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

PETITIONER'S, TRAYLOR BROTHERS, INC., BRIEF ON THE MERITS

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STATEMENT OF THE CASE

This is a petition for discretionary review following an appeal to the first district of a non-final order determining the issue of the jurisdiction of the person, specifically, petitioner, TRAYLOR BROTHERS, INC. (hereinafter referred to as "TRAYLOR BROTHERS"). This Court has jurisdiction to decide the issues presented in this case pursuant to the provisions of Article V, Sec. 3(b)(4), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(vi), as the First District Court of Appeal certified conflict with the decisions of the Fourth and Fifth District Courts concerning the appeal of a non-final order denying a motion to dismiss for failure to effect service of process pursuant to Fla.R.Civ.P. 1.070(j). A true and correct copy of the opinion issued by the First District Court of Appeal is included in the appendix to this brief [A-1].

According to the Fourth and Fifth District Courts, these non-final orders may be appealed pursuant to Fla. R. App. P. 9.130(a)(3)(C)(i) as they determine jurisdiction of the person. Thus, the appellate jurisdiction of the First District Court was properly invoked pursuant to Rule 9.030(b)(1)(B), Fla. R. App. P., as prescribed by Rule 9.130(a)(3)(C)(i) to review the non-final order of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, in Case No. 97-5956-CA,

before the honorable Michael R. Weatherby, Circuit Court Judge. The order denied petitioner's/defendant's second amended motion to dismiss plaintiff's third amended complaint. A true and correct copy of the trial court's order [A-2], and petitioner's motion [A-3] are included in petitioner's appendix to this brief.

This lawsuit was filed on October 22, 1997 (the day before the statute of limitations would have run). Incredibly, service of process on TRAYLOR BROTHERS was not obtained until December 16, 1998, 420 days after the lawsuit was initially filed. A copy of the civil cover sheet and return of service is included in petitioner's appendix [A-4]. As a result, TRAYLOR BROTHERS moved to dismiss this action under Rule 1.070(j), Fla. R. Civ. P., as service of process on a defendant is required to be made within 120 days of the filing of the lawsuit [A-3]. Clearly, plaintiff failed to comply with the requirements of this rule. A hearing on this motion was held on March 29, 1999, and the motion was ultimately denied [A-2].

The order in question was rendered on April 5, 1999 [A-2]. A motion for clarification of this order was filed, a hearing was conducted on April 26, 1999, and an order was subsequently rendered by the trial court denying the motion for clarification on April 28, 1999. A true and correct copy of this order is included in appellant's appendix [A-5]. Petitioner timely filed its Notice of Appeal from the trial

court's non-final order on May 5, 1999. A true and correct copy of this notice is included in the appendix [A-6]. However, this appeal was ultimately dismissed by the First District, which certified conflict with other District Court decisions [A-1], and petition to invoke the discretionary jurisdiction of this Court was made on September 16, 1999.

First, concerning jurisdiction of the appellate courts to review this matter, it is apparent that the district courts of appeal are in conflict over the answer to this question. Petitioner's position is in line with two other districts, which hold that the appellate courts have jurisdiction pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i). As in this case, the failure to serve process within the 120-day time limit goes to the sufficiency of the service of process, and thus the validity of the process to subject a defendant to the jurisdiction of the trial court. This is so because, as one district court of appeal sitting *en banc* has stated, "[I]ts [Fla.R.Civ.P. 1.070(j)] violation deals with the power of the court 'to bind [the defendants] to any ultimate decision rendered in the case . . .'" *Comisky v. Rosen Management Service, Inc.*, 630 So.2d 628, 629 (Fla. 4th DCA 1994). Therefore, an order denying a motion to dismiss for failure to comply with the requirements of Rule 1.070(j) "determines the jurisdiction of the person and is appealable." *See Comisky*, 630 So.2d at 630(Fla. 4th

DCA 1994) (emphasis added). *See also Meadows of Citrus County, Inc. v. Jones*, 704 So.2d 202, 204 n.1 (Fla. 5th DCA 1998) ("We affirm our belief that an order denying a motion to dismiss for failure of the plaintiff to serve the defendant within 120 days of filing the complaint is appealable.").[1]

