IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1671

DEBORAH CHAMES and
HELLER & CHAMES, P.A.,
Petitioners,

v.

HENRY DEMAYO,
Respondent.

ANSWER BRIEF OF RESPONDENT HENRY DEMAYO

Submitted by:
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Florida Constitution, Article X, Sec. 4(a).

STATEMENT OF THE PARTIES

The Petitioners, DEBORAH CHAMES and HELLER & CHAMES, P.A., will be referred to in this brief as Chames or as Attorneys. Respondent, HENRY DEMAYO, will be referred to as client or DeMayo.

STATEMENT OF THE FACTS AND THE CASE

DeMayo, suffering serious financial setbacks, hired Chames in December, 2003, to represent him in seeking downward child support and abatement of alimony. (T 27, 43). He signed her retainer agreement two to three weeks after representation began in earnest. (T27, 43). The retainer agreement, attached in Appendix, Exhibit A, was a six page document in various fonts, boldness, underscores, and capitalizations to emphasize certain sections, but did not emphasize the following which was in the back pages:

> It is specifically agreed that Heller and Chames, P.A., shall have and is hereby granted all general, possessory and retaining liens and all equitable, special and attorney's charging lien upon the client's interests in any and all real and personal property within the jurisdiction of the court for any balance due, owing and unpaid as well as a lien in any recovery whether by settlement or trial; and such lien or liens shall be superior to any other lien subsequent to the date hereof and that the client hereby knowingly, voluntarily and intelligently waives his rights to assert his homestead exemption in the event a charging lien is obtained to secure the balance of attorney's fees and costs. Heller and Chames, P.A., shall be entitled to file a Notice of Claim and Attorney's Charging Lien and a Notice of Lis Pendens with regard to the client's interest in any real property upon which a lien may be claimed and you consent that the Court shall specifically reserve jurisdiction in the Final Judgment to determine and enforce my attorney's charging lien.

At mediation, Chames came up with the following agreement: for the next nine months child support would be reduced from $2000.00 per month to $1500.00 per month and alimony from $7000.00 per month to $2500.00 per month, but for a consideration that six months hence DeMayo would pay his former wife the sum of $25,000.00 or, if he should sell his home by that time, half the proceeds of his home; and further that all monies abated or modified would be added to the end of the term of payments. In other words, Chames only extended for her client by nine months the time before which he had again to pay full alimony and full child support and he wound up paying more to his former wife than he would have had to have paid before Chames filed the motion to abate. A few very minor simplistic motions were filed and never pursued. (Index P. 5-9; R 258-542). For these efforts, attorney billed DeMayo $43,397.00 plus $4009.00 in costs. (T34) The cost of Chames' accountant was an extra $10,000.00. The total billed for this effort was more than $57,000.00. Appellant paid only part of these billed monies.

Very soon thereafter the former wife unexpectedly called the court and in a five minute conference call revealed she had committed herself to a hospital. Mr. DeMayo asked the court (Chames never broached the subject and remained quiet throughout the call) if his three small children could stay with him. The court immediately agreed and the children were put in the custody of their father to live with him. DeMayo's home was purchased by him after dissolution and with non-

marital funds. (T 28—30) (R484-484). (R 534-535, 542-544). (The children remained living full time with their father and less than a year after Chames withdrew the parties acknowledged that Mr. DeMayo should permanently be their primary custodial parent. This agreement was made the order of the court.) Soon after this conference call, when Chames learned DeMayo was days from refinancing his home as he was in desperate need of money, she filed to withdraw and simultaneously filed notice of charging lien specifically and only on his homestead and noticed hearing in five calendar days.

At hearing, court granted motion to withdraw. The next moment Chames said ”I have an order for a charging lien.” The court said “Bring it up. I’ll sign it.’ The court took her order and signed it without reading. (T 9,10,11). The order granted Heller & Chames a charging lien on the homestead of DeMayo for $33,206.76. Upon inquiry by DeMayo as to what had just transpired during those seconds, the court said it had signed a charging lien on his homestead but that he was entitled to a hearing and could have one if he wanted, to which DeMayo said yes and a date for hearing was set. Despite DeMayo being granted a hearing Chames took the order that had just been signed granting her charging lien for $33,207.76 on her client’s homestead and immediately recorded it. (T 79-80)

At hearing DeMayo made the following motions: to dismiss prior entry of order for charging lien for violation of due process (T 9-12); to dismiss hearing on

charging lien for violation of due process on several grounds (T7); objection to imposition of lien because language in retainer agreement was overbroad and overreaching (T12); objection to lien itself as it was imposed on homestead (T12); and objection on lien as there was lack of subject matter on which to impose lien because of lack of tangible fruit obtained by attorney. All motions were denied. (T220) Chames then handed the court the case of *Sabin v. Sabin*, 522 So2d 939 (Fla. 3rd DCA 1988) and told the court that that case gave her the right to a charging lien on her client's homestead even if the homestead was not secured by her for him, had nothing to do with the case, but that as long as her retainer agreement allowed her to take it, she could. The court accepted her argument and proceeded with the hearing over DeMayo's objections. Chames then testified and began as to attorney's fees. DeMayo strongly and continually objected on two grounds. First, the notice addressed only a charging lien specifically on his homestead and no notice of hearing on amount of fees, and second, that entitlement had to be proven, them a proper subject of imposition must be identified, then lastly, and only if the four prongs of charging lien were met under *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavernik, P.A. v. Baucom*, 428 So.2d 1383, (Fla. 1983) could the court inquire as to fees. (T 21,22,25-27, 36,135-136) Every motion was overruled. (T26, 31) DeMayo made the following objections: the case did not produce tangible fruit by the attorney as it was a child support case and an

abatement case, waiver of homestead was not enforceable; even if homestead could be liened the retainer agreement said the property had to be under the jurisdiction of the court which DeMayo's homestead was not, and as no lien could be put on that which was not secured by the attorney there could be no lien. (T 21, 135, 136, 138, 139, 141) All objections were overruled. (T 26, 27, 31, 138-141) The issue of fees was heard over objection. (T 34-36) The only testimony as the reasonableness of the time expended was that Chames testified that she filed 123 pleadings in this case. (T. 24) Chames testified that DeMayo never objected to her fees which testimony was contradicted by DeMayo who said he was constantly objecting in correspondence and in conversation. (T 109-121, 126-128, 132-133) He testified that whenever he objected she would tell him of her good relationship with the judge and how the judge had invited her to join an exclusive club of family law lawyers.

Testimony was elicited regarding the signing of the retainer agreement. Mr. DeMayo testified it was given him in a sealed envelope which he misplaced and never opened. As Chames called him to return it signed before she would do any more work for him or see him, he went to her office where her assistant ran another standard form copy off the computer and he signed it while holding it in the air. Only then was he allowed to see Chames and was escorted to her office by the assistant. Chames testified even though she had to explain the simplest things to

him six, seven or ten times, she never explained the terms of the retainer agreement to him believing that if he didn't understand them he would have asked and because his pre-dissolution attorney had a charging lien provision in his retainer agreement. There was no testimony as to whether that lawyer's retainer agreement also required his client to waive his homestead protection. (T 20, 53-55, 61, 69, 72, 75)

DeMayo testified that if he had known she was giving herself the right to take his home he would never have signed with her; that he didn't know such a thing was even possible; and that he had not even heard of those terms until a few days prior to the hearing. (T 113, 115) Chames admitted that the homestead was not secured by her but claimed that didn't matter as her retainer agreement allowed her authority to take it under a charging lien. Chames then testified as to her efforts and told the court that in addition to reviewing 64 pleadings filed prior to dissolution, she herself had prepared 123 pleadings in this simple case. (T24) She repeated this twice so this was not a slip of the tongue. (T24) The record reflects there were two dozen only <u>one</u> of which has the barest substance to it. The others are threadbare and simplistic. (If there had been that may pleadings filed by her in this simple case, it would surely have been a matter of inquiry.) There were no evidentiary hearings. There were no depositions. There was not a single complex issue. The only expert was the accountant who did the analysis work for her. She

filed no legal memorandums except that at the end of her motions she would ask for attorney's fees citing *Rosen v. Rosen*, 696 So.2d 697 (Fla. 1997). She never got attorney's fees from the other party. (T 79-80).

