IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

CHRIS SIMONS,

Appellant,

vs.

CASE NO: 2D2024-2233
L.T. NO: 2023-SC-2115

PALM LAKES SUBDIVISION HOMEOWNERS ASSOCIATION, INC.,

Appellee.
**********/

APPELLANT'S INITIAL BRIEF

APPEAL FROM THE TWELFTH JUDICIAL SMALL CLAIMS COURT IN AND FOR MANATEE COUNTY, FLORIDA

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INTRODUCTION

This appeal seeks review of an amended final judgment entered in favor of Appellee, PALM LAKES SUBDIVISION HOMEOWNERS ASSOCIATION, INC. In the judgment the trial court awarded Appellee prevailing party attorneys' fees and costs in the amount of $28,915.00.[1] Appellant, CHRIS SIMONS, will be referred to as "Simons" or as he stands before this Court. Appellee, PALM LAKES SUBDIVISION HOMEOWNERS ASSOCIATION, INC., will be referred to as Palm Lakes or as it stands before this Court. References to the record on appeal will be as R. ___ followed by a page number. References to the two hearing transcripts in the record will be as Tr. ___ followed by a page number as renumbered by the Appeals Clerk.

STATEMENT OF THE CASE AND FACTS

This action commenced when Appellant, Simons, filed a pro se statement of claim against Palm Lakes in Small Claims Court in Manatee County, Case No: 2023-SC-2115. R. 3. Thereafter, Simons filed another pro se statement of claim against Palm Lakes in Small Claims Court in Manatee County, Case No: 2023-SC-3593, but the portion of the amended final

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[1] The total amount of the judgment is $35,602.50, but $6,687.50 is attributed to Case No: 2023-SC-3593, as explained in more detail below in the Statement of the Case and Facts.

judgment attributed to that case is not the subject of this appeal. The two cases were largely litigated together, but there was never an order consolidating them. Where necessary to a complete understanding of the proceedings below, Appellant will make references to the other case, and refer to it as Case No: 3593, even though its judgment has not been appealed.

In the instant case, Simons alleged in his statement of claim that the board of directors of Appellee, Palm Lakes, did not allow its members to attend board meetings in person where the meetings were physically being held. R. 3. Rather, he alleged the Palm Lakes members were only permitted to attend the meetings via Zoom, while the board members were permitted to attend in person. R. 3. A pretrial conference was set for June 5, 2023. R. 1-2.

On June 2, 2023, a closed board of directors meeting took place. R. 99. The minutes of that meeting showed that the board of directors had previously met with their attorney, Laurie B. Sams, Esq., to discuss the handling of Simons' complaint in anticipation of the approaching pretrial conference. Palm Lakes decided not to contest Simons' claims. A motion to approve the recommendation that Palm Lakes decline to contest Simons' claims was made by Larry Desiano, the President of Palm Lakes, ("Desiano") which was seconded. R. 99.

Three days later, on June 5, 2023, the pretrial conference took place. Simons and Desiano both appeared. R. 7-8. An order issued showing that Palm Lakes admitted Simons' claim. R. 7. The case was set for trial on August 8, 2023. R. 7. On June 28, 2023, Ms. Sams appeared in the action on behalf of Palm Lakes. R. 9. Palm Lakes filed a motion to dismiss and requested an award of attorneys fees and costs pursuant to §720.305(1), Fla. Stat. R. 10-11. The motion was never set for hearing.

On July, 25, 2023, Simons sent a handwritten letter to Judge Inman stating that he would like to drop the cases against Palm Lakes. R. 12. The litigation was no longer necessary because he had received the outcome he wanted by being allowed to attend the meetings in person at their physical location.

On August 1, 2023, Diane M. Simons, Esq. entered an appearance on behalf of Simons and filed a notice of withdrawal of the voluntary dismissal. R. 13, 14-15. On the same day, a joint stipulation for substitution of counsel was filed, substituting Gary M. Schaaf, Esq. for Ms. Sams on behalf of Palm Lakes. R. 17-18. On August 4, 2023, Ms. Simons filed a notice rescinding the withdrawal of the voluntary dismissal, and stating that the case remains dismissed as of July 25, 2023. R. 19-20. The notice attached the portion of

the Manatee County Clerk of Court's docket which showed that the case was closed. R. 20.

