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IN THE DISTRICT COURT OF APPEAL

THIRD DISTRICT

JAMES E. ROGERS,

Appellant

Vs.

GUARDIANSHIP PROGRAM OF DADE COUNTY, INC.,

Appellee

FROM THE CIRCUIT COURT OF

MIAMI-DADE COUNTY, FLORIDA

CIVIL ACTION CASE NO. 23-021239-CA-01

DISTRICT COURT CASE NO.3D24-1405

INITIAL BRIEF OF APPELLANT JAMES E. ROGERS

WILLIAM F. MURPHY, ESQ.
MURPHY AND O'BRIEN, LTD
3191 CORAL WAY SUITE 403A
MIAMI, FL 33145
SERVICE@MURPHYANDOBRIEN.COM

ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE AND OF THE FACTS

Sharyn Larsson and her husband, Harold Larsson, hereafter referred to as the ¨Larssons¨, acquired the relevant property ("the property") located at 15701 NW 39 Court, Miami Gardens, FL, 33054 as tenants by the entireties in 1982. R. 24, R. 70.

In October 2019, Sharon executed a Durable power of attorney where she appointed her husband Harold as her attorney in fact. R. 53-56. In 2020, Mrs. Larsson was declared incompetent. R. 525.

On December 2, 2021, a Quit claim deed was executed where Harold Larsson and Sharyn Larsson granted the property to Harold Larsson for a life estate, with the remainder interest going to James E. Rogers, hereafter referred to as ¨Rogers¨. R. 32-33.

The Quit claim deed stated that the Grantors "Hereby remise, release and quit claim unto the said Grantee forever, all the right, title, interest, claim and demand which the said Grantor have in and to the following described lot, piece of parcel of land." R. 32. Rogers had known the Larssons since 1977 and moved into the property around November 20, 2021, to assist Larson. R. 499-500.

At the same time that the Quit claim deed was executed, Rogers paid $150,000 dollars in a check, and $50,000 dollars in a promissory note to

acquire the remainder interest. R. 345, 431, 501, 505. He also paid for repairs on the property. R. 501.

On or about December 20th, 2021, the Guardianship Program of Dade County, Inc. ("GPDC") was appointed as Sharyn Larson's plenary guardian. R. 29-30. During November 2021 through January 2022, Rogers had been staying at 15701 NW 39th Ct, Miami Gardens, Florida 33054 based upon an agreement with Harold Larson, hereafter referred to as ¨Larsson¨, to assist him in raising funds for the cost of his wife's care, repairs to the Larsson´ house, and other miscellaneous tasks. *See* R. 499-505.

Larsson died on January 17, 2022. R. 24, 507. On or about the day following the death of Larsson, Rogers went to the property, but GPDC was there. R. 507. Rogers called the police, who declined to deal with the situation because they said it was a civil matter. R. 74. Rogers was excluded from the property by GPDC. R. 509. During the time GPDC was in possession of the property it had not paid the taxes or the mortgage on the property. GPDC also failed to timely submit Larsson's Last will and testament to the probate court. R. 74-76. Due to lack of payments on the mortgage, Rogers had to pay nearly $100,000 dollars to keep the property from going into foreclosure. R. 366. None of the money Rogers had to pay

to acquire the remainder interest in the property, and to save the property from going into foreclosure has been returned. R. 509.

On August 11, 2023, GPDC filed a Complaint and asserted that the Quit-claim deed was invalid. R. 23-28. Rogers filed an answer on September 8, 2023. R. 70-76. In the Answer, Rogers asserted affirmative defenses and counterclaims of Forcible Entry and Unlawful Detainer, Fraud, and Asset Conversion. R. 74-76. Rogers then sought to transfer the case to another pending action that dealt with substantially the same matters. R. 78-79. This request was denied in November 2023. R. 160. On October 15, 2023, GPDC filed a motion for partial summary judgment and asserted that the Quit claim deed was *void ab initio*. R. 95-98. On January 17, 2024, the court granted GPDC's motion for summary judgment. R. 239-242. The court found that Fla. Stat. 732.7025 was not followed in waiving homestead rights, that the December 2, 2021, deed was *void ab initio*, and that title to the property is vested in Sharyn Larson. R. 239-241.

