IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1079

PEGGY ANN PHILLIPS, and
JOSEPH ALAN LEVINE,

Petitioners,

vs.

JANICE HIRSHON, et al.,

Respondents.

RESPONDENT KAREN J. ORLIN'S BRIEF ON JURISDICTION

Steven M. Toister, Esquire
Law Office of Steven M. Toister
9990 SW 77th Avenue, Ph-4
Miami, Florida 33156
Telephone No. (305) 596-2345
Facsimile No. (305) 274-0220

Jay M. Levy, Esquire
Jay M. Levy, P.A.
9130 South Dadeland Boulevard
Two Datran Center, Suite 1510
Miami, Florida 33156
Telephone No. (305) 670-8100
Facsimile No. (305) 670-4827

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Respondent's Jurisdictional Brief

I
Preamble

Petitioners seek to invoke the discretionary jurisdiction of this Court to review a decision of the District Court of Appeal, Third District, on the grounds of express and direct conflict of decision. Petitioner Peggy Ann Phillips, appellant below, shall be referred to as "Phillips". Petitioner Joseph Alan Levine, appellant below, shall be referred to as "Levine". Jointly Petitioners shall be referred to as "Petitioners". Respondent Janice Hirshon, appellee below, shall be referred to as "Hirshon". The letter "A" shall represent the Appendix of Petitioners.

II
Statement of the Case

The instant appeal arises from a decision of the District Court of Appeal, Third District affirming a final order of the Circuit Court of the Eleventh Judicial Circuit, Probate Division which granted Respondent Karen J. Orlin's Motion to

Dismiss the Petitioners' petitions to determine homestead. In granting the motion to dismiss, the Circuit Court relying on this Court's decision in *In re: Estate of Wartels*, 357 So.2d 708 (Fla. 1978) (hereinafter referred to as "*Estate of Wartels*"), held that a cooperative is not homestead property for purposes of descent and devise within the meaning of Article X, §4(c) of the Florida Constitution. Petitioners appealed to the District Court of Appeal, Third District. The District Court of Appeal affirmed the Circuit Court's decision based upon *Estate of Wartels*. As the Court noted in its opinion:

> [W]e consider that our proper institutional role obligates us to adhere to *Wartels*. *See Hoffman v. Jones*, 280 So.2d 431, 434 (Fla. 1973)(cautioning the District Courts of Appeal to always be mindful of their institutional place). In so doing, we note that the language of the Florida Supreme Court in *Wartels* is of relatively recent vintage and sweeping in its tone. If we were to exhibit disagreement with *Wartels*-a sentiment that should not be taken from this opinion-we potentially would throw the law of this state into havoc. *Id.* ("To allow a District Court of Appeal to overrule controlling precedent…would be to create chaos and uncertainty in a judicial forum, particularly at the trial level.") The better course is to affirm and certify.

(App. 9-10).

The District Court of Appeal certified conflict between its decision in the case at bar and *Southern Walls, Inc. v. Stilwell Corporation*, 810 So.2d 566 (Fla. 5DCA), *rev.den.* 829 So.2d 919 (Fla. 2002) (hereinafter "*Southern Walls*"). In addition to

the certification of conflict, the District Court of Appeal below certified two (2) questions as matters of great public importance:

> DOES THE FLORIDA SUPREME COURT'S DECISION IN *IN RE ESTATE OF WARTELS V. WARELS*, 357 So.2d 708 (Fla. 1978), HAVE CONTINUING VITALITY IN LIGHT OF THE ADOPTION BY THE FLORIDA LEGISLATURE OF THE COOPERATIVE ACT, CHAPTER 76-222, LAWS OF FLORIDA?
>
> IF THE ANSWER IS YES, IS IT LEGALLY PERMISSIBLE TO INTERPRET ARTICLE X, SECTION 4(a)(1) OF THE FLORIDA CONSTITUTION DIFFERENTLY FOR FORCED SALE PURPOSES THAN DEVISE AND DESCENT PURPOSES UNDER ARTICLE X, SECTION 4 OF THE CONSTITUTION?

(App. 12).

Petitioners seek to invoke this Court's jurisdiction on the grounds that the decision of the District Court of Appeal below expressly and directly conflicts with the decision in *Southern Walls*. For the reasons which follow, there is no express and direct conflict on the same point of law between *Southern Walls* and the case sub judice. This Court should decline to exercise "conflict" jurisdiction in the case at bar.

