Nova Law Review

Volume 29, *Issue* 1 2004 *Article* 5

The Power of Interlocutory Appeals: Defining the Essence of Personal Jurisdiction Through the Scope of Appellate Jurisdiction

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THE POWER OF INTERLOCUTORY APPEALS: DEFINING THE ESSENCE OF PERSONAL JURISDICTION THROUGH THE SCOPE OF APPELLATE JURISDICTION

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I. INTRODUCTION

The issue of jurisdiction is an essential legal question. "The foundation of jurisdiction is physical power."[1] When a court lacks jurisdiction, it is void of the inherent power to decide a case.[2] One particular form of jurisdiction,

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1. McDonald v. Mabee, 243 U.S. 90, 91 (1917).

2. Johnson v. McKinnon, 45 So. 23, 25 (Fla. 1907). Early Roman notions of jurisdictional procedure were by "voluntary" submission. Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 296 (1956). "Inducement and force" were the jurisdictional tools of later Roman courts. *Id.* Ju-

personal jurisdiction, has been a topic of controversy and litigation since before courts existed in America.[3] The primary inquiry involved in these disputes is whether the court has the power to hale a particular defendant into that court, subject them to proceedings, and enforce the will of the court and the court's judgment upon him or her.[4]

However, as complicated as personal jurisdictional issues may become, when these controversies intersect with other jurisdictional issues, the scope of the litigation tends to become even more confusing and problematic. Indeed, another form of jurisdiction which may add to this morass is appellate jurisdiction. "Appellate jurisdiction is the power to take cognizance of and review proceedings in an inferior court . . . ."[5] Thus, when issues of personal jurisdiction intersect and collide with issues of appellate jurisdiction, the difficulties faced by litigants and courts are amplified.

In *Thomas v. Silvers*,[6] the Supreme Court of Florida faced such a tangled web.[7] This paper will focus on *Thomas* and its interpretation of the intersection of personal jurisdiction and appellate jurisdiction. The procedural technicalities underlying the legal framework for the *Thomas* decision are intricate, and therefore it is necessary to provide substantial background on the relevant law. Thus, part II of this paper will summarize the substantive elements of personal jurisdiction and their relation to service of process. Part II will also illustrate essential differences in the nature of motions to quash service. Part III of this paper will briefly summarize the history and purpose of the intermediate courts in Florida, the district courts of appeal. Additionally, part III will examine the scope of appellate jurisdiction in Florida. Part IV of this paper will discuss the mechanics of the writ of certiorari and the interlocutory appeal, and will demonstrate how these tools are used in connection with issues of personal jurisdiction. Part V of this paper will assess the case history behind the ultimate decision in *Thomas* by exploring the delicate balance between appellate jurisdiction and personal jurisdiction, and

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risdiction in American courts is based on the Constitution of the United Sates. *See* U.S. CONST. art. III, § 2.

3. Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of Quasi in Rem and In Personam Principles*, 1978 DUKE L.J. 1147, 1148 (1978).

4. Richard W. Garnett, *Once More Into the Maze:* United States v. Lopez, *Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country*, 72 N.D. L. REV. 433, 438 (1996) (citing A–1 Contractors v. Strate, 76 F.3d 930, 944 (8th Cir. 1996)) (Gibson, J., dissenting) (noting in the dissent that "the power to adjudicate everyday disputes occurring within a nation's own territory is among the most basic and indispensable manifestations of sovereign power").

5. Williams v. State *ex rel.* Nuccio, 122 So. 523, 524 (Fla. 1929).

6. 748 So. 2d 263 (Fla. 1999).

7. *Id.*

how subtle decisions in one realm can produce adverse, unforeseen effects in the other. Part VI of this paper will focus on *Thomas* itself, and will explain how the Supreme Court of Florida resolved the conflict between the district courts of appeal. Specifically, part VI will look to a recent amendment to the *Florida Rules of Civil Procedure* and show how this change makes the decision in *Thomas* an equitable one. Finally, part VI will explore additional policy reasons supporting the Supreme Court of Florida's decision in *Thomas*. Part VII will conclude by stating that *Thomas* was correctly decided because time limits for service should not be construed as an essential element of personal jurisdiction.

II. PERSONAL JURISDICTION

A. *Service of Process and Its Relation to Personal Jurisdiction*

"Jurisdiction is simply power."[8] A primary form of territorial jurisdiction is personal, or in personam, jurisdiction.[9] Personal jurisdiction is the power of a court to compel a party to litigate and enforce judgment upon that party in that particular forum.[10] Under *Garrett v. Garrett*,[11] Florida's "power to exercise personal jurisdiction is limited by the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[12] For a court to have personal jurisdiction over a party in Florida, the party must meet certain criteria.

These criteria are: 1) being physically present in the state of Florida;[13] 2) having status as a Florida domiciliary;[14] 3) having previously agreed to

8. *Johnson*, 45 So. at 25.

9. GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROCEDURE: STATE AND FEDERAL 175 (Univ. Casebook Series ed., 8th ed. 1999). The other major forms of territorial jurisdiction are in rem jurisdiction and quasi in rem jurisdiction. *Id.* These forms of territorial jurisdiction concern property. *Id.* Although each is important in their own right, a discussion of these forms of jurisdiction is outside the scope of this discussion.

10. *Johnson*, 45 So. at 25.

11. 668 So. 2d 991 (Fla. 1996).

12. *Id.* at 993 (citing Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 108 (1987)).

13. *See generally* Wendt v. Horowitz, 822 So. 2d 1252, 1257-58 (Fla. 2002) (discussing acts which subject a party to personal jurisdiction in Florida in the absence of physical presence); *see also* Burnham v. Super. Ct. of Cal., 495 U.S. 604, 619 (1990) (holding that a California court's exertion of personal jurisdiction over a defendant who was physically present "constitutes due process").

14. Perez v. Perez, 164 So. 2d 561, 562 (Fla. 3d Dist. Ct. App. 1964) (noting that to establish domicile for the purpose of asserting personal jurisdiction, the defendant must have a

submit to jurisdiction by contract;[15] 4) waiving objections to the assertion of jurisdiction;[16] 5) submitting voluntarily to jurisdiction;[17] or 6) possessing minimum contacts.[18] The minimum contacts test in Florida is somewhat elaborate and requires further explanation.

Under *International Shoe Co. v. Washington*,[19] a prospective party must have "certain minimum contacts with [Florida] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[20] An additional requirement under *International Shoe Co.* is articulated in *World-Wide Volkswagen Corp. v. Woodson*.[21] Under *Woodson*, a court can assert personal jurisdiction over a defendant when the defendant "purposefully avails"[22] himself or herself of the laws of Florida and when the assertion of personal jurisdiction is "reasonable."[23] Finally, the court will apply the balancing test provided by *Burger King Corp. v. Rudzewicz*.[24] This test evaluates: 1) "the burden on the defendant"; 2) "the forum State's interest in adjudicating the dispute"; 3) "the plaintiff's interest in obtaining convenient and effective relief"; 4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and 5) "the shared

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residence in Florida coupled with the intent to remain in Florida or for an "*indefinite period*") (citations omitted)).

