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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.
_____/

PETITIONERS' BRIEF ON JURISDICTION

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

ROBERT A. GINSBURG
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By

Roy Wood
Assistant County Attorney

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 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 and a true copy of the decisions of the Supreme Court in Masser v. London Operating Co., 106 Fla. 474, 145 So. 72 (1932) and Finklestein v. North Broward Hospital District, 484 So.2d 1241 (Fla. 1986), with which we contend the decision sought to be

reviewed expressly and directly conflicts. The pages of the Appendix will be indicated by: "A-". The facts relied upon in this brief are only such facts as appear in the decision sought to be reviewed.

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

Express and direct conflict necessary to invoke the jurisdiction of this Honorable Court may be manifested by a discussion in the decision sought to be reviewed of the legal principles applied in reaching said decision.

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 decision sought to be reviewed holds that an appellate court may not enter an order for attorney's fees incident to the appeal unless a previously issued mandate is recalled. The discussion of the legal principles applied by the district court manifests express and direct conflict with Masser and with Finklestein; because, the latter decisions hold that loss of jurisdiction to adjudicate the main claim

does not deprive the court of power to adjudicate collateral claims independent of the main claim.

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. Since the claim for attorney's fees is clearly a collateral and independent claim, the district court decision manifests express and direct conflict with the cited Supreme Court decisions.

The decision sought to be reviewed expressly and directly affects a class of constitutional officers, namely all judges who exercise appellate jurisdiction. This Honorable Court has accepted jurisdiction under this source where a trial court issued a writ of mandamus to compel the court clerk to record a certified copy of a judgment in favor of an indigent without payment of a filing fee, and the District Court reversed.

Upon determination that jurisdiction exists, it is respectfully submitted that this Honorable Court should grant review due to the importance of the issue.

ARGUMENT

POINT I

THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT IN MASSER v. LONDON OPERATING CO., 106 Fla. 474, 145 So. 72 (1932) AND FINKLESTEIN v. NORTH BROWARD HOSPITAL DISTRICT, 484 So.2d 1241 (Fla. 1986)

In Ford v. Kikis, 401 So.2d 1341, 1342 (Fla. 1981), this Court held that express and direct conflict of decisions could be determined upon the basis of the discussion of the legal principles applied in the decision sought to be reviewed. The Court cited England, Hunter, and Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev. 147, 188-89 (1980). There it is indicated that the addition of the requirement of "express" conflict is intended to eliminate review of decisions without written opinions and that the use of dicta to find conflict is not ruled out.

In Masser v. London Operating Co., supra, (A4-10), 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).

Any argument that Masser should be distinguished because an award of costs is different than an award of attorney's fees is answered by the statement of this Court in rejecting an effort to defeat conflict jurisdiction in another case wherein it was stated: "This is a distinction without a difference." City of Miami v. Florida Literary Distributing Corp., 486 So.2d 569, 573 (Fla. 1986).

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 the Finklestein case 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 (A-13).

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., supra, 486 So.2d at 573. The jurisdictional principles are precisely the same.

Accordingly, we respectfully submit that jurisdiction exists in this Court due to express and direct conflict of decisions.

POINT II

THE DECISION SOUGHT TO BE REVIEWED EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OR STATE OFFICERS

It has been held that where review by this Court of a decision is sought under the "class of constitutional officers" provisions, the decision sought to be reviewed must affect, "the duties, powers, . . . or regulation of a particular class of constitutional or state officers." Spradley v. State, 293 So.2d 697, 701 (Fla. 1974).

In Ludlow v. Brinker, 403 So.2d 969 (Fla. 1981), the trial court issued a writ of mandamus to compel the clerk of the court to record a certified copy of a judgment in favor of an indigent without requiring a filing fee. The District Court reversed. This Honorable Court accepted jurisdiction because the decision expressly affected all court clerks, a class of constitutional officers, and affirmed the decision of the District Court. This case was decided under the most recent amendment to the Constitution affecting the jurisdiction of this Court.

Accordingly, we submit that it is manifest that the decision herein sought to be reviewed expressly affects all Florida judges who exercise appellate jurisdiction. It deprives them of the power to make an award of attorney's fees without recalling the mandate and thereby depriving the main decision of finality.

POINT III

THIS COURT SHOULD EXERCISE ITS DISCRETION AND TAKE JURISDICTION TO CLARIFY THE LAW WITH RESPECT TO AN IMPORTANT POWER OF AN APPELLATE COURT

The Committee Notes to Fla.R.App.P. 9.120(d) state that it is permitted in a jurisdiction brief to include a short statement of why this Court should exercise its discretion to review this case on the merits if it finds that it does have jurisdiction.

We submit that the decision sought to be reviewed fosters confusion with respect to the nature and scope of appellate jurisdiction. There should not be confusion concerning the power of a court to act.

While it is not in the record, we are advised that this Honorable Court will determine appellate attorney's fees after issuance of the mandate and without recall thereof. If true, we respectfully suggest that the Court may take judicial notice of its own procedure and give consideration thereto in determining whether to exercise its discretion to grant review in this cause.

CONCLUSION

This Honorable Court has jurisdiction and should resolve the cause on the merits.

Respectfully submitted,

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Roy Wood

By: _____
Roy Wood
Assistant County Attorney
Florida Bar No. 089560

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Brief and Appendix was this 26 day of April, 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
JUDICIAL CIRCUIT, IN AND FOR
DADE COUNTY, FLORIDA,
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INDEX TO APPENDIX

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.

A-2

by one charged with murder, admitting the homicide, but disavowing any criminal responsibility therefor, is admissible in evidence as an admission of a fact, and that, when it is so admitted, the court will be in error in charging the jury on the subject of "confessions" on the theory that such an admission of a fact is a "confession." See Powell v. State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277.

[5] An acknowledgment of a subordinate fact, not directly involving guilt, or, in other words, not essential to the crime charged, is not a "confession," because the supposed ground for rejecting confessions, unless clearly shown to be voluntary, is that a strong motive impels an accused to admit guilt as the price of purchasing immunity from punishment. Therefore, when a person only admits certain facts from which a jury may, or may not, infer guilt, there is no "confession" as that term is understood in the criminal law. Covington v. State, 79 Ga. 687, 7 S. E. 153.

