W00A

91-A-0107M

FILED
SID J. WHITE
OCT 2 1999
CLERK, SUPREME COURT,
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,837

W.R. GRACE & CO. - CONN., etc., et. al.,

Petitioners,

vs.

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

Respondents.

ON **DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEALS**

INITIAL BRIEF ON THE MERITS OF PETITIONERS PITTSBURGH CORNING CORPORATION, FIBREBOARD CORPORATION, AND KEENE CORPORATION

ELAIRE & COLE, P.A.
2801 Ponce de Leon Blvd.
Suite 550
Coral Gables, FL 33134

- and -

LOUISE H. MCMURRAY, P.A.
11430 **N.** Kendall Drive
Suite 226
Miami, Florida **33176**
Fla. Bar No. 264857

Attorneys for Petitioners

TABLE OF CONTENTS

Table of Citations ii

Statement of the Case and Facts 1

Summary of Argument 6

Issue on Discretionary Review 6

WHETHER RULE 1.070(J) APPLIES TO CASES PENDING ON THE RULE'S EFFECTIVE DATE AND REMAINING UNSERVED FOR NINETEEN MONTHS THEREAFTER?

Argument 6

A. APPLICATION OF RULE 1.070(J) TO CASES PENDING ON THE RULE'S EFFECTIVE DATE AND REMAINING UNSERVED FOR NINETEEN MONTHS THEREAFTER IS PROPER - Point I

i. New procedures for rule changes and dates of effect make Rule 1.070(j) applicable on January 1, 1989. 7

ii. Not every "effect" of a rule change is prohibited, and Plaintiffs below claimed no deprivation of previously-acquired rights so as to preclude a truly retroactive application of the rule to their cases. 9

iii. Federal decisions support application of the rule to all cases, including pending cases. 14

Conclusion 17

Certificate of Service 18

LAW OFFICES OF LOUISE H. McMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

TABLE OF CITATIONS

CASES:

Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla.3rd.DCA 1990) 4,5,17

Coleman v. Holmes, 789 F.2d 1206 (5th.Cir. 1986) 16

Foremost Properties, Inc. v. Gladman, 100 So.2d 669 (Fla.1st.DCA 1958), cert.denied, 102 So.2d 728 (Fla. 1958) 13

Gleason v. McBride, 869 F.2d 688 (2nd.Cir. 1989) 16,17

Gordon v. Hunt, 835 F.2d 452 (3rd Cir. 1987), cert.denied, 486 U.S. 1008, 108 S.Ct. 1734, 100 L.Ed.2d 198 (1988) 16

Hill v. Hammerman, 16 F.L.W. 1743 (Fla.4th.DCA July 3, 1991) 5,17

In Re The Florida Bar, 276 So.2d 467 (Fla. 1972) 8

In Re Amendments to Fla. Rules of Civil Procedure, 132 So.2d 6 (Fla. 1961) 7

Klosenski v. Flaherty, 116 So.2d 767 (Fla. 1959) 12

McArthur v. St. Louis-San Francisco Ry. Co., 306 So.2d 575 (Fla.1st.DCA 1975), cert.denied, 316 So.2d 293 (Fla. 1975) 13

Morales v. Sperry Rand Corp., 578 So.2d 1143 (Fla.4th.DCA 1991) 4

Nardone v. Reynolds, 333 So.2d 25, 36 (Fla. 1976) 13,14

Partin v. Flagler Hospital, Inc., 16 FLW D1608 (Fla.5th.DCA 1991) 4,6,7,9,14,16,17

LAW OFFICES OF LOUISE H. McMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

Peters v. E.W. Bliss Co.,
100 F.R.D. 341 (E.D.Pa. 1983) 16

Pratt v. Durkop,
356 So.2d 1278 (Fla.2nd.DCA 1978) 13,15

Riddlesbarger v. Hartford Ins. Co.,
74 U.S. 386, 19 L.Ed. 257 (1869) 14

Sanders v. Marshall,
100 F.R.D. 480 (W.D. Pa. 1984) 16

Smith v. City of Arcadia,
185 So.2d 762 (Fla.2nd.DCA 1966) **13**

OTHER **AUTHORITIES**:

Rule 1.010, Fla.R.Civ.P. 8,9

Rule 1.050, Fla.R.Civ.P. 12,13

Rule 1.070(a), Fla.R.Civ.P 13

Rule 1.070(j), Fla.R.Civ.P. 1,3-7,9,13,14,15

Rule 4(j), F.R.C.P 14-17

Advisory Committee Note, 93 F.R.D. 263 15

D. Siegal, Practice Commentary on Amendment of Federal Rule 4 with Special Statute of Limitations Precaution, 96 F.R.D. 88 **16**