15. Vacation Ventures, Inc. v. Holiday Promotions, Inc., 687 So. 2d 286, 288–89 (Fla. 5th Dist. Ct. App. 1997) (cautioning that although parties my subject themselves to personal jurisdiction through contract, forum selection clauses must also satisfy Florida's long-arm statute and meet the minimum contacts test).

16. FLA. R. CIV. P. 1.140(h)(2) (ordering that a jurisdictional defense is waived unless raised by motion, answer, or reply).

17. Beverly Beach Props., Inc. v. Nelson, 68 So. 2d 604, 608 (Fla. 1953) (noting that the assertion of personal jurisdiction may be acquired through the voluntary appearance of a party).

18. Harris v. Shuttleworth & Ingersoll, P.C., 831 So. 2d 706, 708 (Fla. 4th Dist. Ct. App. 2002) (citing Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989)) (noting that the federal due process test for minimum contacts must be satisfied for the assertion of personal jurisdiction).

19. 326 U.S. 310 (1945). Since Florida courts are bound by decisions from the United States Supreme Court, these tests have been adopted in Florida. *See* Nat'l Alcoholism Programs v. Slocum, 648 So. 2d 234, 236 (Fla. 4th Dist. Ct. App. 1994) (citing Venetian Salami Co. v. Parthenais, 554 So. 2d 499, 502 (Fla. 1989)) (holding that the requirements of the minimum contacts test and Florida's long-arm statute must be satisfied for the assertion of personal jurisdiction over a non-resident defendant).

20. *Int'l Shoe Co.*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

21. 444 U.S. 286 (1980).

22. *Id.* at 297 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

23. *Id.* at 292 (quoting *Int'l Shoe Co.*, 326 U.S. at 317).

24. 471 U.S. 462, 477 (1985).

interest of the several States in furthering fundamental substantive social policies."[25]

As this "minimum contacts" test is applied to non-resident defendants, there is an additional requirement. Courts must look to Florida's long-arm statute[26] to determine whether the assertion of personal jurisdiction over the defendant is legislatively authorized.[27] Not only must it be fair to subject a prospective party to a suit in Florida, but this prospective party must also be informed of the pending litigation.

In order to be informed of the pending litigation, the party must be properly served.[28] In the absence of proper service of process, a judgment is void.[29] The Supreme Court of Florida held that "the real purpose of the service of summons ad respondendum is to give proper notice to the defendant in the case that he is answerable to the claim of plaintiff *and, therefore, to vest jurisdiction in the court entertaining the controversy.*"[30] In *Bedford Computer Corp. v. Graphic Press, Inc.*,[31] the Supreme Court of Florida held that

> [t]he object of process is to warn the defendant that an action or proceeding has been commenced against him by the plaintiff, that he must appear within a time and at a place named and make such defense as he has, and that, in default of his so doing, a judgment will be asked or taken against him in a designated sum or for the other relief specified.[32]

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25. *Id.* (quoting *Woodson*, 444 U.S. at 292).

26. FLA. STAT. § 48.193 (2003).

27. Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co., 752 So. 2d 582, 584 n.4 (Fla. 2000) (noting assertion of personal jurisdiction over non-resident defendant must fall within statutorily proscribed provision of section 48.193 of the *Florida Statutes*).

28. Valdosta Milling Co. v. Garretson, 54 So. 2d 196, 197 (Fla. 1951).

29. *Id.* (holding "[n]otice and an opportunity to defend is fundamental in our jurisprudence"); *see also* Taylor v. Bowles, 570 So. 2d 1093, 1094 (Fla. 4th Dist. Ct. App. 1990) ((citing Li v. Li, 442 So. 2d 327, 328 (Fla. 4th Dist. Ct. App. 1983)) (holding "[w]hen a party has no notice of a trial date, the trial court abuses its discretion when it proceeds with a final hearing and enters final judgment")).

30. Klosenski v. Flaherty, 116 So. 2d 767, 768 (Fla. 1959) (alteration in original) (quoting State *ex rel.* Merritt v. Heffernan, 195 So. 145, 147 (Fla. 1940)); *see also* Shepard v. Kelly, 2 Fla. 634, 655 (1849) ("[A] summons, regularly served, as required by the [statute or rules], gives the court jurisdiction of the person of the defendant.").

31. 484 So. 2d 1225 (Fla. 1986).

32. *Id.* at 1227 (citing Gribbel v. Henderson, 10 So. 2d 734, 739 (Fla. 1942)). *See also* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the

Thus, the form of service of process is also significant as it is central to process' purpose: notice.[33] When a party believes that service of process has not been perfected in compliance with the relevant provisions, the party may file a motion to quash service.

B. *Essential Differences in the Nature of Motions to Quash Service*

In Florida, motions to quash service of process may be filed either in an answer or before a responsive pleading.[34] As one of the seven enumerated defenses of rule 1.140(b)[35] of the *Florida Rules of Civil Procedure*, the defense of "lack of jurisdiction over the person"[36] may be raised by motion. Pursuant to section 48.031(1)(a)[37] of the *Florida Statutes*,

> [s]ervice of original processes is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person their contents. Minors who are or have been married shall be served as provided in this section.[38]

As previously discussed, service of process is an essential element of personal jurisdiction. Without valid service, the court cannot exercise jurisdiction over the person.[39] Thus, when service of process does not purportedly comply with the relevant procedural guidelines of the *Florida Rules of Civil Procedure*, the issue of "lack of jurisdiction over the person"[40] is validly raised. These motions to quash service allege deficiencies in the purported service of process upon the party.[41] Yet in the realm of jurisdiction

pendency of the action and afford them an opportunity to present their objections." (citations omitted)).

33. *Bedford Computer Corp.*, 484 So. 2d at 1227. Personal service is the preferred form of service of process. *Id.* The *Florida Statutes* also provide for substitute service, but it is less preferred because it is less likely to effect the goal of process. *Id.*

34. *See* Viking Superior Corp. v. W.T. Grant Co., 212 So. 2d 331, 334 (Fla. 1st Dist. Ct. App. 1968) (noting that express statutory construction of rule 1.140 authorizes defenses to service of process to be made prior to a responsive pleading).

35. FLA. R. CIV. P. 1.140(b).

36. FLA. R. CIV. P. 1.140(b)(2).

37. FLA. STAT. § 48.031(1)(a) (2003).

38. *Id.*

39. *See* Klosenski v. Flaherty, 116 So. 2d 767, 768 (Fla 1959).

