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

REPLY BRIEF ON THE MERITS OF PETITIONER, DAVID MORALES

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STATEMENT OF THE CASE

The Petitioner adheres to and adopts by reference in this Reply Brief the Statements of the Case and of the Facts contained in his Initial Brief in this cause. The parties will be referred to in this brief, as they were in Petitioner's Initial Brief, as they stand before this Court, or by proper name.

The symbols for reference used in Petitioner's Initial Brief will also be used in this Reply Brief. Additionally, the symbol "RB" will be used to designate Respondent's Brief.

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REPLY ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION BY USING THE POWER OF DISMISSAL, NOT TO CULL AN INACTIVE CASE FROM THE COURT'S CALENDAR, BUT INSTEAD TO PUNISH A PERIOD OF DELAY WHICH NO LONGER EXISTED.

Respondents assert in their brief that MORALES was not deprived of his constitutionally-protected right of access to the courts when his cause was dismissed as punishment for a 4-day delay in service some two and one-half months earlier. However, at the time MORALES' cause was dismissed, all four Respondents had been served; 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 forged ahead with discovery. Additionally, there had been an earlier incarnation of the same case.

UNISYS had taken 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. This affirmative action must be charged to all four Respondents. Each of the four Respondents were represented by the same attorney, and they filed a joint Motion to Dismiss, and a joint Supplement to Motion to Dismiss, just as they have filed joint briefs in the Fourth District Court of Appeal, and in this Court. (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 Respondents by name. (AB.4,5;A.10-31).

Under the well-reasoned cases of Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990), review denied, Case no. 77,890 (Fla. 1991)(an action

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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, 582 So.2d 121 (Fla. 3d DCA 1991), review pending, Case No. 78,341 (Fla. 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), the Trial Court committed reversible error in dismissing MORALES' Complaint. Service was effected two and one-half months prior to both the hearing on the Defendants' Motion to Dismiss and even prior to the Motion to Dismiss itself.

As the Third District wisely reasoned in Berdeaux, the purpose behind requiring service of process within 120 days of filing the complaint is "analogous to the application of Florida Rules of Civil Procedure 1.500(c), wherein the law of the state requires a default not be entered under that rule if the defendant files its answer at any time prior to the proposed entry of a default." The purpose behind Rule 1.070(j) is to speed the cause and give notice to the defendant, so as to prevent the plaintiff from impeding the defendant in marshalling evidence for his defense, just as the purpose behind the rule for default judgments is to speed the cause and prevent defendant from impeding plaintiff in prosecution of his claim. See, Monty Campbell Crane Co., Inc. v. Hancock, 510 So.2d 1104 (Fla. 4th DCA 1987).

This analogy is just and fair because it extends to plaintiffs the same equitable treatment accorded to defendants. And, Rule 1.420(e), Florida Rules of Civil Procedure, is still available against the recalcitrant plaintiff who has failed to move the cause along

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during the period of an entire year. Fla.R.Civ.P. 1.420(e)(1984). After all, the more formalistic requirements of Rule 1.420(e) are more appropriate when the plaintiff has had a full year in which to act. See, Maler v. Baptist Hospital of Miami, Inc., 532 So.2d 79 (Fla. 3d DCA 1988); Araujo-Sanchez v. Amoon, 513 So.2d 1307 (Fla. 3d DCA 1987).

Rather than addressing Florida jurisprudence, which favors liberality in the setting aside of defaults, in order that parties may have their controversies decided on the merits, Respondents devote almost the full 50 pages of their answer brief to a discussion of federal caselaw. Federal caselaw should not apply to this issue. For good reason, the Third District Court of Appeal refused to apply it in Berdeaux v. Eagle Picher-Industries, Inc., 575 So.2d at 1295, and in Schafer v. Schafer, 582 So.2d at 121.

