as to obtain meaningful review, PROSPERI requests that this Court revise its certified question to address the fraud issue. The following question is proposed:

> IS AN OWNER WHO PREVAILS ON A COMPLAINT BY A CONTRACTOR OR SUB-CONTRACTOR TO ENFORCE A MECHANIC'S LIEN UNDER PART I, CHAPTER 713, FLORIDA STATUTES (1991), ENTITLED TO ATTORNEY'S FEES AS A PREVAILING PARTY UNDER 713.29, EVEN THOUGH, IN THE SAME SUIT, THE CONTRACTOR PREVAILED AGAINST THE OWNER ON A CLAIM FOR MONEY DAMAGES FOR BREACH OF THE CONTRACT, BOTH CLAIMS ARISING OUT OF THE SAME TRANSACTION, WHEN THE TRIAL COURT FINDS THAT, BUT FOR THE CONTRACTOR'S FRAUD, THE OWNER WOULD NOT HAVE BREACHED THE CONTRACT.

IV. PROSPERI RESPECTFULLY REQUESTS THAT THE COURT CERTIFY AN ADDITIONAL QUESTION TO DETERMINE WHETHER THE SUPREME COURT INTENDED FOR MORITZ V. HOYT ENTERPRISES TO BE LIMITED TO CASES INVOLVING ATTORNEY'S FEES AWARDED UNDER A CONTRACT OR WHETHER THE TEST ARTICULATED IN MORITZ APPLIES EQUALLY TO THE AWARD OF FEES PURSUANT TO SECTION 713.29, FLORIDA STATUTES (1991).

In its Opinion, the Court acknowldges the supreme court's recent opinion in Moritz v. Hoyt Enterprises, supra, concedes that the supreme court might extend the test articulated in that case to cases involving attorney's fees awarded under section 713.29, Florida Statutes (1991), and recognizes that "there is room in [section 713.29] for such an equitable approach." Nonetheless, the court refuses to apply Moritz to the instant case involving

statutory fees "without guidance from our higher authority."

In his argument in Section II above, PROSPERI contends that the Moritz opinion contains no indication that the supreme court intended the test set out in that case to be limited to awards of attorney's fees pursuant to a contract and not to apply equally to awards of statutory fees under section 713.29.

If, upon further reflection, however, this Court continues to construe Moritz v. Hoyt Enterprises, supra, as applying only to an award of fees under a contract, PROSPERI respectfully requests that the Court seek "guidance from [its] higher authority" by certifying as an additional question:

> Whether the test articulated in Moritz v. Hoyt Enterprises, 17 F.L.W. 465 (Fla. July 23, 1992) for determining who is the prevailing party for purposes of awarding attorney's fees is limited to the award of fees in a contract action or whether it also applies to attorney's fees awardable under section 713.29, Florida Statutes (1991).

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Richard Nadel, Esq. Suite 106, 12300 Alt. A1A, Palm Beach Gardens, Florida 33410, this 19th day of November, 1992.

JONES FOSTER JOHNSTON & STUBBS, P.A.
Attorneys for Appellant
505 South Flagler Drive
West Palm Beach, FL 33402
(407) 659-3000

By _____
PAULA REVENE
Florida Bar No: 656364

prr/16168.1/rehear.mot

_____ EXHIBIT ONE

_____ EXHIBIT TWO


_____ EXHIBIT THREE

_____ EXHIBIT FOUR

_____ EXHIBIT FIVE

_____ EXHIBIT SIX

_____ EXHIBIT SEVEN

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH
DISTRICT

4TH DCA CASE NO.: 91-02930

L.T. CASE NO.: CL 8906831 AN

A. PAUL PROSPERI,

Appellant,

v.

CODE, INC.,

Appellee.

_____/

APPELLEE'S REPLY TO APPELLANT'S MOTION FOR REHEARING

Appellee, CODE, INC., by and through undersigned counsel, hereby replies to Appellant's Motion For Rehearing of the Court's opinion filed on November 4, 1992:

I. Appellant's Motion for Rehearing violates Fla. R. App. P. 9.330(a) as it merely re-argues the merits of the Court's Order and rehashes Appellant's initial positions.

