SUPREME COURT OF FLORIDA

CASE NO. 78,244

District Court of Appeal
Fourth DCA Case No. 90-01639

Florida Bar No. 607071

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

INITIAL BRIEF ON THE MERITS OF PETITIONER, DAVID MORALES

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INTRODUCTION

This brief is submitted on behalf of Petitioner, DAVID MORALES (hereinafter referred to as "MORALES", Appellant/Plaintiff below. The parties will be referred to as they stand before this Court or by proper name. The following symbols are adopted for reference:

"R" for Record on Appeal.

"PB" for Brief of Petitioner.

"A" for Appendix to Initial Brief of Petitioner.

Unless otherwise indicated, all emphasis has been supplied by counsel.

Petitioner, MORALES, invokes this Court's discretionary jurisdiction to review a decision of the Fourth District Court of Appeal, MORALES v. SPERRY RAND CORP., 578 So.2d 1143 (Fla. 4th DCA 1991), certified to be in direct conflict with the Third District case of Berdeaux v. Eagle-Picher Industries, Inc.,[1] 575 So.2d 1295 (Fla. 3d DCA 1990), review pending Case No. 77,890 (Fla. 1991). (A.42-45). Subsequently, the Third District case of Schafer v. Schafer,[2] 16 F.L.W. D1746 (Fla. 3d DCA July 2, 1991), review pending Case No. 78,341 (Fla. 1991), also certified conflict with Morales. (A.47,48). The Fifth District relied on Morales in Partin v. Flagler Hospital, Inc.,[3] 581 So.2d 240 (Fla. 5th DCA 1991), and certified direct conflict with Berdeaux. The Fourth District in Hill v.

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[1] By order dated July 12, 1991, this Court postponed its decision on jurisdiction and ordered briefing on the merits.

[2] Petitioner's Initial Brief was filed on August 23, 1991, and Respondent's Answer Brief is due on September 12, 1991.

[3] Partin has not been appealed.

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Hammerman, 16 F.L.W. D1743 (Fla. 4th DCA July 3, 1991), affirmed dismissal relying upon Morales and Hernandez v. Page, 580 So.2d 793 (Fla. 3d DCA 1991). This Court has jurisdiction. Art. V, §3(b)(4), Fla.Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(vi).

In Morales, the Fourth District Court of Appeal affirmed the Trial Court's dismissal of the Complaint for serving Defendants on the 124th day after filing the Complaint, where Defendants had been served prior to filing both their Motions to Dismiss, and prior to the hearing on and entry of dismissal. The Third District Court of Appeal in Berdeaux held that an action should not be dismissed for failure to effect service upon a defendant within the 120-day period specified by the procedural rule, if process had been served prior to the filing of defendant's motion to dismiss. The Third District then expanded that rule in Schafer, by holding that an action should not be dismissed for failure to effect service upon defendant within the 120-day period, if process has been served prior to the hearing on and entry of dismissal. Each of these appeals is pending before this Court.

The Fifth District Court of Appeal in Partin followed Morales, noting that the rule should be enforced even though service is effected before the filing of a motion to dismiss. Partin, 581 So.2d at 242. However, the Court refused to apply the rule retroactively, and reversed the trial court's dismissal of the complaint. Id. Both the Third and Second District Courts of Appeal have criticized the effect of the rule in cases such as the instant one, where the defendant was not prejudiced or even inconvenienced by the failure to be served with the complaint, as it had full knowledge of the lawsuit. See, Hernandez, supra, (special concurrence by Judge Schwartz); Greco v. Pedersen, 16 F.L.W. D2123 (Fla. 2d DCA August 9, 1991).

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STATEMENT OF THE CASE

MORALES, a landscape laborer, brought suit in the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, against Respondents, the manufacturers/distributors of a New Holland skid-steer loader, to recover damages for personal injuries sustained by him while riding on the loader. (R.13-17). MORALES alleged in his Complaint that, on August 20, 1985, he was riding upon the back of the skid-steer loader when the rear portion of the support arm for the forwarding bucket came crushing down on him, causing severe injuries. He sued SPERRY RAND CORPORATION (hereinafter referred to as "SPERRY RAND"), UNISYS CORPORATION (hereinafter referred to as "UNISYS"), FORD MOTOR COMPANY (hereinafter referred to as "FORD MOTOR"), and FORD NEW HOLLAND CORPORATION (hereinafter referred to as "FORD NEW HOLLAND"),[4] for breach of implied warranties of merchantability and fitness for a particular purpose; breach of an express warranty; strict liability; and negligent manufacture, construction, design, and failure to warn. Id.

MORALES had filed a lawsuit based on this incident once before in Broward County, through a different attorney. (R.3). That case was DAVID MORALES, Plaintiff, v. SPERRY RAND CORP., Defendant, No. 87-21837-CIV-GARRETT. It was dismissed for failure to prosecute on August 4, 1988. Additionally, there was another action pending in federal court involving subject matter which is a material part of the subject matter of

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[4] SPERRY RAND merged into UNISYS, which became liable for the acts of SPERRY RAND, and its subsidiary or division, Sperry New Holland. (R.13, 13). UNISYS and/or SPERRY RAND then sold the New Holland Division to FORD MOTOR, which now maintains and operates the New Holland Division as FORD NEW HOLLAND, and which has or may have assumed the liabilities of SPERRY RAND and/or UNISYS. (R.13-17).

