IN THE SUPREME COURT OF FLORIDA

Case No. SC06-2187

HENRY De MAYO,

Petitioner,

vs.

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

Respondents.

ANSWER BRIEF OF RESPONDENTS DEBORAH CHAMES and HELLER & CHAMES, P.A.

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TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities

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ANSWER BRIEF OF RESPONDENTS

I
Introduction

The instant appeal seeks review of a decision of the District Court of Appeal, Third District in *DeMayo v. Chames*, 934 So.2d 548 (Fla. 3DCA 2006). By its decision, the Third District affirmed a judgment of the Circuit Court of the Eleventh Circuit in and for Dade County, Florida, awarding attorney's fees to Respondents, Petitioner's former counsel in a post-judgment family matter. At the same time, the Third District reversed the trial court's determination that Petitioner had waived his homestead protection against forced sale which allowed Respondents to foreclose their charging lien against the homestead. Both parties seek review by this court of aspects of the district court's decision and in doing so certified the following question as a matter of great public importance:

> WHETHER IN LIGHT OF SUBSEQUENT PRECEDENT IN FLORIDA AND OTHER JURISDICTIONS, AND THE TEXTUAL CHANGES MADE BY THE PEOPLE OF THE STATE OF FLORIDA IN ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION IN THE GENERAL ELECTION OF NOVEMBER, 1984, THE HOLDINGS IN *CARTER'S ADM'RS v. CARTER*, 20 Fla. 558 (1884), FOLLOWED IN *SHERBILL V. MILLER MFG. CO.*, 89 So.2d 28 (Fla. 1956), THAT A WAIVER OF THE BENEFIT AND PROTECTION OF THE EXEMPTION FOUND IN ARTICLE X, SECTION 4(A) OF THE FLORIDA CONSTITUTION IS UNENFORCEABLE AGAINST THE CLAIM OF A GENERAL CREDITOR, SHOULD BE OVERRULED?

The following designations will be used in this brief. Petitioner Henry De Mayo, Husband and Appellant below, shall be referred to as "Petitioner," "Former Husband," or "DeMayo." Respondent Deborah Chames, Attorney and Appellee below, shall be referred to as "Attorney Chames." Respondent Heller & Chames, P.A., Attorney and Appellee below, shall be referred to as the "Law Firm." The Record on Appeal shall be referred to by the letter "R." The transcript of the evidentiary hearing on Respondents' charging lien shall be referred to by the letter "T." The term volume shall be referred to as "Vol." The retainer agreement between Respondents and DeMayo shall be referred to as the "Retainer."

II
Statement of the Case and Facts

Respondents disagree with Petitioner's Statement because it includes Petitioner's unsubstantiated editorial comment, personal attacks on Attorney Chames and inappropriately relies upon DeMayo's testimony which was deemed incredible and was rejected by the trial court. In addition, Petitioner fails to review the facts in the light most favorable to Respondents as the prevailing party after an evidentiary hearing. *See: Harrington v. Mendieta*, 927 So.2d 96 (Fla. 3DCA 2006)(In considering factual issues resolved by the trial court, appellate court must construe the evidence in a light most favorable to prevailing party); *D'Amico v. Brightfelt*, 924 So.2d 872 (Fla. 4DCA 2006)(In reviewing final judgment after trial, facts are set forth in light most favorable to prevailing party). For these reasons, Respondents restate the pertinent facts.

On December 30, 2002, DeMayo and the Law Firm entered into a written retainer agreement for legal representation concerning DeMayo's post-dissolution modification and enforcement proceedings. (Vol IV, T 23). In pertinent part, the Retainer provides as follows:

> 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 liens 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.
>
> Heller and Chames, P.A.'s lien may be adjudicated, at the attorney's option, in the same action in which the attorney represented the client, and the client hereby consents to the jurisdiction of the court for that purpose. This lien shall be perfected on a timely basis and shall not be affected by dismissal of the client's action absent the attorney's consent and shall survive any such dismissal.

(Vol IV, T 60-61).
(Emphasis Supplied).

The parties agreed to hourly rates of $300.00 for Attorney Chames and $235.00 for her associate and monthly billing (Vol IV, T 24).