Rogers timely filed a motion for rehearing as to GPDC´s Motion for Summary judgment on January 31, 2024. R. 248-268. That motion was denied on February 5, 2024. R. 269. On February 8, 2024, Rogers filed a partial Motion for summary judgment on his counterclaim. R. 274-282. GPDC then filed a Motion to dismiss Roger's counterclaims on April 16,

2024. R. 302-303. GPDC also filed a Motion for summary judgement on counterclaims on May 6, 2024. R. 347-349. On April 18, 2024, Rogers filed a Motion that requested the court to take notice of the fact that he had paid nearly $100,000 to keep the property from going into foreclosure. R. 332-333. Rogers filed further motions where he requested the court to take notice of the fact that he had paid money to keep the property from going into foreclosure and that he had paid money to acquire the remainder interest on the Quitclaim deed. R. 350-352, 370-371. On July 5, 2024, after a hearing, the court orally announced it was going to treat GPDC's Motion to dismiss as a judgment on the pleadings and grant it because Rogers failed to state a cause of action. R. 669-671. The court said it would grant the Motion to dismiss without prejudice. R. 671.

Despite this, on July 12, 2024, the court issued an order treating the Motion to dismiss as a judgment on the pleadings and granted GPCD's motion, and declined to dismiss Roger's motion without prejudice. R. 688-689. The court confirmed and ratified its January 17, 2024, order granting Summary judgment to GPDC. R. 688. On July 18, 2024, Rogers requested that the court clarify and amend its judgment. R. 679-680. Rogers noted that the written order did not say the dismissal was without prejudice like the oral ruling stated it would, and noted the court had never addressed the

fact that Rogers had paid money to acquire the remainder interest in the property and save the property from going into foreclosure, other expenses, and that money had not been returned. R. 679-680. The court denied the motion on July 24, 2024. R. 684. Rogers filed his Notice of appeal on August 8, 2024. R. 686-687.

SUMMARY OF ARGUMENT

The trial court erred in finding that Quitclaim Deed did not validly waive homestead rights. Fla. Stat. § 732.7025 does not state that this is the only way to waive homestead rights in a deed. When Section 7025 and Fla. Stat. § 732.702 are compared, it becomes apparent that Section 7025 added an additional way to waive homestead rights in a Deed, not that this is the only way to waive homestead rights. Any other interpretation would lead to part of Section 702 being repealed, which is disfavored. *Thayer v. Hawthorn*, 363 So. *3d 170 (Fla. 4th DCA 2023)* did not indicate that the Section 7025 process is the only way to waive the homestead rights. In this case, Grantors "Hereby remise, release and quit claim unto the said Grantee forever, all the right, title, interest, claim and demand which the said Grantor have in and to the following described lot, piece of parcel of land." This language was sufficient to waive homestead rights under Section 702. It is also noted that the property was the only homestead the

Larssons owned. An adjacent lot, which also falls withing the description of homestead was sold using only the same Durable Power of Attorney. Therefore, the trial court erred in finding, under the totality of the circumstances, that the Deed did not validly waive homestead rights.

Moreover, even if, *arguendo*, the Deed did not waive homestead, Rogers still has an interest as a *bona fide* purchaser. The transaction was voidable, not *void ab initio,* because the Larssons both joined, by way of the DPOA, and executed the Deed to Larsson with the remainder interest going to Rogers, who paid value for it. In addition, cases indicate that it is the transfer rather than the deed itself that is void. Rogers satisfied the requirements to be a *bona fide* purchaser because he paid value and did not know of anyone else's right to the property. The trial court should have determined that Rogers was a *bona fide* purchaser, and thus has the title to the property. At the very least, the trial court, which had a very limited history in this matter, should have conducted an evidentiary hearing.

