FILED
SID J. WHITE
MAY 18 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO: 79-837

W.R. GRACE & CO. - CONN.

Defendant/Petitioner,

v.

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

Plaintiff/Respondent.

PETITIONER, W. R. GRACE'S, BRIEF ON JURISDICTION

JONATHAN C. HOLLINGSHEAD, ESQ.
SUSAN B. COLLINGWOOD, ESQ.
Fisher, Rushmer, Werrenrath,
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STATEMENT OF THE CASE AND FACTS

Plaintiffs in 11 cases filed complaints for personal injury arising out of alleged asbestos exposure against 20 named defendants on December 14 and 15, 1987. Eighteen defendants including Petitioner, W. R. GRACE & CO. - CONN ["hereinafter GRACE"] were ultimately served with process between July and September of **1990**.

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 their service on defendants **"cured"** their prior untimely failure to serve. The trial court rejected both of these contentions and dismissed plaintiffs' actions on November **29**, 1990.

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.1-21, which became final when various motions for rehearing and certification were denied on April 23, **1992**.

NOTICE OF PENDENCY OF SAME ISSUE

Petitioner, GRACE believes the issue raised in this appeal is presently pending on another Petition for Discretionary Review of the decision of the Second District Court of Appeals in King v. Pearlstein [17 F.L.W. D269, (Fla. 2d DCA, January 15, 1992)]. The Florida Supreme Court case numbers for that appeal are 79529 and 79530.

ARGUMENT

The decision of the Fifth District Court of Appeal in this case and the Second District Court of Appeal in King v. Pearlstein, 17 F.L.W. D269 (Fla. 2d DCA, January 15, 1992) held that Rule 1.070(j) does not apply to cases filed prior to the effective date of the Rule. These cases expressly and directly conflict with the decisions of the Third District Court of Appeal in Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3rd DCA 1990) and the Fourth District Court of Appeal in Hill v. Hammerman, [583 So.2d 368 (Fla. 4th DCA 1991)], holding that Rule 1.070(j) does apply to cases filed prior to the effective date of the Rule. Consequently, this court has jurisdiction and should accept these cases for review.

The absolute conflict existing within the District Courts of Appeal on the applicability of Florida Rule of Civil Procedure 1.070(j) to cases filed prior to the Rule's effective date is obvious from a cursory review of the decision in this case and the decision reached by the Third District Court of Appeal in Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3rd DCA 1990). This case and the Berdeaux case are factually indistinguishable, yet come to opposite legal conclusions. Both cases involved multiple asbestos-litigation complaints and turn on the fact that the complaints were filed prior to the effective date of the rule. Consequently, the legal holdings of these two cases are in direct conflict with each other.

This case arose when 11 asbestos-litigation plaintiffs filed lawsuits against various defendants, which were dismissed by the trial court based on Rule 1.070(j), Fla.R.Civ.P. The Fifth District's opinion makes note of the fact that plaintiffs' lawsuits were filed in 1987 (prior to the effective date of Florida Rule of Civil Procedure 1.070(j)). The opinion went on to reverse the

dismissal of these lawsuits, citing as its authority Partin v. Flagler Hospital, Inc., 581 So.2d 240 (Fla. 5th DCA 1991) and King v. Pearlstein, 17 F.L.W. D269 [___ So.2d ___] (Fla. 2d DCA, January 15, 1992).

Partin was the previous appellate decision of the Fifth District which held "that Rule 1.070(j) is not applicable to cases filed prior to January 1, 1989, the effective date of that rule." 581 So.2d at 242. Since the lawsuit in the Partin case had been filed prior to January 1, 1989, the Fifth District Court of Appeals held that Rule 1.070(j) did not apply and the trial court's dismissal of the case was reversed. The opinion in the instant case is consistent with the Partin ruling and reverses dismissal of lawsuits filed prior to January 1, 1989.

The instant opinion also cites the King matter as additional authority. The Second District Court of Appeal in King reversed the dismissal of a complaint pursuant to Rule 1.070(j) stating:

> We agree with the reasoning expressed by our sister court in Partin V. Flasler Hospital, Inc. [citation omitted], and hold that Rule 1.070(j) does not apply to cases pending prior to January 1, 1989.

