

SUPREME COURT OF FLORIDA

BEN WILSON BANE,

Petitioner,

Case No.: 1999-93

vs.

District Court of Appeal,
2d District - No. 98-02291

CONSUELLA KATHLEEN BANE,

Respondent.

_____ /

ON CERTIFICATION OF CONFLICT
BY THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT

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OTHER AUTHORITIES:

Florida Rules of Civil Procedure, Rule 1.540
Florida Statute, Chapter 61
Florida Statute, §741.30

PRELIMINARY STATEMENT

The Petitioner, Ben Wilson Bane, will be referred to herein as the “Former Husband” while the Respondent, Consuella Kathleen Bane, will be referred to as the “Former Wife”. The Former Husband appealed to the Second District Court of Appeal the Order Granting Motion for Attorney Fees entered by the Honorable Robert L. Doyel in the Circuit Court of the Tenth Judicial Circuit in and for Polk County, State of Florida. The Second District Court of Appeal certified conflict with the decision of the Fourth District Court of Appeal in *Spano v. Spano*, 698 So. 2d 324 (Fla. 4th DCA 1997).

The Second District granted the parties’ joint motion and stipulation that the appeal be decided based upon the appendices to the parties’ briefs. (A-21). There are no hearing transcripts incident to the order in question. (A-21). The Former Wife has used the same appendix which was presented to the Second District with the addition of the opinion of the Second District. References to the Appendix will be designated “A” with the appropriate number to the tabs of the Appendix noted.

CERTIFICATE OF FONT SIZE AND STYLE

This brief was prepared using 14 point proportionally spaced Times New Roman.

STATEMENT OF THE FACTS AND OF THE CASE

On January 17, 1995, the Former Husband filed his Petition for Dissolution of Marriage alleging the parties had entered into a Property Settlement Agreement. (A-2). The Former Wife filed an Answer and Waiver. (A-3). On February 17, 1995, the trial court entered the Final Judgment of Dissolution of Marriage which incorporated the parties' Property Settlement Agreement. (A-4). Pursuant to the Final Judgment, the Former Wife received approximately one-half the value of the marital estate set forth on the July 14, 1994 financial statement. (A-1) The Former Husband received all of the other assets, including Bane Respiratory Services. (A-4).

On March 28, 1995, the Former Wife filed a motion to vacate the Final Judgment of Dissolution of Marriage pursuant to Rule 1.540, *Fla.R.Civ.P.* Her motion consisted of two counts: the first alleging the Former Husband's misconduct in beating and threatening, with a gun literally to her head, to kill her if she did not execute the Property Settlement Agreement and the second count alleging the Former Husband's misrepresentation of the value of Bane Respiratory Services, Inc. as set forth in the July 14, 1994 financial statement. The Former Wife later filed an amendment to the motion alleging the Former Husband's failure to disclose material facts and his oral misrepresentations to her of the value of Bane Respiratory Services, Inc. (A-5).

On March 12, 1996, the Former Wife filed a motion for enforcement of the Final Judgment wherein she sought an order accelerating the balance owed to her under the Property Settlement Agreement and the Final Judgment. (A-6). Contrary to the statement in the Former Husband's Initial Brief at page 4, the motion for enforcement was filed after she filed her motion pursuant to Rule 1.540. The trial court granted the requested relief and accelerated the obligations due by ordering the Former Husband to pay the Former Wife the sum of \$3,480,717.15 plus interest. (A-7).

The trial court entered its Order on Motion to Vacate Final Judgment of Dissolution of Marriage. Except for the portion of the Final Judgment dissolving the marriage of the parties, the Order, based on Rule 1.540, set aside the Final Judgment and the incorporated Property Settlement Agreement. The Order stated that the parties could replead the case. (A-8).

The Order recited the following findings of fact:

- (3) The parties negotiated a marital settlement agreement without the assistance of counsel.
- (4) The Former Husband obtained counsel late December 1994.
- (5) The Former Wife obtained counsel January 9, 1995.
- (6) The Former Husband re-executed a Personal Financial Statement on January 10, 1995 providing that the value of Bane Respiratory Services, Inc. ("BRS") was five million dollars.

(7) The parties entered into a marital settlement agreement on January 12, 1995 without the assistance of counsel or benefit of discovery, and over the strenuous objections of the Former Wife's attorney.

(8) The Former Husband signed a letter of intent on February 14, 1995 with Lincare, Inc. whereby he agreed to sell BRS for fifteen million dollars in cash. BRS was sold to Lincare, Inc. on March 9th for fifteen million dollars cash. In addition, the Former Husband retained one million nine hundred thousand dollars in assets for a gross economic benefit of sixteen million nine hundred thousand dollars.

(9) The Final Judgment of Dissolution of Marriage entered by the Honorable Charles A. Davis, Jr., Circuit Judge, on February 17, 1995 incorporated the January 12th marital settlement agreement of the parties.

