Supreme Court of Florida

BEN WILSON BANE,

Petitioner,

vs.

CONSUELLA KATHLEEN BANE,

Respondent.

CASE NO.: 1999-93

District Court of Appeal,
2d District - No. 98-02291

ON CERTIFICATION OF CONFLICT
BY THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

INITIAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes and Rules

Other

PRELIMINARY STATEMENT

Petitioner Ben Wilson Bane was the Petitioner/Former Husband and Respondent, Consuella Kathleen Bane was the Respondent/Former Wife in the Civil Division of the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida, the Honorable Judge Robert L. Doyel presiding.

The following symbols will be used:

"PA" Appendix to Petitioner's Initial Brief In the Court of Appeal, Second District, the contents of which are included in the Appendix hereto with the same item numbers. The Second District Court granted the parties' joint motion and stipulation that the appeal be decided based on the appendices to the parties' briefs (PA.15).

STATEMENT OF THE CASE

A Final Judgment of Dissolution of Marriage of the parties was entered on February 17, 1995.(PA-1) That Final Judgment incorporated a Separation and Property Settlement Agreement of the parties dated January 12, 1995. The Circuit Court, on July 24, 1996, granted Respondent's/Former Wife's [the parties will hereinafter be simply referred to as Former Husband, or Former Wife] motion filed March 28, 1995 made pursuant to Rule 1.540(b) Fla.R.Civ.P. to vacate the said Final Judgment. (PA-4) Former Husband appealed the Order vacating the Final Judgment to the Second District Court, as well as an earlier order accelerating an obligation due under the Final Judgment. Those Second District appeal case numbers were 96-3160 and 96-2229, respectively, which appeals were consolidated. Former Husband's appeals to the Second District were unsuccessful; that Court affirmed the trial court per curiam on November 10, 1997. (PA-5). Bane v. Bane, 701 So.2d 872 (Fla.2d DCA 1997)

After the Rule 1.540 vacation of judgment was upheld on appeal, on or about December 24, 1997, counsel for Former Wife filed Former Wife's Motion for Attorney's Fees, Suit Money and Costs (PA-6). On January 6, 1998, Former Husband filed a Response to Former Wife's Motion for Attorney's Fees, Suit Money and Costs and Affirmative Defenses. (PA-7) Counsel for the Former Wife first prepared a notice for a two hour hearing on the Motion (PA-

9), but then prepared a Notice of Telephonic Hearing (PA-10) and incident to that notice the Circuit Court heard counsel for the parties by telephone on March 27, 1998. At the telephonic hearing of March 27, 1998 counsel for the parties were given permission to submit letter memoranda on the legal issue raised at the hearing concerning the availability of attorney fees incident to a Rule 1.540 proceeding. On March 27, 1998, counsel for Former Husband filed a letter memorandum (PA-11); on April 3, 1998, counsel for Former Wife filed a letter memorandum (PA-12); and on April 21, 1998, counsel for Former Husband filed an additional letter memorandum (PA-13). During the March 27, 1998 telephone hearing no evidence was presented by way of stipulation or otherwise, except for the stipulation that Former Wife's attorney Maney's hourly rate was reasonable and that the time expended was reasonable and necessary.

The next and concluding action in the trial court was the entry on May 19, 1998 of the Order in question, i.e., the Order Granting Motion for Attorney Fees in the amount of $230,955.30 and costs in the amount of $15,435.59 (PA-14).

The Former Husband appealed to the Second District Court of Appeal the said Order granting Former Wife's attorney fees for the Rule 1.540 proceeding. In the Second District opinion under review herein, wherein that Court certified conflict, the Former Wife's entitlement to attorney fees and costs was affirmed, but

the amount and means of determining the fee and costs was reversed and remanded for further proceedings. Bane v. Bane, Appeal No. 98-02291, 24 F.L.W.2559 (Fla.2d DCA November 10, 1999).