Consequently, the holding of the King decision is also based on the conclusion that Rule 1.070 (j) should not apply to cases filed prior to the effective date. [It is GRACE's understanding that a petition seeking discretionary review by this Court has been filed in the King matter, but not yet ruled upon by the Court in cases numbered 79529 and 79530.1

However, in direct conflict with this case, Partin v. Flasler Hospital, Inc. and King v. Pearlstein, the Third District Court of

Appeal has held that Rule 1.070(j) can and should be applied retroactively to actions which were pending on January 1, 1989. Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3rd DCA 1990). In Berdeaux, multiple asbestos-litigation plaintiffs filed lawsuits between January 1987 and March 1988. Id. at 1295. The various defendants in the lawsuits remained unserved until more than 120 days after the effective date of Rule 1.070(j). Id. The trial court applied Rule 1.070(j) and dismissed all complaints against all defendants. Although the plaintiffs argued that Rule 1.070(j) should not be applied to cases already pending on the effective date of the rule, the court declined to construe the rule in this manner. Instead, the Third District Court of Appeal held the rule was applicable to cases pending as of the effective date but that in such cases the plaintiffs were limited to 120 days from the effective date of the rule in which to serve the defendants. Id. at 1296.

The Third District Court of Appeal in Berdeaux proceeded to reverse the dismissal of the complaints against eight of the nine defendants, holding that service on these defendants prior to the filing of the motion to dismiss was sufficient to avoid application of Rule 1.070(j). This holding of the Berdeaux has been specifically considered and rejected by the Fifth District Court of Appeal in Partin. However, this additional holding of Berdeaux was not applicable to one defendant (Flintkote) since service of process was not ever effected upon that defendant. Consequently, with regard to the defendant "Flintokote," the Berdeaux decision held

that Rule 1.070(j) was applicable to cases pending as of January 1, 1989. Thus, the present case is factually on all fours with the situation in Berdeaux, yet the Courts have formed directly contrary rules of law.

As was the case in Berdeaux, the Fourth District Court of Appeal in Hill v. Hammerman, [583 So.2d 368 (Fla. 4th DCA 1991)] has effectively applied Florida Rule of Civil Procedure 1.070(j) to a lawsuit filed prior to January 1, 1989, and has affirmed dismissal of the complaint. The opinion in Hill is a per curiam affirmance on the authority of Hernandez v. Page, 580 So.2d 793 (Fla. 3rd DCA 1991) and Morales v. Sperry Rand Corp., 578 So.2d 1143 (Fla. 4th DCA 1991). Therefore, the main body of the opinion does not demonstrate Rule 1.070(j) is being applied to a cause of action filed prior to January 1, 1989. However, the concurring opinion of Judge Glickstein sets forth the fact that the case before the appellate court involved Complaints filed prior to 1989, similar to the factual circumstances of Berdeaux. It is clear from Judge Glickstein's concurrence that the majority of the Court had rejected without comment appellant's argument that Rule 1.070(j) should only relate to causes of action filed after January 1, 1989. Id. at 369. Judge Glickstein wrote only to emphasize his belief in the correctness of that result. Consequently, the action of the Fourth District Court of Appeal conflicts with the instant holding, even if the text of the majority opinion does not directly state this.

Having the relevant facts of a case set forth in a concurring opinion, rather than in the body of the main opinion should not preclude the Hill case from demonstrating additional conflict sufficient to invoke this Court's jurisdiction. Thus, the instant situation is wholly distinguishable from that found in Reaves v. State. 485 So.2d 829 (Fla. 1986). In Reaves, this Court found that conflict between District Courts of Appeal could not be created by statements of "fact" made in a dissenting opinion, when those statements conflicted with the facts set forth by the majority opinion. In the Hill case, there are no conflicting facts set forth in Judge Glickstein's concurring opinion; he merely sets forth the facts on which the majority's ruling was based.

