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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 92-2447 81,620

PAMELA JANOVITZ,

Petitioner,

vs.

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

Respondents.
_____/

Orig.

PETITIONERS' INITIAL BRIEF ON THE MERITS

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

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By

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STATEMENT OF THE CASE AND FACTS

Petitioners are judges of the appellate division of the Circuit Court of the State of Florida, Eleventh Judicial Circuit. Petitioners invoke the jurisdiction of the Supreme Curt to review a decision of the Third District Court of Appeal which held that a petition for writ of mandamus would be granted because the respondent judges of the circuit court appellate division lacked jurisdiction to enter an order for attorney's fees in an appeal from the county court.

The court of appeal held that the circuit court lacked jurisdiction, because the circuit court had issued its mandate fifty-four days prior to the order for attorney's fees and had not recalled it; furthermore, it held that it did not matter that the mandate and the attorney's fee order were issued in the same term of court. The court of appeal therefore held that mandamus should issue to compel the circuit court to vacate the order for attorney's fees. Formal issuance of the writ was withheld upon the assumption that the circuit court would vacate the order upon receipt of the opinion of the court of appeal. The facts relied upon herein are stated in the opinion of the court of appeal as described above.

The Appendix to this Brief on Jurisdiction consists of a true copy of the decision of the Third District Court of Appeal which is here sought to be reviewed. The pages of the Appendix will be indicated by: "A-".

The decision sought to be reviewed was filed January 26, 1993, and a motion for rehearing was filed February 9, 1993. The order denying rehearing was filed March 16, 1993, and Notice to Invoke Discretionary Jurisdiction was filed April 14, 1993.

SUMMARY OF ARGUMENT

The decision of the Third District Court of Appeal sought to be reviewed conflicts with the decision of the Supreme Court in Masser v. London Operating Co., 106 Fla. 474, 145 So. 72 (1932). In the Masser v. London Operating Co. decision, the Court held that recall of the previously issued mandate was not required in order for the Supreme Court to consider a motion to tax costs incident to the appeal.

The decision sought to be reviewed conflicts with the decision of the Supreme Court in Finklestein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986). In Finklestein, the Court held that a post-judgment motion for attorney's fees filed in a trial court raises a collateral and independent claim which the trial court may entertain within a reasonable time even where the litigation of the main claim has been concluded with finality.

The district court decision applies the principle that recall of the mandate, being the method by which an appellate court re-acquires jurisdiction of the merits of an appeal, is essential to determine a claim for appellate attorney's fees. This conclusion apparently rests upon the assumption that an order for attorney's fees cannot be entered by an appellate court after the merits of the plenary appeal have been concluded with finality unless such finality is removed by recall of the mandate. Such assumption is erroneous, however, as it fails to recognize

that the claim for attorney's fees is an independent collateral claim which may be determined after the plenary appeal has been adjudicated on the merits with finality and such finality remains in effect.

ARGUMENT

POINT I

THE DISTRICT COURT OF APPEAL ERRED BY CONCLUDING THAT AN APPELLATE COURT CANNOT DETERMINE ATTORNEY'S FEES FOR AN APPEAL WHERE THE PLENARY APPEAL HAS BEEN, AND REMAINS, FINALLY ADJUDICATED

In Masser v. London Operating Co., 106 Fla. 474, 145 So. 72 (1932), this Court decided an appeal, refused a petition for rehearing, and then denied a motion to recall the mandate. As to the latter motion, the Court stated:

> If the appellees feel themselves aggrieved as to the costs which have been taxed against them by the clerk in accordance with the usual practice prevailing here where no special order on the subject is made by the court, a motion to tax or retax such costs is always in order during the term of this court at which the case was finally disposed of. And a recall of the mandate, or the award of a rehearing, is not for the consideration by us of an appropriate motion for taxing or retaxing the costs incident to, and occasioned by, our own judgment on the appeal. Shepherd v. Rand, 48 Me. 244, 77 Am. Dec. 225.
>
> Motion to recall mandate denied.

145 So. at 79 (A-10).

There is no meaningful difference for purposes of this analysis from an award of costs and an award of attorney's fees to the prevailing party; because, both claims are collateral to the main claim and cannot be determined until the main claim is resolved. Thus, in Finklestein v. North

Broward Hospital Dist., 484 So.2d 1241 (Fla. 1986) this Court stated:

> Therefore, we adopt the United States Supreme Court's reasoning and holding in White and conclude that a post-judgment motion for attorney's fees raises a "collateral and independent claim" which the trial court has continuing jurisdiction to entertain within a reasonable time, notwithstanding that the litigation of the main claim may have been concluded with finality.

