ORIGINAL

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 JURISDICTION

PAUL MORRIS, ESQ.
Law Offices of Paul Morris, P.A.
999 Ponce de Leon Blvd.
Suite 550
Coral Gables, FL 33134
Florida Bar No. 193769
(305) 446-2020

GERALD I. KORNREICH, ESQ.
International Place
100 S.E. 2nd Street
Suite 3910
Miami, Florida 33131-2148
Florida Bar No. 193037
(305) 579-9111

Counsel for Petitioner Neil Alan Natkow

TABLE OF CONTENTS

ISSUE PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE THIRD DISTRICT IS IN DIRECT AND EXPRESS CONFLICT WITH THE FOLLOWING DECISIONS OF THIS COURT:

Mendez-Perez v. ***Perez-Perez,*** 656 So. 2d 458 **(Fla.1995);**

Continental Assurance Co. v. ***Carroll,*** 485 So. 2d 406 **(Fla.1986);**

Hoffman v. Jones, 280 So. 2d 431 **(Fla.1973);**

State v. Dwyer, 332 So. 2d 333 **(Fla.1976);** and

Homemakers, Inc. v. Gonzales, 400 So. 2d 965 (Fla. 1981).

TABLE OF CITATIONS

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

The following facts are gleaned from the decision of the Third District sought to be reviewed. (App. I-I 0).

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. 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. At the time of the final judgment of dissolution, Fla.R.Civ.P. 1.540(b) provided for a one-year limitation for filing such a motion for relief from judgment. Because the wife's motion was filed beyond the one-year time limit in effect at the time of the final judgment, the husband moved to dismiss the motion as untimely. The wife contended that she was entitled to the benefit of an amendment to the rule which exempted from the one-year time limitation challenges to financial affidavits filed in dissolution actions. (App. 1-4). In *Mender-Perez v. Perez-Perez, 656* So. 2d 458 (Fla.1995), this Court held that the amendment, which became effective on 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. 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 Men&z-Perez divorce was final, she had one year to brina 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]

Id.

Because the wife's motion in this case was brought more than one year after the parties' divorce was final, the circuit judge followed this Court's decision in ***Mender-Perez*** by dismissing the wife's motion as untimely. (App. 1-2). The wife appealed to the Third District.

In a 2-1 decision, the Third District reversed, affording the wife retroactive application of the amendment. (App. 1-4). Judge Green dissented, concluding that the majority had improperly overruled this Court's decision in ***Mendez-Perez*** by applying the amendment retroactively, and in so doing, also violated the decisions of this Court which require District Courts of Appeal to follow this Court's precedents and certify the questions, rather than overrule the precedents, in the event of disagreement. (App. 5-10).[1] The husband timely moved for rehearing, certification of the question, and a stay pending review in this Court. (App. 11-14). The majority denied the motions over the dissent of Judge Green who would have certified the question and granted a stay. (App. 15). The husband filed a timely Notice to Invoke Discretionary

---

[1] Judge Green reasoned in pertinent part as follows:

> After expressly acknowledging the supreme court's holding in ***Mandez-Perez v. Perez-Perez,*** 656 So. 2d 458 (Fla.1995) that the 1993 amendment to Rule 1.540(b), Fla. R. Civ. P. which eliminated the one year time limitation to challenge financial affidavits filed in dissolution proceedings is not retroactive, the majority nevertheless goes on to retroactively apply the amendment to a 1992 dissolution judgment. Because I believe that the majority's holding is directly contrary to the supreme court's holding in ***Mender-Perez*** and impermissibly overrules the same, ***Hoffman v. Jones, 280 So.*** 2d 431 (Fla.1973); ***see*** also ***Continental Assurance Co. v. Carroll, 485 So.*** 2d 406 (Fla. 1986), I respectfully dissent.

(App. 5).

Jurisdiction. (App. 16).

SUMMARY OF THE ARGUMENT

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

In the case at bar, the wife filed her motion for relief from judgment fourteen months after the final judgment of dissolution. The trial judge correctly followed ***Mender-Perez*** by ruling that the wife's motion was untimely filed beyond the one-year time limit of rule 1.540 in 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. Judge Green dissented, noting that this Court has repeatedly held that District Courts of Appeal are' prohibited from overruling Florida Supreme Court decisions.

By overruling this Court's decision in ***Mender-Perez,*** the decision of the Third District necessarily expressly and directly conflicts with ***Mender-Perez.*** The decision below also conflicts with ***Cerniglia*** in which this Court reiterated the holding of ***Mender-Perez*** that rules of procedure are prospective unless expressly provided

otherwise and the effective date of the amendment to rule 1.540(b), January 1, 1993, precludes retroactivity.

There is also express and direct conflict with *Continental Assurance* Co. *v. Carroll, 485 So.* 2d 406 (Fla.1986), *Hoffman v.* Jones, 280 So. 2d 431 (Fla.1973) and *State v. Dwyer,* 332 So. 2d 333 (Fla.1976), which hold that where a District Court of Appeal disagrees with a decision of the Supreme Court of Florida, the correct procedure is not to overrule the Supreme Court decision but to certify the question.

