

SUPREME COURT OF FLORIDA

CASE NO. 85,856

DONNA CERNIGLIA,

Petitioner,

vs.

JOSEPH M. CERNIGLIA, JR.,

Respondent.

An appeal taken from the District Court,
Third District, No. 94-755

PETITIONER'S BRIEF ON THE MERITS

Paul C. Huck, Esq.
Harley S. Tropin, Esq.
KOZYAK TROPIN THROCKMORTON
& HUMPHREYS, P.A.
2850 First Union Financial Ctr.
200 South Biscayne Boulevard
Miami, Florida 33131-2335
Attorneys for Petitioner

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INTRODUCTION

This petition arises from two consolidated cases, a dissolution of marriage case ("dissolution case"), and an independent action to recover damages for torts and breach of contract and to set aside the marital settlement agreement ("assault case"). The Petitioner, Donna Cerniglia, who was the respondent in the dissolution case, and the plaintiff in the assault case, will be referred to as Petitioner or former wife. The Respondent, Joseph M. Cerniglia, Jr., will be referred to as Respondent or former husband.

"R" refers to the record on appeal, "A" refers to the Appendix, and "T" refers to the transcript of the final hearing in the dissolution case. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Third District Court held that former husband's violent battering of and threatening further physical harm to former wife, which extorted a totally one-sided, uncontested marital settlement agreement could not, as a matter of law, constitute "extrinsic fraud" such as would permit former wife to set aside the marital settlement agreement more than a year after final judgment. In doing so, the Third District Court certified a conflict with Lamb v. Leiter, 603 So.2d 632 (Fla. 4th DCA 1992), another marital settlement agreement case with far less compelling facts than those presented here. (A. 34)

Former wife also asks this Court to exercise its ancillary jurisdiction to review the Third District Court's affirming that aspect of the summary judgment which held that the release language contained in the Marital Settlement Agreement, as a matter of law, released former wife's independent claims for tort and breach of contract.

Former husband filed the dissolution case in 1990. (R. 2-4) An uncontested final judgment incorporating a Marital Settlement Agreement was entered in that case on August 20, 1990. (R. 8-21)

In 1993, former wife brought the five count assault case as a result of tragic events arising out of her twenty year marriage. Counts I through IV were damage claims for assaults and batteries, intentional infliction of emotional distress, common-law fraud and breach of contract. Count V was an independent action to set aside the Marital Settlement Agreement ("Agreement"). (R. 25-33)

Contemporaneously, former wife filed a Motion for Relief under Rule 1.540(b) in the dissolution action. The underlying facts supporting that Motion and Count V were former husband's illegal and reprehensible acts described in Counts I through IV in the assault case. (R. 22-23)

The record below established that during their marriage, former husband battered and threatened further physical harm if former wife did not do as he demanded. For one example, former husband threatened to cut her face with a knife so that she

would be so scarred that no one would ever want to look at her again. (A. 1, R. 79) Former husband's violent abuse reached a point that former wife could no longer physically, psychologically or emotionally endure it. She sought marriage counseling, in which former husband refused to participate. In fact, he demanded of both former wife and her counselor that they stop former wife's counseling (A. 1-2, R. 79-80). Having reached the breaking point, she advised her former husband that she had to get away from him. (A. 2, R. 80)

As a result of former wife's attempts to discuss the financial aspects of their dissolution with him, former husband continued to physically assault and batter her; threaten her on numerous occasions with physical harm and telling her that she would get nothing if she fought him on those financial matters. (A. 2, R. 80)

Former husband also threatened to destroy the family business, by far the largest marital asset and only source of income. As a result of his violence, domination and extortion,¹ former wife realized that she must do as he said and submissively abandon her rights in the dissolution proceedings. (A. 2, R. 80)

In addition to his physical violence and threats, former husband told former wife that if she did not fight him in court

¹ Criminal extortion includes maliciously threatening injury to a person or her property with the intent to extort any pecuniary advantage or to have that person act or refrain from acting against her will. Fla. Stat. §936.05 (1993)

over the financial matters, he would provide for her certain financial assistance outside of the Agreement. Of course, former husband has not provided any. (A. 3, R. 81)

Former wife's attorney (then attorney, now the Honorable Eleanor Schockett) was unable to meaningfully represent her in the dissolution proceedings. Fearing her former husband and what he would do if she dared resist him in those proceedings, former wife was unable and unwilling to provide her attorney with any assistance whatsoever and could not follow her attorney's advice. Attorney Schockett was so upset and shocked by former wife's seemingly unexplainable desire "to commit financial suicide" and refusal to act in any rational way on her own behalf that attorney Schockett wrote a most revealing letter to former wife. Attorney Schockett's letter accurately reflects what occurred with regard to her unsuccessful attempts to assist former wife in the dissolution proceedings. (A. 2, 6-7, R. 80, 84-85) Attorney Schockett wrote that the proposed Agreement was so "horrendous" and "monstrous" that she did "not want [her] name associated with it" and that former husband was "reprehensible for even making the demand that [former wife] sign it." (A. 6-7, R. 84-85) Attorney Schockett was absolutely right! After a twenty year marriage, the Agreement provided for no alimony to a housewife who had not worked outside the home and gave former husband one hundred percent of the only meaningful marital assets: their marital home and the family

business, which business attorney Schockett valued at \$1,000,000.00 or higher. (A. 4, 6-7, R. 10-21, 82, 84-85)