40. FLA. R. CIV. P. 1.140(b)(2).

41. FLA. R. CIV. P. 1.140(b) ("The grounds on which any of the enumerated defenses . . . shall be stated specifically and with particularity in the responsive pleading or motion.").

over the person, these allegations of insufficiency of process span a wide scope of legal reasoning.

On the one hand, the alleged deficiencies pursuant to section 48.031(2)(a)[42] of the *Florida Statutes* might point to the fact that the defendant was improperly served because the process was delivered to an address where the defendant did not reside.[43] Likewise, the deficiency alleged could be that a person not authorized to accept service on behalf of the defendant was served and therefore, the purported service was invalid.[44] On the other hand, the alleged deficiency could be that the plaintiff failed to serve the defendant within the 120-day time limit as provided by rule 1.070(j).[45]

All of these alleged deficiencies, if proven, would violate a provision of the *Florida Rules of Civil Procedure* and could warrant service of process to be quashed.[46] This paper will argue that violating the time requirement of rule 1.070(j)[47] is fundamentally different from violating the other provisions. Rule 1.070(j)[48] is different because it fails to go to the essential requirement of service of process: notice. The fact that service is late pursuant to rule 1.070(j)[49] does not mean that the party did not receive notice. It is simply late notice. In contrast, the other violations mentioned all go to the essential nature of service of process. A party who is unauthorized to receive service of process may have an ulterior motive. Specifically, an estranged husband may not inform the former wife of the pending litigation.[50] Likewise, delivering service upon someone who is unauthorized by section 48.031(2)(a)[51] to receive service goes to the essence of notice because the unauthorized person may neither appreciate the gravity of the documents nor care about the potential defendant's welfare. In turn, the unauthorized person may not inform the true party against whom the litigation is pending.

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42. § 48.031(2)(a) ("Substitute service may be made on the spouse of the person to be served . . . if the spouse and person to be served are residing together in the same dwelling.").

43. Montero v. DuVal Fed. Sav. & Loan Ass'n of Jacksonville, 581 So. 2d 938, 939 (Fla. 4th Dist. Ct. App. 1991) (finding that substituted service upon wife at estranged husband's home when she did not reside there was invalid).

44. Berne v. Beznos, 819 So. 2d 235, 239 (Fla. 3d Dist. Ct. App. 2002) (holding that as concierge of apartment building was not a person who resided at the apartment building, concierge was unauthorized to receive service of process for defendant and service of process should have been quashed).

45. *See* Thomas v. Silvers, 748 So. 2d 263, 263 (Fla. 1999).

46. FLA. R. CIV. P. 1.070(j).

47. *Id.*

48. *Id.*

49. *Id.*

50. *See Montero*, 581 So. 2d at 939.

51. § 48.031(2)(a).

This distinction between these rule violations is crucial. As such, the Florida District Courts of Appeal are weary of entertaining all interlocutory appeals and must distinguish between them as the Supreme Court of Florida did in *Thomas*.[52] Yet, in order to understand the context in which these interlocutory appeals occur, it is necessary to further expand upon appellate jurisdiction in Florida.

III. THE APPELLATE SYSTEM IN FLORIDA

Florida created a two-tier appellate system in 1956.[53] Previous to this amendment to the Florida Constitution, only the Supreme Court of Florida conducted appellate review of trial court cases.[54] The need for additional courts arose because the workload of the court system in Florida became unmanageable.[55] Additionally, commentators have suggested that appellate courts in Florida, as well as in other states, came into existence partially to correct "routine error."[56] With the more rudimentary tasks apportioned to these mid-level courts, the highest court in the state can concentrate on more important and urgent legal issues.[57] However, even today a significant consideration in constructing effective judicial administration is creating a system that effectively and efficiently apportions workloads.[58]

Thus, an ideal goal of judicial administration is crafting a framework in which justice is done and the justices maintain manageable dockets. Two of the methods employed to achieve this goal are limiting what issues are appealable and limiting when they are appealable.[59] To adequately describe this process, it is necessary to explore the definition of appellate jurisdiction.

"Appellate jurisdiction is the power to take cognizance of and review proceedings in an inferior court."[60] In Florida, state appellate court jurisdiction is statutorily proscribed.[61] Jurisdiction of the district courts of appeal

52. *See generally* Thomas v. Silvers, 748 So. 2d 263 (Fla. 1999).

53. FLA. CONST. art. V, §§ 4, 5 (1957).

54. Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermediate Appellate Courts: A Comparison of Florida's System with Those of the Other States and the Federal System*, 45 FLA. L. REV. 21, 62 (1993).

55. *See* FLA. CONST. art. V, §§ 16A-B (1955) (providing for additional county judges for expanding county populations).

56. Cope, *supra* note 54, at 33.

57. *Id.*

58. *Id.* at 77 (discussing Florida's appellate practice of issuing affirmances without a written opinion as necessary to manage the workload).

59. *See* FLA. R. APP. P. 9.130.

60. Williams v. State *ex rel.* Nuccio, 122 So. 523, 524 (Fla. 1929).

61. *See* FLA. R. APP. P. 9.030(b).

typically only becomes operative once a final judgment on the merits of the case is entered.[62] In other words, even if a litigant believes that the trial court has committed an error in ruling on a particular motion or other proceeding, the ruling is typically not directly appealable until judgment has been entered.[63] Simply put: litigants will have to wait to appeal until "all judicial labor in the case has come to an end."[64]

This situation often subjects litigants to unnecessary expenditures of time and money because they may be involved in proceedings that they should not have been compelled to participate in at all. However, relief is available from this apparent inequity. Specifically, the judicial mechanisms of the writ of certiorari and the interlocutory appeal exist for litigants to gain relief from such adverse rulings, even before a final judgment on the merits has been entered.

IV. APPELLATE RELIEF PRIOR TO FINAL JUDGMENT

A. *An Overview*

The Florida district courts of appeal provide mechanisms that allow litigants to appeal adverse rulings before a final judgment on the merits has been entered. Two commonly employed mechanisms for this purpose are the common-law writ of certiorari[65] and the interlocutory appeal.[66]

A threshold question for any litigant wishing to appeal an adverse ruling at the trial level is where to pursue that appeal. In Florida's two-tier appellate system, a narrow class of appeals is heard directly by the Supreme Court of Florida.[67] However, the majority of appeals are heard by the district courts of appeal.[68]

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62. FLA. CONST. art.V, § 4(b)(1)-(2); FLA. R. APP. P. 9.030(b)(1).

63. FLA. CONST. art.V, § 4(b)(1)-(2); FLA. R. APP. P. 9.030(b)(1). *See also* Mary Piccard Vance & Ann M. Piccard, *Direct Appeal Jurisdiction of Florida's District Courts of Appeal*, 33 STETSON L. REV. 153, 154–55 (2003).

