IN THE SUPREME COURT OF FLORIDA

CASE NO.: 79-837

W. R. GRACE & CO. - CONN.,

Petitioner,

v.

GARLAND P. PARLIER, et ux.,

Respondent.
_____/

DISTRICT COURT OF APPEAL,
FIFTH DISTRICT
91-18; 91-19; 91-20;
91-22; 91-23; 91-24;
91-25; 91-26; 91-27;
91-28; 91-30

PETITIONER, W. R. GRACE'S, INITIAL BRIEF ON THE MERITS

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OTHER AUTHORITIES

NOTICE OF PENDENCY OF SAME ISSW

Petitioner, W. R. GRACE & CO, - CONN., believes the issue raised in this appeal is presently pending before this Court in this Court's review of the decision of the Second District Court of Appeals in King v. Pearlstein, 592 So.2d 1176 (Fla. 2d DCA 1992). This Court granted review of that action by Order dated May 28, 1992. The Florida Supreme Court Case Numbers for that appeal are 79,529 and 79,530.

PRELIMINARY STATEMENT

Petitioner, W. R. Grace & Co. - Conn., will be referred to herein as "Grace."

Garland P. Parlier, Terry Baugh, Marland Doolittle, Sandy Downing, Edgar English, Richard Hayes, John R. Henry, George Holt, Obediah McKinley, Richard Stipanovich and Gary Young (Plaintiffs in the eleven lawsuits brought against Grace and the other Defendants/Petitioners in this appeal) will be collectively referred to as "Plaintiffs" or "Respondents."

Owens-Corning Fiberglass Corporation, Fiberboard Corporation, Keene Corporation, Pittsburgh-Corning Corporation, U.S. Mineral Products Company and Owens-Illinois, Inc., as well as the other original Defendants to the actions brought by Respondents shall be referred to herein as "Defendants."

References to the Appendix attached to this Brief will be denoted by [A. (page number)].

References to the Record on this appeal will be denoted by [R. (page number)].

STATEMENT OF THE CASE AND FACTS

Plaintiffs in eleven cases filed complaints for personal injury arising out of alleged asbestos exposure against twenty named defendants on December 14 and 15, 1987. [R.33-186]. Eighteen defendants including Petitioner, W. R. Grace & Co. - Conn. were ultimately served with process between July and September of 1990. There is no record evidencing that the remaining two named defendants, Asbestos Manufacturing & Insurance Company and Raymark Industries, Inc., have ever been served.

In various manners, all Defendants raised Plaintiffs' failure to timely serve Defendants in compliance with Rule 1.070(j) of the Florida Rules of Civil Procedure. Plaintiffs argued Rule 1.070(j) did not apply to their cases because their cases were filed prior to the effective date of the rule and also argued that their service on Defendants prior to Defendants' raising the issue "cured" their prior untimely failure to serve. (R. 1-32). Plaintiffs' only showing toward "good cause" for not complying with the rule was their claimed difficulty in establishing "product identification," an issue which goes to whether a defendant should have been sued at all, not any difficulty with obtaining service. The trial court rejected both contentions as to the applicability of Rule 1.070(j), found Plaintiffs had shown no good cause for their untimely service, and dismissed Plaintiffs' actions without

prejudice on November 29, 1990. [A. 1-41, (R. 2304-2347).[1]

All Plaintiffs took separate appeals of the dismissal of their complaints. Pursuant to a stipulated motion for consolidation, the cases were consolidated at the Fifth District Court of Appeals,

On March 13, 1992, the Fifth District Court of Appeals issued its opinion in this matter [A. 5-61, which became final when various motions for rehearing and certification were denied on April 23, 1992. [A. 71.

Grace filed a Notice to Invoke Discretionary Jurisdiction on May 8, 1992, based on the express and direct conflict of the decision by the Fifth District Court of Appeals with decisions rendered by the Third District Court of Appeals in ~~Berdeaux~~ v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990) and the Fourth District Court of Appeals in Hill v. Hammerman, 583 So.2d 368 (Fla. 4th DCA 1991) on the issue of whether Florida Rule of Civil Procedure 1.070(j) applies to cases filed prior to the effective date of the rule.

