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/RESPONDENT ROBERT GREGORY HUTCHINSON'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 20th day of August, 2021, 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.

_____/s/ Webb Wassmer____
WEBB WASSMER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES AND OTHER AUTHORITIES

ARGUMENT

Appellant-Respondent Robert Gregory Hutchinson ("Greg")[1] resists the Application for Further Review filed by Appellee-Petitioner Susan Gayle Hutchinson ("Susan") on August 10, 2021. The Application for Further Review does not meet the requirements of Iowa Rule of Appellate Procedure 6.1103(1)(b).

Susan's underlying claim is that Greg committed fraud in failing to disclose the existence of his GE Pension Plan during their 2010 dissolution. Susan did not file her Petition in this matter until 2016, over five years later. It is undisputed that she missed the one year deadline under Iowa Rule of Civil Procedure 1.1012(2) for an action at law to "correct, vacate or modify a final judgment or order" due to "fraud practiced in obtaining it."

Thus, the question is whether Susan can maintain an action in equity to set aside the Decree based on fraud. As noted by the Court of Appeals, there are three steps in the analysis. *See* Ct. App. Opinion at 8. First, it must be shown that the fraud is "extrinsic," not "intrinsic." Second, it must be shown that "reasonable diligence" would not have allowed discovery of the

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1The District Court used "Greg" as that is what Mr. Hutchinson uses. For an unknown reason, the Court of Appeals used "Robert." Appellant uses "Greg" as the correct short form descriptor.

fraud within one year of the judgment. Finally, the traditional elements of fraud must be shown.

A. The Requirements of Rule 6.1103(1)(b) Are Not Met With Respect to Whether Susan Exercised Reasonable Diligence to Discover the Alleged Fraud and, In Any Event, the Court of Appeals Correctly Decided that Issue

The Court of Appeals resolved the case in Greg's favor on the second step of the test,[2] finding that Susan had not shown reasonable diligence in discovering the fraud. *See* Ct. App. Opinion at 14-15. The facts are cogently set forth at page 4 of the Court of Appeals' Opinion. Prior to entry of the Decree by the District Court, Greg had provided Susan's attorney with a blank GE Consent Form. That form had check boxes for both a "GE Pension Plan" and a "GE Savings & Security Program." Neither box was checked. Susan signed the form and did not check either box. Susan's attorney forwarded the signed form to Greg, with a cover letter stating "Please confirm in Section 2 which plan you are participating in (GE Pension Plan or GE Savings & Security Program) and check the appropriate box."

2The first step of the test, classifying the alleged fraud as "extrinsic" or "intrinsic," is discussed in Section B below.

At the time Susan Hutchinson signed the GE Consent From, she "had some confusion about what box to check." (Tr. Tr. 139). Although confused about the GE Consent Form, Susan Hutchinson did not discuss it with her attorney, Amy Reasner, or ask for an opportunity to discuss the Form with Ms. Reasner, before signing it. (Tr. Tr. 140). She did discuss with Mr. Reasner's legal assistant, Michelle Barnes, that she "could not decipher what box I should check because it talked about a plan and a program and I was looking for a retirement account, a 401(k) or a defined contribution account, and neither one of those addressed either of them." (Tr. Tr. 140).[3] There was nothing on the GE Consent Form that related to a 401(k) or a defined contribution plan. (Tr. Tr. 142). Although Ms. Barnes informed Susan Hutchinson that she would discuss the GE Consent Form with Ms. Reasner, Ms. Reasner never discussed that Form with Susan before filing the Decree and Stipulation with the Court. (Tr. Tr. 144). Ms. Barnes testified that, after Susan Hutchinson expressed uncertainty and concern about the GE Consent Form, she discussed the GE Consent Form with Ms. Reasner, but could not

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3Greg notes that Susan worked in the financial services industry. (Tr. Tr. 108-110). That included, from 2004 to 2010, working for F&M Bank, where she was the assistant to the bank's financial advisor, who advised clients regarding retirement accounts. (Tr. Tr. 109-10). Accordingly, Susan was familiar with the various types of retirement accounts.

recall what they discussed. (Tr. Tr. 182-83). Ms. Reasner also did not recall discussing the GE Consent Form with Susan Hutchinson. (Tr. Tr. 226-27). There was no evidence that Ms. Reasner, Ms. Barnes or Susan Hutchinson discussed the GE Consent Form with Greg Hutchinson before Susan Hutchinson signed it and Amy Reasner filed the Decree and Stipulation with the Court.

Greg checked both boxes and provided the form to GE. He did not send a copy to Susan's attorney.[4] Neither Susan nor her attorney ever followed up to obtain a completed copy.

The Court of Appeals found that Susan had failed to use reasonable diligence. *See* Ct. App. Opinion at 14-15. The GE Consent Form had a check box for the GE Pension Plan. Susan, who was confused about what she was signing, signed the form without knowing which box or boxes Greg would check. Susan and her attorney never followed up to obtain a copy of the completed form. As found by the Court of Appeals, "If she had, she would have seen that [Greg] checked *both* boxes, a clear sign that he had *two* retirement funds with GE, not just one." *Id*. at 15.

