IN THE
SUPREME COURT OF FLORIDA

CASE NO.: 93,367

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

AMENDED BRIEF ON RETROACTIVITY ISSUE SUBMITTED BY SHANDS TEACHING HOSPITAL CLINICS, INC., ET.AL., MOVANTS FOR REHEARING AND PETITIONERS IN CASE NO. 91,718
(As Ordered By The Court On June 16, 1999)

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Procedural History

This Court on June 16, 1999, ordered interested parties to submit briefs to the Court regarding retroactive application of the Court's recent amendment to Rule 1.070(j), Florida Rules of Civil Procedure. *In re: Amendment to Florida Rule of Civil Procedure 1.070(j) -- Time Limit for Service*, 24 Fla. L. Weekly S109 (March 4, 1999). This brief is submitted on behalf of Shands Teaching Hospital, et.al., movants for rehearing on the retroactivity issue and Petitioners in Case No. 91,718 currently pending before this Court.

This is an unusual briefing situation. The Court specifically limited the briefs to the retroactive application of a universal rule amendment. With one notable exception discussed in Footnote 1 below, it would therefore appear that it is not necessary to delve into any factual matters. In order to make clear the evolution of the rule amendment and the serious injustice that would be done to Shands and others if the rule amendment were applied retroactively to cases where judgments have already been entered on the old version of the rule, a brief procedural review of the rule is in order.

On June 11, 1992, this Court published its decision in *Morales v. Sperry Rand*, 601 So.2d 538 (Fla. 1992). In that case, the Court reviewed the state of the

law concerning application of the "120 day rule" embodied in Rule 1.070(j), Florida Rules of Civil Procedure. The rule governs the time frame in which a plaintiff must serve a copy of the summons and complaint on the defendant in order to obtain jurisdiction over the defendant and pursue her lawsuit. The Court in *Morales* noted that application of the rule was necessary in order to ensure "diligent prosecution" of lawsuits.

The *Morales* Court explicitly recognized that, where the statute of limitations runs in the interim between filing of the initial complaint and dismissal for lack of timely service, then the dismissal under the rule is effectively final.[1] This Court

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[1] Because of certain recent representations made by counsel for Warren in the course of this appeal, and because this brief will later argue that there are compromise options available regarding the statute of limitations and this rule, this is the one point on which Shands feels compelled to comment on the specific facts of its case. In Warren's March 18, 1999 opposition to the Petitioner's motion for rehearing on the retroactivity issue, counsel for Warren, Maria Sperando, claimed that the statute of limitations had not expired in the *Shands* case. However, at one of the hearings on the motion to dismiss Warren's complaint in the trial court years ago, Ms. Sperando used the fact that the statute had run in an effort to persuade the trial court not to dismiss Warren's cause of action, stating:

"Sir, the statute of limitations has run."

See Transcript of proceedings January 24, 1995, contained in the record on appeal in Case No. 91,718.

It is patently obvious that the statute of limitations ran in this case long ago. Otherwise, Warren's counsel would not be so vigorous in the attempt to resurrect it. Warren's counsel specifically advised the trial court more than four years ago that the statute of limitations in this case had expired and she did so for her own

held that while the result in such a case is harsh, it is not "*unduly harsh*" because without some firm outer limit on service of process plaintiffs might prosecute their claims so slowly as to prejudice the defendant or the judicial system. The rule clearly set forth a specific deadline, not to be negotiated after the fact in any given case, and all plaintiffs operate under one rule.

Additionally, this Court pointed out in *Morales* that Plaintiffs experiencing difficulty in obtaining timely service could move for an extension of the 120 period before the period ran. An excellent example of a plaintiff who abided by this generous extension provision is found most recently in *Khambaty v. Lepine*, ___ So.2d ___, 24 Fla. L. Weekly D 1554 (Fla. 2d DCA June 30, 1999), a case in which a plaintiff obtained two extensions totalling an extra 120 days over and above the rule's allowance simply by following the express and easily understood

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purposes in attempting to persuade the trial court not to dismiss Warren's action. Further, the argument advanced by Warren's counsel as to why the statute of limitations has not run in the *Shands* case is that, because the *Warren* lawsuit was filed during pendency of presuit, then there is an *infinite* extension of the statute of limitations. It is an absurd argument which is squarely rebutted in the briefs in case number 91,718.

Given Ms. Sperando's representations to the trial court that the statute did run in this case and her express effort to use that fact to her advantage, the contention now that the statute of limitations may not have run is obviously a fallback position in the event that this Court will not rescue the case by changing the rule of civil procedure all the way back to 1994. Warren's change in position is outrageous, unsupported in the facts or the law, and should be categorically rejected by the Court.

text of the rule by asking for extensions before the initial 120 period ran.

Those who sat on their rights -- more appropriately described as obligations in this context -- also had the opportunity to show good cause for the lack of timely service so as to obtain an extension or avoid dismissal. And, if all of those options provided by the rule failed, the plaintiff could still appeal the decision of the trial court by showing the appellate court that the lower court abused its discretion in not finding good cause.

The *Morales* version of Rule 1.070(j) was the subject of substantial criticism. It was essentially argued that, this Court's pronouncement to the contrary in *Morales*, the *Morales* version did in fact exact too harsh a sanction in those cases where plaintiffs filed suit at the end of the statute of limitations and then failed to timely obtain service. Various judges wrote that the rule seemed to penalize plaintiffs for the failure of their counsel to abide by the rule's express terms. What undoubtedly drove most of the criticism was the fact that, in 1993, the United States Supreme Court adopted a change to the federal rule on service of process, Rule 4(m), Federal Rules of Civil Procedure. *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298 (3rd Cir. 1995), citing *The Order of the United States Supreme Court Adopting and Amending the Federal Rules of Civil Procedure* (April 22, 1993).

