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' REPLY BRIEF

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I. THE LANGUAGE OF RULE 1.070(J) PRECLUDES APPLICATION OF THE *KOZEL* FACTORS TO LATE SERVICE OF PROCESS SCENARIOS.

The crux of the Respondents' position in this case comes down to a telling line in the Corrected Answer Brief:

> There is nothing to prevent this Court from requiring the trial courts to consider the same (Kozel) guidelines when determining good cause for the dismissal of a complaint as when determining good cause for late service and the Defendants offer none other than to say that they are procedurally different.

Corrected Answer Brief at 33.

Respondents' contention severely understates the distinction between dismissal under Rule 1.070(j) versus dismissal under Kozel v. Ostendorf, 629 So.2d 817 (Fla. 1993). Dismissal under the plain language of Rule 1.070(j) occurs when there is an absence of good cause *for late service*. Dismissal is without prejudice, though the *effect* of such a dismissal can be to extinguish a cause of action where the statute of limitations has run. Morales v. Sperry Rand Corp., 601 So.2d 538 (Fla. 1992). The *effect* of dismissal under Rule 1.070(j) is not at issue and under the terms of the rule the fact that the case may be extinguished is irrelevant to the trial court's inquiry on good cause for late service. See e.g. Morales. Dismissal under Kozel, on the other hand, is expressly to be governed by whether the effects of dismissal outweigh the severity of the misconduct or malfeasance. The *effect* of a Kozel dismissal is *the* issue in such a case.

Respondents' inference that the procedural difference is petty or inconsequential should be rejected. Rule 1.070(j) states unequivocally that a trial court "*shall*" dismiss a complaint if served beyond the 120 day mark unless good cause is shown *for the late*

service. The rule reads in relevant 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 ... Rule 1.070(j) (emphasis added)

The rule does not contemplate that a trial court will consider the effect of its dismissal on a plaintiff's cause of action. As will be seen below, the federal rule on service of process has been amended to allow just such considerations to come into play in enforcement of service requirements. The purely "procedural" distinction the Respondents pass off so lightly is *the* dispositive aspect of this appeal.

II. THE EVOLUTION OF THE FEDERAL RULE ON SERVICE SUPPORTS PETITIONERS' POSITION, NOT RESPONDENTS' POSITION.

Former Federal Rule of Civil Procedure 4(j) is identical to Florida's current Rule 1.070(j) and federal cases interpreting Rule 4(j) are considered persuasive on questions of interpreting Florida Rule 1.070(j). Morales. In 1993, federal rule 4(j) was changed to Rule 4(m) and that change was specifically intended to provide federal trial courts with discretion to extend the 120 day period where, even if no good cause was shown for late service, there existed a sound reason for doing so. See Henderson v. U.S., 517 U.S. 654 (1996) (Rule 4(j) amended to Rule 4(m) and created "expandable" 120 day time limit for service even where no good cause shown for late service); See e.g. Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. - Pension Fund v. Canny, 876 F.Supp. 14, 16 (N.D.N.Y.1995) (new rule 4(m), unlike 4(j), allows court to extend 120 day period even in absence of good cause for late service). In Mejia v. Castle

Hotel, Inc., 164 F.R.D. 343 (S.D.N.Y.1996), a New York federal trial court held that a plaintiff's attorney's "mistake or inadvertence" did not constitute "good cause" for late service. Id. at 345, n.4. Nonetheless, because Rule 4(j) had been amended to become Rule 4(m) in 1993, the court found that it was permitted *by the amendment* to exercise its discretion to allow an extension of the 120 day period. Id.; See also Gambino v. Village of Oakbrook, 164 F.R.D. 271, 275 (M.D.Fla.1995) (under the new rule, the running of the statute of limitations can serve as justification for expanding 120 day period after period has run), *citing* 1993 advisory committee notes.

Under the old federal Rule 4(j), which again is identical to Florida's current rule, the expiration of the statute of limitations did not have any effect on a federal trial court's determination of the presence of good cause for late service of process. Despain v. Salt Lake Area Metro Gang Unit, 13 F.3d 1436, 1439 (10th Cir.1994) (running of statute of limitations not "good cause" for late service under Rule 4(j) -- dismissal after one week delay in service affirmed even where statute of limitations ran); McGinnis v. Shalala, 2 F.3d 548, 551 (5th Cir. 1993) (lack of prejudice to defense or running of statute of limitations is *irrelevant* to determining good cause for late service under Rule 4(j)), *cert. denied*, 510 U.S. 1191 (1994); See generally Braxton v. U.S., 817 F.2d 238 (3rd Cir.1987) (adopting commentator's observation that "[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 time bomb.")