STATEMENT OF FACTS

The Final Judgment of Dissolution of Marriage entered February 17, 1995 incorporated the Separation and Property Settlement Agreement entered into by the parties. The Final Judgment recited that no children were born of the eleven (11) year marriage and that in the Agreement both parties had waived alimony. On March 28, 1995 Former Wife filed a Motion to Vacate the Judgment under Rule 1.540 alleging misconduct on the part of Former Husband in procuring the agreement. (PA-3) Prior to the Motion to Vacate filed under Rule 1.540, Former Wife filed a Motion for Enforcement of the Final Judgment wherein she sought the entry of an order accelerating the balance owed to her pursuant to the terms of the Settlement Agreement and the Final Judgment of Dissolution of Marriage. Although after the Motion to Vacate was filed on March 28, 1995, a hearing on the said motion for enforcement and acceleration was held on April 11, 1996, and the Court entered an order accelerating the obligation due under the Final Judgment of Dissolution of Marriage. The accelerated principal amount, plus interest, totaling $3,500,513.35 was paid by the Former Husband on May 3, 1996. (PA-2). There was no indication of record that any funds previously paid to Former Wife would be returned to Former Husband; rather, the amounts paid would be considered a credit in the dissolution litigation which ensued after vacation of the previous dissolution judgment

incorporating the settlement agreement.

In the order on the Rule 1.540(b) motion, which vacated the Final Judgment of Dissolution, the trial judge therein stated, among other things: (PA-4)

> 10. Neither party comes before this Court with clean hands.
>
> 11. The instant litigation could easily have been avoided if the Former Wife had heeded the advice of her attorney...
>
> 16. This Court finds the conduct of both parties is inexcusable. However, a person guilty of obtaining an agreement by concealment of a material fact and coercion should not be permitted to use negligence by the other party as his shield. When the choice is between coercion and negligence, negligence is less objectionable.

SUMMARY OF ARGUMENT

THE TRIAL COURT AND SECOND DISTRICT COURT OF APPEAL ERRED IN ENTITLEMENT OF THE FORMER WIFE TO ATTORNEY FEES INCIDENT TO HER PROCEEDING UNDER RULE 1.540(b) FLA.R.CIV.P. TO VACATE AN AGREED FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE.

There is no rule or statutory authority for the award below of attorney fees incident to a proceeding under Rule 1.540, Fl.R.Civ.P. The only case directly on point, Spano v. Spano, 698 So.2d 324 (Fla. 4th DCA 1997), on the applicability of the dissolution statute for fees, F.S. 61.16, to a Rule 1.540 proceeding, is contrary to the decision below, wherein the trial court found that Spano was wrongly decided and the Second District Court of Appeal agreed. Spano was well reasoned, should have been and should be followed. F.S. 61.16 is already applicable to post-dissolution judgment enforcement and modification proceedings and should not be further extended judicially to actions to vacate dissolution judgments, particularly those based upon a settlement agreement between the parties wherein, as in this case, both parties were represented by competent counsel at the time of the settlement agreement.

ARGUMENT

THE TRIAL COURT AND SECOND DISTRICT COURT OF APPEAL ERRED IN ENTITLEMENT OF THE FORMER WIFE TO ATTORNEY FEES INCIDENT TO HER PROCEEDING UNDER RULE 1.540(b) FLA.R.CIV.P. TO VACATE AN AGREED FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE.

The Motion to Vacate Final Judgment of Dissolution Marriage filed by Former Wife as granted by the trial court recited in paragraph 1 thereof the following:

> This is an action to vacate and set aside the Final Judgment of Dissolution of Marriage entered on February 17, 1995 in the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida. This Court has jurisdiction pursuant to §26.012 Fla. Stat. (1993).