484 So.2d at 1243.

The decision sought to be reviewed (A1-2) held that recall of the mandate was essential in order to give an appellate court the power to make an award of appellate attorney's fees. Recall of the mandate, however, enables the appellate court to reclaim control of its decision on the merits of a plenary appeal. Chapman v. St. Stephens Protestant Episcopal Church, 105 Fla. 683, 138 So. 630 (1932). In other words, recall of the mandate deprives the decision on the merits of finality. Thus, to require recall of the mandate as a prerequisite to an award of appellate attorney's fees constitutes a holding that such award cannot be made if the decision on the merits of the appeal is final. This expressly and directly conflicts with Finklestein which states that such award may be made after the judgment has become final. That Finklestein dealt with a trial court award rather than an appellate court award is, again, a "distinction without a difference." City of Miami v. Florida Literary Distributing Corp., 486 So.2d 569,

573 (Fla. 1986). The jurisdictional principles are precisely the same.

The decisions of this Honorable Court in Masser and Finklestein are reproduced in the appendix to petitioner's jurisdictional brief. Under the reasoning of these cases, the decision below is clearly wrong. Not only is it wrong from a technical standpoint; it is wrong from the standpoint of fairness and common sense. Under the district court's reasoning, the circuit court in its appellate capacity could have unilaterally reclaimed jurisdiction to award attorney's fee merely by incanting the magic words: "The mandate is recalled." See Olde Mac Donald's Farms Inns Corp. v. McDill Columbus Corp., 476 So.2d 315 (Fla. 5th DCA 1985) (The appellate court announced sua sponte withdrawal of the mandate in the same order in which it entered the new decision.) The failure of the appellate court to do so in the instant case deprived the successful appellate litigants of the right to attorney's fees through no fault of their own.

Not only does the district court decision exalt ritual over substance with resulting injustice, the ritual is not correct under the most stringent, formalistic, and theoretical analysis.

The district court decision here sought to be reviewed fosters confusion with respect to the nature of appellate jurisdiction. Such confusion should be eliminated and resolved in favor of the power of the court to act.

CONCLUSION

This Honorable Court should quash the decision of the district court of appeal.

Respectfully submitted,

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By: Roy Wood
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Brief and Appendix was this 13 day of September, 1993, mailed to: Bruce H. Freedman, Esq., Freedman & Verebay, P.A., 190 N.E. 199 Street, Suite 204, North Miami, Florida 33179; Bruce Friedlander, Esq., 100 North Biscayne Boulevard, 20th Floor, Miami, Florida 33132; and to Michael Fingar, Esq., 13899 Biscayne Boulevard, Suite 400, Miami, Florida 33181.

Roy Wood
Assistant County Attorney

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,620

THE JUDGES OF THE ELEVENTH
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DADE COUNTY, FLORIDA,
APPELLATE DIVISION,

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_____/

APPENDIX TO
PETITIONERS' BRIEF ON JURISDICTION

On Review From The Third District Court
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By

App

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1993

PAMELA JANOVITZ, **

Petitioner, **

vs. ** CASE NO. 92-2447

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

Respondents. **

Opinion filed January 26, 1993.

A Case of Original Jurisdiction - Mandamus.

Freedman and Vereby and Bruce H. Freedman for petitioner.

Robert A. Ginsberg, Dade County Attorney, and Roy Wood, Assistant County Attorney, for respondents.

Michael J. Fingar, for the Keyes Company and Koslovsky Realty, Inc., as amicus curiae.

Before HUBBART and NESBITT and BASKIN, JJ.

PER CURIAM.

This is a petition for a writ of mandamus filed by Pamela Janovitz, who was an unsuccessful appellant in the circuit court

below, in which it is urged that the circuit court lacked jurisdiction to enter an adverse order assessing appellate attorney's fees. We grant the petition for a writ of mandamus because, simply stated, the order was entered fifty-four days after the circuit court had issued its appellate mandate affirming the county court judgment under review without the court ever having recalled the mandate to enter such order -- and, accordingly, (1) the circuit court had no jurisdiction to enter the subject attorney's fee order, and (2) mandamus lies to require the circuit court to vacate this order. The fact that the attorney's fee order was entered in the same term of court as the appellate mandate cannot change this result. See, e.g., State Farm Mut. Auto. Ins. Co. v. Judges of the Dist. Ct. of Appeal, Fifth Dist., 405 So.2d 980, 982 (Fla. 1981); Dyer v. City of Miami Employee's Retirement Bd., 512 So.2d 338 (Fla. 3d DCA 1987).

The petition for a writ of mandamus is hereby granted, but we withhold issuance of a writ of mandamus on the assumption that the circuit court will vacate the attorney's fee order upon receipt of this opinion.

It is so ordered.

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