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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

IN RE: AMENDMENT TO FLORIDA RULE OF CIVIL PROCEDURE 1.070(j) - TIME LIMIT FOR SERVICE

CASE NO. 93,367

# AMENDED
# BRIEF OF THE FLORIDA DEFENSE LAWYERS' ASSOCIATION

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## CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed with Courier 12-point print, which has 10 characters per inch and is not proportionately spaced.

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## STATEMENT OF THE CASE AND OF THE FACTS

On September 24, 1998, this Court proposed an amendment to Florida Rule of Civil Procedure 1.070(j). See Amendment to Florida Rule of Civil Procedure 1.070(j) - Time Limit for Service, 720 So. 2d 505 (Fla. 1998). The amendment effectively makes it easier for plaintiffs to obtain extensions of the so-called 120-day rule. See id.

Following publication and comment on the substance of the proposed amendment, this Court adopted the amendment in a modified form. See Amendment to Florida Rule of Civil Procedure 1.070(j) - Time Limit for Service, 24 Fla. L. Weekly S109 (Fla. Mar. 4, 1999). This Court directed that the amendment take effect immediately and apply to "all civil cases commenced after the date of this opinion and, insofar as just and practicable, to all civil cases pending as of the date of this opinion." Id.

Because the retroactive application of the amendment was not at issue in the earlier comment period, an interested party moved for rehearing on that issue. The Academy of Florida Trial Lawyers responded to the motion for rehearing, and the Florida Defense Lawyers' Association joined in the initial motion for rehearing.

On June 16, 1999, this Court issued an order directing interested parties to submit briefs on the retroactivity issue. This brief is filed on behalf of the Florida Defense Lawyers' Association ("FDLA") in response to that order.

## SUMMARY OF THE ARGUMENT

The fact that this Court directed application of the amendment to Rule 1.070(j) to "pending cases" does not mean that this Court intended the rule amendment to apply retroactively. Based upon this Court's prior definition of application to "pending cases," the rule amendment should be applied to those cases filed before the rule amendment was adopted, but only **prospectively**. That is, the rule amendment should apply only to (1) those cases filed after March 4, 1999, and (2) those cases filed before March 4, but in which the 120-day limit for service had not expired as of that date. To the extent that such an application reflects this Court's original intent, FDLA requests that this Court clarify that intent on rehearing.

If this Court did originally intend true retroactive application, FDLA respectfully asks this Court to reconsider and recede from that decision. True retroactive application will interfere with the legitimate expectations of defendants, just as true retroactive application of the original Rule 1.070(j) would have interfered with the legitimate expectations of plaintiffs. The rule amendment's potential for interference is particularly pronounced in light of the interplay between Rule 1.070(j) and the undeniable right to be free from time-barred claims.

The negative effects of true retroactive application are not limited to defendants. True retroactive application also affects plaintiffs by punishing those plaintiffs who failed to take frivolous appeals and rewarding those who did. Moreover,

retroactive application "insofar as just and practicable" entails the need for further (and ultimately unnecessary) litigation to determine the extent of "justice" and "praticability." A bright-line rule of prospective application to pending cases will insure that scarce judicial resources are put to better use.

In short, this Court's concern with the sometimes harsh results of Rule 1.070(j) must be balanced with the countervailing concerns listed above. FDLA respectfully submits that this Court can best acheive this balance by directing that the rule amendment be applied (1) to cases filed after March 4, 1999, and (2) to cases filed before that date in which the 120-day time limit for service had not expired as of that date.

## ARGUMENT

THE AMENDMENT TO FLORIDA RULE OF CIVIL PROCEDURE 1.070(j) SHOULD NOT BE APPLIED RETROACTIVELY.

Although the issue before this Court has been loosely framed as the retroactive application of the amendment to Rule 1.070(j), it is not even clear that this Court intended retroactive application in the first place. In its opinion adopting the rule amendment, this Court determined that the amendment "shall apply to all civil cases commenced after the date of this opinion and, insofar as just and practicable, to all civil cases **pending** as of the date of this opinion." Amendment to Florida Rule of Civil Procedure 1.070(j) - Time Limit for Service, 24 Fla. L. Weekly S109 (Fla. Mar. 4, 1999) (emphasis added). Under this Court's prior interpretation of the application of Rule 1.070(j), application to "pending cases" is not retroactive application.

In Pearlstein v. King, 610 So. 2d 445 (Fla. 1992), the plaintiff filed a medical malpractice action on November 1, 1988, but did not effect service until August, 1990. See id. In the interim, Rule 1.070(j) was adopted and became effective on January 1, 1989. See id. at 445-46. This Court held that the new rule applied to cases pending as of that effective date. See id. at 445.

