IN THE SUPREME COURT OF IOWA
NO. 20-0076
(Linn County No. CDDM037207)

IN RE: THE MARRIAGE OF	)
SUSAN GAYLE HUTCHINSON	)
AND ROBERT GREGORY	)
HUTCHINSON	)
	)
SUSAN GAYLE HUTCHINSON,	)
	)
Petitioner/Appellee,	)
	)
vs.	)
	)
ROBERT GREGORY	)
HUTCHINSON;	)
	)
Respondent/Appellant.	)

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
THE HONORABLE MITCHELL E. TURNER, DISTRICT JUDGE

APPELLANT/APPLICANT ROBERT GREGORY HUTCHINSON'S REPLY BRIEF

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 18th_ day of August, 2020, I electronically filed this document with the Clerk of the Supreme Court of Iowa by filing it through EDMS, which will send notice to all registered filers who have appeared in this matter.

_____/s/ Webb L. Wassmer____
WEBB L. WASSMER

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I. SUSAN HUTCHINSON'S CLAIM IS UNTIMELY AND BARRED BY THE ONE-YEAR LIMITATIONS PERIOD SET FORTH IN IOWA RULE OF CIVIL PROCEDURE 1.1013(1)

A. The Alleged Fraud Was Intrinsic

Greg Hutchinson's argument on this issue is well-outlined in his opening Brief.

Susan acknowledges that the fraud sufficient to justify relief under Rule 1.1012 must be "extrinsic," and not "intrinsic," to the judgment. However, she fails to recognize that the alleged fraud committed here is "intrinsic," not "extrinsic."

The line between extrinsic and extrinsic fraud is defined in the Iowa case law. First, it is important to identify the fraudulent act that Susan alleges. She alleges that Greg, under an obligation to do so by the District Court's Order for full disclosure of financial matters, including assets, to the other party, failed to disclose the existence of the GE Pension. He is alleged to have done so by not informing Susan's attorney of the existence of the GE Pension in their communications and by signing the Stipulation asserting that all assets had been disclosed.

Under Iowa case law, that is intrinsic fraud. The "judgment" at issue is the Decree (incorporating the Stipulation) which divided the assets of the parties and addressed other matters. Greg's alleged failure to disclose the existence of the GE Pension and signing documents affirming that all assets have been disclosed is no different than a false affidavit, false testimony or fraudulent exhibits which are clearly intrinsic fraud under Iowa case law. *See In re: Marriage of Bacon*, Iowa Ct. App. No. 1-717/11-0368, slip op. at 10 (Iowa Ct. App. 10/5/11); *In re Marriage of Gance*, 36 P.3d 114, 117-18 (Colo. App. 2001) (collecting cases). Intrinsic fraud relates to "matters or issues which actually were or could have been presented or adjudicated at trial." *Giglos v. Stravropoulos*, 204 N.W.2d 619, 621 (Iowa 1973). Division of assets was actually presented and litigated at trial. The GE Pension, an asset, could have been presented at trial.

Susan attempts to distinguish the decision of the Court of Appeals of Iowa in *Simon v. Simon*, No. 15-0814 (Iowa Ct. App. 4/27/16). *Simon* is not distinguishable. In that case, the claim was made that a party in a dissolution had committed fraud by misrepresenting the value of real estate. The Decree had been entered in 2010 and the “complaint for fraud” was filed in 2014. The Court of Appeals, applying 1.1013(1), affirmed dismissal

of the Petition on the ground that the lawsuit was an improper and untimely collateral attack on the prior judgment. The Court found that the "complaint in fraud" could not be construed as a timely Petition under Rule 1.1012 as it had not been filed within one year of the entry of the Decree. The Court rejected the argument for an equitable exception based on the alleged false misrepresentations during the dissolution proceedings and that those misrepresentations gave a "false sense of security." As the only allegation of fraud, like this case, was fraud committed during the dissolution, not fraud outside of the dissolution, the Court of Appeals found the fraud to be "intrinsic," and therefore the fraud did not excuse the untimely filing. There is no meaningful distinction between *Simon* and Susan Hutchinson's Petition.

