IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,856

DONNA CERNIGLIA,

Petitioner,

vs.

JOSEPH M. CERNIGLIA, JR.,

Respondent.

_____________________________/

PETITIONER'S REPLY BRIEF

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Statement of The Case and Facts

Respondent's contention at page 2, footnote 2, that he denied under oath former wife's claims of physical abuse is not accurate. (R. 145) Respondent's cited reference is to his interrogatory answer where he actually admits to "occasions where verbal arguments escalated and I slapped her." (R.145) Nowhere does former husband actually deny the physical violence and vicious threats described in former wife's unchallenged affidavit, including threats of facial disfigurement.[1] Rather, former husband, typical of wife-beaters, attempts to excuse his inexcusable behavior by rationalizing that on "some of such occasions the former wife's behavior was aggressive," that threats were made in the "heat of the argument" and the parties would typically apologize shortly thereafter.[2] (R. 145)

At page 5, Respondent lists the items provided by the Settlement Agreement to the former wife and former husband,[3]

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[1]Even if Petitioner's sworn statement would have been challenged, it would have been of no legal comfort to Respondent on his summary judgment motion because former wife's statement must be taken as true.

[2]It is an unbelievable stretch to conceive that former husband could in any way have felt threatened by former wife, whose weight was down to a mere 98 pounds (R. 81) when he admittedly slapped her. For a discussion of this type of rationalizing see: The Battered Women, Part I, L.E. Walker, 1979.

[3]In listing these items, Respondent conveniently omits several items retained by him, including his IRA accounts and bank accounts which presumably were greater than former wife's because he was the wage earner and in control. Nor does Respondent acknowledge the extremely disproportionate value of the business and marital home which went exclusively to former husband.

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apparently in an effort to subtly imply that the provisions made for the wife were somehow equitable. This obvious attempt to create such an impression is not supported by the record. It is especially misleading because former husband objected to former wife's attempted discovery into the economic aspects of the "settlement," which objection was sustained by the trial court. (R. 68, 86-89) The record before the Court actually reflects an agreement so "...unfair, horrendous ... that [former] husband is reprehensible for even making the demand that [former wife] sign it...", with which former wife's attorney would not have her name associated (R. 84-85) and about which former husband boasted that "as a result of the dissolution proceedings [former wife] got only a fraction of what [she] should have gotten or was entitled to receive." (R. 82)

Argument

I.

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

Respondent's argument is simply that a husband's physical and psychological violence committed on his wife, regardless how vicious and effective, which is not disclosed to the court, can never constitute extrinsic fraud because that violence and extortion are mere variations of coercion, duress and undue influence. The trial court accepted Respondent's argument. Yet, that over simplified analysis is simply not in conformance with the

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guidelines set down by this Court in DeClaire v. Yohanan, 453 So.2d 375 (Fla. 1984). Respondent fails to distinguish former husband's conduct from the extrinsic fraud as defined by DeClaire - one party's wrongful conduct occurring outside the confines of the dissolution proceedings which effectively prevents the other party "from exhibiting fully his case". Id. at 377.

Respondent complains that former wife offered no explanation why she did not move to set aside the judgment within one year under Rule 1.540(b)(3). In doing so, he raises a valid question which is easily answered. First, the absence of an acceptable explanation was not an issue in nor the basis for granting the Motion for Summary Judgment.[4] The trial court simply ruled that the challenged conduct, as a matter of law, was not extrinsic fraud. Therefore, what happened after the dissolution judgment or why the wife let a year lapse were not relevant to the trial court's ruling. The former wife was, in the eyes of the trial court, simply too late -- the reason being irrelevant. Thus, former wife had neither a reason nor an opportunity to offer her explanation prior to the entry of the summary judgment. Second, the very issue which former husband now raises is one of those issues which raises a question of fact to be resolved at an evidentiary hearing. The trial court, after hearing all of the factual circumstances, may then decide on principles of equity, and

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[4] The issue of why former wife did not act within one year under Rule 1.540(b)(3) was not raised by former husband in his motion for summary judgment. Neither the trial court nor the Third District Court mentions that issue in their decisions.