But for the beatings and threats by her then husband, former wife would not have signed that "horrendous" Agreement. (A. 3, R. 81) Instead, she would have either permitted her attorney to negotiate a fair settlement or litigate her rights in a contested hearing. However, because of former wife's fear, which had devastated her, both physically and emotionally (her weight was down to a mere 98 pounds and she was experiencing other physical symptoms) she concluded that she could not chance a dispute with former husband. Former wife was so traumatized by her former husband's violence and extortion, that she simply caved in as former husband orchestrated the dissolution proceedings. (A. 3, R. 81)

The Final Judgment Dissolving The Marriage states that the Agreement "was executed voluntarily after full disclosure." The record below reflects that that was not true. (R. 8, 79-83) For the reasons described above, former wife did not and could not voluntarily execute the Agreement. (A. 3-4, R. 81-82) The true circumstances which led to the Agreement were fraudulently hidden from the trial court and the attorneys. (R. 82, T. 1-8)

No discovery, no hearing, no other action occurred in the dissolution case except the uncontested final hearing at which the Agreement was submitted to the Court. (R. 2-21) While former wife submissively stated at that hearing that she was satisfied with the Agreement, because of the former husband's

criminal and violent acts, which were kept from the trial court and the attorneys, that statement was untrue. Former wife dared not reveal the extortion behind the charade. (R. 79-85, T. 4-6) Thus, in the face of this false pretense, the Agreement was incorporated into the final judgement. (R. 8-9, T. 4-6)

Three years after that final judgment former wife brought her assault case. She seeks 1) damages for the assaults and batteries, fraud and breach of contract committed by her former husband; and 2) the rescission of the Agreement fraudulently obtained so that her marital rights can be determined through a real, not bogus, proceeding. (R. 25-33) Former wife also filed a separate motion for relief from the final judgment under Rule 1.540(b) in the dissolution case. (R. 22-23) The assault and dissolution cases were consolidated. (R. 166) Former husband moved for summary judgment. (R. 61-67)

The trial court determined, as a matter of law, that former husband's acts, which it described as "outrageous, reprehensible, dastardly, inexcusable and unacceptable," constituted merely intrinsic, as opposed to extrinsic fraud. Therefore, former wife was required to bring her independent action to set aside the Agreement and her Rule 1.540 (b) motion for relief within one year. (A. 23, R. 215-18)

The trial court also determined, as a matter of law, that all of former wife's tort and breach of contract claims, including claims accruing after the judgment, were barred by the release language in the Marital Settlement Agreement even though

admittedly such claims were not mentioned in the release (A 4-5, 25, R. 218-19) and, as shown by former wife's uncontroverted affidavit, not intended to be released. (A 25, R. 82)

The Third District affirmed the summary judgment. Without specifically describing former husband's physical and mental abuse, admittedly occurring outside the dissolution proceedings, or how that abuse extorted former wife, it felt constrained to hold that former husband's conduct constituted merely intrinsic not the extrinsic fraud. In doing so, the Third District Court strayed from the extrinsic versus intrinsic guidelines laid down in DeClaire v. Yohanan, 453 So.2d 374 (Fla. 1984) and is in direct conflict with Lamb v. Leiter, and other pertinent precedents.

In holding, as a matter of law, that claims not specified in and not intended to be affected by the release language contained in the Marital Settlement Agreement were released, the Third District Court ignored generally accepted principles of release language interpretation.

Its opinion should, therefore, be quashed.

Summary of Argument

Point I

The record below established that former husband's physical violence, false promises, and extortion, including threats of disfigurement, actually "prevent[ed former wife] from trying the issue" of her marital rights in the dissolution case. His

conduct was "collateral to the issues tried in [that] case." Therefore, former husband's conduct constituted extrinsic fraud, a basis for obtaining relief from the final judgment more than a year later. DeClaire. However, in granting summary judgment, the trial court determined, as a matter of law, that former husband's acts, though "dastardly" and "reprehensible", were merely intrinsic, not extrinsic, fraud and therefore former wife's action to set aside the marital agreement was brought too late.

In affirming, the Third District Court failed to apply the guidelines established by this Court in DeClaire. Those guidelines teach that extrinsic fraud may be any number of wrongful acts which are collateral to the issues tried in a case and which prevent a party from fully exhibiting his or her case so that there has never been a real contest in the hearing of the case. Measured by that standard, former husband's vicious attacks and threats of reprisal if former wife dared assert her rights in court, together with false promises of financial assistance outside the Agreement, certainly meet the extrinsic fraud standard.

