IN THE
SUPREME COURT OF FLORIDA

SHANDS TEACHING HOSPITAL AND CLINICS, INC.; d/b/a SHANDS HOSPITAL AT THE UNIVERSITY OF FLORIDA; BOARD OF REGENTS, STATE OF FLORIDA d/b/a UNIVERSITY OF FLORIDA COLLEGE OF MEDICINE,

Petitioners/Appellants,

v.

CASE NO.: 91,718
District Court of Appeal,
1st District - No.: 96-2762

JANET LOUISE WARREN, individually and as a natural parent and guardian of DANA CARLOTTA WARREN and ISSAC RUSSELL WARREN, minors,

Respondents/Appellees.
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ON DISCRETIONARY APPEAL FROM A DECISION OF THE FIRST DISTRICT COURT OF APPEAL CERTIFIED TO BE IN CONFLICT WITH A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL

PETITIONERS/APPELLANTS' INITIAL BRIEF

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STATEMENT REGARDING JURISDICTION

This Court has jurisdiction of this case, pursuant to article V, section 3(b)(4) of the Florida Constitution, to resolve the certified conflict between the First District Court of Appeal's decision in this case and the Fourth District Court of Appeal's decision in Stahl v. Evans, 691 So.2d 1184 (Fla. 4th DCA 1997).

The facts of this procedurally based appeal are not in dispute and the precise question before the Court, while simple, is of great importance to the course of a significant amount of litigation in the state: Do the factors previously articulated by this Court in Kozel v. Ostendorf, 629 So.2d 817 (Fla. 1993), a case involving the sanction of dismissal in the face of intentional disregard of a court order, also apply to the good cause test provided for in Rule 1.070(j), Florida Rules of Civil Procedure, when a complaint is served beyond the 120 day period provided for in that rule?

The decision by the First District Court of Appeal in this case, certified by that Court to be in direct conflict with the decision of the Fourth District Court of Appeal in Stahl, held that the Kozel factors *do* apply to good cause determinations in Rule 1.070(j) situations. The Fourth District in Stahl expressly held that the Kozel factors *do not* apply to the good cause determination contemplated by Rule 1.070(j). Enforcement of the time constraints established by Rule 1.070(j) is one of the most litigated and contentious issues in this state. A number of district court judges have asked this Court to reconsider the rule's harsh effects in cases, like this one, where the statute of limitations has run out between the time of filing the complaint and the time of late service. Indeed, the federal rule on service has been changed to avoid the problem presented by this appeal. The appeal before this Court, with diametrically opposed judicial standards and philosophy in the two district court decisions, presents an

appropriate and timely means for the Court to address the serious disagreement that exists over enforcement of Rule 1.070(j).

The Petitioner/Appellants (hereinafter Petitioners) are the Defendants in a medical malpractice case in the lower tribunal. As will be explained in greater detail below, the lower court dismissed the Respondent/Appellees' (hereinafter Respondents) amended complaint against the Petitioners on grounds that the Respondents served the original complaint beyond the 120 day period provided for in Florida Rule of Civil Procedure 1.070(j) and without good cause for having done so. As the Respondents' amended complaint was filed beyond the statute of limitations, and as there was nothing to amend back to given the delinquent service of the original complaint, the lower court's order effectively extinguished the Respondent's action by virtue of this Court's decision in Morales v. Sperry Rand, 601 So.2d 538 (Fla. 1992).

Respondents appealed the lower court's order of dismissal to the First District Court of Appeal, arguing that the appellate law on the subject meant that the trial court abused its discretion in finding lack of good cause. The Petitioners, of course, argued that the trial court was well within its broad discretion in rejecting Respondents' good cause arguments for late service. However, in its decision in this case, the First District Court of Appeal abandoned the good cause test for late service as set forth in the rule and the abuse of discretion test as previously announced by the appellate courts, in favor of a new standard for dismissal -- the sanction standards of this Court's decision in Kozel v. Ostendorf. Rather than follow the simple and clear mandate of the plain language of the rule, the First District Court of Appeal changed the test of the rule from good cause *for late service*, to good cause *for dismissal*. In doing so, the First District Court of Appeal created direct conflict with the Fourth District's decision in Stahl, inappropriately ignored the plain and unequivocal language of the rule, unjustifiably and

illegitimately took upon itself the power to change the rule, and recklessly abandoned the appellate standard for review of such cases as created by decisions of this Court.

