

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

JBK ASSOCIATES, INC., f/k/a
COASTAL INSULATION, INC.

Appellant,

vs.

SILL BROS., INC., PATRICK T. SILL,
STEPHEN D. SILL, LISA D. SILL, and
BARBARA H. SILL,

Appellees.

NO: SC15-977

Lower Tribunal Case Number:
4D14-3049

APPELLANT'S INITIAL BRIEF

UPON PETITION FOR DISCRETIONARY REVIEW OF A DECISION
RENDERED BY THE FOURTH DISTRICT COURT OF APPEAL

ADAM J. HODKIN, FBN 962597
ahodkin@padulahodkin.com
NATHAN PATE, FBN 26737
pate@padulahodkin.com
PADULA HODKIN, PLLC
Attorneys for Appellant
101 Plaza Real South, Suite 207
Boca Raton, Florida 33432
Telephone No. 561.544.8900
Facsimile No. 561.544.8999

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KEY TO ABBREVIATIONS USED IN THIS BRIEF

“App. ___” refers to the specified page in the Appendix on Appeal.

“App. ___; T. __: __” refers to the specified page and line number in the Transcript for the June 25, 2014, hearing before the Honorable Donald W. Hafele, on Appellee/Defendant, Patrick T. Sill’s Motion to Dissolve Writ of Garnishment.

“App. ___; Sill Depo. __: __” refers to the specified page and line number in the Transcript for the April 25, 2014 deposition of Appellee/Defendant Patrick T. Sill.

“JBK” refers to Appellant/Plaintiff, JBK Associates, Inc., f/k/a Coastal Insulation, Inc.

“Sill” refers to Appellee/Defendant, Patrick T. Sill.

STATEMENT OF THE CASE AND FACTS

In 2010, JBK obtained a judgment against Sill after Sill reneged on a contract and refused to satisfy a promissory note that he had signed in payment for the purchase by Sill of JBK's business. App. 8. In October, 2013, after years of bad faith maneuvering in an attempt to avoid paying the judgment, Sill sold his former marital residence. App. 131; T. 6:24-7:16. In March, 2010, Sill and his former wife, Lisa Sill, purchased the former marital residence with the proceeds of the sale of non-exempt assets that would have been subject to levy by JBK so that the Sills could try to use the homestead exemption to try and avoid paying JBK's judgment.

On January 30, 2014, in support of its collection efforts, JBK obtained Post-Judgment Writs of Garnishment against Sill. In turn, Sill filed motions to dissolve those writs, claiming that the proceeds from the sale of his former marital residence are exempt from levy as the proceeds of a constitutionally protected homestead. The only Writ and corresponding Motion to Dissolve at issue is the Writ of Garnishment directed to Garnishee, Wells Fargo Advisors, LLC ("Wells Fargo"). App. 10-11.

On June 25, 2014, the Honorable Donald W. Hafele heard argument on, *inter alia*, Sill's Motions to Dissolve Writs of Garnishment. App. 131; T. 3:4-5. At the hearing, Sill's counsel made a proffer, which was accepted by JBK's counsel. App. 131; T. 6:24-12:24. In pertinent part, the proffer was as follows: in

2010, Sill and his former wife purchased the former marital residence located at 4506 Pine Tree Drive. App. 131; T. 6:25-7:10. Sill’s former wife resided at said residence until it was sold on October 28, 2013 due to a divorce; however, Sill left the residence on October 26, 2013. App. 131; T. 7:10-16. Upon the sale of the former marital residence, the proceeds were split between Sill and his former wife. App. 131; T. 7:9-10. Sill took his portion of the sale proceeds (\$458,696.67) and deposited them into an account with Wells Fargo titled “FL Homestead Account.” App.127; T.7:16-20. The account was then split into sub-accounts. App.127; T.7:21-8:1. As of February 28, 2014, the sub-accounts contained the following assets:

Type of Subaccount	Amount
Cash	\$139,274.66
Mutual Funds	\$297,422.64
Unit Investment Trusts	\$25,136.89

App. 119.

The account statements reveal that Sill’s investment objective/risk tolerance was for moderate growth (as opposed to no risk for purposes of retaining the funds to purchase a homestead); that the time of the investment was to be for three to five years; and that the liquidity was at moderate. App. 131; T. 37:12-16. Sill confirmed at his deposition that he personally chose the time-table and investment objectives. App. 26; Sill Depo. 53:16-20. As indicated above, once deposited, the funds were then invested in individual corporate stocks and mutual funds. App.

