**IN THE SUPREME COURT OF FLORIDA**

Case No.: SC09-751

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LESLIE S. OSBORNE,

Petitioner,

v.

DENISE J. DUMOULIN,

Respondent.

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ON DISCRETIONARY REVIEW OF CERTIFIED QUESTION
FROM THE CIRCUIT COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT,
Lower Tribunal Case No.: 08-15355-A

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# PETITIONER'S BRIEF

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## REQUEST FOR ORAL ARGUMENT

This case is based upon a question certified by the 11th Circuit of Appeals as one of great public importance. This case is also one of first impression before this Court as to the interpretation of the new Florida Statute 222.25(4). The petitioner believes that oral argument may significantly assist the court in rendering its determination in this matter and would therefore request oral argument be granted.

## STATEMENT OF ISSUES AND STANDARD OF REVIEW

In July of 2007, the Florida legislature amended Florida Statute §222.25(4) which increased the personal property exemption from $1,000.00 to $4,000.00, provided that the debtor did not claim or receive the benefits of a homestead under Section 4, Article X of the State Constitution. The issue in this case is whether a debtor who continues to reside in her homestead, initially claims the property as exempt, but later amends her schedules to no longer claim the property as exempt and untimely states an intention to surrender the property, is receiving the benefits of a homestead.

This Court would review the determination of law *de novo* and review the Appellate Court and Bankruptcy Court's factual findings under the clearly erroneous standard. In Re Simmons, 200 F.3d 738, 741 (11th Cir. 2000). In this case, the Bankruptcy Court made no findings of fact because all of the facts were stipulated to by the parties. The Bankruptcy Court did not take evidence, but relied upon the motions, its own knowledge of the then existing case law, and the parties Joint Stipulation of Facts. Therefore, the standard of review for this case is *de novo*.

## STATEMENT OF THE CASE AND FACTS

For this Court's benefit, references to the record below are made as to the Bankruptcy Court Docket as DE #____. All facts were stipulated to and there was no trial transcript. Petitioner Les Osborne, Chapter 7 Trustee, is referred to as by name or as Trustee. Respondent, DENISE J. DUMOULIN, is referred to as by name or as by Debtor.

In this case all of the relevant facts were set forth in the parties' Notice of Filing Stipulation of Facts re: Objection to Exemptions, which was filed on February 27, 2008 (DE #38). For the convenience of the Court, the stipulations are set forth as follows:

The Respondent/Debtor, Denise Dumoulin, filed a Voluntary Petition pursuant to Chapter 7 of the bankruptcy code on September 19, 2007 (DE #1).

Prior to filing the Petition, a foreclosure action had been instituted against the Debtor on her real property located at 3121 NW 69th Court, Ft. Lauderdale, Florida 33309.

The Debtor listed the above real property as her Homestead on Schedule A and claimed it as exempt on Schedule C, both of which were attached to the Petition (DE #1).

The Debtor, on Form 8 also attached to the Petition, stated that she intended to surrender the Real Property.

The reason the Debtor had claimed the property as Homestead, was that the Debtor believed, based upon representations of a third party, that the property could be sold and the Debtor could then lease it back from the purchaser.

However, several months after filing bankruptcy, the potential purchaser elected not to proceed with the closing.

On October 26, 2007, the Meeting of Creditors was held pursuant to §341 of the bankruptcy code.

After that meeting, the Trustee, Les Osborne, demanded from the Debtor the sum of $4,000 as assets over allowed exemptions. In particular, this was the equity in a 2004 Chrysler Sebring convertible.

On December 20, 2007, the Debtor filed amended schedules in which, on Schedule C, she deleted the Homestead exemption and claimed exempt the equity in the Sebring convertible (DE #26).

The Trustee's Objection to Debtor's Claimed Exemptions was filed on January 17, 2008 (DE #34).

The basis for the Objection to Exemptions was the claim that the Debtor was not entitled to the additional $4,000 exemption pursuant to F.S. §222.25(4).

