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 REPLY BRIEF

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ARGUMENT

I

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

The amendment to **Rule 1.540(b)** recognized that divorce litigants who file fraudulent financial affidavits should not be shielded from responsibility for their conduct by a one-year limitation of actions. The issue in this appeal is whether fraudulent conduct committed before a nonspecific and arbitrary "effective date" should still be shielded from the remedy. There are a number of legal paths that lead to the conclusion that it should not. This amendment affects a narrow class of cases and the Rule still contains the "reasonable time" requirement, therefore, applying the amendment retroactively will not "open the floodgates."

The clearest path to the conclusion that the amendment must apply retroactively is the line of cases defining rules of construction for remedial statutes. Respondent does not address the clearly remedial nature of this amendment. It is that remedial nature which dictates that the amendment "can and should" be applied retroactively to serve its remedial purpose, as held by this Court in ***City of Orlando v. Desjardins,* 493 So. 2d 1027 (Fla. 1986).** Instead, Respondent argues, ***Desjardins, Martin County v. Edenfield*** and ***City of Lakeland v. Catinella*** do not apply, because none of them involved construction of a rule or statute of limitations[1]. Petitioner would concur with Respondent's assertion that to

[1]The action below was an equitable proceeding, thus it is arguable that the cases Respondent cites are irrelevant **because** they relate to statutes of limitation. This Court has noted that "a plea of the bar of the statute of limitations is not, **strictly speaking,** a proper defense in an equitable proceeding." ***H.K.L. Realty Corporation v. Kirtley,* 74 So. 2d 876, 878 (Fla. 1954)** (emphasis supplied)(application of the statute of limitations allowed in that case).

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date no rule or statute of limitation has been explicitly classified as "remedial" in Florida caselaw. But she cannot join his leap from classifying a criminal statute of limitation as substantive, as this Court did in ***Lane v. State,*** **337 So. 2d 976 (Fla. 1976),** to the conclusion that amending a period of limitation (whether by statute or rule) may **never** be remedial.

In this regard, Respondent mistakenly relies on a distinction between procedural and substantive rules or statutes. In ***Desjardins,*** even though there was caselaw holding that access to public records was a substantive right, this Court held that a statute exempting certain documents from disclosure under the Public Records Act must be applied retroactively to serve its remedial purpose. **493 So. 2d at 1028.**

Respondent does not refute the law of ***Desjardins,*** that if this statute is remedial, it "can and should" be applied retroactively to serve its remedial purpose. The question remains: what distinguishes a remedial statute? The Third District Court of Appeal labelled the **Rule 1.540(b)** amendment "remedial," a fact apparently overlooked by the Respondent. **632 So. 2d 1047, 1049 (Fla. 1993)** ("In 1992 the supreme court, prompted by a problem which required a remedy, amended Rule 1.540(b) . . ."). This characterization seems inescapable based upon the history of ***DeClaire v. Yohanan,*** **453 So. 2d 375 (Fla. 1986)** and the ***Committee Report*** describing why the rule change was enacted.

Cases construing remedial statutes uniformly show that the purpose of the rule change --not the subject matter-- determines whether it is remedial or not. The purpose served by the present amendment was clearly remedial, by any definition of the word.

"Legislation providing means or method whereby causes of action may be effectuated, wrongs redressed and relief obtained is 'remedial'." ***Black's Law Dictionary*** **(5th Ed. 1979).** In ***Martin County v. Edenfield,*** this Court identified the Whistleblower's Act as this

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type of remedial statute because its purpose was "to encourage the elimination of public corruption by protecting public employees who 'blow the whistle.'" **609 So. 2d 27, 29 (Fla. 1992).** Essentially, it created a remedy and for that reason, was to be construed to serve the remedial purpose. "Remedial laws or statutes" are also defined as "[t]hose designed to correct imperfections in the prior law and to cure a wrong where an aggrieved party had an ineffective remedy under existing statutes." ***Black's Law Dictionary*** **(5th Ed. 1979).** As identified by this Court in ***Desjardins,*** the "imperfection" in the Public Records Act was a total lack of privacy afforded the litigation files of public agencies, and the remedial purpose of the exception was to grant privacy while litigation was pending. **793 So.2d at 1028-9.**

