SUPREME COURT OF FLORIDA

CASE NO.: SC 05-2346

Lower Tribunal No.: 4D04-1266

RICHARD EDWARD PARKER,

Petitioner,

vs.

MARGARET J. PARKER,

Respondent.
_____/

INITIAL BRIEF ON BEHALF OF APPELLANT , RICHARD EDWARD PARKER

SCOTT A. LAZAR
KOLTUN & LAZAR, P.A.
7000 S.W. 97th Avenue, Suite 210
Miami, Florida 33173
(305) 595-6791

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STATEMENT OF THE CASE AND FACTS

On December 6, 2001, Judge Renee Goldenberg entered a Final Judgment of Dissolution of Marriage in Case No.: 01-9563 (36/93) which incorporated a Revised Marital Settlement Agreement which acknowledged the Appellant as the father of the one minor child and determined Appellant's child support obligation. On June 16, 2003, the Appellant filed his "Petition for Relief Based on Fraud" as a new filing in the Family Division of the Seventeenth Judicial Circuit in and for Broward County, Florida. The filing was assigned Case No.:03-012239 (07). In said petition, the Appellant alleged the following pertinent facts:

1. That this is an action for damages in excess of $15,000, exclusive of interest, attorney's fees and costs, and within the jurisdiction of this Court.
5. On December 6, 2001, this Honorable Court entered a Final Judgment of Dissolution of Marriage.
7. That at all times during the original dissolution of marriage proceeding and in subsequent post judgment proceedings, the Respondent has represented to the Court and the Petitioner that the Petitioner was the biological father of the minor child, MASON PARKER.
8. At the time of entering into the Revised Marital Settlement Agreement, the Petitioner had no reason to suspect that he was not the biological father of the minor child, MASON PARKER, who was born on June 10, 1998, since the Respondent, MARGARET PARKER, has at all times material hereto, represented that the Petitioner was the biological father of MASON PARKER.
10. That since the entry of the Final Judgment of Dissolution of Marriage incorporating the parties Revised Marital Settlement

Agreement, the Petitioner has for the first time discovered that he is not the biological father of the minor child, MASON PARKER, and that the Respondent at all times material hereto knew that the Petitioner, RICHARD EDWARD PARKER, was not the minor child's biological father and perpetrated a fraud upon the Petitioner and this Court by not disclosing same.

13. When the parties entered into the Revised Marital Settlement Agreement on December 5, 2001, the Petitioner had no reason to question paternity since the Respondent, MARGARET PARKER, represented that the Petitioner, RICHARD EDWARD PARKER, was the biological father of the minor child, MASON PARKER.

14. Respondent, MARGARET PARKER, has continuously defrauded this Court and the Petitioner by intentionally making a false statement that the Petitioner, RICHARD EDWARD PARKER, was the biological father of the minor child, MASON PARKER.

16. That at all times material hereto, the Respondent, MARGARET PARKER, had the requisite knowledge that the Petitioner, RICHARD EDWARD PARKER, was not the biological father of the minor child, MASON PARKER, due to sexual relations she had with another man, but nevertheless, continued to lead this Court and the Petitioner to believe that Petitioner was the biological father of MASON PARKER.

17. The Respondent, MARGARET PARKER, at all times material hereto, purposefully concealed the fact that the Petitioner, RICHARD EDWARD PARKER, was not the biological father of the minor child, MASON PARKER, during the original dissolution proceedings and in subsequent post dissolution proceedings in order to induce the Petitioner to acquiesce and rely on said information so as to gain an unfair advantage and collect child support monies from the Petitioner.

18. That as a result of the Petitioner, RICHARD EDWARD PARKER'S, reliance on the Respondent, MARGARET PARKER'S, fraudulent representation that the Petitioner, RICHARD EDWARD PARKER, was the biological father of MASON PARKER, the Petitioner sustained injury as more fully set forth hereafter.

19. That as a direct and proximate result of the Respondent, MARGARET PARKER'S, fraudulent conduct wherein she represented that the Petitioner, RICHARD EDWARD PARKER, was the biological father of MASON PARKER, the Petitioner, RICHARD EDWARD PARKER, was the biological father of MASON PARKER, the Petitioner has sustained damages, to wit: child support payments in the amount of $1,200.00 per month from the time of the final judgment until the present, future money damages as a result of the final judgment entered in the original dissolution of marriage proceeding, as well as, attorney's fees and costs.

