38

IN THE SUPREME COURT OF FLORIDA

CARMEN FELICITA ARRIETA-GIMENEZ and THE CONJUGAL PARTNERSHIP comprised of Carmen Felícita Arrieta Giménez and her husband Orlando Vizcarrondo Narváez, represented by Orlando Vizcarrondo Narváez,

Plaintiffs, Appellants

v.

ALBERTO ARRIETA-NEGRON and his wife ANNABELLE DE ANTONIS, and THE CONJUGAL PARTNERSHIP comprised of Alberto Arrieta Negrón and his wife Annabelle de Antonis ROBERTO ARRIETA-NEGRON; RAFAEL ARRIETA NEGRON (now an incompetent, substituted in this action by his guardian, ESTHER R. ARRIETA); and CARMEN MARGARITA ARRIETA-NEGRON, also known as CARMEN MORAN,

Defendants, Appellees



No. 73,222

On Certification from the United States Court of Appeals for the First Circuit.

# INITIAL BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

## TABLE OF CASES

IN THE SUPREME COURT OF FLORIDA

| | | |
|---|---|---|
| CARMEN FELICITA ARRIETA-GIMENEZ, et al., Plaintiffs, Appellants | ) | |
| v. | ) | CASE NO. 73,222 |
| ALBERTO ARRIETA-NEGRON, et al., Defendants, Appellees | ) | |

INITIAL BRIEF OF PLATNTIFPS-APPELLANTS

TO THE HONORABLE COURT:

STATEMENT OF THE CASE AND OF THE FACTS

The facts underlying the Certification of two questions of Florida law to this Court by the United States Court of Appeals for the First Circuit ("Court of Appeals") appear clearly from that Court's Interlocutory Opinion. Since the case reached that Court on appeal from a Summary Judgment and defendants were the movants in the motion for summary judgment, the facts must be accepted as pleaded in the Amended Complaint, and in the light most favorable to plaintiffs as the non-moving party. Court of Appeals' Interlocutory Opinion, bottom of page 9.

To summarize, the four Arrieta-Negrón defendants ("defendants") defrauded their half-sister born out-of-wedlock, plaintiff Carmen F. Arrieta-Negrón ("plaintiff") while settling their father's estate, by concealing from her properties with which they, as directors, managers and administrators of their father's properties, were familiar, and informing her that the sugar mill in Puerto Rico was worthless, as it had only "scrap-value". On this basis plaintiff, in 1960, when she was just over 21 years of age, sold her equal share to her father's properties in Puerto Rico to defendants in return for the payment by them of a mortgage on her home with a balance of about $18,000.

In 1983 plaintiff fortuitously discovered in the Registry of Property of Bayamón, Puerto Rico, a document of Declaration of Trust executed in Dade County, Florida, on April 21, 1978 by defendants and filed for record in Puerto Rico in 1981 in which defendants revealed for the first time (significantly subsequent to the enactment by the Florida Legislature in 1974, effective in 1975, of the statute of repose of Sect. 95.031 and before this Court decided, in 1979, Overland Construction Co., Inc. v. Sirmons, 369 So. 2d 572, in 1980, Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 and in 1981, Diamond v. E.R. Squibb & Sons, Inc., 397 So. 2d 671) that over 2000 acres of land near the city of Bayamón and its environs, although recorded in the name of

defendant Alberto Arrieta-Negrón (one farm was recorded in the name of defendant Roberto Arrieta-Negrón) had belonged to the decedent and were held in trust by them for the benefit of his heirs. (In his will, the testator named his five children, plaintiff and defendants, as his heirs in equal shares.) As a result of further investigation, plaintiff discovered that her father had many other real estate holdings in Puerto Rico besides those included by defendants in their Declaration of Trust. Also, that in 1963 the machinery of the sugar mill had been sold for over two million dollars.

Contending that defendants had made fraudulent representations to her, plaintiff filed this suit in October of 1983, less than three months after her discovery[1]/ and less than 4 years after the document of Declaration of Trust was filed of public record in the Registry of Property of Bayamón, but more than 12 years after the initial fraud was committed against her.

This case is governed by Florida law, as the Court of Appeals ruled, because at the time of her father's death, and since she was a child in third grade, plaintiff had lived with her mother in Florida, where her father had extensive holdings and where he visited often, spending a great deal of his time

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1/ Plaintiff could hardly have been more diligent in filing, and did so even before she finished the full investigation that she started once she discovered the Declaration of Trust.

looking after his ranch. Administration proceedings2/ were held in two courts in Florida. Defendant Alberto Arrieta-Negrón, a resident of Florida, was named Curator by the County Judges' Court of Indian River County and plaintiff's mother was appointed Administratrix by the County Judges' Court of Dade County. The settlement negotiations, and thus the fraudulent representations, occurred in Florida, and the settlement, by which plaintiff ceased to have any share in her father's estate, was submitted, for approval as to the Florida properties, to the County Judges' Court of Dade County (Appendix, page 233) which approved it. (Appendix, page 235.)3/

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2/ Probate itself could not take place in Florida because the will had been executed in Puerto Rico under the civil system of law, in which the Notary keeps all original documents in his Protocol, and issues certified copies.

