IN THE

Supreme Court of Florida

Case No.: SC08-1360
District Court Case Nos. 4D07-1490 & 4D07-2436

HAROLD GOLDBERG, ET AL.,

Petitioners,

vs.

MERRILL LYNCH CREDIT CORPORATION, ET AL.

Respondents.

On Review from the Fourth District Court of Appeal

RESPONDENTS' OPPOSITION BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Harold Goldberg, Arlene Goldberg, and Amy Sue Forman ("Plaintiffs") filed class actions seeking to recover document preparation fees charged for services performed by clerical personnel in the processing of mortgage loans. A1 at 1, 2. Plaintiffs alleged that Merrill Lynch Credit Corporation and World Savings Bank, FSB ("Defendants") were prohibited from charging those fees for services performed by non-lawyers. A1 at 2.

In the trial court, Defendants moved to dismiss the complaints. A1 at 2. Defendants argued that the trial court lacked jurisdiction over the claims because this Court possesses exclusive jurisdiction to determine what constitutes the unauthorized practice of law. A1 at 2. The trial court granted the motions to dismiss, ruling that this Court's "authority to regulate the practice of law also encompasses the determination of what is or is not the practice of law." A1 at 2.

Plaintiffs appealed to the Fourth District Court of Appeal. The district court affirmed the trial court's dismissal, noting that "[n]o case has approved of using the alleged unauthorized practice of law as a sword prior to a determination by the Supreme Court of Florida that the services actually constitute the unauthorized practice of law. We are not compelled to be the first." A1 at 4.

The Fourth District elaborated on its conclusion as follows:

> Requiring a supreme court determination on the unauthorized practice of law as a prerequisite for a suit to recover fees and costs makes sense, practically and technically. Practically, it

> insures consistency in what conduct constitutes the unauthorized practice of law. To allow other courts or juries to randomly make the decision would lead to inconsistent results on the same set of facts. . . . Technically, it reinforces the exclusive jurisdiction of the supreme court over the unauthorized practice of law.

A1 at 4.[1] It is from that decision that Plaintiffs seek discretionary review in this Court.

SUMMARY OF THE ARGUMENT

This Court has "exclusive jurisdiction" under the Florida Constitution to decide whether a particular activity constitutes the unauthorized practice of law. Plaintiffs seek to undermine that exclusive authority by arguing for a regime in which the trial courts throughout the State decide whether defendants' conduct constitutes the unauthorized practice of law. Recognizing that this Court alone has jurisdiction to make such a threshold determination, the trial court and Fourth District Court of Appeal have rejected Plaintiffs' unprecedented attempt to

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[1] Plaintiffs' Jurisdictional Brief, in its argumentative Statement of the Case and of the Facts, improperly goes beyond the four corners of the Fourth District Court of Appeal's decision. See Reaves v. State, 485 So. 2d 829, 830 n.3 (Fla. 1986). For instance, Plaintiffs include in this section a merits (not conflict) argument that this Court has already determined that the conduct at issue constitutes the unauthorized practice of law. Plaintiffs' case and rule citations are simply inapposite. Not one of them addresses this situation, where two parties agree in contract to the allocation of costs for the preparation of documents in their two-party transaction. This is not a third-party situation, as in the cases and rule Plaintiffs include in this section of their brief.

undermine this Court's authority to decide, in the first instance (and through the process it has instituted in the Rules Regulating The Florida Bar) whether an unauthorized practice of law has occurred before a civil action for damages can be instituted.

Now, Plaintiffs seek review in this Court of the Fourth District's decision on this matter. They argue that the Fourth District created express and direct conflict with a rules decision of this court and that the Fourth District expressly construed the Florida Constitution. Neither premise is correct.

There is no express and direct conflict. The Fourth District correctly analyzed this Court's precedent and ruled in furtherance of this Court's "exclusive jurisdiction" to determine whether a particular activity constitutes the unauthorized practice of law. It determined that, while there can be a remedy under the rules in a case such as is alleged here, such a claim "must await a decision by the Supreme Court of Florida as to whether the conduct constitutes the unauthorized practice of law." A1 at 2. There is no case in Florida that has allowed a plaintiff to proceed with such a claim before this Court has made the requisite threshold determination in a proper proceeding. Indeed, to decide otherwise, the Fourth District would have created conflict with longstanding precedent from this Court.

