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PRELIMINARY STATEMENT

Respondent was the appellant in the trial court. She will be referred to as Ms, Fishbein, or as respondent, in this brief. The petitioner will be referred to as petitioner or as the bank.

Attached hereto is a conformed **copy** of the decision of the District Court of Appeal, which sets forth the **facts** upon which the decision was based and the authority in support of the decision below. It will be referred to as the decision below, and referred to by appropriate page number therein.

STATEMENT OF THE CASE

The respondent was the defendant in the circuit court of Palm Beach County in a mortgage foreclosure action initiated by the petitioner, Palm Beach Savings and Loan Association. The trial judge found as facts in the final judgment that the respondent, Ms. Fishbein, was the spouse entitled to homestead protection of the marital home, that she had not taken any part in the unilateral execution of a mortgage of the homestead **property** by her husband, and that her husband had forged her name on the mortgage. The trial court ruled that the mortgage **was** invalid,

However, the trial court awarded an equitable judgment in favor of the bank despite the court's finding of fact that the bank had not exercised reasonable care in the execution

of the loan.

The respondent, Ms. Fishbein, appealed to the district court which found that the mortgage was invalid (as had the trial judge) based on established principles of homestead law under Article X, Section 4, of the Florida Constitution and the bank, having failed to show fraudulent conduct on the part of Ms. Fishbein, was not entitled to an equitable judgment (overruling the trial judge). The petitioner moved for rehearing, rehearing en banc, and for certification of issues of law to this Court, all of which were denied in the district court. The petitioners then filed notice seeking to invoke jurisdiction in this Court. Respondent files this brief on jurisdiction asserting that jurisdiction does not lie to review the decision because it is neither in express or direct conflict with any other decision on the same issue of law and that it likewise did not construe a provision of the Florida Constitution.

STATEMENT OF THE FACTS

Respondent accepts the statement of facts contained in petitioner's brief to the extent that they are directly based on the decision below. Respondent rejects **any** assertions of fact contained in its brief that are outside the decision below as being irrelevant to the issue of whether jurisdiction exists and also as being incomplete or misleading.

SUMMARY OF ARGUMENT

The respondent has shown herein that the decision below applies established principles of law to determine the controversy before it. The decision is not in conflict, either express ~~or~~ direct, with any other appellate decision on the same point of law. The Court lacks jurisdiction because application of the facts as found by the circuit court to the established law is not a basis to invoke jurisdiction in this Court.

The alternative basis claimed by petitioner for jurisdiction is that the decision construes a provision of the Florida Constitution. However, it is shown by the cases that the application of established principles of law to the set of facts before the court is not a construction of the constitution. Mere application of a previously interpreted and applied constitutional provision does not vest jurisdiction in this Court. Otherwise, **every case** which indirectly concerned, or applied a rule emanating in the constitution would be ultimately heard in this Court. Jurisdiction under this basis is reserved for cases which define, or explain or initially apply a new rule interpreting a constitutional provision. Petitioner has not asserted that this case involves such issue, and the respondent submits that jurisdiction does not exist and the petition for review should be denied.

ARGUMENT

POINT I

WHETHER THIS COURT HAS JURISDICTION TO REVIEW **THE**
DECISION BELOW THAT APPLIES ESTABLISHED PRINCIPLES
OF LAW TO THE ENFORCEMENT OF HOMESTEAD PROTECTION
WHEN A MORTGAGE HAS NOT BEEN EXECUTED AS REQUIRED
AND WHEN THE DECISION BELOW APPLIES, BUT DOES NOT
CONSTRUE, A PROVISION OF THE FLORIDA CONSTITUTION?

The Court lacks jurisdiction to review the decision below because it applies established principles of law to uphold the right of a spouse to homestead property against alienation by a single unilateral act of the husband. The decision below followed the decisions in Public Health Trust of Dade County v. Lopez, 531 So.2d **946** (Fla. 1988), and Isaacson v. Isaacson, **504** So.2d 1309 (Fla. 1st DCA 1987), to conclude that a unilaterally executed mortgage failed to encumber homestead property against the valid homestead claim of the spouse when the spouse claiming the benefit of the homestead protection **was** not guilty of any fraud or egregious conduct.

The court also ruled that if it were called upon to consider the issue, it "would not hesitate to conclude that as between the Bank and Mrs. Fishbein, the Bank, the party who was best able to avert the loss and who was least innocent, should bear the loss caused by Mr. Fishbein." (Opinion below, **p.7,n3**).

