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IN THE SUPREME COURT OF FLORIDA

Case No. 87,706

FERNANDO JOSEPH DIFILIPPO, and FRANCESCA GLYNN DIFILIPPO by and through FERNANDO DIFILIPPO, JR., their father and natural guardian, and FERNANDO DIFILIPPO, JR.,

Appellants,

vs.

WANDA RAYLE, f/k/a WANDA DIFILIPPO, and GEORGE C. VOGELSANG,

Appellee.
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APPELLANTS' INITIAL BRIEF

On Appeal from the District Court of Appeal,
Third District Case No. 95-1492

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INTRODUCTION

This appeal is taken from the trial court's dismissal of defendant/appellee, George Vogelsang, from two consolidated cases brought by plaintiffs/appellants, Fernando DiFilippo, Jr. and his children, Fernando Joseph DiFilippo and Francesca Glynn DiFilippo, in the Eleventh Judicial Circuit, Dade County, Florida. DiFilippo and his children will be referred to collectively as Appellants. Vogelsang will be referred to as Appellee. Appellee's co-defendant below and DiFilippo's former wife, Wanda Rayle, will be referred to as Rayle.

The "Prior Action" refers to the lawsuit filed by Appellants on February 19, 1993, Civil Action No. 93-03145, against Appellee and Rayle in Dade County Circuit Court. The Action was dismissed against Appellee and Rayle, with prejudice, on May 6, 1993. By the instant case Appellants seek relief from that judgment.

The "Present Action" refers to the Complaints filed by Appellants in this case, Consolidated Case Nos. 94-24348-CA-30 and 94-24349-CA-30. The Present Action, in addition to seeking relief from the judgment dismissing the Prior Action, states claims against Appellee and Rayle for, *inter alia*, civil theft.

"R" refers to the record on appeal. "A" refers to the Appendix to Appellants' Initial Brief.

STATEMENT OF THE CASE

On May 1, 1995, the trial court entered a final judgment dismissing Appellee with prejudice from the Present Action. (R 812-813). The basis of the trial court's ruling was its conclusion that Appellee was immune from civil suit for his acts, including criminal acts, because those acts were taken on behalf of a client. On May 16, 1995, the trial court denied Appellants' motion for rehearing in Case No. 94-24348-CA-30. (R 814-815). On May 18, 1995, the trial court entered the same judgment on the same grounds in Case No. 94-24349-CA-30. (R 694-695). Both orders were joined for consideration on appeal.

The Third District Court of Appeals affirmed the dismissal of Appellee from the Present Action in a per curiam opinion issued March 6, 1996 (R 834-835). The basis of the Third District's ruling was its conclusion that the Present Action failed on its claim for relief from judgment because it stated only an action for intrinsic fraud. Because more than one year had passed since the dismissal of the Prior Action and the filing of the Present Action, Appellants claims were time barred under Fla. R. Civ. Pro. 1.540(b). The Third District did not reach the question of attorney immunity which caused the trial court's dismissal of Appellant's claims against Appellee.

Notice to invoke discretionary review in this Court was timely filed April 3, 1996. This Court entered its order accepting jurisdiction over this case on July 12, 1996.

STATEMENT OF THE FACTS

This appeal arises on a motion to dismiss. The facts which follow are as pleaded in Appellants' complaints (R 2-112; 319-433) and are deemed admitted for purposes of this Court's review.

On February 19, 1993, DiFilippo and his children filed the Prior Action against Rayle and Appellee in Dade County Circuit Court. (R 326) In the Prior Action, the DiFilippos alleged that Rayle and Appellee, her divorce attorney, had conspired to steal and did steal documents and other personal property belonging to DiFilippo, his legal clients and his children. (R 326). The motive for this theft was Rayle's and Vogelsang's effort to extort a $3,000,000 settlement in a then pending divorce proceeding between Rayle and DiFilippo. (R 324). Proof of the Prior Action included testimony and documents demonstrating that Appellee Vogelsang had threatened DiFilippo, through his counsel, Elizabeth DuFresne, Esq. and William "Toby" Muir, Esq, of the Miami law firm of Steel, Hector and Davis, with the exposure to federal and state law enforcement authorities of the alleged criminal wrongdoing of DiFilippo and his client and former employer, The Home Shopping Network. (R 324). The Prior Action stated claims against Rayle and Appellee for conversion, aiding and abetting conversion and intentional infliction of emotional distress.[1] (R 326).

Contemporaneously with the filing of the Prior Action, the United States Attorney's Office in and for the Middle District of Florida in

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[1] As his first response, Appellee moved to transfer the Prior Action to the divorce court to be litigated in conjunction with the DiFilippo/Rayle divorce case. *See* Motion to Transfer Case No. 93-03145 CA 04 (App.A) and Plaintiff's Memorandum in Opposition to Defendant Vogelsang's Motion to Transfer Cause to Family Division (App. B). Recognizing that the independent nature of the claims, Judge Feder, the Administrative Judge, denied the motion to transfer. *See* Order Denying Motion to Transfer (App. C).

Tampa opened a criminal investigation into the activities of DiFilippo's client and former employer, HSN. (R 326). Federal Grand Jury subpoenas were issued seeking the documents Rayle and Appellee had stolen from DiFilippo. (R 326-327).

Between October 30, 1992, the date of the theft, and April 2, 1993, the date he ultimately stipulated to the dismissal of the Prior Action, DiFilippo received repeated demands from HSN that DiFilippo settle with Rayle and Appellee and regain custody of HSN's stolen documents, regardless of the cost. (R 327). Finally, on April 2, 1993, DiFilippo capitulated.

On April 2, 1993, DiFilippo stipulated to the dismissal of the Prior Action. On the same day he settled the divorce case with Rayle by paying Rayle the $3,000,000 she demanded and by paying Appellee $200,000 in attorney's fees for his eight months of representation. (R 327).

In April, 1994, more than one year after the stipulated dismissal in the Prior Action was filed, the Tampa U.S. Attorney's Office publicly announced the end of the HSN investigation without any finding of criminal wrongdoing. (R 328).[2]

On December 30, 1994, DiFilippo and his children filed the Present Action. Those cases are now before this Court for review. The Complaint in Case No. 94-24349-CA-30, the case brought by DiFilippo individually, contains the following counts: Count 1 requests relief from the stipulated order dismissing the Prior Action under Rule 1.540 based on extrinsic fraud; Count 2 is a claim against both defendants for civil theft of documents belonging to DiFilippo; Count 3 is a claim against both defendants for conversion of property; Count 4 is a claim against

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[2] The Securities and Exchange Commission also cleared HSN of all allegations of improper or criminal conduct on April 4, 1996. (App. F).

Appellee for aiding and abetting conversion; Count 5 is a claim for against both defendants for intentional infliction of emotional distress; Count 6 is a claim against Appellee for professional negligence. (R 320-433).

The Complaint in Case No. 94-24348-CA-30, the cased filed on behalf of the DiFilippo children, contains the following counts: Count 1 is a claim against both defendants for civil theft; Count 2 is a claim against both defendants for conversion of property; Count 3 is a claim against Appellee for aiding and abetting conversion; Count 4 is a claim against both defendants for intentional infliction of emotional distress; Count 5 is a claim against Appellee for professional negligence. (R 2-112).

ISSUES

I. WHETHER APPELLANTS HAVE ALLEGED THE ELEMENTS OF EXTRINSIC FRAUD UNDER FLORIDA LAW.

II. WHETHER AN ATTORNEY IS IMMUNE FROM CIVIL SUIT FOR CRIMINAL ACTS COMMITTED IN FURTHERANCE OF HIS CLIENT'S INTERESTS.

SUMMARY OF ARGUMENT

I. APPELLANTS HAVE ALLEGED THE ELEMENTS OF EXTRINSIC FRAUD UNDER FLORIDA LAW; APPELLANTS ARE ENTITLED TO THE OPPORTUNITY TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT SUCH FRAUD ACTUALLY OCCURRED AND TO RELIEF FROM THE FRAUDULENTLY OBTAINED JUDGMENT.

