IN THE SUPREME COURT OF FLORIDA

Case No: 96,540

TRAYLOR BROTHERS, INC.,

Petitioner

v.

TORA SHIPMAN, as PERSONAL REPRESENTATIVE of the ESTATE OF MAURICE SHIPMAN,

Respondent

On appeal from the First District Court of Appeal
L.T. Case No: 1999-1672

ANSWER BRIEF OF THE RESPONDENT, TORA SHIPMAN AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MAURICE SHIPMAN

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Statement of the Case

The Respondent herein and the Appellee below, Tora Shipman, as Personal Representative of the Estate of Maurice Shipman, filed her Complaint on October 22, 1997. Prior to the passage of 120 days from that filing Shipman obtained a Court Order in accordance with Rule 1.090(b) of the Florida Rules of Civil Procedure extending the time for the service of process on the Defendants beyond the 120 days required by Rule 1.070(j) of the Florida Rules of Civil Procedure. Subsequent to that

and always on a timely basis, Shipman obtained further extensions by Court Order. Eventually service of process was obtained on December 16, 1998 against the Defendant/Appellant Traylor Brothers, Inc. At no time did Shipman ever allow an extended deadline to pass without obtaining an additional Court Order granting further extension.

Traylor Brothers has contended, in effect, that the lower court did not have a right to make an extension of the time required by Rule 1.070(j) and therefore the 120 days had passed and the service was defective. Traylor Brothers' Motion to Dismiss based on that argument was denied by the lower court by Order dated April 5, 1999.

Traylor Brothers then filed the an Appeal in the First District Court of Appeal specifically acknowledging that the District Court of Appeals for the First District has held that such a decision is not appealable in Novella Land, Inc. v. Panama City Branch Office Park, Ltd., 662 So.2d 743 (Fla. 1st DCA 1995), Traylor Brother's Initial Brief at 6. The District Court of Appeal for the First District entered an Order Per Curium Affirming the lower court's order and dismissing the appeal stating that the order was not an appealable non-final order. In the same opinion, filed August 20, 1999, the First District certified that there was a conflict with Mid-Florida Associates Limited vs. Traylor, 641 So.2d 182 (Fla. 5th DCA 1994) and Comisky v. Rosen Management Service, Inc. 630 So.2d 628 (Fla. 4th DCA 1994)(en banc). The appellant and petitioner herein Traylor Brothers, Inc. then filed its Notice to Invoke Discretionary Jurisdiction of the Supreme Court and subsequent thereto filed its Initial Brief on the Merits in accordance with Rule 9.120. The respondent herein and

appellee below does file this, it’s answer brief in accordance with Rule 9.210(c) of the Rules of Appellate Procedure.

Statement of the Facts

Shipman accepts Traylor Brothers' Statement of the Facts with the following additions:

A. Court orders extending the time for service of process were timely obtained in accordance with Rule 1.090(b) prior to the passing of any deadline pursuant to Rule 1.070(j).

B. Traylor Brothers is not entitled to Worker's Compensation immunity because the manner that it caused Plaintiff's death was so grossly negligent as to be tantamount to intentional injury.

Summary Of The Argument

The appeal of this matter is not timely as a matter of law pursuant to First

District Court of Appeals ruling in Novella Land Inc. v. Panama City Beach Office Park, Ltd., 662 So.2d 743 (Fla. 1st DCA 1995).

The petitioner herein and appellant below, Traylor Brothers, Inc. asserts that there is a conflict of opinions between the First District Court of Appeals and the Fourth and Fifth District Court of Appeals and claims access the jurisdiction of the Supreme Court on the basis of the conflict of the District Courts of Appeal. There **is** a conflict in the opinions relied on by the First District Court of Appeals in support of the dismissal of the appellant and petitioners initial appeal with the decisions of the Fourth and Fifth District Court of Appeal. However none of the decisions relied on to certify the conflict involves a decision turning on the factual situation presented by this case. This case is one which involves extensions of time to serve process on the Defendant granted in compliance with Rule 1.090(b) not the failure to serve within the 120-day period to serve process under Rule 1.070(j).

