

In the Supreme Court of Florida

Case No. SC08-_____

Lower Court Case No. 4D07-1490

HAROLD GOLDBERG and ARLENE GOLDBERG,

Petitioners,

v.

MERRILL LYNCH CREDIT CORPORATION,

Respondent.

Consolidated with Lower Court Case No. 4D07-2436

AMY SUE FORMAN,

Petitioner,

v.

WORLD SAVINGS BANK, FSB,

Respondent.

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEALS

* * * * *

PETITIONERS' JURISDICTIONAL BRIEF

* * * * *

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE AND OF THE FACTS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. The Fourth District’s decision that “a supreme court determination on the unauthorized practice of law [i]s a prerequisite for a suit to recover fees” expressly and directly conflicts with this Court’s decision that “victims of the unlicensed practice of law are free to sue the allegedly unlicensed practitioner directly to recover fees.” 5

II. The Fourth District’s decision expressly construes Article V, section 15 of the Florida Constitution. 8

CONCLUSION 9

CERTIFICATE OF SERVICE 10

CERTIFICATE OF COMPLIANCE WITH RULE 9.210..... 10

TABLE OF AUTHORITIES

Cases

<i>Amendments Rs. Regulating Fla. Bar</i> , 875 So. 2d 448 (Fla. 2004).....	6
<i>Dade-Commonwealth Title Ins. Co. v. N. Dade Bar Ass’n</i> , 152 So. 2d 723 (Fla. 1963).....	8
<i>Fla. Bar re Amendments to R. Regulating Fla. Bar (Proceedings Before a Referee)</i> , 685 So. 2d 1203 (Fla. 1996).....	<i>passim</i>
<i>Fla. Bar v. Am. Senior Citizens Alliance, Inc.</i> , 689 So. 2d 255 (Fla. 1997).....	2
<i>Fla. Bar v. Davide</i> , 702 So. 2d 184 (Fla. 1997).....	2
<i>Fla. Bar v. Miravalle</i> , 761 So. 2d 1049 (Fla. 2000)	2
<i>Fla. Bar v. Schramek</i> , 616 So. 2d 979 (Fla. 1993)	2
<i>Fla. Bar v. Smania</i> , 701 So. 2d 835 (Fla. 1997)	2
<i>Vista Designs, Inc. v. Silverman</i> , 774 So. 2d 884 (Fla. 4th DCA 2001)	3

Rules

Fla. R. App. P. 9.030(a)(2)(A)(ii)	4
Fla. R. App. P. 9.030(a)(2)(A)(iv).....	4, 7
R. Regulating Fla. Bar 10-7.1	<i>passim</i>
R. Regulating Fla. Bar 16-1.3	2, 3

Constitutional Provisions

Art. V, § 15, Fla. Const.....	4, 8, 9
Art. V, § 3(b)(3), Fla. Const.....	7

STATEMENT OF THE CASE AND OF THE FACTS

The issue in this case is whether victims of the unlicensed practice of law may sue an allegedly unlicensed practitioner directly to recover fees and other damages, or whether victims may only sue in cases where the Florida Bar has first prosecuted the unlicensed practitioner and this Court has found that unlicensed practice occurred. This Court has expressly held that “victims of the unlicensed practice of law are free to sue the *allegedly* unlicensed practitioner *directly* to recover fees and other damages,” and therefore no prior disciplinary prosecution is necessary. *Fla. Bar re Amendments to R. Regulating Fla. Bar (Proceedings Before a Referee)*, 685 So. 2d 1203, 1203 (Fla. 1996) [hereinafter *Florida Bar Amendments (1996)*] (footnote omitted) (emphasis added). In this case, however, the Fourth District construed the Florida Constitution to hold that “a supreme court determination on the unauthorized practice of law [i]s a prerequisite for a suit to recover fees.” *Goldberg v. Merrill Lynch Credit Corp.*, 981 So. 2d 550 (Fla. 4th DCA 2008), *reh’g and reh’g en banc denied*. (App. A.) Thus, the Fourth District’s decision expressly and directly conflicts with this Court’s decision. The Court should accept jurisdiction to correct the Fourth District’s conflicting decision and confirm that victims of the unlicensed practice of law may sue an allegedly unlicensed practitioner directly to recover fees.

The Petitioners in these consolidated cases are homeowners (the “Homeowners”) who each borrowed money from the Defendant mortgage lenders (the “Defendants”) under loans secured by mortgages on the Homeowners’ homes. In connection with these loans, the Defendants charged the Homeowners a separately itemized “document preparation fee” for preparing various legal instruments, including a mortgage, deed, and note. The Defendants used non-lawyers to prepare these legal instruments but did not disclose that fact to the Homeowners at the time of the transactions.

