IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No.: 1D2023-3255

KELI NIVENS,

Appellant,

v.

MELISSA SCHOFIELD, MEREDITH ALLRED, RICHARD NIVENS, and COMMUNITY BANK OF MISSISSIPPI,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF OKALOOSA COUNTY, FLORIDA, Lower Case No.: 2021-CA-002025

ANSWER BRIEF

ON BEHALF OF APPELLEE RICHARD NIVENS

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PRELIMINARY STATEMENT

Appellant, Keli Nivens, will be referred to herein as "Appellant" or "Keli". Appellee, Richard Nivens, will be referred to as "Richard"[1]. Appellee, Melissa Schofield, will be referred to as "Schofield", Appellee Meredith Allred will be referred to as "Allred", and Appellee Community Bank of Mississippi will be referred to as "Community Bank".

The record on appeal will be cited as (R. [page number]), according to the page number. For example, the citation "(R. 19)" would refer to the document located at page number 19 of the record on appeal. The trial transcript will be cited as (Tr. [page number]:[line number]) referring to the particular page number of the transcript and the applicable line numbers on that page. For example, the citation "(Tr. 450:3–10)" would refer to the page 450 of the trial transcript, lines 3 through 10. The citations to the trial transcript refer to the full trial transcript filed with the appellate court on August 5, 2024. References to the Appellant's Initial Brief filed June 6, 2024 will be cited as (Initial Br. at [page number]).

[1] At trial, the parties and witnesses at times referred to Richard Nivens by his nickname "Frog".

STATEMENT OF THE CASE AND OF THE FACTS

Appellee, Richard Nivens, adopts the entire Statement of the Case and of the Facts and all record cites and authorities asserted in the Answer Brief filed on August 29, 2024 by Appellee Community Bank of Mississippi. Richard Nivens supplements Community Bank's facts with the following:

Until August 3, 2015, Richard Nivens owned at least two residential properties solely in his name. (R. 768–770). The first property was the property located at 4797 Ocean Boulevard in Destiny by the Sea subdivision in Destin, Florida (the "Destiny Property")[2], which Richard Nivens had owned since at least the year 2000 before marrying Keli. (Tr. 237:3–238:2). According to the parties' testimony, Richard and Keli moved into the Destiny Property some time in 2004 before they were married in May 2005. (Tr. 61:20–24; 64:13–15; 237:24–238:2). The second property consisted of two parcels located at 881 Miracle Strip Parkway (the "881 Improved Parcel") and 889 Miracle Strip Parkway (the "889

[2] The Destiny Property is referred to by Appellant, Keli Nivens, in her Initial Brief as the "Destin Property" and was referred to by the parties and court throughout the trial as the "Destiny Property" or "Ocean Boulevard".

Vacant Lot") in Mary Esther, Florida, which property will be collectively described herein as the "Miracle Strip Property".[3] The Miracle Strip Property was purchased by Richard Nivens in January 2006 from the Harbesons[4] and titled solely in Richard Nivens' name "as his separate non-homestead property". (R. 768–769). Richard Nivens testified that he purchased the Miracle Strip Property as a business venture for development purposes, and he funded the purchase with a commercial loan from Whitney Bank. (Tr. 246:10–247:13; 313:6–314:25; R. 954–971).

In 2014, after years of trying to sell the Miracle Strip Property and keep the Whitney Bank loan afloat, which loan was secured by both the Miracle Strip Property and the commercial building for Richard's cabinet business, Whitney Bank initiated foreclosure. (Tr. 294:7–16; 440:4–5; 454:6–24; 531:2–17; 576:8–22). Richard Nivens was able to work out an arrangement with First Florida Bank and his step-father, James Leonard McGaughy ("McGaughy") to pay off

[3] The parties referred to the Mary Esther parcels by various names throughout the trial as the "Miracle Strip Property" or "881" or "889". This property is also referred to in the trial court's Final Judgment, collectively, as the "Miracle Strip Property."

[4] The trial transcript refers to the "Harbeson" name as "Harveston"; however, the Warranty Deed and other record evidence shows the seller's last name is "Harbeson". (R.165, 168–172).

the Whitney Bank loan before they foreclosed on the two properties, where McGaughy put up $780,000 in certificates of deposit ("CDs") as collateral for the First Florida Bank loan. (R. 984–988; Tr. 476:6–478:13). Richard's daughters and McGaughy's granddaughters, Melissa Schofield and Meredith Allred, had been listed as the payable on death beneficiaries on these CDs. (R. 985–987). After the $780,000 in CDs matured at the end of July 2015, these funds were used to pay off the First Florida Bank loan, and Richard Nivens transferred the Miracle Strip Property to McGaughy on August 3, 2015. (R. 984–988; Tr. 476:6–478:13; 575:8–15).

Following the August 3, 2015 transfer, the Destiny Property was the only residential property that Richard Nivens owned until that property was sold in a short sale on September 6, 2016. (R. 130; Tr. 261:19–22; 319:24–320:14). Upon obtaining title to the Miracle Strip Property, McGaughy immediately put it on the market for sale, and although he allowed Richard Nivens and Keli Nivens to stay there, Richard and Keli knew that they would have to leave if McGaughy was able to find a buyer. (Tr. 298:10–16; 350:9–24; R. 755–758). On December 16, 2019, McGaughy, through his

attorney-in-fact Melissa Schofield, mortgaged the Miracle Strip Property to Appellee Community Bank of Mississippi. (R. 131–140).