The instant Appeal is further not well-founded because Shipman timely obtained orders extending the 120 day time limit and served Traylor Brothers within the time granted by those extensions. Shipman had a right to rely on said orders granting said extensions and, in the words of Onett v. Ahola, 683 So.2d 593, 594 (3rd DCA 1996) "Obviously if the Plaintiff obtains an Order extending the 120 day time limit and then accomplishes service within the extension of time, service is timely as a matter of law. There would be no occasion to consider the issue of good cause."

Argument

Issue One
The Present Matter Is Not Ripe For Appeal

In Novella Land, Inc. v. Panama City Beach Office Park, Ltd., 662 So.2d 743 (1st DCA 1995). The First District Court of Appeal stated as follows:

> "In summary, we find that this Court has implied its alliance with the second and third districts on this question and we now expressly state our argument with their conclusion that an order which denies a motion to dismiss for failure to timely serve a Defendant is not an appealable non-final order." Novella, at 744. *Emphasis added.*

Novella clearly stands for the proposition that the instant Appeal is untimely and therefore should be dismissed and the lower court's ruling should be affirmed.

Issue Two

There is no conflict between any cases with similar facts to the facts in this case. In its brief on the merits, Traylor Brothers, Inc., relies on the ruling of the Fourth DCA in Mid-Florida Associates Limited vs. Traylor, 641 So.2d 182 (Fla. 5th DCA 1994) and the Fifth DCA in Comisky v. Rosen Management Service, Inc. 630 So.2d 628 (Fla. 4th DCA 1994)(en banc) as being in conflict with the First DCA in Novella Land, Inc. v. Panama City Beach Office Park, Ltd., 662 So.2d 743 (1st DCA 1995). It is on the basis of this conflict petitioner, Traylor Brothers, Inc., relies to establish conflict jurisdiction in the Supreme Court. Respondent agrees that these cases are in conflict in certain rules of laws, i.e., that an order denying a dismissal of a case for failure to service the Defendant within the 120-day time period for service of process under Rule 1.070(j) is not an appealable non-final order. **This case does not involve that fact situation**. This case involves a fact situation where the plaintiff below moved for and received timely extensions in accordance with Rule 1.090(b) in which to effect service of process as required by Rule 1.070(j) and, the plaintiff did

accomplish service within said extensions. Therefore "service is timely as a matter of law. There would be no occasion to consider the issue of good cause" as stated by the Third DCA in Onett v. Ahola, 683 So.2d 593, 594 (3rd DCA 1996).

In its argument attempting to rely on the conflict between the First and the Fourth and Fifth Districts petitioner fails to point out to the court or acknowledge that the plaintiff below received these extensions of the 120-day period in accordance with Rule 1.090(b) of the Florida Rules of Civil Procedure, therefore factually distinguishing the instant case completely from those cases which establish the conflict and involve petitions to extend the time after the expiration of the 120-day time period in which to effect service of process in accordance with Rule 1.070(j). This court has historically distinguished between the fact situation in this case, where an extension was sought and received before the 120-day period expires, in accordance with Rule 1.090(b) from that situation where the plaintiff must show good cause after the 120-day has expired for an extension of that 120-day time period under Rule 1.070(j), See Morales v. Sperry Rand Corporation, 601 So.2d 538 (Fla. 1992) at 540. All of the cases cited and relied on by the petitioner rely on violations of Rule 1.070(j) or its federal counter part. Many of these cases also point out the existence of an alternative method by seeking a Rule 1.090(b) an extension in accordance with the running of 120-day time period. See Morales v. Sperry Rand Corporation, 601 So.2d 538 (Fla. 1992) at 540, Patterson vs. Loewenstein, 686 So.2d 776 (Fla. App. 4th District 1997), at 777, Coleman vs. Greyhound Lines, Inc., 100 F.R.D. 476 (1984) at 478 interpreting the Federal counter part to Rule 1.090(b),