By an order dated August 20, 1992, the Florida Supreme Court accepted jurisdiction to review the lower court decision.

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[1] The statement in the opinion by the Fifth District that the actions were dismissed with prejudice is simply incorrect. The statute of limitations may, however, bar a number of the long-pending claims from being successfully pursued if the actions had to be refiled.

ISSUES ON APPEAL

WHETHER FLORIDA RULE OF CIVIL PROCEDURE 1.070(j) APPLIES TO DISMISS A CAUSE OF ACTION WHERE THE COMPLAINT WAS FILED PRIOR TO THE EFFECTIVE DATE OF THE RULE BUT WAS NOT SERVED FOR MORE THAN A YEAR AND ONE-HALF AFTER THE EFFECTIVE DATE OF THE RULE.

SUMMARY OF ARGUMENT

Respondents filed their Complaints in 1987, but failed to serve those Complaints upon Grace (or any other Defendant) for two and one-half years. Respondents failed to serve Grace (and other Defendants) for one and one-half years after Rule 1.070(j) became effective. Appellants showed no good cause for these extraordinary delays.

Rule 1.070(j) applies to Respondents' actions, even though those actions were filed prior to the effective date of the rule. No vested substantive rights of Respondents were affected by the adoption of Rule 1.070(j) by the Florida Supreme Court. Respondents not only had a warning period prior to the effective date of the rule, but also 120 days after the rule's effective date to achieve service, yet failed to take any action whatsoever in order to accomplish service within that time. Both Florida law and federal case law interpreting the terms of Rule 1.070(j)'s counterpart, Rule 4(j) of the Federal Rules, hold that the 120-day time limit applies to all cases pending at the time of the rule's effective date. The Florida Supreme Court should adopt the approach of the Third and Fourth District Courts of Appeal and persuasive federal precedent and hold Florida Rule of Civil Procedure 1.070(j) prospectively applies to cases filed prior to its effective date.

ARGUMENT

FLORIDA RULE OF CIVIL PROCEDURE 1.070(j) CORRECTLY APPLIES TO ACTIONS PENDING ON THE RULE'S EFFECTIVE DATE WHERE PLAINTIFFS FAILED TO SERVE DEFENDANTS FOR MORE THAN A YEAR AND ONE-HALF AFTER THE EFFECTIVE DATE OF THE RULE.

Florida Rule of Civil Procedure 1.070(j), enacted October 6, 1988 and made effective January 1, 1989, states:

> **Summons - Time Limit.** If service of the initial process and initial pleadings is not made upon a defendant within 120 days after filing of the initial pleading and the party on whose behalf service is required does not show good cause why service was not made within that time, the action shall be dismissed without prejudice or that defendant dropped as a party on the court's own initiative after notice or on motion.

Respondents filed their actions on December 14 and 15, 1987. [R. 33-186]. Respondents did not have a Summons issued against Grace until more than two and one-half years later, on July 10, 1990. More than 950 days after the Complaints were filed and more than 580 days after Rule 1.070(j) became effective, Respondents finally served Grace by service on Grace's resident agent for service of process. [R. 2452-2453, 2482-2483, 2494-2495, 2520-2521, 2528-2529, 2548-2549, 2570-2571, 2602-2603, 2626-2627, 2656-2657, 2668-2669]. Grace had had such a resident agent for service of process in the state of Florida since 1956.

By the explicit terms of Rule 1.070(j), Respondents' Complaints were required to be dismissed. Respondents, however, claimed that their delay was proper because their Complaints were

filed prior to the enactment and effective date of Rule 1.070(j). The Fifth District Court of Appeals ruled in accordance with Respondents' arguments in Partin v. Flagler Hospital, Inc., 581 So.2d 240 (Fla. 5th DCA 1991). The Fifth District Court of Appeals then relied on its decision in Partin and the decision of the Second District Court of Appeals in King v. Pearlstein, 592 So.2d 1176 (Fla. 2d DCA 1992) [citing Partin as authority] to reverse the decision of the trial court in this case, which had originally dismissed Respondents' actions for failing to comply with the timely service requirements of Rule 1.070(j).