Should the Court agree with Petitioners' position on the correct enforcement of current Rule 1.070(j), then the Petitioners submit that this Court has essentially two choices for resolving the issue. It may choose to leave the rule as it is currently constructed, or it may call for reconfiguration of the rule for *future* cases just as the federal rule has been changed. Under either circumstance, however, the order of the lower tribunal in *this* case, to be judged under the *current* version of the rule and its standards, would have to be affirmed. This Court should accept jurisdiction of this case and resolve the important conflict created by the district court below.

STATEMENT OF CASE AND FACTS

Citations to the trial court Record on Appeal will be to "R.," to the Transcript of the hearing on January 24, 1995, by "T.1.," to the Transcript of the hearing on April 15, 1996, by "T.2," and to the hearing on June 26, 1996, by "T.3." Citation to the First District Court of Appeal's opinion in this case, attached as Appendix A, will be to "App.A."[1] In order to demonstrate that the meaningful procedural facts of the case are not in dispute, and in fact have been advanced by the Respondents in the lower courts, the Petitioners have attached the text of Respondents' initial brief in the First District Court of Appeal, without exhibits, as Appendix B and will cite it as "App.B." The Petitioners also attach to this brief as Appendix C ("App.C.") the order of the First District Court of Appeal certifying conflict between its decision in this case and the Fourth District Court of Appeal's decision in Stahl. Appendix D ("App.D") is a copy of Petitioners' notice of appeal to this Court.

History of the Case Within Trial Court and in First Appeal

On February 16, 1994, the Respondents filed a medical malpractice Complaint naming the Petitioners as Defendants. [R.1.1-13]; [App.B.1]. The Complaint was served on June 17, 1994, 121 days after it was filed. [R.13]; [App.B.1]; [App.A.2]. June 16, 1994 was a Thursday and was not a legal holiday. At the time of the filing of the Complaint and the late service of process, Respondents were represented by Maria Sperando and the law firm of Gary, Williams, Parenti, Finney, Lewis, and McManus, P.A. [R.13] [App.B.1]

On July 11, 1994, Petitioners filed a motion to dismiss on grounds that, in

[1] The reported decision in this case can also be found at Warren v. Shands, 700 So.2d 702 (Fla. 1st DCA 1997).

addition to late service of process, the Respondents' filed the Complaint within the 90 day medical malpractice presuit period. [R.20-22]; [App.B.2]. Shortly before that motion was filed, counsel for the Respondents moved to withdraw and that motion was granted on July 14, 1994. [R.23-24]; The trial court granted Petitioners' first motion to dismiss on November 15, 1994, and gave the Respondents ten days to amend. [R.28-29].

Rather than refile and serve the Complaint, however, Ms. Sperando and the Respondents personally appealed to another attorney, Mr. Alan McMichael, to take over the case. [R.85-93]; [App.B.1-2]. Mr. McMichael attempted unsuccessfully to negotiate a settlement and ultimately refused to take on Respondents' case. [R.85-93]. In a letter to Ms. Sperando dated December 6, 1994, Mr. McMichael advised that he believed that the late service of process problem had to be addressed in some fashion immediately but that he could not "salvage" the case due to the untimely service of process. [R.85-93]. Mr. McMichael filed a motion to extend the time for filing an amended complaint, but did not set it for hearing. [R.30-31]; [App.B.3]. Instead, he too withdrew as counsel for the Respondents. [R.38-39; 40-41].

On December 7, 1994, some 22 days after the trial court had given Respondents ten days to file an amended complaint, the Petitioners moved a second time for dismissal. [R.35-37]. At the January 24, 1995 hearing on that motion, counsel for the Petitioners urged that the complaint was not served within 120 days of its filing and that the court's earlier order granting leave to amend was technically incorrect since Rule 1.070(j) calls for dismissal without prejudice. [T.1.3-5.] The trial court agreed and stated that it was going to correct the error. [T.1.5] At that point, Ms. Sperando, who was again now representing the Respondents, interjected that the statute of limitations had run between the time of filing of the Complaint and the date of the hearing. [T.1.5-

6].