(10) Neither party comes before this Court with clean hands.

(11) The instant litigation could easily have been avoided if the Former Wife had heeded the advice of her attorney. Her complete lack of interest in and hostility towards BRS, in addition to her obstinate refusal to heed Ms. Jeanne Tate's advice, rises to the level of negligence. [footnote omitted]

(12) The issues would be closer if the Court were not convinced that the Former Husband committed a far greater wrong by purposefully waiting in order to catch his Former Wife in a compromising situation, with the intent of coercing her with a gun to sign the January 12th agreement. Neither does the Former Wife's poor judgment in taking her lover into the marital home on a day when the parties were discussing reconciliation obviate this wrongful act on the part of the Former Husband.

(13) The pivotal evidence came from Mr. Franklin Robert Kurchinski. Upon considering Mr. Kurchinski's testimony and reviewing his journal entries, this Court is persuaded by a preponderance of the evidence that the Former Husband attempted to coerce the Former Wife into signing the agreement. The Former Husband had by this time received an offer to sell BRS to Lincare, Inc. for approximately thirteen million dollars.

(14) The basic issue in this case is concealment not the lack of disclosure by the Former Husband. Whether a fiduciary obligation existed between the Former Husband and the Former Wife during the horrendous period between January 9 and January 12, 1995 is not of great significance. The Former Husband's concealment of an offer of approximately thirteen million dollars for BRS combined with coercion is sufficient to null the agreement. [footnote omitted].

(15) The timing and circumstances of the execution of the January 12th agreement by the Former Wife supports her contention that the agreement was to a significant extent the product of duress. This Court is convinced by a preponderance of the evidence that the conduct of the Former Husband contributed to causing the Former Wife to sign the agreement.

(16) This Court finds the conduct of both parties is inexcusable. However, a person guilty of obtaining an agreement by concealment of a material fact and coercion should not be permitted to use negligence by the other party as his shield. When the choice is between coercion and negligence, negligence is less objectionable. [footnote omitted].

(A-8).

The Former Husband appealed both the Order on Motion to Vacate the Final Judgment and the Order accelerating the obligations under the Final Judgment. The Second District affirmed both Orders *per curiam*. *Bane v. Bane*, 701 So. 2d 872 (Fla. 2d DCA 1997). (A-9).

Thereafter, the Former Wife filed her Counterpetition for Dissolution of Marriage seeking, among other relief, alimony, her attorney's fees and costs, and equitable distribution. (A-10).

After the conclusion of the Former Husband's appeal of the Order on Motion to Vacate the Final Judgment, the Former Wife filed her Motion for Attorney's Fees, Suit Money and Costs seeking the payment by the Former Husband of the fees and costs she had actually incurred and seeking anticipated fees and costs. (A-11). The Motion stated that fees of \$230,955.50 and costs of \$15,435.59 had actually been incurred as of the date of the Motion. (A-11). The Former Husband filed a response to the Former Wife's Motion. (A-12). The Former Wife filed an Amendment to her motion to include the accounting costs of \$25,611.85 she had incurred. (A-13).

The hearing on the Former Wife's Motion for Attorney's Fees, Suit Money and Costs was on March 27, 1998. (A-14, 15). The Former Husband stipulated that the fees and costs incurred by the Former Wife were reasonable and necessary. Both parties' submitted letter memoranda following the hearing. (A-16, 17).

The trial court then entered its Order Granting Motion for Attorney Fees ordering the Former Husband to pay \$230,955.30 plus interest of \$15,435.59 for the Former Wife's attorney fees and costs incurred in the 1.540 proceeding. (A-19). The trial court's Order provided:

This matter came before the court on March 27, 1998, on the former wife's motion for attorney fees, costs and suit money. On February 21, 1995, this court dissolved the marriage of the parties in an order which incorporated a property settlement agreement. The former wife filed a motion to vacate the final judgment of dissolution under Rule

1.540(b), Florida Rules of Civil Procedure, alleging misconduct and fraud, and seeking attorney fees. This court granted her motion vacating the final judgment in its entirety except the portion dissolving the marriage, without addressing the former wife's entitlement to attorney fees. The former husband appealed, and vacatur was affirmed without opinion on November 10, 1997.

On December 29, 1997, the former wife renewed her motion for attorney fees, costs and suit money. The matter to be decided by this court is the former wife's entitlement to attorney fees, costs and suit money. Having reviewed all documents and the pertinent law, this court finds as follows:

1. Spano v. Spano, 698 So. 2d 324 (Fla. 4th DCA 1997), appears to be directly on point with the case sub judice because, as in Spano, the former wife's motion under Rule 1.540 alleged misconduct and fraud in executing a property settlement agreement. Spano denied a Rule 1.540(b) motion for attorney fees because, according to the Fourth District, the Rule 1.540 proceeding is outside Chapter 61.