Susan also attempts to distinguish *In re Marriage of Bacon*, 11-0368 (Iowa Court of Appeals Oct. 5, 2011). That case, however, involved a false financial affidavit. The gravamen of Susan's complaint in this case is that Greg failed to disclose the GE Pension in the Stipulation and, thereby made a false certification regarding the assets of the parties. Signing a Stipulation averring that it is true and accurate is no different than signing an Affidavit and averring that it is true and accurate.

Susan cites to *In re Marriage of Rhinehart*, No. 09-0193 (Iowa Ct. App. 2010), in support of her argument that failure to disclose an asset during a dissolution constitutes extrinsic fraud. However, whether the failure to disclose assets during the dissolution constituted extrinsic or intrinsic fraud was not litigated in that case. It appears to be assumed that the fraud was extrinsic. The only related issue litigated was whether the claim had to be filed as a separate petition rather than in the underlying action. *See Rhinehart*, slip op. at 4-5. That is not an issue raised in this case. Thus, *Rhinehart* does not address the question before this Court.

Susan also cites to *Graves v. Graves*, 109 N.W. 707 (Iowa 1906). With regard to the nature of extrinsic fraud, the Court states:

> What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in books are such as these: Keeping the unsuccessful party away from the court by a false promise of compromise, or purposefully 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 interest. United States v. Throckmorton, 98 U.S. 65, 66, 25 L. Ed. 93, and authorities cited.
>
> . . .
>
> In Tucker v. Stewart, 121 Iowa 714, 97 N.W. 148, we said that the rule announced by the Supreme Court of the United States in U. S. v. Throckmorton, supra, is that

> uniformly followed in this state. This settles the matter for this jurisdiction . . .

Graves, 109 N.W. at 709. None of those apply here. There was no false promise of compromise. There was no effort to keep Susan ignorant of the lawsuit, in fact she was the one who filed it. There was no corrupt action by Susan's own attorney.

The most recent Iowa case citing *Graves* is *Dragstra v. Northwestern State Bank of Orange City*, 192 N.W.2d 786 (Iowa 1971). In that case, this Court found that a forged signature on a guaranty and the party's knowledge of the forgery was intrinsic to the judgment and did not justify setting aside the prior judgment. *Id*. at 790. The fraudulent nature of the signature was not disclosed to the other party. Likewise, Greg's alleged false certification on the Stipulation that he had disclosed all assets is intrinsic to the Decree.

An example of true extrinsic fraud is set forth in *Tollefson v. Tollefson*, 137 Iowa 151, 114 N.W. 631 (Iowa 1908). In that case, a married couple from Norway had relocated to Iowa. The husband sent the wife back to Norway with promises that he would follow. Instead, he procured a divorce in Iowa claiming that his wife had deserted him. The Decree was set aside as having been procured by extrinsic fraud. That case involved a false promise of compromise and concealment of the dissolution petition itself.

For the above stated reasons and the reasons previously stated, the alleged fraud in this case was intrinsic to the judgment, not extrinsic. It does not justify setting aside or modifying the Decree.

B. *Susan Hutchinson Did Not Act With Reasonable Diligence*

Greg Hutchinson's argument on this issue is also well-outlined in his opening Brief.

The essence of the argument is this:

1. Susan Hutchinson signed the blank GE Consent Form without further inquiry as to what it meant. Tr. Tr. at 85, 138, 170-71, 197, 229-230). That Form, by its express terms, clearly raised the possibility of the existence of a GE Pension.

2. Susan, through her attorney, asked Greg to "check the box" on the GE Consent Form and return it to her. (App. 114, 116, 120 - Respondent's Exhibits A, B and C).