The decisions of the Fifth District Court of Appeals and the Second District Court of Appeals are erroneous. This Court should adopt the reasoning of federal case law interpreting the federal rule analogous to Rule 1.070(j) and determine, as did Florida's Third and Fourth District Courts of Appeal in Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990), disapproved on other grounds, 17 F.L.W. S348 (Fla. June 11, 1992) and Hill v. Hammerman, 583 So.2d 368 (Fla. 4th DCA 1991), that Rule 1.070(j) does apply to cases filed prior to the effective date of the Rule.

A. Rule 1.070(j) Is Procedural And Applies To All Cases Pending On The Effective Date Of The Rule:

Generally, rules of procedure apply to all cases pending at the time of their adoption. Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985); State v. Jackson, 478 So.2d 1054 (Fla. 1985); Walker & LeBarge, Inc. v. Halligan, 344 So.2d 239 (Fla. 1977); Ratner v.

Hensley, 303 So.2d 41 (Fla. 3d DCA 1974). Florida Rule of Civil Procedure 1.070(j) was properly enacted by the Florida Supreme Court as a procedural rule. The 120-day time limitation prescribed by that rule merely sets standards for the timeliness of the procedure used for effectuating service and does not affect a litigant's substantive rights. Consequently, the trial court correctly applied Florida Rule of Civil Procedure 1.070(j) to Respondents' lawsuits which were filed in December of 1987.

In In Re: Florida Rule of Criminal Procedure, 272 So.2d 65 (Fla. 1972), the Florida Supreme Court enunciated a standard test for determining whether a statute was procedural or a substantive right. Judge Adkins's concurring opinion, states that he:

> gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompasses the court, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Id. at 66.

Justice Adkins also stated that substantive law includes "those rules and principles which fix and declare primary rights of individuals as respects their person and their property." Id. The Florida Rule of Criminal Procedure decision is cited throughout Florida case law on the issue of whether a statute is substantive or procedural. Adams v. Wright, 403 So.2d 391 (Fla. 1981); Avila South Condominium Association v. Kappa Corp., 347 So.2d 599 (Fla. 1977). The test concerning whether a rule or statute affects

substantive rights or is merely procedural has been applied both in criminal and civil cases. See, e.g., Avila South Condominium Association, supra.

The 120-day time limit for service of process set forth in Florida Rule of Civil Procedure 1.070(j) is the epitome of a purely procedural rule. It in no way affects a party's primary rights which the party is seeking to enforce in their lawsuit. Rule 1.070(j) merely limits the manner in which a claimant may pursue a lawsuit: after the effective date of the rule, no claimant may wait longer than 120 days to serve a defendant unless the claimant has some good cause for not complying with the time limit.

As one would expect with a procedural rule, applying the rule to pending cases does not necessarily affect any litigant's rights. First, every plaintiff who had a case pending after October 6, 1988 when the rule was enacted had notice of the impending deadline. This gave them an additional 86 days to effect service prior to the rule taking effect. Additionally, no plaintiff has a substantive right to file a lawsuit and willfully fail to serve the defendant for as long as the plaintiff likes. Once the rule was enacted, under a prospective application of Rule 1.070(j), plaintiffs still had 120 days to effectuate service. It is only the failure to comply with the rule once the rule is in effect which results in sanctions.

B. Fairness Supports The Application Of Rule 1.070(j) Time Limits To All Pending Cases:

A basic tenet of American jurisprudence is equal application

of the law: i.e. like litigants should have the same law applied similarly. However, fairness between similarly situated plaintiffs is achieved only if Rule 1.070(j) is applied to all cases and pending cases are given **120 days** from the rule's effective date in order to achieve service. For example, two people are passengers in the same car when it is involved in an accident. Both receive the same injuries and both have identical causes of action against the defendant tortfeasor. However, plaintiff "A" files their lawsuit December 1, **1988** while plaintiff "B" filed their lawsuit nine months later on August 1, **1989.** Both obtain service on the defendant the same day, December 1, **1989** (over **120** days after "B's" filing but one year after "A's" filing). Under the rule set out in Partin, notwithstanding plaintiff **"A"** has been more dilatory than **"B"** in prosecuting their action (once filed), "A's" case is not subject to dismissal while "B's" would **be.**

