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IN THE SUPREME COURT OF FLORIDA

VIVIAN WEBB MACAR,

Petitioner,

vs.

ALEX V. MACAR,

Respondent.

CASE NO. SC00-2542

L.T. NO. 2D98-3268

PETITIONER'S REPLY BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

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TABLE OF CONTENTS

Table of Citations ii

Preface 1

Rebuttal Statement of the Case and of the Facts 2

Argument in Reply:

Issue I - **THE *CASTO* FACTORS SHOULD APPLY WHEN A RULE1.540 CHALLENGE IS MADE TO THE VALIDITY OF A MARITAL SETTLEMENT AGREEMENT THAT HAS BEEN INCORPORATED INTO THE FINAL JUDGMENT** 5

Issue II - **APART FROM *CASTO* CONSIDERATIONS, THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT VACATING THE AGREEMENT PURSUANT TO RULE 1.540, AND THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN REVERSING THE TRIAL COURT.** 7

Conclusion 10

Certificate of Service 11

Certificate of Compliance 11

TABLE OF CITATIONS

Cases	Page
Casto v. Casto, 508 So.2d 330 (Fla. 1987).	5, 7
DeClaire v. Yohanan, 453 So.2d 375 (Fla. 1984)	5, 6, 7
Goodstein v. Goodstein, 649 So.2d (Fla. 3d DCA 1995)	5

Court Rules

Fla. Fam. L.R.P. Rule 12.540 . . . . . 6, 7

Fla. R.A.P. 9.030(a)(2)A(vi) 10

Fla. R.A.P. 9.600(b)2) 9

Fla. R.C.P. 1.540 . . . . . 5, 7

PREFACE

The parties shall be referred to in accordance with their capacity in the marriage. Vivian Webb Macar, was the appellee in the lower tribunal and shall be referred to herein either as "the Wife" or as "Mrs. Macar". Respondent, Alex Macar, shall be referred to either as "the Husband" or as "Mr. Macar". The Record on Appeal shall be designated as "(R:)". The transcripts of the hearings on the Wife's Motion for Relief from Judgment shall be designated as follows: May 29, 1998, July 13, 1998, and July 28, 1998, shall be designed as "(T:)"; the June 12, 1998 hearing shall be designated as "(ST:)".

Appellee's Answer Brief shall be referred to as "(AB:").

REBUTTAL STATEMENT OF THE CASE AND OF THE FACTS

Appellant relies on the Statement of the Case and of the Facts as presented in the Initial Brief. It is necessary, however, to note certain corrections to Appellee's Statement of the Case and Facts.

Appellee asserts that the Wife had sufficient discovery and that the Husband had produced all the documents requested. (AB:5) That statement was based solely upon the Husband's testimony that he "believed" that he had produced all requested documents. (ST:52) The Husband also contends that he had provided the records pertaining to the Barnett Bank account, the Heritage Cash Trust, the Eaton Vance Trust and the Franklin Value 2 Trust accounts. (AB:5, citing to T:25-59) Evidence showed, however, that Mr. Macar had produced the mutual fund statements for the preceding three years only. (ST:25) The Wife's accountant, George Snyder, testified that Mr. Macar had produced no documents preceding the marriage to support his claim that the assets were non-marital. (T:33-34, 108) These documents had been requested in the Wife's Interrogatories to the Husband and in her Request to Produce. (R:106; ST:26, 41)

Although Mrs. Macar's Motion for Relief from Final Judgment was not filed until May, 1998, she had not waited until that time to contest the agreement. A Notice of Appeal from the Final Judgment had been filed on December 12, 1997, Second District Court of Appeal Case No. 97-05402. (R:266) A Motion to Temporarily Relinquish Jurisdiction was filed on February 24, 1998, which was granted by Order

dated March 5, 1998. (R:397) The purpose of the Motion to Relinquish was two-fold: The original Final Judgment had never found its way into the court file, and was necessary to have another judgment entered *nunc pro tunc.* Secondly, Mrs. Macar desired to file a Motion to Vacate Final Judgment.

