

THE SUPREME COURT OF FLORIDA

MICHAEL ANDERSON,

Petitioner,

CASE NO.: SC00-59

And

CATHY ANDERSON,

Respondent,

/

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

RESPONDENT'S AMENDED ANSWER BRIEF

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CERTIFICATE OF TYPE SIZE AND STYLE

This Brief uses 14 point Time New Roman type style and this font is proportionately spaced.

PRELIMINARY STATEMENT

Petitioner, Michael Anderson, will be referred to as “Michael Anderson” or “Michael”.

Respondent, Cathy Anderson, will be referred to as “Cathy Anderson” or “Cathy”.

References to the record on appeal will be “R Vol./page number”.

STATEMENT OF THE FACTS

Cathy

Anderson submits the following supplement to Michael Anderson's Statement of the Facts:

Following her discovery that she was pregnant, Cathy made an appointment to obtain an abortion (RV3/50)(2). After meeting at the clinic the parties mutually agreed to keep the baby (RV3/13-14)(3). Prior to Cathy's pregnancy, the parties dated for three and one-half years during which time they were having sexual relations without protection or use of birth control devices by either party (RV3/10)(4). The relations continued through the month in which Cathy got pregnant (RV3/47).

Michael testified that he obtained the paternity test as a result of the conversation with Cathy before the hearing in June 1996 (RV3/35;40). The tests were obtained in March, 1997, approximately nine months after the conversation and some six months after the final hearing that was held in October 1996.

The results of the paternity tests were not admitted into evidence, although they are a part of the Record, (RV2/253-254) (RV3/95-96).

The first time that Michael had a doubt about his paternity was when he had the conversation with Cathy before the June 1996 hearing, which ended with her telling him to check it out if he did not believe that he was the father of the child (RV3/40;42;57;167)¹.

Michael conceded during the trial that Cathy may not have known that he was not the father of the child until the test results came back:

Q: Do you think she knew until the test results came back that

¹ Although Michael at first testified that the conversation with Cathy about her previous marriage and child from another relationship occurred on the day of the second final hearing in October 1996, he later conceded that it took place in June 1996 before the first final hearing. (RV3/172)

you were not the father of this child?

A: If she did, she hid it pretty good (RV3/68).

STATEMENT OF CASE

On May 29, 1997, Michael Anderson filed a Motion for Relief from Final Judgment and a Supplemental Petition to Modify Amended Final Judgment. The basis for these pleadings was that Michael had obtained a paternity test establishing that he was not the father of the child. The issues submitted to the General Master as trier of fact were whether Cathy had defrauded Michael by telling him, prior to entry of the Final Judgment, that he was the father of the child, and whether the decision of DeRico v. Wilson, 714 So.2d 623 (Fla. 5th DCA 1998) controlled the outcome of the proceedings regardless of fraud. Cathy alleged res judicata and estoppel as defenses to the alleged fraud, and argued that the DeRico decision should not be applicable to these proceedings (RV2/256-258).

The paternity test results were never admitted into evidence. The General Master resolved the issue of fraud by finding that Michael had failed to prove by a preponderance of the evidence that he had been defrauded into believing the child was his, and that no information had come to his attention

after entry of the Final Judgment of Dissolution of Marriage that he did not have prior to the entry of said Judgment. The General Master further found that the DeRico decision should not be applicable to these proceedings.

Michael Anderson appealed the trial court decision to the Second District Court of Appeal which affirmed the trial court on the issue of fraud and declined to follow the logic and holding of DeRico. The district court certified to this Court that its decision was in conflict with DeRico v. Wilson (infra).

ISSUES ON APPEAL

In his initial brief, Michael Anderson has framed the issue on appeal by commingling the certified issue of conflict and the issue of whether he carried his burden at the trial level in establishing fraud on the part of Cathy Anderson with respect to paternity. As a result, Cathy Anderson has reframed the issues on appeal as follows and submitted argument with respect to each:

WHETHER THIS COURT'S DECISION IN DANIEL V. DANIEL SHOULD BE LIMITED TO THE FACTS OF THAT CASE, OR BE GIVEN THE BROAD APPLICATION SET FORTH IN THE DECISION OF DeRICO V. WILSON.

