THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

APPEAL NO.: 4D22-3360
LOWER CASE NO.: 50-CA-2019-005331-XXXX-MB

KENNETH N. WOLINER and HOLISTIC FAMILY MEDICINE, LLC

Appellants

v.

DAVID S. FURSTELLER, P.A.; WARREN R. TRAZENFELD, P.A.; CARLSON & ASSOCIATES, P.A.; et. al.

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is a plenary appeal of an August 11, 2022, final order, rendered February 15, 2023, involving two contested charging liens. [R. 2270; 3471]. Below, the L.T. awarded $436,000 in contingency fees without holding an evidentiary hearing, receiving any testimony, or admitting any evidence.

The L.T. also rendered an order in which it refused to settle and approve the record. [R. 3468].

The L.T. also rendered an order denying Appellants' motion to dismiss alleging lack of subject matter jurisdiction. [R. 2267].

This Appellate Court has jurisdiction.

STATEMENT OF THE FACTS

1. *The Underlying Malpractice Suit.*

This is an appeal of a charging lien determination. [R. 2270]. The Appellees are Warren R. Trazenfeld, P.A. and Carlson & Associates, P.A. [R. 2283-84]. Attorneys Warren Trazenfeld and Curtis Carlson are the principals of the two law firms.

The underlying suit was a legal malpractice action brought by Appellants Holistic Family Medicine ("HFM") and Kenneth Woliner

("Woliner") against their former lawyers from a prior proceeding for a defective defense in a Department of Health administrative disciplinary proceeding that resulted in Woliner losing his medical license by a scant 5-4 vote. [R. 935-40, at ¶¶ 29-34].

The Third Amended Complaint is the operative pleading. [R. 926]. HFM and Woliner sought millions of dollars in damages against William Huseman and David Fursteller for multiple claims including professional negligence and breach of fiduciary duty. [R. 928, at ¶¶ 35, 41, 47]. Previous versions of the Complaint named referring attorney William McFarlane as a defendant; Mr. McFarlane had subsequently obtained a dismissal. [R. 871; 887].

Woliner claimed personal injuries to him resulting from the tortious conduct of Fursteller and Huseman: (a) harm to his personal and professional reputation; and (b) loss of personal property (his medical license). [R. 928, at ¶ 55, 62]. HFM, Woliner's employer, claimed its own damages for the loss of its employee. [R. 928, at ¶ 59].

Huseman and Fursteller are not part of this appeal, having amicably resolved their dispute with HFM and Woliner through a

detailed Settlement Agreement expressly allocating how much money each defendant (*i.e.*, Huseman; Fursteller) was remitting to each plaintiff (*i.e.*, HFM, Woliner) for each count of the Third Amended Complaint (*e.g.*, negligence, breach of fiduciary duty). [R. 1844, at ¶ 3]. The Settlement Agreement was completely integrated. [R. 1846, at ¶ 12].

2. *Attorneys Trazenfeld and Carlson* Seek *Charging Liens.*

On March 1, 2022, Attorneys Trazenfeld and Carlson (collectively, the "Attorneys") filed notices of claim of charging lien. [R. 962; 965]. The next day, the Attorneys filed petitions to enforce the charging liens, immediately scheduling a single 15-minute hearing to adjudicate both contested liens just 19-days later. [R. 970; 982; 1001]. At that point, the Attorneys still represented HFM and Woliner but had not sought leave to withdraw. When the Attorneys scheduled this hearing, HFM and Woliner did not have any other legal representation; however, the Attorneys did not advise HFM or Woliner to obtain independent counsel.

HFM and Woliner repeatedly demanded an evidentiary hearing. [R. 1105; 1114-1.5; 1153-56; 1192-95]. Attorney Carlson

argued that the L.T. was not required to hold an evidentiary hearing; that Woliner was not entitled to discovery; and that HFM was not entitled to any due process rights at all. [R. 1124; 2081, at ¶ 8; 2079; 2099, at ¶ 10; 2101]. The March 21st, April 22nd, and June 6th, 2022, hearings were non-evidentiary despite HFM and Woliner's written and oral requests. [R. 2999; 2322; 3038; 3563-64; 3565-68].

At the March 21, 2022 hearing, the Attorneys prosecuted their charging liens against their own clients, while remaining as Counsel of Record. [R. 2999]. Attorney Carlson admitted he was adverse to Woliner but argued that the L.T. should nonetheless proceed because Woliner's request to hire counsel was "of no legal significance," and that Woliner was attempting a delay under the guise of seeking leave to obtain independent counsel. [R. 3004-05]. Attorney Trazenfeld expressly stated that Woliner "is trying to bait Mr. Carlson to withdraw, to assess his contest of the lien." [R. 3004]. Attorney Carlson did not move to withdraw at that time. *Id.* The L.T. continued the hearing until April 22, 2022.

It was only after the March 21st hearing concluded that HFM, now with replacement counsel, filed a motion to substitute counsel. [R. 1158; 1203]. Attorney Carlson continued to represent Woliner; until 7-weeks later when the L.T. directly ordered him to file a motion to withdraw. [R. 2038; 2637; 3021]. Attorney Trazenfeld never represented HFM but never withdrew from representing Woliner despite Woliner sending him multiple letters discharging him (on February 13th, October 25th, and November 13th, 2019). [R. 1258-59; 1631; 1633-34].

Woliner did not obtain counsel because Attorney Carlson withheld all funds obtained in the settlement. [R. 2340-41]. Attorney Carlson refused to account for or deliver over to HFM and Woliner the undisputed portion of the settlement - totaling $539,000. [R. 1920-21]. Attorney Carlson claimed he was entitled to counterclaim undisputed trust property belonging to his clients as a set-off for attorney's fees he might later seek for enforcing the lien. *Id.*

It was only after the Appellants were forced to file a motion that the L.T. ordered the uncontested funds to be distributed on

May 5, 2022. [R. 2025-29; 3021-27]. Appellants claimed that the Attorneys withheld funds with the specific intent to impede to achieve a particular outcome, to wit: to interfere with HFM and Woliner's ability to retain counsel. [R. 2027-28].

