IN THE SUPREME COURT OF FLORIDA

FOREST PARK CONDOMINIUM ASSOCIATION, INC. OF DUNEDIN, a Florida corporation not for profit
Petitioner

v.

CASE NO. 84,753

RICHARD W. WIDERA and MARLENE E. WIDERA, his wife

Respondents
_____/

PETITIONER'S INITIAL BRIEF

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STATEMENT OF FACTS AND CASE

Forest Park Condominium Association filed suit against the Wideras seeking to enforce a restrictive covenant prohibiting unit owners from keeping dogs weighing more than fifteen pounds (R. 1-7; App. 1). The Wideras, after filing a couple of motions to dismiss, filed an answer raising selective enforcement as an affirmative defense (R. 135-36; App. 2). The Court ordered the case to non-binding arbitration reserving jurisdiction to hear issues relating to costs and attorney's fees should the parties not agree to submit these issues to the arbitrators (R. 139-40; App. 3). The parties entered into a stipulation whereby the Wideras agreed to remove their dog and comply with the restrictive covenant and both parties agreed to submit the issue of attorney's fees and costs to the County Court (R. 146-47; App. 4).

After holding a hearing at which it considered the evidence and arguments present, the county court ordered the Wideras's to pay Forest Park Condominium Association $2,941.50 in attorney's fees and costs (R. 155-56; App. 5). The Wideras's appealed. Although there was no transcript or statement of the evidence presented at the hearing, the circuit court reversed (App. 6). Forest Park Condominium Association filed a petition for writ of certiorari to the Second District Court of Appeal, which denied the writ but certified a question of great public importance (App. 7).

SUMMARY OF ARGUMENT

The Second District Court of Appeal erred in denying the writ of certiorari as the circuit court committed egregious errors by reversing the county court's findings without having any transcript or statement of the evidence before it, by substituting its own judgment for that of the trial court's, and by incorrectly holding there can be no prevailing party in cases where there is a settlement. The District Courts of Appeal should not be as restricted in granting relief where a circuit court sitting in its appellate capacity reverses a county court's findings as when it affirms. The policy considerations against granting a party two chances for review do not apply. In this case, Forest Park Condominium Association was precluded from its right to have the circuit court's egregiously erroneous ruling reviewed by the District Court of Appeal.

I. AFTER EDUCATION DEVELOPMENT CENTER, INC. V. CITY OF WEST PALM BEACH, 541 So. 2d 106 (Fla. 1989), DOES THE STANDARD OF REVIEW IN COMBS V. STATE, 436 SO. 2D 93 (Fla. 1983), STILL GOVERN A DISTRICT COURT OF APPEAL WHEN IT REVIEWS PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(b)(2)(B), AN ORDER OF A CIRCUIT COURT ACTING IN ITS REVIEW CAPACITY OVER A COUNTY COURT?

The distinction between this Court's decisions in Education Development Center, Inc. v. City of West Palm Beach, 541 So. 2d 106 (Fla. 1989) and Combs v. State, 436 So. 2d 93 (Fla. 1983), was clearly and succinctly detailed by the Second District Court of Appeal in Haines City Community Development d/b/a/ Parkview Village v. Heggs, Case No. 94-00524 (Fla. 2d DCA 1994)

