IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA
THIRD DISTRICT

Appellate Case No. 3D16-0690

L.T. NO.: 12-690

MARIA GONZALEZ, FELIX L. GARCIA AND IDA E. LEAL
Appellants,

v.

INTERNATIONAL PARK CONDOMINIUM I ASSOCIATION, INC.,
a Florida Not-For-Profit Corporation,
Appellee.

On Appeal from the Circuit Court of the Eleventh Judicial Circuit
In and For
Miami-Dade County, Florida
Consolidated Cases 13-026294 CA 01 and 12-00690 CA 42
The Honorable Judge Victoria S. Sigler (Retired)
The Honorable Judge Judith L. Kreeger
The Honorable Judge Rodney Smith

APPELLANTS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes and Other Legal Authorities

International Park Condominium One Association, Inc.

STATEMENT OF THE CASE AND FACTS

Nature of the Case

Appellants brought an action in the Court below for relief from a board of directors' election that took place on April 2, 2013 for the International Park Condominium I Association, Inc. ("Association"). Specifically, Appellants are unit owners who challenged the election results where votes were illegally cast on behalf of defaulted unit owners by a receiver pursuant to a court order granting power beyond the authority of the condominium Declaration, Bylaws and Florida Statutes. Appellants sought specific performance requiring the Association to comply with its Declaration and Bylaws as to the voting rights of unit owners and for recovery of reasonable attorney fees and costs. The Appellant's Complaint was never decided on its merits. However, the trial court issued an order substituting receivers and at the same time limiting the receiver's scope of power to comply with the Declaration, Bylaws and Florida Statutes. Subsequently, a new election was properly held by the Association. Upon motion by the Association, an oral judgment was rendered recognizing that Appellants had obtained the relief they sought. However, an award of attorney's fees was granted in favor of the Association and against Appellants.

The question raised on appeal is whether the Appellants or the Association were the prevailing party in the action below.

Course of the Proceedings

On or about January 9, 2012, the Association filed a Verified Petition for Appointment of Receiver in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida. (Record Index "R" – Vol. 1, 14-17) (*In Re: International Park Condominium I Association, Inc*., Case No.: 12-00690 CA 42) ("Receiver Action")

On March 14, 2012, an Order Appointing Blanket Receiver was entered by the Court. (R - Vol. 1, 18-21)

On December 7, 2012, an Order Substituting the Blanket Receiver was entered substituting Caridad Ortega as Receiver for the Association in place of Condo Court Receivers, LLC. (R – Vol. 1, 112-115)

On March 6, 2013, upon motion by the Association, a Modified Order Appointing Blanket Receiver was entered. (R – Vol. 1, 135-147) Pursuant to paragraph 2(i) of that Order, the Receiver was given the additional power and authority:

> To vote on behalf of The Delinquent Units subject to Receivership as if those Delinquent Unit Owners were current in their monthly assessment dues to The Subject Association. While this receivership is in effect, any and all Delinquent Unit Owners forfeit their voting rights by virtue of their delinquency and this Order, which grants the Receiver with sole and exclusive right to vote in place of any and all Delinquent Unit Owners

By granting the receiver the right to vote on behalf of unit owners, the order of the court was contrary to the following duly recorded controlling documents of the International Park Condominium One Association, Inc.:

> Declaration of Condominium, Section 4.2, recorded at O.R. Book 12060, page 1435 of public records of Miami-Dade County, Florida
> (R – Vol. 10, 1334-1521);
>
> Articles of Incorporation, Article 5, Section 5.3, recorded at O.R. Book 12060, Page 1483,
> (R- Vol. 6, 819 – 840);
>
> By-Laws, Article 3 Section 9, recorded at OR book 12060, page 1492
> (R - Vol. 6, 819 – 840).

