

IN THE SUPREME COURT OF FLORIDA

CASE NO: 72,316

HOWARD M. ZEIDWIG, ESQUIRE,

and

HOWARD M. ZEIDWIG, P.A.

Petitioners

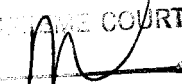
v.

JOSEPH WARD

Respondent

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PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. WHETHER THE MUTUALITY OF PARTIES REQUIREMENT SHOULD BE ABANDONED WHEN THE DOCTRINE OF COLLATERAL ESTOPPEL IS USED IN A DEFENSIVE CONTEXT?

2. WHETHER THE PLAINTIFF IS COLLATERALLY ESTOPPED FROM LITIGATING ISSUES DETERMINED IN A PRIOR HABEAS CORPUS PROCEEDING?

3. WHETHER THE DEFENDANTS ARE IMMUNE FROM LIABILITY FOR TACTICAL DECISIONS UNDER THE "ERROR-IN-JUDGMENT" RULE?

4. WHETHER THE PLAINTIFF'S INABILITY TO PROVE HIS CASE WARRANTED THE ENTRY OF FINAL SUMMARY JUDGMENT?

STATEMENT OF THE CASE & FACTS

The "identity of parties" prerequisite to the application of collateral estoppel provides the premier legal issue in this appeal. The "defensive use" of collateral estoppel, the immunity afforded lawyers under the error-in-judgment rule, and the rules of evidence regarding hearsay, provide the framework to address the issue. The plaintiff/respondent, Joseph Ward filed a legal malpractice action against the defendants/petitioners, Howard M. Zeidwig, Esq. and his P.A. The trial court granted a summary judgment in favor of the defendants on three grounds: (1) the plaintiff's claim was barred by the doctrine of collateral estoppel; (2) the defendants were immune from liability under the "error-in-judgment" rule; and (3) the plaintiff was unable to meet the burden of proof to sustain his claim.

The Fourth District Court of Appeal reversed the summary judgment. Although the Fourth District appeared to agree with the defendants' position regarding the use of collateral estoppel in this context, it felt compelled to reverse under this Court's decision in Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So.2d 843 (Fla. 1984). The Fourth District then certified the following question to be of great public importance:

Whether identity of parties or their privies continues to be a prerequisite in Florida to application of the doctrine of collateral estoppel?

See Ward v. Zeidwig, 521 So.2d 215, 219 (Fla. 4th DCA 1988).

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From this decision, the defendants filed their petition to invoke the discretionary jurisdiction of this Court.

The professional negligence action emanated from the defendant, Howard M. Zeidwig's representation of the plaintiff, Joseph Ward, in a drug-related criminal matter in the United States District Court for the Southern District of Alabama. Ward had claimed in his defense that he was working "undercover". A jury twice convicted him. (R. 1-8). The first conviction was reversed on a severance issue and remanded for a new trial. (R. 4). He was convicted again in the second trial. (R. 4). The Eleventh Circuit Court of Appeals affirmed the second conviction. (R. 5).

The Habeas Corpus Proceeding

Subsequently, Joseph Ward filed a Petition for Writ of Habeas Corpus in the Southern District of Alabama. (R. 3-5). In his petition, Ward claimed a denial of his Sixth Amendment right to effective assistance of counsel. He alleged that his attorney, Howard Zeidwig, had failed to listen to and/or introduce into evidence "a tape recording of a September 21, 1978, conversation with DEA Agent, David Hoyt, which would have allegedly exonerated Ward." (See Order on Petition for Writ of Habeas Corpus; R. 547; App. at 1).

The United States District Court held an evidentiary hearing on Ward's petition. (R. 547). During the proceeding, Ward claimed that he had tape recorded a number of telephone conversations, including a conversation on September 21, 1978,

with DEA Agent Hoyt. (R. 533). Ward testified that Zeidwig had advised him the tapes were illegally obtained and could not be admitted in court. (R. 533-54). Ward further claimed that Zeidwig had told him the illegal tapes could result in multiple five-year prosecutions and that his bond would be revoked for possession of the tapes. (R. 533). He claimed that Zeidwig told him to destroy the tapes. (R. 554).

Three witnesses submitted affidavits in support of Ward's petition. (R. 155-69). Jerry Pickett, who had testified at Ward's criminal trials, attested that he had been present when Ward called DEA Agent Hoyt and that he had listened to Ward's tape of the conversation. (R. 168-69). In the conversation, Ward had mentioned the plane's call numbers and the names Metzger, Travis, Paul, Meacham, Gilroy, and Van Veenendahl. (R. 168-69).

