

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ROBERT ZIVITZ,

Appellant/Petitioner,

v.

JANET ZIVITZ and GARY ZIVITZ,

Appellees/Respondents.

Supreme Court Case No.

SC09-1134

2d DCA Case No.: 2D08-2705

RESPONDENTS' BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Appellant, Robert Zivitz, will be referred to as “Petitioner.” Appellees, Janice Zivitz (erroneously identified as “Janet” Zivitz in the caption) and Gary Zivitz will be collectively referred to as “Respondents.”

STATEMENT OF THE CASE AND OF THE FACTS

For purposes of this brief only, respondents rely upon those facts contained within the Second District’s decision in *Zivitz v. Zivitz*, ____ So. 3d ____, 2009 WL 1424067, 34 Fla. L. Weekly D1024 (Fla. 2d DCA May 22, 2009). Petitioner’s extensive argument contained in his “Issues Presented for Review” and “Statement of the Case and Facts” is improper and should be disregarded.

The facts are clearly and succinctly set forth in the Second District’s written opinion. The Respondents obtained a judgment against the Petitioner. It was not paid in nearly two years; Respondents therefore initiated a garnishment proceeding. The garnishee’s answer revealed that it was holding an amount in excess of the amount necessary in order to satisfy the judgment. The Respondents timely provided Petitioner with notice of the garnishment and the opportunity to assert that the funds were exempt.

The Petitioner failed to claim an exemption or otherwise respond to the action within the time period established by § 77.041, Fla. Stat. and belatedly sought to assert that the funds were protected by the homestead exemption. The

trial court ignored the untimely assertions as required by Chapter 77 of the Florida Statutes and entered judgment for Respondents. When Petitioner moved for rehearing, the trial court properly rejected the arguments. The Second District affirmed.

SUMMARY OF THE ARGUMENT

The Florida Supreme Court does not have jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv) because the Second District's opinion does not reach the statutory issue Petitioner seeks to raise when he argues that the decision expressly and directly conflict with *The Cadle Company v. G & G Associates, Inc.*, 757 So. 2d 1278 (Fla. 4th DCA 2000), nor does this Court have jurisdiction pursuant to Rule 9.030(a)(2)(A)(ii) because the Second District did not construe the state constitution when it held that Petitioner failed to meet the requirements of Rule 1.540(b) of the Florida Rules of Civil Procedure.

ARGUMENT

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

The Second District's opinion does not reach the statutory issue Petitioner seeks to raise when he argues that the decision expressly and directly conflict with *The Cadle Company v. G & G Associates, Inc.*, 757 So. 2d at 1278. Therefore, this Court lacks jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv).

Because Chapters 77 and 222 are interrelated, they are read *in pari materia* and courts rely upon the more specific statute to control the more general one. *The Cadle Company v. Pegasus Ranch, Inc.*, 920 So. 2d 1276, 1277-78 (Fla. 4th DCA 2006). Petitioner argues that the Second District must have read Chapter 222 against him. However, the lower court could not have done so because it decided the matter without reaching the issues Petitioner seeks to raise pursuant to Chapter 222.

At all times during the instant matter, Chapter 77 was relied upon by the trial court and Second District because it was the more specific statute. In finding that § 77.041, Fla. Stat. was the controlling statute, the lower court found it unnecessary to reach any issues regarding Chapter 222 or whether it should be interpreted in favor of the debtor. Therefore, the Second District's decision cannot conflict with the Fourth District in *The Cadle Company v. G & G Associates, Inc.*, 757 So. 2d at 1278.

In order for the Florida Supreme Court to have jurisdiction, the express and direct conflict must exist within the four corners of the majority opinion. *See, e.g., Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). In the instant case, the alleged conflict does not appear within the four corners of the opinion and cannot be implied. Therefore, this Court does not have jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv).

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

The Florida Supreme Court does not have jurisdiction under Rule 9.030(a)(2)(A)(ii). There is no mention of the state constitution or federal constitution in the Second District's opinion because neither the trial court nor appellate court reached the constitutional issue Petitioner argues.

After the Second District traced the language of § 77.041, Fla. Stat. and found that it clearly contains the absolute requirement that an individual defendant assert any exemption he may have to garnishment, including the homestead exemption, within 25 days of judgment creditor's mailing the statutory notice, it only addressed two other issues: (1) Petitioner's argument that the garnishment statute's requirements should be disregarded simply because this case deals with a potential homestead issue; and (2) Petitioner's argument that he should be allowed to belatedly assert the homestead exemption if the requirements of Rule 1.540(b) were met.

In addressing the first argument, the Second District recognized that the homestead protection can be abandoned or alienated in a manner provided by law, then stated that it interpreted § 77.041, Fla. Stat. to provide that Petitioner had abandoned any homestead protection that may exist when he failed to raise the homestead exemption in a timely manner. In addressing the second argument, the Second District found the Petitioner failed to establish excusable neglect in failing

to file his claim of exemption within 25 days of Respondents' mailing the Notice to Individual Defendant. Having found that the requirements of Rule 1.540(b) were not met, the Second District found it unnecessary to address Petitioner's argument that he could have belatedly asserted the homestead exemption by meeting its requirements.

Reaching these conclusions certainly did not require express construction of either the Florida or Federal Constitutions. Accordingly, the Florida Supreme Court does not have Rule 9.030(a)(2)(A)(ii) jurisdiction.

CONCLUSION

This Court should conclude that neither express and direct conflict nor express construction of a provision of the state or federal constitution exist and, accordingly, it should deny the petition for review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by First Class U.S. Mail to: James E. Aker, Esq., Icard, Merrill, Cullis, Timm, Furen & Ginsberg, P.A., 2033 Main Street, Suite 600, Sarasota, FL 34237 and Scott Westheimer, Esq., 1900 Ringling Blvd., Sarasota, FL 34236 on this ____ day of July, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief satisfies the requirements of Rule 9.100(l) and 9.210(a)(2), Florida Rules of Appellate Procedure.

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