On August 22, 2023, Palm Lakes filed its motion for award of prevailing party attorneys' fees and costs pursuant to §720.305(1), Fla. Stat and the governing documents of the association. R. 21-24. It claimed that counsel was preparing in earnest for the trial set for August 8, 2023, and that it was the prevailing party based on Simons having voluntarily dismissed his case. R. 22.

A hearing was set for November 30, 2023 on Palm Lakes' motion for fees and costs. R. 25-26. A few days before the hearing, Mr. Schaaf filed an affidavit as to attorneys fees, and sought a total amount of fees of $10,870, including $9,345 for Case No: 2115 and $1,525 for Case No: 3593. R. 27-29. The affidavit attached as an exhibit details of Mr. Schaaf and his law firm's time spent on the two cases from July 25, 2023 until November 12, 2023. R. 30-39.

A few days before the hearing, Ms. Simons filed documents, including email correspondence about Palm Lakes' board meetings, and an agenda for a board of directors meeting set for August 31, 2023. R. 40-45. At the November 30, 2023 hearing, the parties stipulated to the court hearing the motions for attorneys fees in both cases. Tr. 369. The hearing proceeded only on the issue of entitlement to fees. Tr. 370. Palm Lakes relied on

§720.305(1), F.S., governing homeowners associations which provides that each member and guests and each association must comply with Ch. 720, F.S., the governing documents of the community and the rules of the association. In an action to redress an alleged failure or refusal to comply with these provisions, a prevailing party is entitled to recover attorney's fees and costs. Tr. 370-371.

Palm Lakes argued that it was the prevailing party in both cases because Simons voluntarily dismissed his claims. Tr. 372. It relied on cases that stood for the proposition that when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party. Tr. 372-373. A determination on the merits is not a prerequisite to an award of fees under a prevailing party statute. Tr. 373.

Simons argued that even though the general rule is that a party defendant is entitled to prevailing party fees based on a dismissal by plaintiff, there is an exception to the rule. Tr. 375. The court must look behind the voluntary dismissal to the facts to determine whether the defendant was the substantially prevailing party. He relied on cases that stood for the proposition that when the defendant complies with plaintiff's demand, thereby rendering the matter moot, the voluntary dismissal acts as a functional equivalent of a

judgment or verdict in favor of plaintiff. Tr. 375-376, 381-383. Since Larry Desiano, the president of Palm Lakes, admitted to the statements in Simons' claim, and Simons was permitted to attend the meetings in person, Simons was given what he had asked for in the claim. He filed the voluntary dismissal because he received the outcome and remedy he had requested. T. 376-377, 380-381. Instead of setting the case for trial at the pretrial conference, Simons should have been given a directed verdict. Tr. 380. (A subsequent board meeting of Palm Lakes scheduled for June 22, 2023 at the Fruitville Library was to be held by Zoom, but only because there was not enough notice to reserve the library or obtain another venue.) Tr. 379; R. 43-44.

Simons relied on a plethora of cases that stood for the proposition that when a plaintiff voluntarily dismisses an action because the litigation is mooted by the Defendant providing the relief plaintiff sought, the plaintiff is the prevailing party. Tr. 381-383.

The court explained that in small claims cases, pretrial conferences are held before a case manager and not a judge. They are then set for trial, which is why a directed verdict was not entered. Tr. 392. The court stated that Simons' filing of cases he relied upon was not provided in enough time for the court and Mr. Schaaf to review and respond to. Tr. 391-392. She took the

motion under advisement and asked the parties to submit supplemental memoranda of law. Tr. 393; R. 49.

Simons filed his brief in opposition to Palm Lakes' motion for attorneys fees and costs, relying on the cases and exhibits he had argued at the hearing. R. 87-115. He also filed the cases and an affidavit. R. 50-86, 116-133. Palm Lakes filed a brief in support of its claim of entitlement to an award of attorneys' fees and costs, and relied on the cases it argued at the hearing. R. 224-251. Palm Lakes filed an affidavit of Desiano in support of the motion for fees. R. 243-249. Simons filed a response to Palm Lakes' brief. R. 252-271.

