

IN THE SUPREME COURT OF THE STATE OF FLORIDA
Case No. SC06-2003

ON PETITION TO REVIEW DECISION FROM THE DISTRICT COURT
OF APPEAL, FOURTH DISTRICT, STATE OF FLORIDA
4th DCA NON-FINAL APPEAL NO. 4D06-1222

JOSEPH MAZZIOTTI and LOIS MAZZIOTTI
Petitioners,

v.

PURE H2O BIO-TECHNOLOGIES, INC.
Respondent.

JURISDICTIONAL BRIEF OF RESPONDENT

NON-FINAL APPEAL FROM THE
CIRCUIT COURT FOR THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

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IN THE FLORIDA SUPREME COURT

500 DUVAL STREET, TALLAHASSEE, FLORIDA 32399-1927

Joseph Mazzotti and Louis) Supreme Court No. SC06-2003
Mazzotti)
Petitioners,) 4th DCA No. 4D06-1222
-vs-) LT Case No. CACE 01-13777(05)
)
Pure H2O Bio-Technologies, Inc.)
A Florida Corporation)
)
____ Respondents. /

PRELIMINARY STATEMENT

Petitioners, Appellees below, Joseph Mazzotti and Louis Mazzotti, are referred to as **Athe Mazzottis@**. Respondent, Appellant below, Pure H2O Bio-Technologies, Inc., a Florida corporation, is referred to as **AH20"**. The abbreviation **ARA@** refers to the Appendix accompanying this jurisdictional brief. The abbreviation **IB** refers to Petitioners= jurisdictional brief. The abbreviations “(e.s.)” and “(e.o.)” mean emphasis supplied and emphasis original, respectively.

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NATURE OF THE CASE AND STATEMENT OF THE FACTS

Nature of the case:

The Mazzottis seek discretionary review of the Fourth District Court of Appeals decision (A Decision) reversing the trial court's order setting aside a final damages judgment rendered against them. The Mazzottis' statement of facts incorrectly characterizes multiple assertions as facts, which are found nowhere in the Decision B or in this record. For the sake of accuracy, H2O restates the facts below.¹

Statement of the facts:

Respondent, H2O sued the Mazziottis for fraud in the inducement, fraud, money lent, breach of contract, breach of fiduciary duty and civil theft [RA p. 1]. The Mazziottis failed to defend the suit and, in November 2002, a money judgment was entered in favor of H2O at trial [Id.]. Three years later, the Mazziottis moved to vacate the adverse judgment, alleging that H2O procured the damages judgment by submitting fraudulently altered documents at trial and giving false testimony in a pre-trial deposition [Id.]. The motion to vacate was filed after H2O filed an adversary proceeding in a bankruptcy instituted by the Mazziottis [RA p. 3].

In the suit between H2O and the Mazziottis, H2O submitted checks it had written

¹ The Respondent's statement of the facts is taken from the face of the Decision. *See Hardee v. State*, 534 So. 2d 706, 708 (Fla. 1988).

to the Mazziottis with the words "loan" or "officer loan" written on the memo line of the checks [Id.]. When certified copies of the checks were obtained from the bank, there were no such designations in the memo line of the checks [Id.]. H2O admitted that it wrote on the memo line after the checks came back from the bank, but asserted that neither the amounts, dates, payees or signatures on those checks were altered [RA p. 3]. The Mazziottis asserted that the damages judgment should be vacated under Rule 1.540(b)(5) on the basis that it should not have prospective application [Id.]. The Decision notes, however, that the basis of the motion itself was that H2O committed intrinsic fraud in the trial [Id.]. The Decision then notes that the motion falls under subsection (b)(3) of Rule 1.540 [RA pp. 3-4]. The trial court erroneously vacated the damages judgment, and the Fourth District reversed, finding that there is no significant new evidence or change in circumstances that would allow the trial court to vacate the damages judgment under Rule 1.540(b)(5) [RA pp. 1, 4].