The Motion to Vacate (PA-3) was premised upon "misconduct of adverse party" and in paragraph 14 of Count I of the Motion Former Wife contended that the Separation and Property Settlement Agreement was signed by her due to Former Husband's intentional misconduct "which requires that the Final Judgment of Dissolution of Marriage be set aside pursuant to Rule 1.540(b)(3), Fla.R.Civ.P.". The July 24, 1996 Order Vacating Final Judgment provided in the introductory part that the matter came on for consideration before the Court, "...pursuant to Rule 1.540(b), Florida Rules of Civil Procedure...". and paragraph 1 of the Order Vacating recited that, "This Court has jurisdiction pursuant to Rule 1.540(b)." (PA-4). <u>The Order Vacating the Final Judgment did not include a reservation of jurisdiction to award attorney's fees to either of the parties.</u>

There was no authority for the award below of attorney's fees for Former Wife's attorneys in the Rule 1.540 matter to be paid by the Former Husband. There is a long-standing adherence in Florida to the "American Rule" for collection of attorney's fees, whereby each party is obligated to pay his or her own fees incurred unless there is statutory authority or a contractual basis to alter that rule. P.A.G. v. A.F., 602 So.2d 1259 (Fla. 1992); Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985); Main v. Benjamin Foster Co., 192 So. 602 (Fla. 1939). In light of that rule, attorney fees are in derogation of common law and statutes providing for attorney fees are strictly construed. Gershuny v. Martin McFall Messenger Anesthesia Professional Assn., 539 So.2d 1131 (Fla. 1989); DeRosa v. Shands Teaching Hospital & Clinics, Inc., 549 So.2d 1039 (Fla. 1st DCA 1989). Rivera v. Deauville Hotel Employers Service Corp., 277 So.2d 265 (Fla. 1973); Great American Indemnity Company v. Williams, 85 So.2d 619 (Fla. 1956); Gimbel v. Intern. Mailing & Printing Co., 506 So.2d 1081 (Fla. 4th DCA 1987). Analogous authority is found in the requirement of strict construction in written agreements, see, e.g., Venetian Cove Club, Inc. vs. Venetian Bay Developers, Inc., 411 So.2d 1323, (Fla. 2d DCA 1982); Hurley v. Slingerland, 480 So.2d 104, (Fla. 4th DCA 1985); Keys Lobster, Inc. v. Ocean Divers, Inc., 468 So.2d 360 (Fla. 3d DCA 1985); Bay Lincoln Mercury Dodge, Inc. vs. Transouth Mortgage Corp. of Florida, 531

So.2d 1027 (Fla. 1st DCA 1988); Schumacher v. Wellman, 415 So.2d 120 (Fla. 4th DCA 1982); Weiner v. Tenenbaum, 452 So.2d 986 (Fla. 3d DCA 1984).

Since there are no provisions in Rule 1.540, Florida Rules of Civil Procedure, for the award of attorney fees to a successful litigant pursuant to said rule and, given the fact that there is no contractual provision between the parties that would obligate Mr. Bane to pay attorney fees, the "American Rule" requires that the courts deny the relief sought in the Motion for Attorney Fees filed by the Former Wife.

In a case wherein a former wife brought a Rule 1.540(b) proceeding to vacate a property settlement agreement, the Third District in Spano v. Spano, 698 So.2d 324 (Fla. 4th DCA 1997-as to which the Second District has herein certified conflict), held that there was no statutory authority applicable to Rule 1.540 proceedings for the award of any attorney fees for the former wife. It had been argued therein that the wife was entitled to attorney fees under the dissolution of marriage chapter, Chapter 61, and specifically F.S. 61.16. Spano held that, under Chapter 61, marital property distribution provisions are concluded with the final judgment and that a property distribution under F.S. 61.075 may not be modified even if the needs of a party change after the judgment. Thus it was held that, given the explicit failure in F.S. 61.14 to empower the courts to modify property

interests after final distribution, it follows that the trial court lacks jurisdiction under Chapter 61 after a final judgment to decide property questions, unless the final judgment reserves such jurisdiction for a specific purpose regarding identified property or is reversed, or is otherwise set aside. Spano cited authority for the proposition that where there is no reservation of jurisdiction the court obviously has no authority to entertain a petition to modify provisions of a final judgment adjudicating property rights and, thus, Spano concluded that any attempt after a final judgment to modify an agreed property division must find its basis outside of Chapter 61, and held that the former wife there found that basis in a rule proceeding pursuant to Rule 1.540, specifically stating that the proceeding arose under Rules 1.540 and Family Law Rule 12.540 and the common law, but not under Chapter 61.