The trial court also erred in granting Judgment on the pleadings in favor GPDC and dismissing the counterclaims of Rogers. This is true even if the deed is *void ab initio* because Rogers has a present right to the money that he paid to acquire the remainder interest and saved the property from foreclosure due to GPDC's negligence. This money is being

unlawfully converted by GPDC. In addition, equitable principles indicate that Rogers should be able to recover the money to acquire the remainder interest and save the property from foreclosure because it would be unjust enrichment otherwise.

Finally, even if the court had been right to grant the Motion to dismiss, it should have granted the Motion to dismiss without prejudice, as its oral ruling indicated it would do so. A motion to dismiss should not be granted with prejudice at the pleading stage unless the party cannot allege a cause of action, or the amendment privilege has been abused. Since neither of these conditions are true, the trial court should not have granted the motion to dismiss with prejudice.

ARGUMENT

I. The Trial Court Erred in Determining the Quit Claim Deed did not Contain Sufficient Language to Waive Homestead Rights.

The trial court erred in determining that the quit claim deed was not valid and did not contain sufficient language to waive homestead rights. The trial court determined that the quit claim deed was not valid in its summary judgment order, and then reconfirmed that in its ruling on the judgment on the pleadings. R. 239-241, 692-693. An appellate court reviews summary judgment on a *de novo* standard of review. *Johnson v.*

Deutsche Bank Nat'l Tr. Co. Ams., 248 So. 3d 1205, 1207 (Fla. 2d DCA 2018). At the summary judgment stage, the court must "view the evidence and draw all factual inferences therefrom in a light most favorable to the non-moving party and must resolve any reasonable doubts in that party's favor." *Brevard Cnty. v. Waters Mark Dev. Enters., LC*, 350 So. 3d 395, 399 (Fla. 5th DCA 2022). Similarly, an appellate court "reviews an order granting a motion for judgment on the pleadings *de novo*." *Martinez v. Hernandez*, 227 So. 3d 1257, 1259 (Fla. 3d DCA 2017). A party can only "obtain judgment on the pleadings if it is entitled to judgment as a matter of law based solely on the pleadings and attachments thereto." *U.S. Fire Ins. Co. v*. ADT Sec. Servs., 134 So. 3d 477, 479 (Fla. 2d DCA 2013). Here, the trial court was incorrect in determining that *Thayer v. Hawthorn*, 363 So. 3d 170 (Fla. 4th DCA 2023) and Fla. Stat. § 732.7025 compel a ruling that the Quitclaim deed did not waive homestead rights. R. 239-240.

In *Thayer*, Doris Hawthorn originally owned the property in fee simple before she quit claimed the property to herself and her husband as joint tenants with the right of survivorship. *Id.* at 171. Later, Doris and her husband executed a warranty deed that granted one half of the property to each of their respective trusts. *Id.* They were the grantors and grantees as trustees of their individual trusts. *Id.* The deed stated that the grantor, for

and in consideration of the sum of ten dollars, “has granted, bargained and sold to the said grantee, and grantee’s heirs and assigns forever.” *Id.* The husband was declared dead in 2017, and Doris died the next year in 2018. *Id.* Doris was survived by 5 adult children, while her husband was survived by the appellee. *Id.* The issue before the court was whether Doris had waived her homestead rights to her husband’s half via the warranty deed. *Id.* at 171-72. The court concluded that the language of the deed was insufficient to waive the homestead. *Id.* at 172-73. The trial court had relied upon the case of *Stone v. Stone*, 157 So. 3d 295 (Fla. 4th DCA 2014). In that case, “the deed’s language splitting the property into tenancy in common interests stated that the spouse ‘grants, bargains, sells, aliens, remises, releases, conveys, and confirms’ the property ‘together with all the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining.’” *Thayer, 363 So. 3d at 173 (quoting Stone v. Stone,* 157 So. 3d 295, 304 (Fla. 4th DCA 2014*))*. Unlike in *Stone*, the deed in *Thayer* “simply granted, bargained, and sold” the property to the grantee and was thus insufficient to waive homestead rights. *Id.* at 173.

