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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79-837

W. R. GRACE & CO. – CONN., OWENS-CORNING FIBERGLAS CORPORATION, et al.,

Defendants/Petitioners,

vs.

GARLAND P. PARLIER and MARIE W. PARLIER, his wife,

Plaintiffs/Respondents.

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL FOR FLORIDA

INITIAL BRIEF OF PETITIONER OWENS-ILLINOIS, INC.

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PRELIMINARY STATEMENT

References to the Record on Appeal are made by (R-____). The collective Petitioners are sometimes referred to as Defendants and this Petitioner sometimes refers to itself as Owens-Illinois, Inc. The Respondents are sometimes referred to as the Plaintiffs.

STATEMENT OF THE CASE AND FACTS

This is an appeal of the Fifth District Court of Appeal's opinion in Parlier v. Eagle-Picher Industries, Inc., _____ So.2d _____, 17 FLW D1054 (corrected opinion) (Fla. 5th DCA 1992). The Fifth District's opinion covers eleven cases which were consolidated at both the Trial Court and Appellate Court levels. These cases were filed in the Ninth Judicial Circuit in and for Orange County in December, 1987, and sought damages for personal injuries allegedly sustained by the various Plaintiffs because of their alleged exposure to the asbestos containing products of the named Defendants. **(R-33-186).**

The record shows that the affidavits of service on Owens-Illinois were filed with the trial court on August 13, 1990. **(R-2648-2655; 2672-2685).** Owens-Illinois filed a Motion to Dismiss and Quash Service of Process in each of the eleven cases on August 30, 1990. **(R-1322-1376).** The failure of the Plaintiffs to serve their Complaints within 120 days of either the date of filing or the date Fla. R. Civ. P. 1.070(j) became effective were raised in the Motions.

The Plaintiffs filed two Memoranda in Opposition to the Defendants' Motions to Dismiss in each case. The first Memorandum **(R-1487-1543; 1738-1891)** was general in nature and did not discuss the applicability of rule 1.070(j) to these actions. A supplemental response to the Motions to Dismiss was subsequently filed by each Plaintiff. **(R-1903-1920; 1924-1941; 1944-1961; 1965-1982; 1986-2003; 2007-2025; 2029-2046; 2050-2067; 2071-2088;**

2093-2110; 2114-2130). Plaintiffs argued in their supplemental responses that rule 1.070(j) could not be retroactively applied to these cases because they were filed before the rule's effective date. Plaintiffs also attempted to show "good cause" for their failure to timely serve the Defendants. Using the John R. Henry case as an example **(R-1903-1920),** Plaintiffs stated **that** service was delayed because **"it** is difficult to prove in any individual case exactly whose asbestos products an individual plaintiff was exposed to." Plaintiffs further claimed that because of this difficulty, "service on defendants in asbestos litigation is often delayed until product identification to that particular defendant's products can be obtained. This is more economical to the plaintiffs because they do not have to incur the expense of obtaining service over a defendant who would subsequently have to be dismissed in any event." **(R-1911).** Thus, Plaintiffs intentionally delayed serving many of the Defendants with process, even though those Defendants were named in the Complaint.

On October 29, 1990, a hearing was held before the Honorable W. Rogers Turner on the various Motions to Dismiss. **(R-1-32).** The Plaintiffs again argued that the rule could not be retroactively applied and also asserted that Defendants were not timely served because the original trial counsel had "great difficulty" in obtaining product identification. (R-18). The Trial Court, however, ruled that the Motions should be granted even though the statute of limitations probably had run in each of the cases. The Court felt there were due process considerations for the

Defendants, some of whom had waited over two years to be served. **(R-29).**

The Trial Court's Order of Dismissal was entered November **29,** 1990. **(R-2034-2347).** In its **Order,** the Court found that the Plaintiffs did not serve the original process and initial pleadings on the Defendants within either 120 days of filing the initial pleading **or** 120 **days** of January 1, 1989, the date rule 1.070(j) became **effective.** Moreover, the Trial Court found that Plaintiff had not made any showing of good cause as to why **service** was not made during either time period. Because the Plaintiffs had failed to comply with rule 1.070(j), the Court dismissed the action without prejudice. **(See,** for example, **R-2035).**

