IN THE SUPREME COURT

OF FLORIDA

CASE NO. 85, 856

DONNA CERNIGLIA,

Petitioner,

vs.

JOSEPH M. CERNIGLIA, JR.,

Respondent.

ON CERTIORARI FROM THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

I.

STATEMENT OF THE CASE AND FACTS

Petitioner seeks review by conflict certiorari of the decision of the Third Disrict Court of Appeal in *Cerniglia v. Cerniglia*, 655 So. 2d 172 (Fla. 3d DCA 1995). The Third District has certified that its decision conflicts with *Lamb v. Leiter*, 603 So. 2d 632 (Fla. 4th DCA 1992), "on the issue of whether allegations of coercion and duress constitute extrinsic or intrinsic fraud." The facts are as follows:

The parties were married in 1970 and divorced in 1990. (R.1, 8-9).[1] The Final Judgment dissolving the marriage provided:

> 4. The Marital Settlement Agreement entered into between the parties, introduced into evidence and marked as Exhibit "A", was executed voluntarily after full disclosure and is in the best interests of the parties and is approved and incorporated in this Judgment by reference and the parties are ordered to comply with it. (R.8).

Three years and eighty-three days later, Petitioner sued Respondent, seeking to set aside the above provision of the Final Judgment as well as the Marital Settlement Agreement. (R.26-33). The suit alleged that Petitioner had been physically abused during the marriage and that the agreement had been obtained by duress, coercion and threats that deprived Petitioner of her own free will. (R.26-27). It also was claimed that the Respondent made oral promises to pay additional sums not contained in the agreement and failed to disclose complete financial information. (R.31-32).

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[1] "R" refers to the record on appeal. Unless otherwise indicated, all emphasis is supplied.

Petitioner also sought to recover for assault and battery and the so-called tort of "outrage," allegedly committed during coverture and before the 1990 Final Judgment was entered. (R.26-27). Finally, Petitioner sought to recover the value of the additional payments Respondent allegedly orally promised to make. (R.29-32).

Respondent answered, denying the material allegations of the complaint, including the allegations of physical abuse. (R.39-41).[2] In addition, the Respondent five alleged affirmative defenses as a bar to the suit: 1) the Final Judgment; 2) the Mutual Release of all Claims contained in the Marital Settlement Agreement incorporated in the Final Judgment; 3) the provisions of Fla. R. Civ. P. 1.540(b); 4) the provisions in the Marital Settlement Agreement stating that it constituted the entire agreement between the parties; and 5) the doctrine of estoppel, since Petitioner had accepted payments under the Marital Settlement Agreement for more than three years before contesting it. (R.40-41).

After answering, Respondent moved for summary judgment. (R.61-67). The motion asserted that there were no disputed facts regarding the affirmative defenses and that Respondent was entitled, as a matter of law, to judgment in his favor. A few weeks later, Petitioner filed a motion for relief from the prior judgment on the ground that Respondent furnished false financial affidavits in the divorce proceeding. (R.22). The trial court denied the motion for relief on the authority of Third District's decision in *Mendez-Perez v. Perez-Perez*, 632 So. 2d 1047 (Fla. 3d DCA 1993). (R.220). For the same reason, the trial court

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[2] During discovery, Respondent also denied under oath Petitioner's claims of physical abuse, threats, etc. (R. 145).

denied leave to amend in the 1993 suit to assert a count based on the filing of false financial affidavits. (R.220).[3]

The trial court entered summary judgment for Respondent in the 1993 case in his Order on Motion for Summary Judgment. (R.215-219). A motion for rehearing was denied (R.220-221). The Petitioner appealed and the Third District affirmed. *Cerniglia,* 655 So. 2d 172.

The Prior Divorce Proceeding

In the 1990 divorce case, Petitioner signed the Marital Settlement Agreement even though her lawyer advised her not to do so. At the final hearing, the following occurred:

> BY THE COURT:
>
> Q. Ma'am, would you state your full name for the record.
>
> A. Donna Cerniglia.
>
> Q. Did you sign that agreement?
>
> A. Yes, I did.
>
> Q. You did sign it freely and voluntarily?
>
> A. Yes, sir.
>
> Q. Did you discuss it with your attorney before you signed it?
>
> A. Yes, I did.
>
> Q. Are you satisfied with the advice she gave and representation she provided?

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[3] The motion for relief was filed in the prior divorce case. The trial judge consolidated that case with the new suit file by Petitioner. (R.166).