The 1993 amendment to Rule 4(m) greatly liberalized the federal rule such that, even where the plaintiff did not have good cause for late service, and even where no effort was made to obtain an extension before the 120 day period ran, a federal district court could rescue the plaintiff from the consequences by opening the service period even further after the 120 days had run.

This Court on March 4, 1999 adopted rule amendments to Rule 1.070(j), Florida Rules of Civil Procedure, substantially mirroring the 1993 federal rule amendment. The wisdom of the substance of that rule change is not at issue here. Rather, the question before the Court on rehearing is whether the March 4, 1999 rule amendment is to be applied retroactively to pending cases, including cases filed many years ago and which were, at the time of filing, unquestionably subject to the *Morales* version.

SUMMARY OF ARGUMENT

The issues which militate against retroactive application include the existence of clear precedent for the Court to rescind the retroactivity provision in the March 4, 1999 order on the rule amendment, the unconstitutional nature of retroactive application, the fundamental unfairness of retroactive application, the related concern that retroactive application is poor public policy because of the severely damaging effect it has on the reliability of the rules of civil procedure in every context, and the unique procedural difficulties involved in applying this particular rule change to older cases "insofar as just and practicable."

I. THE COURT HAS PREVIOUSLY RESCINDED RETROACTIVITY PROVISIONS TO RULE AMENDMENTS WHEN THOSE PROVISIONS INTERFERED WITH LITIGANTS' RIGHTS ACQUIRED BEFORE THE AMENDMENT.

On June 30, 1961, this Court adopted changes to the then existing rules of civil procedure to eliminate certain rules and address certain types of cross claims and ex-parte hearings. *In re Matter of Amendments to the Florida Rules of Civil Procedure*, 131 So.2d 475 (Fla. 1961). This Court stated at the conclusion of the opinion:

> Each and all of the foregoing amendments shall become effective on the 1st day of October, 1961, and shall be applicable to all cases then pending as well as to those instituted thereafter.

Id.

Just six weeks later, on July 19, 1961, this Court advised:

> It has been brought to the attention of the Court that the applicability of said amendments to pending cases could result in a deprivation of substantial rights previously acquired by litigants. It is, therefore, ordered that the amendments ... shall be applicable only to cases commenced on and after [the effective date].

In re Matter of Amendments to the Florida Rules of Civil Procedure, 132 So.2d 6 (Fla. 1961)

Thirty-eight years ago, this Court made a mistake when it adopted certain amendments to the rules of civil procedure and made them retroactive where

litigants had already obtained substantial rights. It corrected the error. Shands respectfully submits that, as was the case in 1961, the Court's decision to retroactively apply an amendment to Rule 1.070(j) could also deprive modern litigants of substantial rights. As in 1961, the Court should today recede from its March 4, 1999 order as to retroactivity.

II. RETROACTIVE APPLICATION VIOLATES DEFENDANTS' RIGHTS UNDER THE FLORIDA CONSTITUTION.

The two basic issues present in testing retroactive application of changes to Florida statutes are 1) whether the intent for retroactivity has been clearly announced by the legislature, and 2) whether retroactivity is constitutionally permissible. *Metropolitan Dade County v. Chase Federal Housing Corporation*, ___ So.2d ___, 24 Fla. L. Weekly S267, S268 (Fla. June 10, 1999). There does not appear to be a standardized approach to determining whether retroactive application of a rule amendment is permissible. However, there are a number of decisions of this Court which have used the same process applicable to review of retroactive statutes to the rule amendment arena and which have discussed the Court's unwillingness to take away by retroactive operation of a rule amendment the benefits those litigants previously enjoyed.[2]

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[2] The March 4, 1999 amendment announces the intention to make the rule change retroactive, although as noted below there are some unanswered questions

In the recent *Chase Federal* decision, this Court reiterated that retroactive application of a statute violates the due process rights of litigants and generally will not be allowed where those litigants have obtained vested rights under the old version of the statute. *Id.* at S270. The particular statute at issue in *Chase Federal* eliminated recovery by Dade County of certain environmental costs pursuant to the Dade County Code. This Court determined that retroactive application of the statute did not unconstitutionally interfere with the rights the County claimed under its own regulations, but *only* because of the unique nature of the supremacy of state statutory law to those regulations. *Id.* at S270. In fact, this Court added "we emphasize that a different result might well be reached if these immunity provisions were applied to abrogate" the rights of private litigants as opposed to governmental entities. *Id.*

This Court held in *Wiley v. Roof*, 641 So.2d 66 (Fla. 1994), that giving retroactive effect to an amendment to a statute of limitations did violate a litigant's constitutional rights. Specifically, the plaintiff in *Wiley* wished to pursue tort claims against members of her family for sexual abuse despite the fact that the statute of limitations closed on such claims prior to filing of her suit. *Id.* at 66-67.

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about the special circumstances of this rule change. Suffice it to say for purposes of the constitutional inquiry that the Court has so far indicated an intent to make the March 4, 1999 amendment retroactive. Thus, the question becomes whether retroactive application is constitutionally permissible.

