IN THE SUPREME COURT OF FLORIDA

MICHAEL ANDERSON,

Petitioner,

v. CASE NO.: SC00-59

CATHY ANDERSON,

Respondent.
_____/

ON REVIEW FROM CONFLICT CERTIFIED
BY THE SECOND DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

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NOTICE OF PENDING CASE

This Court has accepted jurisdiction and scheduled oral argument in a case recognizing conflict on one of the issues this case presents, *D.F. v. Department of Revenue,* Supreme Court Case No. 96288, oral argument scheduled for August 29, 2000.

SUMMARY OF ARGUMENT

Cathy makes the same crucial mistake the trial court master made.[1] She claims it was not a misrepresentation for her to tell Michael the child was his if she believed it to be true (AB 15). She is wrong. Michael did not ask her if she believed the child was his. Michael asked if the child was his, and she answered definitively that "yes," the child was his. That was a misrepresentation, because the true answer was "I don't know" (or "I believe so").

Michael moved to set aside the support obligation within a year. His case is much stronger than *DeRico*, and stronger than

[1] Petitioner, Michael Anderson, uses the same designations as set forth in the Preliminary Statement in his Initial Brief. Michael refers to the Initial Brief by the prefix "IB," and Cathy Anderson's Answer Brief by the prefix "AB." Michael refers to the Solicitor General's amicus curiae brief by the prefix "SG."

Daniel, where the husband knew the woman was not pregnant with his child before he married her. Mr. Daniel knew the truth and did not have to support a child that was not his. Michael was lied to and has been penalized.

ARGUMENT

Where a wife affirmatively told her husband he was the father of a child who was less than three years old at dissolution, the former husband should not be forced to pay support for an additional fifteen years where, within one year of the dissolution judgment, he moves to terminate payments when DNA tests show he is not the father.

Cathy says she has reframed the issue into two issues (AB 5). Michael will address both points raised in Cathy's answer brief. Each independently warrants relief for Michael. Cathy faces a more significant problem. She has failed to respond to the case law Michael cited showing she did make a misrepresentation that entitled Michael to set aside the child support obligation.

Cathy acknowledges that if this Court's decision in *Daniel*[2] applies to the facts of *DeRico*[3], then it applies to her case (AB 9). Michael will address *DeRico* more fully below. However, as

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[2] *Daniel v. Daniel,* 695 So. 2d 1253 (Fla. 1997).

[3] *DeRico v. Wilson,* 714 So. 2d 623 (Fla. 5th DCA 1998).

Cathy's brief tacitly acknowledges, Michael's case is much stronger than that of the former husband in *DeRico* (see also IB 9-12).

A. Michael was entitled to relief under Rule 1.540.

Michael challenged the child support obligation within one year of the dissolution judgment. In his initial brief, Michael pointed out the decisions of this and other Florida courts that a misrepresentation includes innocent false representations (IB 8-9). Cathy ignores this authority and cites a single case that, when examined, does not help her (AB 15). Michael will discuss that case, but Cathy's position has an even more substantial flaw.

Cathy asserts, "it was not a fraud, misrepresentation or lie for Cathy to tell Michael he was the father of the child if she believed it to be true and did not know otherwise when she made the statement" (AB 15). This is wrong. It is undisputed that Michael asked Cathy the direct question: was he the father of the child, and that she answered unequivocally "yes" (IB 2). She was not asked did she subjectively *believe* that he was the father of the child. She did not answer that she "believed" he was. The true answer would have been "I don't know" or even "I believe so" (her best case scenario). When she unequivocally answered "yes," it was a misrepresentation.

Thus, Cathy's premise that she did not make a misrepresentation to Michael is wrong. As Michael noted, Cathy was in a unique position to know if her unequivocal statement that Michael was the father was true, or was merely her now claimed

"belief" (IB 14). Telling Michael he was unquestionably the father was a misrepresentation when Cathy had to know there was another man who was potentially the father.

Thus, Cathy's cite to the case listing the "traditional elements of fraud" does not help her, *Charter Air Center, Inc. v. Miller,* 348 So. 2d 614 (Fla. 2d DCA 1977)(AB 15). First, even if the person must know the misrepresentation is false, Cathy knew here: she answered his question falsely.[4]

Second, Cathy's argument ignores that even a claimed innocent misrepresentation is still a misrepresentation (IB 8). As this Court said, "why should he who makes false representations be permitted to profit by them, whether he knew they were false or not?" *Robson Link & Co. v. Leedy Wheeler & Co.,* 154 Fla. 596, 18 So. 2d 523, 533 (1944).

