ORIGINAL

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.
_____/

PETITIONERS' REPLY BRIEF

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

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I. REBUTTAL OF RESPONDENT'S STATEMENT OF THE CASE AND FACTS

Citing principally to his pleadings before the Third District, which in turn rely on facts not before the trial court in this case, Respondent contends that "the issues in this appeal have been the subject of at least two other proceedings." This is wrong.

The 'issues in this appeal' are (1) whether Petitioners were extorted by Respondent into abandoning their judicial remedy for theft and whether such action constitutes extrinsic fraud under the standard imposed by this Court in DeClaire v. Yohanon, 453 So. 2d 375 (Fla. 1984) and (2) whether that remedy lies on the facts as alleged in Petitioners' complaints. The 'two other proceedings' mentioned by Respondent never addressed these questions because, in the divorce action, the court did not have jurisdiction to award the jury trial and money damages Petitioners needed[1] and, in the tort action, Respondent foreclosed full and fair litigation by extorting a dismissal (by threatening to expose DiFilippo's legal client's alleged criminal wrongdoing unless that dismissal were given). To contend, as does now the Respondent, that the record shows Petitioners' present claims have been fully litigated simply repeats the argument made by Respondent below. That argument, then and now, ignores the fact that Petitioners' claims arose because of what Respondent was doing off the record and without the knowledge of the courts conducting the proceedings at issue. That is the essence of fraud on the court and the only thing Petitioners are asking this Court to do is to give them the opportunity to prove that it happened. To date, they have been deprived of that opportunity.

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[1] For this reason, among others, Judge Feder, the Administrative Judge of the Eleventh Judicial Circuit, denied Respondent's motion to consolidate Petitioners' tort case with the divorce action then pending in that same Circuit.

Second, Respondent's repeated efforts to confuse this case with the divorce action lead him to state facts beyond the record in this appeal. We are here on a motion to dismiss. The facts are as pleaded in Petitioners' complaints.[2] Those facts are assumed as true. Because Petitioners do not seek to reopen the divorce case, proceedings in that case are relevant here for only two purposes: (1) because it was in that case that Judge Amy Steele Donner found, by overwhelming evidence, that documents had in fact been taken from DiFilippo's home (R. 326); and (2) because the existence of the divorce action shows motive--Respondent sought to advantage his settlement leverage by taking another lawyer's client's documents and threatening to send those documents to authorities unless the victimized lawyer settled a personal claim between himself and the Respondent, a strategy almost as effective as it was illegal (R. 326-327). Beyond these points, however, the divorce is now and should remain a closed book.

Third, in asserting as fact that Petitioners' case has already been litigated, Respondent is really saying nothing more than that what is alleged here did not happen. His argument, in effect, is that because the record does not show what happened off the record, what happened off the record does not exist. This is an obvious fallacy.

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[2] Petitioners' complaints allege that Vogelsang directed his client to steal attorney/client privileged documents belonging to her husband for the purpose of extorting a favorable divorce settlement. (R. 323). The documents included privileged and confidential client documents and letters belonging to the husband's children written by their deceased mother to be given to each on their respective twenty first birthdays (the Mary Catherine Letters). (R. 322). When Petitioners filed a civil action to recover damages based on Vogelsang's participation in the theft of the documents (R. 326), Vogelsang threatened to disclose the confidential and privileged information contained in the stolen files unless Petitioners dismissed their lawsuit. (R. 325). Petitioners capitulated to his demands and dismissed the action. (R. 327).

Fourth, Respondent's factual submission, again wholly beyond the record, that DiFilippo was a blackmailer and, therefore, was himself an appropriate target of blackmail by Respondent is as puzzling as it is immaterial. If this is the defense Respondent wishes to launch at trial, he is welcome to it. But for purposes of this appeal, once again, the facts are as alleged in Petitioners' complaints. And those facts, which Petitioners will prove by overwhelming independent evidence, are that Respondent and his client stole from DiFilippo's home personal property, including documents belonging to DiFilippo's client, and used that personal property to among other things, extort an abandonment of a judicial remedy for their actions. That a lawyer keeps his client's documents in his home in sealed boxes marked "HIGHLY CONFIDENTIAL" in a separate file storage room does not mean that those documents are fair game for theft or that the use of those documents to extort is without remedy.