2. Spano was wrongly decided. The Fourth District appears to have confused procedure with substance. When the wife in Spano (as the wife in this case) filed a motion under Rule 1.540, she invoked a procedure. According to DeClair v. Yohanon, 453 So. 2d 375 (Fla. 1984), when relief from a judgment is sought by motion, the motion is filed in, and is a continuation of, the action in which the judgment was rendered. Rule 1.540 was created to provide a simplified procedure for obtaining relief from judgments through motions rather requiring a party to bring an independent action. Id. In Spano, as here, the case itself was, substantively, a dissolution of marriage under Chapter 61, Florida Statutes. As DeClair suggests, the Rule 1.540 motion was a continuation of that action, and, therefore, filed under the subject matter jurisdiction granted the circuit and district courts by Article V, Florida Constitution, and Chapter 61, Florida Statutes. This court does not consider itself bound by Spano because the underlying reasoning in Spano is contrary to the underlying reasoning in DeClair.

3. The appropriateness of awarding attorney fees in this case is obvious. All of the wrongdoing that necessitated these proceedings was perpetrated under Chapter 61; hence, these proceedings constituted an attack on the fraudulently procured Chapter 61 order. For these reasons, it makes good public policy sense to utilize Rosen v. Rosen, 696 So. 2d 697 (Fla. 1997), to impose upon the former husband the former wife's expense occasioned by the former husband's fraudulent conduct in court proceedings.

4. In the Rule 1.540 proceeding and appeal, the former wife incurred \$230,955.00 in attorney fees based on hourly rates of \$160.00 to \$250.00, plus costs of \$15,435.59. The former husband stipulated that the fees and costs are reasonable.

(A-19).

The Former Husband appealed. (A-20). The Second District stated:

. . . The fees and costs in this dissolution of marriage action were incurred by the Former Wife in her successful effort to set aside a final judgment incorporating a property settlement agreement that she contended was the product of the Former Husband's misrepresentation and coercion. We reverse for hearing, at which time the trial court shall consider all of the factors outlined in Rosen v. Rosen, 696 So. 2d 697 (Fla. 1997), before making a decision on the fees.

A full recitation of the facts is unnecessary except for the procedural posture of this case in its various stages. Less than three months after signing a settlement agreement, the Former Wife filed a motion to vacate the final judgment of dissolution under Florida Rule of Civil Procedure 1.540. The trial court granted relief and this court affirmed. See Bane v. Bane, 701 So. 2d 872 (Fla. 2d DCA 1997). Subsequently, the parties proceeded with the dissolution proceedings. During that time, the Former Wife sought to recover the attorney's fees and costs that she incurred for the rule 1.540 proceedings and appeal.

In Spano v. Spano, 698 So. 2d 324 (Fla. 4th DCA 1997), the Fourth District held that there is no basis to award attorney's fees for a rule 1.540 attack on a property settlement agreement. Notwithstanding Spano, the trial court [footnote omitted] granted the Former Wife's motion for fees, concluding that although Spano appeared to be directly on point, it was wrongly decided. This was clear error. Because there was no decision by the Second District on this issue, the trial court was bound to follow the Fourth District's opinion. [citation omitted].

Although it was error to fail to follow the binding precedent of the Fourth District, we do not reverse on this basis because we also disagree with Spano. We have reviewed Spano and the Florida Supreme Court's opinion in Rosen. Based on Rosen, we conclude that fees are not precluded for a proceeding to vacate a final judgment of dissolution and property settlement agreement because the attorney's fees provision in chapter 61, Florida Statutes, is to be "liberally -- not restrictively -- construed." 696 So. 2d at 700. Even the Fourth District recognized that fees might be warranted in some cases [footnote citing Spano omitted] and noted that the Rosen factors would need to be consulted prior to making any such fee award. See Spano, 698 So. 2d 328-329. We hold that chapter 61 authorizes an award of attorney's fees for a proceeding to set aside a property settlement agreement that was the product of one party's fraud. Accordingly, we certify conflict with Spano.

From our limited record on appeal, however, we are not able to tell whether the successor judge reviewed the entire record of the proceedings before awarding fees or reviewed only the order granting the Former Wife relief under rule 1.540. We are also unable to determine whether the judge weighed all of the Rosen factors in awarding these fees. In awarding fees under section 61.16: "[T]he financial resources of the parties are the primary factor to be considered. However, other relevant circumstances to be considered include factors such as the scope and history of the litigation; the duration of the litigation; the merits of the respective positions; whether the litigation is brought or maintained primarily to harass (or whether a defense is raised mainly to frustrate or stall); and the existence and course of prior or pending litigation." Rosen, 696 So. 2d at 700. We note that this is a case where need and ability to

pay are completely irrelevant. It appears from our review that the trial court relied on one Rosen factor only, the Former Husband's misconduct. The record, however, indicates that the Former Wife was not blameless and her negligence played a part in the way the case progressed. Accordingly, we reverse the award of \$246,390.98 in attorney's fees and costs. On remand the trial court shall consider the record as a whole in light of this opinion and the supreme court's opinion in Rosen.