Finally, the decision below also conflicts with *Homemakers, Inc. v. Gonzales,* 400 So. 2d 965 (Fla.1981), which holds that in the absence of express intent of retroactive application, an enlargement of a limitations period can only be applied prospectively.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT IS IN EXPRESS AND DIRECT CONFLICT WITH THE FOLLOWING DECISIONS OF THIS COURT:

Cerniglia v. Cerniglia, 21 Fla. L. Weekly S357 (Fla. September 5, 1996);
Mendez-Perez v. *Perez-Perez,* 656 So. 2d 458 (Fla. 1995);
Continental Assurance Co. v. *Carroll, 485* So. 2d 406 (Fla.1986);
Hoffman v. Jones, 280 So. 2d 431 (Fla.1973);
State v. *Dwyer,* 332 So. 2d 333 (Fla.1976); and
Homemakers, inc. v. Gonzales, 400 So. 2d 965 (Fla. 1981).

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 beyond the one-year time limit. In an attempt to avoid dismissal,

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 trial judge rejected the wife's argument based upon this Court's decision in ***Mender-Perez v. Perez-Perez, 656 So.*** 2d 458 **(Fla.1995)** which held that the amendment is not retroactive. In ***Mender-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]

Id.

On appeal by the wife, a majority of the Third District reversed, ignoring this Court's holding that the parties are governed by the "rule in effect" at the time their divorce becomes final. Instead, the majority afforded the wife retroactive application of the amendment in direct and express conflict with ***Mendez-Perez.*** To reach that result, the majority fashioned an unprecedented "alarm clock" and "timekeepers" analogy 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.

(App. 3).

This reasoning directly conflicts with this Court's decisions in ***Mendez-Perez*** and

Cerniglia. This Court did not "dismantle" the one-year time limitation by amending rule 1.540. To the contrary, as this Court explained in ***Mender-Perez,*** the one-year time limitation applies to any final judgment entered when the limitation was in effect. The contrary decision of the Third District effects a retroactive application of the amendment to final judgments predating the effective date of the amendment. As this Court reiterated in *Cerniglia,* a retroactive application of the amendment is prohibited:

> As we explained in ***Mender-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.

The decision of the Third District to the contrary does not merely conflict with ***Mender-Perez*** and *Cerniglia,* it overrules them. The husband respectfully requests that this Court grant review to resolve the clear conflict.

B.

When a District Court of Appeal disagrees with this Court's precedent, the proper course of conduct is not to render a conflicting decision but to rule in accordance with the binding precedent and certify the question. ***Continental Assurance Company v. Carroll,*** 465 So. 2d 406 (Fla.1986); ***Hoffman v. Jones, 280*** So, 2d 431 (Fla. 1973); ***State v. Dwyer,*** 332 So. 2d 333 (Fla. 1976). "Where an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues, even though the court might believe that the law should be otherwise." ***State v. Dwyer,*** **332 So. 2d at 335.** "[A] District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida." ***Hoffman v. Jones, 280 So.*** 2d at 440. ***See*** also ***United***

States Steel Corporation v. Save Sand Key, Inc., 303 So. 2d 9, 11 (Fla. 1974) ("With all due respect, we comment as we did in ***Hoffman*** v. ***Jones*** . . . that it is not the province of the District Court of Appeal to recede from decisions of this Court.")

Rather than certify the question, the Third District rendered a decision which effectively overruled this Court's decisions in ***Mender-Perez*** and ***Cerniglia.*** Therefore, the decision of the Third District is in express and direct conflict with ***Continental Assurance Company v. Carroll, supra, Hoffman v. Jones, supra,*** and ***State v. Dwyer, supra,*** warranting review and correction by this Court.

C.

Review is also justified due to express and direct conflict with the rule of law announced in ***Homemakers, Inc. v. Gonzales,*** 400 So. 2d 965 (Fla. 1981). In that case, 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 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 a legislative amendment to the statute of limitations effective January 1, 1975 due to the absence of express intent of retroactivity.

The Third District majority made the same mistake here which the First District made in ***Homemakers*** by erroneously holding that the amendment enlarging the time for filing certain 1.540 motions applies to then-existing causes of action. As this Court made clear in ***Homemakers,*** an enlargement of a limitations period cannot be

retroactively applied in the absence of such express intent.[2] Not only does this Court's amendment reflect no such intent of retroactive application, this Court expressly ruled in ***Cerniglia*** and ***Mendez-Perez*** that the amendment could not be applied retroactively. Consequently, in affording the wife retroactive application of the enlarged time period, the Third District in this case rendered a decision which expressly and directly conflicts with the rule of law announced by this Court in ***Homemakers.***

[2] Although the case at bar concerns an enlargement of a limitation period enacted by this Court through its rule-making authority rather than a legislatively-enacted enlargement, the distinction is one without a difference for the purpose of ascertaining intent of retroactive application.

CONCLUSION

Based upon the foregoing facts and authorities, the petitioner respectfully requests that this Court grant review.

Respectfully submitted,

PAUL MORRIS, ESQ.
Law Offices of Paul Morris, P.A.
999 Ponce de Leon Blvd.
Suite 550
Coral Gables, FL 33134
(305) 446-2020

GERALD I. KORNREICH, ESQ.
International Place
100 S.E. 2nd Street
Suite 3910
Miami, Florida 33131-2148
(305) 579-9111

Counsel for Petitioner Neil Alan Natkow

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 1 lth day of September, 1996.

PAUL MORRIS