The Wife testified that she did not feel "coerced by the Husband". The basis for the Wife's allegation of "coercion", however, was not due to the Husband's actions but to the Court having changed, unexpectedly and without notice, the Wife's secondary shared parental responsibility of the children to sole custody with the Husband. (R:401) Appellee also overlooked the fact that Mrs. Macar has limited mental capabilities, and the Court had found that Mrs. Macar was confused throughout most of the proceedings. (R:510)

Appellee stated that Mrs. Macar admitted that the Husband's previously filed financial affidavits had listed the assets which she was now claiming were "newly discovered" accounts. (AB:9, citing to T:78-80; 84-88). This is not correct. The cited testimony related to accounts that had been listed on the Husband's financial affidavit filed in the 1994 dissolution of marriage action, which was subsequently dismissed. (T:89) The Motion for Relief from Judgment did not identify the "newly discovered brokerage accounts", and there was no testimony in the subject hearings that related those account to the 1994 accounts. (R:398)

Appellee reported that Mr. Snyder had prepared the schedule of the marital net worth, reflecting the asset values as being higher than what was represented in the parties' settlement agreement. It was stated that these schedules had been discussed

with the Wife and copies had been furnished to her attorney prior to trial. (AB:9, citing to T:24) Again, this is not completely correct. Mr. Snyder had informed Mrs. Macar *after* being advised by her that the parties had settled, that his figures indicated a much larger net worth than "what she was indicating." (T:24) Mr. Snyder testified that it was after that conversation that he faxed the net worth schedule to Mr. McBath, the Wife's attorney. (T:24) The schedule, introduced as Husband's Exhibit No. 1, showed a facsimile transmittal date of October 20, 1997, which was three days after the final hearing. (R:584)

Appellee also asserts that the Court "specifically found no fraud" on the part of Mr. Macar. (AB:10) The Court did not make such a finding. While the Court did not specifically find fraud, it did make a finding that there was incomplete disclosure and a " number" of errors in Mr. Macar's Financial Affidavit. (R:509)

ARGUMENT IN REBUTTAL

I

THE *CASTO* FACTORS SHOULD APPLY WHEN A RULE 1.540 CHALLENGE IS MADE TO THE VALIDITY OF A MARITAL SETTLEMENT AGREEMENT THAT HAS BEEN INCORPORATED INTO THE FINAL JUDGMENT.

STANDARD OF REVIEW: The standard is one of *de novo* because the District Court of Appeal misapplied the law in reviewing a R.C.P. 1.540 motion to vacate a post-nuptial agreement.

Appellee states that *Goodstein v. Goodstein* did not address Rule 1.540 and "made no effort to reconcile the requirement of Rule 1.540 with the more liberal grounds as set forth in *Casto.* (AB:15) *Goodstein v. Goodstein*, 649 So.2d (Fla. 3d DCA 1995); *Casto v. Casto*, 508 So.2d 330 (Fla. 1987). While *Goodstein* did not specifically refer to "1.540", the action was based on a motion to set aside a property settlement agreement and for relief from the final judgment. There is no rule of civil procedure other than 1.540 that would apply to such relief.

Appellee also argues that *DeClaire v. Yohanan*, 453 So.2d 375 (Fla. 1984), holds that the filing of a false financial affidavit does not constitute fraud. (AB:16) This is incorrect. *DeClaire* stated that a false financial affidavit is not *extrinsic* fraud. Extrinsic fraud occurs when a party has been prevented from participating in a case. When a party has had the opportunity to attack a party's false testimony or misrepresentation through cross examination, this "improper conduct" is intrinsic fraud.

A false financial affidavit was specifically identified as intrinsic fraud. *Id.* at 377, 380. Under 1.540, Rules of Civil Procedure, which was in effect at the time, an action for intrinsic fraud must have been brought within one year of the final judgment. The action in *DeClaire* was brought outside the one-year limitation.

The circumstances under which a judgment may be challenged within the one-year requirement of Rule 1.540(b), as explained by the *DeClaire* Court, are:

> 1) Mistake, inadvertence, surprise, or excusable neglect.
>
> 2) Newly discovered evidence which could not have been discovered in time to move for a new trial.
>
> 3) Any type of fraud, misrepresentation, or other misconduct of an adverse party **including intrinsic fraud which occurs during the proceeding such as false testimony.** (emphasis added.) *Id.* At 378.

DeClaire refused to broaden the grounds for setting aside final judgments through expanding the classification of extrinsic fraud to include false financial affidavits. The Court commented that any change should be achieved through the rule-making process. *Id.* at 381. This is precisely why Rule 12.540 was promulgated. See Commentary, Rule 12.540, Florida Family Law Rules of Procedure. The rule now provides that there shall be no time limit for motions based on fraudulent financial affidavits in marital or paternity cases.

