SUPREME COURT OF FLORIDA

CASE NO. SC07-1518
L.T. Case No.: 3D05-2408

AURORA ROMERO,

Petitioner,

vs.

OSVALDO ROMERO,

Respondent.
_____/

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

_____

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The issue in this case is whether the failure of a husband to disclose the existence of marital stock options he owned on his financial affidavit, which he signed under penalties of perjury, constitutes actionable fraud under Rule 12.540, Florida Family Law Rules of Procedure, and supports the modification of the parties' settlement agreement, which was signed without discovery. All relevant facts are stated on the face of the district court's opinion:

> The parties were married in 1990, and separated in 1998. A petition for dissolution of marriage was filed on July 20, 1999. Months prior, the parties began negotiating how to divide their property and drafted a Marital Settlement Agreement ("MSA") in January 1999. In fact, the MSA ultimately signed by the parties contained substantially the same property division as the January draft. On July 6, 1999, the Former Wife signed the MSA. On July 20, 1999, the Former Husband signed the MSA and completed a financial affidavit. The Former Wife completed her financial affidavit on September 23, 1999, and the judgment of dissolution of marriage, which incorporated the MSA, was entered on September 27, 1999. (A-2)
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> Almost three years after the entry of the final judgment of dissolution, the Former Husband petitioned to modify his child support obligations. As a result of his petition, the Former Wife became aware that the Former Husband had exercised certain stock options, which caused substantial increases in the income he declared on his 2000 federal income tax returns. The Former Wife then filed a counter-petition seeking to increase child support. Subsequently, the Former Wife amended her

counter-petition to include a count seeking the imposition of a constructive trust, contending that the stock options and resulting stock were marital assets that the Former Husband failed to disclose on his financial affidavit and that she was entitled to a constructive trust on one-half of the options. Subsequently, both parties dismissed their actions seeking modification of child support and a hearing was held solely on the Former Wife's petition to impose a constructive trust. (A-3)

The stock options and resulting stock at issue were offered to the Former Husband when he obtained employment with Qtera corporation in March 1999. Specifically, the Former Husband received stock options to purchase 22,000 common shares of Qtera stock at ten (10) cents per share. These options were nontransferable and were contingent upon the Former Husband working at Qtera for one year. After one year of employment, twenty-five percent (25%) of the stock options would vest. The remaining stock options would vest 1/48th per month for the following forty-eight (48) months. Thus, at the time the final judgment of dissolution was entered, the Former Husband's stock options were non-vested and he owned no stock. (A 3-4)

* * *

At the hearing on her petition to impose a constructive trust, the Former Wife testified that she did not know the Former Husband had stock options in Qtera when she signed the MSA. She also testified that if she knew about the stock options, she "would have wanted half." She further testified that if awarded half the stock options, she would have exercised all the options and then immediately sold the stock, using the proceeds of the sale to reduce the mortgage on her home. In addition, the Former Wife offered expert testimony as to the value of the stock resulting from the options, although her own expert opined that in July of 1999, the non-vested stock options could not be valued. (A 4-5)

> The trial court ultimately concluded that the options were marital assets because they were awarded to the Former Husband because of his past qualifications and experience. As such, the trial court declared that the marital assets were subject to equitable distribution and adopted the valuations of the Former Wife's expert witness. Specifically, the trial court concluded that "the most equitable division in this case would be based on a pro-rata basis, based on the percentage of the amount of time the Former Husband worked during the marriage at QTERA over the total time at QTERA needed to exercise each stock option." (A-5)
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> * * *
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> . . . The trial court then calculated that "the total marital value of such options was $577,528.38 and that the Former Wife would be entitled, under the facts of this case, to one half (1/2) of that amount, or $288,764.19." The trial court reduced that sum by half the total cost of exercising the options and by the federal income taxes that the Former Wife would have paid at her tax rate on her share of the stock. Ultimately, the trial court concluded that the Former Husband was holding $197,856.92 in a constructive trust for the benefit of the Former Wife . . . (A 6-7)

On April 18, 2007, the Third District Court of Appeal entered its first 11-page opinion in this cause, reversing the trial court's judgment. See, *Romero v. Romero*, 2007 WL 1135608 (Fla. 3d DCA, April 18, 2007). The Former Wife filed for rehearing and subsequently, on May 23, 2007, without argument, the Third District Court of Appeal granted rehearing, withdrew its previous opinion, dated April 18, 2007, and issued the present opinion in its place. (A 1-12) The Former

Wife then timely filed a Notice to Invoke the Discretionary Jurisdiction of this Court after her Second Motion for Rehearing was denied on July 10, 2007.