Citing *In re Guardianship of Schiavo*, 792 So. 2d 551, 559-60 (Fla. 2nd DCA 2001) and *Dep't. Of Revenue ex rel Stephens v. Boswell*, 915 So. 2d 717, 721 (Fla. 5th DCA 2005), the Decision holds that Rule 1.540(b)(5) does not allow a party to retry a case merely because the judgment provides equitable relief and the party has found additional evidence [RA p. 2]. Rather, the moving party must establish that *significant new evidence or substantial changes in circumstances arising after the entry of the judgment* make it "no longer equitable" for the trial court to enforce its earlier order [Id.]

(e.o.). Then, in full alignment with all other districts that have addressed the Rule, the Decision holds that the time bar in subsection (b)(3) is jurisdictional in nature and cannot be extended for any reason [RA p. 3, citing *Bank One, N.A. v. Batronie*, 884 So. 2d 346, 349 (Fla. 2nd DCA 2004)].

As to the fraud alleged here, the Decision finds it to be intrinsic, in that it was between the parties **B** not extrinsic fraud or a fraud on the court [RA p. 4]. It also rules that the Mazziottis cannot have it both ways, because the fraud they alleged could have been discovered with some due diligence during the initial trial and, therefore, does not constitute significant new evidence or substantial change in circumstances that arose after entry of the judgment [Id. pp. 3-4]. The Decision concludes that the alleged fraud took place *during* the proceedings, not *after* the judgment was entered, and therefore does not fall under subsection (b)(5) [Id.]. It also concludes that the Mazziotti's motion is time barred because the fraud they alleged cannot be the basis for a motion to vacate that is filed more than one year after entry of the judgment [RA p. 4].

The Mazziottis petition this Court for review, claiming conflict with *Weitzman v. F.I.F. Consultants*, 468 So. 2d 1085 (Fla. 3rd DCA 1985) and *Brown v. Brown*, 432 So. 2d 704 (Fla. 3rd DCA 1983), *disapproved*, *Declaire v. Yohanan* 453 So. 2d 375, 381 (Fla.1984) [IB pp. 3, 7-8].

SUMMARY OF THE ARGUMENT

There is no discretionary conflict jurisdiction to review this case, because there is

no express or direct conflict with *Weitzman*, nor does the Decision involve any legal issue or policy question in need of resolution. As to *Brown*, that case was expressly disapproved by this Court in *DeClaire*. It is well settled that when an alleged fraud is intrinsic in nature and more than one year has lapsed since the entry of the judgment, the motion to vacate the judgment is time barred. The fraud alleged here goes to pre-judgment and pre-trial matters **B** all of which could have been addressed at trial with minimal due diligence. The Mazzottis=assertions to the contrary are inaccurate and not found within the Decision or record. The very unique post-judgment facts in *Weitzman* involve the fraud perpetrator engineering the post-judgment purchase of the very judgment it caused to be entered against the innocent victim of its fraud in the first place, and then asserting the purchased judgment against the innocent victim. *Weitzman* merely stands for the unremarkable proposition that there are some very unique post-judgment circumstances that can serve as the basis to set aside a judgment after one year. This case does not present any such circumstances. There is nothing new or exceptional occurring after the judgment here. The issues here involve pretrial deposition testimony and some altered check memo lines prior to trial, all of which could have easily been challenged at trial with some due diligence on the Mazziottis=part. At the very least, they could have challenged the damages judgment within one year after its entry. *See*

DeClaire.²

The motion to set aside this judgment was based on intrinsic fraud. It is plainly time barred under subsection (b)(3) of Rule 1.540. There is nothing new or exceptional that could remotely qualify for subsection 1.540(b)(5) here. The Decision does not conflict with or misapply any case. Accordingly, H20 respectfully asks this Court to deny jurisdiction.