While TRAYLOR BROTHERS acknowledges that the First District's decisions in *Novella Land, Inc. v. Panama City Branch Office Park, Ltd.*, 662 So.2d 743 (Fla. 1st DCA 1995), and *Traylor Brothers, Inc. v. Shipman*, 738 So.2d 1028 (Fla. 1st DCA 1999) reach a contrary result, petitioner respectfully submits that the sister courts of the Fourth and Fifth Districts in the *Comisky* and *Meadows* decisions follow the more reasoned approach to this issue. Of particular significance is the fact that the Florida rule of procedure on service of process is based on the Federal rule; this Supreme Court, in *Morales v. Sperry Rand Corp.*, 601 So.2d 538 (Fla. 1992), placed emphasis on this as did the Fourth and Fifth Districts when forming their opinions. As such, petitioner respectfully urges this Court to consider these other decisions, adopt their approach to this issue, and conclude that such non-final orders

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[1] The First DCA has found that such a decision is non-appealable. *See Novella Land, Inc. v. Panama City Branch Office Park, Ltd.*, 662 So.2d 743 (Fla. 1st DCA 1995). The Third DCA has certified conflict and review was granted by the Florida Supreme Court. *See Thomas v. Silvers*, 701 So.2d 389 (Fla. 3rd DCA 1997) *rev. granted* (Fla. Mar. 31, 1998) (Case No. 91,860).

are in fact reviewable by interlocutory appeal.

STATEMENT OF THE FACTS

The underlying action is one for wrongful death of a construction worker, Maurice Shipman, who allegedly fell to his death while working as an employee of defendant, MODERN BRIDGE FORMING COMPANY, INC., on October 23, 1995. MODERN BRIDGE was a subcontractor for appellant, TRAYLOR BROTHERS, the general contractor, on a FLORIDA DEPARTMENT OF TRANSPORTATION project to repair the Buckman Bridge which is located in Jacksonville, Florida. Two years after the death of her husband, TORA SHIPMAN, as personal representative of her husband's estate, filed this wrongful death action in Duval County Circuit Court. The above entities, along with a myriad of others, are named as party defendants.

Over a year (420 days to be exact) passed before service was effected on TRAYLOR BROTHERS, at which time a motion to dismiss was filed based on, *inter alia*, plaintiff's failure to comply with the requirements of Rule 1.070(j), and the fact that appellant, as the general contractor, is the "statutory employer" of Mr. Shipman and is, therefore, entitled to worker's compensation immunity under Chapter 440, Fla. Stat. The motion to dismiss was ultimately denied by the trial court and appeal was taken to the First District, and ultimately to this Court.

SUMMARY OF THE ARGUMENT

Petitioner's position is two-fold: First, case law analysis reveals that the district courts of appeal are vested with jurisdiction to entertain appeals from non-final orders denying motions to dismiss that determine jurisdiction over the person. This is so as an order denying a motion to dismiss for failure to effect service of original process within 120 days goes to the insufficiency of process and jurisdiction over the person. Following this approach, and relying on analysis of similar Federal rules, the Fourth and Fifth District Courts of Appeal have properly recognized jurisdiction to consider such appeals. These courts have articulated the better reasoned position that this Supreme Court should adopt.

Second, based upon the record facts, the trial court abused its discretion in denying petitioner's motion to dismiss plaintiff's complaint. Plaintiff waited 420 days before serving defendant. While plaintiff did seek and obtain four separate orders extending time for service, none of the motions or positions advanced by plaintiff were directed at this defendant. Rather, the motions contained at best generic language indicating that the issues in the case were "complex", and that "many" of the defendants were not Florida residents. However, the record clearly established that TRAYLOR BROTHERS, while an Indiana company, had been

registered with the Florida Secretary of State's office since May 1962, and that its registered agent for service of process since at least 1992, and certainly since the time of the accident, was CT Corporation, a well-known corporate resident agent in this state, located in Plantation, Florida.

Plaintiff has no excuse as to why she or her counsel could not obtain service of process on TRAYLOR BROTHERS, and the generic motions and court orders obtained *ex parte* granting extensions to time to comply with the requirements of Rule 1.070(j) fail to set forth good cause or excusable neglect as to petitioner, TRAYLOR BROTHERS, to justify the delay. Further, neither plaintiff, nor her counsel, made even the slightest effort to comply with the trial court's orders (which were drafted by her counsel) to effect service of process for nearly one year following the initiation of the lawsuit. Plaintiff's lack of diligence mandates dismissal of her claim under Rule 1.070(j).

ARGUMENT

I.

TRIAL COURT DECISIONS THAT DETERMINE JURISDICTION OVER A PERSON PURSUANT TO RULE 1.070(j) ARE PROPERLY REVIEWED BY INTERLOCUTORY APPEAL

This Court has jurisdiction to decide the issues presented in this case pursuant to the provisions of Article V, Sec. 3(b)(4), Fla. Const., and Fla. R. App. P. 9.030(a)(2)(A)(vi). The First District Court of Appeal also had jurisdiction to consider this matter as non-final orders may be appealed pursuant to Fla. R. App. P. 9.130(a)(3)(C)(i) since such orders determine jurisdiction of the person. Thus, the appellate jurisdiction was properly invoked by petitioner, TRAYLOR BROTHERS, pursuant to Rule 9.030(b)(1)(B), Fla. R. App. P.