131; T. 37:16-24. At the time of the June 25, 2014 hearing, the accounts had appreciated in value by approximately \$13,000 as the result of interest and dividends payments. App. 131; T. 11:14-19.

In addition to using the proceeds from the sale of the former marital residence to purchase shares in various corporations, Sill began leasing an apartment. App. 26; Sill Depo. 5:6-6:12. The lease was for a one year term. App. 26; Sill Depo. 11:24-12:1. When deposed, Sill did not know what he planned to do after the lease ended and testified that he had “been looking to buy a house, so [he] might buy a place. It’s TBD [to be determined] right now.” App. 26; Sill Depo. 12:2-12:7. Despite his representations, Sill neither entered into an agreement with a relator, nor made an offer on any properties. App. 26; Sill Depo. 21:10-22.

The trial court decided that Sill’s corporate securities and other investments were protected by the homestead exemption, and on July 14, 2014, the trial court entered an Order Granting, in Part, and Denying, in Part, Defendant, Patrick T. Sill’s Motions to Dissolve Writs of Garnishment. App. 23.

JBK appealed the trial court’s ruling regarding Sill’s Wells Fargo Homestead account (*7779). *Id.* at ¶ 3. On appeal, JBK argued in pertinent part that the Florida homestead exemption does not apply to Sill’s sale proceeds because (i) the proceeds of the sale of the former marital residence were not held *solely* for the purpose of purchasing another homestead, but rather to purchase

shares in various corporations; and (ii) the securities that Sill purchased generated interest, as well as dividends, and Sill commingled the interest and dividends paid to him by the companies he purchased with the proceeds from the sale of his homestead.

The Fourth District Court of Appeal (“District Court”) affirmed the trial court’s decision and framed the issues on appeal as follows:

[a] judgment debtor segregated his portion of the proceeds of the sale of his homestead in a brokerage account, where he purchased mutual funds and unit investment trusts. A judgment creditor seeks to reach that portion of the debtor’s proceeds arguing that these types of investments forfeited the debtor’s homestead protection. We hold that the debtor’s investments were not so incompatible with the purpose of homestead that the protected status of the sale proceeds was destroyed.

JBK Associates, Inc. v. Sill Bros., 160 So.3d 94 (Fla. 4th DCA 2015); App. 3.

On March 26, 2015, JBK filed its Motion for Rehearing, Motion for Written Opinion on Issue of Profits and Motion to Certify a Question of Great Public Importance (“Motion for Rehearing”). JBK’s Motion for Rehearing specifically addressed the District Court’s ruling that JBK did not address and argue that “any profits realized from the securities, over and above the proceeds from the sale” were used for Sill’s “general purposes” and/or were improperly commingled with the proceeds from the sale of the former homestead. On April 22, 2015, the District Court denied JBK’s Motion for Rehearing. App. 7. On May 8, 2015, the District Court issued its Mandate.

SUMMARY OF ARGUMENT

There is no dispute that under appropriate circumstances the owner of a homestead can sell that homestead and the proceeds from such sale can retain their homestead protection if reinvested into a new homestead within a reasonable period of time. However, in this case there are two reasons that the homestead exemption does not apply to Sill's sale proceeds.

First, the proceeds of the sale of the former marital residence were not held *solely* for the purpose of purchasing another homestead. Instead the proceeds from the sale of the former marital residence were used to purchase shares in various corporations – in other words, common stock representing small pieces of various companies – a wholly different and distinct asset class that is the beneficiary of a constitutional provision protecting it from levy, to the contrary of a new homestead. Nor can shares of corporate stock – well known to be risky investments relative to a bank deposit – be said to be the equivalent of a bank deposit to hold cash pending the purchase of a new home.

Second, the securities that Sill purchased generated interest as well as dividends (dividends are not interest, but are a share of the profits of the companies Sill had purchased and owned pieces of). Sill commingled the interest and

dividends paid to him by the companies he purchased with the proceeds from the sale of his homestead, thereby causing the homestead funds to lose their exemption.

