IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

LINDA ROSS SCHORR,

Plaintiff-Appellee,

Vs.

Shelby Chancery No. 94348-1
C.A. No. 02A01-9409-CH-00217

JAMES LEE SCHORR,

Defendant-Appellant

FROM THE SHELBY COUNTY CHANCERY COURT

THE HONORABLE NEAL SMALL, CHANCELLOR

Diane E. Bell of Memphis
Hayden Lait of Memphis
For Plaintiff-Appellee

Grady M. Garrison of Memphis
Gail O. Mathes of Memphis
For Defendant-Appellant

REVERSED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

HOLLY KIRBY LILLARD, JUDGE

HEWITT P. TOMLIN, JR., SENIOR JUDGE

This appeal involves a suit that essentially seeks to set aside and/or modify a final decree of divorce. Defendant, James Lee Schorr, appeals from the judgment of the chancery court awarding plaintiff, Linda Schorr, monetary recovery as an addition to the division of marital

property, plus attorney fees and costs.

Ms. Schorr's complaint in this independent action filed March 24, 1987, alleges, as subsequently amended, that the parties were divorced by decree of the chancery court entered February 23, 1984, and that the decree incorporated a property settlement agreement entered into by the parties on February 16, 1984. Ms. Schorr avers that the settlement agreement: (p. 320 of r., para. 7, 4th line)

> [W]as agreed to by Mrs. Schorr based upon the representations made by Mr. Schorr that his total assets as of November 1, 1983, were $608,528.00, and based upon that fact, at no time between November 1, 1983, and the time of the execution of said document, February 16, 1984, and the date it became final, March 25, 1984, did defendant supplement or alter his alleged statement of net worth. Mrs. Schorr, in reliance upon Mr. Schorr's financial statement which was sworn to November 28, 1983, and incorporated within his answers to interrogatories filed in this cause on November 2, 1983, felt that said settlement agreement was a fair and equitable division of the parties' assets and the said agreement represented approximately fifty percent of the total assets of marital property.

The complaint further avers that the representations made under oath were further manifested by defendant's silence and willful failure to fully disclose essential information regarding ownership of various assets. The complaint alleges that defendant's fraud induced her to agree to the property settlement agreement which ultimately was incorporated into the final decree of court. She seeks, *inter alia,* "a fair and equitable division of marital property based upon the truthful disclosure and an accurate total of the parties' assets as of the date of the divorce plus all interest, and attorney's fees and expenses as actual and compensatory damages." (p. 325 of t.r.)

Defendant's answer joins issue on the material allegations of the complaint and further avers that all of the issues were resolved in the divorce suit. Defendant also avers that the doctrine of res judicata applies, that plaintiff did not avail herself of the remedy provided by Rule 60, Tenn.R.Civ.P., and that there was no extrinsic fraud that would allow the final decree of divorce to be set aside.

The record reveals that in the divorce case both parties were represented by very able lawyers and the discovery provisions of Tenn.R.Civ.P. were extensively utilized. Although the parties' divorce case did not culminate in a trial, there was ample discovery and the parties,

apparently satisfied with the information revealed, entered into a mutual agreement regarding division of assets. Pursuant to the terms of the property settlement agreement, Mr. and Ms. Schorr each received what they considered to be an equitable division of the marital assets.

In August of 1986, Ms. Schorr discovered the parties' 1983 joint tax return. This return, which the parties signed in August of 1984, stated that Mr. Schorr's 1983 income as president of the Holiday Inn's Hotel Group was $841,284.00. Although Ms. Schorr signed the return in August, 1984, she testified that she did not review the return at that time. In 1986, when Ms. Schorr noticed the parties 1983 income as stated on their tax return, she became suspicious that there had not been an equitable division of marital assets and after obtaining counsel filed this suit.

In August of 1989, the trial court granted Ms. Schorr's Motion for Summary Judgment, finding Mr. Schorr liable for fraudulent concealment of assets during the divorce proceedings, and in March of 1991, the court entered a judgment in favor of Ms. Schorr in the amount of $485,000.00. Upon appeal to this Court, this Court, considering only the issue concerning the correctness of summary judgment, reversed the trial court's decision and remanded the case for a trial.