Construing Rule 1.070(j) to not apply to **cases** filed prior to the effective date of the rule essentially rewards those plaintiffs which have been the most slothful **and** whose actions show their disregard for the timely administration of justice. Under such an interpretation, today, a plaintiff who files a complaint, makes some effort toward achieving service during the **120** day period, but fails, is subject to have their action dismissed. **See,** Morales v. Sperry Rand Corp., **17** F.L.W. **S348** (Fla. June **11,** 1992). In contrast, a plaintiff who files their complaint ten years prior to

the effective date of the rule but makes no effort whatsoever to serve the defendant is allowed to prosecute their action against the defendant after witnesses have died, memories have dimmed, and the defendant is without an adequate ability to disprove plaintiff's case. Such an unfair result is avoided by applying the rule to all pending cases.

Not only is it fundamentally fair to treat litigants bringing suit prior to the effective date of Rule 1.070(j) as being subject to the same standard of timeliness as those who bring suit after that time, enforcement of the rule on party plaintiffs is also fundamentally fair to defendants. In Partin, the Fifth District questioned the necessity of the rule, citing commentator's opinions that the rule is redundant with Florida Rule of Civil Procedure 1.420(e). However, the facts of the instant case provide a sterling example of the failure of Rule 1.420(e) to offer protection to defendants where a plaintiff delays service for years. Respondents' complaint remained pending without any record activity for nearly three years. Defendants were unable to protect their own rights as they had no notice of the lawsuits because they had never been served. Likewise, the lower court did nothing to protect Defendants' rights under Rule 1.420(e) during that time because the court administration system is not equipped to monitor the prosecution of cases which are filed but not served. It was for precisely this reason that the Florida Supreme Court chose to enact Rule 1.070(j). Consequently, applying Rule 1.070(j) to

pending cases promotes the ends of justice by insuring timely prosecution of lawsuits.

C. Federal Precedent Supports An Interpretation Of Rule 1.070(j) Applying The Rule To Pending Cases With The 120-Day Period Measured From The Rule's Effective Date:

An interpretation that Florida Rule of Civil Procedure 1.070(j) applies to cases pending at its effective date and requires service of process in those pending cases to be made within 120 days of the rule's effective date is in accordance with federal law interpreting Federal Rule of Civil Procedure 4(j). Rule 4(j) is the rule upon which Florida's Rule 1.070(j) was based. Substantial and well-reasoned federal case law has held that Federal Rule of Civil Procedure 4(j) does apply to actions filed prior to the effective date of that rule. See, e.g., Coleman v. Holmes, 789 F.2d 1206 (5th Cir. 1986); Gordon V. Hunt, 116 F.R.D. 313 (S.D.N.Y. 1987), affirmed, 835 F.2d 452 (2d Cir. 1987); Sanders v. Marshall, 100 F.R.D. 480 (W.D.Pa. 1984). Contrary to the Partin court's observation, none of these cases justify their holdings on the applicability of Rule 4(j) to previously pending cases by resorting to the legislative history of Rule 4(j). Instead, these cases derive from the language of Rule 4(j), which is identical to Florida's Rule 1.070(j), that the Rule 4(j) time limit for service of process should apply to all pending cases.

In Coleman. the Plaintiff (Coleman) filed his Complaint shortly prior to the effective date of Rule 4(j). The summons was issued at that time, but never served. Subsequently, more than 120

days after the effective date of Rule 4(j), Coleman secured and promptly served new process. In deciding that Coleman's service of process did not comply with Rule 4(j) and must be dismissed, the court stated:

> We hold that Rule 4(j) is applicable to the service of process in this case and that the 120-day period began accruing on [Rule 4(j)'s] effective date, February 26, 1983. We are not persuaded that when Congress made the new Rule inapplicable to process issued before February 26, 1983 it intended to allow those who had filed suit before that date to have more than 120 days to effect service. Congress apparently did not intend to give persons filing suit before the new rule less time than those who filed afterwards, But we find no logic in the argument that those filing before February 26, 1983 had unlimited time in which to complete service but those filing after that date had only the allowed 120 days. We find nothing to indicate a Congressional intent to favor the pre-Rule filings.