> In order to avoid the possibility that our opinion can be construed as being in conflict with the standard of certiorari review outlined in Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, 541 So.2d 106 (Fla. 1989), we take this opportunity to distinguish that case. There, the supreme court held again that when a district court of appeal reviews a circuit court's order under rule 9.030(b)(2)(B), the district court's standard is to determine "whether the circuit court afforded procedural due process and applied the correct law." 541 So.2d at 108 (quoting City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982)). Accord Manatee County v. Kuehnel, 542 So.2d 1356 (Fla. 2d DCA), review denied, 548 So.2d 663 (Fla. 1989). This standard is quite different from the one announced in Combs and could compel a different result in this case were we to find an incorrect application of the law by the circuit court.
>
> We note, however, that both Vaillant and Education Development Center, Inc., as well as Kuehnel, concerned the scope of review by a district court of a circuit court's order relating to a decision of an administrative agency. Indeed, every case that we have found that uses the standard of Education Development Center, Inc. does so in the context of a review of administrative action. Of equal significance is that even after Education Development Center, Inc., the district courts of appeal continue to use the Combs' standard when reviewing a final order of a circuit court sitting in its appellate capacity over a county court. E.g., State v. Frazee, 617 So.2d 350 (Fla. 4th DCA 1993); Horatio Enter., Inc. v. Rabin, 614 So.2d 555 (Fla. 3d DCA 1993); Krebs v. State,

> 588 So.2d 38 (Fla. 5th DCA 1991), review denied, 599 So.2d 659 (Fla. 1992); Slater v. State, 543 So.2d 869 (Fla. 2d DCA 1989).
>
> These factors, as well as the critical fact that Education Development Center, Inc. did not even refer to Combs, leads us to conclude that Combs' standard of review is still the law we must apply when determining whether to grant a petition for writ of certiorari directed to an order of a circuit court acting in its review capacity over a county court. State ex rel. Garland v. City of West Palm Beach, 141 Fla. 244, 193 So. 297 (Fla. 1940); Levy v. Levy, 483 So.2d 455 (Fla. 3d DCA), review denied, 492 So.2d 1333 (Fla. 1986). As noted in Mcgee v. State, 570 So.2d 1079, 1081 (Fla. 3d DCA 1990), review denied, 582 So.2d 623 (Fla. 1991), a district court of appeal cannot "decline to follow a supreme court opinion in the absence of a specific indication by the court itself that the case is no longer viable."

The basic difference between the two standards for review is whether or not the District Court of Appeal should consider whether the fact finder's decision (in this case the county court) is based upon competent substantial evidence. See Herrera v. City of Miami, 600 So. 2d 561 (Fla. 3d DCA 1992)(Hubbart, Jl, dissenting); St. Johns County v. Owings, 554 So.2d 535 (Fla. 5th DCA 1989), rev. denied, 564 So.2d 488 (Fla. 1990):

> As recently emphasized by the Florida Supreme Court in Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, 541 So.2d 106 (Fla. 1989), a district court of appeal plays a very limited role in reviewing a circuit court's action in a zoning dispute such as this. Only the circuit court can review whether the judgment of the zoning authority is supported by competent substantial evidence. The district court of appeal merely determines whether the circuit court afforded due process and applied the correct law. See also City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982). As the court in Education Development Center noted, a district court of appeal may not quash a circuit court's decision because it disagrees with the circuit court's evaluation of the evidence."

554 So.2d at 537.

This becomes important in cases such as this where the circuit court presumably applied the correct principle of law (i.e., whether there was competent substantial evidence supporting the county court's decision to award attorney's fees), but improperly concluded there was no competent substantial evidence to support it. Under the principles of Education Development Center, Inc. v. City of West Palm Beach, the District Court of Appeal would be powerless to correct the error, whereas the rule announced in Combs v. State would authorize, but not require, the District Court of Appeal to correct the error.

In justifying a limit on the District Court of Appeal's scope of review, the Courts have emphasized that the appellant should not be entitled to two appeals. In other words, once someone challenges an agency or county court's decision in circuit court which affirms, that party should not be allowed to have a District Court of Appeal reevaluate the evidence and second guess the circuit court.

However, that justification does not apply where the circuit court finds there is no competent substantial evidence to support the agency or county court's decision and reverses. In such situations, the prevailing party at the trial level may have been wronged by the circuit court's decision, and is now deprived of any avenue for redress. In such situations, there is no justification for limiting the District Court of Appeal's scope of review as the wronged party is not seeking a second review.