WHEREFORE, the Petitioner demands compensatory damages from the Respondent, attorney's fees and costs, and any other relief that this Honorable Court deems just and proper.

On August 7, 2003, the Appellee filed a Motion to Dismiss under the new case number.

Somehow, a notice of hearing was signed by Judge Goldenberg under the original dissolution of marriage case number which scheduled a January 27, 2004 hearing on Appellee's Motion to Dismiss. On January 27, 2004, Judge Goldenberg entered a "Final Order Dismissing Case Without Prejudice" on Former Husband's Petition for Relief Based on Fraud. (R2: 333) The order simply read "Former Wife's Motion to Dismiss granted." The order was entered under the case number for the Original Dissolution of Marriage file.

On January 28, 2004, Former Husband served his Motion for Re-Hearing and/or Clarification of Former Wife's Motion to Dismiss Former Husband's

Petition for Relief Based on Fraud. (R2: 334-336) In said motion, Former Husband explained that his was an independent action for relief based on Rule 1.540 and that the Petition is "essentially an action for civil damages for fraud to offset the requirements of the Dissolution of Marriage Final Judgment." In addition, the Former Husband pointed out that the Order as written was not a final order. On March 1, 2004, Judge Goldenberg entered an Order which denied the rehearing. (R2: 337-338)

On March 26, 2004, the Former Husband filed his Notice of Appeal of the January 27, 2004 Order and March 1, 2004 Order. (R2: 351-354) On June 21, 2004, Appellant filed his Initial Brief. On August 11, 2004, the Fourth District Court of Appeal relinquished jurisdiction to the trial court to enter a final order. On November 4, 2004, Judge Goldenberg entered a "Final Order on Former Husband's Motion for Entry of Final Judgment. Said Order provided as follows:

> 2. Former Husband's Petition for Relief Based on Fraud filed under case number 03-012239 is hereby dismissed with prejudice for failure to file said Petition within one year of the entry of the Final Judgment.
> 3. That this order hereby supercedes this Court's final order dismissing case without prejudice entered on January 27, 2004.

On November 30, 2005, the Fourth District Court of Appeal issued its opinion which affirmed the Trial Court's ruling. In its opinion, the Fourth District

certified conflict with the First District's opinion in M.A.F. v. G.L.K., 573 So. 2d 862 (Fla. 1st DCA 1990). The Appellant served his Notice to Invoke Discretionary Jurisdiction on December 22, 2005.

JURISDICTION

This Court should invoke its discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv) of the Rules of Appellate Procedure. In Parker v. Parker, 916 So. 2d 926 (Fla 4th DCA 2005), the Court wrote "[w]e adhere to that view and certify conflict with the first district's decision in *M.A.F.*"[1] These two opinions address the direct issue of whether the Wife's concealment from the Husband that he is not the biological father of the child constitutes extrinsic fraud which would entitle the Husband to relief from the Final Judgment pursuant to Rule 1.540 of the Florida Rules of Civil Procedure.

Furthermore, as Justice Pariente addressed in her concurring opinion in D.F. v. Dept. of Revenue, 823 So. 2d 97 (Fla. 2002) and in her dissenting opinion in Anderson v. Anderson, 845 So. 2d 870 (Fla. 2003), this area of the law involving the rights and responsibilities of biological and non-biological parents will continue to repeat itself and it is highly likely this Court will be faced with the same exact issues again and again as DNA testing continues to become more and more

[1]Referring to M.A.F. v. G.L.K., 573 So. 2d 862 (Fla. 1st DCA 1990).

prevalent. In its opinion, the Fourth District noted "the instant case presents a question which can be expected to recur with increasing frequency." Parker v. Parker, 916 So. 2d 926, 928 (Fla. 4th DCA 2005) While the previous Supreme Court opinions have discussed the applicability of Rule 1.540 in general, no decision of the Supreme Court has specifically addressed whether affirmative misrepresentations of parentage and/or non-participation as to the issue of parentage constitute extrinsic fraud for the purpose of Rule 1.540 relief.

