

IN THE DISTRICT COURT OF APPEAL  
THIRD DISTRICT OF FLORIDA

CASE NO. 3D21-1083  
L.T. Case No. 2018-000931-CA-01

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JOHN W. SCHMITZ,  
Appellant/Cross-Appellee,

v.

DOROTHY JOAN SCHMITZ, *et. al.*,  
Appellees/Cross-Appellants.

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JOHN W. SCHMITZ,  
Cross-Defendant/Appellant/  
Cross-Appellee,

v.

SCHMITZ DEVELOPMENT  
COMPANY,  
Cross-Plaintiff/Appellee/  
Cross-Appellant,

and

LUCILA SCHMITZ,  
Cross-Defendant/Cross-  
Appellee.

**MOTION TO RELINQUISH JURISDICTION**

Appellant/Cross-Appellee/Counter-Defendant/Cross-Defendant  
John W. Schmitz (“John”), and Cross-Appellee/Cross-Defendant,  
Lucila Schmitz (“Lucila”), pursuant to Rule 9.600(b), of the Florida  
Rules of Appellate Procedure, move to relinquish jurisdiction to the

trial court so that it may rule on *Counter-Defendant's Renewed Motion to Vacate Ultra Vires Actions Taken by Counter-Plaintiffs* (A. 24-53).<sup>1</sup> In support, John and Lucila state as follows:

### **INTRODUCTION**

This is an appeal and cross-appeal of an Amended Final Judgment entered following a non-jury trial. A. 15-23, 54-61. After filing the Notice of Appeal, John filed *Counter-Defendant's Renewed Motion to Vacate Ultra Vires Actions Taken by Counter-Plaintiffs*. A. 24-53. The trial court entered an Order denying the motion on the basis that the filing of the Notice of Appeal divested it of jurisdiction to consider the relief sought in the motion. A. 6-8.

The trial court's ruling on the motion will not have the effect of modifying the Amended Final Judgment on appeal but will instead address the propriety of actions taken by Appellees/Cross-Appellants/Counter-Plaintiffs Dorothy Joan Schmitz ("Joan"), Cheryl Schmitz ("Cheryl") and The Northern Trust Company ("Northern Trust"), following the entry of the Final Judgment. Such

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<sup>1</sup> The documents referenced herein are included in an Appendix to the Motion to Relinquish Jurisdiction and will be referenced as: A. [Page Number].

actions could not have been and were not addressed in the Final Judgment or Amended Final Judgment. Thus, the trial court retains concurrent jurisdiction to rule on the post-judgment motion. Given the trial court's decision to the contrary, John and Lucila ask this Court to relinquish jurisdiction to the trial court so that it may consider and rule on the motion.

### **STATEMENT OF THE CASE AND FACTS**

This case involves a dispute among family members and shareholders of Appellee/Cross-Appellant/Cross-Plaintiff Schmitz Development Company ("SDC"). A. 67-68, 77-86. The three directors of SDC were brothers, John, Thomas, and Michael. A. 80-81, 88. Joan and Cheryl became directors of SDC following the death of their respective spouses, Thomas, and Michael. A. 80-81, 85.

The case was initially brought as a declaratory judgment action by SDC, John, individually and as Director of SDC, and "John and Lucila, in Joint Trust With Right of Survivorship in the capacity as shareholders of SDC" against Joan, individually and as the Executrix of the Estate of Thomas Schmitz and in her claimed capacity as Trustee of the Thomas Schmitz Family Trust, Cheryl,

individually and as Co-Trustee of the Michael D. Schmitz GST Non-Exempt Marital Trust Dated 1/18/2000, and Northern Trust, as Co-Trustee of the Michael D. Schmitz GST Non-Exempt Marital Trust Dated 1/18/2000. A. 24, 85, 134-35.

On July 17, 2018, the trial court entered a Declaratory Final Judgment in favor of Joan, Cheryl and Northern Trust, finding that Joan and Cheryl are directors of SDC (replacing their deceased spouses, Thomas and Michael, respectively) and are authorized to call meetings of the board of directors and of the shareholders of SDC. A. 85, 134-35. The court also found that resolutions passed at a December 11, 2017 Special Meeting of shareholders and directors of SDC were valid. A. 84-86, 136. This included resolutions that Joan, Cheryl, and John are the three directors of SDC, and Joan and Cheryl could remove John as president of SDC and replace him with interim president, Brent Ziegler. A. 18, 85-86, 135-36.