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on the merits, whether to grant the relief sought. That decision would include deciding whether former wife, under the specific circumstances, is estopped. By ruling as a matter of law, as it did, the trial court denied former wife the opportunity to offer her explanation and have it evaluated on the merits.[5]

Respondent's reference to three cases, Rowell v. Rowell, 432 So. 2d 762 (Fla. 1st DCA 1983); Paris v. Paris, 412 So.2d 952 (Fla. 1st DCA 1982) and Bakshandeh v. Bakshandeh, 370 So.2d 417 (Fla. 3d DCA 1979) is curious since in each case the martial settlement agreement was set aside under Rule 1.540(b)(3) due to former husband's coercion and threats. If, however, Respondent intends to imply that those cases stand for the proposition that the former wives' claims in those cases were held to constitute intrinsic not

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[5] As noted in the literature and as former wife is prepared to establish at trial, marital violence of the nature involved here, results in "post traumatic stress disorder" with long term effects of extreme helplessness and fear. (Petitioner's Brief on the Merits, p. 17, footnote 3.) One needs only to pick up a local newspaper or follow the State of California v. Simpson trial to see that an abusive husband's attempts to control former wife with violence and threats affects the battered wife long after dissolution. The seriousness with which the legal system should treat domestic violence, and its psychological ill effects on the victim in a legal context is the subject of Florida Bar Journal, Vol. LXVIII, No. 9, Oct. 1994, a special addition entitled "Taking Domestic Violence Seriously". As one contributor concluded:

> "Understanding the dynamics of domestic violence and battered women's response to it are both necessary when raising the issue of domestic violence in a legal case. A battered woman's response to domestic violence includes both the strategies she has used to resist it and the psychological effects of it. An adequate analysis requires an understanding of how these types of responses interact not only with each other, but also with the batterer's behavior (e.g., violence, apologies, remorse) and others' response to it." Dutton, at p. 28.

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extrinsic fraud and that their attempts to set aside the agreements would have been denied if brought as independent actions more than a year after judgment, then the implication is not a fair one. Each of those cases involved a claim brought within one year. There was no issue of whether any one of them could have been properly brought as an independent lawsuit after one year and no suggestion that any one would have been denied if so brought.

A spouse's wrongful conduct in obtaining a one-sided settlement agreement may in many instances constitute both a basis for relief under Rule 1.540(b)(3) and by an independent lawsuit for extrinsic fraud.

It is revealing to note that while Respondent asserts that his conduct can not constitute extrinsic fraud because it is merely garden variety coercion, duress and undue influence, he concedes at page 11 that "extortion" may constitute extrinsic fraud. There Respondent, in attempting to distinguish Gordon v. Gordon, 625 So.2d 59 (Fla. 4th DCA 1993), implicitly acknowledges that extortion constitutes extrinsic fraud. This is so because extortion was the extrinsic fraud alleged in Gordon. Having made that concession, Respondent's position is fatally undermined because "extortion" includes maliciously threatening an injury to another with the intent to gain any pecuniary advantage. Section 836.05 (1993), Florida Statutes. That is precisely what former husband did to former wife here.

At page 11 Respondent also suggests that former wife may not raise the issue of her husband's extortion because the issue of

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voluntariness of the agreement was actually heard and tried in the dissolution proceedings, and therefore, her claim falls outside the DeClaire definition of extrinsic fraud. However, the record below, including the transcript of the dissolution hearing, clearly reveals that former husband's physical violence and threats were never disclosed or discussed, much less considered by the dissolution court. Never considered because former wife was too scared to even reveal them to her own attorney. Former husband's extortion was no more "raised in the original divorce proceedings" than was Mrs. Gordon's extortion in Gordon. Still the Gordon Court properly concluded that former wife's undisclosed threats, which extorted a favorable marital settlement, constituted extrinsic fraud. The Court in Lamb v. Leiter, 603 So.2d 632 (Fla. 4th DCA 1992) reached the same conclusion where the former husband's threats were not brought to the dissolution court's attention until more than a year after the dissolution judgment.