The Declaration of Condominium provides that that only unit owners can vote at elections. Page 6, Paragraph 4.2 provides the following covenant: "Each unit shall be entitled to one vote cast by its owner in accordance with the provisions of the By-Laws and Articles of Incorporation of the Association." (R – Vol. 10, 1334-1521)

The Articles of Incorporation at Article V, Section 5.3, in pertinent part, state:

> On all matters upon which the membership shall be entitled to vote, there shall be only one vote for each Unit, which vote shall be exercised or cast in the manner provided by the Declaration and By-Laws. Any person or entity owning more than one Unit shall be entitled to one vote for each Unit owned.
> (R - Vol. 6, 819 – 840).

The By-Laws at Article III, Section 9, in relevant part, state as follows:

> At every meeting of the members, the owner or owners of each unit, either in person or by proxy, shall have the right to cast one (1) vote as set for the in the Declaration. The vote of the owners of private units owned by more than one (1) person or by a corporation or other entity shall be cast by the person named on a certificate signed by all the owners of the private units and filled with the Secretary of the Association, and such certificate shall be valid until revoked by subsequent certificate. If such a certificate is not on file, the vote of such owners shall not be considered in determining the requirement for a quorum, nor for any other purposes. The vote of the majority of those present, in person or in proxy, shall decide any question brought before such meeting, unless the question in one which, by express provisions of statute or of the Declaration of Condominium, or of the Articles of Incorporation, or of the By-Laws, a different vote is required, in which case such express provision shall govern and control. (emphasis added)
> (R - Vol. 6, 819 – 840)

The court appointed Receiver (Ortega) had no certificate, proxy or ownership right to vote under the Declaration, Articles of Incorporation or Bylaws of the Association.

The power granted to the Receiver by the court was also contrary to Fla. Stat. §718.303. Pursuant to that statute, the Association is permitted to deny voting rights to unit owners delinquent in payment of assessments. However, the court usurped that statutory power bestowed exclusively on the Association by the legislature and anointed the Receiver with power to vote on behalf of delinquent unit owners.

On April 1, 2013, Appellant Gonzalez, filed an Emergency Motion seeking to have the Blanket Receiver's authority limited with respect to voting rights. Gonzalez sought to preserve the Association's exclusive statutory power to deny voting rights to delinquent unit owners and enjoin the Receiver from casting those votes under the purported authority of the court's Modified Receivership Order. (R – Vol. 1, 146-154)

On April 2, 2013, the Court entered an Order Denying Gonzalez's Emergency Motion Seeking to have the Blanket Receiver's Authority Limited with respect to Voting Rights. (R – Vol. 1, 155-155) The Association's election went forward on that date with the Receiver casting ballots for all delinquent condo owners.

Following the Court's denial of Gonzalez's Emergency Motion and a subsequent illegal election conducted by the Association, Gonzalez filed a Petition for Mandatory Non-Binding Arbitration on May 10, 2013 ("Arbitration Petition") pursuant to Fla. Stat §718.1255(4). (*Maria Gonzalez v. International Park Condominium Association I, Inc.*, Florida Department of Business and Professional Regulation Case No. 2013-2-0607) Following a case management conference with the Arbitrator on July 9, 2013, a Final Order of Dismissal was entered on July 11, 2013, which amounted to an abstention. The Arbitrator reasoned that "because the issue of Ortega's (the Receiver) voting rights has been

addressed by the Court, it is not appropriate for the undersigned to take jurisdiction over the allegation that the Association improperly permitted Ortega to vote in the election." (R - Vol. 4, 556-566, 567-635)

Appellants then filed an action for specific performance on August 9, 2013 in the Circuit Court of Miami-Dade County, Florida from which this appeal is brought. *Maria Gonzalez, Felix L. Garcia and Ida E. Leal v. International Park Condominium I Association, Inc*. Case No. 13-026294 CA 01. (R – Vol. 4, 556-566, 567-635)

Appellants' Second Amended Complaint requested the following relief in substantially the same form for each Appellant:

> Plaintiff, MARIA GONZALEZ demands judgment that defendant comply with the Declaration of condominium, that it be enjoined from violating the Declaration and related documents for the association as to the voting rights of unit owners and as to the portions of the Declaration and by laws specifically being sued upon herein, for a recount of the votes or instituting a new election, that pending trial of this action, defendant be restrained and enjoined from violating the Declaration, and for recovery of reasonable attorney fees and costs in this action, and further relief as the court deems just and proper under the circumstances.
> (R – Vol. 4, 654-673)

