DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

NAPLES ESTATES LIMITED PARTNERSHIP,

Appellant,

v.

ROGER GLASBY,

Appellee.

No. 2D20-1351

December 29, 2021

Appeal from the Circuit Court for Collier County; Joseph G. Foster, Judge.

Jody B. Gabel and J. Allen Bobo of Lutz, Bobo & Telfair, P.A., Sarasota, for Appellant.

Donald E. Christopher of Baker Donelson Bearman Caldwell & Berkowitz, PC, Orlando, for Appellee.

CASANUEVA, Judge.

The appellant, Naples Estates Limited Partnership, owns the Naples Estates Mobile Home Park. It instituted an action for

damages based upon a claim for unpaid rents. Following a bench trial, Naples Estates was awarded damages of $20,130.00 and now asserts on appeal that the damage award was insufficient. Naples Estates asserts that an additional award of $4,747.42 is due it.

PROCEDURAL HISTORY

On July 22, 2015, the underlying action was commenced in the county court upon the filing of a complaint for eviction and for damages. Subsequently, the case was transferred to the circuit court for further proceedings, including a bench trial, by order dated November 4, 2019.

For purposes of the issues raised in this appeal the relevant allegations are set forth:

> 4. Pursuant to an oral rental agreement and the Prospectus for Naples Estates Mobile Home Park attached hereto as Exhibit "A" (the "Prospectus"), OWNER, as landlord, leased to DEFENDANTS, as tenants, Lot #83 in the Community (the "Lot").
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> 5. Collier Case No. 07-4646-CA, Naples Estates Limited Partnership v. Naples Estates Homeowners' Association, Inc. (the "Rent Class Action") is a related class action proceeding addressing the reasonableness of the lot rental amounts charged by OWNER for the annual rental term beginning May 1, 2007. On June 21, 2013, an order was entered in the Rent Class Action requiring all residents of the Community who have contested the lot rental amount charged by OWNER and who have

refused to pay a portion of the monthly lot rental amount as defined in Section 723.003(2), Florida Statutes ("Disputed Rent"), to deposit the Disputed Rent into the court registry on or before September 9, 2013. A copy of the June 21, 2013 Court Order (the "Court Order") is attached hereto as Exhibit "B."

6. OWNER mailed a copy of the Court Order to the residents of Naples Estates on June 26, 2013. Ms. Terri Passaro, Community Manager for OWNER, executed an affidavit of service on June 26, 2013 attesting to the mailing process of the Court Order to the residents (the "Affidavit"). A copy of the Affidavit is attached hereto as Exhibit "C." The Affidavit confirms the mailing of the Court Order via the U.S. Postal Service and incorporates a copy of the bill for mailing, the documentation sent to the residents, and the bulk mailing address list for the residents.

7. DEFENDANTS have failed to deposit any of the disputed Rent into the Collier County Court Registry as required by the Court Order for the previous 48 months prior to the written demand dated June 29, 2015.

8. The total amount due and owing for DEFENDANTS' Disputed Rent pursuant to the Court Order for the previous 48 months prior to the written demand dated June 29, 2015 to the date of the filing of this Complaint is the amount of $4,747.42. Lot rental will continue to accrue at the May 1, 2007 rental rate of $610.00 per month during the pendency of this action.

. . . .

COUNT I: EVICTION

14. A written demand for payment of lot rental amount dated June 29, 2015 (the "Demand") was sent on behalf of OWNER to DEFENANTS on June 29, 2015. A

> copy of the Demand and return receipt(s), if any, is attached hereto as Exhibit "D." DEFENDANTS' default has continued for more than five (5) days after delivery to DEFENDANTS of the Demand by OWNER.
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> . . . .
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> **COUNT II: DAMAGES**
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> 19. OWNER claims the amount of $4,747.42 as being due and owing for the Disputed Rent and/or damages from DEFENDANTS to the date of filing of this Complaint, and all rent and damages accruing to OWNER up to the date a final judgment in this cause is entered, plus reasonable attorneys' fees and court costs pursuant to Section 723.068, Florida Statutes.
>
> 20. As a result of DEFENDANTS' failure to pay, owner has been damaged.