3/ References to page numbers in the Appendix are to the Appendix submitted by appellants to the Court of Appeals and which the Court of Appeals forwarded to this Court at the time of the certification. On November 4, 1988 plaintiffs requested that they be relieved from the preparation of an Appendix in view of the comprehensive Appendix already filed in the Court of Appeals and forwarded to this Court. At the time this Initial Brief is being prepared by plaintiffs' counsel, although they have been advised by telephone by the Office of the Clerk of this Court that they were to be considered as the moving party and that their Initial Brief should be served not later than November 29, they have not been advised yet of any decision on their motion to have the Appendix on appeal before the U.S. Court of Appeals for the First Circuit serve as the Appendix on this Certification proceeding.

## QUESTIONS OF LAW CERTIFIED BY THE COURT OF APPEALS TO THTS HON. COURT

1.- Is Fla. Stat. Section 95.031(2), the 12-year statute of repose, constitutional under the "access to the courts" or any other provision of the Florida constitution, when applied to a fraud that was not discovered or discoverable until more than 12 years after the date of its commission?

2.- Would the Florida courts give res judicata effect to a consent judgment approving a property settlement, if it should be shown more than one year later that one party had fraudulently misrepresented to the other or concealed from the other party information that was material to the settlement?

## ARGUMENT AS TO THE FIRST QUESTION CERTIFIED

1.- This court has not passed upon the constitutionality, under the Florida Constitution "access to the court" provisions of Fla. Stat. Sect. 95.031(2) when fraud is discovered more than 12 years after its commission.

We need not belabor this point because the Court of Appeals has ruled, correctly in our opinion, and for the purposes of this Certification, that such is the case. The prior decisions of this Court are concerned with other causes of action,

such as medical malpractice, product liability and professional liability involved in construction.

In 1960, and up to 1974, the "ordinary" statute of limitations for fraud read as follows:

> "95.11 - Limitation upon actions other than real action. - Actions other than those for the recovery of real property can only be commenced as follows:
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> (1) WITHIN TWENTY YEARS-
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> .....
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> .....
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> .....
>
> (5) WITHIN THREE YEARS-
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> (a) .....
>
> (b) .....
>
> (c) .....
>
> (d) An action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;"

(Emphasis supplied.)

.....

But in 1974, the Florida Legislature enacted Sect. 95.031(2) to include a statute of repose reading, in its pertinent part, as follows:

> "Actions for products liability and fraud under subsection 95.11(3) must be begun . . . within 12 years after the date of delivery of the completed product to its original purchaser or within 12 years after the date of the commission of the alleged fraud, regardless of the date the defect in the product or the fraud was or should have been discovered."

As a result of this statute of repose, this Court had occasion to issue its rulings in the cases of Overland v. Sirmons, supra, (1979), Battilla v. Allis Chalmers Mfg. Co., supra (1980) and Diamond v. E.R. Squibb & Sons, Inc., supra (1981). Overland involved a claim against a building contractor. Battilla and Diamond were product liability claims, although Diamond involved a medical product, and is, as the Court of Appeals characterized it, "a special sort of product liability case". (Interlocutory Opinion, page 14). In all three cases this Court held the statute of repose unconstitutional.

After Overland, Battilla and Diamond the Legislature in 1986 amended Section 93.031 to exclude product liability cases from the same. The result was that it remained in the statutes only for fraud cases.

In addition, this Court decided the subsequent cases of Pullum v. Cincinnati, Inc., 476 So. 2d 747, and Meléndez v. Dreis and Krump Manufacturing Co., 515 So. 2d 735, neither of which involved a fraud case. Both Pullum and Meléndez were product liability claims.

Although this Court has not ruled on a fraud case, at least one District Court of Appeals has ruled that the statute is unconstitutional when the cause of action is based on fraud. Kempfer v. St. Johns River Water Management District, 475 So. 2d 920 (1985), appeal dismissed and review denied, 488 So. 2d 68

(1986). While in the federal jurisdiction, appellants argued that the federal courts were bound to follow the rulings of state intermediate courts in the absence of a decision from the highest court, unless the federal court was convinced that the highest court of that state would decide otherwise. Commissioner v. Bosch, 387 US 456, 18 L Ed 2d 886 (1967); Bailey v. Southern Pacific Transportation Co., 613 F 2d 1385 (1980). We have no reason to believe that this Court will rule differently from the holding in Kempfer, in view of the fact that, in spite of Pullum (1985), this Court in 1986 dismissed an appeal and denied a review of Kempfer.

