# IN THE SUPREME COURT OF FLORIDA

## CASE NO. SC06-2187

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**HENRY DEMAYO,**
**Petitioner,**

**v.**

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

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## INITIAL BRIEF OF PETITIONER HENRY DEMAYO AS AMENDED

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**Submitted by:**
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## 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 modification of child support and abatement of alimony. (T 27, 43). Initial consultation was in October at which time she provided legal advice, work began in earnest early December and her retainer agreement was signed December 30th although it had been given him two weeks earlier. (T27, 43, 65). The retainer agreement (Appendix Exhibit A) was a six page document in various fonts, boldnesses, underscores, and capitalizations to emphasize certain sections, but did not in any manner emphasize the following which it put 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, and 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; that if at any time within those nine months DeMayo recovered financially that this agreement would be terminated; and further, that all monies abated or modified would be added to the end of the term of payments. (T. 28, 90-93)

The temporary relief to him on the surface (if the abatement went the full nine months) was $15,500.00 and which a savings of $4500.00 for child support was pursuant to law and followed the charts and by Chames' own admission "simple". (T. 27, 90-92, 128) A few very minor simplistic motions were filed but not 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 part of these billed monies. (T 37)

Very soon thereafter the former wife counsel unexpectedly called the court and in a five minute conference call revealed that former wife had committed herself to a hospital. DeMayo asked the court (Chames never broached the subject and remained quiet throughout the call) if his three small children could stay with him. (T 122-123) The court immediately agreed and the children were put in the custody of their father to live with him full time in DeMayo's home which home had been purchased by him after their dissolution and with non-marital funds. (T 12, 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 former wife and DeMayo acknowledged that DeMayo should permanently be their primary custodial parent. This agreement was made the order of the court entered December 14, 2004. Book 22930 Pg 1655 of Docket.) 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 motion to withdraw and simultaneously filed a notice of charging lien specifically and only on his homestead for the balance of her fees. Notice was filed on a Thursday for hearing the next Tuesday. (R 534-535)

At hearing the court granted motion to withdraw. Instantly upon withdrawal, Chames said to the court,"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 Mr. 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 first to a hearing before an order could be entered 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 physical possession of the order that had just been signed granting her charging lien for $33,207.76 on her client's homestead and immediately recorded it. At hearing she explained she did this as she knew DeMayo was about to refinance his home and wanted her lien (which all believed to be a nullity since the hearing had been granted) to be paid from the proceeds of the refinance even before a hearing to determine her entitlement and the amount of such entitlement was heard. (T 17, 79-81, 83, 135)

At hearing DeMayo made the following motions: to dismiss the prior entry of order for charging lien for violation of due process as there had been no hearing and because of equal protection (T 9-12); to dismiss hearing on charging lien for violation of due process on several grounds including lack of notice (T7); objection to hearing on issue of money owed without first determining if there is a asset which satisfies the four prong requirements of *Sinclair*; *Louis, Siegel, Heath, Nussbaum & Zavernik, P.A. v. Baucom,* 428 So.2d 1383, (Fla. 1983 (T 25-26.

135-136, 138-140); 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; and objection because as the homestead was not subject to the jurisdiction of the court as required in the retainer agreement. (T 139- 141) All motions and objections were denied. (T22, 31)

Chames gave the court the case of *Sabin v. Sabin*, 522 So2d 939 (Fla. 3rd DCA 1988) and told the court that it meant that as long as her retainer agreement allowed her to get a charging lien on <u>any</u> property owned by her former client without regard to *Sinclair* and that even if his homestead was not secured by her efforts, was homestead, and had nothing to do with the case, she was entitled to take it by way of charging lien. (T 17-18, 20) The court accepted her argument and proceeded with the hearing over DeMayo's objections that this was not the law and that there was nothing on which to attach a charging lien. (T 22) Chames immediately began by testifying as to attorney's fees. (T 24) DeMayo strongly and continually objected on two grounds. First, the notice addressed only a charging lien specifically on his homestead and there was no notice that the issue of attorney's fees <u>as a judgment</u> would be heard, and second, that entitlement had to be proven, then a proper subject of imposition had be identified, then lastly, and

only if the four prongs of charging lien were met under *Sinclair* 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 charging lien could be put on that which was not secured by the attorney there could be no charging 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 strenuous objection. (T 34-36)

Testimony was elicited regarding the signing of the retainer agreement. Chames testified it was a "form" retainer agreement. (T 54) DeMayo testified it was first given him in a sealed envelope which he misplaced and never opened which was consistent with his testimony that he has an aversion to and difficulty with paperwork. (T 102) 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 on December 30th where her assistant ran another standard form copy off the computer in front of him and he signed it while holding it in the air without ever reading it. His assistant then walked in Chames office to tell her he signed, and then escorted

DeMayo into her office. (T 103-106; 64) Chames testified that she did not remember how the retainer agreement came to be signed.

