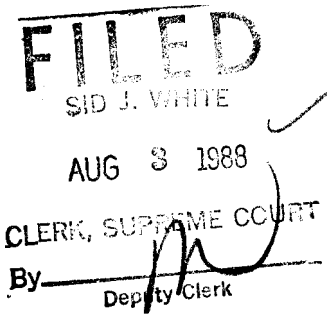
IN THE SUPREME COURT OF FLORIDA

CASE NO: 72,316



HOWARD M. ZEIDWIG, ESQUIRE,

and

HOWARD M. ZEIDWIG, P.A.

Petitioners

v.

JOSEPH WARD

Respondent

PETITIONERS' REPLY BRIEF ON THE MERITS

Submitted by:

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SUMMARY OF THE ARGUMENT[1]

Abandonment of the archaic mutuality of parties requirement would serve to limit litigation. Respondent's suggestion that abandonment of the requirement will increase litigation is simply unjustified. As most of the courts which have addressed the issue have held, there is no reason to allow a party who had a full and fair opportunity to litigate an issue to re-litigate the same issue against a new party. The requirement should be abandoned.

Those courts which have analyzed the standard of proof in habeas corpus proceedings with the standard of proof in legal malpractice cases have found them to be the same. If this Court agrees, then the trial court's summary judgment should be reinstated. If this Court does not agree, however, at the very least the findings of fact made by the U. S. District Court should be binding on the respondent. Applying the error-in-judgment rule to the findings of the U. S. District Court leads to but one conclusion -- the summary judgment should be reinstated.

The respondent will be unable to prove his case regardless of this Court's ruling on the collateral estoppel issue. For the reasons set forth in the petitioners' initial brief, the summary judgment should be reinstated.

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[1]The petitioners object to many of the facts set forth in the respondent's statement of the facts. Upon review of the record, it appears that many of the statements make reference to allegations in the complaint and are not based upon admissible evidence.

ARGUMENT

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

The petitioners are not requesting this Court to recede from its decision in Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So.2d 843 (Fla. 1984), as suggested by the respondent. (See Respondent's Brief at 15). Because this case presents collateral estoppel in a defensive posture, this Court need not recede from Romano in order to rule in favor of the petitioners. All that is necessary is that this Court review the archaic requirement of mutuality of parties as it applies to the facts of this case. By doing so, the petitioners believe this Court will see that the requirement serves no useful purpose. Its application inhibits the efficient administration of justice. The requirement should be abandoned.

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

Respondent correctly notes that the petitioners seek only to abandon the mutuality of parties requirement when collateral estoppel is used defensively. (See Respondent's Brief at 16). This Court did not have the opportunity to review this precise issue "recently" in Romano Brothers. As this Court noted, the Fourth District had limited the inquiry in Romano "to the use of a criminal conviction in a civil suit arising from those same

facts." Id. at 845. This case presents a new set of facts and a slightly different legal issue.

The respondent suggests that abandonment of the mutuality of parties requirement will create "a damaging new principal." (See Respondent's Brief at 16). The Respondent suggests that the change will encourage parties to litigate "to the hilt." The only authority cited for this position is F. James, Civil Procedure (1965). Perhaps this is because many of the courts, which have addressed the issue have come to a different conclusion. See, e.g., Jackson v. District of Columbia, 412 A. 2d 948 (1980); Oates v. Safeco Insurance Co. of America, 583 S.W. 2d 713 (1979); and cases cited on page 17 of petitioner's initial brief.

The respondent relies upon language from Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), in support of its position that the abandonment of the mutuality of parties requirement will increase litigation. The respondent also relies upon language from this Court's decision in Romano Brothers for the same purpose. The argument appears to focus on the necessity of the trial court to review whether the parties had a full and fair opportunity to litigate the issue in the first case.