Respondent also attempts to distinguish Lamb by asserting that the "'voluntary signing' issue was not raised and decided below [in Lamb] as it was in this case" (Brief p. 11). Gordon, Lamb and this case are not distinguishable on that point. It is apparent that the "voluntary signing" issue was as much truly at issue in Gordon and Lamb as it was below - that is, not at all. It is beyond argument that none of the dissolution courts were aware of the spouses' wrongful conduct which extorted the involuntary signing of the settlement agreements. In each instance, the failure to reveal the spouse's extortion constituted fraud on the court.

Rather than attempt to deal with the compelling analysis and policy considerations of Lamb, Respondent simply dismisses that decision as being incorrectly decided. In turn, Respondent offers the bootstrap argument that regardless of how heinous husband's undisclosed extortion, as long as a victimized, frightened wife said she agreed to the settlement, the issue of voluntariness was tried and there could be, as a matter of law, no extrinsic fraud.[6]

The danger and fallacy in Respondent's argument are obvious. If the undisclosed extortion is so dastardly as to be effective, the wife, as below, will be forced to say that the "horrendous" agreement is acceptable. Once said, the husband would then be entitled to assert the wife's extorted "agreement" as proof of a voluntary signing and therefore an absolute defense to the extrinsic fraud claim. Thus, the extorting husband will be legally protected by the very effectiveness of his extortion. That result is so obviously irrational and unjust as to deserve no further comment.[7]

Respondent's casual characterization of this case as simply one of a grown woman telling the dissolution court what she wanted

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[6] At page 6, former husband quotes from paragraph 11 of the Agreement, including a statement that "each [of the parties] is signing this Agreement freely and voluntarily." The trial court accepted that representation; otherwise the Agreement would not have been approved. Because of former husband's undisclosed extortion this statement was not true. Thus, the representation upon which former husband now asks this Court to rely perpetrated a fraud on the trial court.

[7] Just as one party may not contractually limit his liability by an agreement induced by his own fraud (see discussion in Point III), that party should not be able to limit his liability by an agreement induced by extortion.

three years ago and now cries for "more", is not only completely insensitive but also ignores the harsh reality of what actually occurred in the dissolution preceding as a result of former husband's terrorism.[8]

Respondent's characterization also ignores the long term and very devastating psychological impact of former husband's terrorism which results in "post traumatic stress disorder" , controlling the victim long after the physical separation. Former wife, like any other victim of long-term domestic violence, needed to feel safe from former husband's violence and time to heal.

II.

THE TRIAL COURT ERRED IN ITS LEGAL DETERMINATION THAT THE RELEASE IN THE MARITAL SETTLEMENT AGREEMENT, WHICH RELATED SOLELY TO SETTLEMENT OF ALIMONY AND MARITAL PROPERTY DIVISION, INCLUDES TORT AND CONTRACT CLAIMS NEITHER INVOLVED IN THE DISSOLUTION PROCEEDINGS NOR DESCRIBED IN THE AGREEMENT.

Respondent suggests that this Court must affirm the trial court's construction of the agreement unless such construction is "clearly erroneous". In support of that suggestion he cites Barry

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[8]An expert on terrorism, Terry Anderson, held capture in Beirut, equates domestic violence with terrorism:

> "For nearly seven years I suffered from the international version of [terrorism] and I personally don't think that the danger of that is anything as severe as domestic violence ...
>
> Every day thousands of women and children in the U.S. are denied the most basic of human rights. This must change." The Miami Herald, Viewpoint p.1, June 12, 1994.

Cook Ford, Inc. v. Ford Motor Company, 616 So.2d 512, 518 (Fla. 1st DCA 1993) plus three other cases as being in accord.

