IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

Brown Brothers, The Family LLC,

Petitioner,

v.

Chronus Construction, Inc.,

Respondent.
_____/

CASE NO.: 2015-CA-10238-O

LOWER COURT CASE NO.: 2014-CC-15328-O

Petition for Writ of Certiorari from an
Order on Plaintiff's Motion for Increased
Security Pursuant to Section 713.24,
Florida Statutes,
County Court in and for Orange County, Florida,
Jeanette D. Bigney, County Court Judge.

Patrick C. Crowell, Esq.,
for Petitioner.

Douglas K. Gartenlaub, Esq.,
for Respondent.

Before HARRIS, DAWSON, and WHITE, J.J.

PER CURIAM.

FINAL ORDER DENYING AMENDED PETITIONS FOR WRIT OF CERTIORARI

Brown Brothers, The Family LLC, and Chronus Construction, Inc., seek certiorari review of the county court's order granting Brown Brothers' motion to increase the cash security based on a construction lien. The Court denies both petitions, as the statute regarding increasing the lien to provide for attorney's fees incurred in prosecuting a claim against a construction lien does

apply when there is a contingency fee agreement between the attorney and client and there is competent substantial evidence supporting the trial court's order increasing the security.

On May 29, 2015, Brown Brothers filed an amended complaint seeking to foreclose a construction lien against a lien transfer bond (cash security) and for unjust enrichment. The construction lien was transferred from a lien on the property to a bond, as permitted under Florida Statute section 713.24(1)(b). This allows the property owner to unencumber the property, but still provides security for a judgment. *Schonfeld v. Hughes Supply, Inc.*, 392 So. 2d 324, 325 (Fla. 1st DCA 1980). Brown Brothers seeks the total lien of just under $7,000.

Two months later, Brown Brothers moved to increase the security for the lien under section 713.24(3). Brown Brothers argued that the cash deposit was not enough to secure payment of the attorney's fees that it incurred in the proceeding.

At the hearing on the motion, Brown Brothers' attorney testified that they have a contingency fee agreement. The contingency fee agreement states that Brown Brothers' attorney will receive a contingent fee equal to a certain percentage of what he recovers for Brown Brothers or a court's award of attorney's fees, whichever is greater. Brown Brothers' attorney testified that the security should be increased by at least $26,000 to cover the work he did on the case thus far. Additionally, Brown Brothers called an expert witness who testified that the bond should be increased by $33,000. The trial judge, who previously denied Brown Brothers' second motion to strike affirmative defenses, heard the expert witness testify before in other cases. Chronus Construction did not present any witnesses or evidence, although its attorney opined that a reasonable amount should never exceed the court's jurisdictional limitation on damages.

The trial court granted the motion and ordered the security increased by $7,000. Brown Brothers and Chronus Construction petition this Court for certiorari review of that order.

A. Jurisdiction

Brown Brothers and Chronus Construction seek review of the trial court's order granting Brown Brothers' motion to increase the construction lien. Brown Brothers filed its motion to increase the lien under Florida Statute section 713.24(3) (2015), which states:

> Any party having an interest in such security or the property from which the lien was transferred may at any time, and any number of times . . . file a motion in a pending action to enforce a lien, for an order to require additional security . . . . If the court finds that the amount of the deposit or bond in excess of the amount claimed in the claim of lien is insufficient to pay the lienor's attorney's fees and court costs incurred in the action to enforce the lien, the court must increase the amount of the cash deposit or lien transfer bond.

Although the trial court increased the security by $7,000, which brings the security up to approximately $14,000, Brown Brothers argues that it presented evidence that its attorneys have already incurred between $26,000 and $33,000 in work done on this case.