Fifth, the issue of the release is, yet again, immaterial to this appeal. There is no question that a release was given, just as there is no question that a stipulated dismissal was entered. The issue at hand is not whether those actions occurred but whether they were valid or, as Petitioners allege, the fruit of extortion. Once more, the facts which bear on this question are those in the complaints. There it is alleged that the judgment incorporating the release was obtained by fraud on the court. These are issues of fact for the trier of fact, not facts appropriate to this appeal arising on a motion to dismiss.

In sum, these factual issues illustrate the central problem with this case. Since this case arises on a motion to dismiss, Petitioners have never been allowed the opportunity present their proof, which they have, that the extortion they allege did in fact occur and that it had

the effect Declaire proscribes. Instead, Petitioners have been put to the task of proving by the record in the prior litigation that something happened in that litigation which the record itself does not show, all the while having to rebut Respondent's claims that the absence of proof of extortion in the record shows that it did not take place. This is unjust.

The claim of extrinsic fraud has been stated. Petitioners have never before been given the opportunity to prove that such fraud occurred. That opportunity is what they seek--and the only thing they seek--in this case. The well-pleaded allegations of Petitioners' complaints must be taken as true and Petitioners allowed to present evidence that this fraud actually happened.

II. Rebuttal Argument

This case is factually unique in that the fraud Petitioners allege could not have succeeded without the participation of a lawyer. In a very real sense, it was "an inside job," committed by the court's own officer who abused the trust and confidence reposed in him to pervert the system and achieve an unjust result. Because our system of litigation depends upon the integrity of the lawyers conducting it[3], and because in Petitioners' case that integrity was compromised, it is clear that the fraud of which Petitioners complain neither could have been nor was litigated in the underlying action. From this core fact it follows that such fraud was--by definition, has to be--extrinsic in nature. This is

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[3] It is true, as Respondent asserts, that a grievance committee of the Florida Bar elected not to hold an evidentiary hearing on DiFilippo's complaint against Respondent. The Bar did not explain its decision and DiFilippo cannot speak to it. What can and should be said, however, is that DiFilippo, himself an attorney and an alumnus of the law firms of Cravath, Swaine and Moore and Baker & MacKenzie, full well understands the gravity of the charges he has brought, as well as the duty he owes this Court and the public. More than anything else, it is that understanding and that duty which compels this action.

the result mandated by DeClaire and by this Court's most recent case on this point, Cerniglia v. Cerniglia, 21 Fla. L. Weekly S357, S358 (Fla. September 5, 1996).[4]

A. Cerniglia Requires Reversal Of The Third District's Judgment And Reinstatement Of Petitioner's Action Below.

The dispositive question in this appeal is whether the facts alleged in Petitioners' claim to set aside the judgment of dismissal of their tort action constitute *extrinsic* or *intrinsic* fraud. That question is answered on a case by case basis according to the principles set out in DeClaire v. Yohanon. Cerniglia v. Cerniglia, 21 Fla. L. Weekly S357, S358 (Fla. September 5, 1996).[5]

In Cerniglia, this Court reaffirmed the rule of DeClaire that extrinsic fraud exists where a litigant can demonstrate that actions of his party opponent prevented him in the underlying litigation from fully and fairly litigating his claims. Cerniglia, 21 Fla. L. Weekly at S357-S358 (citing DeClaire, 453 So.2d at 377). Although, in Cerniglia, the particular allegations involved, coercion, duress, enticement and fraudulent financial disclosure, fell short of the DeClaire standard because these were all things which could have been litigated before the

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[4] On September 5, 1996, this Court decided Cerniglia v. Cerniglia and, in doing so, reaffirmed the rule of DeClaire that extrinsic fraud exists only where a litigant can demonstrate that the actions of his party opponent somehow prevented him from litigating his claims. In Cerniglia, the wife's allegations of coercion, duress, enticement and fraudulent financial disclosure fell short of that standard because these were all things which could have been litigated before the trial court. Because, as set forth in this brief and in Petitioner's Initial Brief on the merits, the nature of the fraud practiced by Respondent prevented Petitioners from litigating their claims. Cerniglia does not govern the outcome in Petitioner's case.

[5] The Cerniglia case was decided on September 5, 1996, after the filing of Petitioners' initial brief. It is addressed here as supplemental authority bearing upon this case.

trial court, that case nevertheless shows that under the Petitioners' facts the opposite result should appertain.