3. There was a dispute as to whether the form was returned. *Compare* Tr. Tr. 298, 339-40 *with* Tr. Tr. 87. However, it is undisputed that Susan and her attorney did not follow-up on actually obtaining a copy of the "checked" GE Consent Form in 2010. (Tr. Tr. 145-46, 188-89, 242. 298).

4. When Susan found out about the GE Pension in 2015, her attorney requested a copy of the "checked" GE Consent Form which Greg Hutchinson promptly provided. (Tr. Tr. 58-59; App. 173 - Petitioner's Ex. 19).

> 5. The fact that the GE Pension box was checked on the GE Consent Form triggered the filing of Susan's Petition claiming fraud. (Tr. Tr. 89, 164, 192-93, 238-39).

Thus, it cannot be disputed that, if Susan or her attorneys had followed up on obtaining a copy of the GE Consent Form within a year of the Decree, they would have had notice of of the existence of the GE Pension and Susan's claim and could have filed a timely Petition under Rule 1.1012. Susan can argue all she wants about why she utterly failed to follow-up after signing a blank form that she did not understand, but her failure to follow up objectively did not constitute reasonable diligence. Susan was on inquiry notice of the potential issue.

It must be kept in mind that the burden of demonstrating "reasonable diligence" rests with Susan Hutchinson. *See McGrath v. Dougherty*, 275 N.W. 466, 471 (Iowa 1937); *Loughman v. Couchman,* 53 N.W.2d 286, 288 (Iowa 1952); *Berkley Int'l Co. v. Devine*, 423 N.W.2d 9, 12 (Iowa 1988). She failed to satisfy that burden.

Susan argues that "a party . . . may not be accused of a lack of diligence when he possesses no means of knowing that the evidence subsequently discovered was previously obtainable." Susan's Brief at 28

(citations omitted). However, the obtainable evidence was the completed GE Consent Form with the box for "GE Pension" checked. That document is what triggered the fraud claim or would at least have triggered further investigation. Susan, and her attorney, knew in 2010 that the completed GE Consent Form existed and that they did not have a copy. Susan simply failed to use reasonable diligence in obtaining a copy. "The showing of diligence required is that a reasonable effort was made. . . . [The petitioner] must exhaust the probable sources of information concerning [her] case; [s]he must use that of which [s]he knows, and [s]he must follow all clues which would fairly advise a diligent [person] that something bearing on [her] litigation might be discovered or developed." *State v. Farley,* 226 NW.2d 1, 4 (Iowa 1975) (citation omitted).

Whether Greg Hutchinson knowingly and intentionally failed to disclose the GE Pension or not is irrelevant to the question of whether Susan used reasonable diligence in following-up on the information she did have.[1]

1Susan argues about Greg not challenging the proof of other elements of Susan's fraud claim, as he has challenged only "justifiable reliance" on appeal. That is irrelevant. Greg has elected on appeal to challenge the weakest element of Susan's fraud claim. Even though he disagrees with the District Court's findings as to other elements, particularly regarding whether he knowingly and intentionally made any misrepresentation, an appellant is not required to challenge every adverse ruling on appeal. The simple answer is that Greg did not challenge the intent element on appeal because that

Greg Hutchinson also explained in his testimony why he had informed Ms. Reasner in his email of October 28, 2010 (App. 167 - Petitioner's Exhibit 17), that he may designate his children as beneficiaries, but ultimately instead designated Michelle Tegeler. He testified that "I intended to give it to my children, but they're very well off and it would have been convoluted to try to separate that in four ways, so I just gave it to one person." (Tr. Tr. 310). Greg Hutchinson simply changed his mind. (Tr. Tr. 339). After further consideration, he believed that the GE Pension had little or no value and dividing it four ways would have been problematic. *Id*.

Overall, Susan Hutchinson failed to use reasonable diligence in discovering her claim. Thus, her Petition was untimely filed and her claim must be dismissed.

