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SEP 23 1991
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

DAVID MORALES,

Petitioner,

v. CASE NO. 78,244

SPERRY RAND CORPORATION, a foreign corporation, UNISYS CORPORATION, a foreign corporation, FORD MOTOR COMPANY, a foreign corporation, and FORD NEW HOLLAND CORPORATION, a foreign corporation,

Respondents.
_____/

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

BRIEF ON THE MERITS OF RESPONDENTS, SPERRY RAND CORPORATION, UNISYS CORPORATION, FORD MOTOR COMPANY, AND FORD NEW HOLLAND CORPORATION

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STATEMENT OF THE CASE AND FACTS

PETITIONER seeks review of the Fourth District Court of Appeal decision affirming a Final Judgment of dismissal entered in favor of RESPONDENTS, SPERRY RAND CORPORATION, UNISYS CORPORATION, FORD MOTOR COMPANY, and FORD NEW HOLLAND COMPANY, and against PETITIONER, DAVID MORALES.

SPERRY RAND CORPORATION, UNISYS CORPORATION, FORD MOTOR COMPANY, and FORD NEW HOLLAND COMPANY, Defendants in the trial court below and APPELLEES, will be referred to herein as "RESPONDENTS."

DAVID MORALES, the Plaintiff in the trial court below and the APPELLANT, will be referred to herein as "MORALES" and/or "PETITIONER."

The Record on Appeal will be referred to by the symbol "R", and RESPONDENTS' Appendix will be referred to as "App."

RESPONDENTS present the following Statement of the Case and Facts to clarify that presented by MORALES.

On August 17, 1989, three days before the four-year Statute of Limitations expired, MORALES filed a Complaint for damages against RESPONDENTS. (R. 13-17). The lawsuit had previously been filed in Broward County by MORALES and was dismissed for failure to prosecute in 1988. (R. 3). MORALES did not serve any of the RESPONDENTS within the 120-day time period allowed by Fla. R. Civ. P. 1.070(j) [hereinafter referred to as "Rule 1.070(j)"]. (R. 21). MORALES never requested that the Court grant him an extension and/or enlargement of time within which to serve the Summonses and Complaint upon RESPONDENTS.

RESPONDENTS filed a Motion to Dismiss on January 18, 1990, which, as one of its grounds, set forth lack of jurisdiction over the person of RESPONDENTS. (R. 18-20). On January 23 and 25, 1990, one RESPONDENT, UNISYS CORPORATION, propounded a Request to Produce and Interrogatories upon MORALES. (R. 48-54). On January 31, 1990, RESPONDENTS served a supplement to their Motion to Dismiss, raising Rule 1.070(j) as an additional ground for dismissal. (R. 21). The Supplemental Motion to Dismiss was filed before any hearing was held on the original Motion to Dismiss, before any response was filed by MORALES, and before RESPONDENTS filed an answer.

On March 6, 1990, a hearing was held on RESPONDENTS' Motion to Dismiss, and supplement thereto. (App. 1-12). MORALES' attorney filed an Affidavit in opposition to the Motion to Dismiss for failure to effect timely service at the hearing. (R. 22-23). (The Affidavit was filed 34 days after the Supplemental Motion to Dismiss was served.) (R. 22-23).

The Affidavit states, in pertinent part, as follows:

> 4. Summons for service on each of the Defendants was mailed to the Clerk of Court on December 5, 1989 and issued by the Deputy Clerk, Marianita Castillo on December 8, 1989. (R. 22; App. 13).

Thus, MORALES first requested that the summonses be issued 110 days after the Complaint had been filed.

Paragraph 5 of the Affidavit states as follows:

> 5. The issued Summons [sic] were returned by mail to Fort Lauderdale, Florida, received and served on each of the Defendants through their resident agent on December 19, 1989. (R. 22; App. 13).

Noticeably, the Affidavit does not set forth the date the issued summonses were received by MORALES' attorney.

The Affidavit further states the following conclusions:

> 6. Although the process was issued by the Clerk, mailing by return mail was delayed briefly before service of process was affected [sic].
>
> 7. Once process was issued by the Clerk, the undersigned diligently attempted to effect service of process upon the respective Defendants. (R. 23; App. 14). (Emphasis added).

The Affidavit does not set forth any reason why MORALES waited until December 5, 1989, 110 days after filing the Complaint, to first request the issuance of the summonses. (R. 22-23). The Affidavit does not set forth that any of the RESPONDENTS were evading service of process. (R. 22-23). (Indeed, this would have been a difficult argument to maintain in view of the fact that C. T. Corporation was the agent for all the RESPONDENTS for service of process.) The Affidavit does not set forth why MORALES did not request an extension and/or enlargement of time within which to effect service upon RESPONDENTS. (R. 22-23). The Affidavit does not set forth why MORALES did not use a courier and/or overnight mail delivery to obtain the issuance of the summonses, especially in view of the impending 120-day deadline established by Rule 1.070(j).[1] (R. 22-23). The Affidavit does not state why, when the issued summonses had not been received by return mail, alternate steps were not taken to obtain the issued summonses. (R. 22-23).

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[1]MORALES continually refers to December as being the "peak" time for holiday mail in an effort to excuse his failure to effect timely service. Presumably, MORALES and his attorney were aware of the holiday mails, but, nonetheless, waited until that time to begin to request, by mail, the issuance of the summonses.

At the hearing on the Motion to Dismiss, and Supplement thereto, no sworn testimony was provided. (R. 1-12; App. 1-12). MORALES' counsel did, however, argue that, because he had the summonses issued prior to the end of the 120-day period (albeit on the 113th day), the matter should not be dismissed. (R. 8; App. 8).

When asked by the trial court what efforts MORALES had taken to effect service between August 17, 1989, the date the Complaint was filed, and December 5, 1989 (the date MORALES first mailed a request for the issuance of the Summonses), MORALES' counsel stated:

> Your Honor, at that point in time, we chose not to have the summons issued. We had some problems communicating with our client and did not want the summons issued until we knew what our client's status was.[2] So when we recognized what we were going to do and we were going to go forward, within the 120 days, we sought the summons.
>
> The only reason that there was any delay whatsoever was because of the fact that the mailing of the request--and I do have a copy of our letter to the Clerk of Court, dated December 5, 1989, requesting that the summons be issued and forwarding the various summons up, and of course, the file would reflect that the summons [sic] were issued timely. It was a matter of getting the summons [sic] back from the Clerk and getting them served.
>
> We were cognizant of the period of time, we knew what we had to do, but we could not get the documents back within the period of time. So, in the particular case, there was not an indication that we were not intending to serve these parties or not intending to go forward, but only that we couldn't get the documents back and serve a

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[2]Why summonses could not have been issued prior to ascertaining the client's status is unknown. Issuance does not require service. Exactly what was meant by the "client's status" is unknown. No date for the alleged communication problems is mentioned.

corporate resident agent within the time period. (R. 8-9; App. 8-9). (Emphasis added).

MORALES' counsel stated that service of process was ultimately effected on a Tuesday, December 19, 1989. (R. 7; App. 7). MORALES' counsel also argued, as an additional excuse for failure to serve within the 120-day period, that the registered agent of RESPONDENTS was only open Monday through Friday (R. 5; App. 5), and therefore service could not be made on either December 16 or 17, 1989, because those dates fell on weekends.[3] (R. 7; App. 7). However, the 120 days for service of process elapsed on Friday, December 15, 1989. (MORALES' counsel offered no excuse for his failure to effect service on Monday, December 18, 1989).

The trial court stated that:

> Based on the affidavit of David Kahn, there is no showing of good cause, and the motion is granted. (R. 11; App. 11).

On March 6, 1990, the trial court entered an Order granting RESPONDENTS' Motion to Dismiss for failure to comply with Rule 1.070(j). (R. 24). Thereafter, on June 7, 1990, MORALES moved for the entry of a Final Judgment of Dismissal. (R. 37-40). On June 7, 1990, the trial court entered a Final Judgment of Dismissal. (R. 41).

MORALES filed an appeal from that Final Judgment of Dismissal. (R. 42-43). The Fourth District Court of Appeal affirmed the trial court's dismissal, certifying conflict with the Third District

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[3]MORALES' attorney should have taken into consideration that service of process, without court order, cannot be made on Sundays [§ 48.20, Fla. Stat. (1989)], and that corporations need only have a registered agent available for service on Monday through Friday during certain hours [§ 48.091, Fla. Stat. (1989)].

Court of Appeal decision rendered in Berdeaux v Eagle-Picher, Indus., 575 So.2d 1295 (Fla. 3d DCA 1990).[4] MORALES seeks review of the Fourth District Court of Appeal decision, Morales v. Sperry Rand Corp., et al., 578 So.2d 1143 (Fla. 4th DCA 1991) [hereinafter referred to as "Morales"], affirming the dismissal of his action. (App. 15-17).

[4]Hereinafter referred to as "Berdeaux."

ISSUES ON APPEAL

I. WHETHER PURSUANT TO FLA. R. CIV. P. 1.070(j), THE TRIAL COURT WAS CORRECT IN DISMISSING THIS ACTION WHERE MORALES FAILED TO SHOW GOOD CAUSE FOR HIS FAILURE TO EFFECT SERVICE WITHIN 120 DAYS OF FILING THE COMPLAINT?

   A. MORALES HAS FAILED TO MEET HIS BURDEN OF SHOWING A CLEAR ABUSE OF DISCRETION BY THE TRIAL COURT.

   B. MORALES, BY FAILING TO MAKE DILIGENT EFFORTS TO EFFECT SERVICE WITHIN THE 120-DAY PERIOD, CANNOT SHOW GOOD CAUSE.

   C. LACK OF PREJUDICE TO RESPONDENTS IS NOT A RELEVANT FACTOR TO BE CONSIDERED, WHERE MORALES FAILED TO ESTABLISH GOOD CAUSE.

