NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
APPELLATE DIVISION

LESLIE M. CONKLIN,

Appellant,

vs.

Appeal No.: 09-000023AP-88A
UCN: 522009AP000023XXXXCV

ANDREA BATEMAN and
A.N. AARONSON, ESQUIRE,

Appellees.

_____/

Opinion Filed _____

Appeal from Final Judgment
Pinellas County Small Claims Court
Judge Myra Scott McNary

Leslie Conklin, Esq.
Pro Se

A.N. Aaronson, Esq.
Attorney for Appellees

ORDER AND OPINION

This matter is before the Court on an appeal filed by Leslie Conklin (Conklin) from the Pinellas County Court Order entered on March 17, 2009 denying Conklin's Motion for Appellate Attorney Fees. Having fully reviewed the briefs, the record, and pertinent legal authority, this Court reverses the Order for the reasons that follow.

This is the second time this appeal has been before the Court. Initially, Conklin sued Bateman for passing a bad check. Judgment was entered in Conklin's favor, and he was also awarded trial attorney fees. Bateman and her attorney, Aaronson, did not contest the judgment, but they filed an appeal regarding the attorney fees. Conklin then sought attorney fees for the appeal.

This Court affirmed the judgment *per curiam* and remanded the case back to county court for "a determination of *entitlement to* and the amount of attorney's fees and costs." (emphasis added)

On remand, the Pinellas County Small Claims Court conducted a hearing regarding the appellate attorney fees on March 11, 2009. When the court expressed concerns about its authority to determine entitlement to appellate fees, Conklin maintained that the appellate division had directed the small claims court to review the appellate record. However, the court replied, "I understand they returned it for the Court to do that, but how does the Court do that if there are no specific findings of fact from the appellate court?"

Further, when Conklin urged the small claims court to review the appellate briefs and motion, the court responded, "But in the court – in the court doing that, then this Court is in a position to actually make findings of facts for the appellate court in terms of why the appellate court ruled the way it did, and that's what we're left with. I guess you can file a Motion for Clarification. I don't know."

The county court denied Plaintiff's Motion for Appellate Attorney Fees on March 17, 2009. Conklin has now appealed, claiming that the county court erred when it refused to award any appellate attorney fees.

Although the parties' arguments center around the abuse of discretion standard generally applicable to attorney fee issues, Conklin is not challenging a fee amount or even the lower court's interpretation of statutory language. Instead, his primary argument is that the trial court did not actually consider entitlement to fees. Therefore, this Court must consider two questions of law: first, whether an appellate court can direct a trial court to consider entitlement to attorney fees; and second, if so, whether the trial court followed this Court's mandate to determine entitlement. The standard of review of a trial court's construction of appellate court orders is *de novo*. *Avemco Ins. Co. v. Tobin*, 886 So.2d 1034, 1036 (Fla. 4th DCA 2004).

This Court may direct the lower court to determine entitlement to appellate fees as long as the request is made in the appellate court and the appellate court issues a mandate. *Cochran v. Perruso*, 667 So. 2d 494, 495 (Fla. 4th DCA 1996) (requiring that a motion for attorney fees be made in accordance with Florida Rule of Appellate Procedure 9.400, which requires the motion to be filed with the appellate court) (citing *Gieseke v. Gieseke*, 499 So. 2d 839 (Fla. 4th DCA 1986)); *School Bd. of Alachua County v. Rhea*, 661 So. 2d 331 (Fla. 1st DCA 1995) (*per*

curiam) (trial court cannot award attorney fees if Florida Rule of Appellate Procedure 9.400 is not complied with). Here, Conklin complied with Rule 9.400 when he filed his request for appellate fees along with his reply brief with this Court.

In *Rados v. Rados*, 791 So. 2d 1130 (Fla. 2d DCA 2001), where the court addressed remanding the entitlement question in the context of dissolution of a marriage, the court noted that "[t]he scope of the trial court's task on remand may be broad, or it may be limited, depending on the appellate court's order." *Id.* at 1132. Therefore, "[a] trial judge considering such a motion on remand should look first to the language of that order to determine its role in resolving the motion." *Id.* The court continued that in domestic relations cases, one directive the appellate court could give the trial court is to determine entitlement to appellate attorney fees under section 61.16, Florida Statutes. *Id.* at 1134-35.