3. The L.T.'s Hearings Did Not Comport with Due Process.

The L.T. reserved just 30-minutes for the hearing on April 22nd. [R. 1204]. The L.T. ordered the parties to exchange exhibit and witness lists before the hearing, indicating that it intended the parties to have the opportunity to present evidence. [R. 1205]. Appellants understood the L.T.'s order to mean that the hearing would be evidentiary, and listed more than 10 witnesses and 50 exhibits to be used at trial. [R. 1458-68]. Attorney Trazenfeld acknowledged the nature of the hearing; Attorney Carlson likewise filed an exhibit list [R. 1212, at ¶ 9; 1435-46].

The L.T. only had time to entertain Attorney Carlson's opening statement. [R. 2322-45]. During Attorney Carlson's 20-minute unsworn argument, Woliner objected claiming that counsel was testifying. [R. 2333]. The L.T. correctly overruled that objection

because Attorney Carlson was merely presenting his opening argument. *Id.* Attorney Carlson was not sworn in and did not offer any exhibits into evidence. [R. 2322-45]. No exhibits were received into evidence. [R. 3563-64; 3565-68].

The L.T. directed Woliner to proceed after Attorney Carlson but Woliner objected being that there was insufficient time to proceed, noting that he had requested the hearing be set for at least two hours. [R. 2339-40]. The L.T. commented that: (a) there was a "hard stop at 3:30 pm"; (b) "each side is going to need equal time"; and (c) "There's no way I could have done this in a half an hour, honestly. It should have been an hour hearing. It's two motions for charging lien, especially that were contested." [R. 2339-41]. The L.T. continued the hearing to June 6, 2022. [R. 2015].

At the June 6, 2022 hearing, Attorney Trazenfeld gave his opening statement for roughly 15 minutes. [R. 3038-46]. No witnesses were sworn; no testimony was adduced; and no exhibits were admitted into evidence during the entire hearing. [R. 2718; 3038-77]. After Trazenfeld concluded his oral argument, the L.T. stated it would afford the parties equal time, and stated

Woliner would have (35) minutes to give his opening presentation. [R. 3046]. The L.T. did not address how much time HFM's counsel would receive for its opening statement, despite the fact that counsel for HFM was present. [R. 3046-47].

Using thirty (30) PowerPoint slides as a demonstrative aid, Woliner gave his opening statement describing the evidence he intended to present during his case-in-chief. [R. 3046-70; 2671-86]. At the onset, Woliner noted his objections to the procedure being non-evidentiary. [R. 2672, at slide 1; 3046-47]. The L.T. did not interject or otherwise state that this was Woliner's only chance to present evidence. [R. 3038-77]. Woliner then attempted to canvas the 30 PowerPoint slides which set forth the arguments he intended to subsequently support in his case-in-chief. *Id.* The L.T. reminded him that it had another hearing set to begin at the end of the hour. [R. 3063; 3069]. Woliner timely objected that he had not been given sufficient time to present his case, and requested additional time. [R. 3063; 3069]. With only 10-minutes remaining in the hearing, HFM's counsel interjected that it had not been given any opportunity to present its case. *Id.* Ultimately, the L.T. afforded

HFM only minutes to speak, corresponding to 35-lines of transcript text before the L.T. afforded the Attorneys a brief rebuttal to Appellants' opening argument. [R. 3070-75]. The Attorneys spoke for the remaining few minutes, corresponding to 83-lines of transcript text. *Id.*

The L.T. then abruptly halted the hearing, calling for proposed orders, without permitting the parties any opportunity to present evidence. [R. 3075-76]. The L.T. stated, "Okay. All right. So this is what we are going to do so I don't make my 4:00 late. I wasn't sure if one hour was going to be enough time." *Id.*

The Palm Beach Clerk of Courts and the Clerk of the 15th Circuit Court subsequently provided certified copies of their public records which confirmed that: (a) no clerk was present at the June 6, 2022, hearing; (b) the Judge did not deliver any documents or evidence to the Clerk's Office; (c) the Clerk has no records responsive to the public records request seeing an "Exhibit List", "Evidence Working Copy" or "Exhibit Register" for the June 6, 2022, hearing; and (d) the Clerk has no documents produced by a "CRT Clerk" or "Evid Clerk" for the June 6, 2022 hearing. [R. 3418-29;

3565-68]. The Clerk of the 15th Judicial Circuit also certified that it has no exhibits related to case number 50-2019-CA-005331 were uploaded through its electronic evidence portal between March 1st and June 6th, 2022. [R. 3563-64].

Notably, the June 6, 2022, hearing was broadcast over zoom and Woliner's scheduled court reporter did not appear. [R. 3115-16]. The L.T. decided to go forward without a court reporter. [R. 2783 at ¶ 4]. Regardless, Woliner made an audio recording of the hearing which explains why the first (7) minutes of the hearing is omitted. [R. 2641, at ¶¶ 5-11]. Certified court transcriptionist and commissioned notary public, Crystal Turner, transcribed the audio recording in accordance with Rules 2.535; 9.200(b); and 9.800(h). [R. 3038; 3525-30].

4. <u>The Order and Rehearing.</u>

The L.T. rendered judgment for Warren R. Trazenfeld, P.A. and Carlson & Associates, P.A. against Woliner and HFM in the amount of 45% of the settlement proceeds and authorized Carlson and Associates to pay itself all such funds in the IOTA trust account,

and then distribute 25% of the funds to Warren R. Trazenfeld, P.A. [R. 2283-84].

Notably, the L.T.'s judgment stated that it considered the Petition and the entire record, and argument of the parties, but the L.T. did not reference any exhibits admitted into evidence – only docket entries. [R. 2270]. The L.T. does not refer to any testimony and did not state that any testimony was considered. *Id.*

Appellants timely moved for rehearing. [R. 2395]. Appellants argued that the L.T. made factual findings without holding an evidentiary hearing, and therefore, the judgment was not supported by competent, substantial evidence. [R. 2396; 2403-05]. Specifically, Appellants argued, "not a single exhibit was entered into evidence, no testimony was taken, no stipulations to any fact were admitted (not even the authenticity of the purported fee agreement), and no judicial notice was granted." [R. 2399, 2403-05].

The L.T. denied rehearing without an opinion and without any comment as to whether evidence was admitted, or any testimony adduced. [R. 3471].

5. <u>The L.T. Refused to Establish a Complete Record.</u>

A mere two hours after the June 6, 2022 hearing concluded, Appellants filed and served a Rule 9.200(b)(5) Motion to Settle and Approve the Record, filing a joint Statement of the Proceedings. [R. 2139-40]. The record contains prima facie proof of service on both Attorneys Trazenfeld and Carlson. [R. 2140-41].