McGaughy was unsuccessful in selling the property, and when McGaughy passed away in May 2020, his Last Will and Testament ("Will"), prepared by attorney Gill Powell, bequeathed the Miracle Strip Property to Richard Nivens. (R. 148, 879–882; Tr. 493:13–494:15). Gill Powell testified that McGaughy updated his Will in 2018 to direct that his gold in a safe deposit box in Alabama be given to his two granddaughters, Melissa Schofield and Meredith Allred, and that his Alabama property and the Miracle Strip Property be given to Richard. (Tr. 489:15–20). Melissa Schofield, who was appointed agent under McGaughy's power of attorney at the time, believed the devise of the Miracle Strip Property to Richard at this time was incorrect and discussed this with Gill Powell. (R. 120–129; Tr. 611:8–13). Upon McGaughy's passing, unfortunately, his gift of the gold to Schofield and Allred failed because the gold was missing and never found. (Tr. 491:8–22). Schofield was the personal representative of the McGaughy's estate. (Tr. 491:7).

Some months after McGaughy passed away, Richard Nivens suffered a stroke in September 2020. (Tr. 340:8–18; 352:19–20).

Around the time that Richard had his stroke, Keli and Richard separated and Keli moved out and began living in her family's properties in Panama City and Tallahassee. (Tr. 96:1–3; 307:22–308:11). Divorce proceedings followed sometime thereafter, which proceedings are currently pending. (Tr. 62:8–9). On February 17, 2021, Richard Nivens inherited the Miracle Strip Property from McGaughy's estate through the Personal Representative Release and Certificate of Distribution of Real Property. (R. 773–775). On that same date, February 17, 2021, Richard Nivens transferred that property to Schofield and Allred, reserving a life estate. (R. 776–777).

On June 29, 2021, Keli Nivens filed this action against Defendants/Appellees challenging the conveyances of the Miracle Strip Property and the mortgage to Community Bank encumbering the Miracle Strip Property and sought to have them all declared void contending that the Miracle Strip Property was homestead and required her joinder under the Florida Constitution. (R. 16, 22–23). After a three-day bench trial, the lower court found that the greater weight of the evidence demonstrated that the Destiny Property was not abandoned as Keli Nivens and Richard Nivens homestead until

it was conveyed on September 6, 2016. (R. 1077, ¶18). Accordingly, the trial court concluded that the disputed Miracle Strip Property was not the Nivens' homestead over a year earlier on August 3, 2015, when it was conveyed to McGaughy, and found that deed to be a valid conveyance that did not require joinder by Keli Nivens. (R. 1078, ¶¶19, 25). The trial court likewise found that on December 16, 2019, McGaughy's mortgage to Community Bank validly encumbered the disputed property and did not require joinder by Keli Nivens. (R. 1079, ¶26). The court concluded that the deeds and mortgage were not false or fictitious pursuant to Section 817.535, Florida Statutes. (R. 1079, ¶27).

Having previously dismissed Keli Nivens' other counts for civil conspiracy and fraud on Defendants' motions for involuntary dismissal,[5] the trial court entered the Final Judgment for Defendants on the two remaining counts on November 21, 2023 (the "Final Judgment"). (R. 1079, ¶27–28). This appeal followed.

[5] Keli Nivens filed a four-count Amended Complaint against Defendants/Appellees: Count I for Declaratory Relief; Count II for Violation of Florida Statute 817.535(8); Count III for Civil Conspiracy; and Count IV for Fraud. (R. 17–62). The trial court involuntarily dismissed Counts III and IV on Richard Nivens' motion. (Tr. 425:20–23). The Initial Brief does not appeal the dismissal of those counts. (Initial Br. at 11).

SUMMARY OF ARGUMENT

In appellate proceedings, the appellant "has the burden on appeal to show how the trial court reversibly erred." *Figueroa v. Kossiver*, 336 So. 3d 1260, 1262 (Fla. 5th DCA 2022). Keli Nivens argues in her brief that "there was substantial evidence to support her contention that the [881] Improved Parcel was hers and Richard's homestead" from late 2005 to the present. (Initial Br. at 12). And throughout her Initial Brief, Keli Nivens points to only that trial testimony favorable to her arguments, ignoring all of the other testimony and evidence that amply supports the trial court's findings of fact. However, the appellate court does not "assess whether it is possible to recite contradictory record evidence which supports arguments rejected below." *Lahodik v. Lahodik*, 969 So. 2d 533, 534 (Fla. 1st DCA 2007). The standard of review is whether the trial court's findings are supported by competent, substantial evidence.

Following a three-day bench trial, which saw testimony from fifteen witnesses and numerous exhibits from each party, the trial court entered the Final Judgment in favor of Defendants/Appellees. The Final Judgment includes 24 paragraphs of findings of fact, and

ultimately found that the Miracle Strip Property was **not** the homestead of Keli Nivens and Richard Nivens at the time of the August 3, 2015 conveyance to James McGaughy, and as such, Keli Nivens was **not** required to join in that conveyance. (R. 1078, ¶¶ 19, 25). The trial court further found that the greater weight of the evidence demonstrates that Keli and Richard Nivens did not abandon the Destiny Property as their homestead until that property was conveyed on September 6, 2016. (R. 1077, ¶ 18).

