

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ROBERT ZIVITZ,

Appellant/Petitioner,

Supreme Court Case No. SC09-1134

v.

JANET ZIVITZ and GARY ZIVITZ,
and SYPRETT, MESHAD, RESNICK,
LIEB, DUMBAUGH, JONES, KROTEC
& WESTHEIMER, P.A.,

Lower Tribunal No.'s 2D08-2705
2006-CA-2963NC

Appellees/Respondents.

PETITIONER'S AMENDED BRIEF ON JURISDICTION

ON APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

TABLE OF CITATIONS	iii
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE AND OF THE FACTS	1
A. Nature of the Case	1
B. The Course of the Proceedings	2
C. Disposition in the Lower Tribunals (trial and appellate courts)	5
SUMMARY OF ARGUMENT ON JURISDICTION	6
ARGUMENT ON JURISDICTION	6
A. Rule 9.030(a)(2)(A)(ii)	7
B. Rule 9.030(a)(2)(A)(iv)	9
CONCLUSION	10
CERTIFICATE OF SERVICE	11
CERTIFICATE OF COMPLIANCE	11

TABLE OF CITATIONS

Page

Cases:

<i>Allen v. State</i> , 873 So.2d 576, 578 (Fla. 2 nd DCA 2004)	7
<i>Gigliotti Contracting N., Inc. v. Traffic Control Pods. of N. Fla., Inc.</i> , 788 So. 2d 1013, 1016 (Fla. 2 nd DCA 2001)	8
<i>Pleasant Valley Farms & Morey Condensory Co. v. Carl</i> , 106 So. 427 (Fla. 1925);	7-8
<i>Robinson v. Robinson</i> , 18 So.2d, 29 Fla. 1944	7
<i>The Cadle Co. v. G&G Associates</i> , 757 So.2d 1278 (Fla. 4 th DCA 2000)	1, 6, 9, 10

Constitution:

Article X, Section 4(a), Florida Constitution	7
Rule 9.030(a)(2)(A)(ii)	7
Rule 9.030(a)(2)(A)(iv)	9

Statutes:

§77.041, Florida Statutes (2008)	5, 8
§77.07(2), Florida Statutes (2008)	8

ISSUES PRESENTED FOR JURISDICTIONAL REVIEW

Two issues are presented for jurisdictional review. The first is whether the Second District's holding, premised on the notion that "garnishment proceedings are statutory in nature and require strict adherence to the provisions of the statute," impermissibly undermined the Petitioner's Constitutional homestead exemption from forced sale. The second issue is whether the Second District reversibly erred in strictly construing the garnishment statute concerning the homestead exemption *in favor of the creditor and against the debtor*. This construction of the garnishment statute by the Second District is in direct conflict with the established standard of construction attendant with garnishment proceedings concerning exemptions, as described by the court in *The Cadle Company v. G&G Associates*, 757 So.2d 1278 (Fla. 4th DCA 2000):

"Section 222.12 is required to be strictly construed *in favor* of the debtor because the exemption is for the debtor's benefit." (Emphasis added).

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case.

Respondents hold a judgment for damages against Petitioner, Robert Zivitz ("Mr. Zivitz"). Respondents garnished Sypret, Meshad, Resnick, Lieb, Dumbaugh, Jones, Krotec and Westheimer, P.A. ("Sypret Meshad"). Sypret Meshad held proceeds from sale of the marital homestead condominium unit owned by Mr. Zivitz

