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IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,933

3d DCA Case No. 95-3595

NEIL ALAN NATKOW,

Petitioner,

v.

ADRIENNE BETH NATKOW,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

ISSUE PRESENTED FOR REVIEW

WHETHER THE THIRD DISTRICT ERRED IN APPLYING THE 1993 AMENDMENT TO FLA.R.CIV.P. 1.540 TO A 1992 FINAL JUDGMENT OF DISSOLUTION WHERE THIS COURT HAS HELD THAT THE AMENDMENT COULD NOT BE APPLIED RETROACTIVELY.

TABLE OF CITATIONS

Cases

Other Authorities

INTRODUCTION

The petitioner, Neil Natkow, was the appellee in the Third District and the respondent in the circuit court. The petitioner will be referred to as the husband. The respondent, Adrienne Natkow, was the appellant in the Third District and the petitioner in the circuit court. The respondent will be referred to as the wife. The symbol "R" refers to the index to the record prepared by the clerk of the Third District.

STATEMENT OF THE CASE AND FACTS

The marriage between the petitioner, Neil Natkow [husband], and the respondent, Adrienne Natkow [wife], was dissolved by a final judgment entered on November 16, 1992. (R. 13-15). Fourteen months later, on January 17, 1994, the wife filed a motion for relief from judgment under Fla.R.Civ.P. 1.540 challenging the husband's financial affidavit. (R. 16-17). At the time of the final judgment of dissolution, rule 1.540(b) imposed a one-year limitation for filing such a motion for relief from judgment. The husband moved to dismiss the wife's motion as untimely filed beyond the one-year limit provided by the rule in effect at the time of the final judgment. The general master recommended dismissal (R. 18-21), finding dispositive this court's decision in *Mendez-*

Perez v. Perez-Perez, 656 So. 2d 458 (Fla.1995) which held that the amendment, effective January 1, 1993, see *In re Amendments to the Fla. Rules of Civil Procedure*, 604 So. 2d 1110 (Fla.1992), could NOT be applied retroactively. In *Mendez-Perez*, this court ruled in pertinent part as follows:

> We find the plain language of *In re Amendments* controlling. The amendment to rule 1.540(b) did not take effect until January 1, 1993. Under the rule in effect when Mendez-Perez's divorce was final, she had one year to bring a motion under rule 1.540(b) based on fraud. Her motion filed in January 1993 was thus beyond the one-year limitations period. [emphasis supplied]

Mendez-Perez, 656 So. 2d at 460. The circuit judge, similarly following this court's decision in *Mendez-Perez*, denied the wife's exceptions and dismissed the wife's motion as untimely. (R. 24-5).

The wife appealed to the Third District. In a 2-1 decision, the Third District reversed, applying the 1993 amendment retroactively to the parties' 1992 judgment. (R. 45-54); *Natkow v. Natkow*, 21 Fla. L. Weekly D1474 (Fla. June 26, 1996). Judge Green dissented, concluding that the majority had improperly overruled this court's decision in *Mendez-Perez* by applying the amendment retroactively. (R. 49-54). The husband moved for rehearing, certification of the question, and a stay pending

review by this court. (R. 55-58). The majority denied the motions over the dissent of Judge Green who would have certified the question and granted a stay. (R. 62). The husband filed a timely Notice to Invoke Discretionary Jurisdiction and sought review of the denial of a stay pending review. (R. 64). This court granted review and stayed the proceedings below. (R. 65-6).

SUMMARY OF THE ARGUMENT

In *Mendez-Perez v. Perez-Perez*, *supra*, and again in *Cerniglia v. Cerniglia*, 21 Fla. L. Weekly S357 (Fla. September 5, 1996), this court held that the amendment to rule 1.540 (effective January 1, 1993 and eliminating the one-year time limitation for motions for relief from judgment challenging financial affidavits in marriage dissolution cases) was not retroactive. Applying the "rule in effect" at the time the parties' divorce judgment became final, this court ruled that the motion for relief for judgment in *Mendez-Perez* was untimely filed beyond the rule's pre-amendment one-year time limit.