SUMMARY OF ARGUMENT

POINT I. The decision of the Third District Court of Appeal below establishes a dangerous rule of law that a false financial affidavit filed by a party in a dissolution action does not allow for relief from a settlement agreement under Rule 12.540, Fla. Fam. Law Rules P., where the parties have not had mandatory disclosure or any formal discovery, contrary to this Court's specific pronouncements in *Macar v. Macar,* 803 So.2d 707 (Fla. 2001). By its ruling, the Third District Court of Appeal has effectively eliminated the ability of a party to rely on the correctness of the other party's financial affidavit for the purposes of entering into a settlement agreement without first requiring extensive and expensive discovery. More importantly, the protections afforded by Rule 12.540 regarding settlement agreements have been severely eroded, if not eliminated, by the Third District Court of Appeal's decision.

POINT II. The decision also creates conflict because a false financial affidavit, signed under penalties of perjury, is false testimony in a proceeding and is intrinsic fraud under *DeClaire v. Yohanan*, 453 So.2d 375 (Fla. 1984), and *Cerniglia v. Cerniglia*, 679 So.2d 1160 (Fla. 1996). Yet, the Third District Court

of Appeal's decision incorrectly holds that the omission of the stock options on the Former Husband's financial affidavit, of which Former Wife had no knowledge, "is not analogous to a finding that the Former Husband submitted a fraudulent financial affidavit." (A 11)

ARGUMENT

POINT I

THE DECISION BELOW OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FLORIDA SUPREME COURT IN *MACAR v. MACAR*, 803 So.2d 707 (Fla. 2001).

Citing *Macar v. Macar*, 803 So.2d 707 (Fla. 2001), the Third District Court of Appeal in the present case held that:

> Here, the trial court's finding that the Former Husband failed to disclose his Qtera stock options, which had not vested at the time of dissolution, is not analogous to a finding that the Former Husband submitted a fraudulent financial affidavit. See *Macar v. Macar*, 803 So.2d 707, 714-15 (Fla. 2001) (agreeing with the Second District that, under the factual circumstances, mistakes and omissions from the husband's financial affidavit did not constitute fraud so as to establish a basis for relief under Rule 1.540(b).) (A-11)

By this ruling, the Third District Court of Appeal has created a direct and express conflict with *Macar*, *supra*. The Third District Court of Appeal's decision has now established that the standard for granting relief from a settlement agreement involving a false financial affidavit, even in a pre-litigation setting or in a litigated case without discovery, is exactly the same standard this Court set for the settlement agreement in *Macar*, which was entered into after extensive litigation discovery. Yet, in *Macar*, this Court held that there was a different standard for challenging settlement agreements entered into after the commencement of litigation and utilization of discovery procedures and settlement agreements in non-litigation, or litigation cases with little or no discovery (*Macar*, at p.713. See also, the Court's footnotes 6 and 7 in *Macar*, p.713. In *Macar*, this Court applied the stringent standard for relief under Rule 1.540, Florida Rules of Civil Procedure, to the false financial affidavit in that case because the parties had commenced litigation and had utilized extensive discovery to disclose all assets and relevant information. The Third District Court of Appeal has now established that this stringent standard is to be applied to all dissolution cases involving settlement agreements, whether or not there is extensive discovery. This ruling is contrary to this Court's pronouncement in *Macar*. Here, the Third District Court of Appeal on the face of its opinion clearly stated that the settlement agreement below, was signed by the

Former Wife prior to the filing of the dissolution action, and that the Former Husband had signed the agreement and his financial affidavit the same day the lawsuit was filed. There was no formal discovery utilized and both parties filed financial affidavits prior to the uncontested final judgment being entered. By incorrectly applying this stringent standard to pre-litigation cases or litigation cases with no discovery, the Third District Court of Appeal has eliminated any effective remedy against a party for filing a false financial affidavit in connection with a settlement agreement. The very purpose and reason for filing a financial affidavit is destroyed and any fear that a party might have to falsify a financial affidavit and have a settlement agreement set aside under Rule 12.540 is eliminated. By its decision, the Third District Court of Appeal has now indirectly required extensive and expensive discovery procedures to be utilized for all settlement agreements, even in uncontested dissolution actions. A party cannot now enter a settlement agreement and rely on the other party's financial affidavit without discovery, but is forced to verify its correctness through extensive and expensive discovery, or else be precluded from later challenging the agreement under Rule 12.540.

POINT II

THE DECISION BELOW OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FLORIDA SUPREME COURT IN *CERNIGLIA v.*

CERNIGLIA, 679 So.2d 1160 (Fla. 1996), AND *DeCLAIRE v. YOHANAN*, 453 So.2d 375 (Fla. 1984).