Further, the Fourth District did not expressly construe article V, section 15 of the Florida Constitution. It did nothing more than apply a settled constitutional principle. It did not expand the meaning of the constitutional provision or change

the law in any respect. Such an application of settled law does not implicate this Court's jurisdiction.

Finally, aside from these jurisdictional hurdles, there is no good reason for this Court to review the Fourth District's decision. There is no confusion in the law. Plaintiffs are not left without a remedy.

Review should be denied.

ARGUMENT

1. There is No Express and Direct Conflict.

Plaintiffs argue that the Fourth District's decision expressly and directly conflicts with Florida Bar re Amendments to Rules Regulating the Florida Bar (Proceedings Before a Referee), 685 So. 2d 1203 (Fla. 1996). It does not. To be clear, Plaintiffs' conflict argument reduces to the proposition that a stretched reading of a single sentence of dicta from that opinion overturned half a century of unwavering precedent.

In fact, Florida Bar re Amendments had nothing to do with authorizing a lawsuit independent of the Florida Bar's rules and regulations. At issue in Florida Bar re Amendments was whether the Rules Regulating the Florida Bar should be amended to permit the Supreme Court to order restitution to a complainant in a Bar proceeding. See 685 So. 2d at 1203. The Court determined that court-ordered

restitution was not necessary due to existing remedies and, therefore, disapproved the amendment.[2] Id.

One single sentence of that opinion, which Plaintiffs quote out of context, simply says that "victims of the unlicensed practice of law are free to sue the allegedly unlicensed practitioner directly to recover fees." Id. at 1203. Florida Bar v. Warren, 661 So. 2d 304 (Fla. 1995)—the decision on which this Court relied for that single sentence of dicta—was a case where this Court made the threshold determination regarding the respondent's conduct prior to the private lawsuit. Against that backdrop, it is clear this Court did not say that such a claim can be brought before this Court determines whether a particular activity constitutes the unauthorized practice of law.

Of course, the Fourth District's decision never says that victims of the unlicensed practice of law are not free to sue the allegedly unlicensed practitioner directly to recover fees. Instead, it embraces that fact: "While we agree that the Rule provides for such claims, we hold that the claims must await a decision by the Supreme Court of Florida as to whether the conduct constitutes the unauthorized practice of law." A1 at 2.

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[2] In a subsequent amendment, this Court authorized the referee to recommend that the Court order a respondent to pay restitution. See Amendment to the Rules Regulating The Florida Bar, 875 So. 2d 448 (Fla. 2004).

At the same time, the Fourth District's decision maintains consistency with longstanding precedent and respects this Court's exclusive jurisdiction to determine what conduct constitutes the unauthorized practice of law. Plaintiffs' approach fosters confusion in the law and inconsistency across the State in the definition of the unauthorized practice of law.

This Court has frowned on Plaintiffs' approach before. In Dade-Commonwealth Title Ins. Co. v. N. Dade Bar Ass'n, Inc., 152 So. 2d 723 (Fla. 1963) the plaintiff, a local bar association, brought an action asking that "the court declare that [the] actions of the defendants amounted to practicing law and enjoin their continuance." 152 So. 2d at 724. The lower court dismissed the case holding that, pursuant to the Florida Constitution, it lacked jurisdiction. Id. The Third District reversed, despite acknowledging this Court's "exclusive jurisdiction," based on its conclusion that "it did not follow that such jurisdiction precluded other courts from exercising a like power." Id.

This Court disagreed, holding that the district court failed "to give full meaning to the word 'exclusive'" as used in the Florida Constitution's grant of "exclusive" jurisdiction to the Supreme Court. Id. This Court further recognized that, but for the vesting of power in one body, "confusion, if not chaos, would result from independent proceedings" brought throughout Florida. Id. at 726. This Court then concluded that, because of the Florida Constitution's all-encompassing jurisdictional grant, the district court's decision should be quashed. See id.

