IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,933

NEIL ALAN NATKOW,

Petitioner,

vs.

ADRIENNE BETH NATKOW,

Respondent

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

On July 16, 1992 (rehearing denied September 30, 1992), this Court had promulgated amendments to various rules, including Fla.R. Civ.P. 1.540(b)(3) to "become effective at midnight on January 1, 1993" in In re Amendments to the Fla. Rules of Civil Procedure, 604 So.2d 1110 (Fla. 1992). The amendment of Rule 1.540(b)(3) eliminated the rule's one-year post-judgment deadline for service of a motions for relief from judgment "based on fraud in financial affidavits in marital cases," Id. at 1111. After those amendments were promulgated but 46 days before their effective date, a judgment of dissolution of the marriage of Neil Alan Natkow and Adrienne Beth Natkow was on November 16, 1992 entered. (R9)[1]

On January 17, 1994, Adrienne Beth Natkow filed a Rule 1.540 (b)(3) motion for relief from that judgment "on a claim that the financial affidavits her husband filed in the dissolution proceedings were fraudulent." (R12) Upon referral to a master, she reported that the motion was time-barred by the version of that rule that predated the amendment and recommended that the motion be denied "with prejudice." (R14) The Wife timely filed exceptions to that report, pointing out that the rule's one-year deadline had been abrogated well before that year would have expired under the previous version of the rule in regard to the November 16, 1992 judgment. (R18) The lower court denied those exceptions and "ratified" the master's report. (R20)

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[1] That judgment was prefaced with an acknowledgement that the Court had "reviewed both parties' Financial Affidavits..." (A9)

On appeal to the Third District, that denial was reversed. (R45) That Court held that the amendment applied in the case at bar because it became effective before the expiration of the one-year post-judgment grace period afforded by the pre-amendment-version of that rule.

The Husband then filed a Notice to Invoke Discretionary Jurisdiction (R64) and this Court has now granted review (R66).

SUMMARY OF ARGUMENT

In re Amendments to the Fla. Rules of Civil Procedure, 604 So.2d 1110 (Fla. $992) promulgated the amendments, including the one here at issue, prospectively, before the date of the Natkow judgment, and merely deferred their application until 46 days after the date of entry of that judgment.

Furthermore, since In re Amendments to the Fla. Rules of Civil Procedure, 604 So.2d 1110, specified a single effective date, applying across the board to each of that opinion's constituent amendments of the rules, that effective date should be uniformly construed in regard to each of those amendments. For example, one of those amendments authorized service by "fax." That amendment would authorize service via "fax" as a method for service of a post-judgment Rule 1.540(b) motion for relief from judgment even though that judgment predated that effective date. It would be inconsistent to interpret that effective date as applying that portion of the opinion, dealing with service by "fax," to such a proceeding but as not applying another portion of that opinion, dealing with the deadline for service, to that same proceeding.

Moreover, consistent with the rationale announced by this Court in Pearlstein v. King, 610 So.2d 445 (Fla.1992), the application of the Rule 1.540(b)(3) amendment to the Natkow judgment "puts no extra burden on prior filings" and "does not diminish," but rather extends, "the time for complying with the rule."

Neither Mendez-Perez v. Mendez-Perez, 656 So.2d 458 (Fla. 1995) nor Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981), detracts from this analysis. In Mendez-Perez, the judgment there at issue predated both the date of promulgation and effective date of the amendment of Rule 1.540(b)(3) by more than one year so that relief under that rule had already become barred by the pre-amendment version of the rule before those dates. Homemakers did not involve a rule amendment; rather it dealt with an amendment lengthening a statutory period of limitation, whose date of enactment and effective date were both subsequent to the date of accrual of the cause of action there at issue.

ARGUMENT

SINCE THE AMENDMENT OF RULE 1.540(b)(3), ELIMINATING THE PRIOR RULE'S ONE-YEAR POST-JUDGMENT PEAPLINE FOR SEEKING RELIEF FROM A FRAUDULENT FINANCIAL AFFIDAVIT, WAS PART AND PARCEL OF A COMPLEX OF PROCEDURAL AMENDMENTS THAT WERE PROMULGATED BEFORE JUDGMENT WAS ENTERED IN THE CASE AT BAR AND THAT BECAME EFFECTIVE JUST 46 DAYS, AND LESS THAN ONE YEAR, AFTER THAT JUDGMENT NAB ENTERED, AND SINCE THE WIFE'S ENTITLEMENT TO SERVE A RULE 1.540)(3( ) MOTION REMAINED VIABLE UNPER THE PRIOR RULE RIGHT UP TO THE EFFECTIVE DATE OF THE AMENDMENT, THAT AMENDMENT APPLIED PROSPECTIVELY TO THE POST-JUDGMENT RULE 1.540(b)(3) PROCEEDING IN THE CASE AT BAR AND RENDERED THAT PROCEEDING TIMELY

The Third District correctly held that the Wife's Rule 1,540 (b)(3) motion was timely served.