A. Yes, I am.

Q. Are you satisfied that you received full and complete financial disclosure from your husband of his assets?

A. Yes, sir.

Q. Are you satisfied you gave him full and complete financial disclosure of your assets?

A. Yes.

THE COURT: All right.

MS. SCHOCKETT: Your Honor, I have a few questions for my client.

BY MS. SCHOCKETT:

Q. Did I advise you not to sign it?

A. Yes, you did.

Q. Did I tell you that I thought it did not properly provide for you?

A. Yes, you did.

Q. And in spite of that, you decided to sign the agreement?

A. Yes, I did.

THE COURT: Are you sure this is what you want me to do?

MRS. CERNIGLIA: Yes.

THE COURT: All right, thank you.

(Thereupon the hearing was concluded). (R.72-73, 6-7).[4]

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[4] The August 20, 1990, transcript is seven pages long and appears after the notice of its filing at R.72-73. The quoted material appears at pages 6 and 7 of the transcript.

After the hearing, the trial court entered a Final Judgment Dissolving Marriage and ordered the parties to comply with the Marital Settlement Agreement, which he found "was executed voluntarily after full disclosure and is in the best interests of the parties and is approved . . . ." (R.8).

Provisions of Martial Settlement Agreement

The Marital Settlement Agreement provided Petitioner the following:

1. A 560 SL Mercedes convertible;
2. $l,000 a week salary for five years from Respondent's company;
3. $50,000 cash and $50,000 a year for two more years tax free;
4. An IRA account, a life insurance policy and a bank account;
5. Jewelry and personal property; and,
6. Health insurance for five years (R.10-21).

Respondent got the marital home, his jewelry and personal property and all the stock in his mushroom company. He assumed any tax liability arising out of parties' jointly filed returns.

The provisions in the Agreement regarding the parties mutual desire to resolve voluntarily all issues between them included the following:

> 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 (R.l0).
>
> * * *
>
> WHEREAS, each of the parties, believing this Agreement to be fair, just and reasonable, have assented freely and voluntarily to its terms and have accepted its conditions, obligations and mutual agreement to the end and desire of both parties, and with

advice of their respective legal counsel, to avoid expensive and protractive litigation and further their desire to fully settle all matters between them relating to alimony, property rights, equitable distribution, separation and the alike; (R. I0-II).

* * *

11. REPRESENTATIONS: The parties represent to each other that:

a. Each has had independent legal advice by counsel of his or her own selection. Each party fully understands the facts and has been fully informed as to his or her legal rights and/or obligations, and each is signing this Agreement freely and voluntarily, intending to be bound by it. Neither the Husband or the Wife has received tax advice from their counsel in connection with this Agreement.

b. Each understands and agrees that this Agreement constitutes the entire contract of the parties. It supersedes any prior understandings or agreements between them upon the subjects covered in this Agreement. There are no representations or warranties other than those set forth herein. (R.I7).

* * *

12. FULL AGREEMENT: 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. No oral or prior written matters extraneous to this Agreement shall have any force or effect whatsoever and the parties represent that no representations have been made by each to the other except as incorporated in this Agreement. No addendum, modification or waiver of any of the terms of this Agreement shall be effective unless in writing, signed by both parties. (R.17-I8).

* * *

> I8. RELEASE OF ALL CLAIMS: The Husband and Wife mutually forever renounce and relinquish 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, distributive share of which either may have in the estate of the other excepting as set forth herein. (R.I9).

The Third District's Decision Below

In the decision below, the Third Disrict decided three issues. First, it held that the trial court correctly determined that Petitioner had released all of her claims against Respondent in the Marital Settlement Agreement. Second, the court held that Petitioner's claims of duress, coercion and fraud were claims of "intrinsic" fraud and could not now be raised, more than three years after entry of the judgment sought to be vacated. Third, in accord with this Court's *Mendez-Perez*[5] decision, the court held that claims regarding false financial affidavits could not be raised more than three years later, since the 1993 amendment to Rule 1.540(b) was not retroactive.

The Third District certified conflict as to its second holding and Petitioner now seeks review of the first holding as well. Petitioner also seeks to raise a third point, contending that a release should not bar claims arising after its execution. The Third District did not discuss this issue and Respondent contended below, with apparent success, that it was not raised by the record.