Trial of this case began on January 11, 1994. At the close of the proof, the trial court found that Mr. Schorr fraudulently concealed assets worth $521,858.00 from Ms. Schorr prior to entry of the final decree. The court awarded Ms. Schorr one-half the value of these assets plus pre-judgment interest, for a total award of $613,000.00, attorney's fees and expenses of $170,586.15, and punitive damages of $10,000.00. The court later reduced the punitive damages award to $500.00. Mr. Schorr thereafter perfected the present appeal, and presents four issues for review. However, we perceive the dispositive issue to be whether the trial court erred in essentially setting aside or modifying the final decree.

In an action to set aside a final judgment, a litigant may pursue the options set forth in Tenn.R.Civ.P. 60.02 or, as preserved by the rule's savings clause, the party may bring an independent action. ***Jerkins v. McKinney***, 533 S.W.2d 275, 280 (Tenn. 1976). Ms. Schorr chose the latter alternative to bring the present suit, presumably because a Rule 60 proceeding was time barred. Generally, a party may file an independent action to set aside a judgment only

under unusual and exceptional circumstances, and then only where no other remedy is available or adequate. ***Id.*** at 281. In the instant case, Ms. Schorr's allegations for relief are limited to fraud.

In an independent action to set aside a judgment on the basis of fraud, the complaining party must prove extrinsic, as opposed to intrinsic, fraud. ***New York Life Ins. Co. v. Nashville Trust Co.***, 200 Tenn. 513, 517-21, 292 S.W.2d 749, 751-53 (1956); ***Medlock v. Ferrari***, 602 S.W.2d 241, 245-46 (Tenn. App. 1979) ***Noll v. Chattanooga Co.***, 38 S.W. 287, 290-91 (Tenn. Ch. App. 1896), aff'd orally Oct. 28, 1986. The distinction between intrinsic and extrinsic fraud existed at common law, ***id***., and is maintained today both under the rules of civil procedure and in case law. Tenn.R.Civ.P. 60.02 (Michie 1995); ***Stacks v. Saunders***, 812 S.W.2d 587, 592 (Tenn. App. 1990); ***Brown v. Raines***, 611 S.W.2d 594, 597 (Tenn. App. 1980).

Prior to the adoption of the Tennessee Rules of Civil Procedure, a party seeking to set aside a judgment on the basis of intrinsic fraud was required to prove the fraud either at trial, in a motion for a new trial, or on appeal. ***Noll***, 28 S.W. at 290-91. Upon completion of the appellate process, a party could no longer seek to set aside a judgment of the basis of intrinsic fraud:

> The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy.

Id. at 291. This rationale is consistent with fundamental principles of jurisprudence, which state: "Material facts or questions which were in issue in a former action and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and such facts or questions become res judicata and may not again be litigated in a subsequent action brought between the same parties or their privies." ***Medlock***, 602 S.W.2d at 246.

When the Tennessee Rules of Civil Procedure were adopted, the requirement that proof of intrinsic fraud be raised during trial or appeal was softened. Under the current rule, a party may seek to set aside a former judgment on the basis of intrinsic fraud during the first year following entry of the final judgment. Tenn.R.Civ.P. 60.02(2).

Proof of extrinsic fraud, on the other hand, is not now required, nor has it ever been

required, to be proven during the initial trial or appeal of the case. Although the characteristics of intrinsic and extrinsic fraud are somewhat amorphous, it is generally held that extrinsic fraud "consists of conduct that is extrinsic or collateral to the issues examined and determined in the action," ***Thomas v. Dockery***, 33 Tenn. App. 695, 702, 232 S.W.2d 594, 598 (1950), while intrinsic fraud is fraud within the subject matter of the litigation, such as forged documents produced at trial or perjury by a witness. ***Id***. at 702, 598. In ***Noll***, the court further examined the distinctions between these different types of fraud:

> What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat; or, being regularly employed, corruptly sells out his client's interests. U.S. v. Throckmorton, 98 U.S. 65, 66, and authorities cited.

