

**ORIGINAL**

**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

**FILED**  
DEBBIE CAUSSEAU  
MAR 01 2000  
CLERK, SUPREME COURT  
BY           DJ          

HAVOC0 OF AMERICA, LTD., )  
  )  
Appellant, )  
  )  
vs. )  
  )  
ELMER C. HILL, )  
  )  
Appellee. )

**CASE NO.: SC 99-98**

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**CERTIFIED FROM THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**ELEVENTH CIRCUIT COURT OF APPEALS CASE NO.: 97-2277**

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**REPLY BRIEF OF APPELLANT**

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**J. Nixon Daniel, HI  
Fla. Bar No. 228761  
John P. Daniel  
Fla. Bar No. 784291  
BEGGS & LANE  
P. O. Box 12950  
Pensacola, FL 32576-2950  
(850)-432-2451**

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## STATEMENT OF THE CASE AND FACTS

The Appellee emphasizes that the Bankruptcy Court has never made a factual determination that he purchased his Florida homestead in Destin for the purpose of hindering, delaying or defrauding creditors. That statement is correct and is the underlying basis for this appeal. Appellant contends that such an evidentiary hearing must be held and that when a finding is made that Mr. Hill purchased his Florida homestead for the purpose of defrauding his creditors, he should not be afforded the protection of Article X, Section 4 of the Florida Constitution. The issue before this Court is not an issue with respect to whether Mr. Hill defrauded his creditors or whether his homestead was purchased with the fruit of ill-gotten gain, but is instead whether the Florida Constitution permits a debtor to acquire homestead property using non-exempt assets for the purpose of hindering, delaying or defrauding his creditors.

Furthermore, the issue before this Court is not whether **Havoco** has asserted an equitable lien or whether **Havoco** has objected to an exemption claimed by Mr. Hill in his bankruptcy proceeding. That issue has been argued in the federal courts and is not the subject of this appeal. Appellee's distinction between equitable liens and an objection to an exemption claimed in bankruptcy is a distinction without a difference. It is not, however, an issue to be decided in this appeal.

**ISSUE ON APPEAL**

DOES ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION EXEMPT A FLORIDA HOMESTEAD, WHERE THE DEBTOR ACQUIRED THE HOMESTEAD USING NON-EXEMPT FUNDS WITH THE SPECIFIC INTENT OF HINDERING, DELAYING, OR DEFRAUDING CREDITORS IN VIOLATION OF FLA. STAT. § 726.105 OR FLA. STAT. §§ 222.29 AND 222.30?

## SUMMARY OF ARGUMENT

The issue framed by this appeal is acknowledged in Appellee's brief when Appellee writes as follows:

Although acknowledging that the homestead exemption should not be used as an instrument of fraud or other reprehensible conduct, this Court has made it clear that any change in the law to allow forfeiture must originate from a constitutional amendment, not from judicial construction. Appellee's brief at pages 5-6.

It is the fact that this Court has acknowledged that the homestead exemption should not be used as an instrument of fraud or other reprehensible conduct that brings this appeal squarely to the Court. Appellant contends that it will prove at an evidentiary hearing that the conduct of Mr. Hill was both fraudulent and reprehensible and was with the intent to defraud his creditors. The issue which the Eleventh Circuit Court of Appeals has certified to this Court is whether, as a matter of law, fraudulent and reprehensible conduct intended to defraud one's creditors is nevertheless protected by the homestead exemption.

## ARGUMENT

DOES ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION EXEMPT A FLORIDA HOMESTEAD, WHERE THE DEBTOR ACQUIRED THE HOMESTEAD USING NON-EXEMPT FUNDS WITH THE SPECIFIC INTENT OF HINDERING, DELAYING, OR DEFRAUDING CREDITORS IN VIOLATION OF FLA. STAT. § 726.105 OR FLA. STAT. §§ 222.29 AND 222.30?

The Constitution of the State of Florida is a “living document” not easily amended, which demands greater flexibility and interpretation than that required by legislatively enacted statutes. In *Fla. Soc. of Ophthalmology v. Fla. Optometric*, 489 So. 2d 1118 (Fla. 1986). When adjudicating constitutional issues, the principles, rather than the direct operation or literal meanings of the words used, measure the purpose and scope of a provision. *U.S. v. Lefkowitz*, 285 U.S. 452, 467, 52 S. Ct. 420, 424, 76 L.Ed. 877 (1932). “The spirit of the Constitution is as obligatory as the written word.” *Plante v. Smathers*, 372 So.2d 933, 936 (Fla. 1979). The Appellee cites *Department of Environmental Protection v. Millender*, 666 So. 2d 882,886 (Fla. 1996) for the proposition that “less latitude is permitted when construing constitutional provisions because it is presumed that they have been more carefully and deliberately framed than statutes.” In that case, this Court further stated that

other principles of construction are also applicable. Specifically, this Court quoted with approval from *Plante v. Smathers, supra*, when it stated that intent is traditionally discerned

from historical precedent, **from** the present facts, from common sense, and from an examination of the purpose the provision was intended to accomplish and the evils sought to be prevented. Furthermore, we may look to the explanatory materials available to the people as a predicate for their decision as persuasive of their intent. *Millender* at page 886.