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[5] 20 Fla. L. Weekly S72 (Fla. Feb. 16, 1995), modified on other grounds, 20 Fla. L. Weekly S241 (Fla. June 2, 1995).

II.

SUMMARY OF ARGUMENT

Petitioner presents the case in a false light. Petitioner's claims of abuse, threats, duress, etc., are just that--claims which have been denied under oath by Respondent. At issue is whether said claims can be litigated three years and three months later to vacate a final judgment in a divorce case.

The Court is asked to hold that there is no time limit for vacating "final" judgments on the grounds of duress, coercion and fraud. No reason suggests itself as to why this should be done. Ordinary rules regarding *res judicata* and finality of judgments should preclude any claim that the Marital Settlement Agreement was not freely and voluntarily signed. The voluntariness issue was raised at the final hearing in the divorce case and the trial court did just what the wife asked. Beyond that, the one-year period is clearly ample for the raising of such claims. The label "extrinsic fraud" does not encompass the "voluntariness" issue, which the courts determine in every case involving a marital settlement agreement.

The trial court also was correct in holding that the parties' mutual general release barred the Petitioner's tort claims. Certainly, that ruling was not "clearly erroneous." Had Petitioner wished to reserve any claims, it would have been a simple matter to draft an agreement so stating.

There was no holding below that the release barred unmatured claims. Petitioner's claim that additional oral promises were made is barred by the parol evidence rule. The fraud in the inducement claim based on the same supposed promises was barred since it was a claim of intrinsic fraud raised two years and three months too late.

III.

ARGUMENT

For the reasons which follow, it is respectfully submitted that the Court should either decline jurisdiction or approve the decision below:

A. The Courts Below Correctly Held That The Allegations of Coercion, Duress and Fraud Constituted Intrinsic Fraud.

In *DeClaire v. Yohanan*, 453 So. 2d 375 (Fla. 1984), this Court cited with approval the Third District's decision in *August v. August*, 350 So. 2d 794 (Fla. 3rd DCA 1977). *August* held that a motion to vacate a final judgment on the grounds of "undue influence, duress and fraudulent concealment of assets" had to be brought within one year after the judgment was entered. In two subsequent decisions, the Third District cited *Declaire* in holding that "fraud, duress, coercion and failure to provide full disclosure" constitute intrinsic fraud that must be raised within one year after entry of the judgment. *Susskind v. Susskind*, 475 So. 2d 1276 (Fla. 3d DCA 1985), *rev. denied*, 488 So. 2d 832 (Fla. 1986); *Langer v. Langer*, 463 So. 2d 429 (Fla. 3d DCA 1985).

In addition, the Third and First District have both held that threats, coercion, and duress constitute "other misconduct of an adverse party" that will warrant vacation of a prior judgment if a motion to vacate is filed under Rule 1.540(b)(3) within the one-year period. *Rowell v. Rowell,* 432 So. 2d 762 (Fla. 1st DCA 1983); *Paris v. Paris*, 412 So. 2d 952 (Fla. 1st DCA 1982); *Bakshandeh v Bakshandeh*, 370 So. 2d 417 (Fla. 3d DCA 1979).

Like the Third District in this case, the trial court below wrote an opinon relying on *DeClaire.* In this regard, the trial court said that in *DeClaire*:

> Intrinsic was defined as covering conduct that "... arises within a proceeding and pertains to the issues in the case that have been tried or could have been tried." The Court quoted from Johnson v. Wells, 72 Fla. 290, 299, 73 So. 188, 191 (1916) as:
>
> > [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.
>
> Herein, everything which is now alleged was tried and both parties were heard on the issues of voluntariness, lack of duress or threat, and full disclosure. To now permit a collateral attack, 3 years and 3 months post judgment, would be opposite to ensuring the finality of judgments. (Footnote omitted, emphasis the court's).
>
> All of the allegations could and should have been raised in an attack on the Judgment within one year under R.C.P. 1.540(b). They are all classic examples of fraud, duress, misrepresentation by one spouse to get a favorable agreement from the other. Certainly the Wife's then counsel was aware of the inequities. She so stated on the record her refusal to participate and that the client was agreeing against her specific advice. However, the Wife insisted on proceeding and clearly established her voluntariness, acceptance, and total comprehension of what was occurring. (R.217-218).

