Florida Real Property and Business Litigation Report

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Manuel Farach

Fernandez v. Manning Building Supplies, Inc., Case No. 1D18-4819 (Fla. 1st DCA 2019).
A charge for late payment on an account is a delinquency charge, not a "finance charge" which permits a lienor not in privity to charge interest under Florida Statute section 713.06(1). Accordingly, prejudgment interest may not be awarded for this claim.

Fernandez v. Marrero, Case No. 3D16-2931 (Fla. 3d DCA 2019).
The payment by one party of the down payment and closing costs for the purchase of real estate with the subsequent titling of the property as joint tenants with right of survivorship creates a presumption of a gift to the non-paying party, unless the contributing party manifests an intention that a resulting trust should arise.

Bejarano v. City of Hollywood, Case No. 4D18-2613 (Fla. 4th DCA 2019).
Several tenants' claims (each less than $15,000 individually) cannot be aggregated to reach the circuit court monetary threshold; accordingly, their combined case must be transferred to county court.

Sherman v. Sherman, Case No. 4D18-3578 (Fla. 4th DCA 2019).
The standard used to determine an award of court costs under Florida Statute section 57.041(1) is the "party recovering judgment" and not the "prevailing party" standard.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4819

COURTNEY M. FERNANDEZ and
ELLIS T. FERNANDEZ,

Appellants,

v.

MANNING BUILDING SUPPLIES,
INC.,

Appellee.

On appeal from the Circuit Court for Duval County.
Waddell A. Wallace, Judge.

September 25, 2019

BILBREY, J.

Courtney M. and Ellis T. Fernandez challenge a judgment foreclosing on a construction lien and awarding attorney's fees and costs. We find no error in the award of attorney's fees and costs and affirm that award without further comment. However, we find merit in the argument that the trial court erred in its determination of the interest recoverable on the principal amount of the lien, and therefore, we reverse that part of the judgment.

A construction lien was filed by Manning Building Supplies, Inc., on the residential property owned by the Fernandezes. Manning entered into a contract with the general contractor hired

by the Fernandezes to supply materials to be used in a renovation of the residence. Manning was not paid so it filed a lien against the property and filed suit against the contractor as well as the Fernandezes. The trial court granted a partial summary judgment on the lien foreclosure count of Manning's complaint. The trial court thereafter determined that Manning was entitled to collect $24,157.64 in principal from the Fernandezes plus interest at the rate of 18% per year. The trial court determined a rate of 18% was required because the contract between Manning and the contractor provided that a monthly fee of 1.5% of the contract balance would be owed if payment was not timely made on a monthly basis.

The contract provides in pertinent part:

> 1. Payment of all sums due hereunder are due and payable in DUVAL County, Florida. CUSTOMER agrees that all invoices are due upon receipt with the following terms: Net 10th of the month following month of purchase I/We submit to Manning Building Supplies, Inc. I/We agree to make payment to MBS on or before the tenth (10th) day of the month following date of purchase. **I/We understand that a delinquent account will cause credit to be suspended and a 1-1/2% monthly delinquent charge to be added, plus any attorney's fees, and/or court costs necessary to collect this account, all of which I/We agree to pay**. Proper venue shall be in DUVAL County, Florida. Accounts are considered delinquent on the fifteenth (15th) day of the month following purchase and finance charges will be added on the last day of the month following purchase. . . . **CUSTOMER agrees to pay SELLER interest, including post judgment interest, at the highest rate allowable by law on all sums not timely paid** and hereby submits to the jurisdiction of the courts of the State of Florida, whose laws govern this Agreement.

(Emphasis added). The monthly 1.5% charge was annualized by the trial court to be 18%.

Section 713.06(1), Florida Statutes (2018), specifically authorizes a lien on real property for a materialman or laborer "not

in privity" with the owner of real property for unpaid services or materials and "for any unpaid finance charges due under the lienor's contract."* Chapter 713 does not define the term "finance charge."

However, other areas of Florida Statutes distinguish between delinquency and finance charges. For example, Chapter 687, Florida Statutes (2018), pertaining to usury, interest, and lending practices provides:

> (c) Notwithstanding any other provision of this section, **any** lessor or **merchant**, or any person **who** lends money or **extends any other form of credit, who is regularly engaged in the business of selling or leasing merchandise, goods**, or services which are for other than personal, family, or household purposes, or any assignee of such lessor, merchant, or person who lends money or extends any other form of credit, who is the holder of a commercial installment contract, each of which persons or entities is subject to the laws of any jurisdiction of the United States, any state, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession of the United States, **may, if the contract so provides, charge a delinquency charge on each installment which is in default for a period of not less than 10 days in an amount not in excess of 5 percent of such installment**. However, only one such delinquency charge may be collected on any installment, regardless of the period during which it remains in default. **A delinquency charge imposed pursuant to this paragraph shall not be deemed interest or a finance charge made incident to or as a condition to the grant of the loan or other extension of credit and shall not be included in determining the limit on charges, as provided by**

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* Manning does not contend that the Fernandezes were in privity. Thus, any recovery by Manning can only be as allowed by statute and not based on Manning's contract with the general contractor.

> **this section, which may be made in connection with the loan or other extension of credit as provided by law of this state**.

§ 687.03(2)(c), Fla. Stat. (Emphasis added).

Distinguishing between a delinquency charge and a finance charge is also consistent with Chapter 520, Florida Statutes, which regulates retail installment sales and financing of retail installment sales. This chapter defines a finance charge as "the cost of consumer credit as a dollar amount." § 520.02(6), Fla. Stat. (2018). The statute further provides that the "term 'finance charge' includes any charge payable directly or indirectly by the buyer and imposed directly or indirectly by the seller as an incident to or a condition of the extension of credit." *Id.*; *see also* 15 U.S.C. § 1605(a) (defining finance charge for consumer credit as the sum of all charges "imposed directly or indirectly by the creditor as an incident to the extension of credit"). Here, had timely payment been made no additional cost would have been imposed by the Manning contract.