**A. Underlying Counterclaim, Crossclaim and Amended Judgment on Appeal**

Joan, Cheryl and Northern Trust asserted an Amended Counterclaim for breach of the Shareholders Agreement and breach of fiduciary duty against John. A. 67-68. The trial court found that

Cross-Plaintiff SDC asserted similar claims against John and his wife Lucila. A. 77-78. The trial court held a bench trial on the Amended Counterclaim and Crossclaim. A. 63, 77-78.

On May 6, 2021, John filed his Notice of Appeal from the Amended Final Judgment entered on April 8, 2021, based on the trial court's Second Amended Findings of Fact and Conclusions of Law from Non-Jury Trial. A. 54-61, 63. The trial court entered judgment in favor of Counter-Plaintiffs Joan, Cheryl, and Northern Trust on Count I (Breach of Contract), Count III (Application for the Court-Ordered Inspection and Copying of Records), and Count IV (Application for Relief Pursuant to 805 ILCS 5/12.56) of their Amended Counterclaim against John. A. 63. Joan and Cheryl were jointly awarded the total sum of \$566,804.09. A. 64. Important here, the trial court also ordered "the imposition of a constructive trust over the shares of stock in Schmitz Development Company owned by John Schmitz until such time that John Schmitz remedies his wrongdoing as detailed in the findings of the Court's **Second** Amended Findings of Fact and Conclusions of Law from Non-Jury Trial dated **March 29, 2021.**" A. 64-65. The trial court reserved jurisdiction to enforce and liquidate the constructive trust.

A. 65. The court entered judgment against Counter-Plaintiffs and in favor of John on Count II (Breach of Fiduciary Duty) of the Amended Counterclaim. A. 63.

In its Amended Final Judgment, the trial court also entered judgment in favor of Appellee/Cross-Appellant/Cross-Plaintiff Schmitz Development Company (“SDC”) on Count I (Breach of Fiduciary Duty) of its Crossclaim against John. A. 63. The court awarded SDC the total sum of \$3,946,104.46. A. 64. The court entered judgment against SDC and in favor of John as to Counts II and VI-VIII of the Crossclaim. A. 63-64. The court entered judgment against SDC and in favor of Lucila (John’s wife) as to Count V of SDC’s Crossclaim against her. A. 63-64.

The Amended Final Judgment was entered following the trial court’s decision to grant, in part, John’s Motion for Rehearing, Additional Findings and Vacatur of Final Judgment (filed March 8, 2021) (“Motion for Rehearing”), which resulted in the trial court’s *Second* Amended Findings of Fact and Conclusions of Law from Non-Jury Trial dated March 29, 2021. A. 67-119, 120-21, 249-405. The Amended Final Judgment differed from the Final Judgment that was entered on February 19, 2021, in that the amount

awarded to SDC was reduced to \$3,946,104.46 from the \$4,172,713.00 originally awarded. *Compare* A. 64 with A. 408.

**B. Emergency Motion to Vacate Ultra Vires Actions & Renewed Motion to Vacate Ultra Vires Actions**

On March 11, 2021, prior to the trial court's ruling on John's Motion for Rehearing, John filed an *Emergency Motion for a Stay Order, to Dissolve Writs of Garnishment and to Vacate Ultra Vires Actions Taken by Counter-Plaintiffs* ("Emergency Motion to Vacate Ultra Vires Actions"), pursuant to Rule 1.550, of the Florida Rules of Civil Procedure. A. 152-248. The Emergency Motion to Vacate Ultra Vires Actions sought to vacate Actions taken by Joan, Cheryl and Northern Trust on March 2, 2021, in response to the Final Judgment and imposition of the constructive trust as to SDC shares. A. 154-162. The Actions included the following:

1. First Action by Unanimous Written Consent of the Voting Shareholders of Schmitz Development Company (A. 165-168, "First Action"); and
2. Second Action by Unanimous Written Consent of the Voting Shareholders of Schmitz Development Company (A. 169-172, "Second Action").