A second witness, Gene Dodge, who had also testified at the criminal trials, stated that he had listened to the tape recording sometime in late September, 1978. (R. 165-67). He recalled that Ward had mentioned a marijuana deal, going to Columbia, a DC-3 aircraft and call numbers, and that the plane would land in Georgia. (R. 165-67). He also recalled the mentioning of certain names.

The third witness, Donald Schultz, stated that he had heard the tape recording in the latter part of September, 1978. (R. 157-64). Schultz only recalled the name Van Veenendahl, a

Texas airplane and its call numbers, something about Georgia, and a father and son being involved. (R. 157-64).

During the proceeding, Zeidwig testified by deposition. He knew about the alleged September 21, 1978, tape, but considered it unnecessary to the defense of the case. (R. 554). Zeidwig was told there were transcripts of conversations between Ward and Hoyt, which DEA Agent Hoyt had recorded. (R. 554). Zeidwig further testified that during the course of the trial, Ward requested Zeidwig to introduce the alleged tape of September 21, 1978, but Zeidwig decided against it. (R. 554).

In Zeidwig's opinion, admitting the tape would have hurt Ward's case. (R. 554). First, Ward's taping of the conversation with DEA Agent Hoyt would appear foolish. (R. 554). Second, it presented a problem in overcoming Ward's failure to report his activities from late August to October 10, 1978. (R. 554). And, Pickett and Ward could testify to the same information that the tape allegedly contained. (R. 554).

The District Court discredited Ward's testimony and made the following findings of fact:

- (1) Ward had not informed the DEA agent of the details of the smuggling operation;
- (2) The tape recording would have substantiated DEA Agent Hoyt's version of the conversation, not Ward's;
- (3) Any conversation containing details of the smuggling operation took place after September 21, 1978;
- (4) At Ward's second trial, Pickett could not remember whether he had been present on September 21, 1978, or October, 1978;

- (5) Dodge had no personal knowledge as to the date of the alleged conversation;
- (6) Schultz had no personal knowledge of the specific date of the conversation;
- (7) Any taped conversation heard by Pickett, Dodge, or Schultz would have occurred after September 21, 1978;
- (8) Ward had not acted under the authority of the Fort Lauderdale Police Department or the DEA;
- (9) Zeidwig advised Ward that he may have violated Florida Statute §934;
- (10) Zeidwig never advised Ward the tape was inadmissible in court;
- (11) Zeidwig never advised Ward that it was a crime to play the tapes;
- (12) Zeidwig never advised Ward to destroy the tape;
- (13) If Ward had destroyed the tape, it was on his own initiative; and
- (14) Zeidwig made a tactical decision not to use the tape during the second trial.

(R. 555-56; App. at 9-10).

The U.S. District Court specifically found that Zeidwig's performance was not deficient. (R. 557). The court found Zeidwig's decision was a tactical trial decision based on the possible negative consequences of admitting the tape. "It was entirely professionally reasonable for Zeidwig to forego introducing the September 21 tape into evidence because it could have harmed his client," (See Order at Page 12; R. 558; App. at 12).

The U.S. District Court further concluded that the decision not to admit the tape did not prejudice Ward. (R. 557; App. at 12). "It would be incredible for any juror to accept Ward's undercover defense in light of his testimony during cross-examination and his total failure to keep law enforcement agencies abreast of his activities. The record overwhelmingly established Ward's **guilt.**" (R. 559; App. at 13). The court denied Ward's Petition for Writ of Habeas Corpus.

The Negligence Claim

Ward subsequently filed the present civil complaint. (R. 1-8). The complaint alleged that Zeidwig had failed to: adequately investigate the facts, adequately research the applicable law, render competent evidence, properly evaluate and appreciate the evidentiary significance of the tape recording, and allow the plaintiff to make "the important decisions which should have the most profound effect" on the plaintiff's future. (R. 1-8). The defendants denied these allegations and filed a Motion for Summary Judgment, pursuant to Fla. R. Civ. P. 1.510(b). (R. 75-80; 118-19).

The motion set forth the substantial matters of law to be argued. (R. 118-19). First, the issues concerning the tape recording had been fully litigated by Ward in the prior habeas corpus proceeding and he should be collaterally estopped from re-litigating them. Second, Zeidwig's decision concerning the tape recording was an immunized tactical decision. Third, without the

tape, the plaintiff could not establish his case. (The fourth issue was withdrawn at the hearing.)