In *Royal Marble, Inc. v. Innovative Flooring & Stonecrafters of SWF, Inc.*, 932 So. 2d 221, 222 (Fla. 2d DCA 2005), the petitioner sought review of the trial court's "order denying its motion to increase the cash deposit to which a construction lien . . . has been attached." The petitioner moved to increase the security under Florida Statute section 713.24(3), seeking "additional security for both attorney's fees already incurred and prospective attorney's fees." *Id.* Although the trial court denied the motion, it was denied without prejudice. *Id.* The trial court found that the petitioner did not present sufficient evidence supporting its motion. *Id.* The petitioner sought review of the trial court's order with the Second District, but the court dismissed the petition "because the harm alleged is not irreparable." *Id.* To be entitled to a writ of certiorari, the petitioner must demonstrate that there has been a departure from the essential

requirements of law that results in irreparable harm. *Id.* "The trial court's order denied Royal Marble's motion without prejudice, and Royal Marble is free to file a new motion to increase the bond and to present the necessary evidence as to the amount and reasonableness of attorney's fees it has incurred thus far." *Id.* Additionally, the petitioner can "continue to file motions seeking to increase the bond as it incurs fees that exceed the amount of the security bond that is set aside for fees and court costs." *Id.* at 222-23.

Bayview Construction Corp. v. Jomar Properties, LLC, seems to come to the opposite conclusion regarding motions on changing the security's amount under section 713.24(3). 97 So. 3d 909 (Fla. 4th DCA 2012). In *Bayview*, the trial court granted the respondent's motion to reduce the security, reducing it to correspond to an arbitration award. *Id.* at 910-11. The trial "court stated that if additional amounts were proved, [the petitioner] could move to increase the bond, as often as weekly." *Id.* at 911. The Fourth District held that certiorari relief was available, rejecting the respondent's argument that the petitioner would not "suffer material injury for which there is no adequate remedy on appeal." *Id.* The petitioner's claims were secured up to an amount less than what it claimed as damages. *Id.* If the respondent cannot pay that difference or increase the bond when the petitioner asks for another increase, the petitioner "may have no recourse, because a surety is liable only up to the face amount of the transfer bond." *Id.* at 912. The court had certiorari jurisdiction because "[t]he prospect that [the petitioner] will be left with a partially unsecured judgment is a harm which is irreparable on final appeal." *Id.*

Other cases have held that eliminating the petitioner's security for a judgment results in irreparable harm that cannot be remedied on appeal. In *Norwest Mortgage, Inc. v. King*, the trial court ordered the mortgagee to issue a satisfaction of mortgage before being paid in full. 789 So. 2d 1139, 1140 (Fla. 4th DCA 2001). Because the mortgagee would "no longer have the right to

foreclose on the property to collect the difference[,]" the potential for irreparable harm existed, and the court had certiorari jurisdiction. *Id.* In a Second District case, the court held that it had certiorari jurisdiction to review the trial court's order discharging a claim of lien, dismissing the count to foreclose the lien, and dissolving the lis pendens. *Phoenix Walls, Inc. v. Liberty Pasadena, LLC*, 980 So. 2d 1286, 1288-89 (Fla. 2d DCA 2008). Because the order dismissed the claim without an indication that the claim could be pursued against the bond, there was material injury "that cannot be remedied in an appeal of the final judgment . . . ." *Id.*

Bayview relied on the prospect that the petitioner could be left with a partially unsecured judgment. *Bayview*, 97 So. 3d at 912. Brown Brothers presented evidence that its attorney worked on the case in an amount that exceeds the security, so there is evidence that Brown Brothers could be left with a partially unsecured judgment. That, combined with the other cases holding that there is certiorari jurisdiction when security for a potential judgment is eliminated, lead the Court to conclude that it has jurisdiction to review the trial court's order on the motion to increase the security.

B. Standard of Review

In a certiorari proceeding, the circuit court is limited to determining whether the lower tribunal's decision was supported by competent substantial evidence, whether there was a departure from the essential requirements of the law, and whether procedural due process was accorded. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). To grant the petition, the departure from the essential requirements of the law must cause a material injury that cannot be remedied on appeal. *Royal Marble, Inc. v. Innovative Flooring & Stonecrafters of*

SWF, Inc., 932 So. 2d 221, 222 (Fla. 2d DCA 2005); *Phoenix Walls, Inc. v. Liberty Pasadena, LLC*, 980 So. 2d 1286, 1289 (Fla. 2d DCA 2008).