These Actions are dated March 2, 2021, and are signed by Joan, Cheryl and Northern Trust. A. 167-68, 171-72. The Actions state that "all of the voting Shareholders of" SDC consented and

adopted the resolutions passed. A. 165, 167-68, 169, 171-72. John asserted this statement was blatantly false given that John was not notified that a vote was being conducted and certainly did not vote in favor of either of the Actions. A. 154. John argued that to the extent that Joan, Cheryl and Northern Trust sought to identify themselves as “all of the voting Shareholders of” SDC, such a self-serving statement was not supported by the record evidence and the Final Judgment. A. 154.

In an attempt to support their ultra vires conduct, Joan, Cheryl and Northern Trust contend in the First Action that “as a result of the Court’s imposition of a constructive trust over the shares of stock in the Corporation owned by John Schmitz, John Schmitz no longer has beneficial ownership of his shares until such time that John Schmitz remedies his wrongdoing as detailed in the findings of the Court’s Amended Findings of Fact and Conclusions of Law from Non-Jury Trial dated December 30, 2020.” A. 166. John argued this statement was equally false and fabricated given that the court’s findings and the Final Judgment did not support the position that the Counter-Plaintiffs sought to advance. A. 155.

John further argued that the Actions sought to authorize SDC and its interim President, Brent Ziegler, to engage in a host of activities that were: (a) not authorized under the SDC corporate documents, (b) the Final Judgment, or (c) existing Florida law.

A. 155. Specifically, the First Action purports to implement the following resolutions:

RESOLVED: That the Corporation is hereby directed to treat the shares of stock in the Corporation owned by John Schmitz as treasury stock carrying no voting power until such time that John Schmitz remedies his wrongdoing as detailed in the findings of the Court's Amended Findings of Fact and Conclusions of Law from Non-Jury Trial dated December 30, 2020; and

RESOLVED: That, in the interim, the Corporation is authorized to act upon the authorization of the Voting Shareholders; and

RESOLVED: That, in the interim, the Corporation authorizes Brent M. Ziegler, in his capacity as President of and on behalf of the Corporation, to act upon the authorization of the Voting Shareholders; and

RESOLVED: That the President of the Corporation be instructed to mark for identification and insert into the permanent records of the Corporation, the original of this Action by Unanimous Written Consent, which has [sic] submitted to, reviewed, and approved by the Voting Shareholders of the Corporation.

A. 166. As a result of the resolutions sought to be passed through the First Action, the Second Action purports to implement the following resolutions:

RESOLVED: That John Schmitz is hereby removed as a Director/Executive of the Corporation; and

RESOLVED: That Dorothy Joan Schmitz and Cheryl Schmitz are the sole Directors/Executives of the Corporation; and

RESOLVED: That the Corporation is authorized to act upon the authorization of Dorothy Joan Schmitz and Cheryl Schmitz; and

RESOLVED: That the Corporation authorizes Brent M. Ziegler, in his capacity as President of and on behalf of the Corporation, to act upon the authorization of Dorothy Joan Schmitz and Cheryl Schmitz; and

RESOLVED: That the President of the Corporation be instructed to mark for identification and insert into the permanent records of the Corporation, the original of this Action by Unanimous Written Consent, which has [sic] submitted to, reviewed, and approved by the Voting Shareholders of the Corporation.

A. 170. Aside from contending the Actions were improper given the trial court had yet to rule on his Motion for Rehearing, which tolled rendition of the Final Judgment, John contended the Actions

violated the trial court's prior rulings and the terms of the corporate documents that govern SDC. A. 153-162.

