

IN THE FLORIDA SUPREME COURT

CASE NO. SC05-1297

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WILLIAM DAVID MILLSAPS

Petitioner,

v.

MARIJA ARNJAS,

Respondent.

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AMENDED JURISDICTIONAL BRIEF OF PETITIONER

WILLIAM DAVID MILLSAPS

In propria persona  
528 MOROCCO AVENUE  
ORLANDO, FLORIDA 32807  
407-277-2241

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## STATEMENT OF THE CASE AND FACTS

Petitioner William David Millsaps and Anna Jean Millsaps, Petitioner's deceased wife, filed joint tax returns for the years 1979, 1980 and 1981. William David Millsaps filed a single tax return for the year 1982. Anna Jean Millsaps did not have a tax liability for the year 1982 and did not file a tax return.

Petitioner William David Millsaps received a refund for the tax years 1980, 1981 and 1982.

Once a refund is issued the Internal Revenue Service has no authority to audit the return or to file a notice of tax lien. In regards to a tax year in which a refund was issued a suit must be commenced within two years after the making of the refund, see **Sec. 6532** of the Internal Revenue Code, to recover the refund and must be made pursuant to **Sec. 7405** of the Internal Revenue Code by civil action brought in the name of the United States. In violation of **Sec. 6532** and **Sec 7405** of the Internal Revenue Code the Internal Revenue Service disallowed all deductions of the tax returns for 1979,1980, 1981 and 1982 and sent Petitioner William David Millsaps notices of deficiency.

Petitioner William David Millsaps contacted an attorney who filed Chapter 7 **Bankruptcy, Case Number 86-00487-BKC-6P7.**

The following is stated in the **ORDER, DISCHARGE OF DEBTORS, Bankruptcy Case Number 86-00487-BKC-6P7.**

All creditors who debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above be and they hereby are enjoined from commencing, continuing or employing any action, process or act to collect, recover or offset any such debt as a personal liability of the debtor, **or from property of the debtors**, whether or not discharge of such debt is waived. (emphasis added).

**IN RE WILLIAMS 9.B.R. 228, 234,(1981)**, the following is stated:

A creditor attempting to collect a discharged debt, either from debtors or their property, is in violation of § 524(a)(2). See **In Re Warren, 3 CBC2d 326 (N.D. Ala., 1980)**. The debt no longer exists and thus the lien ceases to exist. As the document underlying the lien (the note) has no legal efficacy, no default could occur to trigger lien enforcement for no payment liability exists in the eyes of the law. This result arises from the addition of the language **or from the property of the debtors** which was not present under § 14 of the Act. The new language renders decisions under § 14 inapplicable to this situation. The result is also counselled by the requirement of reaffirmation under court auspices before a pre-filing lien is enforced against debtors or their property in a post discharge proceeding, regardless of forum. (emphasis added).

And

Discharge as injunction. Chapter 7 discharge operates as injunction against commencement or continuation of action, employment of process, or any other act to collect, recovery, or offset any discharged debt as personal liability of debtor. **Bankr.Code**, 11 U.S.C.A. Section 524(a) & Section 727. **In re Bouchelle, 98 B.R. 81.**

**THEREFORE**, for all of the above the Respondent's "Dead of Real Estate" is void.

The discharge of the debtors, William David Millsaps and Anna Jean Millsaps, entered in the debtors' Chapter 7 bankruptcy case on September 15, 1986, discharged their personal liability for federal income taxes, including interest, for the tax years 1979, 1980 and 1981. The discharge also discharged William David Millsaps' personal liability for penalties assessed for tax year 1982, arising from the filing of personal income tax returns for that year.

In absence of the debt there can be no lien, **THEREFORE** the liens for the tax years 1979, 1980 and 1981 did not survive bankruptcy. See **IN RE WILLIAMS, 9 B.R. 228, 232 (1981)**: the following is stated:

A lien is an incident of and inseparable from the debt which it secures. In absence of the debt there can be no lien. **U.S. v. Phillips, 267 F.2d 374 (2nd Cir. 1959)**. A mortgage is security for a debt, a lien or encumbrance, security for performance of an obligation. **State v. Morgan, 73 Kan. 453 (1906)**. The existence of the obligation to be secured is an essential element to a mortgage. **Conway v. Alexander, 11 U.S. 217 (7 Cranch) (1812)**; **Price v. 1st National Bank, 62 Kan 735 (1901)**.

And

If the underlying debt is extinguished an enforceable lien cannot exist. See **U.S. v. Phillips, Conway v. Alexander, Price v. 1st National Bank**, supra.

