NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

KATHRYN S. MACK and MONTE A. KROH,

Appellants,

v.

UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY a/s/o CAROL F. VIGORITA, MARIA SCHLUP, and KAREN K. GOFF as Trustee of the KIGGINS FLORIDA IRREVOCABLE TRUST,

Appellees.

Case No. 2D19-3438

Opinion filed May 26, 2021.

Appeal from the Circuit Court for Collier County; Lauren L. Brodie, Judge.

Sherry M. Bernal and Roland V. Bernal, Jr. of Bernal & Bernal, P.A., Port St. Lucie; Derek J. Angell of Bell & Roper, P.A., Orlando, for Appellants.

Nancy W. Gregoire of Birnbaum, Lippman & Gregoire, PLLC, Fort Lauderdale; Mary E. Cantwell of Markcity, Rothman, Cantwell & Breitner P.A., Plantation, for

Appellee Universal Property &
Casualty Insurance Company.

ATKINSON, Judge.

Kathryn S. Mack and Monte A. Kroh (Appellants) appeal the trial court's orders denying their motions for entry of final judgment and for attorney's fees against Universal Property and Casualty Insurance Company (UPCIC), as subrogee for its insureds Karen K. Goff, as trustee of the Kiggins Florida Irrevocable Trust; Carol F. Vigorita; and Maria Schlup (Insureds). The Appellants argue that the trial court erred by denying their motion for attorney's fees under section 718.303(1), Florida Statutes (2017), the attorney's fees provision of the Condominium Act. We agree and reverse the trial court's order denying the Appellants' motion for attorney's fees. We affirm the trial court's order denying the Appellants' motion for entry of final judgment without discussion.

The Appellants own a condominium unit in Marco Island. On August 30, 2017, UPCIC brought a negligence action against Appellants, alleging that they—or their family members, unit occupants, tenants, guests, or invitees—failed to properly maintain, inspect, or repair the plumbing or appliances in their condominium unit, causing a water leak that damaged the Insureds' adjacent condominium units. UPCIC later filed an amended complaint which contained substantially the same allegations. In paragraphs 10 and 17 of the amended complaint, UPCIC alleged:

> [Appellants] is/are liable for the negligence of [their] guest/visitor/invitee pursuant to Florida Statute 718.111(11)(j) [the Condominium Act]:
>
> 1. A unit owner is responsible for the costs of repair or replacement of any portion of the condominium property not paid by insurance proceeds if such

damage is caused by intentional misconduct, negligence, or failure to comply with the terms of the declaration or the rules of the association by a unit owner, the members of his or her family, unit occupants, tenants, guests, or invitees, without compromise of the subrogation rights of the insurer.

2. The provisions of subparagraph 1. regarding the financial responsibility of a unit owner for the costs of repairing or replacing other portions of the condominium property also apply to the costs of repair or replacement of personal property of other unit owners or the association, as well as other property, whether real or personal, which the unit owners are required to insure.

See § 718.111(11)(j)1–2.

The trial court sua sponte referred the case to nonbinding arbitration on February 20, 2019. On April 9, 2019, the arbitrator rendered a decision favorable to the Appellants. UPCIC filed a timely motion for trial de novo pursuant to section 44.103(5), Florida Statutes (2019), and Florida Rule of Civil Procedure 1.820(h) on April 29, 2019. One week later, UPCIC filed a notice of voluntary dismissal without prejudice pursuant to Florida Rule of Civil Procedure 1.420(a)(1).

In response to UPCIC's notice of voluntary dismissal, the Appellants filed several motions, including a motion for attorney's fees under section 718.303(1). In their attorney's fees motion, the Appellants argued that they were entitled to an award of prevailing party attorney's fees because UPCIC brought its negligence action under section 718.111(11)(j) of the Condominium Act. UPCIC filed a response to the Appellants' motion, arguing that the Appellants were not entitled to an award of attorney's fees under section 718.303(1) because UPCIC did not bring its claim against the Appellants under the Condominium Act. Instead, UPCIC argued, its claim was for

ordinary common law negligence. Additionally, UPCIC asserted that it cannot be held liable for attorney's fees as a subrogee based on Continental Casualty Co. v. Ryan Inc. Eastern, 974 So. 2d 368 (Fla. 2008). After a hearing, the trial court denied the Appellants' motion.