Plaintiffs subsequently filed their Notice of Appeal on December **28,** 1990. **(R-2348-2380).** The Fifth District Court of Appeal reversed the Trial Court in an opinion filed March 13, 1992, Parlier v. Eagle-Picher Industries, Inc., ____ So.2d ____, 17 **FLW D1054** (Fla. 5th DCA 1992). The Fifth District reversed on the authority of Partin v. Flagler Hospital, Inc., **581** So.2d **240** (Fla. 5th **DCA** 1991).

SUMMARY OF ARGUMENT

Owens-Illinois respectfully submits that the Fifth District Court of Appeal is in error and that the Trial Court properly applied Fla. R. Civ. P. 1.070(j) to these cases. Once the rule became effective on January 1, 1991, the Respondents had 120 days in which to serve Owens-Illinois. Instead, the record clearly shows that service was not made until July or August, 1990, over 18 months after the effective date of the rule. Respondents made no showing of good cause to the Trial Court as to why they could not effect timely service on Owens-Illinois.

The crux of the Fifth District's opinion is that rule 1.070(j) is not to be applied to cases which were pending on its effective date. However, Florida law is clear that a rule of procedure such as rule 1.070(j) is to be applied to all pending cases as it does not directly alter or create a substantive right. Further, Respondents had no vested substantive right in the pre-amendment procedure which did not impose a time limit for service because no vested right in any mode of procedure exists. Consequently, Owens-Illinois respectfully requests the Court to reverse the Fifth District's opinion and remand this case with instructions to reinstate the Trial Court's November 29, 1990, Order dismissing these cases.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL'S OPINION BELOW THAT FLA. R. CIV. P. 1.070(j) DOES NOT APPLY TO CASES PENDING ON ITS EFFECTIVE DATE IS INCORRECT AND SHOULD BE REVERSED

The record in this case clearly shows that Plaintiffs have not complied with Fla. R. Civ. P. 1.070(j). All eleven cases were filed in December, 1987, and were not served on Owens-Illinois until 2½ years later. In fact, 1½ years elapsed between the time rule 1.070(j) became effective and the time of service. Furthermore, Plaintiffs came forward with no evidence to show "good cause" for their failure to timely serve any of the Defendants, including Owens-Illinois. Thus, there can be no dispute that Plaintiffs have not complied with the rule. The controversy before this Court is simply whether rule 1.070(j) is applied to cases which were pending on January 1, 1989, the rule's effective date.[1]

The Fifth District reversed the Trial Court's Orders of Dismissal on the authority of its opinion in Partin v. Flagler Hospital Inc., 581 So.2d 240 (Fla. 5th DCA 1991). Parlier, supra, at D1054. The fact situation in Partin is similar to these cases, if not more egregious. There, plaintiff originally sued in 1985 for injuries she received in 1981. The original suit was dismissed, but followed by a similar complaint later in 1985.

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[1] Respondents argued two points to the Fifth District below: that rule 1.070(j) did not apply to cases pending on its effective date and that the rule was not "self executing". The second issue was settled by this Court in Morales v. Sperry Rand Corp., So.2d _____, 17 FLW S348 (Fla. 1992), which held that a dismissal pursuant to rule 1.070(j) is proper even though service of process was effected before the motion to dismiss predicated on the rule is filed. Thus, this appeal concerns only the applicability of rule 1.070(j) to pending cases.

Service, however, was not made on the defendant until November 5, 1989. The trial court, as in this case, dismissed the complaint because service had not been made within 120 days after filing the complaint.

The Fifth District Court of Appeal reversed the trial court, giving three reasons for its ruling that rule 1.070(j) did not apply to the case. The first was that the Supreme Court's order adopting the amendment to rule 1.070(j) was silent as to applicability to pending cases. Second, the Court stated that it was clear that plaintiffs' rights may be affected by the change. Third, the Fifth District stated the rule's language suggestedthat it was not intended to apply to pending cases because it required service within 120 days of filing the action. Partin, 581 So.2d at 241. Owens-Illinois respectfully submits that none of these reasons are sufficient justification for refusing to apply rule 1.070(j) to pending cases.