While Manning's contract with the general contractor called the 1.5% delinquency charge a "finance charge," a late payment fee is not a "finance charge" as that term is generally understood. In addition to the Florida Statutes discussed above, the difference between a finance charge and delinquency fee is recognized by *Black's Law Dictionary* (10th ed. 2014) which defines a "finance charge" as "[a]n additional payment, usu. in the form of interest, paid by a retail buyer for the privilege of purchasing goods or services in installments." As such, a finance charge is the cost of credit — not the cost of paying late. The 1.5% fee required by the Manning contract is to be paid only upon default; it is not a cost of credit per se. Thus, as it is not a finance charge as that term is understood generally, the trial court erred in assessing interest at a rate of 18% against the Fernandezes.

Accordingly, that part of the judgment awarding interest at a rate of 18% is reversed, and the cause is remanded for an award of interest at the statutory rate. In all other respects, the judgment and award of attorney's fees and costs are affirmed.

AFFIRMED in part, REVERSED in part, and REMANDED.

WOLF, J., concurs; RAY, C.J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

RAY, C.J., dissenting.

I respectfully dissent from the majority's conclusion that the delinquency charge authorized by contract is not a finance charge recoverable under the materialman lien statute. I would affirm the final order in full.

Under the lien statute, the amount of the lien of a materialman not in privity with the property owner includes "any unpaid finance charges due under the lienor's contract." § 713.06(1), Fla. Stat. Here, the credit agreement between the materialman (Manning Building Supplies, Inc.) and the general contractor called for a 1.5% monthly delinquency charge if the account was not paid on time. It further provided that the finance charge would be assessed on the delinquent account on the last day of the month following purchase.

I am not persuaded that the 1.5% delinquency charge is anything but a finance charge as that term is used in both the contract and statute. As explained by the trial court, the context of this business transaction assumes a preexisting failure to make timely payments for the building materials supplied on credit. The contract states that the materialman is entitled to X if paid on time, and X + 1.5% per month if not paid on time. While labeled interchangeably as a delinquency charge and a finance charge, the 1.5% assessment refers to the additional charge incurred—as a condition of the extension of credit—for amounts past due. Nothing in Florida's construction lien laws distinguishes this type of charge from the statutorily undefined "finance charge."

Because the construction lien laws are designed in part "to protect suppliers who furnish labor or materials to the property by assuring them of full payment," *Stunkel v. Gazebo Landscaping Design, Inc.*, 660 So. 2d 623, 626 (Fla. 1995), I would affirm the trial court's decision to include interest on the outstanding principal balance at the annual rate of 18% per year as provided in the credit agreement.

E.T. Fernandez, III, of Fernandez Trial Lawyers, P.A., Jacksonville, for Appellants.

Charles B. Jimerson and James O. Birr, III, of Jimerson & Cobb, P.A., Jacksonville, for Appellee.

Third District Court of Appeal

State of Florida

Opinion filed September 25, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2931
Lower Tribunal No. 15-10845

Jorge Alfonso Fernandez,
Appellant,

vs.

Romena Marrero,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, John Schlesinger, Judge.

Alvin Goodman P.A., and Ilene F. Tuckfield, for appellant.

Jorge A. Fernandez; Matthew E. Ladd, for appellee.

Before SALTER,[1] FERNANDEZ, and LINDSEY, JJ.

LINDSEY, J.

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[1] Judge Salter did not participate in oral argument.

Appellant Jorge Alfonso Fernandez ("Fernandez") appeals a final judgment[2] of partition entered following a non-jury trial. For the reasons set forth below, we affirm.

I. BACKGROUND

Fernandez and Romena Marrero ("Marrero") began dating in January of 2013. They moved in together in June 2013. Thereafter, in December 2013, the parties moved into a house ("the property") that they ultimately purchased. The parties were permitted to move in prior to the closing because Fernandez knew the owner. During this time, Fernandez made several repairs and improvements to the property, including, but not limited to, lawn care and the replacement of a fence. The closing took place on March 25, 2014. Fernandez paid the down payment and closing costs. The parties purchased and titled the property as joint tenants with rights of survivorship.

Since the closing, Fernandez has paid all the mortgage payments without contribution from Marrero. After the closing, Fernandez incurred expenses to repair

[2] An Agreed Order on Plaintiff's Motion for Rehearing was filed in this Court on September 6, 2017. While we recognize that the Order purports to amend the Final Judgment, for present purposes, and as reflected in this opinion, the substance of the same does not change or affect the disposition of this case.

the property, to reduce the principal balance of the mortgage, and to pay for taxes and insurance. The parties ended their relationship on or about March 10, 2015—less than one year after the closing. Marrero moved out shortly thereafter and filed the underlying action. In her one count complaint, Marrero sought partition of the property.

While Fernandez conceded that Marrero was entitled to partition, Fernandez argued that he should receive credit for the down payment and closing costs, as well as expenses that he incurred before and after the closing. In support of his claim, Fernandez contends that he only purchased the property with Marrero as joint tenants with rights of survivorship because his credit score was not high enough for him to qualify for a loan on his own. In furtherance of this theory, Fernandez testified that Marrero had agreed to sign over her interest in the property after the first year of ownership. Thereafter, it was his intention to refinance the loan on his own. Fernandez further testified that the only reason he chose to title the home as a joint tenancy with rights of survivorship was because he did not want the property to escheat to the state upon his death. In his view, the purchase of the property was a business transaction and not a product of his relationship with Marrero.

Marrero, on the other hand, testified that they purchased the property because they had plans to start a family and that Fernandez never asked her to sign any kind

of contract or promissory note that would support his position that the purchase of the property was merely a business transaction.

Nidia Lopez ("Lopez"), the title/closing agent, also testified at the trial. Lopez testified that, prior to the closing, she explained to Fernandez that he and Marrero could take title as joint tenants with right of survivorship or as tenants in common. She further explained the differences between the two tenancies, as well as the implications of taking title as joint tenants with rights of survivorship. Specifically, she explained that upon Fernandez's death, his half would automatically go to the other joint tenant—in this case, Marrero. By contrast, she explained that if they acquired the property as tenants in common, Fernandez's heirs would inherit his half upon his death. Lopez testified that, following her explanation, Fernandez elected to take title as joint tenants with a right of survivorship.