The Hill opinion, further, does not contain only a bald assertion of conflict, such as was found to be insufficient in Continental Video Corp. V. Honeywell, Inc., 456 So.2d 892 (Fla. 1984). Judge Glickstein, in fact, does not assert conflict (which may not have been apparent at the time of his opinion), but does provide the facts upon which that Court ruled. Because the action taken by the Fourth District Court of Appeal in Hill is in accord with the Third District's decision in Berdeaux, but directly conflicts with the rulings of the Second and Fifth Districts, conflict exists which should be resolved by this Court.

The conflicting decisions of the District Courts of Appeal have resulted in Plaintiffs with lawsuits in the Third and Fourth Districts being required to timely serve their lawsuits or suffer losing their actions, while similarly situated Plaintiffs in the

Second and Fifth District may wait indefinitely before they finally serve their lawsuit on a Defendant. This conflict creates inequity as between similarly situated litigants which depends on a whim of geography within the state. Florida Rules of Civil Procedure apply statewide. Fla.R.Civ.P. 1.010. Consequently, the Florida Supreme Court should accept jurisdiction to resolve this conflict and establish uniformity among the courts of this state in the interpretation of Florida Rule of Civil Procedure 1.070(j).

CONCLUSION

Since the decision of the Third and Fourth District Courts of Appeal directly conflict with the holdings of the Fifth District Court of Appeal's opinion in the instant case and the Second District concerning the interpretation and application of Florida Rule of Civil Procedure 1.070(j), it is requested that W. R. GRACE's Petition for Review be granted and the Florida Supreme Court resolve the conflict between the circuit courts of appeal.

Respectfully submitted,

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1 HEREBY CERTIFY that a true copy hereof has been furnished by U. S. Mail this May 14, 1992, to all counsel of record.

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IN THE SUPREME COURT OF FLORIDA

CASE NOS.: 79-837

W.R. GRACE & CO. - CONN.

Defendant/Petitioner,

v.

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

Plaintiff/Respondent.

APPENDIX TO W. R. GRACE'S BRIEF ON JURISDICTION

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IN THE OISTRICT 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. Callingwood, 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 was 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 weredismissed 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.

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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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DAUKSCH, Judge.

This is an appeal from a judgment and sentence in a cocaine delivery case.

[1] The trial court did not err in refusing to give the jury an instruction on, or a verdict form for, possession of cocaine. That crime was not charged and it is not a lesser included offense. *State v. McCloud*, 577 So.2d 939 (Fla.1991); *State v. V.A.A.*, 577 So.2d 941 (Fla.1991).

[2] The court did err in sentencing appellant as an adult when he was under eighteen years of age at the time the crime was committed, especially because the judge did not comply with section 39.111, Florida Statutes (1989). *Leach v. State*, 545 So.2d 520 (Fla. 5th DCA 1989); *Smith v. State*, 543 So.2d 419 (Fla. 5th DCA 1989); *Keith v. State*, 542 So.2d 440 (Fla. 5th DCA 1989).

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED.

GOSHORN and PETERSON, JJ., concur.

Della E. PARTIN and Thomas V. Partin, her husband, Appellants,

v.

FLAGLER HOSPITAL, INC., etc., et al., Appellees.

No. 90–360.

District Court of Appeal of Florida, Fifth District.

June 13, 1991.

Action was brought against hospital to recover for injuries caused by malfunctioning elevator. The Circuit Court, St. Johns County, Richard O. Watson, J., dismissed complaint. Plaintiffs appealed. The District Court of Appeal, Peterson, J., held that rule requiring service within 120 days after filing complaint did not apply to pending case that was filed prior to effective date of rule.

Reversed and remanded.

1. Pretrial Procedure ⇐560

Plaintiff's failure to serve defendant within 120 days after filing complaint entitles defendant to dismissal, even though service is effected before defendant's motion to dismiss. West's F.S.A. RCP Rule 1.070(j).

2. Process ⇐21

Rule requiring service within 120 days after filing complaint did not apply to pending case that was filed prior to effective date of rule. West's F.S.A. RCP Rule 1.070(j).

Jason G. Reynolds of Coble, Barkin, Gordon, Morris & Reynolds, P.A., Daytona Beach, for appellants.

Gregg L. Wirtz of Boyd & Jenerette, P.A., Jacksonville, for appellees.

