IN THE SUPREME COURT OF THE STATE OF FLORIDA

Supreme Court Case No.
District Court Case No. 2D03-478; 2D03-2355 (Consolidated)
Florida Bar No. 283975
On Discretionary Review of a Question Certified by the District Court of Appeal

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HOWARD MOSS,
Petitioner

vs.

PATRICIA L. MOSS,
Respondent

PETITIONER'S JURISDICTIONAL BRIEF

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INTRODUCTION

The Petitioner, HOWARD MOSS, was the Appellant in the District Court of Appeal, Second District. The Respondent, PATRICIA MOSS, was the Appellee. The parties shall be referred to herein as "the Husband" and "the Wife." References to the Appendix shall be indicated by the abbreviation "App." All emphasis herein is supplied unless otherwise noted.

JURISDICTIONAL STATEMENT

The Petitioner/Husband seeks the discretionary review of this Court upon the following question certified as one of great public importance by the Second District Court of Appeal: "May the parties, by an express provision in a prenuptial agreement, contract away a future obligation to pay attorney's fees and costs during the term of the marriage by providing for prevailing party attorney's fees in actions seeking to enforce or prevent the breach of the prenuptial contract?"

STATEMENT OF FACTS

The facts which appear in the opinion of the Second District herein are relatively simple: the trial court awarded attorney's fees to the Wife and denied the Husband's request for such an award, the latter of which had been premised upon the provisions of §57.105, Florida Statutes, and the terms of the parties' Prenuptial Agreement. The District Court held, "we affirm the denial of the Husband's request for attorney's fees under section 57.105, Florida Statutes (2002), finding

that this issue is controlled by our recent decision in ***Lashkajani v. Lashkajani***, 855 So.2d 87 (Fla. 2d DCA 2003), review granted, 879 So.2d 622 (Fla. 2004)." (App. 1).[1]

SUMMARY OF THE ARGUMENT

The Husband submits that the issue raised by this case is truly one of great public importance. As Florida law presently stands, a spouse is wholly free to challenge the validity or seek "interpretation" of the provisions of a prenuptial agreement and, regardless of the lack of merit of such an action or even the trial court's subsequent determination that the agreement was fully valid and enforceable, he or she is nevertheless assured of receiving an award of fees for his or her attorney's fruitless efforts simply upon a showing that the other spouse has a

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[1] The issue determined by the Second District in *Lashkajani, supra*., was whether the parties to a prenuptial agreement could validly contract for the future award of "prevailing party" attorney's fees in the event that either party was required "to enforce or prevent the breach of the prenuptial agreement." Therein the District Court held, "It is well settled in Florida that a spouse's obligation to provide spousal support during the marriage, including the responsibility for attorney's fees and costs, may not be contracted away by a prenuptial agreement. Belcher v. Belcher, 271 So.2d 7, 13 (Fla.1972); Fernandez v. Fernandez, 710 So.2d 223, 225 (Fla. 2d DCA 1998); Blanton v. Blanton, 654 So.2d 1240, 1240 (Fla. 2d DCA 1995); Lawhon v. Lawhon, 583 So.2d 776, 777 (Fla. 2d DCA 1991). Thus, a provision of a prenuptial agreement purporting to waive the spouse's obligation to pay attorney's fees and costs incurred during the marriage is unenforceable." Although the question certified in *Lashkajani* is identical to that certified herein, the issue in this case is different because here - as the opinion recites - the District Court applied the foregoing rationale both to a request for fees pursuant to the express terms of the parties' prenuptial agreement and *to a request for attorney's fees pursuant to §57.105, Florida Statutes.*

greater "ability to pay." We submit that this particular circumstance is contrary to the public policy of the State of Florida that, "the general rule is that competent parties shall have the utmost liberty of contracting and their agreements voluntarily and fairly made will be upheld and sustained by the courts." *See, e.g.*, ***Pierce v. Isaac***, 134 Fla. 666, 184 So. 509 (1938). Our public policy further recognizes the benefit of settlements and, given that a prenuptial agreement is nothing more than a settlement in advance of potential future litigation, "the preference for settlements would be undermined if a contracting party could finance - with the funds of the party seeking to uphold the agreement - unsuccessful proceedings to undo such agreements simply by showing need and ability to pay." ***Spano v. Spano***, 698 So.2d 324 (Fla. 4th DCA 1997).[2]

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[2] In this regard we note that in ***Casto v. Casto***, 508 So.2d 330, 334 (Fla. 1987), this Court referred to the parties' agreement therein as a "settlement agreement" although it was actually a post-nuptial agreement, entered into one year prior to any litigation between the parties.