The Court lacks jurisdiction because there has been no

showing of direct or express conflict with the established law in Florida that an encumbrance unilaterally executed by one spouse does not serve to create a valid basis for judgment against homestead property unless the spouse claiming benefit of the homestead protection has engaged in some fraud or egregious conduct. Petitioner had relied upon several **cases** cited in the dissenting opinion, however, those cases can neither form the basis for conflict jurisdiction nor are they in conflict with the decision under the standard enunciated in Reaves v. State, 485 So.2d 829 (Fla. 1986), where the Court stated, at 830, fn 3:

"This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject **such petitions** are those facts contained within the four corners of the decisions allegedly in conflict. **As** we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here."

The Court further said in Reaves, **id.**, at 830:

"Conflict between decisions must be express and direct, i.e., it must appear within the **four** corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction. See Jenkins v. State, 385 So.2d 1356 (Fla. 1980), where we examined at length the effect of the 1980 constitutional amendment on our conflict jurisdiction."

In *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980), at 1359, that:

The dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "**Expressly**" is defined: "in an express manner." *Webster's Third New International Dictionary*, (1961 ed. unabridged). The single word "affirmed" comports with none of these definitions. Furthermore, the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the *decision* of the district court of appeal.

Nor are any of the cases cited to by the signal "cf." in the dissent in any way in conflict with the decision in this case. In each of those cases there was action on the part of the person claiming homestead protection to either establish a valid lien, or egregious conduct on the part of the person claiming homestead protection. Those cases are exactly in accord with the decision below and the authorities relied upon in the decision. The petitioner has cited no case involving dispossession of an innocent spouse due to the unilateral and fraudulent execution of an invalid mortgage by the other spouse where there was no actual physical improvement to the property. The cases relied upon for jurisdiction fail to show that jurisdiction vests here because they are not factually on all fours nor are they even remotely similar in the essential facts at issue.

The **cases** cited by Respondent **are** plainly

distinguishable. In each of them, a beneficiary of the homestead had either knowingly accepted work and improvements to the property or the beneficiary claiming the homestead protection has engaged in some action that created an obligation on which an equitable lien was based to defeat that person's homestead right. Sonneman v. Tuszynski, 139 Fla. 24, 191 So. 18 (1939) (claimant provided labor and helped acquire and improve property with knowledge and approval of homesteader to acquire equitable interest in property); Lamar v. Lechliden, 135 Fla. 703, 185 So. 833 (1939) (both spouses expressed intent to create right of title in claimants in return for improvements); and Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (1925) (homesteader, no spouse involved, had lien imposed for use of funds to make improvements to property), These cases nowhere permit imposition of an equitable lien due to an invalid mortgage loan of one spouse to dispossess homestead rights of surviving spouse and children entitled to protection of homestead rights.

As far petitioner's second basis for asserting jurisdiction, that the decision below construes a provision of the Florida Constitution, said jurisdictional basis is groundless because the decision below did not construe a provision of the constitution, it simply applied a clear cut

established construction of the constitutional provision. **See, e.g., Armstrong v. City of Tampa, 106 So.2d 407,409 (Fla. 1958); Carmazi v. Board of County Commissioners, 104 So.2d 727 (Fla. 1958); Miami Herald Publishing Company v. Brautigam, 121 So.2d 431 (Fla. 1960), and Page v. State, 113 So.2d 557 (Fla. 1959).** These cases hold that the decision sought to be reviewed on the basis on construction of a constitutional provision must attempt to explain, define and resolve doubts about it arising from its terms and language. Indirect or inherent application of a previous constitutional construction is insufficient to establish jurisdiction. Carmazi, supra. In Carmazi the lower court had determined rights of ownership of property from the taking without **just** compensation, and this Court ruled that application of established law did create a construction of the constitution so as to vest automatic jurisdiction in this Court under Article V, Section 4, of the Florida Constitution (1957). Application of **the** law does not suffice to establish jurisdiction on this basis.

The amendment to the Article V of the Florida Constitution in 1980, requiring that a decision to be reviewed "expressly" construe a provision of the constitution narrows the jurisdictional provision, and therefore the **prior** cases are reflective of the required jurisdictional showing

and should retain their precedential value. The amendment to Article V approved in 1980 "must be viewed in light of the historical development of the decisional law extant at the time of **its** adoption and the intent of the framers and adopters." Jenkins v. State, **supra**, 385 So.2d at 1357. The 1980 amendment, like the creation of district courts of appeal in 1956, resulted from the "staggering caseload" in this Court, and the amendment continued the policy that in most cases the district courts of appeal were in most instances to be final appellate courts, except in clearly defined and specific circumstances. The petitioner has failed to establish any basis for exercise of jurisdiction in this **case** and the petition for review must be denied.