This Court further stated that a provision should be construed as a whole in order to ascertain the general purpose and meaning of each part and that each subsection, sentence and clause must be read in light of the others to form a congruous whole so as not to render any language superfluous. *Millender* at page 886. Finally, citing *Plante v. Smathers, supra*, with approval, this Court stated that “an interpretation of a constitutional provision which would lead to an absurd result will not be adopted” when a contra interpretation is more in keeping with the obvious intent and purpose sought to be accomplished. It is all of these principles that should be considered in interpreting the constitutional provisions related to homestead exemption. The Appellant respectfully urges that Appellee’s position that he should be allowed to use the homestead exemption as an instruction of fraud is precisely the kind of absurd result that should be avoided.



It is important to note the specific issue before this Court and to further note what is not now before the Court. The issue is whether the homestead exemption can be used as an instrument of fraud. The issue is not whether, in this particular case, Mr. Hill's purchase of his homestead was such an act to defraud creditors. Appellant has substantial evidence related to other transfers made at or about the time of the purchase of Hill's homestead which will demonstrate to the trier of fact a pattern of deceit and a clear intent to defraud **Havoco**.

Furthermore, the issue in this case is not whether, procedurally, an objection to Hill's claim of exemption was proper or whether asserting an equitable lien was the proper legal vehicle to use. That is an issue to be decided by the Bankruptcy Court and is not now before this Court.

The Appellee suggests that the Florida Constitutional Revision Commission's rejection of a proposed constitutional amendment on the homestead exemption is somehow precedent for this Court. In fact, the Appellee asserts that the Commission's vote indicates "that the citizens of this state **firmly** believe that preserving and protecting the family home **from** financial adversity, irrespective of the source, overrides any creditor's legitimate economic interest and that our **time-**honored homestead exemption should remain sacrosanct." (Appellee's brief at page 14) Appellant respectfully disagrees. The Constitutional Revision Commission and

its activity (or lack thereof) is not precedent to this Court in the interpretation of the Florida Constitution. In fact, with due respect to the Constitutional Revision Commission, its activities are substantially influenced by politics and issues unrelated to a proper interpretation of the constitution. The Revision Commission's failure to deal with the fraudulent acts of bad faith that occur in Florida under the guise of protecting the homestead is irrelevant.

On the substance of the issue, Appellee relies heavily on this Court's decision in *Butterworth v. Cagiano*, 605 So.2d 56 (Fla. 1992). It is interesting to note, however, that the Appellee cites language from that decision at page 60 note 5 as follows:

Virtually all of the relevant cases involve situations that fell within one of the three stated exceptions to the homestead exemption.

The Appellee seems to suggest that if "virtually all" of the cases fall within one of the three exceptions to the exemption, then there can be no situation in which the homestead exemption is not applicable except within those three exceptions. That logic simply does not follow. As noted in Appellant's brief, there is a line of cases that flows from this Court that establishes the common sense, equitable doctrine that the homestead exemption cannot be used as an instrument of fraud and that the fraudulent use of the homestead exemption to perpetrate a fraud on creditors will not

be permitted. See *Jones v. Carpenter*, 106 Southern 127 (Fla. 1925) and *Pasco v. Harley*, 75 Southern 30 (Fla. 1917). In fact, this Court's reference to "virtually all" of the cases in *Butterworth* is acknowledgment of the other cases which demand that the question certified to this Court be answered in the negative.

The Appellee cites *Quigley v. Kennedy & Ely Insurance, Inc.*, 207 So.2d 431 (Fla. 1968) in support of its argument. In the *Quigley* case, however, the issue was whether a homestead previously declared in deposition to consist of 7-1/2 acres could be enlarged to 15 acres with the additional 7-1/2 acres not being subject to the claims of creditors. There was no discussion or indication that the *Quigleys* had taken non-exempt assets and converted them to exempt assets for the purpose of hindering or defrauding their creditors. Furthermore, there was no evidence, as will be presented in the present case, of a pattern of activity designed to defraud **Havoco** of its claim against the assets of Mr. Hill. The *Quigley* case is clearly distinguishable on its facts.

CONCLUSION

The issue presented by this appeal is squarely an issue of constitutional interpretation. The issue is squarely whether the homestead exemption can be used as an instrument of fraud if fraud can be proven at an **evidentiary** hearing. The issue is not an issue of the interpretation of facts in this case but is squarely a constitutional issue whereby this Court has been asked to give direction to the Federal Court in applying Florida law. The Appellant respectfully contends that the question certified should be answered in the negative.

Respectfully submitted,



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J. NIXON DANIEL, III  
Florida Bar No. 228761  
BEGGS & LANE  
Post Office Box 12950  
Pensacola, Florida 32576-2950  
(850) 432-245 1  
Attorneys for **Havoco** of America,  
Ltd.

**CERTIFICATE OF FONT SIZE**

This brief is submitted in Times New Roman at 14 point.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant was furnished by U. S. Mail to Louis K. Rosenbloum, Esquire, P.O. Box 12443, Pensacola, FL 32538-2443; to Jules S. Cohen, Esquire, Post Office Box 23 1, Orlando, FL 32802-9708; and to John E. Venn, Jr., Esquire, 220 West Garden Street, Suite 603, Pensacola, FL 32501 this 6<sup>th</sup> of February, 2000.

  
~~J. NIXON DANIEL, III~~

Florida Bar No. 228761

**BEGGS & LANE**

Post Office Box 12950

Pensacola, Florida 325762950

(850) 432-245 1

Attorney for **Havoco** of America,  
Ltd.