   D. "NOTICE" IS NOT A RELEVANT FACTOR TO BE CONSIDERED ON A RULE 1.070(j) DISMISSAL.

   E. EXCUSABLE NEGLECT.

   F. THERE IS NO REASON TO CONSTRUE RULE 1.070(j) LIKE RULE 1.500.

   G. RULE 1.070(j) REQUIRES SERVICE TO BE MADE WITHIN 120 DAYS, NOT 124 DAYS.

   H. RULE 1.070(j) HAS NOT DEPRIVED MORALES OF HIS RIGHT OF ACCESS TO THE COURTS.

II. WHETHER MORALES HAS WAIVED ANY ISSUES NOT PRESENTED TO THE TRIAL COURT?

III. WHETHER RESPONDENTS DID NOT WAIVE THEIR RIGHT TO SEEK A RULE 1.070(j) DISMISSAL?

IV. WHETHER A RULE 1.070(j) DISMISSAL IS NOT PRECLUDED WHERE SERVICE IS EFFECTED AFTER THE 120-DAY PERIOD, I.E., THE FOURTH DISTRICT MORALES DECISION VERSUS THE THIRD DISTRICT BERDEAUX DECISION?

SUMMARY OF ARGUMENT

This case involves a lawsuit which had previously been filed in Broward County, and dismissed for failure to prosecute. Thereafter, three days prior to the Statute of Limitations' running, MORALES, on August 17, 1989, filed this second lawsuit in Palm Beach County, Florida. The action was dismissed for MORALES' failure to comply with Rule 1.070(j), requiring service of the summons and complaint to be effected within 120 days of filing the complaint, unless good cause is shown.

In the instant matter, the 120-day deadline expired on December 15, 1989. MORALES did not attempt to serve RESPONDENTS even once during the 120-day period. On the 110th day after filing the Complaint, MORALES' counsel merely mailed summonses to the Clerk of the Court for issuance. Service was ultimately effected on RESPONDENTS, through their registered agent, C. T. Corporation, on December 19, 1989, four days after the 120-day time period had elapsed.

MORALES has failed to show any "good cause" for his failure to serve RESPONDENTS within the 120-day time period. MORALES made no reasonable effort which would result in service of process upon RESPONDENTS within the 120-day period. In fact, MORALES' counsel stated he chose not to have the summonses issued earlier, although he was aware of Rule 1.070(j)'s time constraints. Therefore, the mandate of Rule 1.070(j) is clear; dismissal is required.

The fact that MORALES effected service of process after the 120-day period, but before the Motion to Dismiss was filed and/or a hearing thereon was held, is irrelevant. If late service, no

matter how untimely, is allowed, without a showing of good cause, Rule 1.070(j) becomes totally meaningless. Rule 1.070(j) should not be interpreted so as to allow dismissal only where the defendant files a motion to dismiss before being served. If so interpreted, the Rule would have a defendant submit to the court's jurisdiction in advance of service. Of course, a dismissal under Rule 1.070(j) would then only be available to those defendants who somehow know of a lawsuit, without being served.

The Fourth District Morales decision, unlike the Third District Berdeaux decision, and its progeny, give effect to the clear provisions of Rule 1.070(j). Berdeaux and progeny, by refusing to dismiss an action where service is made after 120 days, but before a motion to dismiss is filed, or a hearing held thereon, render void the Rule's "good cause" and 120 day requirements. The Third District has, incorrectly, equated service, no matter how untimely, with "good cause." It is respectfully submitted that the Morales decision is the better reasoned opinion and the only one that gives effect to the requirements of Rule 1.070(j).

MORALES, by not raising the following issues at the trial court level, has waived these arguments and cannot present them for the first time on appeal: 1) that RESPONDENTS waived Rule 1.070 time requirements by not raising same until the Supplemental Motion to Dismiss (served 13 days after the initial Motion to Dismiss and before any hearing thereon); 2) that one RESPONDENT's propounding discovery 3 days before raising Rule 1.070(j) in the Supplemental Motion to Dismiss, waived all RESPONDENTS' rights to raise untimely service; 3) that RESPONDENTS had notice of this action, and

suffered no prejudice from late service;[5] 4) that Rule 1.070(j) violates MORALES' constitutional right of access to the courts.

RESPONDENTS raised MORALES' failure to comply with Rule 1.070(j) on January 31, 1990, in a supplement to their Motion to Dismiss, which had been served on January 18, 1990. The supplemental Motion to Dismiss was filed before any hearing was held on RESPONDENTS' Initial Motion to Dismiss, before MORALES responded thereto, and before RESPONDENTS filed an Answer to MORALES' Complaint. Therefore, RESPONDENTS did not waive the issue of a Rule 1.070(j) dismissal.

The fact that one RESPONDENT, UNISYS CORPORATION, propounded discovery, subsequent to filing the initial Motion to Dismiss, likewise does not constitute a waiver of Rule 1.070(j)'s requirement of timely service. Propounding discovery is not an affirmative action.

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[5]MORALES never even mentioned "prejudice" or "notice" before the trial court, much less introduced any evidence as to those issues.

ARGUMENT

I.

PURSUANT TO FLA. R. CIV. P. 1.070(j), THE TRIAL COURT WAS CORRECT IN DISMISSING THIS ACTION WHERE MORALES FAILED TO SHOW GOOD CAUSE FOR HIS FAILURE TO EFFECT SERVICE WITHIN 120 DAYS OF FILING THE COMPLAINT.

A. MORALES HAS FAILED TO MEET HIS BURDEN OF SHOWING A CLEAR ABUSE OF DISCRETION BY THE TRIAL COURT.

The trial court's dismissal of this action for MORALES' failure to comply with Rule 1.070(j) must be deemed correct, unless the dismissal constitutes a clear abuse of discretion. Owens v. Ken's Paint and Body Shop, 196 So.2d 17 (Fla. 3d DCA 1967).

> A ruling on a motion for order of dismissal for failure to prosecute is subject to attack only on the ground that it constitutes an abuse of discretion and this heavy burden must be borne by the losing party . . . . Lake Crescent Dev. Corp. v. MK Flowers, 355 So.2d 867, 868 (Fla. 1st DCA 1978).

Just as there is a strong presumption of correctness in favor of a trial court's ruling on a motion to dismiss for lack of prosecution, a similar presumption of correctness should be applied to the granting of a dismissal for failure to effect service as required by Rule 1.070(j). See Douglas v. Eiriksson, 347 So.2d 1074 (Fla. 1st DCA 1977).

Therefore, the trial court's dismissal of this action must be affirmed unless MORALES meets the heavy burden of showing a clear and unmistakable abuse of judicial discretion, as well as demonstrating that the conclusion reached, i.e., dismissal, is erroneous. Clem v. Clem, 215 So.2d 789-90 (Fla. 4th DCA 1968). In order to establish the requisite clear abuse of discretion, MORALES must show that the dismissal is "arbitrary, fanciful or

unreasonable." Roberto v. Allstate Ins. Co., 457 So.2d 1148, 1150 (Fla. 3d DCA 1984).

> In reviewing this type of discretionary act of a trial judge, an appellate court must apply the reasonableness test to determine whether the trial court abused its discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. Id. at 1150.

By no stretch of the imagination has MORALES met this burden.

B. MORALES, BY FAILING TO MAKE DILIGENT EFFORTS TO EFFECT SERVICE WITHIN THE 120-DAY PERIOD, CANNOT SHOW GOOD CAUSE.

Rule 1.070(j) states as follows:

> (j) Summons--Time Limit. If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading and the party on whose behalf service is required does not show good cause why service was not made within that time, the action shall be dismissed without prejudice or that defendant dropped as a party on the court's own initiative after notice or on motion. (Emphasis added).

This subsection, which is virtually identical to Fed. R. Civ. P. 4(j), was added: "to require plaintiffs to cause service of original summons within 120 days of filing the complaint absent good cause for further delay." In re Amendments To Rules of Civil Procedure, 536 So.2d 974, 975 (Fla. 1988).

MORALES did not attempt to serve RESPONDENTS even once during the 120 day period. MORALES is not contending that RESPONDENTS evaded service, that their service address was unknown, or that repeated attempts at service were made.

The complaint was filed by MORALES on August 17, 1989. Service of the initial process and complaint was required to be made no later than December 15, 1989, a Friday. On December 5,

1989, 110 days into the 120-day period, MORALES' attorney mailed summonses to the Clerk of the Court for issuance.[6] However, service of process was not effected upon RESPONDENTS' registered agent, C. T. Corporation, until December 19, 1989, four days after the 120-day time period had elapsed. MORALES did not move for an extension and/or enlargement of time within which to serve the summonses and complaint on RESPONDENTS.

It is undisputed that MORALES did not effect service within 120 days. Absent a "good cause" showing by MORALES, a dismissal is mandatory under Rule 1.070(j). The Affidavit filed by MORALES' counsel is the only "good cause evidence" presented and preserved in this record. The conclusory, legally insufficient and late-filed Affidavit[7] states:

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[6]Florida Rule of Civil Procedure 1.090 provides an additional 5-days where a party makes use of the mail. This 5-day period is calculated exclusive of intermediate Saturdays or Sundays. MORALES, by mailing the summonses for issuance on December 5, 1989, and by requesting that they be returned to him by mail, did not allow adequate time. Calculating 5 days from December 5, 1989, excluding weekends, would have meant that MORALES' attorney could reasonably expect the Clerk to receive the summonses on December 12, 1990. Even had the Clerk immediately returned the summonses, their estimated date of arrival (5 days excluding weekends) would have been December 19, 1990, past the 120-day period.

