

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT**

CASE NO. 2D24-1149

DANIEL W. PERRY,

Appellant(s),

v.

CRYSTAL LAKE COMMUNITY ASSOCIATION, INC.,

Appellee(s).

**APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL
CIRCUIT OF FLORIDA IN AND FOR PASCO COUNTY**

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3
STATEMENT OF JURISDICTION	4
STANDARD OF REVIEW	4
STATEMENT OF CASE AND FACTS	4
SUMMARY OF ARGUMENT	7
ARGUMENT	7
1. Whether The Second Or Amended Order Was Entered Without Authority Or Jurisdiction.	7
2. Whether The Statute Of Limitations Affirmative Defense Rendered The Complaint Frivolous	8
3. Whether the Maralago Order Rendered This Completely Different Case Frivolous	9
CONCLUSION	11
CERTIFICATE OF SERVICE	11
CERTIFICATE OF COMPLIANCE	11

TABLE OF AUTHORITIES

Cases

<i>ABA Comm. on Ethics & Prof'l Responsibility</i> , Formal Op. 94-387 (1994)	9
<i>Benjamin v. Fore</i> , 995 So. 2d 543, 544 (Fla. 2d DCA 2008)	7
<i>Byers v. Callahan</i> , 848 So. 2d 1180 (Fla. 2d DCA 2003)	7
<i>Canakaris v. Canakaris</i> , 382 So.2d 1197, 1203 (Fla. 1980)	4
<i>Esposito v. Horning</i> , 416 So. 2d 896, 898 (Fla. 4th DCA 1982)	7
<i>Frisard v. Frisard</i> , 497 So. 2d 885 (Fla. 4th DCA 1986)	7
<i>Or. Eth. Op. 2005-21</i> 2005 WL 5679607, at *1 (Or. State Bar Bd. of Governors 2005)	9
<i>State, Dept. of Environmental Reg. v. Apelgren</i> , 611 So. 2d 72 (Fla. 4th DCA 1992)	8
<i>Trust Mortg., LLC v. Ferlanti</i> , 193 So.3d, 997, 999 (Fla. 4th DCA 2016)	4
<i>Zweibach v. Gordimer</i> , 884 So.2d 244 (Fla. 2nd DCA 2004)	8

Statutes

Fla. Stat 57.105.	passim
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STATEMENT OF JURISDICTION

This is an appeal of an order awarding 57.105 sanctions against Appellant's counsel. This Court has jurisdiction under Florida Rule of Appellate Procedure 9.030(b)(1)(A).

STANDARD OF REVIEW

A ruling on a motion to award 57.105 sanctions is subject to an abuse of discretion standard of review. *See Trust Mortg., LLC v. Ferlanti*, 193 So.3d, 997, 999 (Fla. 4th DCA 2016).

As explained by the Florida Supreme Court in *Canakaris v. Canakaris*, 382 So.2d 1197, 1203 (Fla. 1980):

Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Id. (quoting *Delno v. Mkt. St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942).

STATEMENT OF CASE AND FACTS

The Crystal Lake Community Association, Inc., filed its Complaint on September 22, 2020 alleging violation of the Florida Antitrust Act, Chapter 542, Fla. Stat. The Complaint was amended on September 21, 2021.

Appellee Patrick Zilis, et al., (Defendants below) filed their Motion for Summary Judgment on August 30, 2022. The Crystal Lake Community Association, Inc., filed a voluntary dismissal of the amended complaint before the hearing on the Motion for Summary Judgment.

Appellee Patrick Zilis, et al., (Defendants below) filed their Motion for Attorneys Fees and Costs on November 28, 2022 under §57.105 and §542.22(1). The trial court granted the Defendants' Motion for Attorneys Fees and Costs on April 10, 2023, finding that the Defendants were entitled to attorney fees and costs but reserved on the amount.