At the end of the hearing the court commented that Mr. DeMayo should be grateful to her for her for having gained temporary custody of his small children. Mr. DeMayo politely reminded the court that Chames had nothing to do with that and that that was accomplished by the court instantly granting Mr. DeMayo's his own request (not Chames's) during that conference call that his children stay with him while his former wife was in the hospital. (T 122-134) Chames never even filed a motion or asked for an order making that ore tenus order a part of the court file record! Throughout the hearing, Mr. DeMayo testified forthrightly and without equivocation. Chames testified evasively, equivocally, defensively and almost never gave a direct answer. Yet the court found Mr. DeMayo not credible and based its award in significant part on its erroneous finding that Chames had filed 123 pleadings! The order imposed a money judgment for the full amount of fees requested with interest and a charging lien for that amount on the homestead of her client.

Appeal was made to the Third District Court of Appeals addressing numerous issues regarding the imposition of a charging lien on that which Chames

did not procure for her client, the lack of due process including notice in ordering a money judgment, lien on homestead, and waiver of homestead among other issues.

The opinion issued by the Third District Court of Appeal addressed only the issue of waiver of homestead which allowed the imposition of Chames's charging lien which lien they reversed based on the precedent disallowing waiver of homestead protection. The court certified the question of great public importance correctly quoted in Petitioner's brief except that the election was in 1984, not 1884. The opinion affirmed the lower court on all other grounds including the money judgment.

STANDARD OF REVIEW

The issue on whether or not the prohibition against waiver should be upheld is a question of law to be reviewed de novo.

The issue of whether the charging lien was properly put on the homestead of the Respondent is a matter of law reviewed de novo as to whether a homestead can be so liened, but it the response is that it can, it is reviewed then as abuse of discretion. The issue of whether the hearing on the issue of money judgment can be heard when the notice only noticed a hearing on charging lien is reviewed de novo. The issue of whether the finding of the trial court was based on finding supported on the record by competent substantial evidence is reviewed by abuse of discretion.

JURISDICTION AND ISSUES

The Supreme Court of Florida has jurisdiction over an opinion of the Third District Court of Appeals and over a question of great public importance.

ISSUES AND SUMMARY OF ARGUMENT

The prohibition against enforcement of waiver of homestead has been good law for 122 years, is relied upon by the citizens of this state in their personal and business affairs, is workable, and there are no sufficient legal grounds for finding that the waiver prohibition no longer satisfies the public policy of promoting the welfare and stability of the state.

The charging lien being put on the homestead of the attorney's client by the trial court even though it was homestead and was not secured for the client by the lawyer was properly reversed by the Third District Court of Appeals which found that waiver of homestead was invalid.

The money judgment entered by the trial court during a hearing on charging lien must be reversed. There was no notice the money judgment would be heard and secondly, as there was nothing on which to impose a charging lien the trial court lacked jurisdiction to hear the issue of monies owed.

ARGUMENT

I. The court erred in imposing a charging lien on the client's homestead where the homestead was unrelated to the litigation and was not proceeds of the judgment procured by attorney's efforts. [1]

1. This issue was briefed and argued to the Third District but was not addressed in the court's opinion. Because the law firm's imposition of the charging lien on property unrelated to the representation renders the charging lien invalid regardless of the homestead issue, this Court can and should consider the issue. *Savoie v. State*, 422 So.2d 308, 312 (Fla. 1982) (once the Court has jurisdiction, it can consider all issues appropriately raised in the appellate process, and it is appropriate for the Court to exercise jurisdiction over other issues which are properly briefed and argues and are dispositive of case.)

The lower court erred in enforcing a charging lien on the client's homestead for multiple reasons. First, and assuming the retainer agreement was valid, the very terms of the retainer agreement required that the charging lien be imposed on only that which was under the jurisdiction of the court. Here, Mr. DeMayo's home was purchased with non-marital funds after his dissolution of marriage.. By no stretch of the imagination was it "under the jurisdiction of the court". Therefore by the terms of her own retainer agreement, her client's homestead was not subject to a charging lien by her. (Vol. IV at 27-28)

Second, there was no res suitable on which to impose a charging lien. Charging liens were created to give an attorney the "right to be remunerated out of the results of his industry, and his lien on these fruits is founded in equity and justice. *Sinclair, Louis , Seigel, Heath, Nussbaum & Zavernik, P.A. v. Baucom*, 428 So2d 1383, 1384 (Fla. 1983) (citing *Carter v. Bennett*, 6 Fla. 214, 258 (1855) (emphasis added). The Florida Supreme Court in *Sinclair* spelled out clearly the four proofs required before an attorney could obtain a charging lien of which one is that there must be a recovery secured by the efforts of the attorney to which it is

understood that a charging lien may attach. In fact, there four proofs, or points, are definitional and axiomatic. Florida courts have consistently reaffirmed the rule of law that charging liens are limited to money or identifiable property recovered in the underlying litigation, often referred to as the tangible fruits of an attorney's effort. *See e.g., Zaldiver v. Okeelanta Corp*., 877 So. 2d 927, 930 (Fla. 1st DCA 2004) (a"charging lien is an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit." (citations omitted)); *Mitchell v. Coleman*, 868 So.2d 639, 641 (Fla. 2d DCA 2004) (holding the charging lien was too broad because it did not limit the lien to property recovered by appellant as a result of the attorney's efforts in the dissolution action); *Robert C. Malt v. Carpet World Distribs.,* 861 So.2d 1285, 1288 (Fla. 4th DCA 2004) (holding the trial court erred in imposing the charging lien "(b)ecause the charging lien was not attached to a judgment, settlement of some other tangible fruits of the attorney's service"); *Correa v. Christensen*, 780 So.2d 220 (Fla. 5th DCA 2001) ("(i)t is not enough to support the imposition of a charging lien that an attorney has provided his services; the services must, in addition, produce a positive judgment or settlement for the client, since the lien will attach only to the tangible fruits of the services"); *Mazzorana v. Mazzorana,* 703 So.2d 1187, 1189 (Fla. 3rd DCA 1997) (reversing the imposition of a charging lien upon the appellant's nonmarital property in a dissolution action because "a

charging lien may issue only 'on funds recovered for a client through the attorney's services.'" (citation omitted.))