Extrinsic fraud exists where, through the improper actions of an opposing party or counsel or both a party litigant is prevented from presenting the merits of his case in court. Appellants allege that Appellee conspired to commit and did commit theft of client files and other personal property belonging to Appellants. When Appellants sued Appellee civilly for those criminal acts, Appellee used the fruits of the theft, in particular the attorney-client privileged information contained within the stolen client files, to extort the dismissal of the civil suit. Appellants now seek to set aside the extorted dismissal and to litigate the merits of their claim for theft free of the coercive force of extortion. By holding that Appellants did not allege extrinsic fraud, the Third District deprived them of this right. The Third District's holding also flies in the face of this Court's definition of extrinsic fraud in *DeClaire v. Yohanon* because it denies Appellants the opportunity to demonstrate the existence of the coercive force they have alleged, a coercive force which, according to *DeClaire*, is the touchstone of the right to relief from judgment.

Having alleged the elements of extrinsic fraud in an independent action in equity under Florida law, Appellants are entitled, at the least, to the opportunity to make a threshold showing to the trial court, by clear and convincing evidence, that such fraud actually occurred. Appellants have that evidence. It comes from the files of Steel, Hector and Davis, Appellants' former counsel. The Third District's holding erroneously but effectively deprives Appellants, for the second time, of

their right to a fair hearing on their claim that they were extorted into an unfair settlement of their case.

II. AN ATTORNEY IS NOT IMMUNE FROM CIVIL SUIT FOR CRIMINAL ACTS COMMITTED IN FURTHERANCE OF HIS CLIENT'S INTERESTS.

The trial court's ruling that Appellee is immune from civil suit for theft because he committed that theft in furtherance of a client's interests also deprives Appellants of their remedy for a wrong done and improperly insulates Appellee from liability for wrongful conduct. Had the theft Appellants sued for been committed only by an opposing litigant, the remedy Appellants pursued, a separate suit in tort for theft, would have adequately addressed that wrong; absent extortion and Appellee's central role in committing it, the theft Appellants complained of in the Prior Action could have been and would have been litigated in that case.

The extortion which ultimately prevented the Prior Action from proceeding could not have occurred but for the complicity of Appellee in using the information received from the stolen documents. To now hold, as the Third District has done, that Appellants could have litigated their claims in the Prior Action, while refusing to acknowledge their claims that they could not do so because of Appellee's threatened use of the stolen information to obtain their criminal prosecution, is as patently wrong as it is cynical. Where attorneys are alleged to be complicitous in fraudulent actions the law demands more, not less scrutiny. Attorneys do not enjoy immunity because of some special status as citizens but because and only because they act as the servants of the process of the law. When an attorney's actions are outside the law, his or her protected status falls away and it becomes all the more important that he or she be made accountable for such acts.

Here Appellants have alleged civil theft. Civil theft requires proof of *criminal intent*. If Appellants do not have substantial factual and legal basis for their claims, the law provides a remedy. But if, as here, Appellants do have clear and convincing evidence that an attorney committed a crime, it is ethically irrational to hold the attorney not accountable for his actions because his crime happened to further the interests of his client.

ARGUMENT

This case presents two issues, both of critical importance to litigants and counsel in Florida's trial courts and, indeed, to the trial judges themselves: (1) what procedures should govern independent actions to reopen judgments under the rule of *DeClaire v. Yohanon*; and (2) what are the outer limits of attorney advocacy on behalf of a client. In resolving the first issue, this Court can and, Appellants contend, should articulate a simple, consistent and workable rule for the reopening of judgments under which all independent actions to reopen judgments must, before proceeding to trial on the reopened claims, pass muster before the trial court by convincing the court at a threshold evidentiary hearing and by clear and convincing evidence that the complainants were prevented in the earlier case from presenting their case in court, the requirements of *DeClaire*. In resolution of the second issue, the limits of attorney advocacy and immunity, this Court is presented the opportunity to affirm a proposition which should be but, at least in Dade County, Florida is not, self-evident: that an attorney may not violate the criminal law in furtherance of his own or his client's interests.

I. APPELLANTS HAVE ALLEGED THE ELEMENTS OF EXTRINSIC FRAUD UNDER FLORIDA LAW AND ARE ENTITLED TO THE OPPORTUNITY TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT SUCH FRAUD ACTUALLY OCCURRED.

In *DeClaire v. Yohanan*, 453 So. 2d 375, 379 (Fla. 1984), this Court unequivocally held that a judgment procured through extrinsic fraud, procured, that is, through improper acts preventing the opposing party from presenting his case in court, may be set aside. *DeClaire*, 453 So. 2d at 378. Under such circumstances, the aggrieved party may bring an independent action to reopen the judgment. *Id.* Such an action may be brought at any time. *Id.* Appellants have met *DeClaire*'s standard.

In this case Appellants seek to reopen the May 6, 1993 dismissal of the Prior Action. As grounds for this remedy they allege: (1) that the May 6, 1993 dismissal with prejudice was secured by Rayle and Appellee through extortion (R. 327); (2) that this extortion was accomplished by the theft of attorney-client privileged and other valuable documents from DiFilippo, a lawyer, and from his children (R. 323-327); (3) that Appellee participated in this extortion by threatening DiFilippo, through his counsel, with the publication and/or destruction of the stolen documents unless, among other things, DiFilippo and his children dismissed the their claims against Appellee and Rayle (R. 323-324); and (4) that this extortion prevented Appellants from litigating their claims that Rayle and Appellee had stolen from them and caused them emotional distress by so doing. (R. 327).

The Third District held that the matters alleged in Appellants' complaints were intrinsic and therefore barred by the one year limitation in Rule 1.540(b), Fla. R. Civ. P. In other words, the Third District held as a matter of law that coercion and duress can never constitute extrinsic fraud because such acts could not under any circumstances cause a party to abandon his case. This holding is reversible error because it is inconsistent with *DeClaire*, as a review of caselaw from other Florida districts which have considered the application of *DeClaire* to similar facts shows. The Third District has also taken a position in conflict with the overwhelming majority of states which have addressed the question of whether coercion and duress constitute extrinsic fraud and, most fundamentally, a position conflicting with the principles underlying the doctrine of extrinsic fraud itself. Finally, the conclusion that coercion and duress could never prevent the full and fair litigation of claims is simply irrational in itself.

The Third District's Holding Conflicts with the Mandate of this Court in DeClaire v. Yohanan

In *DeClaire v. Yohanan*, this Court ruled that extrinsic fraud justifies the reopening of judgments. It then defined extrinsic fraud as the:

> prevention of an unsuccessful party [from] presenting his case, by fraud or deception practiced by his adversary; keeping the opponent away from court; falsely promising a compromise; ignorance of the adversary about the existence of the suit or the acts of the plaintiff; fraudulent representation of a party without his consent and connivance in his defeat; and so on.

DeClaire at 377. *DeClaire* also drew a distinction between intrinsic and extrinsic fraud by stating that the essence of extrinsic fraud is conduct preventing a party from presenting his case, *DeClaire*, at 377, while intrinsic fraud is the act of misleading a party *with respect to some aspect of the case presented*. *Id.* (emphasis added).

Thus the essence of the holding in *DeClaire* is that the existence *vel non* of extrinsic fraud is determined not by the exact classification of act alleged, or the label given it by the parties or the court, but by the effect in fact that act had on the party alleging its occurrence. *See Gordon v. Gordon*, 625 So.2d 59, 63 (Fla. 4th DCA 1993) ("[T]he essence of extrinsic fraud is the deliberate use of some device to stop an adverse party's voluntary participation in the litigation process. Extortion can prevent one from fully litigating one's case just as effectively as deceiving the party about the pendency of the suit. It does not much matter whether that prevention is accomplished by lying and cheating or instead by force or extortion. In each, the end is the same. The fact that all are embraced under one term of art--'extrinsic fraud'--is but a convenience of reference, not a boundary on the universe of devices which may be so employed.") *See also* Hon. D. Smallwood, *Vacating Judgments in California: Time to Abolish the Extrinsic Fraud Rule*, 13 W.

St. U. L. Rev. 105, 123 (1985)(cited as *"Vacating Judgments"*) ("[T]he process [of defining extrinsic fraud by use of factual parameters of prior cases] is still analogous to defining the word "toxin" by listing in detail those chemicals known to be poisonous. The list would undoubtedly be helpful to a layman, but a chemist faced with determining the nature of a new and unknown compound would be better served by a systematic approach to the problem of determining just what is a toxin and what is not.")