As in life, disagreements frequently arise. Conflict currently exists among the various district courts of appeal regarding the reviewability of a trial court order denying a motion to dismiss for failure to effect service within 120 days as required by Rule 1.070(j). In the First District, such an order has been deemed inappropriate to review by interlocutory appeal. *See Novella Land, Inc. v. Panama City Branch Office Park, Ltd.*, 662 So.2d 743 (Fla. 1st DCA 1995). The Second and Third Districts have reached a similar conclusion. *See Khandjian v. Compagnie Financiere*

Mediterranee Cofimed, S.A., 619 So.2d 348 (Fla. 2d DCA 1993), and *Thomas v. Silvers*, 701 So.2d 389 (Fla. 3rd DCA 1997) *rev. granted* (Fla. Mar. 31, 1998) (Case No. 91,860). The Third District Court of Appeal certified that its decision was in conflict with *Mid-Florida Associates, Ltd. v. Taylor*, 641 So. 2d 182 (Fla. 5th DCA 1994), and *Comisky v. Rosen Mgmt. Serv. Inc.*, 630 So. 2d 628 (Fla. 4th DCA 1994) (en banc), and review was granted by the Florida Supreme Court on March 31, 1998 (Case No. 91,860). Likewise, in the underlying action, the first district certified conflict with those same cases identified in the *Thomas* opinion. *See Traylor Brothers, Inc. v. Shipman*, 738 So.2d 1028 (Fla. 1st DCA 1999). While resolution of this conflict was sought by petitioner to achieve uniformity in the administration and implementation of Florida law, as well as to promote fairness and consistency in appellate decisions, to date, no decision has been rendered by this Court.

By contrast, the Fourth and Fifth District Courts of Appeal have rendered opinions which hold such orders to be reviewable by interlocutory appeal. *See Comisky v. Rosen Mgmt. Serv., Inc.*, 630 So. 2d at 629; *Mid-Florida Associates, Ltd. v. Taylor*, 641 So.2d at 182 n.1; and *Meadows of Citrus County, Inc. v. Jones*, 704 So.2d 202 n.1 (Fla. 5th DCA 1998) ("We reaffirm our belief that an order denying a motion to dismiss for failure of the plaintiff to serve the defendant within 120 days

of filing the complaint is appealable."). *See also Citrus County v. Vaughn,* 24 Fla. L. Wkly. D2146, 2147 n.1 (Fla. 5th DCA, Sept. 17, 1999) ("This court has taken the position that such an order is an appealable non-final order.").

In the Fourth and Fifth Districts, the courts have found that an order which denies a Rule 1.070(j) motion to dismiss is an "order determining jurisdiction over the person." *See, e.g., Comisky,* 630 So. 2d at 629. The *Comisky* court points out that the 120-day time limit is found within the rule relating to "Process," that violation of the rule is raised by asserting insufficiency of service of process or by way of motion to dismiss, and that violation of the rule results in a finding that service on a defendant is invalid. *Id*. at 630.

Therefore, the Fourth District concludes that a "failure to serve process within the 120-day time limit goes to the sufficiency of the service of process, and thus the validity of the process to subject the defendant to the jurisdiction of the court." *Id.* Since Florida Rule of Appellate Procedure 9.130(a)(3)(C)(i) provides for review of a non-final order that determines jurisdiction of the person, orders denying motions to dismiss pursuant to Rule 1.070(j) are, and should be, appealable.

The Third District's holdings regarding the nonappealability of orders denying motions to dismiss for failure to effect service within 120 days are in contrast to its

acceptance of non-final appeals from orders construing other requirements of Rule 1.070. *See, e.g., White v. Kirsch,* 427 So. 2d 1119 (Fla. 3d DCA 1983) (non-final appeal challenging sufficiency of allegations regarding basis for service of process); *Gilbert v. Gilbert,* 187 So. 2d 49 (Fla. 3d DCA 1966) (interlocutory appeal regarding constructive service of process); *see also Harden v. Harden,* 125 So. 2d 124 (Fla. 3d DCA 1960) (reviewing ruling on motion to quash service on Sunday by interlocutory appeal).

