SUPREME COURT OF FLORIDA

CASE NO: 81,232

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

A. PAUL PROSPERI,

Petitioner,

vs.

CODE, INC.,

Respondent.
_____/

PETITIONERS INITIAL BRIEF

Paul Safran, Jr., Esquire
PAUL SAFRAN, JR., P.A.
265 Sunrise Avenue - Suite 204
Palm Beach, Florida 33480
(407) 832-5696

TABLE OF CONTENTS

TABLE OF CONTENTS, CONTINUED

TABLE OF CITATIONS

FLORIDA RULES OF CIVIL PROCEDURE

FLORIDA STATUTES

UNITED STATES CODE

I.

STATEMENT OF THE CASE AND FACTS

Petitioner, A. PAUL PROSPERI, hired Respondent, CODE, INC., a building contractor, to make improvements on real property owned by PROSPERI. [R 1,7-9]. The parties agreement was a "combination written and oral contract" which provided for PROSPERI to reimburse CODE periodically for payments made by CODE to its subcontractors. [A-1] [R 134-135]. CODE would request payment from PROSPERI by submitting affidavits setting forth the amount of reimbursement due. [A-1] [R 135].

After performance under the contract had commenced and a serious of fraudulent affidavits had been submitted by CODE and paid by PROSPERI, CODE submitted a final affidavit on January 11, 1989, seeking payment of $37,538.01. [A-2] [R 159-161] [R 13; Plaintiff's Exhibit 4]. A dispute arose as to the amount of payment due CODE. [A-1] [R 135-139]. On March 1, 1989 CODE filed its claim of lien which indicated that $308,972.59 in improvements had been made to the property of which $31,898.01 remained unpaid. [Plaintiffs Exhibit 2] [R 114]. On July 11, 1989, CODE sued to foreclose a mechanics lien, for breach of contract (for failure to pay the $31,989.01 due under the contract, quantum meruit, and account stated). [R 1-18]. PROSPERI filed an Answer (which generally denied the Complaint) [R 19-27] and a Second Amended Counterclaim which asserted claims against CODE for: breach of contract for negligent supervision, failure to provide proper

accounting, submission of fraudulent affidavits for payment, and defective workmanship (Count I); the filing of a fraudulent claim of lien pursuant to F.S. 713.31 (Count II); and fraud and misrepresentation arising from the filing of false and fraudulent affidavits pursuant to F.S. 713.35. (Count III); [R 101-114]. CODE filed an Answer to the Second Amended Counterclaim and Affirmative Defenses thereto. [R 123-125].

Following a non jury trial, the Court entered a partial final judgment in which it found that CODE had filed false affidavits claiming to have fully paid subcontractors when in fact it had withheld ten percent (10%) of the payments due the subcontractors. [A-1] [R 135]. Based on that finding, the Court denied CODE's mechanics lien claim and entered judgment for PROSPERI on Count I. [A-1] [R 135].

As to the other claims and counterclaims, the Court ruled in PROSPERI's favor on CODE's claim for quantum meruit and account stated as well as on PROSPERI's counterclaim against CODE for breach of contract for CODE's filing of knowingly false affidavits, inaccurate accounting, and incomplete and careless performance. Included in the damages awarded PROSPERI in his counterclaim was an award of special damages in the amount of $1,100.00 for "attorneys fees needed by Mr. PROSPERI to defend against subcontractors so that he would not have to pay twice for their work, having already paid CODE in reliance upon false affidavits applied by CODE." [A-1] [R 136]; [A-2] [R 160]. Those fees were incurred prior to the filing of CODE's claim of lien. The fees at issue in this appeal

were incurred by PROSPERI after the claim of lien was filed. [A-2] [R 160].

Although CODE prevailed on its breach of contract claim, its recovery was substantially reduced by the damages awarded to PROSPERI on his counterclaim for breach of contract. The court's finding on the various claims (as contained in the partial final judgment) are significant and are discussed in greater detail below. [A-1] [R 134-137].

The court was initially inclined to award PROSPERI his attorneys' fees, ruling:

> A final judgment will be entered when the court has determined the amount of the award of attorneys' fees and costs due to defendant since that amount and the amount awarded today offset each other.

[A-1] [R 137].

PROSPERI filed a verified motion for attorneys' fees seeking the $13,200.00 in fees he had incurred in defending CODE's claims and prosecuting his counterclaim [R 151-154] and a fee affidavit to support the amount of fees being sought. [R 155-158].

The arguments presented to the trial court in the attorneys' fees hearing are reflected in the verified motion for attorneys' fees [R 151-154], PROSPERI's motion for rehearing [R 162-165], CODE's memorandum in opposition to Defendant's motion for rehearing [R 183-185], and in the order denying PROSPERI's motion for fees. [A-2] [R 159-161].

Following the attorneys' fee hearing, the Court denied PROSPERI's request for fees under Section 713.29 (as a prevailing party), under Section 713.31 (pursuant to Count II of the

counterclaim for fraudulent claim of lien), and as special damages (pursuant to Count III of the counterclaim for common law fraud). [A-2] [R 159-161]. His findings and reasonings will be detailed below. [A-2] [R 159-161]. His order failed to address PROSPERI's request for fees pursuant to Section 713.06(3)(d)(1) and Holding Electric, Inc. v. Roberts, 530 So.2d 301 (Fla. 1988). PROSPERI moved for rehearing of the order denying fees. [R 162-165]. CODE filed a memorandum in opposition [R 183-185]. The trial court denied PROSPERI's motion for rehearing on September 20, 1991. [R 179]. PROSPERI timely filed his notice of appeal on October 11, 1991. [R 180].