On appeal, the Appellants argue the trial court erred by denying their motion for attorney's fees because they were prevailing parties in a lawsuit brought under the Condominium Act. They maintain that UPCIC subjected itself to liability for attorney's fees under the Condominium Act by alleging that the Appellants were liable for the negligence of others based on section 718.111(11)(j) of the Condominium Act and that UPCIC's status as the Insureds' subrogee cannot shield them from liability for attorney's fees. UPCIC responds that the trial court correctly denied the Appellants' motion because UPCIC's complaint did not allege a claim under the Condominium Act and UPCIC cannot be liable for attorney's fees since it is a subrogee.

The attorney's fees provision of the Condominium Act, section 718.303(1) provides, in relevant part, the following:

> Each unit owner, each tenant and other invitee, and each association is governed by, and must comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws which shall be deemed expressly incorporated into any lease of a unit. Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association or by a unit owner against: . . .
>
> . . . .
>
> (b) [a] unit owner.
>
> . . . .

> The prevailing party in any such action . . . is entitled to recover reasonable attorney's fees.

"Generally, a plaintiff's voluntary dismissal makes the defendant the prevailing party. However, this court has recognized that this rule does not apply without exception and that a court may look behind a voluntary dismissal at the facts of the litigation to determine if a party has prevailed." Residents for a Better Cmty. v. WCI Cmtys., Inc., 291 So. 3d 632, 634 (Fla. 2d DCA 2020) (citing Tubbs v. Mechanik Nuccio Hearne & Wester, P.A., 125 So. 3d 1034, 1040 (Fla. 2d DCA 2013)). The Appellants are the prevailing parties for purposes of attorney's fees because UPCIC voluntarily dismissed the action and, before the voluntary dismissal, the arbitrator had rendered a decision in their favor. See Yampol v. Schindler Elevator Corp., 186 So. 3d 616, 616–17 (Fla. 3d DCA 2016). Thus, the Appellants would be entitled to attorney's fees if UPCIC brought an action against them for "failure to comply with" the provisions of the Condominium Act. See § 718.303(1).

UPCIC's amended complaint alleged that the Appellants were liable to UPCIC for their own negligence in maintaining their plumbing or appliances or, alternatively, that the Appellants were liable to UPCIC for the negligence of third parties by virtue of section 718.111(11)(j) of the Condominium Act. UPCIC's amended complaint not only references section 718.111(11)(j)1–2 but quotes the entire subsection. Although UPCIC styled its cause of action as common law negligence, it relied on the Condominium Act as the source of the Appellants' vicarious liability for the negligence of others. Cf. Bongiorno v. Americorp, Inc., 159 So. 3d 1027, 1029 (Fla. 5th DCA 2015) ("A duty of care arises from four potential sources," including "legislative enactments" (citing Dorsey v. Reider, 139 So. 3d 860, 863–64 (Fla. 2014))).

UPCIC alleged that the Appellants were "liable for . . . negligence . . . pursuant to" the statute, which provides that "[a] unit owner is responsible" for "damage" in excess of insurance proceeds "if such damage is caused by intentional conduct, *negligence*, *or* failure to comply with the terms of the declaration or the rules of the association." (Emphasis added.) See § 718.111(11)(j)1. Therefore, UPCIC brought its negligence action against the Appellants *under* the Condominium Act, for failure to comply with the provisions of the Condominium Act, having invoked as a basis for the Appellants' negligence the Act's requirement that a condominium unit owner be financially responsible for damages caused by their family members, unit occupants, tenants, guests, or invitees. See § 718.111(11)(j)1, .303(1) (providing for prevailing party attorney's fees in actions brought by the association or unit owners "for damages or for injunctive relief, or both, for failure to comply with these provisions").