Accordingly, it is axiomatic that "where there are no proceeds of a judgment, there is nothing to which a lien may, as a practical matter, attach." *Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A.*, 517 So.2d 88, 91-92 (Fla. 3rd DCA 1987); *see also Yavitz v. Martinez, Charlip, Delgado & Befeler*, 568 So.2d 103, 105 (Fla. 3rd DCA 1990); *Glickman v. Scherer*, 566 So.2d 574, 575 (Fla. 4th DCA 1990); *Pasin v. Kroo*, 412 So.2d 43, 44 (Fla. 3rd DCA 1982). It is undisputed that the client's homestead was not obtained as the result of the efforts of the attorney, nor was the homestead related to the subject matter of the representation. (Vol. IV at 136) As there were no positive results obtained from the law firm's efforts to which a charging lien could attach, and the client's homestead was not related to the subject matter of the representation in a manner so as to allow the enforcement of a charging lien against the homestead, the charging lien is invalid.

Chames rests her claim solely on the fact that she claims her retainer agreement allows it without regard to whether or not the property she wants was secured by her or meets the Supreme Court requirements. To support her argument that property unrelated to the underlying litigation and not secured for her client by her efforts can nevertheless be subject to a charging lien, Chames

relies on a particular sentence, ambiguously written, in *Sabin v. Sabin*, 522 So.2d 939 (Fla. 3rd DCA 1988) which states that that which is other than "judgment proceeds" may be liened. However, the opinion in *Sabin* does not support Chames' argument for several reasons. First, to do so would require the court in *Sabin* to reject the four prong test by The Florida Supreme Court in *Sinclair*, *supra*, in which this Court stated that one of the four requirements of a charging lien was that it must be agreed between attorney and client that the attorney's fees would come from the recovery the attorney obtained for his client. As there is no language even hinting that the *Sabin* court sought to distinguish that case from the definitional strictures of *Sinclair* and from each and every other case in every district in this state, it is logical that the opinion, even with its vagueness of phrasing, never intended that it be interpreted in a manner to defy the Supreme Court of Florida or even to distinguish itself from decades of established jurisprudence. Second, there is further proof contained in that opinion that there was no intention to ignore or defy the *Sinclair* requirements. The *Sabin* opinion cites as authority for its holding the case of *Billingham v. Theile,* 109 So.2d 763 (Fla. 1959) which opinion specifically addresses the imposition of a charging lien upon real property related to the underlying litigation. These two opinions do not stand for the proposition that property unrelated to the underlying action and have not been secured for the client by the efforts of the lawyer can be subject to a

charging lien. In fact even if *Billingham* had stood for anything of the sort, it would not have been good law after the later Supreme Court opinion of *Sinclair* which held exactly the opposite.

Billingham involved the successful efforts of an attorney in securing his clients' property out of a long-term lease. The attorney then attempted to impose a charging lien on that property that he had gotten back for his clients but he had no agreement with them to do so. The opinion and the other cases cited in *Billingham* revolved around the issue of the need for an agreement in order to be able to impose a charging lien. The Florida Supreme Court refused to impose the charging lien and approved the quoted language of the district court which said "…an attorney has no lien on the land of his client absent a statute or express or implied agreement providing one, even though he successfully prosecutes a suit to establish the client's title or recover possession." Id. At 764. So in *Billingham* the property had been recovered by the attorney for the client and *Billingham* stands for the proposition that property which was recovered for the client by the attorney in the suit could be subject to imposition of lien only if there was agreement to do so. Therefore when the court in *Sabin* stated that property other than "judgment proceeds" could be subject to an attorney's charging lien, and cited as authority *Billingham*, it was not saying that even property not secured by the attorney could be liened, but only that that which is other than money (proceeds)

that had been secured through the attorney's efforts could be liened. Third, there is no case found in which the definition of "proceeds" is other than money proceeds. Therefore the "other" than "judgment proceeds" must mean in *Sabin* that other things than money which the attorney has secured for his client may be subject to charging lien such as the recovery of real property as in *Billingham. See Move v. General Motors Corporation*, 77 So.2d 875 (Fla. 1955); *Mitchell v. Coleman*, 868 So.2d 639 (Fla. 2nd DCA 2004). Fourthly, the facts in *Sabin* do not extend the proposition to property outside of the suit, as Chames contends. *Sabin* involved a party in a marital dissolution action whose attorney secured for him in the lawsuit a certain property he co-owned with his brother. The retainer agreement gave the attorney a lien on all assets recovered or protected by him in the lawsuit. When the attorney sought a charging lien on that property, Sabin claimed no such lien could be imposed as it was not "judgment proceeds". The court disagreed citing *Billingham* for the proposition that "although a charging lien attaches only to judgment proceeds, the parties may enter into contracts which expressly subject other property to the charging lien." Id. At 940. There was no agreement between the parties that would allow the attorney a lien on assets unrelated to the dissolution action, thus the court's use of the term "other property" and its citation of *Billingham* as authority each confirm that the court referred only

to those assets recovered by the attorney but which were not in the form of cash assets.

But in the present case, Chames takes the quotations from *Sabin* out of context in order to find support for its position. But even their proposed interpretation is in conflict with their own retainer agreement. They claim that under *Sabin* anything their client owns can be liened as the client agreed to that. But their own agreement states that such property must be under the jurisdiction of the court thereby removing from possible lien that which they claim their retainer allows them to lien whether or not it was secured by them for his benefit! This circuitous reasoning was accepted by the trial court which imposed the lien on their client's homestead and entered a money judgment.

In addition to all the reasons above, Chames is also foreclosed from imposing a lien because this language in her retainer agreement is overbroad. In *Cole v. Kehoe*, 710 So.2d 705 (Fla. 4th DCA 1998) that court found that the retainer agreement which called for the imposition of a charging lien on the client's "interest…in any and all real property…" was overbroad as it encompassed property outside the subject litigation. Id. At 706. Citing *Sinclair, supra,* the court held that "(b)y definition, an attorney's charging lien cannot attach to property not involved in the suit and not before the court". Here, Chames tries to change the very definition of "charging lien" claiming as long as she puts it into her retainer

agreement, she is entitled to lien anything her client has despite the definitional limitations of *Sinclair* and its progeny. Language in a retainer agreement is not dispositive and is not permitted to overcome existing law. *See Shawzin v. Sasser, P.A.*, 658 So.2d 1148 (Fla. 4th DCA 1995).

In stunning affirmation that Chames offered a misinterpretation of *Sabin*, is the case of *Yavitz v. Martinez, Charlip, Delgado, and Befeler*, 568 So.2d 103 (Fla. 3rd DCA 1990) in which two of the very jurists in *Sabin* (Judge Ferguson and Judge Hubbart) participated and which was issued two years later. The issue was whether the charging lien could be imposed on the wife's personal assets instead of on the "proceeds of the judgment." The court reversed for two reasons. First, citing *Pasin v. Kroo,* 412 So.2d 43 (Fla. 3rd DCA 1982), *Litman v. Fine, Jacobson, Schwartz, Nash, Block, and England, P.A.*, 517 So.2d 88 (Fla. 3rd DCA 1987), and *Kucera v. Kucera*, 330 So. 2d 38 (Fla. 4th DCA 1976), the court stated that a charging lien may issue only if proceeds have been recovered by the attorney and then only on those proceeds. Since the court found that the amount of the lien exceeded what could be considered proceeds it reversed the imposition of the lien. Second, it remanded stating that <u>if</u> a charging lien should be imposed, the lien should be only against "the proceeds of the judgment." Id at 106. Emphasis supplied. If there was any thought that *Sabin* permitted property outside of a judgment to be liened, even if the retainer agreement allows it, it was soundly

dispelled in this case. The court further noted that since the amount of the charging lien exceeded the amount that could be considered proceeds, the amount of the charging lien (assuming a suitable subject of imposition existed) had to be reduced to reflect not more than the results obtained by the attorney. Emphasis supplied. Therefore where, as in the case at present, there are no proceeds there is nothing on which to lien, and no lien can be imposed. The order of the court granting attorney's a charging lien must be reversed.