No doubt a trial court would be faced with this decision, but it is not an "added" requirement. Whether or not the parties are identical, the trial court is faced with determining whether the matter was fully litigated in the first proceeding. In fact,

by abandoning the mutuality of parties requirement, the trial court does not have to determine whether the parties are, in fact, identical or in privity with the parties in the first action. Thus, the trial court is faced with no more decisions, and in fact less decisions, if the requirement is abandoned. To suggest that the abandonment of mutuality of parties will increase litigation is disingenuous at best. Its application, as the United States Supreme Court has held, inhibits finality of judgments and the efficient administration of justice. The requirement should be abandoned.

In reality, "the general trend is to discard the mutuality rule wholly or in part." Annotation, 31 A.L.R. Fed. 1044, **1067 (1970).** Collateral estoppel furthers the public's interest by reducing costs. It "limits the vexation and harassment of other parties; lessens the overcrowding of court calendars, thereby freeing the courts for use by others; and by providing for finality in adjudication, encourages respect for judicial decisions." Claim and Issue Preclusion in Civil Litigation in Washinston, **60** Wash. L. Rev. **805, 806 (1985).**

The requirement of a previous opportunity to "fully and fairly" litigate the issue provides the appropriate safeguard. No additional safeguard -- mutuality of parties -- is necessary. A party that has once litigated an issue should be precluded from re-litigating the same issue against another party, "unless the fact that he lacked a full and fair opportunity to litigate the issue in the first action or other circumstances justify

affording him an opportunity to re-litigate the issue." RESTATEMENT (SECOND) OF JUDGMENTS §29 (1982). A litigant is presumed to establish his best case. In this case, the respondent had the opportunity to and did fully litigate the effectiveness of his defense counsel in the habeas corpus proceeding. He should be precluded from re-litigating it again.

The respondent next advocates the "predictability" of current law as a reason to adhere to the mutuality of parties requirement. (See Respondent's Brief at 21.) Predictability is nothing more than the ability to apply the law as it exists at any given time. The law is ever-changing. It would be no more difficult to apply the doctrine of collateral estoppel, absent the mutuality of parties requirement, than it is at the present time. To advance the respondent's "predictability" argument to its fullest would require us to ignore past changes in the law, such as: comparative negligence, the seat-belt defense, inter-spousal immunity (to the extent of insurance coverage), and many other doctrines which have been abandoned or altered to meet the demands of the time. Predictability is **no** excuse for adhering to a doctrine, which no longer serves a useful purpose.

The respondent acknowledges the similarity between Knoblauch v. Kenyon, 163 Mich. App. 712, 415 N.W.2d 286 (Mich. 1987) and the present case, but attempts to distinguish it based on minor procedural differences. The respondent suggests that a Florida plaintiff "faces a much heavier burden in the habeas proceeding than he does in the later civil suit, unlike the

plaintiff in KNOBLAUCH." (See Respondent's Brief at 23). No authority is provided for the statement, however.

The distinctions do not render Knoblauch unpersuasive. The Michigan court's opinion in Knoblauch is all the more persuasive since the Michigan court, like this Court, had previously reviewed the mutuality of parties requirement, and refrained from abandoning it. However, given the right atmosphere, the right facts, and the insight into the needs of our modern judicial system, the Michigan court recognized the benefit to be gained from the abandonment of the mutuality of parties requirement. The petitioners request this Court to follow the lead of the United States Supreme Court and the Michigan court and abandon the requirement when collateral estoppel is asserted defensively.[2]

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

If this Court abandons the mutuality of parties requirement, there are two means by which this Court can reverse the Fourth District Court of Appeal and affirm the summary judgment in favor of the petitioners. First, this Court can equate the "standard of proof" in the habeas corpus proceeding with that required in the legal negligence claim. See, e.g.,

[2]Interestingly, it appears as if the Third District Court of Appeal has followed the modern trend in a more subtle approach. See Davenport v. Stone, 13 F.L.W. 1525 (Fla. 3rd DCA June 28, 1988).