II. WHETHER MICHAEL, IN HIS POST-JUDGMENT ACTION, PROVED FRAUD ON THE PART OF CATHY WITH RESPECT TO HIS PATERNITY, AND IF SO, WHETHER THE FACTS GIVING RISE TO THE FRAUD WERE KNOWN TO HIM BEFORE ENTRY OF FINAL JUDGMENT.

SUMMARY OF ARGUMENT

I. THIS COURT'S DECISION IN DANIEL V. DANIEL SHOULD BE LIMITED TO THOSE CASES WHERE THE ISSUES OF PATERNITY AND CHILD SUPPORT ARE RAISED AT THE TRIAL LEVEL PRIOR TO ENTRY OF FINAL JUDGMENT.

When applied to post-judgment proceedings, the Daniel decision (supra) from this Court does not take into account the traditional burdens that are imposed when seeking relief under Fla. Fam. L.R. P. 12.540(b) . The Rule requires that Michael Anderson must prove fraud in order to obtain post-judgment relief. To ignore this requirement or the defenses of res judicata and estoppel in cases involving paternity and child support will open the flood gates for post-judgment actions. Such a result would be contrary to public policy opposing the endless litigation, as well as the public policy of this state which places priority on the best interest of children and family stability.

ARGUMENT

The Second District Court of Appeal has certified that its decision in this case conflicts with the decision of the Fifth District Court of Appeal in DeRico v. Wilson, 714 So.2d 623 (Fla. 5th DCA 1998). Both cases deal with the scope of this Court's decision in Daniel v. Daniel, 695 So.2d 1253 (Fla. 1997), which held that a husband who is not a natural or adoptive parent of a child and who has not otherwise contracted for the child's care and support has no duty to pay child support upon the dissolution of the marriage. The DeRico Court gave a broad application to the Daniel decision by extending the rule of law to post-judgment proceedings as well as pre-judgment proceedings. The Second District has narrowed the scope of Daniel to cases where paternity and child support issues are raised during the trial prior to entry of Final Judgment.

In Daniel the mother became pregnant before her marriage and the child was born during the marriage. The parties stipulated that Mr. Daniel was not the biological father and the issues of paternity and child support were litigated at the trial level. The specific issue presented to the trial court was whether Mr. Daniel could be obligated to support the child even though

he was not the biological father.² This Court affirmed the opinion of the Second District in Daniel.

In the instant case Cathy became pregnant before her marriage to Michael and the child was born during the marriage. The issues of paternity and child support were not litigated during the dissolution proceedings. Michael filed a Motion for Relief From Final Judgment and a Supplemental Petition to Modify Amended Final Judgment. These pleadings were filed within a year of the entry of final judgment, thereby invoking the provisions of Fla. Fam. L. R. P. 12.540(b), which imposed an additional burden on him of proving either extrinsic or intrinsic fraud in order to obtain relief.

In DeRico as in Daniel the children were born during the marriage. The issues of paternity and child support did not arise until more than one year after entry of Final Judgment. Thus, in DeRico the father should have been limited to proof of extrinsic fraud in order to obtain relief under Rule 12.540(b).

It is interesting to note that the instant case is the only case found by Cathy that deals with a post-judgment proceeding within one year of final

² Because this issue was raised before entry of Final Judgment, there were no issues pertaining to fraud, res judicata, or estoppel.

judgment. Daniel rose out of issues raised at the trial level. DeRico arose out of issues raised more than one year after final judgment as did Lefler v. Lefler, 722 So. 2d 941 (Fla. 4th DCA 1998); D.F. v. Dept. of Revenue, 736 So.2d 782 (Fla. 2nd DCA 1999); Dept. of Revenue v. Pough, 723 So.2d 303 (Fla. 2nd DCA 1998); Dept. of Revenue v. Sullivan, 727 So.2d 1085 (Fla. 2nd DCA 1999); and possibly Dept. of Revenue v. Byrd, 710 So.2d 1036 (Fla. 1st DCA 1998). The First District Court of Appeal and the Fifth District Court of Appeal have given a broad application to Daniel while the Second District Court of Appeal has narrowed the application of Daniel. It is Cathy's position that the conflict in these cases should be resolved by narrowing the application of the Daniel decision to the facts and circumstances of that case, so that it applies only to those cases where the issues of paternity and child support are raised pre-judgment. However, if this Court rules that Daniel is applicable to the facts of DeRico it is then certainly applicable to the case at bar.

