IN THE SUPREME COURT OF FLORIDA

CASE NO. 88,933

NEIL ALAN NATKOW,

Petitioner,

vs.

ADRIENNE BETH NATKOW,

Respondent

Original

# RESPONDENT'S JURISDICTIONAL BRIEF

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## STATEMENT OF THE CABE AND OF THE FACTS

Petitioner's Statement of the Case and Facts impermissibly intermingles his argument into the summary of facts. A clear, concise statement of the case and facts, unencumbered with improper argument, follows.

On November 16, 1992 a judgment of dissolution of the marriage of Neil Alan Natkow and Adrienne Beth Natkow was entered. (App. 2) On January 17, 1994 (App. 2-3), Adrienne Beth Natkow filed a Rule 1.540(b) motion for relief from that judgment "on a claim that the financial affidavits her husband filed in the dissolution proceedings were fraudulent." (App. 2)

The trial court denied that motion as "time-barred." (App. 1)

On appeal to the Third District, that denial was reversed. (App. 4) The Third District held that In re Amendments to the Fla. Rules of Civil Procedure, 604 So.2d 1110, 1111 (Fla. 1992), inter alia eliminating the one-year post-judgment deadline for Rule 1.540(b)(3) motions, challenging judgments of dissolution based on fraudulent financial affidavits, "prospectively" (App. 4) applied in the case at bar because that amendment became effective January 1, 1993 (less than two months after the entry of the judgment of dissolution), before the expiration of the one-year post-judgment grace period afforded by the pre-amendment version of that rule. The Third District rejected the husband's reliance on Mendez-Perez v. Mendez-Perez, 656 So.2d 458 (Fla. 1995), reasoning that, in that case,

> "... the judgment to which the motion was directed was entered in July, 1990, and the one-year time limit of the pre-amend-

ment rule had terminated in July, 1991, prior to the amendment's effective date."

The husband's motion, asking the Third District to certify the question to this Court, was denied. (App. 15)

## SUMMARY OF ARGUMENT

There is no conflict, direct, express, or otherwise, between the decision of the Third District below and that of this Court in Mendez-Perez v. Mendez-Perez, 656 So.2d 458 (Fla. 1995). The Third District itself noted as salient Mendez-Perez' different chronology, that in Mendez-Perez the judgment predated the amendment of the rule by more than one year. That very same feature distinguishes Cernialia v. Cernislia, 21 Fla. L. Weekly S357 (Fla. September 5, 1996).

There is also no decisional conflict, direct, express, or otherwise, with Homemakers. Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981). That case did not involve the issue of how this amendment to Rule 1.540(b) or an amendment of any other rule of court applies in post-judgment proceedings.

The absence of decisional conflict with Mendez-Peres, Cerniglia, and Homemakers disposes of Respondent's remaining argument that the postulated decisional conflict generates further decisional conflict with Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), State v. Dwyer, 332 So.2d 333 (Fla. 1976), and Continental Assurance Co, v. Carroll, 485 So.2d 406 (Fla. 1986).

In any event, the uniqueness of the issue sub judice does not merit an exercise of discretion by this Court to invoke alleged conflict jurisdiction that Petitioner claims exists in this case.

## ARGUMENT

### I. THE DECISION BELOW IS NOT IN CONFLICT, EXPRESS, DIRECT, OR OTHERWISE, WITH EITHER MENDEZ-PEREZ OR CERNIGLIA BECAUSE IN BOTH OF THOSE CASES THE ONE-YEAR GRACE PERIOD AFFORDED UNDER THE PRE-AMENDMENT VERSION OF RULE 1.540(B) HAD EXPIRED BEFORE THE RULE WAS AMENDED

No conflict exists between the decision below and the decisions in Mendez-Perez and Cerniglia. That is because, in both of those cases, the Court relied upon the salient fact that 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 In re Amendments to the Florida Rules of Civil Procedure, 604 So.2d 1110, 1111 (Fla. 1992).

Because the proceedings in Mendez-Perez and Cernialia had finally been laid to rest by the one-year deadline specified in the pre-amendment version of the rule before the effective date of the rule amendment, this Court was not called upon in either of those cases to address the issue posed in the case at bar, i.e., how the amendment, on its effective date, affected proceedings that had progressed to judgment but that were not yet time-barred by the pre-amendment version of the rule. Any attempt by the Petitioner to extrapolate the wording of those opinions to extend to the different facts of the case at bar could therefore implicate nothing more than mere dicta, not generating "decisional" conflict, either "direct" or "express." In re Interest of MP, 472 So.2d 732 (Fla. 1985) (chronological distinctions between cases foreclosed decisional conflict); Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

In an effort to dredge up such dicta, Petitioner focuses upon the Court's pronouncements in those cases that the amendment is "prospective." Those pronouncements do not generate any manner of conflict. The Third District opinion in the case at bar consistently embraced that same terminology, characterizing its application of the amendment to the case at bar as being likewise **"prospective"** (App. 4) -- applying "prospectively" to a court proceeding that had not yet finally been laid to rest by the pre-amendment deadline. Neither Mendez-Perez nor Cerniglia contains any contrary suggestion that this would not be a **"prospective"** application.[1]