Bane v. Bane, 24 Fla. Law W. D2559 (Fla. 2d DCA, November 10, 1999). (A-22).

The Former Husband then sought discretionary review based on the Second District's certified conflict with the Fourth District's Opinion in *Spano v. Spano*, 698 So. 2d 324 (Fla. 4th DCA 1997). By Order dated December 20, 1999, this Court postponed its decision on jurisdiction and set forth a briefing schedule.

SUMMARY OF THE ARGUMENT

Fla. Stat. §61.16 authorizes an award of attorney's fees and costs associated with a motion pursuant to Rule 1.540, *Florida Rules of Civil Procedure*, to set aside a Final Judgment of Dissolution of Marriage which incorporated a Property Settlement Agreement. Pursuant to this Court's opinion in *Rosen v. Rosen*, 696 So. 2d 697 (Fla. 1997), proceedings under Chapter 61 are an equity and governed by basic rules of fairness as opposed to strict rule of law. Section 61.16 should be liberally -- not restrictively -- construed to allow consideration of any factor necessary to provide justice and ensure equity between the parties. This proceeding was, substantively, a dissolution of marriage proceeding. The Rule 1.540 proceeding was a continuation of the dissolution of marriage proceeding. The Order Vacating the Final Judgment was a non-final order given in the middle of the cause which did not address the merits and did not afford any affirmative relief. The Rule 1.540 proceeding was intertwined with and beared the indicia of a Chapter 61 proceeding.

There are two competing public policies which must be balanced when Rule 1.540 is implicated -- the sanctity of final judgments and the incessant command of the court's conscience that justice be done in light of all the facts. Here, the Former Husband engaged in misconduct, both coercion, with a gun, and concealment, in order to procure his then Wife's signature on a settlement agreement. Such a settlement, and

ones like it, are not favored by the law and the trial court vacated that settlement and the Final Judgment, a decision affirmed by the Second District. Indeed, the property settlement in this case was the one designed for a Rule 1.540 proceeding. The law should not require a Former Wife such as this one to fund litigation which would not have been necessary but for the Former Husband's reprehensible conduct. The award of attorney's fees and costs to the Former Wife for the 1.540 proceeding is authorized by Chapter 61 so that justice may be done in light of all the facts. Equitable considerations and the public policy of this State should require the Former Husband to pay the Former Wife's attorney's fees and costs pursuant to *Fla. Stat.* §61.16 in this dissolution of marriage proceeding.

ARGUMENT

I. CHAPTER 61 AUTHORIZES AN AWARD OF ATTORNEY'S FEES AND COSTS ASSOCIATED WITH A MOTION PURSUANT TO RULE 1.540, FLORIDA RULES OF CIVIL PROCEDURE, TO SET ASIDE A FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE.

The trial court ordered the Former Husband to pay the portion of the Former Wife's attorney fees and costs associated with her motion pursuant to Rule 1.540 which were incurred in the dissolution of marriage proceeding. The Second District agreed with the trial court, holding Chapter 61 authorizes an award of the attorney's fees incurred in setting aside a property settlement agreement, and certified conflict with the Fourth District's decision in *Spano v. Spano*, 698 So. 2d 324 (Fla. 4th DCA 1997).

The Former Husband, relying upon the "American Rule" for collection of attorneys' fees, a rule which requires each party to pay his own fees unless there is statutory authority or a contractual basis to alter that rule, asserts there was no authority for the award to the Former Wife of the attorney's fees and costs associated with her motion pursuant to Rule 1.540.

The Former Wife agrees that the "American Rule" for collection of attorneys' fees requires each party to pay his or her own fees unless there is statutory authority

or a contractual basis to alter that rule. But here there was statutory authority to award attorney's fees and costs to the Former Wife -- Chapter 61 of the *Florida Statutes*.

Fla. Stat. Section 61.16(1) provides, in relevant part, that:

The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals.

(Emphasis added). As pointed out by the Second District, this was, substantively, a dissolution of marriage proceeding. The Second District concluded that fees are available for a proceeding to vacate a final judgment of dissolution of marriage based on this Court's opinion in *Rosen v. Rosen*, 696 So. 2d 697, 700 (Fla.1997) that:

. . . proceedings under Chapter 61 are in equity and governed by basic rules of fairness as opposed to strict rule of law. . . The legislature has given trial judges wide leeway to work equity in chapter 61 proceedings. . . . Thus, section 61.16 should be liberally -- not restrictively -- construed to allow consideration of any factor necessary to provide justice and ensure equity between the parties.