Id. at 291(quoting ***Pico v. Cohn***, 91 Cal. 129,133, 25 Pac. 970, 271,27 Pac. 537 (1891)) In ***Noles v. Earhart***, 769 S.W.2d 868, 874 (Tenn. 1988), this Court stated "extrinsic fraud involves deception as to matters not at issue in the case which prevented the defrauded party from receiving a fair hearing." (Emphasis supplied). ***See also***, ***Keith v. Alger***, 114 Tenn (6 Cates) 1, 24-25 (1904); ***Stacks***, 812 S.W.2d at 592; ***Brown***, 611 S.W.2d at 597; ***Thomas***, 33 Tenn. App. at 702-03, 232 S.W.2d at 598 (1950).

The reason for the common law distinction between intrinsic and extrinsic fraud, and the reason that the distinction is maintained in Tenn.R.Civ.P. 60, is grounded in the need for finality of judgments:

> The wrong [caused by intrinsic fraud] in such a case is, of course, a most grievous one; and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischief far worse that the evil being remedied. Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be overruled merely because it can be show to have been based on perjured testimony, for if this could be done once, it could be done again and again, ad infinitum.

Noll, 38 S.W. at 291. We emphasize that, although the purpose of Tenn.R.Civ.P. 60 is to "alleviate the effect of an oppressive or onerous final judgment," ***Killion v. Tennessee Department of Human Services***, 845 S.W.2d 212, 213 (Tenn. 1992), the rule is equally aimed

at striking a balance between the competing interests of justice and finality. ***Banks v. Dement Constr. Co. Inc.***, 817 S.W.2d 16, 18 (Tenn. 1991).

With the aforementioned principles in mind, we now turn to the facts of the present case. During their marriage of approximately nineteen years, James and Linda Schorr enjoyed a high standard of living. In 1979, James Schorr was named president of Holiday Inn's Hotel Group. Ms. Schorr worked inside the home, raising the couples' four sons. Ms. Schorr testified that, throughout the parties' marriage, Mr. Schorr handled the family finances. Ms. Schorr stated that both during her marriage to Mr. Schorr and while their divorce was pending, she relied on Mr. Schorr with regard to financial matters.

In the present suit, Ms. Schorr alleges that Mr. Schorr intentionally failed to disclose his interest in the following assets: shares of Holiday Inn stock and cash awards from the Restricted Stock Incentive Plan, Holiday Inn stock options, bonus awards, and benefits from Holiday Inn's Long Term Performance Plan. Ms. Schorr alleges that as a result of Mr. Schorr's fraudulent acts of concealment, she was denied a fair and equitable division of the marital property.

Prior to the development and execution of their property settlement agreement, Ms. Schorr's attorneys, Frank Glankler, Jr., Michael Robinson, Barry Ward, and Joseph Wilcox, conducted extensive discovery of Mr. Schorr's assets. On May 18, 1993, Ms. Schorr's attorneys filed Plaintiff's Request for Production of Documents. The Request asked Mr. Schorr to produce earnings records, income tax returns, statements of accounts in financial institutions, stock certificates in which Mr. Schorr had any legal or beneficial interest, records of cash now on hand or being held by others for Mr. Schorr's benefit, and "documents showing any other assets or sources of income." Mr. Schorr's attorneys, James Manire and James Reed, responded by producing Mr. Schorr's statements of income, net worth, bonuses, employee benefits package, and prior state and federal income tax returns.

On June 27, 1983, Mr. Glankler wrote to James Manire seeking, *inter alia*, information regarding the following items: "(1) The number of H.I.A. [Holiday Inn] shares Mr. Schorr owns; (2) Stock Option Agreement provides [sic] he has entitlement to 18,000 shares; . . . (6) Schorr's current earning statement; . . . (9) Description of current stocks, bonds and securities held by Mr. Schorr." In response to Mr. Manier's request that he provide the additional information

requested by Mr. Glankler, Mr. Schorr stated that he did not own any Holiday Inn stock, but that he held an option on 350 shares. Mr. Schorr represented that he sold all of his Holiday Inn stock to pay his 1982 taxes. Mr. Schorr further stated:

> I feel the net worth and income statement previously prepared for Frank [Glankler] (by Arthur Anderson at considerable expense) fully and completely reported my financial positions. Candidly, I resent the attitude of this further inquiry which produces no new information for Frank, takes my time in response, and no doubt will give somebody a lot of redundant paper to read (emphasis in original).