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this proceeding. That case is KEITH FLORY, Plaintiff, v. SPERRY NEW HOLLAND DIVISION OF SPERRY CORP. and UNISYS CORP., Defendants; Case No. 87-6207-CIV-HASTINGS.

In this case, MORALES filed the Complaint on August 27, 1989. Service of process was effected on each Respondent on December 19, 1989, four days after the expiration of the 120-day period, but prior to the first Motion to Dismiss, the second Motion to Dismiss, the Hearing on the Motion, and the entry of dismissal.

Respondents had filed a joint Motion to Dismiss on January 18, 1990, which did not raise the defense of failure to serve process within the time period specified by Rule 1.070(j), Florida Rules of Civil Procedure, or the issue of insufficient process and insufficient service of process. (R.18-20). Additionally, several days later, UNISYS sent MORALES a lengthy Request for Production and Interrogatories.

It was not until January 31, 1990, that UNISYS, SPERRY RAND, FORD MOTOR and FORD NEW HOLLAND, jointly filed their Supplement to Motion to Dismiss, for the first time adding the defenses of failure to serve process within the time period specified by Rule 1.070(j), Florida Rules of Civil Procedure, and of insufficient process and service of process. Following the hearing on the Supplement to Motion to Dismiss, on March 6, 1990, the Trial Court entered an order pursuant to Rule 1.070(j), Florida Rules of Civil Procedure, dismissing the Complaint. (R.24). MORALES moved for rehearing, which was denied, and Final Judgment of Dismissal was entered on June 7, 1990. (R.25,26,41). MORALES then appealed to the Fourth District Court of Appeal. (R.42,43).

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MORALES appealed on three grounds:

1. The Trial Court committed reversible error in dismissing the Complaint and cause where MORALES demonstrated good cause for not serving the summonses within 120 days; service was only four (4) days late; and no prejudice was demonstrated;

2. The Trial Court committed reversible error in not finding Respondents had waived the issue of insufficiency of service of process by failing to raise it in the first step they took in the case, and then by participating in discovery; and

3. The Trial Court committed reversible error in dismissing the Complaint two and one-half months after service had been effected and the purpose of the rule had been met.

The District Court affirmed dismissal, even though expiration of the statute of limitations barred refiling. MORALES v. SPERRY RAND CORP., 578 So.2d 1143 (Fla. 4th DCA 1991); (A.42). Judge Polen dissented, without opinion. The District Court found that MORALES had failed to demonstrate diligence and good cause for making no effort to obtain service for 110 days after filing of the Complaint, electing to use mail and obtaining executed summonses 10 days before the deadline, and making no effort to serve the Respondents until after the 120-day period had expired. Following the Federal decisions, the Court ruled that lack of prejudice to the Respondents was not relevant, given an absence of diligence on Petitioner's part. The Court recognized that in the recent case of Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990), the court reached a contrary result by deciding that the rule should not be enforced where service is perfected prior to the filing of a motion to dismiss, and certified conflict with that opinion. (A.44,45).

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Petitioner then filed a Motion for Rehearing and Rehearing En Banc in the District Court, which was denied. (A.34-39). Petitioner thereafter timely filed its notice to invoke Discretionary Jurisdiction of the Supreme Court of Florida to review the decision of the Fourth District Court of Appeal on the basis that the decision expressly and directly conflicts with a decision of another district court of appeal on the same question of law. The Court postponed its decision on jurisdiction, and ordered the matter briefed on the merits.

STATEMENT OF THE FACTS

MORALES was injured on August 20, 1985. (R.13). His Complaint was filed on August 27, 1989. MORALES' attorney mailed summonses for service on SPERRY RAND, UNISYS, FORD MOTOR, and FORD NEW HOLLAND to the Clerk of the Court on December 5, 1989. (R.22; A.1). The summonses were issued by the Deputy Clerk on December 8, 1989. (R.22;A.2,4,6,8). The issued summonses were not received by MORALES' attorney until December 19, 1989, or eleven days later. (R.22). That same day or the next, MORALES' attorney had service effected on each Appellee. (R.5,7;A.3,5,7,9).

SPERRY RAND, UNISYS, FORD MOTOR, and FORD NEW HOLLAND were all represented by the same attorney. On January 18, 1990 they filed their joint Motion to Dismiss. (R.18-20). The motion asserted defenses of failure to state a cause of action, allege privity of contract, and allege sufficient ultimate facts. It did not raise the defense of failure to serve process within the time period specified by Rule 1.070(j), Florida Rules

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of Civil Procedure, or the issue of insufficient process and insufficient service of process. Id.

On January 23, 1990, UNISYS sent MORALES a Request for Production. (A.10-15). The Request for Production was six pages long and requested twenty-six items, including seven years of tax returns; records of earnings; all bills for hospitals, physicians, nurses, etc.; the vehicle involved in the lawsuit; all medical reports and records; all statements, correspondence, depositions, or other written materials authorized by SPERRY RAND, UNISYS, FORD MOTOR, or FORD NEW HOLLAND; a recent photograph of MORALES; expert and accident reports; and documents relating to the purchase, maintenance, repair and/or use of the vehicle. Id.