The Third District erred in this case because instead of looking to the effect in fact that Appellee's actions had upon Appellants' ability to present their case, as *DeClaire* requires, the Court looked only to the classification of the alleged improper actions as coercion and duress. Because in the view of the Third District, coercion and duress could not cause the kind of abandonment of claim *DeClaire* proscribes, Appellants were foreclosed as a matter of law. In so holding, the Court substituted its own judgment for the factual inquiry *DeClaire* mandates, effectively writing out of law the inquiry required by that case.[3]

The core error of the Third District's holding is that it decided as an issue of law a question of fact which under *DeClaire* is committed

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[3] The Third District has erroneously held that allegations of coercion and duress do not state a claim for relief from judgment on the grounds of extrinsic fraud in other cases, as well. *See Cerniglia v. Cerniglia*, 655 So. 2d 172 (Fla. 3d DCA 1995) *rev. granted* 662 So. 2d 931 (Fla. 1995) (threats of physical and mental abuse constitute only intrinsic fraud; relief from judgment denied). *See also Susskind v. Susskind*, 475 So. 2d 1276 (Fla. 3d DCA 1985)(unidentified allegations of fraud, duress, coercion and failure to provide full disclosure held intrinsic fraud only; relief from judgment denied); *Langer v. Langer*, 463 So. 2d 429 (Fla. 3d DCA 1985)(same).

to the sound discretion of the trial judge. It is a common error.[4] The trial judge must be allowed discretion to determine the factual issue of causation on the particular facts of each case and to determine whether the facts in that case are sufficiently egregious to justify departing from the policy favoring the finality of judgments. *Baltins v. Baltins*, 260 Cal. Rptr. 403, 418 (1st Dist. 1989)("Each case will depend on whether the circumstances are sufficiently egregious to justify departing from the policy favoring the finality of judgments")[5]. In this case, they are.

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[4] *See, e.g.*, Evans, Diane E., *Seeking More Equitable Relief from Fraudulent Judgments: Abolishing the Extrinsic-Intrinsic Distinction* 12 Pac. L. J 1013 (1981); Sharp, Robert Duane, *Relief From Fraudulent Judgments in the Federal Courts: Motions to Vacate or Independent Action - Opposite Sides of the Same Coin*,36 Drake L.Rev. 389 (1986); Smallwood, Donald E., *Vacating Judgments in California: Time to Abolish the Extrinsic Fraud Rule*, 13 W.St.U. L.Rev. 105-127 (1985). *See also*, Restatement(Second) of Judgments § 70, com. c, p. 182 (distinctions between extrinsic and intrinsic fraud "have led to much confusion.")

[5] Judge Donald E. Smallwood, a family law judge of the Superior Court of Orange County, California, advocates the complete abolition of the extrinsic/intrinsic fraud dichotomy in favor of a more workable rule for application by the trial courts. Under Judge Smallwood's alternative analysis, reopening of judgments would depend upon an examination of the facts and circumstances in each case, measuring or testing them against the following criteria: (1) Did the conduct, or the facts or circumstances complained of, prevent a trial of any material issue in the case or was the injured party prevented from receiving a fair adversary hearing? (2) If the conduct complained of was perjury or the introduction of false evidence in the original trial, is the proof of such fact clear and convincing, and is there a showing that the injured party was diligent and reasonable in his [or her] efforts to ascertain the truth at the original proceeding? (3) Was the injured party free from any participation in the conduct? If not, was the conduct of the injured party excusable? (4) Has the injured party delayed the bringing of action to a point where such delay constitutes a waiver or estoppel? Would the result in the trial of the original action have ben [sic] substantially different, but for the conduct or facts and circumstances complained of? (6) Is there prejudice to the other party? *Vacating Judgments* at 124-25, fns omitted.

The Third District's Holding Conflicts With The Fourth District's Interpretation of *DeClaire*

In contrast, the Fourth District has correctly interpreted *DeClaire*. In *Gordon v. Gordon*, 625 So. 2d 59 (Fla. 4th DCA 1993), the Fourth District held that the complainant sufficiently pleaded extrinsic fraud by alleging that he was coerced into entering a divorce settlement by extortionate threats of exposure to the IRS. The court reversed the dismissal of the complaint and remanded the case to the trier of fact for determination of whether the prior judgment was procured through extrinsic fraud. *Id.* at 64. The *Gordon* facts are almost indistinguishable from the facts of this case.

Gordon arose out of a divorce proceeding in which the former wife threatened to use financial documents against the husband's interest unless the husband signed a favorable divorce settlement. The husband, under threat of exposure, acceded to the wife's demand. More than 21 months later, the husband sued to set aside the judgment of dissolution and the settlement, claiming that his entry into that agreement had been extorted. The wife moved to dismiss the second action and the trial court granted the motion. *Id.* at 69.

The Fourth District reversed the trial court's dismissal of the husband's action. It ruled in doing so that the wife was alleged to have acted extortionately, that these allegations must be taken as true for purposes of the motion to dismiss, and that extortion constituted extrinsic fraud. *Id.* at 63. Applying the principles as set forth in *DeClaire*, that the essence of extrinsic fraud is the prevention of an opposing party from participating in his cause, the court concluded: "extortion can prevent one from fully litigating one's case...." *Id.* at 62. The court held that the husband was entitled to relief from the dissolution judgment, even though more than one year had elapsed. *Id.*

at 60. In contrast to the instant case, *Gordon* correctly applied the inquiry *DeClaire* requires.

The Third District's Holding Conflicts With Judicially Developed Principles of "Finality" Which Underlie *DeClaire*

The error in the Third District's holding is also apparent from a review of the policy considerations which led this Court to the rule set out in *DeClaire*. Those considerations are laid down in the seminal case of *United States v. Throckmorton*, 98 U.S. 61 (1878) and are further articulated in the First and Second Restatements of Judgments. A balance is struck in these authorities between the legitimate institutional concerns of the courts at large and the fundamental concern for the integrity of judgments.

United States v. Throckmorton

In *Throckmorton*, the United States sought to set aside a land grant based on a claim that the decree which confirmed the grant was obtained through fraud. The government alleged that the grant recipient had falsely antedated a document and then used it to convince the court that the grantor had the authority to make the land transfer. The Court upheld a dismissal of the claim attacking the judgment confirming the land grant and held that the alleged fraud was not the type which vitiates judgments. Only the type of fraud which the Court defined as "extrinsic fraud" vitiates judgments notwithstanding the strong legal maxims which are designed to prevent repeated litigation of the same subject or controversy. *Id.*

In its opinion, the *Throckmorton* court set forth the seminal definition of extrinsic fraud in American jurisprudence:

> When the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise

> of compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives him to his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side - *these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing.*

Id. (emphasis added).

In adopting the *Throckmorton* definition of extrinsic fraud and holding that acts by which a party prevents his opponent from presenting his case are extrinsic fraud, this Court reiterated the definition of extrinsic fraud as the:

> prevention of an unsuccessful party [from] presenting his case, by fraud or deception practiced by his adversary; keeping the opponent away from court; falsely promising a compromise; ignorance of the adversary about the existence of the suit or the acts of the plaintiff; fraudulent representation of a party without his consent and connivance in his defeat; and so on.

Fair v. Tampa Electric Co., 27 So. 2d 514, 515 (Fla. 1946). More recently, in *DeClaire*, this Court repeated the definitions as set forth in both *Throckmorton* and *Fair* and again drew the distinction between intrinsic and extrinsic fraud by stating that the essence of extrinsic fraud is conduct preventing a party from presenting his case. *DeClaire*, at 377.

The essence of this Court's ruling in *Declaire* was not, therefore, that only actions of the kind identified in *Throckmorton* or any other particular case qualify as extrinsic fraud. Rather, *DeClaire* held that the crucial question in whether to classify acts as extrinsic or intrinsic fraud is the impact the acts alleged had in fact on the ability of the complaining party to fairly litigate their case in court. Where that impact was to prevent fair litigation, no matter the nature of its causes, extrinsic fraud exists and the judgment should be reopened.

Restatements of Judgments

The First and Second Restatement of Judgments underscore this interpretation of *DeClaire*. Both the First and the Second Restatements recognize that judgments procured through fraud should be avoided. The First Restatement of Judgments, § 121, "Fraud Preventing Knowledge of the Claim or Defense, or Duress Preventing Contesting It," established duress as an independent ground for relief from a prior judgment. Whether a judgment was so procured is a question of fact determined according to certain fixed principles of fairness:

> Due process of law presupposes that litigants are free to present their claims and defenses. One whose freedom of will has been overcome by duress has not had a fair opportunity to be heard and, *although a judgment obtained through duress is not void, it is subject to equitable relief as in cases where an opportunity to be heard has been prevented by fraud. Whether there has been sufficient compulsion to prevent a fair trial, and hence to constitute a basis for equitable relief is a matter for the discretion of the court.* [emphasis added].