The *Macar* trial court found that there was incomplete financial disclosure, including: The Husband's failure to disclose that the parties' $5,270.00 tax refund that had been appropriated to the Husband's use; misstating the values of the brokerage accounts; and listing the three brokerage accounts on his financial affidavit as "non-marital". (R:509) Mr. Macar had valued the total of the three accounts at $75,000.00.

The Wife's accountant, George Snyder, ascertained that the total values were actually $83,509.00. (R:584) The "error" in the mis-designation as non-marital assets results in the marital estate expanding from $89,274.00, according to Mr. Macar, (R:144, 583) to $226,693.00, according to Mr. Snyder. (R:584). This is not an insignificant amount.

Despite the absence of the word "fraud", the lack of disclosure and mischaracterization of assets as being non-marital, falls within the parameters of intrinsic fraud or "misconduct, as defined by *DeClaire*, and within the grounds of Rule 1.540, Florida Rules of Civil Procedure, and Rule 12.540, Florida Family Law Rules of Procedure.

The Second District erred in refusing to apply *Casto* to the present case, and the trial court ruling should be reinstated.

II

APART FROM *CASTO* CONSIDERATIONS, THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT VACATING THE AGREEMENT PURSUANT TO RULE 1.540, AND THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN REVERSING THE TRIAL COURT.

STANDARD OF REVIEW: The standard of review is one of *de novo* because the Second District exceeded the appropriate standard in reviewing a discretionary act of the trial court.

Appellee has spent considerable time castigating Mrs. Macar for filing "false

and scurrilous" motions, designed to undermine Mr. Macar's parenting abilities. While the motions were undeniably ill-advised, they have absolutely no relevance to the issues on this appeal. The trial court did *not* find that the Motion for Relief from Judgment was baseless. Appellee's attempts to denigrate Mrs. Macar by emphasizing these motions appears to be nothing more than an effort to divert the real issue before this Court.

Mrs. Macar's mental limitations may have contributed to the filing of the motions, and these limitations are certainly relevant to her capability to comprehend the fairness of the settlement and the lapses in Mr. Macar's financial disclosure.

Appellee emphasizes that it was Mrs. Macar's attorney who initiated the settlement negotiations during the recess in the Final hearing. These overtures, however, were made without her knowledge or permission and were presented to her five minutes before the final hearing was to commence. (R:646) Mrs. Macar testified in May, 1998 that she had not wanted to settle the case, but did so to maintain shared parental responsibility. (T:90)

Contrary to Appellee's assertion that the Wife's expert had been provided with all of the necessary discovery to enable to accountant to determine the marital assets (AB:20), Mr. Snyder had not been provided with any documents substantiating the Husband's position that the brokerage accounts were non-marital.(T:33) Added to this is the fact that Mr. Macar had repeatedly informed his wife that the accounts were non-marital and the fact that Mrs. Macar had very limited access to the parties' finances throughout the marriage. She was, consequently, not in a position to

determine what was marital or non-marital.

As for the Wife having received the benefit of the bargain, the "benefit" in this case amounts to Mrs. Macar having received $18,000.00 in assets of a possible marital estate of $226,693.00. (R:584) Furthermore, Rule 9.600(b)2), Florida Rules of Appellate Procedure provides that:

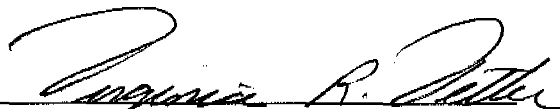
> The receipt, payment, or transfer of funds or property under an order in a family law matter shall not prejudice the rights of appeal of any party.

There was competent substantial evidence to support the trial court's decision vacating the agreement and judgment, and the District Court erroneously substituted its judgment for that of the trial court.

CONCLUSION

Petitioner requests that this Court assume jurisdiction pursuant to Rule 9.030(a)(2)A(vi), Florida Rules of Appellate Procedure and reinstate the order of the trial court vacating the settlement agreement as it related to the financial issues of the parties.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Reply Brief has been served by regular U.S. mail on April 24, 2001, Raymond A. Alley, Jr., Attorney for Respondent, at 805 West Azeele, Tampa, FL 33606.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief has been prepared in Times New Roman 14-point proportional font, in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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