Attorneys Trazenfeld and Carlson did not serve objections or proposed amendments before the expiration of the specified period in Rule 9.200(b)(5). Forty-three (43) days after the specified period expired, Attorney Trazenfeld filed an untimely objection on legal grounds. [R. 2250]. Instead, Attorney Trazenfeld claimed, without citation to authority, that the time period set forth in Rule 9.200(b)(5) did not apply to him because he was not a "party." *Id.* Mr. Trazenfeld did not contend that Appellants' Statement of the Proceedings was inaccurate or untrue. *Id.*

The L.T. first addressed the matter on August 10, 2022, but continued the matter based upon insufficient time to adjudicate the issues. [R. 3112-17]. The L.T. resumed the hearing to settle and approve the record on September 14, 2022. [R. 2704-23]. Attorney Carlson argued that Appellants' Statement of the Proceedings was

factually inaccurate because he felt that the sixty (60) pre-marked exhibits filed into the court's docket were "talked about" during opening presentations which caused the documents to become admitted as evidence. [R. 2710]. Attorney Trazenfeld stipulated on the record, "[c]ertainly nobody was sworn in. I think we can agree on that." [R. 2718].

The L.T. determined that the Statement of the Proceedings was not a complete recreation of the June 6th hearing and denied the motion without prejudice. "[I]f you want a proper appellate transcript for appellate purposes, then, you know, we really need to recreate what happened so that the appellate court has a complete picture." [R. 2715-16; 2994-95].

On September 19, 2022, Woliner filed a renewed Motion to Settle and Approve the Proceedings; or in the alternative, to Declare the Record Incomplete and Correct and Supplement the Record; or in the alternative, to Authenticate *In Pais*. [R. 2640]. Woliner's renewed Statement of the Proceedings was reconstructed through with Woliner's memory refreshed by past recollections recorded, to wit: the thirty (30) PowerPoint slides, Woliner's contemporaneously-

made handwritten notes, and the audio recording Woliner made. *Id.* Woliner made the audio recording available to all parties. [R. 2642-43]. In compliance with Rule 2.525(d)(1), (4), (5); and 9.200(a), a CD-ROM of the audio-recording was subsequently filed with the L.T. and is available for review. [R. 2892-95].

Attorney Carlson's written objection acknowledged the recording was authentic and accurate but contended that the oral communications made at the June 6th hearing were uttered "with the expectation that their communications were not subject to interception" citing § 934.03(1)(a), Fla. Stat. [R. 2782-91, at ¶ 19]. Attorney Carlson did not argue that any of the participants exhibited an expectation of privacy. *Id.* The only prejudice Attorney Carlson alleged was, "the participants declined to make certain arguments or bring certain facts to the attention to the Court because they believed, justifiably so, that the proceedings were not being recorded and there was no need to make a 'record.'" [R. 2789, at ¶ 19].

On December 12, 2022, L.T. held a hearing. [R. 3147-84]. The L.T. stated that she did not listen to the CD-ROM containing a copy

of the recording. [R. 3160]. Woliner formally moved into evidence the CD-ROM containing the June 6, 2022, audio-recording, and the certified transcript and the L.T. allowed it to become part of the court record. [R. 3172]. The L.T. orally pronounced that she was going to declare the record incomplete. [R. 3175]. The L.T. permitted the CD-ROM and transcript to be made part of the court record, but was not going to approve it as an official record, "because of the manner in which it was recorded and because, quite frankly, the other side objects." [R. 3160; 3172].

On December 28, 2022, Appellants sought review of that order on motion in this Appellate Court. [Docket: 4D22-3360, Filing # 163785457, at p. 13]. On February 3, 2023, this Court granted relief, and ordered the L.T. to dispose of the outstanding motions for rehearing and to settle and approve the record, *inter alia*. [Docket: 4D22-3360].

HFM and Woliner promptly filed renewed motions to settle and approve, arguing that the Attorneys waived objections by failing to timely object to the original June 6, 2022, Motion; that a party may not be deprived his constitutional right to an appeal by roadblocks

erected by opposing parties who refuse to participate in accordance with Rule 9.200; and that the L.T.'s discretion was limited to approving "a record" as complete or ordering a new trial, but that the L.T. could not refuse to make a record at all. [R. 3297; 3382]. The L.T. ultimately determined that further consideration was not appropriate denied the motion based upon the recording being made in a surreptitious fashion. [R. 3538-58; 3468-69]

6. *The L.T's Denies Woliner's Motion to Dismiss for Lack of Subject Matter Jurisdiction.*

The legal name of Attorney Carlson's corporate entity is "Curtis Carlson & Associates, P.A." [R. 2210, at ¶ 2.a.; 2221]. On March 2, 2022, Attorney Carlson filed the "Petition of Carlson & Associates, P.A. to Enforce Attorney's Charging and Retaining Lien." ("Petition"). [R. 970]. "Carlson & Associates, P.A.," as referred to in the Petition is not a legal entity, but is merely a fictitious name used by Attorney Carlson's corporate entity. [R. 2226]. However, there is already existing a Florida Profit Corporation named "Carlson & Associates, P.A." that is administratively dissolved; under section 607.1405(1), Florida Statutes, continues its corporate existence. [R. 1147-48, 1745]. In addition, there is a third entity, a Miami-

Dade County law firm named "Carlson Law, P.A.," which concurrently uses the fictitious name, "Carlson & Associates, P.A." [R. 1568-75].

In his March 20, 2022, responsive pleading, Woliner raised by specific negative averment, and with particularity, the lack of legal existence and capacity to sue in the name "Carlson & Associates, P.A." [R. 1146-49]. On July 12, 2022, Appellants filed a Motion to Dismiss for lack of subject matter jurisdiction. [R. 2154]. HFM joined orally at the hearing. [R. 3112]. In response, Attorney Carlson, without seeking leave of court to intervene, an amended notice of charging lien and "Petitioner Curtis Carlson & Associates, P.A.'s Joinder in Petition to Enforce Attorney's Charging Lien" ("Joinder Motion"). [R. 2170; 2202]. Attorney Carlson never obtained leave to substitute a legal entity for a fictitious name.