[7]The Affidavit, which was handed to the trial court at the hearing on the Motion to Dismiss, does not show that it was ever served upon RESPONDENTS' counsel. (R. 22-23). The Affidavit does not reflect that it is made on personal knowledge, and/or that the Affiant was competent to testify as to the allegations contained therein. The Affidavit is conclusory and does not set forth such facts as would be admissible into evidence. Therefore, the Affidavit itself could not be considered on the issue of "good cause." Montejo Inv., N.V. v. Green Companies, Inc. of Fla., 471 So.2d 158 (Fla. 3d DCA 1985); Stolzenberg v. Forte Towers South, Inc., 430 So.2d 558 (Fla. 3d DCA 1983); American Baseball Cap, Inc. v. Duzinski, 308 So.2d 639 (Fla. 1st DCA 1975); Thompson v. Citizens Nat'l Bank of Leesburg, Fla., 433 So.2d 32 (Fla. 5th DCA

3. David Morales filed suit in Palm Beach County Circuit Court pursuant to the attached receipt from the Clerk of Court on or before August 20, 1990. [The record in this cause shows, however, that the Complaint was filed on August 17, 1989].

4. Summons for service on each of the Defendants was mailed to the Clerk of Court on December 5, 1989 and issued by the Deputy Clerk, Marianita Castillo on December 8, 1989.

5. The issued Summons were returned by mail to Fort Lauderdale, Florida, received and served on each of the Defendants through their resident agent on December 19, 1989.

6. Although the process was issued by the Clerk, mailing by return mail was delayed briefly before service of process was affected [sic].

7. Once process was issued by the Clerk, the undersigned diligently attempted to effect service of process upon the respective Defendants. (R. 22-23; App. 13-14).

The Affidavit submitted by MORALES' counsel fails to suggest even an iota of "good cause" for the failure to serve within the 120-day period. Perhaps, paragraph 7 of the Affidavit (R. 23; App. 14) best sums up the situation.

> 7. Once process was issued by the Clerk, the undersigned diligently attempted to effect service of process upon the respective Defendants. (Emphasis added).

Apparently, MORALES' "diligent" effort began when he received the issued summonses, after the 120 day period expired. However, MORALES' "diligent" efforts exemplify the cliche, "too little, too late."

The Affidavit offers no explanation for MORALES' total failure to take any steps toward effecting service within the 120 days.

1983); Florida Power Corp. v. Zenith Ind. Co., 377 So.2d 203 (Fla. 2d DCA 1979).

The Affidavit does not explain why MORALES did not use a courier or one day mail service to have the summonses issued, but, instead, relied upon the U.S. mail service, at what, MORALES contends, without record evidence, is the busiest mail time of the year.[8] Of course, Fla. R. Civ. P. 1.090 renders MORALES' mail attempt untimely at any time of the year. The Affidavit does not explain why, on the 119th or 120th day, when the issued summonses had not been received by return mail, a motion for enlargement of time was not filed. The Affidavit does not state why issued summonses were not obtained earlier.

MORALES' counsel's cavalier attitude towards the requirements of Rule 1.070(j) is evident. First, he did absolutely nothing until the 110th day after filing the Complaint. Second, on the 110th day, he mailed summonses to the Clerk for issuance. Third, when he did not get the issued summonses back in time, he did nothing! Fourth, at the hearing on the Motion to Dismiss on March 6, 1990, MORALES' counsel, although cognizant of the Rule's time constraints, still had not computed when the 120-day period had elapsed. MORALES' counsel stated, "Now, again, the pertinent time period I'm not aware of what it is." (R. 9; App. 9).

Rather than showing the requisite "good cause," it is respectfully submitted that the aforesaid Affidavit, coupled with the attorney's knowledge of Rule 1.070(j)'s implications, evidence

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[8]MORALES, before the Fourth District, contended that a courier was too costly. However, courier expense would have been far less than the appellate filing fees he has since incurred.

a callous disregard for compliance. The Affidavit is tantamount to "no cause."

At the hearing, MORALES' counsel, although not under oath, stated that "he chose" not to have the summonses issued earlier because he had some unidentified "problems" communicating with his client and did not know what his client's status was, whatever that means. (App. 8-9). Unless deliberate disregard of Rule 1.070(j) can satisfy the "good cause" requirement, no conclusion, other than that reached by the trial court, can logically should be reached.

Rule 1.070(j) is not satisfied when only the issuance of a summons has occurred within the 120-day time period. The Rule requires service, or "good cause" for failure to timely serve. "Good cause" requires efforts that would result in service during the 120 days. "At very little effort and expense to" MORALES, service could have been timely made. Reed Holdings, Inc. v. O.P.C. Corp., 122 F.R.D. 441 (S.D.N.Y. 1988).

Contrary to MORALES' protestations, Rule 1.070(j) is not unduly harsh. Rule 1.090(b), providing for enlargements of time, ensures that any "harshness" in Rule 1.070(j), is tempered. MORALES, although apparently aware that service would not be effected within the 120 days (issued summonses had not been obtained) never requested an enlargement of time.[9]

The case sub judice does not reveal a track record of diligent prosecution. The case had been filed once before in Broward

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[9]This is not to say that any such motion would have been granted. Even a Rule 1.090(b) motion can only be granted "for cause" which presumably means "good cause."

County, and dismissed for failure to prosecute. The case was then refiled in Palm Beach County, three days before the 4 year Statute of Limitations expired. In view of the impending Statute of Limitations' bar, it was incumbent upon MORALES and his counsel to be even more vigilant in securing prompt service of process. MORALES and his counsel must now bear the burden of their blatant failure to secure service in a timely manner.

This cause involved service upon RESPONDENTS' registered agent, C. T. Corporation, undeniably the easiest method of serving process in the State of Florida. However, MORALES was not able to accomplish this simple feat within 120 days. Placing blame on the U.S. Postal Service and/or Clerk of the Court is of no avail to MORALES.[10]

MORALES and his attorney are so busy "pointing their fingers" at the U.S. Postal system and/or the Clerk's office, they cannot see the forest for the trees. Neither the Clerk's office nor the U.S. Postal system waited until three days prior to the expiration of the Statute of Limitations to initiate suit. Neither the Clerk's office nor the U.S. Postal system sat back and did nothing to effect service within the 120 days. Neither the Clerk's office nor the U.S. Postal system decided, on the 110th day, to mail summonses for issuance. More important, neither the Clerk's office

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[10]MORALES asks that this Court take judicial notice that December 19, 1989, was at the height of the holiday season. It is respectfully submitted that an appellate court should not do so. See Ellsworth v. Insurance Co. of N. America, 508 So.2d 395 (Fla. 1st DCA 1987). Even assuming that judicial notice would be proper, why did MORALES and his attorney not take notice of the impending holiday season?

nor the U.S. Postal system were responsible for ensuring service of process within 120 days.

As further "good cause" evidence, MORALES' attorney states that he "diligently had the summonses served the same day, or next, after receiving them from the Deputy Clerk." MORALES and his attorney were apparently so "concerned" about service that they did not bother to have service effected immediately upon receipt of the issued summonses. "Dilatory," not diligent, is a far more accurate description of this conduct. Clearly, MORALES has failed to show a clear abuse of discretion by the trial court in dismissing his action.

The cases interpreting Fed. R. Civ. P. 4(j), after which Rule 1.070(j) appears to have been patterned, are pertinent and highly persuasive in determining whether the trial court's dismissal of this action was correct. Savage v. Rowell Distrib. Corp., 95 So.2d 415 (Fla. 1957); Crump v. Gold House Restaurants, Inc., 96 So.2d 215 (Fla. 1957); Moore v. State, 452 So.2d 559, 562 (Fla. 1984).[11]

The federal counterpart, Rule 4(j), requires an action to be dismissed where service is not made within the 120-day period and the plaintiff fails to show good cause. Vietmeier v. Farley, 126 F.R.D. 498 (W.D. Pa. 1989). In that case, it was held that where service was attempted once, with no result, and a second attempt occurred just 16 days before the expiration of the 120-day time

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[11]Many states have a rule identical or similar to Florida's Rule 1.070(j). These rules are interpreted in the same manner was the instant cause as is Fed.R.Civ.P. 4(j). Green v. Wiggins, 803 S.W.2d 536 (Ark. 1991); Dallman v. Merrell, 803 P.2d 232 (Nev. 1990); Read v. Miller, 788 P.2d 883 (Kan. 1990); Shuman v. Stanley Works, 571 N.E.2d 633 (Mass. App. 1991).

period, a dismissal was required. In the case at bar, no attempt at service was made before the expiration of the 120-day period.

The federal decisions interpreting Rule 4(j) recognize the federal courts' "power to vindicate" their "control of" their dockets, "and to protect named defendants in cases brought" in federal courts. Johnston v. Ethyl Corp., 683 F. Supp. 1059 (M.D. La. 1988). Certainly, Florida state courts have the same right.

Strict adherence to the provisions of Fed. R. Civ. P. 4(j) is required. West Coast Theater Corp. v. Portland, 897 F.2d 1519 (9th Cir. 1990) (dismissal held proper where all pages of the complaint were not served within 120 days); In re City of Philadelphia Litigation, 123 F.R.D. 515 (E.D. Pa. 1988) (dismissal held proper where complaint, but not the summons, was served within 120 days). "Meticulous" efforts to comply with the Rule's service provisions are required before "good cause" is established. Id.

> Accordingly, the Court of Appeals has construed the good cause provision narrowly, as protecting only those "diligent plaintiffs who, though making every effort to comply with the dictates of the rule, nonetheless exceed the 120-day limit for service." Id. at 518.

Strict adherence to Rule 1.070(j)'s provisions should also be required, especially where, by its own explicit terms, Rule 1.070(j) states that an action "shall" be dismissed for lack of compliance. MORALES can hardly be considered to have made "every effort" to comply with Florida's Rule 1.070(j), when his "efforts," meager as they were, did not even commence until December 5, 1989, 110 days after the Complaint had been filed.

