SUPREME COURT OF FLORIDA

MICHAEL THOMAS, et. al.,
Petitioners,

v.

JAMES S. SILVERS, et. al.,
Respondents.
_____/

CASE NO. 91,860

District Court of Appeal
3rd District - No. 97-2617

RESPONDENT SILVERS' CORRECTED ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent clarifies Petitioners' submitted statements of the case and facts.

The summones served at Petitoners' residence on October 3, 1996 show a notation on top right-hand corners stating "Gloria Miller Secretary Authorized to Accept." (R.App.No.1).

Upon recieving Petitioners' motion to dismiss for invalid service, Respondent set and noticed the motion for hearing. (R.App.No.2).

Respondent filed an amended complaint, which was validly served on Respondents on June 24, 1997. (R.App.3).

Upon recieving Petitioners' motion to dismiss after service of the amended complaint, Respondent set and noticed that motion for hearing. (R.App.No.4).

SUMMARY OF ARGUMENT

An order denying a motion to dismiss based upon service effected within 120 days of filing a complaint, is not appealable because it is neither a final order nor an appealable non-final order, even if the service is invalid. Such an order is not final because it does not terminate the judicial labor in an action. Neither is the order an appealable non-final order because it is not one of the several categories of appealable non-final orders enumerated by the Florida Rules of Appellate Procedure.

Timeliness of service is not a factor in determining the jurisdiction of the person. The requirement for timely service is designed to assure that claims are diligently prosecuted once a complaint is filed. Dismissal of a complaint for failure to effect timely service is a penalty to be imposed upon a plaintiff. The dismissal is the penalty and not a consequence of a failure to acquire jurisdiction over the person. To interpret the rule differently would mean that timeliness affects the validity of service. If untimeliness equates to invalidity, then it would allow a court to, upon a showing of good cause, somehow "validate" presumptively invalid service. In other words, interpreting timeliness as an element of jurisdiction over the person would allow a court to exercise jurisdiction to which it was not entitled. The rule should not be construed in a way to

create such a legal absurdity. Moreover, construing timeliness of service as a factor determining jurisdiction would create a secondary statute of limitations which violates the policy underlying the rule and infringes upon the province of the legislature.

If this Court finds that timeliness impacts jurisdiction and reviews this case on the merits, the trial court did not abuse its discretion in denying an order to dismiss the complaint when service was effected contemporaneously with filing the complaint, even though the service was invalid. The trial court enjoys broad discretion in ruling upon such a motion. Case law supports the proposition that a complaint should not be dismissed when service,albeit invalid, is effected upon an employee at the Defendant's home within 120 days of filing the complaint. Respondent was also diligent in prosecuting the claim because he reasonably relied on the process server's representation that process was accepted by an individual authorized to accept the summons on behalf of Petitioners. Petitioners provided no reasonable notice to contradict this reliance as their motion to dismiss was supported only by an unsworn statement. Lastly, due process considerations were satisfied as Petitioners received notice that a lawsuit had been filed against them.

For the foregoing reasons, this Court should hold that timeliness of service of process is not a factor in determining

jurisdiction over the person. If this Court does not adopt that holding, then this Court should find that the trial court did not abuse its discretion in denying an order to dismiss Petitioners' Complaint.

ARGUMENT

I. AN ORDER DENYING A MOTION TO DISMISS BASED UPON SERVICE EFFECTED CONTEMPORANEOUS WITH FILING OF THE COMPLAINT IS NOT APPEALABLE, EVEN IF THE SERVICE IS INVALID, BECAUSE IT IS A NON-FINAL ORDER NOT IDENTIFIED BY RULE 9.130, FLA.R.APP.P.

An order denying a motion to dismiss based upon service that was made within 120 days of filing a complaint, even if the service is invalid, is not subject to appellate review because the order is nonfinal in nature. Finality is the test used to determine whether a final order is subject to appellate review. Finality is determined by whether judicial labor is required or permitted to be done by the trial court after the order has been entered. *See Kippy Corp. v. Colburn*, 177 So.2d 193, 195 (Fla. 1965). If an order does not meet this recognized test for finality, then the order is nonfinal and not subject to appellate review.

In the instant case, the trial court's order denying the motion to dismiss is non-final because as a result of the order, the cause still stands and judicial labor is still required to

determine the rights and obligations of the litigants. *See id.* For this reason, only orders granting motions to dismiss may become final as such orders dispose of an action and thereby terminate the need for further judicial labor.

