No. 103740-6

SUPREME COURT
OF THE STATE OF WASHINGTON

JORGE H. NAVAS,

RESPONDENT,

v.

MYRNA LINETT DUARTE SAS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES AND REGULATIONS

I. INTRODUCTION

The Court of Appeals correctly held that the trial court abused its discretion in entering an "order . . . granting to cotenant Myrna Duarte . . . sole interest in certain real property on the basis that Duarte had ousted [Navas] from that property," and that the trial court's decision, which awarded Navas little more than $25,000 for his interest in a property valued at more than a million dollars, was not harmless.

In arguing that this Court should accept review of the Court of Appeals' unpublished opinion, Duarte relies on the theory of owelty, which was raised for the first time in a statement of additional authority filed after oral argument in the Court of Appeals, to claim that the court's decision "undermines a trial court's ability to effectuate equitable partition" and is "in conflict with the partition statute and longstanding precedent." Duarte is wrong. The Court of Appeals' opinion merely corrects the trial court's

improper conflation of two distinct legal principles—partition and ouster—and remands for the trial court to conduct a proper legal analysis under the partition statute given the evidence presented in the record.

This Court should deny review of the Court of Appeals' thoughtful and well-reasoned decision.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly hold that the trial court had abused its discretion in quieting title to Duarte based on an incorrect application of the unpled theory of ouster?

2. Was it proper for the Court of Appeals to instruct the trial court on remand to comply with the partition statute, on which the action was based, while leaving open the possibility of a deviation from the statute if adequate findings of fact and conclusions of law are made?

3. Did the Court of Appeals properly decline to affirm the trial court's decision on the alternative, newly advanced, theory of owelty when the record does not support an award of $25,000 as owelty for Navas' interest in the former family home?

III. RESTATEMENT OF THE CASE

The Court of Appeals' opinion accurately recites the facts of the case (Op. 1–5),[1] and are summarized here:

A. The parties owned a home as tenants in common after their divorce in El Salvador.

Respondent Jorge Navas and petitioner Myrna Duarte married in 1999. (Op. 1; Finding of Fact ("FF") 1, CP 3; RP 127) In 2006, they purchased a home for $425,435, using proceeds from the sale of their former community property home and a mortgage of $383,400. (Op. 1–2; FF 2, CP 3; RP 46–48, 127, 133–34; Exs. 1, 103, 104)

[1] This Answer cites to the slip opinion.

In 2012, the parties separated. Duarte moved out of the home, and Navas continued to reside on the property and paid the mortgage. (Op. 2; RP 48–49, 130) In December 2012, the parties were divorced in El Salvador. (Op. 2; FF 3, CP 3; RP 48–49, 128–29; Ex. 106) The Salvadorean divorce decree did not address the disposition of the home and accordingly, the parties became tenants in common. (Op. 2; FF 3, CP 3; *see* RP 48–49, 128–29; Ex. 106) The parties reconciled in late 2013, and the parties resumed living together in the home and had another child together in 2014. (Op. 2; FF 4, CP 3; RP 49–50, 55, 131)

In November 2014, the parties received notice that their lender was foreclosing on the property, as they had stopped making payments on the mortgage after they both lost their jobs. (Op. 2; FF 5, 6, CP 3–4) In January 2016, the parties received notice that the home would be sold at a foreclosure auction to satisfy the mortgage. (Op. 2; FF 6, CP 3–4) Three days before the auction, Duarte filed for

Chapter 13 bankruptcy, which stayed the foreclosure and impending sale. (Op. 2; FF 7, CP 4; RP 160–61; Ex. 6)

The Chapter 13 plan required Duarte to make payments of $4,000 per month for sixty months. (Op. 2; FF 8, CP 4) According to Duarte, Navas agreed to pay half of the bankruptcy payments each month, but he only made one payment of $2,000 while he lived in the home. (Op. 2–3; RP 64)

In October 2016, Navas moved out of the home, in part, so that Duarte could rent out his bedroom. (Op. 3; FF 9, CP 4; RP 64–65) After moving out, Navas made one additional payment of $2,000. (Op. 3; RP 64)

While Navas returned to perform occasional upkeep on the home (*See* RP 66–67, 209–210), he never returned to reside there, nor did he make additional financial contributions to the home or receive any portion of the rental income that Duarte was collecting from her tenants. (Op. 3; FF 9, 10, 12, CP 4; RP 65, 233–34, 241)

B. After Duarte exited bankruptcy, Navas petitioned to partition the home.

Duarte exited Chapter 13 bankruptcy in June 2021, having paid $217,000 to the bankruptcy trustee and satisfying the terms of the bankruptcy plan. (Op. 3; FF 10, CP 4; RP 204–05) By then, the home, which was valued at $465,000 at the time the bankruptcy petition was filed (Ex. 6 at 21; RP 251), was appraised at $1.1 million (RP 251; *see also* Ex. 11), based solely on increases in property values over the intervening five years.

