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.,

Petitioners/Plaintiffs

vs.

GEORGE C. VOGELSANG,

Respondent/Defendant.
_____/

An Appeal taken from the District Court of Appeals
Third District, Case No. 95-1492

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

This is an appeal taken from an order of the Third District Court of Appeals affirming the trial court's dismissal of Respondent from two consolidated cases brought by Petitioners in the Eleventh Judicial Circuit in and for Dade County, Florida, Case Nos. 94-24348 and 94-24349 (consolidated). The trial court's order dismissing Respondent was entered May 1, 1995. Notice of Appeal to the Third District was timely filed by Petitioners on May 22, 1995. Following oral argument, the Third District Court of Appeals affirmed the trial court's ruling in a per curiam opinion issued March 6, 1996. Notice to invoke discretionary review in this Court was timely filed April 3, 1996.

SUMMARY OF ARGUMENT

This Court has jurisdiction to hear this appeal because the opinion of the Third District from which it is taken expressly and directly conflicts with opinions of this Court and of the Fourth District Court of Appeals. In addition, the Third District's holding conflicts with that District's own standard for determining the existence of extrinsic fraud.

This Court should exercise its jurisdiction in this case to correct and clarify once and for all the standards, substantive and procedural, which govern actions to reopen judgments based upon allegations of extrinsic fraud in Florida and to end the confusion now prevalent in the reported cases on this and related questions. What actions deprive a litigant of the forum of the courts as the means of resolving his claims; is extortion not such an action?

What procedure should be adopted to adjudicate extrinsic fraud claims? Should the jury decide, as the Fourth District seems to have held, or should the existence vel non of extrinsic fraud be a threshold legal determination of the trial court? And, if so, should the issue be resolved on pleadings alone or is an allegedly defrauded litigant entitled to an evidentiary hearing in which to demonstrate his case? All of these questions are carried within this case. This Court can and, Petitioners urge, should use this appeal as a vehicle to resolve them. In doing so, this Court could end the noted confusion now too prevalent and conserve substantial judicial and private resources.

Finally, Petitioners ask this Court to correct an error of law which has occurred in this case and to avoid the injustice now arising from it. Petitioners have sued Respondent for criminal acts, a claim they have from the outset been prepared to prove. Yet because the Respondent is an attorney their claims have been dismissed without a hearing, evidentiary or summary, and this is wrong. It is a result which holds up to ridicule the honor and integrity of the legal profession itself. An attorney is not privileged to break the law, no matter whose interests his criminal acts further. If Petitioners can prove their allegations--and they can--Respondent should be held to account for his actions, an extorted dismissal with prejudice and claims of judicial immunity notwithstanding.

ARGUMENT

I. THIS COURT HAS JURISDICTION BECAUSE THE OPINION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH OPINIONS OF THIS COURT AND THE DISTRICT COURTS OF APPEALS.

A. Express and Direct Conflict Arises By Operation of Law.

The opinion of Third District Court of Appeals cited as controlling authority Cerniglia v. Cerniglia, 655 So. 2d 172 (Fla. 3d DCA), review granted, 662 So. 2d 931 (Fla. 1995), a case pending review in this Court. Reliance on such a case renders the opinion of the District Court of Appeals in prima facie express conflict with prior decisions of this Court. Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981). This Court has jurisdiction pursuant to Article V Section 3(b)(3), Florida Constitution (1980). Id.

B. The Holding Below Expressly and Directly Conflicts With This Court's Prior Opinion in DeClaire v. Yohanan, 453 So. 2d 375 (Fla. 1984).

In affirming the Trial Court's order dismissing Petitioners' complaints against Respondent, the Third District Court of Appeals defined extrinsic fraud inconsistently with this Court's definition of that concept in DeClaire v. Yohanan, 453 So. 2d 375 (Fla. 1984). By holding that theft and extortion cannot as a matter of law be acts preventing the victimized party from litigating his case, the opinion below defines DeClaire too narrowly, eviscerating the protection afforded by that case.

C. The Holding Below Expressly and Directly Conflicts With Opinions Of The Fourth District Court of Appeals.

As noted, the District Court's opinion below relied upon the Cerniglia case and that case's definition of extrinsic fraud in support of its holding. In Cerniglia, the Third District certified to this Court a conflict between its definition of extrinsic fraud and the definition of extrinsic fraud adopted by the Fourth District in Lamb v. Leiter, 603 So. 2d 632 (Fla. 4th DCA 1992). As the point of law relied upon in this case is the same as that already certified in Cerniglia, the same conflict exists.

This case and Cerniglia are also in conflict with the Fourth District's opinion in Gordon v. Gordon, 625 So. 2d 59 (Fla. 4th DCA 1993).