> In this case, the reasons advanced as "good cause" are really no cause at all. As for the 69 days of inaction from May 4 to July 12, prior counsel's so-called

> "inadvertence" is precisely the factor the rule was aimed at. Its entire focus was to force plaintiffs' (more realistically their lawyers') diligence in order to preserve causes of action against limitations problems. . . . and even if it were assumed Coleman's new lawyer is not to be charged with constructive knowledge of the delinquency before he actually learned of the non-service on August 24, eight days then still remained to effect service within the Rule 4(j) limit. There is no hint of any reason timely service could not have then been obtained. If that were in fact a problem, Coleman had available to him--but did not file--a Rule 6(b) motion to extend the time period. . . . Coleman v. Greyhound Lines, Inc., 100 F.R.D. 476, 477 (N.D. Ill. 1984). (Emphasis added).

Had MORALES begun his "efforts" earlier, it is obvious that timely service, on C. T. Corporation, could have been obtained within the 120-day time period. The Court need not strain to find "good cause," where none exists. Id.[12]

In Lovelace v. Acme Markets, Inc., 820 F.2d 81 (3d Cir. 1987), a plaintiff's misplaced reliance upon the word of the process server that process had been effected when, in fact, it had not, was held not to establish the requisite "good cause."

> "Half-hearted" efforts by counsel to effect service of process prior to the deadline do not necessarily excuse a delay, even when dismissal results in the plaintiff's case being time-barred due to the fact that the statute of limitations on the plaintiff's cause of action has run. Id. at 84.

The 120-day provision for service requires:

> that the plaintiff and his counsel be denied the luxury of sitting back and waiting until the 120-day period expires before ensuring that process has been served upon the defendant. When the 120-day period reaches its expiration and adequate proof of service of process has

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[12]There were no "missing" Defendants in the instant case, nor was there any allegation that C. T. Corporation was attempting to evade service. In view of C. T. Corporation's business, and the ease with which service is effected upon C. T. Corporation, MORALES' lack of good cause becomes crystal clear.

> not been received, the plaintiff must taken additional steps to ensure timely service of process, or, in the alternative, move under Fed. R. Civ. P. 6(b) for an enlargement of the time to effect service of process. Id. at 84.

The 120-day period in the instant cause expired on December 15, 1989, a Friday. On that date, MORALES and his counsel were aware that they did not have in hand proof of service upon RESPONDENTS. However, MORALES and his counsel did nothing. No motion for enlargement of time pursuant to Fla. R. Civ. P. 1.090(b) was filed. To excuse MORALES from the Rule's mandate of dismissal, on the basis of the less than "half-hearted" efforts exerted, would render the requirements of Rule 1.070(j) illusory and meaningless.

> It cannot be said that the acts of plaintiff and his counsel as the 120-day period reached its expiration constituted diligent efforts to ensure timely service of process. Alternative means to effect timely service of process were available. . . . This lack of diligence and inadvertence to the running of the 120-day period, even when dismissal . . . could spell the end of Lovelace's cause of action, cannot be excused if the legislative intent for strict interpretation of Fed. R. Civ. P. 4(j) is to be followed. . . . Id. at 85.

MORALES and his counsel had the obligation to effect service timely. They, and no one else, ignored this duty by not serving RESPONDENTS earlier. Stated simply, they "risked" the lawsuit and lost. See Red Elk v. Stotts, 111 F.R.D. 87 (D. Mont. 1986).

MORALES' counsel, at the hearing on the Motion to Dismiss, attempted to present "hodgepodge" excuses for the failure to timely serve. These included: 1) C. T. Corporation was not open on weekends[13] (yet the 120-day time period expired on Friday,

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[13]Nor was it required to be open on weekends, since by statute the office of a registered agent need only be open from Monday to Friday. § 48.20, Fla. Stat. (1989).

December 15, 1989); 2) that there were unspecified, undated communication problems between MORALES and his counsel ("We had some problems communicating with our client and did not want the summons issued until we knew what our client's status was.") (R. 8; App. 8); 3) "The only reason that there was any delay whatsoever" was because the request for issuance of the summonses was mailed (counsel was presumably not "forced" to use the U.S. mail) (R. 8; App. 8);[14] and 4) on appeal, MORALES states it was the postal service's busiest time of the year. (MORALES theoretically knows that Christmas comes every December). Never once is MORALES candid enough to admit that his inactivity, for 110 days, was a contributing factor. Of course, had service been effected when the Complaint was filed (when there were no communication problems), no such reaching for an explanation would be required.

The above statements, even if admissible, fall woefully short of anything approaching "good cause."

> The plaintiff bears the burden of showing good cause. . . . However, inadvertent delay in service does not constitute good cause; plaintiff must have made a "reasonable effort" to effect timely service. . . . Determination of whether good cause is demonstrated in a given case is a matter of discretion.
>
> * * *
>
> This court finds that, because Rule 4(j) states a 120 day limit to service, a plaintiff only makes reasonable efforts if it proceeds in a manner reasonably calculated to effect service within 120 days. Plaintiffs should assume that they have a 120 day "deadline." United States v. Fields, 703 F. Supp. 749, 751 (N.D. Ill. 1989). (Emphasis added).

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[14]None of the statements were made under oath.

Patently, MORALES' efforts were not reasonably calculated to effect service by December 15, 1989, the 120th day.

MORALES' excuses do not justify ignoring the mandate of Rule 1.070(j). In fact, inasmuch as MORALES' counsel was aware of Rule 1.070(j)'s deadline (R. 9; App. 9), his failure to secure prompt service is tantamount to being intentional. Smith v. Pennsylvania Glass Sand Corp., 123 F.R.D. 648 (N.D. Fla. 1988).

> [T]he court reviews Mr. Smith's several explanations for his failure to timely serve the defendants in this case. . . . First, counsel relates that the plaintiff did not want to force the defendants to defend this suit which he might not have the financial resources to litigate. For this reason, Mr. Smith filed the complaint but did not authorize his attorney to serve it. Jerry G. Traynham, the plaintiff's lawyer, was presumably unable to obtain Smith's permission to serve the complaint because Smith's far-reaching efforts to obtain new employment kept him incommunicado. . . .
>
> Several things are significant about the foregoing explanation by the plaintiff. First, it is clear that the plaintiff made no attempt to serve the defendants within the 120 days required by the rule. Like the plaintiff in Fimbres discussed above, Mr. Smith did not explain his financial difficulties to the court prior to the expiration of the 120 day period. While Mr. Traynham may have lacked his client's authority to serve the complaint, surely it cannot be argued that counsel needed permission from his client to timely file a motion to extend the 120 day period. . . .
>
> Indeed, after reviewing plaintiff's explanations, it seems that Mr. Smith's delay has been almost intentional. Rule 4(j) is intended to force parties to be diligent in prosecuting their cases. Plaintiff cannot deliberately or even inadvertently "wait and see" if his financial resources improve enough to allow him to diligently prosecute his case. While the court is sympathetic to the plight of the working man, it cannot condone the actions of a plaintiff who files a complaint, waits 150 or so days to serve it and then, in response to motions to dismiss under rule 4(j), argues that he lacked the resources and the time to prosecute it.
>
> In conclusion, this court finds that plaintiff has not shown good cause for his failure to serve the defendants

> within the 120 day period established by rule 4(j). Id. at 651-2. (Emphasis added).

Likewise, MORALES' undefined communication problems with his attorney are not sufficient to establish the requisite "good cause." There has been no showing made, or attempted, as to why any such "communication problems" prevented service from being made. Certainly, MORALES' attorney could have served RESPONDENTS, through C. T. Corporation, without communicating with MORALES. MORALES' attorney could also have filed a timely motion to extend the 120-day period, pursuant to Fla. R. Civ. P. 1.090(b), but failed to do so.

The purpose of Rule 1.070(j) would be thwarted if excuses, such as those advanced by MORALES and his counsel, were held to constitute "good cause." Rule 1.070(j) would be rendered a virtual nullity if MORALES' explanation could defeat the mandated dismissal.

> Wei does not contend that either he or his attorney attempted to serve the defendants, . . ., was confused about the requirements for service of process, . . ., or was prevented from effecting service within the 120 day limit by factors beyond his control. . . . If we were to hold that Wei's attorney's inadvertent failure to calendar the Rule 4(j) deadline constitute's "good cause," the good cause exception would swallow the rule. Wei v. Hawaii, 763 F.2d 370, 372 (9th Cir. 1985). (Emphasis added).

No factors beyond the control of MORALES or his attorney are set forth which would justify the failure to effect timely service. Under the federal decisions interpreting Rule 4(j), "good cause" is not shown by counsel's inadvertence, heedless non-service and/or negligence. Lewellen v. Morley, 909 F.2d 1073 (7th Cir. 1990);

Reynolds v. Federal Crop. Ins. Corp., 752 F. Supp. 986 (D. Colo. 1990), 725 F. Supp. 1281 (N.D.N.Y. 1989).

> Finally, incorrect use of service by mail and the delay in mailing the summons and complaint to the Secretary of State demonstrates total inattention to an important procedural rule and a lack of diligence on the part of counsel. Hubbard v. Aid Assoc., Inc., 135 F.R.D. 83, 85 (D. Del. 1991). (Emphasis added). (Case dismissed where service made 20 days late).

MORALES' counsel "frittering away" 110 days of the 120 day period, is not good cause. Dismissal is the mandated and readily foreseeable consequence.

> [t]he lesson to the federal plaintiff's lawyer is not to take any chances. Treat the 120 days with the respect reserved for a bomb. . . .
>
> In this instance, plaintiff's counsel treated the 120 days with the respect it reserved for a child's cap gun. Sheets v. Schlear, 132 F.R.D. 391, 393 (D.N.J. 1990).

The decision not to serve was an intentional decision on the part of MORALES' counsel, and this, in itself justifies the dismissal. Smith, supra. "Intentional delay of service is more inexcusable than inadvertence." Fimbres v. United States, 833 F.2d 138 (9th Cir. 1987).