In *Thayer*, the court noted that in response to *Stone*, to provide guidance as to what constitutes a waiver of homestead rights, the Legislature enacted Fla. Stat. § 732.7025, and provided that a deed

"containing certain language would constitute a waiver of the homestead rights." *Id.* at 174. The statute states that a spouse waives her rights as a surviving spouse with respect to the devise restrictions under the State constitution with respect to homestead if she states "By executing or joining this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me" or substantially similar language. Fla. Stat. § 732.7025(1). The statute does not provide that the deed must include this specific language to constitute a waiver. As the court in *Thayer* noted, this statute was enacted merely to provide guidance and "is illustrative of the point that language waiving a constitutional right must be able to be clearly understood as waiving that right." *Id.* at 174. Moreover, the trial court ignored Fla. Stat. § 732.702(1), which provides that a waiver of all rights or equivalent language in property that is executed "by a *written contract*, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses" can waive homestead rights. Fla. Stat. § 732.702 (emphasis added).

Of course, a Deed is a contract. *See Pitts v. Pastore*, 561 So. 2d 297, 300 (Fla. 2d DCA 1990). Therefore, it is no surprise that in *Stone v. Stone*, 157 So.3d 295 (Fla. 4th DCA 2014), the language in the deed that the

spouse “grants, bargains, sells, aliens, remises, releases, conveys, and confirms” the property was held to be sufficient to waive homestead rights under Fla. Stat. § 732.702. *Id.* at 304. Similarly, in this case the deed “hereby remise, release and quit claim unto the said Grantee forever, all the right, title, interest, claim and demand which the said Grantor have in and to the following described lot.” R. 32-33. Under *Stone*, the deed did waive homestead rights under Fla. Stat. § 732.702. Of course, the trial court relied on Fla. Stat. § 732.7025. But, as the court in *Thayer* was clear, the purpose of the statute was just to provide guidance. *Thayer*, 363 So.3d at 174. Section 7025 does not state that this is the only way to waive the homestead restrictions in a deed.

Instead, Section 7025 should be read to harmonize with Section 702, which is the previous section. *See Woodham v. Blue Cross & Blue Shield of Fla., Inc.*, 829 So.2d 891, 898 (Fla. 2002) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 455 (Fla. 1992) (“[R]elated statutory provisions must be read together to achieve a consistent whole, and . . . [w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another”). Thus, Section 702 allows homestead rights to be waived if a waiver of all rights or equivalent language is used. And Section

7025 allows homestead rights to be waived by an additional way in a deed if the spouse uses the specific language mentioned. The position of the trial court would render the statement in Section 702 that language waiving all rights in the property in a contract waives homestead rights without effect if this language is included in a deed, as was the case here. But implied repeals of statutes are not favored. *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1035 (Fla. 2001). Moreover, the synopsis to the bill that enacted Section 7025 states that it "provide[s] language that may be used to waive spousal homestead rights concerning devise restrictions." 2018 Fla. SB 512. The fact that it says "may" rather than "shall" indicates that this is only one way to waive homestead rights. *See Banks v. State*, 262 So.3d 876, 877 (Fla. 1st DCA 2019) ("may" is generally permissive, while "shall" is generally mandatory).

When reading Section 702 and Section 7025 together, it becomes apparent that Section 7025 added specific words that could be used to waive homestead rights. But when the statutes are read together, the purpose of Section 7025 is not to provide that only these specific words waive homestead rights. Instead, using language in a deed that waives all rights to a property also waives homestead rights – under Section 702. And *Thayer v. v. Hawthorn*, 363 So.3d 170 (Fla. 4th DCA 2023) confirms this

analysis because the purpose of Section 7025 is just to provide guidance. *Id.* at 174. Since the language in the deed stated that the grantors were giving up all rights in the property, that was sufficient to waive homestead rights. Therefore, the trial court erred in finding that the language in the deed did not waive the homestead rights.