On October 7th, 2003, when the trial court allowed the Law Firm to withdraw from its representation of DeMayo, (R. Vol III, 534-535 & 542), the

trial court also entered a charging lien in the amount of $33,207.76 (R. Vol III, 542-544). In the October 7th order, the trial court reserved jurisdiction "over Heller and Chames, P.A.'s charging lien to conduct such hearings or proceedings and to enter such orders as may be equitable, appropriate and just in order to enforce the same" (R.Vol III, 542-544). The Law Firm gave notice of the evidentiary hearing scheduled for October 30th, 2003, later rescheduled to November 5th, 2003.

The Court's November 5th, 2003 evidentiary hearing lasted in excess of three (3) hours which included the testimony of Attorney Chames, DeMayo, and the introduction of voluminous exhibits and legal argument. During the course of the lengthy hearing, DeMayo raised various *ore tenus* motions for dismissal of the charging lien based upon due process violations, lack of notice, and violations of Florida Homestead Law - all of which the Court denied. (T. 140; R. Vol. III, 612 - 614).

Following the Court's oral ruling imposing a charging lien in favor of the Law Firm on November 5th, 2003 (T. 140-141), and after DeMayo filed motions for rehearing (R. 560-561), the Court entered its own three-page written Order on December 12th, 2003. In this order, the Court made findings as to the reasonable

and necessary hours expended by Attorney Chames and her associate and the corresponding hourly rates charged by those attorneys supported by further findings of fact as a result of the evidentiary hearing. The Court determined the amount owed to the Law Firm by DeMayo was $33,206.76 and entered a final money judgment in that amount as well as finding that DeMayo had waived his homestead exemption against forced sale in favor of Respondents' charging lien (R. 612 - 614). In its order the Court explained its reasoning for imposition of the charging lien on DeMayo's homestead:

> 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...

In reaching its determination on the attorney's fee issue, the trial court rejected DeMayo's testimony because DeMayo was not credible:

> The court rejects the Former Husband's testimony. <u>The Former Husband was, simply, not credible</u>.

(R. 613).

(Emphasis Supplied).

DeMayo appealed this order to the District Court of Appeal, Third District.

On appeal DeMayo raised eleven separate points on appeal which challenged virtually every aspect of the proceedings leading to the trial court's order as well as the order itself. The District Court of Appeal ultimately reversed the trial court's order insofar as it granted a charging lien on DeMayo's homestead but affirmed the order on appeal "in all other respects" thereby affirming the money judgment entered against DeMayo. *DeMayo v. Chames*, 934 So.2d 548 (Fla. 3DCA 2006). A majority of the panel certified as a matter of great public importance, the question of whether the benefit and protection of the homestead exemption against forced sale contained in Article X, Section 4(a), Fla. Const. could be voluntarily waived.

Respondents invoked this court's jurisdiction pursuant to the certified question in case no. SC06-1671. All issues relating to the waiver of the exemption from forced sale under Article X, Section 4(a), Fla. Const. have been briefed under that case number. DeMayo petitioned for review of the decision of the District Court of Appeal in the instant case which is docketed under case no.

SC06-2187.[1] All issues other than the certified question are briefed in this appeal. This court has consolidated the cases for consideration.

III

Points Involved on Appeal

Point I

WHETHER THE PARTIES TO A RETAINER AGREEMENT CAN AGREE THAT THE ATTORNEY'S CHARGING LIEN CAN APPLY TO THE CLIENT'S REAL AND PERSONAL PROPERTY AND NOT MERELY PROPERTY WHICH IS RECOVERED FOR THE CLIENT THROUGH THE EFFORTS OF THE ATTORNEY?

Point II

WHETHER THE PLAIN LANGUAGE CONTAINED IN THE RETAINER AGREEMENT APPLIES THE LAW FIRM'S CHARGING LIEN TO ALL REAL AND PROPERTY LOCATED WITHIN THE GEOGRAPHIC JURISDICTION OF THE CIRCUIT COURT WHICH ENTERTAINED THE CHARGING LIEN PROCEEDINGS?