II. Appellent's argument that this Court missapprehends Mority v. Hoyt Enterprises, Inc., 17, F.L.W. 465 (Fla. July 23, 1992) is based upon inference of the intent of the Supreme Court but without guidance from the Court.

III. Appellant states no grounds for his request to modify the certified question of M & P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA).

I. Appellant's Motion for Rehearing violates Fla. R. App. P. 9.330(a) as it merely re-argues the merits of the Court's Order and rehashes Appellant's initial positions.

Fla. R. App. P. 9.330(a) states, in pertinent part, that:

> "The motion (for rehearing) shall not re-argue the merits of the Court's Order".

Appellant's Motion, Count I, arguing against the award of Appellee's Appellate attorney's fees, as indicated by Appellant in his Motion for Rehearing, is merely a re-argument of page 6 of his Reply Brief pursuant to the same failed grounds.

Appellant's Motion, Counts II and IV, merely attempt to re-argue the merits of the Court's Order that the Moritz v. Hoyt Enterprises, So.2d, 17 FLW 465 (Fla. July 23, 1992) holding is a test for awarding attorneys fees in a contract action or is an attempt to amend the Court's Order to include a certified question when it has chosen not to do.

Appellant's Motion, Count III, is merely a second request to certify substantially the same issue he requested at page 19 of his Initial Brief as is evident by a comparison of the respective requests for certification below:

> IS AN OWNER WHO PREVAILS ON A COMPLAINT BY A CONTRACTOR OR SUB-CONTRACTOR TO ENFORCE A MECHANIC'S LIEN UNDER PART I, CHAPTER 713, FLORIDA STATUTES (1991), ENTITLED TO ATTORNEY'S FEES AS A PREVAILING PARTY UNDER 713.29, EVEN THOUGH, IN THE SAME SUIT, THE CONTRACTOR PREVAILED AGAINST THE OWNER ON A CLAIM FOR MONEY DAMAGES FOR BREACH OF THE CONTRACT, BOTH CLAIMS ARISING OUT OF THE SAME TRANSACTION, WHEN THE TRIAL COURT FINDS THAT, BUT FOR THE CONTRACTOR'S FRAUD, THE OWNER WOULD NOT HAVE BREACHED THE CONTRACT?

IS AN OWNER WHO PREVAILS ON A COMPLAINT BY A CONTRACTOR TO ENFORCE A MECHANIC'S LIEN UNDER PART I, CHAPTER 713, FLORIDA STATUTES (1989), ENTITLED TO ATTORNEY'S FEES UNDER CHAPTER 713.29, EVEN THOUGH, IN THE SAME SUIT, THE CONTRACTOR PREVAILED AGAINST THE OWNER ON A CLAIM FOR MONEY DAMAGES (ARISING OUT OF THE SAME TRANSACTION) FOR BREACH OF THE CONTRACT, WHEN THE CONTRACTOR'S CLAIM FOR MONEY DAMAGES WAS EXPRESSLY FOUND TO HAVE BEEN TRIGGERED BY FRAUDULENT ACTS COMMITTED BY THE CONTRACTOR PRIOR TO THE FILING OF ITS VALID CLAIM OF LIEN?

Thus, the Appellant's Motion for Rehearing should be summarily denied as it violates Fla. R. App. P. 9.330(a).

II. Appellent's argument that this Court missapprehends Moritz v. Hoyt Enterprises, Inc., 17, F.L.W. 465 (Fla. July 23, 1992) is based upon inference of the intent of the Supreme Court but without guidance from the Court.

As articulated by this Court and as can plainly be seen by a review of the Supreme Court's recent opinion, Moritz v. Hoyt Enterprises, Inc., 17 F.L.W. 465 (Fla. July 23, 1992), Moritz involved a dispute as to the test for awarding attorney's fees in a contract action. Appellant does not dispute this fact but merely contends that in reaching a holding in Moritz the Supreme Court considered Hensley v. Eckhart, 461 U.S. 424 (1983) which quoted Napeau v. Helgemoe, 581 F.2d 25, 278-279 (1st Cir 1978), cases awarding attorney's fees pursuant to the Statute 42 U.S.C. Chapter 1988.