Numerous other decisions have followed this precedent in recognizing that only this Court has jurisdiction to pass on whether an activity constitutes the unauthorized practice of law. See, e.g., Sigma Fin. Corp. v. Inv. Loss Recovery Servs., Inc., 673 So. 2d 572, 573 (Fla. 4th DCA 1996); Heilman v. Suburban Coastal Corp., 506 So. 2d 1088, 1089 (Fla. 4th DCA 1987); Metro. Dade County v. Dade County Employees, Local 1363, AFSCME, 376 So. 2d 1206, 1209 (Fla. 1st DCA 1979).

In fact, no Florida case has approved of the approach urged by Plaintiffs. The Fourth District recognized as much. See A1 at 4. In so recognizing, it actually avoided conflict rather than creating it. There is no express and direct conflict.

2. There is No Express Construction of the Florida Constitution.

Contrary to Plaintiffs' second argument for review, the Fourth District did not expressly construe article V, section 15 of the Florida Constitution. The Fourth District's decision respects and applies the well-settled principle that this Court has exclusive jurisdiction over the unauthorized practice of law. It does not expand that constitutional mandate and it does not change the law.

The contours of this Court's jurisdiction to review decisions that expressly construe the Florida Constitution trace back to pre-1980 cases, before the further limitation that the construction be express was even added through jurisdictional reforms. It has been explained as follows:

> For much the same reason, the statement of construction must be a "ruling" that was more than a mere application of a settled constitutional principle. . . . Commentators called this the "explain or amplify" requirement.
>
> This analysis still would appear to be sound, especially in light of the additional requirement that the construction be express. The Supreme Court of Florida is the one state court that can resolve legal doubts on a statewide basis. Resolving constitutional doubts is a highly important function because it results in more predictable organic law. No similar purpose is served by the Court hearing a case that has merely reiterated settled principles.

Harry Lee Anstead, Gerald Kogan, Thomas D. Hall & Robert Craig Waters, The Operation and Jurisdiction of the Florida Supreme Court, 29 Nova L. Rev. 431, 504-05 (2005)(emphasis supplied; citations omitted).

The Fourth District's treatment of article V, section 15 of the Florida Constitution simply tracks what this Court has already established. See A1 at 4-5. In fact, this Court has long recognized that this exclusive grant of authority to regulate the practice of law includes the singular "power to define the practice of law." Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980); see also Dade-Commonwealth, 152 So. 2d at 724-25 (Fla. 1963) (holding that the constitutional grant of "exclusive" jurisdiction must be given its "full meaning"); Florida Bar v. Catarcio, 709 So. 2d 96, 99 n.1 (Fla. 1998) (quoting In re Losee, 195 B.R. 785, 786 (M.D. Fla. Bankr. 1996), for the proposition that the determination of the "'unauthorized practice of law is a question which must be resolved by the

Supreme Court of this State upon the recommendation of the Florida Bar and not by this Court'" (emphasis added)).

The Fourth District did not expressly construe that Florida Constitution so as to implicate this Court's jurisdiction.

3. This Court Should Not Review this Case.

Beyond the jurisdictional bars explained above, there are also other reasons why the Fourth District's decision makes sense and should not be reviewed.

Despite their protestations, Plaintiffs are not left without a remedy. This Court has provided a detailed process, as set forth in Chapter 10 of the Rules Regulating the Florida Bar, for those seeking a determination as to whether certain conduct is the unauthorized practice of law. This process includes the potential for court-ordered restitution after an adverse finding against a respondent.

Plaintiffs, however, do not avail themselves of this process. Instead, they seek to have the trial courts invade this Court's exclusive jurisdiction and to determine, as an issue of first impression, whether Defendants' conduct was the unauthorized practice of law. As the Fourth District noted, the well-established process "insures consistency in what conduct constitutes the unauthorized practice of law. To allow other courts or juries to randomly make the decision would lead to inconsistent results on the same set of facts." A1 at 4.

Finally, it bears note that the Fourth District is in good company. The Eleventh Circuit Court of Appeals has likewise reached the same conclusion. See

Gonczi v. Countrywide Home Loans, Inc., 271 Fed. Appx. 928, 930, 2008 WL 835251 (11th Cir. Mar. 31, 2008 (unpublished)) ("No private right of action exists for individuals to pursue an unauthorized-practice-of-law claim in the first instance; persons are limited to calling an infraction or misdeed to the Supreme Court's attention. . . .")

CONCLUSION

For the foregoing reasons, Defendants request this Court to deny discretionary review.

Respectfully submitted,

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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