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[1] Respondents contend that this court lacks jurisdiction over DeMayo's petition for review from the Third District's decision as the issues raised in this petition are unrelated to the question certified by the court below and which is the sole subject of SC06-1671.

Point III

WHETHER THE TRIAL COURT'S DETERMINATION OF THE LAW FIRM'S ATTORNEY'S FEES IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND DOES NOT REPRESENT AN ABUSE OF THE TRIAL COURT'S DISCRETION?

Point IV

WHETHER THERE IS COMPETENT EVIDENCE THAT DEMAYO WAS FULLY INFORMED AS TO THE CONTENTS OF THE RETAINER AGREEMENT WHEN HE ENTERED INTO THE AGREEMENT?

IV
Statement of the Standard of Review

The standard of review of the trial court's determination of the entitlement to attorney's fees is an abuse of discretion. *Musselwhite v. Charboneau*, 840 So.2d 1158, 1160 (Fla. 5DCA 2003); *Bateman v. Service Ins. Co.*, 836 So.2d 1109, 1111 (Fla. 3DCA 2003); *Afrazeh v. Miami Elevator Co. of America*, 769 So.2d 399, 401 (Fla. 3DCA 2000), *rev. denied, sub nom. Smyler v. Afrazeh*, 786 So.2d 580 (Fla. 2001).

The standard for review when an award of attorney's fees is made pursuant to a charging lien is abuse of discretion. *Afrazeh v. Miami Elevator Co. of America*, *supra.*

Whether the trial court had jurisdiction to entertain a charging lien proceeding is reviewed for an abuse of discretion. *Milio v. Leinoff and Silvers, P.A.*, 668 So.2d 1108, 1110 (Fla. 3 DCA 1996).

An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980). Where a decision is supported by competent substantial evidence, the decision cannot constitute an abuse of discretion. *Tanzi v. State*, ___ So.2d ___, 2007 WL 1362862 (Fla. 2007); *Pubillones v. Lyons*, 943 So.2d 881 (Fla. 3DCA 2006).

As the decision reviewed was entered after an evidentiary hearing which resolved factual issues, the record is viewed in the light most favorable to Respondents as the prevailing party below. *Harrington v. Mendieta, supra.; D'Amico v. Brightfelt, supra.*

Credibility determinations are within the province of the trial court. *Adkins v. Adkins*, 650 So.2d 61, 62-63 (Fla. 3DCA 1994). The appellate court may not weigh the credibility of the witnesses or the evidence. *Id.* at 62. "So long as there is sufficient evidence in the record to support the trial court's findings, . . . [the appellate court is] required to affirm the final judgment appealed from--even though there may be contrary evidence and reasonable inferences therefrom to

support different findings which are more to the Petitioner's liking." *Id.*

V
Summary of the Argument

DeMayo's appeal raises numerous issues, but the issues fall into two broad categories or questions: 1) Whether the parties could agree that Respondents' charging lien applied to real and personal property other than the proceeds of any recovery obtained through the Law Firm's representation of DeMayo? and 2) Whether the trial court abused its discretion in entering an attorney's fee judgment against DeMayo in favor of the Law Firm?

The trial court did not abuse its discretion in entering a charging lien in favor of the Law Firm based on the clause in the parties' Retainer Agreement wherein DeMayo grants liens for unpaid fees. A client has the right to enter into a representation contract with an attorney which grants a charging lien on property other than the "tangible fruits" of the representation. In the Retainer, DeMayo agreed to a charging lien that is applied to property other than the "tangible fruits" of the representation.

The trial court did not abuse its discretion in determining the amount of the attorney's fees at the November 5th, 2003 hearing. The Law Firm provided notice that was sufficient in the context of the charging lien entered on October 7, 2003

and the Retainer Agreement. Determining the amount of the attorney's fees at the November 5th, 2003 was not a usurpation of DeMayo's right to an independent action for attorney's fees. DeMayo gave the option to the Law Firm to have that determination made in the pending action below.

The trial court acted well within its discretion in determining the reasonable and necessary attorney hours expended multiplied by the appropriate hourly rate. These determinations are amply supported by the testimony, exhibits and the court's own findings. Such findings include the court's rejection of DeMayo's testimony as lacking in credibility.