4This point was disputed in the evidence. Greg testified that he had sent a copy to Ms. Barnes, the paralegal for Susan's attorney. (Tr. Tr. 298-99). For purposes of this proceeding, Greg accepts the finding of the District Court and the Court of Appeals that he did not.

The Court of Appeals correctly analyzed and decided this controlling issue. In doing so, the Court of Appeals applied settled law to the specific facts of this case. Resolution of this issue is based on the undisputed facts.[5] Although, as discussed below, the predicate issue of "extrinsic" versus "intrinsic" fraud is an issue that this Court should take up someday, this is not the case to do so. Even if the Court resolved that issue in Susan's favor, Susan would still have to get around her failure to exercise reasonable diligence in order to prevail. This Court should await a case in which reasonable diligence is not at issue in order to clarify the difference between extrinsic and intrinsic fraud.

Overall, the issue of whether Susan exercised reasonable diligence to discover her claim does not meet the requirements of Rule 6.1103(1)(b) for further review by this Court. First, the Court of Appeals' decision is not "in conflict with a decision of this court or the court of appeals on an important

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5 Susan argues that even though review is *de novo,* the Court of Appeals should have given more deference to the District Court's findings. While that is arguably correct with respect to credibility findings when the evidence is in conflict, that is not the case here. The Court of Appeals considered the same evidence that the District Court considered. The difference is that the Court of Appeals reached a different conclusion as to whether Susan had exercised reasonable diligence, which is permissible in applying a *de novo* standard of review.

matter."[6] Second, there is no "substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court." Third, there is no "important question of changing legal principles." Finally, there is no "issue of broad public importance that the supreme court should ultimately determine."

While Susan strives mightily to convince this Court that the Court of Appeals' conclusion that she failed to exercise reasonable diligence presents a question of great importance to other cases, further analysis by this Court of the specific facts of this case would not generate any broad rules of general applicability. The simple matter is that Susan had a document, the GE Consent Form, which would have triggered an investigation by a reasonable person in Susan's position into what exactly Greg had for a retirement plan or plans with GE. Susan cannot get around the fact that she signed a blank document, yet never followed up to get a copy of the completed document or conduct any further investigation. The law allowed

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[6]Susan argues that the Court of Appeals decision in this case is inconsistent with *In re Marriage of Rhinehart*, No. 09-0193 (Iowa Ct. App. 2010). However, in *Rhinehart* there was no claim that the ex-wife had <u>any</u> information about the concealed assets (contingency fee cases) within the year after entry of the Decree that would have triggered further inquiry. Here, Susan had knowledge of the GE Consent Form which was enough to trigger further inquiry.

her a year to do so. Susan did nothing. Thus, there is no broad issue of creating or modifying rules relating to concealment of assets. Holding Greg to account for the claimed fraud is not the issue here. There is only the narrow question of whether Susan, given the specific facts of this case, exercised reasonable diligence to discover the claimed fraud and, having failed to do so, waited too long to file her Petition.

Accordingly, this Court should decline the invitation to grant further review to address the issue of Susan's failure to exercise reasonable diligence. Doing so would not advance the law. In any event, the Court of Appeals correctly found that Susan had not exercised reasonable diligence.

B. The Issue Of Extrinsic vs. Intrinsic Fraud

The first part of the test, whether the alleged fraud in this case (failing to disclose an asset and providing false statements that all assets have been disclosed) constitutes "extrinsic" or "intrinsic" fraud, arguably and standing alone does meet the test of Rule 6.1103(1)(b). As discussed in the Court of Appeals' decision at pages 8 to 14, this Court's case law on what types of fraud falls into each category has been inconsistent. Even the dissent acknowledges that this issue "has vexed the family law practice." *See* Ct.

App. Opinion at 24 (Schumacher, J.). In order for Susan to prevail on the first part of the test, she must prove that the claimed fraud is "extrinsic," not "intrinsic."

As discussed above, this Court should decline to grant further review as the Court of Appeals correctly found on the second step of the test that Susan had not exercised reasonable diligence, that issue does not merit further review, and resolution of that issue controls the outcome of this case. However, if this Court decides to grant further review on that issue, the Court should necessarily grant further review on the issue of extrinsic versus intrinsic fraud as that is a predicate issue that must be decided. *See* Iowa R. App. P. 6.1103(1)(d) ("On further review, the supreme court may review any or all of the issues raised in the original appeal or limit its review to just those issues brought to the court's attention by the application for further review."). *See also State v. Doggett*, 687 N.W.2d 97, 99 (Iowa 2004) (explaining where a party seeks further review 'we retain the discretion to consider all issues raised in the initial appeal').