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 because she said 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. (T 74, 61, 67-68) There was no testimony as to whether that lawyer's retainer agreement also required his client to waive his homestead protection or that his pre-dissolution attorney ever had to file a charging lien or that her client knew what a charging lien was. (T 20, 53-55, 61, 69, 72, 75)

The following colloquy was during Chames' testimony:

Q. Now, what do you perceive your duties were to your client? He certainly was your client on the day that he signed the retainer agreement. What do you perceive your duties were to your client to explain the retainer agreement to him?

A. My duties were if you had a question, as set forth in the retainer, I'd be happy to explain it.

Q. Are you saying by that answer that you assume he had no questions?

A. He had it from December 12th through December 30th.

Q. No, Ms. Chames. This is a simple question. Did you assume he had no questions?

A. Yeah, that was my assumption.

Q. By making that assumption, do you assume then that he understood the language?

A. I assume he had no questions.

Q. Do you assume he understood the language?

A. I think it's and the same. If you didn't understand the language, you'd have a question. He had no questions.

Q. So you assume then, he understood the language. Is that your testimony?

A. **You can't assume anything, one way of the other**. Emphasis supplied. (T 67-68)

Chames then testified that she asked DeMayo on many occasions over a period of time to sign a mortgage in her behalf and in behalf of the accountant but that he refused to do so. (T 78, 80, 110, 113) DeMayo also testified that she asked him for a mortgage on many occasions and even told him that by giving her a mortgage that he would have totally encumbered his house so that when he sold it his former wife would have nothing. He stated that his reaction was to tell Chames this seemed to him to be a fraud that Chames was suggesting. (T 111)

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 at which he was testifying. (T 113-115) Chames did not cross examine DeMayo as to even a single statement he made under oath.

Chames admitted that the homestead was not secured by her efforts but claimed that didn't matter as her retainer agreement allowed her to take it by way of a charging lien. (T 80, 84)

The only testimony as the reasonableness of the time expended was that Chames testified that she filed 123 pleadings in this case. 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 one of which has the barest substance to it. The others are threadbare and simplistic. Total pleadings as indicated in the index was 61 almost all of which were housekeeping and included that which was filed by all parties and the court. Most of the pleadings were "fill in the blank" pleadings and included in the number were cover letters. 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). Upon inquiry she explained to DeMayo that Rosen meant that where the other side caused the need for the attorney's efforts the other side would pay. He interpreted her explanation to mean that since his former wife was in the wrong, she would be paying these fees. She never got an award for attorney's fees from the other party. (T 79-80). Chames admitted to receiving correspondence from two separate opposing counsels criticizing her for the unnecessary and voluminous paperwork. (T 94)

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 35, 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. (T 109)

At the end of the hearing the court commented that DeMayo should be grateful to her for her for having gained temporary custody of his small children. 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)

The court granted the charging lien stating that while normally the charging lien must attach to the funds obtained at the time of dissolution he would allow the charging lien on the homestead based on the language in the retainer agreement. The court then instructed Ms. Chames to prepare the order "that says whatever language you think that needs to be in there. Show it to Ms. DeMayo first and it it's appropriate, I'll sign it". (T 140) An order was signed but there is no indication in the record that it was ever first submitted to DeMayo's attorney.

Throughout the hearing, Mr. DeMayo testified forthrightly and without equivocation. Chames testified evasively, equivocally, defensively and almost never gave a direct answer. Yet the order signed by the court found Mr. DeMayo

"not credible" and based its award in significant part on its erroneous finding that Chames had filed 123 pleadings and that she had received more than 60 pleadings from opposing counsel! 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 holding a hearing on a money judgment and making a finding of money judgment, the lien on homestead by a hard creditor, and waiver of homestead protection against creditors 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 which included imposition of a money judgment. (Appendix Exhibit B)

## STATEMENT OF JURISDICTION

The Florida Supreme Court has issued an order accepting jurisdiction and consolidating this case with Case No. 1671, with the same parties.

## ISSUES ON APPEAL

**1. Whether the appellate court erred in affirming a money judgment found pursuant to a hearing on charging lien where there was nothing on which to impose a charging lien.**

**a. Whether where there is nothing on which to impose a charging lien, the trial court has the jurisdiction to hear the issue of attorney's fees.**

**b. Whether the finding of a money judgment was a violation of the 14th Amendment as applied to the instant facts where there was no notice that that issue would be heard and where there was nothing on which to impose a charging lien.**

**c. Whether the money judgment can survive when the order imposing charging lien is reversed.**

**II. Whether the court erred in finding that the homestead was "under the jurisdiction of the court" as required by the retainer agreement for any property to which Chames could seek to impose a charging lien.**

**III. Assuming, arguendo, that the hearing on fees was proper, whether the amount of fees impermissibly exceeded the benefit for the client and was egregious and wasteful and whether the findings supporting those fees was supported by the record.**

**IV. Assuming, arguendo, that the Court finds DeMayo effectively waived his right to homestead protection against creditors, whether there can still be a charging lien on his homestead even though the homestead was not secured by the efforts of the attorney.**

