

IN THE DISTRICT COURT OF APPEAL  
THIRD DISTRICT OF FLORIDA

CASE NO. 3D23-1757

Mt. Hawley Insurance Company,

Appellant,

v.

Schmid Construction, Inc., et al.,

Appellees.

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**APPELLANT'S RESPONSE TO APPELLEES' MOTION FOR  
APPELLATE ATTORNEY'S FEES**

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Appellant, Mt. Hawley Insurance Company ("Mt. Hawley"), hereby responds in opposition to Appellees, Schmid Construction, Inc. ("Schmid") and Shul of Bal Harbor, Inc. ("Shul")'s Motion for Appellate Attorney's Fees, filed August 12, 2024. Mt. Hawley states as follows:

**BACKGROUND**

**I. Schmid and Shul's Breach-of-Contract Action Against Mt. Hawley**

The facts and procedural history of this case are recited at length in Mt. Hawley's initial and reply briefs.

To summarize, Schmid and Shul filed this action against Mt. Hawley and H&M Builders, LLC ("H&M"). (R. 24.) Schmid and Shul asserted one

count for breach of contract against Mt. Hawley. (R. 30.) Schmid and Shul alleged that they qualified as additional insureds under an insurance policy Mt. Hawley issued to H&M, and that Mt. Hawley breached the policy by failing to defend them in an underlying wrongful-death action. (R. 30.) They sought damages, attorneys' fees, and interest. (R. 31.)

## **II. The Trial Court's Final Judgment Against Mt. Hawley**

On August 30, 2023, Schmid and Shul solicited the entry of a final judgment on their breach-of-contract claim against Mt. Hawley. (R. 2605.)

The judgment stated:

This Court having ruled upon the Defendant, Mt. Hawley Insurance Company's, Motion for Summary Judgment and having ruled in favor of the Plaintiff pursuant to Fla.R.Civ.P. 1510(f)(1), herein enters a Final Judgment on Plaintiffs Complaint and finds that the Plaintiffs, SCHMID CONSTRUCTION, INC., and SHUL OF BAL HARBOR, INC., are additional insureds under the Defendant's insurance policy and entitled to coverage under the Defendant's policy of insurance.

The Court reserves jurisdiction to issue any other orders and to determine the amount of the costs and fees to be awarded at a later date.

(R. 2605.)

## **III. Mt. Hawley's Appeal**

Mt. Hawley subsequently filed this appeal of the trial court's final judgment. (R. 2497.)

As discussed in Mt. Hawley's initial brief and reply brief, Mt. Hawley requests that this Court affirm the judgment and remand for the dismissal of Mt. Hawley from any further proceedings. Consistent with *McGurn v. Scott*, 596 So. 2d 1042 (Fla. 1992), and *Bailey v. Brickell Key Centre-FBEC, L.L.C.*, 778 So. 2d 386 (Fla. 3d DCA 2001), the judgment entered is final, the plaintiffs waived any entitlement to damages, and the trial court no longer has jurisdiction to do anything else with respect to Mt. Hawley, except assess fees or costs. If necessary, Mt. Hawley asks the Court to treat this appeal as a petition for writ of prohibition and issue a writ preventing the trial court from taking further action as to Mt. Hawley. Alternatively, the final judgment should be reversed, as the trial court improperly entered summary judgment for the plaintiffs, *sua sponte*, without providing Mt. Hawley notice and an opportunity to respond in opposition.

#### **IV. Schmid and Shul's Present Motion for Appellate Attorneys' Fees**

On August 12, 2024, Schmid and Shul filed the present Motion for Attorneys' Fees on Appeal, seeking recovery of appellate fees pursuant to Florida Statutes section 86.121. For the reasons discussed below, their motion for fees should be denied.

## DISCUSSION

Prevailing-party appellate attorneys' fees may be conditionally awarded only to the party that prevails on appeal. *Brevard Orthopaedic, Spine & Pain Clinics, Inc. v. Health First Med. Mgmt., Inc.*, 130 So. 3d 274, 275 (Fla. 5th DCA 2014); *E. Coast Metal Decks, Inc. v. Boran Craig Barber Engel Constr. Co., Inc.*, 114 So. 3d 311, 314 (Fla. 2d DCA 2013).

Even where a motion for appellate fees is granted, fees are awarded only conditionally, subject to the movant ultimately prevailing in the litigation back in the trial court. *Citizens Prop. Ins. Corp. v. Espinosa*, 353 So. 3d 11, 11 (Fla. 3d DCA 2021); *Belle Meade Studios, LLC v. Zig 76, LLC*, 353 So. 3d 40, 40 (Fla. 3d DCA 2022); 2 Philip J. Padovano, *Florida Practice: Appellate Practice* § 22:5 (2024 ed.).

Here, for the reasons stated in Mt. Hawley's initial and reply briefs, Mt. Hawley should prevail in this appeal, so Schmid and Shul should not be entitled to recover appellate attorneys' fees. To the extent the Court somehow finds that Schmid and Shul are the prevailing parties in this appeal, then any appellate fee award should be contingent on the trial court's ultimate determination that they prevailed on the significant issues litigated following remand.

## CONCLUSION

Appellant, Mt. Hawley Insurance Company, respectfully requests that the Court deny Appellees, Schmid Construction, Inc. and Shul of Bal Harbor, Inc.'s Motion for Appellate Attorney's Fees, filed August 12, 2024. Alternatively, if the Court grants their motion, then any appellate fee award should be conditioned on them ultimately prevailing on the significant issues litigated in the trial court.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this motion was electronically filed on this 26<sup>th</sup> day of August, 2024, via the Florida Courts E-filing Portal, and an electronic copy has been furnished to the following counsel of record:

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## CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.045(b) and Florida Rule of Appellate Procedure 9.210(a)(2)(B), I hereby certify that this brief was prepared using proportionately spaced Arial 14-point font and complies with the applicable font and word-limit requirements.

/s/ Adam Topel  
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