

IN THE FLORIDA SUPREME COURT

**Case No. SC17-954
DCA No. 2D15-5198**

**THE BANK OF NEW YORK MELLON FKA
THE BANK OF NEW YORK AS SUCCESSOR
TRUSTEE TO JP MORGAN CHASE BANK N.A.
AS TRUSTEE ON 10N BEHALF OF THE CERTIFICATE-
HOLDERS OF THE CWHEQ INC. CWHEQ
REVOLVING HOME EQUITY
LOAN TRUST SERIES 2006-D
*Petitioner***

v.

**DIANNE D. GLENVILLE A/K/A DIANE
D. GLENVILLE A/K/A DIANE GLENVILLE
and MARK S. GLENVILLE,
*Respondent***

*On Discretionary Review from the
Second District Court of Appeal*

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND OF THE FACTS

Respondents, **DIANNE D. GLENVILLE A/K/A DIANE D. GLENVILLE A/K/A DIANE GLENVILLE and MARK S. GLENVILLE** (“Glenville”) accept the Statement of the Case and of the Facts as set forth in Petitioner’s Jurisdictional brief.

SUMMARY OF THE ARGUMENT

Respondents concede that this Court has discretionary jurisdiction under Article V, Section 3(b)(4) of the Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(vi), however, because of the unique set of facts underlying this action, because the issue is one that can easily be avoided by future litigants, and because the issue should be resolved by the Legislature and not through decisional law, this Court should decline to exercise discretionary jurisdiction in this case. Respondents submit that even if there is conflict of decisions, the discretion of the Court to act is not always boundless. A petitioner to the Supreme Court should demonstrate that the case is significant enough to be heard. Here, Petitioner’s Jurisdictional Brief has failed to do so and thus, this Court should decline to exercise discretionary jurisdiction.

ARGUMENT

I. This Court should decline to exercise its discretionary jurisdiction in this case.

A. This case deals with a unique set of facts the resolution of which will assist only this litigant

Section 45.031, Florida Statutes, was most recently amended in 2006 when language establishing a 60-day deadline from the sale date to file a claim for surplus funds was inserted into the statute. Section 45.031 (1) provides in relevant part:

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

Here, the clerk of court conducted the foreclosure sale on Thursday, July 2, 2015. Customarily, the clerk of court will issue a certificate of sale on the actual sale date, but here, the clerk did not issue the certificate of sale until Monday, July 6, 2015 (4 days after the sale date) most likely because Friday, July 3, 2015 was a legal holiday.

Because the foreclosure sale occurred on July 2, 2015, the 60 day deadline to file a claim expired on August 31, 2015. Petitioner did not file its claim until September 2, 2015, the 62nd day after the sale. Had the clerk issued the certificate

of sale on the sale date as is typical, Petitioner would have no argument on appeal and thus, no argument in this petition.

This Court frequently refuses to grant discretionary jurisdiction involving limited issues addressing unique facts. *See e.g. State v. Brooks*, 788 So.2d 247 (Fla. 2001) (declining to consider whether a reasonable mistake as to the age of the victim may be considered in mitigation in sentencing an individual for sexual battery); *Dade County Property Appraiser v. Lisboa*, 737 So.2d 1078 (Fla. 1999) (declining to consider whether an alien residing in the United States pending application for political asylum can satisfy the constitutional and statutory residency requirements to qualify for Florida's homestead tax exemption); *State v. Sowell*, 734 So.2d 421 (Fla. 1999) (declining to address whether statutory amendments abrogated the common law defense of medical necessity as applied to a seriously ill individual who cultivates marijuana solely for personal use to obtain medical relief).

The issue presented in this case will only affect subordinate lienholders who procrastinate in filing claims to surplus funds until the end of the 60-day window to do so. Furthermore, the possible outcome of a further appeal in this instance can only serve to save the Petitioner from the loss of the surplus funds. As such, this Court should decline to exercise its discretionary jurisdiction.

B. The issue presented can be avoided by future litigants

Here, Petitioner argues that this Court should grant discretionary jurisdiction over their petition because “otherwise, there will be confusion and inconsistency of the application of the legal issues that are the subject of this petition.” Petitioner has asked that this court interpret the language of Section 45.031(1) calling for the filing of a claim “no later than 60 days after the sale”, to clarify whether that should be 60 days from the actual sale date, 60 days from the issuance of the Certificate of Sale, or 60 days from the issuance of the Certificate of Title because the confusion “would thus lead to a disparity in the way the court system is treating litigants in identical circumstances.”

However, a subordinate lienholder, like Petitioner, can easily avoid the issue altogether. Petitioner assumes that all subordinate lienholders procrastinate in filing a claim to surplus funds as it did in this case. Nonetheless, a subordinate lienholder can avoid the supposed conflict altogether merely by filing its claim to surplus funds 10 days after the sale, or 20 days after the sale or some other date that is well before the 60 day deadline. Or, a subordinate lienholder can simply file its claim within 60 days from the actual sale date and not wait for the clerk to issue the certificate of sale or certificate of title.

Because a subordinate lienholder can avoid the issue merely by acting as a savvy and diligent litigant by filing its claim to surplus funds well in advance of the 60-day deadline, this Court should decline to exercise its discretionary jurisdiction.

C. The issue should be resolved by the Legislature and not by decisional law.

In giving effect to the text of a statute, courts may not extend, modify, or limit the statute's express terms or its reasonable or obvious implications because to do so would be an abrogation of legislative power. *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181 (Fla. 2017).

Under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the Legislature clearly has not done so. A court's function is to interpret statutes as they are written and give effect to each word in the statute. *Fla. Dep't of Revenue v. Fla. Mun. Power Agency*, 789 So.2d 320, 324 (Fla.2001)

Courts may not judicially legislate and interpret the law to negate the clear language used by the Legislature. *State v. VanBebber*, 848 So. 2d 1046 (Fla. 2003). In statutory construction, a court's task is to ascertain the meaning of the phrases and words used in a provision, not to substitute its judgment for that of the Legislature. *School Bd. of Palm Beach County v. Survivors Charter Schools*,

Inc., 3 So. 3d 1220 (Fla. 2009). Florida courts are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications, and to do so would be an abrogation of legislative power. *Koster v. Sullivan*, 160 So. 3d 385 (Fla. 2015), cert. denied, 136 S. Ct. 164 (2015). Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity; if it has been passed improvidently, the responsibility is with the Legislature, and not the courts. *Johnson v. Gulf County*, 26 So. 3d 33 (Fla. 1st DCA 2009).

If this Court extends its discretionary jurisdiction to this conflict, it will be asked to interpret an otherwise clear and unambiguous statute and to substitute its judgment for that of the Legislature under the argument that the phrase “**60 DAYS AFTER THE SALE**” in Section 45.031 to mean “60 days after the Clerk issues the Certificate of Sale” or “60 days after the Clerk issues the Certificate of Title”. This would be a clear abrogation of legislative power. Any necessary clarification of Section 45.031 should be left to the Legislature and as such, this Court should decline to exercise discretionary jurisdiction in this matter.

CONCLUSION

Based on the foregoing reasons, Respondents respectfully request this Honorable Court to decline to exercise jurisdiction.

Respectfully submitted,

/s/ Sheryl A. Edwards

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been efiled with the e-portal for the Florida Supreme Court and that true and correct copies of the foregoing were sent by eservice on July 10, 2017 to the parties listed below:

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I CERTIFY that this brief was prepared using Times New Roman 14-point font.

/s/ Sheryl A. Edwards

SHERYL A . EDWARDS, ESQUIRE