IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1671

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

Petitioners,

vs.

HENRY DeMAYO,

Respondent.

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

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vs. **PETITIONER'S REPLY BRIEF**

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I
Argument

THE CONSTITUTIONAL EXEMPTION CONTAINED IN ARTICLE X, §4(a) OF THE FLORIDA CONSTITUTION AGAINST FORCED SALE OF A HOMESTEAD MAY BE EFFECTIVELY WAIVED BY THE PROPERTY OWNER[1]

This court's jurisdiction has been invoked to review a question certified by the Third District Court of Appeal as one of great public importance. A second tier appellate proceeding such as the case at bar is a rare occurrence. At this appellate level, the parties have been to trial and full plenary appeal which contained exhaustive briefing, oral argument, and opinions which have been re-heard and

[1] Attorneys use the term "forced sale" as a term of convenience in this brief because the enforcement of a contractually obtained volitional waiver is not really a forced sale as has been the situation in other cases involved in the interpretation of Article X, Section 4(a), Florida Constitution.

clarified. The Third District affirmed the trial court's final judgment in all respects save for the imposition of the Attorney's charging lien on DeMayo's homestead property. This cause is before this court for the resolution of the question certified by the court below as to the narrow question of whether the protection and exemption afforded by Article X, §4(a) of the Florida Constitution may be waived as to the claim of a general creditor due to case precedent decided after *Carter's Administrators v. Carter,* 20 Fla. 558 (1884) and *Sherbill v. Miller Manufacturing Co.*, 89 So.2d 28 (Fla. 1956) and textual changes made to the Article X, §4(a), Fla. Const. Although the certified question is limited to the homestead issue and DeMayo did not file a cross petition for review, DeMayo's answer brief is essentially a re-argument of the entire plenary appeal heard by the Third District below including both factual and legal issues. All other issues other than the narrowly drawn certified question have been affirmed by the Third District. DeMayo thus raises issues for consideration by this court which are outside the scope of the certified question and the basis for this court's discretionary review. Under these circumstances, this court should decline to consider these issues. *Major League Baseball v. Morsani,* 790 So.2d 1071, 1080 (Fla. 2001)("As a rule we eschew addressing a claim that was not first subjected to the crucible of the jurisdictional process set forth in Article IV, Section 3, Florida Constitution). This

court should refuse to consider any issues other than the homestead question certified by the court below.

In the order entered by the Trial Court with regard to the issue before this Court, as a matter of fact the Trial Court determined there had a been a knowing waiver by DeMayo of his homestead and that DeMayo's testimony to the contrary was not credible. As the final order entered by the trial court states:

> 7. The court finds that the Former Husband and Heller & Chames, P.A. entered into a valid contract under the terms of which the Former Husband 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 & Chames, P.A. The contract was given to the Former Husband on December 12, 2002 and he did not sign it until December 30, 2002. The court rejects the Former Husband's testimony. The Former Husband was, simply, not credible.

(R. 613).

This finding was not disturbed by the District Court of Appeal and should be inviolate before this court.[2] Thus, the discrete issue presented in this second tier appeal concerns whether a homestead can be knowingly waived by the homesteader, as opposed to a waiver effectuated by the mere presence of boiler plate language in a lengthy fine print installment credit agreement or similar type

[2] To the extent that this finding is factually based, an appellate court may not substitute its judgment for that of a trial court by reevaluating the evidence. *Delgado v. Strong*, 360 So.2d 73 (Fla. 1978). Findings of fact are reviewed for substantial competent evidence. *City of Gainesville v. State,* 863 So.2d 95 (Fla. 2003).

agreement. For this reason, the argument advanced by Amicus Attorney General is misplaced. The difference between the case at bar and the six cases cited by the Attorney General to establish the sanctity of the homestead exemption and its imperviousness against attack is simply that in the case at bar there is a voluntary and knowing waiver of the homestead by DeMayo.[3] As the concurring opinion noted below:

> Although the Florida Constitution has long exempted homestead property from a "forced sale," it is important at the outset to recognize that Mr. DeMayo is not facing a "forced sale" of his property. Rather, he resists honoring an agreement he made with his counsel whereby he "knowing, voluntarily and intelligently" waived his constitute right.
>
> Slip opinion at 7.[4]

The six cases cited by the Attorney General were not concerned with any issue of a knowing, voluntary, intelligent waiver. *See: Olesky v. Nicholas*, 82 So.2d 510 (Fla. 1955)(Judgment creditor); *Graham v. Azar*, 204 So.2d 193 (Fla. 1967)(Writ of Execution for nonpayment of child support); *Public Health Trust of Dade*

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[3] The concurring opinion below found conflict between the case at bar and this court's decision in *Sherbill v. Miller Mfg. Co.,* 89 So.2d 28 (Fla. 1956). However the fact pattern of *Sherbill* is to be distinguished from the case at bar in one important respect because there is no discussion as to whether the waiver of homestead was intelligently and knowingly obtained as occurred in the case at bar.

[4] Attorneys cite to the concurring opinion, because it represents the view of the majority of the panel which heard and determined this case below with regard to whether there could be a voluntary wavier of the homestead protection against forced sale.

County v. Lopez, 531 So.2d 946 (Fla. 1988)(Creditor attempting to limit homestead exemption to dependents and not non-dependent spouse or children); *Butterworth v. Caggiano*, 605 So.2d 56 (Fla. 1992)(Foreclosure of homestead property used in perpetration of a crime)[5]; *Tramel v. Stewart*, 697 So.2d 821 (Fla. 1997)(Foreclosure sought for homestead property bought with proceeds of criminal activity); *Havoco of Am., Ltd. v. Hill*, 790 So.2d 1018 (Fla. 2001)(Acquisition of homestead with specific intent to defraud creditor). For this reason, all six of the foregoing cases are off point.

As noted by this court in *Havoco of Am., Ltd. v. Hill, supra.*, notwithstanding the liberal construction to be afforded the homestead exemption, and the strict construction applied to the exceptions to the exemption, this court has in the past judicially engrafted an exception to the prohibition against the forced sale of a homestead. For example, in *Palm Beach Savings & Loan Ass'n v. Fishbein*, 619 So.2d 267 (Fla. 1993), this court permitted an equitable lien against

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[5] The Attorney General argues that the concurring opinion below is directly at odds with *Caggiano* because of Judge Shepherd's statement that DeMayo is not "facing a 'forced sale' because … he resists honoring an agreement with his counsel." Slip opinion at 7. In *Caggiano*, the State argued that a forfeiture was not a forced sale. This court disagreed. However, *Caggiano* is to be distinguished from the case at bar because *Caggiano* is not concerned with the volitional act of waiver, the voluntary and intentional relinquishment of a known right. *Jonas v. West Palm Beach*, 76 Fla. 66, 79 So. 438 (1918). A forfeiture is an involuntary seizure predicated upon a violation of a criminal statute, not predicated upon an agreement to subject the homestead to a specific creditor's lien.

a homestead where a loan had been fraudulently obtained by the owner. This court in *Havoco* described the *Fishbein* exception at 1024:

> We agreed with the trial court and allowed the bank an equitable lien against Mrs. Fishbein's homestead, accepting the bank's argument that although it could not foreclose on the mortgage under the literal language of the exemption it should be entitled to a lien under the doctrine of equitable subrogation as its loan proceeds were used to satisfy the prior liens against the home…. Stated differently, we allowed the Palm Beach bank to stand in the shoes of the prior mortgagees who would have been entitled to proceed against the Fishbeins' homestead under the express terms of article X, section 4.

