ORIGINAL

IN THE SUPREME COURT

OF FLORIDA

CASE NO. 87,706

FERNANDO JOSEPH DIFILIPPO, et. al.,

Petitioner,

vs.

WANDA RAYLE, f/k/ WANDA DIFILIPPO, and

GEORGE C. VOGELSANG,

Respondents.

RESPONDENT GEORGE C. VOGELSANG'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner, FERNANDO DIFILIPPO (hereinafter "DiFilippo"), and Respondent, WANDA RAYLE (hereinafter "Rayle"), were formerly husband and wife. Respondent, GEORGE C. VOGELSANG (hereinafter "Vogelsang"), is an attorney and represented Rayle in her dissolution of marriage proceeding with DiFilippo. DiFilippo seeks review by conflict certiorari of the decision of the Third District Court of Appeal below in **DiFilippo v. Rayle**, 669 So. 2d 306 (Fla. 3d DCA 1996), affirming the trial court's dismissal of DiFilippo's tort action against Vogelsang.

The issues in this appeal have been the subject of at least two other proceedings:

1) The dissolution of marriage proceeding between DiFilippo and Rayle, which action resulted in a mediated stipulation for settlement after eight months of litigation (R. 646-648; 663-669) and;

2) A tort action filed by DiFilippo against Rayle and Vogelsang in February, 1993 and voluntarily dismissed with prejudice on May 6, 1993. (R. 672-687).[1]

A. Dissolution of Marriage Proceeding

DiFilippo and Rayle were married on November 12, 1989, at which time DiFilippo was employed as the executive vice president and general counsel of Home Shopping Network, Inc. (hereinafter "HSN") (R. 819). On September 10, 1990, DiFilippo prepared a

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[1]DiFilippo also filed a Florida Bar Grievance against Vogelsang making the same claims, and the Grievance Committee found no probable cause and dismissed the complaint. (R. 818).

stockholder derivative action alleging misdeeds and improprieties of the Company that he was General Counsel for. (R. 820) The complaint sought $300 million in damages and removal of the corporate officers (R. 820). Two hours after DiFilippo delivered the unfiled complaint to HSN, HSN paid DiFilippo approximately $12 million in exchange for DiFilippo abandoning the lawsuit against HSN. (R. 820). DiFilippo refers to this remuneration as part of a "severance package"! (R. 322).

The settlement monies HSN paid to DiFilippo were the main controversy in the DiFilippo/Rayle dissolution of marriage proceeding. Rayle sought equitable distribution of the settlement proceeds as a marital asset acquired by DiFilippo during the marriage. (R. 819, 820). DiFilippo wanted to shield the money claiming it was compensation for his premarital services to HSN and a nonmarital asset. (R. 822, 829). Why HSN paid DiFilippo this substantial sum of money was the decisive issue in the divorce proceeding and the focus of the following eight months of litigation.

After DiFilippo resigned from HSN he continued to keep HSN records in the marital home he shared with Rayle. (R. 321-323). It is undisputed that DiFilippo kept personal and financial records in unlocked file cabinets located in a utility room in the marital home (R. 323). The documents included papers DiFilippo claimed were highly sensitive and privileged HSN records, documents which detailed the circumstances of DiFilippo's departure from HSN and why HSN paid DiFilippo $12 million during the marriage. (R. 321-

324).

DiFilippo alleged that the HSN papers were confidential and his separate property and that his wife had no right to remove them. [2] Rayle denied DiFilippo's allegations and specifically denied that she stole DiFilippo's papers at the direction of Vogelsang. (R. 696-704). The claims made by DiFilippo in this complaint are not new. DiFilippo filed a flurry of motions in the dissolution of marriage proceeding requesting that the court order the return of his papers (R. 344-356; 369-377; 379-400). Hearings were held before the trial judge assigned to the dissolution of marriage proceeding regarding the HSN documents. (R. 326; 367). The trial court ordered that the documents were not to be published to any third parties other than the attorneys representing Rayle pending a full evidentiary hearing. (R. 367).

B. Prior Tort Action - Case No. 93-03145

While the dissolution of marriage action was pending, DiFilippo and his children filed a tort action against Rayle and Vogelsang, Case No. 93-03145. (R. 401-414). The lawsuit was filed on February 19, 1993, and mirrors the allegations made in the complaint dismissed by the lower court here. (R. 319-343; 401-414). DiFilippo sought damages in the 1993 lawsuit against Rayle and Vogelsang for alleged theft and conversion of his documents, and intentional infliction of emotional distress. (R. 401-414).