64. Vance & Piccard, *supra* note 63, at 157; *See also* FLA. R. APP. P. 9.020(h); Howard v. Ziegler, 40 So. 2d 776, 777 (Fla. 1949) ("A judgment is final when it adjudicates the merits of the cause and disposes of the pending action, leaving nothing further to be done but the execution of the judgment." (citations omitted)).

65. FLA. R. APP. P. 9.030(b)(2).

66. FLA. R. APP. P. 9.030(b)(1)(B).

67. FLA. R. APP. P. 9.030(a) (providing for the jurisdictional scope of the Supreme Court of Florida).

68. *See* FLA. R. APP. P. 9.030(b).

The right to appeal in Florida is not express, but has been constructively inferred from the Florida Constitution.[69] The original *Florida Rules of Appellate Procedure* provided appellate relief before a final judgment on the merits through the writ of certiorari.[70] These rules also provided for "[a]ppeals from interlocutory orders . . . relating to . . . jurisdiction over the person" to be "prosecuted in accordance with this rule."[71] The distinction between the two is significant because the grant of a writ of certiorari is more difficult to obtain than the reversal of an interlocutory order.

B. *The Writ of Certiorari*

The classic procedure used to gain relief before final judgment is entered is the common-law writ of certiorari.[72] A writ of certiorari is "[a]n extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review."[73] However, these writs are rarely granted.[74]

Writs of certiorari are seldom granted because the burden of proof borne by the litigant seeking this extraordinary relief is high.[75] Specifically, appellate courts will grant the writ only when: "(1) the trial court departed from the essential requirements of the law; (2) the departure resulted in material injury that will affect the remainder of the proceedings below; and (3) the departure cannot be corrected through any other means."[76] Thus, unless a litigant meets this heavy burden, the litigant will have to wait until the conclusion of the trial and directly appeal the adverse ruling. By that time, the damage may have already been done.

This situation creates unfairness to litigants because by being forced to continue the trial, they are subjected to unnecessary cost and inconvenience.[77] This cost and inconvenience is unnecessary because had the ruling been directly appealable, the appellate court could have stepped in and cor-

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69. Hala A. Sandridge, *Decisions, Decisions: How the Initial Choice of a State or Federal Forum May Limit Appellate Remedies*, 33 STETSON L. REV. 125, 126–27 (2003).

70. FLA. R. APP. P. 4.5(a)(1), (c) (1957).

71. FLA. R. APP. P. 4.2(a) (1957).

72. Tracy E. Leduc, *Certiorari in the Florida District Courts of Appeal*, 33 STETSON L. REV. 107, 108 (2003).

73. BLACK'S LAW DICTIONARY 220 (7th ed. 1999).

74. Leduc, *supra* note 72, at 108. Leduc suggests interdependency between certiorari and rule 9.130 in that they "expand and contract as changes in the law occur." *Id.* at 124.

75. *See id.* at 108.

76. *Id.*

77. Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1099 (Fla. 1987); Allstate Ins. Co. v. Langston, 655 So. 2d 91, 94 (Fla. 1995).

rected the error, if any, and the trial could have then proceeded properly.[78] Yet judicial economy outweighed these apparent inequities.[79] This overburdening of the district courts of appeal compelled the Supreme Court of Florida to amend the *Rules of Appellate Procedure* in 1977 to narrow the scope of appealable issues through interlocutory orders.[80] Still, the easier route to correct error, that is, if your class of appeal is statutorily proscribed, is the interlocutory appeal.

C. *Interlocutory Appeals*

Rule 9.130 of the *Florida Rules of Appellate Procedure* governs "non-final orders."[81] Appeals of non-final orders are more commonly known as interlocutory appeals. Interlocutory appeals perhaps neatly fall into the category of judicial work, which is properly categorized as routine because they often correct simple trial court errors.[82]

Yet as much as every litigant would desire an immediate remedy for perceived errors at trial, the district courts of appeal would be overburdened if they were called upon to verify every questionable ruling.[83] Additionally, if the appellate jurisdictional scope of interlocutory appeals was extended to every minute issue, speedy determinations of trials would perhaps become non-existent.[84] Thus, the district courts of appeal in Florida command limited jurisdiction over non-final orders.[85]

Unless the nature of the non-final order falls within the statutorily proscribed categories, the district courts of appeal lack jurisdiction to hear the

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78. *See* Travelers Ins. Co. v. Bruns, 443 So. 2d 959, 960–61 (Fla. 1984).

79. *Id.* (noting the 1977 amendment was intended to preserve judicial resources).

80. *See* Amends. to the Fla. R. of App. P., 696 So. 2d 1103, 1127 (Fla. 1996). The following committee notes discuss the amended rule:

> 1977 Amendment. This rule replaces former rule 4.2 and substantially alters current practice. This rule applies to review of all non-final orders, except those entered in criminal cases, and those specifically governed by rules 9.100 and 9.110.
>
> The advisory committee was aware that the common law writ of certiorari is available at any time and did not intend to abolish that writ. However, because that writ provides a remedy only if the petitioner meets the heavy burden of showing that a clear departure from the essential requirements of law has resulted in otherwise irreparable harm, it is extremely rare that erroneous interlocutory rulings can be corrected by resort to common law certiorari. It is anticipated that because the most urgent interlocutory orders are appealable under this rule, there will be very few cases in which common law certiorari will provide relief.

Id.

81. FLA. R. APP. P. 9.130.

82. *See* Cope, *supra* note 54.

83. *Bruns*, 443 So. 2d at 961.

84. *See id.*

85. FLA. R. APP. P. 9.030(b)(1)(B).

appeal.[86] In Florida's civil courts,[87] the district courts of appeal have jurisdiction pursuant to rule 9.130 over interlocutory appeals that:

> (A) concern venue;
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> (B) grant, continue, modify, deny, or dissolve injunctions, or refuse to modify or dissolve injunctions;
>
> (C) determine
>
> (i) the jurisdiction of the person;
>
> (ii) the right to immediate possession of property;
>
> (iii) the right to immediate monetary relief or child custody in family law matters;
>
> (iv) the entitlement of a party to arbitration;
>
> (v) that, as a matter of law, a party is not entitled to workers' compensation immunity;
>
> (vi) that a class should be certified; or
>
> (vii) that, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law;
>
> (D) grant or deny the appointment of a receiver, and terminate or refuse to terminate a receivership.[88]

A fair characterization of rule 9.130 is that the nature of these rulings goes to the initial quality of the proceedings. If this initial and essential quality is erroneously determined at the outset of the proceedings, then judicial resources will be wasted correcting errors and litigants may be substantially inconvenienced.[89]

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86. *See id.*

87. FLA. R. APP. P. 9.130(a)(2). "Appeals of non-final orders in criminal cases shall be as prescribed by rule 9.140." *Id.*

88. FLA. R. APP. P. 9.130(3).

89. FLA. R. APP. P. 9.130 Committee Notes (stating "the purpose of these items is to eliminate useless labor").

For example, venue determines where litigation will occur.[90] As a practical matter, erroneous determinations of venue may cause significant inconvenience to the adversely affected party.[91] Thus, such rulings are immediately appealable pursuant to rule 9.130(a)(3)(A) because if a litigant is forced to wait until the conclusion of the trial to appeal this order, then the relief sought would be moot. The trial has already occurred, and the adversely affected litigant has already sustained the damage caused by the inconvenient venue.