ARGUMENT

THE QUESTION CERTIFIED BY THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, IN THIS CASE IS OF GREAT PUBLIC IMPORTANCE AND SHOULD BE REVIEWED BY THIS COURT.

It is "black letter" law that marital contracts - *including prenuptial agreements* - are to be treated by the courts as they would any other contract. *See, e.g.*, ***Estate of Macarrell***, 254 So.2d 240, 241 (Fla. 4th DCA 1971) - ("an antenuptial agreement like any other contract is presumptively valid"); ***Wagner v. Wagner***, 885 So.2d 488, 492 (Fla. 1st DCA 2004) - ("a settlement agreement… entered into voluntarily after full disclosure and then ratified by a court, is a contract, subject to interpretation like any other contract"); ***Zakian v. Zakian***, 837 So.2d 549, 550 (Fla. 4th DCA 2003) - ("it is well settled that a marital settlement agreement is to be interpreted like any other contract and is construed as a matter of law"). It is also fundamental that our courts "will not interfere with the facility of contracting and free expression of the will and judgment of the parties by not allowing them to be the sole judge of the benefits to be derived from their bargains, provided there is no incompetency to contract, and the agreement violates no rule of law.'" ***Ryland v. Ryland***, 605 So.2d 138 (Fla. 4th DCA 1992). Given the foregoing, it seems a rather simple proposition that when a contract is found to be valid, *all* of its provisions should be enforceable. In other words, if a party freely and voluntarily decides to waive all attorney fees in a dissolution of marriage

action, there is no legal or public policy reason why he or she should not be held to the bargain made. After all, our law permits waivers in prenuptial agreements of far more significant rights such as spousal support, distribution of assets, homestead rights, the ability to modify support payments and so on. *See, e.g.*, ***City National Bank v. Tescher***, 578 So.2d 701 (Fla. 1991) - (waiver of homestead rights in prenuptial agreement); ***Mackaravitz v. Mackaravitz***, 710 So.2d 57 (Fla. 4th DCA 1998) - (waiver of any and all right to support payments in an antenuptial agreement); ***Porter v. Porter***, 593 So.2d 1120 (Fla. 4th DCA 1992) - (waiver of property rights in a prenuptial agreement precludes court from awarding equitable distribution).

We recognize that this Court is presently considering the foregoing issue in *Lashkajani, supra.* This case, however, appears to extend the rationale of *Lashkajani* - *i.e.*, that a spouse with the "ability to pay" cannot be relieved of his or her obligation to pay the fees incurred by the other spouse prior to the entry of a dissolution judgment - to include the statutory right of a party to litigation to seek the imposition of attorney's fees for frivolous litigation pursuant to §57.105, Florida Statutes. If so, then there is now absolutely no protection afforded under our law to a spouse who has been the victim of meritless, frivolous or spurious litigation regarding the validity, interpretation, construction or enforcement of a prenuptial agreement. Such should certainly *not* be either the law or the public

policy of the State of Florida and, therefore, the certified question raised herein is of great public importance and this Court should, accordingly, review this case.

CONCLUSION AND CERTIFICATE OF SERVICE

Based upon the foregoing argument and authority, the Husband respectfully submits that this Court should exercise its discretionary jurisdiction to review the instant case.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been furnished to counsel for the Respondent/Wife, Joseph R. Park, Esq., P.O. Box 1019, Clearwater, Florida 33757, this 12th day of April, 2005.

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STATEMENT OF COMPLIANCE WITH RULE 9.210(a)(2)

WE HEREBY CERTIFY that this Jurisdictional Brief has been prepared in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, using 14 point Times New Roman font.

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