After a day-long bench trial the trial court made its findings, focusing on the following three categories: (1) down payment and closing costs; (2) pre-closing expenses; and (3) post-closing expenses. The trial court concluded that Fernandez was not entitled to any credits for the down payment and closing costs. The trial court also declined to award Fernandez a credit/reimbursement for pre-closing expenditures. However, following O'Donnell v. Marks, 823 So. 2d 197, 199 (Fla. 4th DCA 2002), the trial court ordered Marrero to reimburse Fernandez for his post-

closing expenditures. Lastly, the trial court ordered that the property be sold by way of a private sale. This timely appeal followed.

II. STANDARD OF REVIEW

We review a trial court's factual findings for competent substantial evidence. Griffin Indus., LLC v. Dixie Southland Corp., 162 So. 3d 1062, 1066-67 (Fla. 4th DCA 2015).

III. ANALYSIS

As indicated above, the expenses claimed by Fernandez fall into three categories. The amounts at issue are contested, and the record is somewhat unclear as to what was sought with respect to each category and what was actually awarded. For the reasons that follow, we affirm the trial court's findings as to the down payment/closing costs, the pre-closing expenses, and the post-closing expenses.

In a partition proceeding, there must be an accounting to determine whether each co-tenant has paid his or her proportionate share of the expenses of the property, and to adjust the co-tenants' accounts accordingly. Santos v. Santos, 773 So. 2d 568, 570 (Fla. 3d DCA 2000) (citing Biondo v. Powers, 743 So. 2d 161, 164 (Fla. 4th DCA 1999)); Kail v. Supernant, No. 8:15-cv-2719-T-27TGW, 2017 U.S. Dist. LEXIS 105043 (M.D. Fla. July 7, 2017) ("After the right to partition by sale is established, a two-step analysis is undertaken to: (1) determine each owner's percentage of ownership, and (2) calculate the proportionate share owed to each

owner from the proceeds of a partition for reimbursable investments.")(citing Biondo, 743 So. 2d at 163-64); O'Donnell, 823 So. 2d at 199 (same).

As to the first step, the trial court found that Marrero and Fernandez each hold an "undivided one half (1/2) interest in [the Property] in fee simple." In other words, each party owns an undivided 50% interest in the property. As to the second step, Florida courts have held that co-tenants have a mutual obligation to pay charges upon the co-owned property, including mortgage payments, insurance, taxes, and necessary repairs. The equity of one party should not be increased by the expenditures of the other. Biondo, 743 So. 2d at 164 (citing Singer v. Singer, 342 So. 2d 861 (Fla. 1st DCA 1977); Waskin v. Waskin, 346 So. 2d 1060 (Fla. 3d DCA 1977)). For this reason, "a cotenant paying [the] obligations of the property is entitled to a credit from the proceeds of the sale for the other cotenant's proportionate share of those expenses." Id. (citing Goolsby v. Wiley, 547 So. 2d 227 (Fla. 4th DCA 1989); Gerver v. Stein, 490 So. 2d 1331 (Fla. 3d DCA 1986)).

A. Down Payment/Closing Costs

In determining that Fernandez is not entitled to a credit for the down payment and closing costs, the trial court relied on O'Donnell, 823 So. 2d at 198. In O'Donnell, the Court found that "[w]here a transfer of property is made to one person and the purchase price is paid by another a resulting trust arises in favor of the person by whom the purchase price is paid." Id. (citing Restatement (Second) of

Trusts § 440 (Am. Law Ins. 1959)). "However, '[a] resulting trust does not arise where a transfer of property is made to one person and the purchase price is paid by another, if the person by whom the purchase price is paid manifests an intention that no resulting trust should arise.'" Id. (citing Restatement (Second) of Trusts § 441). Comment e to section 440 of the Restatement (Second) of Trusts states, in part:

> *The fact that the payor takes title to property in the name of himself and another jointly is an indication of an intention of the payor to make a beneficial gift of an undivided interest in the property to the other person*; and in the absence of evidence of a different intention of the payor, the other person does not hold his interest upon a resulting trust for the payor. This is true whether the transfer was made to the payor and the other person as joint tenants or tenants in common.

(Emphasis added).

In O'Donnell, the appellee purchased a property in Jupiter, Florida using his own individual funds. 823 So. 2d at 198. However, the property was then deeded to the appellant and appellee as joint tenants with rights of survivorship. Id. Under those facts, the trial court found that the parties each held an undivided one-half interest in fee simple. Id. On appeal, the Fourth District held that the warranty deed, by which the parties took title as joint tenants with rights of survivorship, was consistent with the presumption of a gift from the appellee to the appellant from the language of the deed. Id. at 199.

Here, as in O'Donnell, an unmarried couple took title to the property as joint tenants with rights of survivorship, and the down payment and closing costs were paid only by one party. Further, there is competent substantial evidence in the record to establish that the parties had been in a relationship for years and that they had discussed moving into the house to start a family and get married. Moreover, nothing in the record suggests that the purchase of the property was a business transaction or a loan. Accordingly, the instant facts likewise create the presumption of a gift from Fernandez to Marrero. See id. The testimony of Lopez, referenced above, supports this presumption, as does the testimony of Marrero that the home was purchased because they were in love and had plans to start a family together.

B. Pre-Closing Expenses

Fernandez's contention that he expected to be reimbursed for the pre-closing expenses is likewise uncorroborated, and was rebutted by Marrero's testimony as follows:

> **Attorney Fernandez**: Did Mr. Fernandez ever ask you to execute an agreement or a promissory note for 50 percent of the funds that he spent?
>
> **Ms. Marrero**: No.
>
> **Attorney Fernandez**: To close on the property or to improve it before or afterwards?
>
> **Ms. Marrero**: No, he didn't.

> **Attorney Fernandez**: Did you have any agreement with him in which you were to buy the house, then sell it, and upon the sale of the house from the sales proceeds, he would be reimbursed of [sic] expenses that he paid at closing and to improve or repair the house; did you have any such agreement?
>
> **Ms. Marrero**: No.