In the case at bar, the parties' final judgment was entered in November 1992, prior to the effective date of the amendment to rule 1.540. Thus, the one-year time limit of the former version of rule 1.540

applied pursuant to *Mendez-Perez* and *Cerniglia*. The wife filed her 1.540 motion for relief from judgment 14 months after the final judgment of dissolution. The trial judge correctly followed this court's decisions by ruling that the wife's motion was untimely filed beyond the one-year limit of the pre-amendment version of rule 1.540 effect at the time the parties' divorce judgment had become final.

However, on appeal by the wife, a majority of the Third District reversed, affording the wife retroactive application of the amendment. The Third District erred in holding that the 1993 amendment to rule 1.540 could apply to a final judgment rendered in 1992. Approval of the Third District's decision would not only overrule this court's decisions in *Mendez-Perez* and *Cerniglia*, but also call into question this court's decisions holding that in the absence of express intent of retroactive application, an enlargement of a limitations period can only be applied prospectively. Accordingly, the decision of the Third District should be quashed.

ARGUMENT

THE THIRD DISTRICT ERRED IN APPLYING THE 1993 AMENDMENT TO FLA.R.CIV.P. 1.540 TO A 1992 FINAL JUDGMENT OF DISSOLUTION WHERE THIS COURT HAS HELD THAT THE AMENDMENT COULD NOT BE APPLIED RETROACTIVELY.

A.

The marriage between the husband and the wife was dissolved by a final judgment entered on November 16, 1992. At that time, Fla.R.Civ.P. 1.540 contained a one-year time limit for motions for relief from judgment. The wife moved for relief from the judgment pursuant to rule 1.540 but beyond the one-year time limit. The husband moved to dismiss the motion as untimely. The wife argued for retroactive application of the amendment to rule 1.540 which exempted from the one-year limitation motions based upon challenges to financial affidavits in dissolution proceedings. The amendment carried an effective date of January 1, 1993 and contained no provision for retroactive application.[1]

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[1] As a result of the amendment, *In re Amendments to the Fla. Rules of Civil Procedure*, 604 So. 2d at 1111, an exception was written into rule 1.540(b) which provided "that there shall be no time limit for motions based on fraudulent financial affidavits in marital cases." Due to the adoption of the new family law rules which became effective January 1, 1996, the quoted exception was deleted from rule 1.540(b) and transferred to Fla.R.Fam.Ct. 12.540, Florida Family Law Rules of Procedure. See *In re Family Law Rules of Procedure*, 665 So. 2d 1049 (Fla.1995).

The husband relied upon this court's decision in *Mendez-Perez v. Perez-Perez, supra*, which ruled in pertinent part as follows:

> We find the plain language of *In re Amendments* controlling. The amendment to rule 1.540(b) did not take effect until January 1, 1993. Under the rule in effect when Mendez-Perez's divorce was final, she had one year to bring a motion under rule 1.540(b) based on fraud. Her motion filed in January 1993 was thus beyond the one-year limitations period. [emphasis supplied]

Mendez-Perez, 656 So. 2d at 460. Applying this holding, the trial court dismissed the wife's motion as untimely filed beyond the one-year limitation in effect at the time of the parties' 1992 final judgment of dissolution.

On appeal by the wife, a majority of the Third District reversed, fashioning an unprecedented "alarm clock" and "timekeepers" analogy which resulted in retroactive application of the amendment to the parties' 1992 judgment. The Third District majority reasoned as follows:

> [W]hen the Natkows' judgment of dissolution was entered in November, 1992, an "alarm clock" was set by rule 1.540(b) to go off in November, 1993. The alarm, had it gone off, would have signaled that neither party could then use the rule. However, the "timekeepers" adoption of the rule change dismantled the alarm clock's machinery so that there would be no alarm after January 1, 1993. Thus, as the alarm did not exist in November, 1993, and thereafter, it did not and could not ring-in the expiration of the Natkows' filing time. The January, 1994 filing was thus not barred.