CONCLUSION

WHEREFORE, the decision below is neither in express or direct conflict with another case on the same question of law. The Court similarly lacks jurisdiction to review the decision as it applied **but** did not construe a provision of the Florida Constitution.

The respondent submits that the petition for review should be denied as the Court is without jurisdiction,

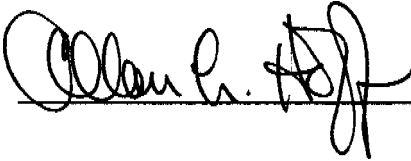
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 21st day of November, 1991, to:

Neil P. Linden, Esq.
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By

A handwritten signature in cursive script, appearing to read "Allan L. Hoffman", is written over a horizontal line.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1991

DEBORAH FISHBEIN,)
)
 Appellant/)
 Cross-Appellee,)
)
 v.)
)
 PALM BEACH SAVINGS & LOAN)
 ASSOCIATION₁ F.S.A., at al.,)
)
 Appellees/)
 Cross-Appellants.)
)

CASE NO. 90-1937.

..

Opinion filed September 4, 1991

Appeal and cross appeal from
the Circuit Court for Palm
Beach County; Jack H. Cook,
Judge.

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

Allan H. Hoffman, West Palm
Beach, for Appellant/Cross-
Appellee.

Neil P. Linden and David B.
Haber of Rollnick, Rosen and
Linden, P.A., Coral Gables,
for Appellee/Cross-Appellant-
Palm Beach Savings & Loan
Association, F.S.A.

GARRETT, J.

Deborah Fishbein [Mrs. Fishbein] appeals the trial
court's final judgment that awarded appellee Palm Beach Savings &
Loan Association, F.S.A. [Bank] an equitable lien on her Palm
Beach property and the Bank cross appeals the trial court's
ruling that the Bank could not foreclose its mortgage because the
mortgage did not attach to the Palm Beach property on the date of

her divorce. The Bank also appeals the trial court's ruling that Mrs. Fishbein did not abandon the Palm Beach property when she moved to Boca Raton. We reverse the award of the equitable lien, but affirm the issues on cross appeal.

Mrs. Fishbein was married to Mr. Fishbein when he purchased a house located in Palm Beach in October of 1984. Mr. Fishbein took title to the property in his name alone, however, the house became their marital home. In March of 1985 Mr. Fishbein executed a quit claim deed from himself to himself and Mrs. Fishbein, as tenants by the entirety. The quit claim deed was never recorded.

Mr. Fishbein assumed an existing first mortgage on the Palm Beach house, he gave a second mortgage at the time of purchase and on November 26, 1985 Mr. and Mrs. Fishbein executed a third mortgage, The third mortgage acknowledged the existence of the first and second mortgages,

In 1988 Mr. and Mrs. Fishbein were involved in divorce proceedings. The Bank knew about the divorce when it loaned Mr. Fishbein \$1,200,000. He wrote the Bank a letter shortly before the closing inquiring whether the mortgage could be made without his wife's signature. The Bank required Mrs. Fishbein's signature but contrary to its closing procedures, permitted Mr. Fishbein to take the loan documents out of the bank and return them signed and notarized. Mr. Fishbein forged Mrs. Fishbein's signature. He secured this loan with a mortgage on the Palm Beach property and used a portion of the proceeds to pay off its three existing mortgages, back property taxes and creditor liens.

Mr. and Mrs. Fishbein's dissolution settlement agreement called for Mr. Fishbein to purchase a home for Mrs. Fishbein in Boca Raton and to make several large payments to her in addition to child support for their two children and alimony. As security for the agreement, Mr. Fishbein signed a quit claim deed on the Palm Beach property. Mrs. Fishbein's attorney was to hold the quit claim deed as security for Mrs. Fishbein in the event Mr. Fishbein failed to fulfill his part of the settlement agreement. During the settlement negotiations Mr. Fishbein represented that the Palm Beach property was owned free and clear of any liens except those being asserted by his mother and sister.

The divorce was granted in August of 1988. At that time, Mrs. Fishbein moved to the Boca Raton house Mr. Fishbein had agreed to purchase for her. However, Mr. Fishbein did not purchase the Boca Raton house nor, with the exception of one \$1,000 payment, did he make any alimony or child support payments. As a result, in November of 1988 the trial court entered a nunc pro tunc order that awarded Mrs. Fishbein the Palm Beach property retroactively to the date of the divorce decree. Mrs. Fishbein moved back into Palm Beach house in December of 1988.