VI
Argument

Point I

THE PARTIES TO A RETAINER AGREEMENT CAN AGREE THAT THE ATTORNEY'S CHARGING LIEN CAN APPLY TO THE CLIENT'S REAL AND PERSONAL PROPERTY AND NOT MERELY PROPERTY WHICH IS RECOVERED FOR THE CLIENT THROUGH THE EFFORTS OF THE ATTORNEY

Under this court's opinion in *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A.*, 428 So.2d 1383 (Fla. 1983), there are four (4) elements to a charging lien:

> In order for a charging lien to be imposed, there must first be a contract between the attorney and the client. *Billingham v. Thiele*, 107 So.2d 238 (Fla. 2DCA 1958), *cert. dismissed* 109 So.2d 763 (Fla. 1959)…. There must be an understanding, express or implied, between the parties that the payment is either dependent upon recovery or that payment will come from the recovery. *Miller v. Scobie*, 152 Fla. 328, 11 So.2d 892 (1943); *Conroy v. Conroy*, 392 So.2d 934 (Fla. 2DCA 1980), *petition denied*, 399 So.2d 1141 (Fla. 1981)… Finally, the remedy is available where there has been an attempt to avoid the payment of fees, *Worley v. Phillips*, or a dispute as to the amount involved. *Renno v. Sigmon; Kurzweil v. Simon*, 204 So.2d 254 (Fla. 3DCA 1967)…. There are no requirements for perfecting a charging lien beyond timely notice.

Id. at 1385.

The Law Firm's charging lien conforms to the elements of *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, *supra.* As to the first *Sinclair* element, there is an express contract between the parties; the Retainer agreement was entered into evidence with no objection from DeMayo. As to the third *Sinclair* element, Attorney Chames testified that DeMayo had refused to pay the balance of her attorney's fees in spite of repeated demand for payment. DeMayo does not dispute that Attorney Chames provided timely notice to perfect the charging lien, the fourth *Sinclair* element. The only element that is in any real dispute is the second *Sinclair* element that the payment is from the "tangible

fruits" of the representation.

DeMayo argues that the Law Firm was not entitled to a charging lien because there are no "tangible fruits" as a result of the Law Firm's services to DeMayo in the child custody, child support modification, and alimony abatement proceedings. However, the Law Firm does not assert entitlement to the charging lien on that basis. Rather the Law Firm's entitlement to the charging lien against DeMayo's real and personal property is based on contract. The retainer agreement between the parties provides:

> It is specifically agreed that Heller and Chames, P.A. shall have and is hereby granted …attorney's charging liens upon the client's interests in any and all real and personal property within the jurisdiction of the court for any balance due…
>
> (Vol IV, T 60-61).
> (Emphasis Added).

In *Sabin v. Butter*, 522 So.2d 939, 940 (Fla. 3DCA) *cause dism. sub nom. Phoenix Collection, Inc. v. Butter*, 531 So.2d 168 (Fla. 1988), *Butter* represented Sabin in a dissolution case. To secure *Butter*'s fees, *Butter* obtained mortgages on *Sabin*'s marital home and a piece of property *Sabin* owned with his brother. When the trial court entered a judgment establishing a charging lien on the two properties and ordering execution, *Sabin* appealed. On appeal *Sabin* argued that *Butter*'s

charging lien was "invalid because it created no judgment proceeds to which a lien could attach. . . ." *Id.* at 940. The Third District rejected *Sabin*'s argument and held that charging lien is not confined to judgment proceeds where "the parties … enter into contract which expressly subjects other property to the charging lien." *Id.* Thus *Sabin* allows the attorney and client to agree to expand the property subject to the charging lien which in the absence in of such an agreement would be limited to the tangible fruits obtained by the attorney for the client. The case at bar is governed by *Sabin* because DeMayo agreed that Respondent's charging lien would apply to all real and personal property within the jurisdiction of the court. As this court noted in *Wechsler v. Novak,* 157 Fla. 703, 708, 26 So.2d 884, 887 (1946): "Competent persons have the utmost liberty of contracting and when these agreements are shown to be voluntarily and freely made and entered into, then the courts usually will uphold and enforce them." The trial court and the district court correctly held that the Law Firm's charging lien is not limited solely to any tangible recovery obtained by Law Firm on his behalf.