On March 11, 2014, an Order was entered transferring Appellants' litigation to Division 42 before the Honorable Judge Victoria S. Sigler. (R – Vol. 5, 797)

Upon motion by the Appellants, an order was entered on August 28, 2014 consolidating the Appellants' litigation (Case No.: 13-026294 CA 01) with the Receiver action (Case No.: 12-00690 CA 42). (R – Vol. 5, 800)

On November 7, 2014 the court entered an Order Directing Receiver (Ortega) to Appear and Submit Reports and Financial Records for Court Examination. (R – Vol. 1, 182-183)

On November 13, 2014 the Court *sua sponte* ordered the discharge of Receiver Ortega. A written order was entered on November 19, 2014. (R – Vol. 2, 205-210)

On November 18, 2014 the court entered an Order of Appointment and Substitution of Receiver. The Order appointed Stuart Grossman, Esq, as Receiver without power to vote on behalf of defaulted owners. Thus, substantially granting the relief requested by Appellants in the consolidated case. (R – Vol. 2, 201-204)

Appellants and the Association both brought motions for summary judgment regarding Appellants' claims and both motions were denied on January 2, 2015. The Court entered an order expressly re-affirming the validity and effect of all prior orders. But, in apparent contradiction, acknowledged that the Order appointing the current Receiver did not include authorization to vote on behalf of defaulted owners. (R – Vol. 6, 921-923)

Disposition in the Lower Tribunal

On May 20, 2015 the Association's motion for entry of final judgment was heard before Judge Sigler. In pertinent part the court addressed counsel for the Appellants as follows:

> Page 20
> As another relief for specific performance, you've asked the Court to institute a new election. That's already happened twice. So since you've -- the issue of recounting votes is moot, the order of instituting a new election is moot since two elections have already come and gone since this was filed**, so you want me to conduct a trial so I can order that the declaration -- the condominium should not ever let the Receiver vote again, even though I've already stripped the Receiver of those rights?**
> MR. GUADAYOL: That's the quagmire that we face, Your Honor.
> THE COURT: **I'm sorry, but I have been trying to point out to you that that relief you've already asked for has already been mooted out by the Court. That's been done.**
> So you asked me to recount the votes, that's mooted out because there have been two subsequent elections. You've asked me to institute a new election and that's already
>
> Page 21
> happened twice**. And you've asked me, as a relief, to order fundamentally that the Receiver never vote again, and I have taken that power away from the Receiver.**
> So, what is it you want to have me conduct a trial on? What relief do you think you asked for that hasn't already occurred by just mere

passage of time?
MR. GUADAYOL: Very true, Your Honor, however, when the suit was instituted --
THE COURT: Uh-uh, not however. Answer my question.
MR. GUADAYOL: Today?
THE COURT: Yes.
What is it you think I can conduct a trial on and order for relief for your client?
MR. GUADAYOL: The relief would be an order directing the Association never to allow anyone who does not have a voting certificate and who is not a unit owner to vote at the future elections. That was the original -- I mean by -- I understand what Your Honor says, however, at the time I filed this --
THE COURT: That's not relief available under specific performance.

Page 22
MR. ESSIG: Judge, if I may.
MR. GUADAYOL: I will have to research that, Your Honor, but I mean --
THE COURT: So then thanks for coming. I will enter -- the final summary judgment is granted. Have a good afternoon.
MR. GUADAYOL: Thank you.
MR. ESSIG: Thank you, Your Honor.
MR. GUADAYOL: Order the transcript.
(The hearing was concluded at 11:34 a.m.)
(emphasis added)

(R – Vol. 13, 1852-1878)

On May 27, 2015 a written Order of Final Judgment, reserving jurisdiction to award attorneys fees, was entered by Judge Victoria Sigler granting the Association's Motion for Entry of Final Judgment. (R – Vol. 13, 1882-1884)

On June 4, 2015 the Association filed Defendant's Motion for Entitlement and Award of Attorney's Fees and Costs. (R – Vol. 12, 1545-1731)

Judge Sigler retired on June 30, 2015 according to the website: http://justicebuilding.blogspot.com/2015/06/judge-victoria-sigler-has-retired.html.