STANDARD OF REVIEW

In reviewing an order granting a motion to dismiss, the Court should apply the *de novo* standard of review. Lopez-Infante v. Union Central Life Ins. Co., 809 So. 2d 13 (Fla. 3rd DCA 2002). In ruling on a motion to dismiss, courts are limited to the four corners of the complaint, must accept the allegations as true, and may not speculate as to what facts may ultimately be proven at trial. Id.

SUMMARY OF ARGUMENT

Continued misrepresentations as to the paternity of a child and failure to disclose an extra marital affair during the pendency of a dissolution of marriage action constitute extrinsic fraud which permits a party to seek relief from a judgment more than one year after the final judgment was entered. It is a legal fiction to suggest that simply because a Marital Settlement Agreement or divorce petition

addresses the children born in a marriage, that this is a litigated issue about which the parties present evidence and/or contest. It is the exception, rather than the rule, where a party will challenge the issue of parentage in a dissolution of marriage action. Unless the party is aware of an extra marital affair, there is no reason why a father would challenge the parentage of a child born during the marriage during a dissolution of marriage action. If this Court determines that the allegations of the within Petition for Relief only constitute intrinsic fraud, fathers in every dissolution of marriage action will be faced with the Hobson's choice of potentially damaging existing father-child relationships which they should have no reason to doubt by being forced to submit the children to DNA testing or potentially paying child support to a woman he is divorcing for a child, that unbeknownst to the father, is not biologically his.

Alternatively, this Court can also reverse the orders dismissing the Petition without prejudice and allowing it to remain as solely a civil action based in fraud. The Petition filed by the Husband states all of the material elements of a cause of action for fraud and actually seeks compensatory damages in the form of the child support which the Final Judgment requires.

ARGUMENT

I. In a dissolution of marriage proceeding where the Wife misrepresents to the Husband that the child was his or fails to disclose to the Husband that

the child is not his, such actions on the part of the Wife constitute extrinsic fraud and entitles the Husband to relief from the Final Judgment even if filed more than one year after the entry of same.

During the course of the underlying dissolution of marriage proceedings, the Appellee Wife, committed extrinsic fraud which deprived the Appellant Husband from participating on the issue of rights and responsibilities of a minor child born during the time of the marriage. Under the applicable provision of Rule 1.540 of the Civil Rules of Procedure, the Appellant Husband is entitled to relief from the Final Judgment of Dissolution of Marriage based on the Appellee Wife's actions.

"[A] final judgment of dissolution of marriage which establishes a child support obligation for a former husband is a final determination of paternity. Any subsequent challenge of paternity must be brought under the provisions of Florida Rule of Civil Procedure 1.540." D.F. v. Dept of Revenue, 823 So. 2d 97, 100 (Fla. 2002)

In pertinent part, Rule 1.540(b) of the Florida Rules of Civil Procedure provides:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

This particular rule was thoroughly analyzed by this Court in DeClaire v. Yohanan,

453 So. 2d 375 (Fla. 1984).

In DeClaire, this Court held that "only extrinsic fraud may constitute fraud on the court." Id. at 377. The Court then went on to analyze the difference between extrinsic fraud and intrinsic fraud. The Court referenced United States v. Throckmorton, 98 U.S. 61 (1878) in defining extrinsic fraud as:

> Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side– these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. Id.

This Court then commented that it had previously defined extrinsic fraud in Fair v. Tampa Electric Co., 158 Fla. 15 (1946) as the

> prevention of an unsuccessful party [from] presenting his case, by fraud or deception practiced by his adversary; keeping the opponent away from court; falsely promising a compromise; ignorance of the adversary about the existence of the suit or acts of the plaintiff; fraudulent representation of a party without his consent and connivance in his defeat; and so on. Id.

In summary this Court held "extrinsic fraud occurs where a defendant has somehow been prevented from participating in a cause." Id.

With respect to intrinsic fraud, the Court held that intrinsic fraud "applies to fraudulent 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 went on to reiterate its holding in Johnson v. Wells, 72 Fla. 290 (1916) that

> [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. DeClaire, at 377.