II. Even if the Deed did not Contain Language Sufficient to Waive Homestead Rights, Rogers is Entitled to the Bona Fide Purchaser Defense.

Assuming *arguendo* that the deed did not contain sufficient language to waive homestead rights, Rogers is entitled to the bona fide purchaser defense. The trial court erred in not determining if Rogers was a *bona fide* purchaser. In Florida,

> **(1)** No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.
> **(2)** Grantees by quitclaim, heretofore or hereafter made, shall be deemed and held to be bona fide purchasers without notice within the meaning of the recording acts.

Fla. Stat. § 695.01(1)-(2). A party is a *bona fide* purchaser when "(1) the purchaser obtained legal title to the challenged property, (2) the purchaser

paid the value of the challenged property, and (3) the purchaser had no knowledge of the claimed interest against the challenged property at the time of the transaction." *Harkless v. Laubhan*, 278 So. 3d 728, 733 (Fla. 2d DCA 2019). If the deed is void, then no legal title can pass to Rogers. *See McCoy v. Love*, 382 So. 2d 647, 648 (Fla. 1979). However, if "the deed was only voidable in equity, then the equitable defenses of laches and of a *bona fide* purchaser are available." *Id.* Where all the "essential legal requisites of a deed are present; it conveys legal title." *Id.* at 649. Florida case law has been slightly unclear on whether deeds that violate the constitutional protection of homestead are void or voidable. *See Pitts*, 561 So. 2d at 300 (noting courts have used void and voidable language). In *Chapman v. Chapman*, 526 So. 2d 131 (Fla. 3d DCA 1988), an attempt to transfer homestead property that was executed by only one spouse without joinder of the other spouse was void ab initio. *Id.* at 133-34; *see also Robbins v. Robbins*, 411 So. 2d 1024, 1025 (Fla. 2d DCA 1982) (same); *Moorefield v. Byrne*, 140 So. 2d 876 (Fla. Dist. Ct. App. 1962) (same).

Meanwhile, in *Thayer*, while the court determined that the language in the deed was insufficient to constitute a waiver, the court did not state that the deed was *void ab initio* but instead said that "we conclude that the warranty deed did not waive homestead, because it lacked language

specifically releasing inheritance rights." *Id.* at 175. Moreover, *Thayer* is distinguishable from the present case because in *Thayer*, there was a conveyance without consideration of homestead property by the parties to separate trusts and the case did not involve a deed conveying property to a *bona fide* purchaser without notice. *Id.* In the present case, Rogers paid $150,000 as consideration for the conveyance. R. 345. No Florida cases were found in which a deed, conveying homestead property to a bona fide purchaser for value, which was joined and executed by both spouses who had no living children, was held to be void *ab initio* because a separate waiver was not executed or because it did not contain specific waiver language. In addition, the facts in *Chapman* and the other cases cited herein are distinguishable because those cases involved transfers without consideration, without joinder of the other spouse, to a spouse or a trust. In this case both parties joined in executing the deed and conveyed the property to the husband for life and then to Rogers as a third-party purchaser of the remainder interest. R. 32-33. Therefore, in this unique case, the court should hold the deed to be voidable rather than void.

Moreover, in cases where a conveyance is deemed to be invalid, Florida courts have held the transfer of property is void, but not the deed itself. *Schlossberg v. Estate of Kaporovsky*, 303 So.3d 982, 987-88 (Fla.

4th DCA 2020) (citing *Brigham v. Brigham*, 11 So.3d 374 (Fla. 3d DCA 2009). The *Schlossberg* court found it significant that the court in *Brigham* had held that

> the transfer was void, rather than finding that the deed was void, because of the relief granted. The court ordered the trustee to refund to the trust the proceeds of the sale to the third party. Had the deed from the trustee to himself individually been void, then the property should have been recovered by the trust, not merely the proceeds. Thus, *Brigham* does not offer support for the proposition that the bona fide purchaser defense is not available.