August 19, 2015, Judge Judith L. Kreeger entered an order under the caption *International Park Condo I Assn. Inc. v. Petition For Appointment Of Receiver, et al.* case number 2012-000690-CA-01 awarding attorney's fees and costs to "Plaintiff." However, no amounts were specified. (R – Vol. 13, 1885)

On August 28, 2015 Appellants timely filed a Motion for Rehearing on Judge Kreeger's order, again asserting that Appellants are the prevailing party and that an award of attorney's fees to the Association is inconsistent with, and contrary to, the record and oral announcement of the court on May 20, 2015. (R-Vol. 13, 1738-1761)

Before the Honorable Judge Rodney Smith on February 29, 2016 the court finally heard Appellants' Motion for Rehearing regarding the order dated August 19, 2015, denied the Motion for Rehearing and entered a Final Judgment Awarding Attorney's Fees and costs in favor of the Association and against Appellants in the amount of $9,638.25. (R-Vol. 13, 1886-1889)

Appellants filed a Notice of Appeal on March 21, 2016 regarding the orders of May 27, 2015 and February 29, 2016, including the prefatory order of August 19, 2015. (R - Vol. 123, 1842-1851)

A Motion to Dismiss was filed by the Appellees and the motion was granted as to the lower court's order of May 27, 2015. The order of February 29, 2016 and the prefatory order of August 19, 2015 are subject of this appeal.

SUMMARY OF ARGUMENT

The Appellants are the prevailing party for purposes of awarding attorney's fees under Fla. Stat.§718.303 and §718.1255(4)(l). A party is a prevailing party if that party succeeds on any significant issue in the litigation which achieves some of the benefit the parties sought.

Here, the Appellants sought to curtail and nullify the extraordinary voting power granted to the Association's receiver by the trial court's order of March 6, 2013. That was accomplished by the trial court's order of November 18, 2014 - after Appellants suit was consolidated with the receiver action on August 28, 2014 and while Appellants' action was still pending.

On May 20, 2015 the trial court orally recognized on the record that Appellants' requested relief had been obtained during the pendency of their action. The trial court judge stated that Appellants had substantially received the

relief they requested and on that basis found that entry of a final order was appropriate.

The Motion for Entry of Final Judgment was brought by Appellee Association. But, while the Association's motion was granted for an order of final judgment, the oral decision of the trial court judge was unequivocally clear that the motion was granted because Appellants had received the relief they requested and there were no further issues to resolve.

Specifically, the court stripped the receiver of the power to vote on behalf of defaulted condo unit owners on November 18, 2014 as requested in Appellants' Second Amended Complaint. Additionally, the Association had conducted proper and remedial elections in accordance with its Declaration and Bylaws and Florida Statutes as orally acknowledged by the court.

After the trial court judge retired, an award of attorney's fees was granted to the Association. That award is incongruent with the orally announced findings of May 20, 2015. In the absence of written findings of fact and conclusions of law, the oral pronouncement of the court on May 20, 2015 should be given considerable weight (if not controlling authority) as to whom was the prevailing party. That oral determination was also consistent with the record.

The Final Judgment of Attorney's Fees and Costs entered February 29, 2016 awarding attorney's fees and costs to Appellees should be vacated and set

aside because Appellees were not the prevailing party according to the oral findings of the trial court and the record of the proceedings below. And, an award of attorney's fees and costs should be granted to Appellants.

The prefatory order of August 19, 2015 is replete with errors of fact and transposes parties making it clearly erroneous and completely ineffectual. It should therefore be set aside.

ARGUMENT

I. THE ORDER OF FEBRUARY 29, 2016 MISAPPLIED THE LAW TO THE ESTABLISHED FACTS, IS CLEARLY ERRONEOUS AND SHOULD BE SET ASIDE.

