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SID J. WHITE
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By _____
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10/19

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.

_____/

RESPONDENT'S ANSWER BRIEF

On Review From The Third District Court
Of Appeal of Florida
Case No. 92-2447

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Petitioner's statement of the case is essentially accurate. In addition to the matters contained therein, it is also important to note that the Respondent advised the Appellate Division of the Circuit Court, as well as the Amicus Curiae before the term of court expired, that the Appellate Division did not have jurisdiction to enter an award of attorney fees after the mandate had issued. (R21-22). Despite the foregoing, the court did not recall its mandate and the Amicus (who was the moving party below), did not seek a recall of the mandate.

The Amicus Curiae was the party seeking attorney fees below and will be referred to herein as the "Amicus" or the "Realtors". All designations to the record will be by: "R-".

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SUMMARY OF THE ARGUMENT

The Appellate Division of the Circuit Court of Dade County, Florida entered an Order granting appellate attorney fees 54 days after the issuance of its mandate. The term of court thereafter expired without a recall of the mandate by the Appellate Division or any request to do so by the moving party, despite the fact that the Respondent advised the Court and advised the moving party that there was no jurisdiction to enter the Order because the mandate had issued. Therefore, the Appellate Division did not have jurisdiction to enter the attorney fee award and the Third District Court of Appeal was correct in issuing the Writ of Mandamus.

The Petitioner's citation of Masser v. London Operating Co., 145 So. 72 (Fla. 1932) does not conflict with the decision below because this Court specifically held that Masser does not contemplate attorney fees. That decision is simply related to an award of court costs under the rules which were in effect in 1932 and in no way invovled an award of attorney fees.

Finkelstein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986) is similarly inapplicable to the Appellate Court setting. Although Finkelstein holds that a Trial Court may enter an award of attorney fees subsequent to the entering of a final judgment, that case does not apply to an appellate court setting since: (1) Unlike a trial court, an appellate court's jurisdiction is governed by terms of court; (2) The Order of Attorney Fees was not entered within a reasonable time (89 days) after the underlying

decision was entered; (3) The practical reasons for allowing a trial court to exercise jurisdiction past the time for filing an appeal of a final judgment do not exist in the appellate court setting.

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ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED BECAUSE AN APPELLATE COURT LOSES JURISDICTION TO ENTER AN AWARD OF ATTORNEY FEES AFTER THE MANDATE IS ISSUED UNLESS THE APPELLATE COURT FIRST RECALLS ITS MANDATE PRIOR TO THE EXPIRATION OF THE TERM OF COURT.

Florida Law is clear that an Appellate Court loses jurisdiction to enter an award of attorney fees once a mandate is issued. De Bowes v. De Bowes, 12 So.2d 118 (Fla. 1943); Dyer v. City of Miami Employees' Retirement Board, 512 So.2d 338 (Fla. 3rd DCA 1987). This case is almost identical to Dyer. In DYER, just like the instant case, the moving party initially filed a timely Motion for Attorney Fees. In both cases, the Circuit Court, acting in its Appellate capacity, did not enter an Order either granting or denying the Motion for Attorney fees until after the mandate was issued. In both cases, the moving party failed to request that the lower court recall its mandate and made no request or showing as required by law that the mandate was inadvertently issued, prior to the end of the term of court due to mistake, fraud, collusion or deceit. The Third District in DYER, held that "...the Circuit Court, under these circumstances, had no jurisdiction to grant the petitioner's aforesaid application for attorney's fees and costs". Dyer, at 339.

The same situation exists here. The lower court did not have jurisdiction to enter the attorney fees Order unless the mandate was recalled prior to the expiration of the term of Court. The Respondent was unable to locate any judicial decision which suggested that an award of attorney fees could be entered after the mandate had issued, unless the mandate was first recalled prior to the expiration of the term of court.

Petitioner relies upon Masser v. London Operating Co., 145 So. 72 (1932), to suggest to this Court that the method for taxation of costs in 1932 should now apply to an award of attorney fees after a mandate has issued despite the fact that this very court in De Bowes, supra, specifically held that the rule for taxation of costs did not "...comprehend counsel fees". De Bowes, supra, at 120.

In De Bowes, a request for attorney fees was made almost two months after the issuance of the mandate. This Court held that jurisdiction was lost once the mandate was issued and the term of Court expired. This is the identical situation that is presented here. A suggestion that Masser authorized an award of attorney fees post mandate is simply wrong.

The Petitioner next suggests that the Appellate Court setting is identical to the Trial Court setting and that this Court's decision in Finkelstein v. North Broward Hospital Dist., 484 So.2d 1241 (Fla. 1986) should apply to an award of attorney fees on appeal. Not only are the present rules of procedure different with respect to an award of attorney fees in the Appellate Courts, the jurisdictional limits for each court's power to act are also

different. Rule 1.090(c) of the Florida Rules of Civil Procedure provides that:

> "The continued existence or expiration of a term of Court in no way effect the power of a Court to do any act or take any proceeding in any action which is or has been pending before it." Fla. R. Civ. Pro. 1.090(c).