**V. Whether Chames' retainer agreement can change the definitional requirements of a charging lien.**

**VI. Assuming, arguendo, that one can waive homestead protection against creditors, whether DeMayo effectively waived such protection where Chames had a duty to explain the terms of the retainer agreement and to determine objectively whether he understood them and agreed with them.**

## STANDARD OF REVIEW

**The issue of whether the court erred in affirming a money judgment that was found pursuant to a hearing on charging lien where there did not exist anything upon which to impose a lien, is a matter of law and is therefore subject to de novo review.**

**Whether the trial court had jurisdiction to issue an order of money judgment is a matter of law and is de novo review.**

**Whether the hearing on charging lien was a violation of the 14th Amendment to the U.S. Constitution is also a matter of law subject to de novo review.**

**Whether a money judgment issued pursuant to a charging lien can survive the reversal of the res upon which the lien was placed is a matter of law and is subject to de novo review.**

**The review of an unambiguous contract to determine the plain meaning of the words is also de novo review.**

**The award of the amount of attorney's fees pursuant to a hearing held with notice and without other legal impediments, is reviewed by abuse of discretion.**

**Review of the issue of whether, assuming arguendo an effective waiver of homestead protection, a homestead can be waived where that homestead was not secured by the efforts of the attorney is a matter of law and is reviewed de novo.**

**Whether a lawyer can change the definitional requirements of a charging lien by contractual language is also a matter of law reviewed de novo.**

**Assuming arguendo, that one can effectively waive homestead protection, whether the purported waiver here was effective is reviewed by an abuse of discretion standard.**

**Whether a lawyer attempting to gain the waiver of her client's protection of homestead against creditors, has the duty to explain to the client the meaning of what she is attempting to get him to sign and has the duty to determine if in fact her client does understand what he is signing, is a matter of law and de novo review. Whether that lawyer has sufficiently performed her duties to the client and whether there are sufficient indicia to show that the client did or did not understand and whether the waiver was in fact voluntary, is subject to de novo review.**

## SUMMARY OF ARGUMENT

The appellate court reversed the order of the trial court wherein that lower court issued a charging lien against a client's homestead where the homestead was not secured by the attorney's efforts. The appellate court found the waiver of homestead protection against creditors in favor of an attorney and pursuant to that attorney's retainer agreement to be ineffective. However, the appellate court added a sentence to its opinion wherein it affirmed the order of the lower court in all other respects. As the lower court had issued an order for money judgment over the strong objections of the client, it is that money judgment that DeMayo appeals. In the event that in the companion case this Court finds the waiver effective, he

appeals as well as the lien on his homestead as it does not satisfy the requirements of this Court for a charging lien.

A dispute between lawyer and client as to attorney's fees is a first party dispute to be heard in an action in law with trial by jury and with all accompanying appropriate causes of action and defenses. It is only when the dispute satisfies the requirements of a charging lien does the court hearing the underlying cause have jurisdiction to hear the dispute. Where the matter does not provide anything to which a lien may lawfully attach, there is no jurisdiction in the lower court to hear the dispute or to issue an order for money judgment. Where, as here, a money judgment was entered pursuant to a hearing on charging lien for which there was no jurisdiction in the lower court to begin with, it cannot survive the reversal of the charging lien. Further, the lower court cannot issue an order for money judgment. It has jurisdiction only to issue an order for a charging lien for a particular amount of money. The distinction is basic. Violation of that distinction is a violation of due process notice and due process equal protection.

Even if this Court should find that the client effectively waived his homestead protection, his homestead, not being secured by the attorney's efforts, is not subject to lien. The retainer agreement of the attorney laying claim to anything the client owns as under her purvey for her imposition of charging lien is doing so in opposition to the case law of this Court and of every appellate decision in this

State. A lawyer cannot change the definitional requirements of a charging lien merely by calling a cause of action in law a charging lien.

Assuming there can be an effective waiver of homestead (which DeMayo denies) DeMayo did not effectively waive his rights. Despite language to the contrary from his own lawyer, which was never shown him or explained to him, he never knowingly, voluntarily, or intelligently gave up his home, where he is the permanent primary custodial parent of three young children.

Chames did not fulfill her duties to her client by giving him any indication the contents, legal meaning, or practical effect of what she had him sign. Her failure to inform him renders the purported waiver ineffective.

The attorney fees demanded by Chames were based on false and erroneous testimony of the amount of effort she expended for this case. In any event, this was a case of gross over-lawyering where Chames did not restrain herself as she had her client's signature on a paper in which she wrote that she would be able to lien his homestead.

The retainer agreement stated that only property under the jurisdiction of the court could be liened. The lower court erred in deciding that DeMayo's homestead, purchased after the dissolution with non-marital funds, was "under the jurisdiction of the court". Further, the retainer agreement is ambiguous in that it states that on the condition that the lawyer obtains a charging lien, then the client

waives his homestead exemption against creditor lien. But the charging lien in this instance is dependent on the waiver coming first! The charging lien cannot be imposed on the homestead until there is an effective waiver. Therefore, by way of the ambiguous and circuitous words of her own making, the homestead can never be liened!