The majority persuasively concludes that there is a strong argument that the claimed fraud here is intrinsic and, therefore, does not justify the exercise of the court's equitable powers. The majority primarily cites to this

Court's opinion in *Mauer v. Rohde*, 257 N.W.2d 489 (Iowa 1977). *Mauer* states:

> Intrinsic fraud "occurs within the framework of the actual conduct of the trial and pertains to and affects the determination of the issue presented therein. It may be accomplished by perjury, or by the use of false or forged instruments, or by concealment or misrepresentation of evidence."
>
> Extrinsic fraud, on the other hand, has been described as that fraud which keeps a litigant from presenting the facts of his or her case and prevents an adjudication on the merits. Examples of extrinsic fraud are a bribed judge, dishonest attorney representing the defrauded client, or a false promise of compromise.

Mauer, 257 N.W.2d at 496 (citations omitted).

The alleged fraud here constitutes "concealment . . . of evidence" as well as the "use of false . . . instruments." The alleged fraud occurred within the framework of the "actual conduct of the trial" as the ultimate step was to sign a Stipulation[7] averring that all assets had been disclosed. Further,

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7 In a dissolution, a Stipulation is presented to the District Court in lieu of testimony and exhibits regarding the parties' financial and other circumstances. *See Greene v. Greene*, 351 S.C. 329, 336 (S.C. App. 2002) ("The purpose of a stipulation is to "obviate need for proof or to narrow [the] range of litigable issues." Black's Law Dictionary 1415 (6th ed.1990)."); *Smith v. Smith*, 985 S.W.2d 836, 842 (Mo. App. 1998) ("The purpose of a stipulation is to eliminate the litigation of an issue so as to save delay, trouble and expense."); *Fiedler v. Fiedler*, 879 P.2d 675, 681 (Mont. 1994) ("The purpose of a stipulation is to relieve the parties from the necessity of introducing evidence about the ultimate fact covered by it."). A Stipulation

disclosure and division of marital assets are matters that squarely fall within the scope of a dissolution. There was no evidence of the types of conduct described in *Mauer* as constituting extrinsic fraud, such as bribing a judge or jury or a corrupt attorney.

However, the Court of Appeals found itself bound by a decision of this Court made over 100 years ago in *Graves v. Graves*, 109 N.W. 707 (Iowa 1906). *See* Ct. App. Opinion at 12-14. The Court of Appeals found *Graves* factually on point.

Thus, the issue of extrinsic versus intrinsic fraud is the type of issue that would ordinarily warrant review by this Court. The Court of Appeals' decision is arguably in conflict with *Mauer* and other cases. The definitions of extrinsic and intrinsic fraud and what types of conduct falls within each category are important questions of law that should be settled by this Court. This Court should also, at some point, address whether *Graves*, which is inconsistent with *Mauer* and other cases, has either been silently overruled by later cases or if *Graves* should be expressly overruled.

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also presents the parties' agreed position as to how the issues of the dissolution should be resolved by the trial court.

C. Other Issues

A few other minor issues are presented.

First, the District Court had awarded Susan a portion of Greg's 401(k) with a subsequent employer, Integrated Sales, as compensation for the fraud. The majority found that this was error as Susan did not prevail. *See* Ct. App. Opinion at 16. The dissent agreed that was error even if Susan prevails as Susan conceded that there is no authority to do so. *Id*. at 30-31. Regardless of the outcome of the other issues, it was improper for the District Court to do so and this Court should so hold.

Second, all three judges on the Court of Appeals agreed that it was proper to remand for a determination of: (1) whether Greg should receive an award of attorneys' fees with respect to dismissal of Count 2 on summary judgment; and (2) whether the District Court properly awarded $7,056 against Greg as a discovery sanction. The Court of Appeals' resolution of those issues was appropriate, should stand, and need not be addressed by this Court. Susan does not raise those issues in her Application for Further Review. *See* Susan's Application for Further Review at 27.

Finally, the majority denied Susan's request for appellate attorneys' fees. The dissent would award her $5,000. It is undisputed that there is no

statutory or contractual right to attorneys' fees with respect to Count 1. The dissent would award fees because of the dissent's view that Greg "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Ct. App. Opinion at 31. What the dissent misses is that the requested attorneys' fees relate to this appeal. Greg's alleged conduct with respect to the dissolution is not at issue in this appeal. The central issue on appeal is whether Susan waited too long to file her Petition for fraud. Greg's arguments on appeal, which were accepted in part and as to the ultimate conclusion by the Court of Appeals' majority, were made in good faith, and were not made vexatiously, wantonly, or for oppressive reasons. The dissent would apparently have Greg concede Susan's Petition for fraud, even though untimely, or pay Susan's attorneys' fees for arguing that her Petition was untimely. No attorneys' fees for the appeal should be awarded to Susan.

CONCLUSION AND RELIEF SOUGHT

For the above stated reasons, Appellant-Respondent Robert Gregory Hutchinson respectfully requests this Court to deny Appellee-Petitioner Susan Gayle Hutchinson Application for Further Review. In the event that

the Court elects to grant further review, this Court should also review the issue of whether the alleged fraud in question was "extrinsic" or "intrinsic."

Respectfully Submitted,

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