Mr. Glasby filed an answer and enumerated affirmative defenses. Mr. Glasby denied the allegations set forth in paragraphs four and five. In further response to the allegations contained in paragraph five, he asserted that "GLASBY is not a party to the referenced legal action, was not served with any Court Order, and that action has never been afforded class status." Further, he denied the primary allegations set forth in the eviction count and damage count.

Additionally, Mr. Glasby asserted ten affirmative defenses. Because of their importance to the issues framed in this appeal, the following affirmative defenses are set forth as follows:

Eighth Affirmative Defense

WAIVER AND ESOPPEL

> Defendant GLASBY paid rent each month to Plaintiff up through and including the month of June 2015. Plaintiff accepted each and every one of those payments without objection, reservation, or exception. Having accepted payments for those months without question, Plaintiff is now estopped to claiming any additional rent is due for those months.

Ninth Affirmative Defense

FUTURE RENT PAYMENTS

> Assuming arguendo that the order in the Rents Case is valid and enforceable, it does not obligate Defendant GLASBY to pay the 46% increase in rent from July 1, 2013 going forward. The order in the Rents Case merely orders the payment into the court registry of the difference between what a resident may have paid monthly since May 1, 2007 and six hundred ten dollars. The order is silent regarding the payment of any rent increase Plaintiff might seek to impose after June 21, 2013, the date of the entry of the order.

DISCUSSION

At the outset it must be noted that the trial court did not afford this court the benefit of its factual or credibility findings.

Although there is no strict requirement that trial courts make written findings of fact, in some instances, most often when findings are required by legislative mandate, the lack of such findings could result in a remand for such findings. *See S.L.V. v. Toth*, 268 So. 3d 801, 803 (Fla. 4th DCA 2019); *Trump Endeavor 12, LLC v. Fla. Pritikin Ctr. LLC*, 208 So. 3d 311, 312 (Fla. 3d DCA 2016).

Having recognized that neither the record on appeal nor the final judgment entered by the trial court identify its findings of fact, we are required to apply the traditional rules that govern this court's review of the trial proceedings. We now set forth the rules that guide our determination in this instance.

First, "[i]n appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). Or stated differently, "the burden is on the appellant to make reversible error appear." *Snowden v. Wells Fargo Bank*, 172 So. 3d 506, 507 (Fla. 1st DCA 2015) (quoting *Pan. Am. Metal Prod. Co. v. Healy*, 138 So. 2d 96 (Fla. 3d DCA 1962)).

The second rule has been articulated by this court. "A fundamental principle of appellate procedure is that an appellate court is not empowered to make findings of fact." *Farneth v. State,* 945 So. 2d 614, 617 (Fla. 2d DCA 2006).

> It is the function of the trial court to evaluate and weigh the testimony and other evidence in order to arrive at findings of fact to which the rules of law are then applied. The appellate court has no opportunity to observe the witnesses and thereby to judge their credibility. For this and other good reasons certain rules of review have been formulated that define and limit the appellate function.

Oceanic Int'l Corp. v. Lantana Boatyard, 402 So. 2d 507, 511 (Fla. 4th DCA 1981). Further, "it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court." *Id.* (quoting *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976)).

The third rule is that, generally, the burden of proof in a civil action is the preponderance or greater weight of the evidence. *Hack v. Janes*, 878 So. 2d 440, 444 (Fla. 5th DCA 2004). In its strict sense, the burden of proof "is the duty of establishing the truth of a given proposition. In civil litigation, this burden is discharged by the production of a preponderance of the evidence and does not shift during the course of a trial." *In re Ziy's Estate*, 223 So. 2d 42,

43 (Fla. 1969). Further, "the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails." *Id.* (quoting *Ala. Great S. R.R. Co. v. Hill*, 43 So. 2d 136, 137 (1949)); *see also Villa Bellini Ristorante & Lounge, Inc. v. Mancini*, 283 So. 3d 972, 980 (Fla. 2d DCA 2019) (citing *Arthur v. Unkart*, 96 U.S. 118, 122 (1887) ("The burden of proof is upon the party holding the affirmative of the issue."); *Meneses v. City Furniture*, 34 So. 3d 71, 73-74 (Fla. 1st DCA 2010) ("As a rule, the burden of persuasion is with the party who initiates the proceeding, and remains with that party to establish the material elements of recovery.").