See also: *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (1925)(Equitable lien allowed against homestead of former president of bankrupt company where former president embezzled corporate funds to make improvements to the homestead); *Craven v. Hartley*, 102 Fla. 282, 135 So. 899 (1931)(Equitable lien imposed against homestead property where creditor loaned money to owner for purchase of home in exchange for a mortgage in the amount of the loan and owner refused to execute mortgage after purchase of property); *LaMar v. Lechlider*, 135 Fla. 703, 185 So. 833 (1939)(Equitable lien allowed where creditor made valuable improvements to homestead with the understanding they were acquiring an interest in the property); *Sonneman v. Tuszynski*, 139 Fla. 824, 191 So. 18 (1939)(Equitable lien allowed where money advanced to defendant by plaintiff was used in purchase

of real property in Florida and that defendant's services "were factors that aided the defendant in accumulating the money placed into the real property).

The foregoing equitable lien cases establish, contrary to the arguments advanced by DeMayo and Amici, that exceptions to the homestead exemption are not solely found in the constitution. The point Attorneys make is only that this court has judicially imposed at least one exception to the homestead protection against forced sale where the equities of the case justified such an exception. A basis for such an exception is present in the case at bar.

The waiver of the homestead exemption with regard to Attorneys' charging lien was a material part of the retainer agreement and a material inducement to Attorneys representation of DeMayo. *Compare: Bakst, Cloyd & Bakst, P.A. v. Cole*, 750 So.2d 676, 677 (Fla. 4DCA 1999)("Nothing in the retainer agreement even hints that Cole is waiving her homestead exemption"). Absent this waiver, Attorneys would not have represented DeMayo. DeMayo admits as much in his answer brief when he indicates that Attorneys refused to do any more work without a signed retainer. Answer Brief at pp. 5-6. After accepting the fruits of Attorneys' services, he now seeks to undo that which he knowingly agreed to when he signed the retainer agreement by having the waiver of homestead judicially invalidated. Given that the agreement specifically singled out DeMayo's homestead as being subject to the charging lien and that DeMayo knowingly waived the protection

against forced sale in the retainer agreement, recognition and enforcement of the waiver by this court is consistent with the judicially created equitable lien exception to the homestead exemption. It is the direct connection between the waiver of DeMayo's homestead and Attorneys' agreement to perform services on his behalf which separates this case from cases where general creditors attempt to void the homestead exemption. This court should find that a specific knowing waiver of the homestead exemption, such as occurred in the case at bar, is both permissible and enforceable.

Each of the Amici points to the policy behind homestead, the need to prevent absolute pauperism by protecting individuals from the consequences of "ill advised promises," *Carter Adm'rs v. Carter,* 20 Fla. 558, 563 (Fla. 1884), and the public welfare by "having families secure in their homes," *Butterworth v. Caggiano, supra.*, general propositions with which Attorneys do not disagree, there is no analysis of why a knowing waiver of homestead should not be effected *in the circumstances of this case*. What practical difference is there between DeMayo's hiring of Attorneys, borrowing money from the bank giving a mortgage against his homestead as security, and using the money to pay Attorneys, or promising to pay Attorneys their fee secured by a lien against his homestead – found by the lower court to be a knowing and intentional act! All parties to this appeal would have no quarrel that such a mortgage is a stated exception to the homestead exemption in

Article X, Section 4(a) and is valid. By the same token, if the Attorneys had taken a mortgage against the homestead to secure the fees for their services, as opposed to securing a knowing waiver of the homestead protection against forced sale with regard to their charging lien for unpaid charges, there would also be no issue but that the mortgage does not constitute a waiver of the homestead exemption. After having accepted Attorneys' services rendered in reliance upon DeMayo's execution of the waiver, because the method utilized by Attorneys to secure their fee was to obtain a voluntary and knowing waiver of the homestead protection against forced sale as to any resulting charging lien for unpaid fees, does DeMayo seek to escape the consequences of the waiver because such a waiver, he says, violates Article X, Section 4(a) of the Florida Constitution.[6] Thus the issue before this court is one of form over substance.