There is no corresponding rule of appellate procedure or statutory authority for the continued existence of jurisdiction beyond a specific term of Court for an Appellate Court.

The practical application of a request for attorney fees is also much different in a Trial Court as opposed to an Appellate Court. In a Trial Court setting, a post judgment motion for attorney fees is not normally made until after liability is decided by Judgment. As such, the Trial Court is not in a position to decide that issue until some time after the Judgment is entered. In the Appellate Court setting, however, the Appellate Court has received all motions for attorney fees before the decision on the merits is rendered. In fact, a motion for attorney fees which is filed after the time for filing same pursuant to Florida Rule of Appellate Procedure 9.400 is a proper basis alone for denying fees. Garcia v. Garcia, 570 So.2d 357 (Fla. 3rd DCA 1990); and Salley v. City of St. Petersburg, 511 So.2d 975 (Fla. 1987).

In addition, unlike the Trial Court setting, no additional testimony or arguments are made, no additional briefs are filed and simply put, no judicial effort is required to enter an order determining entitlement to attorney fees. Although there was a practical reason for extending jurisdiction in the Trial Court

setting, there is absolutely no reason for extending the jurisdiction of the Appellate Courts for an unlimited period of time within which to enter an Order with respect to attorney fees.

Even assuming arguendo that Finkelstein should be applied to Appellate Court proceedings, that does not require reversal in this case. Finkelstein requires that a Trial Court enter its order within a "reasonable time". The appellate division of the Circuit Court affirmed the decision of the Trial Court on June 19, 1992, (R1-24) The award of attorney fees was entered on September 16, 1992 (R1-24) or eighty nine (89) days later! That clearly is not a "reasonable time". How long should a litigant be required to wait if a mandate no longer has any meaning in order to determine whether or not attorney fees will be awarded?

Again even assuming that an award of attorney fees should be treated like an award of costs under rule 9.400 as suggested by the Petitioner, this case still must be affirmed. Rule 9.400(a) requires that a Trial Court must enter an award of costs within thirty (30) days after the issuance of a mandate. In this case, the attorney fees were not awarded until fifty four (54) days after the mandate had issued. Accordingly, even if the appellate rule for taxation of costs was stretched to include an award of attorney fees, the Order here was outside of the requirements of that Rule.

The Petitioner states that the decision below is wrong from a fairness and common sense standpoint (see brief of Petitioner at page 7). This is a matter pertaining to a Court's subject matter jurisdiction. Fairness is not an issue. See Westberry v. Copeland

Sausage Co., 397 So.2d 1018 (Fla. 1st DCA 1981). In Westberry, the First District held that once a term of Court expires an Appellate Court loses jurisdiction over the matter even to prevent a miscarriage of justice.

The mandate of an Appellate Court is the method by which is communicates its Judgment to the lower tribunal. Colonel v. Reed, 379 So.2d 1297, (Fla. 4th DCA 1980). From a practical standpoint once the mandate is issued an Appellate Court has no method of communicating its Judgment to the lower tribunal without first either recalling the mandate previously issued or issuing a second mandate. In the instant case, a second mandate was never issued and there was no way for the Appellate Court to therefore communicate its Judgment to the lower tribunal for enforcement. Garcia v. Garcia, 570 So.2d 357, at 359 (Fla. 3rd DCA 1990) ("...A trial court may not award appellate attorney's fees absent a mandate from the Appellate Court.") See also Real Estate Apts. v. Bay Shore Garden Apts., 530 So.2d 977 (Fla. 2nd DCA 1988).

Parties further cannot confer jurisdiction on an Appellate Court, nor can they waive jurisdictional defects. Peltz v. District Court of Appeal, 605 So.2d 865 (Fla. 1992). When the Appellate Division of the Circuit Court entered the Order granting fees it no longer had subject matter jurisdiction of the case. It could have reacquired jurisdiction by recalling its mandate. The realtor's lawyers could have asked the Court to recall the mandate. They refused to do so despite the fact that the respondent had filed a Motion for Rehearing and specifically called attention to

the Jurisdictional defect before the term of Court expired. (R21-22). The failure of the attorneys to request a recall of the mandate is the reason why they have lost the ability to collect fees. This is not a case whereby a party was left without a remedy.

This very Court in State Farm v. Judges of District Court of Appeal, Fifth District, 405 So.2d 980, at 982-983, (Fla. 1981) noted that:

> All things must have end, even a district court's power to correct inconsistencies. The reasons for this form the bedrock of Anglo-American jurisprudence: There must be an end of litigation. Public policy, as well as the interest of individual litigants, demands it, and the rule just announced is indispensable to such a consummation! ...an appellate court's power to recall its mandate is limited to the term during which it was issued. (Citations omitted.)

The Petitioner also suggests in its brief that the decision below "...fosters confusion with respect to the nature of Appellate Jurisdiction" (see brief of Petitioner at page 7). The exact opposite is true. The decision below provides precise guidelines for Appellate Jurisdiction. If an Appellate Court may enter an award of attorney fees at any time, litigants would have to guess when a case finally becomes final.