As a matter of rational policy and judicial efficiency, the review of nonfinal orders is limited to certain enumerated orders because

> The thrust of rule 9.130 is to restrict the number of appealable nonfinal orders. The theory underlying the more restrictive rule is that appellate review of nonfinal judgments serves to waste court resources and needlessly delays final judgment.

Travelers Ins. Co. v. Burns, 443 So.2d 959, 961 (Fla. 1984). Consequently, district courts of appeal "shall review, by appeal . . . final orders of trial courts . . . [or] non-final orders of circuit courts as prescribed by rule 9.130 . . ." Fla.R.App.P. 9.130(b)(1)(A) and (B)(emphasis added). A trial court's order denying a motion to dismiss cannot be interpreted as a final order and therefore, appellate review is unavailable unless "prescribed" by rule 9.130, Fla.R.App.P.

Litigants are not unduly prejudiced by the inability to have non-final orders reviewed because such orders are reviewable on plenary appeal. The rules of appellate procedure specifically provide that on appeal from the final order, non-final orders are also subject to initial appellate review. Fla.R.App.P. 9.130(g). The limited scope of appealable non-final orders

should be maintained because the policy considerations outweigh whatever prejudice might be experienced by an individual litigant.

A. The plain language of Rule 9.130, Fla.R.App.P. does not include, within the category of non-final reviewable orders, a non-final order denying a motion to dismiss based upon rule 1.070(j), Fla.R.Civ.P.

An order denying a motion to dismiss based on Florida Rule of Civil Procedure 1.070(j) is not an appealable non-final order prescribed by the plain meaning of rule 9.130. The plain language of the rule states that "review . . . is limited . . . [to certain non-final orders]." As stated in the Committee Notes, "[s]ubdivision (a)(3) designates certain instances in which interlocutory appeals may be prosecuted . . . This rule eliminates interlocutory appeals . . . and provides for review of certain interlocutory orders based on the necessity or desirability of expeditious review." Committee Notes to 9.130, Fla.R.App.P., (1977 Amendment)(emphasis added). The limiting nature of the rule is further evinced by the fact that the rule "eliminates interlocutory appeals as a matter of right from all orders formerly cognizable in equity . . ." *Id*. Moreover, "the purpose of these items is to eliminate useless judicial labor . . ." *Id.* The rule therefore "limits rather than broadens the review of non-final orders." *Scheur v. Wille*, 370 So.2d 1166 (Fla. 4th DCA 1979).

An order denying a motion to dismiss brought under rule 1.070(j) should not be included within the category of appealable

non-final orders because of the burden it would impose on both the litigants and the judiciary. The rules of civil procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." Fla.R.App.P. 1.010. Even diligence may be insufficient to obtain valid service of process within the time limitation and making motions to extend the time period violates the spirit of rule 1.010. *See* Henry P. Trawick, Jr., *Florida Practice and Procedure* 126 (1996); *see also, id*. at n. 17 (questioning whether dismissal under 1.070(j) is an improvement over common law procedures). Rule 9.130 should not be expanded to include orders denying motions to dismiss based on rule 1.070(j) because of the plain meaning of the rule is to limit the categories of appealable orders.

B. Non-compliance with Rule 1.070(j),Fla.R.Civ.P. is not the basis for appellate review under rule 9.130 because timeliness of service is not an element of jurisdiction over the person

In this Court's most recent examination of rule 1.070(j), no mention was made of the rule in any way implicating "jurisdiction over the person" as expressed in rule 9.130. *See Morales v. Sperry Rand Corp.,* 601 So.2d 538 (Fla. 1992). In *Morales*, this Court reviewed an affirmance of a final judgment of dismissal

predicated upon an absence of diligence. In the action underlying *Morales*, the plaintiffs chose not to have summonses issued for more that three and a half months following the filing of the complaint and only then attempted to serve the defendants by mail. *Id.* at 538. Initial service was never effected, valid or otherwise, before the expiration of the 120-day period expressed in rule 1.070(j). In holding that the trial court did not abuse is discretion, this Court recognized that "the trial court could certainly conclude that [the plaintiffs] should not have expected to accomplish timely service by the method utilized." *Morales,* 601 So.2d at 539 (quoting *Morales v. Sperry Rand Corp.,* 578 So.2d 1143, 1144-1145 (Fla. 4th DCA 1991)). That absence of reasonable expectation goes directly to the diligent prosecution of lawsuits required by rule 1.070(j) and diligence is the primary factor in evaluating untimely service. Morales, 601 So.2d at 538, 539 (citing Morales, 578 So.2d at 1144-45).