The question for this Court then becomes whether it can truly say that the Husband in a dissolution of marriage action actually participates in litigating the issue of parentage simply because provisions are made for a child born during the marriage in a marital settlement agreement. If this Court answers "Yes" to that question, it will have major ramifications in all dissolution of marriage actions to come.

This issue was analyzed by the First District in M.A.F. v. G.L.K., 573 So. 2d 862 (Fla 1st DCA 1990). In M.A.F., the Wife first disclosed that the Husband was not the father of the three children born during the marriage four years after the

dissolution of marriage. Id. at 863. The record contained substantial evidence that the Husband had no doubts about being the children's father at the time of the dissolution of marriage proceedings.

In determining that the conduct of the Wife constituted extrinsic fraud, the First District held

> A husband is entitled to presume he is the father of his wife's children. A husband has no affirmative duty in a divorce proceeding to question the virtue of his wife and the legitimacy of his children absent a sound basis to doubt otherwise. We therefore hold that when a wife knows that her husband is not the father of her children, and the husband does not know, concealment of that knowledge in a divorce proceeding involving child support is extrinsic fraud upon the court. The husband's petition was not barred by the doctrine of res judicata or the one year limitation of actions provision of Florida Rule of Civil Procedure 1.540(b). Id.

As Justice Pariente pointed out in her dissent in Anderson v. Anderson[2], 845 So. 2d 870 (Fla. 2003), "a father should be able to rely on the unequivocal, affirmative representations of his wife that he is the father of her child, and should not be obligated to request DNA testing during the divorce action to disprove this presumed fact." Id. at 873.

[2]Although this case deals with the setting aside of a Final Judgment due to alleged misrepresentations of the Wife as to paternity, the facts of Anderson are inapplicable to the case at bar. In Anderson, the Husband brought his motion to set aside within one year which meant he could establish intrinsic or extrinsic fraud. The Husband was denied relief because he did not prove a factual basis for his claim as there was evidence he could have known of the misrepresentation during the divorce proceeding.

In the case at bar, the Husband has alleged that the Wife affirmatively represented to him that he was the father of the child, that he had absolutely no basis to know that the child was not his, that the Wife knew during the dissolution of marriage proceedings that he was not the father, and that the Husband only learned the truth after the Final Judgment of Dissolution was entered. There is absolutely no reason for the Husband to "participate" in litigation about the parentage of the minor child if there was absolutely no basis to suspect that the minor child was not his. Accordingly, this Court must determine that the facts as alleged in the Husband's Petition constitute extrinsic fraud and permit the Husband to have a full trial on the merits of his claim.

To hold otherwise would make a DNA request in a dissolution of marriage proceeding the rule rather than the exception it should be. Every attorney will have to advise a male client that if they don't challenge paternity and obtain an official determination during the dissolution of marriage action that the client may be stuck paying child support for a child that may not be his. Instead of simply vacating a minority of final judgments where this situation is discovered, this Court would be damaging the majority of father-child relationships if the Father is forced, for legal reasons, to subject children which he has no reason to believe are not his to DNA testing. As the Fourth District noted in its decision in this matter, "[w]hile this view

appears a bit extreme, there may be some merit in telling divorcing fathers who are in doubt to 'test now, or forever hold your peace.'" Parker v. Parker, 916 So. 2d 926 (Fla. 4th DCA 2005). Unfortunately, if this Court determines that the allegations in the subject Petition do not constitute extrinsic fraud, the advice will not be limited to "divorcing fathers who are in doubt." As Justice Pariente also pointed out, "[u]nless this Court establishes as an unequivocal rule that there must be a DNA test in every dissolution of marriage proceeding, which the Court has yet to mandate, I would conclude that a husband who asks his wife a direct question as to the child's paternity has the right to rely on the affirmative response of his wife that he is the child's father." Anderson, at 873.

In Gordon v. Gordon, 625 So. 2d 59 (Fla. 4th DCA 1993), the Fourth District further defined the type of matter which was subject to extrinsic fraud.

> If one could distill the common element from all of these examples, it appears to be intentional and voluntary conduct by one party to litigation that causes the adverse party involuntarily to acquiesce in or accept without protest a final result in the action. This result is achieved in such a way that the adverse party does not present that party's claim or defense to a court for a resolution. The means used to achieve that acquiescence or acceptance are not as important as is the purpose for which the means are employed–i.e., the deliberate interruption of the free participation by the adverse party in the decision-making process. Id. at 62.

