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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,620

THE JUDGES OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA, APPELLATE DIVISION,

Petitioners,

vs.

PAMELA JANOVITZ,

Respondent.

ON REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT
CASE NO. 92-2447

INITIAL BRIEF OF AMICUS CURIAE ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Page

Page

Florida Rules of Court

SUMMARY OF ARGUMENT

The decision of the District Court overturning the order of the Appellate Division of the Circuit Court granting attorney's fees should be reversed, because such order is contrary to the case law and the rules of court operative in this state, and, in addition, it is contrary to the actual practice in effect in the courts of this state.

Unless the subject matter of an appeal encompasses the subject matter of an ancillary order, the ancillary order, including an order determining entitlement to attorney's fees on appeal, is not invalid by virtue of its issuance subsequent to the issuance of a mandate relating to the determination of the appeal to which it is ancillary. Stated alternatively, the validity of an order which is ancillary in nature is not dependent upon a withdrawal and subsequent reissuance of a mandate previously issued upon the determination of an appeal.

Although the Appellate Division did not identify the basis for its order granting attorney's fees, one basis could have been the absence of any justiciable issue of law or fact raised by Janovitz' appeal. If that is the basis for the order, then such order must be regarded as one for costs. Since orders regarding costs need not accompany or follow a mandate, there is, in this respect, additional authority for the reversal of the order under review.

Even if this Court should decline to reverse the order under review, the Appellate Division should be permitted to withdraw and reissue its mandate so as to legitimize its order granting attorney's fees, since the explicit ground for the setting aside of such order

by the District Court was in no respect attributable to THE KEYES COMPANY or KOSLOVSKY REALTY, INC., but was, instead, attributable only to mistake or inadvertence on the part of the Appellate Division in failing to coordinate the order granting attorney's fees with its mandate.

ARGUMENT

THE DECISION OF THE DISTRICT COURT IS CONTRARY TO THE CASE LAW, RULES OF COURT, AND THE ACTUAL PRACTICE IN EFFECT IN THE COURTS OF THIS STATE.

Basis of Award other than Section 57.105 (1), *Fla.Stat.*

The basis for the Appellate Division's order granting the motion for attorney's fees is silent as to its basis.[1] Assuming, for the moment, that the basis for the order granting the motion for attorney's fees was *other than* pursuant to Section 57.105 (1), *Fla.Stat.*, it is asserted that neither the case law of this state, nor the applicable rules of court, nor the practice of the Appellate Division of the Circuit Court *or of this Court*, require that the mandate accompany or follow orders determining entitlement to attorney's fees, at least when they both issue during the same term of court.

The cases cited by the District Court in the order under review do not support the proposition that orders which are ancillary in nature must be accompanied by a mandate. State Farm Mutual Automobile Insurance Company v. Judges of the District Court of Appeal, Fifth District, 405 So. 2d 980 (Fla. 1981) does not even deal with an ancillary order, but with the reconsideration of the subject matter of an appeal by means of the withdrawal of the mandate after the expiration of the term at which the court issued its decision and

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[1] A motion seeking an express declaration of the basis for the award was rejected by the Appellate Division, although Section 57.105 (1), *Fla.Stat.* was one basis raised in the motion therefor.

mandate. Obviously, Dyer v. City of Miami Employees' Retirement Board, 512 So. 2d 338 (Fla. 3d DCA 1987) does deal with an ancillary order, and, in particular, an order denying a motion for attorney's fees and costs. However, it does *not* deal with an order issued *during the term at which the mandate issued*, the situation at bar; on the contrary, the order in *Dyer* was issued at a term *subsequent to the term at which the mandate issued.* Therefore, it is asserted that these authorities do *not* support the proposition ascribed to them in the decision under review, determining that mandates must accompany or follow ancillary orders during the same term at which issued, or be subject to invalidation.

On the other hand, both State Road Department v. Brenner, 208 So. 2d 279 (Fla. 2d DCA 1967), *reh.denied (1968)* and Gulf Power Company v. Stack, 300 So. 2d 41 (Fla. 1st DCA 1974), *reh.denied* stand for the contrary proposition, that ancillary orders may *follow* the issuance of mandates, and need not accompany or precede them.