On August 4th and 10th, 2022, the L.T. held a non-evidentiary hearing on the two motions to dismiss. [R. 3088-98; 3103-12]. Woliner claimed that Attorney Carlson misidentified the name of his corporation, and that the actual entity was not before the L.T. *Id.* HFM's counsel argued that Attorney Carlson's decision to not

identify his corporation by its legal name was fatal in this proceeding; but that it would not prevent him from suing in a separate legal proceeding. *Id.* At the hearing, Attorney Carlson never sought to amend his Petition. *Id.*

The L.T. denied the motions without explanation. [R. 2267; 3112].

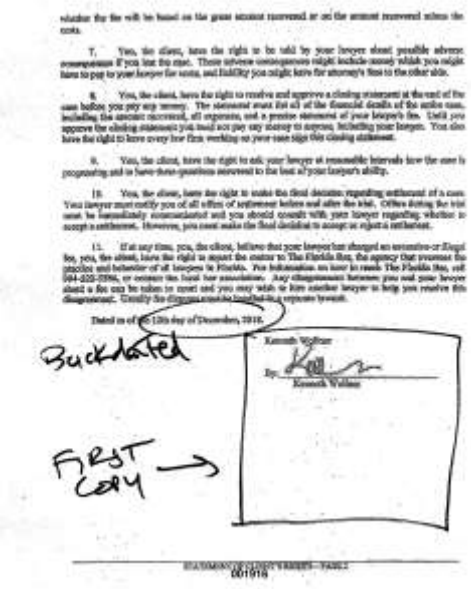
7. *Appellants Were Prepared to Present Evidence on Facts Contested by the Parties; the Final Judgment Adjudicated these Facts and Made Conclusions of Law Without Evidence.*

Appellants demanded that an evidentiary hearing be held. [R. 1114-1.5; 1138; 1153-56; 1176; 1192-95; 2671, at slide 1; 3046; 3050; 3054; 3056; 3061; 3064; 3070-71]. The Final Judgment hinges on factual findings. [R. 2270].

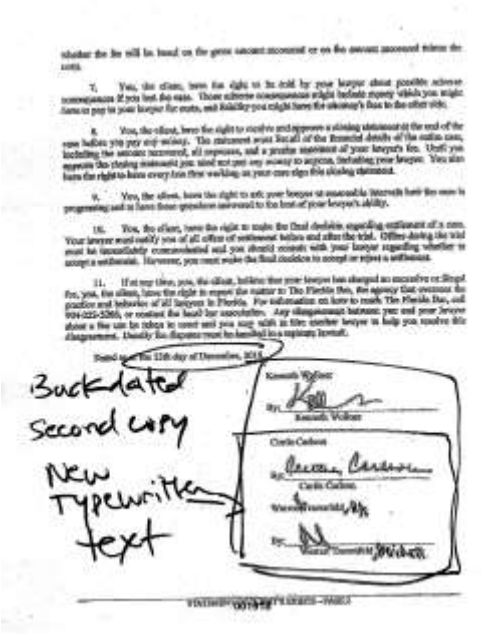
Factually, Appellants describe below the arguments intended to be presented but which were not entertained by the L.T.

Woliner intended to contest the authenticity of the purported fee agreement used by the Attorneys to obtain their award – these arguments are canvassed in Woliner's power point presentation. [R. 2671-2686]. As one example, reprinted below are two versions of the Statement of Client Rights, the "Original Copy" [R. 1916], and

a second version, the "Adulterated Copy", which was attached to the two charging lien Petitions:



Original Copy [R. 1916]



Adulterated Copy [R. 1918]

Woliner intended to show that the "Adulterated Copy", submitted by the Attorneys, was a forgery, as it included additional "typed signature lines" not present when Woliner executed the document. If a forgery were found, then Woliner could have presented numerous legal theories in law, in equity, and under the Florida Bar Rule 4-1.5(a), *inter alia*, which could have invalidated the Attorneys case-in-chief. [R. 2671-2686].

Woliner also intended to put on evidence and testimony regarding Attorney Trazenfeld quitting (*i.e.*, voluntarily withdrawing without cause) prior to settlement which would have had legal implications on his right to recovery. [R. 2680].

In the same PowerPoint, Appellants expressed an intent to introduce evidence regarding the misidentification of Carlson & Associates, P.A. which would have likewise been fatal to his claim. [R. 2672].

Further, Appellants sought to put on evidence to support the equitable argument of unclean hands when the Attorneys withheld undisputed funds in a trust account with the unlawful and unethical intent to coerce settlement. [R. 2674].

SUMMARY OF THE ARGUMENT

The L.T. deprived Appellants of Due Process when it failed to conduct an evidentiary hearing to dispose of two (2) contested charging liens, worth hundreds of thousands of dollars, in two hearings that spanned just 1.5 hours.

Substantively, the L.T. deprived Appellants of the fundamentals of an evidentiary hearing which include the ability to present testimony and evidence as well as the ability to conduct cross examination. Appellants have a right to a decision based upon the evidence presented, not merely upon proposed exhibits and arguments of counsel. Stated differently, the L.T.'s decision is flawed because it is not supported by any evidence, let alone competent and substantial evidence.

Procedurally, the L.T. failed to allot adequate time for adjudication. Both the initial thirty (30) minute hearing and subsequent one (1) hour hearing were terminated arbitrarily because the L.T. had other hearings scheduled. Rather than continuing the hearing, the L.T. abruptly terminated the

proceedings and sought proposed orders. The L.T. only entertained arguments of the parties yet made numerous factual findings which supported its final judgment. The L.T. was required, under Due Process, to afford an adequate opportunity to be heard. Appellants identified more than ten (10) witnesses, more than fifty (50) pieces of evidence, presented a PowerPoint presentation containing thirty (30) slides, chalk full of legal and factual points; lodged numerous requests and objections that the hearing be evidentiary in nature; all to no avail. In total, Woliner was afforded roughly thirty-five (35) minutes of time to present his case and HFM was afforded mere minutes to present its case despite requesting at least two (2) hours in advance, and for additional time during the hearing. Appellants were hamstrung for time and Due Process is not administered arbitrarily with a stopwatch.