In Braxton, as here, plaintiff sued for medical malpractice at the end of the statute of limitations. Service was not accomplished within the time permitted by the rule. The Third Circuit explicitly decided in Braxton that an attorney's lack of monitoring delinquent service of process *was not good cause* for late service under Rule 4(j). Id. at 242. Strikingly similar to the instant case, plaintiff's counsel in Braxton became aware

of lack of service of process when there was only one month left in the 120 day period. Id. The Third Circuit held that the attorney's acceptance of the process server's representations that service would occur did not constitute good cause for late service. Id. "In construing Rule 4, the courts of appeals have concluded that inadvertence of counsel does not constitute good cause." Id.

In many ways, the situation in this case is far worse and even more deserving of dismissal than Braxton. In Braxton, plaintiff's counsel arranged for service of process immediately upon the filing of the complaint and became aware of the lack of service with one month left. Here, Ms. Sperando did not even *start* the process for having summons issued until just over a month was left in the service window. In Braxton, the attorney personally monitored the situation, albeit poorly. Here, Ms. Sperando left the matter to her secretary. In Braxton, poor monitoring by plaintiff's counsel who started the service process immediately was insufficient to avoid dismissal. Certainly Ms. Sperando's commitment of the task to her secretary with 35 days left on a case filed at the end of the statute of limitations should fare no better.

III. GOOD ARGUMENTS FOR CHANGING RULE 1.070(J) IN THE FUTURE ARE POOR ARGUMENTS FOR FAILING TO ENFORCE THE CURRENT VERSION OF THE RULE NOW.

As noted by Respondents and Petitioners throughout, the federal rule was changed in 1993 to allow the federal courts to consider the effect that dismissal would have vis-a-vis the expiration of the statute of limitations. See e.g. Gambino; Canny. The *legitimate* cure to the criticism Respondents have of Florida's current rule is to advocate a change in the rule. As Respondents have pointed out, Justice Pariente (when on the Fourth District Court of Appeal), as well as a number of district courts, have vigorously

advocated such a change. But such a change would not affect this case. This case must be resolved under the current version of the rule. Even Justice Pariente, perhaps the most vocal critic of current Rule 1.070(j), has repeatedly recognized that the courts are bound to enforce the rule as it is written now.

Petitioners and Respondents have both noted that Justice Pariente has been particularly critical of the current rule. See e.g. Porolniczack v. Itkin, 703 So.2d 519 (Fla. 4th DCA 1997); Taco Bell Corp. v. Costanza, 686 So.2d 773 (Fla. 4th DCA 1997). But Justice Pariente, in each of the cases cited by the Respondents to support changing the rule, *also* decided in those cases that the courts had no choice but to enforce the rule *as written*. Justice Pariente joined in affirming dismissal in Porolniczack on grounds that the rule required it. In Taco Bell, she joined in reversing an order declining to dismiss and concurred in a mandate to the trial court that the rule be applied and the case dismissed as to unserved defendants. She joined in an order requiring that a trial court enforce the rule in Patterson v. Loewenstein, 686 So.2d 776 (Fla. 4th DCA 1997). She similarly enforced the rule, despite criticism of it, in O'Leary v. MacDonald, 657 So.2d 81 (Fla. 4th DCA 1995).

Frankly, the Petitioners are stunned that the Respondents would rely on the opinions of Justice Pariente to support their cause in this appeal. Justice Pariente, though she frequently advocated changing the rule, enforced it nonetheless. Respondents cite Taco Bell for the proposition that Justice Pariente is in favor of changing Florida's rule 1.070(j) to comport with Federal Rule 4(m). Nonetheless, in Taco Bell Justice Pariente unequivocally held that the *current* version of the rule requires dismissal in cases of mere inadvertence or mistake by Plaintiff's counsel. Notwithstanding her contention that the rule be changed, she honored its plain language and did not flinch from the task of enforcing it.