This Court, in *Rosen* at page 700 further stated:

Section 61.16 constitutes a broad grant of discretion, the operative phrase being "from time to time." The provision simply says that a trial court may from time to time, i.e., depending on the circumstances surrounding each particular case, award a reasonable attorney's fee after considering the financial resources of both parties. Under this scheme, the financial resources of the parties are the primary factor to be considered. However, other relevant circumstances to be considered

include facts such as the scope and history of the litigation; the duration of the litigation; the merits of the respective positions; whether the litigation is brought or maintained primarily to harass (or whether a defense is raised mainly to frustrate or stall); and the existence and course of prior or pending litigation. Had the legislature intended to limit consideration to the financial resources of the parties, the legislature easily could have said so.

Here, the Second District held that prior to making an award of attorney's fees and costs for a proceeding to set aside a final judgment and property settlement agreement, the trial court must consider all of the *Rosen* factors. In the present case, the trial court, according to the Second District, relied on only one *Rosen* factor, the Former Husband's misconduct. The trial court stated, in its Order Granting Motion for Attorney Fees:

3. The appropriateness of awarding attorney fees in this case is obvious. All of the wrongdoing that necessitated these proceedings was perpetrated under Chapter 61; hence, these proceedings constituted an attack on the fraudulently procured Chapter 61 order. For these reasons, it makes good public policy sense to utilize Rosen v. Rosen, 696 So. 2d 697 (Fla. 1997), to impose upon the former husband the former wife's expense occasioned by the former husband's conduct in court proceedings.

The Second District, therefore, remanded to the trial court to weigh all of the *Rosen* factors prior to making a determination whether to award attorney's fees and costs.

Both the trial court and the Second District concluded that this case was, substantively, a dissolution of marriage proceeding under Chapter 61. As a

consequence, the Former Wife was entitled to fees and costs pursuant to *Fla. Stat.* §61.16.¹ As noted by the trial court, when the Former Wife filed a motion under Rule 1.540 she invoked a procedure. According to *DeClaire v. Yohanan*, 453 So. 2d 375 (Fla. 1984), when relief from a judgment is sought by motion, the motion is filed in, and is a continuation of, the action in which the judgment was rendered. Here, the Rule 1.540 motion was a continuation of the dissolution action and therefore filed under the subject matter jurisdiction of the circuit and district courts by Article V, Florida Constitution, and Chapter 61, *Florida Statutes*.

In responding to the trial court's and Second District's conclusion that this was substantively an initial dissolution proceeding, the Former Husband is forced to argue procedure, not substance. In doing so, he fails to explain or even address why Chapter 61 does not apply. He agrees that at one time there was a dissolution proceeding and that after vacation of the Final Judgment there was again a dissolution

¹ The Former Husband, at pages 11-13 of his Initial Brief, argues at length that this Court's recitation of the law in *DeClaire* should not have been followed by the trial court: "The part of the DeClaire case relied upon by the trial court and Respondent is the dicta in discussion at p. 378 based on a quote from Trawick in Florida Practice and Procedure §26.8 (1982) that implies that a motion to vacate is a continuation of the action in which the judgment was entered. Thus, based on a treatise without citation of authority quoted in dictum not even on point, the trial court found that Chapter 61 applied to the Rule 1.540 motion filed by the Former Mrs. Bane." (Initial Brief at 13).

proceeding. He even agrees that the Former Wife could seek attorney's fees for the time after the vacation of the Final Judgment. But he asserts that because the motion was brought pursuant to Rule 1.540, not §61.16, the Former Wife is not entitled to those fees because there was no dissolution proceeding pending until the motion to vacate the final judgment was granted. The Former Husband contends that this was, instead, a post-dissolution proceeding but it was not a post-judgment enforcement or modification action provided for under §61.16. The Former Wife agrees that this was not a post-judgment enforcement or modification action. This was not a post-dissolution proceeding at all - - this was an initial dissolution of marriage proceeding under which §61.16 specifically authorizes an award of attorney's fees and costs.

The Second District and the trial court were correct for another reason -- the Order vacating the Final Judgment was an interlocutory order, not a final order. The Order clearly was not an adjudication on the merits. *Zwakhals v. Senft*, 206 So. 2d 62 (Fla. 4th DCA 1968). Interlocutory orders are those given in the middle of the cause, which are only intermediate, and which do not finally determine or complete the action. A judgment is final where nothing more remains to be done in the cause. *Geico Financial Services, Inc. v. Kramer*, 575 So. 2d 1345 (Fla. 4th DCA 1991). A Rule 1.540 proceeding does not contemplate disposition on the merits. Fact finding in such a proceeding is limited to those facts necessary to a disposition of the motion for relief

and does not extend to a finding on the actual substantive issues in the cause. The effect is to return the parties to the position they occupied before the judgment was entered -- here to a dissolution of marriage proceeding where attorney's fees and costs are available pursuant to *Fla. Stat. §61.16. Zwakhals v. Senft*, 206 So. 2d 62 (Fla. 4th DCA 1968).