(R. 47).

Judge Green dissented on the ground that the majority had afforded the wife retroactive application of the amendment contrary to this court's decision in *Mendez-Perez*, thereby impermissibly overruling same in violation of the time-honored rule of law that a district court of appeal cannot overrule a decision of the Supreme Court of Florida. See, *e.g.*, *Continental Assurance Co. v. Carroll*, 485 So. 2d 406 (Fla.1986), *Hoffman v. Jones*, 280 So. 2d 431 (Fla.1973). The husband requests that this court quash the decision below and re-affirm *Mendez-Perez*.

B.

This court's decision in *Mendez-Perez* is controlling. *Mendez-Perez* holds that the amendment to rule 1.540, effective January 1, 1993, which eliminated the one-year time limit for motions such as the wife's in the case at bar, does not apply retroactively. Consequently, parties to a final judgment are governed by the time limit of the version of rule 1.540 in effect at the time of judgment. Here, the wife's rule 1.540 motion was filed 14 months after the 1992 final judgment was rendered. Under *Mendez-Perez*, the wife's motion was untimely and could not be saved by retroactive application of the 1993 amendment to the 1992

judgment.

C.

Despite the clear directive of this court's decision in *Mendez-Perez*, the Third District majority decision reversed based upon a novel "alarm clock" theory. Simply stated, this theory posits that when the parties' judgment of dissolution was entered in November 1992, an alarm clock was set to go off in one year to sound the deadline of rule 1.540; however, the promulgation of the amendment to 1.540 "dismantled" the clock so that no alarm would sound after January 1, 1993. The theory concludes that because the alarm clock did not go off in November 1993, the wife's motion was timely.

Although couched in terms of an alarm clock theory, the majority decision below is nothing other than a retroactive application of the amendment to 1.540 to a 1992 judgment. The theory is based upon the flawed premise that the promulgation of the amendment to 1.540 "dismantled" the one-year deadline otherwise applicable to judgments predating the January 1, 1993 effective date of the amendment. The amendment did no such thing. To the contrary, by virtue of its express 1993 effective date combined with its lack of any express intent of

retroactive application, the amendment could apply only to judgments entered on or after its effective date. As this court explicitly held in *Mendez-Perez*, the rule in effect at the time of final judgment governs. The alarm clock theory conflicts with the rule-in-effect holding of this court's ruling in *Mendez-Perez*. The decision below must therefore be quashed.

D.

This court's decision in *Mendez-Perez* was the result of a certified question from the Third District in *Mendez-Perez v. Perez-Perez*, 632 So. 2d 1047 (Fla.3d DCA 1993). In *dictum* in that case, the Third District had suggested that the 1993 amendment to rule 1.540 applied to "all marital cases based on fraudulent financial affidavits in which the final judgment was entered on or after January 1, 1992". *Mendez-Perez*, 632 So. 2d at 1049 (emphasis by the court). In a footnote in the same decision, the Third District created a "window period" for "pending" cases, defined by that court as those "in which the time to file a motion pursuant to Rule 1.540(b) had not yet expired." 632 So. 2d at 1049 n.3.[2]

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[2] The Third District repeated the same *dicta* in *Cerniglia v. Cerniglia*, 655 So. 2d 172, 175-76 & n.1 (Fla.3d DCA), *decision approved*, 21 Fla. L. Weekly S357 (Fla.

In the case at bar, the wife's appeal to the Third District was based almost exclusively upon her contention that she fell within that "window period". Curiously, although the wife prevailed below, the majority decision makes no mention of the "window". Perhaps the majority abandoned the window in the face of Judge Green's conclusion that this court "had no intention of creating a retroactive 'window period'" as evidenced by the plain language of the amendment's effective date as well as this court's "disposal of the issue presented in *Mendez-Perez* with a simple 'rule in effect' analysis." (R. 53). Judge Green reached her conclusion based upon the following forceful analysis.

