047

FILED
SID J. WHITE
SEP 5 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SUPREME COURT OF FLORIDA

CASE NO. 78,244

DISTRICT COURT OF APPEAL
FOURTH DCA Case No. 90-01639

DAVID MORALES,

Petitioner,

vs.

SPERRY RAND CORPORATION, a foreign corporation no longer in existence, UNISYS CORPORATION, a foreign corporation, FORD MOTOR COMPANY, a foreign corporation, and FORD NEW HOLLAND COMPANY, a foreign corporation,

Respondents.

DISCRETIONARY REVIEW OF A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS AMICUS CURIAE

R. J. BECKHAM, ESQUIRE
Beckham & McAliley, P.A.
3131 Independent Square
One Independent Drive
Jacksonville, Florida 32202
Telephone: 904/354-9022
Florida Bar No.: 004738

Attorneys for The Academy of Florida Trial Lawyers, Amicus Curiae

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Academy accepts the Statement of the Case and Facts as contained in Petitioner's Initial Brief.

SUMMARY OF ARGUMENT

The sole issue The Academy shall address is the dismissal of a cause, for failure to serve the complaint within the time specified by Fla. R. Civ. P. 1.070(j), when the complaint was properly served before any motion to dismiss was made. Our positions are:

> (A) Florida should maintain its goal of elevating matters of substance over matters of procedural form, digressing from federal courts if necessary and preferable. Specific examples of other instances where this has occurred reflect this Court's recognition that the "federal rule" is not necessarily the "better rule."
>
> (B) Florida's rule should be interpreted and applied in accordance with Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1991), or this Court should, instanter, amend Rule 1.070(j) as suggested in Greco v. Pedersen, (No. 90-02675, 2d DCA, August 9, 1991) 16 FLW D2123, thus balancing the interests served by our justice system. This course will not prejudice defendants or impose the ultimate penalty upon deserving plaintiffs. Manifest recognition of the injustice of the ruling below is found in pronouncements from other District Courts of Appeal, calling for prompt remedial action in keeping with this Court's rule-making power and precedent.

ARGUMENT

(A) Florida should maintain its goal of elevating matters of substance over matters of procedural form, digressing from federal courts if necessary and preferable. Specific examples of other instances where this has occurred reflect this Court's recognition that the "federal rule" is not necessarily the "better rule."

The primary foundation for the opinion below is federal precedent construing a similar rule. Indeed, the only cases cited below to justify disagreement with Berdeaux were four trial court opinions and three appellate opinions from federal courts. Perhaps the factual scenario underlying the failure by Morales to promptly serve process on the defendant distracted the court below, but "bad facts" do not justify "bad law." As this Court now resolves the conflicting decisions in our Courts of Appeal, we urge that a fair rule be announced to cover all litigants in any scenario.

It has been said many times in many ways, but we commend to this Court two portions of the opinion in Hernandez v. Page (No. 90-259, 3d DCA, April 30, 1991) 16 FLW D1152, 1153. While approving a dismissal where service had not been effected before defendant moved for dismissal (eight months after suit was filed) that court approved the notion that the rule should "be a useful tool for docket management, not an instrument of oppression." Id. at 1152. Further amplification of this laudable goal is found in the concurring opinion of Chief Judge Schwartz:

> I cannot help, however, but think and express my thought that Rule 1.070(j) is another, quite ill-considered, but--as this case illustrates--quite successful attempt to elevate the demands of speed and efficiency in the administration of justice over the substantive rights of the parties which the system is in business only to serve....Thus, the defendants have succeeded in escaping liability only because the plaintiffs' lawyers fell into a procedural pit unrelated to the merits of the case or the substantive interest of the defendants. The result is to transfer the burden of the defendants' liability to the plaintiffs' attorney or his malpractice carrier. I do not believe that such a result properly serves the administration of justice as the rules are supposedly intended to do.

Blind obeisance to federal dogma has never appealed to this Court when a different result would best serve Floridians and their justice system. While other examples undoubtedly exist, The Academy will cite two instances where this Court has opted for <u>different</u> approaches even though the Florida rule is the same, or substantially similar, to the corresponding Federal rule of procedure:

> 1. Florida Rule 1.050 and Federal Rule 3 both specify that civil suits "commence" with the filing of a complaint. Nevertheless, this court rejected federal construction of the same language and applied a different construction that dictated a contrary result. <u>Mabie v. Garden St. Mgmt. Corp.</u>, 397 So.2d 920, 921 fn. 3,4 (Fla. 1981).

2. Florida Rule 1.510(c) and Federal Rule 56(c) each pose the following standard for awarding a summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Yet this court's application, geared to insuring a trial on the merits, stands in glorious contrast to the federal approach. Compare Holl v. Talcott, 191 So.2d 40 (Fla. 1966) with Celotex Corporation v. Catrett, 477 U.S. 316, 106 S.Ct. 2548, 98 L.Ed.2d 992 (1986).