The evidence shows that Richard and Keli Nivens moved into the Destiny Property in 2004, and thereafter, in January 2006 when the housing market was booming, Richard purchased the Miracle Strip Property as a business venture to develop it and almost immediately tore down the big house on the 889 parcel. There is testimony from multiple witnesses, including Richard Nivens, Robert Saxer who put together the commercial loan with Whitney Bank, and Richard's long-time office secretary Cynthia Townley, that the Miracle Strip Property was purchased for development purposes, and not to be Keli Nivens "forever home". Keli Nivens does not mention this testimony.

Richard Nivens testified that after the housing market crash in 2008, they stayed back and forth between the Destiny Property and the Miracle Strip Property, but he considered the Destiny Property to be his permanent residence. He saw the 881 Improved Parcel as a temporary residence that allowed them to free up the Destiny Property to be used as a short-term rental during the peak summer months from Memorial Day to Labor Day for extra income.

"Once homestead status is acquired, it continues until [it] is abandoned", and "a finding of abandonment requires a 'strong showing' of intent not to return to the homestead. *Yost-Rudge v. A to Z Props.*, 263 So. 3d 95, 97 (Fla. 4th DCA 2019). Although Keli Nivens claims the 881 Improved Parcel has been her homestead since 2005, the evidence shows she used the Destiny Property—**not** the 881 Improved Parcel—as her residential address on her driver's license from the years 2004 to 2018 and as her address on her voter registration until that was changed in November 2020. (Tr. 32:6–9; 347:1–7; R. 786; 796–799). Richard Nivens' driver's license records also show the Destiny Property as his residential address from December 2009 until February 2018, and his voting records list the Destiny Property as his address from 2004 until April 2017.

(R. 791–792; 801–803). This evidence supports the trial court's finding that that the Destiny Property was not abandoned as Keli and Richard Nivens homestead until that property was sold on September 16, 2016. Keli Nivens does not dispute or even address this evidence in her arguments in the Initial Brief.

The Initial Brief mentions the February 17, 2021 deed and asserts it is void without Keli's signature, but Keli Nivens does not point to any findings by the trial court in regard to the 2021 deed. To the extent Keli Nivens contends the lack of such findings is somehow error, such arguments are not preserved for appellate review as she did not file a motion for rehearing in the lower court challenging this issue below.

Even if the issue was preserved, the record is clear that Richard Nivens inherited the 881 Improved Parcel and 889 Vacant Lot as a bequest from McGaughy's Will, which was distributed solely to Richard Nivens, in his name alone, on February 17, 2021. It is well established law that real property acquired separately by a spouse through inheritance is a **nonmarital** asset absent some actions or intentions on the part of the receiving spouse that the property become marital. In fact, Richard **immediately, on the**

same day, deeded the property to Schofield and Allred reserving a life estate, clearly demonstrating his intent for that property to remain nonmarital property. At no time did Keli Nivens ever own or hold title to the Miracle Strip Property. Any assertions by Keli Nivens that these transfers were some attempt to keep the Miracle Strip Property from Keli are plainly refuted by the record.

Keli Nivens fails to carry her burden on appeal to show that the findings of the trial court are not supported by competent, substantial evidence. The trial court found the Miracle Strip Property was not homestead property on August 3, 2015 and was validly conveyed to James McGaughy and validly mortgaged to Community Bank by McGaughy on December 16, 2019. (R. 1074–1079). Looking at the totality of all of the evidence presented, it is clear that the trial court's findings in its Final Judgment are more than amply supported by the record evidence. The appellate court will not "retry the case or substitute its judgment for the trial court's on factual matters supported by competent, substantial evidence." *Lahodik*, 969 So. 2d at 534.

ARGUMENT

I. THE TRIAL COURT'S FINDINGS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE, AND THE FINAL JUDGMENT MUST BE AFFIRMED.

The appellate court reviews a judgment rendered after a bench trial under the competent, substantial evidence standard. *Haas v. Automation, Inc. v. Fox*, 243 So. 3d 1017, 1023 (Fla. 3d DCA 2018). "'[T]he trial court's findings of fact come to the appellate court with a presumption of correctness and will not be disturbed unless they are clearly erroneous.'" *Emaminejad v. Ocwen Loan Servicing, LLC*, 156 So. 3d 534, 535 (Fla. 3d DCA 2015) (quoting *Stone v. BankUnited*, 115 So. 3d 411, 412 (Fla. 2d DCA 2013)).

Keli Nivens does not argue that the trial court applied the wrong law or that it misconstrued any applicable law. Keli Nivens' only contention on appeal is that the trial court's findings of fact "are not based on competent, substantial evidence" with respect to the judgment entered in favor of Defendants/Appellees on two counts of the Amended Complaint (Count I Declaratory Relief and Count II Violation of Florida Statute 817.535(8)).[6] (Initial Br. at 5,

[6] The Initial Brief does not appeal the dismissal of Counts III or IV. (Initial Br. at 11).

24–25). In appellate proceedings, the appellant "has the burden on appeal to show how the trial court reversibly erred." *Figueroa v. Kossiver*, 336 So. 3d 1260, 1262 (Fla. 5th DCA 2022).