A. Standard of Review and Jurisdiction: The trial court's determination of which party is the "prevailing party" is reviewed for an abuse of discretion. *Moritz v. Hoyt Enters., Inc.*, 604 So.2d 807(Fla.1992). "When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is "clearly erroneous" and the appellate court will reverse because the trial court has "failed to give legal effect to the evidence" in its entirety. *Holland v. Gross*, 89 So.2d 255 (Fla.1956). "Where, as here, the trial court makes no findings of fact, 'the appellate court must determine whether,

based on the record, the proper analysis would have produced the result reached by the trial court.'" *Garcia v. Carter Constr. Co*., 794 So.2d 723 (Fla. 3d DCA 2001) (quoting *Town of Jupiter v. Alexander*, 747 So.2d 395, 400 (Fla. 4th DCA 1998)). (emphasis added)

This Court has jurisdiction under art. V, § 4(b)(1)(3), Fla. Const.

B. Argument.

Prevailing Party - Legal Test

The United States Supreme Court held that the test to determine a prevailing party is whether the party "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)." The Florida Supreme Court has stated, "We agree that the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees." *Carl A. Moritz, et ux., v. Hoyt Enterprises, Inc*., 604 So.2d 807 (Fla. 1992), citing *Hensley*, supra.

Curtailing the power of the Receiver to vote was a significant issue in the litigation between Appellants and the Association. "Florida courts apply the Supreme Court's definition of 'prevailing party': a party is a 'prevailing party' if that party succeeds on 'any significant issue' in the litigation which 'achieves

some of the benefit the parties sought.'" *CSX Transportation, Inc., v. Auburn Thirty Six, LLC, et al*, No. 4:12-CV-1984-JAR, E.D. Mo. 2014. (citations omitted).

A prevailing party may obtain relief by means other than a direct adjudication of the merits. An analogous situation arose in the case of *Padow v. Knollwood Club Ass'n*, 839 So.2d 744 (Fla. 4th DCA 2003):

> "There, a condominium association filed a complaint against Padow for failing to pay maintenance fees. After the suit was filed, Padow sent the association a check for $2,000, which the association did not consider to have satisfied all of Padow's debt. The association filed a motion for summary judgment, and the trial court denied its motion, finding that the $2,000 check had satisfied the fees and costs owed by Padow. About seven months later, the association filed a voluntary dismissal without prejudice. Padow then filed a motion for attorney's fees, as the prevailing party. At the fee hearing, the association explained it voluntarily dismissed the case "because it had gotten most of what it had sought when filing its suit and ... it did not believe that it was worth while [sic] for a small [c]ondominium [a]ssociation to continue to litigate indefinitely under those circumstances." (internal quotation marks omitted). The trial court denied Padow's motion for fees.
>
> [On appeal, the Fourth Circuit ruled that:]
>
> Padow cannot be a "prevailing party" within the meaning of section 718.303(1) because he paid the substantial part of the association's claim for delinquent assessments prior to the voluntary dismissal. We also agreed with the trial court's reasoning behind finding that Padow was not the prevailing party, by explaining that, "to find that Padow was the prevailing party under these circumstances would require a plaintiff to fight every case to judgment, even though it 'achieved all of the legitimate goals of [its] suit,' which was not a goal of the legislature in passing the statute [allowing attorney's

fees]."

> [Applying the reasoning in Padow to another case, the Fourth Circuit found:]
>
> Padow applies to this case. Two of the three counts that Infiniti filed against the appellees were for the amount that the appellees owed on the note, with one of the counts seeking foreclosure. Although the check that the appellees sent to Blue Infiniti, in an attempt to satisfy its debt, was for $1,575.00 less than the amount that Infiniti requested in its complaint. Blue Infiniti clearly recovered the majority of what it sought by filing suit. Having received most of what it sought, Blue Infiniti dismissed all three counts, bringing litigation to an end. The trial court improperly awarded prevailing attorney's fees in this case [to defendants Wilson]."

Blue Infiniti, LLC and Jorge Diaz-Cueto, v. Annette Cassells Wilson and Ricky Wilson, 170 So.3d 136 (Fla. 4th DCA 2015).