On March 20, 2008, the Bankruptcy Court entered an order overruling the Trustee's Objection to Claimed Exemptions (DE #43).

A Notice of Appeal was filed on March 27, 2008 (DE #49) and this Appeal ensued.

## SUMMARY OF THE ARGUMENT

A Debtor who owns a home on the date of filing bankruptcy, and resided therein, obtains the benefit of the homestead for purposes of F.S. §222.25(4). The Legislative intent is clear that the increase in exemptions were meant for those parties who did not own homes/homesteads.

Many courts have reviewed the Statement of Intention. The Trustee does not believe that this should be looked at in this case as the issue is a Florida Statute, not a Bankruptcy Rule. However, if the Statement of Intention is going to be reviewed, there are several other rules which take into account the Statement of Intention. In this particular case, the Debtor violated all of the other Rules and the Bankruptcy Court ignored those facts. If the Debtor seeks to take advantage of the extended exemption, the Debtor should be forced to comply with all of the Rules in order to do so.

## ARGUMENT

**A DEBTOR DOES "RECEIVE THE BENEFITS OF A HOMESTEAD UNDER SECTION 4, ARTICLE X OF THE STATE CONSTITUTION" WHERE THE DEBTOR INITIALLY CLAIMS THE RESIDENCE EXEMPT AS HOMESTEAD, INDICATES AN INTENT TO RETAIN THE PROPERTY, BUT LATER AMENDS HER EXEMPTIONS AND ULTIMELY FILES A STATEMENT OF INTENTIONS TO INDICATE THAT SHE IS SURRENDERING THE PROPERTY**

Before any detailed analysis of the issue before this court can be undertaken, an issue as to the Certified Question must be addressed. The 11th Circuit certified the following question to this court: "Whether a debtor who elects not to claim a homestead exemption and indicates an intent to surrender the property is entitled to the additional exemptions for personal property under F.S. §222.25(4)."

The 11th Circuit further stated "in certifying this question, we do not intend to restrict the issues considered by the state court and note that discretion to examine this issue and other relevant issues lies with the Florida Supreme Court…"

The real questions which must be determined by this court are, a) "What does it mean to receive the benefits of the homestead exemption?"; b) "What is necessary to manifest an intent to surrender the property, if anything, to entitle

additional exemptions?"; and c) "How does legislative intent and bankruptcy code affect the interpretation?" The standard of review is *de novo*.

In July, 2007, the Florida Legislature amended F.S. §222.25(4) which increased the personal property exemptions for Debtors who do not "claim or receive the benefit of a homestead under Section 4 Article 10 of the State Constitution". Since that time, there has been litigation over the meaning of "claim or receive the benefit of a homestead" in the context of a debtor who files bankruptcy. Although the amount in any one case may not be significant, the implications of this change in the Statute have far-reaching implications for the practice of bankruptcy law in the state of Florida.

**A. The Respondent Received The Benefit Of The Homestead Exemption.**

Section 222.25(4) is a completely new subsection of the Florida statutes. Litigation for the bankruptcy courts in this and other cases has dealt with many issues; however, the primary focus has been on statutory construction. In applying the canons of statutory construction, certain points can be garnered from the language of the statute.

First, the statute is not available to Debtors who simply do not "claim" the homestead exemption. In order to give full effect to all of the words of the statute, the words "receive the benefits" must be given some weight, and the word "claim"

cannot be read to eliminate any use of the words "receive the benefits", or else the words would be rendered superfluous. It is a well-recognized canon of statutory construction, both in the courts of the State of Florida as well as the federal courts that statutes should be read so that no portion is rendered meaningless. *See Hawkins v. Ford Motor Co.*, 748 So. 2d 993, 1000 (Fla. 1999) ("We are compelled by well-established norms of statutory construction to choose that interpretation of statutes and rules which renders their provisions meaningful. Statutory interpretations that render statutory provisions superfluous 'are, and should be, disfavored.'") (citations omitted); In re City of Mobile, 75 F.3d 605, 611 (11th Cir. 1996) ("An interpretation of statutory language that causes other language within the statute to be meaningless contravenes the 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'") (citations omitted). The Debtor cannot therefore simply state that by not claiming the homestead exemption she can avail herself of the statute.