Restatement (First) of Judgments, § 121, com. b., p 591.[6]

The Second Restatement of Judgments, § 70, "Judgment Procured By Corruption, Duress or Fraud," also provides relief from judgment procured through extrinsic fraud and illustrates that the decision whether to grant such relief is a question of fact in a particular case, not a question of law.

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[6] The Illustrations to § 121 set forth factual scenarios which would entitle a claimant to relief from judgment. Illustration number 7 in particular bears a strikingly similarity to the facts of this case:

> A brings suit against B upon a valid claim for $100,000.00. B threatens to cause A's business premises to be destroyed if A does not consent to have final judgment entered for B. Five years later, *when it is too late to have other relief*, A seeks an order requiring the judgment vacated and the case to stand for trial, or in the alternative, to have B pay the amount due. He is entitled to this.

Restatement (First) of Judgments, § 121, com. b, p.592 (emphasis added).

> Judgments are taken as finally determining claims because of confidence that the procedure leading to judgment is reasonably effective to ascertain the merits of the controversy. It is recognized that no system of procedure is infallible and that mistakes and miscarriages of justice may occur despite such protective devices as the right to be heard, the assistance of counsel, and the availability of appellate review. But it is assumed that modern systems of procedure generally yield results that are as just as may be expected. . . . Indeed, if this confidence did not exist, the concept of finality itself would be rationally insupportable.
>
> It is for this reason that attacks are not permitted on a judgment simply on the ground that the losing party neglected to take best advantage of his [or her] day in court. . . . Furthermore, inasmuch as losing parties have strong inducement to contrive attractive reasons why a controversy should be reopened, the rules concerning relief from a judgment are properly cast in narrow terms.
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> *On the other hand, it is equally inappropriate that all judgments be treated as absolutely inviolable. Particularly is this true when a judgment has been procured by the fraud of the successful party. To immunize such a judgment from attack is to compound the injustice of its result on the merits with the injustice of the means by which it was reached. Equally important if judgments were wholly immuned it would give powerful incentive to use of fraudulent tactics in obtaining a judgment. A litigant would know that if he [or she] could sustain duress or deception through the moment of finality, the benefit of the judgment would be his [or hers] forever.*

Restatement (Second) of Judgments, § 70, com. a, pp. 179-180 (emphasis added).

These principles lay down a balancing test. They can be applied only on a case by case basis. The superficial formalism of the Third District's rote conclusion, that coercion and duress can never amount to extrinsic fraud, vitiates both the letter and the intent of the policy considerations inherent in both the *Throckmorton* case, from which *DeClaire* was derived, and the Restatements of Judgments, which summarize the principles *DeClaire* seeks to apply. Cases from the numerous other

states which have considered the question of relief from judgment based upon allegations of coercion and duress further illustrate the point.[7]

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[7] *Baltins v. Baltins*, 260 Cal. Rptr. 403, 418 (1st Dist. 1989) (affirmed trial court's order setting aside judgment requested in petitioner's motion for relief from judgment on grounds that the judgement was procured through coercion and duress after full evidentiary hearing; court stated that the same relief could have been sought through independent action); *Young v. Young*, 2 S.E. 2d 622, 626 (Ga. 1939) (court allowed former husband who filed peition for relief from prior judgment to present evidence on the issue of whether he was entitled to relief from prior judgment procured through extrinsic fraud based on allegations that judgment was obtained by ex-wife through coercive threats to interfere with his employment and physical threats to his children); *Ming v. Ho*, 371 P.2d 379, 407 (Haw. 1962) (reversed dismissal of petition to set aside judgment and allowed petitioners to demonstrate that the judgment was procured through duress tantamount to extrinsic fraud); *Smutny v. Noble*, 308 P.2d 591, 591 (Idaho 1957) (reversed dismissal of action seeking to modify judgment on grounds of coercion in order to allow petitioner to present facts which would show that property settlement agreement should be set aside on grounds of extrinsic fraud); *Berg v. Berg*, 34 N.W. 2d 722, 724 (Minn. 1948) (affirmed order vacating divorce decree where threats of physical harm constituted extrinsic fraud); *Stein v. Stein*, 789 S.W. 2d 87, 91 (Missouri, E.D. Div. 4 1990) (affirmed trial court's refusal to set aside Separation Agreement on grounds of extrinsic fraud where court found that petitioner's testimony submitted at trial that she had been coerced into signing the settlement agreement underlying the judgment was not credible); *In re Kittinger's Estate*, 101 N.Y.S.2d 844, 846 (S.C. N.Y.Cty. 1950) (court properly refused to strike defenses to petition seeking to adjuicate ex-wife's rights under will where ex-wife claimed that the settlement she entered into relinquishing her rights under the subject will was entered into under threats of death and the duress of the decedent constituted a fraud upon the court); *Griffith v. Bank of New York*, 147 F. 2d 899, 901 (2d Cir. 1945) *cert. denied*, 325 U.S. 874, 89 L. Ed. 1992, 65 S.Ct. 1414 (1945) (reversed dismissal of petition for relief from prior judgment and remanded the case for further proceedings where petitioner alleged that he entered into the prior settlement agreement under the threat of opposing party to tie up subject property indefinitely unless he settled case); *Dyke v St. Francis Hospital, Inc.*, 861 P. 2d 295, 302 (Ok. 1993) (reversed dismissal of a complaint and allowed plaintiff to demonstrate by evidence that prior judgment procured through coercion should be set aside as such coercion could constitute extrinsic fraud); *Foley v. Foley*, 572 A. 2d 6, 14 (Penn. 1990) (affirmed order vacating judgment procured through duress after petitioner presented ample factual evidence that she was denied opportunity to litigate her cause by the opponent's intimidation constituting extrinsic fraud); *DeCluitt v. DeCluitt*, 613 S.W. 2d 777, 780 (Tex.Civ.App. 1981) (reversed summary judgment against petitioner in part due to material issues of fact whether divorce judgment was obtained by threats and duress amounting to extrinsic fraud) and *Hill v. Steinberger*, 827 S.W. 2d 58, 62 (Tex.App. 1992) (interpreting *DeCluitt*); *Norris v. Norris*, 622 P.2d 816, 821 (Wash. 1980) (court refused to vacate prior probate judgment after petitioner was allowed to present evidence, but failed to

Appellee's Extortion Prevented Appellants From Presenting Their Claims In The Prior Action

In his December 2, 1992 telephone call to William "Toby" Muir, Esq., recounted in Mr. Muir's memorandum to the file dated December 3, 1992 (App. D). Appellee admitted to Muir his possession of the January 6, 1992 "Project Gator" Memo, a document stolen from the DiFilippo home which contained attorney-client privileged communications between DiFilippo and his client HSN. Appellee stated further to Muir in that conversation that he had not turned the "Project Gator" document over in discovery, as he had been obligated to do, nor had he leaked it in pleadings, as he had leaked other of the stolen documents, because he believed this document reflected criminal wrongdoing on the part of DiFilippo and his client, HSN, and "once 'the cat is out of the bag,' those materials would have little value for negotiating position but could be detrimental to Nando [DiFilippo]." In response to Appellee's statements to Muir, Elizabeth DuFresne wrote Appellee and demanded, again, return of the stolen documents. (App. E). Of course, Appellee ignored this demand as well.

Appellee committed extortion in this December 2, 1992 telephone conversation.[8] It worked. By pressure brought to bear upon DiFilippo's

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meet burden of proof due to lack of evidence of extrinsic fraud deceit or coercion); *Southmark Properties v. Charles House Corp.*, 742 S. 2d 862, 872 (5th Cir. 1984)(court recognized that duress may be grounds for an independent action for relief from former judgment); *Tandra v. Tyrone*, 648 A.2d, 439, 446 (Md. 1994)(court held that no extrinsic fraud existed which would warrant setting aside prior judgment because no evidence or coercion or duress was presented).

[8] § 836.05 provides: Whoever, either verbally or by written or printed communication, maliciously threatens to accuse another of a crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another, or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with

client, HSN, and through the strange coincidence of a federal grand jury investigation arising at the same time as the DiFilippo/Rayle divorce, Appellee, George Vogelsang, successfully used DiFilippo's stolen attorney-client privileged records to quell the litigation of Appellants' claims in the Prior Action. These facts are clear and convincing evidence of many things. Extrinsic fraud is among them. The Third District's ruling that DiFilippo did not allege facts sufficient to meet that standard amounts to nothing more than a denial that any of these ugly events occurred. They did occur. DiFilippo can and should be allowed to prove it.