McCord v. Bailey, 636 F.2d 606 (D.D.C. 1980), cert. denied, 451 U.S. 983 (1981); Hunt v. Tomlinson, 799 F.2d 712 (11th Cir. 1986); and Knoblauch v. Kenyon, 163 Mich. App. 712, 415 N.W.2d 286 (1987). By doing so, the U.S. District Court's ruling against the respondent in the habeas corpus proceeding mandates a summary judgment in favor of the Petitioners.

Alternatively, this Court may not desire to equate the standard of proof in the two proceedings. In which case, the U.S. District Court's findings of fact are binding on the respondent. These findings would again allow the trial court to enter summary judgment in favor of the petitioners based on the error-in-judgment rule. (See Argument C). While the petitioners urge this court to find the proceedings equivalent, it is unnecessary for a favorable ruling for the petitioners in this case.

Respondent suggests that a footnote in Rummell v. Estelle, 498 F. Supp. 793 (W.D. Tex. 1980) distinguished the two proceedings. The petitioners disagree. The footnote did no more than to remind the reader that the court was not asked to rule on the merits of a legal malpractice claim and for that reason, the court's comments were "not meant to address the issues that would be presented by a civil suit for damages for malpractice." Id. at 798 n. 4. The footnote makes no substantive statement concerning the distinction between habeas corpus proceedings and legal malpractice actions. Interestingly, this is the only case the respondent cites as addressing the distinction between the

two proceedings, -- one case from the Western District of Texas. The petitioners, however, have previously supplied this Court with three decisions, which have equated the two proceedings. Surely, the weight of authority is with the petitioners.

The respondent cannot deny the affirmative holdings supportive of the petitioners' position in McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980); Hunt v. Tomlinson, 799 F.2d 712 (11th Cir. 1986); and Knoblauch v. Kenyon, 163 Mich. App. 712, 415 N.W.2d 286 (Mich. 1987). Since the filing of the initial brief, another state court has reached the same conclusion. Alberici v. Tinari, 542 A.2d 127 (Pa. 1988).

In Alberici, "[t]he primary issue [was] whether a civil malpractice action against attorneys is barred where the federal court, in which the underlying criminal case was tried, has previously determined that counsel was not ineffective." Id. at 127. The court answered the question in the affirmative and affirmed a summary judgment in favor of the defendant lawyer. Interestingly, the Pennsylvania court reviewed a very similar scenario.

In Alberici, the plaintiff had been tried and convicted in federal district court for mail fraud. After his original attorneys withdrew, the plaintiff's new attorney filed a supplemental motion for judgment of acquittal or for a new trial, in which he raised the ineffective assistance of counsel claim. The allegations of ineffective assistance of counsel included a failure to investigate, a failure to call certain witnesses, and

a failure to represent the defendant in a competent manner. The District Court denied the motion, which was then appealed to the Third Circuit Court of Appeals. The allegations of ineffective assistance of counsel were broadened to include a failure to investigate a motive and to request an accomplice instruction. The Court of Appeals affirmed the conviction. A subsequent petition for writ of certiorari to the United States Supreme Court was denied.

The plaintiff obtained new counsel, who filed a new motion for new trial and a motion to vacate, set aside or correct sentence, again making the same allegations of ineffective assistance of counsel. Both motions were denied. A new appeal was taken, which again affirmed the District Court's rulings.

The plaintiff then filed a malpractice complaint containing the same allegations which had been the basis of the ineffective assistance of counsel claim. The trial court granted summary judgment based upon the doctrine of collateral estoppel. Finding that the plaintiff had a full and fair opportunity to litigate the issue previously, he was not allowed a third bite at the apple. The court referred to a law review article in rendering its decision.

III. COLLATERAL ESTOPPEL

> The Doctrine of collateral estoppel is a potential defense to any legal malpractice action. One application of the doctrine, however, is unique to criminal malpractice suits. A client who has unsuccessfully raised the constitutional claim of ineffective assistance of counsel in the underlying

> criminal action is estopped from relitigation of identical issues in a subsequent malpractice action against his defense attorney.
>
> . . . .
>
> Applying this form of estoppel in a criminal malpractice action is justified only in certain circumstances. First, the issue barred from relitigation must be identical to an issue necessarily decided or actually adjudicated in the prior proceeding. Second, the party against whom the defense is asserted must have had a full and fair opportunity to litigate the issues in the prior proceeding. In the context of criminal malpractice actions the second requirement generally presents no problem. The client had his day in court when his claim of ineffective assistance of counsel was litigated in the underlying criminal action. . . .