Likewise, orders that determine jurisdiction of the person are subject to interlocutory appeals.[92] Without the interlocutory mechanism for relief, a party who was not originally subject to personal jurisdiction of the court would have to wait until the trial was concluded to seek relief. However, the issue of what constitutes an order that determines "jurisdiction of the person" is not expressly stated in rule 9.130.[93]

The classic elements of personal jurisdiction, such as minimum contacts[94] and notice,[95] are certainly within this rule's scope. Yet in Florida, there is a time limit on serving a potential party.[96] A violation of this proscribed time limit typically results in a dismissal of the claim without prejudice.[97] Thus, there arises the issue of whether a violation of the proscribed time limit for service of process constitutes a question involving "jurisdiction of the person."[98] To provide a potential answer to this question, it is necessary to show how a particular decision on one of the rules involved, rule 1.070(j),[99] can have a ripple effect on the focus of this inquiry. Having set the legal framework in which this controversy arises, this paper will now

90. FLA. R. APP. P. 9.130(a)(3)(A). *See also* Bus. Aide Computers, Inc. v. Cent. Fla. Mack Trucks, Inc., 432 So. 2d 681, 682 (Fla. 5th Dist. Ct. App. 1983) (allowing for interlocutory appeal on the issue of venue pursuant to rule 9.130(a)(3)(A)).

91. *See generally* Kinney Sys. Inc. v. Cont'l Ins. Co., 674 So. 2d 86 (Fla. 1996) (discussing Florida's doctrine of forum non conveniens).

92. FLA. R. APP. P. 9.130(a)(3)(C)(i).

93. *Id.*

94. Wartski v. Sencer, 615 So. 2d 794, 795 (Fla. 5th Dist. Ct. App. 1993) (holding an order denying a motion to dismiss for lack of personal jurisdiction under Florida's long-arm statute and minimum contacts is appealable pursuant to rule 9.130(a)(3)(C)(i)).

95. Allan v. Hill, 502 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1986) (holding the appellate court had jurisdiction to hear the interlocutory appeal pursuant to rule 9.130(a)(3)(C)(i) because "the [trial] court in effect ruled against Allan's claims of immunity from service of process and improper service of process").

96. FLA. R. CIV. P. 1.070(j).

97. *Id.* (directing the trial court to dismiss the action "without prejudice" for violations).

98. FLA. R. APP. P. 9.130(a)(3)(C)(i).

99. FLA. R. CIV. P. 1.070(j).

proceed to discuss the case law relevant to interlocutory appeals based on claims of untimely service of process.

V. THE CAUSE OF THE CONTROVERSY

A. Morales v. Sperry Rand Corp.

In *Morales v. Sperry Rand Corp.*,[100] the Supreme Court of Florida considered "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."[101] In *Morales*, the plaintiff served Sperry's resident agent four days after the 120-day allowance for service had expired.[102] The circuit court dismissed the complaint based on the plaintiff's failure to serve process within 120 days of filing the complaint.[103] The Fourth District Court of Appeal affirmed.[104]

On review, the Supreme Court of Florida affirmed the dismissal because the plaintiff had failed to "meet the burden of demonstrating diligence and good cause"[105] to justify the lateness of the service.[106] This court also noted that the trial court had "broad discretion in declining to dismiss an action if reasonable cause for the failure to effect timely service is documented."[107] Specifically, this court opined that absent this showing of good cause, permitting any untimely service to be valid "would for practical purposes, negate rule 1.070(j) and the reason for its existence."[108] The policy

100. 601 So. 2d 538 (Fla. 1992).
101. *Id.* at 538.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Morales*, 601 So. 2d at 539.
106. *Id.* at 539 (noting that a comparison with federal rule 4(m) is applicable as the Florida rule is modeled on the federal rule); *see also* United States v. Ayer, 857 F.2d 881, 885 (1st Cir. 1988) (holding that the corresponding federal rule's mandates may be relaxed after "scrutinizing plaintiff's efforts" in affecting service); Lovelace v. Acme Mkts., Inc., 820 F.2d 81, 84 (3d Cir. 1987) (holding that the corresponding federal rule for service must be "strictly applied" in the absence of a show of "good cause for the delay" from the plaintiff), *cert. denied*, 484 U.S. 965 (1987). *See contra* Tevdorachvili v. Chase Manhattan Bank, 103 F. Supp. 2d 632, 639 n.5 (E.D.N.Y. 2000) (noting that the 1993 amendments to rule 4(m) broadens the trial judge's discretion and allows district courts to "grant relief from rule 4(m), even in the absence of good cause shown").
107. *Morales*, 601 So. 2d at 540.
108. *Id.*

underpinning the rule is to demand "diligent prosecution of lawsuits once a complaint is filed."[109]

Thus, this ruling would provide incentive for plaintiffs to comply with the mandates of rule 1.070 of the *Florida Rules of Civil Procedure*. Yet this ruling would have consequences in other, perhaps unforeseen, areas as well. Specifically, this ruling would affect a later decision on the scope of appellate jurisdiction in Florida.

B. *The Root of Conflict:* Comisky *on* Morales

In *Comisky v. Rosen Management Service, Inc.*,[110] the Fourth District Court of Appeal considered en banc[111] the question of whether denials of motions to quash service based on claims that service was untimely constitute appealable orders.[112] Specifically, the issue addressed was whether untimely service pursuant to rule 1.070(i) of the *Florida Rules of Civil Procedure* falls within the parameters of "an 'order determining jurisdiction of the person'" of rule 9.130(a)(3)(C)(i) of the *Florida Rules of Appellate Procedure*.[113] The 5-4 majority in *Comisky* relied heavily on *Morales*[114] and its strict interpretation of rule 1.070(i) of the *Florida Rules of Civil Procedure*.[115] The *Comisky* majority held that orders denying motions to quash service based on claims of untimely service are subject to interlocutory appeal.[116]

In *Comisky*, a third-party defendant was served with process outside the 120-day provision of rule 1.070(i) of the *Florida Rules of Civil Procedure*.[117] Additionally, the original defendant in the action provided no good cause for this delay.[118] In writing the Fourth District's majority opinion, Judge Warner acknowledged that this decision "depart[s] from all prior precedent."[119] Yet,

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109. *Id.*

110. 630 So. 2d 628 (Fla. 4th Dist. Ct. App. 1994) (en banc) (Polen, J., dissenting), *rev'd per curiam*, 748 So. 2d 263 (Fla. 1999).