D. The Holding Below Conflicts with the Third District's Own Standard For Determining Extrinsic Fraud.

In this case and in Cerniglia the Third District Court of Appeals has inconsistently applied its own binding precedent on the issue of how and when a party must substantiate a claim of extrinsic fraud in an independent action to reopen a judgment. Compare Cerniglia with Whitman v. Whitman, 532 So. 2d 82 (Fla. 3d DCA 1988).

II. THIS COURT SHOULD EXERCISE JURISDICTION TO CORRECT PUBLIC POLICY AND TO PREVENT INJUSTICE.

The holding below, based on factual allegations assumed as true, is that a lawyer who unlawfully obtains privileged client files of another attorney and who then uses those files to coerce that attorney to settle personal civil litigation has not engaged

in extrinsic fraud. Consequently, the coerced judgment cannot be reopened. This case also holds that an attorney is judicially immune from civil suit for his criminal conduct in aiding and abetting theft so long as the theft furthered a client's interest in litigation. On its face, this holding is inconsistent with this Court's definition of extrinsic fraud and its mandate regarding the reopening of judgments. It also stands on its head Florida law and policy on judicial immunity and the so-called litigation privilege arising from it. The result in this case is also grossly unjust. This Court should exercise its jurisdiction to correct these errors.

A. The District Court's Holding Has Defined Extrinsic Fraud In A Manner Inconsistent With DeClaire v. Yohanan.

In DeClaire, this Court defined extrinsic fraud as conduct calculated to force an opposing party litigant to abandon his judicial remedy. The essence of extrinsic fraud, DeClaire held, is conduct preventing a party from presenting his case in court. Id. By contrast, intrinsic fraud was defined as the act of misleading a party with respect to some aspect of the case presented. Id. at 380.

In this case Petitioners allege (1) that the dismissal with prejudice which this case seeks to set aside was secured by Respondent through extortion; (2) that this extortion was accomplished by the theft of privileged client files and other valuable documents from Petitioner, Fernando DiFilippo, Jr., a lawyer; (3) that Respondent completed the extortion by threatening

publication or destruction of the stolen documents unless Petitioners dismissed their actions against Respondent and DiFilippo settled with Respondent's client in her divorce; and (4) that these acts prevented Petitioners from litigating their claims that Respondent and his client had stolen confidential and valuable documents from Petitioners.

Since these facts are assumed as true by the trial and appellate courts because this case arises from a motion to dismiss, the only possible interpretation of the Third District Court's holding is that, as a matter of law, the alleged conduct could never under any circumstances constitute the coercive force required by DeClaire. And yet, as Petitioners have alleged, it did. The holding below imposes inappropriate limitations on the standard of extrinsic fraud set out in DeClaire.

B. This Case Affords the Opportunity to Clarify the Procedure to be Used in Adjudicating Actions to Reopen Judgments Based on Claims of Extrinsic Fraud.

DeClaire v. Yohanan set the standard for extrinsic fraud but because the complainant in DeClaire did not meet that standard this Court did not define in that case the procedure to be followed by trial courts in evaluating an extrinsic fraud claim. As a result, in the twelve years since DeClaire Florida trial and appellate courts have wrestled with the question of when, how and by whom is the determination of extrinsic fraud to be made. Does the mere allegation of the kind of coercive force required by DeClaire suffice to take the claim to a jury? See Gordon v. Gordon, 625 So. 2d 59 (Fla. 4th DCA 1993)(holding it is). Or is

the existence of extrinsic fraud a pure question of law determinable on a motion to dismiss? See Cerniglia, 655 So. 2d at 175 (arguably so holding).

In this case, although the trial court erred in dismissing respondent on grounds of judicial immunity, it correctly adopted a procedure by which Petitioners would be allowed to present to the trial court at a hearing their evidence of the coercive effect of the actions alleged in the complaint. Based upon this evidentiary showing, the trial court could have ruled as a matter of law whether the DeClaire standard had been met or not.

Although the District Court's holding truncated this process, the issue of how and when an extrinsic fraud claim is to be evaluated is carried within this case. As such, this case presents this Court with an opportunity to articulate once and for all the appropriate procedure by which judgments may be reopened as a result of extrinsic fraud. There is an urgent need for such guidance as the inconsistencies in the cases show.[1] This Court should exercise jurisdiction in this case to resolve these issues.