In her Initial Brief, Keli Nivens argues that the testimony of the parties established the 881 "Improved Parcel as homestead property from late 2005 to the present" and that the transfers and mortgage of that parcel are void without Keli's joinder as spouse under Article X, Section 4(c) of the Florida Constitution. (Initial Br. at 13, 21–22). While Article X, Section 4 of the Florida Constitution requires that a married owner of homestead real estate be joined by the spouse in order to alienate such property by mortgage, sale, or gift, this spousal joinder requirement necessarily only applies to real estate that is actually the owner's *homestead* property. *See* Art. X, § 4(c), Fla. Const. "The character of property as homestead depends upon an actual intention to reside thereon as a permanent place of residence, coupled with the fact of residence." *In re McCarthy*, 13 B.R. 389, 390 (Bankr. M.D. Fla. 1981).

After a three-day bench trial that consisted of testimony from fifteen witnesses and evidence from over sixty exhibits, the trial court correctly found, *inter alia*, that the Miracle Strip Property was

not the homestead of Keli Nivens and Richard Nivens at the time of the August 3, 2015 conveyance to James McGaughy, and as such, Keli Nivens was **not** required to join in that conveyance. (R. 1078, ¶¶ 19, 25). The trial court found that the "greater weight of the evidence demonstrated that the Miracle Strip Property was purchased for development purposes rather than to be used as Defendant Richard Nivens's and Plaintiff Keli Nivens's residence." (R. 1076, ¶ 9). And further found that the greater weight of the evidence demonstrates that Keli and Richard Nivens did not abandon the Destiny Property as their homestead until that property was conveyed on September 6, 2016. (R. 1077, ¶ 18). "[T]he homestead character of a subject property must be determined through fact-based analysis." *Fuller v. Carollo*, 2024 U.S. Dist. LEXIS 133461 at *13 (S.D. Fla. July 27, 2024). And abandonment of homestead turns on intent and is also a fact-intensive inquiry. *Yost-Rudge,* 263 So. 3d at 98.

Throughout her Initial Brief, Keli Nivens points to only that trial testimony favorable to her arguments and ignores all of the substantial and competent testimony and evidence that amply supports the trial court's findings of fact. Keli Nivens argues Lillie

Grace Davenport, Keli's daughter, testified that she was raised "at the [881] Improved Parcel her entire life" and had no belongings at the Destiny Property. (Initial Br. at 13). But this testimony was disputed as Richard's daughter, Meredith Allred, testified that Lillie had a bedroom on the first floor of the Destiny Property and had toys and family pictures there. (Tr. 222:24–223:12).

The Initial Brief also argues testimony from Keli's parents, Jon and Jeri MacDonald, stating that they visited Richard and Keli at the 881 Improved Parcel, attended gatherings there, and believed it was their permanent residence. (Initial Br. at 17–18). However, Richard Nivens testified that after 2008, they stayed back and forth between the Destiny Property and the Miracle Strip Property, but he considered the Destiny Property to be his permanent residence and saw the 881 Improved Parcel as a temporary residence—never a permanent residence—so he could have rental months for the Destiny Property. (Tr. 321:22–322:1; 560:14–561:9). His daughters, Meredith Allred and Melissa Schofield, likewise testified that they attended gatherings and visited Richard and Keli at both the Destiny Property and the 881 Improved Parcel throughout the years

before the Destiny Property was sold in 2016. (Tr. 202:13–203:19; 221:23–222:23; 225:2–19; 227:1–5).

Keli Nivens points to testimony from the postman, Ronnie Pope, saying that he would see Keli at the 881 Improved Parcel "three and five times a week either working in the yard or painting" and that he did not see them ever move out of that property. (Initial Br. at 14). While it would not be surprising that he saw Keli Nivens at the 881 Improved Parcel since the Nivens family stayed back and forth between the Destiny Property and the 881 Improved Parcel, his recollection of dates and when things occurred at property was inconsistent with other testimony. For example, Ronnie Pope said he last saw Keli Nivens at the property in 2023, but there is testimony that Keli started living at her grandmother's house in Panama City in or about 2020 or 2021 after Richard's stroke. (Tr. 54:8–10; 307:22–308:4). He testified that the big house on the 889 Vacant Lot was torn down in 2012 or 2013, but the evidence showed that it was torn down years earlier in 2007. (Tr. 55:9–20; 121:4–11).

When the housing market was booming in 2006, Richard Nivens purchased the Miracle Strip Property, which included both

the 881 Improved Parcel and the adjoining parcel at 889 Miracle Strip Parkway, from the Harbesons with the plan to develop it and sell. (Tr. 246:10–247:13; 313:6–314:8; 530:10–25). He financed the $1,350,000 purchase price through an interest-only, commercial loan with Whitney Bank,[7] which balloon loan was renewed and modified from time to time, nearly year over year, until the loan ultimately matured in November 2013. (R. 954–971; Tr. 370:1–9; 452:5–453:22). Originally, there was a large house on the 889 Miracle Strip parcel, which was immediately torn down as part of Richard's plan to develop the property. (Tr. 239:16–20; 314:21–22; 531:21–24; 538:2–3).