In Coleman, the plaintiff at least obtained a summons prior to the effective date of the rule. Nevertheless, the plaintiff was only given 120 days after the rule went into effect to accomplish service. Application of Rule 1.070(j)'s time limit is even more compelling in the instant case, where Respondents failed to even have a summons issued for the entire year between filing suit and the effective date of the rule. Therefore, under the rule in Coleman, Respondents' 120 days should have begun to accrue on January 1, 1989. Because Respondents failed to serve Grace within the 120 days after January 1, 1989, the trial court properly dismissed their actions against Grace.

In another situation, again very similar to the instant case,

the trial court in Gordon v. Hunt also held that Rule 4(j) would apply in a case which was pending prior to the effective date of the Rule, with the 120 day period being measured from the effective date of the rule. 116 F.R.D. at 322. In Gordon, the plaintiff had filed an action against the defendant nearly a year prior to the effective date of Rule 4(j). The plaintiff, however, did not effect service upon defendant until nearly three years after the effective date of Rule 4(j). The court commented that the plaintiffs' failure to serve defendant for so long a period after the effective date of the amendment adding Rule 4(j) "outlasted any reasonable transition period between the old and amended Rule 4." Thus, it was not unduly harsh to apply Rule 4(j) to the plaintiffs' action.

Similarly, in this case Respondents had approximately 384 days prior to the effective date of Rule 1.070(j) to serve Defendants [December 14, 1987 - January 1, 1989 is 384 days]. Enactment of the rule gave them 120 days more [January 1, 1989 - May 1, 19891. Thus, these particular Plaintiffs had over 500 days to serve their Complaints. Failure to timely serve their Complaints under these circumstances was clearly an abuse af the system. Had Respondents even made an effort to serve Defendants during the first 120 days of Rule 1.070(j)'s applicability, under the rule of both Gordon and Coleman, Respondents' service would have been timely, Instead, Respondents chose to ignore the mandates of Rule 1.070(j) for more than a year and one-half. As determined by the trial court,

Respondents had no good cause for this delay and lack of diligence.

The decision in Sanders v. Marshall, 100 F.R.D. 480 (W.D.Pa. 1984), was primarily focused on determining what constituted "good cause" under Rule 4(j). In order to determine what was intended to be meant by "good cause", the Sanders court reviewed not only Rule 4(j)'s legislative history, but also commentary written about the rule and its purpose. However, in addition, the Sanders court applied the mandatory time limit for service of process contained in Rule 4(j) to an action which had been pending prior to the effective date of the rule without discussion of that result. In fact, the complaint in Sanders had only been pending for a total of seven months before service of process was completed. Nonetheless, the Sanders court found that the plaintiff had failed to show good cause for her failure to obtain service of process on the defendant.

The only courts which have resorted to relying on the minimal legislative history of Federal Rule 4(j) in order to reach a decision on its applicability to pending cases were those courts which held that Federal Rule 4(j) did not apply to actions pending prior to the effective date of the rule. The courts in Coleman, Gordon, and Sanders concluded from the words of Rule 4(j) itself that Rule 4(j) applied to both cases pending before and after its effective date.

The court in Coleman distinguished cases which appeared on their surface to hold that Rule 4(j) did not apply to cases pending

before its effective date, stating:

> [Plaintiff's] reliance on Verri v. State Automobile Mut. Ins. Co., 583 F.Supp. 302 (D.R.I. 1984) is misplaced. That case is inapposite, since the process there was issued before February 26, 1983. In the case at bar, the challenged process [was] issued after 4(j) became the law. The only case brought to our attention which supports [plaintiff's] contention is Baranski v. Serhant, 602 F.Supp. 33 (N.D.Ill. 1985), in which the court declined to apply 4(j) for equitable reasons involving, inter alia, timely service in a consolidated case, a pending class action, and intervening bankruptcy. None of these equitable considerations apply in [plaintiff's] action. The Baranski court held the 120-day period did not begin to run on the date the amended complaint adding the challenging defendants was filed, The Baranski court did not hold that the 120-day period did not begin to run on the effective date of Rule 4(j) as we hold today. Even if Baranski were taken to hold otherwise, we would not find it persuasive,