Applying the third rule first, in this instance Naples Estates, as the plaintiff in the trial court proceeding, carried the burden of proof to establish the truth of its material element of damages. Unless and until its burden was met, the trial court does not consider the affirmative defenses pled by Mr. Glasby. "An affirmative defense is a defense which admits the cause of action, but avoids liability, in whole or in part, by alleging an excuse, justification, or other matter negating or limiting liability." *State*

Farm Mut. Auto. Ins. Co. v. Curran, 135 So. 3d 1071, 1079 (Fla. 2014) (quoting *St. Paul Mercury Ins. Co. v. Coucher*, 837 So. 2d 483, 487 (Fla. 5th DCA 2002)). To determine whether the appellant's proof carried the day, it is the finder of fact that measures the evidence. "It is the role of the finder of fact to resolve conflicts in the evidence and to weigh the credibility of witnesses." *Porzio v. Porzio*, 760 So. 2d 1075, 1076 n.1 (Fla. 5th DCA 2000). Here, as the proceeding was a bench trial, the trial court is the finder of fact.

The focus of this appeal is not upon the $20,130.00 awarded to Naples Estates but rather the denial of its claim for an additional $4,747.42 of damages; we defer, as we must, to the trial court's superior vantage point.

During Naples Estates' presentation of evidence, it sought to admit a statement of the balance due as exhibit four, which alleged "[a]dditional rent owed after September 2015 demand notice." The trial record reflects the trial court's knowledge and understanding of the document as well as its relationship to the damage claim of $4,747.42. The court determined the document was legally admissible but that its admissibility did not prohibit argument regarding its accuracy. "You have an argument about what the

ultimate decision of the document is, and I have no problem with that."

During cross-examination of Naples Estates' sole witness, evidence pertinent to the damage claim was adduced. When examined regarding the September 2015 demand notice, the witness conceded that there was no such notice. The only notice the witness located was dated June 29, 2015, which predated the commencement of the instant action on July 22, 2015, and preceded the August 5, 2016, deposit order of the county court judge then assigned to this matter.[1] The witness speculated that the erroneous date "must have been a typo" and that the figures that were set forth would have started in July.

When asked whether the amount set forth in the deposit order included the amount claimed of $4,747.42, Naples Estates' witness testified: "I don't know." When asked if Mr. Glasby had paid the

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[1] The deposit order required the deposit of $5,297.42 into the court registry and represented "the amount of rent demanded in the Plaintiff's five day notice, plus monthly rental from the date of filing the Complaint through August 31, 2016 at the rate of $610 per month, less all amounts paid by the Defendant into the Court Registry in this action."

monthly fee of $610 per the deposit order the witness answered: "I do not know if he paid that into the court registry." The witness pointed out that she did not have access to that information.

The trial court, on the record before it, concluded that the evidence supported an award of damages and was well within its authority to conclude on the same record that the evidence did not satisfy or meet the necessary burden of proof to sustain a further award.

It is next necessary to address the dissenting opinion. We do so in the context of the rules identified earlier.

First, the dissenting opinion states that the "trial testimony established Mr. Glasby owed back due rent in the amount of $4,747.42." This may well be a proper reading of the trial record, but it is not this court's reading that is dispositive. It is the reading afforded by the trial court. Both the majority and the dissent have noted that the trial court did not make any factual findings on record. This court, as noted above, must follow the appellate rule that precludes us from fact finding. Simply, it is not our role. By establishing on appeal that Mr. Glasby owed Naples Estates back due rent, we would, as did the dissenting opinion, make at least two

assumptions: first, that the trial court found the testimony of Naples Estates' witness credible in all regards, and second, that it satisfied the burden of proof carried by Naples Estates. We are unable to make those assumptions. As earlier noted, the record establishes concerns regarding the witness's testimony. Those matters, if perceived by the trial court as concerns, must be resolved by it, not by this court sitting in review.

Next, the dissenting opinion observes "that the trial court appears to have awarded this $4747.42 to Mr. Glasby based on his affirmative defense" of waiver.