The Fourth District Court of Appeal, in its opinion filed November 4, 1992, affirmed the trial court's denial of attorneys' fees to PROSPERI. [A-3]. The Appellate Court findings and reasonings will also be detailed below. Additionally, the Fourth District Court of Appeal acknowledged this Court's recent opinion in Moritz v. Hoyt Enterprises, Inc. 604 So.2d 807 (Fla. 1992). In its opinion, the Fourth District certified the identical question certified to this Court in M&P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA), rev. dismissed, 589 So.2d 294 (Fla. 1991). PROSPERI moved for rehearing of the Fourth District Court's opinion. [A-4]. CODE, Inc. filed a reply to appellate's motion for rehearing. [A-5]. PROSPERI filed a motion to permit a reply to appellee's reply to a motion for rehearing. [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 attorneys' fees applies to fees awarded under Section 713.29, Florida Statutes. In addition to entering the order affirming the trial court denying attorneys' fees, the Appellate Court also entered an order dated November 4, 1992, granting CODE'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].

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

II.

SUMMARY OF THE ARGUMENT

The certified question presented by the Court in M&P Concrete Products v. Woods, and recertified to this Court in the instant case, should be answered in the affirmative. A mechanical application of the "net judgment rule" in the case sub judice is contrary to the clear language of Statute Section 713.29, and produces a result clearly inequitable under the facts of this case.

PROSPERI is entitled to recover his attorneys' fees under Section 713.29, Florida Statute (1989) for having prevailed on CODE's attempt to enforce a mechanics lien, notwithstanding that CODE prevailed against PROSPERI in its claim for breach of contract, especially given the trial court's finding that CODE's breach of contract claim would not have arisen but for CODE's fraud in submitting a series of false affidavits to PROSPERI for payment

prior to serving the final affidavit on which the claim of lien was based. Section 713.29 Florida Statutes, should be construed so as to provide for the award of attorneys' fees to the party who is successful in the mechanics lien claim, and the question certified 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 affirmative.

PROSPERI is entitled to recover his attorneys' fees pursuant to this Court's ruling in Moritz v. Hoyt, as the record in this case clearly establishes that PROSPERI prevailed on the significant issues tried in this cause. The trial court specifically found that PROSPERI's attorneys' fees and costs incurred in this action directly, naturally, and proximately resulted from the filing of false affidavits by CODE, that PROSPERI was justified in being unwilling to rely on the final affidavit due to CODE's previous filing of false affidavits, and that but for the filing of false affidavits, PROSPERI would have continued to have made all payments due under the contract. The question certified by the Fourth District Court of Appeal in the case sub judice should be answered in the affirmative, to provide that the test for determining a "prevailing party" as enunciated by this Court in Moritz v. Hoyt Enterprises, Inc., 604 So.2d 807 (Fla. 1992), should be construed to apply to requests for attorneys' fees under Section 713.29.

The order awarding appellate attorneys' fees to CODE is contrary to the established law of this Court, contrary to decisions of the Second District Court of Appeal, and, in fact,

conflicts with a recent decision of the Fourth District Court of Appeal, and should be reversed. There is no authority for the award of appellate attorneys' fees to a party who has proven no entitlement to such fees by statute, contract, or common fund.

III. ARGUMENT

ISSUE I

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 ATTORNEYS' 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?

In the instant case, the trial court ruled that CODE's "filing of untrue affidavits for payment by the Plaintiff in order to obtain payment from the owner deprives the Plaintiff of its lien." [A-1] [R 135]. Thus, the Court found that PROSPERI was the prevailing party on mechanics lien claim. [A-1] [R 135].

CODE prevailed on Count II of its complaint for breach of contract. However, its $31,898.01 claim was reduced by the nearly $15,000 in damages awarded to PROSPERI on his counterclaim for breach of contract arising from CODE's filing of untrue affidavits, failure to account, and incomplete or careless performance under the contract. [A-1] [R 136]. Thus, although PROSPERI prevailed on CODE's claim for mechanics lien, he nonetheless owned CODE $17,309.06 on CODE's breach of contract claim.

The trial court denied PROSPERI's request for attorneys' fees under Section 713.29, notwithstanding that PROSPERI prevailed on CODE's claim for a mechanics lien. The sole basis for that denial was the Court's conclusion that, according to M&P Concrete

Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA), appeal dismissed, 589 So.2d 294 (Fla. 1991), PROSPERI was not the prevailing party because CODE ultimately secured a judgment against PROSPERI for breach of contract. [A-2]. The Appellate Court affirmed the order of the trial court, again in reliance upon M&P Concrete Products, Inc. [A-3].

On appeal, PROSPERI requested the Appellate Court to modify the questions certified in M&P Concrete Products, Inc., to more accurately reflect the issues in the instant case, by expressly narrowing the certified question to those circumstances where the contractor's claim for money damages was expressly found to be triggered by fraudulent acts committed by the contractor prior to filing of its valid claim of lien. The Fourth District Court of Appeal declined to modify the certified question as requested.

In his order denying PROSPERI's request for attorneys' fees, the trial court set out the following findings of fact and law:

> The Plaintiff did not prevail on its mechanics lien but did ultimately in this action secure judgment of money flowing in its favor. Consequently, the Defendant cannot recover attorneys' fees based upon the fact that they prevailed on the mechanics lien part of the case because they are not actually a prevailing party. e.g., M&P Concrete Products v. Blane, 16 F.L.W.D. 1731 (Fla. 4th DCA 1991)[3]
>
> On the contract count, there is no right to attorneys' fees.
>
> On the counterclaims the Court has already ruled on the counterclaims for negligence. There was a series of fraudulent affidavits but the very last affidavit was not

[3] The Trial Court erroneously cited to M&P Concrete Products v. Blane. The correct name of the case is M&P Concrete Products, Inc. v. Woods.

fraudulent and it was the one upon which the claim of lien was based. In this case, the lienor overstated the amounts he was due but eventually in the end filed a lien that was not perjurious or fraudulent. Therefore, the question remaining is whether or not the Defendant, Mr. PROSPERI, can recover attorneys' fees incurred in the defense of a mechanics lien and the prosecution of his counterclaims as a form of special damages, (since they are not recoverable on a prevailing party, contractual, or fraudulent in theories). It should be noted that the Court has awarded some attorneys' fees already as special damages. These were attorneys' fees needed by Mr. PROSPERI to defend against subcontractors so that he would not have to pay twice for their work, having already paid CODE in reliance upon false affidavits supplied by CODE. The attorneys' fees incurred in this case occurred after the lien was filed. At that point, Defendant/Counterclaimant was justifiably not willing to rely on the figures provided by CODE.