## ARGUMENT

**1. The appellate court erred in affirming a money judgment found pursuant to a hearing on charging lien where there was nothing on which to impose a charging lien.**

**a. Where there is nothing on which to impose a charging lien, the trial court does not have the jurisdiction to hear the issue of attorney's fees.**

The Court of Appeals, Third District, correctly found that DeMayo's homestead was not subject to an attorney's charging lien. The court based its opinion on the prohibition against effective waiver of homestead in favor of those hard creditors not enumerated in the Florida Constitution, Article X, sec. 4(a).

In so finding, the appellate court stated, in a sentence added to the opinion pursuant to a motion by Chames, that it affirmed the case "in all other respects" which finding effectively left intact the order of money judgment which order was made as a result of the hearing on charging lien. In so stating, the appellate court erred.

At the beginning of the hearing on charging lien, and before any testimony was taken, DeMayo objected to both the hearing on the lien (there was no res on which to impose a lien) and on the court hearing the issue of attorney's fees (the requirements of *Sinclair, Louis , Siegel, Heath, Nussbaum & Zavernik, P.A. v. Baucom*, 428 So2d 1383, 1384 (Fla. 1983) were not met and on due process grounds). All objections were over-ruled and the court proceeded to hearing immediately on the issue of attorney's fees having first acknowledged that while there was nothing procured by the efforts of the attorney upon which to impose a charging lien, as her retainer agreement gave her the right to a charging lien on any property her client owned whether procured by her efforts or not, and as in that agreement he had waived his homestead, that a charging lien might be imposed on his homestead. DeMayo also objected at the end of the hearing renewing her objections to the hearing and to the hearing on money's owed. (Other objections were also over-ruled and are discussed below.)

It is axiomatic that fee disputes between attorney and client are first party disputes and under indemnity agreements are ordinary damage actions in law subject to trial by jury. Where there is no basis on which to impose a lien, the trial court does not have the jurisdiction to usurp the parties' right to independent action on the contract. *Stabinski, Funt & De Oliveiro, P.A.,* 490 So.2d 159 (Fla. 3rd DCA 1986); *Franklin & Marbin, P.A. v. Mascola*, 711 So.2d 46 (Fla. 4th DCA 1998).

See also *Searcy, Denny, Scarola, Barnhart, and Shipley, P.A. v. Poletz,* 652 So. 2d 366 (Fla. 1995); *Sork v. United Benefit Fire Insurance Co.*, 161 So2d 54 (Fla. 3rd DCA 1964); *Barranco, Darlson, Daniel & Bluestein, P.A. v. Winner,* 386 So.2d 1277 (Fla. 3rd DCA 1980). It is only where the attorney proves both entitlement to a charging lien and the existence of a res secured by that attorney by his own efforts (as well as the other prongs of *Sinclair, supra*) is the trial court allowed inquiry into the amount of the attorney's fees between that attorney and the client, and then only after notice that that issue will be heard. Where, in a case similar to the case herein, the client objected to the hearing on the issue of attorney's fees accompanying a hearing for charging lien where there had been no finding of property suitable to impose a charging lien, the Fourth District found that there was no basis or right for the trial judge to take away the client's right to an independent action on the contract in which she could demand a jury trial and avail herself of the myriad of defenses to the action depending on the cause of action claimed by the law firm. *Franklin, supra*. A hearing on a charging lien is therefore a jurisdictional issue. *Barranco, Darlson, Daniel & Bluestein, P.A. v. Winner*, 386 So.2d 1277 (1980).

But 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. See *Shawzin v.*

*Sasser. P.A.,* 658 So. 2d 1148 (Fla. 4th DCA 1995). See also *Yavitzv. Martinez, Charlip, Delgado, and Befeler,* 568 So.2d 103 (Fla. 3rd DCA 1990) where the language in the retainer agreement seeking a lien against general assets is unenforceable. A lawyer and his client cannot agree to convey jurisdiction in the trial court to hear their fee dispute when the facts of the case do not satisfy *Sinclair, supra*.

To find a money judgment may stand under these circumstances is to invite creative mischief. It would not take long for notices of charging liens to be filed by lawyers seeking to avoid an action in law. The courts would be over-burdened as some would try to accomplish through this method what would in effect be a due process violation to their clients.

As the appellate court herein found that DeMayo's homestead could not be liened, and as Chames herself stated that there was nothing which she secured for DeMayo to which a lien could attach, there was no jurisdiction in the trial court to hear the issue of fee dispute. It was therefore error for that court to affirm the money judgment. Here, as in *Franklin, supra,* the money judgment must be reversed.