Two months after Duarte was discharged from bankruptcy, Navas filed a complaint for partition of the home, "either in kind or by sale," under RCW ch. 7.52. (Op. 3; CP 202–13) Duarte responded, arguing that Navas had abandoned his interest in the home when he moved out, and asked the trial court to award her a 100% interest in the home. (Op. 3; CP 199)

C. The trial court divested Navas of his interest in the home under the doctrine of ouster.

The trial court appointed a referee to make recommendations as to the equitable interests of the parties in the home. (Op. 3; CP 164–65) In his report, the referee asserted that the first issue to resolve is whether Navas abandoned his interest in the home. (Op. 4; CP 134) The referee stated that if the trial court finds that Navas had abandoned his interest then "no partition is needed" and Duarte should be awarded the home. (Op. 4; CP 134)

After a two-day trial, the trial court awarded Duarte the home and ordered Navas to execute a quitclaim deed transferring his interest in the property to Duarte. (Op. 4; Conclusion of Law ("CL") 6, CP 5) Rather than adopting the referee's theory of abandonment, the trial court concluded that Navas lost any interest in the property under the doctrine of ouster, finding that Duarte's ownership in the property was open and adverse to Navas. (Op. 4; CL 1, 3, CP 4–5) The trial court ordered Duarte to pay Navas half

the value of rental income paid to her for the length of the ouster period, from October 1, 2016 to September 1, 2022, which it found was $25,025 (Op. 5; FF 7, CP 4; CL 4, 5, CP 5)

Navas appealed. (Op. 5; CP 1)

D. The Court of Appeals reversed, holding that the trial court "plainly erred" by quieting title to Duarte under an unpled theory of ouster and its error was not harmless.

Division One reversed in an unpublished opinion, holding that the trial court had abused its discretion "by (1) relying on a theory of ouster to determine rightful possession of the Mill Creek property and (2) granting to Duarte an exclusive property interest therein." (Op. 10) Division One held the trial court's decision was erroneous for three reasons. First, it was error for the trial court to rely on the unpled theory of ouster because "ouster is a separate cause of action. An action for partition is not a cause of action for ouster . . . [and] [o]uster was not a cause of action that was put at issue in this case." (Op. 11) Second,

there was no evidence of "the hostile assertion of adverse possession necessary to prove ouster." (Op. 11) Third, even if ouster had been established, the statutory period required for ouster to ripen to adverse possession had not yet expired. (Op. 12)

Division One declined Duarte's invitation to affirm, notwithstanding the trial court's error, because the record did not support "the legal conclusion that Duarte possessed a 100 percent interest in the property pursuant to the laws applicable to a partition action." (Op. 13) Division One further held the record does not support the amount awarded to Navas as damages under ouster as "equivalent of an owelty amount sufficient to compensate him for the loss of his present and future interest in the property at issue." (Op. 14)

Division One acknowledged that "partition is an equitable doctrine which bestows upon the trial court great flexibility in fashioning a remedy." (Op. 14) However, it

recognized that this "discretion exists within the confines of a statutory scheme that came into existence prior to statehood and continues in effect to this day." (Op. 14) Based on that statutory scheme, Division One noted in closing that "[a]s a single-family residence in a single-family zone, statutory partition appears possible only by sale" (Op. 15) but left open the possibility that there may be other remedies available on remand so long as the trial court "closely analyzed" "any deviation from this result." (Op. 16)

Duarte moved for reconsideration asking Division One to affirm the trial court's decision under the alternative ground of owelty, a theory that she raised for the first time after oral argument in a statement of additional authority. Division One denied reconsideration.

IV. ARGUMENT WHY THE COURT SHOULD DENY REVIEW

Duarte seeks review of Division One's unpublished opinion based on the doctrine of owelty—a doctrine neither

party addressed in their merits briefs in the lower appellate court. As owelty was never fully briefed in the Court of Appeals, thus not directly addressed in Division One's decision, review is not warranted based on Duarte's assertion that a "published opinion on this topic would assist future parties." (Pet. 21) Nor is review warranted based on Division One's correct observation that statutory partition of a single-family residence "appears possible only by sale." (Op. 15)

That Duarte is concerned that the home may be ordered sold on remand is not an issue of "significant public interest" as it is entirely a private concern. Finally, Division One properly concluded that the trial court's error in divesting Navas of his interest in the house under the doctrine of ouster was not harmless because the de minimis amount he was awarded as damages for ouster was not "the equivalent of an owelty amount sufficient to compensate him." (Op. 14)

This Court should deny review.

