

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. SC06-2003

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On Appeal from the Fourth Judicial District

Case No 4D06-1222

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JOSEPH MAZZIOTTI AND LOUIS MAZZIOTTI,  
Petitioners,

v.

PURE H2O BIO-TECHNOLOGIES.  
Respondent.

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**INITIAL JURISDICTIONAL BRIEF OF PETITIONERS**

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## Statement of the Case and of the Facts

In 2003, H2O filed adversary complaints against Joseph and Lou Mazziotti (“the Mazziottis”) in Bankruptcy Court in the Western District of Kentucky, seeking to prevent the discharge of a default judgment it had obtained against them in Broward Circuit Court in 2003.

The basis for H2O’s action in the Bankruptcy Court, as it had been in the Florida case, was its argument that the Mazziottis had fraudulently induced H2O to loan them money. As proof of that their payments to the Mazziottis were loans, H2O submitted to the Bankruptcy Court exhibits which were checks it had written to the Mazziottis and which purportedly displayed “loan” on the memo line. However, Mazziottis’ counsel obtained the issuing bank’s certified copies of those checks, showing they never had “loan” written on them.

When the Mazziottis filed a motion to dismiss the adversary proceeding, the Bankruptcy Court immediately suspended the proceeding to permit the Circuit Court to determine what action to take under Florida law.

In the original Circuit Court action, the Mazziottis ran out of financial resources and their attorney withdrew. At a hearing on damages, the Mazziottis had no representation, and the jury returned a verdict against them in the amount of \$839,619.50 for breach of contract, breach of fiduciary duty, fraud, and money

lent, and \$19,000 for civil theft. The \$19,000 judgment was trebled under Florida law for a total judgment of \$896,619.50.

The Mazziottis returned to the Circuit Court, seeking relief from judgment pursuant to Fla. R. Civ. P. 1.540(b)(5), on the basis that it was “no longer equitable that the judgment or decree should have prospective application.” Notably, H2O did not contest that it had fraudulently altered the checks. The Florida Circuit Court found the fraud significant: the change in the memo notation was crucial because “it alters what the check was for.” The Circuit Court granted the motion and vacated the damages judgment, holding that it had the “inherent authority to protect the integrity of its proceedings . . . to remedy the possibility that a fraud was committed . . . to ensure that justice is done.”

The Fourth District Court of Appeal reversed the Circuit Court, holding that Rule 1.540(b)(5) would not apply. Despite the evidence of H2O’s additional fraud since the 2003 judgment, the Fourth District held that “the fraud in this case is one that could have been discovered with the use of due diligence during the initial trial, and therefore does not constitute ‘significant new evidence or substantial changes in circumstances arising after the entry of the judgment.’” (Opinion, at 4). It held that the Mazziotti’s motion fell under subsection (b)(3) which provides for relief from judgment due to fraud and contains a one year time limitation. It also held that “subsection (b)(5) is mutually exclusive of subsections (b)(1)-(4).” *Id.*

The Fourth District's ruling is in direct conflict with that of the Third District in *Weitzman v. F.I.F. Consultants, Inc.*, 468 So.2d 1085 (Fla. 3<sup>d</sup> DCA 1985). The Third District held that when a party wrongfully and fraudulently attempts to use the judicial process to enforce an original judgment which it obtained by fraud, Rule 1.540(b)(5) permits the Court to vacate the original judgment regardless of the time which has passed since its entry. While the Fourth District provided that the Mazziottis' motion for relief for judgment should have been brought within one year of the original judgment, the Third District vacated a judgment in 1985 which had originally been entered in 1969. Unlike the Fourth District, the Third District did not find that subsection (b)(5) is mutually exclusive of subsections (b)(1)-(4), but instead found that later actions to use and abuse the judicial process to enforce a fraudulent judgment constitute an "archetypical example" of the purpose for the remedy provided by (b)(5).

The Mazziottis here seek discretionary review by this Court to resolve the conflict between the appellate districts.