The Court finds that the greater weight of the evidence has proven that the attorneys' fees and costs incurred in this action directly, naturally, and proximately, resulted from the filing of false affidavits. But for the filing of the false affidavits, PROSPERI would have continued to have made all payments due under the contract and CODE would have continued to work on the project until it was properly completed.

. . .

In summary, the Court finds that the Defendant/Counterclaimant is not entitled to attorneys' fees based on: prevailing on the mechanics lien, the fact that CODE breached the contract, that the affidavits prior to the final one were fraudulent or as an element of special damages arising from the filing by CODE of false affidavits.

[A-2] [R 159-161] (emphasis added).

Section 713.29, Fla. Stat. (1989) provides for the award of attorneys' fees to the prevailing party in mechanics lien foreclosure actions. That statute provides:

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.

Although one of the purposes of the mechanics lien statute is to protect the interest of contractors, laborers, and materialmen, and other lienors, Chapter 713 also includes provisions designed "to protect the owner against the risk of having to pay for the same services or materials more than once, and to allow the owner an opportunity to make proper payment before suit is filed." Holding Electric, Inc. v. Roberts, 530 So.2d 301, 303 (Fla. 1988) (construing Section 713.06(3)(d)(1). The award of attorneys' fees to the prevailing party under Section 713.29 is mandatory. Sanfilippo v. Larry Gaican Tile Company, Inc., 390 So. 2nd 413, 414 (Fla. 4th DCA 1980). The statute's purpose is to make the prevailing party whole while at the same time discouraging specious claims and defenses. Sanfilippo v. Larry Gaican Tile Company, Inc., supra at 414; Foxbilt Electric, Inc. v. Belefant, 280 So.2d 28 (Fla. 4th DCA 1973).

Although the mechanics lien statute is to be strictly construed, Home Electric of Dade County, Inc. v. Gonas, 547 So.2d 109 (Fla. 1989), the fee provisions should not be construed to favor either the owner or the contractor. Section 713.37, Fla. Stat. (1989).

Notwithstanding the rule of strict construction, courts are required to take a common sense approach in construing provisions of the mechanics lien statute when to apply the provision literally would be manifestly unjust and inconsistent with other decisions bearing on the question. B&H Sales, Inc. v. Fusco Corporation, 342

So.2d 105 (Fla. 2nd DCA 1977). As the special concurring opinion in M&P Concrete Products, Inc. v. Woods, supra, notes:

> The issue being one of statutory construction, the text of the statute itself is of critical importance ... It seems rather clear to me from the text that it is the enforcement of a Part I, Chapter 713 lien which implicates the right to attorneys' fees, and not the joinder of that attempted enforcement with another non-statutory cause of action on which the lienor prevails. In other words, the legislature appears to have been concerned with the attempted enforcement of defective liens (as well as the successful enforcement of valid liens) in allowing prevailing party fees.
>
> From the language chosen, one can reasonably infer that the legislature was persuaded that the assertion of an invalid lien might have consequences affecting title to real property which the failed lienor should pay for in attorneys' fees. At the same time, it appears to have concluded that those planning on using the device of a Chapter 713 lien to force another party to a transaction to pay money, which that party might not otherwise have paid in the absence of the invalid lien claim, might be dissuaded from the attempt by liability for fees.

M&P Concrete Products, Inc. v. Woods, supra, page 431 (Fla. 4th DCA 1991). (emphasis added)

The concerns raised by Judge Farmer in his special concurrence in M&P Concrete, supra, have special application where, as here, the trial court made a specific finding that "attorneys' fees and costs incurred in this action directly, naturally, and proximately, resulted from the filing of the false affidavits. But for the filing of the false affidavits, PROSPERI would have continued to have made all payments due under the contract and CODE would have continued to work on the project until it was properly completed. [A-2] [R 159-161].

Both the trial court and Appellate Court's reliance upon M&P

Concrete Products, supra (and the cases cited therein, and AAA Sod, Inc. v. Weitzer Corp. 513 So.2d 750 (Fla. 4th DCA 1987), in effect penalize the owner for failing to prevail in the "whole litigation" by denying him recovery of the fees he incurred in successfully defending the lien foreclosure suit.

In cases involving 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 his fees even if he does not prevail on his counterclaim. However, his award is limited to fees incurred for services rendered on the lien claim. See, 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).

For example, in United Plumbing and Heating, Inc. v. Goldberger, 452 So.2d 591 (Fla. 4th DCA 1984), the Court considered an owner's entitlement to fees under 713.29 in a case involving a contractor's claim for a mechanics lien against both the owner and his surety and the owner's counterclaim for fraudulent lien. In concluding that the owner was entitled to recover fees on the mechanics lien claim, regardless of his failure to prevail in his counterclaim, this Court held that "there were three claims involved in this suit: . . . The prevailing party on each of those claims was entitled to attorneys' fees under Section 713.29 if those claims were property pleaded." Id., at 593. See also, Snaidman v. Harrell, 432 So.2d 809 (Fla. 1st DCA 1983).

Likewise, in Snaidman v. Harrell, supra, homeowners who successfully resisted a mechanics lien by the contractor were denied fees by the trial court as prevailing parties because they did not prevail on their counterclaim for breach of contract. (The contractor was similarly unsuccessful in its claim against the owner for breach of contract.) On appeal, the District Court reversed the order denying fees upon the following rationale:

> It is evident that the circuit court has impermissibly interrelated the two actions and ruled that the owners must prevail in the whole litigation, including their contract action against the contractor, before becoming entitled to an award of attorneys' fees under Section 713.29. But that Section does not allow attorneys' fees for services in the whole litigation; it provides only for the services incident to the foreclosure action.
>
> . . .
>
> Nor do we find any basis in the statutory language for concluding that the prevailing party in the foreclosure action should be denied recovery of attorneys' fees simply because that party did not also prevail in his breach of contract action against the contractor.

Id., at 811; accord, Java v. Atlas, Inc., 500 So.2d 606 (Fla. 1st DCA 1986); Dominguez v. Benach, 277 So.2d 567 (Fla. 3rd DCA 1973).

