

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO. 93,367

097
FILED

SID J. WHITE

NOV 16 1998

CLERK, SUPREME COURT

By

Chief Deputy Clerk

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

COMMENT TO PROPOSED AMENDMENT TO FLA.R.CIV.P. 1.070(j)

The Academy of Florida Trial Lawyers hereby files this Comment on the proposed amendment to Fla.R.Civ.P. 1.070(j), filed by this Court on September 24, 1998. The Academy is completely in favor of the amendment proposed by this Court, and is simply filing this comment to suggest that, consistent with the United States Supreme Court's amendment to Federal Rule 4(m), this Court provide that the amendment apply to all proceedings in civil cases pending on its effective date. This would permit the amendment to be applied retroactively and, thereby, ameliorate the harsh effects of the prior provision.

As is noted in this Court's proposed amendment to the rule, Fla.R.Civ.P. 1.070(j) was patterned after Fed.R.Civ.P. 4(j), now recodified as Rule 4(m). While intended to be an instrument of case management, the federal rule was roundly

criticized by federal appellate courts as unduly harsh, and characterized as an "instrument of oppression," UNITED STATES v. AYER, 857 F.2d 881, 885-86 (1st Cir. 1988); FLOYD v. UNITED STATES, 900 F.2d 1045, 1047 (7th Cir. 1990); BRAXTON v. UNITED STATES, 817 F.2d 238, 241 (3d Cir. 1987).

The state rule was similarly criticized by Florida judges, see MAHER v. BEST WESTERN INN, 657 So.2d 1024 (Fla. 5th DCA) (Griffin, J., dissenting), rev. dismissed., 676 So.2d 1368 (Fla. 1996); TACO BELL CORP. v. COSTANZA, 686 So.2d 773, 774 (Fla. 4th DCA 1997) (Pariente, J., concurring specially). Judge Schwartz criticized the rule as follows, HERNANDEZ v. PAGE, 580 So.2d 793, 795 (Fla. 3d DCA 1991) (Schwartz, C.J., specially concurring):

[A]nother, quite ill-considered, but - as this case illustrates - quite successful attempt to elevate the demands of speed and efficiency in the administration of justice over the substantive rights of the parties which the system is in business only to serve [Citation omitted].

In GRECO v. PEDERSEN, 583 So.2d 783, 785 (Fla. 2d DCA 1991), the Second District expressly adopted Judge Schwartz' concern.

In 1993, the United States Supreme Court adopted an amendment to Fed.R.Civ.P. 4(m), which is consistent with the rule change now proposed by this Court, Order of the United States Supreme Court Adopting and Amending the

Federal Rules of Civil Procedure (April 22, 1993). In that Order, the Supreme Court stated:

The foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1993, and shall govern...insofar as just and practicable, all proceedings in civil cases then pending.

In *PETRUCELLI v. BOHRINGER & RATZINGER, G.M.B.H.*, 46 F.3d 1298 (3d Cir. 1995), the court specifically relied on that language in the Supreme Court's order to apply the amended rule 4(m) to a case that had been dismissed prior to its adoption. The Third Circuit specifically noted, 46 F.3d at 1305: "Because we believe it to be 'just and practicable,' we conclude that Rule 4(m) applies retroactively to these proceedings."

The Academy of Florida Trial Lawyers would respectfully suggest that this Court should utilize language similar to that of the United States Supreme Court in adopting the rule change which has been proposed.

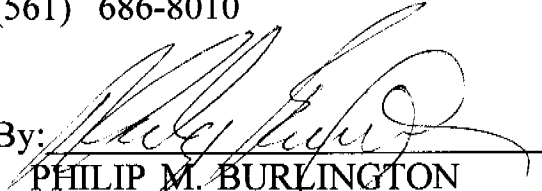
This Court has utilized such language with prior procedural amendments, e.g., *IN RE AMENDMENTS TO FLORIDA RULES OF CIVIL PROCEDURE*, 131 So.2d 475, 476 (Fla. 1961); and the omission of such language can be fatal to a party's reliance on the amendment, e.g., *NATKOW v. NATKOW*, 696 So.2d 315 (Fla. 1997). Utilization of such language with this amendment would enable Florida courts to apply the proposed amendment retroactively when it is "just and

practicable." This would enable Florida courts to ameliorate the harsh effect of the existing rule on pending cases, and promote the determination of cases on their merits and not on the basis of procedural technicalities.

Dated: November 13, 1998

Respectfully submitted on behalf of the
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