#### Summary of Argument

This case presents the question of what remedy does a Florida court have against a party who habitually commits fraud, committing it not only in the past and thereby obtaining a fraudulent judgment, but committing it afterwards by abusing the judicial process to collect upon that judgment. According to the Third

District, the Court should apply Florida Rule 1.540(b)(5) because failure to do so would be “to reward a wrongdoer and penalize the victim.” The Fourth District disagrees. The Fourth District has held that the Court has no power to alter the underlying judgment in such circumstances. It has held that the fraud committed by the party in the original action means that the innocent party must bring its motion for relief from judgment within one year, even when the other party has abused the judicial process by engaging in subsequent fraud to collect upon that first judgment years later. The unintended result of the Fourth District’s decision is that the fraud committed by a party to obtain a judgment insulates the party from consequences of the subsequent fraud he commits more than one year later.

The narrow issue for this Court’s review is whether the provisions and the accompanying one year time period of subsections (b)(1) –(4) of Rule 1.540 trump subsection (b)(5), a more general provision based on equitable principles. The practical issue for the Florida courts is how the Florida courts should address litigants who routinely commit multiple acts of fraud in the courts. While the group of such litigants will, no doubt, be a small one, the issue they present for the Florida court system is a large one. For these reasons, the petitioners seek to have this Court resolve the conflict between the district appellate courts.

## Argument

### I. THIS COURT SHOULD HEAR THIS CASE TO RESOLVE THE CONFLICT BETWEEN THE APPELLATE DIVISIONS ON WHETHER RULE 1.540(B)(5) PREVENTS PARTIES FROM USING A FRAUDULENTLY OBTAINED JUDGMENT AS A VEHICLE FOR COMMITTING FURTHER FRAUDULENT ACTS.

This question of law is subject to *de novo* review by this Court. *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1241 (Fla. 2006).

The Third District has held that when a party attempts to use a judgment, which it obtained by fraud, in order to commit further wrongful fraudulent acts, Rule 1.540(b)(5) requires the Court vacate the original judgment. *Weitzman v. F.I.F. Consultants*, 468 So. 2d 1085 (Fla. 3<sup>rd</sup> DCA 1985). The Third District held that such a case presents an “archetypical example of the situation for which Fla. R. Civ. P. 1.540 was designed.” *Weitzman*, 468 So.2d at 1086. Weitzman had a judgment issued against him for failure to pay for stock. Weitzman later recovered \$89,703.03 in damages against Stein and others in federal district court in New York for the stock fraud they had perpetrated upon him which had resulted in the entry of the earlier judgment against him. Stein did not satisfy the New York federal judgment issued against him. Instead, he purchased the judgment against Weitzman for \$10,000. He then took steps to enforce the judgment in defense to Weitzman’s efforts to secure payment of his federal claim against Stein.

Weitzman filed a motion under Fla. R. Civ. P. 1.540(b)(5). The Court issued him relief from the judgment:

It starkly appears that a party, Stein, who has been held responsible in tort, indeed in fraud, for bringing about the entry of a judgment against the defendant, Weitzman, has himself acquired and is now seeking to enforce that very judgment against Weitzman. Such a state of affairs cannot be countenanced.

*Weitzman*, 468 So. 2d at 1086.

Like in *Weitzman*, this case appears to be a prime example of when Fla. R. Civ. P. 1.540(b)(5) should apply. Like Stein, H2O has abused and manipulated the judicial process, has committed fraud upon the original trial court, upon a subsequent court, upon the other party, and has engaged in duplicity since the judgment of 2003. As a result, the Circuit Court decided to relieve the Mazziottis from the damages judgment so that “justice is done.”

However, in contrast to the Third District, the Fourth District has held that Rule 1.540(b)(5) cannot apply to relieve the Mazziottis from judgment. It has refused to apply Rule 1.540(b)(5) even in light of the many additional acts of fraudulent conduct by H2O since the 2003 judgment was issued: Its submission of false documents to the Bankruptcy Court in an effort to enforce the 2003 judgment.

The conflict between the Districts means that parties who are victims of other parties’ attempts to enforce, through fraud, a judgment obtained against them by fraud, will find that in the Fourth District, two wrongs do make a right and the

wrongdoer will be allowed to enforce an invalid judgment. In contrast, in the Third District, because allowing the original judgment “to stand would serve impermissibly both to reward a wrongdoer and to penalize the victim of his misconduct,” *Weitzman*, at 1086, the original judgment will be vacated. It falls to this Court to establish uniformity and consistency in the law and to resolve the conflict.