Holding Electric, Inc. v. Roberts, 530 So.2d 301 (Fla. 1988) provides yet another twist on the prevailing party rule in that it authorizes the award of that portion of an owner's attorneys' fees attributable to the contractor's failure to properly comply with the requirement in Section 713.06(3)(d)(1) (Florida Statute 1985) relating to the timely filing of the final affidavit "irrespective of what occurs in the rest of the lawsuit." Holding Electric, Inc. v. Roberts, supra at 303. Thus, it would follow under Holding that

a contractor who prevails in both his mechanic's lien claim and a breach of contract claim could recover his fees under Section 713.29 but would nonetheless be liable for that portion of the owner's attorneys' fees which were incurred as a consequence of the contractor's failure to fully comply with Section 713.06(3)(d)(1). It should be noted that Section 713.06(3)(c)(1), providing partial payment affidavits provides that upon the requirement of the owner (as required by PROSPERI in the instant action), the contractor shall furnish as a prerequisite to requiring payment to himself, an affidavit as prescribed in Section 713.06(3)(d)(1). This is the identical statutory provision construed by this Court in Holding Electric, Inc. v. Roberts, supra. CODE'S fraud prior to serving the final affidavit placed PROSPERI in a position identical to an owner who is furnished with no final affidavit, in violation of §713.06(3)(d)(1) or a fraudulent final affidavit, in violation of §713.31. In both those cases the owner is deprived of the opportunity to make proper payment before his lien is filed and in both instances, the owner is entitled to recover fees incurred as a consequence of the contractor's conduct in depriving him of that opportunity.

That same reasoning applies here. Section 713.06(3)(c)(1) requires a contract to submit affidavits to receive interim payments and it prescribes that those affidavits comply with the requirements of §713.06(3)(d)(1). The Court found the interim affidavits to be fraudulent (in violation of §713.06(3)(c)(1),) which fraud rendered CODE'S final affidavit, although technically

valid under 713.06(3)(d)(1), to be unreliable. [A-1]

In construing the legislative intent of Section 713.06(3)(d)(1), this Court held that:

> "the clear purpose of Section 713.06(3)(d)(1) is to protect the owner against the risk of having to pay for the same services or materials more than once, and to allow the owner an opportunity to make proper payment before suit is filed. We note that a contractor who fails to give the required affidavit prior to instituting the lien foreclosure suit should be subject to attorneys' fees for that portion of the action attributable to his failure to comply with the Statute, irrespective of what occurs in the rest of the lawsuit." Holding Electric, Inc. v. Roberts, supra at 303.

In the instant case as in Holding Electric, Inc. v. Roberts, the owner is entitled to fees incurred as a consequence of the contractor's fraud prior to filing the final affidavit given the Court's finding that the contractor's fraud resulted in the owner being unable to rely on the final affidavit.

As noted above, many different standards exist as to the determination of "prevailing party" under Section 713.29. If the contractor loses on his mechanics lien claim, and recovers on no other cause of action, the owner is clearly the prevailing party pursuant to Section 713.29. Additionally, if the contractor does not prevail on his counterclaim, and either does not prevail on his breach of contract, or recovers less than fifty percent of the amount claimed on the contract, and the owner recovers in excess of fifty percent of the amount claimed on his counterclaim for breach of contract, again the owner is considered the prevailing party for purposes of Section 713.29. See, e.g., Snaidman v. Harrel, 432

So.2d 809 (Fla. 1st DCA 1983).

However, the Appellate Courts have fashioned a "net judgment rule", which, in essence, provides that even though the contractor does not prevail on his mechanics lien count, if he is successful in recovering a judgment in excess of any amounts recovered by the owner, he is deemed to be a "prevailing party", thus defeating the owner's entitlement to statutory attorneys' fees.

As noted by the special concurring opinion in M&P Concrete Products, Inc. v. Woods, in construing the legislative intent behind Section 713.29, " . . . it is the enforcement of a Part I, Chapter 713 lien which implicates the right to attorneys' fees and not the joinder of that attempted enforcement with another nonstatutory cause of action in which the lienor prevails". M&P Concrete Products, Inc. v. Woods, 590 So.2d 429 (Fla. 4th DCA 1991).

The legislature specifically amended Section 713.29 in 1977 to refer to the taxing of costs "as allowed in equitable actions". See e.g. S.C.M. Associates, Inc. v. Rhodes, 395 So.2d 632, 634 n.2 (Fla. 4th DCA 1981). As is clear from the facts of this case, mechanical application of the "net judgment rule" results in an inequity clearly not intended by the legislature or the courts.

For these reasons, this Court should answer the certified question posed by the Fourth District Court of Appeal in M&P Concrete Products, Inc. v. Woods, in the affirmative, and provide that PROSPERI is entitled to recover his fees as the prevailing party on CODE's mechanics lien claim without regard to CODE's

recovery on the breach of contract. This result would represent a reasonable interpretation of Section 713.29, would be faithful to Section 713.29's purpose of discouraging specious claims and defenses, and would fairly balance the equities of the case.

ISSUE II

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

Subsequent to PROSPERI's hearing on his motion for attorneys' fees, but prior to the Appellate Court's decision affirming the trial court's denial of attorneys' fees to , this Court issued its opinion in Moritz v. Hoyt Enterprises, Inc., 604 So2d 807 (Fla. 1992). PROSPERI filed a notice of supplemental authority to direct the Appellate Court's attention to Moritz, but he was not authorized via that notice to argue the implications of Moritz on the instant case.

In its per curium opinion affirming the trial court's denial of PROSPERI's motion for attorneys' fees, the Appellate Court recognized the potential relevance of the Moritz holding but refused to apply Moritz, because whereas, Moritz involved a request for attorneys' fees pursuant to a contract, the instant case involves a request for fees pursuant to a statute. (§713.29).