111. *See* FLA. R. APP. P. 9.331(a) (providing for the determination of issues which threaten the court system's "uniformity" or are of "exceptional importance"). En banc proceedings are decided by a majority of the judges, whereas appeals are generally decided by a panel of three judges. *Id.*

112. *Comisky*, 630 So. 2d at 629.

113. *Id.*

114. *Id.* at 629–30.

115. *Id.*

116. *Id.* at 630.

117. *Comisky*, 630 So. 2d at 630.

118. *Id.*

119. *Id.* at 629. *See generally* Khandjian v. Compagnie Financiere Mediterranee Cofimed, S.A., 619 So. 2d 348 (Fla. 2d Dist. Ct. App. 1993); DCA of Hialeah, Inc. v. Lago Grande One

he reasoned that *Morales*, which was decided in 1992, authorized this change because untimely service of process without good cause was adequate to warrant dismissal of the party.[120] Additionally, Judge Warner opined that

> 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, an order denying a motion to dismiss on those grounds determines the jurisdiction of the person and is appealable.[121]

Thus, Judge Warner believed that the time provision of the limit provided by rule 1.070(j) was essential to perfecting service of process because the rule went to its "validity."[122]

Additionally, Judge Warner based part of the opinion on the fact that rule 1.070(j) mirrors it's corresponding rule 4(j) of the *Federal Rules of Civil Procedure*.[123] Thus, it should follow that a survey of federal rulings on this issue is applicable as the Supreme Court of Florida performed in *Morales*.[124] Indeed, federal case law[125] was construed to support the *Comisky* majority position that timeliness of process was an essential element of jurisdiction of the person.[126]

In his dissent, Judge Polen surveyed Florida precedent on this issue and concluded: "to construe *Morales* otherwise, without an amendment to rule 9.130 or a decision by the supreme court, would be wholly improper."[127] Additionally, his dissent recognized the distinction between "validity of the service of process itself . . . [and] not merely the timeliness thereof."[128] Finally, Judge Polen argues that to hold that timeliness of service does not constitute jurisdiction of the person and is not, therefore, subject to appellate

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Condo. Ass'n, Inc., 559 So. 2d 1178 (Fla. 3d Dist. Ct. App. 1990); Cole v. Posada, 555 So. 2d 367 (Fla. 3d Dist. Ct. App. 1989).

120. *Comisky*, 630 So. 2d 628, 630 (Fla. 4th Dist. Ct. App. 1994). "*Morales* is on point and requires the dismissal of the complaint as to this appellant." *Id.*

121. *Id.*

122. *Id.* at 629.

123. *Id.*

124. *See Comisky*, 630 So. 2d at 629; *see also* Morales v. Sperry Rand Corp., 601 So. 2d 538, 539 (Fla. 1992).

125. McDonald v. United States, 898 F.2d 466, 468 (5th Cir. 1990) (holding that defective service outside the 120-day period proscribed by rule 4(j) is insufficient to obtain personal jurisdiction).

126. *Comisky*, 629 So. 2d at 629–30.

127. *Id.* at 631.

128. *Id.*

jurisdiction, would leave the litigant with a remedy because relief could be "obtain[ed] through a petition for common law certiorari."[129]

Ultimately, the essence of Judge Polen's dissent became part of the Supreme Court of Florida's decision in *Thomas*.[130] However, at least for the time being, Judge Polen's opinion would not solve this issue. Nonetheless, the ripple caused by *Morales* was now being felt in other areas: appellate jurisdiction over interlocutory appeals.

C. *The Build-Up to* Thomas

The issue of what constitutes the parameters of "jurisdiction of the person" pursuant to rule 9.130 was and would continue to be controversial for some time.[131] In 1994, the Third District Court of Appeal held in *Polo v. Polo*[132] that timeliness of service was not an element of personal jurisdiction for purposes of interlocutory appeal.[133] This decision was consistent with the Third District's decision the previous year in *RD & G Leasing, Inc. v. Stebnicki*.[134] Yet in 1994, the Fourth and the Fifth District Courts of Appeal arrived at precisely the opposite result.[135]

As has already been explored in detail, the *Comisky* court in the Fourth District held that timeliness of service of process was an element of "jurisdiction of the person"[136] pursuant to rule 9.130 and is, therefore, appealable.[137] Likewise, in *Mid-Florida Associates, Ltd. v. Taylor*,[138] the Fifth District based its jurisdiction to hear the appeal of untimely service of process upon the *Comisky* court's precedent.[139] In *Taylor*, the written opinion does not directly address the jurisdictional issue raised by the opposing statutory interpretations of the Second and Third Districts.[140] Instead, the *Taylor* court claims jurisdiction in a footnote, cites to two cases in favor and two cases

129. *Id.* at 631–32.
130. *See generally* Thomas v. Silvers, 748 So. 2d 263 (Fla. 1999).
131. FLA. R. APP. P. 9.130(a)(3)(C)(i).
132. 643 So. 2d 55 (Fla. 3d Dist. Ct. App. 1994).
133. *Id.* at 56; *see also* Anthony C. Musto, *Appellate Practice,* 20 NOVA. L. REV. 1, 14 (1995).
134. 626 So. 2d 1002 (Fla. 3d Dist. Ct. App. 1993).
135. *Id.* at 1003; *see also* Anthony C. Musto, *Appellate Practice,* 21 NOVA L. REV. 13, 24 (1996).
136. FLA. R. APP. P. 9.130(a)(3)(C)(i).
137. *See generally* Comisky v. Rosen Mgmt. Serv., Inc., 630 So. 2d 628 (Fla. 4th Dist. Ct. App. 1994) (en banc) (Polen, J., dissenting), *rev'd per curiam*, 748 So. 2d 263 (Fla. 1999).
138. 641 So. 2d 182 (Fla. 5th Dist. Ct. App. 1994).
139. *See id.*
140. *Id.* at n.1.

against the jurisdictional issue, and essentially avoids the controversy.[141] In 1995, the Second District Court of Appeal, in *Nowry v. Collyar*,[142] dismissed an appeal of an order denying a motion to dismiss based on claims for untimely service.[143] The Second District recognized the conflict of its decision with the other circuits.[144] Accordingly, the Second District certified the following question to the Supreme Court of Florida:

> DOES AN ORDER DENYING A MOTION TO DISMISS A COMPLAINT CLAIMING UNTIMELY SERVICE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.070(i) FAIL TO CONSTITUTE AN ORDER DETERMINING THE JURISDICTION OVER THE PERSON, THUS MAKING IT A NONAPPEALABLE, NON-FINAL ORDER?[145]

Yet at that time, the question was not destined to gain an audience with the Supreme Court of Florida.[146] Finally, in *Novella Land, Inc. v. Panama City Beach Office Park, Ltd.*,[147] the First District Court of Appeal recognized this conflict, as well.[148] The court in *Novella* agreed with the Second and Third Districts, and held "an order which denies a motion to dismiss for failure to timely serve a defendant is not an appealable non-final order."[149]

However, the court dismissed the certified question in *Nowry* pursuant to rule 9.350(b) of the *Florida Rules of Appellate Procedure*.[150] Thus, for the moment, the conflict concerning the definition of jurisdiction of the person was unresolved.