While *Rados* is a dissolution case, it supports an appellate court's general authority to authorize the trial court to determine whether appellate fees are justified. Here, this Court acted within its authority when it affirmed the award of trial attorney fees *per curiam*, and remanded the case to the trial court to determine both the *entitlement to* and *amount of appellate* attorney fees.

The remaining issue before the Court is whether the county court failed to follow this Court's mandate by failing to consider entitlement to appellate attorney

fees. The Florida Supreme Court has held, "A trial court is without authority to alter or evade the mandate of an appellate court absent permission to do so." *Blackhawk Heating & Plumbing Co. v. Data Lease Financial Corp.*, 328 So. 2d 825, 827 (Fla. 1975) (requesting that the Florida Supreme Court enter an order requiring the trial court to comply with an earlier opinion in the same case involving an agreement relating to purchase of common shares of stock) (citing *Cone v. Cone*, 68 So. 2d 886 (Fla. 1953)). This means that when a lower court receives a mandate from a higher court, the lower court should carry out and make effective the order and judgment of the higher court. *Rinker Materials Corp. v. Holloway Materials Corp.*, 175 So. 2d 564 (Fla. 2d DCA 1965).

Furthermore, in *Specialty Restaurants Corp. v. Elliot,* 924 So. 2d 834, 838 (Fla. 2d DCA 2005), the Second District held that when the trial court granted Elliott's Motion to Reconsider and ultimately denied appellate attorney fees to SRC after the Second District had awarded such fees, the trial court clearly "violated the settled principle of law requiring it to follow the mandate of this court [the Second District Court of Appeal]." Under these circumstances, the Second District reversed and remanded for entry of an award of appellate attorney fees. *Id.*

While this matter represents the flip side of SRC, the county court likewise evaded the mandate of this Court when it *failed* to address the issue of Mr.

Conklin's entitlement to attorney fees. A review of the record supports Conklin's contention that the trial court did not fully or properly consider entitlement.

> COURT: "I understand they returned it for the Court to do that, but how does the Court do that if there are no specific findings of fact from the appellate court?"
>
> CONKLIN: [The only logical interpretation is that the appellate court is asking the trial court to review the appellate briefs and motion.
>
> COURT: "Right. But in the court – in the court doing that, then this Court is in a position to actually make findings of facts for the appellate court in terms of why the appellate court ruled the way it did, and that's what we're left with. I guess you can file a Motion for Clarification. I don't know."

In this case, like *Rados*, the trial court was tasked with determining the issue of entitlement and, if entitlement was present, awarding the reasonable amount of fees. By not addressing the issue of entitlement, the county court did not fulfill its obligation. *Rados*, 791 So. 2d at 1332.

The *de novo* standard enables this Court to review the issue without deference or consideration of the trial court's reasoning. *D'Angelo v. Fitzmaurice*, 863 So. 2d 311 (Fla. 2003). Although the trial court was confronted with an unusual request and its hesitation was understandable, under the *Blackhawk* mandate rule, the court was required to follow the instruction to determine

entitlement. *Blackhawk,* 328 So. 2d at 827. Therefore, denial of attorney fees without first considering entitlement to those fees was erroneous.

Therefore, it is

ORDERED AND ADJUDGED that the Pinellas County Court's Order on Plaintiff's Motion for Attorney Fees dated March 17, 2009 is **REVERSED** and remanded with instructions that the county court make findings of fact and legal conclusions on entitlement to appellate attorney fees. Further, if on remand the county court finds that Conklin is entitled to appellate attorney fees, the county court shall determine the amount of such fees.

DONE AND ORDERED in Chambers, at Clearwater, Pinellas County, Florida, this 12 day of July, 2010.

Original order entered on July 12, 2010 by Circuit Judges Linda R. Allan, George W. Greer, and John A. Schaefer.

Copies to:

The Honorable Myra Scott McNary
Leslie Conklin, Esq.
A.N. Aaronson, Esq.