While the Appellant's inference is possible, there is no guidance from the Supreme Court that it is correct and that this inference should apply to F.S. Section 713.29.

In fact, as recently in C. U. Associates, Inc., v. R. B. Grove, Inc., 472 So.2d 1177 (Fla.1985) the Supreme Court

applied the affirmative net judgment test in determining the award of attorney's fees to the prevailing party under F.S. Section 713.29.

In light of the recent decision of the Supreme court in C. U. Associates, Inc. as well as the long established affirmative net judgment test, with no further direction from the Supreme Court except for the contract action of Moritz there is no clear precedent by which the Appellant can rely and his Motion for Rehearing should be denied.

III. Appellant states no grounds for his request to modify the certified question of M & P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA).

In M & P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla.4th DCA) and the case at bar the Court certified the following question:

> IS AN OWNER WHO PREVAILS ON A COMPLAINT BY A CONTRACTOR OR SUB-CONTRACTOR TO ENFORCE A MECHANIC'S LIEN UNDER PART I, CHAPTER 713, FLORIDA STATUTES (1989), ENTITLED TO ATTORNEY'S FEES UNDER 713.29, EVEN THOUGH, IN THE SAME SUIT, THE CONTRACTOR PREVAILED AGAINST THE OWNER ON A CLAIM FOR MONEY DAMAGES FOR BREACH OF THE CONTRACT, BOTH CLAIMS ARISING OUT OF THE SAME TRANSACTION?

Fla. R. App.P. 9.030 provides the grounds by which the Discretionary Jurisdiction of the Supreme Court Review may be sought, in pertinent part; to:

> (v) Pass upon a question certified to be of great public importance.

In the case at bar and in M & P Concrete Products, Inc., this Court certified that issue for that reason.

Appellant requests this Court alter the question it has certified to so as to narrow the issue to only address the matter; "when the trial Court finds that, but for the contractor's fraud, the owner would not have breached the contract?"

Appellant, in his Motion for Rehearing states no grounds for narrowing the issue except that "it would more accurately reflect the issue presented here" (in his case) and would "obtain meaningful review". However, besides the self serving value to Appellant of narrowing the issue of this Court's certification, Appellant states no grounds why his narrowing the issue will more properly raise an issue of great public importance.

Additionally, Appellant fails to completely state the trial Court's express findings in its Order denying fees in his request to alter the certified question of this Court. Appellant does not account for the fact that the Court found, within the same order denying attorneys fees, that these false interim affidavits were not used as the basis of Appellee's lien and that the final affidavit, requred by Florida Statute for enforcement of a claim of lien, and the claim of lien were neither fraudulent nor perjurious [R-159-160].

Thus, where Appellant has provided no grounds upon which his Motion to Modify the certified question of this Court should be granted, it should be summarily denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paula Revene, Esquire, Jones Foster Johnston & Stubbs, P.A., 505 South Flagler Drive, West Palm Beach, FL 33401 this 27 day of November, 1992.

NADEL ASSOCIATES, P.A.
Attorneys for Appellee
12300 Alternate A1A, Suite 106
Palm Beach Gardens, FL 33410
(407)622-9353

By: _____
RICHARD D. NADEL
FLORIDA BAR NO.: 391247

_____ EXHIBIT ONE

_____ EXHIBIT TWO

_____ EXHIBIT THREE

 EXHIBIT FOUR

_____ EXHIBIT FIVE

_____ EXHIBIT SIX

_____ EXHIBIT SEVEN

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

4DCA CASE NO: 91-02930
PALM BEACH
L.T. CASE NO: CL 89-6831 AN

A. PAUL PROSPERI,

Appellant,

v.