We must admit, however, that the Court of Appeals is correct in its holding that this Court has not specifically ruled on the point.

2.- The statute is unconstitutional because, by making the period in which to file suit run from the date of commission and not from the date of the discovery of the fraud, as was the general common law rule (Bailey v. Glover, 21 Wall. 342, 22 L. Ed' 636; Traer v. Clews, 115 U.S. 528, 29 L. Ed. 467; Holmbers v. Armbrecht, 327 U.S. 392, 90 L. Ed. 743), in cases where the fraud is discovered 12 years after its commission it effectively bars a citizen from having access to the courts for redress, and there is

no overriding public interest or overpowering public necessity that would make it necessary to abrogate that right. Overland Construction Co. v. Simmons, supra, following the "polestar" decision of this Court in Kluger v. White, 281 So. 2d 1, 4 (1973).

This Court has explained in Pullum the overriding public interest or overpowering public necessity to limit causes of action for product liability. It said:

> "The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product."

And in his dissent in Battilla, supra, Mr. Justice McDonald stated an additional reason for upholding the validity of the 12-year statute of repose in product liability cases. Contrary to the usual medical malpractice claim (but similarly to the normal claim against professional engineers, architects or contractors) there was no privity of contract between manufacturer and the user of the product. In the instant case there was privity of contract, so much so that it was the case of the contractual relationship itself, the consent of one of the parties, that was flawed and nullified by the fraudulent misrepresentations.

The desirability of curtailing the effects of unlimited litigation against physicians is widely perceived even by the general public. A measure of protection for them is obviously necessary if their profession is to continue to attract worthwhile individuals. At the same time unrestrained litigation in medical malpractice cases greatly increases insurance premiums, which in turn has made in many cases hospital and other medical services almost prohibitive.

In the manufacturing and construction fields the overriding interest is to establish a real period of limitation of action, in fairness to the individuals or enterprises involved. The cause of action for this type of injury cannot begin to run when the injury occurs, for otherwise the defendants, more so that doctors, would have perpetual liability.

Furthermore the claimant against a manufacturer or a professional of the construction industry, contrary to usual case involving the services of a doctor, may have another source of redress, such as the employer, or the owner of the machine which caused his accident, or the seller of the product to him, or the owner or tenant of the premises at which he was injured. (If it is an injury suffered in the workplace, there is redress under the Workmen's Compensation Statutes, another example of permissible curtailment of the right to sue because of an overriding public

interest.)

Manufacturers and architects who designed products or buildings scores of years (maybe even a century) ago cannot be held accoun'table for present days standards of design and construction.

Furthermore, as stated, neither the manufacturer nor the architect or contractor had any contractual relationship with the injured party and, additionally neither is responsible for the maintenance or upkeep of the machine or other product sold, or of the building.

The situation with regard to fraud is absolutely and completely the reverse.

a.- There is not overriding public interest in protecting the perpetration of a fraud. We need not expand on this proposition as we cannot conceive of any possible argument in support of such a public interest or necessity.

b.- Fraud is an intentional and criminal act, usually a felony if a certain amount is reached, while the injuries received as a result of medical malpractice, improper product manufacturing and faulty design or construction are the result of negligence or imprudence incurred by well-meaning persons in the course of engaging in a lawful and useful enterprise or profession.

Doctors and other medical personnel do not set out to

kill men or injure people, nor do manufacturers of industrial machines, drugs or automobiles, or contractors and designers of buildings. The perpetrator of fraud sets out to harm him with whom he deals. Fraud, by definition, is never inadvertent, or the product of negligence or carelessness.

We submit that there is no valid logical reason, in law or in justice, by which the perpetrators of fraud should me measured by the same yardstick than those who cause injuries through negligence. (Needless to say, those who cause physical or mental injuries through intentional acts, from murder to mugging, also should not be able to defeat a claim of compensation by a victim by raising as a shield a statute of repose which runs from the commission of the act, provided their identity was not known or was not discoverable at the time.)

c.- By its nature some types of fraud, such as that involved in the present action, are not discoverable except by chance or fortituous circumstance.