II. The court erred in determining the amount of attorney's fees and entering a money judgment where there was no notice that the issue would be heard; where there was improper determination that there was a subject on which a charging lien could be imposed; and where the findings were not supported by the record.

The underlying reason, besides *Sinclair* and its progeny, that this procedure must function in above manner is that money disputes between lawyer and clients are first party disputes and are therefore actions in law and subject to trial by jury. *See Stabinski, Funt & De Oliveiro, P.A., v. Law Offices of Frank H. Alvarez,* 490 So.2d 159 (Fla. 3rd DCA 1986). A charging lien is an action in equity heard by the court hearing the underlying action in which the lawyers represented their client and from which the fee dispute arose. A charging lien can never be an action in law. Only where the dispute first satisfies the four prong requirements of *Sinclair* may the dispute be heard in equity and may the court allow inquiry into the amount of the attorney's fees between an attorney and his client, and then only after notice

that the issue of the amount of monies owed will be heard. When, as here, there is no res on which to impose a lien, the court hearing the underlying action does not have the jurisdiction to hear the matter of the dispute of the amount of monies owed. The matter must go to a court of law where the parties have right to independent action on the contract. *Franklin & Marbin, P.A. v. Mascola*, 711 So. 2d 46 (Fla. 4th DCA 1998). Here, the client objected to the hearing as there was no subject matter on which to impose a lien but the hearing was held over objection.

Here, too, the client objected to hearing the issue of the amount of monies claimed by Chames because first, there was no res upon which to impose a lien, and second, there was no notice that the issue of amount of the monies would be heard, only that a charging lien was sought on his homestead. Although the court had no jurisdiction to hear the issue of the amount of monies owed, it proceeded with the hearing and entered a money judgment. In a case where the facts relevant to this issue are identical to the facts at bar, the lower court entered a judgment determining the amount of fees for the attorney in the same action as was held pursuant to the attorney's notice of hearing for a charging lien. The appellate court reversed as the notice failed to apprise the client that a determination of the money judgment would be heard. *Shawzin v. Sasser, P.A.,* 658 So.2d 1148 (Fla. 4th DCA 1995) citing *Lochner v. Monaco, Cardillo & Keith, P.A.,* 551 So.2d 581 (Fla. 2nd DCA 1989). *See also Milio v. Leinoff and Silvers, P.A.,* 668 So.2d 1108

(Fla. 3rd DCA 1996), reh. den. 683 So.2d 608 (Fla. 3rd DCA 1996). A notice stating only that a charging lien is sought on the client's homestead is insufficient to notice the client that the attorney will also seek the amount of the lien for money judgment. *Yavitz v. Martinez, Charlip, Delgado & Befeler*, 568 So.2d 103 (Fla. 3rd DCA 1990); *Rose v. Marcus*, 622 So.2d 63 (Fla. 3rd DCA 1993).

A further issue is that there is no substantial competent evidence on which the trial court made its findings that Chames prepared 123 pleadings. Although she testified to this and this was the basis for the court's findings that the amount of money she claimed was indeed owed her, the record shows this finding is not supported by the record. There were only a few pleadings filed, all but one of them minor housekeeping filings of which there was little or no litigation. The enormity of the difference between the findings, not supported by the record, and the actual efforts by Chames leaves the amount of monies awarded based on unsupported findings and therefore must be reversed. *See North Florida Women's Health & Counseling Services, Inc.*, 866 So.2d 612 (Fla. 2003).

As there was no notice that attorney's fees would be heard, and as there is no subject matter on to which to base a charging lien, the inquiry into the amount of the attorney's fees and determination thereof was a violation of the due process clause of the 14th Amendment to the U.S. Constitution and in violation of cases

cited herein. The order of the lower court regarding money judgment for attorney's fees must be reversed.

III. When the people voted to amend the Constitution granting homestead protection against non-exempt creditors from "head of family" to "a natural person" that amendment did not require the court to nullify the prohibition against effective waiver that has been the law of the state since 1884?

a. The 1984 amendment was designed to be inclusive of persons, not to deny benefit of waiver prohibition to all.

For at least one hundred thirty-eight years the people of the State of Florida have been peaceful in the security of their knowledge that their homesteads are safe from the forced sale by a creditor outside constitutional exemptions. *Florida Constitution, Article X, Sec. 4(a).* In fact, they have known no other situation. That Article provides that there shall be no forced sale of a homestead as against a creditor which does not fall under certain constitutional exceptions. The benefit of this exemption originally went to "head of family" but was in 1984 made more inclusive and now provides that protection to "a natural person".

Occasional attempts were made to chip this fortress of protection. None were successful as in no case did the Florida Supreme Court or any other court allow a crack in the protection. Their opinions were based on public policy grounds and on the clear language of Article X, sec. 4(a) and the right to be protected.

In 1884, The Florida Supreme Court found the waiver provision contained in a promissory note to be invalid as against the policy of the homestead protection clause. *Carter's Administrators v. Carter*, 20 Fla. 558 (Fla 1884). In a sensitive and thoughtful opinion, the Court said:

> In this country especially where there happen to be many illiterate and unsophisticated people it would be mischievous to encourage such agreement in which by the mere scratch of a pen the whole policy of the exemption laws be become nugatory.
>
> Few men would mortgage their household goods and their children's clothes to a hard creditor with the inevitable result brought vividly to their understand, but may thoughtless and improvident people might be induced to obtain credit by merely "waiving the benefit of exemption," and thus placing the last blanket and bed and their own and the children's clothing at the mercy of a hard creditor, if an agreement like this should be sustained.

Both the homeowners who were "head of family", and the creditors were aware of this homestead protection against creditors conducted commerce knowing that the people of this state had made a decision, supported by the courts, that the rights of a non-exempt creditor, no matter how worthy, would not take precedence over the public policy to maintain the family home. Knowing that, commerce continued and creditors sought their protection from those assets other than the family home and the people of this state duly went about ordering their lives and making decisions which relied on this security.

As this Court said in *Hill v. First Nat. Bank of Marianna*, 84 So.190 (Fla. 1920) in discussing the theory behind Article X, sec. 4(a),

> "The theory of the law with relation to homesteads is based upon the idea that as a matter of public policy, or the promotion of the prosperity of the state and to render independent and above want each citizen of the government, it is proper he should have a home where his family may be sheltered and live beyond the reach of financial misfortune and the demands of creditors who have given credit under such a law." *Emphasis supplied.*

This Court was again faced with the question of waiver in *Fidelity & Casualty Co. of New York v. Magwood*, 145 So.2d 67 (Fla. 1932) and continued this line of reasoning for the protection of the homestead.

> "It is true that the Appellee here could have interposed his claim of homestead exemption in that suit, but, having failed to interpose it there, he is not precluded from exercising his constitutional right to contest his ouster from his homestead. Where a homestead has been acquired it can be waived only by abandonment or by alienation in the manner provide by law. At 68.

Therefore again it was affirmed that there can be no waiver by signing or somehow acknowledging waiver of homestead for the benefit of a creditor.

In 1956 this Court was faced with the clear cut question of whether or a waiver provision contained in a promissory note for a debt not listed in the exceptions was valid and enforceable. The Court refused to uphold the waiver of homestead protection against creditors.

