IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CHRIS GRANIER GEARITY,

Appellant,

v. Case No. 5D20-1593

MARIA THERESA GRANIER STUART, SUSAN MARIE GRANIER LESKANIC, STAN JOSEPH GRANIER, OSCEOLA MEMORY GARDENS, INC., OSCEOLA MEMORY GARDENS II, INC., AND ERVIN LOUIS GRANIER, III,

Appellees.

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Opinion filed July 9, 2021

Appeal from the Circuit Court
for Osceola County,
Mike Murphy, Judge.

John W. Zielinski, of NeJame Law, P.A., Orlando, for Appellant.

Meredith Pitts Smith, of Copeland Covert & Smith PLLC, Altamonte Springs, for Appellees.

SASSO, J.

Appellant, Chris Granier Gearity, appeals the denial of her motion for sanctions pursuant to section 57.105, Florida Statutes (2018), against Maria Theresa Granier Stuart, Susan Marie Granier Leskanic, and Stan Joseph Granier (collectively "Appellees"). Appellant argues that, based on the Florida Supreme Court's decision in *Wheaton v. Wheaton*, 261 So. 3d 1236 (Fla. 2019), the trial court erred in relying on Florida Rule of General Practice and Judicial Administration 2.516 as applied to the service requirements of section 57.105's safe harbor provision.[1] Appellees concede error on this point, and we accept the concession. Although this court reached a contrary conclusion in *Goersch v. City of Satellite Beach*, 252 So. 3d 309 (Fla. 5th DCA 2018), that case no longer controls in light of *Wheaton*.

We also reject Appellees' alternative basis for affirmance because the trial court never reached the merits of Appellant's section 57.105 motion. We "cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so." *Featured Props., LLC v. BLKY, LLC*, 65 So. 3d 135, 137 (Fla.

[1] At all times pertinent to this appeal, Florida Rule of Civil Procedure 1.080(a) read: "Every pleading subsequent to the initial pleading, all orders, and every other document filed in the action must be served in conformity with the requirements of Florida Rule of Judicial Administration 2.516." We do not address what implication the amendment to rule 1.080, effective April 8, 2021, would have on a similar fact pattern as that issue is not before us.

1st DCA 2011) (quoting *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 4th DCA 2009)).

Accordingly, we reverse and remand for additional proceedings consistent with this opinion.

REVERSED and REMANDED.

EDWARDS, J., concur.
COHEN, J., concurs specially, with opinion.

COHEN, J., concurring specially.

I concur with the majority opinion reversing the denial of Appellant's motion for sanctions brought under section 57.105, Florida Statutes (2018). Although we reverse, it should be noted that the trial court understood the issues involved and did as was required, which was to apply this Court's decision in Goersch.[2] See Pardo v. State, 596 So. 2d 665, 666–67 (Fla. 1992) ("[I]f the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it." (quoting State v. Hayes, 333 So. 2d 51, 53 (Fla. 4th DCA 1976))). Nonetheless, I write to expand upon the footnote in the majority opinion so as to caution trial courts in applying this decision going forward.

The Florida Supreme Court recently amended Florida Rule of Civil Procedure 1.080(a) to "require documents that are served but not filed with the court to be served in accordance with Florida Rule of General Practice and Judicial Administration 2.516." In re Amends. to Fla. R. Civ. P., 46 Fla. L. Weekly S61, S61 (Fla. Apr. 8, 2021). Arguably, based on the language of

[2] The trial court did not have the benefit of Wheaton, as that decision was issued two days after it denied Appellant's motion.

the amended rule, documents that are only served rather than filed—such as section 57.105 safe harbor notices—now fall within rule 1.080(a) and thus, would be subject to the service requirements of rule 2.516. See id.; Fla. R. Civ. P. 1.080(a) (post-April 2021 amendment). In other words, the result reached in Goersch might once again control in a different case with circumstances similar to the instant case.

However, it appears that the amendment to rule 1.080(a) would not be applicable to this case because the court indicated that the change was prospective. See In re Amends. to Fla. R. Civ. P., 46 Fla. L. Weekly at S61 ("The amendments shall take effect immediately upon the release of this opinion."); see also Mendez-Perez v. Perez-Perez, 656 So. 2d 458, 459–60 (Fla. 1995). But as the majority notes, we need not reach that issue here. Yet, in light of that recent amendment, the service requirement issues presented in this case will likely reappear, necessitating appellate courts to provide future guidance in the application of the amended rule.