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[1] That there is no **"decisional"** conflict is further confirmed by the fact that this Court in Mendez-Perez **"approved"** the **"decision"** of the Third District, reported at 632 **So.2d** 1047, In **Mendez-Perez,** at 1049, the Third District had held that the amendment applies **"prospectively"** and further opined:

> "... the amended rule applies to all marital cases based on fraudulent financial affidavits in which the final judgment was entered on or after January 1, **1992."**

And by way of explanation, footnote 3 to the Third District's **Mendez-Perez** opinion stated:

> "Although the amendment went into effect January 1, 1993, all pending cases would include cases in which the time to file a motion pursuant to Rule **1.540(b)** had not yet **expired."**

Conspicuously missing from this Court's Mendez-Perez. opinion approving the Third District decision is any comment disputing those footnoted remarks.

That same amendment also revised various other rules of court, inter alia introducing service by facsimile transmission. Effective January 1, 1993, a party could for example serve a motion [under **Fla.R.Civ.P. 1.530(g)]** to alter **or** amend, or (under **Fla.R.Civ.P. 1.540(b)]** for relief from, a judgment by facsimile transmission. Nowhere in that amendment was it suggested that service of such a motion by facsimile transmission would be precluded where the judgment to which the motion is directed happened to have been entered before the date of the amendment. Facsimile service of such a motion in regard to a pre-amendment judgment would not be a **"retrospective"** application of the amendment. Consistent application of

## II. SINCE HOMEMAKERS, INC. v. GONZALES DID NOT INVOLVE THE APPLICATION OF AN AMENDMENT OF A RULE OF COURT, THERE IS NO DECISIONAL CONFLICT WITH THE DECISION BELOW

No decisional conflict, direct, express, or otherwise, is generated by Homemakers, Inc. v. Gonzales, 400 So.2d 965 (Fla. 1981). That case concerned the effect of an amendment extending a period of limitations to a not-yet-filed cause of action, not yet barred by the pre-amendment version of the statute of limitations as of the date of that amendment. Not at issue in Homemakers was the subject of the case at bar: the application of an amendment of various rules of court (inter alia authorizing service by facsimile transmission and eliminating a one-year deadline) to a previously-filed proceeding, that had progressed to judgment but was not yet finally laid to rest by the pre-amendment version of the rule.[2] In the light of these distinctions, it does not follow that Homemakers either "directly" or "expressly" applies to the disparate facts of the case at bar and it does therefore not follow that there is any "decisional" conflict. In re Interest of MP, 472 So.2d 732; Department of Revenue v. Johnston, 442 So.2d 950.

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that amendment to the other rule changes that the amendment effected would, as the Third District reasoned in Mendez-Perez, extend the amendment as well to Rule 1.540(b) motions directed to judgments entered "on or after January 1, 1992."

[2] Footnote 2 at page 8 of Petitioner's Jurisdiction Brief seeks to gloss over these several distinctions by characterizing "the case at bar" as merely concerning "an enlargement of a limitation period enacted by this Court through its rule-making authority rather than a legislatively-enacted enlargement" that allegedly represents a "distinction . . . without a difference for the purpose of ascertaining intent of retroactive application,"

## III. SINCE THE DECISION BELOW DOES NOT OTHERWISE GENERATE DECISIONAL CONFLICT, IT DOES NOT CONFLICT WITH CONTINENTAL ASSURANCE COMPANY v. CARROLL, HOFFMAN v. JONES, OR STATE v. DWYER

In the light of the foregoing analysis, the decision sub iudice does not conflict with any Florida Supreme Court decision. Petitioner's reliance upon the holdings in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), State v. Dwver, 332 So.2d 333 (Fla. 1976), and Continental Assurance Co. v. Carroll, 485 So.2d 406 (Fla. 1986), that a District Court of Appeal may not deviate from Florida Supreme Court precedent, alters that analysis not in the least.

## IV. THE DECISION BELOW DOES NOT RAISE ANY ISSUES MERITING THIS COURT'S REVIEW

Omitted from Petitioner's Jurisdictional Brief is any effort to explain why this Court should exercise its "discretion" to invoke the jurisdiction that Petitioner claims is vested to review the case at bar. To the contrary, any such discretion should in this case be exercised to decline review. It is now close to four years after the rule amendment here at issue was promulgated and in all that time no other appellate court was asked to address the peculiar factual issue sub iudice. That circumstance is symptomatic of the narrow one-year period that is affected by the amendment. Review would therefore not likely generate any precedent having broad application in other cases.

## CONCLUSION

For the reasons set out above, no decisional conflict, direct or express, exists and no basis exists for this Court to invoke its jurisdiction under Art. V, § 3(b)(4), Fla. Const. and Fla.R.App.P.

9.030(a)(2)(iv). Alternatively, this Court should decline to exercise any such putative jurisdiction in this case.

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. Second Street Miami, Fla. 33133-2112 and Paul Morris 999 Ponce de Leon Blvd. Suite 550 Coral Gables, Fla. 33134 this 30th day of September, 1996.