LAW OFFICES OF LOUISE H. MCMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

STATEMENT OF THE CASE AND FACTS

Petitioners PITTSBURGH CORNING CORPORATION (hereafter Pittsburgh Corning), FIBREBOARD CORPORATION (hereafter Fibreboard), and KEENE CORPORATION (hereafter Keene), respectfully seek review of the Fifth District Court of Appeal's reversal of eleven orders of dismissal entered upon plaintiffs' failure to serve their complaints on any of eighteen defendants within six months of the effective date of Rule 1.070(j), Fla.R.Civ.P. The reason for the district court's reversal was its ruling that Rule 1.070(j) was not intended to apply to cases pending on its effective date, but only to cases filed thereafter. The facts of the eleven cases are as follows:

The complaints were filed in December, 1987. All sought damages for personal injuries allegedly suffered as a result of exposure to asbestos-containing products. R.1-186.

After the complaints were filed, no record activity occurred for eighteen months. Id., R.187.[1] Six months after Rule 1.070(j) took effect, the trial judge to whom five cases were assigned sua sponte abated them for failure to serve any defendant. R.187-191 (J. Turner).

---

[1] All references to the record will be "R." Unless otherwise indicated, all emphasis is added.

Another thirteen months passed. The law firm of Robles and Gonzalez, P.A., then filed a notice *of* appearance in eight cases. R.192-199.

A paralegal in the Robles firm then called Judge Muszynski, to whom three cases were assigned, and learned he intended to dismiss them for failure to effect service. On July 2, 1990, a letter requesting additional time for service was filed. R.200.[2] There is no record of a hearing or a statement of good cause. There is no order finding good cause. R.192-199.

On July 19, Plaintiffs in the five abated cases filed a motion to set aside those orders. R.249-254. Those motions were granted August 6 (Case Nos. 8889, 8890) and 7 (Case Nos. 8918, 8922, 8934). R.319-324.

Process was served on July 24, 1990, at 11 A.M., on most defendants by a single process server by service on C. T. Corporation as registered agent. E.g., R. 2448-2647; 2654-2671.

Fibreboard, Keene, and Pittsburgh Corning were served on August 2 by substitute service on the secretary of state. E.g., R.2820-2862 (Fibreboard); R.2698-2701 (Keene); R. 2790-2793, 2798-2801 (Pittsburgh Corning). Keene was

---

[2] The cases were Nos. 87-8936, 87-8937, and 87-8931.

LAW OFFICES OF LOUISE H. MCMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

also served on August. 3, by service out-of-state on a reyistered agent. E.g., **R.2698-2701.**

Before receiving responsive pleadings, plaintiffs anticipated motions to dismiss and set a hearing date for them. **R.1986-1987; 2138.** Plaintiffs filed **a** single memorandum opposing a "generic" unidentified motion to dismiss. E.g., R.1738-1756 (Case No. 87-8889), 1757-1775 (Case No. 8890). Three weeks later, they filed a supplemental response directed to Rule 1.070(j). In that response, Plaintiffs argued that the 120-day rule should not be applied "retroactively", i.e., the rule should not be applied to unserved cases pending on its effective date. E.g., R.1965-1982 (Case No. 8922), 1986-2003 (Case No. **8931).** Plaintiffs also suggested that delay of service pending development,of product identification testimony may constitute "good cause" for violation of Rule **1.070(j).** No other contention was made that would preclude dismissal under the rule.

At the hearing, the Honorable W. Rogers Turner observed that. all motions appeared to have as a "common thread" the violation of the **120-day** rule. R.8. Plaintiffs' counsel, **Mr.** O'Shea, reiterated arguments made in the supplemental memorandum. The proposed orders were circulated to all counsel before submission. R.29.

The orders recite that 13 motions were heard, each having as a common ground the plaintiffs' failure to comply

LAW OFFICES OF LOUISE H. McMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 . TELEPHONE (305) 279-7729

with Rule 1.070(j). R. 2304-2347. No motions for rehearing were filed. The eleven cases were consolidated for purposes of appeal, **and a** Notice of Appeal was filed on December 28, 1990. R.2348- *2380.*

While the appeals were pending, a panel of the Fifth District decided Partin v. Flagler Hospital, Inc., 581 So.2d 240 (Fla.5th.DCA 1992). In Partin, application of rule 1.070(j) to cases pending but unserved on January 1, 1989 was rejected.