In this case the court upheld defendant's contention that the statement in question should not be introduced except under the rules relating to proof of confessions, although it might have been introduced under the foregoing rule of evidence as a mere admission of certain subordinate facts, from which the jury might, or might not, have inferred guilt. We commend the practice of trial courts in observing the rule of caution in such matters. When in doubt, it is the better practice to treat such statement of an accused as admissible only under the rule governing admission of "confessions," and requiring that rule to be complied with, even in cases which apparently disclose only admissions of subordinate facts falling within the less stringent rule. The rule of caution followed in this case, and, if error was committed in following it, the error was against the state and not against the accused, who cannot complain under such circumstances, since the statement above quoted is by no means a "confession" of guilt by Norman Heidt of the crime of murder committed by Palmer in which Heidt was alleged to have been implicated. On the contrary, the statement is of an exculpatory nature for the most part, damaging to Heidt only in the sense that it contained an admission by him that he was in the immediate neighborhood of the killing when the crime was committed, and that he had gone there at the time in company with Palmer, the admitted killer.

When an accused attempts to make an exculpatory statement, which, if believed in its entirety, would entitle him to be acquitted of the crime charged against him, in connection with which such exculpatory statement was made, the state may introduce such statement in evidence against the accused as an admission by him of the subordinate facts referred to therein, from which the jury, in connection with other evidence in the case, may or may not infer guilt. In this case the state introduced Heidt's so-called "confession" for the purpose of showing the subordinate fact of his having gone to the scene of the attempted robbery and murder with the murderer, Joe Palmer, and of his having been near enough to the actual killing to have heard the shot which resulted in the killing.

The fact that the net result was to have the admissions contained in the exculpatory statement operate as links in the chain of circumstantial evidence from which the jury inferred guilt cannot convert the statement in question into a "confession" per se.

Petition for rehearing denied.

BUFORD, C. J., and ELLIS, TERRELL, and DAVIS, JJ., concur.

BROWN, J. (concurring in the order made).

While I dissented when this case was decided, the questions raised by the petition for rehearing were fully considered by the court, and, under the rule, I concur with my associate Justices that the petition for rehearing should be denied.

MASSER et al. v. LONDON OPERATING CO.

Supreme Court of Florida.
Aug. 23, 1932.
Rehearing Denied Nov. 2, 1932.

On Motion to Recall Mandate and on Extraordinary Petition for Rehearing
Dec. 12, 1932.

1. Injunction ⇐135, 161.
Granting and dissolving of temporary injunctions lies in discretion of trial court.

2. Appeal and error ⇐1024(2).
Injunction ⇐175.
Chancellor, on application to dissolve injunction, must be governed by weight of evidence, and his ruling is final, unless clearly against evidence.

3. Landlord and tenant ⇐299.
Order dissolving injunction which restrained lessor from bringing summary proceedings *held* justified, where lessor's answer denied allegations respecting lessor's breach of covenant and denied summary proceedings were threatened.

4. Landlord and tenant ⇐299.
On dismissal, for want of equity, of lessee's suit to restrain summary proceedings and for accounting, court erred in requiring

A-3

payment as rent of sum deposited in court by lessees to be held pending adjustment of differences.

It appeared from the lessees' bill, filed to enjoin summary proceedings for nonpayment of rent, that tender of money was not made for the purpose of meeting the installment of rent previously due, in the event suit should be dismissed, but that money was deposited with the intention of having differences between the parties adjusted. The court had required a deposit before making effective temporary injunction order, and the bill indicated that the lessees had a claim for unliquidated damages growing out of violation of certain covenants by lessor.

5. Deposits in court ⇐9.

Money paid into court on condition that certain contingency happen cannot be delivered to defendant until contingency occurs.

6. Equity ⇐365.

Chancellor has discretion in dismissing bill of complaint to dismiss without prejudice.

7. Appeal and error ⇐973.

Decree dismissing bill of complaint without prejudice will not be reversed, unless abuse of discretion to material detriment of party clearly appears.

8. Equity ⇐365.

Dismissal without prejudice is generally proper, where case has been disposed of for reason not reaching merits and plaintiff might make out good case on another trial.

9. Equity ⇐388.

Bill without equity will be dismissed at final hearing, even though demurrer was overruled.

10. Landlord and tenant ⇐299.

Dismissal without prejudice of suit by lessees to restrain summary proceedings *held* justified, where bill indicated lessees had probable action at law against lessor.

11. Landlord and tenant ⇐48(1).

Lessee has action at law for damages resulting from lessor's breach of covenant.

On Motion to Recall Mandate and on Extraordinary Petition for Rehearing.

12. Injunction ⇐149.

Court having custody of fund deposited before granting of temporary injunction had jurisdiction after dismissal to entertain proceedings for disposition according to equitable principles for purpose of making restitution for loss occasioned by improvident injunction.

13. Courts ⇐26.

Court, having by its erroneous act occasioned wrong, possesses inherent and summary jurisdiction to afford redress.

14. Equity ⇐430(1).

Court may make restitution in equity for its own error by decretal order on rule to show cause or motion.

15. Costs ⇐241.

Costs incident to appeal in equity are usually so apportioned as to do equity, where costs do not follow judgment.

16. Costs ⇐264.

Motion to tax or retax costs is in order during term of Supreme Court at which case was finally disposed of, and recall of mandate or rehearing is unnecessary.

Commissioners' Decision.

Appeal from Circuit Court, Dade County; Paul D. Barns, Judge.

Suit by Harry Masser, sometimes known as Harry Messer, and another, against the London Operating Company. From a decree dissolving a temporary injunction and from a final decree of dismissal, complainants appeal, and defendant assigns cross-error.

Reversed, and cause remanded, with directions.

See, also, 145 So. 79.

Aronovitz & Goldstein, Vincent C. Giblin, and R. A. Johnston, all of Miami, for appellants.

Price, Price & Hancock, Otto C. Stegemann, William B. Farley, and Carl T. Hoffman, all of Miami, for appellee.

DAVIS, C.

