In the District Court of Appeal
Fourth District of Florida

CASE NO. [redacted]

(Circuit Court Case No. [redacted]

[redacted]

Appellant,

v.

SUNTRUST BANK,

Appellee.

ON APPEAL FROM THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

Respectfully submitted,

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I. The BANK'S Attack on the Alleged Ulterior Motives of [redacted] is Unfounded and Diverts Attention from the Issue on Appeal.

The main theme of the BANK's Answer Brief is that this Court should overlook the BANK's noncompliance with the service statute and rule of procedure because: 1) this Court is busy;[1] and 2) according to the BANK, [redacted] actual motive for challenging service of process and seeking review was to delay resolution of the case and increase the BANK's cost of collection.[2]

The BANK's attribution of an improper dilatory motive to [redacted] is baseless. [redacted] has not sought a single extension of time from this Court. Nor has [redacted] asked for or obtained a stay from the trial court. [redacted] served his brief over six months ago – <u>in fact, he filed his brief two weeks early</u>. Had the BANK simply filed an answer, this appeal could already have been decided and the underlying case already resolved. Instead, it is the BANK who repeatedly asked this Court for extensions of time for the filing of its brief. It is the BANK who elected not to proceed in the trial court during the pendency of the appeal. It is the BANK who made the strategic decision to refuse to simply re-serve [redacted] when the issue was first raised in the trial court or to confess error on appeal. To

[1] Appellant's Answer Brief ("Answer"), pp. 10-11.

[2] Answer, p. 9.

tell this Court that "SunTrust has tried to speed up these proceedings"[3] is disingenuous, at best. To then attribute the delay to [redacted] is even more so.

The BANK's claim that [redacted] has driven up the costs of collection in this case is equally insincere. The BANK is itself in control of the costs resulting from its own litigation strategy and could have avoided them entirely by re-serving [redacted] immediately upon receipt of the Motion to Quash. There is no evidence that [redacted] has ever evaded the process server. (Indeed, the ease with which the BANK delivered the improperly issued alias summons to Mr. [redacted] is a testament otherwise). Re-service, therefore, would have only consumed an additional few days. [redacted] also submits that re-service would have cost the BANK nothing, because the process server would have undoubtedly completed the job that he failed to perform properly the first time without further charge to the BANK.

Instead, the BANK deliberately chose a strategy of "hardball" litigation from which one may infer an objective of breaking the financial back of a defendant who is already at a fiscal disadvantage. Moreover, the BANK's claim that its costs have increased "exponentially" as a result of this litigation is dubious given the

[3] Answer, p. 7.

claim in its Motion for Attorneys Fees that the BANK's collection costs will be ultimately borne by [redacted][4]

An additional aspersion cast by the BANK on [redacted] is its contention that, because this Court is busy, this appeal impinges on the rights of parties litigating "serious issues in good faith."[5] This sword cuts both ways. The BANK's decision to defend, rather than concede this "trivial, technical point,"[6] is at least equally responsible for its pendency before this Court. And while parties should not be blamed for seeking review of decisions they believe are incorrect, if there is blame to be associated with burdening this Court, the BANK's stubborn adherence to its position merits an equal share of that blame – if not more, since a simple concession would have obviated the delay and costs about which it complains.

Similarly, the BANK claims that the dearth of precedent directly addressing the statutory violation at issue here is because "[n]o defendant has had the audacity to waste an appellate court's time with such a spurious challenge to the validity of the service of process in the past."[7] Leaving aside that such scurrilous attacks have

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[4] Appellee's Motion for Attorney's Fees, filed with this Court, dated January 20, 2010.

[5] Answer, p. 11.

[6] Answer, p. 10.

[7] Answer, p. 10.

no place in an appellate brief, if this case is unusual, it may well be because no plaintiff has persisted in litigating about service it admits is defective,[8] rather than simply re-serving.

The annals of the law are overflowing with cases where defendants have challenged service at the beginning of the lawsuit. These cases are decided without any suggestion that defending on these grounds is somehow improper. The BANK's characterization of [redacted] jurisdictional objection as motivated by something other than legitimately defending the case panders to what it hopes are the prejudices of the Court.

After the BANK's hyperbole and ad hominem attacks are winnowed away, the issue on appeal resolves into a simple decision as to whether admitted non-compliance with a service statute will be abided. [redacted] is the first to concede that the particular requirement being flouted in this case (the obligation to write the time of service on the summons) is not, in the context of this single case, of earthshaking significance. But what would be earthshaking is an opinion from this Court that process servers can pick and choose which statutes they will observe – that subjective notions of triviality determine enforceability.