D. *The* Nowry *Inquiry Revived*

Finally, in 1997, a dispute arose in which the Supreme Court of Florida was afforded the opportunity to resolve whether claims of timeliness of service constitute questions of personal jurisdiction pursuant to rule 9.130 of the *Florida Rules of Appellate Procedure*.[151] In *Thomas v. Silvers*,[152] the Third

141. *Id.*
142. 666 So. 2d 555 (Fla. 2d Dist. Ct. App. 1995).
143. *Id.* at 556.
144. *Id.*
145. *Id.*
146. Nowry v. Collyar, 670 So. 2d 939 (Fla. 1996) (table decision).
147. 662 So. 2d 743 (Fla. 1st Dist. Ct. App. 1995).
148. *Id.* at 743.
149. *Id.* at 744.
150. *Nowry*, 670 So. 2d at 939.
151. Thomas v. Silvers, 701 So. 2d 389 (Fla. 3d Dist. Ct. App. 1997), *aff'd* 748 So. 2d 263 (Fla. 1999).

District Court of Appeal granted the appellee's motion to dismiss an appeal for claims of untimely service as defined by rule 1.070(i) of the *Florida Rules of Civil Procedure*.[153] In a per curiam opinion, the court based its decision on a mixture of statutory interpretation of rule 9.130(a)(3)(C)(i)[154] of the *Florida Rules of Appellate Procedure* and on Third District precedent.[155]

The court concluded that untimely service does not fall within the parameters of "jurisdiction of the person" pursuant to rule 9.130(a)(3)(C)(1).[156] Thus, interlocutory orders claiming untimely service are unappealable for lack of appellate jurisdiction.[157] In doing so, the Third District also certified conflict with the Fourth and the Fifth Districts.[158] The question originally certified by the *Nowry* court would soon be resolved.[159]

VI. MAKING THE RIPPLE PLACID

A. Thomas v. Silvers

On October 21, 1999, the Supreme Court of Florida resolved this long-standing issue.[160] In *Thomas v. Silvers*,[161] the Supreme Court of Florida held that appeals of orders denying motions to quash service based solely on claims that service was untimely pursuant to rule 1.070(i) of the *Florida Rules of Civil Procedure* fall outside the judicially proscribed scope of personal jurisdiction as provided by rule 9.130(a)(3)(C)(i) of the *Florida Rules of Appellate Procedure*.[162] In a per curiam opinion, the Supreme Court of Florida recognized the difficulty presented to appellate courts by litigants continuously seeking review in the district courts for interlocutory appeals.[163] Specifically, the district courts were forced to review these appeals "piecemeal."[164] By their very nature, interlocutory appeals typically occur during a

152. *Id.*
153. FLA. R. CIV. P. 1.070(i); *Thomas*, 701 So. 2d at 390.
154. FLA. R. APP. P. 9.130(a)(3)(C)(i).
155. *Thomas*, 701 So. 2d at 390.
156. *Id.*
157. *Id.*
158. *Id.*
159. *See Nowry*, 666 So. 2d at 556.
160. *See* FLA. CONST. art. V, § 3(b)(4). The Supreme Court of Florida is authorized to, in its discretion, "review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal." *Id.*
161. 748 So. 2d 263 (Fla. 1999).
162. *Id.* at 265.
163. *Id.* at 264.
164. *Id.*

trial, allowing such review, in most cases, only "serves to waste court resources and needlessly delay final judgment."[165] Thus, the court based its opinion on the public policy grounds previously articulated in *Travelers Insurance Co. v. Bruns*.[166] However, the manner in which this court arrived at this ultimate conclusion involves substantial creativity and deserves further explanation.

The dilemma faced by the Supreme Court of Florida in *Bruns* was how to manage and limit the crushing workload faced by the district courts while simultaneously providing efficient and equitable relief from erroneous trial court rulings.[167] In crafting a solution to this problem, this court utilized its inherent power afforded by the Florida Constitution in two ways.[168]

First, the court utilized its ability to resolve conflict.[169] This power is afforded to the Supreme Court of Florida by the Florida Constitution.[170] This court could have merely held that denials of motions to quash service based on claims of untimely service do not constitute jurisdiction of the person pursuant to rule 9.130 of the *Florida Rules of Appellate Procedure*, and stopped there.[171] However, taken alone, such a holding might unfairly prejudice defendants because they would have no redress until a final judgment had been entered. In this light, such a ruling could be construed as unduly plaintiff friendly. Instead, the Supreme Court of Florida went a step further.[172]

Second, as the Supreme Court of Florida is authorized to promulgate its own court rules,[173] the opinion noted a recent amendment to the *Florida Rules of Civil Procedure*.[174] The practical effect of this amendment is to augment the discretion of trial judges and encourage them to dismiss parties who have been improperly served.[175] Thus, defendants should be dismissed for untimely service more frequently, and never have to appeal the decision

165. *Id.* (citing Travelers Ins. Co. v. Bruns, 443 So. 2d 959, 960–61 (Fla. 1984)).

166. *Thomas,* 748 So. 2d at 264; *see Bruns,* 443 So. 2d at 960–61.

167. *See Bruns*, 433 So. 2d at 960–61.

168. *Id.*

169. FLA. CONST. art. V, § 3(b)(4).

170. *Id.*; *see also* FLA. R. APP. P. 9.125(a) (providing for direct appeals of trial court rulings by the District Courts of Appeal to the Supreme Court of Florida for questions either having "great public importance or hav[ing] a great effect on the proper administration of justice throughout the state").

171. *See* FLA. R. APP. P. 9.130.

172. *See Bruns*, 433 So. 2d at 960–61.

173. FLA. CONST. art. V, § 2(a) (authorizing the Supreme Court of Florida to write court rules).

174. Thomas v. Silvers, 748 So. 2d 263, 264 (Fla. 1999).

175. *Id.*

at all.[176] The history and policy underlying this amended rule deserve further discussion.

B. *Amendment to Rule 1.070(j)*

Eleven months before *Thomas* was decided by the Supreme Court of Florida, the court published *Amendment to the Florida Rules of Civil Procedure 1.070 (j) Time Limit for Service.*[177] In this proposal, the Supreme Court of Florida relaxed the harshness of the current rule's mandate which "sometimes acts as a severe sanction."[178] This sanction was severe because "even if dismissal under the rule is without prejudice, a plaintiff would be unable to refile suit in cases where the statute of limitations had expired."[179] The new rule would allow "a court broad discretion to extend the time for service even when good cause has not been shown."[180] This change is crucial because defendants can use claims of untimely service to evade entirely the courts' jurisdiction.