The appellants, whom we will refer to as the lessees, and the appellee, whom we will refer to as the lessor, under date of April 15, 1930, entered into a written agreement, wherein the Lessor leased to the Lessees a hotel building, known as the London Arms Hotel, located at Miami Beach, Florida, for a period of three years after November 1st, 1930. The Lessor agreed to deliver possession of the property to the Lessees on November 1st, 1930. The Lessees agreed to pay to the Lessor, as rental for the property forty-five thousand dollars ($45,000.00). Five thousand dollars ($5,000.00) of the rental was paid upon the execution of the agreement, ten thousand dollars ($10,000.00) was payable on November 1st, 1930, seventy-five hundred ($7,500.00) on February 15th, 1931, fifteen thousand dollars ($15,000.00) on November 1st, 1931, and seventy-five hundred dollars ($7,500.00) on November 1st, 1932. The ten thousand dollars ($10,000.00) payable on November 1st, 1930, was paid November 3rd, 1930, the date upon which the Lessees went into possession of the leased property. In the agreement of lease, the Lessor covenanted as follows (Tr. 17); 'that it will paint the wood-

A-4

work, walls and ceilings of the sleeping rooms and halls of the premises and will complete the solarium on half of the roof in the following manner on or before November 1st, 1930: to-wit: to build a slat wooden floor with a six foot partition in the middle and a four foot screen on the outside, pipe and canvas to be approved by the Building Inspector.'"

The agreement also contains, among others, the following provision:

"10. That the lessees have examined and know the condition of the premises and will receive and accept same in its present condition on November 1, 1930, with the exception of the painting and completion of the solarium as herein provided for."

On March 25, 1931, in a suit theretofore commenced in Dade county, Fla., by the lessees, complainants filed their amended bill of complaint for specific performance of certain covenants of the lease alleged to be binding upon the lessors, and for an injunction restraining the lessor from bringing summary ouster proceedings for the nonpayment of the installment of rent in the amount of $7,500, which became due and payable on February 15, 1931. A demurrer to the amended bill was filed the said 25th day of March, and on the same day an order of the court was filed overruling the demurrer and temporarily restraining the lessor from "enforcing a forfeiture of the lease, described in the amended bill, for non-payment of the Seventy-five Hundred ($7,500.00) Dollar installment of rent due to the Defendant on the 15th day of February, A. D. 1931, as described in the amended bill, and from filing proceeding at law, or otherwise interfering with the possession by the Complainants of the premises described in the amended bill of complaint and in the said lease; provided that the said Complainants shall first pay into the registry of this Court to the Clerk thereof, subject to the further orders of the Court in this cause, the said sum of Seventy-five Hundred ($7500.00) Dollars, on or before the 25th day of March, A. D. 1931," and providing also for the filing of a bond before the injunction should become effective. The said sum of $7,500 was paid into the registry of the court and the said bond was given pursuant to the terms of the order. On the 3d of April, the lessor filed a motion to dissolve the injunction, and on the 6th day of April, 1931, the lessor filed an answer to the bill. The motion to dissolve the injunction came up for a hearing, and thereupon the court, on May 13, 1931, ordered and decreed that the said injunction be dissolved and set aside. From this order the lessee appealed to this court. The appeal did not stay the suit, so the cause proceeded to a final hearing after it had been referred to a master before whom a great volume of testimony was taken. The final decree, omitting the names of the parties, reads as follows:

"The above styled and entitled cause comes on before this court for final hearing and upon exceptions filed by the complainants to the report of the master, and upon defendant's petition for an order requiring the Clerk of this Court to pay to the defendant the Seventy-five Hundred Dollars ($7,500.00) now in the registry of this court in this cause, and argument of counsel for the respective parties having first been had, and the court being fully advised in the premises, it appears unto the court that said bill is without equity (which makes it unnecessary to consider the master's report and exceptions thereto), and it further appearing unto the court that there is paid into the registry of this court the sum of Seventy-five Hundred Dollars by the complainants herein as an installment of rent due the defendant on the 15th day of February, 1931, and that same has been paid into court pursuant to an order of this court made on the 24th day of March, 1931, and that said payment was made as appears by said order subject to the further orders of the court in this cause,

"It is considered, ordered, adjudged and decreed that

"(1) Said cause be and the same is hereby dismissed without prejudice, however, to the rights of the parties;

"(2) That the said sum of Seventy-five Hundred Dollars ($7,500) deposited in the registry of this court be paid by the Clerk of this Court on or after the 1st day of February, 1932, to the London Operating Company to be applied upon that installment of rent falling due on the 15th day of February, 1931, as described in said bill of complaint and amended bill;

"(3) That the defendant, The London Operating Company, a Florida corporation, do have and recover of and from the complainants, Harry Masser, sometimes called Harry Messer, and Morris Baron, the cost of these proceedings, to be hereafter taxed."

From this decree the lessees took an appeal. At the request of appellants, the two appeals have been consolidated here and argued together.

Upon the appeal from the interlocutory order, appellants have assigned as error the ruling of the court in dissolving and setting aside the temporary injunction theretofore granted. Upon the appeal from the final decree, the appellants have assigned as error the making of said decree; the order dismissing the cause; and also "its order of final decree in that it was error for the Court to direct the clerk of the court to pay to the London Operating Company, on or after February 1st, 1932, the sum of $7,500.00, deposited in the registry of the court by the complainants, which sum as directed by the

A-5

Court was to be applied upon the installment of rent falling due on February 15, 1931, as described in the Amended Bill of Complaint."

If the bill as amended is without equity, and no error was committed by the court in dismissing the cause for that reason when it came up for final hearing, it follows that the order dissolving the said injunction from which the first appeal was taken should be affirmed.

In the brief filed here in support of the appeal from the final decree, the able solicitor who signed it says:

"I cannot argue with conviction that the chancellor below erred in dismissing the cause, upon the sole ground that the amended bill is without equity, although the appellee's demurrer to the amended bill had been previously overruled by another judge and the cause had progressed to a final hearing after the taking of the proofs. It will not be my purpose, therefore, to argue the appellant's first or second assignment of error, both of which are predicated upon the dismissal of the amended bill for want of equity."

But he also says:

"It is well to state, however, that my associate counsel entertain the conviction that the amended bill does state a cause for equitable relief; but it is unnecessary for them to file another brief upon this appeal because their views are fully set forth in a brief filed in this Court upon another appeal, which was from an interlocutory order in the cause."