The trial court erroneously concluded that physical violence, extortion and fraud, regardless of their character and their effect on a spouse, may never constitute extrinsic fraud. The trial court, in determining as a matter of law that former husband's violent assaults, extortion and fraud were not collateral to the dissolution issues to be tried and could not

have prevented former wife from truly participating in those proceedings thereby "committing financial suicide," ignored former wife's uncontroverted testimony and strayed outside the DeClaire guidelines.

The concept of extrinsic fraud, as explained by DeClaire, clearly encompasses former husband's "dastardly" and effective conduct. The former husband should not be permitted to prevent former wife for having her day in court by his extortion.

Point II

The trial court, contrary to generally accepted rules for construing releases and to the uncontroverted testimony, held as a matter of law that the release contained in the Marital Settlement Agreement bars former wife's independent tort and contract claims, even though those claims were neither raised in the dissolution proceedings nor mentioned in the Agreement.

The construction accorded a release depends on the release's purpose, it's terms and the subject matter to which it applies. Here the courts below ignored the obvious purpose and context of the release, that is, simply the settlement of the parties' alimony and marital property rights arising in a dissolution proceeding.

The intent of the release must be derived from the whole of the Agreement not isolated, detached language. Here the trial court focused on an incomplete sentence from the Agreement rather than the complete sentence and the context in which that

incomplete phrase is found. In support of its ruling the trial court noted that: "...the Agreement speaks of settlement of '...all claims of any nature whatsoever that each may have against the other,... (Par. 12)'" (A. 26, R. 219) Yet, that partial sentence is sandwiched between more indicative and limiting language which states:

"This Agreement constitutes full and complete settlement of alimony, support, equitable distribution and property rights...and claims of any nature whatsoever that each may have against the other, and all of the terms and provisions herein being interrelated and dependant covenants and that such constitutes a complete Property Settlement Agreement."
(A. 17-18, R. 17-18)

Moreover, the paragraph 12 excerpt quoted by the trial court is not even in the release. The actual release, paragraph 18, certainly is consistent with an intent to settle only marital property claims. The release states that the parties merely:

"renounce[d] and relinquish[ed] all claims of whatever nature each may have had in or to any assets/property or estate of whatever kind, now or hereafter owned or possessed by the other, it being the intention of the parties hereto that this paragraph shall constitute a complete, general and mutual release of all claims whatsoever including dower, courtesy [sic], distributive share of which either may have in the estate of the other." (A. 19, R. 19)

The trial court also ignored the defining statements in the Agreement's whereas clauses which outline the parties' limited

intent and "...desire to settle, adjust and compromise all financial and property rights between [them]..." and to "further their desire to fully settle all matters between them relating to alimony, property rights, equitable distribution, separation and the alike". (A. 11, R. 10-11). Furthermore, the Agreement not only refers to just marital rights but arises out of a dissolution proceeding where only marital property rights issues, not independent tort and contract claims, were raised. In construing the release, the trial court did not consider these factors. As a result, the trial court violated established principles of release construction: 1) if an ambiguity consists of broad release language which could be interpreted to cover claims of every sort, the release should be confined to the purposes intended by the parties as reflected by the whole of the agreement and circumstances; 2) broad, general release language should be disregarded when it is inconsistent with the nature of the Agreement, with particular recitals and with the transaction to which it refers.

The trial court acknowledged that "neither tort nor contract rights were mentioned in the Agreement, only 'property rights', 'equitable distribution', 'dower', 'courtesy [sic]', etc." However, it side-stepped that obvious gap by attempting to rationalize away the absence of any mention of the tort and contract claims with the suggestion that such claims "could skew

any equitable distribution or even alimony award"² (A. 25-26, R. 218-19) In doing so, the trial court judicially rewrote the Agreement and ignored standard rules that: 1) any ambiguity in a release will be resolved against a waiver of the right involved and 2) parties will not be considered as having waived a claim unless it is expressly waived, particularly where, as here, there exist more than one distinct claim.

Finally, the trial court failed to even consider former wife's uncontroverted affidavit which confirmed that the Marital Settlement Agreement was limited to distribution of marital assets, that there was never any indication by anyone that the release was intended to include any tort or contract claim and that the release did not and was not intended to release those claims. Former husband filed no opposing affidavit.

Point III

In addition to the above reasons explaining why former wife's unmentioned claims were not released, two of former wife's claims, the fraud and breach of contract claims, arose well after the execution of the Agreement. The release mentions only existing, not future claims. Therefore, those claims were not intended to be released because they didn't even exist.

² Of course, in the instant case there was neither an equitable distribution nor an alimony award.

ARGUMENT

I.