Plaintiffs' appellate counsel argued three grounds **for** reversal: Rule 1.070(j) should not be applied in any manner *to* cases pending on its **effective** date; perfection of service on a defendant before dismissal under the rule cures tardy service, relying upon the Third District decision in Berdeaux V. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla.3rd.DCA 1990)[3]; and, certain defendants, including Petitioner Keene, had waived application of the rule. No issued was raised regarding the "good cause" asserted in the supplemental memorandum.

The Petitioners responded by arguing, inter alia, that: application of Rule 1.070(j) to cases pending on January 1, 1989, so as to require service within 120 days of

---

[3] This Court has disapproved the Berdeaux decision on the issue of service as "cure" of a violation of Rule 1.070(j) in Morales v. Sperry Rand Corporation, 578 So.2d 1143 (Fla.4th.DCA 1991).

LAW OFFICES OF LOUISE H. McMURRAY, P. A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

that date is not "retroactive" application of the rule; procedural rules may in any event be retroactively applied, and the rule is procedural; "analogy" of Rule 1.070(j) to other rules of procedure so as to engraft a curative provision exceeds the constitutional authority of the lower courts and is contrary to this Court's decision adopting the rule; and, failure to raise an issue of ''waiver" below, coupled with the trial court's express finding that the 120-day rule was "common" to the various defendants' arguments on dismissal, precluded raising such an issue on appeal.

The Fifth District reversed the dismissals based upon the authority of Partin. Petitioners filed timely Motions for Rehearing and for Certification of Conflict with Berdeaux, which held the rule is applicable to cases pending but unserved on January 1, 1989, and Hill V. Hammerman, 16 F.L.W. 1743 (Fla.4th.DCA July 3, 1991), a case in which the rule was applied to pending cases without discussion.

Upon denial of those motions, Petitioner W.R. Grace and Co. - Conn. filed a Notice Invoking Discretionary Jurisdiction, in which Petitioners Fibreboard, Keene, and Pittsburgh Corning filed timely notices of joinder. Petitioner W.R. Grace filed a brief on jurisdiction which these Petitioners adopted. This court accepted jurisdiction, dispensed with oral argument, and directed the parties to file briefs on the merits.

LAW OFFICES OF LOUISE H. McMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

SUMMARY OF ARGUMENT

Application of Rule 1.070(j) to cases pending on its effective date, so as to require service within 120 days of January 1, 1989, is not "retroactive". Nevertheless, rules *of* procedure may be retroactively applied, and Rule 1.070(j) is a rule of procedure. The reasoning set forth in Partin, on which the Fifth District relied in the instant cases, is faulty when viewed in the light of persuasive federal cases and court procedures for adopting rule changes. The Fifth District's decision herein, and in Partin, supra, should be disapproved and rejected. The decision herein should be quashed and the dismissals reinstated.

ISSUE ON DISCRETIONARY REVIEW

I. WHETHER RULE 1.070(j) APPLIES TO CASES PENDING ON THE RULE'S EFFECTIVE DATE AND REMAINING UNSERVED FOR NINETEEN MONTHS THEREAFTER?

ARGUMENT

A. APPLICATION OF RULE 1.070(j) TO CASES PENDING ON THE RULE'S EFFECTIVE DATE AND REMAINING UNSERVED FOR NINETEEN MONTHS THEREAFTER IS PROPER - POINT I.

The Fifth District panel in Partin held that application of rule 1.070(j) to cases pending on the effective date of the rule was not intended by this court. Respondents submit that the decision mistakenly relied on prior rule changes by this court and on purported confusion in the federal courts regarding applicability of Federal rule 4(j) to pending cases.

LAW OFFICES OF LOUISE H. MCMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

i. New procedures for rule changes and dates of effect make Rule 1.070(j) applicable on January 1, 1989.

The Partin decision rests in part on this court's decision adopting the 1961 rule amendments. This court. first stated that those amendments would take effect October 1 and would apply to all pending and newly-filed cases. It appears that objection was then made that application of some of the amendments to pending cases "could result in a deprivation *of* substantial rights previously acquired by litigants". In Re Amendments *to* Fla. Rules of Civil Procedure, 132 So.2d 6,7 (Fla. 1961). The court therefore amended the effectiveness of the rules by stating that they would only apply to cases filed after October 1.

