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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 REPLY BRIEF ON THE MERITS

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REPLY ARGUMENT OF PETITIONER/HUSBAND

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.

The answer brief of the wife/respondent is at complete odds with this court's holdings in ***Mender-Perez v. Perez-Perez, 656 So.*** 2d 458 (Fla. 1995) and ***Homemakers, Inc. v. Gonzales, 400 So.*** 2d 965 (Fla. 1981). The dispositive holding in ***Mendez-Perez*** is the following:

> 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.

Mendez-Perez, 656 So. 2d at 460 (emphasis supplied).

Application of this holding to the case at bar is straightforward. Under the version of Fla.R.Civ.P. 1.540 in effect when the final judgment of dissolution was rendered on November 16, 1992, each party had one year to bring a motion for relief from judgment. The wife brought her motion on January 17, 1994, beyond the rule's one-year time limitation. The trial court correctly followed ***Mendez-Perez*** by applying the rule in effect at the time of the parties' final judgment of dissolution and dismissing the wife's motion as untimely. The reversal of the trial judge

by the Third District majority improperly overrules *Mendez-Perez* by retroactively applying to the parties' 1992 judgment the amendment to rule 1.540 which was not effective until 1993.

The holding in *Mender-Perez* is consistent with the rule of law in the directly analogous arena of statutes of limitations. As this court held in *Homemakers,* a statutory amendment which lengthens a statute of limitations does not apply to pending cases in the absence of intent of retroactive application.[1] The amendment to rule 1.540 lengthens (actually eliminate) a limitations period. Thus, even if the wife's case had been '*pending" as of January 1, 1993, the amendment would not apply under the reasoning of *Homemakers*.[2] The wife would have this court carve out an exception to *Homemakers* by holding that where a rule, rather than a statute, lengthens a limitations period, the rule, unlike the

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[1] This court in ***Homemakers*** approved the reasoning of the Fourth District in ***Brooks v. Cerrato,*** 355 So. 2d 119 Fla.4th DCA), ***cert. denied,*** 361 So. 2d 831 (Fla.1978). In ***Brooks,*** the plaintiff sued for medical malpractice arising from an operation which took place on February 8, 1973. Suit was filed June 27, 1975. At that time, the statute of limitations for medical malpractice actions was two years. § 95.11(6), Florida Statutes (1973). The plaintiff sought application of an amendment to the **statute,** § 95.11(4), Florida Statutes (Supp. 1974), effective January 1, 1975, which provided that the two-year period ran from the time the cause of action was discovered or could have been discovered with the exercise of due diligence. The Fourth District held that the amendment contained no evidence of retroactive intent and therefore did not apply to causes of action accruing prior to the effective date.

[2] The wife's case was not "pending", however, because the one-year time limit had expired before she brought her motion.

statute, applies to pending cases even in the absence of intent of retroactive application. But the wife offers no support in law or logic for such an anomaly.[3] In fact, the wife's argument also conflicts with the well-settled principle common to both rules of procedure and statutes which amend limitations periods -- neither can be applied retroactively in the absence of express intent of retroactivity -- which this court reiterated in ***Mendez-Perez,*** 656 So. 2d at 459 ("We have held that rules of procedure are prospective unless specifically provided otherwise.") Consequently, unless ***Homemakers, Mendez-Perez*** and their underpinnings were wrongly decided and now need to be overruled, the Third District's retroactive application of the amendment to 1.540 must be quashed.

The wife has raised additional arguments (not presented in any of the lower courts) analogizing Fla.R.Civ.P. 1.080 and 1.070(j). These

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[3] **The wife argues that *Homemakers* concerns "the field of legislation" and not "the discrete field of procedural rule amendments". According to the wife, rules of** procedure **call for a different construction to avoid "the same fate". Wife's Brief on the Merits at 10 n.8. Contrary to the wife's unsupported argument, it has long been settled that "[c]ourt rules are construed in much the same way as statutes." 13** Fla.Jur.2d, **Courts and Judges § 176, citing *Bryan v. State,* 94 Fla. 909, 114 So. 773 (1927); *Syndicate Properties, Inc. v. Hotel Floridian* Co., 94 Fla. 899, 1 14 So. 441 (1927); *Hoodless v. Jernigan,* 51 Fla. 21 1, 41 So. 194 (1906). Accord, *Merchants National Bank v. Grunthal,* 39 Fla. 388, 22 So. 685 (1897). Here, the legislative enactment in *Homemakers* is not materially distinguishable from the amendment to 1.540. Both are enactments which extend a limitations period and both have effective dates which evince no intent of retroactivity. Their applications should not be inconsistent. In sum, in the context of limitations periods, whether by rule or statute, if you are late, dismissal is your fate.**

arguments are without merit as discussed below.