The cases Respondent cites in support of his assertion that the cases "uniformly hold that there is a presumption against retroactive application" [Respondent's Brief p. 3], uniformly predate ***Desjardins*** and ***Edenfield,*** both of which imposed retroactive application without expressed legislative intent. As a result, Respondent's cases should be given questionable, if any, weight. In ***Foley v. Morris,*** **339 So. 2d 215 (Fla. 1976);** ***Fleeman v. Case,*** **342 So. 2d 815 (Fla. 1977);** and ***Homemaker's Inc. v. Gonzalez,*** **400 So. 2d 965 (1981),** this Court stated a general presumption against retroactivity. However, if there is such a presumption under current caselaw, then ***Desjardins*** and ***Edenfield,*** which post-date them, compel the conclusion that a remedial purpose rebuts that presumption.

None of Respondent's cases deals with a remedial statute, and his representation[2] that ***Fleeman,*** **342 So.2d 815,** did is misguided, if not misleading. The statute in ***Fleeman*** was not characterized as "remedial" by this Court. Its sole purpose was to

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[2]"It was asserted that the statute was enacted to curb a practice which the legislature thought inimical to this states's economy because of its inflationary nature (e.g. a remedial statute)." [Respondent's Brief at p. 5].

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prevent the use or enforcement of escalation clauses in leases, because they led to inflation, which was viewed as harmful to the state's economy. ***Id.* at 817.** The purpose of prohibiting conduct inconsistent with a healthy state economy, while perhaps laudable, is not within the definition of "remedial." The statute did not provide a remedy, nor did it cure imperfections in a prior law. All statutes are enacted to solve problems. Not all provide a remedy.

Even under the older cases, the presumption against retroactivity does not necessarily exist, at least with respect to remedial statutes. In ***City of Lakeland v. Catinella,*** this Court held:

> Remedial statutes or statutes relating to remedies or modes of procedure, which . . . only operate in the furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes. **129 So. 2d 133, 136 (Fla. 1961).**

The present case involves an amendment to a procedural rule. The amendment extends the time within which a person may move to set aside a final judgment based on fraud. As such, it appears to fall within the holding above, and outside any presumption against retroactivity.

Ultimately, if this Court accepts Respondent's presumption against retroactivity, and his position that the only way around it is clear and explicit legislative intent, then Petitioner finds herself in the awkward position of suggesting to this Court that the Court intended the amendment to apply retroactively. That intent seems clear from ***DeClaire*** and the ***Committee Report,*** but of course, beyond this suggestion, that determination awaits this Court's opinion.

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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.

The Rules Committee explicitly decided that the interest in providing a remedy to parties against whom fraud was committed outweighed the public policy in favor of finality of judgments. ***Report of the Florida Bar Civil Procedure Rules Committee, In Re: Amendments to the Florida Rules of Civil Procedure,* Case No. 79613 (Fla. 1992).** This Court adopted a limited version of the proposed rule change, in an apparent attempt to focus the remedy on the specific harm of fraudulent financial affidavits in divorce cases, and perhaps in deference to the policy which favors finality. In light of this specific analysis, it is practically unnecessary to rebut the Respondent's argument, which does nothing more than set forth and reweigh the basic values that the Rules Committee and this Court already considered.

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 Reply Brief was mailed to MICHAEL A. LIPSKY, ESQUIRE, Michael A. Lipsky, P.A., 444 Brickell Avenue, Suite 1010, Miami, Florida 33131; and to BARRY S. FRANKLIN, ESQUIRE, Franklin, Marbin & Adams, 17071 West Dixie Highway, North Miami Beach, Florida 33160-3792, this 8th day of July, 1994.

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