The Floodgate Argument

The only conceivable rationale for the Third District's holding in this case is the policy concern that by allowing Appellants relief from the prior judgment, a deluge of litigation will ensue by every divorced person who believes they have received an unfair judgment. Appellants and their counsel, who must and do litigate in Florida's state courts, recognize the legitimacy of this concern. Again, however, Appellants respectfully submit that the Third District, in its effort to protect the courts, has overshot the mark. The solution to the problem of frivolous challenges to the finality of judgments is not the preclusion of all such challenges solely because they arise from acts classified by the Third District as "coercion and duress." Instead, as argued here and as *DeClaire* requires, the solution to the floodgate concern is to recognize in the trial courts the discretion granted by *DeClaire*--discretion to decide which claims are meritorious and which are not, based upon the

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intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his will, shall be guilty of a felony of the second degree, punishable as provided in §§775.082, 775.083, or 775.084.

existence, or not, of clear and convincing evidence that the complaining litigant was deprived of the opportunity to present his case. Restatement (Second) of Judgments § 70, comment d.

II. AN ATTORNEY IS NOT IMMUNE FROM CIVIL SUIT FOR CRIMINAL ACTS COMMITTED IN FURTHERANCE OF HIS CLIENT'S INTERESTS.

Because it decided this case on the extrinsic/intrinsic fraud ground, the Third District did not reach the question of whether an attorney is immune from committing criminal acts. That proposition is, however, so clear and so clearly one of law that remand is not necessary. This Court should overrule the trial court's holding that Appellant is immune from claims of civil theft.

Appellee's Criminal Conduct Was Not Permitted Or Required During The Course Of A Judicial Proceeding; Absolute Judicial Immunity Does Not Attach To Appellee's Conduct.

In Florida, absolute judicial immunity does not attach to an attorney's act or statement unless such act or statement is "permitted or required in the due course of a judicial proceeding." *Fridovich v. Fridovich*, 598 So. 2d 65, 66 (Fla. 1992); *Ange v. State*, 98 Fla. 538, 540-41, 123 So. 916, 917 (Fla. 1929); *Pledger v. Burnup & Sims, Inc.*, 432 So. 2d 1323 (Fla. 4th DCA 1983) *review denied* 446 So. 2d 99 (Fla. 1984). As most recently stated in *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994):

> The privilege extends to the protection of the judge, parties, counsel and witnesses, and *arises immediately upon the doing of any act required or permitted by law in the due course of the judicial proceedings or as necessarily preliminary thereto.*

Id. at 608. (emphasis in original). This doctrine is as old as the privilege itself and exists to confirm that the privilege belongs not to

the lawyer, qua lawyer, but to his office as a counselor and administrator of justice. *Park Knoll Associates v. Schmidt*, 59 N.Y.2d 205, 464 N.Y.S.2d 424, 451 N.E.2d 182, 184 (N.Y. App. Ct. 1983) (privilege attaches not because speaker is judge, attorney, party or a witness, but because statements are "spoken in office.") (quoting) *Crown v. Skinner*, Lofft, p. 55 (Lord Mansfield, J.). Appellee's conduct was not required or permitted by law in the due course of a judicial proceeding.

In order to be found within the due course of judicial proceeding, an attorney's actions must be within the permissible range of actions an attorney may take on behalf of his client. *See Levin*, 639 So. 2d at 608. For example, an attorney may obtain all manner of information through discovery by invoking the court's power to compel production of witnesses for deposition, Fla. R. Civ. P. 1.410, to compel the review and production of documents and things or to allow entry onto land, Fla. R. Civ. P. 1.380, to force answers to interrogatories, Fla. R. Civ. P. 1.380, to require admissions, Fla. R. Civ. P. 1.370 and other similar matters. Indeed, in Florida an attorney may lawfully, and without fear of liability, do a great deal more. He may make slanderous remarks in a deposition. *Sussman v. Damian*, 355 So. 2d 809, 811 (Fla. 3d DCA 1977). He may accuse opposing parties of unethical and unlawful conduct in a motion to dismiss. *Ponzoli & Wassenberg, P.A. v. Zuckerman*, 545 So. 2d 309 (Fla. 3d DCA 1989) *review denied*, 554 So. 2d 1170 (Fla. 1989). He may even force the disqualification of opposing counsel by misstating his witness list to the court and naming opposing counsel therein. *Levin*, 639 So. 2d at 608-609. A lawyer is, of course, privileged to do these things not simply because he is a lawyer but because he is, in the archaic sense, his client's champion; these are the tools by which the

client's interest may be pursued with the ultimate goal of finding the truth through the adversarial process. *Id.*

But there are limits. In championing his client's cause or his own, the lawyer must play by the bare minimum rules. He may not resort to self-help, or breach the criminal law. As it pertains to this case, he may not steal, and if he does, he may be held liable. *Kahn v. Crames*, 459 N.Y.S.2d 941 (A.D. 1983)(complaint alleging that lawyer who assisted and advised divorce client in theft of documents from sealed file room of marital residence states claim for conversion; lawyer may be sued for such action notwithstanding motive for the taking was to gain settlement leverage on behalf of client).

Kahn is virtually indistinguishable from this case. In *Kahn*, as here, the husband was a lawyer. In *Kahn*, as here, the wife's divorce attorneys directed her to take documents belonging to her husband's clients that were stored in a special room in the marital residence. *Kahn*, 459 N.Y.S.2d at 942. When the attorneys refused to return the documents upon the husband's demand and the husband sued, the court held that the husband had stated and could pursue a cause of action for conversion against the attorneys. *Id.* at 943. This court's decision is especially relevant because, like Florida, New York recognizes an absolute privilege for statements an attorney makes during the course of a judicial proceeding. *Barratta v. Hubbard*, 523 N.Y.S.2d 107 (A.D. 1 Dept. 1988). Although not expressly discussed in the opinion in *Kahn*, the court's holding in that case demonstrates that the defendants' status as attorneys acting to advantage their client in settlement negotiations was not a bar to liability for conversion.

Like the attorneys in *Kahn*, Appellee did not obtain Appellants' documents through lawful process. Had he done so, DiFilippo and his

clients could have asserted privilege through the judicial process and, as Appellee well knew, prevent the turnover of the documents, a result which would not have advanced Appellee's case one whit. Instead, Appellee chose another and more expedient route. He simply directed his client, on the day the court had ordered her to leave the marital home, to take the documents and run. This is self-help, conversion and, under Florida law, civil theft, conduct from which lawyers or anyone else are prohibited under pain of criminal penalty or civil judgment. It follows that Appellee's acts were neither required nor permitted in the due course of a judicial proceeding.

Actions In Subversion of Judicial Process Are Not In the Due Course Of a Judicial Proceeding

As noted, the underlying rationale of the judicial immunity doctrine and the absolute litigation privilege which arise from it is furtherance of the administration of justice. It makes no sense in light of this rationale to hold that a lawyer's illegal acts, committed in furtherance of a fraud on the court and calculated to obtain a judgment which, by definition, the judicial system itself will not recognize, are acts deserving of immunity because they further the administration of justice. Such reasoning is absurd. This constitutes a complete subversion of the system of justice Appellee now calls upon for protection.[9]

Florida looks to the Restatement Second of Torts in defining a judicial proceeding and the litigation privilege appertaining to

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[9] Appellee, in making the argument for absolute immunity, seeks (successfully thus far) to arrogate to himself personally, based solely upon his status as a lawyer, the privilege designed to protect the administration of justice. This is not the law. *See, e.g.*, Burke, *Privileges and Immunities in American Law,* 31 S.D.L. Rev. 1,1 (1985) ("Immunities relieving particular persons or special classes or groups from the duties and liabilities appropriated by law for their fellow men, have been regarded from times of old as odious.")

attorneys as a consequence of it. *Fridovich*, 298, So. 2d, 26-27. Comment d. to the Second Restatement defines judicial proceeding as "all proceedings before an officer or other tribunal exercising a judicial function." Restatement (Second) of Torts §586, commentary (1977). Comment a. includes matters preliminary to such preceding. *Id.* Thus, the reason for this element of the immunity decision is the existence of safeguards the judicial officer may impose upon the conduct of the attorneys. *See Fridovich*, 598 So. 2d at 67, n.3, 69, n.5.