The Initial Brief points to testimony from Keli Nivens contending that the Destiny Property "has always been a rental property" and she, Richard, and Lillie "only lived in the Destin[y] Property for a brief time until November 2005", and then moved into the 881 Improved Parcel. (Initial Br. at 15). However, Richard's

[7] Initially, Richard Nivens borrowed $500,000 from Whitney Bank secured by his cabinet business, giving $350,000 cash to the seller, and making payments to the seller on the remaining $1 million for a year until Whitney Bank took over that debt and received assignment of seller's mortgage in January 2007. (R. 954; Tr. 370:1–9).

testimony is that it was not until after the 2008 housing market crash that Richard began renting out the Destiny Property during the summer months as a short-term, vacation rental. (Tr. 322:2–9). The downturn in the economy in 2008 hit Richard's cabinetry business hard, and Richard began borrowing heavily against the Destiny Property home in order to keep the payments on the Whitney Bank loan afloat, which loan was cross collateralized with his business building, all while trying to get the Miracle Strip Property sold. (Tr. 259:17–22; 440:4–5; 454:6–24; 531:2–17; 576:8–22). Richard testified that they started using the small, mother-in-law house that remained on the 881 Improved Parcel "**as a second residence**" so they could free up the Destiny Property for vacation rentals during those peak months from Memorial Day to Labor Day for the extra income. (Tr. 558:9–559:1).

Contrary to Keli Nivens' assertions in her brief, the testimony at trial was not at all "consistent" that they treated the 881 Improved Parcel as "their homestead and primary residence". There was conflicting evidence regarding the parties' residence. Although Keli Nivens testified that the Destiny Property was never her home address, this testimony is contradicted by other record evidence

showing that she used the Destiny Property—**not** the 881 Improved Parcel—as her residential address on her driver's license from the years 2004 to 2018. (Tr. 32:6–9; 347:1–7; R. 786). She likewise used the Destiny Property as her address on her voter registration as well, which she did not change to the 881 Improved Parcel until November 2, 2020. (R. 796–799). Richard Nivens' driver's license also shows the Destiny Property as his residential address from December 2009 until February 2018,[8] and his voting records list the Destiny Property as his address from 2004 until April 2017. (R. 791–792; 801–803). This evidence supports the trial court's finding that that the Destiny Property was not abandoned as Keli and Richard Nivens homestead until that property was sold on September 16, 2016. Keli Nivens does not dispute or even address this evidence in her arguments in the Initial Brief.

While Keli Nivens' testified that the Miracle Strip Property was purportedly purchased to build their "forever house", her testimony was that she intended to build that home on the 889 Vacant Lot

[8] There are no residential addresses listed in Richard Nivens' driver's license records for the period before December 2009, only his mailing addresses, which listed his office address at 707 Anchors Street in Fort Walton Beach beginning May 2003.

parcel, not the 881 Improved Parcel. (Tr. 64:25–65:6; 382:12–14). Conversely, Richard Nivens testified that they never discussed a "forever home" and that he purchased the Miracle Strip Property as a business venture, immediately tearing down the big house that was on the 889 Miracle Strip parcel to start developing it. (Tr. 314:13–25). In furtherance of that development project, the evidence is clear that the property was financed with a commercial loan, with the Whitney Bank banker, Robert Saxer, testifying that the size of the Miracle Strip Property was suitable to be subdivided to make a profit. (Tr. 439:21–25; 467:9–468:6). Richard Nivens' long-time office secretary, Cynthia Townley, likewise testified that Richard bought the Miracle Strip Property to develop it, and that he wanted to get a builder to build houses, and the company would do the cabinets. (Tr. 529:2–9; 530:10–20). The testimony and evidence are overwhelming that the Miracle Strip Property was on the market for sale over and over, with "Will Build to Suit" signs, but Richard could not get it sold in order to satisfy the Whitney Bank loan before it went into foreclosure. (Tr. 297:22–25; 577:12–578:22).

The Initial Brief states the Miracle Strip Property parcels were owned "free and clear" on May 5, 2014; however, this statement is

inaccurate and fails to acknowledge the testimony and evidence of the circumstances surrounding the transfer of the 881 Improved Parcel and 889 Vacant Lot to Richard's step-father, James Leonard McGaughy. In February 2014, Whitney Bank initiated foreclosure proceedings against Richard Nivens seeking to foreclose both the Miracle Strip Property *and* Richard's business building, which properties were cross-collateralized. (R. 950–971). Primarily to avoid losing his business property, Richard asked his step-father, McGaughy, for financial help. (Tr. 566:13–25).

In April 2014, Richard and McGaughy entered into a "Loan Assistance Contract" whereby McGaughy would put up approximately $780,000 in CDs as collateral for a loan with First Florida Bank in order to pay off the Whitney Bank loan and stop the foreclosure. (R. 981–982). There were two loans taken from First Florida Bank, one secured by Richard Nivens' business building and the other secured by McGaughy's CDs. (Tr. 476:14–477:18). The First Florida Bank loans satisfied the Whitney Bank loan in April 2014 and Whitney Bank's release was recorded on May 5, 2014. (Tr. 477:3–18; R. 117).