On January 25, 1990, UNISYS sent out its Interrogatories to Plaintiff. (A.16-31). The Interrogatories were sixteen pages long and comprised of twenty-seven questions, including the name, address and telephone number of each person who heard SPERRY RAND, UNISYS, FORD MOTOR or FORD NEW HOLLAND make any statement, remark or comment concerning the accident; general background information on MORALES; information about his medical condition and insurance coverage; details of the accident; expenses incurred and compensation lost as a result of the accident; benefits paid; injuries sustained; a listing of each physician, psychiatrist or psychologist and medical facility who had treated MORALES in the past five years; any non-medical expert witness; all employers for the past five years; the whereabouts of the loader; and any tests or examinations performed on the loader. (A.16-26). UNISYS further requested that MORALES describe each act or omission on the part of UNISYS, SPERRY RAND, FORD

MOTOR, or FORD NEW HOLLAND which constituted negligence, strict liability, or breach of warranty; asked whether MORALES gave notice to any Defendant; and requested specification of express warranties by each Defendant and description of how the product was not merchantable, inherently dangerous and/or defective, with all acts any Defendants did or failed to do. (A.27-30).

On January 31, 1990, UNISYS, SPERRY RAND, FORD MOTOR and FORD NEW HOLLAND, again jointly and through the same attorney, filed their Supplement to Motion to Dismiss, adding the defenses of failure to serve process within the time period specified by Rule 1.070(j), Florida Rules of Civil Procedure, and of insufficient process and service of process. (R.21). On February 9, 1990, MORALES objected to UNISYS's Request for Production. (A.32,33).

Hearing on the Motion to Dismiss was scheduled for March 6, 1990. Before the hearing, MORALES' attorney submitted his Affidavit in Opposition to Motion to Dismiss Regarding Rule 1.070(j), Florida Rules of Civil Procedure. (R.22-23). The Affidavit attested that the summonses on each Defendant were mailed on December 5, 1989, and issued by the Deputy Clerk on December 8th, 1989. (R.22). The issued summonses were not received until December 18 or 19, 1989, and were served on December 19, 1989. (Supra; R.5,7).

At the hearing on the Motion to Dismiss, the attorney for UNISYS, SPERRY RAND, FORD MOTOR, and FORD NEW HOLLAND argued that dismissal is mandatory and that there is no discretion but to dismiss if good cause is not shown. (R.2,3,11). He further

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argued that good cause exists if a Defendant is elusive, which did not occur in the instant case. (R.3).

MORALES' attorney informed the Court that he had problems communicating with his client. (R.8). Further, although the summonses were issued within 120 days, there was a delay in returning the summonses to him. (R.6-9). The 120-day period ended on December 15, a Friday. The summonses were actually served on December 19, a Tuesday. (R.5). The corporate resident agent could not have been served on the intervening Saturday and Sunday. (R.7). MORALES' attorney advised the Trial Court that dismissal without prejudice would actually terminate the case because the statute of limitations had run. (R.6,25).

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ISSUES PRESENTED ON DISCRETIONARY REVIEW

ISSUE A

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING DISMISSAL OF THE ACTION FOR EFFECTING SERVICE ON RESPONDENTS ON THE 124TH DAY AFTER FILING, WHERE PROCESS WAS SERVED PRIOR TO BOTH MOTIONS TO DISMISS?

ISSUE B

WHETHER THE DISTRICT COURT ERRED IN AFFIRMING DISMISSAL OF THE ACTION WHERE THE RESPONDENTS WAIVED THE ISSUE OF INSUFFICIENCY OF SERVICE OF PROCESS BY FAILING TO RAISE IT IN THEIR FIRST MOTION TO DISMISS, AND THEN BY PARTICIPATING IN DISCOVERY?

ISSUE C

WHETHER THE DISTRICT COURT'S INTERPRETATION OF THE RULE ELEVATES 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?

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SUMMARY OF ARGUMENT

In this lawsuit, a severely injured landscape laborer served the four manufacturers/distributors of a New Holland skid-steer loader on the 124th day after filing of the Complaint. At the height of the Christmas holiday season, the issued summonses took eleven days to reach MORALES' attorney's office, whereupon they were served that same day or the next. The four Respondents, UNISYS, SPERRY RAND, FORD MOTOR and FORD NEW HOLLAND, jointly filed their Motion to Dismiss, which did not raise the issue of insufficiency of service of process. (R.18-20). They next took affirmative action in the cause and claimed rights available to parties under the Florida Rules of Civil Procedure when they sent out a Request for Production and Interrogatories, neither of which was coupled with an objection to the jurisdiction of the court over the person. (AB.4,5;A.10-31).

Finally, about six weeks after service had been effected, the four Respondents jointly filed their second Motion to Dismiss, adding the defense of failure to serve process within the time period specified by Rule 1.070(j), Florida Rules of Civil Procedure. (R.21). Following the hearing on that Motion to Dismiss, some two and one-half months after service had been effected, the Trial Court entered an order dismissing the Complaint. (R.24). The statute of limitations barred refiling.