The trial court conducted a lengthy hearing on the motion. Each side presented memorandum of law and a number of evidentiary exhibits. After reviewing the pleadings, memoranda, and exhibits, the trial court made the following rulings. The court held that Ward should not be permitted to re-litigate the same facts against the attorney, whose representation formed the basis of the habeas corpus proceeding. Second, the court held that the alleged error in the tactical decision not to introduce the tape could not form the basis of liability. Third, the court held that the testimony to be proffered at trial would constitute inadmissible hearsay. Without the testimony, the plaintiff could not sustain his burden of proof. Based upon these rulings, the trial court entered summary judgment in favor of the defendants. (R. 560-62). From this summary judgment, the plaintiff appealed to the Fourth District Court of Appeal.

The Fourth District Court reluctantly reversed and remanded. It found that this Court's opinion in Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So.2d 843 (Fla. 1984) mandated compliance with the prerequisite of mutuality of parties before the doctrine of collateral estoppel could be applied. Ward v. Zeidwig, 521 So.2d 215 (Fla. 4th DCA 1988). The court emphasized, however, that it felt "compelled" to follow Romano despite its "preferences in the matter". Id. at 219. The Fourth District expressed concern over allowing the

plaintiff yet a fourth opportunity to attempt to prove his innocence. The Fourth District certified the question to this Court. It did not address the two additional bases upon which the trial court had entered summary judgment. Petitioner now seeks this Court's review of the Fourth District Court of Appeal's decision.

SUMMARY OF THE ARGUMENT

"**Defensive**" collateral estoppel and the requirement of "mutuality of parties" form the foundation of this appeal. Florida has continued to adhere to the "mutuality of parties" requirement before the doctrine of collateral estoppel may be applied. Courts across the nation have recognized the absence of "satisfactory rationalization" for maintaining this prerequisite. Ward v. Zeidwig, 521 So.2d 215, 219 (Fla. 4th DCA 1988). Florida should join this growing trend and abandon the requirement.

The facts litigated in the habeas corpus proceeding are identical to the facts forming the basis of the plaintiff's complaint. At least three courts have found the legal issues to be equivalent. The plaintiff had a full opportunity to litigate the facts in the habeas corpus proceeding. He should be estopped from re-litigating them in the present case.

At least one Florida decision has addressed the significance of an order on a petition for writ of habeas corpus. An order in a habeas corpus proceeding is "res judicata of all issues of law and facts involved," Freeman v. Rubin, 318 So. 2d 540, 543 (Fla. 3d DCA 1975). Relying on this authority, the trial court properly entered summary judgment in favor of the defendants.

The "**error-in-judgment**" rule provided a secondary basis for entry of final summary judgment. In the habeas corpus proceeding, the United States District Court found that the defendant's decision not to use the alleged tape recording

constituted a "tactical decision." Lawyers are immune from liability for "tactical decisions." Applegate v. Dobrovir, Oakes & Gebhardt, 628 F. Supp. 378 (D.D.C. Dec. 2, 1985), aff'd, 809 F. 2d 1245 (D.C.Cir. 1987), cert. denied, 107 S. Ct. 2181 (1987). Because an attorney cannot guarantee the soundness of his opinion, he cannot be liable for every alleged mistake in judgment he may make in his practice. Applying collateral estoppel and relying on the United States District Court's finding that the decision not to introduce the tape was tactical, the defendant is immune from liability.

Hearsay and its application to the admissibility of testimony to support the plaintiff's case served as the third basis for entry of summary judgment. Because the plaintiff's witnesses would be unable to corroborate the date of making the alleged tape and its contents, the plaintiff would be unable to sustain his burden of proof. A party moving for summary judgment should prevail if he can show "conclusively that the plaintiff is unable to present requisite proof of the negligence charged in the pleadings...." Holl v. Talcott, 191 So. 2d 40, 47-48 (Fla. 1966). The plaintiff would have been unable to present requisite proof of the allegations of negligence. Therefore, summary judgment was properly entered. The Fourth District's opinion should be vacated and the trial court's summary final judgment should be reinstated.

ARGUMENT

I. THE MUTUALITY OF PARTIES REQUIREMENT SHOULD BE ABANDONED WHEN THE DOCTRINE OF COLLATERAL ESTOPPEL IS USED IN A DEFENSIVE CONTEXT.

A. Policy Considerations Support the Abrogation of the Mutuality of Parties Requirement.

In 1971, the United States Supreme Court recognized the judicial economy which resulted from the use of defensive collateral estoppel. Blonder-Tonque Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971). To effectuate the goal of judicial economy, the Court abandoned the mutuality of parties requirement for the defensive use of collateral estoppel. The Court then applied collateral estoppel defensively to prevent a plaintiff from re-litigating issues concerning the validity of a patent, which had previously been litigated in an action where only the plaintiff had been a party.

