SUPREME COURT OF FLORIDA

CASE NO. 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. *

*

PETITIONER'S INITIAL BRIEF

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TABLE OF CONTENTS

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THE ISSUE PRESENTED

In 1992, the Civil Procedure Rules Committee and this Court eliminated the one-year limitation for bringing a **Rule 1.540(b)** motion to set aside a final judgment based on a fraudulent financial affidavit in a family law case. ***In re: Amendments to the Florida Rules of Civil Procedure,* 604 So. 2d 1110, 1170 (Fla. 1992).** The issue presented by this appeal is:

> WHETHER THE **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?

The Third District Court of Appeal has certified this question as one of great public importance.

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TABLE OF AUTHORITIES

FLORIDA SUPREME COURT CASES

DISTRICT COURT OF APPEAL CASES

MISCELLANEOUS

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PRELIMINARY STATEMENT

The Petitioner, Maria E. Mendez-Perez, M.D., will be referred to as "Former-Wife," and the Respondent, Jorge H. Perez-Perez, M.D., will be referred to as "Former-Husband." All references to the Record on Appeal will be identified by the letter "R." followed by the page number. Unless otherwise indicated, all emphasis will be as contained in the original document.

STATEMENT OF THE CASE AND FACTS

The parties were divorced on July 20, 1990, after 29 years of marriage [R. 3]. The Final Judgment incorporated a Marital Settlement Agreement that divided some of the parties' assets and awarded the Wife alimony, but failed to account for the Husband's $750,000 retirement fund, which was conspicuously absent on his financial affidavit [R. 5]. In January, 1993, the Wife filed her Petition to Set Aside Final Judgment Based on Fraud, "pursuant to **Rule 1.540(b)** and Florida law." [R. 1].

Specifically, the Former-Wife's motion alleged:

> 2. The Final Judgment and Property Settlement Agreement are the product of a false financial affidavit, fraud, overreaching, self-dealing and lies, by and on behalf of the Former-Husband to the Former-Wife.
>
> . . .
>
> 7. The effect of this conduct was that MARIA E. MENDEZ-PEREZ was without the knowledge necessary to freely and voluntarily agree as to any settlement of her marital rights.

The Former-Husband moved to dismiss on the basis that the Petition was time-barred by the one-year limitation of the pre-amendment **Rule 1.540(b)**, ***Fla.R.Civ.Pro.*** [R. 34-35]. A hearing was held, but no evidence was taken. It was undisputed that the Final

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Judgment of Dissolution of Marriage was dated July 20, 1990, and the Former-Wife's petition to set it aside was filed on January 27, 1993, almost two-and-one-half years after the divorce, and almost one month after the effective date of the rule change.

After receiving memoranda [R. 36-45; 48-51], the trial court granted the motion to dismiss. The court found that applying the amendment in this case would amount to retroactivity, because the one-year limitation period had lapsed more than two years before. Retroactivity, the court found, is presumptively improper, and only allowed when it is clear from the face of the statute that the amendment is intended to apply retroactively. Finding no such intent expressed in the Rule here, the trial court dismissed the Former-Wife's petition [R. 62-63].

The Former-Wife appealed the trial court's ruling, and the Third District Court of Appeal affirmed in a split decision [R. 68-75]. The appellate court denied the Former-Wife's Motion for Rehearing and Rehearing en Banc, but granted her Suggestion for Certification as to the following 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? [R. 78].

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SUMMARY OF THE ARGUMENT

This Court has held that remedial statutes are to be liberally construed to serve their remedial purpose, even if that means retroactive application, and even absent a lack of expressed legislative intent. The amendment to **Rule 1.540(b)** was remedial, as evidenced by caselaw and representations in the Committee Report describing the rulemaking process. The appellate court below acknowledges that the rule change was remedial. Therefore, the trial court should have applied the amendment retroactively to allow the Former-Wife's petition to go forward.

The public policy favoring redress against fraudulent financial affidavits outweighs the need to end litigation and is, itself, sufficient reason to apply the rule change retroactively.

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ARGUMENT

I

THE TRIAL COURT SHOULD HAVE APPLIED THE AMENDMENT RETROACTIVELY TO SERVE ITS INTENDED REMEDIAL PURPOSE.