The Homeowners brought actions for unjust enrichment and for money had and received, seeking disgorgement of the “document preparation fee.” The Homeowners claimed that under Florida law a non-lawyer may not collect a fee for performing legal services. The Homeowners based their claims on this Court’s consistent holdings that preparation of legal documents by a non-lawyer “to a greater extent than typing or writing information provided by the customer on a form constitutes the unlicensed practice of law.” *Fla. Bar v. Miravalle*, 761 So. 2d 1049, 1051 (Fla. 2000) (citing *Fla. Bar v. Davide*, 702 So. 2d 184 (Fla. 1997); *Fla. Bar v. Smania*, 701 So. 2d 835 (Fla. 1997); *Fla. Bar v. Am. Senior Citizens Alliance, Inc.*, 689 So. 2d 255 (Fla. 1997); *Fla. Bar v. Schramek*, 616 So. 2d 979 (Fla. 1993)). In addition, Rule 16-1.3 of the Rules Regulating the Florida Bar,

promulgated by this Court, expressly recognizes that preparation of mortgages and deeds is the practice of law by providing that even a person licensed in Florida as a certified foreign legal consultant (and therefore subject to this Court's disciplinary authority) may still not perform "any service constituting the practice of the law[] . . . including but not limited to . . . prepar[ing] any deed, mortgage, . . . or any other instrument affecting title to real property." R. Regulating Fla. Bar 16-1.3.

The Homeowners filed their complaints in circuit court as permitted by this Court's holding that "victims of the unlicensed practice of law are free to sue the allegedly unlicensed practitioner directly to recover fees and other damages," *Florida Bar Amendments (1996)*, 685 So. 2d at 1203, and consistent with the Fourth District's prior decision in *Vista Designs, Inc. v. Silverman*, 774 So. 2d 884 (Fla. 4th DCA 2001), which upheld a counterclaim for disgorgement of fees charged for legal services performed by a non-lawyer.

The circuit courts, however, dismissed the Homeowners' complaints on the grounds that only this Court has jurisdiction to hear any claim based on the unauthorized practice of law. In a consolidated appeal, the Fourth District recognized that Rule 10-7.1 of the Rules Regulating the Florida Bar, established by this Court, specifically provides for suits like the Homeowners brought in these cases because it expressly states that it does not "preclude an individual from

seeking redress through civil proceedings to recover fees or other damages.” (App. A at 2.) Nonetheless, the Fourth District affirmed, holding that the Homeowners could not sue the Defendants (alleged unlicensed practitioners) directly to recover fees and that “the claims must await a decision by the Supreme Court of Florida as to whether the conduct constitutes the unauthorized practice of law.” (App. A at 2.)

SUMMARY OF THE ARGUMENT

The Fourth District’s holding that “a supreme court determination on the unauthorized practice of law [i]s a prerequisite for a suit to recover fees” (App A at 4) expressly and directly conflicts with this Court’s holding in *Florida Bar Amendments (1996)* that “victims of the unlicensed practice of law are free to sue the *allegedly* unlicensed practitioner *directly* to recover fees and other damages.” 685 So. 2d at 1203 (emphasis added). Thus, this Court has conflict jurisdiction over this appeal under Appellate Rule 9.030(a)(2)(A)(iv).

This Court also has jurisdiction over this appeal under Appellate Rule 9.030(a)(2)(A)(ii) because the Fourth District’s decision expressly construes Article V, section 15 of the Florida Constitution. The decision wrongly holds that this Court’s “exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted,” Art. V, § 15, Fla. Const., “[r]equir[es] a supreme court determination on the unauthorized practice of law as

a prerequisite for a suit to recover fees” (App. A at 4) even though a civil suit to recover fees involves neither admission nor discipline, and even though direct civil suits for fees were expressly approved by this Court in *Florida Bar Amendments (1996)*.

ARGUMENT

I. The Fourth District’s decision that “a supreme court determination on the unauthorized practice of law [i]s a prerequisite for a suit to recover fees” expressly and directly conflicts with this Court’s decision that “victims of the unlicensed practice of law are free to sue the allegedly unlicensed practitioner directly to recover fees.”

The Fourth District’s decision expressly and directly conflicts with this Court’s decision in *Florida Bar Amendments (1996)* that “victims of the unlicensed practice of law are free to sue the *allegedly* unlicensed practitioner *directly* to recover fees.” 685 So. 2d at 1203 (emphasis added). The language in *Florida Bar Amendments (1996)* is clear: a civil suit may be brought against an “allegedly” unauthorized practitioner—that is, against a person who has not previously been judged by this Court to have engaged in the unauthorized practice of law, and a civil suit may be brought “directly”—that is, without a prior disciplinary action or other “prerequisite.”

The history of the Rules Regulating the Florida Bar, adopted by this Court, is instructive. In 1996, the Florida Bar petitioned this Court to amend Rule 10-7.1 to permit “this Court to order an unlicensed practitioner to pay restitution and costs

to a ‘complainant or other person’ in cases where The Florida Bar is requesting civil injunctive relief.” *Id.* At that time, the Court rejected the proposed amendment on the grounds that existing civil remedies were adequate and that

those aggrieved by an unlicensed practitioner’s misconduct may seek redress through civil proceedings. For instance, victims of the unauthorized practice of law are free to sue the allegedly unlicensed practitioner directly to recover fees and other damages. The civil courts have adequate resources and efficient procedures for enforcing their judgments.