After the parties presented their arguments at the hearing and submitted their briefs, the trial court entered an order finding that Palm Lakes was the prevailing party in both cases, and awarding prevailing party attorney's fees and costs to Palm Lakes in Case Nos: 2115 and 3593. R. 427-428.[2] It found that Simons voluntarily dismissed his actions. R. 427. It rejected Simons' argument that the exception to the well established rule that where a plaintiff

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[2] The order awarding prevailing party attorney's fees and costs to defendant was entered in both cases and contained both case numbers: 2023-SC-2115 and 2023-SC-3593. However, it was only filed in Case No: 3593. To insure that the order was included in the record on appeal, counsel for Simons filed a notice of filing case docket in Case No: 3593, and attached the docket showing the order was rendered on January 18, 2024, as well as the order itself. R. 419-428.

files a voluntarily dismissal, a defendant is entitled to prevailing party fees, applied. It stated the exception was not supported by the facts and circumstances of the cases. R. 427. It reserved jurisdiction to determine the amount of fees and costs at a later hearing. R. 428.

Palm Lakes filed a restated motion for award of prevailing party attorneys' fees and costs as to amount, attaching two affidavits with attachments reflecting time expended by Mr. Schaaf and his firm. R. 277-307. The first affidavit reflected fees incurred through November 20, 2023, prior to the November 30, 2023 hearing relative to entitlement to fees. Time detail records were attached. R. 282-293. The second affidavit reflected fees incurred after that and also attached time detail records. R. 294-307. Palm Lakes sought a total of $34,367.50 in attorney and paralegal fees, plus costs. R. 280.

An evidentiary hearing on the issue of the amount of Palm Lakes' attorney's fees and costs incurred in both cases took place on July 12, 2024. Tr. 4. At this point, James D. Gibson, Esq. was representing Simons. R. 273-276. At the beginning of the hearing, Simons stated that the amount of time between the filing of his intent to dismiss the case and the subsequent dismissal by Ms. Simon was less than a week. The amount of fees incurred during that short time-frame should have been nominal. Tr. 440. Further, even

though the hearings addressed both cases, it was not clear in which case the fees were incurred. There was never an order consolidating the two cases. Tr. 440-441.

Phyllis J. Towzey, Esq. testified as Mr. Schaaf's fee expert. She testified that Mr. Schaaf's hourly rate of $425 was reasonable. Tr. 446. She found that the amount of fees were reasonable, necessary and proper. Tr. 451. She stated the issue relative to entitlement to fees based on who was the prevailing party when the other party voluntarily dismissed the case required briefing. Tr. 452-453. She based her opinions about the reasonableness of hours spent and hourly rate at least in part on Mr. Schaaf's affidavits and the billing records attached to them. Tr. 467-468.

Mr. Schaaf briefly testified that in the time details attached to his affidavits part of the case numbers were cut off, but each of the two cases had its own firm matter number. Tr. 497.

During closing argument, Mr. Schaaf stated that since the court ruled that Palm Lakes was entitled to fees on both cases, the allocation of time spent on one case versus the other was irrelevant to the court's determination of whether the fees were reasonable. Tr. 500. Mr. Gibson argued that no invoices for either case were admitted into evidence. Tr. 503. No billing

records, the attachments to the affidavits, were admitted into evidence. Tr. 503. Mr. Schaaf did not testify as to the amount of time he spent on each case or how much time the total fees in each case were. Tr. 503-504. Ms. Towzey also lumped the fees from the two cases into one amount. Tr. 504. She did not render an opinion as to the reasonable amount of hours spent in each case. Tr. 504. The underlying factual issues in each case were different and the cases were never consolidated. Tr. 506. The court must make a finding about the time reasonably spent in each case, but no invoices or billing statements were admitted into evidence. Tr. 508. Mr. Schaaf asserted that the information about the two cases were all before the court, but if the court needed a breakdown, he could provide additional calculations. Tr. 507, 509. Mr. Gibson opposed any post-hearing calculation; the hearing was over and there was no testimony as to total time spent in each of the two cases. Tr. 510.

The trial court entered one final judgment for both cases, awarding Palm Lakes a total of $34,202.50 in attorneys fees, and $1,400.00 in costs for Ms. Towzey's time. R. 351-354. Simons filed a motion for rehearing. R. 355-358. He asserted that since the final judgment was filed in both cases, there were two judgments for the same amounts of $34,202.50 in fees and $1,400.00 in costs, even though the court intended for the fees and costs to be a total

recovery for both cases. R. 356. The court, on its own, divided the time entries between the two cases, allocating the majority of the fees to Case No: 2115 without evidence to support the allocation. R. 356. Simons motion also asserted that the evidence did not support the fees award. Mr. Schaaf did not testify as to the hours worked and his rates. Nor did Palm Lakes present any evidence as to how the fees were to be allocated between the two cases. R. 357. The affidavits and billing records were not admitted into evidence, and counsel for Simons objected to Palm Lakes' reliance on them. R. 357.