In *Fridovich*, this Court denied absolute immunity to statements citizens make to police involving alleged criminal activities, because judicial safeguards are not present in such situations. Instead the Court applied a qualified privilege to such situations where no judicial safeguards are present. *Id.* at 69. In two footnotes in the opinion, the *Fridovich* Court emphasized the distinction between proceedings where the safeguards are present, where the statements would enjoy absolute immunity, and those circumstances where the safeguards are not present, and could be granted a qualified privilege at most. *Id.* at 67, n.3; *Id.* at 69, n.5.

Under the instant facts, Appellee's actions fall clearly outside the *Fridovich* definition of "judicial proceeding." The privileged legal documents Appellee stole from DiFilippo's house were not available through discovery. Additionally, there were no safeguards available to DiFilippo to prevent Appellee's and Rayle's theft and when, after the fact, DiFilippo sought to force return of the stolen documents, Appellee simply lied to the court and counsel about what documents he retained in his possession. These were, in the most literal sense, the actions of an outlaw. When the court finally realized that Appellee and his client had stolen privileged files of DiFilippo's clients and ordered those

files suppressed as evidence in the divorce case, Appellee at first refused to comply, denying that he had read the order or that he had received the faxed copy counsel's facsimile records showed him to have received. Judicial safeguards cannot protect against such actions. A civil suit, while it cannot prevent such actions, can make their victim whole.

The importance of judicial safeguards was emphasized again in *Pledger v. Burnup & Sims, Inc.*, 432 So. 2d 1323 (Fla. 4th DCA 1983) *review denied* 446 So. 2d 99 (Fla. 1984). In *Pledger*, the appellant brought a claim for defamation based on statements written in a complaint in which appellant was specifically referred to by his position, but not named as a defendant in the action. In its opinion this Court stressed the importance of the safeguards inherent in a judicial process which give the court control over any improper statements or actions made by a party:

> Although an action will not lie in favor of a defendant for statements made in the course of a judicial proceeding, still a defendant, as a party to the proceeding, has a host of opportunities to defend his reputation. He receives notice of all proceedings; he may take discovery; he may appear represented by counsel, and present evidence in his own behalf to establish the falsity of any allegation.

Id. at 1327-28. The *Pledger* Court afforded a qualified privilege to the statements in the unfiled complaint under the rationale that they were presettlement negotiations, noting the societal interest in encouraging settlement of cases. *Id.*

These principles recur throughout all cases in which Florida courts have applied absolute immunity to an attorney's actions or statements. *See, e.g., Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co.*, 639 So. 2d 606 (Fla. 1994) (insurance company which listed the plaintiff's lawyer as a witness, allegedly as a pretext

to disqualify lawyer from continuing representation, and then failed to call lawyer as a witness at trial held immune from suit for tortious interference; company's naming of witnesses was part of its compliance with discovery and was made within the court's control and discretion to prevent abuses of the judicial process); *Ponzoli & Wassenberg, P.A. v. Zuckerman*, 545 So. 2d 309 (Fla. 3d DCA 1989) *review denied*, 554 So. 2d 1170 (Fla. 1989) (defendant immune from suit for threats in motion to dismiss because the court could exercise its role in protecting the party exposed to such harmful behavior); *Sussman v. Damian*, 355 So. 2d 809 (Fla. 3d DCA) (attorney immune from suit for slanderous remarks made in deposition because proceeding under supervisory power of court).

In comparison, Florida does allow claims against an attorney acting in bad faith, for malicious prosecution, abuse of process and fraud. *Pledger v. Burnup & Sims, Inc.*, 432 So. 2d 1323 (Fla. 4th DCA 1983) *review denied* 446 So. 2d 99 (Fla. 1984); *Cox v. Klein*, 546 So. 2d 120, 122 (Fla. 1st DCA 1989); *Ange v. State*, 13 So. 916, 918 (Fla. 1929). *Moss v. Zafiris, Inc.*, 524 So. 2d 1010 (Fla. 1988); *Gentile v. Rodriguez*, 583 So. 2d 382 (Fla. 3d DCA 1991). This is so because an attorney acting in bad faith is deemed to be in disregard of the rules and regulations of the process. He acts for himself or on behalf of his client in disregard of the laws and without respect for the profession. Such an attorney ceases in any way to promote fairness and justice. In default of these duties, an attorney ceases to be the court's officer and loses the protection of that office. Judicial immunity is withdrawn.

Appellee's Illegal Conduct Falls Outside the Protection of Judicial Process

As Appellants have alleged below and as they will prove at trial through the testimony and documents of DiFilippo's divorce counsel, Elizabeth DuFresne and William T. ("Toby") Muir, both at the time members of the law firm of Steel, Hector and Davis, and through the testimony and documents of representatives of HSN, DiFilippo's client, Appellee's stated objective in obtaining and holding DiFilippo's privileged client files was leverage in the divorce settlement. The threats of disclosure of these documents were explicit and were made directly to counsel for DiFilippo and to counsel for DiFilippo's client, HSN. This illegal and unlawful conduct was beyond the reach of judicial safeguards. Indeed, it demonstrates Appellee's orchestration of a fraud on the court. Appellee acted to subvert the judicial process of the divorce trial. In acting to subvert judicial process, Appellee forfeited his claim to the protection of that process. This conclusion is also compelled by consideration of the import of the procedural history of this case.

In addition to dismissing Appellee from Appellants' lawsuits on grounds of absolute judicial immunity, the trial court also considered the motion to dismiss brought by Appellee's co-defendant, Rayle. Rayle argued that she should be dismissed from these cases because Appellants' allegations, even if true, constituted at most only intrinsic fraud and, as such, were time-barred under Fla. R. Civ. P. 1.540(b). In denying that motion, the trial court found that Appellants' complaints stated a cause of action for extrinsic fraud and that the acts alleged, if proven, would warrant relief from the judgment of dismissal entered into under the coercive force of Appellee's threats of publication of client documents. So holding, the trial court nevertheless dismissed Appellee. Because the only difference alleged between Rayle and Appellee was that

Appellee was acting as a lawyer, it follows from the trial court's ruling that not only is a lawyer is absolutely immune from liability for committing theft, he is also immune from committing a fraud on the court itself. Such a result is ethically irrational.

Even If Appellee's Conduct Were In Some Way Privileged, It Arose As Part of An Illicit Attempt At Settlement And Would Be Only Qualifiedly Privileged At Best; Qualified Privilege Is An Affirmative Defense Only, Not Cognizable On Motion To Dismiss

On the basis of the foregoing argument, Appellants submit judicial immunity could in no way attach to Appellee's conduct in this case. However, should this Court disagree and find that Appellee's conduct is potentially privileged, clearly the only immunity even potentially applicable to this conduct is qualified privileged under Florida law.

Florida courts draw the distinction between absolute and qualified immunity based upon differing factors. The analysis is fact intensive and the court's decisions hew closely to the circumstances of the cases presented. The factors leading to the absolute versus qualified immunity determination are, however, derivative of those driving the question of immunity generally. *See Fridovich v. Fridovich*, 598 So. 2d at 69. The critical concerns are whether or to what extent the actions of the party were derivative of or incidental to a judicial proceeding and, more fundamentally, the appropriate balance between furtherance of the administration of justice and the individual's right to assert actionable claims. *Id.*

If this Court finds that Appellee's conduct was required or permitted in a judicial proceeding, but irrelevant to the issues in the case, the appropriate immunity standard is qualified, not absolute immunity. *See Myers v. Hodges*, 44 So. 357 (Fla. 1907); *Sussman v. Damian*, 355 So. 2d at 810 (Fla. 3d DCA 1977).

In *Sussman*, the Third District distinguished between conduct in a deposition and conduct in an elevator adjacent to the judge's chambers. The first venue resulted in absolutely privileged status, *see* discussion *supra* at 27. The discussion in the elevator, however, was only qualifiedly privileged. *Sussman*, 355 So. 2d at 812. The difference, according to the court, was that the statements in the elevator were not relevant to the proceeding itself. *Id.*

Appellee's criminal conduct, aiding and abetting civil theft and conversion and the subsequent threats to publish the confidential and privileged documents, was not relevant to any issue in the divorce proceeding between DiFilippo and Rayle. Additionally, Appellee's conduct, in no manner, asserted any factual matters or other information which was intended to, or did, promote the ends of justice in the divorce proceeding.