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[2]This begs the question of why DiFilippo had the documents at his home to begin with, as he was forbidden from removing HSN property from HSN premises under a non-compete agreement. (R. 431-433).

C. Marital Settlement Agreement

On April 2, 1993, a settlement was reached in the dissolution of marriage case during mediation. The mediation was attended by the parties and their counsel, Vogelsang for the Wife and Steel, Hector for the Husband, and the mediator, former Florida Bar President, Burton Young. (R. 664-669). Pursuant to the settlement agreement, Rayle received the following property and support:

1. Sunrise Drive Lot (valued by DiFilippo at $650,000);
2. Yacht Harbour Apartment (or payment of $475,000);
3. $750,000 as lump sum alimony;
4. $360,000 as rehabilitative alimony payable over 36 months;
5. College tuition for three years at $8,000 per year maximum;
6. Mercedes Benz automobile (valued by DiFilippo at $28,000) (R. 670-672; 826-832)

DiFilippo retained cash of $41,068, stocks, bonds and notes in excess of $12 million, Tampa real estate worth $400,000, automobiles worth $67,000, and other personal property worth $85,000. Of over $13.5 million in assets DiFilippo owned (per his financial affidavit), he paid Rayle less than $2.5 million in a combination of property, lump sum and rehabilitative alimony. DiFilippo further agreed to dismiss with prejudice his and his children's tort action against Rayle and Vogelsang, Case No. 93-03145, and to pay $100,000 in attorney's fees to Vogelsang. (R. 664-672; 826-832.[3] The parties **exchanged mutual releases** waiving

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[3]DiFilippo erroneously states that he paid Vogelsang $200,000 in attorney's fees pursuant to the mediation agreement (Appellant's initial brief at 4). The settlement agreement provided that DiFilippo agreed to pay $100,000 to Vogelsang towards the Wife's attorney's fees in addition to what he had previously paid as temporary attorney's fees which had been ordered by the court. (R. 664-669). The trial court had entered an order shortly before

any and all claims any of the parties may have against each other. (R. 672-673).

An uncontested dissolution of marriage hearing took place before Judge Amy Steele Donner on April 2, 1993. The Husband, represented by Steel, Hector testified at the final hearing as follows:

BY MR. VOGELSANG:

Q. Mr. Difilippo, did you enter into this agreement freely and voluntarily with us?

A. I did.

Q. There was no duress applied to you, sir?

A. No.

Q. You are a lawyer, but you have been represented by counsel throughout this and you are satisfied with the services of your fine lawyers?

A. I am.
(R. 669)

After the hearing, the trial court entered a Final Judgment of Dissolution of Marriage. (R. 670, 671). The releases were executed, which provided that the parties, Fernando DiFilippo, Wanda Rayle, and George C. Vogelsang "release, acquit, satisfy and forever discharge all the other parties hereto, jointly and severally, from any and all actions, causes of action, suits..." (R. 672-673). A stipulation and order was entered dismissing Case No. 93-03145 with prejudice. (R. 690).

On December 23, 1994, **nearly two years after the settlement**

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mediation granting additional attorney's fees to Vogelsang, but reserving ruling on the amount of fees until after mediation. (R. 688-689).

was reached and the tort action was dismissed, DiFilippo filed new complaints against Rayle and Vogelsang which were nearly identical to the cases previously dismissed by him with prejudice. The new action sought to revive DiFilippo's previously dismissed tort claims against Rayle and Vogelsang and mirrored the allegations made in the previous litigation.

Vogelsang moved to dismiss the complaint arguing that it was barred by Rule 1.540(b) of the Florida Rules of Civil Procedure, res judicata, release, judicial immunity and other defenses (R. 631-644). The trial court granted the motion and entered a final judgment of dismissal based on judicial immunity. (R. 812-813) The third district affirmed the dismissal, finding that DiFilippo had previously filed **two** related lawsuits which were settled and closed more than one year before the instant action was commenced and accordingly this lawsuit was time barred. (R. 834-835). The third district held that "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." (R. 835). The district court cited as authority, Cerniglia v. Cerniglia, 655 So. 2d 172 (Fla. 3d DCA), which is pending review in this Court, review granted, 662 So. 2d 931 (Fla. 1995); Langer v. Langer, 463 So. 2d 429 (Fla. 3d DCA 1985).

II.