> "…(T)his Court long ago determined that such a waiver was not an alienation of the homestead and not enforceable, and secondly, that such a waiver was contrary to the policy of the exemption laws of this State. Carter's Adm'r v. Carter, 20 Fla. 588. 'The public policy of a state of nation must be determined by its Constitution, laws, and judicial decisions … *internal citations omitted.* … **No policy of this State is more strongly expressed in the constitution, laws and decision of this State than the policy of our exemption laws**. *Emphasis supplied. Sherbill v.Miller Manufacturing Co.,* 89 So.2d 28 (Fla. 1956).

This prohibition against waiver for the benefit of creditors is so strong that it cannot even be waived by husband and wife. *Daniels v. Katz,* 237 So.2d 58 (Fla. 3rd DCA 1970). "In Florida, homesteads are 'sacred cows'; they may not be alienated contrary to the interests of those to be protected by the homestead character of the property involved." *At 60*.

Until 1984, Article X, Sec. 4(a) provided this protection only to the "head of family" which meant that when dependents no longer lived with the former "head" of the family, the homestead could be taken from him or her by forced sale by creditor lien thereby depriving widows, widowers, divorcees and others of their homes. Shifting demographics and societal changes made obvious to the people of this state that the need had come to protect also the single individual. The people of this state determined that an individual was equally deserving of homestead exemption, the same protection against creditor liens, as heads of family. The Senate and the House of Representatives took on the matter and in joint resolution formed the language to put on the ballot that "head of family" be amended to read "a natural person" making the protection to all individuals as full and complete as had been available only to "head of family".

In committee reports, it is written under :

"II. ECONOMIC IMPACT AND FISCAL NOTE:
A. PUBLIC:

> Certain creditors would be precluded from selling a person's home in order to satisfy certain debts."
>
> Senate Staff Analysis April 6 ,7, 26, 27. 1983
>
> Also in a report from the Committee on Judiciary dated February 8, 1983:
>
> "II. FISCAL IMPACT:
> Accurate information relating to home ownership by single persons other than heads of families is not currently available. It does appear that there would be an impact upon the private sector in that an additional class of debtors would have their property protected."

There is not a single word in the committee reports made available to this writer that there was any thought or inclination to do anything except expand the number of persons covered by this protection and the class of persons covered to universal coverage of homeowners. In not a single sentence in these reports is there an indication that this amendment, if passed, would possibly affect the issue of prohibition against waiver. It can easily be inferred that the legislature which formed this language and the committees which wrote the reports never contemplated the possibility that they were opening the door to waivers but that they were affording equal access to the benefits of sec. 4(a) to all.

It is respectfully submitted that the people of this state did not intend their vote to remove from them the protection they had previously benefited. Certainly if such a notion (that protection could be breached by waiver) had been considered possible, it would have been included in the committee reports. In fact, since the reports make marked note that it will be the creditors who will be adversely

affected and no word that the protection afforded families already protected might then be compromised, it is clear that such a possibility was not contemplated. Had it been contemplated, it most assuredly would have been included in the language to be voted so that the people could make up their mind on the issue and the consequences to them. It is entirely reasonable that the language would have then included a provision incorporating the then law forbidding waiver of homestead. It is entirely unreasonable that the people voted for inclusion to put to risk their own benefits historically enjoyed. As there is no indication that this dramatic change (enforceable waiver) suggested by Chames to the lives of everyone in this state was the intent of the voters whose vote for this amendment was 79%, a staggering number by any account, it should not be found suddenly to have been there 22 years after it was enacted.

Further, as a waiver would operate equally to remove homestead protection from a family and head of household as well as a single person, the very protections in place and on which the people of this state relied would be destroyed. So Chames's argument is that even though her client is a single father of three small children who live with him and are dependent on him and as this is exactly the kind of family the Article sought to protect before 1984, that he and his children are no longer protected because others, without families, now have the protection. It is similar to the argument in the concurring opinion which finds

discomfort in some of the persons who have found need to have benefit of this protection and concludes that therefore none shall have such benefit. This argument does not forward the public policy of this state and must be rejected.

That the amendment sought to be inclusive was made clear by *Public Health Trust of Dade County, v. Lopez*, 531 So.2d 946 (Fla. 1988). After the amendment was ratified, this Court clarified who is afforded this constitutional protection and stated that "natural person(s)" when applied to single persons did not mean only widows and divorced parents but included all natural persons. "The amendment thus expanded the class of persons who can take advantage of the homestead provision and its protections. *At 948*. The "homestead exemption formerly only enjoyed by a head of a family can now be enjoyed by any natural person.: *At 951*. The case did not say, "the amendment now takes away from families the protection against waiver which this court found fundamental for more than a century because such protection should not go to single persons". While this case involved the devise clause of the article, it spoke eloquently as to the purpose of the exemption:

> 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. At. 948.

This same public purpose is recognized today. *McKean v. Warburton*, 919 So.2d 341 (Fla. 2005), reh. den. Jan. 5, 2006.

As this purpose (promoting the stability and welfare of the state by securing for persons their home) is not achieved by finding that the amendment suddenly allows waivers that will deprive persons of their home in the face of creditor liens, a finding that there can be effective waiver would, in fact, fly in the face of the public policy purpose of the homestead exemption itself. See also *Cain v. Cain*, 549 So.2d 1161 (Fla. 4th DCA 1989).

b. That other constitutional rights have been found to be subject to waiver is not sufficient argument that the prohibition against waiver for homestead protection against creditors should be found subject to waiver.

Chames states on page 7 of their brief the bald statement, "No matter how fundamental, all constitutional rights are subject to waiver." This, of course, is false. Homestead protection was (and still is) not subject to waiver. Right to free speech, right to freedom of religion, right to bear arms, right to assemble peaceably is not subject to waiver. Chames lump rights found in the U.S. Constitution Bill of Rights with the rights and protections under Article x, sec. 4(a) (creditors). Then Chames lumps waivers found under Article X, sec. 4(c) (devise) with 4(a) creditors. Each is distinct. Each requires separate consideration of waiver to assure that the waiver is in conformance with public policy and that a waiver will not vitiate the entire protection.

It is correct that waiver of the Fifth Amendment right against self incrimination, the Fourth Amendment right to be free of unreasonable searches and

seizures; the Sixth Amendment right to an attorney, speedy trial and to trial by jury, all in the U.S. Constitution Bill of Rights, may be waived. But these are rights which may be reasserted and are not lost with waiver. The waiver of these rights is a waiver for that time and that place. It is not irrevocable. Even when these rights are litigated in the state forum, they have been found to be able to be reasserted and the right is not lost. See *Torrence v. State*, 430 So.2d 489 (Fla. 1st DCA 1983); *J.G. v. State*, 883 So.2d 915 (Fla. 1st DCA 2004); *Phillips v. State*, 707 So.2d 774 (Fla. 2nd DCA 1998); *McNeil v. State*, 438 So.2d 960 (Fla. 1st DCA 1983); *Dooley v. State*, 743 So.2d 65 (Fla. 4th DCA 1999); *Garbacik v. Wal-Mart Transportation* , LLC, 932 So.2d 500 (Fla. 5th DCA 2006); *Goldberg v. State*, 407 So.2d 352 (Fla. 4th DCA 1981); *Lowery v. State*, 894 So.2d 1032 (Fla. 2nd DCA 2005).