In this case, unlike Cerniglia, the nature of the fraud practiced by Respondent prevented Petitioners from litigating their claims before now. This is true both as to the divorce action between DiFilippo and Rayle and as to the separate tort case brought by DiFilippo and his children against Respondent and Rayle.

Petitioner's claims could not have been litigated in the divorce case for three reasons. First, DiFilippo's children, Petitioners herein, were not parties to that litigation. Second, even if they had been parties, the family court did not have jurisdiction to award the jury trial and money damages Petitioners sought in the separate tort action. Third, and most fundamentally, Respondent was acting as an attorney in the divorce case and his sworn averrals that he was innocent of theft could not be adequately challenged in the manner in which propositions of fact must be challenged in litigation--thorough cross examination. Indeed, even after Judge Donner found that a theft of documents had occurred, and after she ordered those documents returned to DiFilippo and suppressed as evidence, Respondent continued to defy the Court's order. (R. 325).

For different reasons but to the same ultimate effect, Petitioners were unable adequately to uncover the truth about Respondent's actions and to obtain remedy for those actions in the tort case, as well. In that case, Respondent, although then a party as well as his own attorney, not surprisingly continued his denial of the theft. But, again fundamentally, while he was denying his complicity in the theft he was also threatening DiFilippo, DiFilippo's former client, Home Shopping Network, and the Chairman of the Board of Home Shopping Network, Roy

Speer, with exposure to criminal prosecution--a threat which, while it did not trouble DiFilippo individually, because he was innocent of wrongdoing, was compelling to DiFilippo, as it would be to any attorney, because of his client's interests. As stated in Petitioners' complaints, a criminal investigation did ensue before the Federal Grand Jury in the Middle District of Florida. It was only after the inception of this investigation that DiFilippo, to the prejudice of himself and his children, sacrificed his claims against Respondent.[6] Had Respondent abided the law, DiFilippo would not have had to make that choice.

On these facts and under the clear authority of DeClaire and, now, Cerniglia, Petitioners have stated a valid claim for the reopening of their judgment of dismissal in the tort case. They seek now only the opportunity to prove that claim and to obtain redress for the harms done them.

B. Rule 1.540(b) Does Not Govern This Action.

Respondents argue at length that Rule 1.540(b) precludes Petitioners' action. This is misleading. Petitioners do not sue under Rule 1.540(b) and that rule is inapplicable. There is no question in this case but that if the only actions Petitioners could allege were those amounting only to intrinsic fraud Petitioners' cases would have been time-barred. But, as stated in Petitioners' Initial Brief and herein, that is not the case. Therefore, Rule 1.540(b) is inapplicable to this action.

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[6] The Grand Jury investigation was finally dismissed, on April 11, 1994 with no finding of criminal wrongdoing on the part of anyone. (R. 328). For this reason, Petitioners were deprived of the remedy of Rule 1.540(b)'s action to set aside a judgment on grounds of intrinsic fraud.

C. Respondent's Interpretation of DeClaire Is Wrong

Next, Respondent acknowledges that under DeClaire a party who can show that he or she was prevented from participating in his cause has alleged extrinsic fraud, *Respondent's Brief* at 12, but then interprets this standard as demanding a showing that the complaining party was kept physically away from court. Because Petitioners do not allege they were physically prevented from attending sessions of court, Respondent's argument goes, Petitioners have failed to state a claim for extrinsic fraud, no matter what other constraints were secretly brought to bear to circumscribe Petitioners' ability to litigate. *See Respondent's Brief* at 11-12. This is absurd. DeClaire is not so limited, as is apparent from the plain language of that case.[7] *See Petitioner's Initial Brief* at 16-20 (analyzing the rationale underlying DeClaire's principle of finality).

Respondent also argues that DeClaire's standard is not met because "the four corners of DiFilippo's complaint"[8] demonstrate that DiFilippo was not prevented from litigating his case. *Respondent's Brief* at 12. This is simply not true. Petitioners' complaints allege direct causation between the actions of Respondent and his co-defendant below and Petitioners' inability to fully and fairly litigate their claims. (R.

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[7] While "keeping the opponent away from court" is enumerated in DeClaire as one example of extrinsic fraud, there are others. DeClaire also included fraud or deception practiced by an adversary, false promises of compromise, fraudulent representation of a party without his consent and connivance in his defeat "and so on." DeClaire, 453 So.2d at 377.