While Richard handled the finances for the family, Keli Nivens testified that she was aware that Richard was having financial difficulties with the bank in 2014 and that McGaughy was helping Richard financially. (Tr. 90:1–4; 113:12–114:9; 301:12–14). Once the CDs matured in July 2015, they were used to pay off the second First Florida Bank loan, and on August 3, 2015, Richard transferred the Miracle Strip Property to McGaughy. (R. 984–988; Tr. 477:12–478:13). While Keli Nivens did not sign the deed to McGaughy, Richard testified that he told Keli that the property was taken and his "stepdad was going to probably try to sell it as quick as he could." (Tr. 298:1–13). McGaughy did just that and immediately listed the property for sale with Scenic Sotheby's International Realty. (Tr. 298:10–16; R. 755–758). Corey Ledbetter, a realtor with Sotheby's, testified at trial that the property was listed with them for over 2 years, from August 10, 2015, through August 31, 2017, and then listed for sale again for 90 days or so in mid-2018. (Tr. 510:6–511:23).

After transferring the Miracle Strip Property to McGaughy, the only residential property that Richard Nivens owned was the Destiny Property. (Tr. 321:2–6). In late 2015, however, the Destiny

Property was also threatened by foreclosure, and on December 28, 2015, Richard Nivens filed a response to the foreclosure complaint with the court, in which he unequivocally stated that the Destiny Property "is my permanent residence, so it is important that the issue is resolved properly." (R. 118). To resolve the foreclosure, in 2016 Richard Nivens ended up having to put the Destiny Property up for short sale and sold it to a third party on September 6, 2016. (R. 130; Tr. 261:19–22; 319:24–320:14).

Looking at all of the testimony and evidence in the record, it is clear that Richard and Keli Nivens established the Destiny Property as their homestead in 2004. The Final Judgment correctly recites the applicable Florida law: "'Once homestead status is acquired, it continues until the homestead is abandoned or alienated in the manner provided by law. To show abandonment, both the owner and his family must have abandoned the property.'" *Yost-Rudge*, 263 So. 3d at 97 (quoting *Coy v. Mango Bay Prop. and Invs., Inc.*, 963 So. 2d 873, 878 (Fla. 4th DCA 2007)). Moreover, a finding of abandonment requires a 'strong showing' of intent not to return to the homestead." *Id.* Based on all of the evidence and testimony at trial, the trial court's finding that Keli Nivens did not meet her

burden of a "strong showing" that the Destiny Property was abandoned as their homestead is supported by competent, substantial evidence.

The Initial Brief argues that the Destiny Property short-sale deed recites that the property is not the grantor's homestead seemingly implying that has some bearing on whether or not the Destiny Property was homestead on the date of the transfer of the Miracle Strip Property to McGaughy over a year earlier. (Initial Br. at 20). However, Richard testified that by that time, the Destiny Property was in foreclosure and on the date of the deed—September 6, 2016—it was no longer his homestead, but he testified that "[p]rior to that, it had been" his homestead. (Tr. 260:7–261:3). This testimony further supports the trial court's finding that the Destiny Property was not abandoned as their homestead until it was conveyed on September 6, 2016. (R. 1076, ¶18). Even more, the evidence shows it was not until after this 2016 date that both Richard and Keli changed their respective addresses on their voter registrations and driver's licenses. (R. 791–799; 801–803).

Keli Nivens also argues that Richard testified that "he never homesteaded the Destiny Property." (Initial Br. at 20). However, this

testimony is taken out of context. Richard's testimony concerned the homestead **tax** exemption, and throughout the trial, Richard consistently testified that he "never had a homestead exemption **for tax purposes**" on any of his properties. (Tr. 276:1–19; 556:7–10). The homestead tax exemption provisions under Article VII of the Florida Constitution "are separate and distinct" from the homestead exemption provisions under Article X. *Crain v. Putnam*, 687 So. 2d 1325, 1326 (Fla. 4th DCA 1997).

After the short sale of the Destiny Property in 2016, Richard's step-father, McGaughy, allowed Richard and his family to live at the 881 Improved Parcel. (Tr. 350:6–14). However, "[h]omestead status is only afforded to property **owned** by a 'natural person'. *Bank of Am., N.A. v. Elnicki*, 2020 U.S. Dist. LEXIS 221811 at *13 (M.D. Fla. Sept. 22, 2020) (quoting Art. X, § 4, Fla. Const.). Thus, to qualify for homestead, "an individual must have an ownership interest in [the] residence." *Id.* (quoting *In re Alexander*, 346 B.R. 546, 547 (Bankr. M.D. Fla. 2006)) (internal quotations omitted). In 2016, Richard Nivens had no ownership interest in the 881 Improved Parcel or 889 Vacant Lot, as he had previously transferred ownership of the parcels to McGaughy over a year earlier when McGaughy paid

$780,000 to First Florida Bank to help resolve the Whitney Bank foreclosure. (Tr. 478:6–10). At no time did Keli Nivens ever have title to the 881 Improved Parcel in her name.

After hearing all of the witnesses' testimony and reviewing all of the exhibits, the trial court found that the "Miracle Strip Property was not homestead property on August 3, 2015". (R. 1078, ¶ 25). Accordingly, the trial court concluded that "Keli Nivens was not required to join-in the conveyance from Richard Nivens to James McGaughy, which validly conveyed that property to James McGaughy", and that McGaughy's subsequent December 16, 2019 Mortgage to Community Bank validly encumbers the Miracle Strip Property and validly secures the related promissory note to Community Bank. (R. 1078, ¶ 25–26).