William David Millsaps' and Anna Jean Millsaps' homestead was

an exempt asset in the chapter 7 bankruptcy case on September 15, 1986. THEREFORE the discharged taxes for the tax years 1979, 1980 and 1981 could not be taken from the Petitioner's homestead by the Internal Revenue Service.

The Internal Revenue Service unlawfully sold Anna Jean Millsaps undivided fifty percent interest in the homestead for an alleged debt of William David Millsaps for the year 1982.

The Internal Revenue Service was precluded from asserting title to property allegedly in the estate of the debtor William David Millsaps when that property never formed part of his estate. The undivided one-half interest of Anna Jean Millsaps was, therefore, immune from seizure and sale by the Internal Revenue Service. See CARTER V. UNITED STATES EX REL. D.I.R., 399 F.2d 340, 343, United states Court of Appeals, Fifth Circuit (Aug. 13, 1968), wherein the following is stated at 343:

A fortiori, as an undivided one-half interest in the property was owned by the appellant, separate and apart from her husband, the defendant cannot now attempt to seize and sell this interest on the theory that it comprises part of the husband's separate estate. The defendant is precluded from asserting title to property allegedly in the estate of the debtor husband when that property never formed part of his estate. **The undivided one-half interest of the appellant is, therefore, immune from seizure and sale by the defendant.** (Emphasis added)

The judgment is reversed in part and the case is remanded for further proceedings not inconsistent with this opinion.

The United States Supreme Court stated the following in FINK v. O'NEIL, SUPREME COURT REPORTER, 325, 333,(196 U.S. 272):  
"But the bankrupt act furnished clear evidence of the

policy of congress in reference to exemptions of property from sale for the payment of debts, by excepting from its operation personal property, necessary to the use of the family, to the amount of \$500, and such other property as was exempt from execution by the laws of the United States and of the state of the debtor's domicile.(emphasis added).

On March 18,1988 the Respondent recorded a void Deed of Real Estate in the public records of Orange County, Florida at OR3965 PG4869. This was in violation of LIMITATIONS OF ACTION, **Florida Statute Chapter 95, Section 95.011 and Section 95.231** as Petitioner's Deed had been of record for more than 20 years at this time. 15 years 11 months later the Respondent filed an Amended Complaint,(3 counts), in violation of LIMITATIONS OF ACTION, **Florida Statute Chapter 95, Section 95.011, Section 95.12, Section 95.231, and Section 82.04.** The Respondent paid no property taxes. Respondent filed "Motion For Final Summary Judgment" on September 15, 2004. Petitioner filed "Defendant's Opposition To Plaintiff's Motion For Final Summary Judgment" and "Defendant's Cross-Motion For Partial Summary Judgment" on December 21, 2004. The Respondent did not file a response to Petitioner's "Cross-Motion For Summary Judgment".

The trial court filed its Order, "PARTIAL ORDER ON PLAINTIFF'S MOTION FOR FINAL SUMMARY JUDGMENT, DEFENDANT'S MOTION TO DISMISS, AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT", (THE ORDER), on March 2, 2005. THE ORDER was a

Partial Final Order which is reviewable pursuant to **Fla.R.App.P. 9.110(k)**. Petitioner filed notice of appeal on March 29, 2005.

The lower tribunal dismissed Petitioner's appeal on May 12, 2005 stating that:

"Appellant's May 4, 2005, response to the Show Cause Order of this Court having been considered, it is

ORDERED, sua sponte, that the above-styled appeal is dismissed for lack of jurisdiction."

Petitioner filed a motion for rehearing on May 26, 2005. The motion for rehearing was denied by the lower tribunal on June 22, 2005. The lower tribunal stated the following in that Order:

"BY ORDER OF THE COURT:  
ORDERED that Appellant's MOTIONS FOR REHEARING, filed May 20, 2005, and June 3, 2005 are denied."

Petitioner file "Notice To Invoke Discretionary Jurisdiction" on July 19, 2005.

#### **SUMMARY OF ARGUMENT**

The lower tribunal's opinion expressly and directly conflicts with decisions of other appellant courts that hold that partial non-final orders granting partial summary judgment are reviewable.

Identification by the lower court of a direct conflict with another Florida appellant decision is not necessary to create an

"express" conflict. Discussion by the lower court of the legal principles upon which it bases its opinion supplies a sufficient basis for a petition for conflict review. **Ford Motor Company v. Kikis, 401 So.2d 1341,1342 (Fla.1981).**

#### **ARGUMENT**

The lower tribunal's decision that it does not have jurisdiction to review Petitioner's appeal expressly and directly conflicts with decisions of other appellant courts that hold that partial non-final orders granting partial summary judgment are reviewable.