For this reason, among others, we find that the trial court was correct in determining that Fernandez was not entitled to a credit for the maintenance and/or improvements done *prior* to closing. As stated above, the record is unclear as to what exactly was sought and awarded with respect to each category. This is especially true for the pre-closing expenditures. The trial court's order provides only that "by taking title as [joint tenants with right of survivorship, Marrero] took title to the Property *without any debt* to [Fernandez] for funds [that Fernandez] had spent to improve the Property *prior to closing* . . . ." (Emphasis added).

This conclusion is consistent with existing case law and common sense. In other words, why would one be responsible for the upkeep of a home that one does not own? Before the closing, the parties were merely tenants of the property's owner with no legal responsibility for its maintenance expenses. The fact that Fernandez moved in prior to the closing and decided, on his own—as a tenant—to make repairs and improvements does not render Marrero legally responsible for payment of the same. In essence, any improvements made prior to the closing

belonged to the prior owner. For these reasons, we affirm as to the trial court's findings on the expenditures incurred prior to the closing.

C. Post-Closing Expenses

Fernandez also contends that he is entitled to a credit, totaling 50%, of his post-closing expenditures. The trial court agreed and found that Fernandez was entitled to certain credits for half of the post-closing expenses related to "repairs and improvements to the Property," "taxes and insurance," and "[the reduction] of the principal balance of the mortgage." We find no error. See O'Donnell, 823 So. 2d at 199 ("The next step requires the court to determine the reimbursable expenses incurred *after closing* and calculate each party's proportionate share using each party's percentage of ownership, i.e., fifty percent for each party." (emphasis added)).

Lastly, we do not reach the question of whether Fernandez is entitled to a right of first refusal. The record indicates that there was no stipulation as to this issue. Here, the trial court ordered that "[t]he property must be sold at a private sale to a third party not related to either the Plaintiff or the Defendant." The parties concede in their briefs that this was error, and at oral argument the parties stated on the record that they agreed that Fernandez had a right of first refusal to purchase the property. However, this matter was not raised below; thus, the trial court was never given the opportunity to correct or address the same. Based on the language in the order, and

the agreement of the parties, on remand the parties may request that the court correct its order and permit Fernandez to exercise a right of first refusal to purchase the property.

Affirmed and remanded for further proceedings consistent with this opinion.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

EDWIN BEJARANO, VITO CHIECO, RONNY HUDSON, AKEELIA JEFFREY, PIERRE MARQUEZ, ROBERT MATSON, ALEKSANDR MELNIKOV, ELIZABETH MIDDLETON, EDSON MOODIE, RAMON PEREZ and **DEREK DUNSTON,**
Appellants,

v.

CITY OF HOLLYWOOD and **HOLLYWOOD CIRCLE, LLC** d/b/a **TOWNHOUSE APARTMENTS,**
Appellees.

No. 4D18-2613

[September 25, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John J. Murphy, III, Judge; L.T. Case No. 14-008722 CACE (19).

John G. Crabtree, Charles M. Auslander, Brian C. Tackenberg and Emily Cabrera of Crabtree & Auslander, LLC, Key Biscayne, for appellants.

Elliot B. Kula and Ashley P. Singrossi of Kula & Associates, P.A., Miami for appellee, Hollywood Circle, LLC d/b/a Townhouse Apartments.

GROSS, J.

Eleven plaintiffs in a circuit court action appeal the summary final judgment dismissing their circuit court action. We reverse in part, holding that the proper remedy was not dismissal but the transfer of the action to the county court.

The plaintiffs are all former tenants of an apartment complex owned by Hollywood Circle, LLC d/b/a Townhouse Apartments (the "Developer"). They were unhappy with the Developer's plan to demolish the apartment complex to build a new luxury apartment building. Each plaintiff made a separate claim under the Florida Deceptive and Unfair Trade Practices Act

("FDUTPA") asserting that the Developer's agents misrepresented the timeline for demolition of the building.[1]

Each plaintiff's individual claim was below the jurisdictional threshold of the circuit court. The plaintiffs sought to aggregate their claims to meet the jurisdictional limit.

Although there are some similarities between the plaintiffs' claims,[2] the plaintiffs resided in different units, their leases were for different terms, and representations to the plaintiffs by the Developer's agents were made at different times, under different circumstances, and by different people. The plaintiffs sought different sorts of damages, for example, some pursued reimbursement for furniture left behind; some wanted to be paid for items needed in their new home; and some sought moving expenses.

The Developer moved for summary judgment on the ground that the circuit court lacked subject matter jurisdiction because the plaintiffs' individual claims were below the circuit court's monetary threshold for jurisdiction. The circuit court granted the motion.

"Whether a court has subject matter jurisdiction is a question of law reviewed de novo." *Sanchez v. Fernandez*, 915 So. 2d 192, 192 (Fla. 4th DCA 2005).

County courts have original jurisdiction of "all actions at law in which the matter in controversy does not exceed the sum of $15,000." § 34.01(1)(c), Fla. Stat. (2014). Circuit courts have "original jurisdiction not vested in county courts." Art. V, §5(b), Fla. Const.

The issue in this case is whether multiple plaintiffs alleging the same cause of action against a single defendant can aggregate their claims to meet the monetary threshold for circuit court jurisdiction.

The plaintiffs rely upon *State ex. Re. City of West Palm Beach v. Chillingworth*, 129 So. 816 (Fla. 1930), but they read that case too broadly. The plaintiffs in *Chillingworth* had *identical* causes of action. Each owned a bond issued in 1920 by West Palm Beach; each sued to recover for an identical amount, a missed interest payment. The Supreme Court

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[1] The original complaint was filed as a class action. An amended complaint abandoned the class action vehicle and opted to file separate claims within a single count.

[2] For example, each plaintiff (1) pled the same cause of action, (2) was a tenant in the apartment complex, and (3) received the same termination letter.

permitted aggregation of the plaintiffs' claims under the "rule that, if the demands from their nature or character are joint or composite, or are in some way related to each other or arise out of the same transaction, circumstances, or occurrence, they may be aggregated to confer jurisdiction." *Id.* at 817.