FORMER HUSBAND'S VIOLENT ACTS,
EXTORTION AND FRAUD COMMITTED
AGAINST WIFE WHICH PREVENTED HER
FROM PRESENTING HER CLAIM TO
ALIMONY AND MARITAL PROPERTY IN
THE DISSOLUTION PROCEEDINGS
CONSTITUTES EXTRINSIC RATHER THAN
INTRINSIC FRAUD

In order to set aside or modify the Agreement more than one year after the final judgment, former wife must establish that former husband's wrongful conduct constituted "extrinsic fraud." Any valid analysis of the extrinsic fraud versus intrinsic fraud distinction must begin with this Court's in-depth and bench mark opinion in DeClaire v. Yohanan, 453 So.2d 375 (Fla. 1984):

At the outset we must distinguish between extrinsic fraud and intrinsic fraud because only extrinsic fraud may constitute fraud on the court. Extrinsic fraud involves conduct which is collateral to the issues tried in a case. The definition of extrinsic fraud was specifically articulated in the United States v. Throckmorton, 98 U.S. 61, 65-66, 25 L.Ed. 93 (1878), in which the United States Supreme Court said:

Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never has knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly seals out his client's interest to the other side-these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and

open the case for a new and fair hearing.
(citations omitted)

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., 1158 Fla. 15, 18, 27 So.2d 514, 515 (1946). See Blacks' Law Dictionary 595 (rev. 5th ed. 1979). In other words, extrinsic fraud occurs where a defendant has somehow been prevented from participating in a cause.

Intrinsic fraud, on the other hand, applies to fraudulent conduct that arises within a proceeding and pertains to the issues in the case that have been tried or could have been tried. This court, consistent with the general rule, has expressly held that false testimony given in a proceedings is intrinsic fraud. We have stated that

[i]f 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...

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, 453 So.2d at 376-77, 380.

DeClaire explains that conduct which is actually a part of the legal proceeding itself, that is, being subjected to the test of an adversarial process, though in a flawed manner, constitutes intrinsic fraud. Perjured testimony is the classic example. The unsuccessful party at least had a real opportunity to utilize the legal procedures available within the trial proceedings to detect and challenge the perjured testimony but failed to so do.

By contrast, extrinsic fraud is "conduct which prevents a party from trying the issues," as "where a [party] has somehow been prevented from participating in a cause." Such fraud is collateral to the issues tried and occurs beyond the confines of the trial proceedings themselves. As a result the affected party is effectively denied a real, as opposed to illusory, opportunity to litigate the subject matter of the litigation. Keeping an opposing party from asserting a claim in court by some scheme or by falsely promising a compromise if that party does not contest the proceedings are but two of the classic examples of extrinsic fraud. Here, former wife's Count V contains allegations of such a falsely promised compromise. More compelling and more important, Count V also describes

former husband's successful scheme of physical violence and threats of further vicious bodily harm which extorted his former wife to "commit financial suicide" by not contesting him in the dissolution proceedings. Each allegation was supported by former wife's unchallenged affidavit.

It is ironic that former husband argued in support of his summary judgment motion that former wife had an attorney, then attorney Eleanor Schockett, who advised her not to sign the Agreement. In fact that was the case. It is also the case that Attorney Schockett observed that former wife was merely going through the motions of having an attorney, that regardless of what her attorney advised, former wife would just "sit there, but not listen", and never divulged to Attorney Schockett "why [the Agreement] is acceptable." (A. 6-7, R. 84-85) Attorney Schockett expressed her extreme concern and puzzlement as to why former wife, who had not worked outside of the home, would give up all alimony and almost all of her rights to the marital property after a twenty year marriage. She refused to have her name associated with the Agreement, noting that former wife "seem[ed] to indicate to me that you know something that I don't, but what I know tells me that this Agreement is monstrous." (A. 6-7, R. 84-85) Of course, what Attorney Schockett and the trial court did not know, and what former wife was too deathly afraid to disclose, were the violence and extortion by the former husband, including threats to cut up her face with a knife if she dared to fight him in court. Did such

conduct "prevent [former wife] from participating in [the] cause?"³ The record below is uncontroverted that because of former husband's deliberate scheme his former wife was "prevented from exhibiting fully [her] case" and there "has never been a real contest in the trial." DeClaire, 453 So.2d at 377.

The most recent opinions on the subject of extrinsic versus intrinsic fraud in dissolution proceedings which carefully analyze the DeClaire guidelines and apply them to detailed, analogous facts are Lamb v. Leiter, 603 So.2d 632 (Fla. 4th DCA 1992) and Gordon v. Gordon, 625 So.2d 59 (Fla. 4th DCA 1993). The Third District Court acknowledged that its decision was in direct conflict with Lamb v. Leiter when it certified its decision. It is also in conflict with Gordon v. Gordon. With similar but far less compelling facts than here, each of these two decisions determined, in accordance with the DeClaire

³Marital violence results in "post traumatic stress disorder." Within that disorder only catastrophic events, including captivity as a hostage or in concentration camps, are ranked as more severe than marital violence. Assaulted and threatened women suffer long term effects of extreme passivity, helplessness and fear. As a result victims are completely dependant, suggestible, primarily focused on self-protection and survival and unable to make their own decisions. Because of the real possibilities of severe reprisals, which are statistically very high, victims have a permanent sense of threat and remain under the assailant's control long after they have left their violent partners. Thus, behavior which may seem self-destructive to the untrained observer - such as refraining from asserting legal rights - are simply the victim's realization that it is the only way to protect herself from the risks of reassault. The worst fear is that the moment of horror will reoccur, resulting in chronic traumatization - a constant state of dread. Trauma And Recovery, J. L. Lewis, M.D., 1992, p. 42-43, 86-87; American Psychologist, Violence Against Women By Male Partners, October, 1993 p. 1077-1083.

guidelines, that the spouse's alleged wrongful conduct constituted extrinsic fraud justifying an independent action to modify a judgment after more than a year. In Lamb v. Leiter:

"The former wife testified that she suffers from multiple sclerosis and requires medication to prevent seizures. She states that the former husband had told her that he wanted a divorce and that if she fought him and defended herself against his claim in the dissolution of marriage action he would prove that she is an unfit mother by reason of her affliction, who is unable to take care of the children. She said that he told her that, if she did not agree as he demanded, he would fight her in court and cause her to lose custody of their two minor children. She added that he forced her to accept the terms and provisions of the property settlement agreement, which he had prepared by his attorney.