**b. The finding of a money judgment was a violation of the 14th Amendment as applied to these facts as the there was no notice that that issue would be heard and as there was nothing on which to impose a charging lien.**

If the finding of money judgment were to stand where the underlying hearing on charging lien was found not to have found a suitable res upon which to lien, DeMayo would be denied due process clause of the 14th Amendment to the U.S. Constitution and the Sixth Amendment right to trial by jury for the reason that he would be foreclosed from his fundamental right to have his civil dispute on monies owed heard by a jury in an action at law. As the hearing was held without jurisdiction, this would render the interpretation of the right to the common law hearing on charging lien and the accompanying hearing for money judgment to be unconstitutional as applied in this case.

Another violation of the due process clause occurred as he was not given notice that the issue of money judgment would be heard. His notice was only for the imposition of a charging lien. Failure to notice client that a determination of the money judgment would be heard is reversible error. See *Shawzin, v. Sasser, P.A.,* 658 So.2d 1148 (Fla. 4th DCA 1995) where the relevant facts are identical to the facts at bar. See also *Milio v. Leinoff & Silvers,* 668 So.2d 608 (Fla. 3d 1996).

Even a notice stating only that a charging lien is sought on the client's homestead is insufficient to notice the client that attorney will also seek the amount of lien. *Yavits, supra; Rose v. Marcus,* 622 So.2d 63 (Fla. 3rd DCA 1993). Notice

violations are due process violations. As there was no notice that attorney's fees would be heard, and as there is no subject matter on to which to impose 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. As DeMayo raised this issue in the form of an objection before, during and at end of hearing, the affirmation of attorney's fees by the appellate court must be reversed.

In fact, before the testimony began, DeMayo also objected on 14th Amendment due process and equal protection grounds, stating the following. Where, as here, the charging lien has a nexus to the state in that it is available only to lawyers who are governed by the Florida Bar through rules promulgated by the Florida Supreme Court and that these lawyers are licensed by the State and pay dues to the Bar, a sufficient nexus exists for the following due process argument. A lawyer, and only a lawyer, has the right to bring by way of notice the issue of charging lien to the court and to require a hearing on same. If the lawyer satisfies the four prongs of the elements of a charging lien, then there is the shift to phase 2 which is the matter of amount of fees. But by hearing the issue of the amount of fees, the court's doors are closed to the client as the only class of persons who do not have access to a court in damages for the following reason. Once a determination is made by a court in equity as to the amount of fees, that

determination is now res judicata. *See Sork, supra.* If the client wishes to go forward with a suit against the lawyer, even a malpractice suit, he is now foreclosed by the findings in the charging lien on which issue he is not allowed trial by jury or the other great actions and defenses to actions. The courts as to him are closed. Such state action constitutes a due process violation of equal protection. See *Carson. V. Gibson*, 638 So.2d 79 (Fla. 2d DCA 1994).

If order of money judgment is upheld even though the underpinnings of it no longer exist, and even if there was no jurisdiction or notice for the issue to be heard, DeMayo will have been denied his due process rights and his equal protection due process rights. Again, the decision of the appellate court to affirm the money judgment should be reversed.

**c. The money judgment cannot survive when the order imposing charging lien is reversed.**

Without there being jurisdiction to act, the orders of the court emanating from the hearing held without jurisdiction must be reversed. "In a dissolution proceeding, the trial court has no power or jurisdiction to determine the amount due from a party to his or her own attorney absent a claim of a charging lien. *Citations omitted.* The determination of the rights of an attorney under his contract with his client remains to be tried in a separate action at law." *Barranco, supra*, at 1278. The money judgment cannot stand on its own in the face of the

determination that there was no res upon which to impose a charging lien. *Cristiani v. Cristiani*, 114 So.2d 726 (Fla. 4th DCA 1959) and *Herold v. Hunt*, 327 So.2d 240 (Fla. 4th DCA 1976).

**II. The court erred in finding that the homestead was "under the jurisdiction of the court" as required by the retainer agreement for any property to which Chames could seek to impose a charging lien.**

The retainer agreement required that any property subject to lien must first be under the jurisdiction of the court. The jurisdiction of the court does not include, in a post-dissolution matter, property that was purchased after dissolution, with non-marital funds, which is not the subject of the underlying suit, and which was not secured by the lawyer's efforts. Where the language is clear and unambiguous and therefore is the best evidence of the intent of the parties (assuming the contract is not voidable on other grounds) the plain meaning of that language controls. *Anthony v. Anthony*, 2007 WL 5786 (Fla. 3rd DCA 2007); *Hernandez v. Gil*, 2007 WL 466029 (Fla. 3rd DCA 2007). Here, the language is clear and unambiguous and "the courts cannot indulge in construction or interpretation of its plain meaning." *Hernandez*, *supra*, quoting *Vermut v. Gen'l Motors Corp.*, 773 So.2d 126 (Fla. 4th DCA 2000) at 128.

DeMayo's homestead, not being under the jurisdiction of the court, is not subject to the imposition of attorney's charging lien by the very terms of the retainer agreement. DeMayo's objection on these grounds were over ruled by the

trial court and affirmed by the appellate court. This was error. As the homestead was not under the court's jurisdiction and the hearing should not have taken place, and the lien not been entered, the issue of money judgment not have been heard. The order of the appellate court affirming money judgment must be reversed.