Here, although the plaintiffs' claims are similar, they are based on different factual situations. A consolidated trial would consist of eleven mini-trials, each turning on its own facts. Such separate claims may not be aggregated to meet the $15,000 threshold for circuit court jurisdiction. In this regard, the plaintiffs' claims are similar to those in *Johnson v. Plantation General Hospital Partnership*, 641 So. 2d 58, 59 (Fla. 1994), which involved separate claims of hospital overbilling for pharmaceuticals, medical supplies, and laboratory services. The Supreme Court allowed the plaintiffs to aggregate their claims to meet the monetary jurisdictional requirement within a class action. *Id.* at 60. But, as Justice Grimes observed in a concurring opinion, the Court did not disturb the ruling of the trial court that the plaintiffs' individual claims, outside of the class action context, did "not have sufficient issues in common to justify the aggregation of the claims" under *Chillingworth*. *Id.* at 60-61 (Grimes, J., concurring).

For these reasons, the circuit court properly ruled that it lacked subject matter jurisdiction. However, as appellee concedes, the court erred by dismissing the case rather than transferring it to county court.

Florida Rule of Civil Procedure 1.060(a) provides: "If it should appear at any time that an action is pending in the wrong court of any county, it may be transferred to the proper court within said county . . . ." Courts applying this rule have held that the preferable approach is to transfer a case to county court following a determination that a circuit court lacks jurisdiction because a plaintiff's claim is less than the monetary threshold for circuit court jurisdiction.

> It is true that Rule 1.060(a) does not require the trial court to transfer to the proper court an action pending in the wrong court. However, it has been held, and we agree, that a better alternative to dismissal in the event that alleged damages are below the jurisdictional amount for the circuit court is a transfer of that action to the county court.

Aysisayh v. Ellis, 497 So. 2d 1316, 1317 (Fla. 1st DCA 1986); *see also, e.g., Edwards v. Jones*, 221 So. 3d 770, 772 n.1 (Fla. 1st DCA 2017); *Martell v. Kurlan*, 626 So. 2d 705, 705 (Fla. 4th DCA 1993) (stating that

"the amount in controversy as to each of those causes of action was below the jurisdictional limit; consequently, the action should have been transferred to County Court"); *Sullivan v. Nova Univ.*, 613 So. 2d 597, 600 (Fla. 5th DCA 1993) (if plaintiff cannot establish that the amount in controversy exceeds the jurisdictional threshold, "the case should be transferred to county court").

Affirmed in part, reversed in part, and remanded for transfer to the county court.

WARNER and GERBER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

VALERIE K. SHERMAN,
Appellant,

v.

MYRON K. SHERMAN,
Appellee.

No. 4D18-3578

[September 25, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carlos Augusto Rodriguez, Judge; L.T. Case No. CACE-11-26900 (09).

Elliot L. Miller, Miami Beach, for appellant.

Jeffrey M. Weissman of Weissman & Dervishi, P.A., Fort Lauderdale, for appellee.

EN BANC

PER CURIAM.

In this action involving partition of property, Valerie K. Sherman, the appellant and plaintiff below, appeals the final judgment and the denial of her motion to alter or amend the final judgment as to the issue of costs. The costs of the partition sale itself have been reimbursed from the proceeds of the sale. However, Valerie seeks an award against Myron K. Sherman, the appellee and defendant below, for the other costs of suit, pursuant to section 57.041(1), Florida Statutes (2018). Because the trial court incorrectly applied a "prevailing party" standard to costs awarded under section 57.041(1), when the correct standard is the "party recovering judgment," we reverse and remand for further proceedings. We consider this case en banc, to recede from conflicting language regarding the appropriate standard for awards of costs pursuant to section 57.041(1) in our prior opinions.

Background

Prior to her death, Ruth Frances Sherman created an irrevocable trust for the residence she lived in with her son, Myron. After Ruth's death, Valerie, Ruth's daughter, filed suit against her brother Myron individually and as co-trustee of the "the Trust Agreement." In the operative complaint, Valerie asserted five counts seeking: (1) a declaration of rights under the trust; (2) a resulting trust; (3) a constructive trust based on unjust enrichment; (4) trust liquidation; and (5) partition with a request for damages. At trial, Valerie sought alternative or supplemental awards of damages regarding the title ownership of the residence.

Myron raised various affirmative defenses and counterclaims for reformation (seeking a determination that he was the sole owner of the property after Ruth's death), slander of title, and "contribution" damages for expenses he advanced as a co-owner of the property, if the counterclaim for reformation was denied.

The matter proceeded to trial, after which the trial court entered its final judgment. In the judgment, the trial court concluded that no evidence had been presented as to any of the common-law damage claims made by each party, and therefore dismissed the damages claims. The trial court granted Valerie's request for declaratory judgment, determining that since its acquisition, the subject property was at all times owned by "the Trust Agreement." The trial court additionally adjudged as valid a corrective deed establishing that Valerie and Myron, as co-trustees of the the Trust Agreement, were the owners of the property. The trial court granted Valerie's request to liquidate the trust, which had continued in existence well beyond the ten-year term originally contemplated in the Trust Agreement. Important to this appeal, the trial court ruled:

> 6. The Court grants [Valerie's] Count V seeking partition and further finds that the premises consist of a single-family home which is not susceptible of partition in kind and can only be partitioned by sale. There appears to be no mortgages of record upon said parcel and a partition by sale shall convey full fee-simple title to the purchaser at said sale.

The final judgment directed Valerie to advance "any and all subsequent costs[,] fees or other expenses of this action," with a provision that she was to be reimbursed by the clerk of court from the proceeds of the sale. However, the final paragraph of the final judgment stated that "[o]ther than as indicated herein, each party to bear their own costs and attorney['s] fees." The final judgment did not grant any relief to Myron or determine

that he prevailed on any defense.

After entry of the final judgment, Valerie filed a motion and supplemental motion to alter or amend the final judgment, pursuant to Florida Rule of Civil Procedure 1.530(g), seeking to eliminate the last paragraph of the final judgment providing that each party shall bear their own costs. Valerie asserted that nothing was presented at trial to support the trial court's ruling that each party should bear their own costs, and *as the prevailing party*, she was statutorily entitled to costs pursuant to section 57.041(1).