Ms. Sperando then gave a lengthy explanation about the reasons for her failure to serve the Complaint within 120 days. [T.1.6-11]. Essentially, Ms. Sperando acknowledged that service was late, but that it was excusable because she was unable to reach her client about an outstanding settlement offer and because she had delegated the task of service to her secretary who then botched the job. [T.1.6-11]. Importantly, Ms. Sperando admitted that she did not make any effort at service until May 12, 1994, some three months after the Complaint was filed and with approximately only one month left for timely service. [T.1.6] She also admitted that it was her firm that "made the mistakes" leading to the need for her to again represent the Respondents in an effort to get the Complaint reinstated. [T.1.13-14] During the course of this appeal, Ms. Sperando has admitted that her first effort at service took place 85 days after the Complaint was filed. [App.B.1].[2]

After hearing argument, the trial court rejected Respondents' excuses for the failure to file an amended complaint and granted the motion to dismiss for failure to file the amended complaint as ordered. [T.1.14]; [R.44-45]. After an unsuccessful rehearing, Respondents appealed the order of dismissal, arguing that the trial court failed to follow this Court's decision in Kozel v. Ostendorf regarding the standards for dismissal of a complaint as a sanction for failing to follow a court order. [R.96-97]; [R.106-107]; [App.B.6].[3] The First District Court of Appeal agreed, and in a one-

[2] Although Ms. Sperando has certainly acknowledged that the fault in failing to timely serve the Complaint was hers, she has alternately blamed the late service on a "mix-up" at the clerk's office [T.2.5-6]; [App.B.22] and miscommunications between her secretary and the clerk. [T.2.6-7]; [B.22-26].

[3] The two sentence opinion of the First District Court of Appeal in *Warren I* may be found at Warren v. Shands, 680 So.2d 460 (Fla. 1st DCA 1996).

sentence order, remanded for reconsideration of dismissal as a sanction under the Kozel standards. [R.106-107].

At the hearing on remand, the trial court reconsidered the issue of dismissal of the original Complaint in this action as a sanction under Kozel. [T.2]. At that hearing, the trial court explained to Respondents the difference between: 1) dismissal with prejudice; 2) dismissal without prejudice with leave to amend; and, 3) dismissal without prejudice without leave to amend. [T.2.8-11]. Most importantly, the trial court and counsel for the *Respondents* noted that dismissal without prejudice but *without* leave to amend pursuant to Rule 1.070(j) would effectively extinguish this action because the statute of limitations had run and there would be no Complaint to relate any amendment back to. [T.2.11.] In fact, counsel for Respondents explicitly explained that she needed the February 16, 1994 Complaint reinstated and leave to amend that Complaint because that Complaint, and only that Complaint, was filed within the statute of limitations. [T.2.11].

The trial court then proceeded to hear argument on the Kozel factors and held that the Complaint should not be dismissed as a sanction for failing to file an amended Complaint within ten days. [T.2.51]; [R.165-168]. However, and most importantly, the trial court went on to state that it would revisit the issue of late service of the original Complaint because it raised a question different than the sanction matters in *Warren I.* [T.2.51-58].

In fact, when the Respondents filed their Amended Complaint on May 28, 1996, the Petitioners immediately moved to dismiss on grounds that the *only* Complaint filed within the statute of limitations was the February 16, 1994 original Complaint and that it was served late and without good cause such that there was nothing to amend back to. [R.244-247]. That motion was heard on June 26, 1996. [T.3.5]. At the hearing, the Petitioners again pointed out that the issue of late service of the original February 16,

1994 Complaint was separate and distinct from the issue of first dismissal of that Complaint because that dismissal was based upon failure to follow a court order. [T.3.5-12]. The trial court then took up the issue of late service (to which Respondents had already admitted) and asked Ms. Sperando to demonstrate good cause for late service of the original Complaint. [T.3.12]. Citing primarily to a "snafu"[4] between her secretary and the clerk's office, Ms. Sperando also argued that service was late because she wasn't clear as to whether her client wanted to settle the case and she planned to withdraw from the case anyway. [T.3.14]. The trial court found each of those justifications seriously wanting, decided it had to follow Rule 1.070(j), stated that it would not allow Ms. Sperando to exploit the initial dismissal with leave to amend to escape Rule 1.070(j), and dismissed the case. [T.3.16-19]; [R.421-422].