To justify its first point, the Fifth District reached back nearly 30 years to find a statement this Court made in an opinion adopting amendments to the Rules of Civil Procedure. Ibid., quoting In Re Amendments to Fla. Rules of Civil Procedure, 132 So.2d 6, 7 (Fla. 1961). The Fifth District seemed to completely ignore the well-settled body of Florida case law which draws a distinction between substantive law and procedural rules when determining whether a new statute or rule is to apply retroactively to pending cases.

This Court has consistently held that substantive law is to be construed as prospective only unless there is explicit legislative

expression to the contrary. Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); State v. Lavazzoli, 434 So.2d 321 (Fla. 1983); Walker and LaBerge, Inc. v. Hallisan, 344 So.2d 239 (Fla. 1977). On the other hand, procedural statutes and rules are generally held to be applicable to all pending cases. Altenhaus, supra; Julian v. Lee, 473 So.2d 736 (Fla. 5th DCA 1985); Harris v. State, 400 So.2d 819 (Fla. 5th DCA 1981); Kocsis v. State, 467 So.2d 384 (Fla. 5th DCA 1985); Johnson v. State, 371 So.2d 556 (Fla. 2d DCA 1979); Love v. Jacobsen, 390 So.2d 782 (Fla. 3d DCA 1980). It is clear that rule 1.070(j) is procedural and is to be applied to these cases.

The most obvious indication that the rule is procedural is that it is a "rule of procedure" setting forth the steps to be followed when process is served on a defendant. Rules adopted by this Court are limited to matters of procedure because of the separation of powers between the judiciary and the legislative branches. State v. Garcia, 229 So.2d 236 (Fla. 1969). This Court noted in its Garcia decision that in some instances it is difficult to determine whether a rule relates to a matter that is substantive or a matter that is procedural:

> A procedural law is sometimes referred to as "adjective law" or "law of remedy" or "remedial law" and has been described as the legal machinery by which substantive law is made effective. Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. [citations omitted.]

229 So.2d at 238. Garcia involved the applicability of a rule of criminal procedure prescribing the procedure and method of waiving a jury trial. This Court defined criminal substantive law as that which declares certain acts are crimes and prescribes the

punishments therefor. Procedural law, on the other hand, is the law which provides and regulates the steps by which the accused is prosecuted and punished. In Garcia, the rule in question was determined to be procedural because it did not "abrogate or modify substantive law". Ibid. at 238.

A similar distinction can be drawn for civil tort law in general and these cases in particular. Substantive law declares what acts are tortious, while civil procedure regulates the steps to be followed in pursuing a claim for damages. In these cases, rule 1.070(j) does not abrogate or modify any substantive law; it merely replaced the former rule which did not specify the time for service and it merely provides steps which the plaintiff must follow in order to serve process on a defendant. It does not abrogate or modify the substantive bases of the Respondents' lawsuits, namely, negligence or strict liability; the rule is merely intended to carry out this Court's mandate that parties diligently pursue their cases. See, Morales V. Sperry Rand Corp., _____ So.2d _____, 17 FLW S348 (Fla. 1992). Thus, as with the rule in Garcia, rule 1.070(j) is a procedural rule which applies to all cases, including those pending on the effective date.

This is the position taken by the Third District Court of Appeal in Berdeaux V. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990), disapproved on other grounds, Morales, supra. Berdeaux also involved the dismissal of several asbestos personal injury cases for failure to comply with rule 1.070(j). While the Third District reversed the order of dismissal on the basis that the rule was not "self executing@@,the Court agreed that the rule

applied to cases pending on its effective date and that Plaintiffs in those cases were required to serve the defendants within 120 days of the rule's effective date, January 1, 1989. Ibid., 575 So.2d at 1296. The Fifth District has acknowledged its position conflicts with Berdeaux. Partin, 581 So.2d at 242.