This Court stated that rule 1.070(j), while requiring dismissal in the absence of timely and diligent prosecution, is "not unduly harsh . . . [because] the trial judge has broad discretion to extend the time limitation . . . [or] decline to dismiss the action . . . ." *Morales,* 601 So.2d at 540. Three propositions flow from this Court's opinion in *Morales*: (1) appellate review of final orders of dismissal is correct; (2) Rule 1.070(j) is designed to assure "diligent prosecution of

lawsuits once a complaint is filed;" and (3) "the trial court has broad discretion" in declining to dismiss an action or extending the 120-day period.

Contrary to the preponderance and history of authority, only one case decision has examined and then held that rule 1.070(j) is a basis for determining jurisdiction over the person. *See Cominsky v. Rosen Management Service, Inc.*, 630 So.2d 628(Fla. 5th DCA 1994).[1] Prior to *Cominsky*, the law was well-settled that an order denying a motion to dismiss brought under rule 1.070(j) alone was not an appealable non-final order. *Cf. id* at 631 (dissent). *Cominsky* does not, however, advance any basis which should redefine the established rule of law. In *Cominsky*, the court held that denial of a motion to dismiss based on rule 1.070(j) is an appealable non-final order under 9.130(a)(3)(c)(i) because it implicates jurisdiction over the person. *Id*. at 629. The Fourth District Court of Appeal acknowledged that "[w]e recognize in doing so we depart from all prior precedent, but we find *Morales* . . . supports this change." *Cominsky*, 630 So.2d at 629 (footnotes omitted).

This Court's reasoning in *Morales* does not support the holding in *Cominsky* because jurisdiction over the person was not

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[1] Other courts, in footnotes, have accepted jurisdiction based on *Cominsky*. *See Mid-Florida Assoc. v. Taylor*, 641 So.2d 182 (Fla. 5th DCA 1994); *Sheriff of Brevard County v. Lampman-Prusky*, 634 So.2d 660 (Fla. 5th DCA 1994).

an issue in *Morales*. As to the first point of contrast, the *Morales* Court reviewed a final order of dismissal in which appellate jurisdiction was appropriate. See Fla.R.App.P. 9.030(b)(1)(a). In *Cominsky* jurisdiction was exercised over a non-final not expressly enumerated in rule 9.130. As to the second point of contrast, the *Morales* Court makes no mention whatsoever regarding the appellate review of non-final orders nor did this Court state that rule 1.070(j) impacted jurisdiction over the person. Somehow, the *Cominsky* Court still managed to find that *Morales* supported the conclusion that rule 1.070(j) implicates jurisdiction over the person.

Aside from its reliance on *Morales*, the *Cominsky* court proposed several other bases for its holding that rule 1.070(j) is jurisdictional in nature, none of which is sufficiently persuasive to deviate from the established rule of law. As to the first basis, the court stated that

> [a]s the rule provides for either dismissal of the action or dropping of the defendant, its violation deals with the power of the court to bind [the defendants] to any ultimate decision rendered in the case . . . because the service on a defendant will be invalid if it exceeds the prescribed time limit without good cause.

Cominsky, 630 So.2d at 629 (quoting *Department of Professional Regulation v. Rentfast, Inc.*, 467 So.2d 486, 487 (Fla. 5th DCA 1985)). However, this reasoning does not comport with the

objective of the rule, which is the "mission of assuring diligent prosecution of lawsuits once a complaint is filed . . . ." *Morales*, 601 So.2d at 540. This Court should therefore exercise its intrinsic authority to carry out the intended purpose behind the rules adoption by applying the preferred construction of the rule. See *Pruitt v. Brock,* 437 So.2d 768, 775 (Fla. 1st DCA 1983) (citing *Messana v. Maule Industries, Inc.,* 50 So.2d 874, 876 (Fla. 1951)).