[8] Answer, p. 9.

is no less entitled to this Court's decision on that issue than is the BANK. The public, too, is entitled to know that the laws of the state regarding service of process will be enforced by its courts.

II. The "Liberal Construction" Rule is Inapplicable.

A. The requirement as to what the process server must write on the summons is unambiguous and needs no interpretation.

The BANK asserts that Rule 1.010 Fla. R. Civ. P. provides this Court with a basis for relieving the BANK of its duty to comply with the service statute and procedural rule. Rule 1.010 provides that the Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action."[9] The Author's Comment quoted by the BANK itself makes it abundantly clear that Rule 1.010 only applies "if a rule [of procedure] needs interpretation."[10] Similarly, the BANK described *Sundell v. Florida*, 354 So. 2d 409 (Fla. 3d DCA 1978) (which held against bending the rules), as conveying a "warning in interpreting the Rules"[11] in an overly technical way.

Here, however, there is no need to interpret the clear and unambiguous rule governing service of process, Florida Rule of Civil Procedure 1.070(e). The

[9] Rule 1.010 Fla. R. Civ. P. (emphasis added).

[10] Answer, p. 17.

[11] Answer, p. 18 (emphasis added).

BANK was not, and is not, uncertain as to its plain meaning, and in fact, readily admits that the process server did not comply with the Rule.[12] This case is about enforcement of the Rule, and nothing in Rule 1.010 would suggest that a rule that needs no interpretation should be ignored in the name of efficiency.

B. The current trend towards strict, "bright-line" enforcement of the rules better serves the goal of speedy, efficient determination of actions.

While the BANK would have this Court use Rule 1.010 to excuse its failure to comply with Rule 1.070(e), as explained by this Court in *Stowe v. Universal Property & Cas. Ins. Co*., 937 So. 2d 156 (Fla. 4th DCA 2006), the actual trend is towards strict, "bright-line" enforcement of the rules based on their plain language and unambiguous meaning:

> The recent trend in these [Florida Supreme Court] decisions is to construe rules of civil procedure according to their plain meaning. Some high court opinions strictly construe provisions to create rules that are clear-cut and easy to apply.

Id. at 158. The case reaffirms the principle that administering the rules by their plain meaning actually furthers "'the purpose of decreasing litigation…and fostering the smooth administration of the trial court's docket.'" *Id*., *quoting Wilson v. Salamon*, 923 So. 2d 363 (Fla. 2005).

[12] Answer, p. 9.

In short, the judicial efficiency for which the BANK argues is achieved through uniform, predictable enforcement, not through a case-by-case determination of whether a rule meets some nebulous, subjective standard of worthiness. *See Bennett v. Continental Chemicals, Inc.*, 492 So. 2d 724, 728 (Fla. 1st DCA 1986) ("[W]e are adopting the bright line approach so as to avoid appeals, such as this, that would not or should not have materialized if the rule had been strictly observed.").

C. Rule 1.010 is inapplicable to the decision of whether to enforce a statute.

Secondly, Rule 1.010 does not apply to the enforcement of, or even the interpretation of, a statute. The process server here failed to comply with both a rule and a statute: § 48.031(5) Fla. Stat. (2009). As pointed out in [redacted] Initial Brief, a court's decision to excuse compliance with its own rules is far different than a decision not to enforce a statute. The latter implicates the constitutional separation of powers.[13] The BANK does not address these constitutional implications other than to declare that [redacted] is "attempting to wrap constitutional garb on his use of a trivial, technical mistake."[14] But the BANK does not offer this

[13] Initial Brief, pp. 12- 15.

[14] Answer, p. 17.

Court an alternative standard for determining whether it should enforce the plain language of the statute. Nor did the BANK offer a reason to ignore the Florida Supreme Court directive that "[i]f the language of a statute or rule is plain and unambiguous, it must be enforced according to its plain meaning." *Mitchell v. State*, 911 So. 2d 1211, 1214 (Fla. 2005).

III. Section IV of the BANK's Argument (and Sections II and III of its Statement of Facts) Should Be Stricken As Improperly Arguing Issues That Did Not Arise Until After the Filing of the Notice of Appeal.

Approximately a third of the BANK's Answer Brief (eleven out of thirty pages) is devoted to discussing events that occurred after the Notice of Appeal was filed, to wit: the BANK's second attempt to serve process on [redacted] while this appeal was pending. It is beyond peradventure that these events can have no relevance to the only issue that is properly before this Court – whether the first attempt at service was sufficient despite an admitted failure to comply with the service statute and procedural rule. *See*, specially concurring opinion of Judge Polen in *Murphy v. Murphy*, 621 So. 2d 455, 459 (Fla. 4th DCA1993) (observing that the norm would be to strike references to events after the appeal was filed).