This Court went on to explain that application to pending cases was not retroactive application. See id. at 446. As this Court explained,

> Applying the 120-day limit to causes of action pending on January 1, 1989,...is not a true

> retroactive application. In the instant case a **retroactive** application of the rule would require that King have served the defendant within 120 days of filing his complaint on November 1, 1988. Instead, applying rule 1.070(j) to causes **pending** on its effective date would give plaintiffs 120 days from January 1, 1989 in which to serve their defendants. This **prospective** application puts no extra burden on prior filings and does not diminish the time for complying with the rule.

Id. at 446 (emphasis added).

Similarly, this Court did not direct "retroactive" application of the present rule amendment. Instead, the rule is to be applied to cases filed after March 4, 1999, and "insofar as just and practicable, to all civil cases **pending** as of [March 4, 1999]." 24 Fla. L. Weekly S109 (emphasis added). According to Pearlstein, this means that the rule is to be applied prospectively only. See 610 So. 2d at 446.

As applied to the present rule amendment, Pearlstein's definition of application to "pending cases" would not countenance the use of the amendment to undo what has already been done. That is, the rule would apply only to:

(1) cases filed after March 4, 1999, and

(2) cases filed before March 4, 1999, but in which the 120-day limit had not yet expired as of that date.

Cf. Flores v. Secretary of the Navy, 159 F.R.D. 472 (S.D. Tex. 1994) (refusing to apply the analogous Federal Rule of Civil Procedure 4(m) to a case in which the 120-day limit had run prior to the effective date of the rule), aff'd, 51 F.3d 1044 (5th Cir. 1995).

In other words, application to pending cases does not mean that all plaintiffs can benefit from the new rule. Certainly, plaintiffs who file their cases after March 4, 1999, will benefit from the new rule. Similarly, plaintiffs who filed their cases prior to (that is, plaintiffs whose cases were pending as of) March 4 will be entitled to application of the new rule if they were still within the 120-day window on that date. However, under Pearlstein, application of the rule amendment to "pending cases" does not mean that plaintiffs who had not complied with the prior version of Rule 1.070(j) as of March 4, 1999, now get retrospective relief from their non-compliance.[1/]

In light of Pearlstein, it is possible that this is exactly the breakdown this Court had in mind when it directed application of the rule amendment to pending cases. To the extent that this is true, FDLA respectfully asks that this Court clarify that intention on rehearing and specify that the rule applies only to (1) cases filed after March 4, 1999 and (2) cases filed before March 4, 1999, in which the 120-day time limit had not yet expired as of that date.

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[1/] Natkow v. Natkow, 696 So. 2d 315 (Fla. 1997), provides a good example of true retroactive application. Natkow involved an amendment to Rule 1.540(b) removing the one-year requirement for motions for relief from judgments based on fraud. See id. at 316. The final judgment from which relief was sought had been entered prior to the amendment's effective date. See id. at 316-17. Thus, Natkow did not involve application of a rule amendment to a "pending case"; it involved true retroactive application. Interestingly, this Court in Natkow refused to apply the amendment retroactively, even to avoid a harsh result. See id. at 317. Instead, this Court applied the rule in effect at the time of entry of final judgment. See id.

It is important to note the distinction between "pending cases" for purposes of applying rules of procedure to cases and the notion that the rules of decision in effect at the time of appeal govern a case. Insofar as it applies to legislative enactments, the latter rule is merely a presumption which can be defeated by contrary legislative intent. See, e.g., State Farm Mut. Auto. Ins. Co. v. LaForet, 658 So. 2d 55, 61 (Fla. 1995). Rules of procedure are analogous to legislative enactments. Cf., e.g., Rowe v. State, 394 So. 2d 1059 (Fla. 1st DCA 1981) (rules of statutory construction apply to court rules). Thus, Pearlstein defines this Court's intent when it directs rules to be applied to "pending cases." To the extent that the principle of LaForet would otherwise require a different result, Pearlstein trumps that principle.

Even if this Court originally intended true retroactive application, it should reconsider and recede from that decision. A number of factors support application of the rule amendment on only a prospective basis.

First, true retroactive application would interfere with reasonable expectations about the finality of judicial decision-making. The importance of such expectations is easily seen by reference to the results that would follow from retroactive application of a different, easily imaginable rule amendment.

If this Court had **tightened** the requirements of Rule 1.070(j) -- for example, by reducing the time for service from 120 to 90

days -- strict retroactive application would lead to some troubling results. Consider the following hypothetical:

Pursuant to the 120-day rule in effect at the time of filing, a plaintiff effects service 100 days after filing the complaint. Before the defendant files a motion to dismiss, the 120-day rule is amended to require service within 90 days. Retroactive application of the amendment would mean that, despite the plaintiff's compliance with the rule in effect at the time of filing, the defendant would now have a valid basis for dismissing the action.