The Crystal Lake Community Association, Inc., filed a Motion for Further Proceedings or an Evidentiary Hearing on the Issue of Entitlement to Attorney's Fees Under Chapter 542. The trial court denied the Motion April 10, 2023 but granted an evidentiary hearing on the amount of fees under §57.105 and §542.22(1). The evidentiary hearing was held on February 27, 2024.

On February 28, 2024 the trial court rendered the initial Order determining the amount of attorneys' fees and costs without apportionment between Appellant-Attorney Perry or the Client Crystal Lake Community Association, Inc . The Crystal Lake Community Association, Inc., timely moved to rehear or reconsider the order.

On April 11, 2024 the trial court rendered the Amended Order determining the amount of attorneys' fees and costs *without ruling upon the pending Motion to Rehear or Reconsider*. The Defendants *themselves* filed a Motion For Entry Of Final Judgment on April 19, 2024. On May 13, 2024 Appellant-Attorney Daniel W. Perry filed his notice of appeal.

On May 29, 2024, Appellant Perry moved this Court to relinquish jurisdiction to the trial court so that it could consider the pending motion to

rehear or reconsider the judgment and enter a proper and valid order within the limited jurisdiction granted by this Court.

On July 18, 2024 this Court entered its Order relinquishing jurisdiction to the trial court for 45 days to address the Appellee Crystal Lake Community Association, Inc.'s motion for rehearing. This Court further directed Appellant Perry to file a status report within 45 days.

On July 30, 2024 the trial court entered an Order Denying Motion To Rehear And For Reconsideration Of February 28, 2023 Order Granting Defendant's Motion For Attorney's Fees. *The trial court's July 30, 2024 Order did nothing to change the order on appeal.*

On August 30, 2024 Appellant Perry' reported that the trial court's July 30, 2024 Order did nothing to change the order on appeal. In response to that report, this Court on September 25, 2024 ordered the matter to proceed and that Appellant serve the initial brief "within 15 days of the date of this Order."

On October 11, 2024, Appellant Perry moved for additional time within which to have the trial clerk prepare the Record and within which to file this Initial brief. This Court granted the extension of time. This Initial Brief timely followed.

SUMMARY OF ARGUMENT

The Second Or Amended Order was entered without authority or jurisdiction. The statute of limitations affirmative defense did not render the Complaint frivolous. The Maralago Order did not render this completely different case frivolous.

ARGUMENT

1. **Whether The Second Or Amended Order Was Entered Without Authority Or Jurisdiction.**

Attorney Daniel Perry argues that since the trial court never addressed the Motion to Rehear or Reconsider, the Amended Order was not timely and the trial court lost jurisdiction to enter the Amended Order. See *Benjamin v. Fore*, 995 So. 2d 543, 544 (Fla. 2d DCA 2008) (quoting *Esposito v. Horning*, 416 So. 2d 896, 898 (Fla. 4th DCA 1982) (“... a judgment entered without jurisdiction is void.”))

In entering the Amended Order, the trial court did not merely correct a clerical error in this case. See Fla. R. Civ. P. 1.540(a) (authorizing a trial court to correct clerical errors without leave of the appellate court before a notice of appeal is docketed in the appellate court). The trial court here determined the amount and apportionment of attorneys’ fees and costs. This is a substantive and material change to a judgment not authorized by rule 1.540(a). See, e.g., *Byers v. Callahan*, 848 So. 2d 1180 (Fla. 2d DCA 2003) (holding that a court removing an award for daycare expenses from the total of a child support award “cannot be characterized as a ‘clerical mistake’ for which relief is available under rule 1.540(a)”); *Frisard v. Frisard*,

497 So. 2d 885 (Fla. 4th DCA 1986) (amendment to judgment to add reservation of jurisdiction to consider attorneys' fees was not a "clerical' mistake correctable under Rule 1.540(a)," so the trial court acted in excess of its jurisdiction); *State, Dept. of Environmental Reg. v. Apelgren*, 611 So. 2d 72 (Fla. 4th DCA 1992) ("the trial court does not have jurisdiction to change material provisions in the final judgment under the guise of clerical mistakes substantively and materially reducing the amount of the final judgment").