In the instant case, the oral announcement granting final judgment is tantamount to a dismissal of the case on the basis that Appellants had gotten most, if not all, of what they had sought when filing their suit. After Appellants filed suit, and after consolidation with the Receiver action, the Receiver was stripped of voting rights by order of the court. The Association then conducted an election in accordance with its Declaration and Bylaws. Those results are exactly what Appellants sought to obtain by instituting litigation. It is of no bearing that the receiver's power was curtailed in the context of the appointment of a new receiver (after the court *sua sponte* fired the previous receiver). The fact is that the significant issue was resolved in the course of the lawsuit brought

by Appellants, just as relief was obtained through the lawsuits of *Knollwood Club Association* and *Blue Infinity* above. The court acceded and granted relief sought by Appellants when stripping voting authority it had granted to the receiver prior to Appellants' lawsuit. The defendant Association acceded and changed its behavior by conducting a proper election. Appellants clearly obtained what they sought by filing suit. And, that was acknowledged by the trial court judge when rendering oral findings and conclusions on May 20, 2015. ("relief you've already asked for has already been mooted out by the Court. That's been done.") (R – Vol. 13, 1852-1878) (emphasis added)

Prevailing Party - Established Facts

When deciding the Motion for Entry of Final Judgment, the trial court judge orally stated to Appellant's counsel in open court, "you've asked me, as a relief, to order fundamentally that the Receiver never vote again, and I have taken that power away from the Receiver." (R – Vol. 13, 1852-1878) That relief was central to the Appellant's Second Amended Complaint against the Association. (R – Vol. 4, 654-673)

Yet, the written Order of Final Judgment dated June 4, 2015 states, "the Court hereby finds in favor of the Defendant, International Park Condominium I Association, Inc. on all claims and Plaintiffs, Maria Gonzalez, Felix L. Garcia and Ida E. Leal, shall take nothing by this action and go hence without day." (R

– Vol. 13, 1882-1884) At that point in time there were no unresolved claims upon which to award damages or compel specific performance in favor of Appellants (or either party). The issues of the receiver's power and proper elections had been resolved in the course of the litigation. Simply put, there was nothing more for the Plaintiffs to take because they had already obtained the relief they sought.

The court recognized in its oral finding on May 20, 2015 that the Appellants did in fact take something in their action, namely stripping the Receiver of the power to vote and the Association conducting proper elections in accordance with its Declaration. (R – Vol. 13, 1852-1878) The written order of June 4, 2015 does not change the nature of the oral ruling. "When a judge has heard the testimony and arguments and rendered an oral ruling in a proceeding, the judge retains the authority to perform the ministerial act of reducing that ruling to writing. However, any substantive change in the trial judge's ruling would not be a ministerial act." *Anne Marie Fischer v. Honorable Francis X. Knuck*, 497 So.2d 240 (Fla. 1986) (citations omitted). "Where there is a difference between the court's oral pronouncement and its written order, the oral pronouncement controls." *B.C., Father of S.C. and D.C., v. Department of Children and Families*, 864 So.2d 486 (Fla. 5th DCA 2004). So, we read the written Order of Final Judgment entered June 4, 2015 as controlled by the oral

pronouncement of the court. That is, the Appellants had prevailed in obtaining the relief they had sought prior to the entry of Final Judgment. And, therefore, no relief was granted to the Plaintiffs in that order. The written order is subsequent to, and merely a record of, the orally announced order which included findings and conclusions. Those finding and conclusions were consistent with the record that shows the Appellants obtained the relief they sought in the course of their lawsuit. Appellants are the prevailing party according to the facts of the record below, the written order of June 4th notwithstanding. The orders of successor judges awarding attorney's fees to the Association are clearly erroneous when applying the law to the facts in the record and constitute an abuse of discretion.

II. THE ORDER OF AUGUST 19, 2015 IS REVIEWABLE AS PREFATORY, MISAPPLIED THE LAW TO THE ESTABLISHED FACTS AND IS CLEARLY ERRONEOUS.