Dismissal of MORALES' Complaint elevates 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. A strict interpretation of Rule 1.070(j) has caused the dismissal of an action for a 4-day delay in service, even though the parties had already been served;

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were fully aware of the action; had retained counsel; had failed to raise the issue of insufficiency of service of process in the first step they took in the case; and had participated in discovery. In fact, there had been an earlier incarnation of the same case.

Under the well-reasoned cases of Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990)(an action should not be dismissed for failure to effect service upon defendants within the 120-day period specified by the procedural rule if process has been served prior to the filing of the motion to dismiss); and Schafer v. Schafer, 16 F.L.W. D1746 (Fla. 3d DCA July 2, 1991)(an action should not be dismissed for failure to effect service upon defendants within the 120-day period if process has been served prior to the hearing on the motion to dismiss), MORALES' Complaint should not have been dismissed. Service was effected prior to both the hearing on the Defendants' Motion to Dismiss and even prior to the Motion to Dismiss itself.

Should this Court choose not to follow the well-reasoned Berdeaux rule as expanded by Schafer, this Court may still reverse because a waiver has occurred. Respondents failed to raise the issue of insufficiency of service of process in the first step they took in the case, and further waived the issue by participating in discovery. This Court should not allow the four Respondents to jump into the litigation, forge ahead with discovery, only to play a game of "gotcha" against MORALES for a highly technical violation of a new rule. The rule was intended to be a useful tool for docket management, and not an instrument of oppression. There has been no suggestion that Respondents were prejudiced or even inconvenienced by the 4-day delay in service of the Complaint.

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The purpose of the rule was to speed the cause and get the case moving, not to defeat the cause without a trial on the merits. In the instant case a hypertechnical reading of the rule by the Trial Court and the Fourth District Court of Appeal has done exactly this. Dismissal of MORALES' cause two and one-half months after service had been effected and the purpose of the rule had been met, is contrary to well established Florida law and policy, and has deprived MORALES of his day in court.

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ARGUMENT

A. THE DISTRICT COURT ERRED IN AFFIRMING DISMISSAL OF THE ACTION FOR EFFECTING SERVICE ON RESPONDENTS ON THE 124TH DAY AFTER FILING, WHERE PROCESS WAS SERVED PRIOR TO BOTH MOTIONS TO DISMISS.

1. The Operation of Rule 1.070(j) is Analogous to Rule 1.500(c), Florida Rules of Civil Procedure, Wherein a Default May Not be Entered if the Defendant Files its Answer at Any Time Prior to the Proposed Entry of a Default.

This Court should adopt and follow the well-reasoned rule of Berdeaux, as expanded by Schafer, in which the Third District Court of Appeal analogized the operation of Rule 1.070(j), Florida Rules of Civil Procedure, to Rule 1.500(c), wherein a default may not be entered if the defendants files its answer at any time prior to the proposed entry of a default. See, Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990); Schafer v. Schafer, 16 F.L.W. D1746 (Fla. 3d DCA July 2, 1991). Under this rule, the Fourth District Court of Appeal's decision in Morales should be reversed, because Respondents were served prior to both Motions to Dismiss, the hearing on the Motion, and the entry of dismissal.

Under Berdeaux, the Third District Court of Appeal held that an action should not be dismissed for failure to effect service upon defendants within the 120-day period specified by the procedural rule, if process has been served prior to the hearing on defendants' motion to dismiss. Berdeaux involved nine asbestos-litigation plaintiffs who appealed the trial court's order dismissing their actions, without prejudice, for failure to serve the defendants within 120-days subsequent to the filing of their complaint. 575 So.2d at 1295. Although the complaints were filed between January of 1987 and March of 1988, the defendants remained unserved until August and September of 1989. On September 25,

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1989 the defense filed a motion to dismiss for failure to effect timely service pursuant to the rule. Only one defendant was still unserved at the time the motion was filed. On December 8, 1989 the trial court dismissed all nine actions. Id.

The Third District held that the trial court erred in dismissing eight actions where service was effected prior to the filing of the motion to dismiss, however, properly dismissed the defendant who had not been served prior to the motion to dismiss. 575 So.2d at 1296. The Third District Court of Appeal analogized operation of Rule 1.070(j) to the operation of Florida Rule of Civil Procedure 1.500(c), wherein the law of this state requires a default not be entered, if the defendant files its answer at any time prior to the proposed entry of a default.[5]

Under this rule the order of the trial court dismissing MORALES'S action should be reversed. MORALES filed the Complaint on August 27, 1989. Service of Process was effected on each Respondent on December 19, 1989, four (4) days after the expiration of the 120-day period, but prior to both the Motions to Dismiss.

Subsequently, the Third District Court of Appeal expanded the Berdeaux rule in Schafer v. Shafer, 16 F.L.W. D1746 (Fla. 3d DCA July 2, 1991). Schafer appealed from an order dismissing a wrongful death action for failure to perfect service of process within 120-days of filing suit. The complaint for wrongful death was filed on October 12, 1990.

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[5] Rule 1.500(c) provides:

> (c) **Right to Plead.** A party may plead or otherwise defend at any time before default is entered. If the party in default files any paper after the default is entered, the clerk shall notify the party of the entry of default. The clerk shall make an entry on the progress docket showing the notification.