But the rights of the criminally accused under the U.S. Constitution represent the lowest standard of protection. States are free to grant more protection, but never to permit less. In fact this Court has held that the Florida constitutional provision of rights is more expansive in nature than the protection offered under the U.S. Constitution in both criminal and civil matters. *Traylor v. State*, 596 So.2d 957 (Fla 1992). See *In re T.W.*, 551 So.2d 1186 (Fla. 1989).

A waiver signed to the benefit of a creditor is a contract. The cases cited by Chames are mostly not contractual. If the homestead protection against creditors is

found to be subject to waiver, that waiver as to that creditor, unlike the waivers cited by Chames, can never be reasserted. The protection will be gone forever.

Chames also cites as authority *Kaplan v. Kimball Homes Florida, Inc.,* 915 So. 755 (Fla. 2nd DCA 2005) in which an adhesion contract required arbitration instead of trial by jury and the court affirmed the waiver of jury trial. But this is precisely the problem in the present case. Adhesion contracts will have waiver clauses of homestead protection and the signer will be held to their terms. Most will not even understand they are jeopardizing the very roof over their heads. Instead of prohibiting a known clause of waiver in a promissory note, as in *Sherbill, supra*, Chames is proposing support of an unknown clause of waiver in every common contract. Did the inclusion of "natural person" envision this?

Chames cites recent amendments to the Rules Regulating the Florida Bar. But that rule cited *Hartwell v. Blasingame*, 564 So. 2d 543 (Fla. 2nd DCA 1990) for the proposition that the homestead protection is subject to waiver. However that case refers only to the devise section of Article X, sec.(c), not to the creditor section of (a). There is no case that says that sec.(a) is subject to waiver. The need for waiver in circumstances of devise is long recognized and fills a need inside families for family harmony for devise. It cannot be transferred to a creditor section for the very purpose in the first (devise) if transferred to the second (creditors) would destroy the public purpose of both!

Further, Chames refers to the "relatively old decisions of this Court" which support prohibition against waiver when referring to *Carter's Adm'rs* and *Sherbill*. In Chames's attempt to denigrate their importance, they write "old" as a perjorative. But that is the same as saying that *Marbury v. Madison* is "old" or *Brown v. The Board of Education of Topeka Kansas* is old. They are more than old. They are an inherent part of the very fabric of our society. Yet then Chames cites as authority an Illinois minor decision from 1876 on page 10 to overrule them!

Chames next argues that the amendment made the right to homestead protection a "personal right". But it was always a personal right. It did not lose that characteristic because persons who were dependent on the head of the family were also benefiting from their home not being taken from them. Yet as a personal right it was and has not been subject to waiver. So Chames argument that she is entitled to have the waiver enforced because it is now a personal right is not convincing.

On page 13. Chames quotes at length from the Amendments to the Rules Regulating the Florida Bar but leaves out key words. In quoting from *City of Treasure Island v. Strong*, 215 so. 2d 473 (Fla. 1968), a case where the city was trying to lien the homestead for unpaid assessments from a taxing body, the entire quote is "[I]t is firmly established that such constitutional rights designed solely for

the protection of the individual concerned may be lost through waiver, estoppel or laches if not timely asserted" but that quote refers to the taking of property without due process. *Emphasis added.* That is not the kind of waiver we are speaking of here. And besides, that is dicta which cannot overcome Supreme Court holdings where there is a conflict. *See F.B., a child, v. State, 852 So.2d 226 (Fla. 2003); Puryear, v. State, 810 So.2d 901 (Fla. 2002).*

Further, homestead protection is different from the constitutional rights cited by Chames. They are unique to the fabric of our society. There can be no analogy to those cases cited by Chames to support the sudden finding of a waiver in this most sacred right.

III. The requirements to live in modern society have not changed the reasoning behind *Carter* and *Sherbill* and do not require the Court to find enforceable waiver.

Going full circle, the Florida Supreme Court warned in dicta as far back as 1905 to be mindful not to construe homestead exemption protection to the extent as to "render it meaningless". *Platt v. Platt*, 39 So. 536 (Fla. 1905) It is precisely this situation we face herein. One of the arguments propounded by the concurring opinion below for re-examination of the prohibition against waiver is that "… we are of the belief that the citizens of this state should be permitted to order their world as they see fit." While personal beliefs are not grounds for determination of legal principals, this comment will be nonetheless analyzed for its validity as

regards waiver. See *Tucker v. Forty-Five Twenty-Five, Inc.*, 199 So 2d 522 (Fla 3rd DCA 1967).

While the sentiment is laudatory, and while that is a wish the Western world in general holds, it is, paradoxically, antiquated. We may be "permitted" to order our world. We simply don't have the power and may never again. We do not see contracts between farmers to sell a horse. We see contracts between institutions and individuals. In its argument to bring the Article X, Sec. 4(a) up to the modern world, the concurring opinion failed to recognize what the modern world is. In times past the courts and the legislature could recognize that there was the frequency in human commerce of contracts entered into through negotiation between parties whether equal or unequal in bargaining power, and could make the determination whether it would or would not be paternalistic in its interpretation of the homestead protection. This court, as seen above in *Carter*, *supra*, and *Sherbill*, *supra*, made the determination that the nature of man to be reckless by "the stroke of a pen" to wipe out the security of his home for himself and his family required the strict prohibition against waiver and also stated that such protection was for the purpose of promoting the stability of the state. Therefore, it was not simply paternalistic for the benefit of that person who entered a contract unadvisedly or faced financially desperate circumstances for which the law was

enacted and interpreted; it was to the benefit of the state that that person remain stable in his home with his dependents.

As the purpose remains the same today, we must then look to see if the modern world requires the court, as opposed to the legislature or the people, to find waiver not just acceptable, but legally required.

It is not an argument that sister states have or have not reached like conclusions which require the court to find that is must overturn centuries of law. What sister states have decided is a political question for the legislature, not a question of law for the courts. Further, each state may have differing purposes for enacting similar laws and therefore the interpretation of their laws must conform to their particular legislative purpose. It may also be that Florida, rather than despairs of the persons moving into this state to protect their assets in homesteads, actually welcomes them. *Havaco* was not decided on the personal preferences of the court. It was decided on the law as enacted by the overwhelming vote of the people who gave constitutional protection to everyone. *Havaco of America, Ltd, v. Hill*, 790 So.2d 1018 (Fla. 2001). It is respectfully submitted that the Court should take judicial notice that there has been no hue and cry from the people of this state to amend the constitution in light of *Havaco*. (The thinking is analogous to the thinking in criminal law, to wit: it is better to have one hundred guilty persons go free than to allow one innocent person to be denied justice. There is a further

analogy and that is that men and women working in the last century were not able to negotiate individually or collectively job contracts. They either accepted the terms given them or they were not employed. As all jobs had the same policy of non-negotiation, the choice was to accept the terms or starve. Today, the individual accepts the terms of living in today's world by signing those contracts and agreements put before him, or he cannot exist in the modern world. It is a reality that the individual in today's world is as enslaved by its corporate terms as the worker of yesterday.)

That a jurist in the concurring opinion finds distasteful that some persons are afforded the benefit of the homestead protection to avoid creditor obligations and that it is that jurist's opinion that therefore none in this state should have waiver protection, is likewise a political decision, not a legal one. In fact, that is exactly what homestead protection is! To avoid creditor obligations falling on the homestead! The following remarkable statement in the concurring opinion in the present case is not one that is based in law, but is based on personal belief, an expression of political belief as to how society should reward and punish, and is therefore not grounds for a judicial decision.