In Lefler v. Lefler, (infra) Judge Klein, in a specially concurring opinion discusses the potential legal ramifications that could result if Daniel

is applied to all cases regardless of when the issue of paternity and child support are raised. Any parent at any time could obtain paternity testing without involving the custodial parent, without court order and regardless of motive, i.e. avoidance of paying child support, vendetta against former wife or children, intimidation, retaliation for losing custody battle, etc. If negative results are obtained the parent could terminate the child support obligation. Instead of a presumption of legitimacy and paternity attaching to matrimony, the courts would be compelled to reopen the proceedings and terminate child support at anytime upon proof of negative paternity testing. The doctrines of res judicata, and equitable estoppel exist precisely to thwart this type of never ending judicial review. DeClaire v. Yohanan, 453 So.2d 375 (Fla. 1984). Adopting the DeRico rationale in post-judgment challenges to paternity and child support make virtually all cases involving children and child support amenable to challenge. Adopting Michael's reasoning for applying Daniel to the instant case would remove the burden of proving fraud in a post-judgment proceeding, and eliminate estoppel and res judicata as defenses to such proceedings.

A broad application of the Daniel doctrine will have untold social and

legal impact on family law proceedings in the State of Florida. The ultimate purpose in resolving issues involving children is to make decisions that will be in their best interest. To allow former spouses at anytime to reopen a divorce proceeding without anything more than a negative paternity test flies in the face of this policy, not to mention the long standing legal doctrines of res judicata and estoppel as well as the legal requirements of Rule 12.540(b), all of which are designed to bring finality to legal proceedings. The best interest of children are not served by depriving them of child support at anytime a father may elect to question his paternity, and whose motives for doing so would be irrelevant.

The conflict between this case and DeRico is that the Second District has restricted the application of Daniel to issues raised at the trial level, while DeRico applies the Daniel doctrine at anytime, whether during trial, within one year, or after one year of entry of Final Judgment. In order to clarify the rule of law in Daniel this Court should limit the application of Daniel to those cases where the issue is raised at the trial level. If raised within one year of Final Judgment, Daniel should apply only after the requirements of Rule 12.540(b) are satisfied. If raised after one year from entry of Final Judgment,

Daniel should apply only after proof of extrinsic fraud.

If this Court resolves the conflict issue in the above manner, it must then turn to a review of the fact finding process of the trial court regarding the issue of fraud. The Circuit Court and the Second District Court of Appeal have affirmed the trial court in its decision in this case. But for the conflict with DeRico in reaching its decision the Second District would be the final word on the factual issues. This Court should not disturb the decision of the trier of fact or the Appellate Court unless the decision fails to satisfy the test of reasonableness Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980).

SUMMARY OF ARGUMENT

II. MICHAEL FAILED TO PROVE FRAUD ON THE PART OF CATHY WITH RESPECT TO HIS PATERNITY, WHICH WAS A NECESSARY ELEMENT TO THE POST-JUDGMENT PROCEEDINGS.

Michael raised the issue of paternity after the entry of an Amended Final Judgment by alleging fraud on the part of Cathy. The doctrines of estoppel and res judicata barred Michael from using evidence obtained prior to entry of final judgment to support his claim of fraud. The only new information available to him, following entry of final judgment, was a paternity test obtained without court order and without acquiescence of Cathy (RV3/295). The test results were not admitted into evidence and are only a part of the record as an exhibit to his pleadings (RV2/253-254;RV3/95).

Michael conceded at the final hearing that the results of the paternity test were the only proof he had that Cathy had defrauded him with respect to paternity. (RV3/68) He could point to no other fact either pre-judgment or post-judgment that indicated that Cathy knew he was not the father of the child (RV3/68). Under the circumstances there is no factual evidence

obtained post-judgment to support his allegation of fraud.