The trial court entered an order granting in part and denying in part Simons' motion for rehearing. R. 359. It contemporaneously entered an amended final judgment. The amended judgment was for the same amount as the initial judgment, but it separated the fees and costs between the two cases: Case No: 2115 was allocated $28,215 in fees and $700 in costs and Case No: 3593 was allocated $5,987.50 in fees and $700 in costs. R. 363. Simons timely filed his notice of appeal in Case No: 2115. R. 406-418.

STANDARD OF REVIEW

In general, a trial court's determination of the prevailing party is reviewed for an abuse of discretion. *T & W Developers, Inc. v. Salmonsen*, 31 So. 3d 298, 301 (Fla. 5th DCA 2010). But, when the trial court's determination of which

party prevails depends on the interpretation of a statute or a contract, the appellate court applies a de novo standard of review. *Id.*

Here, the trial court's determination of the prevailing party issue does not depend on the interpretation of a statute or on the parties' agreement. Thus, this Court reviews the trial court's determination of the prevailing party for abuse of discretion. *Tubbs v. Mechanik Nuccio Hearne & Wester, P.A.*, 125 So. 3d 1034 (Fla. 2d DCA 2013).

However, the exercise of the trial court's discretion in making this determination is subject to the test of reasonableness, i.e, it must be supported by logic and justification for the result and founded on substantial, competent evidence. *In re Guardianship of Sapp*, 868 So. 2d 687 (Fla. 2d DCA 2004).

The standard of review of an award of attorney's fees is abuse of discretion. A trial court's award will be upheld if it is supported by substantial, competent evidence. *Diwakar v. Montecito Palm Beach Condominium Association, Inc.*, 143 So. 3d 958 (Fla. 4th DCA 2014).

SUMMARY OF ARGUMENT

Palm Lakes was not the prevailing party, and therefore, was not entitled to an award of attorney's fees and costs. The remedy Simons was seeking when he filed his claim was to be allowed to attend meetings where the board members were physically present, as opposed to only attending via Zoom.

Palm Lakes did not change its position and allow Simons to attend the meetings until after Simons filed this suit. Only after Palm Lakes agreed to provide Simons with the remedy he sought in his claim did Simons file his voluntary dismissal of the action. At that point, the time for litigating had passed and there was no reason to pursue the action indefinitely. Simons was the prevailing party.

The amount of attorney's fees awarded by the trial court is not supported by competent substantial evidence. Mr. Schaaf's affidavits and time detail exhibits thereto were identified but never admitted into evidence as an exhibit and are not competent evidence to support a judgment. Further, there was no competent substantial evidence to support the trial court' s allocation of attorney's fees and costs between the two cases in the amended final judgment.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN AWARDING APPELLEE, PALM LAKES, ATTORNEY'S FEES AND COSTS AS THE PREVAILING PARTY WHEN APPELLANT, SIMONS, ACHIEVED THE REMEDY HE SOUGHT IN HIS STATEMENT OF CLAIM PRIOR TO VOLUNTARILY DISMISSING HIS ACTION.

In many instances, when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party within the meaning of statutory or contractual provisions awarding attorney's fees to the prevailing party in litigation. *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914 (Fla. 1990). However, the general rule does not apply without exception. A court may look behind a voluntary dismissal at the facts of the litigation to determine whether a party is a substantially prevailing party. *Padow v. Knollwood Club Association, Inc.*, 839 So. 2d 744 (Fla. 4th DCA 2003). The determination of the prevailing party for the purpose of awarding attorney's fees and costs is based on whether the party seeking fees succeeded on any significant issues in the litigation which achieves some of the benefit the parties sought in bringing suit. *Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807 (Fla. 1992).