In response, the Former Husband argues that the Order Vacating the Final Judgment cannot be deemed to be interlocutory because the dissolution proceeding was over until the Final Judgment was vacated. (Initial Brief at 15). Yet in the next sentence of his brief he acknowledges that a 1.540 proceeding does not contemplate disposition on the merits! (Initial Brief at 15).

The Former Husband mentions, as though it is significant, that the Order vacating the Final Judgment did not include a reservation of jurisdiction to award attorney's fees.. (Initial Brief at 7, 17). As stated, the Order vacating the Final Judgment merely set aside the Final Judgment. The Order was not a final order, did not award any affirmative relief, and was not a disposition on the merits. The Order returned the parties to the pleading stage to continue on with the proceeding and contemplated that a final judgment would later be entered awarding the parties' the appropriate affirmative relief available under Chapter 61, including but not limited to attorney's fees and costs . The Order vacating the Final Judgment, because it was a

non-final order, did not have to include a reservation of jurisdiction to later award attorney's fees and costs. See, for example, *Osherow v. Osherow*, 727 So. 2d 1091 (Fla. 4th DCA 1999)(trial court could not proceed to consider former wife's request for attorney's fees, filed in connection with post-dissolution proceedings, after the court had entered final orders without reserving jurisdiction over fee request, and time for moving to amend had expired); *Feltman v. Feltman*, 721 So. 2d 424 (Fla. 4th DCA 1998); *Cibula v. Cibula*, 578 So. 2d 519 (Fla. 4th DCA 1991).

Next, the Former Husband, relying upon the similar rule contained in the Federal Rules of Civil Procedure and federal cases, asserts that Rule 1.540 is available only to set aside a prior order or judgment and cannot be used to impose any additional affirmative relief. (Initial Brief at 15). The Former Wife agrees with this proposition of law. But here, the Former Wife was not awarded attorney's fees and costs pursuant to Rule 1.540 -- the fees and costs were awarded pursuant to 61.16, which has no federal counterpart. Rule 1.540 was used only to set aside the Final Judgment and no affirmative relief was awarded pursuant to that rule.

Even assuming the 1.540 portion of this case was not strictly a Chapter 61 proceeding, the 1.540 motion was intertwined with the dissolution of marriage proceeding. As recognized by the Former Husband, the 1.540 motion was not a separate cause of action and did not afford the Former Wife any affirmative relief. The

Former Wife was only entitled to the relief afforded by Chapter 61. Where an ancillary proceeding is so intertwined with the dissolution of marriage proceeding or bears the indicia of a Chapter 61 proceeding, attorney's fees and costs are properly awarded pursuant to §61.16. See, for example *Kass v. Kass*, 560 So. 2d 293 (Fla. 4th DCA 1990)(Generally, the trial court has no authority to award attorney's fees in other suits involving a spouse's interests which do not fall within the purview of §61.16; however, these non-Chapter 61 proceedings clearly involve entities which are wholly-owned and controlled by the husband, and are so intertwined with the dissolution action that the trial court properly determined all three cases were part and parcel of the domestic strife); *Hornsby v. Newman*, 444 So. 2d 90 (Fla. 4th DCA 1984) (where the defendant appealed an award of temporary attorney's fees on the ground that the award lacked a statutory basis because paternity was uncontested; the Court held the "action bears the indicia of a Chapter 742 paternity proceeding and, therefore, is subject to its provisions." At 91.); *Marino & Goodman, P.A. v. Chapman*, 561 So. 2d 1318 (Fla. 4th DCA 1990)(where the law firm sought entry of a permanent injunction and a restraining order on behalf of the mother to obtain custody from the father and the father filed a petition for a declaratory judgment of paternity and custody, the trial court held that the mother's action bears the indicia of a Chapter 742 paternity proceeding and is, therefore, subject to its provisions including the payment of fees.)

In contrast to *Kass*, *Hornsby*, and *Marino & Goodman* where the Courts deemed the ancillary litigation to be so intertwined with the Chapter 61 proceeding that an award of attorney's fees was appropriate under that Chapter, the Second District in *Baumgartner v. Baumgartner*, 693 So. 2d 84 (Fla. 4th DCA 1997) considered a situation unlike the present one where there was a separate cause of action providing for affirmative relief. The Second District reversed an award of attorney's fees entered in an action to obtain an injunction for protection against domestic violence pursuant to *Fla. Stat.* §741.30, because neither §741.30 nor Chapter 61 provides a basis for the fees. The Second District stated, at page 86:

We conclude that those cases [*Gilvary*, *Marino & Goodman*, *Hornsby*, and *P.A.G.*] are distinguishable because the cause of action created by section 741.30 is utilized in many situations which either do not or cannot result in a divorce proceeding under chapter 61. The statutory domestic violence injunction is not designed or intended to resolve the complex family issues determined in divorce, paternity, or annulment proceedings.