A. Standard of Review and Jurisdiction: The trial court's determination of which party is the "prevailing party" is reviewed for an abuse of discretion. *Moritz v. Hoyt Enters., Inc.*, 604 So.2d 807(Fla.1992). "When the appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts,

then the decision is "clearly erroneous" and the appellate court will reverse because the trial court has "failed to give legal effect to the evidence" in its entirety. *Holland v. Gross*, 89 So.2d 255 (Fla.1956). "Where, as here, the trial court makes no findings of fact, 'the appellate court must determine whether, based on the record, the proper analysis would have produced the result reached by the trial court.'" *Garcia v. Carter Constr. Co*., 794 So.2d 723 (Fla. 3d DCA 2001) (quoting *Town of Jupiter v. Alexander*, 747 So.2d 395, 400 (Fla. 4th DCA 1998)). (emphasis added)

This Court has jurisdiction under art. V, § 4(b)(1)(3), Fla. Const.

B. Argument

The order awarding attorney's fees entered on August 19, 2015 (R – Vol. 13, 1885) is a reviewable because it is: 1) an appealable non-final order; 2) is prefatory in nature, and; the court misapplied the law to the established facts in the record.

Appealable Non-Final Order

This Court in *Blattman v. Williams Island Associates, Ltd*., 592 So.2d 269 (Fla. 3d DCA 1991) stated that an order determining the right of a defendant to attorney's fees without setting the amount is an appealable non-final order under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv). Another Third Circuit opinion, however, found the appeal of such an order premature, but not

dismissible. See, *Southern Management and Inv. Corp. v. Escandar*, 529 So.2d 355 (Fla. 3d DCA 1988).

The order of August 19, 2015 awarded attorney's fees to the Association without stating an amount. On August 28, 2015 Appellants timely filed a motion for rehearing of that order awarding attorney's fees entered on August 19, 2015. The motion for rehearing was not heard until February 29, 2016. Applying the rule in *Blattman*, the portion of the trial court's order concerning the award of attorney's fees constituted a final ruling on an issue that arose after entry of the final judgment and was a final post-judgment order to which a motion for rehearing was properly directed. See, Fla. R. App. P. 9.030(b)(1)(A).

Therefore, because the motion for rehearing was authorized, it stayed rendition of the final order until disposition of the motions on February 29, 2016. See, Fla. R. App. P. 9.030(b)(1)(A). The notice of appeal was timely filed within thirty days after the order disposing of the motion for rehearing. See, Fla. R. App. P. 9.020(h).

Prefatory in Nature

The Florida 4th Circuit Court of Appeal later enunciated a rule which seems to navigate any conflict between the *Blattman* and *Southern Management* cases and resolves the above re-hearing question for purposes of the instant case. The 4th DCA has held that an order awarding attorney's fees is not a final

(appealable) order unless it includes a specific amount awarded. However, that court also recognized:

> Where an order entered after final judgment is merely prefatory to another order which will be appealable either as a final judgment or an order on an authorized motion under rule 9.130(a)(4), review of the correctness of the prefatory order is available when the ultimate order is appealed.

Winkelman v. Toll et al, 632 So.2d 130 (Fla. 4th DCA 1994). Even if viewed as a non-final and non-appealable order, the inclusion of the August 19th order awarding attorney's fees is appropriate in this appeal because it is prefatory to the order of February 29, 2016 which specified the amount of attorney's fees awarded as a final judgement. In effect, it merges into the order of February 29, 2015. By inclusion of the August 19th order, this Court is better enabled to review the entire proceeding below and observe the incongruity and conflict between the oral findings pronounced on May 20, 2015 and the decisions and orders of two successor judges.

Clearly Erroneous – No Relationship to Facts and Parties

The August 19th order is so frought with scrivener's errors as to render it ineffectual. The plaintiffs of record under the order's captioned case number are the Appellants. Yet, the order caption shows the Association as plaintiff, with no mention of Appellants anywhere in the caption or order. In the action below, the Association is the Defendant.