The wife points out that rule 1.080(b) was also amended effective January 1, 1993. The amended version authorizes service by facsimile. According to the wife, "[t]hat 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." Respondent's Brief on the Merits at 2. The wife's argument continues that it would be "asymmetrical" to conclude that her motion for relief from judgment is barred by the pre-amendment version of rule 1 .540 but at the same time governed by the post-amendment version of rule 1.080. Respondent's Brief on the Merits at 5.

It is the wife's analogy which is "asymmetrical". The new version of rule 1.080 altered no time limits whatsoever, thereby distinguishing itself entirely from the rule involved in this case. In any event, neither rule 1 .080 nor 1 .540 is retroactive and prospective applications of both rules are consistent. With regard to rule 1.080(b), the rule in effect at the time of service governs. For example, on December 31, 1992 and prior thereto, service by fax was not authorized. To hold otherwise would constitute an improper retroactive application of the new rule. Similarly,

with regard to rule 1.540, any judgment entered on or before December 31, 1992 was governed by the one-year deadline of rule 1.540 then in effect. Thus, the two rules are applied consistently and prospectively.

It is true that on or after January 1, 1993, a pleading directed to a judgment rendered prior to that date could be served by fax under the new rule. But that is not a true retroactive application of rule 1.080. It is merely an example of authorized service by fax (having taken place on or after the effective date of the rule) of a pleading directed toward a judgment which predated the new rule authorizing such service by fax. It does not follow therefrom that any motion for relief from judgment made after January 1, 1993 is automatically timely. The timeliness of a motion and the permissible means of service of a motion are apples and oranges. The timeliness of a motion for relief from judgment is dependent upon the date of judgment. The authorization of service by fax is determined by the existence of an enabling rule of procedure.

The wife's other analogy relies upon rule 1.070 and ***Pear/stein v. King,*** 610 So. 2d 445 (Fla.1992). In ***Pear/stein,*** this court held that the 120-day rule for serving a defendant after filing an initial pleading applied to causes of action pending on the effective date of the rule. Seizing

language from *Pearlstein,* the wife argues that retroactive application of the amendment to 1.540 would put no "extra burden on prior filings" and would not "diminish the time for complying" because the new amendment lengthens rather than diminishes or shortens the limitations period. Respondent's Brief on the Merits at 3, 9.

Pear/stein does not support the wife's argument for several reasons. First, in ***Pear/stein,*** this court disapproved retroactive application of the new 120-day rule and held that the rule could only be applied prospectively. In the language she quotes from ***Pear/stein,*** the wife has omitted this court's critical introductory clause. The full quotation is as follows: "This prospective application puts no extra burden on prior filings and does not diminish the time for complying with the rule." ***Pear/stein,*** 610 So. 2d at 446 (emphasis supplied). A true retroactive application, this court held, "... would require that King [the plaintiff] have served the defendant within 120 days of filing his complaint on November 1, 1988." *Id.* By contrast, in the case at bar, the wife does not seek such a prospective application of the amendment to 1.540. Rather, she seeks application of the amendment to 1.540 to a 1992 judgment even though the amendment did not take effect until 1993. Thus, the wife is seeking

the "true retroactive application" which this court did not approve in ***Pear/stein.*** Even applying the wife's out-of-context use of the language from ***Pear/stein,*** her argument still fails because: (a) there is, to put it mildly, an extra burden on all the parties' filings, to-wit: a re-opening of the parties' entire divorce proceedings; and (b) the wife's time for compliance with the one-year deadline in effect at the time of the final judgment is not just diminished, it has been eliminated entirely.

The wife also claims that the husband "could not be heard to argue that his formulation of the [financial] affidavit was influenced by an expectancy that, under the prior rule, one year after judgment it would become exempt from scrutiny for fraud..." Respondent's Brief on the Merits at 9 n.7. This argument is improper for two reasons. First, if any expectancy was unreasonable, it was that of the wife who either negligently missed her deadline or wished that her motion filed beyond the one-year deadline would be resurrected by the rule's new amendment. By contrast, the husband's expectancy that the passing of the one-year deadline in effect at the time of the parties' final judgment announced the end of the case, was not only reasonable, it is an expectancy which is embodied in the principle of law recognized in Florida that "...[o]nce an

action is barred, a property right to be free from a claim has accrued." **Wiley** v. *Roof,* 641 So. 2d 66, 68 (Fla.1994).