III
Jurisdictional Point on Appeal

WHETHER THERE IS NO EXPRESS AND DIRECT CONFLICT OF DECISION BETWEEN THE DISTRICT COURT OF APPEAL DECISION RENDERED IN THE CASE *SUB JUDICE* AND THAT OF THE FIFTH DISTRICT COURT OF APPEAL IN *SOUTHERN WALLS, INC. v. STILWELL, CORPORATION*?

IV
Summary of the Argument

In order for a decision to activate this Court's conflict jurisdiction, the conflict must be express and appear within the four (4) corners of the majority opinion. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). In the case at bar there is no conflict between the decision rendered below which involves Article X, Section 4(c), Fla. Const. and the decision of the Fifth District Court of Appeal in *Southern Walls* which is concerned with Article X, Section 4(a), Fla. Const. For this reason this Court lacks jurisdiction to review the decision rendered based upon express and direct conflict of decision.

V
Argument

THERE IS NO EXPRESS AND DIRECT CONFLICT OF DECISION BETWEEN THE DISTRICT COURT OF APPEAL DECISION RENDERED IN THE CASE *SUB JUDICE* AND THAT OF THE FIFTH DISTRICT COURT OF APPEAL IN *SOUTHERN WALLS, INC. v. STILWELL, CORPORATION*

In order to vest this Court with jurisdiction, Petitioners must demonstrate that the decision rendered below expressly and directly conflicts with the decision of another court of appeal or this Court on the same question of law. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980); *Dodi Publishing Company v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980). As this court noted in *Jenkins:*

> This court may only review a decision of the district court of appeal that *directly and expressly* conflicts with a decision of another district court of appeal or the Supreme Court *on the same question of law.* The dictionary definition of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." Webster's Third New International Dictionary (1961 ed. Unabr.)

Id. at 1359
(Emphasis Supplied)

Whether the holdings of the district courts are irreconcilable is one of the tests for conflict jurisdiction. *Aravena v. Miami-Dade County*, 928 So.2d 1163 (2006). Utilizing these principles of conflict jurisdiction, there is no conflict between the decision of the Court below and the *Southern Walls* decision of the Fifth District

Court of Appeal. Consequently, the Petition to Invoke Discretionary Jurisdiction should be denied.[1]

The instant case involves the application of Article X, Sec 4**(c)**, Fla. Const. which is concerned with the devise and descent of homestead. *Estate of Wartels* upon which the district court relied in affirming the Circuit Court's dismissal of the petition to designate and set aside homestead, construed Article X, Sec 4(c), Fla. Const. This section states:

> The homestead shall not be subject to devise if the owner is survived by a spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Estate of Wartels followed by the Third District Court of Appeal below, held that a cooperative apartment is not an interest in realty and not subject to the devise and

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[1] Although the jurisdictional brief of Petitioners is phrased in terms of conflict jurisdiction, it is in reality a plea to this court to accept jurisdiction predicated upon the first question certified by the district court below as a matter of great public importance. This Court should reject the request. The language of Article X, Section 4(c) has not changed since this court's decision in *Estate of Wartels.* Similarly, the basic definition of a cooperative as a stock interest in a cooperative apartment corporation has not changed, upon which this court relied in determining that a cooperative apartment was not homestead, also has not changed. For this reason, this Court should decline to determine the first question certified by the district court below as a matter of great public importance.

descent provision of Article X, Section 4(c), Fla. Const. In contrast to *Estate of Wartels* and the case at bar, the decision of the District Court of Appeal, Fifth District in *Southern Walls* was concerned not with devise and descent but with the forced sale of a cooperative. The exemption from forced sale is regulated by an entirely different section of the Florida Constitution, Article X Section 4(***a***):

> There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property….

As the case at bar and *Southern Walls* interpret separate sections of the Florida Constitution, there can be no express and direct conflict of the decision *on the same point of law*. For this reason, this court should decline to exercise jurisdiction under the guise of express and direct conflict of decision.