The L.T. also made legal errors by allowing Carlson & Associates, P.A. to proceed as a fictitious name to judgment even though fictitious names are without capacity to sue. In addition, the L.T. allowed the Attorneys to collect a contingency fee from HFM without a written fee agreement in violation of Florida Bar Rule

4-1.5 by mistaking a winding up entity with a terminated entity and by interpreting the Settlement Agreement in a manner that would make it void. Specifically, by finding that HFM was entitled to no proceeds for its causes of action, calling into question whether there was adequate consideration and rendering the Settlement Agreement an unlawful aggregate settlement under Bar Rule 4-1.8(g).

Lastly, the L.T. erred when it failed to settle and approve an uncontested record which contained an audio recording of proceedings that all parties and the L.T. agreed were authentic.

ARGUMENT

I. The L.T. Awarded Two Attorney's Charging Liens Without Due Process.

A. *Standard of Review.*

This Court reviews Due Process violations de novo. *Bank of Am., N.A. v. Fogel*, 192 So. 3d 537, 575 (Fla. 4th DCA 2016). "When due process is denied, fundamental error occurs." *Id.* "If a party's due process rights are violated, the underlying final order is void." *Id.* Procedural due process error "may be raised for the first time on

appeal." *Pena v. Rodriguez*, 273 So. 3d 237, 241 (Fla. 3d. DCA 2019).

B. *Merits.*

1. The L.T. scheduled insufficient time to permit a meaningful opportunity to be heard.

The failure to hold a full evidentiary hearing is a due process error. *See Santini v. Cleveland Clinic Florida*, 65 So. 3d 22, 36 (Fla. 4th DCA 2011). "If there are disputed issues of fact, an evidentiary hearing must be held to facilitate their resolution." *In re Beverly Mfg. Corp.*, 841 F.2d 365, 370 (11th Cir. 1988). "Due process requires that a party be given the opportunity to be heard and to testify and call witnesses on the party's behalf ... and the denial of this right is fundamental error." *Julia v. Julia*, 146 So. 3d 516, 520 (Fla. 4th DCA 2014). "The opportunity to be heard must be full and fair, not merely colorable or illusive." *Id.* An order denies due process if it adjudicates an issue that was not presented by the parties or the pleadings. *See Cortina v. Cortina*, 98 So. 2d 334 (Fla. 1957). Due process requires a conclusion that is contingent upon

evidence, but be adduced during the fact-finding process. *See Connor v. Palm Beach*, 398 So. 2d 952 (Fla. 4th DCA 1981).

Here, Appellants timely, and repeatedly, demanded that an evidentiary hearing be held. The parties exchanged exhibit and witness lists fully expecting an evidentiary hearing to be held.

Due Process requires an adequate opportunity to be heard and that means "justice cannot be administered arbitrarily with a stopwatch." *Julia*, 146 So. 3d at 520. That is precisely what occurred here. Plaintiffs were not afforded enough time to put on their evidence or adduce testimony and HFM, especially, was only afforded mere minutes to speak. By the L.T.'s own admission, it had scheduled insufficient time to adjudicate two hotly-contested attorney's liens against two clients.

In preparation for the April 22, 2023 hearing, Plaintiffs contested the charging lien petitions on numerous factual and legal grounds in their papers and exchanged more than 50 exhibits to be used at trial. More than ten witnesses were identified to testify and Appellants intended to prevent a complicated legal defense which would have been impossible to present given the L.T.'s arbitrary

time constraints. To wit: the April 22, 2023 hearing lasted only (30) minutes because the L.T. had a hard stop at 3:30. The L.T. acknowledged that there were (2) charging liens at issue, both of which were contested and continued the hearing continue for a mere hour. This was done despite Plaintiffs contention that the hearing needed to be "at least two hours" because numerous matters were contested. The hearing was reset for (1) hour on July 6, 2023.

At the June 6, 2023, 3:00 p.m. hearing the L.T. acknowledged that it gave roughly 20 minutes to Carlson in the past hearing and 15 minutes for Mr. Trazenfeld to give his presentation and stated that Woliner would have roughly 35 minutes. This allocation accounted for (50) minutes of the hour and no consideration was given to HFM despite the L.T.'s prior insistence that the parties be given equal time.

Woliner gave his presentation and expressly stated he was giving an opening statement and that evidence would be adduced later in accordance with due process because there were issues of fact to be resolved, including forgery. The L.T. did not tell Woliner

that he was mistaken and that he should have been presenting evidence and testimony. The L.T. interrupted Woliner's opening statement and stated that he had had a minute or so left to present before opposing counsel would be afforded an opportunity to reply because the L.T. had another hard stop at 4:00 p.m. There was no consideration for HFM at that time; it was only after HFM's counsel alerted the L.T. that it had independent arguments that the L.T. allowed its counsel to speak. Under extreme time constraints, HFM only had time to argue that Carlson and Trazenfeld did not put forth any evidence of a written fee agreement with HFM and therefore were not entitled to a contingency under the Florida Bar Rules.

The L.T. afforded Carlson and Trazenfeld replies and noted that it "wasn't sure if one hour was going to be enough time" with reference to the 4:00 p.m. deadline. The L.T.'s acknowledgement that it scheduled insufficient time is dispositive.

2. The L.T. <u>did not conduct</u> an evidentiary hearing.

Due process required the L.T. to hold an evidentiary hearing because its Final Judgment expressly resolved factual disputes. In

order to comply with due process, an evidentiary hearing requires an opportunity to put on testimony, subject that testimony to cross-examination, offer exhibits for admission in accordance with the rules of evidence.

The L.T. only entertained unsworn arguments of counsel and pre-marked, unauthenticated documents filed into the docket that were expected to be used at trial. The L.T. did not let any party put on a case-in-chief. However, unsworn arguments of counsel are not evidence. *See*, *e.g.*, *Leon Shaffer Golnick Adver., Inc. v. Cedar*, 423 So. 2d 1015, 1017 (Fla. 4th DCA 1982). Pleadings and filings are not evidence because, "[f]iling a document does not place it in evidence." *Neal v. State*, 697 So. 2d 903, 905-6 (Fla. 2d DCA 1997).