The Petitioners firmly believe that Justice Pariente's refusal to ignore the plain language requirements of Rule 1.070(j), despite her criticism of its harsh effects, is indicative of the way that this appeal must be resolved. Despite Respondents' rhetoric about "form over substance," the rule is plain on its face. If service occurs on the 121st day, the *only* permissible relief under the rule is where good cause is shown *for late service*. The fact that the dismissal extinguishes the cause of action, while now relevant in federal court, is strictly *irrelevant* in Florida courts. Morales. Respondents' emotional appeal to justice and fairplay in their individual case, while high-sounding, is simply too nearsighted a view and not truly reflective of what the Respondents actually ask the Court to do here.

To defend the emasculation of Florida Rule of Civil Procedure 1.070(j), the Respondents rely on rhetorical platitudes about this Court's obligation to interpret the rules of civil procedure consistent with achieving an undefined standard of justice.

> This Court is charged with the responsibility of rulemaking and has the concomitant power and duty to ameliorate the harsh effects of its rules when to fail to do so would result in manifest injustice.

Corrected Answer Brief at 18.

The problem is that the Respondents' view of what constitutes "manifest injustice" is limited by *their* immediate goal of resurrection of *their* claim. But the rules of civil procedure have much more at their core than seeing to it that the particular matter at hand achieve a result satisfactory to one side or the other. The rules of civil procedure are necessary to ensure that all litigants know before a lawsuit begins what is expected of them. The rules cannot be changed after the fact. Respondents do not appear to suggest that the Court could, in an opinion in this case, both change Rule 1.070(j) and apply the change retroactively to their cause of action. Naturally, the

Petitioners would object to any such decision and do not see how it could be justified in this case. See generally Pearlstein v. King, 610 So.2d 445 (Fla.1992) (rule changes generally applied only prospectively unless change otherwise states). This Court, pursuant to Rule 2.130, Rules of Judicial Administration, has a procedure for changing the rules and, should it choose to change Rule 1.070(j), that procedure is the proper mechanism for doing so.

In Morales, this Court rejected the very same arguments as are being made here by Respondents today. The rule's 120 day service window, this Court reasoned, was harsh but not *unduly* harsh because of the availability of an extension before the 120 days expired and because the trial court has the discretion to find good cause for late service and to excuse it. The Petitioners are more than willing to admit that since Morales was issued a number of district courts and district court judges have expressed deep concern over whether the current version of the rule sometimes in practice exacts a harsh result. But, with the exception now of the First District Court of Appeal, each of those district courts have followed the plain language of the rule and this Court's decision in Morales. Some have found good cause. Some have not. But until now, each has enforced the rule *as it is now written*, not as they wish it *were* written.

And, make no mistake about it -- to affirm the District Court in this case requires that this Court recede from Morales, substituting Kozel instead. In Morales, this Court held that unintentional, *mere* malfeasance in the service of Summons and Complaint *alone* could lead to dismissal under Rule 1.070(j). This is consistent with the *actual plain language* of Rule 1.070(j) which limits the good cause inquiry to good cause for late service -- as opposed to good cause for the sanction of dismissal. Kozel, on the other hand, is not limited by the language of a rule. In Kozel, this Court held that dismissal should be employed generally only as a sanction for intentional misconduct or

malfeasance involving the plaintiff directly. Thus, while the focus in Morales was upon the good cause *for late service*, the focus in Kozel was on the *result* of the sanction of dismissal and whether that result was warranted in the particular circumstances of the case at bar. The difference is that Morales interprets a precise and unequivocal rule whereas Kozel describes the inherent power of the trial courts to govern and manage the actions before them.

Respondents make an emotionally appealing (but completely illogical) argument that the courts should never enforce rules that result in the loss of a cause of action. While the presumption might be against enforcement of rules having that consequence, the plain language of Rule 1.070(j) does not entertain the presumption. Petitioners would also note that dismissal of Respondents' Complaint arguably serves a higher, more universal standard of justice here in that, if the rules are enforced *as they are written*, then all litigants and attorneys have a system they can depend upon. It is a far superior system of change to actually amend the rules when problems make themselves manifest rather than force litigants to suffer varying outcomes depending upon the whims of the appellate courts. This is a classic philosophical debate which, if the rules are to mean anything, Respondents must lose. For their rhetorical response, the Petitioners would simply observe that enforcement of the rules is sometimes not a pleasant thing in individual circumstances. But, the cost of having the rule (and the corresponding system it upholds and to whose smooth operation it substantially contributes) is that there will sometimes be a litigant whose attorney's errors have the result we see here.