We are well aware of the old adage that "appearances can be deceiving," but in this instance it is not necessary for our determination. Instead, we must note that the amount in controversy was not awarded to Naples Estates. In reaching that determination, it is probable that the trial court did not find Naples Estates' evidence to be satisfactory proof. Similarly, there is no affirmative indication that the trial court considered and applied the affirmative defense in making the determination to reduce the amount of damages awarded.

Previously, we observed that the appellate process requires that, in this instance, Naples Estates make a clear showing of the presence of reversible error. There, the claim of error is one of fact, not law. Naples Estates asserts it has factually established that the claimed amount of damages was proven and the facts before the trial court did not prove the asserted affirmative defense. Yet, it cannot cite to the record to support its assertion. Rather, there are no findings of fact made by the trial court to support either of its factual assertions. Instead, the final judgment entered by the trial court awards an amount in damages that does not include the amount now claimed by Naples Estates. Implicitly, the trial court ruling determined that the testimony presented did not prove entitlement to an award of damages.

Simply stated, we are asked to determine that Naples Estates' evidence was sufficient to prove its claim. We are asked to do so in an instance where the cross-examination of its sole witness may have, in the eyes of the trial court, caused doubt as to its weight as well as to its credibility.

We are without the power and authority on the record before us to make the factual findings necessary to first, find Naples

Estates proved its claim, and second, find the facts did not establish appellee's affirmative defense. Even if we were to accept Naples Estates' invitation to find that the affirmative defense failed, it would not factually establish that Naples Estates successfully proved its damage claim.

Therefore, the presumption of correctness afforded to the trial court remains intact.

Without the necessary clarity provided by either trial court findings of fact or an unambiguous record, Naples Estates fails to make clear that reversible error occurred. Therefore, we conclude Naples Estates has not and cannot establish the presence of reversible error and, as important, cannot do so without this court becoming the fact finder.

Our last matter for discussion is whether *Florida Insurance Guaranty Ass'n v. Maya*, 162 So. 3d 1118 (Fla. 2d DCA 2015), compels this court to reach a different result. We do not conclude that it does.

In *Maya*, this court was asked to decide whether "the Mayas waived any entitlement to appraisal based upon their litigation activities." *Id.* at 1120. Thus, this court focused on whether the

record established that the Mayas, who sought appraisal, waived that right by actively participating in the pending lawsuit or by engaging in conduct that was inconsistent with the contractual right of appraisal.

We note that this court's opinion contained a section entitled, "THE FACTUAL AND PROCEDURAL BACKGROUND." *Id.* at 1119. In that section, the facts, unlike here, were set forth with clarity.

This court set forth the following rule: "Where, as in this case, the trial court made no findings of fact or law with regard to the question of waiver, we apply the relevant law to the facts in the record." *Id.* at 1120.

As further developed, the opinion in a parenthetical observed, "Here, while the trial court made no findings of fact on the issue of waiver, *the facts are not in dispute.* Therefore, we review the waiver issue de novo." *Id.* (emphasis added) (quoting *Fla. Ins. Guar. Ass'n v. Branco*, 148 So. 3d 488, 493 (Fla. 5th DCA 2014)).

We must observe that the record before this court does not establish that the trial court, in fact and in law, ruled upon the affirmative defense of waiver. Rather, the record, as previously noted, suggests that the trial court was concerned regarding the

proof presented to establish the amount allegedly due to Naples Estates. A reading of the trial court's comment to counsel strongly suggests an invitation to argue the issue in closing. Again, this conclusion must be qualified by the lack of findings presented here.

The trial court necessarily would have had to determine that Naples Estates had satisfied its burden of proof before determining whether Mr. Glasby had carried his burden of establishing the affirmative defense. This record does not establish that this occurred. This record lacks the clear factual record presented in *Maya.* Without such a record of proceedings we conclude that *Maya* does not apply here.

Affirmed.

LUCAS, J., Concurs.
STARGEL, J., Dissents with opinion.

STARGEL, Judge, Dissenting.