Since the question raised upon the appeal from the interlocutory decree is not argued by appellants to sustain the appeal from the final decree, we deem it best to decide whether or not the court erred in dissolving the temporary injunction.

Upon the appeal from the interlocutory decree, lessees contend merely that the lessor breached its covenant to paint, resulting in damage to the lessees, that the lessor threatened to commence summary proceedings to oust the lessees from the property for the nonpayment of rent, and that an action at law for damages is not adequate relief to lessees.

[1] It has been declared repeatedly by this court that the granting and dissolving of temporary injunctions lies in the sound discretion of the court. See I. R. S. Co. v. E. C. Transp. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258; Shaw v. Palmer, 54 Fla. 490, 44 So. 953; Godwin v. Phifer, 51 Fla. 441, 41 So. 597; Thursby v. Stewart (Fla.) 138 So. 742.

[2, 3] Before the temporary injunction was granted, certain testimony was taken before the chancellor, and certain affidavits were filed in the cause before him. The lessor filed its answer to the bill before the motion to dissolve the said injunction was heard. This answer, which was sworn to, took sharp issue with the allegations of fact set out in the bill, and particularly denied the allegations relating to a breach of lessor's covenant to paint the woodwork, walls, and ceilings of the sleeping rooms and halls, and also the allegations relating to threatened summary proceedings to oust lessees from the premises. Under such circumstances, where an application is made to dissolve an injunction, though the bill may not be without equity, the chancellor must be governed by the weight of the evidence, and, unless his ruling is clearly against the weight of the evidence, it will not be reversed on appeal. See Baya v. Lake City, 44 Fla. 491, 33 So. 400; Richardson v. Kittlewell, 45 Fla. 551, 33 So. 984; High v. Jasper Mfg. Co., 57 Fla. 437, 49 So. 156; Ogden v. Baile, 69 Fla. 458, 68 So. 671.

Here, even though we should hold that lessees have a right to withhold a due payment of rent, because of a violation of the covenant to paint the woodwork, walls, and ceilings of the sleeping rooms and halls, a question we do not at this time decide, and that they are entitled to an injunction where summary process for their removal from the property is threatened because of their refusal to pay rent, we cannot say that the order dissolving the injunction was against the weight of the evidence that was before the court. It follows that the interlocutory order dissolving the injunction must be affirmed.

[4] Since the only question argued here in the brief of appellants upon the appeal from the final decree is involved in the assignment of error addressed to that part of the decree which directed the clerk of the court to pay to the lessor the said sum of $7,500 deposited in the registry of the court by the lessees, we will not consider any other question upon such appeal.

In and by their bill, the lessees offered, and thereby tendered into the registry of the court, $7,500 in cash, "so that the lessor will be secured for the payment of the sum of money which is due to it, the said sum of money to be held in the registry of the Court at the direction and order of the Court as may seem proper and meet to this Honorable Court," and they prayed that they be permitted to deposit the said sum in the registry of the court.

The prayer asks for an accounting, and that "such amounts as are found to be due to your complainants shall be deducted from the amount paid into the registry of the Court and the balance delievered to your defendant." The cause was dismissed because it was determined and declared by the court that the "bill is without equity," and it is conceded by appellants that the decree is proper in that respect. Now, the question arises: Did the court commit error in decreeing that the said sum of $7,500 be paid to the lessor to be applied upon the installment of rent which was due on February 15, 1931?

A-6

The bill indicates that the lessees had a claim for unliquidated damages growing out of alleged violation of certain covenants of the lessor, the amount of which they desired to have the court assess and deduct from the said sum of $7,500, and that they deposited the money in the registry of the court with authority to the court, after deducting the amount found to be due the lessees, to deliver the balance to the lessor.

It is the contention of appellants that the decree in effect gave the defendant, the lessor, a judgment for $7,500 for rent due February 15, 1931, that the money was deposited as a condition precedent to the obtaining of certain relief, and not as a tender to satisfy the lessor's claim for rent, and that the decree, in effect, says to the complainant: "We have taken your money and will not return it to you, nor will we give you any of the relief you have sought."

It appears from the bill that a tender of the money was not made for the purpose of meeting the installment of rent due on the 15th day of February, 1931, in the event the suit should be dismissed, but that it was deposited with the intention, as we gather it from the allegations of the bill, of having the differences apparently existing between lessor and lessees adjusted, and that such sum be held at the "direction and order of the Court as may seem proper and meet." One of the conditions imposed by the court for the issuance of the injunction was the payment of said sum of $7,500 into the registry of the court, "subject to the further orders of the Court." This condition was imposed, no doubt, because of the offer contained in the bill.

In the light of what is shown by the bill, we cannot ascribe to the court the intention, when the injunction order was made, to summarily dispose of the said sum of $7,500, in the event the cause should be subsequently dismissed, without an accounting and assessment of damages, if any, sustained by lessees. The bill could well be without equity and yet the lessees could have a claim against the lessor enforceable in an action at law.

We do not understand that the court, without the consent of the lessees, had the right, in this proceeding, to decree that the said sum of money be paid to the lessor to be applied upon the installment of rent that fell due on February 15, 1931. The lessees offered to do equity by offering to pay money into the registry of the court and have the court deduct therefrom such amount as the court might find upon an accounting was due them, and, after making such deductions, deliver to the lessor the balance. Before making effective the order for an injunction, the court required lessees to comply with the terms of the offer. However, no accounting was had, because the cause was dismissed for the reason that the bill was without equity. The cause having been dismissed for want of equity in the bill without accomplishing the purpose for which the money was offered as a deposit, the court was without authority to make and enter a decree in this proceeding that said sum be paid to the lessor. It follows that the court committed error in making such a decree.

As a general rule, the payment of money into court passes the title to the money so paid irrevocably to the party to whom it is tendered, though he does not accept the tender, or does not accept it until after judgment has gone against him. 26 R. C. L. 656; Mann v. Seneca Sprout, 185 N. Y. 109, 77 N. E. 1018, 5 L. R. A. (N. S.) 561, and note, 7 Ann. Cas. 95; Sims v. Hardin, 132 Miss. 137, 95 So. 842; Fox v. Williams, 92 Wis. 320, 66 N. W. 357; Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 P. 691, 3 Am. St. Rep. 586; Ye Seng Co. v. Corbitt (D. C.) 9 F. 423, 7 Sawy. 368; Coghlan v. S. Car. R. Co. (C. C.) 32 F. 316; Parker v. Beasly, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231; Note 73 A. L. R. 1281; Stolze v. Milwaukee, etc., R. Co., 113 Wis. 44, 88 N. W. 919, 90 Am. St. Rep. 833; 38 Cyc. 176.