The trial court dismissed the Former-Wife's petition based on the general rule against retroactive application of statutory changes and the lack of explicit legislative intent to the contrary. The appellate court below agreed, noting that in amending the Rule this Court could have expressly provided for retroactive application, but instead "clearly specified"[1] the amendment would be effective on January 1, 1993. Neither of these approaches places the required emphasis on the fact that the rule change in question was solely and explicitly remedial, and in accordance with this Court's holding in ***City of Orlando v. Desjardins,*** the amendment "can and should be retroactively applied in order to serve its intended purposes." **493 So. 2d 1027, 1028 (Fla. 1986) (citations omitted).**

The amendment to **Rule 1.540(b)** is implicitly remedial. Like the statutory exemption in ***Desjardins,*** the change in **Rule 1.540(b)** was prompted by caselaw indicating a specific problem that required a legislative remedy. In its report to the Florida Supreme Court, the Civil Procedure Rules Committee cited this Court's suggestion in ***DeClaire v. Yohanan,*** **453 So. 2d 375 (Fla. 1984),** as a factor that motivated it to act. ***Report of the Florida Bar Civil Procedure Rules Committee, In Re: Amendments to the Florida Rules of Civil Procedure,*** **Case No. 79613 (Fla. 1992).** Significantly, the appellate court agreed that this was

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[1]January 1, 1993 was the effective date for all rule changes. ***In re: Amendments to the Florida Rules of Civil Procedure,*** **604 So. 2d 1110, 1111 (Fla. 1992).** Hence, it is questionable whether this effective date should be considered an indicia of intent that the amendment not apply retroactively.

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a remedial statute, while in the same sentence indicating that this Court should have expressly required retroactive application, if that was intended [R. 71]. ***Desjardins*** implies there is no such requirement[2] in the case of a remedial statute. Remedial statutes are not governed by the general rule in favor of "prospective only" application. ***City of Lakeland v. Catinella,* 129 So. 2d 133 (Fla. 1961).** Therefore, there is no basis for requiring express intent to "violate" the Rule.

In ***Desjardins,*** this Court distinguished remedial purpose from the "procedural/ substantive analysis," frequently applied to determine whether an amendment applies retroactively, and held remedial purpose alone[3] was sufficient to justify retroactive application of a statutory amendment or rule change. **493 So. 2d at 1028.** This is consistent with this Court's holding that remedial statutes are to be liberally construed to serve their remedial purposes. ***Martin County v. Edenfeld,* 609 So. 2d 27, 29 (Fla. 1992).**

In keeping with ***Desjardins,*** the remedial purpose of the amendment should have been the focus of the determination below. In 1984, deciding an appeal in a fraudulent financial affidavit case brought under **Rule 1.540(b)**, this Court observed:

> Since the adoption of **Rule 1.540(b),** all of the case law interpreting it concerns actions attacking a judgment more than one year old. ***DeClaire v. Yohanan,* 453 So. 2d 375, 379 (Fla. 1984).**

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[2]The Third and Fourth District Courts of Appeal have held that a statutory change's remedial nature creates a presumption that retroactive application was intended, ***Walsh v. Arrow Air, Inc.,* 629 So. 2d 144, 149 (Fla. 3d DCA 1993); *Snellgrove v. Fogazzi,* 616 So. 2d 527 (Fla. 4th DCA 1993).** The Fourth District appears to have made retroactive application mandatory. ***Cebrian v. Klein,* 614 So. 2d 1209, 1212 (Fla. 4th DCA 1994).**

[3]The opinion in ***Desjardins*** does not mention expressed legislative intent, which strongly suggests that there was none in that case, because such an expression would have made it an "easy case" in favor of allowing retroactivity.