In *Pena*, the Third DCA reversed a civil paternity judgment when "the final hearing was restricted to the representations of counsel." *Id.* The Third DCA found the "trial court deprived the father of procedural due process in relying solely upon the representations of counsel in support of its determinations..." *Id.* The *Pena* Court noted repeatedly that "absent a clear stipulation of counsel," argument of counsel can never constitute evidence. *Id.* at

240. *Pena* came to this conclusion by reciting the basic tenants of Due Process including the Supreme Court's warning that "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* at 240 (*citing Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)). Here, the amount of property at stake (nearly half a million dollars) was far greater than the property right in *Goldberg* (welfare benefits) and thus HFM was entitled to, at a minimum, the protections of a traditional judicial evidentiary hearing. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (the greater the deprivation of property, the more process is required).

This case is identical to *Pena* in that the evidentiary hearing constituted nothing but arguments and commentary on materials not in evidence. No documents were admitted into evidence, no testimony was given, and when Mr. Woliner attempted to object to Mr. Carlson's presentation, the L.T. overruled the objection on the grounds that Mr. Carlson was merely arguing.

Clearly, the Due Process violation is more serious here than in *Pena* because the L.T.'s arbitrary time constraints precluded the

presentation of any evidence and were such that HFM had barely any opportunity to be heard in any fashion. This Court must void this judgment on due process grounds and remand for a new hearing.

II. The L.T. Enforced a Prohibited Contingency Fee Agreement Against HFM.

The L.T. erred when it erroneously concluded that 45% of HFM's settlement proceeds should be remitted to the Attorneys pursuant to an unwritten contingency fee agreement. It justified this error by finding that: (1) the Attorneys had an implied agreement with HFM to pay a "specific percentage" of the recovery; (2) HFM was "not an existing entity" and therefore entitled to nothing; and (3) the confidential settlement agreement did not allocate any percentage of recovery to HFM. The L.T. made such findings without holding an evidentiary hearing in violation of Due Process. These findings based upon unsworn arguments of counsel included a conclusive determination that Woliner must have owned 100% of HFM – that fact being contested and resulting in the deprivation of tens of thousands of dollars to a 77 year-old widow.

[R. 2295-96]. This error was compounded when the court either ignored or misapplied the law.

While this Court can easily vacate the L.T.'s judgment for want of Due Process and remand for a proper trial on the merits, there are important legal errors which ought to be addressed and can be dispositive to certain issues. This Court reviews pure questions of law *de novo*. *Bosem v. Musa Holdings, Inc.*, 46 So. 3d. 42, 44 (Fla. 2010).

First, the L.T. erred by awarding the Attorneys a contingency fee percentage on the grounds that HFM had an implied contingency fee agreement with the Lawyers "to pay the fees out of the recovery in the specific percentages." [R. 2281]. That ruling is legal error because The Florida Bar's Rules of Professional Conduct prohibits percentage contingency payments based upon agreements not signed by both the lawyer and the client. "Because this contingency fee arrangement was never reduced to a writing, it is an unconscionable contract." *FIGA v. R.V.M.P. Corp.*, 681 F. Supp. 806, 810 (S.D. Fla. 1988) (applying Florida Law). Specifically, Rule

4-1.5(f) mandates that all contingency fee agreements be express and in writing to be valid:

> (1) A fee may be contingent on the outcome of the matter for which the services are rendered … A contingent fee agreement must be in writing and must state the method by which the fee is to be determined, including the percentage or percentages that will accrue to the lawyer in the event of settlement, trial, or appeal [and] must also state the costs to be deducted from the recovery and whether those costs are to be deducted from the recovery and whether those costs are to be deducted before or after the contingency fee is calculated…
>
> (2) Every lawyer who … enters into an agreement, express or implied, for compensation of is to be dependent or contingent in whole or in part on the successful prosecution or settlement must do so only where the fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm must sign the contract with the client and must agree to assume joint legal responsibility … The client must be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule will apply to such fee contracts.

R. Regulating Fla. Bar 4-1.5(f) (Emphases supplied).

Moreover, Rule 4-1.5(d) states that a failure to adhere to the Florida Bar Rules renders fee agreements unenforceable:

> Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule**.**

The Supreme Court expressly held, "contingent fee contract[s] entered into by a member of The Florida Bar must comply with the rule governing contingency fees in order to be enforceable." *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 185-86 (Fla. 1995).

It is well-established that "a contract which is illegal because its execution requires the performance of an immoral or unlawful act, or transgresses an express statutory prohibition … receives no aid or encouragement whatever from the courts on, the principle, '*Ex turpi causa non oritur actio*.'" *Robert G. Lassiter Co. v. Taylor*, 99 Fla. 819, 829-30 (Fla. 1930).

The L.T.'s description of the implied arrangement clearly fits the definition of a contingency fee agreement because payment would be contingent upon recovery from the opposing party. Rule 4-1.5(f)(1), (2) applies to all contingency fee contracts. *See Santini*, 65 So. 3d at 30-31. Without a written fee agreement that meets the strictures of Rule 4-1.5(f), it was an error to award any monies under an "implied" agreement that was required to be reduced to writing and, *inter alia*, signed by the client and all representing lawyers. To hold otherwise would mean "attorneys who comply with the rules are at a competitive disadvantage." *Id.*

The Supreme Court, through The Florida Bar and directly through itself, commanded that bar rules afford protection to the public and that lawyers who eschew those obligations do so at their own peril. *Santini*, 65 So. 3d at 30-31 (rejecting incredulous claims that Florida law permits a lawyer to recover more from his former client by violating the rules governing contingency fees than he would be entitled to if he had followed them). This Court should not depart from that bright-line rule. The Attorneys remedy lies in quantum meruit. *Guy Bennet Rubin, P.A. v. Guettler,* 73 So. 3d 809,

814 (Fla. 4th DCA 2011) (defective contingency fee arrangement results in quantum meruit); *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 652 So. 2d 366 (Fla. 1995) (quantum meruit is to be decided using lodestar method). As the Supreme Court has explained:

> When the contract looks to doing of a lawful act but may be avoided by one of the parties to it because the other party at the time acted in a fiduciary capacity for the first, the rule is applied in order to avoid the possibility of reaping any undue advantage from the contract. When it has been executed without objection, and actual benefits have been received under it, all parties acting in entire good faith, the law is maintained and the ends of justice subserved by disregarding those parts of the express agreement where in advantage might have been taken, and allowing compensation merely for the reasonable value of the benefits received under it. Considerations of public policy do not require the doing of less than this. The defense of public policy has no element of punishment in it; nor is it allowed out of consideration for the defendant. It is upheld by the consideration which the law ever entertains for the protection of the public, and the settled policy of the courts to give no aid to the enforcement of contracts whose general tendency is injurious to the public. Hence, the courts refuse all relief to one who asks compensation for the doing of an act which is

> conclusively presumed to be hurtful to public interests or morals.

