

**TABLE OF CONTENTS**

TABLE OF CITATIONS----- 2

Argument in Response and Rebuttal Argument ----- 3

**STANDARD OF REVIEW**----- 3

**I. The lower court did not act within its authority to amend its Final  
    Deficiency Order**----- 3

Conclusion----- 6

Certificate of Service----- 6

Certificate of Compliance ----- 6

**TABLE OF CITATIONS**

CASES

Betts v. Fowelin, 203 So.2d 630 (Fla. 4th DCA 1967) ----- 5  
Izaak walton Investors, LLC v. Oesterle, 51 So.2d 612 (Fla. 1st DCA 2011)3  
McCrea v. Deutsche National Trust Company, 993 So.2d 1057 (Fla. 2d  
DCA 2008)----- 4  
Metcalf v. Lee, M.D., 952 So.2d 624 (Fla. 4th DCA 2007) ----- 3  
Schaeffler v Deych, 38 So.2d 796 (Fla. 4th DCA 2010) ----- 3

## Argument in Response and Rebuttal Argument

### STANDARD OF REVIEW

The lower court did not enter the amended deficiency judgment as a result of Rule 1.540 of the Florida Rules of Civil Procedure. Rather, the amended deficiency judgment was the result of an *ex parte* communication between Appellee's counsel and the court. There exist no motions or reasons on the record explaining the entry of the amended deficiency judgment. Accordingly, the standard of review must focus on the application of the Florida Rules of Civil Procedure by the lower court. In such cases, the standard of review is *de novo*. See Schaeffler v Deych, 38 So.2d 796 (Fla. 4<sup>th</sup> DCA 2010), Metcalf v. Lee, M.D., 952 So.2d 624 (Fla. 4<sup>th</sup> DCA 2007), Izaak Walton Investors, LLC v. Oesterle, 51 So.2d 612 (Fla. 1<sup>st</sup> DCA 2011).

#### **I. The lower court did not act within its authority to amend its Final Deficiency Order**

Appellee admits that Appellee's counsel submitted the wrong deficiency judgment to the lower court, which the lower court signed. (Answer Brief p. 11) To rectify its mistake, Appellee's counsel ignored the rules of procedure and engaged in *ex parte* communications with the lower court. (Answer Brief p. 3, 8, 11) Those communications resulted in the amended deficiency judgment, which increased the amount by a whopping

\$300,000.00 over the original judgment. Now, the Appellee asks this Court to ignore its impropriety as a mere mistake. However, to do so would be a manifest failure of due process. In McCrea v. Deutsche National Trust Company, 993 So.2d 1057, 1058-59 (Fla. 2d DCA 2008) the appellee, Deutsche Bank, engaged in ex parte communications with the lower court to correct an order. As a result of Deutsche Bank's ex parte communication with the lower court, the lower court entered an order to the detriment of the McCreas. Id at 1058. The lower court did not provide the McCreas with a hearing to challenge the court's proposed action. Id. The appeal court in McCrea ultimately found against Deutsche Bank. Id at 1059. The appeal court reasoned that there existed no evidence of an improperly submitted order, and the lower court failed to give the McCreas an opportunity to rebut the ex parte communication between the Appellee's counsel and the lower court. Id at 1058-59.

Similarly here, the record provides no evidence that the original deficiency judgment was entered in error, the Appellee engaged in ex parte communications with the lower court, and the lower court did not provide the Appellants an opportunity to challenge the amended deficiency judgment. Under such circumstances, McCrea instructs that the amended deficiency judgment be reversed.

The Appellee invokes the case of Betts v. Fowelin, 203 So.2d 630 (Fla. 4<sup>th</sup> DCA 1967) to argue that a change in the amount of a judgment is a clerical error correctable by 1.540(a), Florida Rules of Civil Procedure. (Answer Brief p. 9). However, the Betts case does not apply to the matter at hand. First, the judgment in Betts was the result of a jury verdict in the amount of \$63,660.00. Id at 631. The subsequent judgment entered by the court was for \$63,600.00, a mere \$60 difference. Id. Unlike in the present case, in which no evidence exists as to the “correct” judgment amount, the Betts judgment was supported by the record in the form of a jury verdict. Additionally, the corrected judgment in Betts resulted from the plaintiff making a motion to correct the final judgment to conform to the verdict. Id. Here, the Appellee made no motion whatsoever, but instead engaged in ex parte communications with the lower court. Finally, the difference between the judgments in this case is over \$300,000.00, whereas the difference in Betts was only \$60.00. The change in judgment in the present case signifies a change in the substance of the judgment as the amended judgment is almost 2.5 times greater than the original judgment. Accordingly, the original deficiency judgment was not a clerical error correctible by 1.540(a), Florida Rules of Civil Procedure.

## **Conclusion**

The trial court did not have authority to amend the Final Deficiency Judgment. The change made to the Final Deficiency Judgment does not qualify as one that can be corrected as a clerical mistake. The Appellee also failed to amend the judgment under Rule 1.540(b). Accordingly, the trial court entered the Amended Final Deficiency Judgment in error and must be reversed.

## **Certificate of Service**

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was sent on this 20<sup>th</sup> day of May, 2011 via U.S. Mail to: Feldman, Koenig, Highsmith, and Van Loon, 3158 Northside Drive, Key West, Florida 33040.

## **Certificate of Compliance**

I HEREBY CERTIFY that I have complied with the font requirements of Rule 9.210.

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