789 F.2d 1206, 1208.

Likewise, the Gordon court was aware of and criticized the rationale of cases which had held Rule 4(j) to be inapplicable to actions filed prior to its effective date. The court held:

> Furthermore, no practical purpose would be served by limiting the application of Rule 4(j) to complaints filed after the effective date. Unlike the portions of new Rule 4 outlining manner of service, Rule 4(j) does not change the methods by which service is made. Enforcing its time limitations would not cause any of the confusion or potential injustice that allowing service by a new method during the transition period would cause. 116 F.R.D. at 322.

The cases which Gordon is criticizing either do nothing more than summarily decide the issue without discussion, involve process

issued prior to the effective date of the rule, or base their decision on the legislative history behind the substantial amendments made at that time to Rule 4. Baranski v. Serhant, 602 F.Supp. 33 (N.D.Ill. 1985); Peters v. W. E. Bliss Co., 100 F.R.D. 341 (E.D.Pa. 1983); Donaghy v. Roudebush, 614 F.Supp. 585 (D.N.J. 1985); Kyle v. Steamfitter's Local Union No. 614, 767 F.2d 920 (6th Cir. 1985); Verri v. State Automobile Mutual Insurance Co., 583 F.Supp. 302 (D.R.I. 1984). Those cases cited which discuss the issue base their decision on a single statement by Congressman Edwards contained in a section-by-section analysis of Rule 4:

> Service of process issued before the effective date [of the rule] is to be made in accordance with current Rule 4.

128 Cong.Rec. H 9848, H 9852 (December 15, 1982), reprinted in 96 F.R.D. 116, 122-23. The Gordon court held this sentence was discussing the method by which service would be permitted to be made, rather than time limits. The amendments made to Rule 4 at the same time that Subsection (j) was added made substantial changes in a method of service of process, Prior to the effective date of the new Rule 4, the U. S. Marshall Service had sole responsibility for serving process. Under the new Rule 4, several new and alternative methods of service were set forth. See, e.g., United States v. Bluewater-Toltec Irrigation District, 100 F.R.D. 687 (D.N.M. 1983) [determining when new method of service by mail should be applied.] As is shown by the Coleman and Gordon decisions, a statement saying that the date process is issued

determines the method by which service of process may be made does not logically support those courts' ruling that Subsection (j) should not apply to all cases. Instead, Subsection (j) clearly applied to pending cases, with the 120-day period beginning on the effective date of the rule.

D. Partin Court's Analysis Is Flawed:

The "root" case for all the Florida decisions which refuse to apply Rule 1.070(j) to cases filed prior to its effective date, is Partin v. Flagler Hospital, Inc., 581 So.2d 240 (Fla. 5th DCA 1991). See, King v. Perlstein, 592 So.2d 1176 (Fla. 2d DCA 1992); Lewis v. Burnside, 593 So.2d 1185 (Fla. 2d DCA 1992); Parlier v. Eagle-Picher Industries, Inc., 596 So.2d 1125 (Fla. 5th DCA 1992) [all citing the Partin decision as authority]. These cases merely cite Partin as authority that Rule 1.070(j) should not apply to cases filed prior to its effective date; none of these cases attempt any independent analysis of the Partin court's holding.

In Partin, the Fifth District quoted two sources critical of the very existence of the 120-day time limit as support for their assertion that Rule 1.070(j) affects claimants' "rights" and so must be applied only to cases filed after the effective date of the rule, No discussion of the difference between substantive and procedural matters appears in the decision.

The Partin court then attempted to discern the intent of the Florida Supreme Court as to the applicability of Rule 1.070(j) to

pending cases from the language of the rule. However, in pursuing that analysis the Partin court declared that federal cases interpreting the analogous Federal Rule of Civil Procedure 4(j) were "not helpful because ... they are based on the legislative history ..." of that rule and that court did not have any legislative history for Rule 1.070(j). Both the Partin court's determination that Rule 1.070(j) affects a claimant's "rights" and their rejection of federal case law are incorrect.