JURISDICTIONAL STATEMENT

There is no discretionary conflict jurisdiction to review this Decision under Fla. Const. Art. V, ' 3(b)(3) or Rule 9.030(a)(2)(A)(iv), Fla.R.App.P.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE APPELLATE DISTRICTS ABOUT THE DECISION'S VIEW OF RULE 1.540(b)(5), NOR HAVE PETITIONERS ASSERTED ONE [restated by Respondent]

The Decision does not expressly or directly conflict with any decision of another district court of appeal or of this Court on the same question of law. Nor is there any implied conflict. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980). The law is not only

² While not applicable here, *DeClaire* was superseded in part on other grounds as to Florida Family Law Rule 12.540, which eliminated the one year rule for cases of false financial affidavits in a family law case. *See Lefler v. Lefler*, 776 So. 2d 319, n. 1 (Fla. 4th DCA 2001).

harmonious on the issues in this case **C** it is well settled.

To determine whether discretionary conflict jurisdiction exists, this Court is limited to facts which appear on face of the opinion, not the underlying record. *See Hardee v. State*, 534 So. 2d 706, 708 (Fla.1988); *Art. 5, ' 3(b)(3), Fla. Const.* For the most part, the Mazzottis argue their version of the record, instead of matters relevant to the threshold jurisdictional issue. In doing so, the Mazzottis impermissibly recite as **A** facts multiple assertions that are found nowhere within the four corners of the Decision **B** or in this record. The simple facts here involve some alterations to the check memo lines *before trial* and *pre-trial* deposition testimony about it **B** both of which could have been discovered and challenged at or before trial with minimal due diligence [RA pp. 1, 3].

For that reason and more, Petitioners' reliance on *Weitzman* is misplaced. *Weitzman* does not stand for the proposition that the Mazzottis say it does. The only unremarkable proposition that *Weitzman* actually stands for is that some exceptionally strange facts that occur *after* entry of the judgment can sometimes give rise to equity sufficient to qualify as grounds to vacate a judgment under subsection (b)(5) more than a year after entry of the judgment. In *Weitzman*, the perpetrators of securities fraud purchased the judgment through a sham company well *after* its rendition, and asserted the purchased judgment against the innocent fraud victim. *Id.*, 468 So. 2d at 1085-86. The purchase of the judgment was a significant new and very exceptional *post judgment*

change of circumstances for which subsection (5) is designed. *Id.* at 1086. The Third District even noted that there had never been a case like *Weitzman* before. *Id.* at 1086. Nor has there been one since, as far as Respondent can tell. *Weitzman* has been limited to its particular facts by the court that issued it, and its applicability to money judgments has been questioned, except under its own very unique circumstances **B** which are not present here. *See Pozo v. Prada*, 563 So. 2d 726, 727 (Fla. 3rd DCA 1990) (Cope, J., special concurrence).

This case does not conflict with *Weitzman*. It is not even remotely analogous. H2O did not purchase a judgment to become judgment creditors of the Mazziottis. Rather, the Mazziottis were held liable to H2O for fraud in the first instance, a money judgment therefore was rendered against them, then 3 years later they alleged that H2O committed fraud consisting exclusively of matters that existed *before* entry of the judgment - i.e., alteration of some mere check memo lines and some pretrial deposition testimony about it [RA pp. 1, 3]. That purported fraud could have easily been addressed at or before trial [*Id.*].

The law is well settled on what constitutes intrinsic fraud. *See DeClaire*, 453 So. 2d at 377; *Wescott v. Wescott*, 444 So. 2d 495 (Fla. 2nd DCA 1984). It is also well settled that a motion to set aside a judgment based on intrinsic fraud is time barred if brought more than one year after entry of the judgment. *Id;* *see also, Schiavo* 792 So.

2d at 559-60 (no retrial merely because party found some additional evidence); *Boswell*, 915 So. 2d at 721 (subsection (b)(5) not applicable to intrinsic fraud); *Wescott* (perjury by witness is classic example of intrinsic fraud, and is insufficient grounds to set aside judgment more than one year after its entry). The Decision relied on *Schiavo*, *Wescott* and *Boswell*. There is no conflict at all here. Thus, even if this Court were to find that discretionary conflict jurisdiction exists (it does not), the legal issues and policy questions are well settled and have been thoroughly addressed by this Court. Therefore, there is no reason to exercise jurisdiction even if it does exist.