There are a plethora of cases which hold that where a plaintiff voluntarily dismisses its action because it obtained the exact relief it sought in the complaint, it is the prevailing party. For example, in the *Padow* case, supra, Dr. Padow was the owner of a condominium unit and a member of the Knollwood Club Association, Inc. ("the Association"). The Association sued Dr. Padow for failure to pay maintenance assessments. While the litigation was still pending, Dr. Padow sent the Association a check for $2,000 which represented the

amount due plus interest and late fees. Months later, the Association voluntarily dismissed its complaint pursuant to Fla. R. Civ. P. 1.420(a)(1).

Dr. Padow filed a motion to tax costs and attorney's fees, claiming he was the "prevailing party" within the meaning of §718.303(1), Fla. Stat., which provides for an award of prevailing party attorney's fees and costs in any action between a condominium association and a unit owner to enforce the governing condominium documents. At the hearing on the fee motion, the Association explained that it had taken a voluntary dismissal because it had gotten most of what it had sought when filing its suit and it was not worthwhile for a small condominium association to continue to litigate indefinitely under those circumstances. The county court denied the motion, reasoning that since Dr. Padow had paid the claim, or a very good part of it, the Association got most of what it sought, and the time for fighting or litigating had passed. To find that Dr. Padow was the prevailing party would require a plaintiff to fight every case to judgment, even though it achieved all of the legitimate goals of its suit. The unit owner appealed.

The county court judge certified a question as being of great public importance, and the Fourth District Court of Appeal reviewed the issue based on the following question:

> In a suit by a condominium association against a unit owner for unpaid assessments, is the unit owner the "prevailing party" within the meaning of section 718.303(1), Fla. Stat. (2001), where the owner pays substantially all that is sought by the association, and the association thereafter files a voluntary dismissal without prejudice?

The appellate court answered the question in the negative, holding that Dr. Padow was not the prevailing party. Here, the Association, not Dr. Padow, succeeded on the primary issue in the litigation. The court relied on *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914 (Fla. 1990), in which the Florida Supreme Court contemplated that after a voluntary dismissal, a trial court must determine whether the party requesting fees has prevailed. This language indicated that a defendant is not automatically the prevailing party for the purpose of an attorney's fee statute when a plaintiff takes a voluntary dismissal. Indeed, the court noted that to declare Dr. Padow the prevailing party would fail to discourage needless litigation by encouraging settlement. *51 Island Way Condominium Association v. Williams*, 458 So. 2d 364 (Fla. 2d DCA 1984) involved an action brought by a condominium association for declaratory and injunctive relief, monetary damages and attorney's fees. The complaint alleged that the sale by unit owners of a one-third interest in their unit to others was contrary to the condominium declaration. During the litigation, the buyers of the

one-third interest reconveyed their interest by quitclaim deed to the unit owners. Immediately before trial, the owners moved to dismiss the case for mootness. The trial court dismissed the case on the ground that the action and relief sought in the association's complaint were rendered moot by the defendant/unit owners' voluntary actions. However, the court denied the association's motion for attorney's fees and costs.

The appellate court affirmed the dismissal based on mootness, but remanded the case for an award of reasonable attorney's fees and costs to the association. The court stated that the association was compelled to bring suit for relief, prepare for trial and otherwise participate in litigation. It determined that the association had prevailed because the effect of the reconveyance of the interest in the unit was to accede to the association's request for relief.

Similarly, in *The Collins Condominium Association, Inc. v. Riveiro*, 348 So. 3d 8 (Fla. 3d DCA 2022), the unit owner, Riveiro's, complaint sought to enjoin the Association from denying him the right to install a safety barrier around the perimeter of his porch area without time and use restrictions. Subsequently, the Association installed pool alarm devices on the sliding glass doors of Riverio's unit. Riveiro then voluntarily dismissed his complaint. The trial court concluded that Riveiro had substantially prevailed in the litigation

because he obtained the relief he had sought. He voluntarily dismissed his complaint not because he was destined to lose on the merits, but, rather, because the Association's actions had rendered his lawsuit moot. The appellate court affirmed, finding that the trial court did not abuse its discretion in determining that Riveiro was the prevailing party on the significant issues in the litigation, and thus was the prevailing party for purposes of attorney's fees.