PETERSON, Judge.

Della and Thomas Partin appeal the dismissal of their negligence complaint against Flagler Hospital, Inc. We reverse.

Partin sued Flagler for injuries received in 1981 when an elevator malfunctioned. This original suit was dismissed in 1985, but was followed by a similar complaint in that year. Service was not made until November 6, 1989. After it was served, Flagler successfully moved to dismiss the complaint pursuant to rule 1.070(j), Florida Rules of Civil Procedure, on the ground that service had not been made within 120 days after filing the complaint. The court ruled that Partin did not show good cause for not having made service within the time limit, and Partin does not appeal that ruling.

[1] Partin argues that the dismissal is improper since rule 1.070(j) should be construed to operate in a non-self-executing manner analogous to rule 1.420(e). Under

rule 1.420(e), an action may not be dismissed if record activity takes place before a motion to dismiss based upon the rule is filed. Service of process before the filing of a motion to dismiss for failure to prosecute has been held to be sufficient record activity to preclude dismissal under rule 1.420(e). *Glassalum Engineering Corp. v. 392208 Ontario Ltd.*, 487 So.2d 87 (Fla. 3d DCA 1986).

Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990), lends credence to this argument. In *Berdeaux*, the court held that the rule should not be enforced after the defendant had been served. The rationale of the decision is similar to Partin's argument except that the decision was based on an analogy between rule 1.070(j) and rule 1.500(c), Florida Rules of Civil Procedure. Under the latter rule, defaults may not be entered if a defendant files an answer prior to the proposed entry of a default. Thus, under *Berdeaux*, a plaintiff who effects service after the time limit can escape dismissal if service is effected before a motion to dismiss is filed by the defendant.

The Fourth District took a contrary view in *Morales v. Sperry Rand Corporation*, 578 So.2d 1143 (Fla. 4th DCA 1991), and held that the rule should be enforced even though service is effected before the filing of a motion to dismiss. The *Morales* view is in line with rule 4(j), Federal Rules of Civil Procedure. The federal rule is almost verbatim the Florida rule, and federal cases are routinely dismissed on rule 4(j) motions made after untimely service. *Morales* and the federal procedure support Flagler's argument that the purpose of the rule would be frustrated if the only defendants who could avail themselves of the rule were those defendants who, although unserved, for some reason knew they were being sued. We believe that *Morales* is the correct view. A defendant aggrieved by untimely service should be able to enforce his rights.

[2] We reverse, nevertheless, because we believe that rule 1.070(j) does not apply to cases filed prior to the effective date of the rule. We note that the instant action was pending at both the time rule 1.070(j) was adopted in 1988 and the effective date of January 1, 1989. *In re Amendments to Fla.Rules of Civil Procedure*, 536 So.2d 974 (Fla.1988). The order adopting the 1988 amendments was silent as to applicability to pending cases. When an earlier amendment was made to the rules of civil procedure, the supreme court did give direction as to applicability. In a later order, the supreme court stated:

> It was provided [in an earlier order] that said amendments "shall become effective on the first day of October, 1961, and shall be applicable to all cases then pending, as well as those instituted thereafter." It has been brought to the attention of the Court that the applicability of said amendments to pending cases could result in a deprivation of substantial rights previously acquired by litigants. It is, therefore, ordered that the amendments to the Florida Rules of Civil Procedure promulgated by the order above described shall become effective on the first day of October, 1961, but shall be applicable only to cases commenced on and after said date.

In re Amendments to Fla.Rules of Civil Procedure, 132 So.2d 6, 7 (Fla.1961). Since the supreme court, in its order adopting rule 1.070(j), did not mention whether it should be applied to cases filed before January 1, 1989, as they did in the 1961 amendments, and since it is clear that a plaintiff's rights may be affected by the change,[1] we conclude that it was the intent of the supreme court to apply the rule to cases filed on or after the effective date.