"The resolution of factual conflicts by a trial judge in a nonjury case will not be set aside on review unless totally unsupported by competent substantial evidence." *Clegg v. Chipola Aviation, Inc.*, 458 So. 2d 1186, 1187 (Fla. 1st DCA 1984) (quoting *Concreform Systems, Inc. v. R.M. Hicks Construction Co.*, 433 So. 2d 50 (Fla. 3d DCA 1983)). "Substantial evidence is 'such evidence as a reasonable mind would accept as adequate to support a conclusion.'" *Atkins N.*

Am., Inc. v. Tallahassee MH Parks, LLC, 277 So. 3d 1156, 1160 (Fla. 1st DCA 2019). Even if reasonable minds could differ as to the trial court's resolution of the issues, the appellate court must affirm where there is competent substantial evidence to support the decision. *Lento v. Hill York Broward, Inc.*, 1986 Fla. App. LEXIS 8235 (Fla. 1st DCA June 10, 1986). Here, given all the testimony and evidence in the record, it is more than reasonable for the trial court to conclude that the Miracle Strip Property was **not** the homestead of Richard Nivens and Keli Nivens when Richard deeded it to McGaughy on August 3, 2015, since the evidence and testimony shows that they had not abandoned their homestead at the Destiny Property at that time.

After McGaughy passed away in May 2020, Richard inherited the Miracle Strip Property from McGaughy's Will. (R. 47, 50). Simultaneously with receiving the probate distribution of the Miracle Strip Property on February 17, 2021, Richard Nivens immediately deeded the property to his daughters, Schofield and Allred, reserving a life estate. (R. 773–777).

Attorney Gill Powell, who handled the probate of McGaughy's estate, prepared the February 17, 2021 Personal Representative's

Release and Certificate of Distribution of Real Property ("PR Distribution"), and the February 17, 2021 Warranty Deed from Richard Nivens to Schofield and Allred. (R. 773–777; Tr. 493:13–20; 494:19–495:13). He explained, without objection, that the bequest of the Miracle Strip Property from McGaughy's estate was not marital property, rather "it's inheritance property to Richard [Nivens] pursuant to the will." (Tr. 496:19–24). In preparing the Warranty Deed, he testified that they "checked it all out" and determined that it was not homestead. (Tr. 496:25–497:4).

Although the Initial Brief mentions the February 17, 2021 deed and asserts it is void without Keli's signature, Keli Nivens does not point to any findings by the trial court in regard to the 2021 deed. In fact, the trial court did not make any factual findings specific to the February 17, 2021 deed in its oral pronouncement or Final Judgment, nor did Keli Nivens make any contemporaneous objections or requests to the lower court seeking clarification in this regard. (Tr. 719:1–723:8; R. 1074–1080). To the extent Keli Nivens contends the lack of such findings in regard to this deed is somehow error, she did not file a motion for rehearing in the lower court in order to bring this alleged error to the trial court's attention

or afford the trial judge a reasonable opportunity to address it. As such, any arguments in this regard are not preserved for appellate review. *See Owens v. Owens*, 973 So. 2d 1169, 1170 (Fla. 1st DCA 2007) (holding that an issue is not properly preserved for appellate review where appellant did not challenge the adequacy of the factual findings in a motion for rehearing with the trial court).

Even if the issue was preserved, the record is clear that Richard Nivens inherited the 881 Improved Parcel and 889 Vacant Lot as a bequest from McGaughy's Will. (R. 773–775). Pursuant to Florida law, "[a]ssets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets" are **nonmarital** assets. § 61.075(6)(b)(2), Fla. Stat. (2023). The case law likewise consistently holds that property inherited by one spouse is a nonmarital asset absent some actions or intentions on the part of the receiving spouse that the property become marital. *See Lakin v. Lakin*, 901 So. 2d 186, 190 (Fla. 4th DCA 2005) (holding spouse intended for inherited funds to be marital property where the spouse deposited funds into a joint marital brokerage account).

In *Martin v. Martin*, this Court held that a forty-acre parcel of property that the former wife inherited and titled in her name alone was **nonmartial** property notwithstanding that the spouses lived on that parcel during most of their 47-year marriage. *Martin v. Martin*, 923 So. 2d 1236, 1237–1238 (Fla. 1st DCA 2006). Consistent with this Court's holding in *Martin v. Martin*, effective July 1, 2024, § 61.075(6)(b), Fla. Stat, was amended to add a sixth asset to the prescribed list of nonmarital assets and liabilities expressly providing that "**[r]eal property** acquired separately by either party by noninterspousal gift, bequest, devise, or descent for which legal title has not been transferred to the parties as tenants by the entireties" remains non-marital property. § 61.075(6)(b)(6), Fla. Stat. (2024).

Here, the Miracle Strip Property was inherited by Richard Nivens on February 17, 2021, and the PR Distribution reflects the property was distributed solely to Richard Nivens, in his name alone. (R. 773–775). It was not distributed to Richard and Keli Nivens jointly, nor did Richard Nivens ever transfer title to the property to himself and Keli as tenants by the entireties. In fact, Keli Nivens never owned or held title to the 881 Improved Parcel at

any point in time. Additionally, Richard's intention for that property to remain nonmarital property is abundantly clear as he **immediately, on the same day**, deeded that property to Schofield and Allred reserving a life estate. Moreover, it is without dispute that the 881 Improved Parcel was **not** McGaughy's homestead, and as such, that property did not pass as homestead-protected property to Richard. As separately inherited property, the Miracle Strip Property is clearly a nonmarital asset.

