IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC09-751

LESLIE S. OSBORNE,

Appellant,

v.

DENISE J. DUMOULIN,

Appellee.

ON REVIEW OF A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLEE DUMOULIN

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PRELIMINARY STATEMENT

By Order dated August 13, 2009, the Court authorized the Business Law Section of The Florida Bar (the "BLSFB") to file a Brief in support of Appellee Denise J. Dumoulin ("Ms. Dumoulin"). This Brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar which consented to its filing on August 19, 2009, consistent with applicable standing board policies. This Brief is tendered solely by the BLSFB, supported by the separate resources of this voluntary organization—not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

INTRODUCTION

The matter is before this Court on a certified question from the United States Court of Appeals for the Eleventh Circuit by Order dated April 23, 2009.

The issue before the Court is the proper interpretation and application of section 222.25(4), *Florida Statutes*. This is an issue of first impression. As acknowledged by what the BLSFB understands to be the most recent reported decision addressing this issue, there has been and continues to be disagreement by the various federal courts which have "grappled" with the statute's proper meaning and application. *In re Abbott,* 2009 WL 1872125, *2 (Bankr. S.D. Fla. June 26, 2009) (canvassing the conflicting case law). In submitting this Brief, the BLSFB does not believe that the Court should or needs to address long standing Florida

law that establishes the proposition that "where a homestead has been acquired it can be waived only by abandonment or by alienation in the manner provided by law." *Olesky v. Nichols*, 82 So. 2d 510, 512 (Fla. 1955). Of note, the BLSFB proposed the statutory language in question and will add insight into its thinking in submitting that language to the Florida Legislature.

As correctly noted by Ms. Dumoulin, notwithstanding its phrasing of the question certified to the Court, the Eleventh Circuit explained that the "phrasing of the certified question is ***merely suggestive*** and does not in any way restrict the scope of the inquiry by the Supreme Court of Florida." Eleventh Circuit Opinion, App. 1 at 4[1] (Emphasis Added). Thus, the Court is not limited and should not limit itself to inquiring as to whether a debtor in bankruptcy who elects not to claim a homestead as exempt on his or her bankruptcy schedules, and indicates an intent to surrender homestead property found only in a "Statement of Intention," forms specific to bankruptcy cases, is entitled to the expanded personal property exemption provided for in section 222.25(4), *Florida Statutes*. The question, as posed by the Eleventh Circuit, does not address the instances in which a person not in bankruptcy asserts or declines to assert his or her constitutional homestead rights against creditor collection efforts. But these instances are considered by those courts which the BLSFB submits have correctly construed the "receives the

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[1] Unless otherwise defined herein, this Brief will use the same form of citations as set forth in the Preliminary Statement section of Ms. Dumoulin's *Brief of Appellee*.

benefits of" statutory exclusionary language. *See*, *e.g.*, *Osborne v. Smith*, 398 B.R. 355, 357-58 (S.D. Fla. 2008) ("[T]he 'receives the benefits of' exclusion must be interpreted in the context of protection from efforts to execute against the home[stead].").

SUMMARY OF ARGUMENT

It is well-settled that exemptions are to be construed liberally in favor of the party asserting the exemption, *In re Mootosammy*, 387 B.R. 291, 296 (Bankr. M.D. Fla. 2008), and that exceptions to exemptions are to be construed narrowly against the party challenging same. *See*, *e.g.*, *Havoco of America, Ltd. v. Hill,* 790 So. 2d 1018 (Fla. 2001) (construing the three exceptions to provisions in the Florida Constitution protecting homesteads and holding that no exceptions beyond those in the Constitution could limit the scope of the unlimited protection (other than fraud-based claims resulting in the imposition of an equitable lien)). Against this backdrop, the Court should hold that the exclusionary phrase "receives the benefits of" be construed narrowly such that ***only*** the affirmative assertion of the homestead exemption to thwart collection efforts by a trustee in bankruptcy, or a creditor outside of bankruptcy, precludes the application of the increased personal property exemption provided for in section 222.25(4), *Florida Statutes*.