. . . .

We cannot imply a right to attorney's fees under this statute, especially given the legislature's efforts to minimize the involvement of attorneys in its enforcement. We are fully aware that attorneys often become involved in these proceedings. . . . Providing trial courts with the discretion to award attorneys' fees in appropriate cases would certainly encourage greater reliance upon this statute. Nevertheless, the power to amend this statutory cause of action belongs to the legislature.

(Emphasis added).

The Former Husband, as he did before the trial court and the Second District, primarily relies on the Fourth District's opinion in *Spano v. Spano*, 698 So. 2d 324 (Fla. 4th DCA 1997). In *Spano* the parties entered into a property settlement agreement which was incorporated into a final judgment of dissolution of marriage. Three years after the final judgment, the former wife commenced a proceeding under Rule 1.540 to set it aside the property provisions. The trial court denied the former wife relief under Rule 1.540 but awarded her attorney's fees, based on need and ability, pursuant to §61.16.

The Fourth District, in reversing, confused a petition to modify the property provisions of an agreement and final judgment with a motion pursuant to Rule 1.540. The Fourth District's confusion is illustrated throughout *Spano* including: the statement of the issue on appeal as "whether the proceeding initiated by her under Rule 1.540 was a proceeding under Chapter 61 as an enforcement or modification proceeding" at 325; the reliance on *Fayson v. Fayson*, 482 So. 2d 523 (Fla. 5th DCA 1986) for the proposition that "even though the former wife had couched her attempt to revise the property division of the final judgment as a modification of child support, the court looked at the substance of her proceeding" at 326; and the statement of the issue on appeal as "whether a post judgment effort under rule 1.540 to revise the property division is a proceeding under chapter 61" at 326.

The Fourth District then noted that *Fla. Stat.* Section 61.14 makes clear that only alimony, child support, visitation, or custody may be modified after final judgment. Under Chapter 61, the property division is conclusive upon entry of the final judgment and may not be modified, even if the needs of a party change after the judgment. The Fourth District explained, at length, why the non-modifiability of a property distribution serves important interests. Illustrating its confusion, the Fourth District stated at pages 327 to 328:

Given section 61.14's rather explicit failure to empower the court to modify property interests after final distribution, it follows that the trial court lacks jurisdiction under chapter 61 after a final judgment to decide property questions, unless the final judgment reserves such jurisdiction for a specific purpose regarding identified property, or is reversed, or is otherwise set aside. [citations omitted]. And so, any attempt after a final judgment to modify an agreed property division must find its basis outside of chapter 61.

(Emphasis added). The *Spano* Court, in support of the above quote, relied upon numerous cases, all of which stand for the proposition that you cannot modify the provisions of a final judgment adjudicating final property rights.

The Fourth District in *Spano* confused an impermissible post judgment attempt to modify a final judgment's property provisions with a motion pursuant to Rule 1.540 to set aside a final judgment. A post judgment petition to modify property provisions is not permitted by Chapter 61 so no attorney's fees are awardable pursuant to §61.16.

A motion pursuant to Rule 1.540, on the other hand, is a continuation of the original dissolution proceeding under Chapter 61.

Finally, as pointed out by the Second District, even the Fourth District recognized that attorney's fees might be warranted in some cases² and noted that the *Rosen* factors would need to be consulted prior to making any such fee award.

The Former Husband argues that the public policy of favoring and enforcing settlements relied on in *Spano* outweighs the public policy of ensuring that parties in a dissolution of marriage proceeding both have competent counsel. (Initial Brief at 11). An award of attorneys fees and costs serves more than just the purpose of making sure both parties have competent counsel. In fact, all of the *Rosen* factors show the reasons for an award of attorneys fees and costs.

Moreover, and as recognized by the trial court, the public policy of this State should not permit the Former Husband to engage in misconduct, coercion with a gun and concealment of material facts, thereby procuring his then Wife's signature on a settlement agreement, and then permit him to escape the economic consequences of

²"Thus even assuming that in some rare case the party moving to set aside might arguably qualify for preliminary legal fees under section 61.16 simply to undertake the effort of convincing a judge that the agreement should be cancelled, there is absolutely no justification in our mind to allow that unsuccessful party to recover fees when the attempt is later found without merit." *Spano* at 328.