Appellant Daniel Perry argues that there must be a valid judgment effectuating the apportionment of the 57.105 sanction fees for half by Appellant lawyer Perry and half by the client Crystal Lake Community Association, Inc. The second order is still void, and the original judgment is still error as evidenced by the trial court's attempt to fix it with the second order.

It is also error for the other reasons argued in this Initial Brief. But, at the very least, the order awarding 57.105 sanctions needs to be reversed and remanded to have a valid new judgment entered.

2. Whether The Statute Of Limitations Affirmative Defense Rendered The Complaint Frivolous

In the trial court's April 10, 2023 order the court reviewed the second District Court of appeal decision in *Zweibach v. Gordimer*, 884 So.2d 244 (Fla. 2nd DCA 2004). In *Zweibach* the court held an award of fees is justified when plaintiff was unable to state any claim within the statute of limitations therefore its "... claims against Gordimer completely lack

of justicable issue and were frivolous. See section 57.105(1).” *Id.* The trial court concluded — without analysis — that “*Zweibach* applied to the Hometown Defendants as the sale alleged by the plaintiff was in 2011 and is subject to a statute of limitations bar.” (R. 1171-1175)

But, a lawyer may pursue a claim that he knows to be time-barred:

The running of the period provided for enforcement of a civil claim creates an affirmative defense which must be asserted by the opposing party, and is not a bar to a court’s jurisdiction over the matter. A time-barred claim may still be enforced by a court, and will be if the opposing party raises no objection. And, opposing counsel may fail to raise a limitations defense for any number of reasons, ranging from incompetence to a considered decision to forego the defense in order to have vindication on the merits or to assert some counterclaim.

ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 94-387 (1994).

*See also Or. Eth. Op. 2005-21, 2005 WL 5679607, at *1 (Or. State Bar Bd. of Governors 2005)* (opining that a lawyer can file complaint knowing that a valid affirmative defense exists because “it is up to [the] [d]efendant or [the] [d]efendant’s own counsel to look after [the] [d]efendant’s interests and to discover and assert any available defenses”).

3. Whether the Maralago Order Rendered This Completely Different Case Frivolous

In the trial court’s April 10, 2023 order the court found that “... the Maralago decision directly held on virtually identical pleadings that the claims asserted by plaintiff counsel were frivolous. As counsel was adequately warned of the frivolous nature of these of those claims. A 57.105 fee award obligating him to pay a portion of the reasonable fees is

warranted.” (R. 1171-1175)

But, Appellant Perry pointed out to the trial court that there were significant differences between the *Maralago* case and the instant case.

First, the cases involved different parties with differing factual claims. (R. 1640-1644)

Second, the *Maralago* case involved a previous Civil RICO action against a lawyer defendant, J. Allen Bobo. The *Maralago* judge initially denied a motion to dismiss the Florida Antitrust Act claim asserting that Bobo’s alleged public comments to an industry trade association defendant could independently support antitrust liability. (R. 1640-1644) Subsequently, the *Maralago* trial judge in granting summary judgment concluded that Attorney Bobo was dismissed from the lawsuit on the grounds of *res judicata*.

Third, no such prior lawsuit or Civil RICO action or *res judicata* basis for dismissal of Bobo existed in the Crystal Lake antitrust lawsuit.

Finally, the *Maralago* trial judge opined that he viewed the Bobo-less lawsuit as frivolous yet did not award Rule 11 sanctions against Attorney Perry.

CONCLUSION

Appellant Daniel Perry respectfully requests this Court to reverse the judgment of awarding 57.105 sanctions and provide any other relief as is deemed just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing and served a true and accurate copy of this document via the Florida Courts eFiling Portal on December 16, 2024 to all parties not exempt from Fla. R. Jud. Admin. 2.516 at the indicated email address on the service list, and by U.S. Mail to any other parties.

By: /s/ Daniel W. Perry
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