SUMMARY OF ARGUMENT

Florida Rule of Civil Procedure 1.540(b) establishes finality of judgments by imposing a reasonable time limitation of one year

to attack judgments based on matters which were or could have been litigated between parties. DiFilippo not only had ample opportunity to raise the matters set forth in his complaint, **he previously asserted and actually litigated the very issues raised here in two other lawsuits.** DiFilippo was not prevented from presenting his case in court, he aggressively presented his case during eight months of intense litigation until the case was settled at mediation on the eve of trial.

DiFilippo's allegations do not amount to extrinsic fraud or fraud upon the court. He does not claim that he was kept away from court or prevented from voluntarily participating in the litigation process. DiFilippo testified under oath before the trial judge that he entered the settlement voluntarily and without duress. He was duly represented by counsel and he released all claims against Rayle and Vogelsang.

DiFilippo's claims are further barred by the doctrine of judicial immunity as the tortious conduct he alleges occurred during the course of and was reasonably related to judicial proceedings. To expose an attorney to potential criminal and civil liability for receiving and reviewing records brought to them by their clients would have a most chilling effect on the practice of law and place an unreasonable burden on attorneys to interrogate their own clients as to the circumstances under which they acquired documents.

III.

ARGUMENT

A.

DIFILIPPO WAS BARRED BY RULE 1.540(B) FROM REFILING A TORT ACTION WHERE TWO RELATED ACTIONS WERE BROUGHT BY DIFILIPPO AND CONCLUDED MORE THAN ONE YEAR EARLIER

Rule 1.540(b) limits the circumstances under which a party may attack final judgments more than one year after their entry.[4] DiFilippo acknowledged in his complaint that he previously filed a virtually identical lawsuit in 1993 (Case No. 93-03145), and that he had dismissed that suit with prejudice almost two years prior to filing the present claim. The rule provides:

> **1.540 RELIEF FROM JUDGMENT, DECREES OR ORDERS**
>
> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic fraud, misrepresentation, or other misconduct of an adverse party); (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment

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[4]The Appellee's motion to dismiss raised multiple grounds for dismissal of the complaint, including Rule 1.540(b). Although the transcript of the hearing on the motion to dismiss reflects that the trial court granted dismissal based upon judicial immunity (R. 705-750), the appellate court affirmed the order based on Rule 1.540 (b). While Vogelsang submits that both grounds were appropriate, the dismissal order should be affirmed if the trial court reached the right result regardless of which legal ground the order was established on. **Falk v. City of Miami Beach,** 538 So. 2d 956 (Fla. 3d DCA 1989).

> or decree should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) **not more than 1 year after the judgment, decree, order, or proceeding was entered or taken....**This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding to set aside a judgment on decree for **fraud upon the court.** Fla. R. Civ. P. 1.540(B) (emphasis supplied).

The rule limits attacks on judgments whether made by motion or by independent action.

In **DeClaire v. Yohanan,** 453 So. 2d 375 (Fla. 1984), a former wife sought to set aside the parties' marital settlement agreement and the final judgment of dissolution of marriage after more than a year had passed. She alleged that her former husband had filed a false financial affidavit in the divorce proceeding. This Court held that she was barred from attacking the judgment more than one year later as her claim amounted to intrinsic fraud. This Court held that actions to set aside judgments beyond the one year limitation period are limited to void judgments, judgments which have been satisfied, released or discharged, judgments which have prospective application and equity should require relief from its present enforcement, and **extrinsic fraud which prevents a party from having an opportunity to present his case in court.** Id. at 379 (emphasis supplied).

It was enough in **DeClaire** that the former wife **could have** raised the issue of the fraudulent financial affidavit in the trial court. "The issue of the husband's net worth was, therefore, a matter before the court for resolution and **could have been tried."** Id. at 380. How much stronger would the case have been if Ms.

Yohanan had actually attacked Mr. DeClaire's financial affidavit in the dissolution proceedings, for example by cross-examining Mr. DeClaire about his affidavit at a temporary support hearing and introducing impeaching evidence. Take this hypothetical one step further and assume that while the dissolution of marriage action was pending, Ms. Yohanan filed a separate tort action against Mr. DeClaire for fraud asserting that he had filed a fraudulent financial affidavit, and that shortly before trial, a mediated settlement agreement was reached and both lawsuits were dismissed. That hypothetical scenario is what DiFilippo did here. He not only had the opportunity to raise his claims in the previous dissolution and tort actions, he did raise them and vigorously pursued them until the eve of trial.