The trial record is clear that Naples Estates met its burden to establish the amount owed, and the trial court failed to award Naples Estates the rent due as of the filing of the complaint in the amount of $4,747.42, while awarding Naples Estates the rent that accrued during the litigation without making any factual findings to support its failure to award the back due rent. This Court recently addressed an almost identical issue in *Naples Estates Limited Partnership v. Muston*, 46 Fla. L. Weekly D2018 (Fla. 2d DCA Sept. 10, 2021). The cases were actually tried the same morning before the same judge, and the same witness testified for Naples Estates below. I find the rationale of that case compelling and note that there are no significant distinguishing facts in the present case.[2] I respectfully dissent.

[2] The majority highlights a dialogue on cross-examination regarding Exhibit 4 and the subheading in the document that states: "Additional Rent due after September Demand Notice." The witness admitted that the word "September" was a typo and that the list of amounts then due began by listing July and August rent.

Without delving into a detailed history of the proceedings related to this case, a brief overview of the related litigation is necessary to understand this appeal. Naples Estates owns the Naples Estates Mobile Home Park in Naples, Florida. Naples Estates substantially raised the rent charged for all mobile home lots effective May 1, 2007. Counsel for the mobile home park association, Naples Estates Homeowners' Association, Inc., sent a letter to Naples Estates asserting that the increase in rent was not permitted by the leases and was retaliatory and, as such, the individual homeowners affected by the rent only would be paying $391.32 and $399.58 per month in rent to Naples Estates instead of the $600 and $610 per month that Naples Estates attempted to charge.

Exhibit 1 was the actual notice and is clearly dated June 29, 2019, and set forth the demand for $4,747.42. It is significant to note that had these amounts been inaccurate, it would have affected the amount of postfiling rent due—the amount actually awarded by the trial court—since the listed amounts under that heading were for the amounts due after the demand notice. The demand amount, which statutorily must predate the filing and thus could not have started with September, is clearly listed in the line above the typo and states: "Amount owed per the Demand Notice July 2011-July 2015 . . . $4747.42."

Naples Estates then brought suit against the Homeowners' Association as class representatives of the residents of the mobile home park who were affected by the increase in lot rent (the rent case). In that litigation, Naples Estates moved the trial court to order the homeowners who refused to pay the increased amount of rent to pay this disputed amount into the court registry. The court in the rent case then ordered the "Participating Homeowners" to pay the difference between what the homeowner had paid Naples Estates and either $600 or $610, depending on their leased lot, since May 1, 2007, into the court registry by September 9, 2013, pursuant to section 723.063, Florida Statutes (2007). While the term "Participating Homeowners" is not defined in the order, the court did characterize this term as "some homeowners of Naples Estates Mobile Home Park ("Participating Homeowners") represented by [the Homeowners' Association who] have contested the lot rental amount charged by [Naples Estates] and have refused to pay a portion of each Participating Homeowner's monthly lot rental amount as defined in [s]ection 723.003(2), Florida Statutes." The court in the rent case also held that the failure of any Participating Homeowner to timely make the deposit into the court

registry would result in the Participating Homeowner being in default of the order, subject to eviction, and deemed to have waived all defenses to an eviction proceeding other than payment. This court per curiam affirmed the rent case in *Naples Estates Homeowners' Ass'n v. Naples Estates Ltd. Partnership*, 137 So. 3d 385 (Fla. 2d DCA 2014) (table decision).

In the case at hand, Roger Glasby leased a lot in the mobile home park. It appears that Mr. Glasby began leasing a mobile home lot at some point prior to 2011 and stopped leasing a lot in March 2018. Mr. Glasby leased a lot for which Naples Estates had charged $610 per month in rent since 2007. In response to the rent case order requiring Participating Homeowners to deposit the disputed amount of rent into the court registry, Mr. Glasby deposited $9,573.88 into the court registry on September 9, 2013.

After making the court registry deposit, Mr. Glasby continued to pay less than $610 in monthly rent and did not make any additional deposits into the court registry between 2013 and summer 2015. Naples Estates issued Mr. Glasby a notice of demand for payment of the back due rent for the previous forty-eight months on June 29, 2015. Mr. Glasby did not make a deposit

into the court registry following receipt of the demand letter. Naples Estates then filed an eviction complaint seeking to evict Mr. Glasby and seeking back due rent in the amount of $4,747.42 plus all rent and damages accruing to Naples Estates up to the date that final judgment was entered in the cause.