At the hearing on the charging lien, the trial court agreed when DeMayo's attorney stated, "The house has nothing to do with a tangible fruit of the case." (R. Vol IV, T 136). Later, the trial court stated, "I'm making no finding that she

[Chames] made any efforts that recover any properties for Mr. DeMayo for which the charging lien is being assessed." (R. Vol IV, T 140). Then the trial court continued, "I'm distinguishing this case based upon the specific language in the contract between the parties." (R. Vol IV, T. 141). In its written order, the trial court stated, "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 Heller & Chames, P.A." (R. 613). This ruling is consistent with *Sabin* and should be affirmed.

DeMayo refuses to acknowledge that a client may agree to allow a charging lien to attach to assets other than the tangible benefits obtained for the client by the attorney in the lawsuit. His brief is replete with the contention that the elements of a charging lien as set out by this court in *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavernik, P.A. v. Baucom, supra.*, and specifically, the element that a charging lien only attaches to the proceeds of recovery, may not be modified by the parties' retainer agreement. However DeMayo offers no authority in support of his position and *Sabin* is directly to the contrary. Significantly, DeMayo has not even discussed *Sabin* in his brief although it

figured prominently in argument before the trial and district courts. The money judgment should be affirmed.

In his initial brief, DeMayo argues that a charging lien may not extend to the general assets of a client. This proposition is irrelevant to the case at bar and the decisions relied upon by DeMayo are all distinguishable because they do not involve a contract by the parties agreed to expand the scope of the charging lien as is the situation in the case at bar.[2] Typical of the cases relied upon by DeMayo is *Yavitz v. Martinez, Charlip, Delgado & Befeler*, 568 So.2d 103 (Fla. 3DCA 1990), *rev. denied*, 576 So.2d 295 (Fla. 1991). *Yavitz* is not in conflict with *Sabin* because *Yavitz* does not involve a contract which expanded the scope of the charging lien. Contrary to the statement in DeMayo's brief at page 20, there is no language in the retainer agreement in *Yavitz* which attached the charging lien to the general assets of the client. As the charging lien in the case at bar by the agreement of the parties attached not merely to the proceeds of recovery but also to DeMayo's personal and real property within the court's jurisdiction, the charging lien is applicable even though DeMayo made no tangible recovery in the

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[2] *Mazzorona v. Mazzorana*, 703 So.2d 1187 (Fla. 3DCA 1997); *Pasin v. Kroo*, 412 So.2d 43 (Fla. 3DCA 1982); *Shawzin v. Sasser, P.A.*, 658 So.2d 1148 (Fla. 4DCA 1995) or *Cole v. Kehoe*, 710 So.2d 705 (Fla. 4DCA 1998).

lawsuit. For this reason, contrary to DeMayo's argument, the trial court had jurisdiction to adjudicate Respondents' charging lien notwithstanding the lack of a tangible recovery for DeMayo and Respondent was not limited to recovery of its fee through an action at law.[3] The order should be affirmed.

DeMayo argues that determining the amount of Attorney Chames' fees was a usurpation of a client's right to an independent action. DeMayo's reliance on *Franklin & Marbin, P.A. v. Mascola*, 711 So.2d 46 (Fla. 4DCA 1998) is misplaced. First, there is no indication that the attorneys in that case had a contract granting a charging lien which attached to all real and personal property such as the one in the case before this Court. Second, there is no indication that Mascola had waived his right to an independent action as DeMayo has done here. As this court stated in *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom, supra.* at 1385:

> [P]roceedings at law between attorney and client for collection of fees have long been disfavored. The equitable enforcement of charging liens in the proceeding in which they arise best serves to protect the attorney's

[3] At pages 22-23 of his brief, DeMayo argues that he is deprived of equal protection and due process because a jury will not determine the amount of what is owed because a charging lien is an equitable proceeding heard by the court. Suffice it to say here, this argument was not raised below and for this reason may not be raised here.

> right to payment for services rendered while protecting the confidential nature of the attorney-client relationship.