The trial court dismissed the case, but while it was on appeal, the Florida Legislature changed the statute of limitations and included a provision that would allow time-barred claims to be instituted within a certain period following the legislative changes. *Id.* The district court hearing the appeal would have allowed the *Wiley* plaintiff to pursue her claims under the amended statute. *Id.*

The plaintiff in *Wiley* argued that the amended statute was permissible under the United State Supreme Court decisions in *Campbell v. Holt*, 115 U.S. 620 (1885) and *Chase Securities Corporation v. Donaldson*, 325 U.S. 304 (1945), reasoning that those decisions allowed for retroactive application of new or revised statutes of limitations. This Court summarized the decision in *Chase Securities* as proclaiming:

> [E]ven after the statute of limitations has barred the action, the Fourteenth Amendment is not violated when the legislature repeals or extends a statute of limitations, restores the plaintiff with a remedy, and divests the defendant from the benefits of the statutory bar.

Wiley, 641 So.2d at 68.

Critically, this Court went on to note that the *Chase Securities* decision allowed the states to interpret their state constitutions differently, providing for the possibility that a state supreme court would find that its own constitution would not endorse, in the words of *Chase Securities* "restoring the plaintiff with a remedy

and divesting the defendant from the benefit of the statutory bar." *Wiley*, 641 So.2d at 68. In *Wiley*, this Court expressly opted to part with the United States Supreme Court on retroactivity, holding that the due process and property right guarantees of Article I, Section 9 of the Florida Constitution precluded retroactive amendments to the statute of limitations. *Id.*

In deciding what *Florida's* Constitution required in this respect, this Court announced several key holdings which are clearly relevant to the issue before the Court on retroactive application of the March 4, 1999 amendment to Rule 1.070(j). First, this Court held that "regardless of whether the statute of limitations pertains to a right or a remedy, retroactively applying a new statute of limitations *robs* both plaintiffs and defendants of the reliability and predictability of the law." *Id.* (emphasis added).

It certainly seems that these words are paramount in the context of the *Shands* case as, to retroactively apply the new rule to the *Shands* case, decided four to five years ago under the *Morales* version of the rule, would cast doubt as to whether any litigant in any case could trust the rules. Shands respectfully submits that, if the new rule were applied in *Shands* Case No. 91,718, then no litigant in the state would be justified in relying upon this Court's rules or legal rulings since they would always be open to eventual change. The principle

involved is the very essence of the judicial system -- for that system to work and for litigants to subject themselves to it, there must be some confidence that it is reliable and predictable. *Wiley*. Here, to reach back five years and change the rule governing obtaining jurisdiction so as to avoid the consequences of the statute of limitations would, Shands submits, absolutely shatter any claim the Court has to that confidence.

Second, the decision in *Wiley* expressly declined to follow the United States Supreme Court's lead on the retroactivity issue in the context of the running of the statute of limitations. That holding is of obvious significance in the context of the instant issue as the way in which the federal courts applied the amendment to Rule 4(m) is what led to possible retroactive application of the change to Rule 1.070(j) in the first place.

Third, this Court in *Wiley* announced a critical state constitutional and public policy restriction on retroactive application of amendments for the purpose of resurrecting time-barred claims. As has oft been noted to this Court during the Rule 1.070(j) debate:

> [T]he legislature cannot subsequently declare that "we change our minds on this type of claim" and then resurrect it. Once an action is barred, a property right to be free from a claim has accrued.

Id. at 68.

This Court and the district courts have summarized the holding in *Wiley* as:

* proclaiming that a statutory amendment may not "breathe life into a claim that is lifeless as a result of a pre-existing statute," *Boyce v. Cutlett*, 672 So.2d 858, 860 (Fla. 4th DCA 1996);

* making it "clear that the legislature cannot revive time-barred claims" and that any attempt to do so is a violation of the due process clause of the Florida Constitution, *AHCA v. Associated Industries of Florida, Inc.*, 678 So.2d 1239, 1254 (Fla. 1996), *cert. denied*, 520 U.S. 1115 (1997), see also *Zlotogura v. Geller*, 681 So.2d 778 (Fla. 3rd DCA 1996) (same);

* expressly adopting the view that Florida's Constitution confers on a defendant a property right to be free from a time-barred claim even if there is an effort to revise the time-frame after the fact, *Hearndon v. Graham*, 710 So.2d 87, 89 (Fla. 1st DCA 1998); and, most importantly,

* precluding subsequent court action to revive a time-barred claim, *Wood v. Eli Lilly & Co.*, 701 So.2d 344, 346 (Fla. 1997).

This Court in *In re: Estate of Smith*, 685 So.2d 1206 (Fla.1997), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2434 (1997), held that the running of the statute of limitations *is* a vested right protected by the due process clause of the Florida Constitution. *Id.* The Court further held that retroactive changes to avoid that

consequence are unconstitutional. *Id.* at 1209-10.

In the rule amendment context, the Court has previously considered retroactive application of Rule 1.540(b), Florida Rules of Civil Procedure. See *Mendez-Perez v. Perez-Perez*, 656 So.2d 458 (Fla. 1995). In that marriage dissolution case, the rule in effect at the time of entry of judgment on divorce settlement set a one year time limit on motions to set aside for financial fraud. This Court, after the judgment was entered in that case, amended the rule to eliminate the one year time period. When the wife in that case detected evidence of fraud, she moved to set aside the settlement. But, she filed her motion beyond the one year period in effect at the time of the settlement.

The issue on appeal in *Mendez-Perez* was whether the amendment could be applied retroactively to allow the wife in that case to show the fraud and set aside the settlement. This Court held that the rule could not be applied retroactively because the opinion on the rule amendment did not state an intention by the Court to make the amendment retroactive. The *Mendez-Perez* case does not raise the same issue as in the instant case because the March 4, 1999 amendment indicates an intent to make the change retroactive. However, the *description* of the issue in *Mendez-Perez* is very instructive here:

> Mendez-Perez argues that failing to apply the amendment to her petition would reward a perpetrator of fraud. While

> we are not unsympathetic to Mendez-Perez' arguments, we note that a purpose of a limitations period is to set a time limit within which a suit should be brought. By its very nature, a limitations period may deprive someone of rights if he or she fails to bring an action within the applicable period.