A. Division One's unpublished opinion correctly observing that "statutory partition" of a single-family residence "appears possible only by sale" is consistent with the partition statute and does not conflict with any appellate decisions.

Review of Division One's unpublished opinion does not warrant review, as it does not conflict with any decisions from this Court or the Court of Appeals. RAP 13.4(b)(1), (2). Duarte does not dispute that despite Navas filing his action under the partition statute, the trial court improperly divested him of his interest in the former family home under the unpled theory of ouster, which is a separate cause of action. (Op. 11) Division One thus properly remanded for the trial court to "take the necessary steps to partition the property and the ownership interests thereto," consistent with the partition statute. (Op. 15)

Duarte seeks reviews of Division One's decision based solely on its wholly correct observation that "[a]s a single-family residence in a single-family zone, statutory

partition appears possible only by sale." (Op. 15) As Division One properly held, a trial court's "statutory obligation" under RCW 7.52.010 is "to determine the parties' respective rights to the property and whether participation would be effectuated in kind or by sale." (Op. 10) "The partition statute gives tenants in common the right to partition their property, *either* in kind *or* by sale." *Friend v. Friend*, 92 Wn. App. 799, 803, 964 P.2d 1219 (1998) (emphasis in original), *rev. denied*, 137 Wn.2d 1030 (1999). As partition in kind requires the property be "physically divided" (Op. 7, n.3), Division One properly recognized that "statutory partition" of a single-family residence "appears possible only by sale." (Op. 15)

Review is not warranted based on a single challenged sentence in an unpublished opinion. As Duarte conceded in her motion for reconsideration, this statement is dicta. (Motion for Recon. 3) Dicta is not binding authority. It is an "observation or remark made by a judge in pronouncing

an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination . . . " *Sw. Suburban Sewer Dist. v. Fish*, 17 Wn. App. 2d 833, 841, ¶18, n.3, 488 P.3d 839 (2021) (internal quotations and quoted source omitted).

Further, Division One's decision noting that partition in kind is not appropriate for a single-family residence does not conflict with the "doctrine of owelty partition authorized by the partition statute itself." (Pet. 19) In its decision, Division One recognized that the partition statute authorizes a court to "award monetary equalizing compensation—known as an owelty—when a 'partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them.'" (Op. 8, citing RCW 7.52.440; *Hartley v. Liberty Park Assocs.*, 54 Wn. App. 434, 438, 774

P.2d 40, *rev. denied*, 113 Wn.2d 1013 (1989)). Owelty, however, is an "equitable *alternative to partition*." *Marriage of Wintermute*, 70 Wn. App. 741, 745, 855 P.2d 1186 (1993) (emphasis added), *rev. denied*, 123 Wn.2d 1009 (1994) (Pet. 19). When "a particular piece of real property cannot be fairly apportioned, an equalizing monetary award can be made in *lieu of partition*." *Wintermute*, 70 Wn. App. at 745 (emphasis added).

While Division One references owelty under RCW 7.52.440 (Op. 8), it did not address whether owelty was appropriate here as an "equitable alternative to partition" because neither party raised this issue in the merits briefs, nor had it been addressed in the trial court. The first time owelty was raised was *after* oral argument in a statement of additional authorities. (*See* Pet. 14)

As Division One recognized, the trial court had completely sidestepped any consideration of the partition statute by resolving Navas' claimed interest in the property

based on the unpled theory of ouster. (*See* Op. 11) Because Navas had brought this action as one for partition of the property "either in kind or by sale" (CP 205), Division One properly instructed that resolution of his claim on remand must begin with the partition statue, which provides for the sale of property if it appears that partition in kind "cannot be made without great prejudice to the owners." RCW 7.52.010 (*See* Op. 10) This instruction is entirely consistent with the partition statute and does not conflict with any decision from this Court or the Court of Appeals to warrant review under RAP 13.4(b)(1), (2).

B. Division One's unpublished opinion does not raise an issue of substantial public interest warranting review by this Court.

Review of Division One's unpublished decision remanding for the trial court to apply the partition statute to resolve the parties' respective rights in the former family home does not raise an issue of substantial public interest warranting review under RAP 13.4(b)(4). It is not "terrible

public policy" to require cotenants to litigate their claims in a manner consistent with the partition statute on which the action was commenced. (Pet. 27)

By recognizing that "statutory partition" of a single-family residence "appears possible only by sale" (Op. 15), Division One did not, as Duarte seems to imply, limit the trial court's authority on remand to only partitioning the property "via a courthouse auction." (Pet. 19) Division One's decision expressly left open the possibility that there may be other possible options on remand, but did not speak expressly to those options because "the issue was not briefed herein." (Op. 14–15)

Partition of a single-family residence by sale in order to divide co-tenants' interests therein is not "terrible public policy," as it is expressly provided for by the partition statute, which as Division One recognized has been "largely unchanged, since it was enacted by the territorial

legislature in 1869." (Op. 7)[2] Requiring partition by sale will not create a "windfall to the other cotenants" if one cotenant has contributed more to the property. (Pet. 28) As this Court has recognized, a cotenant may be "given some consideration on a partition sale for the enhanced valuation resulting from improvements" made by the co-tenant. *Leinweber v. Leinweber*, 63 Wn.2d 54, 57–58, 385 P.2d 556 (1963).