The federal caselaw on service of process within 120 days is unfair to the plaintiff, and inappropriate to Florida courts. There are significant differences between state and federal practice. One, Florida does not normally use mail service under the control of the plaintiff, as the federal system does. For this reason the renowned civil procedure authority, Henry Trawick, has denounced the rule, stating:

> The reason for its adoption by the Congress 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). Two, as Respondents themselves pointed out in the court below, the federal rules of civil procedure do not contain a

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counterpart to Florida's rule which allows dismissal after one year for failure to prosecute. (BB.27). Rule 1.420(e), Florida Rules of Civil Procedure, exists here in state court to dispose of dilatory conduct by the plaintiff further along in the suit, thereby making unnecessary such a draconian remedy at the outset of the suit.

The issue of this case, which Respondents refused to address in their brief, is that the Trial Court abused its discretion by using the power of dismissal, not to cull an inactive case from the court's calendar, but instead to punish a period of delay which no longer existed. Respondents would have this Court believe the punishment is mandated by caselaw. Nonsense!

There is a plethora of authority from jurisdictions throughout the United States which go "both ways" on this issue. The cases swim the reporters like fish in a lake. Respondents would have this Court pull up its line with a trout on the hook, and argue that the lake is full of trout only, when in fact the water is full of bass, salmon and sunfish too.[1] While the federal courts go one way, the service of process rule, as interpreted by state courts, go another way. The state cases not only make more sense, but are also fair and just to both plaintiff and defendant. One in particular, Grant v. City of Twin Falls, 746 P.2d 1063 (Idaho App. 1987), has facts very similar to those of the instant case, and adoption by this Court of its rule would mandate that the dismissal below be reversed.

Grant involved a summons which was served 19 months after the complaint was filed, rather than within the twelve months that the applicable state rule demanded. 746

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[1] Pepper's Steel & Alloys v. U.S. Fidelity & Guaranty, 668 F.Supp. 1541 (S.D. Fla. 1987).

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P.2d at 1065. However, defendants had waited 5 months after service, answered the complaint, and responded to interrogatories before moving to dismiss. Even before service, the defendants had been on notice of a possible lawsuit, and had investigated the facts potentially underlying such a suit as a result of having received a Notice of Tort Claim. 746 P.2d at 1066.

The trial court granted defendant's motion to dismiss for untimely service. The Idaho Court of Appeals reversed, reasoning that the defendants had pled and engaged in discovery before seeking a dismissal. Id. Although the case had been dormant for a time, it had been revived and was an active case when the motion to dismiss was filed. Id. The court held:

> It is an abuse of discretion to use the power of dismissal, not to cull an inactive case from the court's calendar, but to punish a period of delay which no longer exists. ... Administrative firmness must be coupled with an understanding that real people and substantive rights hang in the balance when a decision is made under Rule 41(b). (Emphasis added).

746 P.2d at 1067.

The Grant rule was quoted with approval by the Supreme Court of Idaho in several cases. See, Systems Associates, Inc. v. Motorola Communications and Electronics, Inc., 778 P.2d 737 (Idaho 1989); Day v. CIBA Geigy Corp., 772 P.2d 222 (Idaho 1989). In Day, the Supreme Court restated the rule of Grant as follows:

> It is an abuse of discretion to use the power of dismissal to punish a period of delay which no longer exists if the defendant has not established prejudice resulting from the delay. The rule places key emphasis upon demonstrated prejudice to the defendant's ability to present a defense rather than upon the length of the period of delay per se.

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Similarly, in the instant case, 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 prosecution. (AB.2). And, as the four Respondents are all represented by the same attorney, the remaining Respondents or Respondent had constructive, if not actual, notice of this lawsuit. And, as in Grant, the four Respondents jointly filed a Motion to Dismiss which failed to raise the issue of delay in service; actively engaged in discovery; and demonstrated absolutely no prejudice below from the 4-day delay.