CODE, INC.,

Appellee.
_____/

APPELLANT'S MOTION FOR LEAVE TO RESPOND TO APPELLEE'S REPLY TO APPELLANT'S MOTION FOR REHEARING

Appellant, A. PAUL PROSPERI, by and through his undersigned counsel, pursuant to Rule 9.300(a), hereby moves for leave to respond to Appellee, CODE's, Reply to PROSPERI's Motion For Rehearing and in support thereof states as follows:

1. On November 19, 1992, PROSPERI filed a Motion For Rehearing of this Court's Opinion issued on November 4, 1992.

2. On November 27, 1992, CODE responded to the Motion For Rehearing in a filing entitled "Appellee's Reply To Appellant's Motion For Rehearing."

3. CODE's "Reply" to the Motion for Rehearing contains several misrepresentations and mischaracterizations of the Motion for Rehearing which PROSPERI would like to bring to the Court's attention. PROSPERI's proposed Response is attached hereto.

WHEREFORE, Appellant, PROSPERI, respectfully requests leave of court to file the attached Response to Appellee's Reply to

PROSPERI v. CODE, INC.
4TH DCA CASE NO. 91-02930
L.T. CASE NO. CL 89-6831 AN

the Motion for Rehearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard D. Nadel, Esquire, NADEL & ASSOCIATES, 12300 Alternate A1A, Suite 106, Palm Beach Gardens, Florida 33410, this 3rd day of December, 1992.

JONES FOSTER JOHNSTON
& STUBBS, P.A.
Attorneys for Appellant
505 South Flagler Drive
P. O. Drawer E
West Palm Beach, FL 33402
(407) 659 3000

By _____
PAULA REVENE
Florida Bar No: 656364

prr/16168-1/motion.rsp

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FOURTH
DISTRICT

4TH DCA CASE NO: 91-02930

A. PAUL PROSPERI,

Appellant,

v.

CODE, INC.,

Appellee.
_____/

APPELLANT'S RESPONSE TO APPELLEE'S REPLY TO MOTION FOR REHEARING

Appellant, A. PAUL PROSPERI, by and through his undersigned counsel, and with leave of court granted pursuant to Fl. R. App. P. 9.300(a), files this Response to Appellee, CODE's, Reply to the Motion For Rehearing.

I. CODE's contention that PROSPERI's Motion for Rehearing merely rehashes his initial position is wholly without merit. In fact, the greater portion of the Motion For Rehearing focuses on this Court's interpretation of Moritz v. Hoyt Enterprises, Inc., 17, F.L.W. 465 (Fla. July 23, 1992) which was not decided until after all of the briefing and oral arguments in this case had been completed. Obviously, the application of that recently decided case provides an appropriate basis for a Motion For Rehearing and cannot be considered reargument of PROSPERI's initial position.

II. CODE's contention that PROSPERI's interpretation of

Moritz v. Hoyt Enterprises, 17 F.L.W. 465 (Fla. July 23, 1992) "is based upon inference of the intent of the Supreme Court but without guidance from the Court" (sic) contradicts CODE's own admission on page 3 of his Reply that "Appellant's inference [regarding the applicability of the Moritz holding] is possible."

Application of Moritz in this case would result in the remand of the case to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court. By refusing to apply Moritz to the case at bar solely because this case involves statutory rather than contractual attorney's fees, this court draws a distinction between the determination of prevailing party for purposes of contractual versus statutory attorney's fees, which is nowhere implied in, or inferrable from, Moritz. On the contrary, the Florida supreme court's reliance solely on two statutory fee cases [1] in its holding in Moritz (which happened to involve contractual fees) militates against this Court's inference/conclusion that the Moritz rule was not intended to be applied to a statutory fee case. As such, CODE is incorrect in asserting that PROSPERI's argument in support of the applicability of Moritz to statutory fee cases is without guidance from that court. As was noted above, the supreme court's "guidance" is provided by way of its citation to statutory fee cases in support of its holding.