In order to construe rule 1.070(j) in accordance with its purpose, the provisions providing for dismissal as a result of non-compliance can only be read as a penalty for failure to timely prosecute a lawsuit. This construction alone harmonizes the purpose of the rule with its application. Read in this manner, the rule requires that plaintiff timely effect service of process in order to assure the timely prosecution of a lawsuit. If the prosecution is untimely, as defined by the 120-day period, as a consequence the plaintiff will be penalized by having the case dismissed without prejudice and then having to re-file the complaint when prepared to diligently prosecute the matter.

Rule 1.070(j) is also not jurisdictional within the meaning of rule 9.130(a)(3)(c)(i) because it does affect the court's ability to exert jurisdiction over the person. The penalty provision of the rule merely requires the court to withhold its exercise of jurisdiction due to a violation of the rule. A true

jurisdictional issue would only arise when the court is incapable of exercising jurisdiction over the person.

A trial court is not divested of jurisdiction over the person due to a technical violation of rule 1.070(j) alone. For example, a complaint may be dismissed due to late service of process, but the plaintiff may re-file that same day, effect valid service of process, and the court will be able to exercise jurisdiction over the defendant. Logically, this scenario can only occur if the court always possessed the ability to exert jurisdiction over the person. The penalty provision of rule 1.070(j), however, only requires the court to withhold exercise of that jurisdiction until such time as the complaint is refiled and timely service of process effected or a showing of good cause for the delay is made. In this way, the mission of rule 1.070(j) is ensured.

Interrelated with the issue of dismissal as a penalty is the fact that 120-day period relates to timeliness and not the reach of the court -- the second basis with which the *Cominsky* Court disagreed. Only the validity of service of process could impact upon the court's ability to exercise jurisdiction over the person. Rule 1.070(j) does not address the validity, but rather the voidability, of the service of process. First, the plain language of the subdivision (j) does not include the words "valid" or "invalid." Second, only by construing late service of

process as voidable can the rule avoid a legal absurdity. According to the rule, upon a finding of untimeliness without a good cause, a court shall dismiss a complaint or drop a party even if service is otherwise effected validly. The rule thereby allows the court to void otherwise valid service. Hence, the only acceptable construction of rule 1.070(j) is that untimely service is voidable and not invalid. To interpret the language to affect the intrinsic validity of service would yield an absurd result. It would indicate that if a court finds good cause for untimely service, then it could somehow "validate" what is presumptively invalid service. Therefore, the only logical construction is that untimely service is presumptively voidable with any absence of good cause rendering the service voided.

The *Cominsky* court cites to the interlocutory appeal of a motion to quash service of process on a Sunday as additional support for its contention that timeliness affects the reach of the court. *Cominsky*, 630 So.2d at 630 (citing *Harden v. Harden*, 125 So.2d 124, Fla. 3d DCA 1960). This is not an analogous example as the statutory requirement at issue in *Harden* specifically renders "service or execution on Sunday of any writ, process, warrant, order, or judgment void." § 48.20, Fla. Stat. This statute is based on the long-standing common-law rule prohibiting judicial proceedings on Sunday. *See Harrison v. Bayshore Development Co.*, 92 Fla. 875, 111 So. 128 (1927). The

Harden Court stated that as the applicable statute was "in derogation of the common law ... [it] . . . should be strictly construed and complied with." *Id.* at 125. Moreover, the *Harden* Court entertained the interlocutory appeal in the absence of current rule 9.130 which specifically proscribes interlocutory appeals based in equity. *See* Comment to Fla.R.App.P. 9.130, 1977 Amendment.

The conclusion that the purpose of rule 1.070(j) is not an additional jurisdictional element is further buttressed by the fact that such dismissals are without prejudice. The cause of action is not adjudicated on the issue of whether the court can bind the defendant. The rule instead requires that a plaintiff be prepared to diligently prosecute a claim once the complaint is filed. Essentially, the rule, along with the penalty, is designed to inform a plaintiff that a complaint should not be filed until the plaintiff is prepared to prosecute the action.

The fact that the time limitation of subdivision (j) is contained within rule 1.070 entitled "Process" is not indicative of any jurisdictional aspect -- the third basis with which the *Cominsky* Court disagreed. *Cominsky*, 630 So.2d at 630. The titles of statutes must only notify a reader of the contents of the statute and those contents need only be reasonably related to the central theme of the statute. *See, State v. Canova*, 94 So.2d 181, 184 (Fla. 1957) (en banc) (stating that provisions of a

statute promoting the purpose of the statute are properly connected with the subject)). By analogy, subdivisions of rules should only need be related to the central subject of the rule. Therefore, a time period associated with service of process does not necessarily create an additional requirement for valid service merely because the rule is entitled "Process."