The Partin court apparently reasoned from that series of events that intent to apply rule changes to all cases must be spelled out in the decision adopting those changes, else every rule change "could result in deprivation of substantial rights previously acquired by litigants." Because this court's opinion adopting rule 1.070(j) was silent as to any distinction between pending cases and newly-filed cases, the Partin panel inferred that this court intended not to apply the rule to pending cases.

However, that conclusion overlooks current procedures for adoption of rule changes that may have substantial bearing on the "silence" construed by the Partin court.. In addition, that conclusion mistakenly suggests that all "effects" of a rule change may constitute

LAW OFFICES OF LOUISE H. McMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

"deprivation" of "substantial rights previously acquired by litigants".

An important development in procedures for adoption of rule changes took place in 1972, when this court adopted procedures for periodic consideration of proposals for changes to rules. Proposals may be submitted to the rules committee, which studies them, gathers comments, votes on recommendations, then refers proposals and committee recommendations to this court every fourth year. This court invites further comment, holds hearings on recommended changes, then decides whether to adopt such changes. January first of each ensuing year is the effective date of all such changes. In re. The Florida Bar, 276 So.2d 467 (Fla. 1972).[4] Under this system, enunciation of a date of effect of such a rule change is not required, although it is permitted. This procedure for adoption of rule changes must be read in pari materia with the provisions of Rule 1.010, Fla.R.Civ.P., that all rules apply to "all actions" in the circuit court, and that their purpose is to "secure the just, speedy, and inexpensive determination of every action."

---

[4] This system expands opportunity for litigants or lawyers to present specific objection that a proposed change may result in deprivation of previously-acquired rights.

LAW OFFICES OF LOUISE H. McMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

Rule 1.070(j) was adopted after a quadrennial report of the rules committee. It became effective on the following January 1 in keeping with the 1972 procedures, and was therefore applicable to **all** cases, including pending cases, in keeping with Rule 1.010. The Partin panel incorrectly failed to consider these current procedures and related rule provisions. Application of rule 1.070(j) to "all" cases advances the purpose of the rules as set forth in Rule **1.010**. It *is* just, for no case in which good cause for failure to effect service exists may be dismissed; and it secures the speedy and inexpensive determination of every action in which defendants have been falsely **lulled** into a belief that they will not be called upon to defend against a stale claim.[5]

ii. Not every "effect" of a rule change is prohibited, and Plaintiffs below claimed no deprivation of previously-acquired rights so as to preclude a truly "retroactive" application of the rule *to* their cases.

The Fifth District has improperly relied on language regarding deprivation ***of*** substantial rights in Partin and in the instant case.

The Partin court **did** not find that application of Rule 1.070(j) to cases pending on January **1**, 1989, may result in a deprivation of substantial rights. Neither did it construe this court's 1961 language that "substantial

---

[5] See discussion infra, at p. 13.

LAW OFFICES OF LOUISE H. MCMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

rights previously acquired by litigants" should not be compromised by those rule changes. The **1961** decision suggests that this court heard and determined specific objection that the rules as they existed prior to adoption of the 1961 changes may have created substantial rights in "litigants" in pending cases, which amendment might impair. Those amendments affected rules relating to cross-claims, pre-trial conferences, and effect of ex parte orders. One may deduce situations in which litigants might acquire substantial rights under those rules. For example, the rule on effect of ex parte orders was changed to render such orders not effective until served in a certain fashion. Ex parte orders under which litigants were operating might be deemed "suspended" by the amendment. making such orders ineffective without service on opposing counsel and filing of proof of service. Such a suspension of the order might constitute a "deprivation of substantial rights'' such as would rise ***to*** the level of a challenge to the rules' constitutionality. Amendment of the application of the rules may have served to foreclose piece-meal litigation of such anticipated challenges.

The framework of those apparent objections is that of a due process claim that a rule change may impermissibly impinge upon substantial rights **of** litigants previously acquired. The 1961 language must thus be set within the framework of traditional distinctions between substance and

LAW OFFICES OF LOUISE H. McMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

procedure: between "substantial" rights, and ordinary consequences or effects.

Petitioner W.R. Grace & Co. - Conn. has summarized the law of this state regarding that traditional distinction between substance and procedure at pages 7 to 9 of its initial brief on the merits, and has related that distinction to the permissibility of retroactive application of changes in laws. Petitioners respectfully adopt that summary and, for the sake of brevity, do not repeat it here. Petitioners similarly adopt W.R. Grace's discussion of Fifth District decisions following the general rule that procedural changes may generally be applied retroactively, while substantive changes (changes in "substantial rights") may generally only be applied prospectively. That discussion appears at pages 10-11.