The court in Spano wrote further that F.S. 61.16 (attorney's fees) says nothing about post-judgment proceedings to vacate a judgment as to property divisions on the grounds that it was procured through fraud or mistake. And the court stated that, moreover, there are good prudential reasons for not reading into F.S. 61.16 a right to fees in a Rule 1.540 proceeding, including the fact that consent judgments are special and deserving of the greatest protection from assault, settlements being highly favored and to be enforced whenever possible; settlement agreements are

highly favored in the law. The Spano court felt that the policy of deference to settlements should apply with special force to consent judgments for property divisions in divorce cases, in that the law strongly encourages voluntary resolutions in all cases, and in no area is that more true than when the parties seek to dissolve their marriage. Further, society was said to have the strongest possible interest in seeing the end of discord among family members and the parents of young children. The preference for settlements would be undermined if one party could finance proceedings to undo such agreements with the funds of the party seeking to uphold the agreements. In the absence of an explicit direction from the legislature that F.S. 61.16 applies to the 1.540 proceeding, the Spano court was simply unable to read such authority into the statute, stating that different policies attend an effort to unsettle a settlement as compared to the proposition that parties should be able to receive an equal quality of representation during the course of the dissolution proceedings. Both Ben and Kathe Bane were represented by competent counsel at the time of their settlement agreement and entry of the final judgment of dissolution of marriage (PA-1).

But the trial court herein awarded Former Wife attorney fees and found in his order that Spano, although directly on point, was wrongly decided. The trial court relied on DeClaire v. Yohanan, 453 So.2d 375 (Fla. 1984). The former wife in DeClaire filed an

action three years after the final dissolution judgment, which approved a property settlement agreement, to set aside the judgment because of the fraud of the former husband in filing a false financial affidavit she had relied upon in entering the property settlement agreement. The trial court, after hearing, denied the wife's request because she knew or should have known of the husband's net worth and was untimely in applying to vacate. The Fourth District in Yohanan v. DeClaire, 421 So.2d 551 (Fla. 4th DCA 1982) reversed the trial court finding that the husband's false affidavit was fraud on the court which was not barred by the one year limitation of Rule 1.540.

The issue in the Supreme Court review in DeClaire was what type of fraud was involved. If extrinsic fraud (basically - deception, keeping one away from, or ignorant of court proceedings) was involved, the Supreme Court was of the view that, according to its terms, Rule 1.540 would not limit the power of the court to entertain an independent action for relief from a judgment obtained through fraud on the court. If, however, intrinsic fraud was involved, as the Supreme Court found, then the Rule 1.540 proceeding in question should have been brought within one year from the final judgment, which it was not. The Supreme Court stated: (at p. 380)

> 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. (Emphasis added)

The Supreme Court decision reinstated the trial court denial of relief to the former wife.

What, then, does the above holding concerning the limitations under Rule 1.540 have to do with this case? Nothing, except to point out what was in issue in DeClaire, and what was necessary for the decision. The part of the DeClaire case relied upon by the trial court and Respondent is the dicta in discussion at p.378 based on a quote from Trawick in Florida Practice and Procedure §26.8 (1982) that implies that a motion to vacate is a continuation of the action in which the judgment was entered. Thus, based on a treatise without citation of authority quoted in dictum not even on point, the trial court found that Chapter 61 applied to the Rule 1.540 motion filed by the Former Mrs. Bane.

Compare Spano with DeClaire. DeClaire did not have in issue the question of applying F.S. 61.16 to a Rule 1.540 proceeding; Spano did. Spano went into great depth as to the reason why the dissolution attorney fee provision of F.S. 61.16 should not by judicial strain apply to a Rule 1.540 proceeding. Certainly the Supreme Court was capable of such analysis as well, had that been an issue in DeClaire. Petitioner submits that Spano is well reasoned and correct. Spano is directly on point, as the trial court found.