For all the aforementioned reasons, rule 1.070(j) simply states a timeliness element associated with service of process and this Court should affirm the dismissal of the appeal and hold that an appeal of an order denying a motion to dismiss is an not an appealable non-final order.

C. As a matter of public policy, Rule 1.070(j) cannot be construed as jurisdictional because it would create a secondary statute of limitations violating the policy underlying the rule.

Rule 1.070(j) should not be interpreted as a jurisdictional requirement determining the validity of process because the policy supporting the rule is only one of timeliness in the prosecution of a lawsuit. The rules should be construed to "further justice, not frustrate it." *Singletary v. State,* 322 So.2d 551, 555 (Fla. 1975). The "mission of the rule is to assure[e] diligent prosecution of lawsuits once a complaint is

filed . . .” *Morales,* 601 So.2d at 540. To construe the 120-day period as a strict requirement for validity of service without regard to this “mission” is antagonistic to the public policy supporting litigation on the merits because it would preclude the ability to litigate claims on the merits. Faced with such contrary results, this Court should construe rule 1.070(j) in accordance with its purpose because

> [i]t is not intended to be a trap for the unwary, nor a rule to impose a secondary statute of limitation based on time of service. The results of such an interpretation would be harsh in a system where great emphasis is placed on deciding cases justly on the merits. We instead understand the rule to be an administrative tool to efficiently move cases through the courts.

Sneed v. H.B. Daniel Const. Co., Inc., 675 So.2d 158, 160 (Fla. 5th DCA 1996). (emphasis added)

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO DISMISS BASED UPON RULE 1.070(j) BECAUSE IT FOUND THAT SERVICE, ALBEIT INVALID, HAD BEEN MADE CONTEMPORANEOUS WITH THE FILING OF THE COMPLAINT AND BOTH LAW AND EQUITY SUPPORT THE TRIAL COURT’S ORDER.

The trial court did not abuse its discretion in denying the motion to dismiss Respondent’s complaint because, as stated in the court’s order, service, albeit invalid, was effected within the 120-day period prescribed by rule 1.070(j). In

reviewing an order entered pursuant to Rule 1.070(j), the trial court should be afforded broad discretion in order to mitigate the otherwise potentially harsh consequences of the rule. *See Morales*, 640 So.2d at 540. The trial court's order is supported by its findings as well as uncontroverted facts in the record that the trial court did not articulate. The fact that the trial court did not list every point supporting the order only indicates that the court did not deem it necessary to go beyond the authority of *Bankers Insurance Co. v. Thomas*, 684 So.2d 246 (Fla. 2d DCA 1996) to support its ruling.

The trial court did not abuse its discretion because even the Fourth District Court of Appeal, after the *Cominsky* decision, held that service effected within the 120-day period, albeit invalid, is sufficient to comply with rule 1.070(j) to preclude dismissal. *See Bice v. Metz Construction Co.,* 699 So.2d 745 (Fla. 4th DCA 1997) ((citing with approval *Caban v. Skinner,* 648 So.2d 251 (Fla. 3d DCA 1994); *Sneed v. H.B. Daniel Constr. Co., Inc.,* 674 So. 2d 158 (Fla. 4th DCA 1996); *Stoeffler v. Castagoliola,* 629 So.2d 196 (Fla. 2d DCA 1993)). One of the cases cited by the *Bice* Court specifically held it was an abuse of discretion to dismiss a complaint based on service of process upon an employee at a defendant's residence during the 120 day period. *Caban*, 650 So.2d at 251.

In the instant case, Respondent served a woman named

Gloria Miller at Petitioners' residence on the same day of filing the complaint. *Compare* (P.App. Nos. 8 and 9 with No. 10). The process server indicated on the summones, that Ms. Miller was a "secretary, authorized to accept" the summons on behalf of Petitioners. (R.App.No.1). This fact did not escape the trial court as it referred to this at the hearing. (P.App.No.11, p.4). It is also good cause within the meaning of rule 1.070(j) if process was brought to the correct address within the 120-day time limit and service only failed because the process server was given incorrect information. *See Onett v. Ahola,* 683 So.2d 593, 595 (Fla. 3d DCA 1996). Petitioners base a good deal of their argument on federal cases but in *Floyd v. United States,* 900 F.2d 1045 (7th Cir. 1990), the court stated that it "believe[d] that Congress 'intended Rule 4(j) to be a useful tool for docket management, not an instrument of oppression." *Id.* at 1049 (citing *United States v. Ayer,* 857 F.2d 881, 885-86 (1st Cir. 1988).