PROSPERI respectfully submits that the Appellate 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 expressed nor even an implied suggestion that its holding is limited to cases involving

fees sought under a contract. Indeed, in acknowledging this Court's decision in Moritz, the Appellate Court noted that "it may be that the Supreme Court will extend that test to cases involving attorneys' fees awarded under Section 713.29, Florida Statutes (1991). Indeed, there is room in the Statute for such an equitable approach. See, e.g., S.C.M Associates, Inc. v. Rhodes, 395 So.2d 632, 634 n.2 (Fla. 2nd DCA 1981)."

As noted by the Fourth District Court of Appeal in S.C.M. Associates, Inc., "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 77-53, Section 11, Laws of Florida) to refer to the taxing of attorneys' 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 reasonably contend that he was 'the equitably' prevailing party because he prevailed with respect to more than three-fourths of the money in issue." S.C.M. Associates, Inc., supra, p. 634 n. 2.

In the instant case, there can be no argument that PROSPERI in fact prevailed on the significant issues tried before the Court. As previously noted, as PROSPERI was the prevailing party on the mechanics lien claim. [A-1] [R 135]. Additionally, PROSPERI prevailed on CODE's claim for quantum meruit (Count III), account stated (Count IV) and in his counterclaim against CODE for breach of contract. [A-1] [R 134-137].

While CODE prevailed on Count II of its complaint for breach of contract, nonetheless the trial court determined that the contract was first breached by CODE, and its claim of $31,898.01 was reduced by the nearly $15,000 in damages awarded to PROSPERI on his counterclaim. [A-1] [R 136]. More importantly, the trial court's order expressly provided that

> "the court finds that the greater weight of the evidence has proven that the attorneys' fees and costs incurred in this action directly, naturally, and proximately, resulted from the filing of the false affidavits. But for the filing of the false affidavits, PROSPERI would have continued to make all payments due under the contract and CODE would have continued to work on the project until it was properly completed." [A-2] [R 159-161].

Furthermore, in its finding of facts, the trial court ruled that

> "as to Count II of the complaint, breach of contract, and the Defendant's counterclaim, the Court finds that the contract was originally breached by the Plaintiff by filing untrue affidavits and by inaccurately accounting to the Defendant. The Defendant by contract and law was entitled to an accurate accounting and the Plaintiff was not entitled to be paid until it had adequately accounted. The affidavits were knowingly false, and submitted for the purpose of obtaining money in reliance upon their accuracy. The Plaintiff apparently believed that it was the Defendant that had breached the contract and so refused to continue to perform. At this point, the Defendant [PROSPERI] has no practical choice but to engage assistance elsewhere in order to complete the contract and the Defendant was entitled to deduct the cost of completing the contract from any sums due to the Plaintiff. Therefore, the Court finds that of the $31,898.01 unpaid under the contract, the Defendant is entitled to deduction as more fully detailed below of $14,588.95 leaving a balance of $17,309.06 due and payable under Count II of the complaint." [A-1] [R 134-136].

As this Court noted in Moritz, "... the fairest test to determine who is the prevailing party 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." Moritz v. Hoyt Enterprises, Inc., 604 So.2d 807, 810 (Fla. 1992).

The Fourth District Court of Appeal reluctance to extend the holding of Moritz to statutory fee actions is unfounded. On the contrary, in articulating the test to be used in determining who is the prevailing party for purposes of an award of attorneys' 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. Helgemone, 581 F.2nd 271, 278-279 (1st Circuit 1978), both of which involve the award of fees pursuant to a statute. (42 U.S.C. Section 1988).

Given this Court's citation to statutory fee award cases as authority for its holding in Moritz which involved a contractual fee issue, this Court clearly did not make the distinction that the Fourth District Court of Appeal has made in determining prevailing parties for the purpose 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 a series knowingly and willingly false affidavits of the payment upon which justifiably could not rely. This inequity need not be condoned by

this Court.

The applicability of equitable considerations in the award of fees under Section 713.29 is particularly well illustrated in Ferrell v. Ashmore, 507 So.2d 691 (Fla. 1st DCA 1987), in which the First District found the owners to be prevailing parties under Section 713.29 even though they did not prevail in the contractor's lien claim. In that case, the owners recovered more against the contractor in their breach of contract claim than the contractor recovered in his counterclaim for mechanics lien. In deciding that the contractor was not entitled to his fees under Section 713.29, even though he had prevailed on his lien claim, the First District expressly "declined to apply Section 713.29 in a strictly mechanical manner." Id. at fn. 3. The court opted instead for "a reasonable construction of the statute [...] comports with common sense and is consistent with prior decisions." Id. at 695. The Ferrell court held:

> Where the lien claimant's effort to foreclose on an otherwise valid mechanics lien was defeated by judgement entered in favor of the owner whose recovery on a counterclaim for damages caused by the lien claimant's breach of the contract exceeds the amount of the lien claim, the owner is under such circumstances, the prevailing party under Section 713.29.

Id., at 694 (emphasis added).

While the facts of Ferrell are distinguishable from those presented here, the opinion's value lies in its acknowledgement that: (1) the determination of who is the prevailing party pursuant to Section 713.29 is very fact-specific and must take into account all circumstances of the parties claims against each other;

and (2) a court cannot suspend common sense and equitable principles in construing Section 713.29. See also, B&H Sales, Inc. v. Fusco Corporation, where the court expressly declined to literally enforce the one-year statute of limitations of Section 713.22(1), Florida Statutes, where such enforcement would "in light of the circumstances in this case be both manifestly unjust and inconsistent with the decisions bearing on the question." Id., at 107.

The application of similar equitable considerations is relevant in the interpretation of other prevailing party fee statutes. For example, in Newsom v. Dean Whitter Reynolds, Inc., 588 So.2d 1076 (Fla. 1st DCA 1990), a securities broker who prevailed in a claim brought by an investor under Florida's Blue Sky Act (Chapter 517) was nevertheless denied attorneys' fees as a prevailing party under Section 517.211(6), Florida Statutes, based upon the Court's conclusion that it would be unjust to award fees to the broker who had been found to have committed fraud but who had prevailed in the action on the basis of a successful statute of limitations defense.

In view of the Court's acknowledgements in Ferrell v. Ashmore, and B&H Sales, Inc. v. Fusco Corp., the Newsom Court's reasoning is clearly applicable here. This is especially true where CODE has unjustly escaped liability for PROSPERI's attorneys' fees which the Court specifically found "directly, naturally, and proximately resulted from [CODE's] filing of false affidavits" prior to the final affidavit. [A-2].