and his wife, Nancy Zivitz, as husband and wife. After Respondents filed a Motion for Entry of Final Garnishment Judgment alleging that Mr. Zivitz had not filed or served any pleadings in the garnishment matter, and served undersigned counsel (not as Mr. Zivitz's counsel, but because undersigned counsel had his own separate interest in the fund), undersigned counsel contacted Mr. Zivitz, suggested that he needed counsel and filed Mr. Zivitz's Response to Motion for Entry of Final Garnishment Judgment and to Dissolve the Garnishment, attaching the Affidavit of Mr. Zivitz, the Sarasota Tax Collector's records and the Affidavit of Mr. Zivitz's physician. Mr. Zivitz's pleading was filed on March 12, 2008 (only one day late) and well before the final garnishment hearing on May 16, 2008, followed by his filing for the exemption on the Clerk's Notice form. The court entered an Amended Final Garnishment Judgment ("Judgment") on May 20, 2008 for Respondents *because Mr. Zivitz did not timely file the Clerk's form to claim his Florida Constitutional Homestead Exemption*. The court denied Mr. Zivitz's Motions for Rehearing and for Relief from Judgment. Appeal was filed with the Second District.

B. The Course of the Proceedings.

Respondents Writ of Garnishment was served on Syprett Meshad on January 15, 2008. On January 17, 2008, Respondents served Mr. Zivitz with the Clerk's Notice to Defendant of Right Against Garnishment of Wages, Money and Other Property ("Clerk's Notice"). The Clerk's Notice stated that Defendant *must* complete

and file a form for claim of exemption within 20 days or he *may* lose important rights.

The twenty-fifth day after service of the Clerk's Notice by mail was February 11, 2008.

On February 5, 2008, Syprett Meshad filed its Answer. Their Answer raised the issue that the funds Syprett Meshad held were as a result of the sale of the marital, homestead condominium unit held by Mr. Zivitz and his wife, Nancy Zivitz, as husband and wife. Respondents served garnishee's Answer on Mr. Zivitz on February 15, 2008, stating that he must move to dissolve the Writ within 20 days. The 25th day to respond after service by mail would have been March 11, 2008. On March 7, 2008, Respondents filed a Motion for Entry of Final Garnishment Judgment alleging that Mr. Zivitz had not filed any pleadings.

The Garnishee's Answer disclosed that undersigned counsel, James E. Aker, had an interest in the garnished funds by virtue of his representation of Mr. Zivitz and Nancy Zivitz in *Trout v. Zivitz*, Case No. 2003-CA-00102NC in the Circuit Court for Sarasota County, Florida (the "*Trout* action") and by virtue of an Order entered *In re: The Marriage of Robert C. Zivitz, husband, and Nancy S. Zivitz, wife*, Case No. 2006-TR-4164-NC. The Order provided that Aker would be paid from the proceeds of sale of the marital domicile for his representation of Mr. Zivitz and his wife, Nancy Zivitz, in the *Trout* action. Undersigned counsel, having received a copy of the Motion for Entry of Final Garnishment Judgment because he had an interest in the garnished

funds and noticing the allegation that Mr. Zivitz had not filed any response in the garnishment proceedings, contacted Mr. Zivitz and suggested that he should have counsel regarding the homestead issue. On March 12, 2008, undersigned counsel filed Mr. Zivitz and Mr. Zivitz's Response to Motion for Entry of Final Garnishment Judgment which also contained his Motion to Dissolve the Garnishment. Mr. Zivitz's Response was filed on March 12, *one* day after his response was due on March 11, 2008. Respondents moved to strike Mr. Zivitz's Response. On March 24, 2008, Mr. Zivitz filed his Claim for Exemption on the Clerk's form.

On May 9, 2008, Mr. Zivitz filed his Memorandum Opposing Respondents' Motions to Strike, attaching the Affidavit of Robert Zivitz, certified copies of the tax collector's records showing that the condominium unit owned by Mr. and Mrs. Zivitz had homestead status from 1999 through the time it was sold in 2007 and the Affidavit of Barry McLean, M.D., Ph.D., Mr. Zivitz's physician, testifying that Mr. Zivitz was severely depressed and that it is not unusual for patients, such as Mr. Zivitz who are severely depressed, to pay insufficient attention to legal documents that require responses by a deadline date and to fail to make sound, prudent or timely legal or business decisions when confronted with deadline dates. Mr. Zivitz testified in his Affidavit, not only that the proceeds held by Syprett Meshad resulted from the sale of his homestead, but also that he thought from his conversation with the Tax Collector's office that any proceeds from the sale of the homestead residence were exempt from

execution to allow him to reinvest his proceeds in a new homestead, that he intended to do so and that he didn't think that he needed counsel to protect this right. He testified that he had prostate cancer surgery in 2004, that he had lost his life savings in 2005-2006, that he had open heart bypass surgery in 2006, and that he suffered from severe depression. The record itself further disclosed that his marriage to Nancy Zivitz was dissolved.