Lamb, 625 So.2d at 634.

The trial court, after a full trial, characterized the husband's conduct as merely intrinsic fraud and denied the wife's claim because it was not brought within one year of the judgment. The Fourth District Court, after reviewing the pertinent language and analysis from DeClaire, reversed, holding:

Unlike the former wife in DeClaire, who alleged that the former husband has submitted a false financial affidavit in the divorce proceedings, here the former wife alleged that the former husband had used coercion and duress to keep her from litigating child custody, alimony and property division issues. Indeed, the record from that proceeding shows that she appeared without counsel in her "answer," admitting all of his allegations, and prayed simply that the marriage be dissolved. Without attempting to state for all time what circumstances might amount to a fraud on the court, we can confidently say that what was alleged herein fills the bill.

Id. at 635.

In Gordon the husband sought to overturn his judgment more than a year later on the allegation that his former wife had extorted his consent to the marital settlement agreement by threatening to reveal husband's income tax violations to the I.R.S. After resolving some procedural issues not relevant here, the Fourth District Court identified the determinative issue as extrinsic versus intrinsic fraud. It reversed the trial court's dismissal of husband's claim, observing that:

All claims of extrinsic fraud depend on their own facts, but it is useful to compare the facts here with those in Lamb.

Gordon, 625 So.2d at 62.

The Gordon court astutely analyzed:

As a matter of policy, there are good reasons to allow this kind of collateral attack - upon proper showing - in dissolution of marriage proceedings. The inflamed emotions attending the end of a marriage often present an irresistibly tempting occasion for a dominating party to use coercion and duress, or extortion, to force a weaker party to capitulate without a real hearing in court.

While an ingredient in many of the examples used by the court in DeClaire may well have been lying or trickery, both entirely embraced by the concept of fraud, the essence of extrinsic fraud is the deliberate use of some device to stop an adverse party's voluntary participation in the litigation process. Extortion can prevent one from fully litigating one's case just as effectively as deceiving the party about the pendency of the suit. It does not much matter whether that prevention is accomplished by lying and cheating or instead by force or extortion. In each, the end is the same. The fact that all are embraced under one term or fact - "extrinsic fraud" - is but a convenience of reference, not a boundary on the universe of devices which may be so employed.

Gordon, 625 So.2d at 63.

Against the legal backdrop of DeClaire, Gordon and Lamb, it is clear that former husband's acts against former wife constituted extrinsic fraud -- physical assaults and batteries, vicious threats of further violence and false promises of future financial assistance (not to be mentioned, of course, in the Agreement) -- all effectively designed to prevent former wife from asserting her rights in violation of her former husband's dictated terms. Former husband's undisclosed illegal conduct was certainly "collateral to the issues tried in the case" and made certain there would be "no real contest in the trial or hearing of the case." DeClaire, 453 So.2d at 377.

The trial court ruled that former husband's conduct, while "reprehensible, dastardly, inexcusable and unacceptable" was nevertheless, as a matter of law, merely intrinsic fraud. In doing so, the trial court acknowledged that the Lamb and Gordon decisions were contrary. However, the trial court said it was bound by three decisions of the Third District which it felt conflicted with Lamb and Gordon. (R. 216-17) The three decisions referred to and relied upon by the trial court for its conclusion that "fraud, duress, coercion and failure to provide full disclosure" always constitute only intrinsic, never extrinsic fraud (R. 216) were Susskind v. Susskind, 475 So.2d 1276 (Fla. 3d DCA 1985); Langer v. Langer, 463 So.2d 429 (Fla. 3d DCA 1985), and August v. August, 350 So.2d 794 (Fla. 3d DCA 1977). (R. 216-17). In affirming the summary judgment, the Third District Court again relied on those cases.

Former wife respectfully suggests that in concluding that those three decisions are controlling and appropriate precedent for the facts established below, the courts below did not adequately measure former husband's conduct against the DeClaire two prong test: 1) conduct "collateral to the issues tried" which 2) prevented former wife "from trying the issue."