Certainly, it would be difficult to argue that retroactive application of the rule amendment in those circumstances would not interfere with the legitimate expectations of the plaintiff. Yet true retroactive application of the rule would countenance just such a result: a plaintiff who fully complied with the rules in effect at the time of filing would now be punished for failing to anticipate that the rules might change while his case was pending.

Indeed, this Court recognized the unfairness of such a result in Pearlstein. As this Court explained, true retroactive application of the original Rule 1.070(j) would have placed an extra burden on plaintiffs by defeating their legitimate expectations. See 610 So. 2d at 446. That is, until the 120-day rule was enacted, plaintiffs could justifiably expect that they could effect service outside this period. This Court should now recognize that strict retroactive application of the rule amendment would just as surely defeat the analogous expectation of defendants

that, once the rule **was** adopted, plaintiffs would be required to comply with its terms.

FDLA does not mean to suggest that existing defendants have some sort of permanent vested right to former Rule 1.070(j). As this Court determined in Pearlstein, pre-rule plaintiffs did not have the analogous right to be free from the 120-day requirement altogether. The plaintiff in Pearlstein was still required to comply with the rule **prospectively** by effecting service within 120 days of the rule's adoption. Similarly, FDLA does not question the ability of a plaintiff to rely on the new rule when he initially attempts to obtain an extension of time for service, even if his case was filed prior to March 4, 1999.

FDLA submits that the defendant in such a case is comparable to the plaintiff in Pearlstein: although not entitled to assume that the rules in effect on the date of filing will remain unchanged, changes in the rules should not operate to defeat expectations by undoing what has already been done. A defendant who has already obtained a ruling on his plaintiff's non-compliance with the 120-day requirement is analogous to a plaintiff who had complied with existing service requirements by the time Rule 1.070(j) was adopted. Just as the latter had a legitimate expectation that its compliance could not be retroactively challenged, the former has a legitimate expectation that a plaintiff's failure to comply will be retroactively rectified.

This interference with expectations is more pronounced in light of the interplay between Rule 1.070(j) and the statute of

limitations. As a practical matter, the only time a court's decision to dismiss a case rather than grant an extension of time to effect service makes difference is when the statute of limitations has run. If the statute has not run, then a plaintiff whose case has been dismissed can effectively obtain an extension by refiling the case and thereby resetting the 120-day clock. See Petrucelli v. Bohringer & Ratzinger, GMBH, 46 F.3d 1298, 1304 n.6 (3d Cir. 1995).

There can be no doubt that defendants have a legitimate expectation of freedom from a time-barred claim. In Wiley v. Roof, 641 So. 2d 66 (Fla. 1994), this Court held that defendants have a **due process property right** to be free from time-barred claims, and that retroactive interference with this right is unconstitutional. See id. at 68-69.

True retroactive application of Rule 1.070(j) will undoubtedly resurrect otherwise time-barred claims. Prior to March 4, 1999, when a plaintiff failed to effect service within 120 days and failed to show good cause why he did not do so, the defendant was entitled to have the case dismissed. See, e.g., Morales v. Sperry Rand Corp., 601 So. 2d 538 (Fla. 1992). When the statute of limitations has run, this dismissal renders the claim time-barred. See id. at 539 (quoting Morales v. Sperry Rand Corp., 578 So. 2d 1143 (Fla. 4th DCA 1991)).

Retroactive application of Rule 1.070(j), by interfering with defendants' entitlement to a dismissal which results in a time-barred claim, also interferes with defendants' right to be free

from such claims. Because of the serious constitutional problems this scenario presents, this Court should not apply the amendment retroactively. See, e.g., Smithwick v. Television 12, Inc., 730 So. 2d 795 (Fla. 1st DCA 1999) (courts must construe rules to avoid conflict with the constitution to the greatest extent possible).

The negative effects of true retroactive application of Rule 1.070(j) are not limited to defendants. Perversely, retroactive application also punishes plaintiffs who did **not** take frivolous appeals. In at least some cases, the dismissal for failure to effect service will clearly have been correct under the previous version of the 120-day rule. Plaintiffs who recognized this fact and did not appeal the dismissal cannot benefit from even the most generous retroactive application of the rule, while plaintiffs who appealed without a good-faith basis for doing so can. Applying the rule amendment retroactively, then, would have the perverse effect of punishing plaintiffs who don't file frivolous appeals, and rewarding plaintiffs who do.