That motion was governed by the amendment to that rule, included among the amendments prospectively promulgated by In re Amendments to the Florida Rules of Civil Procedure, 604 So.2d 1110, 1111 (Fla. 1992). That opinion was issued on July 16, 1992, rehearing denied September 30, 1992, well before the November 16, 1992 date of entry of the judgment in the case at bar. Moreover, the "effective" date of those rule amendments, January 1, 1993, came just 46 days after entry of that judgment, well before the one-year grace period specified in the pre-amendment version of Rule 1.540 (b)(3) would otherwise have expired.

The complex of rule amendments "effective" January 1, 1993 -- that include the particular amendment here at issue -- were strictly procedural. The amendment to Rule 1.540(b)(3) merely eliminated in futuro a procedural deadline for a motion for relief from judgment. Also included among the amendments promulgated by In re Amendments to the Florida Rules of Civil Procedure, 604 So.2d 1110, was yet another procedural change -- an amendment of Fla.R.Civ.P.

1.080, inaugurating facsimile transmission as a sanctioned method of service. That facsimile amendment governs the method of service of all motions served on or after January 1, 1993, including a post-judgment Rule 1.540 motion -- regardless of whether the antecedent judgment or the commencement of suit predated the amendment. See Pearlstein v. King, 610 So.2d 445, 446 (Fla. 1992) (rule amendment imposing 120-day deadline for service of process applied to cases pending on date of amendment); Whittaker v. Eddy, 37 Fla. 533, 147 So. 868, 873 (1933) (procedure as it exists at that stage of a court proceeding controls).

The significance of these observations is that the omnibus provision of this Court's July 16, 1992 opinion, establishing a January 1, 1993 "effective" date, encompassed all the amendments set out in that opinion. Therefore, as to each amendment, that provision must be applied uniformly and symmetrically. It would be an asymmetrical, inconsistent application of that provision to treat the Wife's Rule 1.540(b)(3) motion, served after January 1, 1993, seeking relief from the November 16, 1992 judgment, as being governed by the post-amendment version of Rule 1.080, but at the same time as being governed (and barred) by the D-amendment version of Rule 1.540(b)(3).[2]

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[2] Unaffected by this analysis are post-judgment Rule 1.540(b) motions already time-barred as of the effective date of the amendment. An example of such a time-barred motion is to be found in Mendez-Perez v. Perez-Perez, 632 So.2d 1047 (Fla. 3d DCA 1993), approved, 656 So.2d 458 (Fla. 1995). That distinction was clearly drawn in the Third District opinion here under review, rejecting the husband's reliance on Mendez-Perez. The Third District pointed out that in Mendez-Perez,

No conflict exists between the foregoing analysis (or the decision of the Third District in the case at bar) and the decision of this Court in Mendez-Perez v. Perez-Perez, 656 So.2d 458 (Fla. 1995). As is noted in footnote 2, ante, in that case, the one-year grace period afforded by the former version of Rule 1.540(b)(3) had already expired on July 20, 1991[3], long before the January 1, 1993 effective date of the amendment. Additionally, that one-year grace period had expired even before this Court's July 16, 1992 opinion promulgating that amendment.[4]

The parties to the Mendez-Perez judgment had every reason to expect that any claims of intrinsic fraud relating to the financial affidavits filed in that case had been finally laid to rest by the expiration of the one-year grace period well before that amendment was promulgated. By contrast, in the case at bar, any similar expectancy was foreclosed by the fact that the amendment was promulgated before the entry of the Natkow judgment of dissolution and

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"... the judgment to which the motion was directed was entered in July, 1990, and the one-year time limit of the pre-amendment rule had terminated in July, 1991, prior to the amendment's effective date."

[3] The certified question posed to this Court and answered in the affirmative in Mendez-Perez pinpointed the date of entry of judgment in that case as July 20, 1990. Therefore, the one-year grace period in that case expired on July 20, 1991.