DeMayo ignores the constraints of the Retainer Agreement between the parties. DeMayo gave Attorney Chames the option of adjudicating the charging lien in the same action rather than an independent action, when the parties agreed as follows:

> Heller and Chames, P.A.'s lien may be adjudicated, at the attorney's option, in the same action in which the attorney represented the client, and the client hereby consents to the jurisdiction of the court for that purpose. This lien shall be perfected on a timely basis and shall not be affected by dismissal of the client's action absent the attorney's consent and shall survive any such dismissal.
>
> (Vol IV, T 60-61).
> (Emphasis Supplied).

DeMayo's agreement that the Law Firm's lien may be adjudicated in the same action certainly contemplates that the court would resolve all of the claims between the parties in that proceeding, as occurred here.

DeMayo's argument as to lack of notice is flawed because this ground was not raised at the hearing below. Although DeMayo's attorney objected to the order of the proceedings, she did not object that the notice for the November 5, 2003 hearing was insufficient. By failing to raise the issue below, DeMayo has waived the issue on appeal. Even if this court were to reach the merits of the

notice argument, no reversible error is demonstrated by DeMayo. The notice and re-notice of hearing indicate that an "Evidentiary Hearing on Heller and Chames, P.A.'S Charging Lien" was scheduled at the appointed time. DeMayo and his counsel knew that on October 7, 2003 the trial court had allowed Attorney Chames to withdraw and ordered the entry of a charging lien in the amount of $33,207.76 in favor of Attorney Chames and her Law Firm (R. Vol III, 542-544). The footnote to the Notice of October 29, 2003 indicates: the hearing was "coordinated with Sophie DeMayo and Judge's secretary at Mr. DeMayo's counsel's request.". Clearly, both DeMayo and his counsel were aware of the upcoming hearing as well as its subject matter. There is no notice problem with regard to the adjudication of the charging lien.

DeMayo also complains that he had notice only that the hearing would encompass the appropriateness of the imposition of a charging lien on his homestead, not the amount of the lien. DeMayo cannot seriously advance the far-flung notion that a one hour evidentiary hearing later expanded to three hours on an attorney's charging lien would not encompass presentation of evidence to determine reasonableness, necessity and amount of the attorney's fees sought! It is simply an untenable position for DeMayo to claim only notice as to the propriety of the lien and not the amount.

The lack of notice argument is further undercut by the very language of the retainer agreement executed by DeMayo. Page 4 of the retainer states, "... that the court shall specifically reserve jurisdiction in the final judgment to determine and enforce my attorney's charging lien." In legal parlance regarding fee disputes, it is axiomatic that the word "determine" equates with the word "amount". In this regard, DeMayo's reliance upon *Shawzin v. Sasser*, 658 So.2d 1148 (Fla. 4DCA 1995) for lack of notice is distinguishable. Just as DeMayo omitted additional language in the instant retainer agreement as compared to that provision at issue in *Shawzin*, so too, has DeMayo misread the essence of the holding of *Shawzin*. The Fourth DCA in *Shawzin* affirmed the attorney's charging lien against the client's homestead property, but set aside the money judgment against the client.[4] The Fourth District held where an issue is not presented by the pleadings, nor litigated by the parties, such judgment entered on that issue cannot stand (citing with approval from *Lochner v. Monaco Cardillo and Keith, P.A.*, 551 So.2d 581 (Fla. 2DCA 1989). Here however, the issue between DeMayo and the Law Firm was

[4] At pages 19-20 of his brief, DeMayo cites to *Shawzin* for the proposition that "a retainer agreement in which the lawyer states that even that which was not secured by the attorney is subject to the lawyer's charging lien, does not give jurisdiction to the court to hear the matter of attorney's fees." A review of *Shawzin* fails to establish that it stands for the proposition for which DeMayo has cited it.

the subject of the retainer agreement and by stipulation indicated that it could be "adjudicated" in the same proceeding. Furthermore, the evidentiary hearing was properly noticed for adjudication not once, but twice, and was litigated by the parties in a three hour hearing. Thus, *Shawzin* is inapposite to the case at bar and the court's final judgment should be affirmed.