CODE's reference to the supreme court's application of the net

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[1] Hensley v. Eckerhart, 461 U.S. 424 (1983); Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978).

judgment rule in C.U. Associates, Inc. v. R. B. Grove, 472 So.2d 1177 (Fla. 1985) as authority for the application of that rule in statutory fee cases misses the mark. PROSPERI has never argued that the net judgment rule should not be applied in statutory fee cases. He simply argues that it should not be mechanically applied in any case where, as here, it is found that the money damages forming the basis of one party's "net judgment" arose solely from that party's fraud.

III. CODE incorrectly claims that PROSPERI stated no grounds for his request that this Court modify its certified question. As Appellant pointed out in the Motion for Rehearing, by certifying the same question in the instant case as was certified in M & P Concrete Products, Inc., this Court fails to alert the supreme court to the trial court's finding in this case that the judgment obtained by the contractor for breach of contract (which formed the basis for the court's application of the net judgment rule) arose solely as a result of the contractor's own fraud in filing a series of false affidavits thereby causing what the trial court described as the owner's "justifable unwillingness" to rely on the figures contained in the Final Affidavit. By so doing, this Court lumps this case into the same category as the M & P Concrete Products line of cases wherein a party's breach of the contract and adverse net judgment was not prompted by fraud perpetrated on him by the other party.

By failing to frame the certified question in this case to reflect the fraud from which the entire case against PROSPERI

arose, this Court whitewashes CODE's fraudulent conduct and punishes PROSPERI, whose refusal to pay based on CODE's Final Affidavit was found by the trial court to be fully justified. This is an unconcionable result where, as here, the trial court expressly found that PROSPERI's attorney's fees "directly, naturally, and proximately resulted from the filing of the false affidavits." [R-160] [A-2 to the Initial and Reply Briefs]. Moreover, this result clearly contravenes the purpose of the attorney's fee provision of Chapter 713 which is intended to make the prevailing party whole while at the same time discouraging specious claims and defenses. SanFilippo v. Larry Giacin Tile Company, Inc., 390 So.2d 413, 414 (Fla. 4th DCA 1980); Foxbilt Electric Inc. v. Belefante, 280 So.2d 28 (Fla. 4th DCA 1973).

Contrary to CODE's assertion, by asking this Court to provide an avenue whereby PROSPERI can obtain the supreme court's ruling on whether fraudulent conduct by one party should constitute an exception to the applicability of the net judgment rule in favor of that party, PROSPERI raises an issue of great public importance which, PROSPERI respectfully submits, warrants this Court's modification of the certified question.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard D. Nadel, Esquire, NADEL & ASSOCIATES, 12300 Alternate A1A, Suite 106, Palm Beach Gardens,

24

Florida 33410, this 3rd day of December, 1992.

JONES FOSTER JOHNSTON & STUBBS, P.A.
Attorneys for Appellant
505 South Flagler Drive
P. O. Drawer E
West Palm Beach, FL 33402
(407) 659-3000

By _____
PAULA REVENE
Florida Bar No: 656364

prr/16168-1/response.rmr

_____ EXHIBIT ONE

_____ EXHIBIT TWO

_____ EXHIBIT THREE

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EXHIBIT FIVE

_____ EXHIBIT SIX

_____ EXHIBIT SEVEN

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1992

A. PAUL PROSPERI,

Appellant,

v.

CODE, INC.,

Appellee.

CASE NO. 91-2930.

L.T. CASE NO. CL 89-6831 AN.

Opinion filed December 30, 1992

Appeal from the Circuit Court for Palm Beach County; Edward Fine, Judge.

Paula Revene of Jones, Foster, Johnston & Stubbs, P.A., West Palm Beach, for appellant.

Richard A. Nadel of Nadel Associates, P.A., Palm Beach Gardens, for appellee.

ON MOTION FOR REHEARING

PER CURIAM.

We grant rehearing in part to include the following question as one of great public importance:

DOES THE TEST OF MORITZ V. HOYT FOR DETERMINING WHO IS THE PREVAILING PARTY FOR THE PURPOSES OF AWARDING ATTORNEY'S FEES APPLY TO FEES AWARDED UNDER SECTION 713.29, FLORIDA STATUTES?