C. Whether Brown Brothers "incurred" attorney's fees

Chronus Construction argues that Brown Brothers did not incur attorney's fees under the construction lien statute because the agreement between it and its attorney is a contingency fee agreement. As the contingency has not yet occurred, Chronus Construction argues that Brown Brothers is not entitled to an increase in security for Brown Brothers' attorney's fees.

The fee agreement between Brown Brothers and its attorney states:

> This is to confirm that . . . "Attorney"[], will handle this matter and, provided the Client and Attorney mutually agree, any future collection proceedings, construction lien foreclosure and bond claims, on a contingent fee equivalent to the ***greater*** of (a) or (b) below:
>
> (a) 33 1/3% of the gross amount of the sum owed and accrued interest recovered through settlement, trial, arbitration or appeal; or
> (b) all reasonable attorney's fees awarded by a[] trial or appellate court or obtained through voluntary settlement, mediation or arbitration.

(Brown Bros.' App. Ex. 7 at 13 (emphasis supplied).)

As noted above, section 713.24(3) states that a party may apply for an order requiring additional security, and the court must increase the bond if it "is insufficient to pay the lienor's attorney's fees and court costs *incurred* in the action to enforce the lien . . . ." (Emphasis added.)

Although Florida courts have not addressed the meaning of "incurred" in a prevailing party fee statute in a situation regarding contingency fee agreements, the federal courts have done so. The federal courts consistently hold that, when a prevailing party attorney's fee statute

states that the attorney's fees awarded are for those "incurred," a client is considered to incur attorney's fees under a contingency fee agreement if the agreement provides that the attorney is entitled to the court-awarded statutory fee. *Turner v. Comm'r of Soc. Sec.*, 680 F. 3d 721 (6th Cir. 2012); *Murkeldove v. Astrue*, 635 F.3d 784 (5th Cir. 2011).

In *Murkeldove*, the clients were denied benefits from the Social Security Commissioner, appealed the denials, and the cases were reversed and remanded for further proceedings. *Murkeldove*, 635 F.3d at 786. Their attorney then sought an award of attorney's fees under the Equal Access to Justice Act (EAJA). *Id.* Although the Commissioner agreed with the request, the district court denied it, finding that the clients had not "incurred" attorney's fees because their contingency fee agreements with their attorney "did not obligate them to pay attorney's fees unless they won their benefits cases on remand[,]" which had not yet happened. *Id.* at 787.

Under the EAJA, a court shall award attorney's fees to a prevailing party that were "incurred by that party . . . ." *Id.* at 788 (quoting EAJA, 28 U.S.C. § 2412(d)(1)(A)). Like the statute at issue in this case, the EAJA does not define "incur," so the Fifth Circuit looked to the definitions in Webster's Dictionary and Black's Law Dictionary. *Id.* at 790. Webster's defined "incur" as "to become liable or subject to," and Black's defined it as "to suffer to bring on oneself a liability or expense." *Id.* Using these rules, the court decided that generally, the client incurs attorney's fees when he has a legal obligation to pay them. *Id.* Then, the court noted, "Courts have also interpreted 'incurred' in similar fee-shifting statutes to mean that a party has a legal obligation to pay fees pursuant to a contingency-fee agreement." *Id.* at 791.