UPCIC argues the Appellants are not entitled to prevailing party attorney's fees under section 718.303(1) because section 718.111(11)(j) of the Condominium Act does not provide a private right of action for condominium unit owners or their subrogees. To support its argument, UPCIC relies on the Fourth District's decision in Universal Property & Casualty Insurance Co. v. Loftus, 276 So. 3d 849, 850, 854 (Fla. 4th DCA 2019). In Loftus, the Fourth District held "section 718.111(11)(j) was not intended to create a statutory right of action whereby condominium unit owners (or their insurers) may hold other unit owners vicariously liable for property damage caused by the tortious acts of the latter's tenants or occupants." Id. at 854. After examining subsections (f), (j), and (g) of section 718.111(11), the Fourth District explained that while subsection (j) "impose[d] a duty on a unit owner to be 'responsible for costs of

repair' " not paid by the insurance company if the damages were caused by the unit owner's tenants or invitees, the duty did not give rise to a private right of action because subsection (g) provided an enforcement mechanism other than a private right of action—the condominium association may charge and enforce the amount as an assessment against the unit owner. Id. at 853; see § 718.111(11)(g). The Fourth District recognized that "[a] private right of action may be implied from a statutory provision that would serve no useful purpose in the absence of a private right of action." Id. at 851. However, it concluded that section 718.111(11)(j) did not create an implied private right of action in favor of unit owners who suffered damages as a result of the negligence of adjacent unit owners' tenants, guests, or other occupants because subsection (g) provided an enforcement mechanism for the duty. Id. at 854.

We need not reach the issue of whether section 718.111(11)(j) provides unit owners or their subrogees with a private right of action against other unit owners for the negligence of their family members, tenants, guests, or other occupants. The fact that section 718.111(11)(j) did not provide UPCIC with a colorable claim for relief does not prevent the Appellants from seeking prevailing party attorney's fees under section 718.303(1). Its failed *attempt* to support a cause of action under the Condominium Act is what exposed it to fee liability. See Diamond Aircraft Indus., Inc. v. Horowitch, 107 So. 3d 362, 369 (Fla. 2013).

In Diamond Aircraft, the plaintiff, a citizen of Arizona, had filed a complaint against the defendant, a foreign corporation doing business in Florida, under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) in federal court. Id. at 365. The federal district court determined that Arizona law applied to the plaintiff's unfair trade

practices claim, not FDUTPA. Id. at 366. The defendant moved for attorney's fees under FDUTPA, arguing that it was the prevailing party for purposes of the unfair trade practices claim. Id.; see also § 501.2105(1) ("In any civil litigation resulting from an act or practice involving a violation of this part, . . . the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, may receive his or her reasonable attorney's fees and costs from the nonprevailing party."). The federal district court denied the motion. Diamond Aircraft, 107 So. 3d at 366. After an appeal, the Eleventh Circuit Court of Appeals certified a question to the Florida Supreme Court to determine whether a prevailing defendant under FDUTPA would be entitled to an award of attorney's fees if the trial court decided that FDUTPA did not apply because the substantive law of another jurisdiction governed the claim. Id. at 366–67.

The Florida Supreme Court determined that the defendant was "entitled to attorney's fees under [FDUTPA's attorney's fees provision] because [the plaintiff] . . . filed an action against [the defendant] under FDUTPA and ultimately was the nonprevailing party." Id. at 369. The supreme court recognized that "[b]y invoking FDUTPA and seeking redress under its remedial provisions, [the plaintiff had] exposed himself to both the benefits and the possible consequences of that act's provisions." Id. It concluded that

> simply because FDUTPA is ultimately held to have no application and does not provide a plaintiff with a basis for recovery after the provisions of the act have been invoked does not negate a defendant's status as a prevailing party in an action filed by a plaintiff under that act.

Id. (first citing Brown v. Gardens by the Sea S. Condo. Ass'n, 424 So. 2d 181, 184 (Fla. 4th DCA 1983) (reversing the trial court's order denying defendant's motion for

attorney's fees even though the trial court determined that FDUTPA was inapplicable because the plaintiff invoked FDUTPA's protections by filing an action under FDUTPA); and then citing Rustic Vill., Inc. v. Friedman, 417 So. 2d 305, 305–06 (Fla. 3d DCA 1982) (reversing the trial court's order denying defendant's motion for attorney's fees even though the plaintiff's claim was not one contemplated by FDUTPA)).