Austin vs. Gaylord, 603 So.2d 66 (Fla. App. 1st District 1992), at 67, Smith vs. Pennsylvania Glass Sand Corporation, 123 F.R.D. 648 (N.D. Fla. 1988), at 651, interpreting the Federal counter part to Rule 1.090(b). This case is clearly distinguishable factually and distinguishable in that seeks to interpret a different rule of civil procedure. While there may be a conflict between the First DCA and the Fourth and Fifth DCA's the conflict has little or nothing to do with the facts of this case. Therefore the court should decline to accept jurisdiction over this question and dismiss the Petitioners appeal.

Issue Three
Computation of Time

Traylor Brother's assertion that the Orders extending the deadline were not obtained timely arises from a misreading of the date of the filing of the Complaint, the effect of the Orders extending the time and the law. The original Complaint was filed herein on October 23, 1997 (see copy of date stamped first page of Complaint, Shipman's Appendix 1). It was not timely filed on October 22nd as asserted by Traylor Brothers. Rule 1.090(a) F.R.C.P. provides that the date of the event from which the designated period of time begins to run shall not be included in computations of time limits. Thus the first deadline for service of process was February 20, 1998, 120 days after October 23rd, with October 23, 1998 not being included.

On February 18, 1998 the Court entered its first Order (see Shipman's Appendix 2) adding an additional 90 days in which to comply with Rule 1.070(j)

Requirement for Service of Process. The additional 90 days added to the deadline of February 20, 1998 extended the deadline to May 21, 1998. Almost a month prior to that May 21st deadline, the Court entered its Order (see Shipman's Appendix 3) dated April 22, 1998 again extending the deadline for service of process an additional 90 days from the expiration of the previous extension. That extension made the deadline August 19, 1998. The Court's next Order (see Shipman's Appendix 4) extending the deadline was issued on the deadline date of August 19, 1998 and provided the Plaintiff with an additional 60 days from the expiration of the previous extension. That extended the deadline to October 18th. On October 7, 1998 the Court entered another Order (see Shipman's Appendix 5) granting an additional 90 days in which to comply with the rule which extended the deadline to January 16, 1999. Service was perfected on Traylor Brothers on December 14, 1998.

It should be noted here that the extensions of time granted by the lower court's orders were extensions from the previous deadline and not extensions from the date of the Order.

Issue Four
Timely Extensions Of The Period During Which Service Is Required Pursuant Rule 1.070(j) Prohibits Dismissal Pursuant To That Rule.

The essence of Traylor Brothers' Appeal is that Shipman did not have Traylor Brothers served within 120 days of the filing of the original Complaint. As shown in "Issue Three" supra, timely extensions were obtained prior to service. Therefore there is no basis for dismissal of the Complaint.

In Bacchi v. Manna of Hernando, Inc., 24 Fla. Law Weekly D962 (5th DCA,

April 16, 1999) the District Court of Appeals noted that:

> "During the pendency of this appeal, in September 1998, the Supreme Court of Florida proposed, on its own motion to amen Florida Rule of Civil Procedure 1.070(j) consistent with the amendments to Federal Rule of Civil Procedure 4(m) to give the trial court broad discretion to extend the time for service even when good cause for failing to meet the 120 day deadline has not been shown. Shortly before oral argument of this case, the Supreme Court of Florida formally adopted the amendment. *Amendment to Florida Rule of Civil Procedure 1.070(j) - - Time Limit for Service, 24 Fla. L. Weekly S109 (Fla. Mar. 4, 1999).* The version actually adopted is modified from the one originally proposed in that it specifies that if a Plaintiff shows either good cause or excusable neglect for failure to serve, the Court is obliged to extend the time for service. Consistent with the original proposed rule, the rule as adopted specifies that the Court also has broad discretion to extend the time for service even when good cause has not been shown". Bacchi at D962 *Emphasis added*

In Sneed v. HB Daniel Construction Company, Inc. 674 So.2d 158 (5th DCA 1996) the Fifth District Court of Appeals considered the purpose of Rule 1.070(j) in reversing a trial court's dismissal of a negligence suit for failure to comply with said rule. The Court described its understanding of the purpose of the rule:

> "It is not intended to be a trap for the unwary, nor a rule to impose a secondary statute of limitations based on time of service. The result 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, supra, at 160.