Indeed, when the circuit court while acting in its appellate

capacity simply reweighs the evidence and substitutes it judgment for the trial tribunal's, the District Court of Appeal should reverse. Fort Lauderdale v. Multidyne Medical Waste Management, 567 So. 2d 955 (Fla. 4th DCA 1990).

> Nevertheless, following the most recent appellate pronouncements which finetune the respective standards of review in such matters, we are compelled to hold that the wrong standard of review was utilized and resulted in the circuit judge doing what the supreme court charged this court with doing in Education Development Center, Inc. v. West Palm Beach Zoning Board of Appeals, 541 So.2d 106 (Fla. 1989); that is, he "simply disagreed with the [City Commission's] evaluation of the evidence." Id. at 108-109.

567 So. 2d at 957 (emphasis supplied).

In the case at hand, the District Court of Appeal erred by not quashing the circuit court's decision under either standard. The Circuit Court's decision to reverse the county court's order when there was no record of the evidentiary hearing and there was sufficient legal and factual basis to support the county court's determination that Forest Park Condominium Association was the prevailing party was a miscarriage of justice under Combs and was a misapplication of the wrong principle of law under Education Development Center. This Court should therefore grant the petition to invoke its discretionary jurisdiction and remand with instructions that the county court's order awarding attorney's fees be reinstated.

II. THE CIRCUIT COURT COMMITTED A MISCARRIAGE OF JUSTICE RENDERING A FACTUAL DECISION WHEN THERE WAS NO RECORD OF THE EVIDENCE PRESENTED TO IT, BY SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF THE COUNTY COURT JUDGE'S AND FOR APPLYING AN INCORRECT PRINCIPLE OF LAW.

The Circuit Court judge committed fundamental error in three major respects: 1) rendering a factual decision when there was no transcript or stipulation as to the evidence presented to the trial court, 2) substituting its own judgment as to the facts in the case contrary to the facts found by the trial court, and 3) finding there can be no prevailing party when there has been a settlement, which is an incorrect principle of law. The violation of each one of these principles of law constitutes a departure from the essential requirements of law which would justify a reversal. The combination of all three is a miscarriage of justice which should require a reversal.

A. The Circuit Judge departed from the essential requirements of law by reversing a trial court's findings when the record on appeal fails to contain a transcript or stipulation as to the evidence presented at the hearing.

The record is clear that the parties agreed and stipulated that the county court judge could make a determination as to entitlement and amount of attorney's fees (R. 146). After holding a hearing, at which there was no court reporter present, the county judge make a factual finding that Forest Park Condominium Association, Inc. was the prevailing party (R. 155-56). When they appealed, the Respondents failed to prepare a statement of the evidence or proceedings to be included in the record on appeal as required by Florida Rule of Appellate Procedure 9.200(b)(4). For this reason alone, the county court's decisions should have been affirmed.

Florida Rule of Appellate Procedure 9.200(e) places the burden on the appellant "to ensure that the record is prepared and transmitted in accordance with these rules." When no record exists, rule 9.200(b)(4) provides a procedure for obtaining a statement of the evidence. The rule provides:

> If no report of the proceedings was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments to it within 10 days of service. Thereafter, the statement and any objections or proposed amendments shall be submitted to the lower tribunal for settlement and approval. As settled and approved, the statement shall be included by the clerk of the lower tribunal in the record.

Opposing counsel's statements, even if sworn to, are not authorized as a substitution for following this procedure. Hadden v. State, 616 So. 2d 153 (Fla. 1st DCA 1993).

When this procedure is not followed and there is no record of the evidence presented at the final hearing, the appellate court is required to affirm.

> Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal. The trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error.

Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1979).