History of the Case in the District Court in this Appeal

The Respondents appealed the order related to late service of the original Complaint on July 17, 1996. [R.425-426]. Respondents' appeal to the First District Court of Appeal essentially raised three arguments: that good cause existed for late service, that the Petitioners raised the late service issue in *Warren I* and the First District Court's silence on the point impliedly rejected the argument, and that the original February 16, 1994 Complaint was *filed* prematurely during the presuit period and thus precluded the running of the 120 day service period. [App.B.]

The First District Court of Appeal issued its opinion in the case on October 21, 1997. [App.A] In that opinion, the First District Court of Appeal first rejected

[4] The First District Court of Appeal appears to have viewed with considerable skepticism Respondents' contention that a "snafu" between a secretary and a court clerk is good cause for late service of a lawsuit. [App.A.]

Respondents' contention that the district court's failure to address the late service issue in *Warren I* disposed of the issue. [App.A.5]. And, while the Court held that timely medical malpractice notices of intent tolled the statute of limitations [App.A.7], it rejected Respondents' argument that the prematurely filed February 16, 1994 Complaint did not trigger the 120 day rule.[5] The tolling of the statute of limitations by the presuit notices is of no moment if, as in this case, the only Complaint filed within the tolled and extended statute of limitations is dismissed and cannot be amended back to.

The First District Court of Appeal then addressed the central point on appeal -- whether the Respondents had shown good cause for late service of the original February 16, 1994 Complaint. [App.A.6-7]. However, rather than employ the abuse of discretion standard for its review of the trial court order as mandated by this Court's opinion in Morales v. Sperry Rand, the First District Court of Appeal held that the trial court erred in failing to use the six standards adopted in Kozel for dismissal of a complaint as a sanction. [App.A.6-7]. The First District Court of Appeal reversed and remanded for reconsideration in light of the Kozel standards for dismissal of a complaint as a sanction. [App.A]. On Petitioners' motion for rehearing, rehearing en banc, and certification of conflict, the First District Court of Appeal entered an order on October 21, 1997, granting the motion for certification of conflict with Stahl. [App.C.2]. The Petitioners then timely filed notice of appeal to this Court based upon Florida Rule of Appellate Procedure 9.120 to resolve the conflict. [App.D].

[5] This decision is inescapable given that the February 16, 1994 Complaint was the *only* Complaint that was filed within the statute of limitations.

SUMMARY OF ARGUMENT

There is no dispute in this case but that the only Complaint filed within the statute of limitations, even as tolled and extended, was served beyond the time period contemplated by Rule 1.070(j), Florida Rules of Appellate Procedure. It is also indisputable that the rule *requires* dismissal of a Complaint served beyond the period unless good cause for late service is shown. The question raised by the appeal, and of significant import to the practice of law throughout the state, is the standard that must be employed by a trial court in enforcing the rule.

The First District Court of Appeal in this case held that the Kozel standards for dismissal of a Complaint as a sanction also govern dismissal under Rule 1.070(j). The Fourth District Court of Appeal in Stahl has flatly rejected application of the Kozel standards to Rule 1.070(j) situations. For the following reasons, the Petitioners submit that this Court should approve Stahl, disapprove the opinion of the First District Court of Appeal in this case, quash the decision of the First District Court of Appeal in this case as to its application of the Kozel factors to the late service issue, and affirm the order of the trial court dismissing this case.

First, the plain language of Rule 1.070(j) states that a Complaint served more than 120 days after filing "shall be dismissed" unless the plaintiff can show "good cause why service was not made within that time." The good cause determination is made relative to reasons that service was not timely made. On the other hand, the Kozel factors invoke issues of whether the dismissal *itself* would be a harsh or unbalanced result of the late service. Good cause for dismissal as a sanction and good cause for dismissal pursuant to a long established rule of civil procedure are two entirely different matters. One could argue that application of something like the Kozel factors is worthwhile in any case involving dismissal of a Complaint, especially where a statute of limitations

problem bars further filings. But the current rule simply does not allow it. Desire to avoid loss of Respondents' claims against Petitioner, due to attorney error, does not, and cannot, justify ignoring the clear and unequivocal requirements of the rules of civil procedure. The First District Court of Appeal's wish to avoid extinguishing Respondents' cause of action may be laudable, but the court's decision to rewrite the rule without authority or justification cannot be allowed. As this Court has recognized in the past, sympathy for a litigant does not justify abandonment of the rules of civil procedure.