In a letter dated August 18, 1983, Mr. Glankler asked Mr. Manire and Mr. Reed to provide a further explanation of Mr. Schorr's use of the proceeds from his sale of Holiday Inn stock. Apparently dissatisfied with Mr. Schorr's responses regarding stock ownership, Ms. Schorr filed Interrogatories on October 24, 1983, requesting the following information from Mr. Schorr:

> Describe the amount of Holiday Inn stock owned by you individually or jointly with the Plaintiff/Counter-Defendant prior to January 1983 . . . . Describe in detail what Defendant/Counter-Plaintiff has done with said Holiday Inn stock since January 1983. Please provide canceled checks indicating the disposition of stock . . . . Describe listing the name, issuer, if applicable, account number and location of all stocks, bonds, securities, real estate, cash, bank accounts, and Certificates of Deposit in the name of Defendant/Counter-Plaintiff or being held for or on behalf of Defendant/Counter-Plaintiff.

Mr. Schorr's Answers to these Interrogatories indicated that he owned 5,748 shares of Holiday Inn Stock prior to January, 1983. Mr. Schorr responded that he sold all of his shares and placed the proceeds, some $190,012.61, in a capital preservation fund. Mr. Schorr did not indicate that he owned, actually or beneficially, any other stock, or that same was being held for his benefit.

In reliance upon Mr. Schorr's sworn financial statements and his responses to sworn interrogatories, Ms. Schorr agreed to the parties' property settlement agreement, executed February 16, 1984. The property settlement agreement was incorporated into the Final Decree of Divorce, entered on February 23, 1984, and made final March 25, 1984.

As discussed *supra,* in order to bring an independent action to set aside a judgment, a plaintiff must prove extrinsic fraud, or fraud collateral to the subject matter of the litigation. Counsel for Ms. Schorr argues that Mr. Schorr's false promises of compromise kept Ms. Schorr

from pursuing litigation in the parties' divorce; constituting extrinsic fraud. We do not agree. There is no proof of any collateral action taken by Mr. Schorr that kept Ms. Schorr from pursuing litigation. While it is true that the divorce case was not tried, nevertheless, any alleged fraud by Mr. Schorr occurred during the discovery process and thus was entirely internal to the subject matter of the parties' litigation.

A detailed examination of the record, particularly the discovery proceedings, reveals that James Schorr was a sophisticated businessman. He held a high position at a large corporation and was familiar with business transactions. During discovery proceedings prior to the parties' divorce, Mr. Schorr was asked by his wife's attorneys as well as his own attorneys to reveal the extent of his rather large portfolio of assets. According to Ms. Schorr, he failed to do so. In determining the result of this failure, we find instructive a statement made by the Tennessee Court of Chancery Appeals:

> It is averred, and we think sufficiently shown, that, upon proof of these facts, there is a reasonable certainty that plaintiff, upon another trial, would gain his cause. Such being the case, is plaintiff entitled to a decree vacating and annulling the former decree, on the ground that it was procured by fraud? After a careful and extended examination of the authorities, we are constrained to answer this question in the negative. That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination it the same proceeding, it must be regarded as final and conclusive, unless it can be shown that jurisdiction of the court has been imposed upon, or that the prevailing party has, by some extrinsic or collateral fraud, prevented a fair submission of the controversy.

Noll, 38 S.W. at 290-91.

In the case at bar, the parties had an opportunity to conduct, and did conduct, ample discovery and investigation to determine the extent of the parties' marital assets. The fact that the investigation ended at the close of discovery, rather than after trial, does not change the fact that the matter was pursued to finality. In all probability, Mr. Schorr's testimony at trial would have been the same as the responses he gave during discovery and the result in this case would

have been the same. Regardless, Ms. Schorr's attorney was apparently satisfied with Mr. Schorr's responses during discovery, and therefore advised Ms. Schorr to sign the property settlement agreement without a trial, finalizing the matter.