The gross inequity in denying the award of PROSPERI's attorneys' fees as the prevailing party based on CODE's recovery in its breach of contract claim becomes particularly clear upon consideration of the Court's factual findings in the partial final judgement relating to CODE's breach of contract claim:

> The Court finds that the greater weight of the evidence has proven that attorneys' fees and costs incurred in this action directly, naturally, and proximately resulted from the filing of the false affidavits. But for the filing of the false affidavits, would have continued to have made all payments due under the contract and CODE would have continued to work on the project until it was properly completed.

[A-2] [R 159-161].

The trial court's findings absolutely established that had not CODE not engaged in the fraudulent conduct found to have occurred prior to the filing of the final affidavit and claim of lien, PROSPERI would have been willing to rely on the figures contained in the final affidavit and would not have breached the contract by refusing to make payment on the final affidavit. Thus, CODE's mechanics lien and breach of contract claim against PROSPERI would never have occurred. To mechanically apply the rule followed in M&P Concrete Products, Inc. v. Woods to relieve CODE of liability for PROSPERI's attorneys' fees based solely on CODE's recovery of damages against PROSPERI contravene's the doctrine that a party to a contract whose own conduct prevents a later performance by the other party to the contract cannot take advantage of his own wrong. Paul v. Hurley, 315 So.2d 536 (Fla. 4th DCA 1975).

Refusal to apply Moritz to Section 713.29 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 setoffs 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, by refusing to apply Moritz, he will be responsible for his own attorneys' fees unless he is able to obtain a setoff for more than fifty percent 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 fifty percent of the damages for which he sued the owner, there is no deterrent for him not to engage in fraudulent conduct (prior to filing a valid final affidavit) since even if he loses his lien foreclosure claim, he will be spared, by application of the net judgment rule, from paying the owner's attorneys' fees. Clearly, that result was not the legislature's intent in authorizing the award of fees pursuant to Section 713.29.

Applying Moritz to attorneys' fees request pursuant to Florida Statute, Section 713.29, finds additional support in the legislature's 1977 amendment to Section 713.29, wherein they refer to the taxing of costs "as allowed in equitable actions". See e.g. S.C.M. Associates, Inc. v. Rhodes, 395 So.2d 632, 634 n.2 (Fla. 4th DCA 1981). Application of Moritz to the facts of this case would fulfill the legislative intent of Section 713.29 by awarding attorneys fees to the prevailing party [PROSPERI] based upon the equities of the case.

ISSUE III

THE AWARD OF APPELLATE ATTORNEYS' FEES TO CODE IS IN DIRECT CONFLICT WITH THIS COURT AND THE SECOND DISTRICT'S ANALYSIS OF ENTITLEMENT TO ATTORNEYS' FEES AND SHOULD BE REVERSED.

The Fourth District, in addition to rendering its decision affirming the trial court's denial of attorneys' fees to PROSPERI, also entered an order granting appellate attorneys' fees to CODE. [A-4]. In doing so, the decision of the Fourth District is in direct conflict with this Court's and the Second District's analysis of entitlement to attorneys fees in Kittel v. Kittel, 210 So.2d 1 (Fla. 1967), and in Israel v. Lee, 470 So.2d 861 (Fla. 2nd DCA 1985). In Kittel, the Court underscored the fact that

> "It is an elemental principle of law in this state that attorneys fees may be awarded a prevailing party only under three circumstances, viz: (1) where authorized by contract; (2) where authorized by a constitutional legislative enactment; and (3) where awarded for services performed by an attorney in creating or bringing into the court a fund or other property."

Implicit in Kittel is the rule that attorneys fees shall not be awarded in the absence of any of the three stated criteria.

In Israel, the trial court awarded both trial costs and attorneys fees and appellate costs and attorneys fees against the appellant. The Second District, in reversing the award of attorneys fees, held that:

> The entitlement to an attorney's fee is derivative in nature. Florida Rule of Appellate Procedure 9.400 contemplates an allowance of attorneys fees in favor of the prevailing party to be paid by the unsuccessful party and, then, only if otherwise authorized by substantive law." (Emphasis added.)

In citing Kittel, supra, the Court further noted that "attorneys fees may awarded only where authorized by either a

contract or by a statute or where the attorney services create or bring a fund or other property into the court."

The Respondent in this case, as in Israel, has proven no entitlement to attorneys fees either by statute, contract, or separate fund. Indeed, the Respondent's motion for attorneys fees relies solely upon Section 713.29 of the Florida Statutes, which 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."

[A-10].

The record in this case is abundantly clear. Respondent was not a prevailing party under the mechanics lien statute. Furthermore, there was no contractual provision providing for entitlement of attorneys' fees to CODE, nor was there a common fund created by CODE'S attorney. Indeed, Respondent never even moved for attorneys fees at trial, either under Section 713.29, or otherwise.

The Fourth District Court of Appeal's opinion discloses no entitlement for the award of appellate attorneys fees to Respondent. The Fourth District's order merely cites to Fla. R. App. P., Rule 9.400(b). [A-3A] Rule 9.400(b) provides that

> "A motion for attorneys fees may be served not later than the time for service of the reply brief and shall state the ground on which recovery is sought. The assessment of attorneys fees may be remanded to the lower tribunal. If attorneys fees are assessed by the Court, the lower tribunal may enforce payment."

As previously stated, Respondent's motion for attorneys fees relies upon Section 713.29, Florida Statutes (1989), which provides for the award of attorneys fees in mechanics lien actions to the prevailing party. [A-10] Implicit in the decision of the Fourth District is the holding that a contractor can be defeated on his mechanics lien action at the trial court level and still be a prevailing party for attorneys fees under the same mechanics lien action on appeal. It must be noted that the contractor at no time appealed the trial court's decision denying the its claim for a mechanics lien in this action. Accordingly, that issue was never before the Fourth District Court of Appeal.