In rendering its decision, the United States Supreme Court articulated the policy reasons supporting the abrogation of the mutuality of parties requirement when the doctrine of collateral estoppel was applied defensively. The erosion of the mutuality requirement was connected

to the goal of limiting re-litigation of issues where that can be achieved without compromising fairness in particular cases. The courts have often discarded the rule while commenting on crowded dockets and long delays preceding trial. . . . The broader question is whether it is any longer tenable

to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue. . . . In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. . . . Permitting repeated litigation of the same issue as long as the supply of unrelated defendants hold out reflects either the aura 'of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." . . . Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

Id. (citing Kerotest Manufacturing Co. v. C-O-Two Co., 342 U.S. 180, 185 (1952)). Thus, more than fifteen years ago the United States Supreme Court recognized the significant practical solution to over-crowded dockets afforded by the abandonment of a requirement that served no useful purpose.

Subsequently, in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), the Court abandoned the mutuality of parties requirement for the "offensive" use of collateral estoppel. The Court delegated to federal judges the responsibility to make an ad hoc determination of whether the requirement should be enforced in a particular case. The Court extensively analyzed the factors to consider in making such a determination and discussed its application in both the "offensive" and "defensive" context.

The Court found that offensive use did not enhance judicial economy as did defensive use. While defensive use encouraged a plaintiff to join all defendants in one suit, offensive use had the opposite effect.

Since a plaintiff will be able to rely on a previous judgment against a defendant, but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. . . . Thus, offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.

439 U.S. at 326.

The Court also recognized concerns existent in the offensive use of collateral estoppel absent a mutuality of parties. If a defendant was sued for a nominal sum in the first action, he may have little incentive to defend the claim if no future claims were foreseeable. The second action, however, might involve a greater sum that the defendant would have more reason to defend vigorously. If the initial judgment against the defendant could be used offensively, it would result in the entry of a large judgment when the defendant did not take advantage of his opportunity to defend the first action.

Furthermore, a subsequent action might provide the defendant with procedural opportunities unavailable in the first suit. It would be unfair to allow the doctrine to be applied offensively in such situations. Because of the potential

problems that might arise in the offensive use of collateral estoppel, absent a mutuality of parties, the United States Supreme Court held that the federal courts should evaluate the need for complying with the mutuality of parties requirement on an ad hoc basis.

Despite these United States Supreme Court decisions, this Court has been reticent to abrogate the mutuality of parties requirement. See Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843 (Fla. 1984). In Romano, this Court acknowledged that the federal courts had abandoned the requirement of mutuality of parties and that other jurisdictions had also receded from that requirement. See, e.g., Bernhard v. Bank of America National Trust & Savings Association, 19 Cal. 2d 807, 122 P.2d 892 (1942). Yet, this Court declined to abandon the requirement.

This Court appeared to restrict its holding to the limited question before it. "The question presented by the district court, however, further limits our inquiry to the use of a criminal conviction as conclusive proof of the facts underlying the conviction in a civil suit arising from those same **facts**." Id. at 845. The opinion appeared to be limited to offensive use, compounded by an evidentiary concern.

This Court noted that the intended evidentiary use of the conviction in Romano violated established rules of evidence. In the present case, however, admitting the order on the habeas corpus petition is not violative of the Florida Rules of

Evidence. Indeed, it has been previously recognized that such an order is "res judicata of all issues of law and fact ruled upon in the habeas corpus proceeding." Freeman v. Rubin, 318 So.2d 540, 543 (Fla. 3d DCA 1975).

Florida Courts have recognized the distinction between "offensive" and "defensive" use of collateral estoppel. See, Dudley v. Carroll, 467 So.2d 706 (Fla. 5th DCA 1985). Unlike Romano, this case provides this Court with a chance to evaluate the mutuality of parties requirement in a defensive context. This case provides this Court with the perfect opportunity to abandon the archaic requirement and promote judicial economy. The petitioners/defendants respectfully request this Court to abrogate the requirement of mutuality of parties for the defensive use of collateral estoppel.

In fact, it was in a virtually identical context that the Michigan Court of Appeals recently receded from a rigid adherence to the mutuality of parties requirement. Knoblauch v. Kenyon, 163 Mich. App. 712, 415 N.W. 2d 286 (1987). In Knoblauch, the plaintiff brought a legal malpractice action against his former criminal defense attorney. The plaintiff had been convicted and had ultimately lost his motion for new trial based on an ineffective assistance of counsel claim.

The Michigan court reviewed the state's long history of adherence to the mutuality of parties requirement. Only if one of "the well-recognized exceptions to the mutuality rule" applied, could the requirement be ignored. Id. at 290. Just as

the United States Supreme Court had acknowledged in Blonder-Tongue and Parklane Hoisery, the Michigan Court of Appeals found "little satisfaction in strict adherence to the mutuality requirement, where . . . the issue presented has been decided and appealed and the plaintiff has had a full and fair opportunity to litigate the question in his prior case." Id.