Cerniglia v. Cerniglia, 655 So. 2d 172 (Fla. 3d DCA 1995) was decided after the trial court granted dismissal of DiFilippo's complaint and is pending review in this Court.[5] In **Cerniglia**, a summary judgment was entered against a former wife foreclosing her claims against her former husband for assault, battery, intentional infliction of emotional distress, common law fraud, and breach of contract. The parties there had entered into a marital settlement agreement in 1990 and signed mutual releases of all claims against each other, and a final judgment was entered approving the

[5]"[A]ppeals are decided on the law as it existed at the time of the rendition of an appellate decision, and not as the law may have existed at the time of the trial court proceeding." **Fletcher v. Metro Dade Police**, 593 So. 2d 266 (Fla. 3d DCA 1992). **See, also Lowe v. Price,** 437 So. 2d 142 (Fla. 1983); **Evans Packing Company v. Department of Agriculture and Consumer Services,** 550 So. 2d 112 (Fla. 1st DCA 1989).

agreement. **Three years later** the Former Wife filed the tort action against her Former Husband and sought to set aside the parties' marital settlement agreement.

The Former Wife alleged that she was entitled to have the marital settlement agreement and final judgment vacated because the Former Husband had committed extrinsic fraud or fraud on the court. She alleged that she had been physically and mentally abused by her husband and that the agreement had been obtained by "duress, coercion, and threats." The trial court denied her claim for relief and held that the allegations constituted intrinsic fraud, rather than extrinsic fraud.

The third district affirmed and held that extrinsic fraud exists where a party is somehow been prevented from participating in a cause, whereas "intrinsic fraud applies to conduct that arises within a proceeding and pertains to the issues in the case that have been tried or could have been tried." **Id.** at 175. The third district in **Cerniglia** did not hold that coercion and duress can **never** constitute extrinsic fraud as DiFilippo asserts. The determination of whether allegations of fraud comprise extrinsic or intrinsic fraud must be made on a case by case basis.

There may be circumstances where coercion and duress may be applied to prevent a party from presenting his case. For example, if a party threatened the opposing party with physical harm if they appeared in court to contest a claim and the aggrieved party did not appear as a result of the threat, the victim could file an independent action to set aside the judgment for extrinsic fraud.

Examining the four corners of DiFilippo's complaint it is evident that DiFilippo was not precluded from participating in the divorce and/or tort litigation. His complaint and the exhibits attached to it substantiate that DiFilippo raised the same complaints about alleged theft and misuse of documents in the dissolution of marriage case and evidentiary proceedings were conducted by the trial court. In addition, he filed the identical claim in a separate tort action which was dismissed with prejudice. As held by the third district in **Langer v. Langer,** 463 So. 2d 429 (Fla. 3d DCA 1985), "[A]ppellant's allegations in support of her motion to set aside the property settlement agreement (fraud, duress, coercion, and failure to provide full disclosure) form the basis for a claim of **intrinsic** fraud. Any petition to vacate a judgment on the grounds of intrinsic fraud must be filed within one year after entry of the judgment."

The key distinction between extrinsic and intrinsic fraud is that a party must be **prevented from participating in a cause** because of the opposing party's misconduct to constitute extrinsic fraud. DiFilippo actively participated in the prior litigation. His allegations amount to intrinsic fraud at most as they arose within the divorce proceeding and pertained to the issues in the case that were tried or could have been tried. Just as in **DeClaire v. Yohanan** it was clear that the Husband's financial affidavits were part of the record of the case, it is clear here that DiFilippo's cries of spousal theft and extortion are part of the record of the parties' previous dissolution and tort actions and

multiple proceedings were held thereon. As held by this Court:

> When an issue is before a court for resolution, and the complaining party could have addressed the issue in the proceeding, such as attacking the false testimony or misrepresentation through cross examination and other evidence, then the improper conduct, even though it may be perjury, is intrinsic fraud and an attack on a final judgment based on such fraud must be made within one year of the entry of the judgment. **Id.** at 380.

The Third District Court of Appeal properly held that this case is final and to allow DiFilippo a third opportunity to litigate the very issues tried in the divorce action and raised in the prior tort action would defeat the purpose and public policy of imposing a time limitation on when final judgments may be attacked and set aside. "Public policy has always favored the termination of litigation after a party has had an opportunity for a trial and an appeal of the trial court's judgment. Consequently, the grounds upon which a final judgment may be set aside, other than by appeal, are limited in order to allow the parties and the public to rely on duly entered final judgments." **Id.** at 380.

