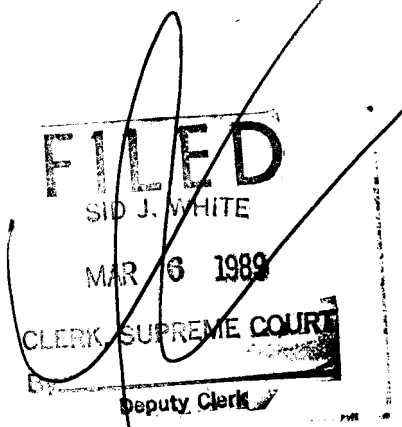
IN THE SUPREME COURT OF FLORIDA



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.

REPLY BRIEF

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REPLY BRIEF

Plaintiffs respectfully hereby submit their Reply to Defendants' Answer Brief.

Rebuttal to defendants' argument that the Order approving the Settlement Agreement is an absolute defense to the present action.

For more than 54 years, since this Honorable Court's decision in Columbus Hotel Corp. v. Hotel Management Co., 116 Fla. 464, 156 So. 893 (1934), it has been well settled in this jurisdiction that fraud perpetrated to induce a party to consent to a judicial decree is extrinsic fraud and as such can be the basis for an independent action to set aside such a decree filed more than one year of its issuance. In so ruling in 1934, this Hon. Court anticipated what has now become the modern approach of Courts when dealing with consent decrees or judgments obtained

through the use of fraud by one of the parties.

The Restatement of Judgments, 2nd Edition, Section 70, page 181, defines extrinsic fraud as the "fraud that induced a party to default or to consent to judgment against him". Surely defendants' contention that as a matter of public policy (the encouragement of final disposition of cases by settlement) this Court should accord consent decrees the same status as other decrees or judgments is untenable when the consent to the consent decree was obtained by fraud; such public policy does not and can not outweigh and on the contrary must bow to the public policy doctrine that American courts now follow (after the decision of Columbus Hotel by this court in 1934) as set forth in the Restatement, supra, when dealing with consent decrees procured by fraud: by denying preclusive effect to said judgments or decrees the courts provide the fraud victim the opportunity of a day in court and discourage the use of fraudulent methods to obtain judgments or decrees.

This doctrine, established in Florida and now followed in most jurisdictions, is further expressed in Besett v. Basnett, 389 So. 2d 995 (1980), cited by the U.S. Court of Appeals (App. page 9).1/ In justice, it is the only rule possible; to hold otherwise would convert our Courts into fraud-laundering institutions where fraudulently-induced private contracts would

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1/ We shall make reference only to the Appendix filed with the Initial Brief in this proceeding. Defendants' innumerable references in their Answer Brief to the Appendix filed with the U.S. Court of Appeals are improper because this Court, by Order of December 12, 1988, specifically denied defendants' request to have that Appendix used as the Appendix before this Court.

be sheltered and given the same res judicata effect as if they were judgments resulting from true and fair independent determinations by a judge or jury after weighing all the available evidence before them.

Defendants further contend that the full faith and credit statute, Section 1738 of Title 28 of the U.S. Code, "obliges federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." (Answer Brief, page 13).

This statute contemplates a valid judgment. If such exists, it cannot be ignored by federal courts. But when fraud was used to obtain the judgment, the courts are empowered to deny the guilty parties the fruit of their illicit conduct. Said inherent powers of the courts do not impinge upon the principles of full faith and credit, or res judicata, where the judgment from which relief is sought is void, because a void judgment is a legal nullity. See Moore's Federal Practice, 2nd Edition, Vol. 7, Sec. 60.36, p. 60-368 to 60-370.

The first case that defendants cite to try to uphold the preclusive effect of the consent decree is Mims v. Reid, 98 So. 2d 498 (Fla. 1957). The Mims case is clearly distinguishable from the present case. Mims did not involve any allegation of fraud in procuring the consent judgment. The controversy in that case was solely whether different types of damages resulting from one accident could be recovered through separate actions, or had to be claimed in one action.

The second case cited by defendants, DeClaire v.