On December 5, 1988 the Bank filed the complaint in this case which sought foreclosure of its mortgage on the Palm Beach property or in the alternative an equitable lien against that property. Mrs. Fishbein defended on the grounds that the Palm Beach house was homestead property, her signature was forged

on the loan documents without her knowledge or consent and the Bank was negligent in the manner in which it closed the transaction.

Initially the trial court granted partial summary judgment in favor of Mrs. Fishbein, finding the mortgage to be void. The Bank's motion for rehearing was denied. The Bank did not file an appeal of this order, but several months later, it filed a motion for reconsideration of the order granting partial summary judgment. The trial court granted the motion and vacated the partial summary judgment.

After a bench trial, the trial judge found that Mr. Fishbein had forged Mrs. Fishbein's signature on the mortgage and misrepresented that the Palm Beach property was free and clear of any liens. It ruled that Mr. Fishbein's fraud vitiated any intent upon Mrs. Fishbein's part to abandon the homestead. It also found that Mr. Fishbein's fraud prevented title, unencumbered by Mrs. Fishbein's right of homestead, from vesting in Mr. Fishbein as of the date of the divorce decree. The trial court ruled that because Mr. Fishbein did not acquire title to the Palm Beach property unencumbered by Mrs. Fishbein's homestead rights, the Bank's mortgage did not attach to the Palm Beach property upon entry of the divorce decree or upon Mrs. Fishbein's departure from the Palm Beach house. The court held that the Palm Beach property remained Mrs. Fishbein's homestead and that the Bank could not foreclose on its mortgage.

However, the trial court did award the Bank an equitable lien on the Palm Beach property to the extent that the

proceeds of the loan were used to satisfy the preexisting mortgages and property taxes, Although the trial court agreed with Mrs. Fishbein that the Bank was negligent in the manner by which it chose to close the loan, the trial court ruled that the Bank's conduct did not rise to the level of "active misfeasance," Finding that the Palm Beach property would have been subject to the preexisting mortgages and taxes if Mr. Fishbein had not procured the loan from the Bank, the trial court concluded that by awarding the Bank an equitable lien, Mrs. Fishbein stood in no worse position than she would have stood in had there been no fraudulent mortgage. This appeal and cross appeal followed, The Bank proceeded to execute on its judgment, but we stayed those proceedings pending the outcome of this appeal.

HOMESTEAD EXEMPTION

For the reasons stated by the trial judge, we agree that the Palm Beach property remained Mrs. Fishbein's homestead.¹

Article X, section 4 of the Florida Constitution provides that no judgment shall be a lien on homestead property except for the payment of taxes and assessments, obligations contracted for its purchase, improvement or repair, or for labor performed on the property. The judgment, sub judice, obviously created a lien on the Palm Beach property. But, because the basis of the judgment, the loan to Mr. Fishbein, did not fall

¹ The transfer of a husband's interest in homestead property to his wife pursuant to a divorce decree is equivalent to the defeasance of the husband's interest in the property which would have occurred had he predeceased the wife while the parties were still married:, *Liberma v. Kelso*, 354 So.2d 137, '139 (Fla. 2d DCA 1978).

within any of the exceptions enumerated in our state constitution the Bank cannot execute on the Palm Beach property. See Caggiano v. Butterworth, 16 F.L.W. D1642 (Fla. 2d DCA June 21, 1991)(criminal enterprise forfeiture judgment not one of the constitutional exceptions to homestead exemption).² The fact that Mr. Fishbein used the proceeds to pay off existing mortgages and back property taxes did not change the basis of the Bank's judgment from the loan to Mr. Fishbein to an obligation contracted to purchase or to pay taxes on the Palm Beach property .

Therefore, we affirm the trial court's ruling that the Bank cannot execute on its mortgage foreclosure judgment so long as the Palm Beach property remains Mrs. Fishbein's or her children's homestead property.

EQUITABLE LIEN

Mrs. Fishbein contends that in order to successfully impose an equitable lien on homestead property, the creditor must prove fraudulent or otherwise egregious conduct on the part of the beneficiary of the homestead. She argues that because the mortgage in question is invalid, the Bank is not entitled to an equitable lien on the homestead property. She also contends that the Bank negligently granted the mortgage and for this reason is

² We acknowledge that the Fifth District has held otherwise, but on different grounds, See DeRuyter v. State, 521 So.2d 135, 137-138 (Fla. 5th DCA 1988)(homestead exemption designed to protect real property from forced sale for debts, not criminal enterprise).

not entitled to an equitable remedy especially when that remedy dispossesses her of homestead property.