[5] When, however, a party seeking affirmative relief has paid money into court upon condition that the party paying received something in return therefor, or that a contingency happen, it cannot be delivered to the adversary party until the condition upon which it was paid has been performed, or the contingency occurs. The proposition is well stated in 26 R. C. L. 658, as follows:

"Where one is not defending against a claim but is seeking affirmative relief to which, as a condition precedent, it is essential that he tender an amount due, the payment of the money tendered into court does not transfer the title to the other party, but it remains in the one making the tender subject to the final outcome of the suit. To hold otherwise would make the payment of money into court under the circumstances an exceedingly dangerous trap for one to enter, for, if he failed in the action, he would not only lose the right which he claimed but would also lose the money which he paid into court for the purpose of enforcing his right."

See, also, 18 C. J. 775; Levin v. Goodman, 107 N. J. Eq. 473, 153 A. 476, 73 A. L. R. 1278 and note page 1286; Dunn v. Hunt, 76 Minn. 196, 78 N. W. 1110.

[6, 7] The lessor assigned as cross-error the dismissal of the cause "without prejudice," their contention being that it should have been dismissed with prejudice.

"It is within the sound judicial discretion of the chancellor to dismiss without prejudice a bill of complaint in equity, thereby enabling the complainant to relitigate the matter in controversy, and an appellate court will not adjudge such ruling to be error, unless it is

A-7

made clearly to appear that the judicial discretion thereby exercised has been abused to the material detriment of the party affected by the ruling." Phillips v. Lindsay (Fla.) 136 So. 666, 668; Veillard v. City of St. Petersburg, 87 Fla. 381, 100 So. 163; Tilghman Cypress Co. v. Young Co., 60 Fla. 382, 53 So. 939; Meffert v. Thomas, 51 Fla. 492, 40 So. 764.

While every dismissal upon a final hearing is not necessarily an adjudication on the merits, yet the rule is that, where the cause is at issue, and on final hearing, either upon pleadings and testimony after the time for taking testimony has expired, a dismissal of the bill by the court is deemed to be a dismissal upon the merits; this being a conclusive presumption from the record, where the order is not made "without prejudice," and nothing appears to show that the dismissal was on other grounds. Da Costa v. Dibble, 40 Fla. 418, 24 So. 911. See, also, 34 C. J. 792.

A decree rendered on a demurrer is equally conclusive, by way of estoppel, of the facts confessed by the demurrer, as would be a decree containing a finding of the same facts. 34 C. J. 797, 799. See, also, Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577.

[8] A dismissal without prejudice is generally proper wherever the case has been disposed of for a reason not reaching the merits, and it is probable that the plaintiff might be able to make out a good case. 21 C. J. 639; Deen v. Thomas, 51 Fla. 644, 40 So. 765; Meffert v. Thomas, 51 Fla. 492, 40 So. 764.

The lessor concedes that the bill is without equity, and that the decree dismissing the cause for that reason was proper. The appellees agree that the cause should have been dismissed, but say it should not have been dismissed without prejudice. Therefore we may well assume that there is no equity in the bill.

[9] A bill will be dismissed at final hearing, if it is without equity, even though a demurrer thereto has been overruled, or no objection has been taken by the defendant in his pleadings. 21 C. J. 636.

It is the rule that, even after a case has been brought here, this court can take notice of the insufficiency of a bill of complaint, though it has not been noticed by the defendant in the lower court, and direct a dismissal of the bill. Norris v. Elkenberry (Fla.) 137 So. 128; Cook v. Pontious, 98 Fla. 373, 123 So. 765; Micou v. McDonald, 55 Fla. 776, 46 So. 291; City of Jacksonville v. Massey Business College, 47 Fla. 339, 36 So. 432; Williams v. Peeples, 48 Fla. 316, 37 So. 572; Hendry v. Whidden, 48 Fla. 268, 37 So. 571; McNeill v. Lyons (Fla.) 140 So. 921.

[10, 11] The action of the court in the instant case in dismissing the cause was tantamount to a reconsideration and reversal of its action on the demurrer to bill.

For a breach of a lessor's covenant, the lessee may have an action at law for his damages. 36 C. J. 795; annotation, 28 A. L. R. 1450.

The allegations of the bill show a probable right of lessees to an action at law against the lessor for breach of covenant.

The court having concluded that "the bill is without equity (which makes it unnecessary to consider the Master's report and exceptions thereto)," no abuse of sound judicial discretion of the chancellor in dismissing the cause without prejudice has been shown. See Boyd v. Hunter (Fla.) 140 So. 666.

The cause is remanded to the lower court, with directions to reform its final decree so that it will conform to the views herein expressed.

PER CURIAM.

The record of this cause having been considered by the court, and the foregoing opinion, prepared under chapter 14553, Acts of 1929 (Ex. Sess.), adopted by the court as its opinion, it is considered and ordered by the court that the interlocutory order of the court below, dissolving the injunction, be, and the same is hereby, affirmed, and that the decree of the court below dismissing the cause be, and the same is hereby, affirmed in part and reversed in part, and that the said cause is remanded to the lower court, with directions to reform its final decree so that it will conform to the views of the court as set out in the said opinion.

BUFORD, C. J., and WHITFIELD, BROWN, and DAVIS, JJ., concur.

ELLIS and TERRELL, JJ., not participating.

On Rehearing.

PER CURIAM.

Upon petitions for rehearing filed by the London Operating Company, appellee, it is suggested that the opinion of this court filed August 23, 1932, remanding the cause to the lower court with directions to reform its final decree so that it will conform to the views stated in the appellate court's opinion, works inequitable consequences to the appellee, for which reason a rehearing should be awarded.