"The people of this state in 1984 expanded the breadth of the availability of the shield of homestead to all persons who hold an interest in homestead property "[without regard to] criminal or immoral conduct," in *Havoco*, 790 So.2d at 1022, as now recognized by our Supreme Court; it therefore seems most reasonable to us to pause to inquire whether the judicial branch should continue to make itself available through *Carter's Adm'rs* to those like Mr. DeMayo and others of

potentially lesser repute in the future, who wish to use Article X, sec. 4 as a sword, especially when the homestead provision as it appeared before the *Carter's Adm'rs* court is no longer "construed [solely] in the interest of the family home." See *Havaco* 1020. If we were writing on a blank slate, we would not adhere to the reasoning of *Carter's Adm'rs*."

First, the statement is unusual in that it appears to say that the prohibition is a gift or privilege that is given out of grace from the judicial branch. Most respectfully, that is a statement that seems to imply that the Supreme Court did not make their decision based on the law and what was required of them, but for grounds based on personal belief! Most assuredly, the Supreme Court based all its decisions interpreting Sec. 4(a) strictly on the law. The Court was not giving the people a gift that they then could take back. They were fulfilling the duties as jurists in interpreting the law and in so interpreting found that the amendment required the prohibition of waiver in order that it have vitality and meaning. Likewise the suggestion that the Court "pause to inquire whether the judicial branch should continue to make itself available" to persons found undesirable by the concurring opinion is an unusual posture. The Court most assuredly will fulfill its constitutional duties without regard to its personal views. *See In Re Seaton's Estates , 18 So.2d 20 (Fla. 1944).*

Second, Mr. DeMayo is exactly the person so strongly protected before the 1984 Amendment. He is the head of household of three small dependent children. Also, if the moral standing of persons who owe creditors money should be the

standard of review for upholding or not upholding waiver, then it is nonsensical. The concurring opinion based its premise originally on the amendment to the constitution allowing all natural persons protection. Is it now saying that only persons who were heads of families before were morally deserving but that now because single persons are included, even present heads of families are not, or that anyone owing a creditor money is somehow morally not deserving? Will there then be a morals test for those who wish to claim waiver prohibition protection?

And besides, what does morality have to do with a person signing a contract wherein the creditor included a waiver provision for himself depriving the other of a constitutional protection? Shall the waiver provision only apply to heads of household? Is Mr. DeMayo more or less deserving because he is a single father head of household living with and supporting three small children? Why is he denigrated under the present amendment when he was lauded under the old amendment? Is the anger towards certain debtors shown in the concurring opinion such that now none should have protection? Is the baby to be thrown out with the bathwater?

Most particularly, why does the concurring opinion not deal with the acts of the creditors themselves? In our modern society, where creditors are knowledgeable of the laws of this state regarding protection of the home, and have structured their business affairs accordingly, should not their decisions to place

burdens which they know may or may not be able to be handled by the person to whom they are affording credit also be placed on their shoulders? Should creditors in this state be responsible for their own recklessness in giving credit to those whose ability to pay is limited and then, through a waiver clause, take from that person the only thing they have, their home? If the home of the homeowner is protected from his own recklessness by constitution, and the constitution makes no provision to protect the creditor from his own recklessness, why is the concurring opinion attempting to tilt the balance towards protecting the creditor? If such constitutional protection is to be made to him, it must be made by the legislature and the people who have thus far not granted him any more rights than is presently in the statutes and in the common law. Further, the creditor does have extraordinary rights protecting him for his own recklessness and irresponsibility in affording credit to those whose ability to pay is questionable. He has the right to go to court and obtain a judgment against which the debtor does not have the right to claim his own stupidity or even the irresponsibility and business gamble of the creditor as an affirmative defense. The line, however, is drawn on the homestead.

Further, the argument of the concurring opinion assumes that contracts in the modern world are based on negotiation. Of course, they are not. Contracts are entered into on an almost daily basis, from the parking of a car, to the lease of a car, lease of an office, lease of business equipment, installment purchases, doctor's

visits, hospital care, dental care, using public transport, moving contracts, ordering eye glasses, entering installment contracts, phone and cell phones, internet access, cable access, credit cards, small business rentals, equipment rentals, car loans, and the myriad of other contracts necessary to live in today's world are not negotiated. *Kaplan, supra.*

While it is nice to believe that "the citizens of this state should be permitted to order their world as they see fit", in the matter of contracts in the modern world it is not possible. Contracts are presented to us, to the citizens of this state, to sign or to be denied service or products. They are not negotiated. They are generally adhesion contracts or as close to them as possible. They are most often handed forth to the potential signer by those who have no decision in the composition, by sales staff, clerical staff, or service personnel. They are designed to protect the creditor. It is also the bane of the signer that he is assumed to have read and to have understood what he has signed. His signature is proof of his agreement to the terms. A simple daily example is the trend in recent years to lease autos. After a term the auto is returned. The dealer looks at the car and disputes with the lessee the extent of wear and tear on the car. The dealer makes the decision, fairly or unfairly. Suit is instituted. A suit for less than ten thousand dollars would cost more in attorney's fees and costs. The dealer wins by default or by having a better attorney. Attorney's fees, interest and costs are added. By Chames' argument, the

customer's home will be liened as the lease will no doubt give the dealer that right through waiver. The lien will be executed. Other examples are credit card agreements and cell phone agreements which change their terms monthly and one who continues with the company is deemed to have agreed to the change in terms.

But think of the horrific examples of hospital and emergency visits. Those contracts which must be signed before triage will also have waiver clauses. Will the parent carrying in his sick child be forced to choose between the child's health and the roof over the child's head? Of course, he will. Is this the promotion of the stability of the state? To what higher purpose will we reach by allowing Chames and others enforceable waiver clauses?

In the present case, Chames refers this Court on page 15 of their brief, to the findings of the lower court to wit; that Mr. DeMayo "agreed to waive his homestead exemption and to have a charging lien placed on his residence to secure any fees and costs owed to Heller and Chames, P.A." This finding was made solely on the basis that he signed the agreement! His testimony as to how he was given the contract to sign was not deemed credible. But Chames did not contradict one word he said regarding the signing of the contract. She also admitted she did not ask him if he understood the many legal terms and his waiver of rights under it. He testified that had he understood she was giving herself the right to take his

home, he would never have signed with her. How many others will be in exactly the same position?

On page 16 Chames argues that she "cut him a break" and allowed him to run up a bill in reliance of the waiver of homestead. It is obvious from the pleadings that Mr. DeMayo, who came to her because he no longer had the money to pay his child support and alimony payments, did not "run up a bill". Chames did that through over-lawyering. But she is right when she said in her brief that she "allowed" it because she knew she had his signature on a waiver and could always take his home. There was no reason for this case to have been handled in this manner. Mr. DeMayo was given a nine month abatement on child support and alimony which he had to repay in full to his former wife plus within six months of the agreement for the temporary abatement he had to pay his wife $25,000.00. His temporary savings for the nine months was $20,000.00 which as said he had to repay to his former wife, and the charges from Chames, knowing she could take his home and therefore having no self-restraint on how she proceeded, for executing this agreement was a total of $57,000.00. Chames knew his only asset was his home and that he had no money. But it was her decision to take or refuse to take the case. Chames now argues that her charging lien of over $33,000 should be affirmed because he could have gone to the bank and gotten a mortgage for that amount! While the assumption is ridiculous knowing his financial

situation, Chames is arguing that a creditor can take a homestead because the debtor should have gone to the bank, re-mortgaged his home, and used that money to pay the creditor. Chames appears to be saying that they are doing the public a favor by skipping the middleman! If Chames did not have the questionably obtained waiver, would she have not found a more expeditious, responsible way to handle her client's case? Of what responsibility, moral and professional, does Chames have to the situation from which she seeks to profit? And even if there was no question as to the efficacy of her efforts (and claimed 123 pleadings that somehow never saw the court file) she would still not be entitled to foreclose on the lien on her client's homestead as there can be no enforceable waiver.