Although Section 713.29 authorizes the award of attorneys fees for trial and appeal, such fees are only awardable to a party who prevails in a mechanics lien foreclosure action. In this case, both the trial court and the Fourth District Court acknowledged that Code did not prevail in Count I of its complaint for foreclosure of mechanics lien. On the contrary, the court denied Code's lien claim based upon its filing of fraudulent affidavits for payment.

As noted previously the Fourth District decision in this case also conflicts with its prior decision in M&P Concrete Products, Inc. v. Woods, 590 So. 2nd 429 (Fla. 4th DCA 1991) rev. dismissed 589 So. 2nd 294 (Fla. 1991), wherein the Fourth District acknowledged that a subcontractor is not entitled to attorneys fees upon defeat in a mechanics lien action, even though he obtains a money judgement pursuant to a contract claim.

CONCLUSION

The question certified by the Fourth District Court of Appeal in M&P Concrete Products, Inc. v. Woods should be answered in the affirmative. PROSPERI should be entitled to his attorneys' fees as prevailing party pursuant to Section 713.29.

The question certified by the Fourth District Court of Appeal in this case should also be answered in the affirmative. The test articulated by this Court in Moritz v. Hoyt Enterprises, Inc., applies to attorney fee requests arising under Section 713.29.

The order granting CODE's appellate attorneys' fees should be reversed, as CODE failed to prevail in its mechanics lien foreclosure claim and he is not otherwise entitled to fees pursuant to contract, statute, or a common fund.

This case should be remanded for the award of attorneys' fees incurred by PROSPERI at trial and in this appeal pursuant to Section 713.29 and/or Section 713.06(3) and Holding Electric, Inc. v. Roberts, supra.

Respectfully submitted,

PAUL SAFRAN, JR., P.A.

By: _____

Paul Safran, Jr.
265 Sunrise Avenue - Suite 204
Palm Beach, Florida 33480
(407) 832-5696
Fla. Bar No. 473278

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, Florida 33410, this 9th day of March, 1993.

PAUL SAFRAN, JR., P.A.
265 Sunrise Avenue
Suite 204
Palm Beach, Florida 33480
(407) 832-5696

By: _____
Paul Safran, Jr., Esquire
Florida Bar No. 473278

appeals.app/wp

A P P E N D I X

INDEX TO APPENDIX

✓ EXHIBIT ONE

_____ EXHIBIT TWO

_____ EXHIBIT THREE

_____ EXHIBIT FOUR

_____ EXHIBIT FIVE

_____ EXHIBIT SIX

_____ EXHIBIT SEVEN

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.
CIVIL DIVISION.

CASE NO. CL-89-6831-AN

CODE, INC.,

Plaintiff,

vs.

A. PAUL PROSPERI,

Defendant.
_____/

PARTIAL FINAL JUDGMENT

This action was tried before the Court without a jury on a complaint and a counterclaim and the respective answers.

As to the complaint: The Plaintiff's claim for a mechanics lien is denied for the following reasons: The parties had an agreement which was partially evinced by a written contract which was not actually the entire contract but contained certain terms which were the core of what was essentially a combination written and oral contract. The parties both relied upon the provisions of the written portion of the contract that had to do with payment. For example the Plaintiff cites the written contract in Item 17 of Plaintiff's composite exhibit where the Plaintiff brings attention to the Defendant of the terms of the contract claiming that payment was due in essence within 10 days, no later than the 10th and 25th of the month because these are the payment terms under which they employ subcontractors. This is illustrative of two points, one, that the Plaintiff was relying on this provision of the contract (actually the letter misrepresents the true facts, namely that the contractors subcontracts provide payment by Plaintiff on a monthly

basis not a twice monthly basis). Two, all dealings between the parties indicate that this was an agreement for reimbursement. The written contract provides that the Defendant is to reimburse the Plaintiff. The Plaintiff's subcontracts provide that the Plaintiff will only pay subcontractors reimbursement as work is done. The requests for payment submitted by the Plaintiff to the Defendant under oath were claims for reimbursement. These affidavits claimed that the amounts for which they sought reimbursement had been fully paid which as a matter of fact was untrue. (Actually Plaintiff held back 10% due to subs.) The Defendant was unaware that the Plaintiff was holding back 10%. The filing of untrue affidavits for payment by the Plaintiff in order to obtain payment from the owner deprives the Plaintiff of its lien. Therefore as to Count I, a claim for a mechanics lien, the Court finds in favor of the Defendant.

As to Count II of the complaint, breach of contract, and the Defendant's counterclaim the Court finds that the contract was originally breached by the Plaintiff by filing untrue affidavits and by inaccurately accounting to the Defendant. The Defendant by contract and law was entitled to an accurate accounting and the Plaintiff was not entitled to be paid until it had adequately accounted. The affidavits were knowingly false, and submitted for the purpose of obtaining money in reliance on their accuracy. The Plaintiff apparently believed that it was the Defendant that had breached the contract and so refused to continue to perform. At this point the Defendant had no practical choice but to engage assistance elsewhere in order to complete the contract and the Defendant was entitled to deduct the costs of completing the

contract from any sums due to the Plaintiff. Therefore the Court finds that of the $31,898.01 unpaid under the contract the Defendant is entitled to a deduction as more fully detailed below of $14,588.95 leaving a balance of $17,309.06 due and payable under Count II of the complaint.

Count III is denied since the Plaintiff has an adequate remedy at law.

Count IV is denied since this account was not agreed upon by the parties.

As to the counterclaim: The Court finds that certain work either remained incomplete or was carelessly done and needed to be repaired. This was the responsibility of the Plaintiff/Counterdefendant and is the same work deducted above and set forth below.

As to the construction defects: 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. Setoff against the $31,898.00 owed are the following damages: $1,100.00 in attorneys fees, $1,700.00 roof repairs, 37% of the $6,000.00 fee paid to the general contractor ($2,220.00). 37% being the Court's assessment of the appropriate proportion of the fee allocable to the correction of construction

defects attributable to Plaintiff-Counterdefendant. Liens paid $3,702.29. Two months lost rent $5,866.66.

A final judgment will be entered when the Court has determined the amount of the award of attorneys fees and costs due to Defendant since that amount and the amount awarded today offset each other.