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The opinion then described five cases involving claims to set aside judgments under **Rule 1.540(b).** Four of those alleged false financial disclosure in divorce cases. ***Id.*** This Court concluded that allowing recovery beyond the one-year period for false financial disclosure would be "substantially expanding grounds on which final judgments may be attacked." ***Id.* at 380.** In declining to do that, this Court laid down the gauntlet: "If there is to be any change, it should be achieved through the rule-making process." ***Id.* at 381.**

In 1992, the Bar and the Civil Procedure Rules Committee answered the challenge, and the answer makes clear that the policy favoring the finality of judgments should *not* outweigh the policy concern engendered by fraudulent financial disclosure in divorce cases:

> Is the finality of judgments more sacrosanct than ... avoiding an unjust result emanating from ... intrinsic fraud? The committee has answered that question in favor of broadening the power of the Courts to set aside judgments for intrinsic fraud. A vocal minority of our committee believed this was a mistake ... practically eliminating finality in [family law] cases.
>
> Nevertheless, a large majority of the committee believed that justice would better be served by allowing those who have been defrauded to obtain relief. ***Report of the Florida Bar Civil Procedure Rules Committee, In re: Amendments to the Florida Rules of Civil Procedure,* Case No. 79613 (Fla. 1992)** (emphasis supplied).

The way to meet this remedial purpose is to allow the Former-Wife to proceed with her claim. Restricting her with a time-limit that is no longer in effect, thanks to the remedial action of the rulemaking process, is directly counter to the remedial purpose.

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ARGUMENT

II

AS A MATTER OF PUBLIC POLICY, IT IS NECESSARY TO ALLOW THE CLAIM BELOW TO PROCEED, BECAUSE PERPETRATORS OF FRAUD SHOULD NOT BE REWARDED AND THERE IS NO PREJUDICE ENGENDERED BY RETROACTIVE APPLICATION.

As a matter of statutory construction, it does not matter whether the application of the amendment is labelled "retroactive" or not. **N. Singer, *Sutherland Stat. Const.* §41.01 (4th Ed. 1986), citing *Alexander v. Robinson,* 756 F.2d 1153 (5th Cir. 1985).** Professor Sutherland tells us that the real issue in deciding whether to apply a statute retroactively is "to determine ... to what extent, unfairness results from the time frame within which the statute exerts its influence." **N. Singer, *Sutherland Stat. Const.* §41.01 (4th Ed. 1986).**

Applying the rule change retroactively to the present case engenders no unfairness. The amendment did not create a vested right or obligation. Fraud was already a basis for setting aside the judgment under **Rule 1.540(b),** not to mention the availability of an independent action for fraud[4]. The Former-Husband did not act in reliance on an existing rule. He was already on notice of the consequences of fraudulent conduct, and it would be unfair to the victim to prevent those consequences from following. A dissolution of marriage is an equitable proceeding.

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[4]As the appellate court's opinion points out, even if the **Rule 1.540(b)** Petition is dismissed, the Former-Wife's independent action for extrinsic fraud may go forward [R. 72]. ***DeClaire v. Yohanan,* 453 So. 2d 375 (Fla. 1984).** This raises the question: What happens to a claim in which allegations of intrinsic and extrinsic fraud are intertwined? In the present case, affirming the trial court's dismissal raises more questions than it answers, because the allegations are so intertwined.

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Great unfairness results from *not* applying the amendment retroactively in this case. The Former-Wife's petition alleged "a false financial affidavit, fraud, overreaching, self-dealing and lies, by and on behalf of the Former-Husband to the Former-Wife" –reprehensible conduct by any standard. Public policy should favor the victim of this fraud, and allow her to pursue the remedy specifically provided by the amended Rule. Especially when that value judgment was already made by the Rules Committee, and its Report contains an explicit statement of the Committee's intent to put the victim's rights first.

Further, applying the amendment to the present case affects a relatively narrow window of cases because Rule 1.540(b) still contains a requirement that "[t]he motion shall be made within a reasonable time . . . ." The Rule's reasonable time requirement will effectively limit the number of claims and protect against what the Rules Committee's "vocal minority" feared would be a "complete lack of finality" in family law matters.

CONCLUSION

As a remedial rule change, the amendment to **Rule 1.540(b)** should be applied retroactively to allow the petition to proceed below. The Former-Wife asks that the order below be reversed and that this matter be remanded to the trial court for a full trial on the merits.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioner's Initial Brief was mailed to MICHAEL A. LIPSKY, ESQUIRE, Michael A. Lipsky, P.A., 444 Brickell Avenue, Suite 1010, Miami, Florida 33131, this 6th day of May, 1994.

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