Most fathers "accept without protest" that a child born during the marriage is their child. By making knowing misrepresentations about the true parentage of the child, the Wife caused the Appellant to "acquiesce in or accept without protest" the fact that the minor child was his by inducing him to pay child support for a child that was not his. If the Husband had any reason to suspect that he was not the father of the minor child, he would not have entered into an agreement which obligates him to pay child support.

II. Alternatively, this Court should reinstate the Petition as a civil action for fraud.

If this Court determines that the allegations of the Husband's Petition only constitute intrinsic fraud, this Court can still afford the Husband relief by reversing the lower courts' rulings and permitting the Petition to go forward as a civil action for fraud. The essential elements of a fraud claim are : (1) a false statement concerning a specific material fact; (2) the maker's knowledge that the representation is false; (3) an intention that the representation induces another's reliance; and (4) consequent injury by the other party acting in reliance on the representation." Lopez-Infante v. Union Central Life Insurance Co., 809 So. 2d 13, 15 (Fla. 3rd DCA 2002) In looking at the independent action filed by the Husband, the Husband alleges all necessary elements to establish a civil action for fraud. In

fact, the Petition contains damage allegations and a wherefore clause which would be found in a typical civil complaint for fraud. As noted earlier, the Petition states:

> 19. That as a direct and proximate result of the Respondent, MARGARET PARKER'S, fraudulent conduct wherein she represented that the Petitioner, RICHARD EDWARD PARKER, was the biological father of MASON PARKER, the Petitioner, RICHARD EDWARD PARKER, was the biological father of MASON PARKER, the Petitioner has sustained damages, to wit: child support payments in the amount of $1,200.00 per month from the time of the final judgment until the present, future money damages as a result of the final judgment entered in the original dissolution of marriage proceeding, as well as, attorney's fees and costs.
>
> WHEREFORE, the Petitioner demands compensatory damages from the Respondent, attorney's fees and costs, and any other relief that this Honorable Court deems just and proper.

"It is well settled that a complaint should not be dismissed with prejudice if it supports a cause of action on any ground." Drakeford v. Barnett Bank of Tampa, 694 So. 2d 822, 824 (Fla. 2nd DCA 1997) "Dismissal of a complaint with prejudice is a severe sanction which should only be granted when the pleader has failed to state a cause of action and it conclusively appears that there is no possible way to amend the complaint in order to state a cause of action." Id.

By allowing the Husband to continue with a civil action for fraud, the Court can provide monetary relief to the Husband if he prevails in such an action. Since the Final Judgment of Dissolution of Marriage would still be in force, the Husband

would conceivably still be required to make child support payments even if he was entitled to a separate monetary judgment against the Wife for repayment. In addition, the child would not lose the benefit of the Husband retaining his rights as a parent.

CONCLUSION

Appellant's independent action, as filed, properly states a claim for extrinsic fraud which occurred during the dissolution of marriage action, and accordingly is proper under Rule 1.540. This Court should reverse the lower courts' rulings which dismissed said claim without prejudice and allow the Husband to proceed to establish the merits of his petition. In the alternative, this Court can also reverse the lower courts' rulings and allow the action to proceed as a civil action for fraud while maintaining the finality of the Final Judgment of Dissolution of Marriage.

Respectfully submitted,

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SCOTT A. LAZAR
Koltun & Lazar, P.A.
7000 S.W. 97th Ave., Suite 210
Miami, Florida 33173
(305) 595-6791
Florida Bar No.: 987506

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed on March 2, 2006 to: Margaret J. Parker, 11260 Heron Bay Blvd., #1616, Coral Springs, FL 33076.

_____
Scott A. Lazar
Fla. Bar No.: 987506

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant, Richard Parker, certifies that said brief is in full compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, in that the size and type style used is Times New Roman 14 point font.

KOLTUN & LAZAR, P.A.
Attorneys for Appellant
7000 S.W. 97th Ave., Suite 210
Miami, Florida 33173
(305) 595-6791

_____
SCOTT A. LAZAR
Fla. Bar No.: 987506

APPENDIX

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