Second, the wife's argument improperly implicates the merits of the underlying action which is not relevant to the determination whether the wife's action is time-barred. For fear of the possible prejudicial impact such an argument might have, the husband submits as an appendix to this reply brief ["Reply App."] the first pleading he filed in response to the wife's motion for relief from judgment. That pleading, entitled "Former Husband's Motion to Dismiss Former Wife's Motion for Relief from Amended Final Judgment Dissolving Marriage, Motion to Strike Pleading as a Sham, and Motion for Attorney's Fees", demonstrates the frivolity of the wife's attack on the final judgment and the baselessness of her conclusory allegation of fraud.[4]

[4] The only claim set forth in the wife's one-paragraph motion for relief from judgment was that the husband had misrepresented the value of closely held stock which induced her to enter in the marital settlement agreement approved by the trial court and incorporated into the final judgment. (R. 16-17). As the husband's response established, the wife not only had her own experts value the stock (Reply App. 5) after which she was free to reject the marital settlement agreement, the parties acknowledged in the agreement that any valuations of the stock were merely estimates and that the stock "could be more or less valuable due to numerous market factors." (Reply App. 8).

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 4th day of February, 1997.

PAUL MORRIS

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

FAMILY DIVISION

CASE NO. 92-54220 (FC 26)

/

IN RE: THE MARRIAGE OF

ADRIENNE BETH NATKOW,

Petitioner/Former Wife,

and

NEIL ALAN NATKOW,

Respondent/Former Husband.

_____/

FORMER HUSBAND'S MOTION TO DISMISS FORMER WIFE'S MOTION FOR RELIEF FROM AMENDED FINAL JUDGMENT DISSOLVING MARRIAGE, MOTION TO STRIKE PLEADING AS A SHAM, AND MOTION FOR ATTORNEYS' FEES

COMES **NOW**, the Respondent/Former **Husband, NEIL ALAN** NATKOW (hereinafter **"the** Former Husband"), by and through his undersigned Counsel and files this his Motion to Dismiss the Petitioner/Former Wife, ADRIENNE BETH **NATKOW's** (hereinafter **"the** Former **Wife"),** Motion for Relief from Amended Final Judgment Dissolving Marriage of January **14,** 1994, Motion to Strike the Former Wife's Pleading as **a Sham, and** Motion for Attorneys' Fees and Costs pursuant to Rules 1.110, 1.120, 1.140, and 1.150 of the Florida Rules of Civil Procedure, all applicable Florida Rules of Civil Procedure, and Florida Statutes, and as grounds therefore would state **as** follows:

1. The Former Wife's Motion fails to state a cause of action upon which **any** relief can be granted by this Honorable Court and should be **dismissed.**

2. Specifically, the Former Wife's Motion fails to state with particularity and specificity the elements necessary to sustain a cause of action for fraud,

3. The Former Wife's Motion fails to allege that the Former Husband made a false statement regarding a material fact in his Financial Affidavit; that the Former Husband had knowledge of its falsity; that the Former Husband had the intention that the falsity be acted upon; and that injury was caused to the Former Wife by her reasonable reliance upon the Former Husband'? representation in his Financial Affidavit.

4. The Former Wife's Motion is actually a veiled complaint for modification of the parties' Marital Settlement Agreement dated October 13, 1992.

5. The Former Wife knew that the parties' Marital Settlement Agreement, which she entered into freely and voluntarily is a nonmodifiable agreement; however, once the Former Wife learned of the Husband's good fortune with regard to his stock interests, she sought to modify the Marital Settlement Agreement. The Former Wife knew that she could not bring a complaint for modification and thus filed her instant sham pleading, which is in fact a supplemental complaint for modification due to the Former Husband's perceived increased ability.

6. The Former Wife's Motion fails to state a cause of action completely in that it alleges that the Former Wife relied upon the Former Husband's Financial Affidavit and thus was induced to enter into the parties' Marital Settlement Agreement.

7. In fact, the Former Wife settled her case two (2) weeks prior to her receipt of the Former Husband's Financial Affidavit, evidenced by a letter dated September 23, 1992, from the Former Wife's counsel to the Former Husband's counsel, in which the specific terms of the parties' Marital Settlement Agreement are expressly set forth. This letter was executed by the parties in excess of two (2) weeks prior to the date on which the Former Wife received the Former Husband's Financial Affidavit on October 9, 1992, which contained the Former Husband's value for his stock interests.

8. Additionally, and to highlight the frivolity of the Former Wife's Motion, the Former Wife entered into an agreement with the Former Husband labeled "Amended Marital Settlement Agreement" on August 13, 1993, a full year after the initial Marital Settlement Agreement was entered into between the parties.