Second, this Court and the district courts of appeal have made it clear that Rule 1.070(j) has a purpose -- the efficient administration of justice. Respondents throughout have argued that one day late service does not thwart that purpose. But no matter how emotionally appealing their argument may be to the notion that the case should advance irrespective of fatal attorney neglect, that appeal to emotion cannot be entertained at the expense of the clear requirements of the rule. Perhaps the rule should be revised just as the federal rule has been changed and as some district court judges have suggested so as to avoid statute of limitations problems. If so, there is a mechanism for that to occur that does not include complete and utter circumvention of the rule as it is now constituted.

Third, the Kozel factors simply do not lend themselves to the inquiry of good cause for late service of process. In fact, some of the Kozel factors are irreconcilable with the body of caselaw that has evolved for enforcement of Rule 1.070(j).

Ultimately, the Petitioners respectfully submit that this case comes down to whether this Court will sanction the rewriting of the rules by district courts of appeal in the face of clear contrary law from this Court on the same point. Even a cursory comparison of the decision in Kozel, the rule, and the decision in this case demonstrates

the pitfalls of doing so. Again, a particular lawsuit, three years from its inception, is not the place to suddenly change the rules of civil procedure. Perhaps the rule should be changed. This is simply not the way to do it.

ARGUMENT

I. The First District Court of Appeal erred in holding that the *Kozel* factors apply to Rule 1.070(j) enforcement situations.

Five years ago, in Morales v. Sperry Rand Corp., 601 So.2d 538 (Fla.1992), this Court recited the district court's conclusion that:

> [H]alf-hearted efforts by counsel to effect service of process prior to the deadline do not necessarily excuse a delay, even where 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 539.

In expressly approving this holding, this Court stated:

> For rule 1.070(j) to fulfill its mission of assuring diligent prosecution of lawsuits once a complained is filed, the district court's conclusion and analysis must be approved. We do not believe that the rule is unduly harsh in that the trial judge has broad discretion under Florida Rule of Civil Procedure 1.090(b) to extend the time limitation if reasonable grounds are asserted before the 120 day period expires. Likewise, the trial judge has broad discretion in declining to dismiss an action if reasonable cause for the failure to effect timely service is documented.
> Id. at 540.

It seems to Petitioners that this Court meant what it said in Morales. The rule spells out the requirement for timely service. If plaintiff's counsel can't meet the deadline, she can ask for more time under the rules of procedure. If failure to timely serve comes to light after the deadline has run, she can still seek to show good cause for

late service. If she loses that battle, she can appeal and attempt to convince the appellate courts that the trial court abused its discretion in holding that good cause was not shown.

What counsel cannot do is wait until there is barely a month left in the service window, turn service of a complaint filed at the edge of the statute of limitations over to her secretary, and then expect the trial and appellate courts to abandon the rule when she misses the deadline. Yet that is exactly what has happened in this case. Respondents' counsel has admitted that the Complaint was served late. She offers no legitimate reason for excusing it, but pleads that she missed the deadline by only one day and that the rule should simply not be enforced.

Unfortunately, the First District Court of Appeal has ignored Morales and seized upon this Court's decision in Kozel v. Ostendorf as an opportunity to relieve Respondents' counsel of the burden placed upon her by the rules. But to do so, the district court ignored the rule itself, abandoned the abuse of discretion standard unequivocally established by Morales, and simply rewrote a rule it does not like. Again, Petitioners do not disagree that the result of proper enforcement of the rule in this case is harsh, but note as this Court did in Morales that it is not ***unduly*** harsh under the liberal workings of the rules of civil procedure. The Petitioners respectfully suggest that this Court must now choose between standing firm on its prior decision in Morales and the plain language of the rule, or allow the district court to rewrite the rule, ignoring this Court's precedent on the matter.