It should be noted that Petitioner did not allege that Respondent's supposed misconduct deprived her of her own free will after August of 1990, when the final hearing was held and when the Final Judgment was entered. Nor did Petitioner allege either threats by the husband, or that she was deprived of her free will during the first or second year after the divorce. All that was alleged was that she was deprived of her free will when she signed the

Marital Settlement Agreement on July II, I990. No explanation was offered as to why the wife did not move within a year of the final judgment to set it aside under Rule I.540(b)(3) for "other misconduct of an adverse party."[6]

As the Court stated in *DeClaire*:

> Public policy has always favored the termination of litigation after a party has had an opportunity for a trial and an appeal of the trial court's judgment. Consequently, the grounds upon which a final judgment may be set aside, other than by appeal, are limited in order to allow the parties and the public to rely on duly entered final judgments. Rule I.540(b) broadened the grounds upon which final judgments may be attacked but we do not find it appropriate to further broaden these grounds by decision of this court. If there is to be any change, it should be achieved through the rule-making process.

DeClaire, 453 So. 2d at 380-81. For the above reasons, we believe that *Lamb v. Leiter*, 603 So. 2d 632 (Fla. 4th DCA I992), was incorrectly decided. In addition, *Lamb* is not on point because the "voluntary signing" issue was not raised and decided below, as it was in this case. For the same reason, *Gordon v. Gordon*, 625 So. 2d 59 (Fla. 4th DCA I993), is not on point. Extortion was claimed in *Gordon* and that issue was neither raised nor decided in the original divorce proceeding in this case.

This is a case where a grown woman told a trial judge what she wanted and it was both ordered and obtained for more than three years. Her request for "more" should, it is respectfully submitted, be denied just as the trial judge and the Third District have now so ordered.

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[6] Without question, Petitioner got $50,000 payments in 1990, I99I and I992 and did not claim duress, etc., until November of I993.

B. Courts Below Properly Found and Held That The Tort Claims Were Released In The Marital Settlement Agreement.

The starting point in addressing the release issue is that appellate courts "have a duty to affirm the trial court's construction of the agreement unless such construction is clearly erroneous." *Barry Cook Ford, Inc. v. Ford Motor Company*, 616 So. 2d 512, 518 (Fla. 1st DCA 1993). *Accord Helie v. Wickersham*, 137 So. 226 (Fla. 1931); *Taines v. Taines*, 427 So. 2d 334 (Fla. 3d DCA 1983); *Liza Danielle, Inc. v. Jamko, Inc.*, 408 So. 2d 735 (Fla. 3d DCA 1982).

The trial court construed the language of the Marital Settlement Agreement as a mutual release of all claims, including tort claims (R.218-219), and the Third District has affirmed that finding. We have quoted the relevant provisions of the Agreement, supra, pp. 5-7. We would simply point out that paragraph 12 provides:

> 12. **FULL AGREEMENT:** 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. No oral or prior written matters extraneous to this Agreement shall have any force or effect whatsoever and the parties represent that no representations have been made by each to the other except as incorporated in this Agreement. No addendum, modification or waiver of any of the terms of this Agreement shall be effective unless in writing, signed by both parties. (R.17-18).

Likewise, Paragraph 18 provides:

> 18. RELEASE OF ALL CLAIMS: The Husband and Wife mutually forever renounce and relinquish 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 downer, courtesy, distributive share of which either may have in the state of the other excepting as set forth herein. (R.19).

There is simply no fair reading of the agreement which reserves any claim of any kind that either party had against the other. Petitioner's affidavit stating she did not intend to release all her claims (R.82-83) means nothing since she signed a release of "all claims of any nature whatsoever that each may have against the other." (R.51,53). In *Bellefonte Ins. Co. v. Queen*, 431 So. 2d 1039, 1040 (Fla. 4th DCA 1983), *pet. rev. denied*, 440 So. 2d 353 (Fla. 1983), the same argument Petitioner now makes was rejected, the court holding:

> The parents argue that they never intended to release the School Board for any negligence occasioned by inept supervision of the crosswalk where the accident occurred. However, even if this be true, the language of the release is not ambiguous and does not permit such an interpretation. "When [the] language is clear and unambiguous, the courts cannot indulge in construction or interpretation of its plain meaning." Hurt v. Leatherby Insur-ance Co., 380 So. 2d 432, 433 (Fla. 1980), see also Boat Town U.S.A. v. Mercury Marine Division of Brunswick Corp., 364 So. 2d 15 (Fla. 4th DCA 1978). (footnote omitted).