Id. at 460 (citations omitted).

The argument that some make in favor of retroactive application of the change to Rule 1.070(j) is that it does not actually change the statute of limitations, just the procedural rule that works in tandem with the statute to sometimes result in loss of a claim. That argument is squarely rebutted by the above-cited language of *Mendez-Perez*. Just like the one year time limit in *Rule* 1.540(b), the 120 day time limit in the *Morales* version of Rule 1.070(j) is a serious one. It is of no lesser dignity or import than the rule at issue in *Mendez-Perez* and those who took it less seriously than the statute of limitations itself did so at their own risk. The one year time limit that formerly existed in Rule 1.540(b) and which was the subject of *Mendez-Perez* was not technically a statute of limitations, either. But, because it set a time limit to set the legal wheels in motion for setting aside settlement pursuant to a fraud, this Court characterized it in that fashion. This Court held that the one year time limit *in the rule* had the same import and consequence as a statute of limitations because the rule was the mechanism for setting aside the settlement. Here, of course, Rule 1.070 is generally the rule

defining the requirements of service of process and subsection (j) is the precise mechanism setting the deadline for service.

Most importantly, this Court in *Mendez-Perez* emphasized that while sympathetic to the defrauded wife, the Court would not be driven by the outcome of individual cases to determine the retroactivity issue. If, however, one peruses the filings of those who favor retroactive application in the case of Rule 1.070(j), it is abundantly clear that they do seek retroactive application because they do not like the outcome of application of the older rule in their particular cases.

Now, why is that? It is because those who favor retroactive application know that they have found a potential mechanism to avoid the effect of their failure to follow *the* rule on jurisdiction and the consequent closure of the statute of limitations in their respective cases. The Court should greet with great skepticism any claim that proponents only wish to see justice done when, in reality, they simply wish to evade the consequences of the rule of law.

In the case of Rule 1.070(j), there was clear caselaw from this Court, in the form of *Morales*, which established the potential consequences of failing to meet the 120 day requirement for service of process. Taking the Shands case as an example, the plaintiff filed suit in 1994 and both the plain terms of the rule and the decision in *Morales* dictated that, absent good cause, the late service of process

in that case compelled dismissal. Consistent with *Morales*, the running of the statute of limitations resulted in the vesting of a substantive right in Shands not to be subject to suit from Warren. The issue of retroactivity ultimately comes down to the question of whether that right can be disturbed by changing the rule four or five years later. Each and every one of the above noted cases can be cited for the proposition that Florida courts are bound to refuse to do so.

III. RETROACTIVE APPLICATION IS FUNDAMENTALLY UNFAIR.

At the risk of sounding somewhat legally unsophisticated, perhaps the best and clearest argument against retroactive application of the rule amendment is that it would be fundamentally unfair to do so. For example, the complaint in *Shands v. Warren* was filed in February of 1994, less than two years after the decision in *Morales* was published, but five years before the new rule was adopted. The extant version of Rule 1.070(j) unquestionably governed service of process for that complaint. Now, more than five years after the complaint was filed, the possibility of application of the amended rule threatens to take from the defendant that to which it was entitled under the rule in effect at the time. If it is to apply to Shands five years later, the March 4, 1999 order might as well have said that the amendment was adopted "nunc pro tunc" to the day before the *Morales* decision was issued. So much for the rule of law.

The simple fact is that the rules of civil procedure are filled with provisions that can affect disposition of a case just as much as Rule 1.070(j). For example, Rule 1.420(e) can dispose of a claim by virtue of failure to prosecute it timely. Failure to comply with Rule 1.530(b) can result in loss of an opportunity for a new trial. How can the litigants in cases where those rules are at issue ever have any faith at all that they are practicing as the law compels if this Court, driven by results in particular cases, is willing to reach back and change those rules?

IV. RETROACTIVE APPLICATION OF THE FEDERAL AMENDMENT IS A POOR JUSTIFICATION FOR RETROACTIVE APPLICATION OF THE AMENDMENT TO RULE 1.070(J).

The sole basis for even the potential retroactive application of the March 4, 1999 amendment to Rule 1.070(j) is the fact that the federal rule amendment in 1993 was applied to pending cases "insofar as just and practicable." *In re: Amendment to Florida Rule of Civil Procedure 1.070(j) -- Time Limit for Service*, 24 Fla. L. Weekly S109 (March 4, 1999), citing *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298 (3rd Cir. 1995). But, this Court refused to follow the United States Supreme Court on virtually the same issue in *Wiley* and there are myriad reasons it should refuse to do so here, as well.[3]

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[3] It should be noted that there is nothing *binding* about the fact that the United States Supreme Court 1993 amendment to Rule 4(m) was made retroactive. While no one doubt but that this fact is persuasive, there are, as in *Wiley*, some excellent

To begin with, the decision *Petrucelli* did not in any way discuss the *wisdom* of retroactive application of the amendment to Rule 4(m), Federal Rules of Civil Procedure. Rather, *Petrucelli* simply stated that the United States Supreme Court had indicated that it wanted the amendment so applied. Second, and perhaps more important, *Petrucelli* expressly recognized that the amendment to the federal rule could be applied retroactively *even though* it would disturb the expiration of the statute of limitations. *Id.* at 1305-06. We know from this Court's decision in *Wiley v. Roof* that this Court will not follow federal precedent when it comes to reopening statutes of limitations despite the fact that a federal court might resolve the matter differently. This is based upon this Court's previous holding that the Florida Constitution and this Court are more protective of a litigant's vested rights under the closing of the statute of limitations than are the federal courts. *Wiley*.