II. THIS COURT SHOULD HEAR THIS CASE TO RESOLVE THE CONFLICT BETWEEN THE APPELLATE DIVISIONS AS TO WHETHER SUBSECTION (B)(5) IS MUTUALLY EXCLUSIVE OF SUBSECTIONS (B)(1)-(4).

This question of law is subject to *de novo* review by this Court. *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1241 (Fla. 2006).

In *Weitzman*, the party attempting to enforce the judgment had originally obtained that judgment through fraud, but also committed fraudulent acts to collect upon the judgment. The Third District ruled that Rule 1.540(b)(5) existed precisely for vacating the original judgment in such cases. It therefore did not find that subsection (b)(5) is mutually exclusive of subsections (b)(1)-(4).

The Third District’s interpretation agrees with federal law. Because Rule 1.540 is patterned on Federal Rule of Civil Procedure 60(b), Florida courts “look to the background of the federal rule and the construction given it by federal courts as authority for the correct interpretation of the Florida rule.” *Brown v. Brown*, 432

So.2d 704, 706-707 (Dist. Ct. App. Flor. 3<sup>rd</sup> Dist. 1983). Unlike the Florida rule, the federal rule also contains a provision in (b)(6) which provides for relief for “any other reason justifying relief from the operation of the judgment.” It is the Fed. R. Civ. P 60(b)(6) provision, *not* the (b)(5) prospective application provision, which has found to be exclusive with the other grounds for relief. “Clause (6) and the first five clauses are mutually exclusive and . . . relief cannot be had under clause (6) if it would have been available under the earlier clauses. This reading seems required by the language of the rule.” C. Wright and A. Miller, *Federal Practice and Procedure*, § 2864 at 362 (1995 & Supp. 2004). The (b)(5) provision of the federal rule continues to operate jointly and equally with the other first five grounds for relief.

Fed. R. Civ. P. 60(b)(6) has been determined to be exclusive due to the language of the rule, as (b)(6) provides for relief for “any *other* reason” (emphasis added). Notably, that exclusionary language is not found in either section (b)(5) of the federal or the Florida rule. If the drafters of the rule had wished to make Fla. R. Civ. P. 1.540(b)(5) exclusionary, they could have easily done so. If they had wished, they could have written the part providing relief to read that “*for reasons other than those set for in subparagraph (3)*, it is no longer equitable that the judgment or decree should have prospective application.” However, the rule does not contain such exclusionary language. Courts are required to interpret statutes by

their clear language and give effect to their plain meaning. *City of Miami Beach v. Galbut*, 626 So.2d 192 (Fla. 1993). The clear language of Rule 1.540 (b)(5) requires that the motion be brought within a “reasonable time” concerning the changed circumstances, not within a year of the original judgment.

In contrast with the Third District, the Fourth District has ruled that “subsection (b)(5) is mutually exclusive of subsections (b)(1)-(4). Opinion, at 4. The ruling by the Fourth District requires that courts stand by helplessly when parties engage in ongoing post-judgment duplicitous and fraudulent acts. Such a holding means that (b)(3) trumps (b)(5), giving it a priority unauthorized by the rule. Further, the holding has the perverse result that a party who commits fraud in the underlying judgment is given a carte blanche to commit further fraud, without end, after one year has passed from the original judgment. Such an interpretation is nonsensical and runs against the clear language of the rule.

In reaching its holding, the Fourth District relied upon the case of *Dep’t of Revenue ex re. Stephens v. Boswell*, 915 So. 2d 717, 722 (Fla. 5<sup>th</sup> DCA 2005). However, *Boswell* merely held that the facts at issue in that case did not merit relief under (b)(5), since no new matters had arisen after the judgment to qualify for relief. The Fourth District clearly believed otherwise, and felt that the Fifth District, too, believed the provisions of (b)(5) to be exclusionary from (b)(1)-(4). This Court must exercise its power of discretionary review to clarify the law

concerning the applicability of Rule 1.540(b)(5), and to address the clear conflict between the Third District and the Fourth District, a conflict which arguably has extended to include the Fifth District.

Conclusion

For the above stated reasons, the Mazziottis here seek that this Court exercise its powers of discretionary review and hear this case.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was served via U.S. first class mail, postage prepared upon the following this \_\_\_\_<sup>th</sup> day of October, 2006:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer Brief complies with Rule 9.210(a)(2), Fla. R. App. P., as it is typed with Times New Roman 14 point font in Microsoft Word.

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