The thrust of the position of the Amici is that the 1984 constitutional change effected a broadening rather than a narrowing of the protection afforded by Article

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[6] The inequity of DeMayo's position and his unclean hands are obvious. Attorneys entered into a retainer agreement with DeMayo which contained the waiver of homestead. In reliance upon his execution of the retainer agreement, Attorneys performed services on his behalf in post judgment proceedings with regard to the dissolution of his marriage. Now, after the services are performed and he has not paid the bill, he seeks to invalidate a material provision designed to insure that Attorneys would recover full compensation for their services. Such conduct by DeMayo smacks of fraud and allows him to make his homestead an instrument of fraud upon creditors, something this court has frowned upon. *Milton v. Milton*, 63 Fla. 533, 58 So. 718 (1912); *accord: Havoco of America, Ltd. v. Hill, supra.*

X, Section 4(a) of the Florida Constitution. *See: Public Health Trust of Dade County v. Lopez*, 531 So.2d 946 (Fla. 1988). As noted in Attorneys' initial brief before this court, when the 1984 constitutional change expanded homestead protection from the family to individuals, it represented a shift in the policy behind the homestead exemption to the protection of individuals. It is not inconsistent to broaden the class of individuals who are entitled to claim homestead yet at the same time recognize that the expansion of the homestead protection contained in Article X, §4(a), Fla. Const. from "a head of family" to "a natural person" represents a shift in the philosophy behind the homestead to make it more of a personal right which is subject to a knowing, voluntary, and intelligent wavier. As the concurring opinion noted below:

> Unless there is a compelling legal reason to the contrary, we are of the belief that the citizens of this state should be permitted to order their world as they see fit.

Slip Opinion at 16.

In this day and age, given the deference of courts to and the enforceability of voluntary waivers of most constitutional rights, it would simply be incongruous not to allow an intelligent, knowing and voluntary waiver of a homestead. There is nothing about the nature of the homestead protection against forced sale which compels a determination that it cannot be knowingly waived, thereby making it more sacrosanct than the rights contained in the Bill of Rights to the United States

Constitution or the Declaration of Rights contained in the Florida Constitution. This court should adopt the reasoning of the concurring opinion below, limit the protection of the homestead exemption against forced sale as set forth in *Carter's Adm'rs v. Carter, supra.* and *Sherbill v. Miller Mfg. Co., supra.* to those waivers which are unknowing unintentional waivers such as the type contained in boilerplate, fine print contracts.

VII
Conclusion

Based upon the foregoing cases and arguments, Petitioners Deborah Chames and Heller & Chames, P.A. respectfully request that this Court reverse the decision of the District Court of Appeal, Third District, and reinstate the final order of the Circuit Court which determined that DeMayo "agreed to waive his homestead exemption and to have a charging lien place on his residence to secure any fees and costs owed to Heller & Chames, P.A." and allow the execution of Heller & Chames, P.A.'s charging lien against DeMayo's homestead.

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VII
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed to Sophie DeMayo, Esquire, 9100 SW 115th Terrace, Miami, Florida, 33176, d Lynn C. Hearn, Esquire, Louis Hubener, Jenna Reynolds, Office of the Attorney General, 400 S. Monroe Street, #PL-01, Tallahassee, Florida 32399, Paul S. Singerman, Esquire, Ilyse M. Homer, Esquire, Paul Avron, Esquire, Berger Singerman, P.A., 200 S. Biscayne Boulevard, Suite 1000, Miami, Florida, 33131, Robert W. Goldman, Esquire, Goldman, Felcoski & Stone, P.A., 745 12th Avenue South, Suite 101, Naples, Florida, 34102, John W. Little, Esquire, Brigham and Moore, LLP, One Clearlake Centre, Suite 1601, 250 South Australian Avenue, West Palm Beach, Florida 33401 and to HELLER & CHAMES, P.A. 261 NE First Street, Sixth Floor, Miami, Florida 33132, this 6th day of March, 2007.

_____
Attorneys for Petitioners

VIII

Certificate of Type Size and Format

Counsel for Respondent hereby certifies that this brief has been prepared in 14 point Times New Roman, Microsoft Word format.

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Attorneys for Petitioners