ARGUMENT

I. SILL LOST HIS CONSTITUTIONAL HOMESTEAD PROTECTION

- a. **The sale proceeds were not held solely for the purchase of another homestead, but were used to buy and invest in pieces of corporations**

In 1962, this Court explained the limited and specific conditions upon which proceeds from the sale of a homestead could retain the protection of the constitutional homestead exemption against forced sale. Specifically, in *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So.2d 201 (Fla. 1962), the Court held that:

[T]he proceeds of a voluntary sale of a homestead to be exempt from the claims of creditors just as the homestead itself is exempt if, and only if, the vendor shows, by a preponderance of the evidence an abiding good faith intention prior to and at the time of the sale of the homestead to reinvest the proceeds thereof in another homestead within a reasonable time. Moreover, only *so much* of the proceeds of the sale as are intended to be reinvested in another homestead may be exempt under this holding. Any surplus over and above that amount should be treated as general assets of the debtor. We further hold that in order to satisfy the requirements of the exemption **the funds must not be commingled with other monies of the vendor but must be kept separate and apart and held for the sole purpose of acquiring another home.** *The proceeds of the sale are not exempt* if they are not reinvested in another homestead in a reasonable time *or if they are held for the general purposes of the vendor.*

Orange Brevard, 137 So.2d at 206 (emphasis added); see also *In re: Dezonias*, 347 B.R. 920, 924 (2006) (“The factors a court considers in determining whether the proceeds from the sale of homestead property are entitled to exemption are: (1) a

good faith intention, prior to and at the time of the sale, to reinvest the proceeds in another homestead within a reasonable time; (2) the funds must not be commingled with other monies; and (3) the proceeds must be kept separate and apart and held for the sole purpose of acquiring another home.”).

This Court’s decision in *Orange Brevard* created several bright line rules that are unequivocal and precise, leaving little room for interpretation; nevertheless, the District Court’s interpretation of *Orange Brevard* would render *Orange Brevard* so equivocal and imprecise that courts across the state would now be required to evaluate the element of risk in an asset in order to determine the applicability or inapplicability of the homestead exemption where the monies were not retained in a bank account, but were used to purchase commercial investments instead. *JBK Associates*, 160 So.3d at 94. (“There was no evidence that the securities in Sill’s account were particularly risky and the funds were kept ‘separate and apart’ from Sill’s other funds.”). Such an interpretation does *exactly* what the District Court wrote should not happen, as it “encourages excessive speculation with the proceeds of a sale.” *Id.* More specifically, the “excessive speculation” would manifest itself in a case-by-case judicial evaluation of the risk level of investments, on an investment by investment basis. The courts are not financial advisors given latitude to determine the risk of financial investments nor does this Court’s opinion in *Orange Brevard* case stand for such a proposition.

Contrary to this Court's holding in *Orange Brevard*, the District Court essentially held that the proceeds from the sale of a homestead do not need to be held "for the sole purpose of acquiring another home" so long as they are invested in investments that an evaluating court deems not too risky. *Orange Brevard*, 137 So.2d at 206. Such a decision should be reversed.

Sill deposited the monies from the sale of the former marital residence into a securities account at Wells Fargo Advisors, LLC, and by his admission, those cash proceeds were thereafter used at his instruction to purchase various stocks, bonds, and securities; thus, converting the homestead, as it were, into stocks (pieces of publicly traded corporations) and bonds. To state the obvious, shares of stock in corporations are not homesteads, nor are they fungible, like cash. They are actually pieces of ownership in the issuing corporation. The value of those stocks and corporate holdings will fluctuate daily. Their value is very much dependent upon the actions of the corporation, a third party. Under *Orange Brevard*, there are no actions to evaluate, nor do third parties (a corporation's officers, directors, and shareholders) generally control and determine the value of the bank account into which the homestead monies are to be deposited and held. Those third parties – the corporation's officers, directors, and shareholders – do, however, in large part determine the value of the stocks over which they preside. By purchasing pieces of companies, instead of another homestead, Sill violated the *Orange Brevard* rule

that the monies be held “for *the sole purpose* of acquiring another home” because he put the monies at risk and decidedly used the sale proceeds to make more money. *Id.* (emphasis added). The fact that Sill’s investments were to be for **three to five years with a moderate level of liquidity** makes it clear that Sill did not use the sale proceeds for the “sole” purpose of acquiring another home. App. 131; T. 37:12-16.