At the hearing on the motion to amend the final judgment, Valerie's counsel clarified that section 57.041(1) dictates that costs be awarded to *the party recovering judgment*, as opposed to *the prevailing party*, and explained that the final judgment granted Valerie's causes of action and granted nothing on Myron's affirmative defenses and counterclaims, making it clear that Valerie was both the prevailing party and the party recovering judgment.

Despite the fact that it was Valerie, and not Myron, who sought the partition, the transcript of the hearing indicates that the trial court denied Valerie's motion, reasoning that neither party was the *prevailing party* because the judgment was not favorable to one over the other, as there was a partition, and it was more equitable that each party incurring costs before the hearing should bear those costs without reimbursement, except as provided in the final judgment.

Following the hearing, the trial court entered an order simply stating that Valerie's motion to amend the final judgment was "denied." Valerie gave notice of appeal.[1]

Appellate Analysis

"An appellate court reviews whether a trial court's award of costs is excessive for an abuse of discretion; however, whether a cost requested may be awarded, at all, is a question of law to be reviewed de novo." *City of Boca Raton v. Basso*, 242 So. 3d 1141, 1144 (Fla. 4th DCA 2018) (quoting *Winn-Dixie Stores, Inc. v. Reddick*, 954 So. 2d 723, 730 (Fla. 1st DCA 2007)). As such, the standard of review of the trial court's denial of

[1] Subsequent to the proceedings on appeal, it appears the trial court entertained and granted Valerie's motions for award of costs relating to (1) the partition sale of the property and (2) a sanction imposed for failure to admit the genuineness of a document. Those costs awards are not the subject of this appeal.

Valerie's request for costs is *de novo*.

On appeal, Valerie argues that the trial court erred in denying her motion to alter or amend the final judgment, precluding her from obtaining an award of costs. She contends the premise of the trial court's ruling is that there was no prevailing party, since the net effect of the judgment was to grant partition. Valerie argues the trial court should have applied the proper standard, the "party recovering judgment" standard, which would have entitled her to an award of costs under section 57.041(1).

Section 57.041(1) provides in pertinent part:

> (1) *The party recovering judgment* shall recover all his or her legal costs and charges which shall be included in the judgment . . . .

§ 57.041(1), Fla. Stat. (emphasis added). Our supreme court in *Hendry Tractor Co. v. Fernandez*, 432 So. 2d 1315, 1316 (Fla. 1983), explained that this language "*expressly demands that the party recovering judgment be awarded costs. This unambiguous language need not be construed.*" (emphasis added).

Valerie points out that while the "prevailing party" and the "party recovering judgment" will frequently be the same party, circumstances may arise in which that is not the case. For example, a party may prevail on some, but not all counts or causes of action, or it may be difficult to discern which party prevails where a non-monetary judgment is entered.

In *Hendry Tractor*, the supreme court clarified that "a plaintiff in a multicount personal injury action who recovers [a] money judgment on at least one but not all counts in the cause of action, is the 'party recovering judgment' for purposes of section 57.041(1), Florida Statutes (1979), and therefore is entitled to recover costs." *Id.* As such, the argument that a defendant prevailed in defense of a failed count does not appear to entitle the defendant to costs, where the plaintiff nevertheless prevailed on at least one other count.

Although not discussed by the parties in their briefs, we note that in *Folta v. Bolton*, 493 So. 2d 440 (Fla. 1986), the supreme court clarified the holding of *Hendry Tractor* to apply to claims "arising out of a single set of circumstances." *Id.* at 442. In *Folta*, the court addressed a multicount medical malpractice action in which the claims involved two unrelated injuries which could have been filed as separate actions because the fact patterns of the injuries were different. *Id.* at 441. Joinder was proper

because some of the defendants were common to both injuries. *Id.* Notably, the court wrote:

> Although section 57.041 provides for costs to "the party recovering judgment" and section 768.56 [addressing fees and costs in medical malpractice actions] provides for "prevailing party" attorney fees, *we concede that the same principles should be applied under each provision*.

Id. at 442 (emphasis added). In the next paragraph, the court explained that the holding in *Hendry Tractor* was guided by the procedural posture of the case, pointing out that under the modern pleading rules, alternative pleading of causes of action arising out of the same transaction is permitted, which is the reason the court did not follow its prior holding in *Marianna Mfg. Co. v. Boone*, 55 Fla. 289, 45 So. 754 (1908). *Id.* Importantly, the court said:

> In *Marianna Mfg. Co.*, we concluded that "[w]here the verdict is in effect for the defendant on any one or more of the counts of a declaration the costs should be taxed as the statute and rules direct." 55 Fla. at 291, 45 So. at 755.

Id. (alteration in original). What is important to note is that *Marianna Mfg. Co.* involved an action alleging two counts for breach of contract concerning two different breaches of contract. *Marianna Mfg. Co.*, 45 So. at 754. *Marianna Mfg.* also held that a verdict which was silent as to one count constituted a verdict in favor of the defendant as to that count. *Id.* at 754-55.

Although there is language in *Folta* suggesting that "the party recovering judgment" and "prevailing party" are equivalent standards, we focus on the language in *Folta* affirming the principle in *Hendry Tractor* that an award of costs (as distinct from fees) should focus on *who obtained a judgment* in multicount actions seeking relief on claims "arising out of a single set of circumstances," and affirming the principle in *Marianna Mfg.* that costs in multicount actions seeking relief on factually distinct and unrelated claims "should be taxed as the statute and rules direct"; in other words, as to which party obtained a judgment as to each separate claim. *Folta*, 493 So. 2d at 442-43.