As held by Judge Farmer in his concurring opinion in **Fenno v. Spearman,** 653 So. 2d 1147 (Fla. 4th DCA 1995):

> Litigation should end when it is over. To paraphrase Shakespeare, of all the wonders that I yet have heard, it seems to me most strange that men should resist, seeing that the conclusion of a lawsuit, a necessary end, will come when it will come. When parties have had an opportunity to state their claims and to produce their evidence, when they have had a full appeal after the final judgmetn, then it is time to lay down the instruments of justice and cease advocacy.

DiFilippo, a multimillionaire lawyer and a disgruntled former husband, obtained a $12 million settlement from the client he served as general counsel by threatening a suit revealing their

corporate secrets. He continues this pattern of harassing litigation abuses against his former wife's attorney, commencing with a tort action filed in the middle of the divorce case, which tort action he subsequently dismissed and gave a general release for, the filing of a bar grievance that was dismissed for no probable cause, his attempts to revoke Vogelsang's two Florida Bar Certifications, and by now trying to revive a tort action that has already been adjudicated. DiFilippo's petition requests his "day in court." He has had his day in three prior forums.

B.

DIFILIPPO'S ACTION AGAINST HIS FORMER WIFE'S DIVORCE ATTORNEY ALLEGING THAT THE ATTORNEY IMPROPERLY USED DIFILIPPO'S PRIVATE FINANCIAL RECORDS TO OBTAIN A BETTER SETTLEMENT FOR THE FORMER WIFE IS BARRED BY JUDICIAL IMMUNITY

DiFilippo's action against Vogelsang is founded on allegations that Rayle "stole" DiFilippo's papers while DiFilippo and Rayle were married and jointly occupied their marital abode. The tortious conduct professed against Vogelsang is that "**upon information and belief, Rayle stole this property at the direction of Vogelsang,**" Rayle's attorney. DiFilippo claims that Vogelsang threatened to disclose the contents of the papers which were potentially damaging and embarrassing to DiFilippo, unless DiFilippo settled the case. Even if DiFilippo could prove these unfounded and scandalous accusations, the imagined acts would be privileged under the veil of judicial immunity.

In **Wright v. Yurko,** 446 So. 2d 1162 (Fla. 5th DCA 1984),

Wright was a defendant in a medical malpractice case. After he successfully defended the suit, he sued the plaintiffs, their attorney, and the plaintiff's medical expert witness for malicious prosecution, libel, perjury, slander and defamation. The trial court dismissed Wright's complaint and the fifth district affirmed, holding that Wright's action was barred by judicial immunity. "With regard to civil suits for perjury, libel, slander, defamation, and the like based on statements made in connection with judicial proceedings, this state has long followed the rule, overwhelmingly adopted by the weight of authority, that **such torts committed in the course of judicial proceedings are not actionable."** **Wright,** 446 So. 2d at 1164.

This Court has also held that actions such as the one DiFilippo has filed are barred as a matter of law. In **Levin, Middlebrooks, et al. v. United States Fire Ins. Company,** 639 So. 2d 606 (Fla. 1994), a federal district court certified to the Florida Supreme Court the question of whether absolute judicial immunity which is afforded to acts of slander, libel, and perjury, **extends to other tort claims** such as tortious interference with business relationships. The Supreme Court answered the question in the affirmative, holding:

> **In balancing policy considerations, we find that absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior such as the alleged misconduct at issue, so long as the act has some relation to the proceeding.** The rationale behind the immunity afforded to defamatory statements is equally applicable to other misconduct occurring during the course of a judicial proceeding. Just as participants in litigation must be

> free to engage in unhindered communication, so too must those participants be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct. (emphasis supplied). Id. at 608.

The Court noted that absolute immunity resulted from balancing two competing interests, the right of an individual to enjoy a reputation unimpaired by defamatory attacks versus the right of the public interest to a free and full disclosure of facts in the course of judicial proceedings. The rule resulted that "participants in judicial proceedings must be free from the fear of later civil liability as to anything said or written during litigation so as not to chill the actions of the participants in the immediate claim....[T]he chilling effect on free testimony would seriously hamper the adversary system if absolute immunity were not provided." Id. at 608.