C. Disposition in the Lower Tribunals (trial and appellate courts).

On May 16, 2008, the court entered a Judgment for Respondents which struck Mr. Zivitz's pleadings solely as a result of his late filing because the court felt restricted by the "must file" language of §77.041. The Amended Judgment on May 20, 2008 corrected a clerical error in the amount held by the Garnishee and the amount due Respondents.

Mr. Zivitz's motions for rehearing, for relief from judgment and for stay were denied without oral argument, with the court's handwritten notes concluding that Mr. Zivitz was "deliberately indifferent." Petitioner's Notice of Appeal followed. The Second District's opinion strictly construed the garnishment statute in a proceeding where the constitutional homestead exemption was at issue *against* Mr. Zivitz as judgment debtor, which is in direct conflict with established law providing that in garnishment proceedings, exemptions are to be strictly construed *in favor* of a debtor. Compounding its error, the result of the Second District's erroneous statutory

construction was the impingement upon the debtor's protected homestead exemption rights. The Second District's use of a rule of strict construction *against* a debtor placed its decision in inherent conflict with *The Cadle Co. v. G&G Associates*, 757 So.2d 1278 (Fla. 4th DCA 2000), and, furthermore, the holding expressly conflicts with established Constitutional homestead protection.

SUMMARY OF ARGUMENT ON JURISDICTION

The Second District applied a rule of strict construction of the garnishment statute *against* Mr. Zivitz, the debtor, despite the fact that established Florida law calls for the opposite; to wit, that in garnishment proceedings, exemptions are to be strictly construed *in favor* of the debtor. In garnishment proceedings generally, the exemptions, and thus the garnishment itself, is strictly construed *in favor of the debtor*.

The Second District turned these principles on their heads, finding that the statute is strictly construed *against* the debtor. This, the Second District found, despite the use of the permissive "may" language in the statute concerning the loss of exemptions, and the language of the statute which placed Mr. Zivitz only in a default "posture." The net effect of the Second District's backward application of the rule of strict construction, was to elevate the judgment creditors' claim over Mr. Zivitz's homestead exemption rights, which homestead rights are to be construed in his favor.

ARGUMENT ON JURISDICTION

A. Rule 9.030(a)(2)(A)(ii).

The Second District's opinion erroneously construed the garnishment statute in a way that undermined the Petitioner's Constitutional homestead exemption from forced sale. *See*, Article X, 4(a), Florida Constitution. The effect of the Second District's opinion was to hold that Petitioner's Constitutional homestead exemption was eradicated by its misapplication of a garnishment rule of construction. The homestead exemption and the garnishment proceeding, where it impinges on exemption rights, are to be construed *in favor of the debtor*.

In its opinion, the Second District acknowledged that there were no reported cases in Florida addressing the precise issue presented in the appeal to that court, i.e., "What effect does a belated homestead exemption claim have in garnishment proceedings?" The Second District reviewed the statutory garnishment language and the trial court's interpretation of the statutory garnishment language *de novo*, which is the proper standard of review for questions of law, including matters of statutory and Constitutional construction. This is the standard of review before this Court. *Allen v. State*, 873 So.2d 576, 578 (Fla. 2nd DCA 2004).