Naples Estates initially filed the eviction case in county court, which ruled that the 2013 rent case order did not apply to Mr. Glasby and explicitly reserved ruling until after further hearing on Mr. Glasby's claim that Naples Estates waived the right to collect rents for all months prior to the filing of the complaint. The county court also ordered Mr. Glasby to deposit $5,297.42 into the court registry to account for (i) back rent due at the time of filing the complaint and (ii) rent accrued from the filing of the complaint through August 31, 2016. Finally, the county court ordered Mr. Glasby to pay $610 per month thereafter into the court registry during the pendency of the litigation. Mr. Glasby complied with this order. He vacated his lot in Naples Estates during March of 2018.

While the eviction count became moot once Mr. Glasby vacated his lot, Naples Estates still sought damages for back due

rent and rent that accrued during the pendency of the litigation until March 2018. The trial court held a brief trial where one witness testified, and the trial court took judicial notice of the rent case and other related litigation involving Naples Estates and the mobile home park. The office manager of the mobile home park testified that Mr. Glasby had not been paying Naples Estates $610 per month in rent during the period at issue in the case, but instead paid $494.10, $508.92, and $517.57 in rent per month, as applicable, at the recommendation of the Homeowners' Association in its newsletter. The office manager also testified that Naples Estates provided Mr. Glasby with a copy of the rent case order and that the total amount of accrued but unpaid rent was $24,877.42. No additional witnesses testified, and Mr. Glasby did not offer any evidence at trial.

In the final judgment, the trial court awarded Naples Estates the sum of $20,130, which was an amount equal to the unpaid lot rent for the period between the filing of the complaint on July 21, 2015, and March 2018. The trial court also directed any remaining amounts paid by Mr. Glasby into the court registry to be disbursed to Mr. Glasby. The trial court did not make any factual findings or

include any legal analysis in the final judgment, nor does it appear that the trial court made any factual findings on the record at trial. While the complaint asserted that Mr. Glasby owed back due rent in the amount of $4,747.42, and trial testimony established that Mr. Glasby underpaid this amount of rent to Naples Estates for the forty-eight month period prior to sending the demand letter, the trial court awarded this $4,747.42 to Mr. Glasby either (i) because Naples Estates did not meet its burden, which is not supported by the record; (ii) because Mr. Glasby was not a Participating Homeowner in the rent case, which is of no import because he was properly noticed of the increased rent amount; or (iii) based on Mr. Glasby's affirmative defense that Naples Estates waived its right to collect the full amount of monthly rent by accepting his monthly payments.

"In order for a waiver to occur there must be: (1) a right, privilege, or benefit that existed at the time of the waiver and which may be waived; (2) the actual or constructive knowledge of that right, privilege, or benefit; and (3) an intention to relinquish that right, privilege, or benefit." *Muston*, 46 Fla. L. Weekly at D2019; *see also Goodwin v. Blu Murray Ins. Agency, Inc.*, 939 So. 2d 1098,

1104 (Fla. 5th DCA 2006). "When a waiver is implied from conduct, the acts, conduct, or circumstances relied upon to show waiver must make out a clear case." *Fireman's Fund Ins. Co. v. Vogel*, 195 So. 2d 20, 24 (Fla. 2d DCA 1967). "The question of waiver is one of fact, reviewable for competent substantial evidence." *Drs. Assocs., Inc. v. Thomas*, 898 So. 2d 159, 162 (Fla. 4th DCA 2005). "Where, as in this case, the trial court made no findings of fact or law with regard to the question of waiver, we apply the relevant law to the facts in the record." *Fla. Ins. Guar. Ass'n v. Maya*, 162 So. 3d 1118, 1120 (Fla. 2d DCA 2015).