Vogelsang emphatically denies the acts attributed to him by DiFilippo, however, even if DiFilippo's allegations are necessarily deemed true for appellate review, Vogelsang is entitled to judicial immunity from civil suit. DiFilippo attempts to circumvent application of judicial immunity by arguing that immunity does not apply to "criminal acts". The essence of DiFilippo's complaint against Vogelsang is his allegation that Vogelsang threatened to disclose information allegedly detrimental to DiFilippo, concerning the circumstances of DiFilippo's departure from HSN. (R. 324). A careful examination of DiFilippo's complaint reveals that his suit, although labeled as civil theft and conversion, in reality is a

claim of extortion.[6] DiFilippo alleges that he received demands from **third parties**, including the Chief Executive Officer of HSN, to settle his dissolution of marriage case, and that a grand jury investigation against the CEO had been instituted. "Between October 30, 1992 and April 2, 1993, DiFilippo received repeated demands from Roy Speer [HSN's Chief Executive Officer], through intermediaries, that DiFilippo accede to Rayle's demands and pay Rayle whatever she wanted to settle the divorce action." (R. 327, ¶ 31).

These claims against Vogelsang are barred by judicial immunity. **Ponzoli & Wassenberg v. Zuckerman**, 545 So. 2d 309 (Fla. 3d DCA 1989), **rev. denied**, 554 So.2d 1170 (Fla. 1989), is a closely analogous case. Zuckerman sued his opponent's attorneys claiming they were guilty of **extortion and defamation.** The trial court dismissed the action and the third district affirmed, holding that Ponzoli & Wassenberg should have been awarded attorney's fees for defending the meritless litigation. This court noted:

> Doubtless many litigants harbor a desire to bring suit against their adversary attorney. Appellee did so, bringing an action against appellant Ponzoli & Wassenberg, P.A., counsel for his adversary in a bitterly contested partnership dissolution. Appellee's suit against Ponzoli & Wassenberg contended that the attorneys had committed actionable **libel and extortion** against him during the partnership dissolution suit....While appellee may have been offended by the motion to dismiss the appeal, the statements were

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[6]DiFilippo attempts to draft his complaint as one for conversion and civil theft, recognizing that there is no civil cause of action for extortion. **See, Bass v. Morgan, Lewis & Bockius,** 516 So. 2d 1011 (Fla. 3d DCA 1988).

> connected with, and relevant to, the matter at hand and are therefore absolutely privileged. These principals are so clear, and so well-known, that the defamation claim must be considered frivolous. The same analysis applies to the extortion claim, which is based on the same statement in the same motion. The absolute immunity for statements made in judicial proceedings precludes civil liability. (emphasis supplied).[7]

Contrary to DiFilippo's assertions, judicial immunity can apply to "criminal acts" such as perjury, extortion or as here, alleged conspiracy to steal the financial records of a client's spouse.[8] DiFilippo attempts to persuade the Court that immunity does not apply citing a New York decision that does not even address judicial immunity. In **Kahn v. Crames,** 459 N.Y.S. 2d 941 (A.D. 1983), the court held that a cause of action was stated against a divorce attorney who directed and instructed his client (the wife) to remove the husband's files from the marital home. The opinion is silent as to whether judicial immunity applied or was even raised as a defense. Further, there is no indication

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[7] **Ponzoli & Wassenberg** was cited with approval by the Florida Supreme Court in **Levin Middlebrooks**, 639 So. 2d 606, 608 (Fla. 1994).

[8] DiFilippo's complaint does not even state a cause of action for civil theft against his former wife or her attorney. His assertions would have a most chilling effect on the practice of law if they would subject attorneys to civil suit. Can a wife and her attorney be charged with larceny if the wife takes her husband's financial records from the marital home and hands them to her divorce lawyer? Is the lawyer allowed to review the records or make photocopies of them. If the parties maintain joint and separate federal income tax returns in the marital home is it a theft for a spouse to take those papers to her divorce attorney if some of the returns include the husband's separate returns prior to the marriage?

whether New York applies the same standard of application of judicial immunity granting immunity to torts other than defamation.

Based on the overwhelming authority which holds that a party, witness or attorney is afforded judicial immunity for statements or tortious conduct during the course of judicial proceedings, the trial court properly granted Vogelsang's motion to dismiss and the order should be affirmed.

CONCLUSION

The Respondent, George C. Vogelsang respectfully submits that the decisions below should be affirmed or the petition should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was ~~mailed~~ hand-delivered this 3rd day of September, 1996 to Donnal S. Mixon, Esq., Suite 600, 2600 Douglas Road, Miami, FL 33134, and Joel Hirschhorn, Douglas Centre, Penthouse One, 2600 Douglas Road, Coral Gables, Florida.

By: _____
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