Surprisingly, the Fifth District's opinion also seems to ignore a line of its own decisions which are consistent with the above position. For example, in Julian V. Lee, supra, the issue before the Fifth District was the applicability of a newly amended Rule of Juvenile Procedure in a dependency action commenced before the amendment's date. The amended rule became effective January 1, 1985, and provided that a 180 day speedy trial period now applied in dependency cases. Even though the time for speedy trial under the new rule doubled the time provided for by the rule in effect when the case commenced, the Fifth District held that the new rule was procedural and applied to pending cases. The fact that a juvenile dependency proceeding is a civil action was critical to the Fifth District's decision because the Court found that there was no substantive right to a speedy trial in a civil dependency case. The amendment, therefore, was procedural as it did not abrogate or alter any substantive right to a speedy trial. Ibid. at 739.

In Lunsford v. State, 426 So.2d 1178 (Fla. 5th DCA 1983), the Fifth District similarly held that an amended rule of criminal procedure was applicable to a criminal trial which occurred after the effective date of the amendment, even though the offense occurred before the amendment became effective. Similar results

were reached by the Fifth District in Kocsis, supra, and Harris, supra. See also, Johnson, supra, where a procedural statute was held to be applicable to a pending criminal case.

The key to analyzing cases such as Julian and Lunsford, and, in fact, to analyzing the applicability of rule 1.070(j) in the cases before the Court, is the axiom that rules of procedure in effect at the time of trial or other proceedings control the conduct of those proceedings. Julian, supra; Kocsis, supra; Lunsford, supra. In Julian, the operative proceeding for the purpose of applying the rule was the motion for discharge, which was filed after the effective date of the new rule. Thus, the Court held the new speedy trial rule controlled that proceeding. Julian, supra, at 739. If, on the other hand, the motion had been filed before the effective date of the new rule, the outcome would have been different. Similarly, in Lunsford, the trial was the operative proceeding and because it occurred after the effective date of the amended rule, the amendment applied. Ibid. at 1178.

In the cases before this Court, the operative event or proceeding was service of process on the Defendants. Because service did not take place until July and August, 1990, rule 1.070(j) was the rule in effect at the time and, therefore, controlled how Plaintiffs served Owens-Illinois. Had Plaintiffs not complied with the 120 day requirement, but still served Owens-Illinois in 1988 before rule 1.070(j)'s effective date, Owens-Illinois could not have complained about noncompliance with the rule because service of process would have been controlled by the old rule. Instead, Respondents waited to serve Owens-Illinois

until after the new rule's effective date and became subject to its requirements. Consequently, the new rule controlled whether Owens-Illinois was timely served.

The Fifth District's second point for justifying reversal of the trial court's order is also without merit. According to the Partin decision, the Fifth District stated it was clear that a plaintiff's rights may be affected by applying rule 1.070(j) to cases pending on its effective date. Partin, supra, at 241. In these cases, this presumably means that if the dismissal is affirmed, the Plaintiffs are prevented from refiling because the statute of limitations has expired. However, as argued above, it is Owens-Illinois' position that rule 1.070(j) does not abrogate or modify substantive law and merely has an incidental effect on the Plaintiffs' substantive rights.

In these cases, the Plaintiffs' substantive right to sue the Defendants for personal injury were not directly altered or modified by rule 1.070(j), nor did the rule create any new substantive obligation or duty on the part of the Plaintiffs. The Plaintiffs were still free to pursue all their rights to recover damages from Defendant pursuant to Florida products liability law. The only new obligation was that Plaintiffs were now required to serve the Defendants within 120 days of January 1, 1989. Even if they did not effect timely service, any dismissal suffered would have been without prejudice to any of their causes of action. The only reason Plaintiffs' substantive rights are now being affected is because they chose not to serve the Defendants until the summer

of 1990, when the statute of limitations on their claims had either expired or was near expiration.

The Fifth District may have also accepted Plaintiffs' argument below that they relied on the "law" at the time of filing, which did not impose a 120 day limitation on service of process. Presumably, Plaintiffs are claiming that they had a vested interest in the prior rule. This argument is without merit because "no vested rights in any mode of procedure exist." Love v. Jacobsen, 397 So.2d at 783. Thus, whether or not a plaintiff's substantive rights were affected by rule 1.070(j) becoming effective is irrelevant.