The fact is that this Court and the Florida Constitution protect a litigant's right to the close of the statute of limitation substantially more so than would the federal courts. The mere fact that the Third Circuit in *Petrucelli* simply observed that it could, under the U.S. Supreme Court order for Rule 4(m), reach back and disturb the running of the statute of limitations in a federal case should not persuade this Court at all that it should abandon the protection that the Florida

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reasons not to be persuaded today.

Constitution gives to Shands.

Second, there is no evidence that the "insofar as just and practicable" language was deemed by the United States Supreme Court to have any special significance in the case of the amendment to Rule 4(m). This language is almost always included in all of the Court's rule changes and there is nothing to suggest that the Court thought it particularly necessary to retroactively apply the change to Rule 4(m). *Orders*, Federal Civil Judicial Procedure and Rules, (West Group), pp. 36-37 (1998).

Third, it is settled federal law that the words "just and practicable" in a United States Supreme Court change to a rule of procedure *do not* authorize retroactive application in cases where to do so would be unjust to litigants who have operated or litigated under the old version of the rule. *Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 275 n.29 (1994) (amendments to procedural rules should not be applied to pending cases where it would be unjust to a litigant to do so). In reviewing the materials already submitted to this Court by some of the proponents of retroactive application of Rule 1.070(j), Florida Rules of Civil Procedure, it is apparent that many of them have severely oversimplified the evaluation of retroactive application into a mere question of whether the rule is procedural or substantive in nature.

For example, the Almeidas, plaintiffs in *Almeida v. FMC Corp.*, ___ So.2d ___, 24 Fla. L. Wkly. D765 (Fla. 3rd DCA Mar. 24, 1999) submitted a "Joinder in Response Against Motion for Rehearing of the Proposed Amendment to Florida Rule of Civil Procedure 1.070(j)" to this Court on July 2, 1999. That joinder argues that the amendment to Rule 1.070(j) is purely procedural, thus not affecting any vested right of those defendants who enjoyed the running of the statute of limitations under the old rule.

Quite apart from the facial absurdity of such an argument, it must be emphasized that even a rule which appears to be purely procedural can have a dispositive effect on vested and substantive rights (see e.g. *Wiley*), requiring that an amendment to the procedural rule not be applied retroactively if it would work an injustice. *Landgraf.*

> Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime...our orders approving amendments to federal procedural rules reflect a commonsense notion that the applicability of such provisions ordinarily depends *on the posture of the particular case*.

Id.

Thus, even though the United States Supreme Court included in its 1993 amendment its usual "insofar as just and practicable" language, this Court should

not be misled into believing that retroactive application is always required or even advisable. Rather, as the United States Supreme Court emphasized in *Landgraf*, when it issues a new or revised rule, it does so with the understanding that particular cases may not be in such a posture as to make retroactive application just. *Landgraf* at note 29 ("Nor do we suggest that concerns about retroactivity have no application to procedural rules.")

The Supreme Court Order of April 22, 1993 which adopted the federal revision to Rule 4(m), Federal Rules of Civil Procedure, is not to be applied as though there were a universal retroactive amendment. *Fusco v. Madeiros*, 965 F.Supp. 230 (D.R.I. 1996). The 1993 amendments are not to be applied if "it would be *unjust or impracticable* to do so." *Id.* at 234, citing *Silva v. Witschen*, 19 F.3d 725 (1st Cir. 1994). In fact, in cases where the 1993 amendments would "require a burdensome, impracticable remand and continued unfairness," then the 1993 amendments should not be applied. *Id.* The *Fusco* decision, the decision in *Silva*, and the many cases cited in the *Fusco* decision, demonstrate that one cannot blindly follow the "insofar as just and practicable" language if doing so is either burdensome or unfair to litigants.

Shands urges the Court to review the decision in *Freund v. Fleetwood Enterprises, Inc.*, 956 F.2d 354 (1st Cir. 1992). In *Freund*, the First Circuit

Court of Appeals dealt with whether it should apply, during pendency of an appeal, a new federal rule of civil procedure. The First Circuit refused to do so, in part, because it was not willing to allow the plaintiff, who had delayed a decision in his case by constant appeals, to benefit from "an otherwise unattainable windfall due to a change in a procedural rule." *Id.* at 363. To do so, the Court held, would violate a significant public interest against relitigation of a previously decided issue.

Shands respectfully submits that Warren (and other plaintiffs similarly situated) should not receive the "otherwise unattainable windfall" of the resurrection of their dead cases[4] simply by virtue of the fact that they happened to have had those cases on appeal at the time that a rule of civil procedure for the trial court was changed. Without question, this Court would swiftly move to strike down as unconstitutional any attempt by the legislature to reopen the statute of limitations in *Shands* or any of the other cases relevant to the retroactivity issue pending before the Court. It would represent, in the words of the *Freund* court,

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[4] And make no mistake about it, by Warren's own counsel's admission, the *Shands* case was dead four years ago! See note 1, *supra*. Shands urges the Court to reject any effort by Warren to relitigate that admission, especially since the fact that the statute had run was originally used by Warren to her advantage in this case. There must be some finality to this case and its journey back and forth in the appellate courts over the last five years. If this Court does not enforce the statute of limitations in this case, then it must be evident by now that Warren will keep it going, and going, and going.

a "manifest injustice" to use an amendment to the rule of civil procedure to bypass that result and provide the subject plaintiffs "an otherwise unattainable windfall." *Id.*

To be sure, there are some federal courts that have simply applied the new Rule 4(m) without much, if any, thought to whether it was just and practicable to do so in a given case. But, many federal courts have found that under the circumstances of individual cases it would not be "just and practicable" to apply an amended federal rule because, as in *Shands*, one of the litigants would be stripped of a significant benefit. For example, in *In matter of Generes*, 69 F.3d 821 (7th Cir. 1995), *cert. denied*, 519 U.S. 823, the United States Court of Appeals for the Seventh Circuit agreed with a district court decision to apply the old version of a rule of civil procedure because the operative facts all occurred prior to adoption of the new rule.