It is apparent from its opinion that the Third District Court accepted former husband's argument that the questioned conduct in the three decisions were equal in kind, degree and effect to his extortion. That conclusion is not well-founded as an analysis of those decisions reveal. While those three opinions refer to general allegations of fraud, duress, coercion and failure to provide full disclosure as being intrinsic fraud, none recites a single operative fact to indicate the specific nature of the coercion, fraud or non-disclosure involved or whether it prevented a party "from exhibiting fully his case." Given the lack of any specific discussion of the wrongful conduct, those decisions are of little, if any, precedential guidance for evaluating former husband's illegal and effective conduct, particularly in view of the detailed factual and legal discussions set forth in DeClaire, Gordon, Lamb and other

pertinent precedent.⁴

The wrongful acts in each case must be individually analyzed in order to:

...distinguish between false and misleading information being presented on an issue to be tried [intrinsic fraud] and conduct which prevents a party from trying the issue [extrinsic fraud]...

DeClaire, 453 So.2d at 380.

The trial court failed to draw this critical distinction.

The trial court concluded that it was obliged to grant the summary judgment because of the broad, vague wording of the Third District Court's earlier opinions in Susskind, Langer and August. The Third District Court followed suit, noting that the DeClaire court cited August with approval. Former wife respectfully requests that this Court distinguish those

⁴ Other pertinent precedent include the Third District Court's own Whitman v. Whitman, 532 So.2d 82 (Fla. 3rd DCA 1988). There the husband fraudulently induced his wife to forgo independent counsel by convincing her that their property settlement dispute should be resolved by a "neutral arbitrator" who allegedly was actually representing the husband. That court agreed that the husband's conduct constituted extrinsic fraud because it was conduct collateral to the substantive issues which prevented the wife from fully presenting her case in court.

In M.A.F. v. G.L.K., 573 So.2d 862 (1st DCA 1990), the court held that the wife's concealment from her husband of the fact that he was not her child's biological father constituted extrinsic fraud.

In Lopez v. Lopez, 627 So.2d 108 (Fla. 1st DCA 1993), the court acknowledged that wife's allegations that husband had concealed from the court the fact that his wife was seven months pregnant stated a claim of extrinsic fraud. However, there the court upheld the trial court's factual finding, after a full evidentiary hearing, that the facts did not substantiate wife's claim.

decisions, or, if necessary, reject them and reaffirm the more realistic and just policy consistent with DeClaire, Lamb and Gordon. Such a policy would not permit a husband to prevent his wife from having her day in court by physical violence, extortion and fraud.

If ever there was a case of outrageous conduct constituting extrinsic fraud which deprived a victimized spouse of her day in court and perpetrated an unmitigated fraud on that court, this one "fills the bill". Former husband's motion for summary judgment should have been denied. This case should ultimately proceed to "a new and fair hearing."

II.

THE TRIAL COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT THE RELEASE IN THE MARITAL SETTLEMENT AGREEMENT, WHICH RELATED SOLELY TO SETTLEMENT OF ALIMONY AND MARITAL PROPERTY DIVISION, RELEASED TORT AND CONTRACT CLAIMS NEITHER INVOLVED IN THE DISSOLUTION PROCEEDINGS NOR DESCRIBED IN THE AGREEMENT.

The trial court's determination that the release language in the Marital Settlement Agreement bars, as a matter of law, all claims in the assault case is erroneous for two separate reasons. First, the release language is contained in the Agreement which must be set aside because it was obtained by threats of physical violence, extortion and fraud. Obviously, if the Agreement falls so must the release.

Second, the record reflects that the release was not intended to encompass former wife's independent tort and contract claims, Counts I through IV of the assault case.

Former husband did not carry his burden of showing former wife's unambiguous intent to release her claims which were not the subject of the dissolution. In determining whether the release was intended to include former wife's tort and contract claims rather than merely to settle her marital property rights, a court has simply to evaluate the release language in accordance with generally accepted rules of construction. Those rules have been assembled and concisely summarized as follows:

The construction to be accorded a release depends upon its purpose, the terms in which it is stated, and the subject matter to which it applies. In accordance with the general rule of construction applicable to all contracts, the intention of the parties as expressed in the instrument itself determines the extent and operation of the release. Intent is to be gathered from the entire instrument and not from detached sections of it, and great liberality is exercised by the courts in construing releases to determine the parties' intent. Any ambiguities in the release will be resolved against a waiver of the right involved. The parties will not be considered as having waived a right unless they expressly agree to such terms as are inconsistent with the existence of the right. If the ambiguity consists of language so broad that it could be interpreted to cover claims of every sort, the effect of the release will be confined to the purpose intended by the parties. Conversely, where the purpose for which the parties intended the release is obvious from the nature of the document and the transactions to which it refers, broad general language inconsistent therewith will be disregarded. Broad general language may also be limited by particular recitals, though in part inconsistent therewith, where it manifestly appears from the whole instrument and circumstances surrounding its execution that the parties so intended.

10 Fla. Jur. 2d, Compromise, Accord and Release § 35. See Also Albert Shoes, Inc. v. Crabtree, 89 So.2d 491 (Fla. 1956); Commercial Trading Co. v. Zero Food Storage, Inc., 199 So.2d 109 (Fla. 3d DCA 1967).