The BANK's argument regarding its re-service attempt is an invitation to this Court to "review" a decision of the trial court that has not yet even been made.

The efficacy of the re-service (an issue dependent on whether the alias summons was properly issued) is a matter still pending before the trial on second motion to quash. The trial court has not decided the motion because the BANK has not set it for hearing.

This Court's jurisdiction has not been triggered to "review" a hypothetical, future decision by the trial court. Opining as to what the trial court should do, if and when it is confronted with the issue, would constitute an impermissible advisory opinion. *See Schwarz v. Nourse*, 390 So. 2d 389 (Fla. 4th DCA 1980) (Other than opinions of the Florida Supreme Court requested by the Governor, no other advisory opinions are authorized within the courts of Florida.)

Permitting the BANK to reargue two motions[15] that this Court has already decided also prejudices because the reply brief space limitations of fifteen pages contemplates that the answer brief will be responding to issues raised in the initial brief, not asking the Court to decide a completely different issue still pending in the trial court. If this Court should choose to consider issues regarding the second attempt at service, asks this Court to consider the points and

[15] Motion to Relinquish Jurisdiction to the Circuit Court for Re-Service of Process and its Response to the Court's October 22, 2009 Order and Motion to Dismiss the Appeal as Moot.

authorities presented in his responsive memoranda as if fully set forth herein, or otherwise waive the reply brief page limitation so that [redacted] may fully respond.[16]

A summary of [redacted] position is as follows: the BANK represents that this Court's relinquishment order "granted SunTrust's request"[17] and "provided the authority for re-service..."[18] In reality, the BANK's motion had requested very specific relief – that the Court send the case back "with directions that [the Circuit Court] issue an alias summons…"[19] [redacted] had pointed out that such an instruction would violate Rule 1.070(b) Fla. R. Civ. P. and exceed this Court's jurisdiction.[20] When this Court issued its relinquishment order, the BANK's requested instructions were conspicuously absent.

The relinquishment order, therefore, did not provide authority for re-service as the BANK claims. Rather, this Court ceded its control over the trial court's order denying the motion to quash "to allow for issuance of alias summons and

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[16] Memorandum In Opposition To Motion to Relinquish Jurisdiction, dated October 16, 2009; Memorandum in Opposition to Motion to Dismiss the Appeal as Moot, dated November 24, 2009.

[17] Answer, p. 21.

[18] Answer, p. 27.

[19] The BANK's Motion to Relinquish Jurisdiction to the Circuit Court for Re-Service of Process, dated October 8, 2009, p. 4 (emphasis added).

[20] [redacted] Memorandum In Opposition To Motion to Relinquish Jurisdiction, dated October 16, 2009, p. 3.

attempt at service of process"[21] – i.e. to give the BANK the opportunity to initiate the appropriate procedures to have the trial court order that an alias summons be issued. That opportunity was squandered by the BANK.

Under Rule 1.070(b) Fla. R. Civ. P., the appropriate procedure is to move the trial court to: 1) quash the first summons as "not executed" or "improperly executed;" and 2) order the issuance of an alias summons. Instead, the BANK persuaded the Clerk to issue the alias summons by having one of its employees "read" this Court's relinquishment order.[22]

Accordingly, the BANK's argument that this Court's relinquishment order rejected [redacted] position (that the original summons must be quashed before an alias summons may be issued[23]) turns the facts on their head. By declining to issue the instruction specifically requested by the BANK, this Court rejected the BANK's argument that this Court could (and should) simply suspend the Rules of Procedure for the convenience of the BANK.[24]

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[21] Order of the Fourth District, dated October 22, 2009 (emphasis added).

[22] Plaintiff's Memorandum in Opposition to Defendant's Motion to Quash Service of Alias Summons and Motion for Sanction of Dismissal with Prejudice, p. 3.

[23] Answer, p. 24.

[24] *See also*, Section III, "This Court's Decision to Relinquish Jurisdiction is Not "Law of the Case" of [redacted] Memorandum in Opposition to Motion to Dismiss the Appeal as Moot, dated November 24, 2009, pp. 5-6.