The probable genesis for the Third District's arbitrary creation of the "window period" in its decision in *Mendez-Perez*, Judge Green reasoned, was older limitations case law such as *Walter Denson & Son v. Nelson*, 88 So. 2d 120 (Fla.1956), which had "suggested that the enlargement of a limitation period, unlike the shortening of such a period, presumptively applied retroactively to all causes of action whose limitation period had not yet expired." (R. 52 n.4). But that case law,

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September 5, 1996).

Judge Green noted, was no longer the law in Florida as of 1981, having been implicitly overruled by this court in *Homemakers, Inc. v. Gonzales*, 400 So. 2d 965 (Fla.1981). *Id.* Thus, the "window period" *dictum* of the Third District majority conflicts not only with this court's decision in *Mendez-Perez*, but also the decision in *Homemakers*.

Judge Green rejected the wife's argument that this court, in approving the decision of the Third District in *Mendez-Perez*, also approved the "window period." Judge Green characterized the Third District's creation of the "window" as "loose language" and *dictum* having "no precedential value because it was wholly unnecessary" to the holding of this court in *Mendez-Perez* and because "*Mendez-Perez* did not factually involve a dissolution judgment entered on or after January 1, 1992." (R. 50-1).[3] The facts and procedural history of *Mendez-Perez* are instructive. In that case, the final judgment of dissolution was entered on July 20, 1990. More than two years later, the former wife moved to set aside the judgment based upon fraud. The former husband moved to

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[3] That the former wife pressed her cause in the lower courts based solely upon *dictum* recalls the following: "Judicial pronouncements which are obiter dicta in character more often serve to confound than to clarify the jurisprudence of the State." *Dobson v. Crews*, 164 So. 2d 252, 255 (Fla.1964).

dismiss the action as untimely and the trial court granted the motion. On appeal by the former wife, the Third District affirmed, ruling that

> [w]hen the supreme court created the remedy, it could have expressly stated that the change would apply retroactively to any and all cases. However, the court clearly specified that the amendment became effective at midnight on January 1, 1993. *In re Amendments to the Florida Rules of Civil Procedure*, 604 So. 2d at 1111."

632 So. 2d at 1049.[4] Accordingly, the Third District correctly held that the former wife in *Mendez-Perez* had only until July 20, 1992 to file her action and the amended rule 1.540 could not be applied retroactively to the parties' 1990 judgment. Judge Green properly observed the following:

> It was this holding and this holding alone which was then certified to and approved by the Florida Supreme Court in *Mendez-Perez v. Perez-Perez*. [citation omitted] There was absolutely no question put to the supreme court by this court about this court's additional dicta concerning so called "window period" cases nor did the supreme court address the same.

(R. 51-2).

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[4] In *Cerniglia, supra*, this court reiterated the following: "As we explained in *Mendez-Perez*,... rules of procedure are prospective unless specifically provided otherwise and the amendment to rule 1.540(b) became effective January 1, 1993, which precluded retroactivity." If this court had intended the application of a "window" period, it would have so expressly provided through plain language in the amendment as it did, for example, when Fla.R.Crim.P. 3.850 was amended. See *In re Rule 3.850 of the Florida Rules of Criminal Procedure*, 481 So. 2d 480 (Fla.1985).

Thus, ample reasons justified the abandonment of the "window" by the majority below. Unfortunately, as previously noted, the majority replaced the "window" retroactivity with yet another ill-advised contrivance, namely, the "alarm clock."

E.

In her brief opposing jurisdiction, the wife argued that *Cerniglia* and *Mendez-Perez* were distinguishable because in those cases, "... the dates of entry of judgment were (in contrast to the chronology of the case at bar) more than one year before the effective date of [the amendment to rule 1.540]...". Respondent's Jurisdictional Brief at 3. The wife's argument went on to claim that by contrast, the case at bar involves "... proceedings that had progressed to judgment but that were not yet time-barred by the pre-amendment version of the rule." *Id.* The wife's argument, which is likely to be reiterated in her brief on the merits, is wrong in at least two respects.