In Albert's Shoes, Inc. v. Crabtree Construction Co., Inc., this Court reversed a summary judgment because the lower court had construed a covenant not to sue to include a claim not specifically mentioned. As in the present case, there the lower court had obviously focused on a single, isolated boiler-plate provision rather than considering the context of the document. In reversing, this Court held that when construing a covenant not to sue the entire document, not isolated portions, must be considered in order to ascertain the parties' intent. Relevant language which qualifies other portions of the document must be considered in determining the parties' intent. Albert's Shoes, 89 So.2d at 493.

The Court in Commercial Trading Co., Inc. v. Zero Food Storage, Inc. reversed a summary judgment which too broadly interpreted a release. Observing the above rules of construction, that court held that summary judgments are properly granted only where there remains no genuine issue as to intent of the scope of the release and that the parties' intent is best determined by considering all of the circumstances involved. The court concluded that since the release was subject to more than one reasonable interpretation an ambiguity existed which precluded a summary judgment. Commercial Trading, 199 So.2d at 112.

A fair analysis of the entire Agreement reveals that the release dealt solely with alimony and marital property rights:

1. The Agreement is descriptively entitled "Marital Settlement Agreement" and arose out of and in connection with but one matter - the dissolution of the marriage with the associated division of marital property.

2. The Agreement contains the following defining recitals which reflect the limited purpose of the Agreement and its release provisions:

WHEREAS, the parties mutually desire to settle, adjust and compromise all of the financial and property rights between them, and to reach an agreement to the end so that no difficulties may arise hereafter with respect to such matters; and

WHEREAS, each of the parties...desire to fully settle all matters between them relating to alimony, property rights, equitable distribution, separation and the alike. (A. 10-11, R. 10-11)

3. Paragraph 12 of the Agreement, entitled Full Agreement, also reflects that the parties were merely settling their alimony and marital property division issues, not tort or contract claims:

This Agreement constitutes a full and complete settlement of the alimony, support, equitable distribution and property rights of the parties and claims of any nature whatsoever that each may have against the other, and all of the terms and provisions herein being interrelated and dependent covenants and that such constituting a complete Property Settlement Agreement... (A. 17-18, R. 17-18)

4. Nowhere does the Agreement refer to an assault and battery claim, an intentional infliction of emotional distress

claim, a future fraud claim, a future breach of contract claim, or any similar claim.

5. Most telling, of course, is the specific release language itself. That language simply refers to each party relinquishing claims to the other's "assets/property or estate of whatever kind...owned...by the other", intending a "... release of all claims whatsoever, including dower, courtesy [sic], distributive share of which either may have in the estate of the other...". There is no mention of a tort or contract claim, only matrimonial issues. (A. 19, R. 19)

It is abundantly clear from the release language itself, as well as the Agreement as a whole, that former wife neither contemplated nor intended to release any non-marital property rights such as personal injury, fraud or contract claims.

In addition to the Agreement itself, the extrinsic evidence--which the trial court--clearly established that the release related only to marital property rights, not the independent tort and contract claims. Under Florida law the trial court was obligated to consider the extrinsic evidence. Hurt v. Leatherby Ins. Co., 380 So.2d 432 (Fla. 1980), Soucy v. Casper, 20 Fla. L. Weekly D202 (Fla. 4th DCA 1995) and Griffin Builders Supply, Inc., 384 So.2d 265 (Fla. 2d DCA 1980). That evidence, former wife's unrefuted affidavit, established that no one believed or suggested that the release included existing tort claims or any future claims and that she did not intend for the release to include such claims. Of course, the former

wife's attorney had no such intention. As a result of former husband's behind the scenes violence and extortion, Attorney Schockett was kept completely in the dark as to the existence of those claims. This lack of knowledge explains her complete puzzlement as to why former wife would commit "financial suicide" by entering into so "monstrous" an Agreement. Presumably, former husband's attorney, in drafting the Agreement, had no such intention because he was equally ignorant of his client's "outrageous, reprehensible, dastardly" acts. In any event, neither former husband nor his attorney filed a counter-affidavit.

Florida courts have consistently refused to extend and apply release language where the releasor had more claims than those specifically mentioned in the release unless it is absolutely clear from all the circumstances that all of the releasor's claims were specifically intended to be released. Hurt v. Leatherby; Albert's Shoes, Inc. v. Crabtree Constr. Co.; Soucy v. Casper; Titan Atlantic Constr. Co. v. Quality Electric Service, Inc., 409 So.2d 1156 (Fla. 1st DCA 1982); Danford v. City of Rockledge, 387 So.2d 968 (Fla. 5th DCA 1980); Griffin Builders Supply, Inc. v. Jones, 384 So.2d 265 (Fla. 2d DCA 1980); Florida State Turnpike Authority v. Industrial Constr. Co., 133 So.2d 115 (Fla. 2d DCA 1961); Weingart v. Allen & O'Hara, Inc., 654 F.2d 1096 (5th Cir. 1981) (applying Florida law).