Point II

THE PLAIN LANGUAGE CONTAINED IN THE RETAINER AGREEMENT APPLIES THE LAW FIRM'S CHARGING LIEN TO ALL REAL AND PROPERTY LOCATED WITHIN THE GEOGRAPHIC JURISDICTION OF THE CIRCUIT COURT WHICH ENTERTAINED THE CHARGING LIEN PROCEEDINGS

The trial court did not err in liening DeMayo's real property because it is within the jurisdiction of the Eleventh Circuit. The Retainer specifically includes within the scope of the available property to be liened: "...all real and personal property within the jurisdiction of the court ...". In his argument DeMayo rewrites the Retainer Agreement to require the property to be "under the jurisdiction of the court" rather than "within the jurisdiction of the court." He then defines the rewritten phrase to mean that the property must be subject to adjudication as part of the case before the court in order to be subject to the charging lien under the

Retainer Agreement. This argument of DeMayo is utter nonsense because it completely rewrites the agreement. The plain language of the agreement controls. DeMayo's claim is disingenuous, and, quite frankly, incomprehensible.[5]

Point III[6]

THE TRIAL COURT'S DETERMINATION OF THE LAW FIRM'S ATTORNEY'S FEES IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND DOES NOT REPRESENT AN ABUSE OF THE TRIAL COURT'S DISCRETION

There is competent, substantial evidence of reasonableness of the hours spent by Attorney Chames and the Law Firm. Attorney Chames testified that she represented DeMayo in proceedings to modify child support, to abate alimony, and to modify the marital settlement agreement (Vol IV, T 24; Retainer). She testified that she had come up with a novel approach to deal with nonmodifiable

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[5] Equally incomprehensible is DeMayo's argument that the Retainer Agreement is ambiguous. This argument which is raised at pages 25-26 of Petitioner's brief was not raised anywhere below and for this reason may not be raised here. Additionally, if DeMayo contended the agreement was ambiguous, it was his burden to raise such a contention before the trial court and to introduce parole evidence as to the parties' intent. This he did not do.

[6] This point should not be reviewed by this court because it represents a garden variety issue of whether the award is supported by competent, substantial evidence. DeMayo has already had plenary review of this point by the district

alimony (Vol IV, T 24; Retainer). Attorney Chames testified under oath that she prepared voluminous court filings, reviewed 64 pleadings[7] from the file prior to her appearance and prepared a master document index (Vol IV, T 22, 24, 26). Attorney Chames also testified that the case was document intensive, that it involved mandatory disclosure, and that it involved emergency procedures regarding custodial care and emergency motions regarding the children's medicines (Vol IV, T 26 29-30). Attorney Chames spent thirteen hours in mediation on the case. (Vol IV, T 27). Time was also incurred because DeMayo delayed in providing discovery, DeMayo demanded discovery from his former wife in an attempt to prove fraud, DeMayo required hand holding, and DeMayo was a compulsive participant in redrafting everything that went out of the Law Firm. (Vol IV, T 30, 32, 38). Attorney Chames filed emergency child custody motions due to the mother's entry into a drug rehabilitation program and numerous motions wherein the father alleged the mother's detrimental conduct with the children. The court received into evidence multiple exhibits which included the Law Firm's monthly fee statements. Attorney Chames represented

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court below. There is nothing raised by this point which compels this court to re-review the issue.

DeMayo for over nine months. (R. Vol IV, T 23 & 37). For that period of time, the court concluded that 106.90 hours for Attorney Chames and 48.20 hours for her associate were appropriately expended (R. 613).

The only evidence remotely contrary on the issue of a reasonable fee was that of DeMayo himself. However the trial court rejected his testimony as lacking credibility and as mentioned previously, such determinations are exclusively the prerogative of the trial court as the finder of fact. There is competent substantial evidence which supports the amount of a reasonable fee awarded to Respondents consisting of the hours expended by the attorneys and the rate each attorney charged as well as how these hours were spent. *See: Young v. Taubman,* 855 So.2d 184 (Fla. 4DCA 2003). The trial court's determination as to the quantum of fees awarded Respondents should be affirmed.

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[7] Ms. Chames' use of the word "pleadings", clearly denotes any and all papers filed with the court.