Bonds were given for the protection of the landlord, and the order of the Supreme Court does not direct what ultimate disposition should be made of the money which has been paid into the registry of the court. Upon that question this court did not think that it was proper to summarily determine what should be done with that money merely because the dismissal of the bill of complaint

A-8

without prejudice was approved. This is so, because it was taken for granted that the lessor might seek to take further appropriate steps either in this case or in a new one to subject the fund, if it felt that its rights were not sufficiently protected by the bonds on file, and that therefore this fund, which was deposited as security for payment of rent, should be applied as payment.

In view of the doubt which seems to be entertained about the effect of our previous opinion and judgment, we now modify our opinion and judgment to such effect as to conform to the views herein expressed and to direct that the entire decree be set aside and the cause be remanded to the court below, with directions to have such further proceedings and enter such amended new decree as will be according to right and equity and not be inconsistent with the views expressed by this court as to the law governing the rights of the respective parties as set forth in this court's opinion of August 23, 1932.

Judgment of appellate court modified, and petition for rehearing refused.

BUFORD, C. J., and WHITFIELD, ELLIS, BROWN, and DAVIS, JJ., concur.

TERRELL, J., not participating.

On Motion to Recall Mandate and on Extraordinary Petition for Rehearing.

PER CURIAM.

This case was decided by an opinion filed August 23, 1932. On November 2, 1932, the judgment here was modified and a rehearing refused. The case is now before us on a motion to recall the mandate, accompanied by an extraordinary petition for a rehearing.

The prayer to recall the mandate should be denied and the extraordinary petition for rehearing should be refused.

The record shows that a final decree was entered by the chancellor holding that the bill was without equity and ordering it dismissed without prejudice. The chancellor in entering that decree expressly stated in it that he regarded it as unnecessary to consider either the master's report or the exceptions thereto. Thus there was eliminated from consideration, by the very decree itself, all of the testimony which had been taken in the case and reported by the master.

The chancellor also held in his final decree that it appeared that "there is paid into the registry of this Court the sum of seventy-five hundred dollars by the complainants herein as an installment of rent due the defendant on the 15th day of February, 1931." Having reached the conclusion that the deposit in the registry of the court had been paid in as rent, rather than deposited as security for the rent, the chancellor who signed the final decree ordered that money paid over to the defendant summarily. We say *summarily* because the chancellor himself had just before that expressly recited the fact that he had dismissed the bill without considering either the master's report or the evidence.

This court disagreed with the chancellor's holding as to the precise purpose of the deposit, and in the opinion first filed in this case we expressly held:

"It appears from the bill that a tender of the money was not made for the purpose of meeting the installment of rent due on the 15th day of February, 1931, in the event the suit should be dismissed but that it was deposited with the intention, as we gather it from the allegations of the bill, of having the differences apparently existing between lessor and lessees adjusted," etc.

[12-14] The bill having been dismissed because of insufficiency of the complainants' bill to state an equitable cause of action, the money now remains in the registry of the court, not as a tender for summary disposition, but to be disposed of as a fund in hand "as may seem proper and meet" in accordance with the order under which it was deposited. Such fund being in hand, it is within the jurisdiction of the court in whose custody it is to entertain appropriate proceedings for its disposition, not summarily, but according to equitable principles for the purpose of making restitution to the defendant for its loss occasioned by an improvident injunction which had been granted on an insufficient bill.

A court, having by its own erroneous act occasioned a wrong, possesses an inherent and summary jurisdiction to afford the redress, without reference to the peculiar nature of the controversy which it had erroneously determined. This is a power which is as much to be exercised where the same court abrogates its own erroneous decision as where it is done pursuant to a judgment of reversal by an appellate court. The power of a court to repair the injury occasioned by its own wrongful adjudication is not derived from the mandate of an appellate court, but is an inherent power flowing from the judicial function exercised in deciding a judicial controversy under the law. Where restitution is sought at law, the remedy is usually by scire facias, but, where it is sought in equity, redress may be ordered by a decretal order, founded upon a rule to show cause, or upon motion after notice to the adverse party. The duty of the court to repair its own wrongs is usually regarded as mandatory. See cases cited with approval by us in Hazen v. Smith, 101 Fla. 767, 135 So. 813. See, also, Flemings v. Riddick, 5 Grat. (Va.) 272, 50 Am. Dec. 119; Gregory v. Litsey, 9 B. Mon.

A-9

(Ky.) 43, 48 Am. Dec. 415; Florida East Coast Ry. Co. v. State, 77 Fla. text 577, 82 So. text 136.

The deposit made in the court below was of an amount equal to the then due installment of rent due, and was expressly made "subject to the further orders of the court in this cause." As a result of that deposit, the complainant was enabled to obtain from the chancellor an interlocutory order restraining complainant from enforcing a forfeiture of the lease, and from filing proceedings at law, or otherwise interfering with possession by the complainant of the premises described in the amended bill of complaint. The court when it entered the order, and conditioned it upon deposit of the amount of rent due as security, no doubt anticipated that a setting aside of the injunction would entitle the defendant to an award of restitution in addition to having an action on the injunction bond, especially when it is observed from the record that the same order which granted the injunction and required the deposit also overruled a demurrer that then challenged the sufficiency of the bill to support the award of any relief at all.

The probability that a further consideration of the case by the chancellor in the light of the opinions heretofore filed by this court will result in a decision on his part to allow restitution to the extent of the whole $7,500 on deposit presents no excuse for a failure to observe the requirements of the practice in properly arriving at whatever award is made; neither does that likelihood call for any further rehearing by this court.

[15] Costs incident to an appeal in equity are awarded by the judgment of the appellate court, and are usually so apportioned as to do equity, where there are special circumstances which require that such costs do not follow the judgment. Grand Union Tea Co. v. Dodds, 164 Mich. 50, 128 N. W. 1090, 31 L. R. A. (N. S.) 260.

[16] 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.

BUFORD, C. J., and WHITFIELD, ELLIS, BROWN, and DAVIS, JJ., concur.

TERRELL, J., not participating.

MASSER et al. v. LONDON OPERATING CO.

Supreme Court of Florida.

Nov. 2, 1932.

1. Equity ⇐129.

Bill is not without equity if it states any ground for equitable relief (Acts 1931, c. 14658, § 33).