Like the plaintiffs in Diamond Aircraft, Brown, and Rustic Village, UPCIC expressly invoked a statutory provision to support its claim for relief against the Appellants. By seeking the benefits that it thought section 718.111(11)(j) provided for subrogees of condominium unit owners, UPCIC exposed itself to fee liability under the Condominium Act's prevailing party attorney's fees provision. See Diamond Aircraft, 107 So. 3d at 369; Brown, 424 So. 2d at 184; Rustic Vill., 417 So. 2d at 305–06. The fact that UPCIC was ultimately unsuccessful in making its claim against the Appellants under section 718.111(11)(j)—and could not be successful since the section does not create a private right of action—is irrelevant. UPCIC exposed itself to liability for prevailing party attorney's fees by making a claim under the Condominium Act. Therefore, even though the claim was not one contemplated by section 718.111(11)(j), UPCIC is liable for attorney's fees under the Condominium Act's fee provision. See Diamond Aircraft, 107 So. 3d at 369; Brown, 424 So. 2d at 184; Rustic Vill., 417 So. 2d at 305–06.

UPCIC's argument that subrogees are not liable for prevailing party attorney's fees is also unavailing. In Continental Casualty Co., on which UPCIC relies, the Florida Supreme Court held that a subrogee is not entitled to an award of attorney's fees under section 627.428, Florida Statutes (2006), unless the subrogor assigns his or

her right to attorney's fees to the subrogee. Continental, 974 So. 2d at 379; see also § 627.428(1) (providing that insureds are entitled to fees "[u]pon the rendition of a judgment or decree . . . against an insurer"). Based on the language of section 627.428, the Florida Supreme Court in Continental concluded that the right to attorney's fees in insurance cases is personal to the "named or omnibus insureds or the named beneficiary" in an insurance contract; thus, a subrogee who "stands in the shoes" of the insured does not automatically acquire the insured's right to attorney's fees by virtue of subrogation. Id. at 375–77, 379. The court also recognized that limiting the right to attorney's fees under section 627.428 to the named insured or beneficiary (or his or her assignee) would protect the insurance company from double liability for attorney's fees. Id. at 377 ("Because the principal retains its rights under the policy, which includes the statutory right to claim attorney's fees, the surety does not acquire the principal's status as one of the designated entities entitled to attorney's fees under the statute. This prevents the insurer from being subject to a claim for attorney's fees from both the principal (insured) and the surety (subrogee) when, as in this case, both litigate the same coverage issue.").

UPCIC's reliance on Continental is misplaced. In Continental, the attorney's fees provision in question only allowed for the "named or omnibus insured or the named beneficiary" to receive an award of attorney's fees if the insured prevails against the insurance company; the opposing party (insurance company) has no right to attorney's fees under section 627.428 even if it is the prevailing party. Id. at 374; see § 627.428(1). Section 718.303(1), on the other hand, is a reciprocal attorney's fees provision that allows for an award of attorney's fees to the prevailing party, regardless of

his or her identity or status in the litigation. § 718.303(1) ("The prevailing party in any . . . action [under the provisions of the Condominium Act] . . . is entitled to recover reasonable attorney's fees."). In other words, under section 718.303(1), a prevailing party's entitlement to attorney's fees is not based on her identity as a unit owner or a condominium association. And a nonprevailing party is liable for attorney's fees because he or she did not prevail in the litigation—not because of his or her identity or subrogation status. As such, the Continental opinion's rationale for the limitation on a subrogees' right to attorney's fees under section 627.428 has no application to this case, in which the prevailing parties sought fees under section 718.303(1).[1]

The trial court erred by denying the Appellants' motion for attorney's fees. Therefore, we reverse the trial court's order denying the Appellants' motion for attorney's fees and remand for further proceedings consistent with this opinion. We affirm in all other respects.

Affirmed in part, reversed in part, and remanded.

VILLANTI and BLACK, JJ., Concur.

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[1]The supreme court's concern regarding insurance companies' potential exposure to double liability for attorney's fees is not relevant to this case. See Continental, 974 So. 2d at 377. That concern derived from scenarios in which both the subrogor and the subrogee were parties. Id. Here, there is no risk of double liability because the Insureds are not parties. However, even if the Insureds were UPCIC's coplaintiffs in this action there would be no risk of double liability because the Appellants are the prevailing parties entitled to attorney's fees—not UPCIC and the Insureds.