It is obvious that many types of fraud can be discovered some time after the commission. Fraudulent misrepresentations by a seller with regard to the object of the sale, whether an automobile or a house (or by the buyer with regard to the validity of the check he is delivering) can be determined within various periods of time, relatively shorter or longer, after the event, as the product breaks down or is found to be defective or not to perform as represented. But other types of fraud, such as the

instant case, in which an heir is never informed, or affirmatively misinformed, about the extent of her father's estate, cannot be discovered by her except through chance. Such a person would not have felt or perceived in her body the effects of the medical malpractice. She will not have a product that she bought (or the worthless check she had received) whose use would enable her to determine the false representation. That is why this Court has on more than one occasion held that the victim of a fraud does not have a duty to investigate. Besett v. Basnett, 389 So. 2d 995, 998 (1980) followed also by the U.S. Court of Appeals for the 11th Circuit, Banco Nacional de la Vivienda v. Cooper, 680 F. 2d 727, 730 (1982). (See also Hudak v. Economic Research Analysts, Inc., 499 F. 2d 996 (5th Cir. 1974)). Actually, in Besett, this Court stated that if the choice is between a fraud perpetrator and a negligent victim, the law will protect the victim of the fraud in spite of his negligence.

It is much easier for a person to determine when he has been physically or mentally injured, although in malpractice cases this admittedly may take some time. Usually, as in a car accident, the knowledge of the injury is immediate. In other cases, as in medical malpractice, the person may be feeling the ill effects of the injury but may not be aware that they should be ascribed to improper medical procedures. Even when the damage is only to property, it is or should be promptly known by the injured

property owner. But when the fraud causes pecuniary loss by depriving a person of property or rights which she never knew she owned or was entitled to, then the fraud cannot be detected or determined except by chance.

As we argued in the Court of Appeals, even if the fraud or fraudulent misrepresentations to plaintiff had been only with regard to the value of property in her father's estate, it conceivably may or may not have been discoverable, depending on circumstances. But when the fraud consists, among other things, of fraudulently failing to inform plaintiff, as owner by inheritance of 1/5 of her father's estate, that large real estate holdings in Puerto Rico which appeared recorded in the name of one or more of her brothers did not belong to them, but to her father, such type of fraud cannot be discovered even through reasonable diligence, which victims on fraud, this Court has ruled, do not have to display. Besett, supra. Only the perpetrators of the fraud, in this case the father's legitimate children, knew that this land was secretly held in trust by one or two of them for the benefit of his heirs,4/ and they were not about to disclose their conspiracy.

These conspirators kept their secret for many years,

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4/ Needless to say, this land was not included as property of the estate for Estate Tax purposes (Appendix, page 444) and plaintiff, had she had any reason to, could not have determined its existence by an examination of the return filed with the Treasury Department.

selling property of the estate in Puerto Rico for over five million dollars (Appendix, page 92) and secretly sharing the proceeds of the operation of the other farms (Appendix, page 54), until 1978, when the adoption (effective in 1975) of the statute of repose by the Florida Legislature (and before the 1978, 1979 and 1980 decisions of this Court in Overland, Battilla. and Diamond) made them believe that they could disclose their duplicity with impunity, and they executed the Declaration of Trust admitting that the property had belonged to their father and had really been held by the owners of record in trust for the benefit of all the heirs.5/

As stated above, in most fraud cases, fraud is not easily discoverable (unless it consists of misrepresentations as to realty or chattels whose possession is then turned over to the victim) and in many cases impossible to discover except by chance,

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5/ Decedent's intention, as appears from his will, was to leave all his properties to his five children share and share alike. Of course, the self-serving Declaration of Trust does not state that the land was held for the benefit of all the heirs of the decedent, mentioning only the four heirs which executed the same, but, as with all other facts and inferences to be obtained and drawn from the complaint, this must be viewed in the light most favorable to the non-moving party in a motion for summary judgment, as the Court of Appeals ruled in its Interlocutory Opinion (pp. 9-10) citing their own case of Oliver v. Digital Equipment Corp., 846 F. 2d 103 (1988). Plaintiffs have no doubt that the jury will decide that the verbal trust to which the self-serving document refers was for the benefit of all of grantor's children, as they appear in his will.

as in this case, and therefore the statute of repose that purports to cut off the period of time for filing suit for redress after the commission of the fraud, regardless of the date of discovery of the same, impermissibly infringes upon the victim's right of access to the courts granted by Article 1, Section 21 of the Florida Constitution.

2.- Apart from the argument that, by the nature of the act involved, an overriding public interest or overpowering public necessity to protect the perpetrators of fraud is not present, there is in any event a curtailment of plaintiff's right because of the time frame involved in her particular situation: the injury to her was committed in 1960, when the statute of repose had not been adopted, and she did not and could not discover the fraud (her injury was not "discovered or discoverable", to use the Court of Appeals phrase in the first question certified) neither within the one-year period of grace to file suit granted by the Legislature after the enactment of the statute of repose, nor within the 12-year period, which was made to run from the commission of the fraudulent act, and thus had already "expired" at the time it was enacted.