John asserted that the Actions violated the trial court's decision to not remove him as a Director/Executive of SDC. A. 158. On October 23, 2020, SDC, Joan, Cheryl and Northern Trust filed their Supplemental Motion for Limited Reconsideration of Findings of Fact and Conclusions of Law from Non-Jury Trial, arguing that the trial court erred in not removing John as a Director/Executive of SDC. A. 158, 173-240. The trial court rejected the renewed request that John be removed as a Director/Executive of SDC. A. 158, 406-410, 460-61. John contended that the Actions resulted from a complete disregard of the court's ruling and were an attempt by SDC, Joan, Cheryl and Northern Trust to conduct an illegitimate vote, which sought to do exactly what the trial court stated it would not do – remove John as a Director/Executive of SDC. A. 158. Namely, the Second Action contains a resolution stating, "John Schmitz is hereby removed as a Director/Executive of the Corporation." A. 170.

John asserted the Actions violated the terms of the corporate records that govern SDC in that there was a lack of notice. A. 158-

159. John explained that Article I. D. (3) of SDC's By-Laws provides that, "Written notice of all meetings shall be given, stating the place, date, and hour of the meeting.... The notice of a special [not annual] meeting shall in all instances state the purpose for which the meeting is called." A. 158 (quoting A. 243). Article I. D. (3) further provides that the notice of the meeting shall be no less than ten (10) days and no more than sixty (60) days before the date of the meeting, unless the lapse of the prescribed period of time shall have been waived. A. 158 (citing A. 243). Further, "[t]he notice shall be directed to each shareholder at his record address or at such other address which he may have furnished in writing to the Secretary of the corporation.... Notice need not be given to any shareholder who submits a waiver of notice by him before or after the time stated therein. Attendance of a person at a meeting of shareholders shall constitute a waiver of notice of such meeting..." A. 158-59 (quoting A. 243). John argued the March 2, 2021 "special meeting" (which did not appear to have actually taken place given the language in both Actions), wherein Joan, Cheryl and Northern Trust consented to the Actions, did not meet the requirements of Article I. D. (3), because written notice of the meeting was not given to John, the

owner of one-third of SDC's stock, and because John did not at any time submit a waiver of notice. A. 159.

John further asserted the Actions breached the 1985 Shareholders Agreement. A. 159-161. The 1985 Shareholders Agreement, as reflected in the trial court's Amended Findings of Fact and Conclusions of Law, undeniably states, inter alia, that: "in the event of Marion [Schmitz's] death, Thomas, Michael and John shall serve as the sole directors of the Company for as long as they are all living." A. 159 (quoting A. 423). *See also* A. 80 (Second Amended Findings). John argued the Actions taken by Joan, Cheryl and Northern Trust in seeking to remove him as a Director/Executive of SDC was a breach of the Shareholders Agreement. A. 159.

In addition, John argued the Second Action intentionally misrepresented what the Shareholders Agreement provides. A. 159-161. Specifically, the operative provision in the Shareholders Agreement relating to Thomas, Michael and John serving for as long as they are living relates to them in their capacity as *directors*. No mention is made of their roles as *executives*. A. 159-160. Despite important distinctions existing between these terms within the SDC

corporate documents, the Second Action sought to render these two terms interchangeable through the false statement that “the Shareholders Agreement states that, in the event of Marion Schmitz’s death, Thomas Schmitz, Michael Schmitz and John Schmitz were to serve as sole *Directors/Executives* of the Corporation for as long as they are all living.” A. 160 (quoting A. 169 (emphasis added)).

Such improper phrasing hides the fact that Section 3 of the Shareholders Agreement provides the following:

Requirement of Unanimity. Except for payments to be made Marion under the Trust Agreement, all of the Company’s investments and expenditures shall require the unanimous approval of the Executives. The Company shall implement appropriate control procedures to insure that all Company investments and expenditures are approved by such parties. The requirement of unanimity shall be deemed an amendment to the by-laws of the Company. It is specifically understood that each Executive shall receive the same, if any, benefits, compensation or emoluments from the Company.

A. 160. *See also* A. 80 (finding the Shareholders Agreement provides: “[A]ll of the Company’s investments and expenditures shall require the unanimous approval of the Executives . . . This

requirement of unanimity shall be deemed an amendment to the by-laws of the Company”); A. 118 (finding that governing SDC requires unanimous approval by John, Joan and Cheryl). This provision requires SDC’s Executives to be unanimous in their decision-making and has been referred to as imposing the “Unanimity Rule” on SDC and its Executives. A. 160. John argued the Second Action’s purported attempt to remove John as a “Director/Executive” and name Joan and Cheryl as the sole “Directors/Executives” violated the Unanimity Rule. A. 160.