Third, in *Charter*, the alleged misrepresentations included that the defendant represented it was an authorized Piper aircraft dealer. 348 So. 2d at 615. The court's decision did not turn on some claimed subjective belief. Rather, the court found, among other things, that the plaintiff was not harmed by the statement because even though the defendant was not a Piper aircraft dealer, it had the capability of delivering the airplane ordered by the plaintiff. Thus, *Charter* turned on a lack of damage, not the lack of knowledge that a statement was false.

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[4] Consider if a client asks an attorney what the attorney's malpractice liability limits are. If the attorney says they are $1 million which he believes to be true, but does not know, he has answered falsely if the limits are a lower number. His erroneous subjective belief does not make his false answer true.

Cathy emphasizes that she asked Michael in cross-examination if he thought she knew until the test results came back that he was not the father of the child (AB 3, 15). This again misses the point. The misrepresentation does not turn on whether she knew to a certainty that he was not the father of the child. She knew he might not be and when he asked her if he was, she should have answered truthfully that she did not know.

Cathy argues the master's decision should be given deference (AB 12). The lower tribunal is entitled to no deference when it acts under an erroneous legal assumption, or when it is applying the law to the facts.[5] There is no factual dispute that Cathy told Michael that he definitely was the father. The master made the same mistake of law that Cathy argues here, concluding "no evidence was adduced that the former wife knew, when she first told him of her pregnancy, that he was not the father of the child" (R V2/296). When Michael asked Cathy if he was the father, she said "yes" when the true answer was "I don't know." Her response was a misrepresentation.

Cathy continues to overlook the fact, recognized in the Second District opinion, that there was new information after the dissolution judgment: Cathy interfered with Michael's visitation and he had obtained the results of the DNA test (AB 13, 16; 746 So. 2d at 526).

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[5] *See, e.g., St. Petersburg Housing Authority v. J.R. Development,* 706 So. 2d 1377 (Fla. 2d DCA 1998); *Butler v. State,* 706 So. 2d 100 (Fla. 1st DCA 1998).

In addition to these new facts, Michael had another new fact: he now knew Cathy had lied to him when she unequivocally said the child was his.

Contrary to Cathy's claim, this case is not like *Lathrop v. Lathrop,* 627 So. 2d 1317 (Fla. 2d DCA 1993). In *Lathrop,* the husband had ordered blood tests before the dissolution, but the results were inconclusive. The husband went forward without further testing and signed a stipulation that he was the father of the child. **If** Cathy had truthfully told Michael that she did not know if he was the father of the child, and he had gone forward, then this case would be like *Lathrop.* It is not, because Cathy did not give a truthful answer to his question. Thus, Michael is entitled to relief under Rule 1.540.

Cathy's asserted "procedure" on page 19 reaffirms the master used an erroneous approach below. If Michael demonstrates a misrepresentation, then because he moved for relief within one year of the judgment, he is entitled to have the judgment set aside. If the judgment is set aside, there is no estoppel or res judicata effect from it.

In other words, when a party prevails in its Rule 1.540 motion, the court vacates the final judgment. *See, e.g., In Re Adoption of a Minor Child,* 593 So. 2d 185, 190 (Fla. 1991). Obviously, such a vacated judgment has no res judicata effect (if simply because a judgment had been entered meant its res judicata effect were unassailable, there would be no need for Rule 1.540).

Cathy's contention that Michael obtained the test without her acquiescence is wrong (AB 13). Cathy had told Michael that if he did not believe her that M. was his child, he could check it (IB 2). There is no suggestion in the record she ever withdrew her assent to Michael checking it.[6]

To the extent Cathy states the results of the paternity tests were not admitted into evidence, that is a result of the master's error in not holding Michael had proven a misrepresentation by Cathy (see 746 So. 2d at 526). Cathy's brief before this Court does not challenge the accuracy of those test results. It would be a simple matter to run this test again (a cotton swab in the mouth).