First, while it is true that the judgment in the case at bar was, unlike the judgments in *Mendez-Perez* and *Cerniglia*, rendered within one year prior to the effective date of the 1993 amendment, that factual distinction makes no difference. Under the rule in effect at the time of the

final judgment, the actions were untimely filed beyond the one-year time limit in *Mendez-Perez*, *Cerniglia*, and the case *sub judice*. The wife's conclusion that her action was "not yet time-barred by the pre-amendment version of the rule" does not follow. Rather, her action was indeed untimely because the rule in effect in 1992 was the pre-amendment version prescribing the one-year deadline which the wife failed to meet.

Second, the wife's argument is refuted by this court's decision in *Homemakers, supra*. In *Homemakers,* a two-year statute of limitations was in effect when the plaintiff's cause of action accrued on April 2, 1973. The plaintiff's claim was filed November 12, 1975. The First District held that the amendment enlarging the time limitation, effective January 1, 1975, applied to then-existing causes of action despite the absence of any expression of retroactive intent. This court quashed the decision of the First District, holding that the plaintiff was not entitled to the benefit of the amendment due to the absence of express intent of retroactivity.

In the case at bar, the Third District majority made the same mistake which the First District made in *Homemakers* by erroneously holding that

the amendment enlarging the time for filing 1.540 motions applies to then-existing causes of action. Thus, the wife's claimed distinction of *Cerniglia* and *Mendez-Perez* is incorrect and would not justify application of the 1993 amendment to the 1992 final judgment.

F.

When the parties' 1992 judgment had remained unchallenged for one year, the time for challenge had run and each party had a vested interest in the finality of the judgment. As this court stated in *Mendez-Perez*:

> While we are not unsympathetic to [the wife's] arguments, we note that a purpose of a limitations period "is to set a time limit within which a suit should be brought." *Thermo Air Contractors, Inc. v. Travelers Indem. Co.*, 277 So. 2d 47, 48 (Fla.3d DCA 1973). By its very nature, a limitations period may deprive someone of rights if he or she fails to bring an action within the applicable period. See, *e.g.*, *Mason v. Salinas*, 643 So. 2d 1077 (Fla.1994) (barring action alleging sexual abuse because it was filed beyond the limitations period in effect when the alleged abuse occurred). We find the plain language of *In re Amendments* controlling.

Mendez-Perez, 656 So. 2d at 460.

The husband had the right to rely upon the plain language of the amendment and expect that the judgment would not be opened to attack after the expiration of one year. To hold otherwise would further erode

the notion of finality in the law and subject every change in a limitations period to retroactive application even in the absence of a specific provision for retroactivity. See *Wiley v. Roof*, 641 So. 2d 66, 68 (Fla.1994) ("Regardless of whether the statute of limitations pertains to a right or a remedy, retroactively applying a new statute of limitations robs both plaintiffs and defendants of the reliability and predictability of the law."). In effect, the wife is asking the courts to rewrite the amendment to include the following provision: "Although effective January 1, 1993, this amendment shall apply to all judgments entered on or after January 1, 1992." The rule could have contained such a provision had a retroactive application been intended. But no such provision was promulgated. Therefore, the decision below should be quashed with directions to affirm the trial court's order of dismissal.

G.

In sum, rule 1.540 in effect at the time of the parties' final judgment afforded each party one year to file a motion for relief from judgment. The wife's untimely motion was properly dismissed by the trial judge. The decision of the Third District, affording the wife retroactive application of the amendment to the rule, must be quashed.

CONCLUSION

Based upon the foregoing facts and authorities, the petitioner respectfully requests that this court quash the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was mailed to Arthur J. Morburger, Counsel for Respondent, Penthouse I, 155 South Miami Avenue, Miami, FL 33130, and Alvin N. Weinstein, Suite 920, Biscayne Building, 19 West Flagler Street, Miami, FL 33130, this 27th day of December, 1996.

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