Yohanan, 453 So. 2d 375 (Fla. 1984), is also distinguishable from the present case in that it involved a final judgment of dissolution of marriage in which there was incorporated a property-settlement agreement entered into between the parties. We read in this case, at page 176, that

> "The record reflects that this was a contested dissolution with substantial discovery and multiple proceedings before and after the entry of final judgment.!!

And later at page 377, citing from Johnson v. Wells, 72 Fla. 290, 299, 73 So. 188, 191:

> "If a judgment was obtained upon false testimony or a fraudulent instrument and the parties were heard, the evidence submitted to and received consideration by the court, then it may be said that the matter has been actually tried, or was so in issue that it might have been tried and the parties are estopped to set up an intrinsic or direct fraud to vitiate the judgment, because the judgment is the highest evidence and cannot be contradicted by the parties to it."

None of the elements mentioned above occurred in the present case: there was no trial or evidentiary hearing, no evidence was submitted to or received by the Court, and naturally, could not be considered by the Court to rrive at its own independent judgment. The issue of how much the other heirs (defendants) should have paid to plaintiff to have her sell her share of the inheritance to them was not pending before the Court for resolution at the time the Settlement Agreement was entered into. The U.S. Court of Appeals so found as a matter of fact. (App., page 17).

It must be concluded that, according to DeClaire, the present case is one involving extrinsic fraud, or fraud upon the

court, which entitles plaintiff to bring an independent action at any time.2/

In May Dept. Stores Co. v. Adworks, Inc., 740 SW 2d 383 (Mo.App. 1987), defendant, a tenant, moved to set aside a consent judgment, alleging that it was fraudulently induced by plaintiff to sign said consent judgment.

At page 385 the Court stated:

> "We choose to follow here the Restatement's clear definitions of 'extrinsic' and 'intrinsic' fraud. 'Extrinsic' fraud means 'fraud that induced a party to default or to consent to judgment against him.' Id. 'Intrinsic' fraud means 'knowing use of perjured testimony or otherwise fabricated evidence.' Id. These definitions have been embraced at times and obfuscated at times.
>
> We need not concern ourselves here with the obfuscations. As noted, defendant claims its corporate president was fraudulently induced to consent to the judgment of record and, thereby, was induced to waive the corporation's defenses. If properly pleaded, this is a classic claim of 'extrinsic-fraud.' See J.R. Watkins Co. v. Hubbard, 343 S.W.2d 189, 192 (Mo.App. 1961)."

Defendants contend at page 19 of their Reply Brief that plaintiff could have taken the deposition of defendants at the probate proceedings and could have served interrogatories. We add: there could also have been a trial on the merits, which would have ended with a valid judgment based on the independent

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2/ At page 16 of defendants' Reply Brief (last paragraph) they state that in DeClaire this Court discussed at length the distinction between intrinsic and extrinsic fraud, but refrain from mentioning the basis used by this Court in determining what constitutes intrinsic fraud and what constitutes extrinsic fraud. They fail to provide this basis or rationale anywhere in their Reply Brief or in their previous briefs submitted in this case. This is undoubtedly due to the fact that the present case clearly falls within the category of extrinsic fraud as outlined in DeClaire.

determination of the Court. But all these events (discovery and trial) did not take place because defendants through their fraudulent misrepresentations and concealment induced plaintiff into signing the Settlement Agreement and thus deprived her of the benefits of a contested case.

As happened in the May Department Stores case cited above, the injured party was kept out of court, and did not have the benefits of discovery and independent determination by trial, by the fraud committed by the other party.

Defendants try to distinguish the Columbus Hotel case from the present case on the basis of irrelevant and inmaterial facts, but the essential facts in both cases are similar. In both cases plaintiff sought in an independent action to set aside a consent decree procured by fraud. The fact that claimants in the Columbus Hotel case sought to set aside the consent decree in the same Court that had entered it is inmaterial; and the fact that the Settlement Agreement in the present case did not contain a disclaimer of representation as was the case in Columbus Hotel, is also inmaterial.

What is significant and material is the fact that there was no hearing in either case, that in both cases the Settlement Agreement was signed without the benefit of discovery proceedings that there was no evidentiary hearing in either case and that in both cases the sole intervention of the Judge was to approve the the Settlement Agreement.