In *Isola Bella Homeowners Association, Inc. v. Clement*, 328 So. 3d 1132 (Fla. 4th DCA 2021) the homeowners association sued homeowners, the Clements, for injunctive relief seeking an order requiring the Clements to comply with the provisions of the declaration and directing them to remove portions of a fence they installed which encroached on an easement created for the benefit of the adjacent homeowners. After court-ordered mediation, the parties entered into a partial settlement agreement wherein the Clements agreed to remove the portions of the fence that encroached on the easement. The settlement was "partial" because the parties did not agree on who was entitled to attorney's fees. A joint stipulation for dismissal was filed which the court approved. It retained jurisdiction to enforce the agreement and determine entitlement to fees.

The association moved for attorney's fees under §720.305, Fla. Stat., asserting it was the prevailing party because it obtained the exact relief sought in the complaint, namely compliance with the declaration and removal of the encroaching fence. The trial court denied the motion for fees and the association appealed. The appellate court, relying on *Padow v. Knollwood Club Association*, supra, reversed and remanded, stating that although the association voluntarily dismissed its action, under the settlement agreement, it obtained the only relief sought on the only issue raised in the litigation: compliance with the declaration and removal of the encroaching fence. This was sufficient to render the association the prevailing party.

In *Bessard v. Bessard*, 40 So. 3d 775 (Fla. 3d DCA 2010), the plaintiffs, the wife and daughters of a man who purportedly signed a power of attorney in favor of his son, filed a complaint for declaratory judgment, temporary injunctive relief, and fraud, asking the court to declare the power of attorney void and prohibit the son from exercising any powers under the power of attorney until its validity was determined. The court granted a temporary injunction, but during the litigation, the man died. The son moved to dismiss the complaint as moot, since the purpose of the power of attorney, to make decisions for his father's medical needs, no longer existed. He renounced his

powers under the power of attorney. The son's motion to dismiss on mootness grounds was granted. The court also granted the wife's and daughters' motion for attorney's fees and costs as the prevailing parties pursuant to §709.08(11), Fla. Stat., which provides for prevailing party fees in power of attorney litigation.

The appellate court affirmed the fee award in favor of the plaintiffs, noting that the complaint sought to enjoin the son from exercising any powers granted him under the power of attorney, to have the power of attorney declared null and void, and to prohibit the son from holding himself out as the decedent's designated agent. The temporary injunction issued by the court, the decedent's death and the son's renunciation gave plaintiffs the relief they sought. The son's actions in renunciating the powers under the power of attorney necessarily mooted the complaint and was the functional equivalent of a judgment or verdict in favor of the plaintiff entitling the plaintiff to an award of attorney's fees as the prevailing party. See also, *Augustin v. Health Options of South Florida, Inc.*, 580 So. 2d 314 (Fla. 3d DCA 1991) (finding that when the defendant changed its position in the matter and made full payment as prayed for in the plaintiff's complaint, it necessarily mooted the complaint and was the functional equivalent of a judgment or verdict in favor of the plaintiff entitling the plaintiff to an award of attorney's fees as the prevailing party).

The above-cited cases stand for the principle that courts must look to the substance of litigation outcomes, not just procedural maneuvers, in determining the issue of which party has prevailed in an action. It is the results, not the procedure, which govern the determination of which party prevailed for purposes of awarding attorney's fees. The exception to the general rule as to the effect of a voluntary dismissal applies to the facts of this action. Looking behind Simons' voluntary dismissal, it is undisputed that he received what he sought by his statement of claim, which was to be permitted by Palm Lakes to attend meetings in person, as opposed to only via Zoom. It was no longer worthwhile to continue to litigate when Palm Lakes' post-suit actions in deciding not to contest Simons' claim mooted the claim. Simons did not communicate his intent to dismiss his claim until after he obtained the outcome he was seeking. Since Simons received the remedy he sought in his statement of claim, he was the prevailing party. The voluntary dismissal was the functional equivalent of a judgment in favor of Simons. It necessarily follows that Palm Lakes was not the prevailing party, and therefore was not entitled to an award of attorney's fees and costs. The trial court should not have penalized Simons with a substantial assessment of attorney's fees for recognizing the obvious and dismissing his claim, as continued prosecution of

it would have been a waste of judicial resources.

The cases relied upon by Palm Lakes at the entitlement hearing and in its brief to support its position that it was the prevailing party are not on point. For example, it relied on *Boca Airport v. Roll-N-Roaster*, 690 So. 2d 640 (Fla. 4th DCA 1997), which applied the general rule that when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party. A determination on the merits is not a prerequisite to an award of attorney's fees. *Id.* There was no issue raised about whether the voluntary dismissal occurred because the dismissal was the result of obtaining the remedy sought by the plaintiff.