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[1] See Cerniglia v. Cerniglia, 655 So. 2d 172 (Fla. 3d DCA 1995); Zuckerman v.Hofichter, 630 So. 2d 210 (Fla. 3d DCA 1993); Lopez v. Lopez, 627 So. 2d 108 (Fla. 1st DCA 1993); Gordon v. Gordon, 625 So. 2d 59 (Fla. 4th DCA 1993); Lamb v. Leiter, 603 So. 2d 632 (Fla. 4th DCA 1992); Fritsevich v. Estate of Voss, 590 So. 2d 1057 (Fla. 3d DCA 1991); Guerriero v. Schaub, 579 So. 2d 370 (Fla. 4th DCA 1991); M.A.F. v. G.L.F., 573 So. 2d 862 (Fla. 1st DCA 1990); Bobinger v. Deltona Corporation, 563 So. 2d 739 (Fla. 2d DCA 1990); M.L.B. v. HRS, 559 So. 2d 87 (Fla. 3d DCA 1990); Micale v. Micale, 542 So. 2d 415 (Fla. 4th DCA 1989); Hinchee v. Golden Oak Bank, 540 So. 2d 262 (Fla. 2d DCA 1989); Whitman v. Whitman, 532 So. 2d 82 (Fla. 3d DCA 1988); Champion v. Champion, 525 So. 2d 999 (Fla. 5th DCA); First Florida Bank v. Shafer, 503 So. 2d 459 (Fla. 2d DCA 1987); Weitzman v. F.I.F. Consultants, Inc., 468 So. 2d 1085 (Fla. 3d DCA 1985); Daugharty v. Daugharty, 456 So. 2d 1271 (Fla. 1st DCA 1984).

C. The District Court's Opinion Wrongfully Immunizes an Attorney from Civil Suit for Criminal Actions Taken on Behalf of a Client.

Petitioners sued respondent for civil theft. An essential element of that action, alleged in Petitioners' complaints, is felonious intent. The trial court assumed this and Petitioners' other allegations as true in ruling on Respondent's motion to dismiss. In granting that motion on grounds of judicial immunity, the trial court effectively held that a lawyer is immune from civil suit for criminal conduct so long as that conduct furthered the interests of a client. This result is an ethical non sequitur. Judicial immunity attaches only to conduct required or permitted by law. By definition, therefore, it cannot attach to criminal conduct which the law prohibits. In affirming on other grounds the trial court's ruling, the District Court left standing this irrational precedent. This Court should exercise jurisdiction and correct that error.

D. Dismissal Of This Case Without Hearing Is Grossly Unjust.

Much has been made in this case of the scandalous nature of Petitioners' allegations and their affect on the professional reputation of the Respondent, a prominent Miami divorce attorney. Little, however, has been said by anyone about the rights of Petitioners in this case. But it was Petitioners upon whom Respondent preyed. And they have rights, as well.

Fernando DiFilippo, Jr. is an attorney, an alumnus of Sullivan & Cromwell, a former partner at Baker & MacKenzie and the former general counsel of a Fortune Five Hundred company. He

understands the seriousness of the charges he has made against Respondent and has from the outset been prepared to prove those charges through the sworn pleadings and testimony of his former counsel, Steel, Hector & Davis. He has not had the opportunity. Indeed, the most distressing aspect of this case, both to Petitioners and to undersigned counsel, has been the consistent hostility of the courts to these charges and the consistent refusal of the courts to allow their public airing.

Ending this case without affording Petitioners even a summary hearing on their claims would work a gross injustice, bringing into disrepute the profession and the law. This Court is urged to exercise jurisdiction and, by giving Petitioners the chance to prove their claims, right the wrong perpetuated in this case.

Conclusion

For the foregoing reasons, Petitioners, Fernando DiFilippo, Jr., and Fernando Joseph DiFilippo and Francesca Glynn DiFilippo, by and through Fernando DiFilippo, Jr., their father and natural guardian, respectfully request this Court to recognize and exercise its jurisdiction and grant full review of this case on its merits, with opportunity for full briefing and oral argument.

Respectfully submitted,

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

Petitioners

By: _____

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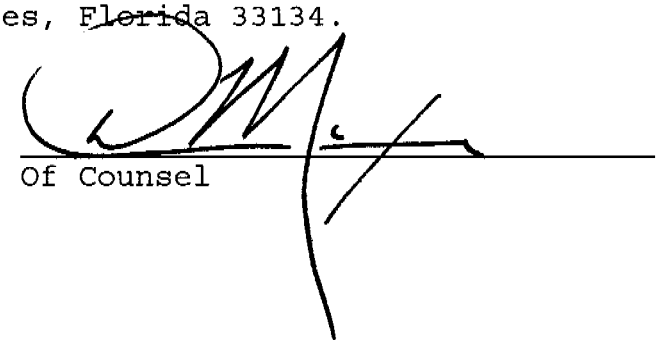
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of Petitioners' Brief on Jurisdiction has been sent by U.S. Mail to the following on this 16th day of April, 1996: **George C. Vogelsang**, The Vogelsang Law Firm, Douglas Centre, Suite 906, 2600 Road, Coral Gables, Florida 33134, and **Joel Hirschhorn**, Douglas Centre, Penthouse One, 2600 Douglas Road, Coral Gables, Florida 33134.



Of Counsel