It is this situation, different from most other decisions of this Court above-cited, which makes this statute of repose constitutionally inapplicable to her.

In none of the other cases decided by this Court, except Diamond,6/ had the 12-year period already elapsed by the time the statute of repose was adopted: as stated, the contract for the sale of her hereditary rights was signed in 1960 and the statute was adopted in 1974. Insofar as she was concerned, the period fixed by the statute of repose was useless and worthless.

This Court in Kluger v. White, supra, stated:

> "Where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the state pursuant to Fla. Stat. Sect. 2.01, F.S.A., the legislature is without power to abolish such right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown."

In accordance with her situation, plaintiff has consistently argued that because: (1) her right of access to the court for redress predated the adoption of the declaration of rights of the Constitution of the State of Florida; (2) her cause of

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6/ In Overland, a construction industry case, the alleged act of negligence occurred before but the injury did not occur until more than 12 years later. In Diamond and in the instant case the injury occurred more than 12 years before the statute was enacted.

action became a part of the common law of this state pursuant to Florida Stat. Section 2.01; and (3) Section 95.11(5)(d) which was in effect at the time of the signing of the Settlement Agreement in 1960 gave plaintiff a cause of action and a term of three years in which to bring said action, from the time of discovery of the fraud, the statute of repose could not take this right away from her without providing an alternative, which it did not because of the time-frame involved in her case.

In Diamond, supra, a case with a similar situation, in which the injury occurred when plaintiff Nina Diamond was an unborn child in her mother's womb, this Court declared the statute unconstitutional. Because of the concise analysis made by the Court of Appeals on this particular point, we cite the following from its Interlocutory Opinion:

> "The Pullum court's reference to Diamond is interesting in this regard. In Diamond, the plaintiff's mother had ingested the drug diethylstilbestrol (DES) while she was pregnant with her daughter. The drug's effect as a cancer-causing agent in the plaintiff daughter did not become evident until the daughter reached puberty. The Pullurn court noted,
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> > Under these circumstances, if the statute (of repose) applied, plaintiffs' claim would have been barred even though the injury caused by the product did not become evident until over twelve years after the product had been ingested. The legislature, no doubt, did not contemplate the application of this statute to the facts in Diamond. Were it applicable, there certainly would have been a denial of access to the courts.

> 476 So.2d at 659 n.*. An analogy can be drawn between the facts in Diamond and the allegation of fraud in the present case: in both instances, the initial injury (the ingestion of DES; the misrepresentation) took place within the 12-year period, but the effects of that injury did not become evident until after 12 years. This is different from the situation in Pullum and the other more typical product liability cases, e.g., Eddings v. Volkswagenwerk, A.G., 835 F.2d 1369 (11th Cir. 1988), in which the initial injury -- for example, an industrial or automobile accident -- does not take place until after the 12-year period."
>
> (Emphasis by the Court.)

The quoted footnote in Pullum makes it clear, that although this Court was receding from Battilla, it was not revoking Diamond because, as it states, "there certainly would have been a denial of access to the courts" if the discovery is made after the 12 years, holding that such could not have been the Legislature's intent.

Actually, with due respect to the Court of Appeals' Interlocutory Opinion, both in Diamond and in the instant case the ingestion of DES and the fraudulent misrepresentations took place more than twelve years before: the statute was enacted.

It is evident, by the time of the enactment of the statute of repose that plaintiff was left adrift, with no period in which to file suit after discovery of the fraud. Therefore this Court should rule that the statute of repose cannot constitutionally apply to her, and that her cause of action is governed by the "ordinary" statute of limitation, with which she complied at the time she filed her suit.

Before closing the argument on the first question presented, we wish to add the following:

The Court of Appeals informed this Hon. Court that it would "welcome the advice of the Supreme Court of Florida on any other relevant question or aspect of Florida law on which the court believes that it is advisable to provide clarification". (Certification, page 2).

The argument we have developed above with regard to the first question certified is based on the assumption that the fraud ceased in 1960 when the Settlement Agreement was signed. But plaintiffs have also argued that, under the facts of this case, because defendants continued to conceal the true ownership of the realty recorded in the name of only one of them, (obviously to conceal from plaintiff the fact that she was entitled to a 1/5 share in said properties) the fraud continued, at least, up to the time in 1981 when they filed for recording the 1978 Declaration of Trust which plaintiff discovered in 1983. The Court of Appeals, however, in its Interlocutory Opinion (page 21), said: "All frauds are 'continuing' in the sense that the victim remains fooled until the fraud is discovered." And later: "We hold, therefore, that the alleged fraud would have been committed -- for purposes of applying the Florida statute of repose -- in 1960, when the settlement agreement was signed."