Similarly, in *U.S. v. Jean*, ___ F.Supp. ___, 1999 WL 301652 (N.D.Ill. April 29, 1999), the district court refused to apply a new rule of procedure -- despite the fact that the United States Supreme Court had instructed that it be applied to pending cases "insofar as just and practicable" -- because the legally operative conduct had occurred years prior to the adoption of the new rule.

In *Land v. Chicago Truck Drivers, Helpers, and Warehouse Workers' Union*

(Independent), Health and Welfare Fund, 25 F.3d 509 (7th Cir. 1994), the Seventh Circuit refused to apply an amendment to Rule 11, Federal Rules of Civil Procedure, to a situation where both the conduct at issue and the trial court's decision on that conduct occurred prior to the amendment to the rule. In fact, the Seventh Circuit generally will not apply a rule amendment retroactively even in the presence of the "just and practicable" language from the United States Supreme Court unless the defendant would suffer "no prejudice or injustice." *Land*; see also *Wren v. Ahitow*, 67 F.3d 302 (7th Cir. 1995) (unpublished decision). It is quite apparent that "just and practicable" means much more than "retroactive."

The Eighth Circuit had recognized that the question of whether a rule amendment should be applied retroactively insofar as "just and practicable" is "necessarily a case by case consideration." *U.S. v. Duke*, 50 F.3d 571, 575 (8th Cir. 1995), *cert. denied*, 516 U.S. 885 (1995). The Sixth Circuit also evaluates whether retroactive application is "just and practicable" on the basis of the facts of individual cases. See e.g. *Spurlock v. Demby*, 48 F.3d 1219, n.1 (6th Cir. 1995).

The Tenth Circuit faced a similar situation in *Avila v. Sullivan*, 46 F.3d 1150 (10th Cir. 1995) (unreported decision), a case dealing with an amendment by the United States Supreme Court to the appellate rules of procedure. In

commenting on what renders a case "pending" at the time of a rule change, the Tenth Circuit held:

> Where, then, does the concept of a "pending case" go to find a home? Can it be anywhere but that point at which the matter of pendency is crucial? We think not; Therefore, we look to the time in which jurisdiction was to have attached: The date the appeal was filed. By the expressed terms of the rule then in effect, the two notices of appeal filed prior to disposition of the Rule 59 motion or ineffective to confer jurisdiction on the appellate court. A contrary rule would allow appellate jurisdiction to turn on whether the court of appeals determine its jurisdiction over the case rather than by the rules in effect when the appeal was filed.

As in *Avila*, this Court could certainly conclude that a case is only "pending" for purposes of determining which version of Rule 1.070(j) applies if, *but only if*, the case had not passed the "crucial" point at which the trial court has determined that the plaintiff violated the *Morales* version of the rule in effect at the time. Again using the *Shands* case as an example, this Court could construe "pending" to apply to that point in time at which the trial court (in 1994 and again in 1995) determined that Mrs. Warren failed to comply with the version of Rule 1.070(j) then in effect.

As explained in much greater detail in Section VI of this brief, such a construction would preserve the interests of Shands in the rights to which it was entitled under the old rule. After all, is it not the case that the "crucial" point of

pendency for purposes of the March 4, 1999 rule amendment is the point at which the trial court has already determined that the plaintiff failed to follow the terms of the old rule in effect at the time of service of process?

In addition to deprivation of the right to an already closed statute of limitations, Shands and other defendants could be greatly financially victimized by retroactive application of the new rule. In the case of Shands, this is so by virtue of the fact that Warren kept this case on appeal for five years, including two appeals to the First District Court of Appeal. It is indisputable that Shands participated in the expense of litigation of these appeals without divining that the Florida Supreme Court would change the rule that was the basis of the trial court orders on appeal five years before. One federal district court has explicitly held that it would not apply an amendment to a rule of civil procedure "insofar as just and practicable" because the only reason the case was still "pending" at the time of the amendment was that the losing party continuously kept it alive on interlocutory appeal. *Franz v. Lytle*, 854 F.Supp. 753, 755 (D. Kansas 1994).

> It would not be just to apply the amended rules to this action, which was filed in 1989, which was the subject of an interlocutory appeal to the Tenth Circuit on the issue of qualified immunity, and which was tried commencing November 30, 1993. Were it not for the appeal, this action *would have been concluded long before the effective date of the amendments*.

Franz, 854 F.Supp. at 755.

In the *Shands* case, Shands obtained dismissals in 1994, 1995, and again in 1996. As in *Franz*, a case which incidentally dealt with other 1993 amendments to the federal rules of civil procedure, the only reason that the Shands case is still "pending" so as to be subject to the new Rule 1.070(j) is because Warren kept losing her cause of action under the rule of civil procedure which governed her case and then repeatedly appealed. As in *Franz* and *Fusco*, and quite apart from the issue of whether it is unconstitutional and unfair to deprive Shands of the benefit of the running of the statute of limitations, it is beyond dispute that it is unfair to Shands to apply the new rule of civil procedure after two dismissals in the trial court, two appeals to the First District Court of Appeal, and an appeal to this Court. The expense to Shands of having fairly and conscientiously litigated this case through those dismissals and the multiple appeals is certainly a factor that this Court should consider in whether it would be "just" to apply the new rule to Shands simply because Warren kept her case on appeal long enough for the rule to change.