The trial court found Mr. Schorr guilty of fraudulent conduct; however, we find no proof to support Ms. Schorr's allegations of extrinsic fraud. Even if we take as true all of the allegations made by Ms. Schorr concerning Mr. Schorr's fraudulent concealment of assets, as well as the supporting documents and trial testimony, we are nonetheless constrained to hold that the fraud in this case was completely intertwined with the subject matter of the litigation; *to wit*, the division of the parties' marital assets. Such fraud is intrinsic. Finding no proof of extrinsic fraud, we hold that the trial court erred in modifying the 1984 final decree.

Ms. Schorr also apparently contends that this Court should set aside the parties' property settlement agreement pursuant to the provisions of Tenn.R.Civ.P. 60.02(2) and (5). Although the present case is not a proceeding pursuant to Rule 60.02, we will briefly address the points involved. Rule 60.02 provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; . . . (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation . . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court.

We first address Ms. Schorr's argument that the judgment may be set aside under Tenn.R.Civ.P. 60.02(2). In the case at bar, the final decree was entered in February of 1984 and became final on March 25, 1984. Ms. Schorr did not bring an action to set aside the parties' property settlement agreement until March of 1987, three years later. Rule 60.02(2) states that actions to set aside a prior judgment based on fraud, either intrinsic or extrinsic, must be filed within one year of the entry of the judgment or order in question. Although the very nature of fraud is such that it is often concealed from the defrauded party, the rule clearly sets forth a one

year limitation. We cannot agree with the argument of Ms. Schorr's counsel that the one year period set forth in Rule 60.02 was tolled because Mr. Schorr concealed his fraudulent actions.[1] A finding that the limitations period is tolled because of fraudulent concealment would not only nullify the one year limit set forth in the rule, it would ignore long established policies supporting finality of litigation. ***See, e.g***. ***Jerkins***, 533 S.W.2d at 281; ***Banks***, 817 S.W.2d at 18; ***Noll***, 38 S.W. at 291. Ms. Schorr's suit, brought in 1987, to set aside a final decree entered in 1984, was barred under the terms of Tenn.R.Civ.P. 60.02(2).

Ms. Schorr's contention that she is entitled to relief under Tenn.R.Civ.P. 60.02 (5) is similarly without merit. Under Rule 60.02(5), this Court may set aside a final judgment that does not fall within the other provisions of Rule 60.02 for "any other reason" the Court deems just.

Courts in this State have interpreted Rule 60.02(5) narrowly, finding that relief under sub-part five is only available in cases of "overriding importance" or "extraordinary hardship." ***Underwood v. Zurich Ins. Co.***, 854 S.W.2d 94, 97 (Tenn. 1993). We do not find this to be such a case. Moreover, relief under Rule 60.02(5) is not to be sought as a fall back position; rather, relief under that provision is limited to claims that do not otherwise come within other clauses of Rule 60.02. ***See Duncan v. Duncan***, 789 S.W.2d 557, 564 (Tenn. App. 1990). In the present suit, the remedies set forth in 60.02(2), until time barred, were available to Ms. Schorr.

The judgment of the trial court is reversed, and the case is remanded for such further proceedings as are necessary. Costs of appeal are assessed against appellee. The remaining issues are pretermitted.

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[1] Although we do not find it necessary to reach the issue, we note that Ms. Schorr did in fact sign the parties' 1983 tax return in August, 1984, less than six months after the Schorr divorce became final. Ms. Schorr testified that she did not review the contents of the tax return before signing it, stating that she relied on Mr. Schorr as the manager of family finances. While we sympathize with Ms. Schorr's position, she is nonetheless held to the same standard as all taxpayers, who by signing their tax return swear the following: "Under penalty of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete." We realize that it is common for one party in a marriage to manage the couple's finances; however, we cannot relieve a party of responsibility from the contents of a sworn document based on a claim of ignorance.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

HOLLY KIRBY LILLARD, JUDGE

HEWITT P. TOMLIN, JR.
SENIOR JUDGE