In another sentence of the same paragraph, the language is not clear. It is in fact ambiguous. As it was written by Chames, the interpretation must be made in favor of DeMayo. *McGhee Interests v. Alexander Nat. Bank*, 135 So. 545 (Fla. 1931). Chames' retainer agreement requires that only upon the condition precedent that "a charging lien is obtained" does the client thereafter waive his homestead protection. This is circuitous standing on its own and when it is combined with the language in the preceding sentence regarding jurisdiction it becomes even more confusing. Chames, although her own retainer agreement forbids it, bootstraps her client's homestead into jurisdiction to give herself the right to a charging lien, but also requires him to waive his protections only afterwards! But he must waive first, or else there is nothing upon which to lien. She cannot, by her own words, bring his homestead into the jurisdiction of the court. The retainer agreement is ambiguous and unclear. It does not convey the homestead within the jurisdiction of the court to determine charging lien or money judgment.

Where the contract contains ambiguous terms, extrinsic parol evidence may be taken to determine the intent of the parties, but only insofar as the contract is not changed! *Gorman v. Kelly*, 658 So.2d 1049 (Fla. 4th DCA 1995). As it is obvious here that no parol evidence would bring the parties together on the ambiguous terms, it is of no assistance to remand. The only resolution in this case is not to enforce the clause.

The retainer agreement, not being properly interpreted and being ambiguous, cannot be enforced. Neither the waiver provision is enforceable nor the charging lien provision is enforceable.

**III. Assuming, arguendo, that the hearing on fees was proper, the amount of fees impermissibly exceeded the benefit for the client and was egregious and wasteful and the findings supporting those fees was not supported by the record.**

Here, the court was confounded by the representations of Chames as to the number of pleadings she filed (123) and the number filed by her opposing counsel (60). Here the evidence of the record itself denies these findings. The court record shows vastly smaller numbers, in fact the total number of pleadings for Chames, opposing counsel and the court together was only 61, including cover letters for pleadings and notices. Further almost all but a few were minor housekeeping matters and many of them entirely unnecessary. But these findings of fact as claimed by Chames were the primary basis for the award of that sum of attorney's fees for which the money judgment was entered. Here the weight of

the evidence must be the court record itself. As the weight of the evidence shows clearly the number of pleadings filed, and as that finding disrupts the finding of the trial court in a substantial way, the findings of the trial court as to the amount of the attorney's fees cannot stand undisturbed as they are not supported by substantial competent evidence. The court misinterpreted the legal effect of the evidence as a whole. The order of judgment, based on materially wrong facts, cannot stand and must be reversed. See *Matter of the Estate of Lizzie Thompson, deceased, Ethel Childs v. Squarcia*, 84 So.2d 911 (Fla. 1955).

While counsel to DeMayo should have been alert to the discrepancy, and properly cross-examined, it must again be noted that the issue of attorney's fees was not noticed and was objected to strenuously. DeMayo was unaware that this issue would be heard and was not prepared for cross examination.

There is the further issue regarding the amount of fees sought for the results obtained. Here, where even at best Chames procured only a nine month respite for a total of $15,500.00 for her client, which amount would still have to be paid by being tacked on to the end of the term of payments, her fees, including the accountant was in excess of $57,000.00. Chames will argue that her client required psychological counseling. Assuming, arguendo, that psychological counseling is what she did, at what point does a lawyer recognize that her license is to practice law, not medicine, and that she has no right to squander the monies needed for her

client and his children for what she was not qualified to do. Is there any doubt that she would have kept herself to her profession and acted with judicial economy if she did not have in the back of her mind that she was not going to get for herself his homestead?

"The ethics of the legal profession demand that the attorney's right to bill a client for legal services rendered be exercised with a healthy restrain for the client's economic interests, that doubts be resolved in favor of the client rather than the firm, and that lawyers charge no more than the circumstances and the standards under Rule 4-1.5(b) will bear." *Haines v. Sophia, 711 So.2d 209 (Fla. 4th DCA 1998)* at 212. Had Chames complied, it is reasonable that she would not have received the criticism from her opposing counsel for her paper crunching or from her own client for destroying forests in Brazil. If the pleadings had merit, or had been pursued, it would be a different matter. But nothing came to fruition except the nine month abatement. This case benefited Chames infinitely more than it benefited DeMayo. As the court should also examine whether the amount of time expended was appropriate or necessary and examine the relationship of the monetary benefits obtained related to the fees imposed, the amount of fees is grossly over what can be legally tolerated.

As Judge Altenbernd said in *Wrona v. Wrona*, 592 So.2d 694 (Fla. 2nd DCA 1991), "Florida's families are entitled to legal advice that is as sensible and cost-

effective as that given to Florida's corporations." At 967. Here, DeMayo was suffering financial severe economic problems. This was known to Chames from the very beginning. In fact, it was why he hired her. It does not seem to comply with the admonitions to the bar, to litigate a situation such as this to the extent that the lawyer gains in such dramatic proportion to the family and the children.