Retroactive application will also have negative effects on judicial economy. As it now stands, courts are directed to apply the amendment to pending cases "insofar as just and practicable." 24 Fla. L. Weekly at S109. Regrettably, however, this Court has provided no explicit guidance as to what constitutes justice and practicability. Similarly, existing state and federal case law is not helpful in determining whether the amendment should be applied to any particular case. See, e.g., Petrucelli, 46 F.3d at 1305; Espinoza v. United States, 52 F.3d 838, 840 (10th Cir. 1995);

Foster v. Chung, 24 Fla. L. Weekly D1393 (Fla. 4th DCA Jun. 16, 1999); Almeida v. FMC Corp., 24 Fla. L. Weekly D765 (Fla. 3d DCA Mar. 24, 1999) (all determining that it was "just and practicable" to apply the amended rule without explaining why). But see Flores, 159 F.R.D. at 473 (explaining that is was **not** "just and practicable" to apply amended rule because 120-day limit expired well before adoption of amendment). It is not even clear whether the determination is to be left to the trial court's discretion or determined as a matter of law (and therefore subject to de novo review).

In these circumstances, retroactive application could easily result in a spate of case-specific litigation to determine what is "just and practicable." Of course, the set of cases affected by retroactive application of the rule amendment is finite. Thus, once all pending claims are resolved, this body of law will be virtually useless.

In contrast to the vague standard of "just and practicable," a bright-line rule would alleviate the need for further litigation and thereby insure that scarce judicial resources are put to better use. Rather than directing courts to apply the rule amendment "insofar as just and practicable," this Court should specify that the rule applies only to (1) cases filed after March 4, 1999, and (2) cases filed prior to March 4, 1999, in which the 120-day time limit had not expired as of that date. The clarity of such a rule makes it easy to apply and unlikely to cause the unnecessary, case-specific litigation necessary to define "just and practicable."

Even if this Court declines to adopt FDLA's proposed rule of application, this Court should at least provide some sort of explicit guidance as to the extent of "just and practicable" retroactive application.

## CONCLUSION

FDLA appreciates this Court's concern with the harsh results of the prior version of Rule 1.070(j). See 720 So. 2d at 505 (citing cases). This concern must be balanced, however, with a concern for defendants' legitimate expectations, the constitutional protection against time-barred claims, the discouragement of frivolous appeals, and the conservation of scarce judicial resources. FDLA submits that the best way to balance all these concerns is to apply the rule amendment to (1) cases filed after March 4, 1999, and (2) to cases filed before March 4, 1999, in which the 120-day time requirement of Rule 1.070(j) had not expired as of that date. Such a rule of application is easy to apply and consistent with this Court's earlier treatment of Rule 1.070(j). More importantly, such application balances the interests of both plaintiffs and defendants.

WHEREFORE, the Florida Defense Lawyers' Association respectfully requests this Court to clarify its intent not to apply the March 4 amendment to Florida Rule of Civil Procedure 1.070(j) purely retroactively; or, alternatively, to reconsider and recede from its earlier decision to do so.

Respectfully submitted,

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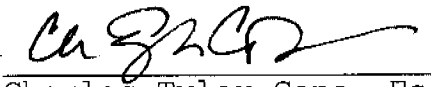
By 
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **ROBERT E. FENSTER, Esquire**, 890 S.R. 434 North, Altamonte Springs, FL 32714; **MICHAEL TONELLI, Esquire**, Post Office Box 172669, Tampa, FL 33672; **JACK D. EVANS, Esquire**, Post Office Box 24317, Tampa, FL 33623; **THOMAS W. POULTON, Esquire** and **A. RUSSELL BOBO, Esquire**, Bobo, Spicer, Ciotoli, Fulford, Bocchino, DeBevoise & Le Clainche, P.A., 315 E. Robinson Street, Suite 510, Orlando, Florida 32801; **ROBERT DIETZ, Esquire**, Zimmerman, Shuffield, Kiser & Sutcliffe, P.A., 315 E. Robinson Street, Suite 600, Orlando, Florida 32801; **TYRIE W. BOYER, Esquire**, 200 E. Forsyth Street, Jacksonville, Florida 32202-3320; **PHILIP BURLINGTON, Esquire**, 1615 Forum Place, West Palm Beach, Florida 33401; **JOHN F. HARKNESS, JR., Esquire**, Post Office Box 389, Tallahassee, Florida 32302-0389; **DAN CYTRYN, Esquire**, 8100 N. University Dr., Suite 202, Tamarac, Florida 33321; **HENRY P. TRAWICK, Esquire**, Post Office Box 4019, Sarasota, Florida 34230; **BERNARD PENN, Esquire**, Post Office Box 4182, Pensacola, Florida 32507; **MARIA P. SPERANDO, Esquire**, 221 E. Osceola, Stuart, Florida 34994; **ROBERT M. KLEIN, Esquire**, 2 Datron Center, Penthouse II, 9130 S. Dadeland Blvd., Miami, Florida 33156-7818; **SCOTT A. COLE, Esquire**, Joseph, Salk & Gaebe, 2950 SW 27th Avenue, Suite 100, Miami, Florida 33133-3765; and **GREG M. GAEBE, Esquire**, 420 South Dixie Highway, Third Floor, Miami, Florida 33146 on this the 20th day of July, 1999.

Charles Tyler Cone, Esquire