Respondent was never given reasonable notice that the service could not be relied upon during the 120 day period and therefore should not be penalized. Petitioners filed a motion to dismiss on invalid service of process and referred to an attached supporting affidavit. (P.App.Nos. 6,7). The supposed affidavit, however, is not notarized and therefore constituted nothing more than an unsubstantiated averment. *See Hamilton v.*

Alexander Proudfoot Co. World Headquarters, 576 So.2d 1339, 1341 (Fla. 4th DCA 1991). While situations may exist in which allegations unsupported by evidence may be sufficient to provide notice, the instant case is not one. In contrast to Petitioners' allegations of defective service, Respondent reasonably relied on the process server's representations that process was effected upon an authorized person. These circumstances would certainly support a trial court's finding that Respondent had good cause for relying on the belief that service was validly effected.

Respondent's reliance on the belief that a person authorized by Petitioners had accepted service was reinforced by the fact that Petitioners filed a motion to dismiss the complaint within a reasonable period of time. Compliance with the rules relating to process are not necessarily evaluated by notice to the defendant. But

> [t]he real purpose of the service of summons as to give proper notice to the defendant in the case that he is answerable to the claim of process. The major purpose of the constitutional provision which guarantees "due process" is to make certain that when a person is sued, he has notice of the suit and an opportunity to defend.

Haney v. Olin Corp., 245 So.2d 671, 673 (Fla. 4th DCA 1971) (citations omitted).

The equities of the case support the trial court's order denying the motion to dismiss. First, there is no support for

Petitioner's claim that Respondent knew exactly who was living at the Petitioner's home. (P. Brief, pp. 8, 10, 11, 12, 20, 22, 23). Mr. Thomas' affidavit merely states that Respondent had been to Petitioner's home in the past and that Respondent knew where Petitioner lived. (P.App.3) Respondent had Petitioners served at the correct address; that is not at issue (P.App. Nos. 3,4).

Mr. Thomas' affidavit does not state any basis upon which Respondent would have knowledge of the residents of Petitioner's home during the time that service was effected in October, 1995. In fact, the affidavit merely states that Respondent has been to Petitioner's home "on occasion" within the last ten years. (P.App.No. 3). This statement in no way supports the claim that Respondent had knowledge of the residents in Petitioner's home.

As to the second point of equity, Respondents never attempted to pursue their motion to dismiss but claim dismissal is proper under a rule designed to ensure the diligence of litigants. (R.App.Nos.2,4). Petitioners never set either motion to dismiss for hearing. Petitioners never notarized Ms. Thomas' affidavit to support their claim of invalid service. Petitioners never moved to quash the service of process.

Respondent, on the other hand, reasonably relied on the representations of the process server. Respondent noticed both

motions to dismiss for hearing in order to resolve the issue. (R.App.Nos.2,4). Respondent reserved an amended complaint, (R.App.No.3) not the original complaint, further inaction that Respondent relied wholly on the perceived validity of the original service of process.

If this Court finds that a non-final order based on rule 1.070(j) is appealable, this Court should affirm the trial court’s order because it did not abuse its discretion.

CONCLUSION

Respondent respectfully requests this Court to rule that an order denying a motion to dismiss a complaint based on Florida Rule of Civil Procedure 1.070(j) does not invest an appellate court with jurisdiction under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i) and affirm the decision of the Third District Court of Appeal.

If jurisdiction is permitted under this Court's construction of the rules, Respondent requests this Court to find that the trial court did not abuse its discretion and affirm the order of the trial court.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished, by U.S. Mail, this 8th day of January, 1998, to Thomas F. Luken, Counsel for Petitioners, 1290 E. Oakland park Blvd., Suite 200, Ft. Lauderdale, Florida 33334.

By:_____

JOHN ARRASTIA, JR.
Florida Bar No. 0072461