2. Injunction ⇐18.

Insolvency of defendant is not alone ground for injunction, but some equity must be superadded.

3. Injunction ⇐16.

Injunction should not be granted when complainant has full, adequate, and complete remedy at law.

4. Landlord and tenant ⇐299.

Equity has jurisdiction to enjoin dispossessory proceedings instituted by landlord.

5. Landlord and tenant ⇐299.

Tenant, suing to enjoin maintenance of summary proceeding by landlord, could not have relief against forfeiture of lease, where there was no tender of amount of rent due.

6. Tender ⇐13(1).

"Tender" imports not merely readiness and ability to pay, but actual production of thing to be paid, and offer thereof.

[Ed. Note.—For other definitions of "Tender (Verb)," see Words and Phrases.]

7. Contracts ⇐237(1).

Promise to extend time of payment becoming due under contract must be founded on sufficient consideration.

8. Contracts ⇐237(2).

Debtor's promise to do something which he is legally bound to do is insufficient consideration for creditor's agreement to extend time of payment.

9. Estoppel ⇐52.

In absence of conduct creating estoppel, waiver should be supported by agreement founded on valuable consideration.

10. Landlord and tenant ⇐188(1).

Mere failure of landlord to make repairs will not warrant tenant's abandonment or relieve tenant from liability for rent, where premises are not rendered untenantable.

11. Landlord and tenant ⇐152(10), 154(1).

On breach of landlord's covenant to repair, tenant has right, after waiting reasonable time after notice to lessor, to make necessary repairs and deduct expense thereof from rent, to setoff or recoup damages, or to leave premises unrepaired and sue lessor.

12. Landlord and tenant ⇐188(1).

Where lease provided that damage to building should not entitle lessees to surrender premises, lessees' continuance in posses-

A-10

absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 2066, 2068–69.

[3–5] Because an evidentiary hearing has not been held on the ineffective assistance of counsel claims, we must treat Harich's allegations as true except to the extent that they are conclusively rebutted by the record. With regard to the intoxication issue, we do not find that trial counsel's conduct was outside the range of professionally competent assistance, given the evidence presented in this case, which included Harich's testimony that he left the victim alive at a convenience store. With regard to the claim of ineffective assistance of counsel for failure to present the testimony of Harich's family members at his sentencing hearing, we have reviewed the proffered evidence and concluded that there is no reasonable probability that the result of this trial would have been different had the evidence been presented.

Accordingly, we affirm the trial court's order denying appellant's motion for post-conviction relief and deny his motion for stay of execution.

It is so ordered.

No motion for rehearing will be entertained by the court.

BOYD, C.J., and ADKINS, OVERTON and EHRLICH, JJ., concur.

McDONALD, J., dissents with opinion in which BARKETT, J., concurs.

McDONALD, Justice, dissenting.

I am deeply disturbed by the untimeliness of the filing of Harich's 3.850 motion. I share the obvious feeling of frustration by the trial judge. Nevertheless, my review of the motion satisfies me that there are sufficient allegations of fact on the questionable failure to request an instruction on the effect of voluntary intoxication and on the presentation of nonstatutory mitigating evidence to warrant an evidentiary hearing. I recognize that the trial judge is in a superior position to evaluate the effect of the alleged deficiencies than we are. I am also aware of the fact that trial counsel's presentation of mitigating circumstances was adequate to convince me on the first appeal that a death sentence was not appropriate. Clearly the crime and the manner of its commission warranted the imposition of death. In all likelihood a death sentence could only have been avoided by a careful and clear showing of a previously untainted character of the defendant and that the commission of those crimes was so out of character that it must have been the handmaiden of some unusual force visited upon him. I believe that Harich should be allowed an opportunity to show that facts to avoid a death sentence existed and that those facts were not employed to his detriment.

Accordingly, I would grant a stay and direct that an evidentiary hearing be held on the motion.

BARKETT, J., concurs.

Nancy FINKELSTEIN, et vir., Petitioners,

v.

NORTH BROWARD HOSPITAL DISTRICT, etc., et al., Respondents.

No. 66160.

Supreme Court of Florida.

March 20, 1986.

In a medical malpractice action, the trial court awarded attorney's fees to the prevailing plaintiffs. The District Court of Appeal reversed, 456 So.2d 498. Applica-

A-11

tion for review was granted. The Supreme Court, Adkins, J., held that trial court did not lack jurisdiction, notwithstanding that final judgment did not explicitly retain jurisdiction over fee claim or that motion was filed three days after judgment had become final.

Decision quashed and cause remanded.

1. Costs ⇐197

Trial court, in medical malpractice action, was not without jurisdiction to entertain prevailing plaintiffs' motion for statutory attorney's fees where complaint contained a demand for such fees, notwithstanding that final judgment did not dispose of or explicitly retain jurisdiction over fee claim or that motion for fees was filed three days after the judgment on the main claim had become final. F.S.1981, § 768.56.

2. Costs ⇐197

Postjudgment 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 litigation of the main claim may have been concluded with finality.

3. Costs ⇐173(1)

Statutory attorney fees provided for in medical malpractice cases could not be awarded to nurse who was not one of the enumerated health care professionals affected by the statute. F.S.1981, § 768.56.

Joel D. Eaton and Joel S. Perwin of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow and Olin, P.A., and Spence, Payne, Masington, Grossman and Needle, P.A., Miami, for petitioners.

Ellen Mills Gibbs of Gibbs and Zei, P.A., and William D. Ricker, Jr. of Fleming, O'Bryan and Fleming, Ft. Lauderdale, for respondents.

ADKINS, Justice.

We have for review *North Broward Hospital District v. Finkelstein*, 456 So.2d 498 (Fla. 4th DCA 1984), which directly and expressly conflicts with *Young v. Altenhaus*, 448 So.2d 1039 (Fla. 3d DCA 1983), *quashed on other grounds* 472 So.2d 1152 (Fla.1985). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

The Finkelsteins sued defendants for medical malpractice. The jury returned a verdict for the Finkelsteins. A final judgment was rendered against the defendants. However, the final judgment did not dispose of the plaintiffs' claim for attorney's fees or expressly reserve jurisdiction to award the attorney's fees to which the plaintiffs were entitled by virtue of section 768.56, Florida Statutes (1981). The final judgment simply stated that "(c)osts will be taxed at a later date upon appropriate motion."