Even if the information available to Michael before entry of final judgment were not barred by estoppel and res judicata, they are insufficient to establish fraud. Michael argues that Cathy's affirmative response to his question regarding paternity constitutes fraud and misrepresentation.

However, an essential element of fraud is that the party making the representation must know that the representation is false. Once again, Michael can point to no evidence to suggest that Cathy knew that he was not the father of the child. In fact, there is no evidence in the record to suggest that Cathy even had a doubt about Michael's paternity. In order for Michael to prevail, this Court must hold that a negative paternity test obtained post-judgment constitutes fraud per se, which is the practical effect of the District Court decisions in DeRico (infra) and Lefler (supra). These decisions and the rule of law established by this Court in Daniel (infra) should not be used to eliminate the legal doctrines of res judicata and estoppel with respect to post-judgment paternity and child support issues.

ARGUMENT

Even if Michael proved fraud on the part of Cathy with respect to his paternity, the facts supporting the proof of fraud were known prior to entry of final judgment and barred by the doctrines of estoppel and res judicata, Miller v. Cower, 545 So.2d 768 (Fla. 2nd DCA 1989); DeVaughn v. Dept. of Revenue, 691 So.2d 11(Fla. 4th DCA) review denied 700 So.2d 684 (Fla. 1997); Dept. of Revenue v. Byrd, 710 So.2d 1036 (Fla. 1st DCA 1998) . 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. An essential element of fraud is that the party making the representation must know that the representation is false. The traditional elements of fraud are a false statement pertaining to a real fact; the statement is known by the proponent to be false; there is intent by the proponent to induce another to act on the falsity; and there must be injury to the party relying on the deception Charter Air Center, Inc. v. Miller, 348 So.2d 614 (Fla. 2nd DCA 1977) cert denied, 354 So. 2d 983 (Fla. 1977); 27 Fla. Jur 2d Fraud and Deceit, §7 (1981); Black's Law Dictionary, 594 (5th Edition, 1979).

Michael failed to provide any evidence and acknowledged he was not aware of any evidence, that would tend to show Cathy knew or even had any reason to believe that he was not the father of the child. Michael obtained paternity tests after entry of the final judgment. He argues that difficulties concerning visitation are what prompted him to obtain the test. However, the transcript reveals that two other significant incidents had occurred before entry of the final judgment which motivated Michael to consider testing. The first incident involved a phone conversation with Cathy's sister wherein he was advised that Cathy had been previously married and that she had had a child born out of wedlock. The second incident occurred when Michael armed with the information from Cathy's sister, confronted Cathy prior to a hearing in June of 1996. During their conversation, Michael asked Cathy whether she had been previously married and he testified that she denied this fact. He further inquired as to whether she had a baby out of wedlock in the past, which Cathy denied (RV3/34). Finally, Michael asked Cathy if he was the father of the child and Cathy answered yes and told him if he did not believe her he should check it out. At the time of the conversation, Michael had already verified that Cathy was previously married despite her denials,

but he was unable to verify the allegation of a child born to her out of wedlock. He did acknowledge that he had made a decision to obtain paternity testing but he could not currently afford the cost. It was not until after entry of final judgment that he was able to pay the \$475.00 cost of the testing (RV3/145). The tests were obtained in March of 1997, some nine months after he confronted Cathy with the information obtained from her sister. Michael would have this Court believe that this delay was solely a result of his inability to raise sufficient funds to obtain testing.

The General Master as trier of fact, found that Michael had not met his burden of proving fraud by Cathy, which was a necessary element to obtain post-judgment relief. The General Master further found that if Michael had proven fraud it was the result of information he had prior to entry of final judgment, which he failed to act upon, and that he had no new information obtained after entry of final judgment. As a result, Michael was estopped from using the information to prove the alleged fraud on the basis of res judicata. Michael then argues that this Court should determine that the statement from Cathy that he was the father, standing alone, satisfies all the elements of fraud and overcomes the defenses of estoppel and res judicata. Such a ruling will

amount to a reaffirmance of the broad application of this Court's decision in Daniel by the Fourth and Fifth District Courts.