Lack of prejudice to Respondents should have been considered by the Trial Court and the Fourth District Court of Appeal, but was not. Many cases from out of state consider lack of prejudice to the defendant significant in ruling upon a dismissal for delay in service. See, Systems Associates, Inc., 778 P.2d at 737; Day, 772 P.2d at 222; Grant, 746 P.2d at 1063; Dallman v. Merrell, 803 P.2d 232 (Nev. 1990)(motion to dismiss properly granted where delay prejudiced defendant); Domino v. Gaughan, 747 P.2d 236 (Nev. 1987)(dismissal reversed where the delay in service occasioned no prejudice to respondents); State v. One 1986 Subaru, 576 A.2d 859 (N.J. 1990)(complaint not subject to dismissal for failure to issue summons within time limit as defendant's ability to prevent a defense on the merits was not impaired); Vines v. Orange Memorial Hospital, 471 A.2d 71 (N.J. Super.A.D. 1984)(rule is that delay in issuance of summons after complaint does not compel dismissal where defendant is not prejudiced).

Should this Court choose not to follow the well-reasoned Berdeaux rule as expanded by Schafer, or the Grant rule, 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. The waiver appears on the face of the record, which includes Respondents' joint Motion to Dismiss which failed to raise the issue of insufficiency of service of process, and UNISYS'S six page Request for Production and sixteen page Interrogatories. (R.18-20;A.10-31).

Respondents assert in their brief that Petitioner is precluded from making the waiver argument here. That assertion is not only without merit, but was rejected by the Fourth District Court of Appeal. Petitioners argued waiver at length in both the Initial and Reply Brief in the Fourth District. (AB.20,BB.10-12). Respondents argued at length against waiver in the Appellees' brief. Petitioner moved to Supplement the Record in the Fourth District Court of Appeal to include UNISYS'S Request for Production filed on January 26, 1990, and Interrogatories to Plaintiff filed on January 29, 1990. Respondents not only objected, but actually moved to strike portions of Petitioner's brief and appendix, claiming that the waiver issue had not been presented to the Trial Court. The Fourth District Court of Appeal rejected that argument, and not only granted Petitioner's Motion to Supplement the Record, but denied Respondents' Motion to Strike Portions of Petitioner's brief and appendix. Finally, the waiver issue was discussed at length at oral argument, especially by Judge Polen, who dissented without opinion.

After oral argument at the Fourth District Court of Appeal, this Court ruled on the Ingersoll v. Warren Hoffman, D.D.S., 16 F.L.W. S626 (Fla. September 26, 1991) case. In the event this Court chooses not to follow Berdeaux or Grant, the rule of the Ingersoll case would still mandate a reversal on the grounds of waiver.

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In Ingersoll, the plaintiff had sent a Notice of Intent to one defendant, but not to Warren Hoffman. Warren Hoffman answered the complaint with a general denial of the allegation of compliance with all conditions precedent, but did not refer in any way to the Ingersolls' failure to comply with Section 768.57, Florida Statutes.

On the day of the trial, Warren Hoffman filed a motion to dismiss, alleging he had not been served with a Notice of Intent to Initiate Litigation for Medical Malpractice as required by Section 768.57, Florida Statutes. The trial court granted his motion to dismiss, and the Third District affirmed. This Court reversed, concluding that Warren Hoffman had waived the Ingersolls' failure to comply with Section 768.57 by failing to timely raise the issue in his pleadings. Similarly, in the instant case, Respondents filed a Motion to Dismiss on the merits which did not raise the issue of delay in service, and only after Respondents had forged ahead with discovery did they send out an Amended Motion to Dismiss which did raise that issue.

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, thereby giving an unfair advantage to defendants. The rule was intended to be a useful tool for docket management, not an instrument of oppression. In the instant case a hypertechnical reading of the rule by the Trial Court and the Fourth District Court of Appeal has turned the rule into an instrument of oppression. Dismissal of MORALES' cause two and one-half months after service had been effected to punish him for a 4-day delay in service, is contrary to well established Florida law and policy, and has deprived MORALES of his constitutionally proceeded right of access to the courts.

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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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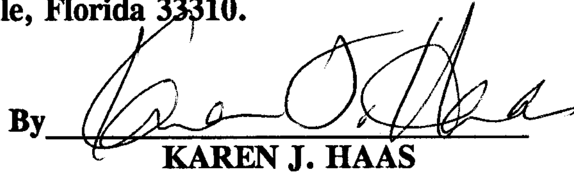
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of November, 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.



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