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element rests largely on the District Court's credibility findings. Credibility findings are extremely difficult, if not impossible, to overturn on appeal. In any event, whether Susan used reasonable diligence to discover her claim after the Decree was entered is a distinct question from whether she has shown justifiable reliance before the Decree was entered.

II. SUSAN HUTCHINSON DID NOT PROVE THE JUSTIFIABLE RELIANCE ELEMENT OF HER FRAUD CLAIM

Greg relies on the discussion of this issue set forth in his opening Brief. Susan's Brief raises no argument not adequately addressed therein. The key point is that the GE Consent Form raised a question about the existence of the GE Pension that Susan and her attorney failed to investigate or answer before submitting the Decree and Stipulation to the District Court. That precludes Susan's proof of the justifiable reliance element of a fraud claim, particularly since a party alleging fraud must establish its existence by clear and convincing evidence. *See Benson v. Richardson*, 537 N.W.2d 748, 756 (Iowa 1995).

> The justifiable-reliance standard does not mean a plaintiff can blindly rely on a representation. Instead, the standard requires plaintiffs to utilize their abilities to observe the obvious, and the entire context of the transaction is considered to determine if the justifiable-reliance element has been met.

Spreitzer v. Hawkeye State Bank, 779 N.W.2d 726, 737 (Iowa 2009). (citations omitted). While, absent the GE Consent Form, Susan might have justifiably relied on Greg's failure to disclose the GE Pension, Susan cannot turn a blind eye to the GE Consent Form, what it states on its face, and her failure to investigate further.

III. ATTORNEYS' FEES ISSUES

A. Greg Hutchinson Should Recover His Attorneys' Fees Incurred in Obtaining Dismissal of Count II Seeking Modification of Alimony

Susan Hutchinson first argues that "the district court understood that Susan's request to modify alimony was alternate and subsidiary to her primary claim to correct, vacate or modify the parties' 2010 decree." Susan's Brief at 52. However, there is nothing in the District Court's Ruling on this issue so suggesting. App. 255 (Ruling Re: Rule 1.904(2) Motion, filed December 30, 2019, at 1). As discussed in Greg's opening Brief, the District Court incorrectly found that attorneys fees were not available and that Susan had "completely prevailed in this proceeding."

Further, the two Counts of the Petition sought different relief. Count I sought a division of the GE Pension. Count II sought a reopening of alimony and an increased alimony award. Division of assets and alimony are different animals. The District Court did not deny the request for Greg's attorneys' fees relating to Count II because it was "alternative" to Count I or because Susan had obtained all of the relief that she had requested in her Petition.

Second, Susan argues that the District Court did not conduct any analysis of the parties' relative ability to pay fees. Obviously, as the District Court concluded that there was no "right" for Greg to recover his attorneys' fees, the District Court did not reach and perform that analysis. This issue should be remanded for the District Court to perform that analysis.

Finally, Susan argues that Greg provided no evidence at trial regarding his claimed fees. However, attorneys' fees attributable to the dismissed Count II was not a trial issue. It was the proper subject of a post-trial request,. App. 221-22 (Respondent's Post-Trial Brief Regarding Requested Relief at 5-6). Post-trial requests for attorneys' fees are common. *See, e.g.* Iowa R. App. P. 6.103(2) (governing appeal of attorneys' fee orders entered after final judgment and noting that "the district court retains jurisdiction to consider an application for attorney fees notwithstanding the appeal of a final order or judgment in the action."). In any event, the District Court expressly permitted post-trial submission of attorneys' fee affidavits. (Tr. Tr. 358). That included submission of Susan's post-trial attorneys' fee affidavit. (App. 237). If Susan wished to challenged the claimed amount or

the supporting documentation thereof, her proper method was to file a response with the District Court. With regard to the main complaint Susan now raises regarding the merits of Greg's attorneys' fees claim, counsel for Greg did acknowledge that some of the fees incurred related to Count I and did not request those fees that solely related to Count I. (App. 222).