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On February 1, 1991, Julie Schafer moved to dismiss Mr. Schafer's complaint against her pursuant to Rule 1.070(j), Florida Rules of Civil Procedure. Service of process was effected on Julie Schafer on February 12, 1991, four (4) days after the expiration of the 120-day period, but prior to the hearing on her motion to dismiss. Relying both on Berdeaux, supra, and Hernandez v. Page, (120-day rule intended to be useful tool for docket management, not instrument of oppression), the Third District reversed the trial court's dismissal, holding that because service of process was perfected prior to the hearing on and entry of dismissal, the trial court erred in dismissing the complaint. That case certified conflict with MORALES.

As in Schafer, in the instant case service of process was effected only four (4) days after expiration of the 120-day period. And as in Schafer, service of process was perfected prior to the hearing on the Motion to Dismiss and the entry of dismissal. Dismissal of MORALES' cause should likewise be reversed.

Several other cases, distinguishable on their facts, have upheld dismissal under Rule 1.070(j), Florida Rules of Civil Procedure. For instance, in Hernandez v. Page, 580 So.2d 793 (Fla. 3d DCA 1991), service on defendants had not still been effected eight months after refiling of the case. 580 So.2d at 794. Defendants moved for dismissal. Although plaintiffs then filed a motion for leave to serve defendants, no actual service had been effected by the time of the hearing. The Third District Court of Appeal affirmed the trial court's finding that plaintiff failed to demonstrate good cause for failure to comply with Rule 1.070(j), as plaintiff's attorney offered no argument or record support to rebut the

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clear evidence that his office simply had forgotten about the case until the defendants filed their motion to dismiss some eight months after suit was refiled. Id.

In Greco v. Pedersen, 16 F.L.W. D2123 (Fla. 2d DCA August 9, 1991), the Second District affirmed dismissal for failure to serve initial process within 120-days. In that case, the plaintiff filed a lawsuit on June 2, 1989, and the 120-days expired on October 2, 1989. On November 17, 1989, defendant filed a motion to dismiss for failure to timely serve process. Only after this motion was served on December 7, 1989, was an alias summons sent to a private process server, and service of process successfully made on December 13, 1989. Id.

The Second District Court of Appeal distinguished Greco as one in which process was served after 120-days but before the filing of a motion to dismiss, and therefore found that it did not involve the issue upon which the Third, Fourth and Fifth Districts had announced conflict in Partin, Morales, and Berdeaux. 16 F.L.W. D2123. Thus the Second District specifically pointed out:

> We do not need to determine what the result would have been if the plaintiff had served his complaint in the six weeks between the expiration of the 120-day period and the filing of the motion to dismiss.

Id.

In Partin v. Flagler Hospital, Inc., 581 So.2d 240 (Fla. 5th DCA 1991), the Partins filed a negligence complaint in 1985, but did not effect service until November 6, 1989. After service, defendant successfully moved to dismiss the complaint pursuant to Rule 1.070(j). Partin appealed, claiming that Rule 1.070(j) should be construed to operate in a non-self-executing manner analogous to Rule 1.420(e). Under that rule, an action may not

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be dismissed if record activity takes place before a motion to dismiss based on the rule is filed. The Fifth District declined to apply the Berdeaux rule, and instead approved the Morales decision that the rule should be enforced even though service is effected before the filing of a motion to dismiss. Nevertheless, because the Fifth District believed that Rule 1.070(j) did not apply to cases filed prior to the effective date of that rule, it reversed the dismissal. Id. Partin's complaint had been filed in 1985, and thus had been pending both at the time Rule 1.070(j) was adopted in 1988, and the effective date of January 1, 1989. 16 F.L.W. at D1609. That situation did not occur in the instant case.

2. The Berdeaux Rule as Expanded by Schafer Comports With Florida Jurisprudence, Which Favors Liberality in the Area of Setting Aside Defaults in Order That Parties May Have Their Controversies Decided on the Merits.

The Berdeaux rule as expanded by Schafer is well reasoned in that it safeguards the substantive rights of the parties, and is more in harmony with Florida jurisprudence which favors liberality in the area of setting aside of defaults in order that the parties may have their controversies decided on the merits. See, e.g., Somero v. Hendry General Hospital, 467 So.2d 1103 (Fla. 4th DCA 1985) petition for rev. denied, 476 So.2d 674 (Fla. 1985); (default will not be set aside where the defaulted party or his attorney (1) simply forgot or (2) intentionally ignored the necessity to take appropriate action, but will be set aside where an action results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir); Trans-World Realty Corporation-Plantation v. Realty World Corp., 507 So.2d 1201 (Fla. 4th DCA 1987)(default against defendant reversed where attorney instructed secretary to have another in office sign answer and file it before hearing).

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Under Rule 1.500(c), Florida Rules of Civil Procedure, the law of the State requires a default not be entered if the Defendant files its answer at any time prior to the proposed entry of a default. See, Humbert v. Ackerman, 541 So.2d 1229 (Fla. 3d DCA 1989)(defendant in personal injury action was entitled to vacatur of default judgment, where he filed his answer and affirmative defenses after order of default was signed but before it was filed); Nants v. Faria, 552 So.2d 369 (Fla. 5th DCA 1989)(default should not have been entered where an answer was filed prior to such entry, even though it was filed after motion for default and earlier on the same day as the default was entered).