Another distinction noted in the case law is the question of whether the actions involved occurred as part of settlement negotiation. Clearly, if implicitly, the cases refer to settlement negotiation by legitimate means, i.e. means required or permitted by law, *see* discussion *supra*, at 24, and as such Appellee's conduct, while clearly part of an effort at settlement, would not fall within the ambit of immunity.[10]

In any case, should this Court conclude that Appellee's actions are potentially privileged, whether because they were irrelevant or because of their context in settlement, the appropriate level of immunity accorded would be the qualified variety, which may be overcome by a showing of malice. *Pledger v. Burnup & Sims, Inc.*, 432 So. 2d 1213 (Fla.

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[10] One thrust of Appellee's argument below was that the effectiveness, as opposed to the legitimacy, of his settlement efforts should be the gauge of privilege. If this were true, lawyers could advantage their cases by any number of means, kidnapping and murder among them. Clearly this is not the measure of immunity or its concomitant privilege in this state.

4th DCA 1983) *review denied* 446 So. 2d 99 (Fla. 1984); *Silver v. Levinson*, 648 So. 2d 240 (Fla. 4th DCA 1994). Appellants have alleged, and will prove, that Appellee acted with criminal intent. That allegation alone, taken as true for purposes of this appeal, demonstrates malice and lack of good faith. If Appellee's conduct is potentially privileged, Appellants are entitled to rebut that presumptive privilege by proof at trial. The trial court's dismissal of their claims deprived them of that entitlement.

CONCLUSION

Few activities in modern life are as emotionally charged as litigation. Indeed, these days it is regrettably the exceptional case which does not at its conclusion present at least one litigant who is embittered, disenchanted and convinced to his core that the system has betrayed him. In a better world our courts might be a place where a dialogue of justice would roll as the rivers until all proclaim the rightness of result; then shall lion would lie down with lamb and plowshares be made of all swords, etc. But in the meantime, and in this world, nothing cheats justice more than delay. If our courts are to be freed to attend the case next in line, if fairness is to extend to the case just outside the courthouse door, the finality of our courts' judgments must be respected. For these right reasons our courts are inured to claims that judgments, once settled, should be reopened. Appellants acknowledge this fact and agree that it is right.

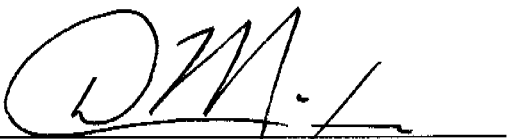
But there is another principle which must also inform the question of finality and that is that the judgment to be respected must have been reached in such as way as to make that judgment deserving of respect, the fair product of a fair contest under law. That is what this case,

rightly conceived, is about. Absent confidence in the fairness of the functioning of the judicial process, no judgment, however efficiently reached, can be rightly imposed or honorably accepted. The instant judgment is unworthy of this Court's confidence, and should be overturned.

For the foregoing reasons, Appellants, Fernando DiFilippo, Jr., and Fernando Joseph DiFilippo, and Francesca Glynn DiFilippo, by and through Fernando DiFilippo, Jr., their father and natural guardian, respectfully request that this Court reverse the trial court's dsimissal of Appellee, George Vogelsang, from these cases and remand for an evidentiary hearing at which Appellants may show by clear and convincing evidence that they were prevented from litigating the Prior Action.

Respectfully submitted,

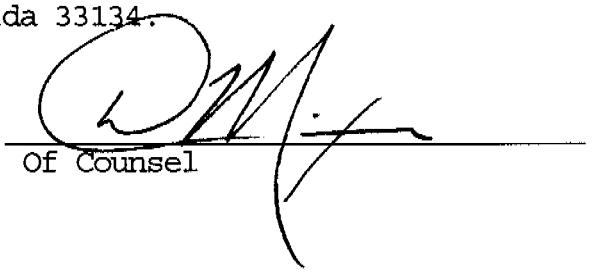
FERNANDO DIFILIPPO, JR.,
FERNANDO JOSEPH DIFILIPPO
and FRANCESCA GLYNN DIFILIPPO,
By and through FERNANDO
DIFILIPPO, JR., THEIR FATHER
AND NATURAL GUARDIAN

By: 

Donnal S. Mixon
Fla. Bar No. 011185

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 6th day of August, 1996, a true and correct copy of the foregoing APPELLANTS' INITIAL BRIEF has been hand-delivered to BETH TYLER VOGELSANG, ESQ., THE VOGELSANG LAW FIRM, Douglas Centre, Suite 906, 2600 Douglas Road, Coral Gables, Florida 33134, and to JOEL HIRSCHHORN, ESQ., JOEL HIRSCHHORN, P.A., Douglas Centre, PH1, 2600 Douglas Road, Coral Gables, Florida 33134.



Of Counsel

IN THE SUPREME COURT OF FLORIDA

Case No. 87,706

FERNANDO JOSEPH DIFILIPPO, and
FRANCESCA GLYNN DIFILIPPO by
and through FERNANDO DIFILIPPO,
JR., their father and natural guardian,
and FERNANDO DIFILIPPO, JR.,

Appellants,

vs.

WANDA RAYLE, f/k/a WANDA DIFILIPPO,
and GEORGE C. VOGELSANG,

Appellee.
_____/

APPENDIX TO APPELLANTS' INITIAL BRIEF

DONNAL S. MIXON, ESQ.
WILLIAM M. RICHARDSON, JR., ESQ.
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Coral Gables, Florida 33134
Attorneys for Appellants

INDEX TO APPENDIX

Appendix A

02-22-93

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 93-03145 CA 04

FERNANDO DIFILIPPO, JR., and FERNANDO JOSEPH DIFILIPPO and FRANCESCA GLYNN DIFILIPPO BY AND THROUGH FERNANDO DIFILIPPO, JR., THEIR NEXT FRIEND,

Plaintiffs,

-vs-

WANDA RAYLE DIFILIPPO and GEORGE C. VOGELSANG,

Defendants.

_____/

MOTION TO TRANSFER

Pursuant to Administrative Order 79.2 and the Florida Rules of Civil Procedure, the Defendant, GEORGE C. VOGELSANG, moves this Honorable Court to transfer Circuit Court Case No 93-03145 CA Division 04, to Division 38, and alleges as follows:

1. Case No. 92-59906 FC, Division 38, is a Dissolution action filed by the Wife on September 30, 1992.

2. Case No. 93-03145 CA, Division 04, is a injunction relief action filed by the Husband on February 19, 1993.

3. Case No. 93-03145 CA, Division 04, should be transferred to Division 38 as the Complaint and Jury Demand filed by the Husband involves the same subject matter as the Wife's Petition.

WE HEREBY CERTIFY that a true copy of the foregoing was mailed and faxed this 22 day of February, 1993 to STEEL, HECTOR

& DAVIS, Attorneys for Husband, 200 South Biscayne Boulevard, Suite 4000, Miami, Florida 33131 and JENNER & BLOCK, One Biscayne Tower, Miami, Florida 33131.

THE VOGELSANG LAW FIRM
Attorneys for Defendant
3250 Mary Street, #305
Miami, Florida 33133
(305) 441-6611

By: _____
George C. Vogelsang

Appendix B

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 93-03145 CA 04

FERNANDO DIFILIPPO, JR., and FERNANDO JOSEPH DIFILIPPO and FRANCESCA GLYNN DIFILIPPO BY AND THROUGH FERNANDO DIFILIPPO, JR., THEIR NEXT FRIEND,

Plaintiffs,

vs.

WANDA RAYLE DIFILIPPO and GEORGE C. VOGELSANG,

Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT VOGELSANG'S MOTION TO TRANSFER CAUSE TO FAMILY DIVISION

On February 19, 1993, plaintiffs filed this action against Wanda Rayle DiFilippo ("Rayle") and George C. Vogelsang ("Vogelsang"), seeking damages for defendants' conversion of their confidential financial, business and other personal documents and intentional infliction of emotional distress. In their Complaint, plaintiffs demanded a jury trial on all of their claims.

Defendant Vogelsang now seeks entry of an Order transferring this action to Judge Amy Steele Donner of the Court's Family Division on the ground that this action "involves the same subject matter as the Wife's Petition" for dissolution of her marriage to plaintiff Fernando DiFilippo, Jr. ("DiFilippo"), which is pending before Judge Donner. See In re Marriage of Fernando

Appendix B

DiFilippo and Wanda Rayle DiFilippo, Case No. 92-59906 FC 38 (Dade County, Fam. Div.). As shown below, Vogelsang's motion should be denied.