B. The District Court Abused Its Discretion In Awarding Susan Hutchinson $7,056 in Attorneys' Fees as a Discovery Sanction

At the outset, Susan states that "Greg never requested an unredacted copy of Exhibit 21 for his own inspection." Susan's Brief at 55. Counsel for Greg fully expected that counsel for Susan would provide a copy of the unredacted Exhibit 21 to counsel for Greg because otherwise, submission of the unredacted Exhibit 21 to the Court would be an *ex parte* communication and it is usual practice to provide opposing counsel with a copy of any document provided to the Court.[2]

2The Appendix contains only the redacted version of Exhibit 21 because: (1) Susan never provided a copy of the unredacted version to counsel for Greg; and (2) Susan never made the unredacted version part of the District Court file and thus, it is not part of the record on appeal. *See* Iowa R. App. P. 6.801 ("Only the original documents and exhibits filed in the district court case from which the appeal is taken, the transcript of proceedings, if any, and a certified copy of the related docket and court calendar entries prepared by the clerk of the district court constitute the

The District Court did not explain its reasoning for awarding Susan substantially more than she had requested as a discovery sanction or provide any indication that it had applied the analysis required by *Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 23-24 (Iowa 2001). The District Court also did not expressly rule on the issues raised in Greg Hutchinson's Resistance to the Renewed Motion for Sanctions, filed October 22, 2019. (App. 75 - Resistance).

Susan primarily argues from the unredacted Exhibit 21. However, as discussed above, that document is not part of the record on appeal. Thus, there is no basis for this Court to independently evaluate the District Court's award or to determine the reasonableness of that award.

In sum, the District Court abused its discretion in awarding Susan $7,056 in attorneys' fees as a sanction.

IV. THERE IS NO AUTHORITY FOR THE DISTRICT COURT AWARDING SUSAN HUTCHINSON A PORTION OF GREG HUTCHINSON'S INTEGRATED SALES 401(k), A POST-DISSOLUTION ASSET

Susan Hutchinson "concedes that Greg's Integrated Sales 401k retirement plan is an asset he acquired following the parties' divorce."

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record on appeal.").

Susan's Brief at 60. She further concedes that "Susan knows of no legal authority granting jurisdiction to the district court to divide post-divorce assets." *Id*. Accordingly, the parties are in agreement that that portion of the District Court's Ruling must be reversed.

V. SUSAN HUTCHINSON SHOULD NOT BE AWARDED APPELLATE ATTORNEYS' FEES

Susan requests an award of appellate attorneys' fees. The only authority she cites is case law that permits an award of attorneys' fees when a party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Susan's Brief at 62.

Susan made a similar request to the District Court. App. 232, 235 (Petitioner's Post-Trial Statement of Requested Relief at 2, 5). The District Court denied that request. App. 245-46(Ruling at 5-6 (¶ 9), 8 (¶ 11), 10). The District Court also correctly found that attorneys' fees were not recoverable in an action pursuant to Rule of Civil Procedure 1.1012. *Id*. Susan did not appeal those portions of the District Court's Ruling. There is nothing about Greg's arguments on appeal that would meet the high burden set by that case law or justify an award of appellate attorneys' fees.

CONCLUSION AND RELIEF SOUGHT

For the above stated reasons and the reasons previously stated, Appellant Robert Gregory Hutchinson respectfully requests the Court to: (1) reverse the District Court's judgment against him and Vacate the Modification of the Decree and remand for dismissal of Count 1 of the Petition; (2) award Greg Hutchinson his attorneys' fees incurred in obtaining dismissal of Count 2 of the Petition; (3) vacate the award of $7,056 against him as a discovery sanction; and (4) reverse the provision of the Modified Decree awarding Susan Hutchinson a portion of Greg Hutchinson's Integrated Sales 401(k).

Respectfully Submitted,

___/s/ Webb L. Wassmer_____

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