In *Alhambra Homeowners Association v. Asad*, 943 So. 2d 316 (Fla. 4th DCA 2006), the court held that the defendant, homeowners, were the prevailing parties under §720.305(1), Fla. Stat. after the plaintiff, Association, voluntarily dismissed its case without prejudice, even though the plaintiff subsequently refiled the same lawsuit and ultimately prevailed. The filing of a second lawsuit did not negate the owners' right to recover fees for the first suit. The court relied on *Padow v. Knollwood Club Association, Inc.*, supra, to identify the exception to the general rule regarding a plaintiff's voluntary dismissal of an action. It noted the well-established rule relied on by Simons that a court looks behind a plaintiff's voluntary dismissal when the dismissal results from

succeeding on its demands. But that exception didn't apply in *Alhambra*, because the prevailing homeowners in the first case did not cave into the Association's demands prior to the voluntary dismissal. It provides no support for Palm Lakes' position. See also, *Ajax Paving Industries, Inc. v. Hardaway Company*, 824 So. 2 d 1026 (Fla. 2d DCA 2002) where the only issues were whether the request for prevailing party fees had been properly pleaded and whether there was a contractual basis for the fees. No issue was raised about the application of the exception to the general rule regarding recovery of fees after a voluntary dismissal.

The trial court inappropriately made its determination of who was the prevailing party by focusing on a procedural maneuver, the voluntary dismissal, without reference to the substance of what occurred in the litigation. In doing so, it abused its discretion and the award of attorney's fees and costs it entered in favor of Palm Lakes must be reversed.

ARGUMENT

POINT II

THE TRIAL COURT ERRED IN GRANTING PALM LAKES THE AMOUNT OF ATTORNEY'S FEES AND COSTS REQUESTED BY IT BECAUSE IT WAS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

As argued in Point I above, the award of attorney's fees and costs must be reversed on the merits because Palm Lakes was not the prevailing party. However, even if this Court disagrees with Simons on that issue, the judgment must still be reversed because the amount of attorneys fees and costs awarded was not supported by competent substantial evidence.

A. DOCUMENTS THAT WERE IDENTIFIED BUT NEVER ADMITTED INTO EVIDENCE AS AN EXHIBIT ARE NOT COMPETENT EVIDENCE TO SUPPORT A JUDGMENT.

At the hearing relative to the amount of attorneys fees and costs incurred by Mr. Schaaf and his law firm, his affidavits, his invoices, and his time detail records were not admitted into evidence. His expert witness, Ms. Towzey, testified that his hourly rate and his time were reasonable, but she relied on the affidavits that were not admitted into evidence.

An award of attorney's fees must be supported by competent substantial evidence. Not only must an expert testify as to the reasonableness of the attorney's fees, but evidence detailing the nature and extent of the services performed by the attorney must also be presented. *Loftus v. Fairchild*, 2024 Fla. App. LEXIS 8016 (Fla. 2d DCA 2024). Competent evidence includes invoices, records, and other information detailing the services provided, as well as the testimony from the attorney in support of the fee. *Diwakar v. Montecito*

Palm Beach Conodminium Association, Inc., 143 So. 3d 958 (Fla. 4th DCA 2014).

In *Loftus*, supra, there was testimony presented at an evidentiary hearing as to an attorney's hourly rate, the total amount of fees incurred, and the reasonableness of the rate and number of hours expended by the attorney. But that testimony alone was insufficient to support the amount of the fee award. See also, *Chandler v. KCCS, Inc.*, 224 So. 3d 929 (Fla. 2d DCA 2017) (Although there was evidence presented at the evidentiary hearing as to the hourly rate and the reasonableness of the fees, the only evidence detailing the work actually completed consisted of an affidavit and related documents that were neither introduced into evidence nor stipulated to at the hearing. The evidence was thus insufficient to support the award.)

In *Pansky v. Pansky*, 259 So. 3d 872 (Fla. 4th DCA 2018), the court reversed an award of the amount of attorney's fees because the trial court had not received any testimony or other evidence. The court determined the amount exclusively on argument of counsel. Although counsel provided a copy of certain billing records, those records were not admitted into evidence. As a result, the billing records were not competent evidence to support the court's determination of the amount of sanctions.