WARNER, POLEN, JJ., and DIMITROULEAS, WILLIAM P., Associate Judge, concur.

_____ EXHIBIT ONE

_____ EXHIBIT TWO

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EXHIBIT SIX

_____ EXHIBIT SEVEN

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause as may be in accordance with the opinion of this Court, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Hugh S. Glickstein, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and seal of the said Court at West Palm Beach, Florida on this day.

DATE: JANUARY 15, 1993

CASE NO.: 91-2930

COUNTY OF ORIGIN: PALM BEACH

T.C. CASE NO.: CL 89-6831 AN

STYLE: A. PAUL PROSPERI V. CODE, INC.

A TRUE COPY

Marilyn Beuttenmuller, Clerk
District Court of Appeal
Fourth District

ORIGINAL TO: HON. DOROTHY H. WILKEN, CLERK

cc: Paula Revene
Richard A. Nadel

TMG

COMPOSITE EXHIBIT C

_____ EXHIBIT ONE

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 EXHIBIT SEVEN

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

4TH DCA CASE NO: 91-02930

A. PAUL PROSPERI,

Appellant,

v.

CODE, INC.,

Appellee.
_____/

DISTRICT COURT OF APPEAL 4TH DCA 93 JAN 27 11:31

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

Notice is hereby given that A. PAUL PROSPERI, Defendant/Appellant/Petitioner, invokes the discretionary jurisdiction of the Supreme Court pursuant to Florida Rule of Appellate Procedure 9.030(2)(A)(v) to review the following decisions of this court: Opinion rendered November 4, 1992 affirming the trial court's order denying appellant's motion for attorney's fees at trial and granting appellee's appellate attorney's fees; and the Order on the Motion for Rehearing rendered December 30, 1992 to the extent that it denied, in part, Appellant's Motion for Rehearing.

The decisions pass upon two questions certified to be of great public importance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Richard D. Nadel, Esq., NADEL & ASSOCIATES, 12300 Alternate A1A, Suite 106, Palm Beach Gardens, FL 33410, this 26th day of January, 1993.

HEINRICH GORDON BATCHELDER
HARGROVE WEIHE & GENT
Attorneys for appellants
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By: 
PAULA REVENE, ESQ.
FLORIDA BAR NO. 636564

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_____ EXHIBIT ONE

_____ EXHIBIT TWO

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✓ EXHIBIT EIGHT

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

4TH DCA CASE NO.: 91-02930
PALM BEACH
L.T. CASE NO.: CL 89-6831 AN

A. PAUL PROSPERI,

Appellant,

v.

CODE, INC.,

Appellee.
_____/

MOTION FOR APPELLE'S ATTORNEY'S FEES

Appellee, CODE, INC., by and through its undersigned counsel, hereby moves for the award of Appellee's attorney's fees pursuant to Fla. R. App.P 9.400(b) and in support thereof states as follows:

1. Appellee has retained the undersinged law firm to represent it in this appeal and has agreed to pay a reasonable fee to legal services.

2. Section 713.29, Fla. Stat. (1989) entitles the prevailing party to recover a reasonable fee for the services of its attorney for trial and appeal.

4. Pursuant to Fla. R. App. P. 9.400, Appellee hereby moves for an award of attorney's fees incurred by it in pursuing this appeal.

A. PROSPERI v. CODE, INC.
4TH DCA CASE NO.: 91-02930
L.T. CASE NO.: CL 89-6831 AN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paula Revene, Esquire, Jones Foster Jonnston & Stubbs, P.A., 505 South Flagler Drive, P.O. Drawer E, West Palm Beach, FL 33402 and to Paul Safran, Jr., Esquire, Alagia Day Marshall, et al., Suite 204, 265 Sunrise Avenue, Palm Beach, Florida 33480 this 25 day of March, 1992.

NADEL ASSOCIATES, P.A.
12300 Alternate A1A, Suite 106
Palm Beach Gardens, FL 33410
(407)622-9353

By: _____
RICHARD D. NADEL
FLORIDA BAR NO.: 391247

OT