The Bank responds that it is entitled to a lien because the proceeds of its invalid mortgage were used to pay off valid liens and property taxes on the homestead property. It argues that when a mortgage is invalid, the party granting the mortgage is entitled to an equitable lien to the extent that the proceeds of the mortgage were used to improve the property. The Bank points out that courts in Florida have imposed equitable liens on homestead property. The Bank disagrees with Mrs. Fishbein that the fraudulent or egregious conduct must be committed by the beneficiary of the homestead in order for a creditor to be entitled to an equitable lien. According to the Bank, all a creditor has to do is prove fraudulent or reprehensible conduct to be entitled to an equitable lien.

We disagree with the Bank. "The purpose of an equitable lien is to achieve right and justice, considering the relations of the parties and the circumstances of their dealings." Public Health Trust of Dade County v. Lopez, 531 So.2d 946, 948 (Fla. 1988).³ However, courts may impose equitable liens against homestead real property only where the Plaintiff can establish some fraudulent or otherwise egregious conduct on the part of the beneficiary of the homestead protection. Isaacson v. Isaacson, 504 So.2d 1309, 1310-1311

³ If required to do so, we would not hesitate to conclude that as between the Bank and Mrs. Fishbein, the Bank, the party who was best able to avert the loss and who was least innocent, should bear the loss caused by Mr. Fishbein.

(Fla. 1st DCA 1987). Limiting the imposition of equitable liens against homestead property to cases where the plaintiff has established fraud or other egregious conduct on the part of the beneficiary of the protection is "consistent with the well-established principle that exceptions from the constitutional exemption from forced sale are to be strictly construed." Id. at 1311.

Despite the fact that the trial judge concluded that the Bank had not established fraud on Mrs. Fishbein's part, he imposed an equitable lien in the Bank's favor based on his finding that the Bank had established fraud on Mr. Fishbein's part. The trial judge relied on Clutter Construction Corp. v. Clutter, 173 So.2d 761 (Fla. 3d DCA 1965), which holds that to recover an equitable lien on homestead property, the plaintiff must establish fraud or reprehensible conduct.

Mrs. Fishbein correctly relies on Isaacson for the proposition that in order to be entitled to an equitable lien against homestead property a plaintiff must prove fraud or egregious conduct on the part of the beneficiary of the homestead protection. Although the Bank suggests that Isaacson conflicts with Clutter, again we disagree. The Clutter opinion provides no facts. It does not discuss the law in detail. To interpret Clutter as only requiring proof of fraud on someone's part rather than on the part of the person claiming homestead protection is to defeat the purpose of homestead protection. To allow one party's fraud to affect another party's homestead interest is exactly the same as allowing one party's debts to encumber

homestead property. In this case, applying the rule in the manner that the trial court did resulted in depriving Mrs. Fishbein of the homestead exemption provided to her by the Florida Constitution.

Based on Isaacson, we conclude that the only basis on which a court may impose an equitable lien is where there is fraud or egregious conduct by the party claiming the homestead exemption. Therefore, we hold that the trial court erred when it imposed an equitable lien against the homestead property because the Bank failed to establish fraudulent conduct on Mrs. Fishbein's part.

However, the trial court also based its decision to impose the equitable lien on the fact that Mrs. Fishbein would have been liable for the three existing mortgages on the property if Mr. Fishbein had not paid them off with the fraudulent mortgage. In essence, the trial court imposed a lien against homestead property for an equitable reason. We hold that the trial court erred when it imposed the equitable lien on this basis. The plain language of the constitution cannot be ignored, homestead protection is not and never was based upon principles of equity. Public Health Trust of Dade County v. Lopez, 531 So.2d 946, 968 (Fla. 1988). Homestead protection has always been extended to the homesteader or his or her heirs regardless of whether the property is a mansion or a hut and regardless whether the heirs are rich or poor and regardless whether it is equitable to do otherwise.

As a matter of public policy, the purpose of the homestead exemption is to promote the

stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law. See Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328 (Fla. 1940). [Emphasis added.]

Id.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

FARMER, J., concurs.
STONE, J., dissents with opinion.

STONE, J., dissenting.

I would affirm the imposition of an equitable lien on the property. The trial court has the discretion to conclude that the appellant has received a windfall constituting unjust enrichment. Therefore, the appellant cannot in good conscience retain the property free and clear of all liens, Cf. Sonneman v. Tuszynski, 139 Fla. 824, 191 So. 18 (Fla. 1939); La Mar v. Lechluder, 135 Fla. 703, 185 So. 833 (Fla. 1939); Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (Fla. 1925).