Any assertions by Keli Nivens that these transfers were some attempt to keep the Miracle Strip Property from Keli are plainly refuted by the record. Gill Powell who probated McGaughy's WIll testified at trial that there were never any discissions with anyone that the February 17, 2021 deed to Schofield and Allred had anything to do with Keli Nivens. (496:2–14). Additionally, the record reflects reasons why the Miracle Strip Property would have been deeded to Schofield and Allred that have absolutely nothing to do with Keli. There is evidence that Schofield and Allred were the payable on death beneficiaries on McGaughy's CDs, which they did not receive upon McGaughy's death since the CDs were previously used to pay for the Miracle Strip Property. (R. 985–987; Tr. 476:6–

478:13). There is also evidence that McGaughy intended his gold be left to Schofield and Allred, but that gold went missing so they did not receive that either. (Tr. 491:8–22).

Since the 881 Improved Parcel is believed to contain 0.47 acres, Keli Nivens also argues in her brief that she is entitled to another 0.03 acres to her homestead interest from the 889 Vacant Lot, which is believed to be 1.46 acres, citing *Quigley v. Kennedy & Ely Insurance, Inc.*, 207 So. 2d 431 (Fla. 1968). (Initial Br. at 22). The Florida Constitution limits the maximum size of homestead property that is located within a municipality to a one-half acre of contiguous land. Art. X, § 4(a), Fla. Const. The parties agree that both parcels of the Miracle Strip property are located within the city limits of the City of Mary Esther. (R. 1062). The trial court did not find that the 881 Improved Parcel was homestead though; therefore, there is no homestead property to be expanded. Further, "homestead status is established by actual intention to live permanently in a place coupled with actual use and occupancy." *In re Lee*, 223 B.R. 594, 598 (Bankr. M.D. Fla. 1998). And there was no evidence or testimony at trial that Richard or Keli Nivens actually used or occupied any part of the 889 Vacant Lot.

Keli Nivens also briefly makes mention of the trial court's oral pronouncement where the trial transcript reflects the judge stated that the 881 Improved Parcel "was purchased on January 4, 2016" and asserts the court committed error since the evidence shows the property was purchased on January 4, 20<u>06</u>. (Initial Br. at 25). Whether there is a typo in the transcript or the judge simply misspoke is of no consequence and is certainly not reversible error, particularly since the Final Judgment reflects the purchase as January 6, 2006 consistent with the evidence. (R. 1075, ¶3).

Throughout her brief, Appellant, Keli Nivens, merely recites testimony and evidence that are favorable to her arguments below and fails to carry her burden on appeal to show that the findings of the trial court are not supported by competent, substantial evidence. Indeed, "the scope of the [appellate court's] review does not entail examining evidence that potentially supports a different result." *Q.G.S. Dev., Inc. v. Nat'l Lining Sys., Inc.*, 386 So. 3d 596, 598 (Fla. 3d DCA 2024). Nor does the appellate court "assess whether it is possible to recite contradictory record evidence which supports arguments rejected below." *Lahodik*, 969 So. 2d at 534. As

discussed *supra*, there is ample testimony and evidence in the record that supports the trial court's findings in this case.

As with all cases, the trial court sitting as the trier of fact is charged with assessing the credibility of witnesses and weighing conflicting testimony. During the three-day bench trial, the trial court heard the testimony of 15 different witnesses and considered all of the parties' respective exhibits. "It is well-established that the appellate court does not re-weigh the evidence or the credibility of witnesses." *Id.* Looking at the totality of all of the evidence presented, the trial court made 24 detailed findings of fact in its Final Judgment, and ultimately, concluded that the Miracle Strip Property was not homestead property on August 3, 2015 and was validly conveyed to James McGaughy and validly mortgaged to Community Bank by McGaughy on December 16, 2019. (R. 1074–1079). In reviewing lower court decisions, the appellate court will not "retry the case or substitute its judgment for the trial court's on factual matters supported by competent, substantial evidence." *Id.*

In addition to the foregoing arguments, Appellee, Richard Nivens, adopts the arguments in the Answer Brief filed on August 29, 2024 by Appellee, Community Bank of Mississippi. *See*

Pensacola Beach, L.L.C. v. American Fid. Life Ins. Co., 294 So. 3d 976, 977 n.2 (Fla. 1st DCA 2020) (observing that a party to an appeal may adopt a brief to present arguments).

CONCLUSION

Appellant, Keli Nivens, has failed to establish that the lower court has committed reversible error. The record is replete with competent and substantial testimony and evidence that amply supports the trial court's findings in this case. As such, Appellee, Richard Nivens, respectfully requests that the Final Judgment be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that on September 4, 2024, a copy of the foregoing Answer Brief of Appellee Richard Nivens has been served via the Florida E-Filing portal service to the following:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this Answer Brief was prepared using Bookman Old Style 14-point font and complies with the font and word count requirements of Fla. R. App. P. 9.045 and 9.210(a). I relied upon the word count of the word processing system used to prepare this document.

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