Seven months before *Thomas* was decided by the Supreme Court of Florida, the court amended the *Florida Rules of Civil Procedure.* On March 4, 1999, the Supreme Court of Florida published *Amendment to Florida Rule of Civil Procedure 1.070(j) Time Limit for Service.*[181] This adopted amendment provided:

> (j) Summons; Time Limit. If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading . . . the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or shall dismiss the action . . . without prejudice or drop that defendant . . . as a party . . . provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period. A dismissal under this subdivision shall not be considered a voluntary

176. *Id.* at 264–65.

177. 720 So. 2d 505 (Fla. 1998). This proposed amendment was published in the *Florida Bar News*. *Id.* at 506. The court sought "any comments on the proposed rule within thirty days of the date of publication." *Id.* Specifically, the court asked for input from "the Florida Bar Civil Procedure Rules Committee and interested persons." *Id.*

178. *Id.* at 505.

179. Amend. to Fla. Rule of Civil Proc. 1.070(j) Time Limit for Service, 720 So. 2d 505 (Fla. 1998).

180. *Id.*

181. 746 So. 2d 1084 (Fla. 1999).

> dismissal or operate as an adjudication on the merits under rule 1.420(a)(1).[182]

As articulated in the proposal, the practical effect of this amendment is to afford trial judges greater discretion in quashing service of process on improperly served parties.[183] Yet there are other important considerations.

This paper argues that another policy reason supports the equity of this decision. This policy was articulated after *Thomas* was decided, but was perhaps still an unwritten factor that determined the ultimate outcome of *Thomas*.[184] This reasoning goes to the essence of what personal jurisdiction is and what it is not.

C. Totura & Co. v. Williams

On February 17, 2000, the Supreme Court of Florida decided *Totura & Co. v. Williams*.[185] Although the issue in *Williams* centered on Florida's relation-back doctrine,[186] the policies underlying this decision are applicable in the context of timely service of process because both issues center on rule 1.070(j)[187] of the *Florida Rules of Civil Procedure*.

In resolving the conflict of *Williams*, the Supreme Court of Florida held that rule 1.070(j) of the *Florida Rules of Civil Procedure* "is intended to be 'a case management tool, not an additional statute of limitations cutting off liability of a tortfeasor.'"[188] This notion is well supported by rule 1.010 of the *Florida Rules of Civil Procedure*[189] and is substantially buttressed by previous holdings.[190] In this connection, once a case is filed, the statute of limitations is tolled, and allowing a party to escape litigation for failing to serve process in a timely fashion would cause "technical defenses [to] be-

182. *Id.*
183. *Thomas*, 748 So. 2d at 264.
184. *See generally id.* at 263.
185. 754 So. 2d 671 (Fla. 2000).
186. *Id.* at 672.
187. FLA. R. CIV. P. 1.070(j).
188. *Williams*, 754 So. 2d at 678 (quoting Root v. Little, 721 So. 2d 836, 837 (Fla. 5th Dist. Ct. App. 1998)).
189. FLA . R. CIV. P. 1.010 ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.").
190. *See* Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993) (identifying the purpose as "encourag[ing] the orderly movement of litigation"); Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983) ("The purpose of the rules of civil procedure is to promote the orderly movement of litigation."); Amlan, Inc. v. Detroit Diesel Corp., 651 So. 2d 701, 704–05 (Fla. 4th Dist. Ct. App. 1995) ("The purpose of the rules of civil procedure is to promote the orderly movement of litigation.") (quoting *Mercer*, 443 So. 2d at 946).

come the centerpiece of the litigation . . . ."[191] In that situation, "the merits are obscured, if not totally overshadowed."[192] Thus, if the time limit provided by rule 1.070(j) is a "'case management tool,'"[193] then it is not truly an element of personal jurisdiction.

This distinction is precisely why the underlying policy of *Williams* is applicable to *Thomas*. Just because rule 1.070(j) of the *Florida Rules of Civil Procedure* prescribes a time limit to effect valid service of process,[194] it does not mean that failure to comply with the time requirements constitutes a question of jurisdiction of the person. It merely constitutes an issue of judicial administration in the form of case management. This logic was the same erroneous logic employed by *Comisky*:[195] to consider untimely service as invalid may be correct, but to consider untimely service as a jurisdictional question is essentially to mistakenly view a rule designed to be "'a case management tool,'"[196] as an element of personal jurisdiction. Thus, for the moment, the ripple created by *Comisky* is placid.

VII. CONCLUSION

The decision in *Thomas* was correct and embodies sound judicial policies. Time limits on service do not equate to true legal power. Timeliness of service of process is not a substantive element of personal jurisdiction because it fails to go to the essential quality of service of process: notice.[197] Notice is paramount for a court to have jurisdiction or power over a defendant.[198] The time limit on service of process is merely a procedural aspect designed to efficiently move cases through the courts.[199] Thus, defendants are properly precluded from using technical claims of untimely service of process to evade justice.[200] Indeed, as articulated in Judge Polen's dissent in *Comisky*, a truly unjust result stemming from the issue of timeliness of service of process may be corrected by a common law writ of certiorari.[201]

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191. *Williams*, 754 So. 2d at 678.
192. *Id.*
193. *Id.* at 678 (quoting Root v. Little, 721 So. 2d 836, 837 (Fla. 5th Dist. Ct. App. 1998)).
194. FLA. R. CIV. P. 1.070(j).
195. *See generally* Comisky v. Rosen Mgmt. Serv., Inc., 630 So. 2d 628 (Fla. 4th Dist. Ct. App. 1994) (en banc) (Polen, J., dissenting), *rev'd per curiam*, 748 So. 2d 263 (Fla. 1999).
196. *See generally Williams*, 754 So. 2d at 678.
197. *See* Bedford Computer Corp. v. Graphic Press, Inc., 484 So. 2d 1225, 1227 (Fla. 1986).
198. *Id.*
199. *Williams*, 754 So. 2d at 678.
200. *Id.*
201. *Comisky*, 630 So. 2d at 631–32.

Case management is an important aspect of judicial administration.[202] When questions of personal jurisdiction intersect with questions of appellate jurisdiction, the situation can be quite complicated. This is especially true when the judiciary must craft a solution that balances the interests of litigants against the interests of judicial economy.[203] In *Thomas*, the Supreme Court of Florida creatively and equitably solved this issue so that both litigants' rights and the judicial economy are preserved. Indeed, after *Thomas*, plaintiffs' causes of action are better protected and less interlocutory appeals will be entertained. In *Thomas*, the Supreme Court of Florida effectively clarified the essence of personal jurisdiction through the scope of appellate jurisdiction.

202. Cope, *supra* note 54, at 62.
203. *Id.*