The Fifth District's third stated position for not applying rule 1.070(j) to pending cases is that the language of the rule suggests that this Court did not intend it to apply to cases filed before the effective date. Partin, 581 So.2d at 241, 242. The Fifth District strictly interprets the rule's language which provides that service must be effected within 120 days of filing. The Court notes that it is impossible in cases such as the one before this Court to comply with the rule because they were filed more than 120 days before the effective date. Ibid.

Owens-Illinois respectfully submits that this position ignores that the purpose of this rule is to force parties and their attorneys to be diligent in prosecuting their causes of action. Morales, supra. See also: Wei v. State of Hawaii, 763 F.2d 370, 372 (9th Cir. 1985); and Smith v. Pennsylvania Glass Sand Corporation, 123 F.R.D. 648 (N.D. Fla. 1988) (interpreting Fed. R. Civ. Pro. 4(j), which is identical to rule 1.070(j)). One would be

hard pressed to say that the Plaintiffs in these cases were diligently pursuing their causes of action when they waited nearly 2½ years to serve their Complaints. The situation is even more egregious in Partin, where nearly four years elapsed between filing and service of process. The Fifth District's opinion below subverts the rule's intent to encourage diligence.

While it is true that if rule 1.070(j) is strictly construed in these cases, Plaintiffs would have to have served the Defendants before the rule was even effective, Owens-Illinois respectfully submits that a reasonable interpretation of the rule is the one discussed by the Third District in Berdeaux, supra at 1296, namely that Plaintiffs had **120** days from the rule's effective date to serve the Defendants. Owens-Illinois urges this Court to adopt this interpretation in these cases.

It is clear the Fifth District Court of Appeal does not Care for rule 1.070(j). Footnote 1 of the Partin decision appears to favor statements criticizing the rule made by Judge Schwartz and Henry Trawick. This dislike, however, does not justify refusing to apply the rule as intended by this Court. This is particularly true in these cases where Plaintiffs allowed **2½** years to elapse between filing and service. Plaintiffs had over a year after filing to serve Owens-Illinois before the rule took effect. They then had another 120 days after January 1, 1989, to serve process, effectively giving them 16 months after filing to serve Owens-Illinois. Plaintiffs still could have served Owens-Illinois during the remainder of **1989**, suffered **a** dismissal without prejudice, and then refiled without running into the statute of limitations.

Instead, they chose to wait until the absolute last minute to attempt service. When they did decide to serve, Plaintiffs were able to do so quickly and without difficulty. They have made no assertion that an inability to serve Owens-Illinois was the reason for the delay.

Owens-Illinois grants that if this Court reverses the Fifth District's opinion and reinstates the Trial Court's Order of Dismissal, most, if not all, of Plaintiffs' cases will be barred by the statute of limitations. However, it is not an overly harsh rule that has created Plaintiffs' predicament. It is the actions of the Plaintiffs themselves.

Consequently, Owens-Illinois respectfully requests this Court to reverse the Fifth District Court of Appeal's March 13, 1992, opinion and remand this case with instructions to reinstate the Trial Court's November 29, 1990, Order dismissing these cases without prejudice.

CONCLUSION

Fla. R. Civ. P. 1.070(j) is a rule of procedure which directly affects only procedural matters. It is, therefore, applicable to these cases, even though they were filed before the effective date of the amendment. Once the rule became effective on January 1, 1989, the Respondents had 120 days in which to serve Owens-Illinois, Inc. The record is clear that service was not even attempted until July or August, 1990, over 18 months after the effective date of the rule. The Trial Court was correct in dismissing these cases for failure to comply with rule 1.070(j). Owens-Illinois, Inc. respectfully requests this Court to reverse the Fifth District Court of Appeal's March 13, 1992, opinion and to remand this case with instructions to reinstate the Trial Court's November 29, 1990, Order dismissing these cases without prejudice.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 11th day of September, 1992, to:

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