The case law of this state is, in fact, replete with instances of courts treating ancillary orders in a manner distinct from orders dealing with primary or appealed issues. In Chapman v. St. Stephens Protestant Episcopal Church, 105 Fla. 683, 138 So. 630 (1932), dealing with the right of the court to recall and reissue its same-term mandate, this Court expressly referred to reconsideration *of its judgment.* The same may be said of Washington v. State, 92 Fla. 740, 110 So. 259 (1926), and many other cases. However, research reveals *not a single instance* where a mandate had to be withdrawn and reissued unless that which was sought affected the subject matter of the appeal--in other words, *was other than ancillary.*

Cf. City of Miami Beach v. Arthree, Inc., 300 So. 2d 65 (Fla. 3d DCA 1973), in which this Court declared that mandates may not be the subject of amendment or variance without direction from the mandating court, and the situation presented in Stockman v. Downs, 573 So. 2d 835, 837 (Fla. 1991), where this Court stated that

> A motion for attorney's fees requires consideration of factors distinct from the issues decided on the merits of the cause of action. Thus, it is not improper to adjudicate entitlement to attorney's fees after resolution of the other claims.

The District Court has itself recognized the fundamental *jurisdictional* distinction between consideration of primary subject matter and matters ancillary thereto, and, in particular, the *jurisdictional* distinction between *that which is the subject matter of an appeal* and *that which is not*, including applications for attorney's fees and costs. The leading example of such recognition appears to be found in Finast Development, Inc. v. Bemaor, 449 So. 2d 290 (Fla. 3d DCA 1983).

The scheme of the Florida Rules of Appellate Procedure suggests a similar distinction. Fla.R.App.P 9.340 (a) speaks of the issuance of the mandate "after expiration of 15 days from the date of an order or decision," while subsection (b) speaks of an extension of such period after denial or determination of timely motions for rehearing, clarification, or certification. Fla.R.Civ.P. 9.300 (b) and (d) (6), read together, provide that service of motions relating to attorney's fees on appeal do not toll the time schedule of any proceeding in the appellate court. Read all together, it appears that the mandate is to issue *even when there is an undetermined motion for attorney's fees on appeal.* To read these rules

together to *require* (as distinguished from *permit*) issuance of the mandate after a determination of the subject matter of the appeal, then its *withdrawal*, and then its *reissuance* after determination of a motion for attorney's fees on appeal, is strained, convoluted and unreasonable.

In fact, it is the practice of both the Appellate Division of the Circuit Court and of this Court to determine motions for attorney's fees on appeal after the issuance of mandates *without subsequently withdrawing and reissuing same*, except, of course, where the subject matter of the motion also constitutes subject matter of the appeal.[2]

While the mere existence of this practice in the Appellate Division of the Circuit Court, and even in this Court, together with the evident endorsement of same by the District Courts in *State Road Department* and *Gulf Power Company*,[3] *supra*, do not necessarily compel its formal adoption by this Court for the entire state, the cited case law and rules

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[2] That this is the procedure followed in the Appellate Division of the Circuit Court is evident from this record, and may be verified through the Clerk, and in particular, through Appellate Division Deputy Clerk Tom Stevens. That this is also the procedure regularly followed in this Court comes on the authority of Clerk Sid J. White. Mr. White stated to undersigned counsel by telephone on February 4, 1993 that, while he believed it to be inappropriate for him to provide a writing confirming this practice, he would authorize undersigned counsel to make this representation to the District Court during its consideration of this matter. This representation was so made. At this state of the proceedings, Amicus Curiae respectfully presumes that this Court is entirely familiar with all aspects of its own practice, including this one, and will take notice accordingly.

[3] The Supplemental Brief on Jurisdiction filed by this Amicus Curiae demonstrates that this is, in fact, the practice in the First, if not the First and Second, District Courts.

of appellate procedure strongly support such action. On the other hand, there is no legal or reasoned basis for sustaining the contrary order here under review.

Section 57.105 (1), *Fla.Stat.* as Basis of Award

Assuming, alternatively, that the basis for the order granting attorney's fees on appeal *is* Section 57.105 (1), *Fla. Stat.*, as would be entirely appropriate under that section when read in conjunction with Section 59.46, *Fla.Stat.*, as that statute was construed in Allen v. Estate of Dutton, 384 So. 2d 171 (Fla. 5th DCA 1980), *reh.denied*, and in T.I.E. Communications, Inc. v. Toyota Motors Center, Inc, 391 So. 2d 697 (Fla. 3d DCA 1980), *reh.denied (1981)*, then the order under review should have been treated as one determining entitlement to *costs*. *See also* People Against Tax Revenue Mismanagement, Inc. v. Leon County Canvassing Board, 573 So. 2d 31 (Fla. 1st DCA 1990), *reh.denied (1991)*. As a consequence, under C.B.T. Realty Corporation v. St. Andrews Cove I Condominium Association, Inc., 508 So. 2d 409 (Fla. 2d DCA 1987) and Roberts v. Askew, 492 So. 2d 260 (Fla. 1972), *reh.denied*, it is absolutely clear that jurisdictional requirements--*in mandate terms*--are inconsequential. Indeed, in such case, not only need the mandate *not* be withdrawn and reissued, but a request to do so *will be denied as unnecessary*. Masser v. London Operating Co., 106 Fla. 474, 145 So. 72 (1932), *reh.denied*.