Florida courts have routinely reversed dismissal of actions as being too severe and drastic a sanction where the record does not show willful or intentional disregard of a trial court's order. See, e.g., Garland v. Dixie Insurance Co., 495 So.2d 785 (Fla. 4th DCA 1986)(dismissal of complaint without prejudice was too severe a sanction for failure of counsel to appear at scheduled pretrial conference); Beauchamp v. Collins, 500 So.2d 294 (Fla. 3d DCA 1986), review denied, 430 So.2d 450 (Fla. 1983)(dismissal for failure to comply with pretrial order of discovery reversed where record devoid of any indication of bad faith compliance with discovery or court orders which would warrant a finding of willful and flagrant disobedience). There was nothing in the record below indicating that MORALES' attorney willfully and intentionally disregarded Rule 1.070(j), Florida Rules of Civil Procedure.

In fact, there is ample evidence in the record that inaction resulted from a clerical or secretarial error, reasonable misunderstanding, or a system gone awry. MORALES' attorney proceeded in a manner reasonably calculated to effect service within 120 days

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when he mailed the summonses to the Deputy Clerk on December 5, 1989. The summonses were issued within the 120-day deadline. (R.6). However, as the issued summonses took eleven days to travel from the courthouse to MORALES' attorney's office, he was not able to serve them until four days past the deadline. (R.22).

This Court might take judicial notice that December 19, 1989 was six days before Christmas, and at the height of the holiday season, when the U.S. Postal System, and other offices, do not function as promptly or smoothly as normal. This delay in sending the summonses was beyond MORALES'S attorney's control and was certainly not wilful or intentional. He promptly had the summonses served the same day, or next, after receiving them from the deputy clerk. (A.3,5,7,4;R.5,7). Compare, Middleton v. Silverman, 430 So.2d 981 (Fla. 3d DCA 1983)(plaintiff, who made a positive and identifiable attempt to commence her action within applicable statute of limitations, but who was frustrated in her attempt because the circuit court was closed as a result of a civil disorder, was not required to ferret out a circuit court judge willing to accept papers, and motion of individual defendants to dismiss action as untimely should not have been granted).

Additionally, Florida courts often consider, in weighing a plaintiff's tardiness, whether the defendant is able to demonstrate that it was prejudiced. See, Maler v. Baptist Hospital of Miami, Inc., 532 So.2d 79 (Fla. 3d DCA 1988)(dismissal for lack of prosecution reversed where no prejudice to defendants was shown by late filed affidavit); Araujo-Sanchez v. Amoon, 513 So.2d 1307 (Fla. 3d DCA 1987)(dismissal of amended complaint filed late reversed where defendants were in no way prejudiced by delay); Beauchamp, 500 So.2d at 295.

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There was nothing in the record below indicating that Respondents were prejudiced in any meaningful way by MORALES' four-day delay in serving the summonses. In fact, at least SPERRY RAND had actual notice of the lawsuit, as it had been involved in the prior lawsuit in Broward County dismissed for lack of prosection. (AB.2). Moreover, Sperry New Holland Division of Sperry Corp. and UNISYS are involved in a companion lawsuit in federal court. Id. As the four Respondents are all represented by the same attorney, the remaining Respondent or Respondents had constructive, if not actual, notice of this lawsuit. In any event, no prejudice was demonstrated below. This lack of prejudice should have been a factor in considering whether good cause existed, but was not.

Florida courts have also been quick to reverse and remand to the trial court dismissals involving tardiness of only several days to several weeks. See, e.g., Rothblatt v. Department of Health and Rehabilitative Services, 520 So.2d 644 (Fla. 4th DCA 1988)(dismissal reversed where plaintiff's request for an administrative hearing and answer was received by Department six days late); Maler, 532 So.2d at 79 (trial court's refusal to consider plaintiff's affidavit of good cause filed four days late and one day prior to hearing on motions reversed); Araujo-Sanchez, 513 So.2d at 1308 (order reversed dismissing third amended complaint because it was filed fourteen days late where counsel had miscalendared the due date); D'Best Laundromat, Inc., 508 So.2d 1325, 1326 (Fla. 3d DCA 1987)(dismissal reversed where amended complaint was filed four days late). Surely, MORALES' cause which involves a mere four-day delay, deserves this same treatment.

The dismissal based on the four-day delay in service of the summonses has deprived MORALES of a determination of his cause on the merits. MORALES, at a point now

beyond the statute of limitations, no longer has a chance to prove his claim. The statute of limitations problem was brought to the trial court's attention below. Compare, Johnson v. Landmark First National Bank, 415 So.2d 161 (Fla. 4th DCA 1982)(dismissal without prejudice affirmed even though it actually terminated the case because the statute of limitations had run, where that issue was never raised with trial court). As the Fourth District Court of Appeal recently cautioned:

> The right of access to our courts is constitutionally protected and should be denied only under extreme circumstances. Article I, §21, Florida Constitution.

U.S.B. Acquisition Co., Inc. v. Block Corp., 564 So.2d 221 (Fla. 4th DCA 1990), review denied, 574 So.2d 144 (Fla. 1990).