In the First District, a similar result was reached. Originally though, the First District held these types of non-final orders to be appealable. *See McMillian v. Brown,* 667 So.2d 277, 278 (Fla. 1st DCA 1995), citing *Austin v. Gaylord,* 603 So.2d 66 (Fla. 1st DCA 1992). The basis then, as petitioner currently asserts, is that service of process within 120 days "is essential to acquire jurisdiction" over a defendant. *McMillian,* 667 So.2d at 278. While the First District has since receded from the *Austin* opinion (*see Platt v. Florida Department of Health and Rehabilitative Services,* 659 So.2d 1251 (Fla. 1st DCA 1995), it did so by adopting the Fifth District's rationale espoused in *Turner v. Gallagher,* 640 So.2d 120 (Fla. 5th DCA 1994). These cases are distinguishable as they involve service on the non-party state agency, The Department of Insurance, as compared to a party, or a private entity such

as petitioner. As such, the First District Court of Appeal declared that "[R]ule 1.070(i) [now (j)] is not implicated by the failure to serve the Department [of Insurance] within 120 days" as the Department of Insurance was not a "party defendant." *McMillian,* at 278.

This is not the case however for private corporations that are party defendants over whom personal jurisdiction must be acquired. This Court should approve the better reasoned position of the Fourth and Fifth District Courts of Appeal and declare that trial court decisions that determine whether service complied with Rule 1.070(j) address "jurisdiction over the person". This is appropriate, as expressed in *Comisky, supra,* because ". . . a failure to serve process within the 120-day time limit goes to the **sufficiency** of the service of process, and thus the **validity** of the process to subject the defendant to the jurisdiction of the court. . . ." *Id*. at 630 (emphasis added). Accordingly, such orders should be reviewable by interlocutory appeal.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO DISMISS PLAINTIFF'S COMPLAINT WHERE PLAINTIFF FAILED TO SERVE DEFENDANT FOR 420 DAYS AFTER FILING THE COMPLAINT AND FAILED TO SHOW GOOD CAUSE FOR THE DELAY IN SERVICE

Four hundred and twenty days. The plaintiff elected to wait 420 days after filing the initial complaint to effect service of process on defendant. The accident in question took place on October 22, 1995 on the Buckman Bridge in Jacksonville, Florida. Two years later, the lawsuit was filed exactly one day before the statute of limitations expired. It named petitioner, TRAYLOR BROTHERS, as one of over a dozen defendants to the initial lawsuit. Over the next several months, the complaint would be amended no less than three times, as the list of defendants grew without a single summons being issued. Petitioner, TRAYLOR BROTHERS, was the general contractor on the bridge project, with subcontracts awarded to co-defendants, MODERN BRIDGE FORMING COMPANY, INC. (Maurice Shipman's employer), and PARSONS BRINKERHOFF CONSTRUCTION SERVICES, INC. (the architectural firm). The FLORIDA DOT was the state entity that awarded the project to petitioner.

TRAYLOR BROTHERS is no stranger to Florida, or to the Jacksonville area.

It has been doing business in this State since at least 1962, and has been registered with the Florida Secretary of State's office since that time. At least since 1992, and most likely for years prior to that, petitioner has designated CT Corporation System as its registered agent for service of process. CT Corporation is widely known as a professional service of process company. Its location in Plantation, Florida is accessed by process servers daily, and it has earned its reputation of providing fast and effective service for its clients. But most importantly, it is identified, and was identified in the public records at the time of the incident and the initiation of the underlying action, as the registered agent for petitioner, TRAYLOR BROTHERS. A copy of the Secretary of State's Corporate Detail Records Screen is included in the appendix [A-7]. A copy of this sheet was also filed with the lower court and was available at both the motion to dismiss hearing, and the subsequent hearing on the motion for clarification. It was also provided to the appellate court by way of inclusion in an appendix.

As the clock ticked on plaintiff's time for service of process, CT Corporation remained defendant's registered agent. A simple telephone call away, and service could easily have been obtained on TRAYLOR BROTHERS by any number of professional process servers throughout the State. However, as the clock ticked,

plaintiff elected, for whatever reason, to wait and sit on her rights. Time passed. Defendant continued to conduct business in this State as it had since 1962. CT Corporation remained its registered agent for service of process.