The Fifth Circuit held that the clients "incurred fees because they have a legal obligation to pay their attorneys fees pursuant to contingency-fee agreements." *Id.* The agreements stated that if EAJA fees are awarded, then the fees belong to the attorney. *Id.*

The court also held that "well-established rules of statutory construction and policy considerations dictate that they should be awarded attorney's fees." *Id.* at 792. The EAJA, as a waiver of sovereign immunity, must be strictly construed. *Id.* Construing the EAJA to prohibit contingency-fee agreements, however, would significantly frustrate the Act's purpose. *Id.* That interpretation would prevent a significant percentage of parties from obtaining an award of attorney's fees under the EAJA, and the purpose of the Act was to financially assist those defending against unjustified governmental action, thus deterring such action, and to lessen the deterrents of seeking review of governmental action. *Id.* at 793. Holding "that contingency-fee agreements are an invalid means to 'incur' fees pursuant to the EAJA, would have the effect of restricting rather than expanding access to courts." *Id.* at 794. The court "decline[d] to create this precedent" and held that the clients did incur attorney's fees under the EAJA, even though their cases had been remanded for further proceedings. *Id.*

Murkeldove is applicable here. The EAJA and Florida statute section 713.24(3) state that they apply to attorney's fees that were "incurred." 28 U.S.C. § 2412(d)(1)(A); § 713.24(3), Fla. Stat. (2015). Both *Murkeldove* and this case involve contingency fee agreements with provisions regarding court-awarded fees. Both the EAJA and Florida's construction lien law are to be strictly construed. *Murkeldove*, 635 F.3d at 792; *Aetna Cas. & Sur. Co. v. Buck*, 594 So. 2d 280, 281 (Fla. 1992). In *Murkeldove*, the clients had not yet prevailed on the ultimate determination of whether they were entitled to social security benefits; here, there has been no determination of whether Brown Brothers is the prevailing party. Because of these similarities between *Murkeldove* and this case, because the federal courts consistently hold that a contingency fee agreement does not preclude an award of attorney's fees under a prevailing party attorney's fee statute that uses the word "incur," and because there does not appear to be any Florida law on

this issue, the trial court did not depart from the essential requirements of the law in increasing the security under section 713.24(3) to cover the attorney's time spent litigating the case under a contingency fee agreement that contains a provision regarding the attorney being entitled to an amount equal to attorney's fees awarded by a court. As this is the sole basis for Chronus Construction's Amended Petition for Writ of Certiorari, its Amended Petition is denied.

D. Whether the increased amount is supported by competent substantial evidence

Brown Brothers argues that the trial court's decision to increase the security by $7,000 is unsupported by competent substantial evidence. It asserts that the only evidence before the court was that of its attorney and expert witness, who testified that the bond should be increased by at least $26,000 to cover attorney's fees. Chronus Construction replies that the increase is supported by the record, the trial court has discretion in determining the security amount, and it was not required to follow the expert witness's recommendation.

Trial courts are "not bound by the testimony of the expert as to the amount of a reasonable attorney's fee, even [if] there [i]s no opposing expert." *Baldwin Piano & Organ Co. v. Dote*, 740 So. 2d 1230, 1231 (Fla. 1999); *Fatolitis v. Fatolitis*, 271 So. 2d 227, 229 (Fla. 2d DCA 1973) (recognizing that attorney's fee award must be supported by competent substantial evidence and holding that parties did not demonstrate abuse of discretion in attorney's fee award less than that recommended by expert witness, even when witness was only one to testify). In addition, expert witness "testimony is to be weighed with the other evidence in the case bearing upon the value of the services." *In re Estate of Harrell*, 426 So. 2d 63, 64 (Fla. 5th DCA 1983) (affirming trial court's award of attorney's fees finding that reasonable number of hours was 200 less than that testified to by expert witnesses).