The underlying premise for the Second District's opinion is a rule of statutory construction applicable to garnishment proceedings: "Garnishment proceedings are statutory in nature and require strict adherence to the provisions of the statute," *citing Robinson v. Robinson*, 18 So.2d 29 (Fla. 1944); *Pleasant Valley Farms & Morey Condensory Co. v. Carl*, 106 So. 427 (Fla. 1925); *Gigliotti Contracting N., Inc. v.*

Traffic Control Pods. of N. Fla., Inc., 788 So. 2d 1013, 1016 (Fla. 2nd DCA 2001)

However, in all three of the foregoing decisions, the statutes, although strictly construed, were construed *against* the creditor using the statute to garnish funds. The Second District read these three cases wrongly as authority to construe the garnishment statute *against* the debtor. Especially so where the debtor's homestead exemption was at issue. The Second District seized on the use of the word "must" in §77.041, while ignoring the use of the word "may" in the same statute. Section 77.041 provides that a garnishment defendant "must" complete and file a claim of exemption and request for hearing within 20 days after receiving a notice of garnishment, or the defendant "may" lose important rights. Section 77.07(2) indicates that a failure on the part of a defendant to timely raise exemptions puts the defendant only in a "default posture."

The Second District set forth the general proposition that garnishment statutes are to be "strictly construed," but applied this standard in favor of the creditor, relying exclusively on the "must" language, and ignoring completely the "may" language and the indication in §77.07(2) and that the worst that can happen if a deadline is missed by a debtor is a "default posture." As a result of this erroneous analysis and conclusion, the trial court and the Second District gave no credence and insufficient weight to Mr. Zivitz's address of his "default posture" (the trial judge gave no analysis of the issue). In sum, the appellate court strictly construed the statute *against* Mr.

Zivitz, notwithstanding that exemptions are to be construed in the debtor's favor. Authority for the correct standard of construction as applied to a debtor's exemption is *The Cadle Co. v. G&G Associates, supra*, which held in a garnishment proceeding, "Section 222.12 is required to be strictly construed *in favor* of the debtor because the exemption is *for the debtor's benefit*." (Emphasis added). Contrary to the correct rule of construction, the Second District construed the garnishment statute strictly against Mr. Zivitz, which resulted in construing Mr. Zivitz's homestead rights strictly against him.

B. Rule 9.030(a)(2)(A)(iv).

On the same case authority as set forth above, the Second District's opinion regarding the rule of construction for garnishment proceedings affecting an exemption directly conflicts with the correct standard of construction in garnishment proceedings where an exemption is in issue as set forth in *The Cadle Co. v. G&G Associates* - Exemption statutes are "required to be strictly construed *in favor* of the debtor because the exemption involved is for the debtor's benefit." (Emphasis added). The Second District's opinion is not simply a function of misconstruing garnishment statutes in favor of a creditor generally: the Second District's error was compounded by the fact that the the court misapplied the standard in the context of a Constitutionally protected exemption. Once again drawing from *The Cadle Co. v. G&G Associates*, exemption rights are to be "construed in favor of the holder of the exemption."

In sum, this Court has discretionary jurisdiction for two reasons: (1) because the Second District strictly construed the garnishment statutes against Mr. Zivitz where his homestead rights were at issue, despite authority directly standing for the proposition that strict construction is applied to those seeking the assistance of the garnishment statute; and (2) the Second District's opinion directly impacted Mr. Zivitz's state Constitutional homestead exemption rights, which rights are, in and of themselves, to be construed in *his* favor. The Second District's analysis and holding in this regard expressly and directly conflicts with *The Cadle Co. v. G&G Associates, supra*.

CONCLUSION

Petitioner requests that this Court exercise its discretionary jurisdiction under Rule 9.030(a)(2)(ii) and (iv), accept jurisdiction and require briefs on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and attached Appendix have been furnished by U.S. Mail to F. Scott Westheimer, Esq., 1900 Ringling Boulevard, Sarasota, Florida 34236 and Darren R. Inverso, Esq., 1819 Main Street, Suite 610, Sarasota, Florida 34236, on this 10th day of July 2009.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Florida Rule of Appellate Procedure 9.210(a)(2) because this brief has been prepared in a proportionally spaced type face using Times New Roman 14-point font.

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