V. RETROACTIVE APPLICATION OF THE AMENDMENT TO RULE 1.070(J) IS FRAUGHT WITH PROCEDURAL DIFFICULTIES.

It must be noted that the language in the March 4 amendment did not actually state that the rule is to applied "retroactively." Rather, as noted above, this Court simply imprinted on the March 4 change the same language used by the U.S. Supreme Court whenever it makes a rule change and this Court's March 4 opinion stated that the new version of the rule is to be applied to pending cases "insofar as just and practicable." The Court did not define what "just and practicable" means in the context of the rule change.

This is a very odd ruling in that it actually leaves the decision as to which rule to apply to the lower courts. Shands respectfully submits that it is unthinkable that the decision as to which rule governing jurisdiction over the defendant applies -- the old or the new version -- can be allowed to differ depending on the court. A judge in one circuit could find that application of the new rule is appropriate when a judge in another circuit, on similar or the same facts, could find that the old rule should apply. Absent an abuse of discretion, their respective decisions would presumably be upheld. See *Morales*. Lest it be forgotten, this is *the* rule on service of process. It is jurisdictional. If ever there was a rule where uniformity amongst the trial courts was mandatory, Rule 1.070 is it.

To the knowledge of counsel for Shands, this Court has never published a rule change and then left the decision as to whether to apply it in an individual case to the trial court. As will be seen below, the Court can use the *Shands* case as a means to guide the lower courts on what is a "just and practicable" application of the new rule. And, it is clear that they do need some guidance.

Since the March 4, 1999 amendment was published by this Court, there have already been four district court of appeal decisions touching directly upon the retroactive effect of the amendment. In *Foster v. Chung*, ___, So.2d ___, 24 Fla. L. Wkly. D1393 (Fla. 4h DCA June 16, 1999), the district court opinion reflects no consideration of why, or why it wouldn't, be just and practicable to apply the new rule to that particular case -- the district court simply did so. In *Bacchi v. Manna of Hernando, Inc.*, ___ So.2d ___, 24 Fla. L. Wkly. D962 (Fla. 5th DCA April 16, 1999), a different district court remanded its case for a trial court determination of which rule to apply. In *Almeida*, a Third District case, the court flatly declared that it would be just and practicable to apply the new rule to its case. And, in *Crawford v. Weaver, Kuvin, Weaver & Lipton, P.A.*, 730 So.2d 844 (Fla. 3rd DCA 1999), the Third District actually used the presence of good cause for late service (an element more significant in the old version of the rule) to partially justify application of the new rule.

Thus, the district courts have not set any parameters that could consistently be applied to determine what is a "just and practicable" application of the new rule. Even the federal courts -- on whose shoulders proponents of retroactivity stand -- hold that "just and practicable" must have some meaning and that where it would be unfair or unjust to a litigant to do so, the new rule will not be applied. The sole basis in *Petrucelli* for retroactive application was that the U.S. Supreme Court and the Committee Notes for the change to Rule 4(m) indicated that it was acceptable to apply the new federal rule even where a defendant would lose the vested right to running of the statute of limitations. We know from *Wiley* that this is not the law in Florida.

Moreover, based upon the above decisions, there is already a conflict as to whether the trial or appellate court is the proper venue to decide which rule to apply. And, what is to become of all of those cases disposed of by application of the *Morales* version of the rule since 1992, but which did not find their way to this Court? By now it is well established that there are many plaintiffs out there who did not keep their cases in litigation so as to be "pending" at the time of the March 4, 1999 amendment. If application of the *Morales* rule to Mrs. Warren in *Shands v. Warren* is so unfair as to justify retroactive application over a five year span to avoid the result, why shouldn't those who did not have the luck of maintaining

their "pending" status also similarly have their claims resurrected under the amended rule?

Many plaintiff's lawyers who failed to abide by the *Morales* version of the rule or by the published dictates of the *Morales* decision itself have undoubtedly faced claims for legal malpractice for late service of process and subsequent dismissal. Have they compounded their error by subsequently failing to, as the plaintiff in *Shands* managed to do, keep the case pending for five years on multiple appeals?

What kind of message does it send to Florida attorneys, plaintiff *and* defense, when the Court makes retroactive application of a rule amendment a viable means of avoiding harsh, but not "unduly harsh" results? Any Florida lawyer who loses a case or a significant issue in a case because of application of the rules of civil procedure must appeal, and appeal, and appeal, just in case the Court decides to substantively change the rule and apply it retroactively.

The Court adopted the rule amendment because of criticism that it is not fair to an actual plaintiff to bar her claim because her attorney fails to meet the terms of the rule while the statute of limitations runs in the interim. Shands respectfully submits that it is no more fair to the actual defendant to take from it the benefit of the rule and the running of the statute of limitations five years before the rule

change. If the Court must choose (and, as always, it must), then it would seem that it is obligated to choose the rights Shands obtained five years ago despite the fact that the Court has, in the words of *Wiley*, "simply changed its mind."