Other Considerations

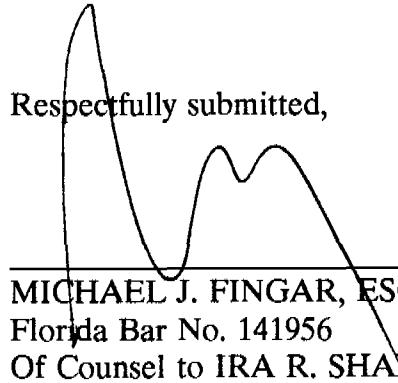
In the event that this Court is not persuaded that the order under review should be reversed, then it is urged that this Court expressly grant the lower tribunal leave to withdraw

its mandate, republish its order granting attorney's fees on appeal, and reissue the mandate. As grounds, it is asserted that there is applicable a well-established exception to the preclusion of post-term withdrawal of mandate, specifically, where orders, decrees, or judgments are the product of fraud, collusion, deceit, or mistake, or in cases where the mandate issued because of inadvertence, mistake or error. This principle has been expressed in numerous cases, including State *ex rel.* Melbourne State Bank v. Wright, 107 Fla. 178, 145 So. 598 (1932), and McGregor v. Hammock, 114 Fla. 259, 154 So. 191 (1934). More current expressions of this principle are found in Gardner v. State, 375 So. 2d 2 (Fla. 4th DCA 1979) and Brown v. State, 502 So. 2d. 979 (Fla.1st DCA 1987). In Martin v. Martin, 139 So. 2d 407, 408 (Fla. 1962), this Court recalled and corrected a judgment which contained "inadvertent wording," and which arose "without fault of petitioner and solely by virtue of the inadvertent wording of our mandate." *See also* State *ex rel.* Alfred E. Destin Co. v. Heffernan, 47 So. 2d 15 (Fla. 1950), *reh.denied*; Wheeler Fertilizer Co. v. Rogers, 49 So.2d 83 (Fla. 1950); and Maffea v. Moe, 483 So. 2d 829 (Fla. 4th DCA 1986). The leave requested will simply give effect to this principle under circumstances which invite its application. In the absence of such leave, KOSLOVSKY will be precluded from enforcing its entitlement to attorney's fees purely as a consequence of the inadvertence or mistake of the Appellate Division to coordinate its mandate with its order granting the motion for attorney's fees on appeal, without any fault on the part of KOSLOVSKY whatsoever.

CONCLUSION

Based on the foregoing, it is apparent that neither the case law, nor rules of court, nor the practice in the courts of this state, support the decision under review. On the contrary, they demonstrate that the decision is erroneous. Accordingly, KOSLOVSKY REALTY, INC. urges that this Court reverse the order of the District Court, and direct the reinstatement of the order of the Appellate Division of the Circuit Court granting the motion for attorney's fees on appeal. In the alternative, KOSLOVSKY urges that the Appellate Division be authorized (upon application) to withdraw its mandate; republish its order granting the motion for attorney's fees on appeal; and thence reissue its mandate.

Respectfully submitted,



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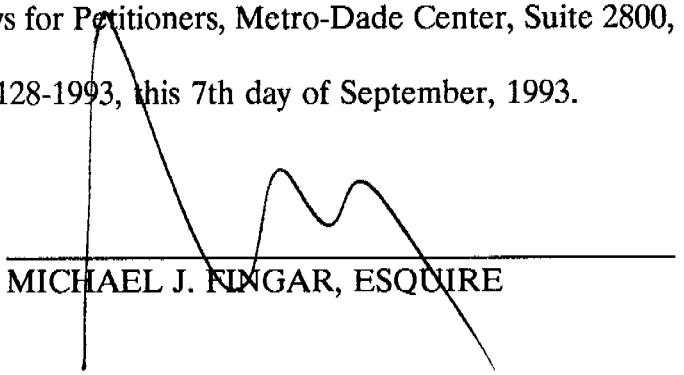
CERTIFICATE OF SERVICE

I CERTIFY that copies of the foregoing Initial Brief of Amicus Curiae on the Merits were furnished by mail to BRUCE H. FREEDMAN, ESQUIRE, FREEDMAN & VEREBAY, P.A., Attorneys for Respondent, 190 N.E. 199th Street, Suite 204, North Miami Beach, Florida 33179; and ROY WOOD, Assistant County Attorney, Office of the County Attorney, Dade County, Florida, Attorneys for Petitioners, Metro-Dade Center, Suite 2800, 111 N.W. First Street, Miami, Florida 33128-1993, this 7th day of September, 1993.



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