The Michigan Supreme Court had previously rejected the offensive use of collateral estoppel absent mutuality of parties. See, Howell v. Vito's Trucking & Excavations Co., 191 N.W. 2d 313 (Mich. 1971). The Michigan Supreme Court had also implicitly rejected the defensive use of collateral estoppel, absent compliance with the prerequisite of mutuality of parties. 415 N.W.2d at 290. Nevertheless, the Knoblauch court found policy considerations in such a case outweighed the prior strict adherence to the mutuality requirement. Because the plaintiff in Knoblauch had received a full and fair opportunity to litigate his claim and had enormous incentive to litigate his cause vigorously, he was estopped from again using the court's sparse resources to re-litigate his claim.

Those same policy considerations mandate the abandonment of the mutuality or parties requirement in this case. The plaintiff had every incentive to litigate his ineffective assistance of counsel claim fully in the habeas corpus proceeding. His incentive -- his freedom -- could not have been greater. He had a full and fair opportunity to present his claim. As the Fourth District Court of Appeal noted in its

opinion, he should be precluded from re-litigating his innocence for a fourth time.

Just as the United States Supreme Court found in Blonder-Tongue, and the Michigan Court of Appeals found in Knoblauch, the mutuality of parties requirement does not serve the ends of justice. See, also, Conley v. Spillers, 301 S.E.2d 216 (W. Va. 1983) (see legion of cases on page 222); Oates v. Safeco Insurance Company of America, 583 S.W.2d 713 (Mo. 1979) and Continental Can Co. v. Hudson Foam Latex Products, Inc., 129 N.J. Super. 426, 324 A.2d 60 (1974). Adherence to the archaic requirement impedes judicial economy. While collateral estoppel is not going to single-handedly solve the "**overcrowded**" dockets that exist in our court system, it can help, if allowed, to accomplish its designated goal without the burden of an unnecessary prerequisite. The petitioners/defendants request this Court to abandon the mutuality of parties requirement when collateral estoppel is used defensively.

B. The Plaintiff Should Be Collaterally Estopped From Litigating Issues Determined In The Prior Habeas Corpus Proceeding.

Absent a mandated compliance with the requirement of mutuality of parties, the plaintiff is bound by the findings and conclusions of the United States District Court for the Southern District of Alabama. The findings and conclusions found in the U.S. District Court's order lead to one conclusion -- the summary

judgment was properly entered in favor of the defendants. The Fourth District Court of Appeal's decision should be vacated and the trial court's summary judgment reinstated.

In the present case, the District Court for the Southern District of Alabama determined that the plaintiff, Ward, did not inform DEA Agent Hoyt of the details of the Alabama smuggling operation. The court found that any tape recording would have confirmed DEA Agent Hoyt's version of the facts and not Ward's. The court found that Jerry Pickett, Gene Dodge, and Donald Schultz had no personal knowledge of the specific date of the conversation allegedly contained on the tape.

While the District Court found that Zeidwig had advised Ward that he may have violated Fla. Stat. §934, it also found that Zeidwig had never advised Ward that the alleged September 21, 1978, tape was inadmissible in court nor that it would have been a crime to play the tape. (R. 555-56). The court further found that Zeidwig had never advised Ward to destroy the tape. Id. The court found that Zeidwig's decision not to introduce the tape was "particularly within the judgment of the attorney." (R. 557). "Zeidwig made a tactical trial decision not to use Ward's September 21, 1978, tape recording because of the possible whiplash effect it may have had upon Ward's defense." Id.

The U.S. District Court found that the verdict was overwhelmingly substantiated by the record. Thus, even if the decision not to use the tape had been in error, it would not have affected the outcome of the trial. "The record overwhelmingly

established Ward's guilt. The court is convinced that Ward's case was not sufficiently prejudiced by any failure to admit the September 21, 1978, tape recording." (R. 557).

Ward had every opportunity to dispute these factual issues in the habeas corpus proceeding. Ward, obviously, was a party to the habeas corpus proceeding. It was to his advantage to convince the District Court that Zeidwig's performance violated his constitutional rights. The specific findings of fact by the District Court should therefore bind Ward.

In McCord v. Bailey, 636 F. 2d 606 (D.D.C. 1980), cert. denied, 451 U.S. 983 (1981), the Circuit Court of Appeals for the District of Columbia addressed an issue identical to the one before this Court. The court affirmed a District Court order, which had granted a defendant's motion for summary judgment in a legal malpractice claim. The plaintiff had previously brought an ineffective assistance of counsel claim in a petition for writ of error coram nobis following his conviction. The District Court found that the doctrine of collateral estoppel prohibited the plaintiff from re-litigating the same issues in the subsequent legal malpractice action.