[8] In arguing that the issues in this appeal have been litigated before in the divorce case, Respondent simply ignores the fact that the DiFilippo Children, who were not parties to the divorce, were also victims of Respondent's actions and also sued in the tort case--only to be foreclosed by their father's forced dismissal of that litigation.

326-327). It should also be noted that the trial court, at least as to Rayle, found that this was so.[9]

Lastly, Respondent likens "DiFilippo's cries of spousal theft and extortion" to the financial affidavits of the husband which were asserted unsuccessfully in DeClaire as the basis for reopening the judgment in that case. *Respondent's Brief* at 12-13. In essence, Respondent argues, Petitioners should be barred from reopening their tort case because they did not capitulate without a fight to Respondent's extortionate tactics. DeClaire does not require this.

The fraudulent character of the financial affidavits at issue in DeClaire and, indeed, in most other extrinsic fraud cases, did not justify the reopening of the judgment because it was the fraud of a party, discoverable through skilled cross-examination by the complaining party's attorney. In other words, Mrs. DeClaire's lawyer had her chance in open court to test the veracity of Mr. DeClaire's financial affidavit and she either did not take it or failed to use it adequately. In either case the result is the same. If there was something Mrs. DeClaire's lawyer could have done to uncover the deception, the fraud complained of was intrinsic, not extrinsic, and an action to reopen a judgment based on that fraud must be brought within Rule 1.540(b)'s one year period. This was the circumstance in DeClaire and Cerniglia and other, similar cases. But in circumstances such as those presented here, where there

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[9] Judge Goldman dismissed Respondent not on grounds of a time-bar but on his (Petitioners contend erroneous) conclusion that Respondent was judicially immune from suit. Judge Goldman did not, therefore, rule expressly on the adequacy of Petitioner's allegations regarding their claim that Respondent committed extrinsic fraud. However, when Rayle, Respondent's co-defendant below, moved to dismiss on grounds that Petitioners had stated only a time-barred claim of intrinsic fraud, Judge Goldman denied that motion. Judge Goldman was of the view that Petitioners' complaints did make out an adequate claim of extrinsic fraud under DeClaire.

was nothing any lawyer could do to unmask or emasculate the fraud, then in the most fundamental sense the party at issue was prevented from litigating his or her case. That, Petitioners submit, is what DeClaire really means.[10]

In this case, Petitioners arguably had some of the most skillful lawyers in the country.[11] Yet because of the extortionate nature of the fraud being perpetrated upon Petitioners, those lawyers were powerless. As noted before, this was so for two reasons. First, the fraud emanated not from an ordinary opposing party, who might be cross-examined and exposed as a fraud on the witness stand, but from a lawyer who was and is cloaked with the credibility of the court, whose officer he is, and who is thereby immune from effective cross-examination. Here, Respondent denied on his oath that he was guilty of the acts of which he was accused, all the while escalating his threats of criminal exposure. Second, Rayle's actions put DiFilippo to the unacceptable choice of sacrificing his client's interests or his own claims and those of his children. He chose to protect his client. In the face of these facts, there was nothing any lawyer could have done. And thus, Petitioners,

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[10] See *Restatement (Second) of Judgments*, § 70, com. a, pp. 179-180: "[I]t 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. . . . 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 immune 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."

[11] As noted, Petitioners were represented in the tort action by the prominent Chicago law firm of Jenner & Block.

unlike Mrs. DeClaire, and Mrs. Cerniglia, however much they might try to fight, could ultimately do nothing but watch and wait and in the end capitulate.

Simply because they tried to fight and could not, does not mean that DeClaire's protections are unavailable to them. On the contrary, DeClaire, rightly interpreted, requires a party to do everything they can within the system to protect themselves from fraud. When they have done that, as Petitioners have done, and failed DeClaire protects them.