A. The *Kozel* sanction factors have utterly nothing to do with dismissal of a case pursuant to Rule 1.070(j).

Rule 1.070(j) states in pertinent part:

> 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 ...
> Fla. R. Civ. Pro. 1.070(j) (emphasis added)

The rule is clear and unequivocal. Service beyond 120 days -- even one day beyond -- requires dismissal unless the plaintiff shows good cause *for the late service*. As this Court stated in Morales, an approach to enforcing the rule that on its face appears reasonable will be rejected if it renders the rule ineffective or is contrary to the purpose of its existence. Morales, 601 So.2d at 540. The Petitioners submit that an approach that forces the trial court to consider the *effect* of dismissal on the litigant, when the rule is *procedurally* based, has just that effect and must be rejected.

This Court specifically observed that the dismissal in Kozel was a *sanction* based upon the trial court's power to manage the cases within its purview. Kozel, 629 So.2d at 818. The decision in Kozel was about a "meaningful set of guidelines to assist [trial courts] in their task of *sanctioning* parties and their attorneys for acts of malfeasance or disobedience." Id. But Rule 1.070(j) **IS NOT A RULE ABOUT SANCTIONS.** Rather, as this Court held in Morales, Rule 1.070(j) is a rule enforced on all plaintiffs for the purpose of ensuring diligent prosecution of lawsuits. Morales, 601 So.2d at 540.

While the effect of dismissal of a complaint as a sanction may have the same *effect* as dismissal for failure to follow the rules of civil procedure, it would be a

mammoth error in logic to conclude that they are procedurally the same thing. They are not. Dismissal under the rule is mandatory unless good cause is shown *for late service*. Dismissal as a sanction is warranted only where there is good cause *for the dismissal*. It is frustratingly obvious to Petitioners that these are distinct inquiries. Again, as this Court held in Morales, the rule serves its purpose only if it is enforced as it is written. Morales, 601 So.2d at 540. As written, the rule asks the trial court to consider whether the plaintiff had good cause for failing to meet the terms of the rule of procedure, not whether there is good cause to dismiss the lawsuit as a sanction. The Fourth District Court of Appeal had it right when it simply stated that "Kozel v. Ostendorf is not controlling, since it does not pertain to a Rule 1.070(i) dismissal." Stahl, 691 So.2d at 1185.[6]

B. The *Morales* test of due diligence cannot be harmonized with the six *Kozel* factors.

In the district court opinion adopted by this Court in Morales, the lower appellate court held that the initial and prime query in any Rule 1.070(j) good cause situation is the diligence of the party or her attorney in attempting service. There, the plaintiff's attorney's due diligence amounted to a "half-hearted" attempt at service 110 days into the 120 day window. This Court refused to disturb the district court's finding that the trial court did not abuse its discretion in holding that this did not meet the due diligence test. In this case, plaintiff's counsel, having filed the case at the end of the statute of limitations, decided that she wanted to withdraw from the case. With 85 of the 120 days having expired, and unable to find her client to check on a settlement proposal, she decided to attempt service *for the very first time*. She delegated the matter to her

[6] Rule 1.070(j) was Rule 1.070(i) until January 1, 1997. See Eldridge v. Multi-Resources, Inc., 695 So.2d 1320, n.1 (Fla. 4th DCA 1997).

secretary and, though she accepts ultimate responsibility for the failure to serve, blames the violation of the rule on "mix-ups," "miscommunications," or "snafus" between the clerk and her secretary. It seems plainly obvious that, if the trial court did not abuse its discretion in Morales, then the trial court here certainly was within its broad discretion in this case.

The First District Court of Appeal in this case sidestepped the clear holding of Morales and instead fused onto Rule 1.070(j) the Kozel factors. As noted above, this action is in direct conflict with the language of the rule itself. But more revealing of the inapplicability of Kozel to Rule 1.070(j) are the Kozel factors themselves. They are:

> 1) whether the attorney's disobedience of a court order was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;
> 2) whether the attorney has previously been sanctioned;
> 3) whether the client was personally involved in the act of disobedience;
> 4) whether a resulting delay in meeting the court's order led to prejudice to the opposing party;
> 5) whether the attorney offered reasonable justification for noncompliance; and,
> 6) whether the delay created significant problems of judicial administration.
> Kozel, 629 So.2d at 818.