[T]he circumstances of this case particularly favor invocation of collateral estoppel. Mc Cord had every incentive in his criminal proceeding to argue aggressively for his claim of ineffective assistance of counsel. As noted above, he had a full and fair opportunity to prove his case. Precluding reconsideration of a litigated claim saves valuable judicial time and resources, while re-affirming the certainty and stability of judicial decisions.

Id. at 610. The same reasons mandate a similar result in this case.

The purpose of the mutuality of parties requirement is to prevent a party, who was not represented in a prior proceeding, from being bound by the outcome of that proceeding. In this case, only Ziedwig has that concern. Ward had the opportunity in the habeas corpus proceeding to present his evidence and establish his position. He was unable to do so; he should not now be allowed to re-litigate the same issues before a new trial court. He should be bound by the fact findings and conclusions of law made by the District Court.

In fact, in Freeman v. Rubin, 318 So.2d 540 (Fla. 3rd DCA 1975), the Third District Court appears to have approved the application of collateral estoppel, absent a mutuality of parties. In Freeman, the plaintiff had been convicted on a charge of extortion and sentenced to ten years. Five years after his incarceration, he was released by an order of the District Court, pursuant to a petition for writ of habeas corpus. Shortly after his release, the plaintiff retained Ellis Rubin to file a civil rights suit. The suit was eventually dismissed due to the attorney's failure to comply with a court order.

In a subsequent malpractice action against Rubin, the trial court refused to admit the order from the habeas corpus proceeding. In ruling on the evidentiary significance of the order the Third District stated: "The order is all the more relevant as it was entered pursuant to a habeas corpus proceeding

and, therefore, was res judicata of all issues of law and facts involved **therein.**" *Id.* at 543. Thus, the Third District has, in dicta, recognized the effect to be given findings made in a habeas corpus proceeding, and has implied that those findings are binding in a subsequent malpractice action.

The doctrine of collateral estoppel, absent mutuality of parties, may be applied in one of two ways. Either the ultimate conclusion of the U.S. District Court is conclusively binding as the ultimate conclusion in the present case or the findings of fact are binding. The standard of proof in a habeas corpus proceeding differs slightly from the standard in a legal malpractice action. Certainly, the theory is different as are the elements of proof. However, at least three courts have found the distinction to be unimportant. *McCord v. Bailey*, 636 F. 2d 606 (D.D.C. Cir. 1980); *cert. denied*, 451 U.S. 983 (1981). *Hunt v. Tomlinson*, 799 F. 2d 712 (11th Cir. 1986) (the standard of proof in a legal malpractice suit "is similar to the test applied in federal criminal habeas corpus cases.") *Knoblauch v. Kenyon*, 163 Mich. App. 712, 415 N.W.2d 286 (1987).

In *McCord*, the court stated:

the legal standards for ineffective assistance of counsel . . . and for legal malpractice . . . are equivalent . . . [T]his court defined ineffective assistance of counsel as the denial of a defendant's entitlement "to *the reasonably* competent assistance of an attorney acting as his diligent conscientious advocate The concept of reasonable competence is also the standard "traditionally and universally employed as the measure of the lawyer's civil liability

Id. at 609. In Knoblauch, the Michigan court also found the standards for determining ineffective assistance of counsel in a criminal proceeding and for legal malpractice in civil proceeding to be equivalent. Id. at 289.

The conclusion of the U.S. District Court should be binding on the plaintiff and preclude his prosecution of this legal malpractice claim. Nevertheless, it is unnecessary for this court to equate the standards of proof in each proceeding. (See Argument C). All that is required is a determination that the factual findings of the District Court, not necessarily the ultimate outcome, be given binding effect on Ward, who had a full and fair opportunity to litigate the facts. In either event, the plaintiff should be estopped as a matter of law from pursuing this legal negligence claim.

C. The Defendants Are Immune From Liability Under the "Error-In-Judgment Rule.

In the event this Court does not find the standard of proof in a habeas corpus proceeding and a legal malpractice claim to be equivalent, but the mutuality of parties requirement is abandoned, then the binding effect of the U.S. District Court's findings of fact bar this claim under the "error-in-judgment" rule. As the area of legal malpractice claims expands, the defenses to such actions become more refined. The "error in judgment" rule, however, has been traditionally recognized and continues to be a defense to a legal malpractice

action. See Mallen & Evans, Attorneys' Liability for Errors of Judgment -- At the Crossroads, 48 Tenn. L. Rev. 283, 284 (1981); Beck, Legal Malpractice and the Error-in-Judgment Rule, Ins. Counsel J. 50 (Jan. 1985).