In Soucy v. Casper, a husband and wife, who had been injured in an accident, settled husband's personal injury case. Both husband and wife signed a pre-printed release form and endorsed the settlement check. The release contained no language limiting the release to wife's loss of consortium claim. The wife later filed suit for her own injuries. Defendant sought summary judgment based on wife's release. As here, the wife filed affidavits in opposition. The affidavits stated "that at the time the release was signed it was intended to release only [wife's] claim for loss of consortium." As here, defendant filed no contradicting affidavit. Summary judgment was granted for Defendant. The appellate court reversed based on wife's uncontradicted affidavits which established that in spite of broad, unintended language, the wife had established that both sides intended to release only wife's consortium claim and a genuine question of fact had been raised precluding summary judgment.

In Danford v. City of Rockledge, plaintiff had filed a first suit against the city seeking declaratory and injunctive relief relating to a claim arising out of his employment with the city. That suit was settled by a written compromise. Plaintiff filed a second suit against the city seeking damages for related and co-existing claims also arising out of his employment. The city obtained a summary judgment on the basis that the settlement and release in the earlier suit precluded plaintiff's second lawsuit. In reversing, the court held that

based on the record, including a deposition, an affidavit, documents and correspondence, there was a genuine issue as to "...what rights were given up by the compromise and settlement of the first suit..." Danford, 387 So.2d at 970.

In Titan Atlantic Construction Co. v. Quality Electric Service, Inc., the Court reversed a summary judgment which had found that a Mutual Release Agreement between parties settling their breach of construction contract dispute also released plaintiff's claim for conversion of funds related to that same construction contract. There, unlike here, the release agreement even specifically mentioned additional claims that related to the converted funds which involved work performed under the construction contract. It also contained preamble language that specifically stated a purpose:

...to settle the disputes and differences described above, as well as any other disputes and differences which have or may arise between [the parties] arising out of or related to the construction...

Titan, 409 So.2d at 115.

Unlike here where former wife's affidavit stands alone, the parties submitted conflicting affidavits as to whether the conversion claim was intended to be included in the release. With facts much less favorable to claimant than those here, the court concluded that the agreement's terms were sufficiently ambiguous to create an issue of fact respecting the correct interpretation of the scope of the agreement. Id. at 1158.

The trial court and the Third District Court deviated from established guidelines to be followed in construing the scope of

the release contained in the Marital Settlement Agreement. They did so by determining, as a matter of law, that the release encompassed claims not clearly delineated, by failing to take into consideration all of the terms of the Agreements and the circumstances under which the Agreement came about, by failing to resolve ambiguities against waiver of a right where that right was not expressly released, and by failing to even consider former wife's undisputed affidavit.

III.

THE TRIAL COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT RELEASE LANGUAGE IN THE MARITAL SETTLEMENT AGREEMENT INCLUDED FRAUD AND CONTRACT CLAIMS NOT IN EXISTENCE WHEN THE AGREEMENT WAS EXECUTED.

It is uncontroverted that former wife's fraud and breach of contract claims did not accrue until after the Agreement was incorporated into the final judgment of dissolution. Even given former husband's broad interpretation of the scope of the release, the release speaks only of claims "each may have had" and "may have" not of claims each will have. (R. 19) Therefore, as unmatured claims when the Agreement was executed, those fraud and contract claims were not released. Ciliberti v. Ciliberti, 416 So.2d 48 (Fla. 3d DCA 1982); Sottile v. Gaines Construction Co., 281 So.2d 558 (Fla. 3d DCA 1973).

Thus, for the reasons set forth in Points II and III, the Third District Court's decision in affirming the summary

judgment regarding the scope of the release contravenes existing principles of release interpretation and fails to give due consideration to former wife's uncontradicted affidavit.

Conclusion

For the foregoing reasons, Petitioner, Donna Cerniglia, respectfully requests this Court to quash the decision of the Third District Court.

Respectfully submitted,

KOZYAK, TROPIN & THROCKMORTON, P.A.

By: 

PAUL C. HUCK

FBN 091992

HARLEY S. TROPIN

FBN 241253

2850 First Union Financial Ctr.

200 So. Biscayne Boulevard

Miami, Florida 33131

(305) 372-1800

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing Brief was sent via U.S. Mail this 10th day of July, 1995, to Sam Daniels, Esq., BARRANCO & ASSOCIATES, 1400 Museum Tower, 150 W. Flagler Street, Miami, FL 33130; and Harold Bluestein, Esq., BLUESTEIN AND WAYNE, P.A., Grand Bay Plaza, Suite 1204, 2665 South Bayshore Drive, Miami, Florida 33133.

KOZYAK, TROPIN & THROCKMORTON, P.A.

By: 

PAUL C. HUCK

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SUPREME COURT OF FLORIDA

CASE NO. 85,856

DONNA CERNIGLIA,

Petitioner,

vs.

JOSEPH M. CERNIGLIA, JR.,

Respondent.

APPENDIX TO
PETITIONER'S BRIEF ON THE MERITS

Paul C. Huck, Esq.
Harley S. Tropin, Esq.
KOZYAK TROPIN THROCKMORTON
& HUMPHREYS, P.A.
2850 First Union Financial Ctr.
200 South Biscayne Boulevard
Miami, Florida 33131-2335
Attorneys for Petitioner

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