The multicount scenario was recently discussed by this Court in *Basso*, where the plaintiff filed suit against the City of Boca Raton for false arrest and false imprisonment. *Basso*, 242 So. 3d at 1142. The plaintiff prevailed on the false imprisonment claim and obtained a money judgment

against the city. *Id.* The city prevailed in defense of the false arrest claim. *Id.* Both parties moved for costs. *Id.* at 1143. Despite the damages awarded against it on the false imprisonment claim, the city moved for costs asserting it had prevailed in defense of the false arrest claim. *Id.* The trial court determined that each party was entitled to costs in their entirety with respect to the prevailed upon counts ($2,494.83 to the plaintiff and $8,611.87 to the city), and thus awarded a net cost final judgment in favor of the city in the amount of $6,117.04. *Id.* On appeal, we determined that it was error to deny the plaintiff's motion for costs where she had recovered a money judgment in the suit. *Id.* at 1144. In coming to the conclusion that the plaintiff was entitled to "all of her court costs" and that the trial court erred in holding that the plaintiff must pay the city its court costs, we analyzed section 57.041(1), and applied the supreme court's instruction that:

> "The statute expressly demands that the *party recovering judgment* be awarded costs. This unambiguous language need not be construed." *Hendry Tractor Co. v. Fernandez*, 432 So. 2d 1315, 1316 (Fla. 1983); *see also Weitzer Oak Park Estate, Ltd. v. Petto*, 573 So. 2d 990, 991 (Fla. 3d DCA 1991) (stating that "every party who recovers a judgment in a legal proceeding is entitled as a matter of right to recover lawful court costs, and a trial judge has no discretion to deny costs to the parties recovering judgment").

Id. (emphasis added).

Despite our emphasis on the language of section 57.041(1) in *Basso* as setting the "party recovering judgment" standard, it appears we have also subsequently characterized the standard with reference to the "prevailing party." Specifically, after *Basso*, we issued our opinion in *Coconut Key Homeowner's Ass'n v. Gonzalez*, 246 So. 3d 428, 434 (Fla. 4th DCA 2018), in which we said:

> Court costs under section 57.041, Florida Statutes (2008), are also "[]governed by the *'prevailing party'* standard . . . .[]" *Wyatt v. Milner Document Prods., Inc.*, 932 So. 2d 487, 490 (Fla. 4th DCA 2006) (quoting *Spring Lake Imp. Distrib. v. Tyrrell*, 868 So. 2d 656, 658-59 (Fla. 2d DCA 2004)), abrogated on other grounds by *Westgate Miami Beach, Ltd. v. Newport Operating Corp.*, 55 So. 3d 567 (Fla. 2010).

Id. (second alteration in original) (emphasis added).

As can be seen in the above quote, we cited our prior opinion in *Wyatt*, which quoted the Second District's *Spring Lake* decision for the proposition that costs are governed by the prevailing party standard. Notably, the Second District has receded from *Spring Lake* in an en banc opinion wherein it determined that the plain language of section 57.041(1) and the supreme court's opinion in *Hendry Tractor* indicate that the proper standard for determining entitlement to costs is to the "party recovering judgment," and the standard for costs is not to be confused with the "prevailing party" standard for attorney's fees. *Wolfe v. Culpepper Constructors, Inc.*, 104 So. 3d 1132, 1136-37 (Fla. 2d DCA 2012). The Second District has reaffirmed its holding regarding the "party recovering judgment" standard as the proper standard for awarding costs. *Hawks v. Libit*, 251 So. 3d 321, 324 (Fla. 2d DCA 2018) ("Since *Wolfe* was decided in 2012, this court has applied the 'party recovering judgment' standard—not the 'prevailing party' standard—to costs motions filed pursuant to this section."); *Wanda Dipaola Stephen Rinko Gen. P'ship v. Beach Terrace Ass'n*, 173 So. 3d 1014, 1015 (Fla. 2d DCA 2015).

The First and Third Districts also appear to be aligned with the Second District. *See Bessey v. Difilippo*, 951 So. 2d 992, 997 (Fla. 1st DCA 2007); *Weitzer Oak Park Estate, Ltd. v. Petto*, 573 So. 2d 990, 991 (Fla. 3d DCA 1991). Additionally, we note that in *Basso*, we relied on *Hendry Tractor*, *Wanda*, and *Bessy* in determining that costs should be awarded to the "party recovering judgment."

Finally, to the extent it could be argued that the "party recovering judgment" standard does not apply where claims sound in equity, due to the equity court's traditional discretion to apportion costs, it is relevant to point out that Valerie in this case specifically sought costs pursuant to section 57.041(1). As the Second District recently reasoned in *Hawks*, there does not appear to be authority suggesting that section 57.041(1) should apply differently to equitable claims. *See Hawks*, 251 So. 3d at 324 ("[W]e have been unable to locate, any authority from this court suggesting that section 57.041(1) or the holding in *Wolfe* should apply differently to equitable claims."). Significantly, the language in section 57.041(1) carves out only the following exception to the entitlement to costs:

> (1) The party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment; *but this section does not apply to executors or administrators in actions when they are not liable for costs.*

§ 57.041(1), Fla. Stat. (emphasis added). The action below does not involve

executors or administrators, thus the exception does not apply.

Based on the foregoing, although equity courts generally have the discretion to apportion costs, section 57.041(1) mandates costs to Valerie as the party recovering judgment in this action. We reverse the trial court's order as to costs and remand for the trial court to grant the motion to amend or alter the final judgment as to the provision for costs. We recede from the language of any of our prior opinions in which it appears that we have construed the "prevailing party" standard to apply to costs awarded pursuant to section 57.041(1). Under section 57.041(1), costs should be awarded to the "party recovering judgment."

Reversed and remanded.

LEVINE, C.J., MAY, DAMOORGIAN, CIKLIN, GERBER, CONNER, FORST, KLINGENSMITH, and KUNTZ, JJ., concur.
CONNER, J., concurs specially with an opinion.
WARNER, J., concurs in part and dissents in part with an opinion, in which GROSS and TAYLOR, JJ. concur.

CONNER, J., concurring specially.