The penchant of federal courts to discourage litigants from access to that system must never become a hallmark of Florida's justice system. Florida must continue to promote justice by looking to matters of substance rather than to short-cuts--or, short-circuits through procedural niceties that bear no semblance of equitable application!

> (B) Florida's rule should be interpreted and applied in accordance with Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1991), or this Court should, instanter, amend Rule 1.070(j) as suggested in Greco v. Pedersen, (No. 90-02675, 2d DCA, August 9, 1991) 16 FLW D2123, thus balancing the interests served by our justice system. This course will not prejudice defendants or impose the ultimate penalty upon deserving plaintiffs. Manifest recognition of the injustice of the ruling below is found in pronouncements from other District Courts of Appeal, calling for prompt remedial action in keeping with this Court's rule-making power and precedent.

Berdeaux presents an entirely apropriate resolution to this question. By equating Rule 1.070(j) with Rule 1.500(c) the result is to extend to plaintiffs the same equitable treatment accorded to defendants--and it retains to a defendant the further opportunity for dismissal under Rule 1.410(e) if service is not perfected within one year. Surely, that is enough to balance interests between access to our courts and the desire for docket management.

Should this Court determine another avenue to accomplish fairness in this situation, we recommend an instanter amendment in terms suggested by the unanimous court in Greco. After lamentably observing an undesirable result dictated by "the supposed interest of efficient judicial administration," 16 FLW D2123, that court postulated:

> ...That such a rule could better achieve its valid purposes if the trial court were authorized to issue an order to show cause

> after 90 days from the filing of the complaint, granting the plaintiff an additional 30 days in which to serve process or show cause why service could not be achieved.

This Court has promulgated an instanter rule change at least once before. Reference is made to Rule 1.481, concerning separate verdicts for punitive damages. While the need for such a rule change undoubtedly was warranted, the urgency of that matter pales in contrast to the exigencies presented by the multiple dismissals* under Rule 1.070(j). Yet, this Court did not relegate the punitive damage rule change to a committee. This Court acted! See Lehman v. Spencer Ladd's Inc., 182 So.2d 402 (Fla. 1965) adopting "the recommendation of the district court." [The "formal" rule change came much later; see In Re Florida Rules of Civil Procedure, 211 So.2d 206, 208 (Fla. 1968).]

---

*Volume 16, FLW, contains at least six cases already!

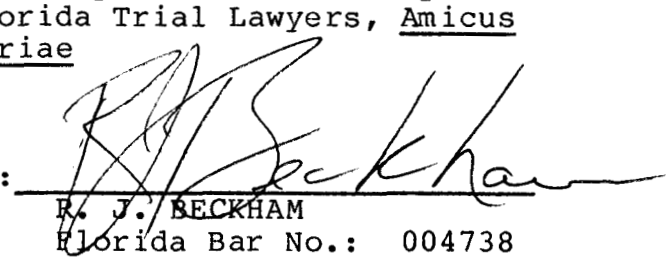
CONCLUSION

Federal courts have successfully discouraged many litigants from invoking federal jurisdiction by a number of stratagems. Florida courts functioned well for decades without a deadline for serving process. The Draconian result of the federal application of the rule in question is not required to accomplish the goal sought--it transposes a "docket management" into a device to cut down the case load in federal courts. The Academy of Florida Trial Lawyers submits that this Court should follow its established policy of balancing the interests of litigants by quashing the opinion below.

Respectfully submitted,

R. J. BECKHAM, ESQUIRE
Beckham & McAliley, P.A.
3131 Independent Square
One Independent Drive
Jacksonville, Florida 32202
Telephone: 904/354-9022

Attorneys for The Academy of Florida Trial Lawyers, Amicus Curiae

By: 

R. J. BECKHAM
Florida Bar No.: 004738

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing Brief of The Academy of Florida Trial Lawyers, Amicus Curiae, has been furnished by U. S. Mail, this 4 day of September, 1991, to: KAREN J. HAAS, ESQUIRE, 13805 Southwest 83rd Court, Miami, Florida 33158; ALEXANDER S. DOUGLAS, II, ESQUIRE, Allen & Bush, 1000 Legion Place, Suite 1625, Orlando, Florida 32801; JEFFREY B. SHAPIRO, ESQUIRE and JUDY D. SHAPIRO, ESQUIRE, Herzfeld and Rubin, 801 Brickell Avenue, Suite 1501, Miami, Florida 33131; and DAVID L. KAHN, ESQUIRE, 110 S.E. 6th Street, Ft. Lauderdale, Florida 33310.

BECKHAM & McALILEY, P.A.
3131 Independent Square
One Independent Drive
Jacksonville, Florida 32202
Telephone: 904/354-9022
Attorneys for The Academy of Florida Trial Laywers, Amicus Curiae

By: _____
R. J. BECKHAM
Florida Bar No.: 004738