The doctrines of res judicata and equitable estoppel exist for the precise purpose of thwarting never ending judicial review and in DeClaire v. Yohanan, 453 So.2d 375 (Fla. 1984), this Court held that public policy has always favored the termination of litigation after a party has had an opportunity for a trial and appeal of the trial court's judgment. Michael is not entitled to two bites of the apple. If the issue of paternity had been raised in the dissolution proceedings, the decision in Daniel would control, and his obligation for child support would be terminated. Michael chose to obtain testing and challenge paternity after entry of final judgment. As a result, under Rule 12.540(b) he is required to establish fraud on the part of Cathy. Results of paternity testing are simply insufficient to overcome the burden of fraud Johnson v. Johnson, 395 So.2d 640 (Fla. 2nd DCA 1981). The Amended Final Judgment of Dissolution of Marriage is res judicata on the issue of paternity unless Michael proves fraud, which he was unable to do.

The facts of this case fit squarely within the facts of Lathrop v.

Lathrop, 627 So.2d 1317 (Fla. 2nd DCA 1993) . As in Lathrop, Michael had reason to believe he was not the child's father but failed to raise the issue of paternity before entry of final judgment. His failure to do so as in Lathrop should deny him relief under the Daniel decision. His failure to prove fraud in the trial of his post-judgment petition denies him the relief available under Fla. Fam. L. R. P. 12.540(b).

It is not incomprehensible to imagine that both parties believed that Michael was the father of the child until the paternity test was obtained. Under these circumstances to hold that Cathy's statement alone is sufficient to overcome the elements of fraud as required in a post-judgment proceeding flies in the face of the doctrines of res judicata and estoppel.

The proper procedure for Michael to have followed in litigating the paternity issue post-judgment is as follows:

Overcome estoppel and res judicata

Establish fraud following final judgment.

Upon satisfactorily resolving issues (a) and (b), Michael would then request paternity tests.

This procedure was established by the General Master in his Order

dated May 29, 1998 (RV2/290-292: 294). Under the above procedure, the admittance of the paternity test obtained by Michael would have been irrelevant to the outcome of the proceedings. The test results were only relevant in establishing a basis for Michael challenging paternity. Michael's burden was to show proof that Cathy knew, and that he did not know, that he was the father of the child until an event occurred after entry of final judgment, and that the new information constituted a fraud. Once fraud is established, test results would be admissible or a new test would have been required.

Michael was not always without a remedy. If he had raised the issue of paternity at the trial level, DeRico applying Daniel would have released him from the responsibility of paying child support. If he acted on the doubts raised by the conversation with Cathy's sister and Cathy, (not to mention his attorney at the time) (RV3/59) he would have requested a test before entry of final judgment. If he had not delayed in obtaining a test after his conversation with Cathy, he could have introduced the results at the final hearing and been relieved of his child support obligation. He can not sit on his rights or the information provided before final judgment and seek relief

post-judgment (Lathrop *infra*). The additional requirement that he prove fraud was a result of his delay in obtaining paternity tests. Case law and the Rules of Procedure, as well as public policy to bring litigation to a conclusion after an opportunity of a trial and an appeal, take precedence over Michael's request for relief.

CONCLUSION

The conflict between this case and DeRico should be resolved by affirming the Second District Court of Appeal, thereby narrowing the application of the decision in Daniel to those cases where the issues of paternity and payment of child support are raised prior to entry of final judgment. The Appellate Court and Trial Court should be affirmed with respect to the issue of fraud in that Michael has failed to show that reasonable men could differ with the findings of fact made by the Trial Court on this issue.

In the event this Court grants Michael the relief requested, the decision on whether Cathy should repay child support previously paid by Michael should be left to the discretion of the trial court. M.A.F. v. G.L.K., 573 So.2d 862 (Fla. 1st DCA 1991); DeRico (infra P.B. 624).

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, on this day of March, 2000, to Catherine M. Catlin, Esquire, 1412 East Madison Street, Suite 817, Tampa, Florida 33602 and Raymond T. Elligett, Jr., Esquire, 401 E. Jackson Street, Suite 2600, Tampa, Florida 33602, Attorneys for Petitioner.

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