That the Statute of Limitations now bars MORALES' action is not a factor to be considered in determining whether or not "good cause" is shown. United States v. Fields, 703 F. Supp. 749 (N.D. Ill. 1989).[15] MORALES did not deem the potential Statute of

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[15]MORALES argues that the Rule 1.070(j) dismissal shortened the applicable statute of limitations. The statute of limitations in this cause expired on August 20, 1989. The subsequent dismissal, in 1990, one year later, in no way shortened the limitations period.

Limitations bar as a factor important enough to secure timely service, yet requests this Court to do so.

> Here, dismissal without prejudice would time bar this action, because the statute of limitations has already run. Nevertheless, due to the facts of this case, the court is unwilling to consider the factor as weighing in plaintiff's favor. The only reason that dismissal pursuant to Rule 4(j) would prejudice plaintiff is plaintiff's extreme delay in filing this action. And only plaintiff's lax pursuit of its own assessment accounts for the last minute filing of this action. Thus, plaintiff brought the prejudicial impact upon itself. . . . Consequently, prejudice to the parties is not a factor in the court's determination of good cause. Id. at 751.

Rule 1.070(j) requires only that the dismissal be without prejudice, not without consequence. In the instant cause, MORALES' cause of action had been dismissed, once before, for failure to prosecute. MORALES made the decision not to refile the lawsuit until three days before the Statute of Limitations ran. The subsequent laxity in proceeding to effect service is attributable to MORALES. MORALES and his counsel had control of their actions, more aptly described as non-actions.

> But Congress balanced such policy considerations in enacting Rule 4(j). By providing that district courts "shall" dismiss a complaint served over 120 days after its filing unless service took place in a foreign country or good cause for untimely service has been shown, Congress mandated dismissal in the circumstances of this case. We recognize that Wei may be harmed by his attorneys' neglect, but "litigants are bound by the conduct of their attorneys, absent egregious circumstances which are not present here." Wei, supra, at 372.

If MORALES' "explanations" were held to establish the requisite "good cause" for untimely service, they would allow "the good cause exception to swallow" Rule 1.070(j). Townsel v. Contra Costa County, Cal., 820 F.2d 319 (9th Cir. 1987). MORALES and his

counsel must bear the fatal consequences of having played "foot loose and fancy free" with the requirements of Rule 1.070(j), especially after having waited until virtually the eve of the Statute of Limitations' deadline to file the Complaint. Green v. Humphrey Elevator & Truck Co., 816 F.2d 877 (3d Cir. 1987). However, they have no one to blame but themselves for the dismissal of this action, which was entirely appropriate under the circumstances. Their alleged "inadvertence," tantamount to intentional, heedless inaction, is precisely the type of conduct prohibited and contemplated by the Rule. MORALES' appellate counsel's presentation of other generalized excuses does nothing to salvage the situation.

C. LACK OF PREJUDICE TO RESPONDENTS IS NOT A RELEVANT FACTOR TO BE CONSIDERED, WHERE MORALES FAILED TO ESTABLISH GOOD CAUSE.

MORALES attempts to read into Rule 1.070(j) an exception that an action cannot be dismissed, unless a defendant has been prejudiced by the plaintiff's failure to effect service in a timely manner.[16] However, no such exception is set forth in the Rule, nor has any evidence regarding lack of prejudice to RESPONDENTS been presented. Since the rule was enacted to ensure service within 120 days, prejudice, or lack thereof, to a defendant is irrelevant. Boykin v. Commerce Union Bank, 109 F.R.D. 344 (W.D. Tenn. 1986). The existence or non-existence of prejudice to a defendant, has no

[16]This argument advanced, for the first time, on appeal is waived as discussed in Point II of this Brief.

bearing on why a plaintiff did not secure service within 120-days. Id.[17]

Indeed, the majority of federal courts do not consider prejudice to the defendant as a relevant factor. Those federal courts that consider "prejudice" as a factor, do so only when it is supportive of dismissal. United States v. Fields, supra.

> More importantly, if absence of prejudice were a recognized ground for avoiding the dismissal sanction of Rule 4, the service scheme contemplated by the federal rules would be severely undermined. In Re City of Philadelphia Litigation, 123 F.R.D. 515, 519 (E.D. Pa. 1988).

"The absence of prejudice to a defendant does not enhance a plaintiff's case for demonstrating good cause." United States v. Fields, supra, at 751.

> Since the policy behind the 120-day limit is primarily "to encourage prompt movement of civil actions in federal courts," . . . the absence of prejudice to the defendant would not appear to be a relevant consideration. 2 J. Moore & J. Lucas, Moore's Federal Practice Sec. 4.46 at 4-433 n.8 (2d Ed. 1986).[18]

Thus, inasmuch as MORALES has failed to show good cause for the untimely service, prejudice or lack thereof, to RESPONDENTS is irrelevant. Even if prejudice were a factor, MORALES has offered no evidence on this issue.

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[17]In this regard, Fla. R. Civ. P. 1.420(e), pertaining to dismissals for failure to prosecute, is most analogous. No prejudice-to-the-defendant requirement is read into this rule.

[18]Those federal courts which have considered the prejudice to a defendant in deciding whether a dismissal under Rule 4(j) is appropriate, have done so only after finding that the plaintiff was diligent in attempting to make service within the allotted time. In Re City of Philadelphia Litigation, supra, at 520.

D. "NOTICE" IS NOT A RELEVANT FACTOR TO BE CONSIDERED ON A RULE 1.070(j) DISMISSAL.

MORALES also attempts to justify reversal of the trial court's dismissal on the ground that RESPONDENTS had notice of the subject lawsuit, even though they were not served.[19] This argument cannot withstand judicial scrutiny. More important, the record is totally devoid of any evidence that RESPONDENTS had notice of the subject lawsuit, prior to service being effected.[20]

MORALES, in effect, is asking this Court to convert Rule 1.070(j) into the proverbial "catch-22" rule. MORALES requests that Rule 1.070(j) be interpreted so that a defendant can only obtain a dismissal if he files a motion to dismiss before service is effected. Of course, a defendant can only file a motion to dismiss if he has notice of the lawsuit. MORALES then suggests that a defendant's notice also precludes a Rule 1.070(j) dismissal. How could any defendant, served or un-served, file a motion to dismiss, without having notice of a lawsuit?

If MORALES' contentions are accepted, no defendant could ever obtain a Rule 1.070(j) dismissal. Rule 1.070(j)'s provision regarding dismissal "on motion" becomes thoroughly emasculated under MORALES' reasoning.

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[19]This argument advanced, for the first time, on appeal is waived as discussed in Point II of this Brief.

[20]Even this argument is faulty. MORALES states that since one RESPONDENT is being sued in another case by another plaintiff, all RESPONDENTS have notice of this lawsuit. Another lawsuit filed by a different plaintiff, in no way establishes notice of the existence of this lawsuit.

It is respectfully submitted that even if RESPONDENTS had notice of MORALES' lawsuit, any notice on RESPONDENTS' part would not be a substitute for the service requirements of Rule 1.070(j).

> Nonetheless, plaintiffs argue that their failure to effect service of process should not result in dismissal because defendants had actual notice of the actions and suffered no prejudice. Although plaintiffs are correct in their assertion that "actual notice" is the goal animating the service provisions of Rule 4(j), it does not follow that actual notice provides an exception to the service requirements under the Rule. . . . But the rules are there to be followed, and plain requirements for the means of effecting service of process may not be ignored. . . . The mere fact that a defendant received actual notice is not sufficient if there has not been compliance with the plain requirements of the Federal Rules of Civil Procedure. In re City of Philadelphia Litigation, supra, at 519. (Emphasis added).

Federal courts have rejected the "notice" argument advanced by MORALES, and rightly so. The rule does not refer to "notice" within 120 days.

> Indeed, if actual knowledge were regarded as sufficient, plaintiffs would have no incentive to provide their adversaries with summonses at all; if defendants were to challenge service, plaintiffs could expect to defeat the challenge by proving actual knowledge at a fact-finding hearing. Id. at 519.

"Notice", of a defendant, without service, does not vest a court with jurisdiction to enter a judgment against him.

> A defendant must be served in accordance with Rule 4's requirements or there is no personal jurisdiction; neither notice nor simply naming the defendants will subject the defendant to personal jurisdiction . . . . Davis-Wilson v. Hilton Hotel Corp., 106 F.R.D. 505, 508 (E.D. La. 1985).

Clearly, a defendant's notice of a lawsuit, absent service, does nothing to move cases along and/or "decongest" court dockets.

MORALES' "prejudice" and "notice" arguments are nothing more than an attempt to distract this Court from the only appropriate inquiry, i.e., whether the trial court abused its discretion in holding that MORALES did not make diligent efforts to secure service on RESPONDENTS within the 120-day period.

> Indeed, plaintiffs' arguments about notice and prejudice misdirect judicial attention from the core issue on service disputes: Plaintiffs' diligence. Id. at 520.

Therefore, regardless of MORALES' attempts at having this Court misdirect its attention to irrelevant, extraneous matters, this Court's focus must, it is respectfully submitted, be upon the issue of whether MORALES has demonstrated "good cause," via diligence, for his failure to effect timely service.

E. EXCUSABLE NEGLECT.

MORALES cites to cases where defaults have been set aside because of excusable neglect. Of course, Fla. R. Civ. P. 1.500(d) and 1.540 explicitly provide for setting aside defaults upon a showing of "excusable neglect," while Rule 1.070(j) requires "good cause." However, assuming arguendo, that "excusable neglect" could satisfy the "good cause" requirement of Rule 1.070(j), MORALES' excuses for late service still fall short.

> Excusable neglect may be found only where there is "a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for non-compliance with the time specified in the rules." In Re City of Philadelphia Litigation, supra, at 520.

