067

SUPREME COURT OF FLORIDA

CASE 83,431

DISTRICT COURT OF APPEAL
3RD DISTRICT NO. 93-606

MARIA E. MENDEZ-PEREZ, M.D., **

Petitioner, **

and **

JORGE H. PEREZ-PEREZ, M.D., **

Respondent. **

**

FILED
SID J. WHITE
JUN 14 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

RESPONDENT'S BRIEF

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THE CERTIFIED QUESTION

WHETHER FLORIDA RULE OF CIVIL PROCEDURE 1.540(b), AS AMENDED EFFECTIVE JANUARY 1, 1993 BY IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, 604 SO.2D 1110 (FLA. 1992), CAN BE RETROACTIVELY APPLIED TO A FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE ENTERED ON JULY 20, 1990 WHERE THE MOTION FOR RELIEF FROM JUDGMENT ALLEGES THE FILING OF A FRAUDULENT FINANCIAL AFFIDAVIT AND WAS FILED MORE THAN ONE YEAR AFTER THE JUDGMENT WAS ENTERED?

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE AND FACTS

In this brief, the petitioner, MARIA E. MENDEZ-PEREZ, M.D., will be referred to as "MARIA". She is the former wife of the respondent, JORGE H. PEREZ-PEREZ, M.D., referred to here as "JORGE". Emphasis supplied is ours. References to the Record on Appeal are indicated by "R" followed by the page number.

As there are statements in the petitioner's statement of the case and facts not supported by the record, it is necessary to provide more accurate references.

The parties were divorced on July 20, 1990 (R-1). They had resolved their disputes in a property settlement agreement. Each is a doctor of medicine. MARIA is a psychiatrist. JORGE's specialty is gynocology.

On January 27, 1993 MARIA filed a motion to set aside the divorce judgment, based on a false financial affidavit (R1-20).

The motion claimed JORGE had omitted and undervalued assets on his financial affidavit. The motion does not mention what assets were omitted or their true value. While MARIA in her instant appeal claims JORGE omitted a $750,000 pension plan, there is no mention of that or any other figure in her original pleading (R 1-20).

While the appeal below was pending, MARIA filed a second lawsuit against JORGE, an independent action for fraud, which is now pending in the Dade County Circuit Court (R 72).

SUMMARY OF THE ARGUMENT

Rules of civil procedure have prospective effect only unless they specifically provide otherwise. There is no language in the amendments to the rules effective January 1, 1993 stating the changed rules take effect retroactively or apply to closed cases.

Rule 1.540(b), effective January 1, 1993, was amended to eliminate the one year time limit on fraud claims but provided a reasonable time requirement. This rule of procedure, having a prospective effect only, would not apply to a marital final judgment entered July 20, 1990. Such limitation periods, whether statutory or by rule, have never been determined to be remedial in nature and therefore cannot be applied retroactively, specially where there is no expressed legislative intent that the statute or rule so applies.

Public policy has also favored the termination of litigation and finality of judgments. Consequently the grounds upon which a final judgment may be set aside, other than by an appeal, are limited in order to allow the parties and the public to rely on duly entered final judgments.

The petitioner is not without remedy, having a pending independent action for fraud in the Dade County circuit court, which was timely filed.

We respectfully submit that the court should answer the certified question in the negative and let stand the decision of the District Court of Appeal.

ARGUMENT

I.

THE AMENDMENT TO RULE 1.540(b) CHANGING THE LIMITATION PERIOD IN WHICH CLAIMS BASED UPON FALSE FINANCIAL AFFIDAVITS CAN BE BROUGHT, ONLY APPLIES PROSPECTIVELY AS THERE IS NO MANIFESTATION OF INTENT THAT THE AMENDED RULE BE GIVEN RETROACTIVE EFFECT.

The amended Rule 1.540(b) changed a limitation of time in which a claim could be brought for a fraudulent financial affidavit in a marital case from one year to a no time limitation.