ORDERED at West Palm Beach, Florida, this 16 day of May, 1991.

EDWARD FINE
Circuit Judge

Copies furnished:
Richard D. Nadel, Esq.
12300 Alternate A1A
Suite 106
Palm Beach Gardens, FL 33410

Paul Safran, Jr., Esq.
165 Sunrise Avenue
Suite 204
Palm Beach, FL 33480

_____ EXHIBIT ONE

_____ EXHIBIT TWO

_____ EXHIBIT THREE

_____ EXHIBIT FOUR

_____ EXHIBIT FIVE

_____ EXHIBIT SIX

_____ EXHIBIT SEVEN

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.
CIVIL DIVISION.

CASE NO. CL-89-6831-AN

CODE, INC.,

Plaintiff,

vs.

A. PAUL PROSPERI,

Defendant.
_____/

ORDER

The Court previously entered a partial final judgment and deferred ruling pending the outcome of an award of attorneys fees for the Defendant. That matter has come before the Court and the Court having considered the arguments and authorities presented, finds, orders and adjudges as follows:

The Plaintiff did not prevail on its mechanic's lien but did ultimately in this action secure a judgment of money flowing in its favor. Consequently the Defendant Prosperi can not recover attorneys fees based upon the fact that they prevailed on the mechanic's lien part of the case because they are not actually a prevailing party. E.g., M & P Concrete Products v. Blaine, 16 F.L.W. D. 1731 (Fla. 4 DCA 1991).

On the contract count, there is no right to attorneys fees.

On the counterclaims the Court has already ruled on the counterclaims for negligence. There was a series of fraudulent affidavits but the very last affidavit was not fraudulent and it was the one upon which the claim of lien was based. In this case the lienor overstated the amounts he was due but eventually in the

end filed a lien that was not perjurious or fraudulent. Therefore the question remaining is whether or not the Defendant, Mr. Prosperi can recover attorneys fees incurred in the defense of the mechanic's lien and the prosecution of his counterclaims as a form of special damages, (since they are not recoverable on prevailing party, contractual, or fraudulent lien theories). It should be noted that the Court has awarded some attorneys fees already as special damages. These were attorneys fees needed by Mr. Prosperi to defend against subcontractors so that he would not have to pay twice for their work, having already paid Code in reliance upon false affidavits supplied by Code. The attorneys fees incurred in this case occurred after the lien was filed. At that point the Defendant/Counterclaimant was justifiably not willing to rely on the figures provided by Code.

The Court finds that the greater weight of the evidence has proven that the attorneys fees and costs incurred in this action directly, naturally, and proximately, resulted from the filing of the false affidavits. But for the filing of the false affidavits, Prosperi would have continued to have made all payments due under the contract and Code would have continued to work on the project until it was properly completed.

I can find no authority to support an award of attorneys fees as special damages arising from the presentation by Code of fraudulent affidavits (which were not used as the basis of the lien). E.g., Attorney's Fees as Recoverable in Fraud Actions, 44 ALR 4th 776.

In summary, the Court finds that the Defendant/Counterplaintiff is not entitled to attorneys fees based

on: prevailing on the mechanic's lien, the fact that Code breached the contract, that the affidavits prior to the final one were fraudulent or as an element of special damages arising from the filing by Code of false affidavits.

ORDERED at West Palm Beach, Florida, this 26 day of August, 1991.

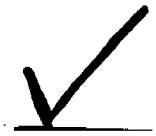
EDWARD PINE
Circuit Judge

Copies furnished:
Richard D. Nadel, Esq.
12300 Alternate A1A
Suite 106
Palm Beach Gardens, FL 33410

Paul Safran, Jr., Esq.
265 Sunrise Ave., #204
Palm Beach, FL 33480

_____ 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
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 November 4, 1992

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

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.

PER CURIAM.

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 Const. Co., 370 So.2d 380 (Fla. 2d DCA), cert. denied, 379 So.2d 205 (Fla. 1979). We certify the same question as was certified in M & P Concrete Products.

We acknowledge the supreme court's recent opinion in Moritz v. Hoyt Enterprises, Inc., 17 F.L.W. 465 (Fla. July 23, 1992), in which it held 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." Id. at 466. It may be that the supreme court will extend that test to cases involving attorney's fees awarded under section 713.29, Florida Statutes (1991). Indeed there is room in the statute for such an equitable approach. See e.g. S.C.M. Assoc. Inc. v. Rhodes, 395 So.2d 632, 634 n. 2 (Fla. 2d DCA 1981).

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

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

_____ EXHIBIT ONE

_____ EXHIBIT TWO

✓ EXHIBIT THREE -A

_____ 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 the 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 of 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.

---

[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.: 91-0293Ø

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

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

_____ EXHIBIT ONE

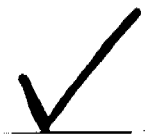
_____ EXHIBIT TWO

_____ EXHIBIT THREE

_____ EXHIBIT FOUR

_____ EXHIBIT FIVE

_____ EXHIBIT SIX

 EXHIBIT SEVEN

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

_____ EXHIBIT THREE

_____ EXHIBIT FOUR

_____ EXHIBIT FIVE

_____ EXHIBIT SIX

✓ EXHIBIT EIGHT

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

/MG

COMPOSITE EXHIBIT C

_____ EXHIBIT ONE

_____ EXHIBIT TWO

_____ EXHIBIT THREE

_____ EXHIBIT FOUR

_____ EXHIBIT FIVE

_____ EXHIBIT SIX

✓ EXHIBIT NINE

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.

______________________________/

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
500 East Broward Boulevard
Suite 1000
Ft. Lauderdale, FL 33394-3092
(305) 527-2800

By: 
PAULA REVENE, ESQ.
FLORIDA BAR NO. 636564

q:\pro_shar\prosperi.noa

_____ EXHIBIT ONE

_____ EXHIBIT TWO

_____ EXHIBIT THREE

_____ EXHIBIT FOUR

_____ EXHIBIT FIVE

_____ EXHIBIT SIX

✓ EXHIBIT TEN

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