It is the Trustee's position that the phrase "receives the benefits" of the homestead exemption means that any natural person who owns a homestead, as a sole owner, jointly, in a tenancy by the entireties or otherwise, is ineligible to claim the new exemption. Accordingly, a person who owns a homestead "receives the benefits" of owning that homestead. For example, prior to bankruptcy, no creditors could levy on the homestead after obtaining a judgment because the

debtor would claim it as exempt. The creditor would not be able to force the sale by obtaining a judgment against the debtor. However, the debtor could sell the homestead notwithstanding the existence of a recorded judgment, roll the equity into a new homestead, and then, if the debtor so chose, refinance the new homestead before bankruptcy, place the equity into an annuity or other exempted asset, then file bankruptcy and utilize the new exemption. Thus, defeating a vigilant creditor's claim and forcing the creditor to share in the bankruptcy estate, which would be further reduced by the debtor's claiming the new exemption.

Likewise, by not claiming the homestead interest in bankruptcy, but instead protecting personal property, a debtor could discharge claims, and then, subsequent to bankruptcy, the debtor could revert to using the homestead exemption and thus protect any equity that was built up while the Debtor successfully protected her personal property from the claims of previous creditors—and while the value of the personal property decreased, but the debtor built equity in a homestead by continuing to pay the mortgage (and perhaps by an increase in the value of the homestead).

Clearly, ownership of a homestead gives a debtor many ways to reap its benefits. Allowing a debtor to take the new exemption when the debtor owns a homestead effectively allows a debtor to subsequently use the homestead exemption, as well as the new exemption, as a sword, a result which the courts

have specifically rejected. *See* Kozyak v. Levy (In re Financial Federated Title & Trust, Inc.), 273 B.R. 706, 717 (Bankr. S.D. Fla. 2001) (Ray, J.), *aff'd* 347 F.3d 880 (11th Cir. 2003) ("The homestead exemption is intended to be used as a shield, not a sword.") (citing Palm Beach Savings & Loan Association, F.S.A. v. Fishbein, 619 So. 2d 267, 270-71 (Fla. 1993)).

This is particularly so in the instant case. The Debtor here specifically chose to claim the Florida exemption in an effort to keep her home. The Debtor was attempting to sell the home to a friendly party so that she might retain possession and reap the benefits. It was only after the sale fell through, over three months after filing bankruptcy, and more than two months after the conclusion of her 341 Meeting of Creditors, that the Debtor deleted the claimed homestead exemption and sought to obtain the personal property exemption. The Debtor clearly sought, therefore, to obtain the benefit of the homestead.

The term "benefit" was defined in the case of In Franzeze, 2008 WL 515631 (Bankr. M.D. Fla. 2008), which, citing to Black's Law Dictionary, stated as follows:

> A "benefit" therefore is the right, privilege, or interest in some advantage to which a debtor is entitled to receive, regardless of whether the debtor actually has realized the advantage. If a person acquires "some legal right to which he would not otherwise have been entitled," the person has received a legal "benefit."

Therefore, the Respondent received a benefit if she had a right or interest in the property regardless of whether she chose to realize the advantage. The question then becomes whether the Respondent received a benefit under Section 4, Article 10 of the State Constitution. This section states as follows:

> (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 owned by a natural person:
>
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