As the Court is aware, "circuit courts are divided into divisions, and cases of a particular type are assigned to judges within the division." Payette v. Clark, 559 So. 2d 530, 533 (Fla. 2d DCA 1990). These divisions are intended to enhance the "efficiency of administration." Id.

The Circuit Court of Dade County consists of a number of divisions, including civil, probate and family. The Civil Division generally handles all civil actions cognizable by the Dade Circuit Court except proceedings involving probate and dissolution of marriage.[1/]

The instant action was properly assigned to the Court's Civil Division. This is because it is an action at law for money damages for which plaintiffs have demanded a jury trial. Vogelsang's contention that this action should be transferred to the Court's Family Division because it involves the same subject matter as the DiFilippo marital dissolution proceeding is without merit for a number of different reasons.

First, the central issues in this action and the DiFilippo dissolution proceeding are dissimilar. This action seeks redress for Rayle and Vogelsang's theft of the DiFilippo family's confidential personal, financial and business records and intentional infliction of emotional distress. Defendants'

[1/] The other divisions of the Dade Circuit Court are Juvenile and Criminal. In addition, there is the Small Claims Division and the County Court.

misconduct that is the subject of this action occurred after the parties' marriage had become irretrievably broken and the parties had each filed petitions for dissolution of the marriage. In contrast, the dissolution action principally concerns the equities in dividing assets acquired during the marriage and the payment of alimony. Although the theft of the DiFilippo family records was raised in the dissolution action, it is not a principal issue in that case. See, e.g., State of Florida v. Rowe, 104 So. 2d 134, 135 (Fla. 1st DCA 1958).

Second, the parties in the two actions are not the same. The dissolution action is solely between Rayle and DiFilippo whereas in this action, Fernando and Francesca DiFilippo are also plaintiffs and Vogelsang is a defendant. Id. at 137.

Third, plaintiffs have requested a jury trial of the claims in this action. Jury trials are not conducted by the Family Division. See Fla. Stat. 61.011 (1991) ("Proceedings under this chapter are in chancery.").

Finally, plaintiffs elected to file this separate action to recover money damages for defendants' misconduct. They should not be forced to litigate this suit in conjunction with the marital dissolution action merely because Vogelsang has sought to erroneously inject that action into this case. See, e.g., Barnes v. Meece, 530 So. 2d 958, 959 (Fla. 5th DCA 1988).

For the foregoing reasons, plaintiffs Fernando DiFilippo, Jr., and Fernando Joseph DiFilippo and Francesca Glynn DiFilippo request that the Court deny defendant George C. Vogelsang's motion

to transfer this cause to Judge Donner of the Court's Family Division.

Respectfully submitted,

FERNANDO DIFILIPPO, JR.
FERNANDO JOSEPH DIFILIPPO
FRANCESCA DIFILIPPO

By _____
One of Their Attorneys

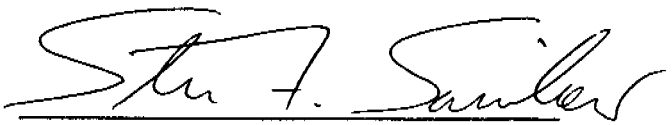
Ross B. Bricker
Florida Bar No. 801951
Steven F. Samilow
Florida Bar No. 769142
JENNER & BLOCK
One Biscayne Tower
Miami, FL 33131
(305) 530-3535

Dated: March 1, 1993

DiFilippo/MemOpVog.Doc

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Plaintiffs' Memorandum in Opposition to Defendant Vogelsang's Motion to Transfer Cause to Family Division was served by hand delivery on March 1, 1993, to George C. Vogelsang, 3250 Mary, Coconut Grove, FL 33131, and Wanda Rayle DiFilippo, 2900 South Bayshore Drive (Apts. 13G and H), Coconut Grove, FL 33133.



Appendix C

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION:

CASE NO.: 93-3145 CA 04

Fernando Defilippo, Jr., et al.,

Plaintiff(s)

vs.

Wanda Payle Defilippo, et al.,

Defendant(s).

ORDER DENYING MOTION TO TRANSFER

THIS CAUSE came on to be heard upon the (Plaintiff's) (Defendant's) Motion to Transfer, and the Court being fully advised in the premises, it is

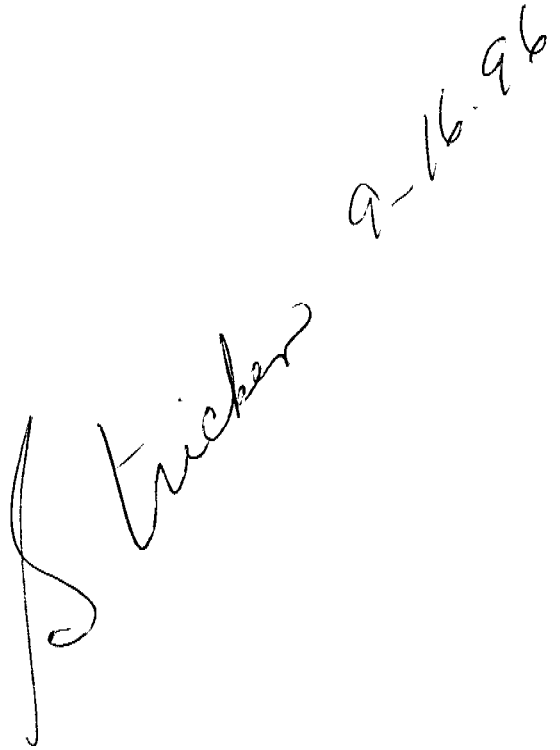
ORDERED AND ADJUDGED that this cause be and the same is hereby denied. Without prejudice

DONE AND ORDERED at Miami, Dade County, Florida, this 2 day of March, 1993.

ADMINISTRATIVE JUDGE

Copies furnished to:

Appendix C



Appendix D

Stricken

Appendix E

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Appendix F

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
ENFORCEMENT
Mail Stop 5-3

April 4, 1996

BY TELECOPIER (202) 408-7614

Frank C. Razzano, Esq.
Camhy, Karlinsky, Stein, Razzano & Rubin
1100 New York Avenue, N.W.
West Tower, Suite 812
Washington, D.C. 20005

Re: In the Matter of Home Shopping Network, Inc.
HO-2736

Dear Mr. Razzano:

This is to advise you that the present staff inquiry in the above captioned matter has been terminated and that, at this time, no enforcement action has been recommended to the Commission. We are providing this information in accordance with the guidelines applicable to formal investigations set forth in Securities Act Release No. 5310, which in pertinent part reads as follows:

> "The Commission is instructing its staff that in cases where such action appears appropriate, it may advise a person under inquiry that its formal investigation has been terminated. Such action on the part of the staff will be purely discretionary on its part. . . Even if such advice is given, however, it must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation of that particular matter. All that such a communication means is that the staff has completed its investigation and that at that time no enforcement action has been recommended to the Commission. The attempted use of such a communication as a purported defense in any action that might subsequently be brought against the party, either civilly or criminally, would be clearly inappropriate and improper since such a communication, at the most, can mean that, as of its date, the staff of the Commission does not regard enforcement action as called for based upon whatever information it then has."

Sincerely yours,

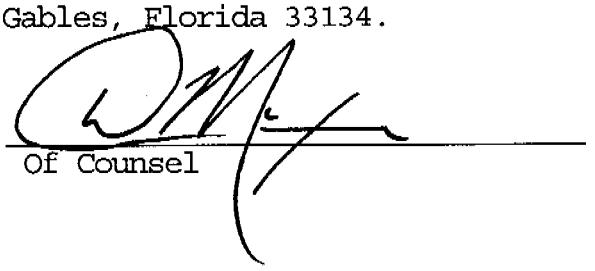
Ellen B. Ross

Ellen B. Ross
Assistant Director

Appendix F

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 6th day of August, 1996, a true and correct copy of the foregoing APPENDIX TO APPELLANTS' INITIAL BRIEF has been hand-delivered to BETH TYLER VOGELSANG, ESQ., THE VOGELSANG LAW FIRM, Douglas Centre, Suite 906, 2600 Douglas Road, Coral Gables, Florida 33134, and to JOEL HIRSCHHORN, ESQ., JOEL HIRSCHHORN, P.A., Douglas Centre, PH1, 2600 Douglas Road, Coral Gables, Florida 33134.



Of Counsel