II. THERE IS NO CONFLICT BETWEEN THE APPELLATE DISTRICTS AS TO WHETHER SUBSECTION (B)(5) IS MUTUALLY EXCLUSIVE OF SUBSECTION (B)(1)-(4) [restated by Respondents]

This Decision does not present an express or implied conflict as to whether subsection (b)(5) is mutually exclusive of subsections (b)(1)-(b)(4) of Rule 1.540, Fla.R.Civ.P. [RA p. 4; IB pp. 7-10]. The Mazzottis assert conflict on this point with *Brown v. Brown*, 432 So. 2d 704 (Fla. 3rd DCA 1983) [IB pp. 7-9]. Nonsense. This Court expressly *disapproved Brown* in *DeClaire*. 453 So. 2d at 381 (e.s.). The Decision concurs with *Boswell*'s rulings that (a) the subsections of Rule 1.540(b) are mutually exclusive; (b) if a party seeking to vacate the judgment had a chance to litigate the issue and present a defense below, but did not do so, courts are reluctant to set aside judgments; and (c) the circumstances addressed in subsection (b)(5) all appear to address

matters arising *after* the judgment, *not* circumstances present *before* the judgment [RA pp. 3-4] (e.s.). The Decision cites to and relies on *Boswell*; it does not conflict with *Boswell*. The Decision correctly concludes that although the Mazzottis asserted that the judgment should not have prospective application under subsection (b)(5), the real basis of their motion to vacate was simply that H2O purportedly committed *intrinsic* fraud in the trial court, which falls under subsection (b)(3) of Rule 1.540(b) [RA pp. 3-4]. Over twenty years ago, this Court settled that issue, holding that fraudulent conduct arising within a proceeding and pertaining to the issues in the case that have or could have been tried is intrinsic and time barred after one year. *DeClaire* (perjury and false trial testimony must be asserted within one year). The instant Decision is in full alignment with the other districts and this Court. *See id.* It is beyond any rational argument that the fraud allegations asserted here to set aside the judgment presented no "significant new evidence or substantial changes in circumstances arising after the entry of the judgment." *Rule 1.540(b)(5), Fla.R.Civ.P.*

Likewise the assertion of conflict with *Boswell* is incorrect. Just like *Boswell*, the instant Decision found that if subsection (b)(5)'s equity included any of the categories contained in subsection (b)(3), the other sections would be rendered meaningless. There is no conflict with *Boswell B* or any other case.

Finally, the Mazzottis' discussion about Rule 60(b) of the Federal Rules of

Procedure is predicated on *Brown*, which was expressly disapproved by *DeClaire* [IB pp. 7-8]. This Decision does not pass on any federal rule, let alone, create a conflict with one. There is no conflict of any kind in this case.

CONCLUSION

For the foregoing reasons H20 respectfully asserts that there is no discretionary conflict jurisdiction to review the Fourth District's Decision. Accordingly, this Court should deny review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and authentic copy of this Answer to Jurisdictional Brief has been furnished via U.S. Mail, first class postage prepaid, to Steven Ginns, Esq., 370 Camino Gardens Blvd., Suite 300, Boca Raton, Florida 33432 (trial counsel Pure H20); Kent Wicker, Esq., Reed Wicker PLC, 2100 Waterfront Plaza, 321 W. Main Street, Louisville, KY 40202 (Petitioners=counsel); J.D. Dickinson, Esq., 250 S. Australian Avenue, Suite 600, West Palm Beach, Fl 33401 (Petitioners=counsel); Michael H. Stauder, Esq., Crystal Tree Office Centre, 1201 US Highway One, Suite 315, North

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**CERTIFICATE COMPLIANCE WITH
FONT REQUIREMENTS OF RULE 9.210**

The undersigned certifies that this Brief complies with Rule 9.210(a)(2), Fla.R.App.P., as it is typed with times new roman 14 point font in Corel WordPerfect Suite 12 for windows format.

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