In contrast to the course of events leading to this court's 1961 decision, Plaintiffs here have made no objection, and the Fifth District has not found, that Respondents acquired substantial rights under the old rules. The Fifth District does not even speculate that application of the new rule in general might deprive litigants of substantial rights previously acquired. For this additional reason, the 1961 decision is inapposite. There simply is no prohibition against "effects" of rule changes as contrasted to the deprivation of "substantial rights".

LAW OFFICES OF LOUISE H. MCMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

The instant rule provides that violation of the timely service requirement will subject the complaint **to** dismissal without prejudice. That is the effect or consequence specified. The trial court applied the rule **in** such a manner as to afford all plaintiffs below the prescribed 120 days for compliance, notwithstanding their failure to serve their complaints for more than a year before the rule's effective date. The trial court then ordered a dismissal without prejudice.

But this "effect" is not the effect to which Respondents object. The effect. to which they object is the practical effect that dismissal without prejudice in these cases has. All causes of action in all eleven cases are barred by the statute of limitations and can not be re-filed.[6] Yet, this "effect", which is in fact implementation of the statute of limitations period, is central to the rule's purpose.

Rule 1.050, Fla.R.Civ.P., defines "commencement" as filing of the complaint, and governs **the** tolling ***of*** the statute of limitations. Klosenski v. Flaherty, 116 So.2d 767, 769 (Fla. 1959). When service of process was made by

---

[6] The **bar** is the **result** of the passage of time without effective initiation of suit, not the entry *of* an **order** of dismissal without prejudice. Had the Plaintiffs not waited so many years, this effect would not exist. The rule does not require dismissal with prejudice, so it is Plaintiffs' own delay which "caused" this "effect".

LAW OFFICES OF LOUISE H. McMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

sheriffs, because Rule 1.070(a) required the clerk to issue process "forthwith", deliberate delays of service appeared unlikely. See, McArthur v. St. Louis-San Francisco Ry. Co., 306 So.2d 575, 577 (Fla.1st.DCA 1975), cert.denied, 316 So.2d 293 (Fla. 1975). When the rule was amended to permit private service of process, Rule 1.050 invited plaintiffs to enlarge the limitations periods. Without a rule limiting the time for service of process, the lower courts were without power to limit this expansion of limitations periods. Pratt V. Durkop, 356 So.2d 1278 (Fla.2nd.DCA 1978).

The only teeth in rule 1.070(j) lie in its application to cases in which the limitations period has run. The underlying policies and purposes of limitations statutes should apply with equal force to the rule.

The purpose of such statutes is to protect parties from unusually long delays or prevent unexpected enforcement of stale claims concerning which they have been thrown off guard for want of reasonable prosecution. Nardone V. Reynolds, 333 So.2d 25, 36 (Fla. 1976). Enforcement of such claims may be fraudulent or prejudicial due to the loss of evidence over time. Foremost Properties, Inc. v. Gladman, 100 So.2d 669, 672 (Fla.1st.DCA 1958), cert.denied, 102 So.2d 728 (Fla. 1958). Such statutes are therefore liberally construed so as to accomplish their objective. Id. Accord, Smith v. City of Arcadia, 185 So.2d 762, 767 (Fla.2nd.DCA 1966).

LAW OFFICES OF LOUISE H. McMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

In Nardone, this court discussed the underlying policy of limitations periods:

> ...[H]ow resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims which (sic) are not usually left to gather dust or remain dormant for long periods of time.

333 So.2d at 36-37, quoting, Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 19 L.Ed. 257 (1869)(emphasis omitted). Rule 1.070(j) is predicated on the same reason and fairness.

The rule simply closes a procedural escape hatch by which Plaintiffs were avoiding the "effect" of the statute of limitations. Plaintiffs have no "substantial rights" in a continuation of that escape hatch. The escape hatch was procedural in its origin, and is procedural in its termination.

iii. Federal decisions support application of the rule to all cases, including pending cases.

The second area of law relied upon by the Partin court was federal rule 4(j) and cases construing it. Rule 1.070(j) is patterned on that rule. Partin cites federal cases that are purportedly in conflict on the question whether Rule 4(j), F.R.C.P., applies to cases pending on its effective date. Respondents submit that the perceived

LAW OFFICES OF LOUISE H. McMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

"conflict" is not in application of the rule, but in the circumstances in which applicability was questioned. Federal cases support the trial court's application of Rule 1.070(j) to cases pending on the rule's effective date.