A. The First Extension of Time

As the record demonstrates, 119 days passed before plaintiff stirred into action. A motion to extend the time for service of process was filed in open court before Judge Weatherby on February 18, 1998. Plaintiff's counsel was the only party present. It was conducted in an *ex parte* fashion without opposition, and most importantly, without affidavit or verification under oath as to the veracity of the statements made orally or in writing. The court had only the good name of the attorney to rely on, and the representations being made by counsel at the time of the hearing. A copy of the motion and order are included in the appendix [A-8]. One claim is that the issues were "complex", and that at that point the complaint had been twice amended as a result. Another was that the "Defendants are widespread and in many cases unknown to the Plaintiff." Yet the complaint, the pleadings, and the record available at that time clearly indicated that plaintiff knew TRAYLOR BROTHERS was the general contractor, Maurice Shipman's "statutory employer", and that it was working on the contract at the behest of the Florida DOT. With all due

respect, given the record in this case, petitioner may hardly be described as "unknown" to the plaintiff or her attorneys.

The realities of practice sometime vary from its theory. Petitioner concedes that, even under the best of circumstances, the diligent practitioner will, occasionally, require extra time in which to service process on a defendant. Clearly the Florida Supreme Court envisioned this early on and made provision for this in the rules of court, specifically Rule 1.070(j), which, as recently modified on March 4, 1999, provides that the plaintiff must show good cause or excusable neglect why service was not made within 120 days, or suffer dismissal without prejudice. However, this extension of goodwill is not without its limits, and at some point the litigant or her counsel must be held accountable for her actions, or inaction.

The Florida Supreme Court, in the case of *Morales v. Sperry Rand Corp.*, 601 So.2d 538 (Fla. 1992), ruled on the issue of the consequences of failing to obtain service of process within 120 days of the filing of a complaint as required by Florida Rule of Civil Procedure 1.070(j) when no good cause for this failure is demonstrated. In *Morales* the Supreme Court affirmed the district court's decision and held that Rule 1.070(j) required dismissal even though the plaintiff missed the deadline for service by four days.

In its decision the Florida Supreme Court stated as follows:

> The Florida rule is patterned after Federal Rule of Civil Procedure 4(j). Therefore, the federal decisions under that rule are pertinent. Those cases generally recognize that the primary factor in evaluating untimely service is **diligence**. *E.g., In re City of Philadelphia Litigation*, 123 F.R.D. 515 (E.D.Pa.1988). Federal courts that have considered prejudice in deciding whether to dismiss under the rule have done so only after first determining that the plaintiff had been diligent in attempting service. This is so even where, as here, the applicable statute of limitations period had subsequently expired. *Cf., In re City of Philadelphia Litigation; Smith v. Pennsylvania Glass Sand Corp.*, 123 F.R.D. 648 (N.D.Fla.1988); *Coleman v. Greyhound Lines, Inc.*, 100 F.R.D. 476 (N.D.Ill.1984).

Morales, 601 So.2d at 539 (emphasis added). Thus, the underlying factor to be considered in this case is the diligence of plaintiff. As to this issue, petitioner respectfully suggests that the record speaks for itself. Please note that the trial court's order stated that plaintiff had "an additional 90 days to comply with the service of process requirements of Rule 1.070(j)" [A-8] (emphasis added). This was never accomplished, nor was even the slightest effort made by plaintiff or her counsel to comply with this order.

B.The Second Extension of Time

After obtaining her first extension of 90 days, plaintiff's new date for

compliance was May 19, 1998. As before, the clock ticked, plaintiff elected, for whatever reason, to wait and continued to sit on her collective rights. Time passed. Defendant continued to conduct business in this State as it had since 1962. CT Corporation remained its registered agent for service of process. The identical generic motion and order were presented to the court on April 22, 1998 with the same result. No affidavits, or verified statements under oath were provided to the court to explain why summons was not issued on TRAYLOR BROTHERS, or why service of process had not be accomplished on any defendant. Another *ex parte* hearing was simply held with no notice to any party and certainly no opportunity to object to yet another extension of time which was granted, again, on the basis of counsel's representations. A copy of the motion and order are included in the appendix [A-9].

The court granted another 90 day extension of time to serve process on petitioner, which was a defendant that was registered with the State, and was conducting business in Jacksonville, just as it always had. It was not, as the *Morales* court points out, intentionally evading service of process, nor were any specific allegations made by plaintiff as to why she was unable to serve this specific defendant. The "half-hearted efforts" identified by the *Morales* court were not even present; in fact no effort was made by plaintiff to attempt service on petitioner. One

hundred and eighty-two days had passed at this point since the filing of the complaint. No summons had even been issued at this time (no summons would be issued until August 1998). Yet the trial court granted another extension to effect service of process on petitioner by August 17, 1998. Clearly, some justification should have been required for the second extension as to TRAYLOR BROTHERS, yet none was offered by counsel or requested by the court. Arguably, at this point, the granting of the motion as to petitioner was an abuse of discretion by the judge which warranted reversal. However, as the record reveals, two more extensions would be granted. As before, the trial court order stated that the additional 90 days was granted to allow the plaintiff "to comply with the service of process requirements of Rule 1.070(j)" [A-9] (emphasis added). Once again, this was never accomplished, nor was even the slightest effort made by plaintiff or her counsel to comply with this or the prior court order.