Can it be imagined that any contract in the future, if the waiver prohibition provision is not upheld, will not contain an ironclad waiver provision? Can it be imagined that with a provision for attorney's fees and costs that this provision will not be aggressively litigated? At what point then will the warning of *Platt*, *supra*, become a trumpet call? When scores, or hundreds, or tens of thousands of persons are fighting for their homes? When a bill, justified or not, originally in the hundreds and not worthy of the cost of an attorney, skyrockets with interest and attorney's fees to thousands and a lien is placed and enforced on the family (or single person's home)? **Of what significance will be homestead protection without the prohibition against waiver?** Absolutely none.

If the answer by the other side is to say that the people can then express their intent by amending the constitution again, that is a reply that must be rejected. The people have spoken. With comfort in the full knowledge of *Carter's* and *Sherbill* they made their intent known to be inclusive giving that protection to all. They should not be forced the trauma and costs of speaking again on an issue that has long been decided. If the people wish to remove the prohibition against waiver they may do so but discussion, debate, and vote. If they do not, the courts should not change their lives for them.

IV. Where millions of citizens of this state have relied on the prohibition against waiver in homestead protection for more than a century, and where they have ordered their lives, their property, and their personal and business decisions on this law, there has been no change sufficient to overturn the stare decisis.

This Court is being asked by Chames to overturn a law on which the people of this state have relied and upon which they have order their lives and the lives of the descendents for 122 years. It governs millions of contracts. It governs wills and other devises, trusts and estates. It is part of the fabric of our society. It determines how commerce is conducted between parties. It allows for the stability of the home. It furthers the stability and the welfare of the state. It is our "sacred cow" but much more. *Daniels, supra*. Without the prohibition against waiver, uncertainty would rule our commerce and our most personal decisions. Creditors, who thus far have factored into the business decisions that they may not seize a

person's home, will in the face of a bonanza that says otherwise, have to reassess to whom they give credit and what the terms will be. Unscrupulous (or bottom line) creditors will give freely without regard to ability to repay. Banks which have given mortgages on these properties will also be affected. Properties will flood onto the market. Real estate values will be affected. Persons who have committed their resources and lives in reliance of the present law, will have that reliance now work against them. The consequences to this removal of protection against waiver will permeate all aspects of society. The consequences will be an upheaval.

This Court recently set the standard for determining when stare decisis should be upheld. *North Florida Women's Health and Counseling Services, Inc. v. State*, 856 So.2d 612 (Fla. 2003). It reasserted the basic principal of the strong presumption in favor of stare decisis and said that where the issue was "a watershed judgment resolving a deeply divisive societal controversy, the presumption is at its zenith." In the present case, the issue is a watershed issue. But it does not resolve a deeply divisive societal controversy. There is virtually little controversy. Therefore the strong presumption should be in favor of stare decisis as to overturn existing law would <u>create</u> societal controversy and turmoil.

The Court gave three traditionally asked questions that should be asked before a rule of law is overturned. First, whether the prior decision proved

unworkable due to reliance on an impractical legal fiction. That is not the situation here. In fact, the law prohibiting waiver has proved immensely workable and it relied on no legal fiction. Second, whether the rule of law announced in the decision could be reversed without serious injustice to those who have relied on it and without serious disruption in the stability of the law. That of course is impossible. The upheaval in commerce and in the personal lives of almost each and every person in this state will be traumatic. *See also Crown Life Insurance Company v. Feagin*, 139 So.2d 461 (Fla. 1st DCA 1962); *State v. Green*, WL 3025732 (Fla. Oct. 26, 2006) (Not yet released for publication).

Third, and this is the ground relied on by the concurring opinion, is whether the factual premises underlying the decision have changed "so drastically" as to leave the decision's central holding "utterly without justification." The only change that has occurred is the change from "head of family" to "natural person". Is the central holding now "utterly without justification"? That can only be argued in the affirmative if the will of the people and the intent of the people is that in enacting the amendment they were saying that a single person is so unworthy of protection that in including them the people wanted no persons, single or head of family, to have protection against waiver. That of course is an absurdity. There is ample justification for continuing the prohibition against waiver. It works for all. It is not argument to throw it out because it works for some for whom the

concurring opinion feels should not be allowed it. *North Florida Women's Health, supra*. ; *Rotemi Realty, Inc. v. Act Realty Company, Inc.*, 911 So.2d 1181 (Fla. 2005)

The Court must also look to future litigants in deciding whether to overturn centuries of law. It is not known as part of the record how many thousands or millions of contracts entered into by the people of this state have such a waiver clause which heretofore has been unenforceable. What then will be the status of those waivers? They may have been entered into with the parties knowing they were unenforceable or without knowledge by the debtor that the clause was even there. Is there not a judicial duty to the people of the state that relied on previous Court decisions? And since the amendment is already 23 years old, is it not reasonable that if the amendment caused under law the waiver to be lost, that some hint of that would have already been noticed to the public. Instead, we have *Havaco, supra,* stating just the opposite.

But Chames ignores these standards and argues that stare decisis should not apply as they "cut their client a break" believing that they could foreclose on his homestead. While recognizing the internal contradiction of this statement, it will be answered by the authority of *Gentile Bros. Co. v. Fla Industrial Com, 10 So2d 568 (Fla. 1942) reh. den*., wherein the Court in dicta stated that the "rules of law must be grounded on reason and justice rather than emotional impulse, and the fact

that hardship will result in an individual case should not be permitted to overthrow a long settled rule on which the public has relied and the overthrow of which would adversely affect the public in a multitude of instances.

CONCLUSION

The order of the trial court granting a money judgment and charging lien on their former client's homestead to Heller and Chames, P.A. must be reversed. The requirements of Sinclair, supra, for charging lien was not met as the attorney did not secure anything for her client on which a lien could be placed. The order for the money judgment must be reversed as there was no jurisdiction in the trial court to hear the issue of attorney's fees where there was no basis for a charging lien and because there was no notice that the issue of monies due would be heard.

The order of the Third District Court of Appeals reversing the lower court order of charging lien on Mr. DeMayo's homestead should be upheld as the waiver of his homestead protection against creditors is unenforceable.

There has been no factual change which leaves the central holding of *Carter's Adm'rs* and *Sherbill* "utterly without justification". The change in homestead protection which gave protection not only to "head of family" but also to "natural person" was not intended to remove prohibition of waiver from all. The law as it has been for more than 122 years as to prohibition of effective waiver

is still serving its purpose of promoting the welfare and stability of the state and should be undisturbed.

Respectfully submitted,

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I HERBY CERTIFY that this Answer Brief of Henry DeMayo was prepared in 14 point Times New Roman, Microsoft Word Format.

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I HEREBY CERTIFY that a copy of the foregoing was mailed this 18th day of January, 2007. to the following:

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