The Florida Constitution imposes homestead status upon certain property when the constitutional requirements are met. Id. citing Venn v. Reinhard (In re Reinhard), 377 B.R. 315, 318-19 (Bankr.N.D.Fla.2007). The homestead exemption provision is self-executing in this regard, and a Florida resident is not required to take any affirmative action to claim the exemption in order for it to apply. Id. citing Hutchinson Shoe Co. v. Turner, 100 Fla. 1120, 130 So. 623 (Fla.1930) (stating that land is impressed with homestead status when the debtor acquires title to it and

makes it his home; "no action of the Legislature or declaration or other act on [the debtor's] part was required to make it his homestead, for it was already such in fact"); Grant v. Credithrift of America, Inc., 402 So.2d 486, 488 (1st DCA 1981) (concluding that a debtor's failure to file a pre-levy designation of homestead under Fla. Stat. § 222.01 does not preclude the debtor from asserting the constitutional homestead exemption). Once acquired, homestead status is retained until the property is abandoned or properly alienated. Id. citing Olesky v. Nicholas, 82 So.2d 510, 512 (Fla.1955) (stating that "[a]dmittedly where a homestead has been acquired it can be waived only by abandonment or by alienation in the manner provided by law"). In this case, there is no dispute that property was the residence of the Respondent at the time of the filing bankruptcy. Further, the Respondent claimed the property as exempt and did not sell or otherwise abandon the property. Therefore, under Florida law, the property was the Respondent's homestead property and her mere amendment in Schedule C exemptions alone was insufficient to divest the property of this status.

The Respondent's amendments to her Schedule C and Statement of Intentions did not change the fact that she continued to reside on the property. In re Magelitz, 2008 WL 1868074 (Bkrtcy.N.D.Fla.) the court stated that the effect of making an election in bankruptcy to exempt a particular asset on Schedule C only goes to whether that asset is property of the estate for purposes of administration.

A trustee will typically abandon an asset if it is determined to have no financial or beneficial interest to the bankruptcy estate. Id. Once the asset is abandoned, then the debtor retains possession and ownership of the property. Id. However, neither the debtor's failure to claim the home as exempt nor the trustee's decision to abandon it alters the property's homestead status under state law. Id. Since the Respondent is and will continue to be in possession of property that has the status of homestead under Florida law, it follows that the Respondent receives the benefits of the homestead exemption under Section 4, Art. X of the Florida Constitution. Id. Therefore, the Debtor who resided in her homestead property at the time of the filing of the bankruptcy was receiving a "benefit" under Florida's homestead law, because she retained the right to either claim or not claim the property as exempt and judgment lien creditors could not attach liens to the property. This is a sufficient benefit to disqualify the increased exemption amount under Florida Statute §222.25(4). In this case, the Respondent exercised that right by initially claiming the property as exempt and then amending her schedules to no longer claim the property as exempt. A debtor who has properly abandoned their homestead prior to the filing of the bankruptcy does not have an option to claim the property as exempt in the first instance. Therefore, the Petitioner requests that the order overruling the Petitioner's Objection to Exemptions be reversed.

### B. The Legislature did not intend to increase exemptions for homeowners.

The application of a second canon of statutory construction, a review of the legislative history of the statute and an attempt to determine the intent of the legislature, is an additional clue that the true intent of the statute is to protect persons who do not own a homestead. *See City of Mobile*, 75 F.3d at 610-11 ("Our objective when interpreting a statute is to determine the drafters' intent . . . 'In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'") (citations omitted). The Bankruptcy/UCC Committee of the Business Law Section of the Florida Bar originally created, and then proposed the change to the statute. The well-intentioned change was proposed because the protection of personal property found in the Florida Constitution is limited to $1,000.00. This protection dated from the 1868 version of the Florida Constitution. The provision has never been amended, and the $1,000.00 exemption remained as the only general personal property exemption until Section 222.25(4) was passed.

The Business Law Section, in a release on their website, stated that the purpose of the new statute was to protect those who did not have homesteads:

> The arguments against this proposal have been that Florida has the most generous homestead exemption protection of any state and Florida debtors are able to protect vast amounts of money

> in the form of equity in their homes. However, **if a debtor has no homestead** then he/she will not be able to benefit from that generous homestead and most likely will be left with only $1000 of automobile and $1000 of personal property. This has an extremely disruptive effect on the large number of debtors **who don't own homes**, live paycheck to paycheck and have either a paid-for used car worth about $5,000 to $7500 or tools of trade that are necessary for work.