The first inconsistency with Rule 1.070(j) that is immediately apparent when considering these factors is that factors 1, 2, and 4 are completely irrelevant to rules of procedure. Factor one contemplates that an attorney has *intentionally* disobeyed a court order and rules out neglect or inadvertence as a reason to dismiss a case. Rule 1.070(j), on the other hand, has been held to squarely encompass the *mere negligent* failure to follow the requirements of a rule of civil procedure. See e.g. Morales. The Third District Court of Appeal recognized in Hernandez v. Page, 580 So.2d 793 (Fla. 3rd DCA 1991), that Rule 1.070(j) provides that attorney neglect is not good cause for late service. Indeed, it is difficult to imagine a case where a plaintiff's attorney would deliberately and contumaciously withhold service of process. But factor one of Kozel

explicitly rules out attorney neglect as a justification for dismissal. Factor one is completely inconsistent with the rule and the law that has evolved on the enforcement of Rule 1.070(j).

Factor two considers prior sanction of the attorney. What on earth does prior sanction of an attorney have to do with late service of process in a given case? Is it only the attorney who habitually misses the service deadline that runs the risk of dismissal? When an attorney does not serve process on time, does Rule 1.070(j) require dismissal only if the defendant can prove that the plaintiff's attorney has missed 120 day deadlines in the past? That is utter nonsense and application of factor two to Rule 1.070(j) demonstrates just how ridiculous the process would become if the rule is not enforced on its plain terms.

Factor 4 would place the issue of prejudice squarely before the trial court when considering good cause. But this Court in Morales, in approving of the district court's analysis, held that prejudice to the defense is not usually an issue, much less a mandatory factor, in Rule 1.070(j) decision-making. Morales, 601 So.2d at 538. Moreover, the Second District Court of Appeal has rejected prejudice to the defense as a factor in determining whether dismissal is appropriate under the rule. Greco v. Pederson, 583 So.2d 783 (Fla. 2d DCA 1991).

It would appear that, based upon the decisions in Morales, Greco, and Hernandez, the district court opinion in this case conflicts with far more than the decision in Stahl. Indeed, a comparison of all of these cases leads to the inescapable conclusion that the decision here by the First District conflicts with this Court's decisions, as well as the decisions of the Second, Third, and Fourth District Courts of Appeal.

In that regard, it is important to note that some of the district courts have

appropriately stood fast by the rule and this Court's decision in Morales while at the same time calling for reform *of the rule*. See e.g. Taco Bell v. Costanza, 686 So.2d 773 (Fla. 4th DCA 1997) (Pariente, J., concurring) (Rule 1.070(j) should be changed in accord with Federal Rule of Civil Procedure 4(m) so as to avoid statute of limitations problems). In O'Leary v. MacDonald, 657 So.2d 81 (Fla. 4th DCA 1995), Judge Pariente wrote that Rule 1.070(j) must be enforced as it is currently written *even if* dismissal is the harsh result of attorney neglect. The solution, she wrote, would be to change the rule to avoid statute of limitations problems. See also Greco (Rule 1.070(j) should be amended to allow for warning of impending late service). These district courts and judges, while acknowledging the unfortunate effect of the rule in some case, nevertheless enforced it appropriately and called for reform of the rule. The First District Court of Appeal's revision of the rule by opinion simply cannot be squared with these other opinions.

Perhaps the rule should be changed to conform to federal Rule 4(m). But as the judges cited above realized, that is not an issue appropriately before a district court. Naturally, any change to the rule would be prospective and would not affect *this* case. Menendez-Perez v. Perez-Perez, 656 So.2d 458 (Fla.1995); Pearlstein v. King, 610 So.2d 445 (Fla.1992). As the rule is currently constituted and interpreted by this Court, the question now is whether the district court opinion in this case is a permissible means of interpreting and enforcing the rule. A simple reading of Kozel, Morales, and the rule demonstrates that the answer to that question must be an emphatic "No."