[4] The very same distinguishing features, noted hereinabove, that render Mendez-Perez inapplicable to the facts of the case at bar were likewise present in Cerniglia v. Cerniglia, 679 So.2d 1160 (Fla. 1996). The fact that the judgment in Cerniglia was entered more than one year before the effective date of the amendment is explicated by the opinion of the Third District in Cernislia v. Cerniglia, 655 So. 2d 172, 175-176 (Fla. 3d DCA 1995). Thus, the very same analysis to which Mendez-Perez is subject extends equally to, and demonstrates the inapplicability of, Cerniglia.

was additionally to become effective well before the arrival *in futuro* of the deadline that would otherwise have been applied under the previous version of the rule.[5] The Husband's bald assertion, at p. 15 of his Brief on the Merits, that he had a legitimate contrary expectancy is therefore not only unsupported by, but also grossly at odds with, the realities of this case.

The Husband's Brief on the Merits mistakenly relies on *Mendez-Perez's* pronouncement that "rules of procedure are prospective unless specifically provided otherwise, Pearlstein v. *King*, 610 So.2d 445, 446 (Fla.1992)." Neither *Mendez-Perez* nor Pearlstein implies that the Third District's particular application of the amendment *in* the case at bar is other than "prospective." Rather those cases' insistence upon "prospective" application of amendments merely means that an amendment cannot "retroactively" resurrect a proceeding that, prior to the effective date of the amendment, had already become finally foreclosed by the pre-amendment version of the rule. As has already been fully explained, ante, that feature was not present in the case at bar -- the Wife's entitlement to move for relief from the judgment under Fla.R.Civ.P.

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[5] In Diamond Glue Co. v. United States Glue Co., 187 U.S. 611 (1903), the analogous significance of a statutory provision, deferring to a later date its "effective date," was considered. The statute was enacted prior to the date of execution of a contract by the parties but that statute provided that it was to become effective at a date subsequent to the date of execution of that contract. One of the parties to the contract sought to escape liability for his non-performance of the contract on the ground that the law was changed by that statute after the contract was executed. The U.S. Supreme Court rejected that argument, aptly reasoning that the defaulting party was on notice of the statute when it entered into the contract and could not claim to have contracted in reliance upon the future application of the law predating that statute.

1.540(b)(3) remained fully viable right up to the effective date of the amendment of that rule.

Tucker v. State, 357 So.2d 719 (Fla. 1978) employed the word "prospective" in the same sense as Mendez-Perez, 656 So.2d 458, in the context of an amendment to a rule. Tucker, 357 So.2d at 722 n. 9, stated: "Unless otherwise specifically provided, our court rules are prospective only in effect. Poyntz v. Revnolds, 37 Fla. 533, 19 So. 649 (1896)." Tucker's above-quoted footnote is cited in Pearlstein, 610 So.2d 445, and Pearlstein is in turn cited in Mendez-Perez. That footnote accompanies a statement in the main text of Tucker, 357 So.2d at 721, that the amendment of Fla.R.Crim.P. 3.191 (d)(2)(iv), adopting a new basis for securing an extension of the speedy trial period,[6] did not have "retrospective effect" in that case and was therefore inapplicable. That is because the speedy-trial period under the prior version of the rule had already expired several years before that 1977 amendment was promulgated. The amendmentcouldtherefore not "retrospectively" create a procedural tool to resurrect that expired criminal proceeding -- just as in Mendez-Perez the amendment could not resurrect a proceeding that had already become time-barred before the date of amendment.

The amendment in Pearlstein, 610 So.2d 445, did not operate to resurrect a time-barred proceeding; in finding that the amendment was "prospective," Pearlstein acknowledged Tucker's above-quoted holding but was careful to avoid imparting to the word "retroac-

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[6] The Florida Rules of Criminal Procedure, 343 So.2d 1247, 1256 (Fla.1977).

tive" an overly broad, wooden interpretation. In Pearlstein, the Court explained that the application of an amendment of Fla.R.Civ. P. 1.070(j) requiring service of process within 120 days after the date of amendment to cases pending before that date is "prospective" because it "puts no extra burden on prior filings and does not diminish the time for complying with the rule." By the same token, the application of the Rule 1.540(b)(3) amendment to the particular facts of the case at bar "puts no extra burden on prior filings"[7] and "does not diminish," but rather extends, "the time for complying with the rule."

The Husband's additional reliance (in his Brief on the Merits, at p. 14) upon Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981), is likewise mistaken for the following reasons:

(a) pomemakers, 400 So.2d 965, did not involve an amendment of a rule of procedure. It concerned rather a statutory amendment extending a statutory period of limitations.[8] Any attempt to equate

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[7] In the case at bar, the amendment put "no extra burden on prior filings" because it did not alter the Husband's already pre-existing obligation to file a truthful (non-fraudulent) finanacial affidavit. Surely, the Husband could not be heard to argue that his formulation of the affidavit was influenced by an expectancy that, under the prior rule, one year after judgment it would become exempt from scrutiny for fraud -- nor would any such nefarious expectancy merit the protection of the law.