C.The Third Extension of Time

Count 90 days from April 22, 1998 and the calendar places you at July 21, 1999. This day comes and goes without any activity from plaintiff directed at

effective service of process on the petitioner. On careful examination of the order however, plaintiff included language which allowed for "an additional 90 days from the expiration of the last extension period" whatever that means. The language is confusing in that it failed to set forth an exact date for effecting service; rather, plaintiff choose to use amorphous language which, perhaps, intended to provide for a larger window than the requested 90 day period.

Utilizing this expanded interpretation, and assuming that the prior extension period lapsed on May 19, 1998, 90 days from that date would place the new date for compliance on Monday, August 17, 1998. Again, this date came and went without any activity on the part of plaintiff to effect service of process. Petitioner continued to conduct business in this State as it had since 1962. CT Corporation remained its registered agent for service of process. August 17, 1998 passes by. Perhaps realizing her crucial mistake, plaintiff again filed in open court yet another motion and obtained another order extending the time for service of process. Unfortunately for plaintiff, this action was not taken until **two days after** the time for effecting service of process had passed.

Like before, the motion and order were generic in nature. It was presented to the court on August 19, 1998, an incredible 301 days since the filing of the initial

complaint, with the same result. No affidavits, or verified statements under oath. Simply another *ex parte* hearing with no notice to any party and certainly no opportunity to object to yet another extension of time which was granted, again, on the basis of counsel's representations. A copy of the motion and order are included in the appendix [A-10]. The motion, which requested an additional 60 days to effect service, makes one new representation: that the plaintiff had been "[R]equired to employ the services of a skip tracer in order to locate most of the Defendants."

This for a defendant which was registered with this State since 1962, and was conducting business in Jacksonville, just as it always had. Petitioner was not, as the *Morales* court points out, intentionally evading service of process. No specific allegations were made by plaintiff, at any time, as to why she was unable to serve this specific defendant. In *Morales,* the Florida Supreme Court approved the District Court's decision to affirm the dismissal of plaintiff's case even though plaintiff missed the deadline for service by a mere four days. *Id* at 538. The court noted that no effort was made to obtain service of process until 110 days after the complaint was filed, summons were requested only a few days before the deadline would lapse, and no efforts were made to serve the defendant until the 120 days had passed. *Id* at 539. To these facts the Florida Supreme Court responded, citing to the district court

decision, and stated:

> Here, the trial court could certainly conclude that appellant should not reasonably have expected to accomplish timely service by the method utilized. By choosing not to have the summonses issued for over three and a half months, and then processing them by mail, the plaintiff can hardly demand a finding of diligence and good cause. *In Lovelace v. Acme Markets, Inc.*, 820 F.2d 81 (3d Cir.), *cert. denied*, 484 U.S. 965, 108 S.Ct. 455, 98 L.Ed.2d 395 (1987), the court stated:
>
> The 120-day limit to effect service of process, established by Fed.R.Civ.P. 4(j) is to be strictly applied, and if service of the summons and the complaint is not made in time and the plaintiff fails to demonstrate good cause for the delay "the court must dismiss the action as to the unserved defendant."

Morales, at 539 (emphasis added). The Florida Supreme Court went on to add that "We recognize that the rule exacts a harsh sanction in cases where the limitations period may have expired. Certainly the rule need not be imposed inflexibly where the plaintiff does meet the burden of demonstrating diligence and good cause . . ." However, "[f]or rule 1.070(j) to fulfill its mission of assuring diligent prosecution of lawsuits once a complaint is filed, the district court's conclusion and analysis must be approved." *Morales*, at 539-540.

Clearly, some justification should have been required for this third extension

as to TRAYLOR BROTHERS, especially in light of the missed deadline. Yet none was offered by counsel nor requested by the trial court. To proceed any further at this point without some showing by plaintiff's counsel of diligence and good cause, preferably by affidavit or sworn testimony, would be an abuse of discretion. Ordinarily, a trial court should be able to rely on the reasonable representations of counsel, knowing full well their twin duties as zealous advocates and officers of the court. However, the deadline had passed. Neither diligence nor good cause were presented by counsel, nor was it present in the record. The granting of the third motion as to petitioner, TRAYLOR BROTHERS, 301 days after the filing of the initial complaint, was an abuse of discretion by the trial judge which clearly warranted reversal. The law required nothing less. Please note that for the third time, the trial court's order stated that plaintiff had an additional 60 days "to comply with the service of process requirements of Rule 1.070(j)" [A-10] (emphasis added). This was never accomplished. Plaintiff, perhaps buoyed by overconfidence from her prior successes, failed to make even the slightest effort to comply with the terms of the two prior court orders that were drafted by her own counsel.