Proposed Amendment to Personal Property Exemption Statute, Florida Statutes §222.25 found at http://flabuslaw.org/index.php?$ef44c4e0312065fcec04c6be8a57f8ef//list.committees=2/1 (the "Committee Notes") (emphasis added).

The Committee Notes are substantial evidence that the intent of the new statute was to protect those who do not own homes—not persons who own homes and can utilize the homestead exemption and the new exemption interchangeably, as they see fit, to switch back and forth between what is protected and what is not.

The staff analysis conducted by the staff of the Florida Senate likewise demonstrates that the intent of the new exemption was to protect the most destitute of debtors who do not own homes. In their description of the new provision, the staff members noted that

> The bill also increases the amount of personal property exempt from creditor claims, **for persons without homestead property**. . . . The bill amends s. 222.25, F.S., to increase to $4,000 from $1,000 the amount of personal property exempt from creditor claims for persons **who do not own homestead property. The**

**exemption for persons with homestead property will remain at $1,000 as provided in the Florida Constitution.**

Florida Senate Professional Staff Analysis and Economic Impact Statement For CS/SB 2118 (the "Staff Report") (emphasis added).

An interpretation of the law that only allowed non-homestead owners to claim the exemption would be consistent with the intent of the new statute as these two sources demonstrate. For example, a renter who was being evicted could protect his personal property from any claim of the landlord based on a money judgment for nonpayment of rent. Thus, the renter would not be left completely destitute, which is the purpose of the exemption statutes. A renter who filed bankruptcy who was current on his rent could likewise protect his personal property. The intent of the new statute is to protect these most vulnerable of citizens.

**C. If the Statement of Intention is to be Considered, Debtors Must Observe all the Rules Relating Thereto, Including Timely Compliance.**

Whenever a debtor files a bankruptcy, there are official forms which need to be filed with the court, which forms include a Statement Intention. The Statement of Intention is a document whereby the debtor affirmatively states their intention with regard to secured property as to whether that property will be retained or

surrendered. In rendering their determination as to the effectiveness of F.S. §222.25(4), several courts have focused on the Statement of Intention filed by the Debtor. In the instant case, the Debtor filed a Statement of Intention stating that she would surrender the property; however, this was immediately contradicted by her claims that she wished to keep the homestead and claimed it exempt.

If this Court determines that the Statement of Intention is one of the issues to be reviewed, the following sections of law which are integral to the analysis, but ignored by the Bankruptcy Court, must be reviewed and considered: 11 U.S.C. §521(a)(2) (A) and (B), 11 U.S.C. §704(a)(3) and the F.R.B.P. 1009(A) and (B).

11 U.S.C. §521(a)(2)(A) requires the debtor to file a Statement of Intention with regard to secured property within 30 days of the filing of the petition or before the 341 meeting of creditors, whichever is earlier (unless the Court extends the time for cause).

11 U.S.C. §521(A)(2)(b) requires the debtor to perform her intention within 30 days after the first date set for the 341 meeting of creditors, pursuant to Section 341(A).

In this case, the first date set for the 341 Meeting of Creditors was October 26, 2007. Therefore, pursuant to 11 U.S.C. §521(A)(2)(b), the debtor had to perform her intention on or before November 25, 2007.

The Debtor's Statement of Intention, filed with the initial Petition (DE #1), indicated the Debtor's intent to surrender the property. The Debtor never amended the Statement of Intention and, therefore, should have turned the property over to the secured creditor on or before November 26, 2007.

The Stipulated Facts (DE #38) clearly indicate that the Debtor retained the property through December 20, 2007.

In addition to the above, the Debtor initially claimed the homestead property as exempt, as homestead. The Debtor did this purposefully, as she believed she would be able to sell the property and lease it back, thereby keeping the property for her use.