We submit that under the "other relevant question or aspect of Florida law" on which the Court of Appeals invited

clarification, this Court may want to consider the fact that, under its previous holdings, in Florida concealment is, of or by itself, fraud,7/ and that in this sense the fraud continued until at least 1981.

Such a pronouncement would make unnecessary a ruling as to the constitutional issues involved.

Insofar as any advice under this part of the Certification by the Court of Appeals may be considered to necessarily involve the reconsideration of part of its Interlocutory Opinion, we wish to state that the Interlocutory Opinion is not by its nature a final opinion, that no Judgment has issued from the Court of Appeals and that plaintiffs', and may we add defendants', time to file for reconsideration or rehearing is still open because the 14-day period to do so (Rule 40(a)) of the Federal Rules of Appellate Procedure) starts to run from the entering of the Judgment by the Court of Appeals and no Judgment has yet been entered in this case.

## ARGUMENT AS TO THE **SECOND** QUESTION CERTIFIED

Although the second question certified does not deal with

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7/ Even "actual fraud", the most restrictive of the four fraud classification in Florida (actual fraud, "fraud in fact", "constructive fraud" and "fraud in law") includes "misrepresentations, concealment or other artifices employed to deceive another." 27 Florida Jurisprudence 2d, Fraud and Deceit. Sec. 2, page 289.

the Constitution of the State of Florida nor with a statute which has been the subject of different interpretations, the Court of Appeals certified the question of the res judicata effect of the Order of the County Judges' Court of Dade County, Florida, of July 27, 1960 ("the consent Order") in case 45176-A (Appendix, page 235) because it was uncertain of the preclusive effect to be granted to it.

The first uncertainty that was raised in connection with the res judicata claim of defendants was based on the fact that this was a consent judgment. Even consent judgments can in no way be considered similar to judgments issued after trial in litigated cases. The Court of Appeals itself cites Crowe v. Cherokee Wonderland, Inc., 379 F. 2d 51, 54 (1967), for the proposition that a consent judgment is no more than a judicially-approved contract.

In this case the consent Order should not be considered preclusive of plaintiff's right to maintain her claim because, not only was it not the result of the court's own findings after a trial, but was not a judgment. Although in many cases consent orders or decrees have the same effect as judgments in others, as in this case, they do not. The consent Order in this case neither finalized the proceedings in the Dade County Judges' Court nor did it resolve any issue submitted to that court for resolution.

The Court of Appeals has cited a 1986 decision of the

Supreme Court of the United States in this matter that we believe bears repetition here:

> "To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees closely resemble contracts . . . . (C)onsent decrees 'have attributes both of contracts and of judicial decrees,' a dual character that has resulted in different treatment for different purposes."
>
> Local No. 93, International Association of Fireffghters v. City of Cleveland, 478 U.S. 501, 519 (1986)

It is important to consider, not only that the Order in question was issued by consent, but that it was just that, an interlocutory order which, in approving a contract fixing an amount to be paid to plaintiff for her share of her father's estate, did not resolve any issue that at that moment was before the court for resolution. How much the estate was worth, or, even further, how much the share of any one of the five children under the will was worth, was not in any way, form or manner before the court.

Consent judgments usually adjudicate the cause of action being litigated, albeit by agreement of the parties and not by independent findings of the court on its own. Final decrees or orders of a court may also so resolve and determine the issues and disputes submitted to the court but in this consent Order these elements were not present. The court merely approved a stipulation referring to a contract for the purchase of hereditary

rights. (For example, it was necessary for the court to issue a Judgment, dated August 9, 1960, to dispose of the claim of plaintiff's mother, as widow, for assignment of dower. See Appendix, page 393. Needless to say, plaintiff was not a party to such a claim for dower, or to any other similar claim for relief or assignment of any property or for any allotment or any part of the proceeds of the properties or the income of the estate.)

Since the consent Order is both an interlocutory order and a consent order, and none of the issues arising from the claim in the instant case were pending resolution in the County Judges' Court of Dade County, the consent Order does not have a preclusive effect of res judicata as to the claim in the instant case.

Another element necessary for a decree or judgment to have a preclusive effect is for the matter to have been actually litigated.

This Court in DeClaire v. Yohanan, 453 So.2d 375 (1984) had occasion to state:

> "At the outset we must distinguish between extrinsic fraud and intrinsic fraud because only extrinsic fraud may constitute fraud on the court.
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> .....
>
> 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."