When the amended rules were promulgated, the Supreme Court could have expressly stated that the change would apply retroactively to any and all cases. Instead the Court specified that the amendment became effective on January 1, 1993. In Re: Amendments to the Florida Rules of Civil Procedure, 604 So.2d 1111 (Fla. 1992).

Florida cases appear uniformly to hold that there is a presumption against retroactive application where the legislature has not expressed in clear and explicit language an intention that a statute be applied retroactively.

In the oft-cited case of Foley v. Morris, 339 So.2d 215 (Fla. 1976) a new two year limitation period replacing a previous four year limitation statute in medical malpractice actions was

held not to be applied retroactively to causes of action which accrued prior to the amended statute's effective date. The Court noted:

> Generally referring to the conceded authority of the Legislature to pass a statute of limitations or to change a period previously established by law and to make the changes applicable to existing causes of action so long as a reasonable time is permitted by the new law for commencing an action before the action is barred, we approve the following language from American Jurisprudence:
>
> > 'Where the legislature has not sufficient manifested its intent whether a statute of limitations should apply retrospectively or should apply prospectively only, the question is passed on the courts to determine, as a matter of construction, in which these ways the statute should apply. In most jurisdictions, in the absence of a clear manifestation of legislative intent to the contrary, statutes of limitation are construed as prospective and not retrospective in their operation, and the presumption is against any intent on the part of the legislature to make such a statute retroactive. Thus, rights accrued, claims arising, proceedings instituted,orders made under the former law, or judgments rendered before the passage of an amended statute of limitations will not be affected by it, but will be governed by the original statute unless a contrary intention is expressed by the legislature in the new law.' 51 Am Jur. 2d S57, Limitation of Actions.
> Since the legislative intent to provide retroactive effect to Section 95.11(6), Florida Statutes, is not express, clear, or manifest, we conclude that it does not apply to causes of action occuring prior to its effective date.

While Foley dealt with a shortening of a period of limitation, the case of Homemaker's, Inc. v. Gonzales, 400 So.2d

965, 967 (Fla. 1981), involved the issue of whether a statute extending the period of limitations of medical malpractice could be retroactively applied to bring life a cause of action late filed under the old statute. We find:

> It follows that section 95.022, Florida Statutes (Supp. 1974), provides no evidence that the legislature clearly intended retroactive effect for those sections of chapter 95 which either lengthened or retained periods of limitations previously defined.
>
> The impact of our holding in the instant case is that the statute of limitations applicable to Mrs. Gonzales' claim for all purposes is section 95.11(6), Florida Statutes (1973), which provides a two year period of limitation. Neither of the subsequent amendments to chapter 95 disrupted the application of section 95.11(6) since there is no evidence of legislative intent of retroactivity. In the final analysis, Mrs. Gonzales' claim accrued on April 3, 1973, but no action was taken thereon within two years, so her action is barred by section 95.11(6).

In Fleeman v. Case, 342 So.2d 815 (Fla. 1976), condominium owners brought suit against the lessor claiming the codification of Chapter 75-61, Laws of Florida, retroactively voided an escalation clause in their lease. It was asserted that the statute was enacted to curb a practice which the legislature thought inimical to this state's economy because of its inflationary nature (e.g. a remedial statute). In finding for the lessor the Florida Supreme Court refused to apply retroactivity:

> ...we can restrict the debate on a legislative 'intent' for retroactivity

> to the floor of those chambers, as well as avoid judicial intrusions into the domain of the legislative branch, if we insist that a declaration of retroactive application be made expressly in the legislation under review. By this means the forward or backward reach of proposed laws is irrevocably assigned in the forum best suited to determine that issue, and the judiciary is limited only to determining an appropriate cases whether the expressed retroactive application of the law collides with any overriding constitutional provision.

MARIA contends amended Rule 1.540(b) is remedial law and can therefore be retroactively applied. However, none of the decisions cited by MARIA factually support her contention. None of those cases involve changes in statutes of limitation by statute or rule. In City of Orlando v. Desjardins, 493 So.2d 1027 (Fla. 1986), a change involving the Florida Public Records Act was found to be remedial. It is not, however, a statute of limitations or limitations of action decision. Desjardins is a factually different case dealing with a unique and wholly unrelated statute and, we submit, has no bearing on the instant case.