The Debtor ultimately filed amended schedules wherein she deleted the claim of exemption for homestead, but this was not until December 20, 2007, long after the deadline provided in the Rules.

Pursuant to 11 U.S.C. §704(A)(3), it is the duty of the Trustee to ensure that the Debtor shall perform his intention as specified in Section 521(2)(b) of this Title. The Bankruptcy Court's ruling effectively states that the Debtor could change her mind at anytime. This completely renders this Rule meaningless and a nullity.

The third related issue is the Federal Rules of Bankruptcy Procedure 1009. Federal Rules of Bankruptcy Procedure ("FRBP") Section A allows the debtor to

amend her schedules as a matter of course at any time before the case is closed. However, Rule 1009(B) states that "the Statement of Intention may be amended by the debtor at any time before the expiration of the period provided in Section 521(2)(b) of the code. Debtor shall give notice of the amendment to the Trustee and to any entity affected thereby".

Thus, had the debtor elected to change her Statement of Intention, the amendment to the Statement of Intention must have been filed on or before November 26, 2007. This did not occur. The only way the bankruptcy ruling could stand is if this Court completely ignores FRBP 1009 and 11 US.C. §704(A)(3). Accordingly, the decision of the Bankruptcy Court must be reversed.

The Debtor asked the Bankruptcy Court to allow her to have the additional $4,000 wildcard exemption provided by F.S. §222.25(4) because she did not receive the benefit of the homestead. In this case however, although indicating in the Statement of Intention that the debtor would surrender, the debtor failed to comply with the rules.

The Rules clearly provide that the debtor return the property to the secured creditor on or before November 26, 2007, and/or change their statement of intention by that time. The Debtor did not do so.

Rather, the Debtor retained possession of the property without paying her mortgage and left the property when the debtor was ready to leave the property -- not when the rules required it.

In reviewing cases under F.S. §222.25(4) in the past, the courts have recognized the debtor's right to amend at any time. Allowing the debtors in these circumstances to amend their schedules to claim additional exemptions when they are clearly obtaining the benefit of the homestead, would be an abuse of the system.

The debtor who wishes to take full advantage of the Florida exemptions needs to comply fully with her duties under the Code.

The debtor continued to live in the home and enjoy the benefit of the home. As Judge Killian pointed out in In re Magelitz, 2008 WL 1868074 (Bkrtcy.N.D.Fla.):

> "the Florida constitution imposes homestead status upon certain property when the constitutional requirements are met... the homestead exemption provision is self executing in this regard, and the debtor is not required to take any affirmative action to claim the exemption in order for it to apply... furthermore, the effect of making election in bankruptcy to exempt a particular asset on Schedule C only goes to whether that asset is property of the estate for purposes of administration... the trustee typically abandons assets with no equity because they are not beneficial to the estate, in which case the asset is not administered and the debtor can retain possession. However, neither the debtor's failure to claim the home as exempt nor the trustee's decision to abandon it alters the property's homestead status under state law. Since the Debtor is and will continue to

> be in possession of property that has the status of homestead under Florida law, it follows that the Debtor receives the benefits of the homestead exemption under Section 4, Art. X of the Florida constitution."

This is precisely what happened in the instant case.

The Debtor did not manifest an intent to abandon the property as evidenced by claiming the property exempt while stating she was going to surrender it.

Without such a clear manifestation, pursuant to Florida law, the property is not abandoned.

The Debtor therefore retained the benefit of the homestead.

Were the court to allow any amendment to be effective, and to deem that a Debtor who retains possession of the home after the period for surrendering under §521 has expired, then the Trustee's duty to enforce 11 U.S.C. §521 would be meaningless. The Trustee would be unable, at any time, to compel the Debtor to comply with the Bankruptcy Rules and Code.

The only way to give meaning to all of the relevant Sections of the Bankruptcy Code, Bankruptcy Rules, and the intent of the Florida Legislature is to determine that when a Debtor retains possession of a property for more than 30 days past the meeting of creditors, the Debtor has received the benefits of the homestead and therefore is not eligible for the wildcard exemption.