Much of Cathy's argument boils down to "you should have caught me lying sooner." That Michael, because of her sister's comments, may have thought Cathy was untruthful about previously being married is unrelated to the direct question he asked her on whether the child was his child (AB 16). There was no evidence then that Cathy had been untruthful about any aspect of her relationship with Michael. She asks this Court to hold that a husband cannot believe his wife when he asks a direct question as to the parentage of a

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[6] Cathy cites to her counsel's question to her about a $475 cost for the testing (AB 16-17, citing R V3/145). Michael actually testified that he originally had been quoted $800 to $900 for the test (R V3/40, 167). The final judgment of dissolution saddled Michael with substantial debts to pay, in addition to the child support of over $8,000 per year (R V1/149, 151). Cathy apparently asks this Court to rule that a man who cannot afford to have testing done should be required to pay fifteen years of unwarranted child support.

child, and she provides an unequivocal answer. Cathy asks this Court to reward concealment and misrepresentation.

"A recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him." *Besett v. Basnett*, 389 So. 2d 995, 998 (Fla. 1980). Michael was entitled to rely on Cathy's affirmative statement that he was the father of the child, and did not have to further investigate it.

Since her brief, Cathy has filed as supplemental authority, *Florida Department of Revenue v. M.L.S.,* 25 Fla. L. Weekly D438 (Fla. 2d DCA February 18, 2000). This case supports Michael's position. In *M.L.S.,* the parties were not married and the man had signed the child's birth certificate. After a hearing, the trial court entered a final order requiring the man to pay child support. There was no indication "that the issue of paternity was challenged or otherwise litigated at that hearing." When the man later challenged paternity after obtaining a blood test (over 10 years later), the Second District held res judicata did not apply because

there was no evidence that the matter was formerly adjudicated.[7]

M.L.S. made other comments apropos to Michael's case. The court noted the man no longer maintained a relationship with the child (nor does Michael). The court stated it was unable to conclude the child's best interest would be better served by receiving child support from a party who is not her father, than by learning the identity of her father. The court noted that if the appellee was no longer required to pay support, the child's mother will have an incentive to locate the child's father "and perhaps the child will have the opportunity to develop a meaningful relationship with him." 25 Fla. L. Weekly at D439.

This highlights another issue in this case. By her actions, Cathy has not only deprived the child of a relationship with her father, she has also deprived the father of a relationship with his child. And the father has been deprived of a relationship with his daughter without any notice to him.

Cathy misplaces her attempted reliance on *DeClaire v. Yohanan,* 453 So. 2d 375 (Fla. 1984). *DeClaire* addressed a party's attempt

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[7] Citing *State of Wisconsin v. Martorella,* 670 So. 2d 1161 (Fla. 4th DCA 1996). Michael's situation presents a stronger case. First, Michael was affirmatively misled by Cathy. Second, the order in Michael's case, like in the one in *M.L.S.,* merely recites that the parties have one child. There is no suggestion the issue of paternity "was challenged or otherwise litigated" (R V1/147). Cathy's brief states "the issues of paternity and child support were **not** litigated during the dissolution proceedings" (AB 8, emphasis added).

to attack a final judgment entered three years earlier. 453 So. 2d at 376. The opinion discussed the differences between extrinsic and intrinsic fraud, and when judgments could be challenged within one year or with no time limit. 453 So. 2d at 376-379. For Michael, the difference in intrinsic and extrinsic fraud is irrelevant. He moved within one year of the final judgment. This Court recognized that for issues a party could have addressed in the trial court proceeding, the party has one year after the judgment to attack the result based on fraud. 453 So. 2d at 380.

Thus, regardless of how this Court comes out on the application of *Daniel* and *DeRico,* Michael established he was entitled to relief under Rule 1.540. Cathy's response to his direct question was not truthful. He did not ask for her subjective belief. When she said "yes" he was the father instead of "I don't know," she made a misrepresentation that entitled him to relief from the judgment.

At the current rate of monetary child support (not including other expenses for medical, dental and life insurance), Michael is paying over $8,000 a year and will pay over $130,000 of support for a child that is not his (R V1/149). Michael moved in a timely manner to correct this injustice. He should be granted relief from the child support order for a child that is not his.[8]

[8] Viewed as a periodic or total sum, these are substantial amounts to Michael, who is a city police officer (R V1/33, 65).

B. *Daniel* should control here.

As Michael discussed in his initial brief, his facts are much stronger for application of *Daniel* than are the facts in *DeRico* (IB 10-13). Cathy recognizes this, admitting that if *DeRico* is the law, the child support order must be reversed (AB 9, 11).

Not only does Michael's case present a stronger case than the facts of *DeRico,* in many ways his is a stronger case than *Daniel*. In *Daniel* when the husband married the wife, he knew she was pregnant with the child of another man. 695 So. 2d at 1254. This Court held that, even so, he was not required to pay child support for that child when the couple divorced. Here Michael was misled into believing that Cathy was pregnant with his child. Michael should not be worse off than Mr. Daniel, simply because Michael was lied to. Being the victim of such a misrepresentation should place Michael in a stronger position.