In DeClaire, as in all the other divorce cases cited by defendants, the proceeding began with the filing of a complaint and continued as a contested case with full evidentiary hearings

until there was a final judgment granting the dissolution of the marriage. It is at this point that a property settlement agreement is incorporated into the judgment. As the court stated in DeClaire, the parties had the benefit of substantial discovery and multiple proceeding before and after the entering of the judgment.

Unlike DeClaire and the other cases cited by defendants, in the present case, and in Columbus Hotel, the Settlement Agreement stopped all proceedings and prevented plaintiffs from obtaining the benefits of an evidentiary hearing and of discovery mechanisms.

Even assuming, arguendo, that the order or decree in this case were to have preclusive effect, said order or decree could not have any preclusive effect with regard to the sale of the property of the estate located in Puerto Rico for two jurisdictional reasons:

1) the Court did not have jurisdiction over real properties outside of the State of Florida; and, additionally

2) the parties agreed to a consent judgment only as to properties administrable in Florida.

It is inmaterial what Judge Blanton may have said in his Order: he had neither subject-matter jurisdiction, by operation of law, nor jurisdiction conferred by the voluntary act of the parties to the stipulation.

Rebuttal to defendants' argument that the facts allegedly concealed or misrepresented were discoverable in 1960.

To begin with, the issue of discoverability is not properly before the Court. Defendants admitted in their Answer

Brief, at page 28, that the discoverability issue "had not been raised by the defendants in their motion for summary judgment or supporting papers".

The U.S. Court of Appeals determined that discoverability presents a genuine issue of material fact and that the record as so far developed affords little tangible support for the proposition that plaintiff was obliged to have initiated an investigation during the 12-year period following the 1960 settlement; it ruled that the District Court could not resolve controverted factual questions. In this certification proceeding, we respectfully submit that this is the law of the case; and any attempt to reargue this issue should be disregarded.

At page 9 of its Opinion and Order (App.p.8) the U.S. Court of Appeals stated:

> "As noted above, the district court found that the alleged fraud was discoverable within the 12 years following execution of the 1960 settlement agreement between plaintiff and defendants. The district court erred, however, in making such a finding in this summary judgment proceeding. When determining a motion for summary judgment, a district court must make all factual inferences in favor of the party opposing the motion, and may not resolve controverted factual questions. Oliver v. Digital Equipment Corp., 846 F.2d 103 (1st. Cir. 1988). On the present record, the discoverability of the fraud is a controverted question of fact."

(Emphasis supplied)

Even if it were possible to enter into the issue of discoverability, defendants' position claiming that plaintiff should have discovered the fraud is unsustainable. As was decided by this Hon. Court in Besett v. Basnett, supra, and is stated in Section 540 of the Restatement of the Law 2d., p. 88,

perpetrators of fraud cannot raise as a defense an alleged duty on the part of the victim to investigate, and public records such as documents kept in the Property Registry, are not there to protect fraudulent liars; their purpose is to afford protection to persons who buy from someone having a recorded title from the claims of those who, having obtained a proper title, negligently have failed to record it. Reasonable diligence does not require that one having no cause for suspicion examine public records to determine whether or not others have committed acts of fraud affecting his property or rights. See 137 ALR 290. At no time before she discovered the Declaration of Trust in 1983 was there any reason for plaintiff to suspect that her consent to the Settlement Agreement had been obtained through fraud.

Furthermore, there was no way that plaintiff or any other person, whether it was any lawyer her mother or she may have used, or anybody else, could have discovered that thousands of acres of land in Puerto Rico that were registered in the name of defendant Alberto Arrieta were not really his, but were in fact concealed properties which had been obtained by him with monies supplied by the father through his corporations and were held by him in trust for his father's heirs. (App., p.30, p.75).

Defendants argue (page 27 of their Reply Brief) that the U.S. Court of Appeals reversed the District Court on the question of discoverability as a result of "confusion". By so arguing, defendants pretend to ignore this Court's decisions in Diamond, Pullum and Overland, infra, and the U.S. Court of Appeal's reasoning (App., pp. 13-15) when it held that it considered this case as very similar to Diamond, and concluded that there was an

indication in the Pullum case that to apply the Section 95.031(2) to an undiscoverable fraud, as in this case, would be unconstitutional under the Florida Constitution.