It bears mentioning that the First District Court of Appeal's opinion in this case cites to its own decision in Crews v. Shadburne, 637 So.2d 979 (Fla.1st DCA 1994) as the first place that the Kozel factors were considered in enforcement of Rule 1.070(j). In Crews, the district court held that the trial court abused its discretion in finding lack of

due diligence in efforts to serve the complaint. Id. at 980-981. There, plaintiffs counsel had the summons issued at the time of filing the complaint and immediately initiated efforts to serve. Id. at 979. The First District, citing Kozel, held that plaintiff's counsel's efforts at service, though technically deficient, were enough to show due diligence. Id. at 981. Good cause existed for failure to meet the deadline for *effective* service of a valid complaint due to a defect in the pleadings themselves. Id. "In short [the plaintiffs] did not sleep on their rights and obligations." Id.

The circumstances in Crews are a far cry from the situation here. Plaintiff's counsel in this case did not even *begin* attempting service until almost three months had gone by. She cannot lay fault at the feet of a secretary. As she has admitted, it was her responsibility to have the complaint served in a timely fashion. She did not do so, and as long as *any* reasonable judge could find that the steps she took were not good cause for failure to timely serve, then the First District Court of Appeal and this Court must affirm the trial court's judgment. Carlton v. Wal-Mart Stores, Inc., 621 So.2d 451, 454 (Fla. 1st DCA 1993). As this Court has observed, "if reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla.1980).

II. Respondents did not demonstrate good cause for the delay in service, nor an abuse of discretion by the trial court in so holding.

In Morales, this Court held that a trial court has a broad range of discretion to excuse late service upon a showing of good cause. It seems to the Petitioners that this is a rather obvious adoption of an abuse of discretion standard for review of such findings and the district courts have interpreted it that way. See e.g. Arison v. Offer, 669 So.2d 1128 (Fla. 4th DCA 1996). Until the decision to apply Kozel standards to Rule 1.070(j) motions, the First District Court of Appeal also employed that standard. Carlton v. Wal-Mart Stores, Inc., 621 So.2d 451 (Fla. 1st DCA 1993).

Here, Ms. Sperando has acknowledged repeatedly that it was her responsibility to be sure that the Complaint was timely served. However, having filed the Complaint at the end of the statute of limitations, she waited until there was barely a month left in the 120 day window to make her first attempt at service. She decided she wanted to withdraw from the case, and then delegated the responsibility of service to her secretary. Under the circumstances, can it be said that the trial court abused its discretion in rejecting that sequence of events as good cause for late service? Of course not. Proper enforcement of the rule, under all of the precedent, the rule itself, and especially Morales, compels affirmance of the trial court's judgment on this point.

Skeptically commenting on the dubious "snafu" explanation, the district court in this case abandoned the rule and the tests announced in Morales and its progeny. The district court's remand of this case for consideration of the sanction standards of Kozel is simply nonsensical because the Kozel standards have nothing to do -- indeed are contrary to -- the rule and the law on this subject. This Court has recognized that a

court's sympathy for the plight of a litigant who has been adversely affected by proper application of a rule of civil procedure does not, in any fashion, justify winking at the rule. Pearlstein v. King, 610 So.2d 445 (Fla.1992). The rule simply must be enforced as written. Id.

To understand the effect of the inter-district conflict created, one need only envision the remand hearing on this case. Rule 1.070(j) seeks to enforce timely service of a Complaint. To meet the remand order of the district court, the Gainesville trial court will now have to expressly weigh delay prejudice to the defendants caused by the untimely service. In West Palm Beach, however, the trial court would be *forbidden* from even noting the presence or absence of delay. In Gainesville, the prior sanction history of the attorney will play a specific role in the determination of whether there was good cause for the failure to timely serve the Complaint. In Tampa, the issue of timely service would be limited to a consideration of the facts of the particular failure to serve the Complaint within 120 days -- prior sanction history of the attorney would be irrelevant. Indeed, if service of a Complaint initiates a case, how could there be *any* prior sanction history to draw upon in determining good cause for late service? This Court should take jurisdiction over the case and, while mindful of the consequences to this particular litigant, enforce the rule. That is unquestionably what the rule and the law requires.

CONCLUSION

For the foregoing reasons, the Petitioners request that the Court approve Stahl, disapprove and quash the decision of the district court in this case, and affirm the trial court's order dismissing this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. Mail this 7th day of January, 1997 to Maria P. Sperando, Esq, P.O. Box 3390, Fort Pierce, Florida 34948-3390.

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