Robert G. Lassiter Co., 99 Fla. at 830-31 (Emphases supplied).

Here, the Attorneys are not entitled to any percentage of HFM's recovery because they did not, plead, proffer, or admit, any written contingency fee agreement with HFM. Rather, the Attorneys chose to sidestep the issue and argue that HFM was not a legal person.

Second, and to much surprise, the L.T. agreed with the Attorneys when it stated that HFM was "not even an existing entity." [R. 2281]. Apart from creating an impermissible paradox (HFM not a person on one hand, but also finding that the Attorneys had an "implied contract" with HFM on the other), the L.T. was wrong to deny HFM's personhood a matter of law.

In Florida a Limited Liability Company is a person until it files a statement of termination with the Secretary of State. *SPA Creek Services, v. SW Cole, Inc.*, 239 So. 3d 730, 735 (Fla. 5th DCA 2017) ("The new limited liability act adopted in 2014, provides for the

filing of a statement of termination after the limited liability company has finished winding up its affairs, but the act does not prohibit a dissolved entity from continuing to prosecute or defend proceedings after that point. § 605.0709(7), Fla. Stat. (2014)"). As stated in *SPA Creek Services*, an LLC is merely winding up until termination occurs. Because there was no evidence, let alone proffer, that HFM delivered a termination notice with the Secretary of State, HFM continues to exist as a person under Florida Law.

As an additional point, the Attorneys must be estopped from making such an argument because they knew that Attorney Carlson obtained an order for leave to add HFM as a Plaintiff [R. 904]; secured a settlement on HFM's behalf which it had HFM sign; and offered a closing statement to HFM which also requested a HFM's corporate representative to execute [R. 1446], substituted as counsel for HFM, and obtained a judgment against HFM. It is outrageous that the Attorneys made such an argument as it demonstrates a mockery of justice and is tantamount to "playing fast and loose with the courts." *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001).

Third, the L.T. erred by determining that the Settlement Agreement did not allocate certain amounts to HFM. Apart from not admitting the Settlement Agreement into evidence or taking testimony regarding the intent of the parties, the L.T. was not free to interpret the Settlement Agreement in a way that disregarded its plain language in a manner that violated the Florida Bar Rules. This Court reviews interpretation of written contracts *de novo*. *Land Co. of Osceola Cnty., LLC v. Genesis Concepts, Inc.*, 169 So. 3d 243, 247 (Fla. 4th DCA 2015).

Under Florida Law, "The intent of the parties governs contract interpretation and that intent is to be determined from the plain language of the agreement and the everyday meaning of the words used." *Burlington & Rockenbach, P.A. v. Law Offices of E. Clay Parker*, 160 So. 3d 955, 958 (Fla. 5th DCA 2015). "The entire contract should be considered and provisions should not be considered in isolation to other provisions in the contract." *Id.*

Despite the L.T.'s conclusion that that the Settlement Agreement did not "break[] down how much was going to HFM or Woliner in particular", Paragraph (3) of the agreement clearly shows

an intent to delineates certain amounts of funds to be paid by certain defendants to certain plaintiffs for certain counts asserted in the complaint. [R. 1844-45, 2281]. The plain language of Paragraph (3) reads in its entirety, "Allocation of the Settlement Payments. HFM and Woliner plan to allocate the Settlement Payments between the Parties as follows: [followed by a table listing individual claims made by individual Appellants to be paid by individual Defendants for sums certain.]" Paragraph (4) of the agreement reads, "Compromise of Disputed Claims. The Parties agree that the 'Settlement Payments' represent a compromise of disputed claims…" [R. 1845].

The net effect of Paragraphs (3) & (4) show an intent to provide consideration for each party and claim. To write HFM out entirely is to deprive HFM, and the Defendants, of their consideration. To read it any other way would make the Settlement Agreement an unlawful aggregate agreement under Rule 4-1.8(g). "The law assumes that parties have made an agreement for some lawful, enforceable purpose, that courts should not apply a strained or

unusual meaning so as to render it entirely unenforceable." *J.R.D. Mgmt. Corp. v. Dulin*, 883 So. 2d 314, 317 (Fla. 4th DCA 2004).

Rule 4-1.8(g) prohibits settlement of claims for multiple clients without informed consent. The Comments to Rule 1.8(g) stated that the lawyer must inform each of the clients about the terms of the deal, "including what the other clients will receive or pay if the settlement … is accepted." The L.T's interpretation violates Rule 4-1.8(g) because it allows for settlement proceeds to flow from two defendants to two claimants, without any understanding as to how the proceeds will be allocated.

Whether using a canon of construction to interpret a contract in a way that avoids violating Florida Bar Rules or illegality or the validity rule, the Court must determine that the L.T.'s interpretation of the Settlement Agreement is outright wrong by its plain language or is to be given a fair interpretation that avoids rendering the contract an unlawful aggregate settlement. Either way, the Settlement Agreement must be interpreted so that HFM and Woliner are entitled to their respective amounts as delineated in ¶ 3. It was error to write out HFM in its entirety.

In addition to this Court determining the L.T.'s order void for want of Due Process, it should also declare that the L.T.'s legal findings regarding HFM above are in error and remand for further proceedings.

III. The L.T. Lacked Jurisdiction to Adjudicate the Petition of Carlson & Associates, P.A.

A. Standard of Review.

Whether a party is a legal person with the capacity sue is a pure question of law reviewed de novo. *See Seminole Tribe of Fla. Inc v. Courson*, 183 So. 2d 569, 570 (Fla. 2d DCA 1966).

B. Merits.

The L.T. should have dismissed the Petition of Carlson & Associates, P.A., on the grounds that a fictitious name has no legal existence and no legal capacity to sue. The facts are not in dispute. Attorney Carlson admitted that "Carlson & Associates, P.A." was a

fictitious name used by Curtis Carlson & Associates, P.A. [R. 1435; 1448; 2210, at ¶ 2.d.]. The L.T.'s Final Judgment was entered in favor of Carlson & Associates, P.A. [R. 2283]. Because Carlson & Associates, P.A., has a judgment in a fictitious name, this Court should reverse the L.T.'s denial of Woliner's Motion to Dismiss and void the judgment.