In *Daniel,* this Court's unanimous decision said that *Privette*'s[9] application "is limited to those instances where a child faces the threat of being declared illegitimate, and the 'legal father' also faces the threat of losing parental rights which he seeks to maintain." 695 So. 2d at 1255. What Cathy really urges here is not a limitation of *Daniel,* but for this Court to reverse *Daniel* and greatly expand the ruling in *Privette*. Cathy's brief never mentions *Privette*; the Solicitor General's brief does.

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[9]*Department of Health and Rehabilitative Services v. Privette,* 617 So. 2d 305 (Fla. 1993).

Michael and Cathy's case is **not** a *Privette* case. Under *Daniel*, the child will remain legitimate. Also, unlike *Privette*, the "legal father" (husband) does not face the threat of losing parental rights that he seeks to maintain.

As the Solicitor General's brief suggests, there may be a variety of fact situations that implicate different applications of *Daniel*. At one extreme is the husband who is repeatedly told the child is his, including in response to a direct inquiry during the dissolution suit, and this turns out to be a misrepresentation. This is Michael's situation.

Strong arguments exist that there should not be a one-year time limit for an ex-husband to challenge the child support obligation once he learns the truth. This Court need not decide that issue here because Michael did move within the one-year period in Rule 1.540. Thus, much of the Solicitor General's brief, such as the discussion of intrinsic or extrinsic fraud, is not relevant to the facts of this case, as it acknowledges (SG 18).

The Solicitor General specifically notes it is not taking a position on the merits of Michael's contention that the evidence before the trial court was sufficient to entitle him to relief from the final judgment (SG 18-19).

The Solicitor General recognizes that legislative action may be required to resolve some questions (SG 21). Of course, that is not a reason for Florida courts to refuse to apply the logic of *Daniel,* pending some action by the legislature.

Beyond noting that it takes no position on one determinative issue in Michael's case, the Solicitor General's brief is largely an academic discussion that does not apply to the facts here. Michael notes that even in the historical perspective at SG 5-7, it is apparent the once nearly irrebuttable presumption that a child born during a marriage is the child of the husband, is clearly no longer the law after *Daniel*. The other cases the Solicitor General cites for its historical perspective all predate *Daniel*.

To the extent the Solicitor General focuses on the welfare of the child, *Daniel* directs that it is not proper to impose such a financial burden on a husband who is not the father of the child. This financial focus (which is the sole motivation for Cathy's position) ignores that the best interests of the child include receiving support from the party who is her father and "the opportunity to develop a meaningful relationship with him." *M.L.S., supra* (as noted, Michael has not seen the child since learning she was not his)(R V3/42).

Following the *DeRico* dissent would raise serious public policy issues as to notice to the child's father -- who has been deprived of the opportunity to have a relationship with his child, or even to be heard on the subject.

The remainder of the Solicitor General's argument and Cathy's argument rely either on cases that predate *Daniel,* or on the dissent in *DeRico.* Michael has already addressed the problems with the *DeRico* dissent, which concluded with Judge Harris's acknowledgment that the result he was urging as to making the

husband pay for one of the children "appears grossly unfair." 714 So. 2d at 626, n. 5 (IB 11-14).

Michael's case does not present the issue of how *Daniel* should be applied beyond a one-year period after the dissolution judgment. After Cathy interfered with Michael's visitation rights, Michael learned through the DNA test that the child was not his child, and that Cathy had lied to him when she unequivocally said the child was his. Michael then moved promptly to set aside the child support obligation. Michael should not be subjected to in excess of $150,000 in child-related support costs (R V1/149-150). Cathy should seek those sums from the father of the child, and permit the child to establish a meaningful relationship with the father.

CONCLUSION

Michael Anderson requests this Court reverse the opinion of the Second District and remand for entry of a judgment in his favor (including repayment of support payments he made since filing his petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to: THOMAS D. CASPER, ESQ., One Urban Centre, 4830 W. Kennedy Boulevard, Suite 750, Tampa, Florida 33609, Attorney for Respondent; and THOMAS E. WARNER, ESQ., and T. KENT WETHERELL, II, ESQ., Attorney General's Office, The Capitol - PL-01, Tallahassee, Florida 32399, Attorneys for Solicitor General Amicus Curiae, this 5th day of April, 2000.

Attorney