The Petitioners do not contend that this Court is without the power to interpret the rules of civil procedure or to change those rules when the Court deems it advisable. But that is not the issue here. The argument in this case is not over the Court's authority -- it is over whether the Court should graft onto a rule evaluative factors that, by the terms of

the rule itself, have no bearing on the matter.

Consider Kozel's factor number four: prejudice to the defense. Prejudice to the defense has nothing to do with whether a plaintiff had good cause for serving the Complaint late. In McGinnis, a case interpreting Rule 4(j), the U.S. Court of Appeals for the Fifth Circuit explicitly held that prejudice is not a factor in good cause for late service. McGinnis, 2 F.3d at 551. In fact, and to further demonstrate the degree of the conflict created by the First District Court of Appeal in this matter, consider that this Court in Morales held that prejudice to the defense is not relevant in Rule 1.070(j) cases absent an initial showing of due diligence such as to demonstrate good cause for late service. Morales, 601 So.2d at 539. And, in Greco v. Pederson, 583 So.2d 783 (Fla. 2d DCA 1991), the Second District Court of Appeal flatly rejected prejudice to the defense as a factor in determining whether dismissal is appropriate under Rule 1.070(j). The decision of the First District in this case, which by adoption of Kozel would make relevant to Rule 1.070(j) dismissals the issue of prejudice to the defense, cannot be squared with the rule, Morales, or the decisions of the other district courts on this point.

Consider also Kozel factor number two: attorney's prior sanction history. As noted in the initial brief, the prior sanction history of the plaintiff's attorney makes not one wit of difference in whether he had good cause for serving plaintiff's complaint beyond the period authorized. Rule 1.070(j) expressly limits the good cause inquiry to good cause for late service. The presence of a prior sanction history for Ms. Sperando would have nothing to do with whether she had good cause for failing to serve the Complaint *in this case* within 120 days. Neither should the absence of a prior sanction history for Ms. Sperando provide the Respondents with a "free ride" for her having failed to timely serve the Complaint.

Factor number one, presence of intentional misconduct, is also irrelevant to

determining presence of good cause for late service. Morales held that malfeasance -- even unintentional -- is enough to justify dismissal if, in the trial court's sound discretion, the malfeasance was without good cause. And, this Court in Morales held that unintentional service four days late warranted dismissal even where the statute of limitations had run. The federal courts often reached similar conclusions. See e.g. Mejia. Under Morales, *both* an attorney who *intentionally* fails to accomplish service *and* an attorney who merely *neglects* the matter are subject to dismissal if no good cause is shown for late service. Moreover, enforcing Rule 1.070(j) in cases only of intentional misconduct represents an exception to Rule 1.070(j) which impermissibly "swallows" the rule. As this Court noted in Morales, this Court will not adopt an interpretation of Rule 1.070(j) that "negates" the rule or the reason for its existence. Morales, 601 So.2d at 540. Very few attorneys, if any, deliberately withhold service past the 120 day deadline. Under Morales, the very purpose of the rule is to dismiss cases that, *due purely to neglect*, are not timely served.

Factor number three is the plaintiff's own misconduct. Does application of Kozel to late service issues mean that only pro se complaints will be dismissed, and how many litigants are "personally involved" in late service of process? It seems patently obvious to the Petitioners that application of the Kozel factors runs counter to the purposes of the rule. This Court rejected similar proposals for interpretation in Morales because, again, the interpretation of the rule should not negate its purpose. Id. In sum, the Kozel factors have nothing at all to do with determining good cause for late service. The Petitioners would respectfully suggest that the First District Court of Appeal in this case has used a yardstick to measure weight. The Kozel factors measure something completely different than good cause for failure to serve a Complaint within 120 days.

Respondents spend two or three pages of their factual recitation observing

machinations over failed settlement negotiations. Corrected Answer Brief at 2-4. But it is critical that the Court note that those settlement negotiations occurred well *after* the late service had occurred. Respondents discuss settlement negotiations in November and December, 1994 and have attached to their Corrected Answer Brief as Exhibit 7 a copy of settlement correspondence from the defense dated January, *1995*. Late service was accomplished on June 17, 1994. If the parties can agree on nothing else, surely they should be able to concur that settlement negotiations 5 months *after* late service had occurred has nothing at all to do with the presence, or absence, of good cause for the late service. Ms. Sperando also alludes to repeated failed attempts to reach her client regarding an outstanding settlement offer *during* the 120 day period. According to the Corrected Answer Brief, Ms. Sperando wrote to her client about a long standing offer from the defense to settle the case. Corrected Answer Brief at 11. It was when she could not get a response from her client that Ms. Sperando then began the first effort at service. The Respondents' personal lack of contact with Ms. Sperando is hardly good cause for failure to serve the Complaint.