The defense was best described by the District Court for the District of Columbia in Applegate v. Dobrovir, Oakes & Gebhardt, 628 F. Supp. 378, (D.D.C. Dec. 2, 1985), aff'd, 809 F. 2d 930 (D.C. Cir. 1987), cert. denied, 107 S. Ct. 2181 (1987).

To the extent that plaintiff claims defendants breached their professional duty by failing to introduce specific items of evidence at trial, his claim must fail. Questions of tactics are in the lawyer's discretion. ... The fact, ... that the attorney in the heat of the trial disregards the direction of the client as to trial strategy or activity does not give the client a right of action against the attorney. After all, it is the duty of the attorney who is a professional to determine trial strategy. If the client had the last word on this, the client could be his or her own lawyer. Therefore, an attorney does not ordinarily violate his duty to the client by rejecting a client's suggested tactic.

Id. (citations omitted) (citing Frank v. Bloom, 634 F. 2d 1245 (10th Cir. 1980)). See also, Smith v. Lewis, 530 P. 2d 589 (Cal. 1975)(en banc). Because an attorney does not guarantee the soundness of his opinions, he cannot be liable for every alleged mistake in judgment he may make in his practice.

Florida recognized the error-in-judgment defense in Dillard Smith Construction Co. v. Greene, 337 So. 2d 841 (Fla. 1st DCA 1976).

A lawyer does not guarantee the efficacy of his advice.... [T]he exercise of judgment in

good faith and with the degree of knowledge and skill ordinarily possessed by other lawyers similarly situated, do not become actionable simply because a court later rules against his client.

Id. at 843. Although Dillard Smith involved a professional negligence action based upon an attorney's interpretation of a contract, the opinion acknowledged the viability of the error-in-judgment rule in the State of Florida.

The policy underlying the error-in-judgment rule is well-founded. A trial lawyer is faced with numerous decisions in the course of litigation. He must make choices to best serve his client's needs. These decisions are a matter of strategy and may vary according to how the trial unfolds. If a trial lawyer were faced with exposure to a negligence claim each time he made a tactical decision, he would be unable to concentrate on the issues at hand in order to make the best decisions for his client.

In this case, Howard **Zeidwig's** decision not to introduce the alleged tape recording was just such a tactical decision. As his deposition testimony during the habeas corpus proceeding reflected, he could obtain the information contained on the alleged tape through the testimony of Ward and Pickett. Use of the alleged tape raised other problems. First, Ward would have to explain to the jury why he did nothing between late August and October 10, 1978. Second, Ward would have to explain why he taped his conversation with a Federal DEA Agent.

As the U.S. District Court found: "Counsel's performance was not deficient. The decision to attempt to introduce certain evidence at trial is particularly within the judgment of the attorney Zeidwig made a tactical trial decision not to use Ward's September 21, 1978, tape recording because of the possible whiplash effect it may have had upon Ward's defense." (See Order at Page 11; R. 557; App. at 11). Because the complaint in essence is based upon Zeidwig's tactical decision, it fell squarely within the protective cloak of the error-in-judgment rule. It was not actionable. Summary judgment was therefore properly entered in favor of the defendants.

The Fourth District Court of Appeal did not address this secondary argument, presumably due to its initial decision to adhere the mutuality of parties requirement. Should this court abandon this requirement, but find the U.S. District Court's conclusions of law not to be dispositive of the case, then the defendants/petitioners request this Court to apply the error-in-judgment rule to the U.S. District Court's findings of fact. By doing so, the trial court's entry of summary judgment for the defendants should be reinstated.

11. THE PLAINTIFF'S INABILITY TO PROVE HIS CASE WARRANTED THE ENTRY OF FINAL SUMMARY JUDGMENT.

Ward's inability to establish his case provided yet another basis for entry of summary judgment. Ward would have been required to prove the contents of the alleged tape recording of September 21, 1978, to sustain his claim. Because the alleged tape was no longer in existence, proof of its existence and its contents would have to be elicited from testimony.

Ward could testify concerning his alleged conversation with DEA Agent Hoyt, just as he had during his two criminal trials and the habeas corpus proceeding. However, because the other alleged witnesses had no personal knowledge of the contents of the conversation nor that the tape was actually made on September 21, 1978, the Florida Rules of Evidence prohibited the other witnesses' testimony. Duggan v. State, 189 So. 2d 890 (Fla. 1st DCA 1966).