Id.

In 2004, this Court then approved an amendment to Rule 10.7-1 to allow the Court to order an unlicensed practitioner to pay restitution in cases where the Florida Bar requested civil injunctive relief. *Amendments Rs. Regulating Fla. Bar*, 875 So. 2d 448 (Fla. 2004). But the amended rule *expressly* provided that “[n]othing in this section shall preclude an individual from seeking redress through civil proceedings to recover fees or other damages.” R. Regulating Fla. Bar 10-7.1(d)(3). Thus, the amendment preserved the right of “victims of the unauthorized practice of law . . . to sue the allegedly unlicensed practitioner directly to recover fees,” as set forth in *Florida Bar Amendments (1996)*.

The Fourth District’s decision in this case expressly and directly conflicts with *Florida Bar Amendments (1996)*. Under the conflicting decision in this case, a victim of the unauthorized practice of law is no longer “free to sue an allegedly

unlicensed practitioner” because the decision only permits a victim to sue after a defendant has first been judged by this Court to be an unlicensed practitioner. Thus, the decision expressly prevents a victim from suing an “allegedly unlicensed practitioner” and only allows a suit against those who have been charged and finally adjudged to be unlicensed practitioners. Under the conflicting decision in this case, a victim of the unauthorized practice of law is also not free to sue the allegedly unlicensed practitioner “directly,” but must first file a disciplinary complaint with the Florida Bar and hope that the Bar chooses to prosecute the complaint and does not settle or otherwise dispose of it before the case reaches this Court. Under the conflicting decision in this case, a settlement of the disciplinary action by the Bar would prevent victims from “su[ing] the allegedly unlicensed practitioner directly.” Under the conflicting decision in this case, without a prior judgment by this Court that a defendant has engaged in the unlicensed practice of law, a victim cannot bring a suit to recover fees charged for the unlicensed practitioner’s legal services. The decision is therefore in direct and express conflict with *Florida Bar Amendments (1996)*, and this Court should exercise jurisdiction over this appeal under Article V, section 3(b)(3) of the Florida Constitution and Appellate Rule 9.030(a)(2)(A)(iv).

The Fourth District's reliance on *Dade-Commonwealth Title Insurance Co. v. North Dade Bar Ass'n*, 152 So. 2d 723 (Fla. 1963), that lawyers or bar associations may not bring a civil injunctive action to prevent a non-lawyer from practicing law, does not alleviate the conflict with *Florida Bar Amendments (1996)*. This is not an injunctive action brought by lawyers; it is an action for money damages brought by victims who were charged fees. The Rules Regulating the Florida Bar explicitly require that "[c]omplaints for civil *injunctive* relief shall be by petition filed in the Supreme Court of Florida by the Florida Bar" but provide that this restriction on *injunctive* relief shall not "preclude an individual from seeking redress through civil proceedings *to recover fees or other damages.*" R. Regulating Fla. Bar 10-7.1 (emphasis added). Thus, the Fourth District's reliance on *Dade-Commonwealth* is misplaced because this is a civil action to recover fees.

II. The Fourth District's decision expressly construes Article V, section 15 of the Florida Constitution.

This Court has jurisdiction over this appeal for the additional reason that the Fourth District's decision expressly construes Article V, section 15 of the Florida Constitution. (App. A at 4.) The Fourth District stated that its decision was technically required in order to "reinforce[] the exclusive jurisdiction of the supreme court over the unauthorized practice of law," expressly construing Article

V, section 15. (App. A at 4.) This Court has held, however, that while it exercises exclusive jurisdiction over the “admission” and “discipline” of lawyers, individuals may bring claims directly before Florida’s trial courts to recover fees charged to them by an allegedly unlicensed practitioner. *Florida Bar Amendments (1996)*, 685 So. 2d at 1203. And the Rules Regulating the Florida Bar, established by this Court, authorize the Florida Bar to bring injunctive and disciplinary actions for the unauthorized practice of law, yet provide that “[n]othing in this section [(Rules Governing The Investigation And Prosecution Of The Unlicensed Practice Of Law)] shall preclude an individual from seeking redress through civil proceedings *to recover fees or other damages.*” R. Regulating Fla. Bar 10-7.1(d)(3) (emphasis added).

CONCLUSION

This Court should accept jurisdiction over this appeal and resolve the express and direct conflict between the Fourth District Court of Appeal’s decision below, which construed Article V, section 15 of the Florida Constitution, and the decision of this Court on the same issue of law.

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2008, I filed this document with the Clerk of the Court via overnight commercial mail carrier, and that one copy is being served this day by the same means on counsel for Appellees, identified below:

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I hereby certify that this Brief was formatted in 14-point Times New Roman font in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

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INDEX OF APPENDIX

Conformed copy of the decision of the Fourth District below,
Goldberg v. Merrill Lynch Credit Corp.,
981 So. 2d 550 (Fla. 4th DCA 2008), *reh'g and reh'g en banc denied*.1-5