The District Court appears to have ignored the substance of *Orange Brevard’s* holding and thus, erred in its ruling that “[n]o constitutional provision or statute limits how the proceeds of a sale must be held.” *JBK Associates*, 160 So.3d 94 at 96. The facts remain that Sill never had a good faith intention, prior to and at the time of the sale, to reinvest the proceeds in another homestead within a reasonable time. There are no Florida cases holding that proceeds from the sale of a homestead that are then used to purchase corporations are exempt from levy under the homestead exemption because this scenario – the same scenario being perpetrated by Sill – clearly violates *Orange Brevard’s* requirement that the sale proceeds be held *solely* for reinvestment into another homestead. Indeed, there is no question under *Orange Brevard* that if Sill had sold his homestead and purchased a company with the homestead proceeds, the owner’s stock in that new company would be considered to be an asset subject to levy, and most definitely not a residential homestead. The District Court’s decision is essentially that as

long as one only purchases pieces of a company for purposes of commercial, speculative investment, instead of the outright purchase of a company, the funds in that circumstance retain their status as exempt assets. But once used to purchase a company, whether in whole or in part, the funds are not being held and segregated for the purchase of a new residential homestead. Rather, the funds have been used to purchase a speculative commercial investment, an asset that is not a residential homestead, but a commercial opportunity. The District Court's decision should be reversed, or this State's homestead law and the clear standards set forth in *Orange Brevard* will become an uncertain morass of courts evaluating the commercial investment decisions of judgment debtors.

- b. The sale proceeds were used to purchase securities which generated interest and dividends that were impermissibly commingled with the proceeds from the sale of the homestead.**

The purchase of the securities forced another violation of *Orange Brevard* because the dividends and interest generated by those securities were impermissibly commingled with the sale proceeds from the former marital residence, to the contrary of *Orange Brevard's* instruction that the sale proceeds "must not be commingled with other monies of the vendor" *Orange Brevard*, 137 So.2d at 206. Dividends are not the same as interest that a bank may pay to an account holder. Dividends represent a share of corporate profits. As a result of Sill commingling his share of the corporate profits paid to him by the corporations

he purchased pieces of with the proceeds from the sale of the former homestead (and in accordance with *Orange Brevard*), Sill forfeited any potential homestead exemption. Although it is JBK's position that by commingling the profits with the sale proceeds Sill forfeited his *entire* homestead exemption, at a minimum, Sill absolutely forfeited all of the money that he used to purchase unprotected commercial securities and the money – the profit – that was generated from such investments.

The District Court expressly overlooked the foregoing arguments by JBK in its decision. *JBK Associates*, 160 So.3d at 96. Profits over and above the proceeds of the real estate sale are not exempt and should be treated as a general asset of the debtor, subject to levy. Moreover, by failing to analyze whether the profits realized from the securities are “general assets,” the District Court's analysis of whether funds were improperly commingled under *Orange Brevard* (i.e. when the profits were deposited back into the accounts with the proceeds from the sale of the former homestead) falls short. In other words, under *Orange Brevard*, the District Court could not have affirmatively determined that Sill's funds were not improperly commingled without first determining whether the profits constituted “general assets.” *Orange Brevard*, 137 So.2d at 206. If the District Court determined that the profits from the securities constituted “general assets” (as it

should), then it necessarily follows that such “general assets” were improperly commingled with the proceeds from the sale of the former homestead.

CONCLUSION

Sill forfeited any potential homestead exemption when he decided to purchase securities in various companies, and then commingled the remaining cash funds with the securities and the dividends and interest generated thereon. Accordingly, this Court should reverse the District Court's decision to the extent that it held that Sill's Wells Fargo Advisors, LLC account was protected by the homestead exemption.

Respectfully submitted,

PADULA HODKIN, PLLC
Attorneys for Appellant
101 Plaza Real South, Suite 207
Boca Raton, Florida 33432
Telephone No. 561.544.8900
Facsimile No. 561.544.8999

By: /s/ Adam J. Hodkin
ADAM J. HODKIN, FBN 962597
ahodkin@padulahodkin.com
NATHAN PATE, FBN 26737
pate@padulahodkin.com

CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I hereby certify that the font type and size of this brief complies with the requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Adam J. Hodkin
ADAM J. HODKIN

CERTIFICATE OF SERVICE

I certify that a true and correct copy hereof was provided this 2nd day of November, 2015 via **E-mail** to: **Les Osborne, Esquire**, Rappaport Osborne & Rappaport PL, counsel for Patrick Sill, 1300 N. Federal Highway, Suite 203, Boca Raton, Florida 33432 (office@rorlawfirm.com).

/s/ Adam J. Hodkin _____

ADAM J. HODKIN