D.The Fourth Extension of Time

By all calculations, the 60 day extension of time meant that service of process

was due no later than Monday, October 19, 1998. Plaintiff finally began to act. On August 21, 1998, an amazing 303 days since the filing of the initial complaint, a summons was issued on TRAYLOR BROTHERS. A copy of this summons is included in the appendix [A-11]. The summons directed that service of process be effected on none other that CT Corporation, the registered agent for petitioner since at least 1992. However, for some unknown reason, plaintiff elected not to pursue service. Rather, plaintiff returned to her, or her counsel's, old habit of seeking an extension of time from the trial court. Why not? It worked three times before.

Once again, the same generic motion and order was presented to the trial court on October 7, 1998. Incredibly, in what may properly be deemed a disrespect to the court, plaintiff did not even take the time to pencil in the number "5" for the last paragraph as she had done on the third motion. It was simply submitted for approval. This was apparently approved without question as no change was made to the order by the trial judge. A copy of the motion and order are included in the appendix [A-12].

Plaintiff obtained an additional 90 days to comply with the requirements of Rule 1.070(j), and to effect service of process on petitioner. By proper calculations, plaintiff had until January 5, 1999 to accomplish this task. Time passed. TRAYLOR

BROTHERS continued to conduct business in this State as it had since 1962. CT Corporation remained its registered agent for service of process. Finally, on December 16, 1998, 420 days after the filing of the initial complaint, petitioner is served through its registered agent, CT Corporation. Over a year since the filing of the complaint, the lawsuit now begins in earnest.

As before, some justification should have been required for this fourth extension as to TRAYLOR BROTHERS. Some safeguard should have been in place to prevent this abuse of discretion. Yet none was offered by counsel nor requested by the trial court. While three times prior, the trial court's order mandated that plaintiff "comply with the service of process requirements of Rule 1.070(j)" [A-8, A-9, and A-10], this was never accomplished. No meaningful effort, no diligence or a hint of good faith was demonstrated to evidence even the slightest attempt on plaintiff's part to comply with these orders, let alone the "requirements" of the rule as directed by the court.

As a consequence, the mission of the rule was subverted by the perpetual filing and granting of what essentially amounted to baseless motions for extensions of time to serve a private entity that, by all accounts, was easily located with a simple telephone call to the secretary of state's office. Thus, the granting of the fourth

motion as to petitioner, TRAYLOR BROTHERS, 420 days after the filing of the initial complaint was an abuse of discretion by the judge which warrants reversal and the dismissal of plaintiff's action. The law and public policy require nothing less.

E.The Rule of Law

Rule 1.070(j), Fla. R. Civ. P., requires that service of the initial process and initial pleading occur within 120 days after filing of the initial complaint. In order to overcome this requirement, the plaintiff must show good cause or excusable neglect why service was not made within 120 days, or the action shall be dismissed without prejudice. The requirement that service be accomplished within 120 days is mandatory. *See General Motors Acceptance Corp. v. Lanman,* 630 So. 2d 682 (Fla. 4th DCA 1994); *Austin v. Gaylord,* 603 So. 2d 66, 67 (Fla. 1st DCA 1992), receded from to the extent that rule applies to state agencies in *Platt By and Through Platt v. Florida Dept. Of Health and Rehabilitation Serv.,* 659 So. 2d 1251 (Fla. 1st DCA 1995); *see also Morales v. Sperry Rand Corp.,* 601 So. 2d 538 (Fla. 1992).

The purpose of the rule is to assure diligent prosecution of lawsuits once a complaint is filed. *Morales,* 601 So. 2d at 540. *See also* Schakow, Gerald D., *The 120 Day Rule: What You Need To Know,* 73 Fla.B.J. 91 (June 1999). Accordingly, Rule 1.070(j) is to be strictly applied. *Morales*, 601 So. 2d at 540.