Id. at 988. Just like the defendant in *Schlossberg*, Rogers has asserted that he is a *bona fide* purchaser. To be a *bona fide* purchaser, Rogers must have (1) obtained legal title to the challenged property, (2) paid the value of the challenged property, and (3) must have had no knowledge of the claimed interest against the challenged property at the time of the transaction. *Harkless*, 278 So. 3d at 733. Since the deed was voidable rather than void, Rogers has claimed legal title to the challenged property. *See Schlossberg v. Estate of Kaporovsky*, 303 So.3d 982, 988 (Fla. 4th DCA 2020). And the record shows that he paid value for the challenged property. R. 345. And Rogers had no knowledge of Ms. Larsson's interest in the challenged property at the time of the transaction because the quitclaim deed was joined by Sharyn Lasson via DPOA, and executed by and Stephen Larsson. R. 32-33. Therefore, Rogers was innocent of

knowledge of any equity against the property at the time his interest was acquired. So, the trial court erred in granting summary judgment and in not at least holding an evidentiary hearing to determine if Rogers is the owner of the property due to being a bona fide purchaser.

III. The Trial Court Erred in Granting the Motion for Judgment on the Pleadings and Dismissing the Counterclaims.

Since the trial court erred in determining that Rogers was not the owner of the property and in granting summary judgment to GPDC, the trial court also erred in granting GPDC's motion for judgment on the pleadings and dismissing the counterclaims. If Rogers is the rightful owner of the property, there can be no dispute that his counterclaims would be or could be valid. *See* R. 74-76. Moreover, even if the deed was *void ab initio,* the trial court erred in granting the motion for judgment on the pleadings and dismissing the counterclaims. An appellate court "reviews an order granting a motion for judgment on the pleadings de novo." *Martinez v. Hernandez*, 227 So. 3d 1257, 1259 (Fla. 3rd DCA 2017). The trial court granted judgment on the pleadings due to the alleged failure of Rogers to state a cause of action in his counterclaim. R. 692-93. Rogers had brought causes of action for Forcible Entry and Unlawful Detainer, Fraud, and Asset conversion. R. 74-76.

Even if the trial court was correct to declare the deed *void ab initio*, Rogers has at least a claim for asset conversion. To state a claim for conversion, "one must allege facts sufficient to show ownership of the subject property and facts that the other party wrongfully asserted dominion over the property. *Taubenfield v. Lasko*, 324 So.3d 529, 541-42 (Fla. 4th DCA 2021) (quoting *Edwards v. Landsman*, 51 So.3d 1208, 1213 (Fla. 4th DCA 2011). Conversion applies to money so long as "it consists of specific money capable of identification." *Belford Trucking Co. v. Zagar*, 243 So.2d 646, 648 (Fla. 4th DCA 1970). Rogers paid $150,000 to acquire a remainder interest in the property. R. 345. And he paid nearly another $100,000 to prevent the property from going into foreclosure. R. 276. If the deed is *void ab initio*, then the deed never had effect from the beginning. That means that Rogers does not own the property but has a right to his money – the $250,000 dollars paid to acquire and keep the property. That means that Rogers had a right to ownership of his nearly $250,000 dollars. Therefore, GPDC has wrongfully converted the money. At the very least, Rogers alleged sufficient facts such that it was wrong for the trial court to grant judgment on the pleadings.

In addition, equity indicates that Rogers is entitled to the recovery of the approximately $250,000 he paid to acquire the remainder interest in the property and to prevent the property going into foreclosure.