The importance of maintaining the Unanimity Rule is manifest. Pursuant to the 2001 Agreement that amended the 1985 Agreement, upon the death of their respective husbands, Cheryl and Joan became SDC Executives. A. 160. The Unanimity Rule gave both widows the power to say “No” to anything that SDC could ever do (or try to do) during their respective lifetimes. A. 160. John argued that if counsel for Joan and Cheryl sought to water down the importance of being an SDC Executive by permitting that an Executive be removed through the vote of the other Executives or shareholders, such actions opened the door to Mr. Ziegler (or his successor) engaging in conduct in the position of SDC President

which would otherwise not be permitted if the Unanimity Rule was respected (as Marion Schmitz required in her Trust). A. 160-61. Given the mature ages of Joan and Cheryl, John contended that it stands to reason that there is a possibility neither are able to fulfill the responsibility of checking the power of the SDC President through the use of their power as an SDC Executive. A. 161. If incapacity or other impediment to voting were to occur, under the actions taken by Joan and Cheryl in the Second Action, the non-impaired Executive could vote on matters authorizing any number of activities or could authorize the SDC President to engage in conduct that would otherwise not be permitted. A. 161. John asserted the Second Action opens the pandora's box to a host of potential consequences which the SDC corporate documents sought to avoid. A. 161.

John further asserted that Counter-Plaintiff's actions intentionally distorted the Final Judgment, which stated that a constructive trust has been imposed over the shares in SDC that are "owned" by John. A. 64, 161, 408. John argued that, as the record evidence at trial demonstrated, and as the trial court's findings of fact made clear, John and Lucila own their shares in

SDC, as noted in the caption of the case, “in Joint Trust With Right of Survivorship.” A. 161. *See also* 125-26, 127, 130, 133, 134, 135, 136, 138. The February 18, 2000 Amendment to the SDC Shareholders Agreement, which was introduced into evidence at trial and was signed by Thomas, Michael and John, expressly stated:

1. John may transfer his shares in the Company (the Shares”) to John W. Schmitz and Lucila Schmitz, his wife, in joint trust with right of survivorship, provided that he and his wife affirm below that, during the life of John, with respect to the Shares, Lucila Schmitz shall not have voting rights and the Shares may be voted by John as if the Transfer had not occurred.

A. 161 (quoting A. 150).

John argued that although the trial court imposed a constructive trust over the shares owned by John, it did not impose a constructive trust over “John W. Schmitz and Lucila Schmitz, his wife, in joint trust with right of survivorship.” A. 162. Thus, the actions taken by the Counter-Plaintiffs were ultra vires acts done in complete disregard of well settled rights, including Lucila’s rights given that the lawful owner of those shares is John Schmitz and Lucila Schmitz in Joint Trust With Right of Survivorship. A. 162.

*See also* 125-26, 127, 130, 133, 134, 135, 136, 138. To the extent that the way Counter-Plaintiffs' interpretation of the scope of the constructive trust impacts Lucila's interest in SDC, such an interpretation would be contrary to law given that the trial court determined that Lucila is not liable to Counter-Plaintiffs. A. 63-64, 162, 408-09, 460.

On March 21, 2021, the trial court entered its Order on the Emergency Motion to Vacate Ultra Vires Actions. A. 144-45. The trial court stayed the First Action and Second Action until the March 23, 2021 hearing on the Motion for Rehearing. A. 145.

On March 29, 2021, the trial court entered its Order granting, in part, the Motion for Rehearing (A. 120-21), and its Second Amended Findings of Fact and Conclusions of Law (A. 67-119). On April 8, 2021, the Amended Final Judgment was entered. A. 62-66. On May 6, 2021, John filed the Notice of Appeal. A. 54-61. On May 14, 2021, Joan, Cheryl, Northern Trust and SDC filed their Notice of Cross Appeal. A. 15-23.