IV. The Cases

In his Initial Brief, [redacted] pointed out that actual notice of a lawsuit has never been the standard for determining whether service was valid; nor could it, since any method that provides actual notice would then be legitimized.[25] The BANK turned once again to the case of *Shurman v. Atlantic Mortgage. & Inv. Corp*., 795 So. 2d 952 (Fla. 2001).[26] This case, which concluded that service was not proper, does not hold that noncompliance with a service statute may be excused where there is actual notice. The BANK did not cite to a single case with such a holding – that actual notice is a substitute for proper service.

In conjunction with its "actual notice" argument, the BANK claims that "there is no dispute that [redacted] received all of the information he was required by law to receive during service."[27] This representation is apparently based on its own speculation that "the time of service was witnessed by the individual who had been served."[28] But while the recipient of the process may be said to have witnessed its delivery, there is no record evidence that the recipient noted the time, mentally or otherwise, much less communicated it to anyone.

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[25] [redacted] Initial Brief, pp. 8-10.

[26] Answer, p. 14.

[27] Answer p. 14.

[28] Answer p. 9.

But more importantly, the argument is unavailing because both the time and date could always be "witnessed" – in this broad sense of having been capable of being observed – by the person receiving service. If this sort of "witnessing" were enough to meet the requirements of Rule 1.070(e), then the Rule itself is completely superfluous.

The case of *Veigle v. St. Cloud Marine, Inc*., 818 So. 2d 695, 696 (Fla. 5th DCA 2002) concerns an alleged defect in the summons, not defective service of that summons. The BANK cites the case[29] primarily for its quotation from *Gore* v. *Chillingworth*, 171 So. 649, 652 (Fla. 1936), a case in which the objection to irregular service had been waived. *Id*. at 652-53. In fact, the very sentence following the quoted passage, and completing the paragraph, clarifies that a party challenging service should raise the issue promptly (just as has done here):

> In order that a person complaining of the defective service may avoid the consequences of a judgment based thereon, he is required to move diligently by either plea in abatement to the jurisdiction or motion to dismiss.

Id. at 652. Because has moved diligently, the distinction in *Chillingworth* between a void and a voidable judgment is inapplicable. But the distinction is nevertheless important because it means that future litigants will be prohibited

[29] Answer, p. 19.

from raising a process server's failure to write information on the summons more than a year after the judgment. *See Cannella v. Auto Owners Insurance Co*., 801 So. 2d 94, 100 (Fla. 2001); *Craven v. J. M. Fields, Inc.*, 226 So. 2d 407, 409-10 (Fla. 4th DCA 1969). Enforcing the rules in this case will not, therefore, open the floodgates to default judgment challenges.

The BANK cites to *Int'l Typographical Union v. Ormerod*, 59 So. 2d 534 (Fla. 1952) for the point that "any defect in a return may be cured."[30] The defect in this case, however, in not in the return of service, but in the procedure used to serve process itself. The only "cure" for this defect is re-service.

Russell v. Zulla, 556 So. 2d 1241 (Fla. 5th DCA 1990), discussed in Initial Brief,[31] is the case closest to the facts of this case. Yet, the BANK does little to distinguish *Russell* except to say that the defendant there "was not provided with a complete process by a properly-appointed process server."[32] Actually, on the second service attempt, "complete process" (i.e. a summons) was delivered to the defendant by a properly-appointed process server. In *Russell*, the process server failed to comply with the very same rule as in this case, Rule

[30] Answer, p. 19.

[31] Initial Brief, pp. 11-12.

[32] Answer, p. 14.

1.070(e) Fla. R. Civ. P.[33] In *Russell*, just as in this case, the process server failed to deliver a portion of the additional information that the rule requires be delivered to the defendant along with the summons. In *Russell*, it was a copy of the initial pleading. Here, it was the "hour of service." On this ground alone – the failure to fully comply with the rule – the Court in *Russell* held that service was improper. This Court should also hold that service here was improper.

To summarize, this Court's words in *Genuine Parts Co. v. Parsons*, 917 So. 2d 419 (Fla. 4th DCA 2006) resonate with this case. There, this Court rejected the argument, similar to the BANK's argument here, that requiring strict compliance with a procedural rule would exalt form over substance:

> We disagree. There is no excuse to ignore the mandatory language of [the rule]…. We do not adhere to the plaintiff's theory that the rules of civil procedure were meant to be broken.

Id. at 421. The sentiment that rules were not meant to be broken is one which is fundamental to the administration of justice and should be applied with equal vigor to the case at hand.

CONCLUSION

The lower court's denial of [redacted] motion to quash service of process should be reversed.

[33] At the time, the Rule was numbered 1.070(f).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail this February 8, 2010 to all parties on the attached service list.

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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