Mr. Glasby asserts that he was not a party to the rent case litigation, but he deposited $9,573.88 into the court registry on September 9, 2013, in compliance with the rent case order. As such, he clearly was aware no later than September 9, 2013, that Naples Estates was charging $610 per month in rent for his lot at the mobile home park. Following his payment into the court registry, he continued to pay less than the full amount of rent due per month and failed to make any additional payments into the court registry until this litigation commenced. Because he had an oral lease with Naples Estates, Mr. Glasby claims that the amount

he paid per month in rent is the best evidence of the amount of rent he was required to pay. However, this claim appears to be disingenuous as the rent amount being charged had been provided to all tenants during the rent case. Mr. Glasby then made the disputed rent payment into the court registry on September 9, 2013, with the amount of the deposit based on the difference between the actual amount of rent he had paid Naples Estates since May 1, 2007, and the amount he would have paid at a rate of $610 per month during the same timeframe. It appears he thereafter annually increased the amount he paid per month based on the amount recommended by the Homeowners' Association instead of paying the full amount of rent sought by Naples Estates.

While Naples Estates had the right to collect $610 per month in rent and was aware of this right for the forty-eight months prior to instigating the litigation, this appeal centers on whether Naples Estates intended to waive its right to collect the full amount of rent from July 2011 until filing the complaint.[3] *See Goodwin*, 939 So.

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[3] Naples Estates asserts that Mr. Glasby violated the rent case order by not paying the full $610 per month in rent or making additional monthly payments of disputed rent into the court

2d at 1104. Notwithstanding the fact that the county court explicitly stated that the court would hold an evidentiary hearing to determine if Naples Estates waived the right to collect back due rent and that Mr. Glasby also raised this issue in his written closing argument, the trial court made no factual findings or legal conclusions regarding Naples Estates' possible waiver of the past due rent for the period of time prior to filing the complaint. Given the trial court's failure to make any legal or factual findings regarding Naples Estates' possible waiver, this court is to apply the relevant law to the limited facts in the record. *See Fla. Ins. Guar. Ass'n.,* 162 So. 3d at 1120.

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registry prior to this litigation and is therefore prevented from asserting any defense other than payment under the terms of the rent case order and section 723.063(2); however, it appears that the terms of the rent case order merely required the accrued disputed rent to be deposited into the court registry and did not contemplate Participating Homeowners making monthly deposits of the amount of disputed rent into the court registry thereafter during the pendency of the litigation. *But cf. Poal Wk Taft, LLC v. Johnson Med. Ctr. Corp*, 45 So. 3d 37, 38 (Fla. 4th DCA 2010) (holding that a landlord was entitled to an immediate writ of possession where a tenant failed to timely make monthly payments into the court registry during an ongoing landlord-tenant dispute when the trial court had previously ordered the tenant to pay rent into the court registry and "to continue to do so until further Court Order on a monthly basis").

In this situation, I do not believe the facts support a determination that Naples Estates affirmatively waived its right to collect the full $610 per month for rent during the four-year period prior to filing the litigation. Naples Estates instigated litigation in November 2007 against the Homeowners' Association as class representative asserting it had a right to collect $610 per month for lots similar to the one rented by Mr. Glasby and $600 per month for the other lots. On December 12, 2012, Naples Estates moved the trial court in the rent case to require the mobile home lot renters to deposit the disputed amount of rent into the court registry. Following the rent case order requiring Participating Homeowners to deposit the accrued disputed rent into the court registry, Naples Estates sent Mr. Glasby a copy of this order on or before June 28, 2013. On June 29, 2015, Naples Estates issued Mr. Glasby a demand for payment for the disputed rent accruing between July 2011 and June 2015. Following Mr. Glasby's failure to comply with the demand, Naples Estates filed the instant litigation on July 21,

2015.[4] Naples Estates put forth sufficient evidence to support both its claim for predemand and postdemand rent. Competent, substantial evidence does not exist to support Mr. Glasby's assertion that Naples Estates has clearly waived its right to the unpaid rent accrued as of the filing of this litigation. *See Drs. Assocs., Inc.*, 898 So. 2d at 162. As such, I believe the trial court erred in failing to award Naples Estates the $4,747.42 in accrued rent due as of the filing of the complaint.

Accordingly, I dissent.

Opinion subject to revision prior to official publication.

[4] Naples Estates filed this litigation a little over a year after this court issued the mandate in the rent case on May 7, 2014. There is nothing in the record that supports a waiver to collect disputed rent that was not paid to Naples Estates between 2011 and 2015.