On May 13, 2021, John filed *Counter-Defendant's Renewed Motion to Vacate Ultra Vires Actions Taken by Counter-Plaintiffs* ("Renewed Motion to Vacate Ultra Vires Actions"), pursuant to Rule

1.550. A. 24-53. John asserted the same arguments as in its Emergency Motion to Vacate Ultra Vires Actions as to the First Action and Second Action that the trial court had yet to rule on. A. 24-33. John further asserted that he came to learn that one of the real properties owned by SDC, “the Courtyard Property,” was under contract for sale and was being offered for sale, notwithstanding that he was not notified of such potential sale, had not seen the contract and did not vote in favor of selling the property. A. 27. To the extent there was a meeting held to approve placing the property for sale, he argued the meeting was void given that he and Lucila never received notice of the meeting. A. 29. John argued that any such sale, absent his vote and consent, violated the terms of the corporate documents that govern SDC. A. 27. Counsel for John asserted that prior to filing the motion, he sent an email to SDC’s counsel to confirm whether SDC had, in fact, placed the Courtyard Property for sale and requested copies of the documents evidencing the vote taken by SDC to place the Courtyard Property for sale. SDC’s counsel advised that the Courtyard Property was not presently for sale but that it was previously listed for sale but said sale fell through. A. 33.

Further, John asserted that SDC, Joan, Cheryl and Northern Trust continued to press forward as if John had no role within SDC, warranting vacatur of the First Action and Second Action, and that they be barred from engaging in any acts that run counter to what the SDC corporate documents mandate. A. 27. John requested that the trial court enter an order vacating these ultra vires actions. A. 33.

On May 21, 2021, Joan, Cheryl, Northern Trust and SDC filed a Joint Response to the Renewed Motion to Vacate Ultra Vires Actions. A. 9-14. They argued that by virtue of the filing of the Notice of Appeal and the Notice of Cross Appeal, the trial court was divested of jurisdiction to proceed with matters related to the Amended Final Judgment, including hearing and considering the relief sought in the motion. A. 10. They contended that the relief sought was reconsideration of the effect and scope of the constructive trust to reverse the post-judgment acts of SDC's voting shareholders and directors. A. 10. In that regard, they asserted that such a remedy was not provided for under Rule 1.550, of the Florida Rules of Civil Procedure, but rather, could only be pursued under Rule 1.540(b). A. 10.

On June 1, 2021, the trial court entered its Order denying the Renewed Motion on the basis that the appeals divested it of jurisdiction to consider the motion, citing *Fonseca v. Taverna Imports, Inc.*, 193 So. 3d 92, 94 (Fla. 3d DCA 2016), and *Jallali v. Knightsbridge Village Homeowners' Association, Inc.*, 158 So. 3d 808, 809 (Fla. 4th DCA 2014). A. 6-8. The court further determined that the motion improperly sought relief under Rule 1.550 and it lacked authority to grant relief under Rule 1.550 as a result of the pending appeals. A. 6-7.

### **ARGUMENT**

#### **I. THIS COURT SHOULD RELINQUISH JURISDICTION FOR THE TRIAL COURT TO RULE ON THE RENEWED MOTION TO VACATE ULTRA VIRES ACTIONS TAKEN POST-JUDGMENT**

This Court should relinquish jurisdiction for the trial court to rule on the Renewed Motion to Vacate Ultra Vires Actions. *See Fla. R. App. P. 9.600(b)* (“If the jurisdiction of the lower tribunal has been divested by an appeal from a final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal.”).

The relief sought in the motion was not reconsideration or modification of the Amended Final Judgment. Rather, the relief sought was enforcement of the Amended Final Judgment and a determination that the First Action and Second Action that were taken post-judgment violated the Amended Final Judgment and the corporate documents that govern SDC. Thus, the trial court's ruling on the motion will not have the effect of modifying the Amended Final Judgment on appeal but will instead address the propriety of the First and Second Actions taken by Joan, Cheryl and Northern Trust based on the imposition of a constructive trust in the Final Judgment. Such actions could not have been and were not addressed in the Final Judgment or Amended Final Judgment. Indeed, the trial court reserved jurisdiction to enforce and liquidate the constructive trust in the Amended Final Judgment. A. 65.