MORALES, although offering a plethora of tenuous excuses, has failed to offer a reasonable basis for non-compliance with Rule 1.070(j).

> The message is clear. Negligence by a litigant's representative may be grounds for independent suit, but it will not support the setting aside of a default judgment save under exceptional circumstances. Westinghouse Credit Corp. v. Steven Lake Masonry, Inc., 356 So.2d 1329, 1330 (Fla. 4th DCA 1978).

MORALES' attorney's inexplicable failure to effect service does not establish the requisite "excusable neglect" for setting aside a default. "Failure of the attorney to act with no good reason given," is not "excusable neglect." Id. The failure to serve within the 120-day period is grossly negligent and inexcusable, not even satisfying the minimum standard of "excusable neglect." See Fischer v. Barnett Bank of South Florida, N.A., 511 So.2d 1087 (Fla. 3d DCA 1987).

MORALES has not yet given any clue of a "clerical or secretarial error, reasonable misunderstanding, or a system gone awry," that may have occurred. Conclusory statements, unsupported by record evidence, has never been held to constitute excusable neglect, much less good cause.

MORALES concedes, on page 18 of his Brief, that an attorney's "simply forgetting" and/or "intentionally" ignoring "the necessity to take appropriate action" would not justify setting aside a default. Yet, at the hearing MORALES' attorney, knowing the time constraints imposed by Rule 1.070(j), stated that he chose not to have summonses issued earlier. Clearly, this conduct falls within that category that would not support an "excusable neglect" finding. Knowingly disregarding this Court's rules has never been held to constitute "excusable neglect."

F. THERE IS NO REASON TO CONSTRUE RULE 1.070(j) LIKE RULE 1.500.

MORALES asks this Court to construe Rule 1.070(j) in a manner akin to that of Fla. R. Civ. P. 1.500, regarding defaults, as was done by the Third District Court of Appeal in Berdeaux, supra. However, it is respectfully submitted that there is no rational basis for doing so. Rule 1.500(c), by its very terms, allows a party to plead at any time before a default is entered. There is no requirement in Rule 1.500 that a defendant show good cause for failure to timely plead.

However, Rule 1.070(j) does not state that a plaintiff may effect service at any time before a motion to dismiss is filed and/or a hearing is held thereon. More important, if service, no matter how untimely, is acceptable as long as it is effected before a hearing on a motion to dismiss, the "good cause" and 120 day requirements of Rule 1.070(j) become "mere surplusage." Presumably, this Court did not adopt Rule 1.070(j) only to have it totally ignored.

Certainly, if a defendant can be forced to plead within 20 days, a plaintiff can be compelled to accomplish the relatively easy task of service within 120 days. Since a defendant is required to show both excusable neglect and an affirmative defense before setting aside a default, it seems not too much to require the plaintiff to show good cause for untimely service.

It is respectfully submitted that there is no justification for construing Rule 1.070(j) in a manner similar to Rule 1.500. Presumably, had this Court intended that Rule 1.070(j) not allow

for dismissals where service is effected prior to a hearing on a motion to dismiss, the rule would have said just that. To the contrary, Rule 1.070(j) requires a dismissal, if service is not made within 120 days, absent good cause.

Protestations that the Fourth District's interpretation of Rule 1.070(j) is unjust, cannot pass muster. A defendant suffers a default if he does not answer within 20 days after being served. It is, therefore, not unreasonable to suggest that a plaintiff, who does not effect service within 120 days, should suffer the consequences of a dismissal.

G. RULE 1.070(j) REQUIRES SERVICE TO BE MADE WITHIN 120 DAYS, NOT 124 DAYS.

MORALES attempts to persuade this Court that the dismissal should be reversed because there was only a "mere four-day delay."[21] It is noteworthy that Rule 1.070(j) requires service within 120 days, not 124 days. Later service is irrelevant unless the plaintiff can show good cause for not serving within the 120 days allotted. Quann v. Whitegate-Edgewater, 112 F.R.D. 649 (D. Md. 1986).

In Putnam v. Morris, 833 F.2d 903 (10th Cir. 1987), an action was dismissed where service was made 123 days after filing the complaint, where good cause was not shown; in Davis-Wilson v. Hilton Hotel Corp., 106 F.R.D. 505 (E.D. La. 1985), an action was dismissed where service was made 125 days after filing the complaint; and in Green v. Humphrey Elevator & Truck Co., 816 F.2d

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[21]Perhaps MORALES would make the same argument regarding missing a statute of limitations by 4 days.

877 (3d Cir. 1987), an action was dismissed where service was made 124 days after the complaint was filed.

> Implicit in the Court's reasoning was the primacy of the 120-day time limit; to be effective, service, by whatever means, must be completed within the 120 days period. Id. at 882.

Presumably, time limits were placed in the Florida Rules of Civil Procedure to establish deadlines, not to establish the "vicinity" within which something must be done. Rule 1.070(j) does not state that a plaintiff must effect service as close to 120 days as possible. The Rules governing Florida civil procedure are not like the rules in a game of horseshoes, i.e., "close" is not good enough.

H. RULE 1.070(j) HAS NOT DEPRIVED MORALES OF HIS RIGHT OF ACCESS TO THE COURTS.

MORALES argues that he is being deprived of his constitutionally-protected right of access to the courts, by the Rule 1.070(j) dismissal. Rule 1.070(j) does not deprive MORALES of his right of access to the courts, any more than a statute of limitation and/or dismissal for failure to prosecute would.[22] The constitutional guarantee of access to the courts does not mean that a plaintiff, who carelessly allows the 120 days to expire without effecting service, is protected from dismissal. The constitutional guarantee does not mean that a plaintiff may ignore the Florida Rules of Civil Procedure. The courts of this state were open to MORALES.

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[22]If MORALES' argument is accepted, the Florida Appellate Rules, setting forth the times for taking appeals would also violate a right of access to the courts.

The "deprivation," if any, is attributable to MORALES and his attorney, no one else. MORALES has filed two lawsuits. The first was dismissed for failure to prosecute. The second, the case at bar, was dismissed for failure to effect timely service. MORALES was not denied access to the courts. Having opened the door to the courts on two separate occasions, MORALES failed to enter the judicial system as a complying participant. Stated simply, MORALES twice slammed the judicial door in his own face. MORALES can blame only himself and his attorney if the judicial doors are now locked to him.

II.

MORALES HAS WAIVED ANY ISSUES NOT PRESENTED TO THE TRIAL COURT.

In his Brief, MORALES presents issues to this Court which were never submitted to the trial court for consideration. These issues include: 1) that the four RESPONDENTS waived the right to seek a Rule 1.070(j) dismissal because one RESPONDENT, UNISYS CORPORATION, propounded discovery after the initial Motion to Dismiss was filed; 2) that all RESPONDENTS waived the right to seek a Rule 1.070(j) dismissal by not raising the untimeliness of service until the Supplemental Motion to Dismiss (served only 13 days after the Initial Motion to Dismiss was served); 3) that a Rule 1.070(j) dismissal was improper because: A) RESPONDENTS suffered no prejudice from late service, and B) RESPONDENT had notice of the instant lawsuit (no evidence, whatsoever, regarding lack of prejudice and/or notice was ever presented; and 4) that Rule

1.070(j) is an unconstitutional deprivation of MORALES' right of access to the courts.

It is axiomatic that an appellate court cannot consider issues not presented to the trial judge, regardless of whether the appeal involves an order of dismissal or a final judgment on the merits. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). Since MORALES did not present these arguments to the trial court, he cannot do so now. Therefore, it is respectfully submitted that this Court should not consider Issue B presented by MORALES, in his Brief, as well as any other statements pertaining to any of the above issues.

> The record is devoid of a single fact which would indicate that this question was ever before the trial court. It is a rule of long standing that on appeal the Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings or ruled upon by the trial court will not be considered by this Court on appeal. Lipe v. Miami, 141 So.2d 738, 743 (Fla. 1962). (Emphasis added).

MORALES' attempt at having this Court determine issues which were not presented to the trial court should be soundly rejected. DeMendoza v. Southeast Bank, N.A., 16 F.L.W. D2279 (Fla. 4th DCA 1991); Clark v. Department of Professional Regulation, 463 So.2d 328 (Fla. 5th DCA 1985); Patterson v. Weathers, 476 So.2d 1294 (Fla. 5th DCA 1985).

> [I]t is axiomatic that it is the function of the appellate court to review errors allegedly committed by trial courts, not to entertain for the first time on appeal issues which the complaining party could have, and should have, but did not, present to the trial court. Abrams v. Paul, 453 So.2d 826, 827 (Fla. 1st DCA 1984).

Therefore, RESPONDENTS present Point III of this Brief in an abundance of caution.

III.

RESPONDENTS DID NOT WAIVE THEIR RIGHT TO SEEK A RULE 1.070(j) DISMISSAL.[23]

RESPONDENTS did not waive their right to seek a Rule 1.070(j) dismissal. Astra v. Colt Industries Operating Corp., 452 So.2d 1031 (Fla. 4th DCA 1984). On January 18, 1990, RESPONDENTS timely served their Motion to Dismiss, raising lack of jurisdiction over their persons. On January 23 and 25, 1990, RESPONDENT, UNISYS CORPORATION, alone, propounded discovery, consisting of a request to produce and interrogatories, on MORALES. On January 31, 1990, RESPONDENTS served a Supplement to their Motion to Dismiss, setting forth the propriety of a dismissal pursuant to Rule 1.070(j).[24] The Supplement was served prior to any court hearing being held on RESPONDENTS' original Motion to Dismiss, and prior to MORALES filing any response thereto. RESPONDENTS did not file an Answer prior to filing their Supplement to Motion to Dismiss.[25] MORALES did not respond to the discovery prior to the supplemental motion to dismiss being filed.