Although a mandate is a "technical" part of the law, it still exists. Maybe there is no longer a need for the technical issuance of a mandate and maybe the use of a mandate is no longer necessary. However, until the rules of civil procedure or appellate procedure are changed, Florida Law is clear that an Appellate Court loses

Jurisdiction once its mandate is issued. State Farm, supra De Bowes, supra Dyer, supra.

POINT II

THE BRIEF FILED BY THE AMICUS CURIAE CONTAINS CITATIONS WHICH DO NOT ADDRESS THE ISSUES PRESENTED AND CONTAINS MATTERS OUTSIDE THE RECORD.

The brief by the Amicus/Realtors is misleading and many of the cases cited therein do not stand for the propositions suggested.

State Road Department v. Brenner, 208 So.2d 279 (Fla. 2nd DCA 1967) and Gulf Power Company v. Stack, 300 So.2d 41 (1st DCA 1974) do not stand for the proposition that "ancillary orders may follow the issuance of mandates, and need not accompany or proceed them". See brief of Amicus Curiae at page 4. Neither State Road Department or Gulf Power even mention the issuance of a mandate or the expiration of a term of court. In State Road Department, the Second District granted a Motion for Rehearing in order to enter an attorney fee award. There was absolutely no mention in that case whether or not the mandate had issued, whether or not the mandate needed to be recalled or if the term of court had expired. Likewise, in Gulf Power, the First District Court of Appeal also didn't mention whether or not a mandate had issued, whether the mandate had been recalled or whether or not the term of court had expired.

Simply put, State Road Department and Gulf Power have nothing whatsoever to do with the issue decided by the Third District Court of Appeal below. In addition, the Amicus argues "...research reveals not a single instance where a mandate had to be withdrawn and reissued unless that which was sought effected the subject

matter of the appeal - - in other words, was other than ancillary." See brief of Amicus at page 4. The Third District Court of Appeal Decision in Dyer v. City of Miami Employees' Retirement Board, 512 So.2d 338 (Fla. 3rd DCA 1987) specifically provides that a mandate must be recalled prior to the expiration of a term of Court in order to award attorney fees which were not previously made. In fact, this decision formed the basis of the granting of the petition for Writ of Mandamus in the Third District Court of Appeal and the Amicus, who also filed briefs in that case, was well aware of the existence of this decision.

In addition, the recitation of the conversations which counsel for the Amicus allegedly had with Clerk Sid White, as well as the conversation he allegedly had with the Clerk of the Appellate Division of the Circuit Court, are clearly improper to be included within a brief since there is absolutely no basis in the record to support or confirm the accuracy of the representations. Matters not included in the record should not be included in a brief. Thornbes v. City of Fort Walton Beach, 534 So.2d 754 (Fla. 1st DCA 1988). Even assuming that the clerks had followed the procedure as suggested by counsel for the Amicus, that does not make it the correct legal procedure which must be filed in the State of Florida.

The Amicus next argues that an award of attorney fees could have been made by the Appellate Division of the Circuit Court pursuant to Florida Statute Section 57.105(1). One of the obvious deficiencies in this argument is that the Appellate Division of the

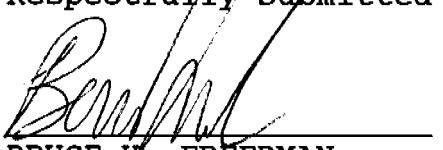
Circuit Court did not specify why they granted attorney fees. (In fact, it is difficult to imagine why the Appellate Division granted attorney fees.) In any event, any award of attorney fees pursuant to Florida Statute Section 57.105(1) must contain a holding that the merits of the appeal were frivolous. Key West Polo Club v. Towers Constr. Co., 589 So.2d 917 (Fla. 3rd DCA 1991). None was made in this case.

Finally, the Amicus suggests that the Appellate Division of the Circuit Court should have the opportunity to withdraw its mandate as a result of some "fraud, collusion, deceit or mistake." The Amicus has not given the underlying reasons for the alleged fraud, collusion, deceit or mistake which would allow a post term withdrawal of a mandate. It must also be remembered that the Amicus was advised of the jurisdictional defect before the term of court expired and its counsel did not request a recall of the mandate. Accordingly, even if a "mistake" was made, that clearly was waived by their failure to act. Notwithstanding the foregoing, this issue was not raised by either of the parties to this appeal and Amici do not have standing to raise issues which are not raised by the parties. Acton II v. Ft. Lauderdale Hospital, 418 So.2d 1099 (Fla. 1st DCA 1982).

CONCLUSION

Based upon the foregoing, the decision of the Third District of Appeal should be affirmed.

Respectfully Submitted



BRUCE H. FREEDMAN

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent to All Counsel in the lower court actions: MICHAEL FINGAR, ESQ., 13899 Biscayne Boulevard, Suite 400, Miami, Florida 33181, and ROY S. WOOD, Jr., ESQ., 111 N.W. 1st Street, #2820, Miami, Florida 33128, this 24th day of September, 1993 by U.S. Mail Delivery.

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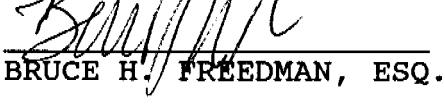
By: 

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