When asked to show the trial court good cause for late service of process, the Respondents maintained that "late service was due to the clerk's office twice sending back to the undersigned's secretary the summons form she had sent. Had it not been for that mixup, service would have been effected within the 120 days ..." Corrected Answer Brief at 12. This seems to Petitioners to be a confession of lack of good cause for late service. Ms. Sperando has always acknowledged that the ultimate responsibility for timely service is ultimately hers. She told the trial court that the clerk's office twice returned the summons form to her secretary and that this was the source of the late service. She admits that, due to her reliance on her secretary, she did not personally check with the clerk's office to ensure that service was timely accomplished. Corrected

Answer Brief at 11. Ms. Sperando contends that, in the day-to-day practice of law, attorneys are forced to rely upon their secretaries or staff for the filling out of summonses and other administrative functions. Corrected Answer Brief at 45.

Rule 1.070(j) does not contemplate relaxing the standard for service of a Summons and Complaint based upon the errors of secretaries or court clerks. To be blunt, their errors are her errors. Ms. Sperando's reliance upon them for compliance with the rules of civil procedure, especially service of process, is risky and the trial court was well within its rights to decide that such evidently misplaced reliance does not constitute "good cause" for failure to timely serve under the rule.[1]

Ms. Sperando made her *first* effort at service on May 12, 1994, 85 days after the Complaint was filed, when she sent executed Summonses to the Clerk's office for service. Thirteen days later, on May 25, she moved to withdraw. Rather than monitor the service of process, however, Ms. Sperando turned the matter over to her secretary who sent blank and corrected Summonses back and forth to the clerk's office for almost a month.

Respondents mistakenly contend that their case is similar to Onett v. Ahola, 683

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[1] Respondents question whether this Court can approve the decision of the trial court below because the district court did not make a threshold determination as to whether Respondents had shown good cause for late service. The district court did not explicitly rule on the "good cause" issue because it changed the test under Rule 1.070(j) from evaluating good cause for late service to evaluating good cause for dismissal. However, this Court has in the past been willing to determine that a trial court did not abuse its discretion even where the district court failed to make the initial inquiry. See e.g. Sims v. Brown, 574 So.2d 131 (Fla.1991) (district court found exclusion of report reversible on first point and therefore did not address court's abuse of discretion on second point; having reversed district court on the first point, Supreme Court moved ahead with evaluating abuse of discretion on relevancy issue even though district court did not reach it).

So.2d 593 (Fla. 3rd DCA 1996). They base that claim on the fact that, in Onett, good cause for late service was found where plaintiff attempted service on the defendant 91 days after the complaint was filed and failed in perfecting it only because the defendant intentionally misled the process server. Respondents reason that, if service on the 91st day was sufficient in Onett, then their beginning the process on the 85th day in this case is also sufficient.

The two critical elements of Onett that drove that decision -- that the defendant or a neighbor misled the process server and that service was attempted within 120 days -- are not present here. There has never been an allegation in this case that any of the Petitioners, i.e. Shands, the University of Florida, or the Board of Regents, misled anyone as to where they are located. And, process in Onett was actually delivered to the defendant's correct address *within* 120 days. Here, the very first service of Summons and Complaint occurred on the 121st day. The plaintiff's attorney in Onett tried to serve the Complaint on the defendant's Florida address, actually did serve the Complaint on his New York address (though it was fraudulently refused), used the Secretary of State to serve the defendant, obtained an updated address from the postal service, and tried to obtain an address from the defendants' insurer -- all within the 120 day period. Respondents' good cause, on the other hand, amounts to no service *at all* within 120 days (mistaken, refused, or otherwise), severely misplaced reliance on a secretary who was left to secure service of a complaint filed at the end of the statute of limitations, and an attorney who did not even *begin* an effort at service until there was only one month left in the service period. The instant case is nothing like Onett and the trial court was well within its discretion to find a lack of good cause for late service of process.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. Mail this day of March, 1998 to Maria P. Sperando, Esq, 221 E. Osceola Street, Stuart, Florida 34994.

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