Such a narrow reading of the subject exclusionary language, as explained by Judge Paul Hyman, Chief Judge of the United States Bankruptcy Court for the

Southern District of Florida, in *Abbott,* 2009 WL 1872125, *7, "more fully realizes the intent and plain language of the statute by allowing the enhanced exemption to debtors who neither claim the homestead exemption on their bankruptcy schedules or receive the benefit of protecting the homestead from forced sale by creditors." *Id*. Moreover, such a narrow construction is totally consistent with the fundamental purpose of a homestead, that is, "to protect the family home from forced sale…." *Hospital Affiliates of Florida, Inc. v. McElroy*, 393 So. 2d 25, 27 (Fla. 3d DCA 1981) (citing *Tullis v. Tullis*, 360 So. 2d 375 (Fla. 1978) and *In re Noble's Estate*, 73 So. 2d 873 (Fla. 1954)).

Therefore, the issue of whether a debtor in bankruptcy claims a homestead as exempt in his or her bankruptcy schedules, or indicates an intent to surrender on the "Statement of Intention" form, forms specific to bankruptcy cases, or continues to reside in the homestead, factors relied upon by courts that give a broad interpretation to the subject exclusionary language, should be deemed irrelevant to a person's right to the benefit of the expanded personal property exemption provided for in section 222.25(4), *Florida Statutes*.

In short, the BLSFB respectfully submits that the Court should adopt as the law of this State the rule that persons, regardless of whether they are debtors in bankruptcy, get the benefit of the expanded personal property exemptions provided for in section 222.25(4), *Florida Statutes*, in all cases except those in which they

affirmatively use the constitutionally protected homestead as a defense to collection efforts.

STANDARD OF REVIEW

There are no findings of facts to review because the parties submitted to the Bankruptcy Curt a set of stipulated facts. App. 4 at 13-14. Conclusions of law are reviewed *de novo*. *Strand v. Escambia County*, 992 So. 2d 150, 154 (Fla. 2008).

ARGUMENT

A. The Statute.

Section 222.25(4), *Florida Statutes*, became effective July 1, 2007. This statute provides for an additional $4,000.00 personal property exemption if the claimant "does not claim or receive the benefits of a homestead exemption under s. 4, Art. X of the State Constitution." This $4,000.00 exemption is in addition to the $1,000.00 exemption for personal property, Fla. Const., Art. X, § 4(a), and the $1,000.00 exemption for motor vehicles, § 222.25(1), *Florida Statutes*.

The BLSFB respectfully submits that for those persons who have the right, but who are not affirmatively asserting their constitutional homestead exemption to maintain same in the face of collection efforts by a bankruptcy trustee or a creditor outside of bankruptcy, the combined personal property exemptions of $6,000.00 is modest, and the absolute minimum one in dire financial straits would need to start to get his or her finances back on track. *See* Minutes, Bankruptcy/UCC Committee

Meeting, Jan. 18, 2007, ¶ X.5.B ("The proposal is based on the premise that the personal property exemption amount has not changed since 1868 and is thus unreasonably low.").

B. The BLSFB's reasoning behind the statutory exclusionary language.

The BLSFB was the driving force behind the statutory language at issue. The BLSFB believed prior to the adoption of the statue in 2007, and continues to believe today, that this additional $4,000.00 should be available to all persons who do not affirmatively make use of the homestead exemption; that is, people who do not use that exemption to thwart collection efforts by trustees in bankruptcy or creditors outside of bankruptcy.

The primary concern of the BLSFB in proposing the "receives the benefit of" language was that there might be a situation where one spouse, who had filed for bankruptcy protection, did not affirmatively assert the homestead as exempt property against collection efforts by a bankruptcy trustee, while the other spouse, a non-debtor, continued to reside in the homestead and asserted the homestead as a defense against non-bankruptcy collection efforts. This is the precise scenario presented by Ms. Dumoulin in her *Brief of Appellee* (pg. 5), and Chief Judge Paul Hyman in *Abbott*, 2009 WL 1872125, n.2. That fact pattern is admittedly not before this Court in the instant case.