As the fees are over burdensome, as Chames did not curb her efforts to that necessary to achieve her goals, as her claims are not supported by the unbiased record, she has failed in this fee dispute to sustain her burden that she has not taken advantage of her client. For all reasons put forth in this section, the order affirming the money judgment must be reversed.

**IV. Assuming, arguendo, that the Court finds DeMayo effectively waived his right to homestead protection against creditors, there can still be no charging lien on this homestead as the homestead was not secured by the efforts of the attorney.**

Assuming, arguendo, that a decision is made stating that DeMayo effectively waived his right to homestead protection against creditors, Chames may still not obtain a charging lien on his homestead for all the reasons above and as such lien would violate the definitional requirements of *Sinclair, supra*. Those requirements are four, and for purposes of this section, the relevant requirement is that there is an agreement that payment will come from recovery or be dependent on recovery. Here, there was no recovery. The oft cited "tangible fruit" of the attorney's representation from which a lien may be imposed does not exist.

*Litman v. Fine, Jacobson, Schwartz, Nash, Bloch, and England, P.A.*, 517 So.2d 88 (Fla 3rd DCA 1987). Where the representation involves child custody, child support, and visitation, courts have found these issues would also not produce "tangible fruits" to which a lien may attach. *Glickman v. Scherer*, 566 So.2d 574 (Fla. 4th DCA 1990); *Rochlin v. Cunninham*, 739 So.2d 1215 (Fla. 4th DCA). Here, child support and alimony were temporarily abated but even if they were awarded no lien could attach. *Dyer v. Dyer*, 438 So.2d 954 (Fla. 4th DCA 1983); *Zimmerman v. Livnat*, 507 So.2d 1205 (Fla. 4th DCA. 1987); *Rose v. Marcus*, 622 So.2d 63 (Fla. 3rd DCA 1993).

Regardless of the outcome of the decision regarding waiver, the homestead cannot be liened as it was not secured by the attorney's efforts.

**V. Chames' retainer agreement cannot change the definitional requirements of a charging lien.**

Assuming, arguendo, that the Court finds DeMayo effectively waived his homestead protection, Chames' retainer agreement cannot change the definitional requirements of a charging lien, The Florida Supreme Court has spoken in *Sinclair, supra*, and has given the four definitional requirements in order to be able to obtain a charging lien and to avoid an action in law. A lawyer may not change those definitional requirements in an agreement between that lawyer and his client. The Supreme Court cannot be overturned by contract. The courts of this state cannot be used where there was no intention they be used. All attempts to

circumvent *Sinclair* have been rebuffed no matter what the language in the attorney's retainer agreement. See *Mazzorana v. Mazzorana,* 703 So.2d 1187 (Fla. 3rd DCA 1997) (Attorney's were not entitled to a charging lien on their client's general assets, estate, and property, or against her personal injury award that was her non-marital property.) See also *Pasin v. Kroo*, 412 So.2d 43 (Fla. 3rd DCA 1982) (A charging lien may not issue if no proceeds have been recovered.); *Yavits, supra; Shawzin v. Sasser. P.A.*, 658 So. 2d 1148 (Fla. 4th DCA 1995); *Cole v. Kehoe*, 710 So.2d 705 (Fla. 4th DCA 1998). Retainer agreements which are over-reaching are unenforceable. Not only can they not secure property for attorneys outside the definitions of *Sinclair, supra,* they cannot convey jurisdiction on trial courts to award money judgments for those liens.

As DeMayo's homestead does not fall under the definitional requirements of *Sinclair*, and as the case law does not recognize attempts by attorneys to change those definitions by way of contract, his homestead may not be liened despite Chames' retainer agreement. The order of the trial court must be reversed and the order of the appellate court, which removed the lien, must be affirmed.

**VI. Assuming, arguendo, that one can waive homestead protection against creditors, DeMayo did not effectively waive such protection where Chames had a duty to explain the terms of the retainer agreement and to determine objectively whether he understood them and agreed with them; and where there was no evidence that he understood he was waiving his homestead.**

This retainer agreement contains many pages and involves terms over which even the courts are arguing. To read the quoted language (reproduced in the statement of facts) and for Chames to assume that her client understood them (later recanted) is disingenuous at best as a reading of the transcript shows.

Fees recovered by an attorney were reversed where the attorney failed to inform his client before she signed the retainer agreement of facts and knowledge which would have effected whether that client would have been willing to sign that agreement. Because the agreement had been entered into subsequent to the establishment of the attorney/client relationship, the attorney had the burden of showing the agreement was fair and equitable by the standard of clear and convincing proof. *In Re Estate of Kindy,* 310 So.2d 349 (Fla. 3rd DCA 1975).