The Court of Appeals, after citing this decision, said:

> "This language could be taken to imply that in a case like this one -- in which the issue (here, the values of the deceased father's properties) was not 'before a court for resolution' -- an attack on the judgment can be made even more than a year after judgment."

(Emphasis by the Court)

We agree with the Court of Appeals' interpretation of DeClaire that the attack can be made more than a year after 'judgment' because of the fact that the issue purportedly approved by the consent Order was not before the Dade County Judges' Court for resolution, but we must also add that the attack can be made by this independent action more than a year of the 'judgment' because Rule 1.540(b) of the Florida Rules of Civil Procedure, in which defendants rely, specifically provides for relief by independent action if fraud upon the court is present.

Said Rule 1.540(b) reads, in its pertinent part, as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order or proceedings for the following reasons: .... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; .... The motion shall be made

> within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, decree, order or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. 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 or to set aside a judgment or decree for fraud upon the court."

(Emphasis supplied.)

DeClaire makes clear that extrinsic fraud depends on whether:

1.- The parties had a full hearing on the case;

2.- Whether the issues were presented or could have been presented to the Court for resolution;

3.- Whether the parties addressed or could have addressed those issues at a hearing through cross-examination or other evidence;

4.- Whether the parties had the benefit of discovery proceedings through which the falsity or fraudulent behavior could have been ascertained.

If the above elements are not present, then the conduct alleged must be considered extrinsic fraud or fraud upon the Court and an independent action to set aside the judgment or order can be filed at any time.

> "Determining the conduct that constitutes intrinsic fraud, which requires action under the rule within one year of the entry of a final judgment, and the conduct that

> constitutes extrinsic fraud, for which an action may be brought at any time, is the critical issue in the instant case. The cases distinguish between false and misleading information being presented on an issue to be tried and conduct which prevents a party from trying the issue. 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."
>
> DeClaire, page 380

None of the above-mentioned elements or facts are present in this action. As stated before, there was never a hearing on the extent and valuation of the properties comprising the estate; the concealment of assets, the misrepresentations made and false and misleading information given to plaintiff by the defendants were never presented to the County Judge's Court. They were not an issue before the Court for resolution; there was no trial, and there were no discovery proceedings.

In DeClaire at page 377, the Court states:

> "Consistent with the general rule, this Court has defined extrinsic fraud as the 'prevention of an unsuccessful party (from) presenting his case, by fraud or deception practiced by his adversary; keeping the opponent away from court; falsely promising a compromise; ignorance of the adversary about the existence of the suit or the acts of the plaintiff; fraudulent representation of a party without his consent and connivance in his

defeat; and so on.' Fair v. Tampa Electric Co., 158 Fla. 15, 18; 27 So. 2d 514, 515 (1946)."

It would be hard to find a better example of extrinsic fraud than the 'instant action. Through misrepresentation and concealment defendants induced plaintiff to sign a Settlement Agreement thus keeping her out of Court and preventing her from discovering the true extent and value of her father's estate.

This Court many years ago had occasion to consider an attack by independent action to relieve a party from a consent decree, based on extrinsic fraud or fraud upon the court in the case of Columbus Hotel Corporation v. Hotel Management Cb., 156 So. 893 (1934). It said, at page 897:

"And, by a bill in equity in the nature of a bill of review, equity will for the same causes vacate a judgment or consent decree that has been entered in pursuance of such an agreement, since fraud, deceit, artifice, or trickery employed in procuring a complaining party's consent to a voluntary judgment or decree entered pursuant to a fraudulently procured agreement is regarded as extrinsic fraud, against which equity has jurisdiction to relieve by acting directly upon the consciences of the parties to the agreement which has resulted in such judgment or decree. Smith v. Richards, 13 Pet. 26. 10 L. Ed. 42; Nixon v. Temple Terrace Estates, 97 Fla. 392, 121 so. 475; Willis v. Fowler, 102 Fla. 35, 136 So. 358; People v. Rogers, 104 Fla. 462, 140 so. 205; United States v. Throckmorton, 98 U.S. 61, 25 Ed. 93; Pico v. Cohn, 91 Cal. 129, 25 P. 970, 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Miami Bank & Trust Company v. Mahlstedt, 107 Fla. 282, 144 So. 659; Powers v. Scales, 61 Fla. 717, 55 So. 799; 15 Ruling Case Law, 762; Freeman on Judgments (5th Ed.), Sec. Sec. 1231; 21 Corpus Juris, 769."

The Columbus Hotel' case is determinative of the situation herein inasmuch as it involves a consent decree entered pursuant to an agreement obtained by fraudulent misrepresentations. It is clear that in such cases "extrinsic fraud" or "fraud upon the court" is involved, and thus an independent attack to such a consent judgment can be made at any time and is not limited to the one-year period established in Rule 1.540(b) for intrinsic fraud.