The U.S. Court of Appeals' determination to the effect that the fraud in this case was undiscoverable for purposes of the Summary Judgment proceedings is final and binding in this Court and on defendants, and they cannot reargue it in the present certification proceedings, as they purport to do in their Reply Brief. In these certification proceedings it is the law of the case.

The jurisdiction of this Court in this discretionary Certification process is limited to assisting the U.S. Court of Appeals in applying Florida law to the factual determinations made by that Court as to the two questions sent for Certification. In this proceeding this Hon. Court lacks jurisdiction to solve any factual dispute in this case, whether as to discoverability or otherwise.

The question certified by the U.S. Court of Appeals is based on a fraud not discovered or discoverable after 12 years of its commission, and must be addressed on that basis for the application of Florida law.

Citing Besett, the U.S. Court of Appeals said:

> ".... Florida law does not impose upon the victim of a fraudulent representation the duty to investigate the truth or falsity of that representation. Indeed, the Supreme Court of Florida has gone so far as to state that when the choice is between a perpetrator of a fraud and a negligent victim, the law must protect the victim:
>
> > 'A person guilty of fraud should not be permitted to use the law as his shield. Nor should the law encourage negligence. However, when the choice is between the

> two -- fraud and negligence -- negligence is less objectionable than fraud. Though one should not be inattentive to one's business affairs, the law should not permit an inattentive person to suffer loss at the hands of a misrepresenter.'
>
> "Besett v. Basnett, 389 So.2d 995, 998 (Fla. 1980). See also Banco Nacional de la Vivienda v. Cooper, 680 F.2d 727, 730 (11th Cir. 1982) (applying Besett's holding that a plaintiff who reasonably relies on a false representation is under no duty to investigate its truth or falsity).
>
> "In the circumstances, therefore, we cannot accept the district court's determination on summary judgment that the alleged fraud was discoverable before 1983. Not only does discoverability present here a genuine issue of material fact, but the record as so far developed affords little tangible support for the proposition that plaintiff was obliged to have initiated an investigation during the 12-year period following the 1960 settlement."

Rebuttal to defendants' argument that the statute of repose is constitutional under the access to the courts' provision of the Florida Constitution.

Defendants rely on Pullum v. Cincinnati, Inc., 476 So.2d 657, and Meléndez v. Dreis & Krump Manufacturing Co., 515 So.2d 735, to uphold the constitutionality of the Florida statute of repose. Both of these cases are clearly distinguishable from Diamond v. E.R. Squibb & Sons, Inc., 397 So.2d 671, and the present case.

In Pullum the claimant filed his suit in November of 1960. His injury occurred after the effective date of the 1974 amendment and he conceded that the application of Sec. 95.031(2) did not deny him his right of access to the courts guaranteed by Article 1, Section 21 of the Florida Constitution.

There was no denial, since the statute granted him access to the courts from April 1977 (date of the injury) to November 1978 (date on which the twelve-year period elapsed).

This Honorable Court, reacting to Pullum's claim that the application of Section 95.031(2) would violate the equal protection clause contained in the 14th Amendment *to* the U.S. Constitution, overruled Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 995, and ruled that in product liability cases whose factual background were similar *to* Pullum and Battilla, the application of the section does not violate the "access to the courts" provision of the Florida Constitution.

This Court carefully distinguished Pullum and the overruled Battilla from Diamond, supra. At page 659 of the Pullum decision, this Court reaffirmed that the "Diamond case presents a completely different factual context from that present in Battilla and Pullum and that the Legislature, no doubt, did not contemplate the application of this statute *to* the facts in Diamond where, if applicable, it would have been a denial of access *to* the courts.

Defendants' reliance on Meléndez is unwarranted. Melén-dez again presents an entirely different time frame from Diamond, Overland and the present case. In Meléndez the claimant was injured on May 10, 1982 while operating an allegedly defective press brake machine which had been sold and delivered to the original purchaser on October 28, 1963. Claimant filed his product liability action against the defendant on May 17, 1983. Thus in Meléndez, the injury occured after the twelve-year period from the date of delivery of the product had elapsed. The decision in said case in no way affects the doctrine set forth by this Supreme Court in Diamond. In Diamond the plaintiff was injured shortly after buying the product but the ill effects

became evident after the 12-year period had elapsed. None of the cases cited by defendants even in the product liability field present a factual background similar to the Diamond case or the present case. In all the cases cited by defendants the claimant either suffered the injury after the twelve-year period of the statute of limitations had elapsed or suffered the injury within the twelve years and having knowledge of his injury, let the twelve-year period pass.