MARIA also relies upon Martin County v. Edenfield, 609 So.2d 27 (Fla. 1992). An amendment to the Florida Whistle-Blower's Act reached the Supreme Court on the question of ambiguity of that statute. It was held to be remedial, designed to encourage protection of public employees who "blow the whistle". Again, no limitation of action or statute of

limitation was involved contrary to the instant case. Martin County did not address the issue of retroactivity.

Lastly MARIA cites City of Lakeland v. Catonella, 129 So.2d 133 (Fla. 1961) involving a change to worker's compensation jursidiction. It did not involve a limitation of action or statute of limitations statute or rule.

The Florida Supreme Court has spoken on this issue. It has held that the application of statute of limitations are substantive matters and not simply quasi-procedural. Lane v. State, 337 So.2d 976, 977 (Fla. 1976). Statutes of limitation have thus not been categorized as remedial in nature by the Florida courts.

The Supreme Court, when it approved the amended rules, could have declared retroactive application. It did not do so. Therefore the amendment to Rule 1.540(b) is prospective and would not apply, we urge, to matrimonial cases, including the instant one where the final judgment was entered before January 1, 1992, on July 20, 1990.

MARIA can and is currently pursuing her independent action for fraud against JORGE below (R-72).

The argument the amended rule is remedial and not substantive is totally unsupported by any relevant case authority. We submit retroactive application of the amended rule to a cause of action barred under the prior turn rules of

statutory construction and stare decisis upside down.

II.

PUBLIC POLICY FAVORS THE TERMINATION OF LITIGATION SO THAT GROUNDS UPON WHICH A FINAL JUDGMENT MAY BE SET ASIDE, OTHER THAN BY APPEAL ARE LIMITED IN ORDER TO ALLOW THE PARTIES AND THE PUBLIC TO RELY ON DULY ENTERED FINAL JUDGMENTS.

The courts, when discussing the public policy involved, have indicated termination of litigation is favored. In DeClaire v. Yohanan, 453 So.2d 375, 380 (Fla. 1984), the difference between intrinsic and extrinsic fraud claims in matrimonial actions was reviewed. In discussing the public interests in ending litigation we find:

> Public policy has always favored the termination of litigation after a party has had an opportunity for a trial and an appeal of the trial court's judgment. Consequently, the grounds upon which a final judgment may be set aside, other than by appeal, are limited in order to allow the parties and the public to rely on duly entered final judgments. Rule 1.540(b) broadened the grounds upon which final judgments may be attacked but we do not find it appropriate to further broaden these grounds by decision of this court. If there is to be any change, it should be achieved through the rule-making process.

In recently reviewing the public police policy in ending disputes, the United States Supreme Court spoke in Custis v. United States, _____ U.S. _____, 8 Fla.L.Weekly Federal, S149 (May 23, 1994):

> The interest in promoting the finality of judgments provides additional support for our constitutional conclusion. As we have explained 'inroads on the concept of finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impede the orderly administration of justice. United States v. Addonizio, 442 U.S. 178, 184 n.11 (1979).

In her argument on this issue, MARIA has failed to cite a single case in support. She relies on a text book quotation. Public policy, we urge, strongly favors an end to litigation, not resurrection of a 1990 final judgment by a 1993 rule change applicable only to pending and future cases.

CONCLUSION

We submit the Court should answer the certified question in the negative, in accordance with decisions holding, in the absence of a clear legislative expression to the contrary, amendments to laws, including those providing limitation periods, are presumed to operate prospectively. The amended rules specifically announce they are only effective as of January 1, 1993. In Re: Amendments to the Florida Rules of Civil Procedure, 604 So.2d 1110 (Fla. 1992).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Maurice J. Kutner, Esq., Attorney for petitioner, 12th Floor, Courthouse Plaza, 28 West Flagler Street, Miami, Florida 33130 this 13 day of June, 1994.

Respectfully Submitted,

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BY _____
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