Although the Court of Appeals does not cite Columbus Hotel (it cites Brown v. Brbwn, a District Court of Appeals' case, 432 So.2d 704, which this Court refused to review in 1984, 458 So. 2d 271) it does mention the general principle that because consent judgments are the result of a contract between the parties and not of the independent determinations of a court of law, if the contract is invalid because the consent of one of the parties had been obtained through fraud, then the judgment or final order consequently also fails, and it can be attacked as invalid on such grounds.

In California, the Supreme Court, sitting in banc, has gone further and ruled that extrinsic fraud and mistake "are given a broad meaning and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing", and allowed an attack on an anullment decree after one year when the wife, Mrs. Park, had been suddenly arrested and deported by

the U.S. Immigration Service to Korea and her husband gave the "impression" to the Court that she had abandoned him voluntarily. In Re Marriage of Park, 27 Cal. 2d 337, 165 Cal. Rptr. 792, 612 P. 2d 882 (1980).

From all of the above, we submit it is clear that the interlocutory consent Order is not valid on account of "fraud on the court", is not preclusive of this action as res judicata and can be attacked by an independent action filed at any subsequent time without the one-year limitation of Rule 1.540(b) for cases of intrinsic fraud.

However, plaintiffs, before closing this argument on the second question certified, wish to point out another feature of the interlocutory consent Order. The stipulation submitting the contract between the parties for approval to the Dade County Judges' Court (Appendix, page 391).8/ reads as follows in its second paragraph:

> "2. That the aforesaid Settlement Agreement provides that this Stipulation be submitted to this Court for the Court's approval of such provisions of said Settlement Agrekment as 'apply to the assets of-the aforesaid estate administerable in the State of Florida."
>
> (Emphasis supplied)

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8/ It is significant that defendants, as movants in the Motion for Summary Judgment, did not submit this document to the trial court in support thereof, although they submitted the consent Order itself. It was plaintiffs who had to submit it to the trial court in opposition to the Motion for Summary Judgment.

The Settlement Agreement itself in its second page (Appendix, page 214), states as follows:

> "WHEREAS, all parties hereto are desirous of settling amicably the rights, interests and claims of all parties hereto in and to such estates and properties of the decedent and the Negrón Children, whereever situate, and to have this agreement recognized and approved by the County Judges' Court in and for Dade County, Florida, so far as same applies to the Florida estate:
>
> NOW, THEREFORE .... (etc.)."

(Emphasis supplied)

Although the Settlement Agreement covered the estate of the decedent both in Florida and Puerto Rico, it is clear that its approval by the consent Order was only with respect to the Florida property. However, the main thrust of the complaint is that the fraudulent misrepresentations occurred with regard to the extent and value of the real estate of the decedent in Puerto Rico and this was not, to use the Stipulation's word, 'administerable' in Florida by the Dade County Judges' Court.

Therefore, neither by consent of the parties nor by fundamental judicial jurisdiction in the administration of a decedent's estate, did the Court have any authority, nor did it purport, to approve the Settlement Agreement in its entirety. The fraudulent misrepresentations which caused the whole contract to fail, were made not only about Florida property, but also included real estate and other properties located in Puerto Rico over which the Dade County Judges' Court was not given

jurisdiction by the parties nor over which it had jurisdiction under the law. The same Stipulation, incidentally, recites that the decedent died a resident of Puerto Rico. (Subsequent administration proceedings were held in Puerto Rico, in the Superior Court of San Juan, and the Judicial Administrator of the estates of both his father and his mother, one of the defendants, was not discharged as such until October 5, 1964.) (Appendix, page 342).

Therefore, although the consent Order is not in any event ~~res~~ judicata and is subject to an independent attack in a separate action, as we have shown, additionally the Court that issued the said consent Order did not have any jurisdiction whatsoever over the real estate and other property in Puerto Rico, regarding which fraudulent misrepresentations were made.

## CONCLUSION

This Honorable Court should answer "No" to both of the questions certified to it by the United States Court of Appeals for the First Circuit.

CERTIFICATE OF SERVICE: Two copies of this Initial Brief have this day been served by mail on attorneys for defendants-appellees, namely: on Earl D. Waldin, Jr., Esq., Kelley Drye & Warren, 2400 Miami Center, 100 Chopin Plaza, Miami, Fla. 33131, and on Stanley L. Feldstein, Esq., P.O. Box 2552, San

Juan, Puerto Rico 00903.

San Juan, Puerto Rico, this 29th day of November, 1988.

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