D. Respondent Is Not Judicially Immune From An Action For Civil Theft

Respondent argues that a lawyer is immune from civil suit for criminal acts committed in furtherance of a client's interests. This is simply wrong. Judicial immunity extends to attorneys in furtherance of a public policy fostering zealous advocacy. Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Company, 639 So. 2d 606 (Fla. 1994) (attorney granted immunity for statements made in answers to interrogatories and motions during zealous representation of client); Ponzoli & Wassenberg, P.A. v. Zuckerman, 545 So. 2d 309 (Fla. 3d DCA 1989) (attorney granted immunity for statements made in motion filed on behalf of his client during bitterly contested partnership dissolution); and Wright v. Yurko, 446 So. 2d 1162 (Fla. 5th DCA 1984) (witness granted immunity for testimony given in trial to prevent chilling effect on free testimony and access to courts which would severely hamper the adversary system). But even zealous advocates must confine their advocacy to the bounds of law or face the consequences. In Florida, one of the consequences of theft is a civil remedy for that wrong. § 772.11, Fla. Stat. 1993. Another is a cause of action for conversion. Appellee is not, merely because of his status as an attorney, immune from liability for that cause of action.

Appellee also attempts to distinguish Kahn v. Crames, 459 N.Y.S. 2d 941 (A.D. 1983) on the ground that the court did not express the rationale of its holding in that case in terms of judicial immunity. In doing so, Appellee overlooks the clear import of Kahn. Kahn held that a lawyer may be sued in tort (conversion) for assisting and advising his divorce client in the theft of documents from a sealed file room in the marital residence, notwithstanding that the lawyer's motivation for that action was to obtain leverage for his client in settlement negotiations. Since New York adopts the same principles of judicial immunity as does Florida, at least insofar as the threshold question of defamation claims is concerned, Barratta v. Hubbard, 523 N.Y.S.2d 107 (A.D. 1 Dept. 1988), Kahn stands as clear authority for the proposition that acts of aiding and counseling theft by an attorney are not within the province of zealous advocacy and are not within the privilege Appellee asserts. Kahn is factually indistinguishable from this case. The same result should follow.

Lastly, Respondent asserts that holding a lawyer accountable for criminal acts (theft) would chill his ability to fully represent his client. Three responses should be made to this argument.

First, the same argument could be made, to equally absurd effect, in support of a lawyer's immunity for homicide, or kidnapping or money laundering or perjury or a host of other criminal acts by which a lawyer might advantage his client's interests. As a lawyer may, presumably, be held accountable for these crimes, whether committed on behalf of a client or not, he or she may be held accountable for the crime of theft. Even the Respondent may reasonably be expected to know when he is breaking the law and to avoid that activity.

Second, Respondent's effort to paint this case as one against a lawyer who has innocently and inadvertently discovered that his client has wrongfully taken documents flies in the face of the facts demonstrating Respondent's full complicity in his client's actions. Petitioners have alleged and will prove that Respondent was a full and willing participant in a scheme to steal and extort, that he not only received stolen documents, he used his possession of those documents and his knowledge of their content to extort money and the abandonment of civil remedy. Moreover, Respondent's argument that this is really a suit for extortion is a red herring, confusing remedy with evidence. Petitioners do not have to sue for extortion in order to be allowed to prove that Respondent committed extortion, thereby lending his support to a larger chain of criminal activity, including theft, for which a civil remedy does exist. If this case does have a chilling effect on the actions of attorneys in Dade County's divorce and civil courts--if it diminishes in any way the willingness of a lawyer to receive stolen documents and use them to leverage settlement--that is all to the good. A law license is not a license to steal, after all.

Third, and finally, left standing the trial court's holding means that an attorney may use stolen client documents of another attorney to prevent the litigation of personal claims and, if the coercive effect of the threat can be made to last more than one year, the extortionist has the courts' protection to be sure that the judgment procured through the extortion is protected from challenge. This result, derived as it is from an attorney's perversion of the judicial system, cannot stand.

CONCLUSION

Petitioners, Fernando DiFilippo, Jr., and Fernando Joseph DiFilippo, and Francesca Glynn DiFilippo, by and through Fernando DiFilippo, Jr., their father and natural guardian, respectfully urge that this Court reverse the trial court's dismissal of Respondent, George Vogelsang, from these cases and remand for an evidentiary hearing at which Petitioner's may show by clear and convincing evidence that they were prevented from litigating the Prior Action and, upon that showing, for a trial on the merits of their claims.

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. Dixon
Fla. Bar No. 011185

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 23rd day of September, 1996, a true and correct copy of the foregoing PETITIONERS' REPLY 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, Penthouse One, 2600 Douglas Road, Coral Gables, Florida 33134.

Of Counsel