Another concern of the BLSFB was that the $1,000.00 personal property exemption was woefully inadequate for a person not affirmatively claiming the constitutional homestead exemption to thwart collection efforts by a trustee in bankruptcy or a creditor outside of bankruptcy to be able to sustain himself or herself during a time of financial difficulty. *See* Minutes, Bankruptcy/UCC Committee Meeting, Jan. 18, 2007, ¶ X.5.B, *supra*. As noted by Ms. Dumoulin in her *Brief of Appellee* (pg. 6) and in the above-quoted language from the January 18, 2007 meeting of the Bankruptcy/UCC Committee, the $1,000.00 personal property exemption was first made available to residents of the State of Florida in 1868. *See* Fla. Const., Art. IX, § 2.

As further noted by Ms. Dumoulin in her *Brief of Appellee* (pg. 12), the legislative history to section 222.25(4), *Florida Statutes*, is "inconclusive" as to the "receives the benefit of" language and, in any event, because the statute's language is plain, resort to such legislative history is improper. *See Daniels v. Fla. Dept. of Health*, 898 So. 2d 61, 64 (Fla. 2005).

C. A narrow construction of the statutory exclusionary language (i) is consistent with the (a) well-settled proposition that exceptions to exemptions are to be construed narrowly against the party challenging same, and (b) fundamental purpose of a homestead, that is, to protect the family home from forced sale, and (ii) more fully realizes the intent and plain language of the statute.

Chief Judge Hyman, in the most recent decision considering the exclusionary language at issue, considered the various decisions by other federal

courts, and then concluded that that exclusion should only apply if the debtor asserts the homestead exemption as against forced sale of the homestead. *Id.*, *3. Other courts, including the District Court in the instant matter, *Osborne*, 398 B.R. at 357-58 ("[T]he 'receives the benefits of' must be interpreted in the context of protection from efforts to execute against the home[stead]."), are in accord. *See, e.g., In re Hernandez,* 2008 WL 1711528, *3 (Bankr. S.D. Fla. April 10, 2008) ("In this Court's view, the 'receive the benefits of' exclusion must be interpreted in the context of protection from efforts to execute against the home."[2]); *In re Bennett*, 395 B.R. 781, 788 (Bankr. M.D. Fla. 2008) ("[T]he Homestead Exemption…only provides one benefit-it shields the home from forced judgment sale.").

This narrow construction of the subject statutory exclusionary language is (i) consistent with the (a) well-settled proposition that exceptions to exemptions are to be construed narrowly against the party challenging same, *see*, *e.g.*, *Havoco of Am., Ltd.,* 790 So. 2d 1018, and (b) with the fundamental purpose of a homestead, that is, "to protect the family home from forced sale…." *Hospital Affiliates of*

[2] The *Hernandez* court nevertheless sustained the objection to the debtor's assertion of the homestead exemption lodged by the bankruptcy trustee because the non-debtor spouse retained her right to assert the constitutionally protected homestead exemption in respect of the homestead which the couple owned as tenants by the entireties. This result was duly noted by Chief Judge Hyman in *Abbott*, 2009 WL 1872125, n.5.

Florida, Inc., 393 So. 2d at 27, and (ii) "more fully realizes the intent and plain language of the statute…." *Abbott,* 2009 WL 1872125, *7.

D. Incidental benefits of the homestead, like tax benefits, are separate and distinct from the benefit afforded by the Florida constitution and should not preclude the right to the expanded personal property exemptions provided for by section 222.25(4), *Florida Statutes*.

Courts which narrowly construe the subject exclusionary language hold that non-creditor, incidental benefits related to the homestead, like tax benefits that flow therefrom, are separate and distinct from the benefit afforded by the Florida Constitution, that is, being able to maintain the homestead in the face of collection efforts by a trustee in bankruptcy or a creditor outside of bankruptcy. *See, e.g., In re Shoopman,* 2008 WL 817109, *2 (Bankr. S.D. Fla. Mar. 25, 2008); *Hernandez*, 2008 WL 1711528, *4; *In re Gatto,* 380 B.R. 88, 93 (Bankr. M.D. Fla. 2007).

The focus by some courts on the related concepts of the assertion of the homestead exemption in bankruptcy schedules, or the submission of a "Statement of Intention," is misplaced. These concepts (and forms) are unique to bankruptcy cases and, importantly, are nowhere mentioned in section 222.25(4), *Florida Statutes*. These bankruptcy-specific concepts, referred to by the Eleventh Circuit in the question certified to this Court, should not be controlling and, in fact, are irrelevant to the construction of the statute because they completely ignore the

non-bankruptcy context in which one can assert the homestead exemption in the face of creditor collection efforts.