9. The Former Wife was represented by her trial counsel in the negotiation and execution of this Amended Agreement, whereas the Former Husband represented himself. The Amended Marital Settlement Agreement, which beneficially affected the Former Wife, clearly and unequivocally ratified the original-Marital Settlement Agreement.

10. The Former Wife also claims in her Response to Petitioner's Motion for Release of Escrowed Stock dated January 17, 1994 (attached hereto and made a part hereof as Exhibit "A"), that she first discovered the value of the Former Husband's stock by reading an article that appeared in the Miami Herald.

11. In fact, the Amended Marital Settlement Agreement was entered into by the Former Husband after the Miami Herald article appeared. The Former Wife certainly had enough time to rescind the Amended Marital Settlement Agreement after she read the Herald article dated August 9, 1994; however, the Former Wife did not rescind the Amended Marital Settlement Agreement. The Former Wife is, therefore, estopped from asserting that she was deceived and/or defrauded with regard to the value of the Former Husband's stock.

12. The Former Wife simply wanted to benefit from the bargain she made in the Amended marital Settlement Agreement, and is now attempting to modify her entire Marital Settlement Agreement because she now feels that she made a bad deal on October 13, 1992.

13. To highlight the absurdity of the Wife's instant **Motion**, the Former Wife in her own Financial Affidavit dated July 22, 1992 (attached hereto and made a part hereof as Exhibit **"B"**), listed the value of the Former Husband's stock at ONE MILLION FOUR HUNDRED SIXTEEN THOUSAND THREE HUNDRED EIGHT DOLLARS **($1,416,308.00)**. The Former Wife then divided this value in half and listed as her equity in the Former Husband's stock the amount of SEVEN HUNDRED EIGHT THOUSAND ONE HUNDRED FIFTY FOUR DOLLARS **($708,154.00)**.

14. In fact, pursuant to the parties' Marital Settlement Agreement, the Former Wife received Eight **Hundred** Thousand Dollars **($800,000.00)** -- approximately One Hundred Thousand Dollars ($100,000.00) more than she valued her interest in the Former Husband **'s** stock on her own Financial Affidavit!

15. The Former Wife retained one of the County's premier accounting firms to value the Former Husband's stock. The accounting finn did full and complete discovery after full disclosure by the Husband and Family Health Plan, Inc.

16. The Former Husband actually requested that the Former Wife seek out accounting advice and paid for the Former Wife's accounting advice (see correspondence of August 4, 1992 and August 5, 1992, attached hereto and made a part hereof as Composite Exhibit "C").

17. The Former Wife's valuation of the Former Husband's stock was based on full disclosure by the Former Husband, including disclosure directly form Family Health Plan, Inc., a privately held company in which the Former Husband was merely a minority stock holder.

18. A written agreement was entered into between Family Health Plan, Inc. and the parties (attached hereto and made a part hereof as Exhibit "D") for all records to be turned over to the Former Wife's counsel and, in fact, all of the records were disclosed to the Former Wife.

19. The Former Wife's accountants received all of the items from Family Health Plan, Inc., including letters from the law firm of Wampler Buchanan & Breen (counsel for Family Health Plan, Inc.) and letters instructing the accounting firm to contact the Former Husband's accountant for further information (see correspondence to the Former Wife's accountants from the Former Wife's counsel dated

September 11, 1992, attached hereto and made a part hereof as Exhibit "E").

20. The Former Wife's Complaint should be dismissed because the Former Husband used an acceptable valuation method to value his stock, to wit, the adjusted book value of his interest stock interests.

21. The valuation method employed by the Former Husband is universally accepted and vitiates any and all claims that the Former Wife could make as to the filing of,a false or fraudulent Financial Affidavit by the Former Husband.

22. The Former Wife's plea of ignorance and fraud at this point in time is fraught with deceit, as is most clearly evidenced by her own Motion filed with the Court on July 29, 1992, and labeled "Motion for Expenses for Evaluation of Stock Ownership" (attached hereto and made a part hereof as Exhibit "F").

23. In the Former Wife's Motion of July 29, 1992, prior to entering into the original Marital Settlement Agreement, the Former Wife pleads that the Husband's stock interest is valued "between a minimum of $1,400,000 and an unknown maximum, which may be $2,825,000 or greater."

24. The Former Wife's Motion of July 29, 1992, further states in paragraph 6, the Former Wife's intention to value the Husband's interest in the stock, including "the plan to take the company public ." Clearly, all of the Former Wife's valuations in this case were made with her eyes wide open and are not now subject to review

by the Court because the **Former** Husband prospered due to market conditions.