I concur with the majority opinion and its analysis regarding the correct standard to be applied to an award of fees pursuant to section 57.041(1), Florida Statutes (2018). I write to point out that, in my opinion, the attorneys for both parties below led the trial court astray by either failing to discover and alert the trial court or, worse yet, ignoring that the partition statute has a provision addressing costs. Neither party brought to the trial court's attention the provision of section 64.081, Florida Statutes (2018), which states:

> *Every party shall be bound by the judgment to pay a share of the costs*, including attorneys' fees to plaintiff's or defendant's attorneys or to each of them *commensurate with* their services rendered and *of benefit to the partition, to be determined on equitable principles in proportion to the party's interest*. Such judgment is binding on all his or her goods and chattels, lands, or tenements. In case of sale the court may order the costs and fees to be paid or retained out of the moneys arising from the sale and due to the parties who ought to pay the same. All taxes, state, county, and municipal, due thereon at the time of the sale, shall be paid out of the purchase money.

§ 64.081, Fla. Stat. (emphases added). Similarly, on appeal the parties

failed to cite this statute in their briefs.

However, my reading of the transcript reveals the trial judge intuitively understood that partition actions are unique. The case law interpreting section 64.081 makes clear that costs incurred by both parties in partition actions are to be paid in proportion to the party's interest in the property, subject to adjustment based on equitable principles. *See Robinson v. Barr*, 133 So. 3d 599, 600 (Fla. 2d DCA 2014) ("The circumstance that both [parties] prevailed on their claims for partition, but not on their requests for additional relief is not a valid reason to disregard the command of [section 64.081]" to award costs in proportion to the party's interest.); *Diaz v. Sec. Union Title Ins. Co.*, 639 So. 2d 1004, 1006 (Fla. 3d DCA 1994) (awarding attorney's fees for a separate probate proceeding as an award in the partition action because the prior probate proceeding was of benefit to the partition action).

Because section 64.081 applies specifically to partition actions, that was the appropriate statute for the trial court to apply, not section 57.041(1). *See State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So. 2d 1067, 1073 (Fla. 2006) (noting the "long-recognized principle of statutory construction that where two statutory provisions are in conflict, the specific statute controls over the general statute") (quoting *State v. J.M.*, 824 So. 2d 105, 112 (Fla. 2002)). However, because section 57.041(1) was the only statute argued below and on appeal, I concur with the majority opinion.

WARNER, J., concurring in part and dissenting in part.

While I agree with the construction that the majority opinion places on the language used in section 57.041, Florida Statutes (2018), I concur in the result on different grounds. All three actions upon which the court based its judgment were equitable, and both the Declaratory Judgment Statute and the Partition Statute have their own cost provisions. Florida Supreme Court precedent allows trial courts discretion in allocating costs in equitable actions. While the trial court had discretion in allocating costs, I would conclude that it abused its discretion by denying costs without determining what those costs were and how that would affect the equitable rights of the parties.

As noted in the majority, all of the causes of action asserted by Valerie were equitable in nature. As to the Declaratory Judgment action, section 86.081, Florida Statutes (2018) provides that "The court may award costs as are equitable." As to the partition action, as noted in Judge Conner's concurring opinion, section 64.081, Florida Statutes (2018) requires that

each party pay a proportionate share of costs as is equitable. Thus, those two causes of action had specific cost allocation statutes applying equitable considerations.

The remaining equitable action of reformation does not have a specific statute governing cost allocation, but the supreme court has never receded from cases which provide for discretion in the taxing of costs in equitable actions: "The general rule is that costs follow the results of the litigation *but in equity this rule may be departed from according to the circumstances.*" *Schwartz v. Zaconick*, 74 So. 2d 108 (Fla. 1954) (emphasis added). This rule has been in effect for over 150 years, as it appears to be first announced in *Lewis v. Yale*, 4 Fla. 441 (1852). Likewise, the statute in question, section 57.041, has been in existence since 1828, with basically the same language. *See* Act Nov. 23, 1828, § 71.

The majority relies on *Hendry Tractor Co. v. Fernandez*, 432 So. 2d 1315, 1316 (Fla. 1983), to explain the meaning of "party recovering a judgment," but it fails to address *Hendry's* qualification to the application of the statute. The *Hendry* court noted: "As a general rule costs follow the outcome of the litigation and *we are not here confronted with a situation warranting departure from such principle.*" *Id.* (citing *Schwartz v. Zaconick*, 74 So. 2d 108 (Fla.1954)) (emphasis added). I can only surmise by the citation to *Schwartz* that the supreme court did not intend to recede from its rulings that allow the trial court discretion in taxing costs in equitable actions. As the supreme court explained in *Puryear v. State,* 810 So. 2d 901, 905 (Fla. 2002),

> [T]his Court does not intentionally overrule itself sub silentio. Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express holding in the former decision until such time as this Court recedes from the express holding.

Therefore, I conclude that, having failed to recede from its express holding that trial courts have discretion in the allocation of costs in equity cases, the trial court did not err by refusing to apply section 57.041 without regard to equitable circumstances. In *Hawks v. Libit*, 251 So. 3d 321, 324 (Fla. 2d DCA 2018), the Second District noted that the court was "unable to locate, any authority from this court suggesting that section 57.041(1) or the holding in *Wolfe* [*v. Culpepper Constructors, Inc.*, 104 So. 3d 1132 (Fla. 2d DCA 2012)] should apply differently to equitable claims." Although there may be no Second District authority, as noted above, there is ample supreme court precedent which would suggest otherwise. The majority

opinion agrees with *Hawks* as to the application of the statute to cases in equity. If my view of *Hendry* and prior supreme court case law on the subject is correct, then both the majority opinion and *Hawks* conflict with supreme court precedent.

However, the trial court did not act within its discretion by requiring each party to bear his or her own costs without any evidence of the extent of the costs of each party. The court cannot act equitably without such information. Therefore, I agree that the court erred in denying the motion to amend to correct the final judgment by deleting that provision.

Once that provision is removed from the final judgment, then the court can consider appellant's motion on the merits. Because I would hold that the court has discretion in its allocation of costs, I would not mandate that the court approve all taxable costs. The appellee should be entitled to oppose the motion by arguing that the court should consider equitable principles in determining what and how much to award to appellant in these proceedings. Both the specific statutes governing declaratory judgments and partition actions, as well as supreme court precedent governing other equitable actions, permit the trial court to exercise such discretion.

* * *

Not final until disposition of timely filed motion for rehearing.