We must refer again to the time-frame in this case, mentioned in our Initial Brief (pages 16-17). When the 12-year statute of repose was adopted, more than 12 years had elapsed since the fraud was committed in 1960. And the one-year grace period was useless to her because the fraud was undiscovered and undiscoverable.

In none of the other cases cited, except only in Diamond, supra, had the 12-year period elapsed already by the time the statute of repose was adopted.

Defendants also rely on Armbrister v. Roland Intern Corp., 667 F.Supp. 802 (M.D. Fla. 1987), a case which is also distinguishable from Diamond and the present case.

In Armbrister plaintiffs alleged that they were fraudulently induced into buying lots of land in Florida which were floodable and useless. All the plaintiffs signed and returned the receipt portion of the Florida Public Offering Statement which contained explicit description of the lots, including the fact that the lots had no access, that they were not suitable for building, and that they were subject to flooding, having been designated as flood-prone. In addition,

all plaintiffs had six months in which to rescind the contract if they so wished.

Even though plaintiffs pleaded the inconstitutionality of Section 95.031(2) of the Florida Statutes, the elements that cause the inconstitutionality of said Section, present in Diamond and in the present case, were missing in Armbrister.

The court determined that when plaintiffs read and signed the Public Offering Statements they were put on notice that further inquiry was needed and therefore the statute of limitations started to run when they signed the contract or at least when they made their first payment.3/

In the present case, plaintiff relied on defendants' fraudulent misrepresentations, and there was nothing in the document itself nor did anything thereafter occur (prior to July 19, 1983) that should have alerted plaintiff and made her start an inquiry as to the validity of the transaction. 4/ The statute of limitations did not start to run in this case until 1983 when she discovered the Declaration of Trust.

The three reasons advanced by defendants in their brief

3/ These disclosures placed buyers (potential claimants) on-notice, and triggered the running of the statute of limitations. Otherwise, the victim would have had no reason or duty to investigate. Besett, supra. Once a fraud victim relies on the misrepresentations by the fraud perpetrators there must be an act or event which should put the victim on notice that an inquiry should be made into the transaction. - "... the statute starts to run when the plaintiff has information of circumstances which put him on inquiry to discover the true facts." 37 Am. Jur. 2d, Fraud and Deceit, Section 408, p. 554.

4/ As shown before, the U.S. Court of Appeals, for the purpose of defendants' Motion for Summary Judgment, in which all inferences must be made in favor of plaintiff, has already ruled, as a question of fact, that the fraud was undiscovered and undiscoverable.

in support of their contention that there is an overpowering state interest that would justify the abolishing of plaintiff's action without providing an adequate alternative were considered and expressly rejected in Overland Const. Co. v. Sirmons, 369 So.2d 572 (Fla. 1979).

As to defendants' arguments, we say this: the victim of fraud, an intentional act, should receive more protection than the victim of negligence, an unintentional act. It would be repugnant if it were to be held that public policy should provide to fraud perpetrators the protection that has been denied to unintentional tort-feasors.

Conclusion

For all the foregoing reasons it is respectfully urged that this Court find that the consent order approving the Settlement Agreement has no preclusive effect in this case and can be challenged on the basis of fraud perpetrated to obtain the consent, and that the application of Section 95.031(2) to this plaintiff would violate the "right of access to the courts" provision of the Constitution of the State of Florida.

CERTIFICATE OF SERVICE: Copies of this Reply Brief have been served on Earl D. Waldin, Jr., Esq., Kelley Drye & Warren, 2400 Miami Center, 100 Chopin Plaza, Miami, Fla. 33131, and on Edward A. Godoy, Esq., P.O. Box 2552, San Juan, Puerto Rico 00903.

San Juan, Puerto Rico, this 3rd day of March, 1989.

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