> However, in none of them do we have the present scenario, i.e. an initial motion filed without asserting the jurisdictional question but amending the motion to raise that question before the motion is heard. In this case, prior to the motion's being heard, Astra tried to amend the motion to raise the jurisdictional question so that

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[23]MORALES first argued a possible waiver by RESPONDENTS, before the Fourth District Court of Appeal.

[24]As do other amended pleadings, the supplemental motion to dismiss would "relate back" to the date the original motion was filed.

[25]Fla. R. Civ. P. 1.190 allows a pleading to be amended, as a matter of right, within 20 days of service. The supplement was filed 13 days after the original motion.

> when it was heard by the court, the motion asserted the jurisdictional defect. It seems to us hypertechnical to suggest that it was waived and we hold that under the facts of this case the question was not waived. Id. at 1032.

MORALES' counsel never raised the alleged untimeliness of the Supplemental Motion to Dismiss. In fact, he filed his Affidavit of "good cause" in response thereto, some 30 days later.

MORALES further argues that by RESPONDENT, UNISYS CORPORATION'S, propounding discovery, UNISYS CORPORATION waived the right to seek a Rule 1.070(j) dismissal.[26] MORALES cites to various cases which state that if a party takes affirmative action, prior to presenting an objection to the jurisdiction of the court, the jurisdictional inadequacy is waived.[27]

However, MORALES has overlooked one very important factor -- a defendant's propounding discovery is not an affirmative action. Public Gas Co. v. Weatherhead Co., 409 So.2d 1026 (Fla. 1982); Dimino v. Farina, 16 F.L.W. D7 (Fla. 4th DCA 1990). Clearly, this is defensive action.

The only RESPONDENT propounding discovery was UNISYS CORPORATION. The other RESPONDENTS, propounded no discovery whatsoever. MORALES further contends that UNISYS CORPORATION'S propounding discovery, after filing its Motion to Dismiss, not only waived UNISYS CORPORATION'S right to seek a dismissal pursuant to Rule 1.070(j), but also waived the remaining RESPONDENTS' similar

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[26]Once again, this argument was never presented to the trial court and must be deemed waived.

[27]In the original Motion to Dismiss, filed before discovery was propounded, RESPONDENTS did raise lack of personal jurisdiction.

right. MORALES "justifies" this total waiver theory on the ground that all RESPONDENTS were represented by the same counsel.

Of course, MORALES cites no authority for this rather extraordinary proposition. It is respectfully submitted that not only did the discovery propounded by UNISYS CORPORATION not waive its right to seek the subject dismissal, the rights of the remaining RESPONDENTS' were likewise not waived. If in fact MORALES' anomalous contention that the discovery propounded by UNISYS CORPORATIONS waived its right to seek a Rule 1.070(j) dismissal, MORALES' twisted logic could not possibly be extended to the remaining RESPONDENTS. MORALES' "intertwining" of RESPONDENTS, is more suggestive of fiction, than fact.

IV.

A RULE 1.070(j) DISMISSAL IS NOT PRECLUDED WHERE SERVICE IS EFFECTED AFTER THE 120-DAY PERIOD, I.E., THE FOURTH DISTRICT MORALES DECISION VERSUS THE THIRD DISTRICT BERDEAUX DECISION.

It is respectfully submitted that the Fourth District in its Morales decision gave Rule 1.070(j) an interpretation consistent with the Rule's express provisions. The Fifth District Court of Appeal, in Partin v. Flagler Hospital, 16 F.L.W. D1608 (Fla. 5th DCA 1991), found the Morales decision, not the Third District's Berdeaux decision, to be the correct view. The Fifth District held that the purpose of the Rule would be "frustrated" under the Third District's interpretation.

It is respectfully submitted that the Third District's decisions can, in no way, be reconciled with Rule 1.070(j)'s explicit provisions. The Third District Court of Appeal began its

erosion of Rule 1.070(j) in Berdeaux by ignoring the 120 day and good cause requirements, prohibiting a dismissal where service, no matter how untimely, is effected prior to a motion to dismiss being filed by the defendant. In effect, the Third District equated service, no matter how untimely, with the good cause requirement of the Rule. It is noteworthy that the Third District, in Berdeaux, did not even address the issue of "good cause."

Berdeaux results in several illogical and ill-conceived conclusions. First, a defendant must somehow file a motion to dismiss, without ever having been served. In order for this clairvoyant defendant to be able to file his motion, he, along with every other potential defendant, must check every courthouse in the State of Florida, everyday, to see if a lawsuit had been filed, so that 120 days can be calendared to file the motion to dismiss. Berdeaux would allow dismissals only to those defendants who have enough foresight to somehow know they've been sued, before being served. Clearly, Berdeaux undermines the intent of Rule 1.070(j).

Second, defendants, in order to avail themselves of a dismissal under Rule 1.070(j), must appear before the Court to file a motion to dismiss, without ever having been served with process. Rule 1.070(j) was promulgated to require plaintiffs to effect service within 120 days, presumably to move cases along and not congest the court systems with unprosecuted complaints. Patently, the purpose of Rule 1.070(j) is not to provide an alternative means of obtaining personal jurisdiction over a defendant, which is the result of Berdeaux interpretation. Berdeaux, rather than "burdening" plaintiffs with the obligation of service, burdens the

unserved defendant with the obligation of appearing. An illogical, if not entirely absurd result.

Third, since special appearances are not allowed, a defendant would be required to file a motion to dismiss setting forth all the grounds for dismissal of the plaintiff's action, or have them deemed waived. Thus, the defendant is put in a position of defending an action without ever having been served. Clearly, Rule 1.070(j) was promulgated to ensure a plaintiff's effecting service in a timely manner, not as an alternative to service of process.

Berdeaux' reliance on Rule 1.500, as being analogous, is also misplaced. Rule 1.070(j) requires service within 120 days, not any time prior to a motion to dismiss being filed by the defendant. Relying on Rule 1.500, results in Rule 1.070(j)'s explicit provisions being ignored. Why set forth "good cause" and 120 day service requirements if all that is really meant is service before a defendant files a motion to dismiss?

The Third District further eroded Rule 1.070(j) by holding, in Schafer v. Schafer, 16 F.L.W. D1746 (Fla. 3d DCA 1991), that service, no matter how untimely, precludes a dismissal, as long as the service was effected before a hearing was held on a motion to dismiss, or before the dismissal was actually entered. Patently, this holding takes the very heart out of Rule 1.070(j).

It defies any form of logic to conceive of any possible situations where a Rule 1.070(j) dismissal could actually be sustained in the Third District. In effect, Berdeaux would allow a dismissal only where the plaintiff wishes to dismiss his own lawsuit. However, since Rule 1.420 already allows a plaintiff to

take a voluntary dismissal, there would be no need for Rule 1.070(j) if dismissals are only allowed where the plaintiff "gives up."

The Third District's interpretation of Rule 1.070(j) is, indeed, difficult to fathom. Rule 1.420(e), regarding dismissals for failure to prosecute, absent good cause, presents a more appropriate analogy. Even the Third District recognizes that a plaintiff cannot avail himself of record activity after a motion to dismiss for failure to prosecute is filed. Yeargan v. Arrow Air, Inc., 561 So.2d 354 (Fla. 3d DCA 1990). Why should the plaintiff in a Rule 1.070(j) situation be given more latitude? In fact, there is more reason to give him less latitude.

RESPONDENTS recognize that a plaintiff filing pleadings more than 1 year after any prior activity, but before a motion to dismiss, precludes a Rule 1.420(e) dismissal. However, in a Rule 1.420(e) situation, the defendant is properly before the court and has been served. That defendant has the ability to monitor the file activity. That defendant has a reasonable opportunity to file a motion to dismiss where there has been no record activity for more than 1 year. If that defendant does not file a motion, there is no reason to disallow subsequent pleadings by the plaintiff. The Rule 1.070(j) defendant has no reasonable opportunity to file a motion to dismiss if he has not been served, and is also not properly subject to the court's jurisdiction.

In an attempt to protect negligent and dilatory plaintiffs' attorneys, the Third District has carved out "exceptions" which, in effect, "swallow" Rule 1.070(j). These exceptions amount

> . . . to a plea to disdain the Rules of Civil Procedure when they have consequences. Consequences are the goads to compliance; to use adverse effects as a reason to overlook the requirements is to reduce the incentive to comply and make litigation even longer and more complex than it is. Powell v. Starwalt, 866 F.2d 964, 966 (7th Cir. 1989).

It is respectfully submitted that the "good cause" requirement, set forth in Rule 1.070(j), must apply, else there would have been no reason to include that language within the Rule. See Townsel v. Contra Costa County, Cal., 820 F.2d 319 (9th Cir. 1987). The untimely service allowed by the Third District, without a showing of good cause, emasculates, if not castrates, Rule 1.070(j).

That the Rule might result in some hardship, if not malpractice actions, does not justify ignoring the Rule's provisions. In espousing its view, the Third District evidences a protective attitude towards plaintiffs' attorneys. The Third District sees nothing wrong with subjecting negligent defense counsel to a malpractice action, for failing to serve an answer within 20 days, but somehow objects to plaintiffs' counsel being similarly burdened for failing to effect service within 120 days. This judicial "favoritism" is not needed, as both plaintiff and defense counsel are presumably equally able to comply with the rules of this Court.

The Third District, in Berdeaux and its progeny, has, in effect, re-written the rule to its own liking. Rule 1.070(j) as interpreted by the Third District would state:

> If service of the initial process and initial pleading is not made upon a defendant prior to a hearing being held

> on a motion to dismiss for failure to serve, the action shall be dismissed.

However, Rule 1.070(j) does not so state, and therefore, should not be so interpreted.

According to the Third District, service, even if made several years after a complaint is filed, precludes a dismissal as long as the service was made before the motion to dismiss is filed and/or a hearing is held thereon and/or the dismissal is actually entered. In effect, the Third District holds that service, no matter how untimely, obviates the need for showing good cause.