In the present case, the Third District Court of Appeal held that:

> We find that the trial court failed to make adequate findings to support his order granting relief on the basis of fraud. In fact, the trial court did not even find that a fraud had been committed. In fact, the trial court's finding that the Former Husband failed to disclose his Qtera stock options, which had not vested at the time of dissolution, is not analogous to a finding that the Former Husband submitted a fraudulent financial affidavit. . . .Without making a finding that the Former Wife satisfied one of the grounds of Rule 1.540(b), the trial court had no authority to award relief. (A-11)

This holding is in direct conflict with this Court's decision in both *Cerniglia v. Cerniglia*, 679 So.2d 1160 (Fla. 1996), and *DeClaire v. Yohanan*, 453 So.2d 375 (Fla. 1984), as to what constitutes actionable intrinsic fraud under Rule 1.540 and Rule 12.540 with respect to a financial affidavit. Here, the Former Husband's financial affidavit was false, as it failed to disclose the existence of the Qtera stock options (App., p.7-8),[1] and the trial court also found that the Former wife had

[1]The trial judge below in the Amended Final Judgment held:

> **ORDERED AND ADJUDGED** that:
>
> 1. This Court has jurisdiction over the parties pursuant to Rule 12.540(b), Florida Family Law Rules of Procedure, in that the Former Husband failed to disclose the existence of his stock options in QTERA stock on his

absolutely no knowledge of the Qtera stock options until long after the final judgment of dissolution was entered. The standard form financial affidavit in dissolution actions, which was filed in this case, requires a party under the penalties of perjury to "list what you own" in the asset section of the affidavit and not just assets which you think have value. The Former Husband testified that he knew that the Qtera stock options were not listed on his affidavit.

In *DeClaire, supra*, the trial court "found" that the financial affidavit executed by the petitioner was false, in that it did not accurately reflect the petitioner's assets and liabilities or petitioner's net worth at the time of the dissolution. There, the trial court found that respondent knew or should have known of petitioner's net worth, since she had co-signed financial affidavits with him to a bank. However, on appeal the district court reversed the trial court's refusal to set aside the property settlement agreement, finding petitioner's conduct was fraud on the court. In reviewing the principle of intrinsic fraud, this Court in *DeClaire* held: "This Court, consistent with the general rule, has expressly held that false testimony given in a proceeding is intrinsic fraud." (emphasis added).

> financial affidavit in the dissolution action in the above-styled cause, notwithstanding that they were titled in his name on March 8, 1999, four months before the signing of his financial affidavit on July 20, 1999.

DeClaire, at p. 377. This Court also reaffirmed this principle in *Cerniglia*, *supra*.[2] This Court, in *DeClaire*, went on to explain: "When an issue is before a court for resolution, and the complaining party could have addressed the issue in the proceeding, such as attacking the false testimony or misrepresentation through cross-examination and other evidence, then the improper conduct, even though it may be perjury, is intrinsic fraud and an attack on a final judgment based on such fraud must be made within one year of the entry of the judgment. . .". *DeClaire*, at p.380; *Cerniglia*, at p.1163. In the present case, the Former Husband's failure to reveal the existence of the Qtera stock options on his affidavit, which he executed under penalties of perjury, is a finding and proof that the Former Husband submitted a fraudulent financial affidavit when the Former wife had no knowledge of the existence of the stock options. It constitutes intrinsic fraud under *DeClaire* and *Cerniglia*. Under Rule 12.540, there is no time limitation as to when this action can be filed, as even the Third District Court of Appeal recognized in its decision below. Here, in direct and open conflict with *DeClaire* and *Cerniglia*, the Third District Court of Appeal has ruled that a false financial affidavit does not constitute

[2] [2]Because the false financial affidavits submitted by the husband were part of the record in the case, and the husband's net worth was a matter before the court for resolution, the court found the conduct to be intrinsic fraud. *Cerniglia*, at p.1163.

intrinsic fraud and is not actionable under Rule 1.540 and/or 12.540.

CONCLUSION

The opinion of the Third District Court of Appeal directly and expressly conflicts with *DeClaire*, *Cerniglia* and *Macar*, *supra*, on whether a false financial affidavit constitutes fraud, and that the Court should accept jurisdiction to resolve the conflict. Moreover, the Third District's opinion sets a dangerous precedent which virtually eliminates any possibility of obtaining relief against a party who files a false financial affidavit in connection with a settlement agreement where no discovery or little discovery is utilized and the parties are relying on the correctness of the other party's financial affidavit. In that setting, the financial affidavit under the Third District Court of Appeal's decision now becomes a tool which encourages fraud rather than a tool which prevents it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Petitioner's Amended Brief on Jurisdiction have been furnished by U.S. MAIL to: Cynthia L. Greene, Esq., Greene, Smith & Associates, P.A., 7340 S.W. 61st Court, Miami, FL 33143-5108; and Mary Lou Rodon-Alvarez, Esq., Mary Lou Rodon-Alvarez, P.A., 2222 Ponce de Leon Boulevard, Penthouse Suite, Coral Gables, FL 33134-5039, attorneys for Respondent, on Friday, 24 August 2007.

By_____

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Florida rule of Appellate Procedure 9.210(a). This brief is typed in Times New Roman 14.

By_____

John L. Zavertnik