his misconduct. In *Brown v. Brown*, 432 So. 2d 704 (Fla. 3d DCA 1983), disapproved on other grounds in *DeClaire v. Yohanan*, 453 So. 2d 375 (Fla. 1984), cited by the Former Husband, the Court noted that there are two competing public policies which must be balanced when Rule 1.540 is implicated -- the sanctity of final judgments and the incessant command of the court's conscience that justice be done in light of all the facts. The Former Husband attempts to belittle the second public policy, that settlements procured through misconduct are not favored in the law, by referring to this as a "would-be important issue" and "a strawman". But in this case, and other cases, the settlement reached between the parties was not one favored by the law -- it was coerced, with a gun, and procured through concealment of material facts. The Order on the Former Wife's Motion to Vacate detailed, at length, the Former Husband's misconduct in procuring the Former Wife's signature on the Property Settlement Agreement. Indeed, the Property Settlement Agreement in this case was the one designed for a Rule 1.540 proceeding. The Former Wife should not be required to fund litigation which would not have been necessary but for the Former Husband's reprehensible conduct. Equitable considerations and public policy should require the Former Husband to pay for the consequences of his conduct. Indeed, equity and public policy support the Second District's conclusion that §61.16 authorizes an award of attorney's fees and costs associated with a motion to Rule

1.540 provided that trial court considers all of the *Rosen* factors prior to making such an award.

The Former Husband contends that the Second District imposed a prevailing party standard so that in a Rule 1.540 action fees should be awarded only when the motion to vacate is successful. Ignoring the other competing public policies referred to above, he argues that the policy of not financing attacks upon property settlements is not based upon the results of a Rule 1.540 action but upon the general proposition that settlements are favored in the law and should not be easily attacked. The Former Husband states: “What Respondent has really argued, in essence, is that the prevailing party in a Rule 1.540 action should be awarded fees when the action to vacate is successful. And, as that argument goes, the award would be under FS 61.16. But if § 61.16 applied, it would apply to all attacks on dissolution judgments, successful or not.”(Initial Brief at 18).

Based on the Second District’s opinion, §61.16 does apply to all attacks on dissolution judgments, whether successful or not. The Second District held:

Based on Rosen, we conclude that fees are not precluded for a proceeding to vacate a final judgment of dissolution and property settlement agreement because the attorney’s fees provision in chapter 61, Florida Statutes, is to be “liberally -- not restrictively -- construed.” 696 So. 2d at 700. Even the Fourth District recognized that fees might be warranted in some cases [footnote citing Spano omitted] and noted that the Rosen factors would need to be consulted prior to making any such

fee award. See *Spano*, 698 So. 2d 328-329. We hold that chapter 61 authorizes an award of attorney's fees for a proceeding to set aside a property settlement agreement that was the product of one party's fraud.

The Second District did not impose a prevailing party standard -- the Second District's opinion requires the trial courts to consider all of the factors set forth by this Court in *Rosen* prior to making a decision to award attorney's fees and costs for a Rule 1.540 motion. §61.16 applies because, as noted by the Second District, the attorney's fees and costs were incurred in "this dissolution of marriage action".

The Fourth District, in *Spano*, on the other hand, did impose a prevailing party standard. The Former Husband contradictorily argues that this Court should adopt the Fourth District's opinion in *Spano* while at the same time arguing a prevailing party standard should not be imposed. Yet the *Spano* court carefully distinguished between a successful and an unsuccessful attempt under Rule 1.540 to set aside a final judgment based on a settlement agreement, as follows:

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. . . .

. . . That is even more true where, as here, the attempt is found meritless after an evidentiary hearing. Thus even assuming that in some rare case the party moving to set is aside might arguably qualify for preliminary legal fees under section 61.16 simply to undertake the effort of convincing a judge that the agreement should be cancelled, there is

absolutely no justification in our mind to allow that unsuccessful party to recover fees when the attempt is later found without merit.

At 328. (Emphasis added).

Finally, the legislature does not, as argued by the Former Husband, need to amend §61.16 to include “a proceeding outside this chapter under Rule 1.540(b)(3), *Fla. R. Civ. P.* to a party who is successful in having a final judgment or order vacated on the ground of fraud” (Initial Brief at 19) because §61.16 states:

The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney’s fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter . . .”

(Emphasis added). Section 61.16 applies to an initial dissolution of marriage proceeding. The Former Wife was not seeking to enforce or modify the Final Judgment; she was seeking to set aside the Final Judgment and continue with the initial dissolution proceeding.

CONCLUSION

For the foregoing reasons, this Court should resolve the conflict between the Second District and the Fourth District by reversing the Fourth District's decision in *Spano v. Spano*, 698 So. 2d 324 (Fla. 4th DCA 1997) and affirming the Second District's conclusion that *Fla. Stat.* §61.16 authorizes an award of attorney's fees and costs in a dissolution of marriage proceeding for the attorney's fees and costs associated with a motion pursuant to Rule 1.540 to set aside a Final Judgment of Dissolution of Marriage.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this
____ day of February, 2000 by U. S. Mail to Arnold D. Levine, Esquire, Post Office
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