**D. The District Court's rationale towards sustaining the Bankruptcy Court's decision inherently contradicts itself and must be reversed.**

The District Court based it's analysis on a decision by the Honorable Judge Mark in In re: Hernandez, 2008 WL 1711528, *3(Bankruptcy So. District FL 2008), stating:

> In this Court's view, the 'received the benefits of' exclusion must be interpreted in the context of protection from efforts to execute against the home. After all, that is what the constitutional provision is – protection of the home from forced sale or other execution efforts. Thus, the exclusion only applies to those who received the benefits of constitutional protection in resisting execution efforts by creditors outside of bankruptcy or efforts to administer the property by a Trustee within a bankruptcy case.

The District Court further stated "but here the Bankruptcy Court found that Ms. Dumoulin always indicated intention to surrender the property, and that she amended her schedules before the Trustee filed any objections or moved for turnover. Under these circumstances, Ms. Dumoulin was not barred from the $4,000 personal property exemption."

As shown above, the stipulated facts first indicate that Ms. Dumoulin claimed the property exempt. Based upon her claiming the homestead exempt, and her living on the homestead, there would be no reason for the Trustee to object and, in fact, the Trustee allowed her exemption. The Trustee then demanded the $4,000 extra amount, since Ms. Dumoulin was above her allotted exemptions. The Trustee made repeated demands after Ms. Dumoulin failed to comply. As stipulated to in this case, Ms. Dumoulin amended her schedules to delete the homestead exemption and then claim the $4,000 exemption of F.S. §222.25(4).

Thus, Ms. Dumoulin did not always indicate her intention to surrender the property. The fact that she checked the box that says 'intend to surrender' was contradicted by her claim of the property as exempt, and her continuing to remain on the property after the deadlines to execute any intention to surrender had past. The District Court's sustaining of a bankruptcy finding to the contrary, when said facts are stipulated to, is clearly erroneous. Further, the District Court's limiting of the exclusion only to debtors who resist execution efforts is clearly limiting language that exists nowhere in the statute. The District Court's theory would be that only debtors who have had creditors attempt to take their home and successfully defend it, could not claim the exemption. Florida law is clear that a homestead is exempt from the claim of creditors. Creditors do not try to take a homestead. In this particular case, as the Debtor claimed the property as homestead, the Trustee did not attempt to administer the property, as it was clearly an allowed exemption. The District Court seems to suggest that the Trustee should object to an exemption which is clearly allowable and only after losing such an objection to exemption, could the Trustee then proceed to collect the additional $4,000 personal property exemption. This makes no sense. It is clear from the stipulated facts that when the Trustee demanded the turnover of the additional $4,000 in assets over exemptions, he was doing so because the Debtor was being allowed the homestead exemption. Had the Debtor not wanted to claim the

property exempt, the Trustee could have asked for turnover of the real estate/homestead property and possibly tried to sell that property for the benefit of creditors. Instead, the Debtor retained that property to attempt to sell it herself and obtain whatever profits she could. When the sale fell through, several months later, the Debtor then changed her mind and decided to abandon the property. By this time it would be too late for the Trustee to do anything with said property. The Debtor therefore did successfully resist any effort the Trustee might make, or be entitled to make, to administer the property. To rule otherwise, is contrary to logic. For all of the foregoing reasons, the decision of the District Court affirming the Bankruptcy Court must be reversed.

## CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the District Court affirming the Bankruptcy Court.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. and/or electronic mail to: DENISE J. DUMOULIN, c/o Donna A. Bumgardner, donnabkclaw@aol.com, MOREQUITY, INC., c/o Peter E. Lanning, Esq, bkfiling@consuegralaw.com, and OFFICE OF THE US TRUSTEE, USTPRegion21.MM.ECF@usdoj.gov.

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Rule 9.210.

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