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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.,

Petitioner,

vs.

GEORGE C. VOGELSANG,

Respondent.

**FILED**

SID J. WHITE

MAY 8 1996

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

An Appeal from the Third District Court of Appeal of Florida  
Case No. 95-1492

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**BRIEF OF RESPONDENT ON JURISDICTION**

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By: BETH TYLER VOGELSANG  
Counsel for Respondent

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## I. JURISDICTIONAL STATEMENT

The Petitioner seeks to invoke the discretionary jurisdiction of this Court under the authority of Article V, § 3(b)(3), Florida Constitution, based upon an asserted express and direct conflict of the decision rendered below with decisions of this Court and/or other district courts. The decision of the Third District Court of Appeal below reads in its entirety as follows:

The record reflects that the matters raised in the instant lawsuit relate to two other cases that were settled and closed more than one year before the instant action was commenced. In view of the fact that the matters raised by appellants in the instant lawsuit are intrinsic, rather than extrinsic, the trial court was correct in entering its order of dismissal. See Cerniglia v. Cerniglia, 655 So. 2d 172 (Fla. 3d DCA), review granted, 662 So. 2d 931 (Fla. 1995); Langer v. Langer, 463 So. 2d 429 (Fla. 3d DCA 1985).

Affirmed.

While there is no express and direct conflict in the decision below, the Respondent acknowledges that "a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or which has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction." Jollie v. State, 405 So. 2d 418 (Fla. 1981). The Third District Court of Appeal rendered its per curiam decision below in reliance on Cerniglia v. Cerniglia, 655 So. 2d 172 (Fla. 3d DCA), a case which this Court accepted to review, 662 So. 2d 931 (Fla. 1995). This Court may, therefore, accept jurisdiction to review this appeal. The Respondent respectfully submits, however, that the Court should postpone its decision on jurisdiction pending its determination of Cerniglia. See, e.g. Roberts v. State of Florida,

644 So. 2d 84 (Fla. 1994), Harrison v. Hyster Company, 515 So. 2d 1279 (Fla. 1987), and Davis v. State, 437 So. 2d 1097 (Fla. 1983).

## **II. STATEMENT OF CASE AND FACTS**

The Petitioner has failed to submit a statement of facts to this Court in his jurisdictional brief. The only facts set forth in the opinion below are that: 1) the matters raised by the Petitioner in his lawsuit relate to two other cases that were settled and closed more than one year before the instant action was commenced, and 2) the matters raised by the Petitioner in the instant lawsuit are intrinsic, rather than extrinsic.

The Petitioner improperly attempts to inject his unproven theories and claims as "fact" throughout the argument sections of his jurisdictional brief. Conflict must arise from the decision sought to be reviewed and not from the "evidence" claimed to exist for which not even record citations are supplied.

## **III. SUMMARY OF ARGUMENT**

The per curiam opinion below holds that the Petitioner's action was barred as it was filed more than one year after the dismissal of two related lawsuits filed by Petitioner. As the Petitioner alleged intrinsic as opposed to extrinsic fraud in an attempt to reopen his claims, the new action was time barred. Petitioner seeks to invoke the express and direct conflict certiorari jurisdiction of this Court. If Cerniglia is approved by this Court it will be determinative of this matter. Accordingly, this Court should postpone its decision on jurisdiction pending the outcome of Cerniglia.

#### **IV. ARGUMENT**

#### **THIS COURT SHOULD POSTPONE ITS DECISION ON JURISDICTION AS CERNIGLIA V. CERNIGLIA WILL BE DETERMINATIVE OF THE JURISDICTIONAL QUESTION**

This Court may review any decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or of the Supreme Court on the same question of law. The decision below which the Petitioner seeks review of is, in all practical effect, a "Citation PCA." Instead of presenting this Court with any factual or legal basis for accepting conflict jurisdiction, the Petitioner improperly argues matters in his jurisdictional brief that are not relevant to the jurisdictional question and have no record support. As this Court noted in Reaves v. State, 485 So. 2d 829 (Fla. 1986):

This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the records or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. Similarly, voluminous appendices are normally not relevant.

Id. At 830, n. 3.

This Court held that "conflict between decisions must be express and direct and must appear within the four corners of the majority decision." Id. At 830. There is nothing in the District Court decision that expressly and conflicts with decisions from other district

courts or this Court, however, the Respondent recognizes that the authority cited for affirmance below is a decision pending review before this Court.

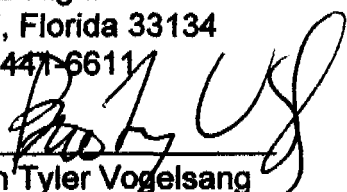
Jollie v. State, 405 So. 2d 418 (Fla. 1981), held that a per curiam opinion of a district court of appeal which cites as authority a decision which is pending review by the Supreme Court, constitutes prima facie express conflict and allows the Florida Supreme Court to exercise its jurisdiction. This does not require the Court to consider the merits of this case, however. Rule 9.120(e) authorizes the Court to postpone a decision on jurisdiction. This Court's conflict jurisdiction would be mooted by the rendering of a decision approving the third district's decision in Cerniglia, or declining to accept discretionary jurisdiction to review the case. This Court should deny the petition, or in the alternative, postpone a jurisdictional decision. 655 So. 2d 172 (Fla. 3d DCA), rev. granted, 662 So. 2d 931 (Fla. 1995).

**CONCLUSION**

Based upon the foregoing arguments and authorities, the Respondent, George C. Vogelsang, respectfully requests this Court deny the Petitioner's request and postpone its decision on jurisdiction.

Respectfully submitted,

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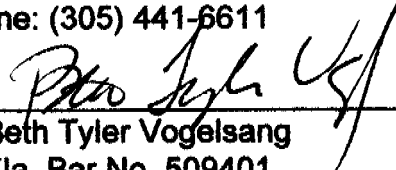
By:   
Beth Tyler Vogelsang  
Fla. Bar No. 509401

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 6<sup>th</sup> day of May, 1996 to Donnal S. Mixon, Esq., Suite 1230 SunTrust International Center, One Southeast Third Avenue, Miami, Florida 33131, and Joel Hirschhorn, Douglas Centre, Penthouse One, 2600 Douglas Road, Coral Gables, Florida.

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