Prior to Berdeaux, the Third District stated, albeit in a footnote, in Utset v. Campers, 548 So.2d 834 (Fla. 3d DCA 1989), that Rule 1.070(j) had been amended to:

> provide for dismissal without prejudice of a defendant who has not been served with process within 120 days after the filing of the initial pleading, absent a showing of good cause. Id. at 837.

This acknowledgement of the Rule's purpose is difficult to reconcile with the decisions thereafter rendered by the Third District.

In enacting Rule 1.070(j), this Court must have weighed dismissal versus diligent service and prosecution of a lawsuit. Congress, in enacting Fed. R. Civ. P. 4(j) performed a weighing test.

> In enacting Rule 4(j) Congress balanced the possible loss of a litigant's federal cause of action against the need to encourage diligent prosecution of lawsuits. . . . "By providing that district courts 'shall' dismiss a complaint served over 120 days after its filing unless . . . good cause for untimely service has been shown, Congress mandated dismissal in the circumstances of this case. Townsel, supra at 321.

It is noteworthy that Rule 1.070(j) does not bar a diligent plaintiff from prosecuting a lawsuit, where service cannot timely be effected. The diligent plaintiff will always be able to establish good cause for an enlargement of time.

> Here, however, the litigant did not institute suit until 5 days before the statute of limitations apparently ran. It is not our function to create exceptions to the rule for cases in which dismissal without prejudice may work prejudice in fact or for some causes of action on the basis that these are more favored than others. Quann v. Whitegate-Edgewater, 112 F.R.D. 649, 664 (D. Md. 1986).

MORALES, urging the Third District's interpretation of Rule 1.070(j), argues that because he had effected service of process before RESPONDENTS filed their Motions to Dismiss, as well as before the hearing thereon was held, he should not be held to the precise time limit set forth by the Rule. It would be anomalous to impose a deadline for service only to have that deadline ignored. It would be even more unjust to impose upon defendants a burden to object to service, where they are "not properly subject to the court's authority." In re City of Philadelphia Litigation, supra, at 520.

> First, Geiger argues that Rule 4(j) does not apply to this case because Allen was actually served with process. Geiger contends that Rule 4(j) applies only to situations in which the 120-day period has run and the defendant has not been served. . . . This argument is meritless.
>
> Rule 4(j) applies equally to defendants who were never served and defendants who were served after the 120-day period had lapsed. If we were to accept Geiger's reasoning, the ability of a defendant to move for dismissal of an action for failure to comply with Rule 4(j) would be virtually meaningless, since many defendants will not be aware that an action is pending until they are served. Instead, we agree that the reasoning of the Fifth Circuit that "the only exception to Rule 4(j) dismissal is good cause for failure to serve within the 120 days. Later service or later knowledge by

the defendant is irrelevant to that." Geiger v. Allen, 850 F.2d 330, 332 (7th Cir. 1988).

It is respectfully submitted that if this Court intended Rule 1.070(j) to have the interpretation adopted by the Third District, i.e., no meaning, the Rule would never have been promulgated in the first place.

> It would appear to be generally irrelevant that defendant not served within the 120-day period later finds out about the suit or is in fact later served, so long as there was not good cause for the failure to serve within the 120 days. As noted, the only exception to Rule 4(j) dismissal is good cause for failure to serve within the 120 days. Later service or later knowledge by the defendant is irrelevant to that. . . . If the defendant's mere becoming aware of the suit after the 120-day period precluded dismissal, then the "upon motion" provision of Rule 4(j) would be meaningless. Likewise, the fact that the plaintiff must be notified and given an opportunity to show good cause necessarily means that service after the 120-day period, where the delay is not excused by good cause, does not preclude dismissal, else dismissal under Rule 4(j) could almost never be effected even though there was a complete lack of good cause for failure to timely serve. Certainly, nothing in the language of Rule 4(j) infers that a dismissal there is improper merely because the defendant has been served after the 120-day period. Winters v. Teledyne Movible Offshore, Inc., 776 F.2d 1304, 1305-6 (5th Cir. 1985). (Emphasis added).

The federal decisions have consistently held that, absent special circumstances (pro se plaintiff), service effected after the 120 day period does not preclude a dismissal and is irrelevant to whether good cause existed during the 120 day period for failure to serve. McDonald v. United States, 898 F.2d 466 (5th Cir. 1990); Lorentzen v. Honeywell Heating, 120 F.R.D. 681 (N.D. Ill. 1988); United States v. Kenner General Contractors, Inc., 764 F.2d 707 (9th Cir. 1985); Braxton v. United States, 817 F.2d 238 (3d Cir. 1987); Reany v. United States, 738 F. Supp. 680 (E.D.N.Y. 1990);

Delicata v. Bowen, 116 F.R.D. 564 (S.D.N.Y. 1987); Bryant v. Brooklyn Barbecue Corp., 130 F.R.D. 665 (W.D. Mo. 1990).

> The plain language of Rule 4(j) leaves no room for excusing untimely service where there is total failure to show good cause. Id. at 668.

Similarly, the clear language of Rule 1.070(j) does not leave room to excuse untimely service where good cause is not shown.

> The court notes, however, that Rule 4(j) is subject to two possible interpretations. One view of the language contained in the Rule holds that a complaint must be dismissed if service is not made within 120 days of the filing of the complaint. The other view holds that a complaint must be dismissed only if service is not effected within 120 days after the filing of the complaint and service has not been accomplished prior to defendant's filing a motion to dismiss. After careful consideration of the language of the Rule together with the policy considerations behind it, this Court believes that Rule 4(j) requires dismissal regardless of whether any defendant has moved to dismiss the complaint . . . . This position is supported by the commentators, see 2 J. Moore, Moore's Federal Practice, § 4.46 at 4-574 (2d Ed. 1983); C. Wright, Federal Courts, § 64 at 412 n.9 (4th Ed. 1983), and makes good sense in that most defendants would not ordinarily be aware of the pendency of an action until well after the 120-day period had elapsed. Burks v. Griffiths, 100 F.R.D. 491, 492 (N.D.N.Y. 1984).

MORALES suggests that the Third District decisions are better reasoned and that the Fourth District's Morales interpretation is too "hypertechnical." On the other hand, RESPONDENTS submit that the Third District decisions give no credence to any of Rule 1.070(j)'s provisions. The Fourth District's Morales decision is not hypertechnical. To the contrary, Rule 1.070(j) provides no basis for the interpretation adopted by the Third District. There is nothing about Rule 1.070(j) that is ambiguous or vague. There is no magic required to understand the Rule's simple language. Any distaste experienced by the Third District in an even handed and

accurate application of the Rule, can in no way justify its rewriting of Rule 1.070(j).

> Finally, plaintiffs contend that dismissing these actions on a technicality would not be in the interests of justice. I recognize that the litigation of which these cases form a part is of great importance both to the parties directly involved and also to the wider Philadelphia community. Moreover, as a general matter, it is certainly desirable that controversies which require judicial disposition be adjudicated on their merits. But resort to the courts presupposes full compliance with these procedural rules that are fundamental. Rule 4(j) is such a rule. . . . ("We do not believe that 'factors of justice and equity' can override the unambiguous terms of a specific service rule.") In this instance, I find no basis for exempting plaintiffs from the Rule. Accordingly, I am persuaded that the City's motions to dismiss should be granted. Id. at 520-21.

In a last-ditch effort, MORALES suggests that he should not be held to the "rigors" of Rule 1.070(j) because it was a "new rule." The rule was effective 8-1/2 months prior to the date that MORALES filed this lawsuit. Moreover, MORALES' attorney stated that he was aware of the Rule. He simply ignored its ramifications.

The Fourth District, in its Morales decision, properly held that "the primary factor in evaluating untimely service is diligence," not later service. Id. at 1144. This is especially so where, as here, "it is undisputed that the plaintiff [MORALES] intended the delay prior to mailing the forms to the clerk." Id. at 1144. (Emphasis added).

The Third District would suffer MORALES' counsel's intentional disregard of Rule 1.070(j) because of the late service ultimately effected. The Fourth District correctly would not.

> We conclude that the appellant has failed to demonstrate an abuse of discretion. The trial court found no good cause for the delay. Morales made no effort to obtain

> service for 110 days after filing the complaint. He gave no acceptable explanation for this delay. With only a few days remaining, and being cognizant of the mandate of the rule, counsel chose to use the mail in obtaining the executed summonses. He made no effort to serve defendants until the 120 days had expired. We note that he did not contend that the defendants or their agent were evading service or had done anything to interfere with routine service of process. Id. at 1144.

The Fourth District in Morales, recognized that Rule 1.070(j) should be imposed but "need not be imposed inflexibly" where the Plaintiff shows good cause. The Third District, in effect, has decided that the Rule should not be imposed at all.

The Third District decisions do nothing but protect the very plaintiffs (dilatory) who least deserve this consideration. The Fourth District Morales decision respects the intent of Rule 1.070(j) and offers no solace to the plaintiff who intentionally disregards the rules of this Court.

CONCLUSION

Based on the foregoing reasoning and authorities, the Fourth District Court of Appeal's affirmance of the dismissal of this action is eminently correct. It is respectfully submitted that the decision of the Fourth District Court of Appeal must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits of Respondents was mailed this 20th day of September, 1991 to: Law Offices of Karen J. Haas, 13805 Southwest 83rd Court, Miami, Florida 33158; David L. Kahn, Esq., 110 Southeast 6th Street, Fort Lauderdale, Florida 33310; Richard L. Allen, Jr., Esq., 1000 Legion Place, Suite 1625, Orlando, Florida 32801; and Robert J. Beckham, Esq., 3131 Independent Square, 1 Independent Drive, Jacksonville, Florida 32202.

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