Therefore, the trial court has concurrent jurisdiction to rule on the post-judgment motion. As this Court has explained:

Whether the trial court lacks jurisdiction depends not simply on the fact that an appeal in the case has been taken and is pending, but rather on the nature of the action being taken by the trial court in relation to the subject matter of the pending appeal. If what the trial court does while the appeal is pending cannot

affect or interfere with the subject matter of the appeal, and thus impinge upon the appellate court's power and authority to decide the issues presented to it by the appeal, then the trial court can act. The jurisdiction of the appellate court is exclusive only as to the subject matter of the appeal.

*Bailey v. Bailey*, 392 So. 2d 49, 52 (Fla. 3d DCA 1981). See also *Schultz v. Schickedanz*, 884 So. 2d 422, 424 (Fla. 4th DCA 2004) (“[A] trial court is divested of jurisdiction upon notice of appeal except with regard to those matters which do not interfere with the power and authority of the appellate court or with the rights of a party to the appeal which are under consideration by the appellate court.” (citing *Palma Sola Harbour Condo., Inc. v. Huber*, 374 So. 2d 1135, 1138 (Fla. 2d DCA 1979))); *FMS Mgmt. Sys. v. IDS Mortg. Corp.*, 402 So. 2d 474, 475 (Fla. 4th DCA 1981) (“In the absence of supersedeas or stay, the lower tribunal may proceed in the cause, even as to the subject matter of the appeal, if such subsequent proceedings do not interfere with the power of the appellate court to make its jurisdiction effective as to the order on appeal.”).

However, the trial court denied the motion on the basis that the filing of the Notice of Appeal divested it of jurisdiction to

consider the relief sought. A. 6-8. The cases relied upon by the trial court in that regard are inapposite.

In *Fonseca v. Taverna Imports, Inc.*, 193 So. 3d 92 (Fla. 3d DCA 2016), this Court granted a petition seeking prohibition because the trial court lacked jurisdiction to modify the adjudications, the appeals of which were pending before this Court. *Id.* at 92. This Court found there was no doubt that the trial court's proposed order on the motion at issue would create two new amended judgments and effectively grant a Rule 1.540(b) order, the denial of which was on appeal to this Court. *Id.* at 94. Thus, if the trial court were to enter the proposed order, both the jurisdiction of this Court, and the rights of the parties to the judgments and order on appeal, would be frustrated. *Id.*

Similarly, in *Jallali v. Knightsbridge Village Homeowners' Association, Inc.*, 158 So. 3d 808, 809 (Fla. 4th DCA 2014), the Fourth District quashed an amended final judgment entered while the appeal of the original final judgment was pending before it on the basis that the trial court was without jurisdiction to modify or amend a judgment on appeal.

In contrast to *Fonseca* and *Jallali*, the trial court's consideration of the motion at issue would not result in the modification of the Amended Final Judgment on appeal, but rather, its enforcement. Thus, contrary to the trial court's determination, the motion properly sought relief under Rule 1.550 and the trial court had authority to grant such relief, notwithstanding the pending appeal. A. 6-7. Any doubts in that regard, however, would be resolved by this Court's relinquishment of jurisdiction. Thus, John and Lucila ask this Court to relinquish jurisdiction to the trial court so that it may consider and rule on the motion.

### **CONCLUSION**

Based on the foregoing, Appellant/Cross-Appellee John W. Schmitz and Cross-Appellee Lucila Schmitz respectfully request that this Court enter an Order relinquishing jurisdiction to the trial court so that it may rule on *Counter-Defendant's Renewed Motion to Vacate Ultra Vires Actions Taken by Counter-Plaintiffs*.

Respectfully submitted,

By: /s/ Cristina Alonso

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Director of Schmitz Development  
Company, and JOHN W. SCHMITZ  
and LUCILA SCHMITZ in Joint Trust  
With Right of Survivorship in the  
capacity as shareholders of Schmitz  
Development Company and as  
individuals*

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was electronically filed with the court via the Florida Courts E-Filing Portal on June 9, 2021, which will transmit a service copy to all counsel of record, including: J. Raul Cosio, Esq. (raul.cosio@hklaw.com) (elaine.starling@hklaw.com), Jose A. Casal,

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