An appellate court is required to presume that evidence was presented at the final hearing and that the trial judge considered

the issues raised. The absence of a record of such hearing absolutely precludes reversal. E.g., Kennedy v. Kennedy, 583 So. 2d 415 (Fla. 5th DCA 1991); Carter v. Carter, 504 So.2d 418 (Fla. 5th DCA 1987). Because of the lack of an adequate record to review, the circuit court had no basis on which to find that the lower tribunal abused its discretion in awarding Appellant's motion for attorney's fees. E.g., Paston & Coffman, M.D.S., P.A. v. Katzen, 610 So.2d 512 (Fla. 4th DCA 1992); Chamberlain v. Chamberlain, 588 So.2d 20 (Fla. 1st DCA 1991); Chatman v. London, 579 So. 2d (Fla. 2d DCA 1991); Caddell v. Caddell, 574 So. 2d 328 (Fla. 5th DCA 1991); Bill Williams Air Conditioning & Heating, Inc. v. Gentrac, Inc., 565 So. 2d 832 (Fla. 1st DCA 1990); Bank of Virginia v. In Re: Estate of Ingraham, 564 So. 2d 627 (Fla. 2d DCA 1990); Hamm v. Ambassador Insurance Co., 456 So. 2d 966 (Fla. 5th DCA 1984); Starks v. Starks, 423 So.2d 452 (Fla. 1st DCA 1982).

B. The Circuit Judge departed from the essential requirements of law by substituting its own judgment for that of the county judge's and by reversing the order awarding attorney's fees absent a clear abuse of discretion.

The Florida Supreme Court has held that "the award of attorney's fees is a matter committed to sound judicial discretion which will not be disturbed on appeal, absent a showing of clear abuse of discretion. DiStefano Construction, Inc. v. Fidelity and Deposit Company of Maryland, 597 So. 2d 248, 250 (Fla. 1992); see also, Lord v. Lord, 566 So.2d 35 (Fla. 2d DCA 1990); Deakyne v. Deakyne, 460 So.2d 582 (Fla. 5th DCA 1984).

In this case, after holding a final hearing, the trial court

specifically found that Forest Park Condominium Association, Inc. "was the prevailing party in this action and is entitled to recover attorney's fees pursuant to section 718.303 of the Florida Statutes." (R. 155). There is nothing in the record to show that the county judge clearly abused his discretion in reaching this finding. Hence, the circuit court departed from the essential requirements of law by substituting its own findings and judgment for that of the trial court's. DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957); Fort Lauderdale v. Multidyne Medical Waste Management, 567 So. 2d 955 (Fla. 4th DCA 1990)

C. The Circuit Court departed from the essential requirements of law by holding that there can be no prevailing party when an injunction was not issued, which is an incorrect principle of law.

In reversing the county court's order awarding attorney's fees, the circuit court stated the Association could not be a prevailing party since it did not obtain an injunction. Such holding was not supported by any legal citation and indeed is directly contrary to the holding in 51 Island Way Condominium Association, Inc. v. Williams, 458 So. 2d 364 (Fla. 2d DCA 1984).

In 51 Island Way, the condominium association filed suit seeking declaratory and injunctive relief against one of the unit owners. Immediately before the non-jury trial, the unit owners attorney moved to dismiss the cause for mootness as the unit owners had quitclaimed their interest in the condominium to another person. The trial court granted the motion and ordered that each party bear the expense of its own costs and attorney's fees. The

District Court of Appeal, reversed and ordered that attorney's fees be awarded to the association, noting "there need not be a determination on the merits in a lawsuit for purposes of a fee award if the applicable statutory provision provides for fees to a 'prevailing party.'" 458 So. 2d at 366; see also Metropolitan Dade County v. Evans, 474 So. 2d 392 (Fla. 3d DCA 1985); State Department of Health and Rehabilitative Services v. Hall, 409 So.2d 193 (Fla. 3d DCA 1982).