When the federal courts instituted private service of process they foresaw the potential for abuse in effecting timely service. Advisory Committee Note, 93 F.R.D. 263 ("gradual elimination of marshal service raises new concerns about timeliness"). Similar abuses are evident here and in earlier cases deploring the filing of complaints without any attempt at service for the purpose of tolling the statute of limitations. E.g., Pratt, supra. Foresight of that abuse led to incorporation of the 120-day limit into the federal rule authorizing private service.

Rule 4 thus changed two aspects of service at once - the person and the time for service. Questions naturally arose in pending cases regarding how to apply these distinct provisions. These questions related to the effect of applying the two aspects of the rule disjunctively as opposed to conjunctively.

On the rule's effective date, process had issued and was in the hands of the Marshal but was not yet served in many pending cases. In such circumstances, concerns arose regarding application of the 120-day limit to process in the hands of the Marshal. Application of the new time limits to all process, including that initiated under the

LAW OFFICES OF LOUISE H. McMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

old rule, would require case-by-case weighing of "good cause" for delays of service and that would necessitate inquiry into the internal workings and priorities of the U.S. Marshal's office. These concerns are not involved in construction of Florida's rule because of Florida's earlier change to private service of process.

Federal cases dealt with such concerns during the transition to private service by applying the rule to pending cases except where service had been initiated under the old rules. E.g., Gordon v. Hunt, 835 F.2d 452 (3rd.Cir. 1987), cert.denied, 486 U.S. 1008, 108 S.Ct. 1734, 100 L.Ed.2d 198 (1988); Coleman v. Holmes, 789 F.2d. 1206 (5th.Cir. 1986); Sanders v. Marshall, 100 F.R.D. 480 (W.D.Pa. 1984); Peters v. E.W. Bliss Co., 100 F.R.D. 341 (E.D.Pa. 1983); D. Siegel, Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precaution, 96 F.R.D. 88, 93, 122-123.

The Partin decision does not acknowledge these unique issues which underly the "conflict" it cites. For example, in Gleason v. McBride, 869 F.2d 688 (2nd.Cir. 1989), on which Partin rests its conclusion that federal courts are split on this issue, the date of initiation of process is not noted. However, the complaint was filed in 1981, amended in 1982, and served in 1985. Initiation of process was thus required before Rule 4(j)'s effective date. In any event, the trial court dismissed the case for failure

LAW OFFICES OF LOUISE H. MCMURRAY, P.A.
11430 NORTH KENDALL DRIVE. SUITE 226. MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

to effect timely service under the federal "due diligence" standard. Rule 4(j) was not squarely at issue and was not dispositive. Dismissal was affirmed, since, even without benefit of 4(j), "'delay in service **of** the summons **and** complaint may nullify the effect of filing the complaint'" for purposes of tolling the statute of limitations. Id., at 691. The Gleason result should support the trial court's dismissals here. Gleason waited 34 months to effect service. Respondents waited **31** months, then demonstrated their lack of difficulty in obtaining service (i.e., lack of good cause for delay) by serving most defendants in all cases in one minute.

In sum, Petitioners submit that this court should follow the federal precedents, and approve the ruling of Berdeaux and the result.of Hill on this issue. Partin should be rejected and the instant decision quashed with directions **to** reinstate the orders of dismissal. The abuses of private service of process, such as are evident **here** where defendants are called into court years after the expiration of the statute of limitations periods, should be subject to the sanction ***of*** dismissal as the rule intended.

CONCLUSION

The decision below should be quashed **and** the orders of dismissal affirmed and reinstated.

LAW OFFICES OF LOUISE H. MCMURRAY, P.A.
11430 NORTH KENDALL DRIVE, SUITE 226, MIAMI, FLORIDA 33176 • TELEPHONE (305) 279-7729

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief on the Merits was served by mail this 29th. day of September, 1992, on: attached service list.

Respectfully submitted,

BLAIRE & COLE, P.A.
Suite 550
2801 Ponce de Leon Blvd.
Coral Gables, Florida 33134
- and -
LOUISE H. MCMURRAY, **P.A.**
Suite 226
11430 **North Kendall** Drive
Miami, Florida 33176
(305) 279-7729
Florida Bar Number 264857

By: Louise H. McMurray