In *Southpointe Homeowners Association, Inc. v. Segarra*, 763 So. 2d 1186, 1186 (Fla. 4th DCA 2000), the homeowners' association sought $300 in arrearages, but its attorneys requested $4,650 in fees. The Fourth District affirmed the trial court's order awarding $785 in attorney's fees. *Id.* Although the homeowners' association presented unrebutted expert testimony supporting its request, the trial court was not bound by it. *Id.* at 1187. Trial judges "can, based on their own familiarity with the type of litigation involved, determine that some of the work was unnecessary." *Id.*

In this case, Brown Brothers seeks to foreclose a construction lien for almost $7,000. Brown Brothers argued that the bond should be increased by at least $26,000. There is evidence that the trial judge is familiar with this type of litigation, as she had earlier ruled upon a motion to strike affirmative defenses in the case and had heard Brown Brothers' expert witness testify in other cases. Therefore, under *Southpointe Homeowners Association*, the trial court was not bound by Brown Brothers' expert witness's testimony and could find that a lesser amount would be sufficient to provide security for a future award of attorney's fees. The amount of the construction lien compared to the requested amount of attorney's fees, plus evidence of the trial court's familiarity with this litigation, constitute competent substantial evidence supporting the order increasing the security by $7,000.

The trial court's order did not include any findings. Although an order awarding attorney's fees must make findings regarding the hourly rate and reasonable number of hours expended, *Delmonico v. Crespo*, 127 So. 3d 576, 578-79 (Fla. 4th DCA 2012), the trial court's order did not award attorney's fees. Instead, it increased the security to cover a possible future award of attorney's fees. Brown Brothers argues that the standard should be the same, but did not

cite any law, and the Court did not find any, supporting the proposition that an order increasing security for attorney's fees has the same requirements as an order awarding attorney's fees.

E. Requests for attorney's fees

Brown Brothers and Chronus Construction request an award of attorney's fees in their petitions and responses. Neither party filed a motion for appellate attorney's fees with the Court.

Under Florida Rule of Appellate Procedure 9.400(b), a party seeking an award of appellate attorney's fees must file a motion. "[A]ttorney's fees must be requested by filing a separate motion and not merely as a line request in a pleading." *Garcia v. Collazo*, 178 So. 3d 429, 430 (Fla. 3d DCA 2015) (denying request for appellate attorney's fees contained in motion to dismiss appeal which also failed to include a substantive basis for such an award). The appellate court may properly deny a request for attorney's fees that is not presented in a motion complying with Rule 9.400(b). *Reichenberg v. Davis*, 846 So. 2d 1233, 1234 (Fla. 5th DCA 2003) ("Appellee's request for attorney's fees on appeal is denied because the request was made in her brief, rather than by separate motion."); *McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 696 (Fla. 4th DCA 2000). Because the parties' requests for appellate attorney's fees were made in their petitions and response, rather than in a separate motion as Rule 9.400(b) requires, the requests are denied.

The Court does have jurisdiction to review the petitions for writ of certiorari, as the courts consider eliminating or reducing security for a judgment to be irreparable harm. The statute regarding increasing the lien to provide for attorney's fees incurred in prosecuting a claim against a construction lien does apply when there is a contingency fee agreement between the attorney and client. Additionally, there is competent substantial evidence supporting the trial

court's order increasing the security by $7,000. Finally, both parties' requests for attorney's fees for this proceeding fail to comply with the Florida Rules of Appellate Procedure.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

1. "Petitioner, Brown Brothers, The Family LLC's, Amended Petition for Writ of Certiorari" and Chronus Construction, Inc.'s "Amended Cross-Petition for Writ of Certiorari" are **DENIED**.

2. The parties' requests for appellate attorney's fees are **DENIED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 20th day of April, 2016.

/S/
JENIFER M. HARRIS
Presiding Circuit Judge

DAWSON and WHITE, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to: **The Honorable Jeanette D. Bigney, Orange County Judge**, Orange County Courthouse, 425 N. Orange Ave., Orlando, FL 32801; **C. Patrick Crowell, Esq.**, C. Patrick Crowell, P.A., 4853 S. Orange Ave., Suite B, Orlando, FL 32806; and **Douglas K. Gartenlaub, Esq.**, Burr & Forman LLP, 200 S. Orange Ave., Suite 800, Orlando, FL 32801, on this 20th day of April, 2016.

/S/
Judicial Assistant