E. The broad construction of the subject exclusionary language is inconsistent with the (i) well-settled proposition that exceptions to exemptions are to be construed narrowly against the party challenging same, (ii) fundamental purpose of a homestead, that is, to protect the family home from forced sale, and (iii) plain language of the statute that uses the present tense.

As noted by the Eleventh Circuit, and acknowledged by the BLSFB, the position asserted by the Trustee is not without support. The cases supporting the Trustee's position give the "retains the benefits of" language a broad construction and, in so doing, reason that such "benefits" accrue to a person by, for example, continuing to live in the homestead, by the fact that they "could" claim the exemption, or because they have not timely expressed their intention to surrender or have failed to surrender their homestead. *See, e.g., In re Franzese,* 383 B.R. 197, 206 (Bankr. M.D. Fla. 2008); *In re Oliver*, 395 B.R. 792, 793 (Bankr. S.D. Fla. 2008).

The BLSFB respectfully submits that these decisions are not well-reasoned. Specifically, these decisions (especially the lead case supporting a broad construction, *Franzese, supra,* which makes specific reference to the assertion of a homestead exemption at some future date), are inconsistent with the plain language of the statute which uses the ***present*** tense.

Moreover, the broad construction afforded the statutory exclusionary language is contrary to the (i) well-settled proposition that exceptions to exemptions are to be construed narrowly against the party challenging same, *see*, *e.g.*, *Havoco of Am., Ltd.,* 790 So. 2d 1018, and (ii) fundamental purpose of a homestead, that is, "to protect the family home from forced sale…." *Hospital Affiliates of Florida, Inc.*, 393 So. 2d at 27.

CONCLUSION

Based on the foregoing, the Court should answer the question certified to it in the affirmative. In addition, the Court should avail itself of the invitation extended by the Eleventh Circuit and go further. Specifically, because exemptions are to be construed liberally in favor of the party asserting the exemption, and exceptions to exemptions are to be construed narrowly against the party challenging same, the BLSFB respectfully submits that the narrow construction afforded the "receives the benefits of" the statutory exclusionary language is the appropriate interpretation to be afforded that language. Applying such a narrow construction, the Court can and should hold that the exclusionary phrase "receives the benefits of" applies ***only*** where a person affirmatively asserts the homestead exemption to thwart collection efforts by a trustee in bankruptcy or a creditor outside of bankruptcy.

Such a narrow reading of the subject exclusionary language, as explained by Chief Judge Hyman in *Abbott,* 2009 WL 1872125, *7, "more fully realizes the intent and plain language of the statute by allowing the enhanced exemption to debtors who neither claim the homestead exemption on their bankruptcy schedules or receive the benefit of protecting the homestead from forced sale by creditors," *id*., and is entirely consistent with the fundamental purpose of a homestead, that is, "to protect the family home from forced sale," *Hospital Affiliates of Florida,* 393 So. 2d at 27.

Whether a debtor in bankruptcy claims a homestead as exempt in his or her bankruptcy schedules, or indicates an intent to surrender on the "Statement of Intention" form, concepts (and forms) specific to bankruptcy cases, or continues to reside in the homestead, factors relied upon by courts that give a broad interpretation to the subject exclusionary language, are irrelevant to a person's right to the benefit of the expanded personal property exemption provided for in section 222.25(4), *Florida Statutes*.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Rule 9.210, *Florida Rules of Appellate Procedure*, and that the foregoing Brief is Times New Roman, fourteen point, proportionally spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Regular U.S. Mail, postage prepaid, and Electronic Mail, upon Leslie S. Osborne, Trustee/Appellant, Rappaport, Osborne & Rappaport, P.L., 1300 N. Federal Hwy., Suite 203, Boca Raton, FL 33432 (les@kennethrappaportlawoffice.com) and Patrick S. Scott, Esq. and Jeffrey T. Kuntz, Esq., Counsel for Appellee Denise J. Dumoulin, 401 East Las Olas Blvd., Suite 1850, Ft. Lauderdale, FL 33301 (patrick.scott@gray-robinson.com; jeffrey.kuntz@gray-robinson.com) on this 1st day of September, 2009.

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