The trial court incorrectly determined that the case was,

substantively, a dissolution of marriage proceeding under Chapter 61, Florida Statutes. Yes, there was at one time a dissolution proceeding, that after vacation of the Final Judgment returned to a dissolution proceeding, but the case or action that gave rise to the award of attorney's fees was brought under Rule 1.540(b) Fla.R.Civ.P. and not pursuant to any provision of F.S. 61.16. Under Rule 1.540 the dissolution case file is a place to file a motion to vacate, but there is no dissolution pending until the motion to vacate the final judgment is granted. Once the Rule 1.540 Motion is granted and the dissolution proceedings begin from scratch, for all services rendered in the new case counsel can make a claim for attorney's fees, and if the case and statutory criteria are satisfied, the court could then make a husband pay or contribute to the wife's claim for attorney's fees. The dissolution proceeding ended with the Final Judgment and a 1.540 proceeding is <u>not</u> an enforcement or modification action in which post-judgment actions any claim for attorney's fees are governed by F.S. 61.16. Indeed, under Chapter 61 a modification cannot be had as to a property settlement agreement.

Although an order entered on a Rule 1.540 motion is reviewable by the same procedure as to review non-final orders under Florida Appellate Rule 9.130, it is obvious from the latter rule that the subsection relating to review of 1.540 orders is separated and separate from what could be described as true

interlocutory orders that are given in the middle or intermediate stages of a cause, which non-final orders are otherwise described in other provisions of the appellate rule. Whatever may be the provisions for appeal of Rule 1.540 orders, the order in question cannot be said to be one given in the middle of the cause, because the dissolution proceeding was over until the Final Judgment was vacated.

A Rule 1.540 proceeding does not contemplate disposition on the merits. Rule 1.540(b) is available only to set aside a prior order or judgment. The Rule cannot be used to impose any additional affirmative relief. The Florida Rule comes from, and is substantially identical to, Federal Rule of Civil Procedure 60(b). The case of *Adduono v. World Hockey Ass'n*, 824 F.2d 617 (8th Cir. 1987) was one wherein the 8th Circuit denied a request for attorney's fees incident to a Rule 60(b) action, stating that Rule 60(b) is available only to set aside a prior order or judgment and cannot be used to impose any additional affirmative relief, citing *United States v. $119,980*, 680 F.2d 106 (11th Cir. 1982). In the latter case the 11th Circuit stated that under Rule 60(b), a prior order can only be set aside and the Rule cannot be used to impose any additional affirmative relief. It is of course clear that the award below to the Former Wife of attorney's fees is affirmative relief incident to the initiation and maintenance of a Rule 1.540(b) proceeding. Petitioner submits that the

federal rationale under the same rule should be persuasive, and, indeed is well-reasoned and should be applied here. The fees herein were awarded for services in a Rule 1.540(b) proceeding; there just was not any F.S. 61 action to attach the fees to at the time the final judgment was vacated.

A Rule 1.540 Motion is much more than mere invocation of a procedure. While stating that, since Federal Rule 60(b) is substantially the same as the Florida Rule, Florida courts would look to federal decisions for proper interpretation of the Florida rule, the Third District in Brown v. Brown, 432 So.2d 704 (3rd DCA Fla. 1983), disapproved on other grounds in DeClaire v. Yohanan, 453 So.2d 375 (Fla. 1984), stated the following:

> The problem of whether and under what circumstances a final judgment should be assailable involves the clash of two important principles - that litigation must come to an end, see Bros, Inc. v. W.E. Grace Manufacturing Co., 320 F.2d 594, 597-98 (5th Cir. 1963), and that justice should be accorded in a particular case, see Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244-45, 64 S.Ct. 997, 1000, 88 L.Ed. 1250 (1943). In an effort to maintain the proper balance between these two principles, Rule 60(b) of the Federal Rules of Civil Procedure was promulgated.
>
> > "The purpose of Rule 60(b) is to define the circumstances under which a party may obtain relief from a final judgment. The provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice be done in light of all the facts. In its present form, 60(b) is a response to the plaintive cries of parties who have for centuries floundered, and often succumbed, among the snares and pitfalls of the