Courts of equity "came into being in order to provide relief in accordance with basic principles of right and justice in cases where the restrictive technicalities of the law prevent the giving of relief." *Adventist Health System/Sunbelt, Inc. v. Hegwood*, 569 So. 2d 1295, 1298 (Fla. 5th DCA 1990). A party can recover restitution when it shows "that the money was received in such circumstances that the possession will give offense to equity and good conscience if permitted to retain it." *Mann v. Thompson*, 118 So. 2d 112, 115 (Fla. Dist. Ct. App. 1960). And an action for money had or received "is an equitable remedy requiring proof that money has been paid due to . . . mistake, or as a result of some other grounds appropriate for intervention by a court of equity." *Hall v. Humana Hosp. Daytona Beach*, 686 So. 2d 653, 656 (Fla. 5th DCA 1996). Thus, it is no surprise that courts have held that it is possible for money paid on a void contract to be recovered and that purchasers should be returned to the place they were before the purchase in other contexts. *See Mayer v. First Nat'l Co.*, 125 So. 909, 911 (Fla. 1930); *Vista Designs v. Silverman.*, 774 So. 2d 884, 886 (Fla. 4th DCA 2001); *Griffin v. Lasalle Bank, N.A.*, 318 So.

3d 1232, 1235 (Fla. 2020) (quoting *Griffin v. Lasalle Bank, N.A.*, 4 So. 2d 1232, 854 (Fla. 2020)).

In this case, Rogers paid $150,000 on a deed that he mistakenly thought was valid. R. 345. And he paid almost $100,000 more dollars to pay off the mortgage. R. 276. Even if the deed is *void ab initio,* equitable principles indicate that Rogers should recover the money. It would be unjust otherwise because he paid that money on the assumption that he was or would become the owner of the property. Despite this being brought to the attention of the court, the trial court dismissed the counterclaim. That was an error.

IV. Even if the Trial Court was Right to Dismiss Rogers' Counterclaims, It should Have Dismissed Without Prejudice.

Even if the trial court was right to dismiss the counterclaims of Rogers, it should have dismissed the counterclaims without prejudice, as it stated it would do in its oral ruling. It has been said that at the "pleading stage, a motion to dismiss should not be granted with prejudice unless the plaintiff cannot allege a cause of action, or the amendment privilege has been abused." *City of Delray Beach v. Sherman Williams Am. Legion, Post 188*, 358 So. 3d 440, 444 (Fla. 4th DCA 2023).

The amendment privilege has not been abused here because Rogers has not amended his counterclaim. And it is not true that Rogers cannot allege a cause of action even if the trial court was right to dismiss Rogers' counterclaims. As shown above, Rogers can allege that he is entitled, on equitable grounds, to a return of the money that he paid to acquire the remainder interest in the deed and to prevent the property from going into foreclosure. Therefore, the dismissal should have been without prejudice.

This Final Judgment is defective for many reasons: 1. The oral pronouncement of the ruling is inconsistent with the order entered, which it should have been entered as to Rogers counterclaims "without prejudice", 2. The court failed to consider Rogers as *bona fide* purchaser and the record sufficiently contained evidence of the funds disbursed by Rogers in connection with the property, and 3. The Quit Claim Deed should not have been ruled as *void ab initio* without an equitable relief to Rogers.

CONCLUSION

For the foregoing reasons, the judgment should be reversed, and the case be remanded to the lower tribunal for further proceedings.

Dated: October 24, 2024

Respectfully submitted,

/S/

William F. Murphy III
Attorney for Appellant
3191 Coral Way, Unit 403A
Miami, FL 33145
305-948-7355

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to counsel by U.S. Mail and e-mail to Judith Frankel, ESQ., 5420 N. Bay Road, Miami Beach, Florida, 33140-2032 at JAF674@AOL.com on this 24th day of October 2024.

/S/

William F. Murphy
Fla. Bar No.: 300470
Murphy & O'brien, Ltd
3191 Coral Way suite 403A
Miami, Florida 33145
Tel.: (305) 948-7355
service@murphyandobrien.com

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the font and spacing requirements of Fla. R. App. P. 9.210.

/S/

William F. Murphy
Fla. Bar No.: 300470
Murphy & O'brien, Ltd
3191 Coral Way suite 403A
Miami, Florida 33145
Tel.: (305) 948-7355
service@murphyandobrien.com