VI. TWO POTENTIAL *FAIR* COMPROMISES.

There are two potential compromises on the retroactivity issue that would set clear parameters for "just and practicable" and which would prevent confusion in the lower courts, maximize reasonable retroactive application, and protect the vested rights of Shands and other defendants in already decided civil cases. This Court could hold, as a matter of law, that it is neither just nor practicable to apply (1) the March 4 amendment to cases where the plaintiff had already violated the *Morales* version of Rule 1.070(j) in effect at the time the 120th day came and went. In the alternative, the Court could hold, as a matter of law, that it is neither just nor practicable to apply the new rule to cases where the defendant had (2) obtained, prior to March 4, 1999, an order of dismissal for failure to follow the extant version of Rule 1.070(j).

Under either compromise, the Court would not violate the state constitution by resurrecting time-barred claims. *Wiley*; *In re: Estate of Smith*. Furthermore, either holding would not represent an unfair intrusion into the legitimate

expectations of litigants that the rules will not change on them five years into a case and after multiple appeals. These possible compromises would not save Warren or the plaintiffs in those cases which have recently been decided at the appellate level under the new rule. But, it would apply the rule amendment most liberally -- only to the extent that it does not unconstitutionally or unfairly disturb the rights of those who have obtained judgments. Such a holding could be issued either on this rehearing matter or in the context of the Shands case. It would provide guidance to the district and trial courts on what is a "just and practicable" application of the amended rule. It would protect those defendants who already had in pocket judgments which were sealed by the fact that the statute of limitations ran in their respective cases *before* the March 4, 1999 amendment and by virtue of an order of dismissal under the *Morales* version of the rule in effect at the time the defendant's motion to dismiss was granted.

Similar holdings have issued from this Court before. In *Leapai v. Milton*, 595 So.2d 12 (Fla.1992), this court held that §45.061, Fla. Stat., governing offers of judgment, could be applied retroactively so long as the statute was enacted *before the offeree's rejection* of the offer of judgment. This Court extended that exact reasoning to Florida Rule of Civil Procedure 1.442 in *TGI Friday's, Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995), adopting the decision of the district court of

appeal and holding that the rule of civil procedure could be applied retroactively *only* to cases where the rule was in effect *before* rejection of an offer of judgment.

The rationale behind these decisions was that the "moment" at which litigants operating under the statutes or rules governing offers of judgment obtain a vested right was when the offeree rejected the offer of judgment. If the offer had not been made, or if the 30 day window for acceptance was still open when the statute or rule change was enacted, then the Court held that the new provision applied. But, in cases where rejection of the offer had already happened such as to create a legal right to fees and costs, this Court was unwilling to intervene in such a manner as to disturb legal relationships and rights that arose before the parties had the benefit of the new statute or rule.

It is true that those who seek the fullest degree of retroactive application would not be helped by such a holding. For example, Warren would not be entitled to have the 1994 and 1995 dismissals in her case adjudged under the amended 1999 rule because five years ago a judgment was entered on the *Morales* version of the rule such that her claim was extinguished. But, if the words "just and practicable" are to have any meaning at all, it is nonetheless encumbent on this Court to provide some guidance on what is a just and practicable retroactive application.

It seems patently obvious to Shands that if retroactive application is allowed in its case, then they have no reason to assume that they will be given due process protection to their rights and, in fact, there will be no such thing as a case where retroactive application is not "just and practicable."

CONCLUSION

It is not an exaggeration to say here that if the Court chooses to allow retroactive application of the amendment to *Shands v. Warren* over a four to five year span, then the Court substantially undermines reliability in the rules of civil procedure and this Court. It would be fundamentally unfair to take a case filed five years ago and salvage it from the dispositive fate it was subject to under the rule in force at the time by applying a new rule to it. If this were a case where the plaintiff had simply filed her complaint one day past the statute of limitations, the Court would not hesitate to reject any argument that an amended statute of limitations be retroactively applied so as to breathe new life into the lawsuit.

Retroactive application of the March 4, 1999 amendment to Rule 1.070(j) offends the due process provisions of the Florida Constitution, is not justified by the federal decisions in the area, and cannot be justified as "just and practicable" in the *Shands v. Warren* case currently pending before the Court. This Court should either recede from retroactivity altogether as it did in the case of the 1961 amendments, or explain, either on rehearing in Case No. 93,367 or in the opinion in *Shands*, that it is not just and practicable to apply the amended rule in cases like *Shands* where the statute of limitations ran before the amendment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July, 1999, copies of the foregoing (as amended) were provided by U.S. Mail to **Maria P. Sperando**, Esq., 221 E. Osceola, Stuart, Florida 34994, **Henry P. Trawick**, Esq., P.O. Box 4019, Sarastoa, Florida 34230, **Dan Cytryn, Esq.**, 8100 N. Univ. Drive, Tamarac, Florida, 33321, **Philip Burlington, Esq.**, 1615 Forum Place, West Palm Beach, Florida, 33401, **Bernard Penn, Esq.**, P.O. Box 4182, Pensacola, Florida, 32507, **Robert Dietz**, Esq., 315 E. Robinson Street, Suite 600, Orlando, Florida 32801, **Robert M. Klein**, 9130 S. Dadeland Blvd., PH I & H, Two Datran Center, Miami, Florida 33156, **Scott A. Cole**, Esq. Josephs, Jack & Gaebe, P.A., Grove Professional Bldg., 2950 S.W. 27th Avenue - Suite 100, Miami, Florida 33133-3765, **Greg M. Gaebe**, Esq., 420 S. Dixie Hwy., 3rd Floor, Coral Gables, Florida 33146, **Sina Negahbani**, P.O. Box 163605, Miami, FL 33116, **Tyrie William Boyer, Esq.**, 210 E. Forsyth St., Jacksonville, FL 32202, **John F. Harkness, Jr.**, Florida Bar, 650 Apalachee Pkwy., Tallahassee, FL 32399.

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