"Under Florida law, only natural persons or legal entities have capacity to sue [or be sued]." *In re Berris*, 2009 WL 1139085, at *2 (Bankr. S.D. Fla. Apr. 27, 2009) (*citing Underwriters a La Concorde v. Airtech Servs.*, 493 So. 2d 428, 429 (Fla. 1986) (J. Boyd, concurring in part and dissenting in part) ("It is axiomatic that the capacity to sue in court of Florida attaches only to natural or legal persons.")).

A fictitious name does not identify a legal person. *Cohen v. Burlington, Inc. (In re Gulisano)*, No. 20-12660, at *5 (11th Cir. May 12, 2022) (affirming sanctions against attorney who "attempt[ed] to conflate various distinct corporate entities [with similar names] in order to recover an award of damages"). A fictitious name has no independent legal existence. *Osmo Tec SACV Co. v. Crane Envtl.,*

Inc., 884 So. 2d 324, 327 (Fla. 2d DCA 2004). Rather, it is a "fiction involving the name of the real party in interest, and nothing more." *Riverwalk Apartments, L.P. v. RTM Gen. Contractors, Inc.*, 779 So. 2d 537, 539 (Fla. 2d DCA 2000). The Fictitious Name Act does not confer any rights and does not create a separate entity or legal person. § 865.09(8), Fla. Stat.

Because it is undisputed that Carlson & Associates, P.A. is a fictitious name, it cannot have a judgment as a matter of law. This Court has no alternative other than but to void the judgment below as it relates to Carlson & Associates, P.A.

IV. The L.T. Erred by Not Settling and Approving the Record or Granting a New Trial.

The L.T. erred when it failed to settle and approve the record in total. In the alternative, the L.T. erred by not settling the record in accordance with HFM's initial June 6, 2022 Statement and again with Woliner's September 19, 2022 Statement (the "Statements").

Appellants first contend that the L.T. had a duty to settle and approve the Record under Rule 9.200(b)(5) and that an outright refusal to do so when the L.T., and all parties, acknowledged that a recording reflected the proceedings is legal error; in the alternative, it is an abuse of discretion. Second, Appellants contend that the L.T. was required to adopt Appellants' Statements because the Attorneys did not present a counter narrative of the facts, and thus, conceded to Appellants' version of events. Both issues present pure questions of law which concern the application of Rule 9.200(b)(5) for which this Court reviews de novo. *Koppel v. Ochoa*, 243 So. 3d 886, 889 (Fla. 2018).

First, the L.T. was wrong to deny a motion to approve the record based upon an audio recording and transcript that it found authentic under Rule 9.200(b)(5). This was particularly so when all parties agreed that the audio recording was authentic. Rule 9.200(b)(5) contemplates reconstruction of the record from the "best

available means." Here, the best available means was an audio recording of the vast majority of the June 6, 2022 hearing, combined with a PowerPoint demonstrative aide, and Appellants Statements. It is clear that the L.T. was not pleased with the fact that the audio recording was made on the spot without notifying anyone during a Zoom hearing open to the public during the COVID-19 pandemic emergency orders, but that was no justification to outright refuse to make such an undisputed account of the proceedings part of the record. The L.T. noted that that "there is no authority directly on point which dictates how a Court should handle a surreptitious recording..." and posed the issue as a matter of law. Whether as a matter of law or under an abuse of discretion standard, the result is the same. The L.T. erred by depriving the parties of a record on impermissible grounds, or alternatively, on grounds that no reasonable court could uphold (both being that the audio was made without knowledge of the participants).

Second, the L.T. erred as a matter of law when it refused to adopt the Statements because the Statements were not contested,

factually. Rule 9.200(b)(5), sets forth a procedure whereby a party may propound a statement of the proceedings and evidence to the other parties for their comments. The other parties may agree, or disagree, in whole or in part. Here, the receiving parties did nothing. If the procedure under Rule 9.200(b)(5) is to have any force, it must have consequences for non-participation. That is because "Rule 9.200(b)(5) contemplates participation by both parties." *Carbaugh v. State*, 331 So. 3d 208, 210 (Fla. 4th DCA 2022). The only meaningful consequence is that the opposing parties silence must result in agreement to the propounding parties' statements.

When that occurs, there is nothing for the L.T. to do but ministerially adopt the record (or perhaps modify the record to the extent the L.T. recalls the proceedings differently). In *Kuenstler v. Andreasen*, 386 So. 2d 896, 897 (Fla. 1st DCA 1980), the DCA stated, when settling and approving the record, the rule "requires Appellee to make specific objections and proposed amendments if he has any going to the factual basis of Appellant's document."

Then, "the trial judge should [] act as arbiter of any factual dispute between the parties." *Id.*

Here, the L.T.'s refusal to adopt procedurally uncontested Rule 9.200(b)(5) motions was legal error. To hold otherwise would be to allow Appellees and L.T. the ability to thwart the constitutional right appellate review. This is especially so in circumstances like these where there is no record confirming that Appellants were at fault for the failure of a court reporter to appear. Further, Appellants did everything possible to ensure an adequate record for this Court.

This Court has the ability to find that the record is sufficient for review because the issues on review because the L.T. and all parties have acknowledged the authenticity of the audio recording. In the alternative, Appellants seek an order reversing and remanding for a new trial on the merits.

CONCLUSION

Appellants request this Court find the Final Judgment to be void as a matter of law, or in the alterative, find reversible error. Appellants further request that this Court remand back to the Circuit Court for further proceedings. Appellants finally request an Order from this Court to direct Attorneys Warren Trazenfeld and Curtis Carlson to immediately restore $436,000, the disputed trust property, to be held in trust to restore the status quo ante, or an Order to the L.T. to do the same.

Respectfully submitted,

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I certify that the foregoing is prepared using Bookman Old Style 14-point font in compliance with the font requirements of Rule 9.045(b) of the Florida Rules of Appellate Procedure, and it is less than 13,000 words or 50 pages excluding the cover sheet, the tables of contents and citations, the certificates of service and compliance, and the signature block, in compliance with the word count and page limit requirement in Florida Rule of Appellate Procedure 9.210(a)(2)(B).

/s/ Kenneth Woliner
Kenneth Woliner
pro se

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/s/ Kenneth Woliner
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