> ancillary common law and equitable remedies. It is designed to remove the uncertainties and historical limitations of the ancient remedies, but to preserve all of the various kinds of relief which they offered." Bankers Mortgage Co. v. United States, 423 F.2d 73, 77 (5th Cir. 1970). (Emphasis added)

Rule 1.540 by its very terms took the place of and abolished writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review.

The effect of the Rule 1.540 Order is to return the parties to the position they occupied before the judgment was entered, i.e., in this case to a dissolution of marriage proceeding, but the operative word is "return". The return in this case was to a dissolution proceeding in which there had been no court order, prior to or in the final judgment, awarding attorney's fees to either party nor a reservation of jurisdiction to make such an award.

Respondent's argument below concerning the Spano case is a classic teaching of execution of strawmen. Spano reasons that settlements and stipulations are favored in the law and a spouse by merely showing need and ability to pay should not be financed, in effect, for an attack on a judgment entered on a settlement. Respondent would then set up a would-be important issue, as a strawman, by arguing that this *particular* settlement could not be favored by the law because it was coerced and procured through

concealment, parading the horribles of the Husband's conduct in order to poison the well, so to speak. But this settlement, just as any other settlement, was also favored by the law, until it was shown that it should be vacated. The policy of not financing attacks upon property settlements is not based upon the results of a Rule 1.540 action, it is based upon the general proposition that settlements are favored in the law and should not easily be attacked. What Respondent has really argued, in essence, is that the prevailing party in a Rule 1.540 action should be awarded fees when the action to vacate is successful. And, as that argument goes, the award would be under FS 61.16. But if §61.16 applied, it would apply to all attacks on dissolution judgments, successful or not. The legislative branch did not say that, however, but in the present posture of this Bane case there is now arguably authority for recovery under FS 61.16 of attorney fees whether or not the vacation attempt is successful. However, the Second District opinion below says:

> We hold that Chapter 61 authorizes the award of attorney fees for a proceeding to set aside a property settlement agreement that *was* the product of one party's fraud. Accordingly, we certify conflict with Spano.
> (Emphasis added)

Does "was" mean that only the successful vacatant may be awarded fees? Although the language is vague, it would seem that the Second District should have said "allegedly the product of fraud"

if *all* attackers of final judgments on that ground could be awarded fees under F.S. §61.16. Thus it may be argued that the Second District would have FS 61.16(1) now in effect to read:

> The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals, *[and including a proceeding outside this chapter under Rule 1.540 (b)(3), Fl.R.Civ.P. to a party who is successful in having a final judgment or order vacated on the ground of fraud].*

The Second District's citation of Rosen v. Rosen, 696 So.2d 697 (Fla.1997) for liberality in construing FS 61.16 is an overgeneralization in that the liberality Rosen refers to is in the consideration of any factor necessary to provide justice and equity between the parties. And, moreover, that liberality is applicable if §61.16 is operable. The cart has been put before the horse. The use of factors which may be considered under Rosen and the use of the financial resources test, of need and ability, under the statute are all irrelevant. The question is the applicability of the statute at all, not what tests apply in making an award.

CONCLUSION

The Petitioner respectfully submits and moves that this Court reverse the decisions below entitling the Former Wife to recover attorney fees incident to the Rule 1.540 motion proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to David A. Maney, Esquire, Post Office Box 172009, Tampa, Florida 33672, this 13 day of January, 2000.

LEVINE, HIRSCH, SEGALL
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INDEX TO APPENDIX

14. Order Granting Motion for Attorney Fees dated May 19, 1998

15. Joint Motion and Stipulation Regarding Use of Appendix

16. Notice of Appeal

17. Opinion below of District Court of Appeal, Second District.