[8] Homemakers' holding that the application of an amendment extending a statutory period of limitation to a cause of action whose period of limitation had not yet expired on the date of the amendment is "retroactive" legislation is curiously at odds with this Court's prior holding in Corbett v. Gen. Eng'g & Machinery Co,, 37 So.2d 161, 162 (Fla. 1948). Corbett, at 162, quotes with approval, and adheres to, Davis & McMillan v. Indus. Accident Comm'n, 246 P. 1046, 1047, 46 A.L.R. 1095 (Cal. 1926), holding that such legislation is "not retroactive." The later Homemakers decision did not advert to Corbett -- only Justice England's dissent in

the body of law relating to statutes of limitation with that relating to a rule of procedure would, **inter alia**, run afoul of Pearlstein, 610 **So.2d** 445. As is noted, **ante**, **Pearlstein** construed the Rule **1.070(j)** amendment as creating a 120-day service-of-process deadline running from the date of the amendment to cases instituted before that amendment and reasoned that this application of the amendment was **"prospective."** If **Pearlstein's** reasoning were to be extended to statutes of limitation, a statute, analogously creating a period of limitation running from the date of enactment of the statute with regard to a cause of action accruing prior to that date, would (contrary to **Homemakers'** declaration that such statutes are **"retroactive")** be viewed as being innocuously **"prospective."**[9] while it is true that, included among the cases cited by this Court in **Mendez-Perez**, 656 **So.2d** 458 in support of its decision, were cases dealing with statutes of limitation, this Court did not go so far as to hold **that** cases in that field of substantive law have blanket application in the separate field of procedural rules. In **Mendez** Perez, it happened that the particular facts of that case fell into an area of law wherein the two fields of law converged. The different facts of the case at bar do not fall into that area

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Homemakers cites Corbett. While **Homemakers** may **sub silentio** have overruled **Corbett in the field of legislation** it does not follow that the **discrete** field of procedural rule amendments must silently be subsumed under, and succumb to, the same fate.

[9] To treat the application of the amendment in the case at bar as **"retroactive"** would moreover run afoul of the application of the rules in force at that stage of the proceeding, not the rules in force at the commencement of the suit, to that stage of the proceeding in **Whittaker v. Eddy**, 37 Fla. 533, 147 So. 868, 873 (1933).

of convergence. The U. S. Supreme Court, in Landgraf v. US1 Film Products, ____ U.S. ____, 114 S.Ct. 1483, 1502 (1994), has recognized the distinction between rules of procedure and substantive law in applying the doctrine of "retroactivity":

> Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. For example, in Ex parte Collett, 337 U.S. 55, 71, 69 S.Ct. 944, 952-953, 93 L.Ed. 1207 (1949), we held that 28 U.S.C. §1404(a) governed the transfer of an action instituted prior to that statute's enactment. We noted the diminished reliance interest in matters of procedure. Id., at 71, 69 S.Ct., at 952-953. Because rules of procedure regulate secondary rather than primary conduct the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive. Cf. McBurney v. Carson, 99 U.S. 567, 569, 25 L.Ed. 378 (1879). (e.s.)

(b) The amendment at issue in Homemakers (effective January 1, 1975) was inappositely enacted in 1974 well after the period of limitation had on April 2, 1973 begun to run. That contrasts with the reverse chronology of the July 16, 1992 date of this Court's opinion (that promulgated the amendment here at issue), antedating by several months the November 16, 1992 date of commencement of the post-judgment grace-period specified in the previous version of Rule 1.540(b)(3) that was abrogated by that opinion.

(c) A third distinguishing feature is the previously-noted fact that the amendment of Rule 1.540(b)(3) here at issue was but one of a number of rule amendments encompassed within an omnibus provision specifying a single effective date; none of the other affected rules concerned grace periods, periods of limitation, or any other subject even remotely related to Homemakers. As is noted at pp. 4-5, ante, that omnibus provision could not inconsistently

be applied -- applying those other rule amendments to post-judgment proceedings, not time-barred prior to the date of amendment, in cases in which the judgments predated the amendment, while at the same time refusing to apply the amendment of Rule 1.540(b)(3) to those same proceedings.

CONCLUSION

In the light of the foregoing analysis, it is evident that the Third District decision here under *review* was consistent with the applicable precedent. The petition for review should be dismissed or alternatively denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing were mailed to Gerald I. Kornreich International Place Ste. 3910 100 S.E. 2nd St. Miami, Fla. 33133-2112 and Paul Morris 999 Ponce de Leon Blvd. Ste. 550 Coral Gables, Fla. 33134 this 17 day of January, 1997.