Point IV

THERE IS COMPETENT EVIDENCE THAT DEMAYO WAS FULLY INFORMED AS TO THE CONTENTS OF THE RETAINER AGREEMENT WHEN HE ENTERED INTO THE AGREEMENT

Attorney Chames testified that although it was her standard practice not to begin her work until the Retainer had been signed, DeMayo induced her to do so by saying, "'Deborah, I really need this stuff done. I'm going to sign the retainer. I'm busy, I'm this, I'm that. Don't worry, you're going to get the retainer agreement.'" (R. Vol IV, T 64). She was able to file her initial pleadings in the matter on January 2, 2003, only because she began working before DeMayo signed the Retainer. (R. Vol IV, T 64-65).

DeMayo offers *In re Kindy's Estate*, 310 So.2d 349, 350 (Fla. 3DCA), *cert. den.* 324 So.2d 83 (Fla. 1975), as support for his position that Attorney Chames had a duty to read the 6 page retainer agreement to him. However, the issue in *Kindy* concerned the propriety of the law firm's insistence upon a 20% contingency fee where the firm possessed information which it did not share with the client, making the fee inequitable. Here the fee was hourly and the monetary terms did not impact upon DeMayo's decision to retain the firm. The issue of the

charging lien was certainly never raised by DeMayo at the time he entered into the fee contract. And his claimed lack of understanding offered at evidentiary hearing was expressly rejected by the lower court as not credible.

DeMayo also relies on the Rules of Professional Conduct to create a legal duty. (Initial Brief 32). DeMayo ignores the scope of the rules :

> Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.

Scope, Preamble, Rules of Professional Conduct, Rules Regulating the Florida Bar; *Beach Higher Power Corp. v. Rekant,* 832 So.2d 831, 833 n 2 (Fla. 3DCA 2002)("[T]he rules themselves clearly provide that they are not to be applied for the purpose of determining the existence of an attorney client relationship, or for the purpose of determining liability.")

DeMayo seeks to analogize the holding in *Arabia v. Siedlecki*, 789 So.2d 380, 383 (Fla. 4DCA 2001), *rev. denied sub nom. Lavalle, Brown, Ronan & Soff, P.A. v. Arabia*, 817 So.2d 848 (Fla. 2002), "An attorney must be clear and precise in explaining the terms of a fee agreement. To the extent the contract is unclear, the agreement should be construed against the attorney." Here, there is no ambiguity and absent inquiry from DeMayo, Attorney Chames' silence cannot possibly be construed as malfeasance. The sophomoric nature of this argument resounds when considered in light of the emboldened language appearing at the end of the retainer agreement immediately above DeMayo's signature:

> THIS IS A LEGAL BINDING CONTRACT BETWEEN HENRY DEMAYO AND HELLER AND CHAMES, P.A. BEFORE SIGNING, PLEASE READ IT CAREFULLY AND BE SURE YOU UNDERSTAND ALL OF ITS CONTENTS. IF THERE IS ANYTHING YOU DO NOT UNDERSTAND, WE ENCOURAGE YOU TO ASK ABOUT IT.

The final money judgment should be affirmed.

VII
Conclusion

There exists a presumption of correctness of the orders appealed. There is abundant, competent evidence in the record before this court which supports the

order which is the subject of this appeal. The trial court had jurisdiction to enter a money judgment against DeMayo since it had jurisdiction to consider the adjudication of the charging lien against all of DeMayo's property located within the jurisdiction of the trial court. The trial court did not abuse its discretion in entering an attorney's fee judgment against DeMayo and in favor of the Law Firm. This Court should affirm the order appealed with the exception of its ruling finding that a voluntary waiver of the homestead protection against forced sale is ineffective.

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BY:_____
JAY M. LEVY, ESQUIRE
FLORIDA BAR NO: 219754

VIII

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, 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, 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, this 18th day of July, 2007.

_____

Attorney for Respondents

IX
Certificate of Compliance

I FURTHER CERTIFY that the above and foregoing complies with the font requirements of Fla. R. App. P. Rule 9.100(1) and specifically that this has been prepared in 14 point Times New Roman type.

_____
Attorney for Respondents