In Block, supra, the Court reversed a final order of dismissal, holding that the trial judge had abused his discretion in striking pleadings for failure to comply with a discovery order. Id. Similarly, in the instant case, MORALES has been denied his constitutionally protected right of access to our courts. Service was only four days late, and no prejudice was demonstrated below. Dismissal of the complaint and cause is contrary to Florida's liberal policy of vacating defaults and liberal definition of excusable neglect; contrary to Florida's policy of examining whether prejudice has been shown; and violative to the right of access to our courts, protected by the Florida Constitution.

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B. THE DISTRICT COURT ERRED IN AFFIRMING DISMISSAL OF THE ACTION WHERE THE RESPONDENTS WAIVED THE ISSUE OF INSUFFICIENCY OF SERVICE OF PROCESS BY FAILING TO RAISE IT IN THEIR MOTION TO DISMISS, AND THEN BY PARTICIPATING IN DISCOVERY.

1. Respondents Waived the Issue of Insufficiency of Service of Process by Failing to Raise it in the First Step They Took in the Case.

Rule 1.140(b), Florida Rules of Civil Procedure, provides that the defense of insufficiency of service of process must be raised in or before the parties first responsive pleading or by motion, or it is waived. Fla.R.Civ.P. 1.140(b)(1989). See, also, Cumberland Software, Inc. v. Great American Mortgage Corp., 507 So.2d 794 (Fla. 4th DCA 1987); Consolidated Aluminum Corp. v. Weinroth, 422 So.2d 330 (Fla. 5th DCA 1982), review denied, 430 So.2d 450 (Fla. 1983). SPERRY RAND, UNISYS, FORD MOTOR and FORD NEW HOLLAND, all represented by the same attorney, filed their joint Motion to Dismiss on January 18, 1990 (R.18-20). That Motion asserted defenses of failure to state a cause of action, to allege privity of contract, to allege sufficient ultimate facts, etc. Id. The Motion did not raise the defense of failure to serve process within the time period specified by Rule 1.070(j), Florida Rules of Civil Procedure, or the issue of insufficient process and insufficient service of process. Id. On January 31, 1990, the four Respondents again jointly, filed a Supplement to the Motion to Dismiss, adding the defenses of failure to serve process within the time period specified by Rule 1.070(j), Florida Rules of Civil Procedure, and of insufficient process and insufficient service of process. (R.21). However, by then Respondents had waived the issue of insufficiency of service of process by failing to raise it in their Motion to Dismiss.

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2. Respondents Waived the Issue of Insufficiency of Service of Process by Participating in Discovery.

Where a party takes affirmative action in a cause, it must be coupled with an objection to the jurisdiction of the court over the person or such jurisdictional inadequacy is waived. See, e.g., Joannou v. Corsini, 543 So.2d 308 (Fla. 4th DCA 1989)(defendant waived claim of personal jurisdiction when he voluntarily entered an appearance by moving for a protective order against taking of depositions without asserting his claim of lack of personal jurisdiction).

UNISYS took affirmative action in the cause and claimed rights available to parties under the Florida Rules of Civil Procedure when it sent out the Request for Production and Interrogatories, neither of which was coupled with an objection to the jurisdiction of the court over the person. (AB.4,5;A.10-31). By taking this affirmative action, UNISYS unequivocally waived the issue of insufficiency of service of process.

Moreover, it would be an exaltation of form over substance to not hold that all four Respondents waived the issue of insufficiency of service of process by taking this affirmative action. Each of the four Respondents were represented by the same attorney. Their interests are presumably intertwined by that fact alone. However, they also filed a joint Motion to Dismiss, and a joint Supplement to Motion to Dismiss. (R.18-21). Although the Request for Production and Interrogatories were ostensibly sent out only by UNISYS, both requested or asked for detailed records and information concerning each of the four Appellees by name. (AB.4,5;A.10-31).

Finally, on January 31, 1990, well after service of the Request for Production and Interrogatories, the four Appellees jointly filed the Supplement to Motion to Dismiss.

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(R.21). Then, they finally added the defenses of failure to serve process within the time period specified by Rule 1.070(j), Florida Rules of Civil Procedure, and of insufficient process and service of process. Id. By this time Respondents had waived their defense of failure to serve process within the time period specified by Rule 1.070(j).

This Court should not allow the four Respondents, through their one attorney, to jointly jump into the litigation with both feet, forge ahead with discovery, only to play a game of "gotcha" against MORALES for a highly technical violation of a new rule. It now falls to this Court to establish some guidelines for trial and appellate courts to follow, in the exercise of their discretion. Otherwise, the Court may be faced in the future with the absurdity of a plaintiff who serves a defendant four days past the 120-day deadline; the defendant sending out discovery and participating in the lawsuit for perhaps a year; and then, on the eve of trial, making a motion to dismiss for failure to serve within the 120-day limit.

It was never intended that the rule cover the above scenario, or the instant factual situation. Surely the rule was intended to be a useful tool for docket management, and not an instrument of oppression. The Trial Court, and the Fourth District Court of Appeal erred in not finding that Respondents waived the issue of insufficiency of service of process by failing to raise it in the first step they took in the case, and by participating in discovery.

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C. THE DISTRICT COURT'S INTERPRETATION OF THE RULE ELEVATES 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.