Traylor Brothers primarily relies on Morales v. Sperry Rand Corporation, 601 So.2d 538 (Fla. 1992). However that case is distinguishable from the instant matter in that there was no extension of the 120 day time period either sought or obtained by Morales. The trial court's exercise of its discretion to dismiss Morales' case was

upheld by the District Court of Appeals and then the Supreme Court. In discussing the purpose of the rule the Supreme Court stated as follows:

> "We do not believe the rule is unduly harsh in that the trial judge has broad discretion under Florida Rule of Civil Procedure 1.090(b) to extend the time limitation if reasonable grounds are asserted before the 120 day period expires." Morales, supra at 540.

In the instant case the trial judge did exercise its broad discretion to extend the time limitations and Shipman had right to rely on orders granting that extension. It should be noted here also that the Morales decision proceeded the September 1998 liberalization of Rule 1.070(j) described herein above.

In Onett v. Ahola, 683 So.2d 593 (3rd DCA 1996) Onett appealed an Order dismissing his Complaint for failure to serve Ahola within 120 days after filing the Complaint. In reversing that dismissal the Third District Court of Appeals quoted the Fourth District on the same issue.

> "an affected Plaintiff may either seek an extension of the 120 day time limit to its expiration or provide good cause for delay in a hearing held pursuant to a motion filed subsequent to the expiration of the [120 day] time period." Onett at 594 *Emphasis added.*

Then, using its own language, the Third District stated as follows:

> "Obviously if the Plaintiff obtains an order extending the 120 day time limit and then accomplishes service within the extension of time, service is timely as a matter of law. There would be no occasion to consider the issue of good cause." Onett, supra, at 594 *Emphasis added.*

The undersigned counsel for Shipman has found no opinion and has seen no opinion cited by Traylor Brothers which states that a person obtaining a court ordered extension of the 120 day time period does not have a right to rely on that lower court

order. Shipman respectfully submits to this Court that "Obviously if a Plaintiff obtains an Order Extending the 120 day time limit and then accomplishes service within the extension of time, service is timely as a matter of law."

Based on all of the above Traylor Brothers' Motion to Dismiss should be denied.

Conclusion

This Appeal should be denied because:

(a) The issue is not appealable at this time under the precedent of Novella Land Inc. v. Panama City Branch Office Park, Ltd., supra;

(b) There is no conflict between the First and the Fourth and Fifth DCA's on the facts or the law interpreted by the trial court in this case as the plaintiff moved for and received timely extensions of the 120-day time limit to serve process in accordance with Rule 1.090(b).

(c) Extensions for service were timely obtained; and

(d) Shipman therefore did not violate Rule 1.070(j).

Shipman respectfully requests that this court refuse jurisdiction of this matter.

Alternatively, Shipman respectfully requests that the appellate court's order dismissing Traylor Brothers' Appeal be affirmed.

CERTIFICATE OF FONT REQUIREMENTS

I hereby certify that this brief complies with the font requirements of Rule 9.210 and this Court's Administrative Order dated July 13, 1998, in that it was typed in 14 point Times New Roman font.

DAWSON, GALANT & SULIK

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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 this ___ day of November, 1999 to: J. Scott Murphy, Esquire, 200 East Robinson Street, Suite 555, Eola Park Centre, Orlando, Florida 32801; and Mike Gotchall, 200 East Robinson Street, Suite 555, Eola park Centre, Orlando, Florida 32801, Patrick Toomey, 707 Southeast Third Avenue, Suite 500, Ft. Lauderdale, FL 33302 and David Beers, Esquire, 1900 Summit Tower Boulevard, Suite 930, Orlando, Florida 32810.

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