Here the relationship of attorney/client was established before DeMayo signed the retainer agreement. Chames was therefore in a fiduciary relationship with her client and owed her client her allegiance and protection in legal matters, including protection against herself! She had the duty to explain to him the legal issues which he was confronting, including those she put before him in her retainer agreement. "As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." *Rules Regulating the Florida Bar,* Chapter 4. *Rules of Professional Conduct,* Preamble, Paragraph 2. "A lawyer shall explain a matter to

the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Ibid*. Rule 4-1.4.)b) "A lawyer shall not:…(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." *Ibid*, Rule 4-8. (c).

Here, Chames not only did not explain the terms to him, she did not even ask him if he understood. She knew that he couldn't find the envelope she gave him. She knew she told him to come in and sign it before she would do any further work on his case. She knew that he did sign a copy run off the computer by her assistant. She knew she was his lawyer well before he signed. She knew she had to explain the simplest things to him over and over again. Yet she says he must have known what that he was signing away his home because he didn't ask her any questions! "When a justiciable controversy arises between attorney and client as to fees alleged to be due the attorney, or as to interest acquired by attorney as to any property involved in the litigation, the burden is on the attorney to show not only the existence of conditions supporting his position, but to also show that no advantage has been taken by him. *Renno v. Sigmon*, 4 So.2d 11 (Fla. 1941).

In response to the question put to Chames at the hearing regarding the language in her retainer agreement: "So you assume then, he understood the language. Is that your testimony?" A. "You can't assume anything, one way of the other." If Chames cannot assume one way or the other that her client had any

idea what the legal language meant that she put before him to sign, and if she did not question him as to whether or not he understood the terms, then she has failed in her duty to her client to explain to him his legal rights and the practical applications thereof.

When asked what she would advise someone coming to her office with an identical retainer agreement given them by another lawyer, Chames, after trying to avoid the question, stated that she would tell him if he paid his bills there would be no problem! Such an answer is certainly not one that is envisioned by the admonitions and case cited above.

Chames was on notice that DeMayo could not find the envelope and that he probably did not read its contents. However, even if that were not the case, she had a duty to advise him of the legal ramifications whether he asked her or not. "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." En Banc opinion, *Arabia v. Siedlecki*, 789 So.2d 380 (Fla. 4$^{h}$ DCA 2001). How much more unclear can an attorney be who does not explain at all? How much more unclear can the legal terminology be than in this retainer agreement. If Chames did not explain the terms, perhaps it is because she knew the reaction that DeMayo would have. When asked if he had known what the

terms meant, would he have signed with her, his answer was an emphatic, “No way!”.

Chames then testified that DeMayo’s predissolution lawyer had a charging lien so that he must have understood the terms in hers. Although she had a copy of that retainer agreement, she did not introduce it into evidence. The record does not show whether that agreement also required DeMayo to waive his homestead protection or if the issue of charging lien was ever discussed. Chames attempts to both acknowledge her duty to explain to her client and to brush that duty on to another lawyer.

(It is significant that the attorney/client relationship was already well underway. DeMayo is making no representations as to the duties of a lawyer before the lawyer client relationship is already in existence.)

A retainer agreement that states that the client “knowingly, voluntarily and intelligently waives his rights to assert homestead exemption in the event a charging lien is obtained” where the lawyer knows full well that that is not true, does not obtain a waiver of homestead merely because she has placed those words there. Without satisfying herself as to his actual knowledge, and without informing the client of the import of these words and their practical significance, they are meaningless. <u>There is nothing in the record to indicate DeMayo understood he was waiving his homestead</u>. Chames failed in her duty to explain

and there is no effective waiver. The waiver provision cannot be enforced. There can be no lien on the homestead.

Even if it is found in the companion case that one may waive homestead protection, such waiver must be effective. This waiver was not effective. The homestead may not be liened.

## CONCLUSION

DeMayo went to a lawyer asking her to reduce his child support and to abate alimony. He expected her to act on his behalf and to protect him. Instead, Chames gave him a confusing and ambiguous retainer agreement which in effect purported to allow her to take his home. Chames secured nothing to which a charging lien could be imposed and DeMayo's homestead was not, as required in her retainer agreement, under the jurisdiction of the court. The trial court did not have jurisdiction to hear a first party dispute on fees between lawyer and client, but did so and wrongly issued a money judgment and a charging lien on the homestead.

DeMayo respectfully prays this court issue an opinion which 1) affirms the appellate court by continuing the more than 122 years of protection against effective waiver of homestead and by finding that DeMayo never effectively waived homestead; 2) reverses the order of the money judgment entered by the lower court and affirmed by the appellate court, and further finds the amount not

supported by the record; 3) finds that in this case where there is nothing secured by the attorney, there can be no charging lien; 4) finds the retainer agreement unenforceable as ambiguous; 5) finds that the homestead was not "under the jurisdiction of the court" and by the terms of the contract could not be liened; and 6) reaffirms the definitional requirements of charging lien so as to dissuade any future end runs around its decisions by retainer agreements which bring untold suffering to clients.

Respectfully submitted,

_____

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 21st day of February, 2007, to the following:

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## CERTIFICATE OF COMPLIANCE

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

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