Due to the combination of errors in the order, the award of attorney's fees in favor of the "Plaintiff" is confusing and, at best, ambiguous. The Appellants were the Plaintiffs in the action below. A literal, albeit circumscribed, reading of the order would award attorney's fees to the Appellants. Yet, the order does not indicate against whom the award is granted. No party is ordered to pay.

The trial court's interpretation of statutory provisions upon which to grant an award of attorney's fees was a misapplication of the law to the facts in the record (which indicate Appellants were the prevailing party) and is clearly erroneous. See, *Central Waterworks, Inc. v. Town of Century*, 754 So. 2d 814 (Fla. 1st DCA 2000), citing *Holland v. Gross*, 89 So. 2d 255 (Fla 1956)

Put another way, the order of August 19, 2015 is so indecipherable as to be clearly erroneous having no coherent connection to the facts (or parties) in the record and should be set aside as a matter of law.

III APPELLANTS ARE ENTITLED TO ATTORNEYS FEES UNDER FLORIDA STATUTES §718.1255(4) AND §718.303(1)

A. Standard of Review.

The trial court's determination of which party is the "prevailing party" is reviewed for an abuse of discretion. *Moritz v. Hoyt Enters., Inc., 604 So.2d 807(Fla.1992).* Attorney's fees awardable under Fla. Stat.§718.303(1) and

§718.1255(4) are mandatory and not discretionary.

B. Argument

Prevailing Party Against Association – Fla Stat.§718.303(1)

As prevailing parties Appellants are entitled to an award of attorney's fees pursuant to Fla. Stat. §718.303(1) where a unit owners prevailing in an action brought against the condominium association are entitled to attorney's fees. The award is not discretionary.

The Order Awarding Attorney's Fees entered on August 19, 2015 and the Final Judgment of Attorney's Fees and Costs entered on February 29, 2016 should be reversed and remanded for an award in favor of Appellants consistent with the oral findings and conclusions of the trial court pronounced on May 20, 2015 and the record below wherein Appellants are clearly the prevailing parties.

Prevailing Party from Arbitration - Fla Stat. 718.1255(4)

Attorney's fees shall be awarded to a prevailing party pursuant to Fla. Stat. §718.1255(4) when a party appeals from an arbitration decision and betters its position. Here, the arbitration rendered no decision and the arbitrator abstained on jurisdictional grounds. Appellants proceeded in Circuit Court and obtained the relief they sought. The Statute provides:

> (l) The party who files a complaint for a trial de novo shall be assessed the other party's arbitration costs, court costs, and other reasonable costs, including attorney's fees, investigation expenses,

> and expenses for expert or other testimony or evidence incurred after the arbitration hearing if the judgment upon the trial de novo is not more favorable than the arbitration decision. If the judgment is more favorable, the party who filed a complaint for trial de novo shall be awarded reasonable court costs and attorney's fees.

The outcome of the Appellants' complaint for a trial *de novo* was clearly more favorable than the arbitration decision, or abstention thereof. Attorney's fees are awardable to Appellants under Fla. Stat. 718.1255(4)(l).

CONCLUSION

The Order on Plaintiff's Amended Motion for Attorney's Fees dated August 19, 2015 and the Final Judgment of Attorney's Fees and Costs entered February 29, 2016 awarding attorney's fees and costs to Appellees should be vacated and set aside because Appellees were not the prevailing party according to the oral pronouncement of the trial court and the record of the proceedings below.

The Appellants should be awarded attorney's fees and costs as prevailing parties and 1) the trial court should be instructed to conduct an evidentiary hearing to determine amounts of attorney's fees and costs to be entered as a final judgment in favor of Appellants and against Association, and; 2) Appellants should be awarded their attorney's fees and costs incurred in this appeal.

Submitted this ___ day of June 2016.

CERTIFICATE OF SERVICE

I HEREBY CERTIFIED that a true and correct copy of this Brief of Appellants was furnished by electronic mail to Essig Law Group, P.A., at wessig@essiglawgroup.com and Pablo F Gonzalez Zepeda at service@gzattorneys.com and participant parties through the e-service program this ____ day of _____, 2016.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENT

I certify that this brief was typed in 14-point Times New Roman font.

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