In Duggan, the trial court admitted written transcripts of tape recorded conversations between the defendant and another individual. The transcripts had been made by a court reporter, who was not present when the alleged conversations were recorded and had no personal knowledge of the conversation or the recording. The court stated:

It is our opinion that the written transcripts of the three tape recordings were inadmissible in evidence under several established rules of evidence; permitting the transcripts to be furnished to the jury violated the best evidence rule, since the tape recordings themselves were the best evidence; the court reporter who made the

transcripts was not present when the recordings were made, and hence his transcripts constituted pure hearsay and were inadmissible under the hearsay rules

Id. at 891.

In the present case, the plaintiff would have been required to elicit testimony from witnesses, who were unable to remember precisely when they heard the alleged tape recording. Two of these witnesses were not present on September 21, 1978, when the alleged recording was made. One admitted to having been present, but could not swear to the contents of the conversation since he had only overheard Ward's side of the conversation. These witnesses therefore could not testify as persons who witnessed the event nor as professionals skilled in understanding the recorded conversation. They would therefore have been precluded from testifying about the contents of the tape because they had no independent, first-hand knowledge of the conversation.

The plaintiff would have been unable to demonstrate the existence of the tape recordings by the direct testimony of parties to the taped conversation or by subsequent listeners. The only parties to the conversation were the plaintiff and DEA Agent Hoyt. Hoyt had previously testified at Ward's two criminal trials that the alleged exculpatory conversation did not occur until after the arrests of other defendants were initiated. (See Order of District Court at 4; R. 550; App. at 4). Ward testified at both trials and at the habeas corpus proceeding. No one believed his story on any of those occasions.

The testimony necessary to support the plaintiff's claim fell within the definition of hearsay and would, therefore, have been inadmissible. The proof would have required testimony as to "what" statements were contained on the tape. By testifying as to "what" was on the tape, the witnesses would testify to the truth of Ward's assertion. This would violate traditional hearsay rules.

Hearsay is defined as: "A statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted." Fla. Stat. §90.801 (1985). While these witnesses could have testified that they heard a tape recording at a given point in time, they could not testify to the ultimate issue: that the tape recording was made on September 21, 1978, and accurately depicted the conversation which allegedly transpired between Ward and DEA Agent Hoyt on September 21, 1978. Without this evidence, the plaintiff would have been unable to sustain his burden of proof that the contents of the tape corroborated his version of the facts. Ward testified at his criminal trial that the alleged conversation took place on September 21, 1978. The jury did not believe him nor did the U.S. District Court believe him during the habeas corpus proceeding.

Florida Rule of Civil Procedure 1.510(b) provides: "[A] party against whom a claim ... is asserted or a declaratory judgment is sought may move for a summary judgment in his favor as to all or any part thereof at any time with or without

supporting affidavits." Subsection (c) provides that a "judgment sought shall be rendered forthwith 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." Fla. R. Civ. P. 1.510(c). Summary judgment is appropriate in this case.

"A moving party meets his burden of proof if he can show conclusively that he is not liable for the negligence alleged. A party might also meet this burden by showing conclusively that the plaintiff is unable to present requisite proof of the negligence charged in the pleadings" Id. at 47-48.

The defendants met their requisite burden of proof in this case. The plaintiff would have been unable to sustain his burden of proof because the Florida Rules of Evidence precluded the admission of necessary hearsay testimony. As there were no genuine issues of material fact, the defendants were entitled to final summary judgment as a matter of law. The trial court entered final summary judgment. This judgment should be reinstated.

CONCLUSION

For the foregoing reasons, the petitioners, Howard M. Zeidwig, Esquire, and Howard M. Zeidwig, P.A., respectfully request this court to answer the certified question in the negative, reverse the decision of the Fourth District Court of Appeal, and reinstate the summary judgment in favor of the defendants.

Respectfully submitted,

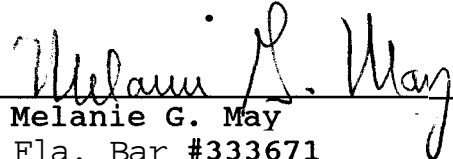
By: Melanie G. May
Melanie G. May

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail this 23rd day of May, 1988, to: REX CONRAD, ESQUIRE, Post Office Box 14723, Ft. Lauderdale, Fl, 33302; HOWARD ZEIDWIG, ESQUIRE, 633 S.E Third Avenue, Suite 4-F, Ft. Lauderdale, FL 33301; and to BARBARA J. COMPIANI, MONTGOMERY, SEARCH & DENNEY, P.A., Post Office Drawer 3626, West Palm Beach, FL 33402 & EDNA L. CARUSO, P.A., 1615 Forum Place, Suite 4-B/Barristers Bldg., West Palm Beach, FL 33401.

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