1. A Strict Interpretation of the Rule 1.070(j) has Been Criticized For Good Reason by Three District Courts of Appeal.

A strict interpretation of Rule 1.070(j), Florida Rules of Civil Procedure, has been criticized, for good reason, by the Third District Court of Appeal; the Second District Court of Appeal; and to a lesser extent, the Fifth District Court of Appeal, which refused to apply the rule retroactively. See, Hernandez v. Page, 580 So.2d at 793 (special concurrence by Chief Judge Schwartz); Schafer v. Schafer, 16 F.L.W. at D1746 (citing Hernandez v. Page, for the proposition that 120-day rule was intended to be a useful tool for docket management, and not an instrument of oppression); Greco v. Pederson, 16 F.L.W. at D2123; Partin v. Flagler Hospital, 581 So.2d at 240. In Hernandez v. Page, Chief Judge Schwartz, specially concurring, explained:

> ... 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. Summit Chase Condominium Assoc. v. Protean Investors, Inc., 421 So.2d 562 (Fla. 3d DCA 1982)(Judge Schwartz, concurring in part, dissenting in part). In this instance, the rule has caused the dismissal of an action because the defendants were not served with process, even though those same parties had been served, were fully aware of the action, had retained counsel and had defended themselves in an earlier incarnation of the same case. Indeed, they continued to be represented after that first action had been terminated by a voluntary dismissal on the eve of trial. 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 interests 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

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> such a result properly serves the administration of justice as the rules are supposedly intended to do. (Emphasis added).

580 So.2d at 796.

Similarly, in Greco v. Pederson, the Second District Court of Appeal expressly stated that it shared the concerns expressed by Judge Schwartz in his special concurrence in Hernandez v. Page. 16 F.L.W. at D2123. In Greco, the court observed:

> In this case, there is no suggestion that the defendant was prejudiced or even inconvenienced by the failure to be served with the complaint. His attorney, and presumably Mr. Pedersen, had full knowledge that that lawsuit had been filed. But for the unexplained inability of the sheriff's deputy to obtain service, this case would have begun on a timely basis. We are dismissing this case, while perhaps upholding the predicate for a new lawsuit against yet another attorney, in the supposed interest of efficient judicial administration. (Emphasis added).

16 F.L.W. at D2123. The Second District suggested that the 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. Although the court noted that this suggestion would maintain the 120-day period currently employed by the rule, it suggested that a somewhat longer period would be more practical. The court reasoned:

> This would promote efficient judicial administration without unduly compromising 'the substantive rights of the parties which the system is in business only to serve.' Hernandez, 15 F.L.W. at 1153 (Judge Schwartz, specially concurring).

Id.

Finally, even though the Fifth District in Partin stated: "we believe that MORALES is the correct view," the court could not help but observe that a plaintiff's rights may be

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affected by the new rule, and refused to apply the rule to cases filed before the effective date of the rule, citing both to Hernandez and the renowned civil procedure authority, Henry Trawick, in his Florida Practice and Procedure, §8-4. Id.

At its inception, Henry Trawick criticized the rule:

> The rule is taken from federal Rule 4(j). The reason for its adoption ... is ridiculous and does not take into account the litigation that will be spawned by the rule or its malpractice effect on lawyers. In addition, Florida does not normally use mail service that is under the control of the plaintiff. Sometimes it is not possible to obtain service of process using diligence within the limitation and making expensive motions to extend the time violates the spirit of Rule 1.010. After all Rule 1.420(e) is ultimately available. ... So far, good cause seems to be equated with diligence. The time limit is not absolute. (Emphasis added).

H. Trawick, Florida Practice and Procedure, §8-4 (1989). See also, H. Trawick, Supra, (1990)("There is no reason for the rule in Florida practice, except to provide a fertile field for malpractice").

2. By Shortening the Applicable Statute of Limitations, the Rule Functions in a Substantive Way to Curtail a Plaintiff's Rights.

When MORALES' cause of action occurred on August 20, 1985, Rule 1.070(j) was not in effect. By creating another statute of limitations, the rule functions to curtail his substantive rights. Substantive law creates, defines and regulates rights, and is a function of the legislature rather than the courts. See, generally, Fla.Const.Art. 2 §3 (1991) and Milton v. Leapar, 562 So.2d 804 (Fla. 5th DCA 1990).

This is a rule, thus it is and should remain procedural. It was meant to speed the cause and get the case moving. The rule was never intended to furnish an advantage to the defendant, so that the cause could be defeated without a trial on the merits. However, in the instant case, a hypertechnical reading of the rule by the Trial Court and the Fourth

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District Court of Appeal has done exactly this. Respondents were able to defeat the cause and deprive MORALES entirely of a chance to prove his claim. To dismiss the Complaint and cause two and one-half months after service had been effected and the purpose of the rule had been met, is contrary to well-established Florida law and policy, and has deprived MORALES of his day in court.

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CONCLUSION

Based upon the foregoing reasons and citations of authority, it is respectfully submitted that the Final Judgment of Dismissal under review be reversed, and the cause remanded to the Trial Court with directions to reinstate Petitioner's Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 4th day of September, 1991 to JUDY D. SHAPIRO, ESQ., Herzfeld & Rubin, 801 Brickell Avenue, Miami, Florida 33131 and DAVID L. KAHN, ESQ., David L. Kahn, P.A., 110 S.E. Sixth Street, Fort Lauderdale, Florida 33310.

By _____
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