25. The Former Wife's Motion and/or Supplemental Complaint is **not** sustainable in that the Complaint is untimely pursuant to Rule 1.540 of the Florida Rules of Civil Procedure as the Rule existed at the time of the dissolution of the parties' marriage.

26. One (1) full year has elapsed since the parties executed their Marital Settlement Agreement on **Oct** 13, 1992, and the parties are governed by the Rules as they existed at, the time of the Final Judgment of Dissolution of Marriage. Although, the Florida Rules of Civil Procedure have been amended as of January 1993, nevertheless, one (1) full year has elapsed. (A case is pending for rehearing before the Third District Court of Appeal, which may clarify this procedural point.)

27. The Former Wife had full access to full discovery and disclosure. The Former Wife made full use of her discovery rights as is evidenced by the Exhibits attached hereto, and she had every right to reject the settlement offer until she could adequately explore the extent of the value of the Former Husband's stock.

28. The Former Wife had sufficient opportunity from the outset to discover any **"fraudulent"** behavior, and thus bring an action in Court either before or after the Marital Settlement Agreement was executed, and before the Final Judgment of Dissolution of Marriage and/or the Amended Final Judgment of Dissolution of Marriage was entered by the Court as late as

November 16, 1992, or even during the one (1) year time limit expressed in Rule 1.540.

29. Yet, the Former Wife failed to take any action and even entered into the Amended Marital Settlement Agreement on August 13, 1993, ratifying the parties' Marital Settlement Agreement of October 13, 1992, with the full advice of her counsel. It was only after the Former Wife learned of the Former Husband's good fortune as a result of fortuitous market conditions, including a new President who espoused universal health care, that she cried "sour grapes."

30. Most importantly, the Former Wife's Motion fails to state any cause of action based upon the filing by the Former Husband of a false or fraudulent Financial Affidavit and should be dismissed, in that the Marital Settlement Agreement dated October 13, 1992, executed by the Former Wife with full disclosure and with the advice of competent counsel and accountants, provided specifically in paragraph 13 (b) (iv) as follows:

> **The parties acknowledge that the payment by the Husband to the Wife in Article 13 of this Agreement may or may not exceed the fair market value of the Husband's interest in such stock and stock options. The parties further acknowledge that in computing the total sum due the Wife, the parties recognize that the Husband's interest in N.A.N. Associates, Inc., Family Health Plan, Inc., and Family Health Systams, Inc. could be more or less valuable due to numerous market factors. The parties have compromised to achieve a value that they feel is in their best interests and eliminates costly litigation.**

31. In light of the Former Wife's agreement and representation in paragraph 13 (b) (iv) of the parties' Marital Settlement Agreement, the Former Wife is barred from alleging fraud and her Motion should be stricken as a sham pleading.

32. The Former Husband is entitled to the payment of his attorneys' fees for the necessity of defending the Former Wife's action.

33. The Former Wife has turned down a properly tendered check in the amount of FOUR HUNDRED FIFTY EIGHT. THOUSAND ONE HUNDRED FORTY SEVEN DOLLARS FIVE CENTS ($458,147.05), which represented complete settlement and the full, present value of the sum due and outstanding to the Wife pursuant to the parties's Marital Settlement Agreement. Upon receipt of the funds due to the Former Wife, she will have sufficient funds to pay her attorney's fees and the Husband's counsel's fees.

34. The Former Wife's Motion for Relief from Amended Final Judgment Dissolving Marriage of January 14, 1994, fails to state any cause of action upon which relief may be granted by the Court, which justifies an order dismissing the Former Wife's Motion and the entry of an order striking the Former Wife's Motion as a sham pleading for all of the reasons set forth herein.

WHEREFORE, the Respondent/Former Husband, NEIL ALAN NATKOW, moves this Honorable Court for the entry of an Order dismissing and striking as a sham pleading, the Petitioner/Former Wife, ADRIENNE BETH NATKOW's, Motion for Relief from Amended Final Judgment Dissolving Marriage of January 14, 1994, pursuant to Rules

1.110, 1.120, 1.140 and 1.150 of the Florida Rules of Civil Procedure and all applicable Florida Rules of Civil procedure and Florida Statutes, for attorneys' fees and costs for having to bring this Motion, and for such other and further relief as this Honorable Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via facsimile transmission and was mailed via United States first class mail to **ALVIN N. WEINSTEIN, ESQUIRE**, Counsel for the Petitioner/Former Wife, Weinstein, Bavly & Moon, P.A., 920 **Biscayne Building,** 19 West Flagler Street, Miami, Florida 33130, **this** 3rd day of February, 1994.

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