The defendants did not appeal the final judgment. Three days after the appeal time had expired, the plaintiffs filed a motion seeking recovery of attorney's fees contained in their complaint and not disposed of in the final judgment. The trial court granted the motion. The Fourth District Court of Appeal reversed the award of attorney's fees finding that the trial court's order was void for lack of jurisdiction because the motion for attorney's fees was filed three days after the final judgment had become final.

[1] The issue before us is whether the trial court lacked jurisdiction to entertain the plaintiffs' motion for "prevailing party" attorney's fees, where the plaintiffs' complaint contained a demand for attorney's fees, where the final judgment did not dispose of or explicitly retain jurisdiction over the claim for attorney's fees, and where the plaintiffs' motion for attorney's fees was filed three days after the final judgment on the main claim became final.

We hold that the trial court properly exercised its jurisdiction when it awarded attorney's fees to the plaintiffs. We therefore quash the decision of the district court

A-12

and approve of *Young v. Altenhaus*, 448 So.2d 1039 (Fla. 3d DCA 1983), *quashed on other grounds*, 472 So.2d 1152 (Fla.1985), which held that a trial court has jurisdiction to entertain a motion for attorney's fees despite the fact that the final judgment on the main claim did not specifically reserve jurisdiction to do so.

Section 768.56(1), Florida Statutes (1981), provides that attorney's fees shall be awarded to the prevailing party in a medical malpractice action. The provisions of section 768.56(1) are mandatory. Defendants concede that plaintiffs would be entitled to attorney's fees if the final judgment on the main claim expressly provided for retention of jurisdiction to award them. We refuse to deprive plaintiffs of their substantive right to attorney's fees merely because the final judgment did not contain the magic words "jurisdiction is reserved."

Defendants cite *Oyer v. Boyer*, 383 So.2d 717 (Fla. 4th DCA 1980); *McCallum v. McCallum*, 364 So.2d 97 (Fla. 4th DCA 1978); and *Frumkes v. Frumkes*, 328 So.2d 34 (Fla. 3d DCA 1976), to support their contention that the trial court lacked jurisdiction to award attorney's fees because the plaintiffs' motion for attorney's fees was filed three days after the time for appeal had expired. However, a significant difference exists between this case, which deals with "prevailing party" attorney's fees, and *Oyer*, *McCallum* and *Frumkes* which deal with attorney's fees in the context of a dissolution of marriage proceeding.

As noted by the United States Supreme Court in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982), a post-judgment motion for prevailing party attorney's fees raises a "collateral and independent" claim. Such is the case because the prevailing party simply cannot be determined until the main claims have been tried and resolved. In sharp contrast, attorney's fees in dissolution proceedings are intended to equalize the relative positions of the parties and are part of the "property" to be distributed in the final decree. Further, unlike the fees awarded in the instant case, fees in a dissolution proceeding are not awarded to the prevailing party, and their award therefore does not depend upon the outcome of the main claims.

[2] 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.

[3] Nurse Poore, one of the defendants in the malpractice action, contends that the trial court lacked jurisdiction to award attorney's fees against her because she is not one of the enumerated health care professionals affected by section 768.56. We agree.

Section 768.56 provides in pertinent part that:

> Except as otherwise provided by law, the court shall award a reasonable attorney's fee to the prevailing party in any civil action which involves a claim for damages ... on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital or health maintenance organization.

Nurse Poore is not a medical or osteopathic physician, a podiatrist, a hospital or a health maintenance organization. Therefore, the trial court erred in assessing attorney's fees against Nurse Poore because she is not a member of any of the classes of persons enumerated in section 768.56.

The principle that the mention of one thing in a statute implies the exclusion of another, *Thayer v. State*, 335 So.2d 815 (Fla.1976), coupled with the requirement that statutes awarding attorney's fees must be strictly construed, *Roberts v. Carter*, 350 So.2d 78 (Fla.1977), mandates reversal of the trial court's order assessing attorney's fees against Nurse Poore.

Accordingly, the decision of the district court is quashed and the cause is remanded

A-13

with instructions to reinstate the order of the trial court except that portion of the order awarding attorney's fees against Nurse Poore.

It is so ordered.

BOYD, C.J., and OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur.

THE FLORIDA BAR, Complainant,

v.

William E. WHITLOCK, III, Respondent.

No. 66481.

Supreme Court of Florida.

March 20, 1986.

Original Proceeding—The Florida Bar.

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and Diane Victor Kuenzel, Bar Counsel, Tampa, for complainant.

Bennie Lazzara, Jr. of Bennie Lazzara, Jr., P.A., Tampa, for respondent.

PER CURIAM.

Upon a complaint by The Florida Bar this Court appointed a referee to conduct a hearing regarding Whitlock's alleged misconduct. Whitlock tendered a conditional guilty plea for consent judgment,* acknowledging his violation of Florida Bar Code of Professional Responsibility, Disciplinary Rules 6–101(A)(2) and (3). The referee recommended that Whitlock be found guilty in accordance with his conditional plea and that he be given a one year suspension to run concurrent with respondent's prior suspension as ordered by the Supreme Court on June 28, 1982, and that respondent should successfully complete the Ethics portion of the bar examination prior to reinstatement into The Florida Bar.

Neither side contests the referee's report which we hereby adopt. Accordingly, the Referee's Findings of Fact are deemed conclusive and his recommended discipline is hereby imposed pursuant to Florida Bar Integration Rule, article XI, Rule 11.09(f).

Judgment for costs in the amount of $700.98 is hereby entered against respondent, for which sum let execution issue.

It is so ordered.

ADKINS, Acting C.J., and OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur.

STATE of Florida, Petitioner,

v.

Sandy SAFFORD, Respondent.

No. 66730.

Supreme Court of Florida.

March 20, 1986.

Defendant's conviction was reversed by the District Court of Appeal, Third District, 463 So.2d 378, and state petitioned for review. The Supreme Court, McDonald, J., held that opinion in *State v. Neil*, concerning racially discriminatory use of peremptory challenges, is applicable to those cases where original trial or original appeal had

* We feel it unnecessary to publish the full text of the plea. The Court file is open for inspection.

A-14