Review of Division One's decision is not warranted based on Duarte's assertion that it may result in her "potentially los[ing] the family home," which she claims she "saved." (Pet. 27) This is a wholly private interest; whether the property in dispute here is partitioned by sale on remand is not an issue of public interest warranting review under RAP 13.4(b)(4).

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[2] In 2023, the legislature enacted the Uniform Partition of Heirs Property Act, which governs partition of real property determined as "heirs property" in actions filed after July 23, 2023. RCW 7.54.120. Partition of the property here will be still be governed under RCW 7.52.

C. Division One properly concluded that the trial court's decision was not harmless error.

Review of Division One's unpublished opinion holding that the trial court's erroneous decision divesting Navas of his interest in the former family home was not harmless is not warranted under RAP 13.4(b)(1), (2) because it is wholly consistent with "appellate jurisprudence, especially on harmless error." (Pet. 22) While a court may affirm a trial court's decision on alternative grounds not relied on by the trial court, it must be on "grounds established by the pleadings and supported by the record." *Marriage of Rideout*, 150 Wn.2d 337, 358, 77 P.2d 1174 (2003).

Division One properly recognized that it "cannot affirm a trial court on a ground neither established by the pleadings nor supported by the record." (Op. 13, citing *Pub. Util. Dist. No. 2 of Pac. County v. Comcast of Wash. IV, Inc.*, 8 Wn. App. 2d 418, 455, ¶71, n.41, 438 P.3d 1212, *rev. denied*, 193 Wn.2d 1031 (2019)) Neither party argued

owelty in the trial court, in their briefing in the Court of Appeals, or at oral argument. This new theory was only raised by Duarte *after* oral argument in a Statement of Additional Authority. (*See* Pet. 14)

Further, as Duarte recognizes, an appellate court may only affirm on an alternative ground if "the record supports the trial court's outcome." (Pet. 22) Division One properly held that it could not affirm the trial court's decision on the existing record since it "would need the record to inform us as to many questions that were never answered" (Op. 14) to determine "whether the record supports the legal conclusion that Duarte possessed a 100 percent interest in the property pursuant to the laws applicable to a partition action." (Op. 13)

Compensation under RCW 7.52.440 as owelty requires the trial court to first determine the parties' "respective rights" in the property, which the trial court never did. Instead, under the erroneous theory of ouster,

the trial court determined that Navas had no interest in the property and awarded him little more than $25,000 as "a damage award to compensate him for a past wrong." (Op. 14)

Division One properly declined to affirm the trial court's decision on the alternative theory of owelty because an award of $25,000 to compensate Navas for his interest in the property is not supported by the record. As Division One held, "[t]his is no way the equivalent of an owelty amount sufficient to compensate him for the loss of his present and future ownership interest in the property at issue." (Op. 14) In fact, the existing record shows that Navas was entitled to *at least* $218,032, which was the amount the referee found Duarte should pay Navas for his "one-half of the equity in the home," less half the payments Duarte paid towards the home after Navas moved out. (CP 138)

The trial court's decision here was not harmless. Had the trial court properly determined the parties' respective rights in the property as required by the partition statute in establishing the amount owed to Navas, "a different outcome was reasonably probable." *Dependency of A.C.*, 1 Wn.3d 186, 195, ¶25, 525 P.3d 177 (2023). "[I]f a different outcome was reasonably probable without the error, then the error had a material effect and the judgment should be reversed." *Dependency of A.C.*, 1 Wn.3d at 195, ¶25.

Division One's decision declining to affirm the trial court's decision on the alternative ground of owelty is wholly consistent with "appellate jurisprudence" because the trial court's award of $25,000 to Navas as owelty is not supported by the record and a different outcome was reasonably probable had the trial court not ignored its statutory obligation to determine the parties' respective rights in the property. This Court should deny review.

V. CONCLUSION

For these reasons, the Court should deny review and allow the mandate to issue so that the parties may have their interests in the property established by the trial court.

I certify that this brief is in 14-point Georgia font and contains 3,606 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 27th day of January, 2025.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 27, 2025, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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/s/ Victoria K. Vigoren
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