In both the final judgment and the amended final judgment, the trial judge acknowledged that counsel for Simons objected to the court considering Mr. Schaaf's affidavits and billing records because they were never received into evidence. R. 351-352, 411. It justified its reliance on the documents by stating they were provided to the parties several days before the hearing and were in the court file. R. 351-352, 411. It relied on case law that was inapposite, and therefore, it reversibly erred in considering the documents.

Specifically, the court relied on *Smith v. Short*, 332 So. 3d 1064 (Fla. 2d DCA 2021) which held that the trial court's consideration of documents former wife attached to her motion but not formally moved into evidence was proper where former husband never objected to former wife's reference to the documents or to the court's consideration of them. It relied on *Carroll v. Carroll*, 936 So. 2d 706 (Fla. 4th DCA 2006) which concluded that the wife's technical failure to formally place the parties' financial affidavits into evidence did not preclude an award of attorney's fees to the wife when the affidavits were in the court file and both parties argued extensively regarding their contents without objection. It relied on *Kerper v. Kerper*, 496 So. 2d 199 (Fla. 4th DCA 1986) which concluded that the bank's technical failure to formally place the formal judgment and closing statement from an earlier lawsuit into evidence

was harmless when the parties stipulated to their authenticity, they were shown to the trial judge without objection, and they were otherwise part of the record. R. 351-352, 411.

The trial court's own language in its final judgment and amended final judgment reveal the misplaced reliance on the above-cited cases, because it stated that counsel for Simons objected to the court considering the affidavits and billing records because they were never received into evidence. Simons' motion for rehearing averred that since he objected to Palm Lakes' reliance on the affidavits and billing records, the court's dependence on the above-cited cases was misplaced. R. 357. Yet, the court denied this portion of the motion for rehearing and in entering its amended final judgment, it relied on the same cases that were not applicable. It was error for the court to consider the cases in entering its judgment.

The trial court also erred in awarding costs in the amount of $1,400 as an expert witness fee for Ms. Towzey. She testified that she charged $350 per hour as an expert witness and before the hearing, she spent 2.5 hours which amounts to $875. Tr. 455-456. She stated she expected to be paid for her time at the hearing. Tr. 455-456. The court awarded $1,400 in costs, allocating $700 to each case. On the record before the court it is unclear how

it calculated the costs, and the order must be reversed.

B. THE TRIAL COURT'S AMENDED FINAL JUDGMENT ALLOCATED THE ATTORNEY'S FEES AND COSTS BETWEEN TWO UNCONSOLIDATED CASES WITHOUT COMPETENT SUBSTANTIAL EVIDENCE TO DO SO.

The amended final judgment awarded $34,202.50 in attorneys fees to Palm Lakes, the precise amount it requested. R. 411-413. It decided that $28,215 represented the attorneys fees incurred in Case No: 2115 and $5,987.50 represented the attorneys fees incurred in Case No: 3593. R. 413. There was no evidence presented by Mr. Schaaf or his expert, Ms. Towzey that a certain number of hours for each case were reasonable and necessary, nor that a total fee per case was reasonable and necessary. Ms. Towzey testified that most of the charges related to the briefing which the court ordered on the issue of entitlement, but the time was not allocated between the two cases. Mr. Schaaf did not testify as to the amount of time he spent on each case or how much time the total fees in each case were. The underlying factual issues in each case were different and the cases were never consolidated. The court essentially did a post-hearing calculation on its own without supporting evidence.

CONCLUSION

Based on the foregoing arguments and citations of authority, Appellant, Simons, respectfully requests that this Court reverse the trial court's award to Palm Lakes of attorney's fees and costs, award Simons his attorney's fees and costs on appeal per his separately filed motion for fees and costs, and for such further relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by electronic mail via the e-filing portal to Gary M. Schaaf, Esq., BECKER & POLIAKOFF, P.A., 1511 N. Westshore Blvd., Suite 1000, Tampa, Florida 33607 at gschaaf@beckerlawyers.com, kmurphy@beckerlawyers.com gthomas@beckerlawyers.com and CourtMail@beckerlawyers.com on this 2nd day of December, 2024.

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CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that I have complied with the font standards required by Fla. R. App. P. 9.210 and 9.045(b) for computer-generated briefs, by submitting this brief in Arial 14-point font and by meeting the word count limit requirements.

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