The Barry Cook Ford decision is irrelevant for several reasons. First, the appellant in Barry Cook Ford sought its own summary judgment. The appellate court treated the appeal in view of the very narrow legal issue raised by both parties' motions for summary judgment. Second, appellant there maintained that the pertinent provisions in the subject franchise agreement were unambiguous and therefore "...compelled a ruling as a matter of law...in its favor." Barry Cook Ford, 616 So.2d at 517. There the appellant requested the lower court "to rule on an 'either-or' basis": either grant summary judgment for "... one or the other parties..." 616 So.2d at 518.[9] Finally, the court was not required to and did not undertake to apply the rules of construction applicable to release language such as that involved in this appeal. In fact, none of these four cases cited for Respondent's proposition involved the construction of a release.

Respondent never addresses the rules of construction to be employed in construing a release as discussed in Petitioner's initial brief. Those rules of construction are specific, restrictive and applicable here. Rather Respondent asserts that

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[9]Even where both parties moved for summary judgment the lower court was not to construe the agreement in a vacuum: "We find that the trial court fairly evaluated the agreement in the context of the controversy between the parties, and reached a conclusion consistent with the existing statutes and in accordance with the reasonably ascertainable intentions of the parties, and therefore the judgment should be, and hereby is, affirmed." Barry Cook Ford, 616 So.2d at 519.

"there is simply <u>no fair reading</u> of the agreement which reserves any claim." This standard more closely, though not completely, reflects the standard of review to be applied to the trial court's summary judgment. Applying even that standard, it is clear that based on all of the relevant factors a fair reading of the complete Marital Settlement Agreement in the marital dissolution context reflects an intent to release only those claims involved in the dissolution proceedings and specifically mentioned, not those which were neither involved in the litigation nor mentioned.

One of the cases cited by Respondent as being in accord with Barry Cook Ford is Liza Danielle, Inc. v. Jamko, Inc., 408 So.2d 735 (Fla. 3rd DCA 1982). While not a release case, it is instructive because the subject construction of a lease agreement was rendered only after a trial to determine the parties' intention regarding the extent of an exclusivity clause contained in a lease. At trial the parties submitted testimony, albeit conflicting, on the question of what the parties intended to include in the exclusivity clause. The appellate court approved the trial court's consideration of extrinsic evidence to assist in ascertaining the true intent of the parties. Furthermore, the court approved the established practice of considering all relevant provisions and circumstances of the lease in order to better obtain the intent of the specific clause under consideration. Jamko, 408 So.2d at 737-38. Jamko, rather than supporting the granting of the summary judgment which failed to consider the agreement as a whole and completely ignored former wife's affidavit, is contrary.

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Respondent cites Bellefonte Ins. Co. v. Queen, 431 So.2d 1039 (Fla. 4th DCA 1983), for support of his contention that former wife's affidavit regarding the limited intention of the release means nothing. However, an analysis of the Queen decision, reveals that it is factually distinguishable and does not support former husband's position. In Queen, the plaintiffs brought a claim for their child's death allegedly caused by defendant's negligent supervision of their child. Previously, the parents had executed a release of defendant specifically releasing defendant from all of their claims growing out of the injuries and death of their child resulting from the accident specifically described in the release. The parents claimed that they only intended to release defendant from its negligence in operating the bus which struck their child not from its negligent supervision. The appellate court reversed the lower court's summary judgement which had held that the release did not include the negligent supervision claim. In reversing, the appellate court determined that the release was unambiguous and "unequivocally releases [defendant] from all claims growing out of the accident resulting in the child's injuries and death". Queen, 431 So.2d at 1040. Since the release was so unambiguous and unequivocal, not permitting plaintiffs' interpretation, the court would not consider plaintiffs' affidavit as to their intent. In Queen, unlike below, the tort claims concerning plaintiffs' child's death were the very subject of the parties' release agreement and were specifically spelled out in detail in the release. In this case, former husband's torts were not the object of the release or

the Marital Settlement Agreement.

III.

THE TRIAL COURT ERRED IN ITS LEGAL DETERMINATION THAT RELEASE LANGUAGE IN THE MARITAL SETTLEMENT AGREEMENT INCLUDED FRAUD AND CONTRACT CLAIMS NOT IN EXISTENCE WHEN THE AGREEMENT WAS EXECUTED.