The Partin court's refusal to apply Rule 1.070(j) to cases pending as of January 1, 1989 was erroneously based on a fear that application to pending cases would affect a litigant's "rights". The Partin court's decision failed to analyze whether Rule 1.070(j) affected any substantive rights of claimants bringing a lawsuit or was merely a procedural rule in which no party has a vested right. Love v. Jacobesen, 390 So.2d 782 (Fla. 3d DCA 1980). Judge Schwartz's concurring opinion in Hernandez v. Page, 580 So.2d 793 (Fla. 3d DCA 1991) and Trawick's commentary on the rule (cited by the Partin court in support of its concern) merely criticize the results inherent in the existence of the rule. Both opinions fail to identify any substantive right impaired by applying the rule other than to comment on its "burdensome" effect on litigants.

Likewise, Partin's commentary on federal case law interpreting Rule 4(j) as being "unhelpful" because the case law relies on the federal rule's legislative history is similarly misguided. As has been previously discussed, persuasive federal case law applied rule

4(j) to cases pending on the effective date of that rule based solely on the language of the rule and issues of public policy and fairness.

CONCLUSION

Well-settled principles of Florida law hold that, unless otherwise stated, rules of procedure apply to all pending cases. Rule 1.070(j) sets out the procedural time limit for service of process to be effected and should, therefore, be applied prospectively to cases pending on the rule's effective date.

Public policy supports a conclusion that the timely service requirements of Florida Rule of Civil Procedure 1.070(j) applies equally to cases filed before and after the effective date of the rule. Federal case law interpreting Federal Rule of Civil Procedure 4(j) would also support such an interpretation of Rule 1.070(j).

The decision of the Fifth District Court of Appeals in Partin v. Flagler Hospital, Inc. holding to the contrary is based on erronious reasoning. Consequently, this Court should reverse the decision of the Fifth District Court of Appeals below and direct that Court to reinstate the dismissals without prejudice entered by the trial court in Respondents' actions.

B:/Grace/Parlier.Brf

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to all counsel of record on the attached Service List this 14th day of September, 1992.

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91-25; 91-26; 91-27;
91-28; 91-30

APPENDIX TO W. R. GRACE'S INITIAL BRIEF ON THE MERITS

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APPENDIX

[redacted]

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA
CIVIL DIVISION

CASE NO. CI 87-8931
ASBESTOS LITIGATION

Fla. Bar No. 127577
Fla. Bar No. 380024

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

Plaintiffs,

vs.

EAGLE-PICHER INDUSTRIES, INC.,
et al.,

Defendants.

_____/

ORDER OF DISMISSAL

THIS CAUSE having come before the Court for hearing on October 29, 1990, on the following motions:

1. Motion *to* Dismiss for Failure to Serve of W. R. Grace Company;

2. Motion to Dismiss of Foster Wheeler Corporation;

3. Motion to Dismiss of Anchor Packing Company;

4. Motion to Dismiss And/Or Strike of Eagle-Picher Industries, Inc.

5. Motion to Dismiss of Armstrong World Industries, Xeene Corporation, GAF *Corporation,* National Gypsum Company and U.S. Gypsum Company;

6. Motion to Dismiss and Quash Service of Process of *Owens-Illinois,* Inc.;

7. Owens-Corning Fiberglas's Notice of Joinder in Various Defendants' Motion to Dismiss;

8. Motion to Dismiss And/Or Strike of Fibreboard Corporation and Pittsburgh Corning Corporation;

9. Motion to Dismiss of U.S. Mineral Products.

The common ground in each of these Motions is that Plaintiffs' action should be dismissed because plaintiffs did not comply with Fla. R. Civ. P. 1.070(j). This Rule provides that an action shall be dismissed with prejudice if service of the initial process and initial pleading is not made within 120 days of filing the initial pleading and the plaintiff does not show good cause why service was not made within that time. The Court has heard argument of counsel and has been fully advised in the premises of these Motions. It finds that Plaintiff did not serve the initial process and initial pleading on the defendants within either 120 days of the date of filing the initial pleading or 120 days of January 1, 1989, the date of Fla. R. Civ. P. 1.070(j) became effective. Moreover, Plaintiff has not made any showing of good cause as to why service was not made during either time period. Consequently, the Court concludes that Plaintiff has failed to comply with Rule 1.070(j).