In this case, plaintiff did not serve process on the defendants within 120 days. Instead, she waited 420 days to effect service. A good cause showing requires a demonstration of diligence. *Morales*, 601 So. 2d at 539. "A trial court may not exercise its discretion to refuse to dismiss a case under rule 1.070(i) unless there is record evidence of efforts made at service during the 120-day service period which would support a finding of 'good cause' under the rule." *Hodges v. Noel*, 675 So. 2d 248, 249 (Fla. 4th DCA 1996) (citing to the rule as previously designated) (emphasis).

Plaintiff in this matter failed to establish that she was diligent in her efforts to serve defendants. The record as previously reviewed clearly illustrates this. *See Austin*, 603 So. 2d at 67 (failure to document reasonable cause for failure to effect timely service is a factor supporting dismissal).

At the very least, plaintiff should have filed a motion pursuant to Rule 1.090(b) seeking to extend the time for service, as to the petitioner,[2] prior to the expiration of

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[2] The defense of insufficiency of service of process is personal to the affected defendant and cannot be raised by a co-defendant. *Meadows of Citrus County, Inc.*, 704 So.2d at 203. It stands to reason that the plaintiff, in order to demonstrate "good cause" or "excusable neglect" as to the failure to effect such service must prove its case as to each defendant or suffer dismissal.

the 120 day period, and set forth reasons why it was unable, despite good faith and diligent efforts, to serve a corporation that has been registered with the state and doing business here since 1962. *See Patterson v. Loewenstein,* 686 So. 2d 776, 777 (Fla. 4th DCA 1997). Plaintiff's failure to take any affirmative action directed at this defendant[3] is exactly what Rule 1.070(j) is aimed at eliminating. Rather, plaintiff elected to file four generic motions in an effort to avoid compliance with the rules of procedure and attempted to extend the two year statute of limitations of a wrongful death claim for an additional year.

Clearly, it was an abuse of discretion for the trial judge to deny defendant's motion to dismiss. The generic assertions advanced by plaintiff are not directed at the petitioner, and certainly are not supported by any evidence of diligent action or good faith on plaintiff's part. Plaintiff, in essence, took no action to comply with the rule, court orders, or to effect service of process until obtaining the summons on appellant 303 days after the filing of the original complaint. Even then, service was not effected until 420 days later, requiring yet another motion for extension of time.

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[3] *See Meadows of Citrus County, Inc.*, 704 So.2d at 203-204 ("[T]he defense of failure to timely serve a defendant under Rule 1.070(j) warrants dismissal of the case as to that defendant . . . This is particularly clear when the language of Federal Rule of Civil Procedure 4(m) . . .is reviewed. . .")

Clearly, a pattern emerged evidencing a lack of diligence and good faith on plaintiff's part for which plaintiff should not be rewarded by allowing her complaint to stand.

On appeal, a court is to review the denial of the motion to dismiss to determine if the trial court, in light of the facts and circumstances of this case, abused its discretion in finding that plaintiff showed good cause. *Morales,* 601 So. 2d 539; *Arison v. Offer,* 669 So. 2d 1128, 1129 (Fla. 4th DCA 1996). In light of the facts presented here, and the information easily available to plaintiff, the trial court abused its discretion in finding that plaintiff showed excusable neglect or good cause for her failure to serve this defendant.

CONCLUSION

Based upon the foregoing facts and legal authorities, petitioner, TRAYLOR BROTHERS, respectfully requests that this Court find that it has jurisdiction to review this matter; reverse the First District Court of Appeal's decision and remand with instructions, finding that appellate courts have jurisdiction to review non-final orders denying a motion to dismiss based on failure to effect service of process in accordance with Rule 1.070(j); reverse the trial court's ruling denying petitioner's motion to dismiss plaintiff's third amended complaint; and remand the case with specific instructions to dismiss plaintiff's third amended complaint. Further, as the statute of limitations for a wrongful death claim has run, petitioner respectfully requests that this Court remand the case to the trial court with instructions to enter the dismissal with prejudice based on the running of said statute, and grant such other, further relief as this Supreme Court deems appropriate under the circumstances.

Respectfully submitted
this 15th day of October, 1999.

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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.

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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 delivery this 15th day of October, 1999 to: Allen L. Poucher, Jr., 320 East Adams Street, Jacksonville, Florida 32202-2817 (counsel for Plaintiff); David M. Wiesenfeld, Esquire, 1406 Kingsley Avenue, Orange Park, Florida 32073 (counsel for Plaintiff); Patrick Toomey, 707 Southeast Third Avenue, Suite 500, Fort Lauderdale, Florida, 33302 (counsel for Defendant, Parsons Brinckerhoff); and David Beers, Esquire, 1900 Summit Tower Blvd., Suite 930, Orlando, Florida 32810 (counsel for Defendant, Modern Bridge).

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