The Agreement in this case releases each party from all rights, duties and obligations arising out of the marriage and also releases all claims of whatever nature each may have had against the other. The Agreement is clear and unambiguous, and as the trial court correctly held, "all claims" means just that.

C. No Holding Below That Unmatured Claims Barred By Release.

The trial court did not hold that the release barred unmatured "fraud and breach of contract claims." The fraud claim based on the supposed furnishing of false financial affidavits was precluded by this Court's *Mendez-Perez* decision.

The breach of contract claim alleged that Respondent promised many things in addition to those promised in the Marital Settlement Agreement, and breached his extraneous oral premises. (R.29-31). These claims were precluded by the parol evidence rule. That rule precludes claims that a prior or contemporaneous oral agreement exists that directly contradicts the parties' written agreement. The instant Agreement provides in paragraph II(b) that:

> b. Each understands and agrees that this Agreement constitutes the entire contract of the parties. It supersedes any prior understandings or agreements between them upon the subjects covered in this Agreement. There are no representations or warranties other than those set forth herein. (R.I7).

Likewise, paragraph 12 provides:

> [N]o oral or prior written matters extraneous to this Agreement shall have any force or effect whatsoever and the parties represent that no representations have been made by each to the other except as incorporated in this Agreement. No addendum, modification or waiver of any of the terms of this Agreement shall be effective unless in writing, signed by both parties. (R.I8).

In *McComb v. Hygeia Coca-Cola Bottling Works, Inc.*, I88 So. 2I9 (Fla. 1939), plaintiff sued his former employer after settlement of his personal injury claim. The complaint alleged that in addition to the money received in the settlement, plaintiff was promised a

lifetime job but was later discharged. The release provided that the money paid was the "sole consideration" for the settlement. This Court affirmed dismissal of the complaint because: "[A] party cannot, either in law or equity, contradict or vary terms of his written unambiguous contract by showing that while he signed the same, there was an agreement resting in parol that he was not bound by the terms thereof." *Id.* at 222.

Likewise, in *Johnson v. Johnson*, 403 So. 2d 1388, 1390 (Fla. 2d DCA 1981), a former wife sued her former husband claiming he promised her a job in his medical office if she would sign the marital settlement agreement. Judge (now Justice) Grimes, speaking for the Second District, held the claim was barred by the parol evidence rule:

> In the present case, the settlement agreement spelled out in detail Dr. Johnson's obligations to his wife. Therefore, the issue of whether Dr.Johnson was obligated to keep Mrs. Johnson on the payroll was necessarily within the scope of the written agreement. Since the written agreement did not express this obligation, the parol evidence rule barred any evidence that Dr. Johnson orally agreed to such an obligation. Id.

Accord Masvidal v. Ochoa, 505 So. 2d 555 (Fla. 3d DCA 1987).

Finally, to the extent that fraud in inducing the Marital Settlement Agreement by such oral promises is asserted, the claim is barred by the rule stated in *Linear Corp. v. Standard Hardware Co.*, 423 So. 2d 966, 968 (Fla. 1st DCA 1982):

> First, the testimony as to a contemporaneous oral agreement was not admissible. It did not fit under the exception for oral agreements which induce execution of the written agreement, because the alleged oral agreement related to the identical subject matter embodied in the written agreement and, in fact, directly contradicted an express provision of the written agreement, See E.J. Sparks Enterprises v. Christman, 95 Fla. 928, 117 So. 1388 (1928) and Johnson v. Johnson, 403 So. 2d 1388 (Fla. 2d DCA 1981).

Cf., *Grossman v. Banco Indus. de Venezuela*, 534 So. 2d 773 (Fla. 3d DCA 1988).

Another bar to the "oral promises/fraud in the inducement claim" is the one-year provision in Rule 1.540(b)(3). *Cf.*, *DeClaire,* 453 So. 2d 375. According to the complaint, the breaches started occurring immediately after the divorce. (R.29-30). Yet, Petitioner waited three years and three months, and filed suit only after receiving all the lump sum payments due under the Agreement.

IV.

CONCLUSION

It is respectfully submitted that the decisions below should either be affirmed or the petition should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Respondent's Brief on the Merits was mailed this 28th day of July, 1995 to: Paul C. Huck, Esq., KOZYAK, TROPIN, THROCKMORTON & HUMPHREYS, P.A., 200 S. Biscayne Boulevard, Suite 2850, Miami, Florida 33131.

By: Sam Daniels
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