Based upon the foregoing, the Court orders and adjudges that the aforesaid Motions are granted and in accordance with Rule 1.070(j) this action is dismissed without prejudice.

DONE AND ORDERED in Chambers at Orlando, Orange County this 29th day of November, 1990.

W. Rogers Turner

THE HONORABLE W. ROGERS TURNER
CIRCUIT COURT JUDGE

I HEREBY CERTIFY that conformed copies have been furnished to All Counsel of Record on the attached Service List this 30th day of November, 1990.

s/Naomi C. Parker

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1992

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

GARLAND P. PARLIER, et ux, et al.,

Appellants,

v.

CASE NO. 91-18, 91-19, 91-20, 91-22, 91-23, 91-24, 91-25, 91-26, 91-27, 91-28, 91-30

EAGLE-PICHER INDUSTRIES, INC., et al.,

Appellees.

Opinion filed March 13, 1992

Appeal from the Circuit Court
for Orange County,
W. Rogers Turner, Judge.

Patrice A. Talisman and David B. Pakula, of
Robles & Gonzales, Miami, and
Daniels & Talisman, P.A., Miami,
for Appellants.

Henry W. 'Jewett, II, of Hannah, Marsee, Beik & Voght,
Orlando, for Appellee, Owens-Illinois, Inc.

Ronnie H. Walker, of Ronnie H. Walker, P.A.,
Orlando, for Appellee, U. S. Mineral Products, Inc.

Jonathan C. Hollingshead and Susan B. Collingwood, of
Fisher, Rushmer, Werrenrath, Keiner, Wack & Dickson, P.A.,
Orlando, for Appellee, W. R. Grace & Co.

Wendy F. Lumish and Amy M. Uber, of
Rumberger, Kirk, Caldwell, Cabaniss, Burke & Wechsler,
Miami, for Appellee, Foster Wheeler Corporation.

M. Stephen Smith and Marie P. Montefusco, of
Rumberger, Kirk, Caldwell, Cabaniss, Burke & Wechsler,
Miami, for Appellee, Anchor Packing Company.

James E. Tribble, of Blackwell & Walker, P.A.,

Miami, for Appellee, Owens-Corning Fiberglass Corporation.

Louise H. McMurray, *of* Louise H. McMurray, P.A., Miami, and Susan J. Cole, of Blair & Cole, P.A., Coral Gables, for Appellees Pittsburgh Corning Corporation, Fiberboard Corporation and Keene Corporation.

No Appearance for Appellee, Eagle-Picher.

HARRIS, J.

In 1987 appellants in this consolidated action filed suit for damages alleging asbestos related injuries, Service war not effected within 120 days from the filings nor within 120 days from the effective date of Florida Rules of Civil Procedure 1.070(j).

The trial court held that Rule 1.020(j) was applicable to these cases and, since appellants had failed to show good cause for their noncompliance with the 120 day rule, the actions were dismissed with prejudice.

We reverse. *Partin v. Flagler Hospital, Inc.*, 581 So.2d 240 (Fla. 5th DCA 1991). Accord *King v. Pearlstein*, 17 F.L.W. 269 (Fla. 2d DCA Jan. 15, 1992).

REVERSED and REMANDED.

GRIFFIN, J., and POUND, F. R. JR., Associate Judge, concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

GARLAND P. PARLIER,
Appellant,

v.

Case No. 91-18, 91-19, 91-20, 91-22-28, 91-30

EAGLE-PICHER INDUSTRIES, INC., et al.,
Appellee.

DATE: April 23, 1992

BY ORDER OF THE COURT:

ORDERED that Appellees' MOTION FOR CLARIFICATION OR REHEARING, filed March 27, 1992, Appellees' MOTIONS FOR CERTIFICATION, filed March 30, 1992, and Appellees' untimely MOTION FOR REHEARING AND CERTIFICATION, filed March 31, 1992, are denied.

I hereby certify that the foregoing is
(a true copy of the original court order.

Frank J. Habershaw

FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Louise H. McMurray, Esq.
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RECEIVED APR 27 1992