That the case at bar and *Southern Walls* are both concerned with the issue of whether a cooperative is a homestead and reach different conclusions does not create an express and direct conflict of decision because each is predicated upon a different section of the Florida Constitution. As support for the principle that differing sections of the Florida Constitution may support a difference in the application of a homestead with regard to cooperative apartments, this Court need only compare its decision in *Ammerman v. Markham*, 222 So.2d 423 (Fla. 1969),

which involved the application of the homestead exemption with regard to real property taxes contained in Article X Section 7 of the 1885 Florida Constitution to cooperative apartments, to its decision in *Estate of Wartels.* In *Ammerman* this Court determined that cooperative apartments were entitled to the exemption from property taxes. Eight years later, this court decided *Estate of Wartels* in which this court found that a cooperative apartment was not an interest in land for purposes of devise and descent under Article X Section 4(c), Fla. Const. and distinguished *Ammerman* because *Ammerman* was concerned with the definition of homestead under a different provision of the Florida Constitution: [2]

> The widow relies upon Ammerman v. Markham, 222 So.2d 423 (Fla. 1969) to support her position. In Ammerman, supra, the court allowed homestead exemption for the purpose of taxation to owners of cooperative apartments. The court considered Section 196.031, Florida Statutes (1973) which allowed the tax exemption of homestead and included a provision that "an exemption up to the assessed valuation of five thousand dollars may be allowed on each apartment occupied by a tenant-stockholder or member of a cooperative apartment corporation…" Article VII, Section 6, Florida Constitution, providing for homestead exemption from taxation was the controlling constitutional provision, considered in Ammerman v. Markham. *The Court did not clothe cooperative*

[2] In *Snyder v. Davis*, 699 So.2d 999, 1001 (Fla. 1997), this Court recognized that the Florida Constitution protects the homestead in "three distinct ways." First, Article VII Section 6 protects homesteads with an exemption from taxes. Second, Article X, Section 4(a)-(b) protects homestead from forced sale by creditors. Third, Article X, Section 4(c) restricts a homestead owner when he or she attempts to "alienate or devise the homestead property."

> *apartments with homestead status; it merely sustained the statutory implementation of A*rticle VII, Section 6, Florida Constitution, governing tax exemption for homesteads. In holding that the widow was not entitled to homestead in the deceased's cooperative apartment, the District Court of Appeal in the case sub judice said:
>
> > "This does not conflict with the decision in Ammerman v. Markham, 222 So.2d 423 (Fla. 1969), which provides that the homestead exemption is applicable to cooperative apartments solely for the purpose of taxation." In re: Estate of Wartels, supra. at 50.
>
> We agree with this conclusion.
>
> *Id*. at 710
> (Emphasis Supplied)

Consequently, it is neither unusual nor inconsistent for different provisions of the Florida Constitution relating to homestead to be construed differently.[3] There is no express and direct conflict of decision between the decision of the Third District Court of Appeal below which relied upon *Estate of Wartels* and *Southern Walls.*[4] This Court should decline to accept this case under its conflict jurisdiction.

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[3] For this reason, the second question certified by the district court below, which inquires as to whether it is permissible to interpret the definition of homestead differently depending on what section of the Florida Constitution is before the court, has already been decided in the affirmative by this Court in *Estate of Wartels*.

[4] Petitioners argue that conflict between the decision of the court below and *Southern Walls* is inherent because Article X, Section 4(a) and Article X, Section 4(c) both utilize the same definition of homestead contained in Article X, Section (4)(a)(1). This contention proceeds on a faulty premise because this Court in *Estate of Wartels* at 710 held:

VI
Conclusion

Based upon the foregoing cases and arguments, Respondent Karen J. Orlin respectfully requests that this Court decline to exercise its discretionary jurisdiction over the instant cause on the grounds of express and direct conflict of decision.

Steven M. Toister, Esquire
Law Office of Steven M. Toister
9990 SW 77th Avenue, Ph-4
Miami, Florida 33156
Telephone No. (305) 596-2345
Facsimile No. (305) 274-0220

&

JAY M. LEVY, P.A.
9130 South Dadeland Boulevard
Two Datran Center, Suite 1510
Miami, Florida 33156
Telephone No: (305) 670-8100
Facsimile No: (305) 670-4827

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

Neither the Constitution nor the statutes define a homestead for the purpose of devise and descent.

VII
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed to John H. Pelzer, Esquire, RUDEN, McCLOSKY, et.al, PO Box 1900, Ft. Lauderdale, Florida, 33302, Norman S. Segall, Esquire, RUDEN, McCLOSKY, et.al, 701 Brickell, Avenue, Suite 1900, Miami, Florida, 33131, Kenneth G. Lancaster, Esquire, King & Lancaster, P.A., 5975 Sunset Drive, Suite 703, South Miami, Florida, 33143, and Bette E. Quiat, Esquire, 8525 SW 92nd Street, Suite B-5, Miami, Florida 33156, this 9th day of July, 2007.

_____
Attorneys for Respondent

VIII
Certificate of Type Size and Format

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

_____
Attorneys for Respondent