Respondent asserts at page 14 that contrary to Petitioner's brief the trial court did not hold that unmatured tort and contract claims were barred by the release contained in the Agreement. Rather he claims that those claims were held to be barred by the parole evidence rule. However, a review of the Order On Motion For Summary Judgment clearly shows that this was not the trial court's ruling. First, the trial court clearly defines in its Order the issues before it.

> The within Motion for Summary Judgment is based on a Release of Claims as to the torts and the limitations of one year. (R.C.P. 1.540(b) barring intrinsic fraud (R. 215)

Thereafter, the Order discusses at great length the basis for the granting of the summary judgment: 1) the intrinsic versus extrinsic fraud issue and 2) the scope of the release language. The trial court specifically ruled that <u>all</u> of Petitioner's tort and contract claims were included in the release in the Agreement, referring to it as a "Global Settlement".[10] Of necessity, this ruling included claims that were not in existence at the time of

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[10]The term "Global Settlement" was never used by the parties. Rather the more descriptive and limiting term "Marital Settlement Agreement" was used. (R. 219)

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the dissolution judgment.

The parole evidence rule was never mentioned much less relied on in granting the summary judgment on the tort and contract claims. (R. 215-19) This is so because, contrary to Respondent's assertion, the parole evidence rule does not prohibit a claim based on a secret agreement that fraudulently induces one party to enter into a written agreement. Florida Pottery Stores v. American Nat. Bank, 578 So.2d 801 (Fla. 1st DCA 1991), Nagelbush v. United Postal Savings Association, 504 So.2d 782 (Fla. 3d DCA 1987), Nobles v. Citizens Mortgage Corp., 479 So.2d 822 (Fla. 2d DCA 1985), Tinker v. DeMaria Porsche Audi, Inc. 459 So.2d 487 (Fla. 3d DCA 1984), pet. for review denied, 471 So.2d 43 (Fla. 1985), Pena v. Tampa Federal Savings and Loan Association, 363 So.2d 815 (Fla. 2nd DCA 1978). This is true even though the subject agreement contains an integration clause such as the one contained in the Marital Settlement Agreement. Cas-Kay Enterprises v. Snapper Creek Trading Center, Inc., 453 So.2d 1147 (Fla. 3d DCA 1984). One party cannot contractually limit his liability by an agreement induced by his own fraud. Oceanic Villas, Inc v. Gordon, 4 So.2d 689 (Fla. 1941). Banks v. Public Storage Management, Inc., 585 So.2d 476 (Fla. 3d DCA 1991).

Finally, at page 17, Respondent argues that former wife's unmatured "oral promises/fraud in the inducement claim" is barred by Rule 1.540(b)(3), Florida Rules of Civil Procedure. Respondent is wrong. Rule 1.540(b)(3) relates exclusively to obtaining relief from a judgment, decree, order or proceeding not to an independent

claim for money judgment as a result of the fraud in the inducement. The obvious purpose of Rule 1.540(b)(3) is to directly attack a judgment in the same proceeding from which it arose. Former wife's independent fraud claim does not attack the judgment. Rather that claim is in addition to and plead in the alternative to her recision claims, and seeks only monetary damages. Thus, former wife may recover damages for former husband's fraud without disturbing in any way the Final Judgment Dissolving Marriage. Therefore, Rule 1.540(b)(3) is not relevant to former wife's claim for damages resulting from former husband's fraud and oral promises. The only applicable limitation there is the four year statute of limitations.

Thus, it is clear that former wife's fraud in the inducement and oral promise claims are not barred by any release language, the parole evidence rule, or Rule 1.540(b)(3). In view of the evidence in support of these claims the granting of the summary judgment was error.

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Conclusion

For the reasons set forth in this reply brief and in her initial brief, Petitioner/former wife, respectfully suggests that the summary judgment entered below and the denial of her motion under Rule 1.540(b)(3) were erroneously entered and must be reversed.

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I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief was sent via U.S. Mail this 4th day of August, 1995, to Sam Daniels, Esq., A.J. 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.

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