The District Court reasoned the association was a prevailing party because it

> was compelled to bring suit for relief, prepare for trial, and had to participate up to the point of engaging in litigation. Appellees had maintained certain affirmative defenses and a counterclaim for almost a year. Rather than act on an earlier date, they made their oral motion of dismissal on the day of trial, evincing their deliberate choice not to contest the association's position. Once clear result of their timing was to seek to avoid the possible imposition of the association's costs and attorney's fees. Yet, in essence, the association had prevailed because the effect of appellees' reconveyance was to accede to the association's request for relief. Thus, we hold that the association was entitled to attorney's fees under the applicable statute and declaration provision.

458 So. 2d at 366. Similarly, in this case, Forest Park Condominium Association was compelled to bring suit and counter affirmative defenses and otherwise engage in litigation. Had it not been for the efforts of the Association's attorney, the Wideras would have never removed their dog.

Another case directly on point is Neeley v. Maxson Const. Co., Inc., 553 So. 2d 762 (Fla. 2d DCA 1989). In that case, the parties in a construction lien case submitted their dispute to arbitration,

agreeing that the matter of attorney's fees and costs would be submitted to the court. The District Court affirmed the award even though the judge did not state the basis for awarding attorney's fees because "the language of the stipulation clearly indicates the intent of the parties for the prevailing party to be awarded costs, expenses, and a reasonable attorney fee to be set by the court." Id. at 763.

Similarly, in this case, the parties agreed to submit to the county court the issue of entitlement and amount of attorney's fees. This agreement could only be set aside if "it were shown that both parties mistook the law and entered the stipulation, thinking they were merely doing obeisance to the law by making the stipulation; or if the law explicitly prohibited such award of attorney's fees, making the agreement an illegal contract." Goodman v. Aero Enterprises, Div. of ARA Serv., 469 So. 2d 835 (Fla. 4th DCA 1985). Since there is nothing in the record to show that both Forest Park Condominium Association and the Wideras mistook the law or that the agreement to have the trial court rule on attorney's fees was illegal, the Wideras are precluded from contesting the court's authority to award attorney's fees.

In Wollard v. Lloyd's Companies of Lloyd's, 439 So. 2d 217, 218 (Fla. 1983), the Florida Supreme Court explained the policy reasons for awarding attorney's fees in cases that settle.

> Requiring the plaintiff to continue litigation in spite of an acceptable offer of settlement merely to avoid having to offset attorney's fees against compensation for the loss puts an unnecessary burden on the judicial system, fails to protect any interest . . . and discourages any attempt at settlement.

Obviously, Forest Park Condominium Association and other associations will not enter into settlement agreements if by doing so they automatically waive all rights to attorney's fees. The associations will be forced to fully litigate what could have been easily resolved disputes simply to protect their right to claim attorney's fees. This will result in thousands of more cases in already over crowded dockets.

In conclusion, the circuit court's action was a miscarriage of justice because it resulted in a forfeiture of the Association's legal right to attorney's fees. See Horatio Enterprises, Inc. v. Rabin, 614 So.2d 555, 556 (Fla. 3d DCA 1993)("The legal error in reversing the county court's judgment caused "a miscarriage of justice" because it resulted in a forfeiture of the sublease). Its a further miscarriage of justice because it causes all the other members of the association, who are the innocent parties in this situation, to foot the bill for the Wideras' obstinate noncompliance.

CONCLUSION

This Court's decision in Education Development Center, Inc. v. City of West Palm Beach, 541 So. 2d 106 (Fla. 1989) should not be construed as overruling Combs v. State, 436 So. 2d 93 (Fla. 1983). In any event, under the standard of either case, the circuit court below committed a miscarriage of justice by applying a wrong principle of law and substituting its judgment for the county court's. This error is especially egregious given there was no transcript or statement of the evidence furnishing the circuit court a basis for even reviewing the county court's decision. This Court should therefore grant the petition to seek discretionary review and remand with instructions that the county court's order awarding attorney's fees be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail on this 23rd day of December, 1994 to Wayne T. Phillips, 2555 Enterprise Road #7, Clearwater, FL 34623.

Randall O. Reder

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APPENDIX TO PETITIONER'S INITIAL BRIEF

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