Id. at 130 (citing Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel, Duke L. J. 542 (1981)).

The Pennsylvania Court held as a matter of law that the plaintiff had failed to set forth a cause of action. For the reasons expressed in the Duke Law Journal and those articulated in the petitioners' briefs in this case, the plaintiff in Alberici was collaterally estopped from re-litigating the ineffective assistance of counsel claim for a third time. See also. Johnson v. Raban, 702 S.W.2d 134 (Mo. App. 1985); Vavolizza v. Krieger, 33 N.Y.2d 351, 352 N.Y.S.2d 919, 308 N.E.2d 439 (1974); and Garcia v. Ray, 556 S.W. 2d 870 (Tex. Civ. App. 1977). The petitioners request this Court to reach the same conclusion.

C. The Defendants Are Immune From Liability for Tactical Decisions Under the "Error-in-Judgment" Rule.

If this Court does not equate the two proceedings, but does find the respondent bound by the factual findings of the U.S. District Court, then the respondent's claim is barred by the error-in-judgment rule. The respondent argues that the facts are in dispute with regard to the application of the error-in-judgment rule. The facts are in dispute **only** if the U. S. District Court's findings are not binding.

The Petitioners agree that the respondent's version of the facts varies with the petitioners. If this Court does not apply collateral estoppel even to the extent of the factual findings, then the error-in-judgment defense will need to be litigated. Thus, there is no need to argue the petitioners' respective position on the facts.

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

The gist of respondent's argument is that testimony concerning the contents of the alleged tape recorded conversation do not fall within the definition of hearsay. (See Respondent's Brief at **32.**) The petitioners respectfully disagree. The contents of the taped conversation constitute the **"truth"** of the matter asserted. It matters not whether the contents were true, but simply that the respondent made certain statements to the DEA agent on September **21**, 1978. Thus, the purpose for introducing testimony concerning the tape recording is to prove that the

statements were made. This renders the testimony concerning the contents an attempt to prove the "truth" -- that the statements were actually made. For the reasons set forth in our initial brief, the rules of evidence preclude the testimony of anyone other than the respondent on this issue.

An additional Florida case helps to illustrate why testimony concerning the "contents" of the tape violate the hearsay rule. Burton v. State, 442 So.2d 355 (Fla. 1st DCA 1983). In Burton, the prosecutor elicited the following testimony:

> Q. Has this defendant contacted you since this event?
>
> A. He has called me up and he has stated he is sorry for what has happened and he has also tried to bribe my mother by saying that he would pay --

442 So.2d at 356. The trial court ruled, over the objection of defense counsel, that because the statement was not offered for its truth, but just to show that the statement had been made, it was not inadmissable hearsay. The appellate court disagreed. Because there was no other valid explanation for the use of the statement other than to prove the truth of the matter asserted, it was inadmissible hearsay.

In this case, any witness other than the respondent would be testifying to precisely "what" was said by the respondent. The significance would be an attempt to align a number of witnesses against the DEA agent, who previously disputed the contents of the telephone conversation. It is the statements

themselves, which constitute the "truth" so vital to the respondent's case. Without this testimony, he would not be able to sustain his burden of proof. For this additional reason, the trial court correctly granted summary judgment for the petitioners.

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
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CERTIFICATE OF SERVICE

I HEREB CERTIFY that a copy of the foregoing has been furnished by U.S. mail this 2nd day of August, 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 RUSSELL S. BOHN, Suite 4-B Barristers Bldg. 1615 Forum Place, West Palm Beach, FL 33401, and MONTGOMERY, SEARCY & DENNEY, P.A., Post Office Drawer 3626, West Palm Beach, Fl 33402.

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