In **LIBERTY MUTUAL INS. v. LONE STAR INDUS., 661 so.2d 1218, (Fla.App. 3 Dist. 1995)**, the following is stated at 1220:

The trial court granted Lone Star's motion for partial summary judgment finding that Liberty Mutual had a duty to defend Lone Star. Liberty Mutual appeals from this non-final order.

AND at 1221:

Based on the foregoing reasons, we reverse the trial court's non-final order granting partial summary judgment and finding that Liberty Mutual has a duty to defend Lone Star.

In **MIAMI-DADE COUNTY v. Aviation Office, 826 So.2d 1009 (Fla.App. 3 Dist. 2001)**. The following is stated by JORGENSON,

Judge, dissenting at 1011:

"Because the order under review is an appealable nonfinal order that determines the insurers' duty to defend, I respectfully dissent from the order of dismissal.....This case should proceed on the merits, and not be dismissed for lack of jurisdiction."

The Florida Rules of Appellate Procedure provide for review of final orders and a certain class of nonfinal orders. Fla. R. App. P. 9.110, 9.130..... The class of final appealable orders include partial final judgments of which there are two types. Orders that dispose of a separate and distinct portion of the litigation are considered sufficiently final so as to be subject to immediate appeal, as are orders that finally dispose of an entire case as to any party to the litigation. Fla. R. App. P. 9.110(k). SHEPARDSON v. SHEPARDSON, 820 So.2d 360(Fla App. First Dist).(2002).

The trial court admitted in its order that issues raised by the Petitioner had merit, therefore the trial court can not issue partial summary judgment for the Respondent.

In Holl v. Talcott, 191 So. 2d 40 (Fla. 1966), the Florida Supreme Court held that the party moving for a summary judgment has the burden of conclusively showing the nonexistence of a genuine issue of material fact, and the proof must overcome all reasonable inferences which may be drawn in favor of the non-moving party. See also Brooks v. Herndon Ambulance Service, Inc., 475 So. 2d 1319 (Fla. 5th DCA 1985).

Florida Rule of Civil Procedure 1.510 states that a party is entitled to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." And this is an

appealable issue.

The trial court's Order dismissed Petitioner's "Defendant's Motion to Dismiss" and the dismissal is final. This was a motion to dismiss the action for failure of the plaintiff to join an indispensable/necessary party. And this is an appealable issue.

Petitioner raised 22 genuine issues of material fact in his "motion in opposition to plaintiff's motion for final summary judgment". One of those 22 genuine issues of material fact was that Petitioner's homestead is exempt from forced sale as the sale violated Petitioner's rights under **ARTICLE X, SECTION 4(a) of the Florida Constitution**. The trial court in its Order disregarded 21 of the genuine issues of material fact including Petitioner's rights under **ARTICLE X, SECTION 4(a) of the Florida Constitution** and the Florida Supreme Court's decisions in support thereof and **GRANTED IN PART** Plaintiff's Motion for Summary Judgment. And this is an appealable issue as well as the remaining genuine issues of material fact.

In its Order, the trial court raises the issue of Collateral estoppel which does not apply to Petitioner. This issue was not raised by Respondent in her complaint and has not been raised by Respondent in any of her motions. The trial court cannot raise an issue that was not raised by the parties

to the action, but the trial court has done that and that is an appealable issue.

**CONCLUSION**

The Petitioner respectfully requests that this Honorable Court accept jurisdiction based on express and direct conflict.

Respectfully submitted this        day of December 2005.

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William David Millsaps  
In propria persona

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was this  
\_\_\_\_\_day of December 2005, furnished by U.S. Mail to Jeffrey A.  
Icardi, ICARDI & ICARDI, P.A., 2180 West State Road 434, Suite  
6190 Longwood, Fl 32779-5060, P.O. Box 1656, Maitland, Florida  
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**CERTIFICATE OF COMPLIANCE**

I CERTIFY that this computer-generated brief is submitted  
in Courier New-12 point font.

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William David Millsaps

**APPENDIX A-1-1**

Order of the Fifth District Court of Appeal

Dated May 12, 2005

Dismissing Petitioner's Appeal

**APPENDIX A-1-2**

Order of Fifth District Court of Appeal  
Dated June 22, 2005  
Denying Petitioner's Motion For Rehearing