Examination of the rule itself suggests that it was not intended to apply to cases

1. In *Hernandez v. Page*, 580 So.2d 793 (Fla. 3d DCA 1991), Judge Schwartz in a concurrence refers to rule 1.070(j) as an ill-considered but successful "attempt to elevate the demands of speed and efficiency in the administration of justice over the substantive rights of the parties which the system is in business only to serve." Trawick, in his Florida Practice and Procedure, section 8-4, speaks no more kindly of the rule, suggesting that it is unnecessary since rule 1.420(e) is available to spur plaintiffs who might otherwise lack diligence.

filed prior to its effective date. The rule requires service within 120 days of filing the action. For all cases filed more than 120 days prior to the effective date of the rule, literal compliance would have been impossible. Given the obvious inapplicability to many or most cases filed before the effective date, we believe that the supreme court could not have intended the rule to apply to pending cases. Had the court intended otherwise, we think it would have provided a requirement for service within 120 days of filing and some other requirement literally applicable to pending cases, such as filing within 120 days of the effective date of the rule. Since there is no such provision in the rule, we conclude that the rule does not apply to cases pending on its effective date. We recognize that this conclusion conflicts with *Berdeaux* which applied the rule to cases that were pending before the effective date, but we believe that, if our supreme court had intended the rule to apply to pending cases, it would have said so.[2]

We hold that rule 1.070(j) is not applicable to cases filed prior to January 1, 1989, the effective date of that rule. Since the instant case had been filed prior to that date, we reverse the dismissal of plaintiffs' complaint and remand.

REVERSED and REMANDED.

SHARP, W., and GRIFFIN, JJ., concur.

2. We note that there appears to be a conflict on this issue in the federal jurisdictions. *See, e.g., Gleason v. McBride,* 869 F.2d 688, 691 (2d Cir. 1989), holding that federal rule 4(j) does not apply to cases pending on its effective date and *Coleman v. Holmes,* 789 F.2d 1206 (5th Cir. 1986), holding that it does. *See also Gordon v. Hunt,* 116 F.R.D. 313 (S.D.N.Y.1987), *aff'd,* 835 F.2d 452 (2d Cir.1987), and conflicting cases cited therein. The federal cases are not helpful because, for the most part, they are based on the legislative history, and we do not find similar guidance in reviewing the adoption of the Florida rule.

Anthony Lopez BROWN, Appellant,

v.

STATE of Florida, Appellee.

No. 90–687.

District Court of Appeal of Florida, Fifth District.

June 13, 1991.

Defendant was convicted in the Circuit Court, Orange County, Gary L. Formet, Sr., J., of two counts of sexual battery committed on one victim, burglary of dwelling, and battery on second victim. Defendant appealed. The District Court of Appeal, Harris, J., held that trial court erred in scoring victim injury points on both counts of sexual battery committed on same victim.

Affirmed in part, reversed in part and remanded.

Criminal Law ⇐1244

Trial court erred in scoring victim injury points on both counts of sexual battery committed on same victim.

James B. Gibson, Public Defender, and Barbara L. Condon, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and David S. Morgan, Asst. Atty. Gen., Daytona Beach, for appellee.

HARRIS, Judge.

Anthony Lopez Brown appeals his convictions and sentences for two counts of sexual battery committed on one victim, burglary of a dwelling and battery on a second victim. We affirm the convictions.

We agree with Brown, however, that the trial court erred in scoring victim injury

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conclusion, the panel of arbitrators made a substantial award to the appellants.

On October 29, 1990, the appellants filed suit in the trial court seeking confirmation of the arbitration award. The appellees responded with a motion to vacate the award pursuant to section 682.13(d), Florida Statutes (1989), which in pertinent part provides that an award may be vacated when "[t]he arbitrators or the umpire in the course of his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefor." The motion contained extensive factual recitals pertaining to the death of the expert and the reasons why a replacement could not be procured in time for the arbitration proceeding. These recitals were not contained in the appellees' letter of August 24, 1990, to the AAA requesting the second continuance, nor did the appellees seek to offer evidence on the subject before the arbitration panel.

A hearing on the motion was held on February 19, 1991. Over the appellants' objection, the trial court permitted one of the appellees' attorneys to testify at length regarding the expert's death and why a successor expert could not be retained and prepared to testify in the thirty-one day period between the expert's death and the arbitration hearing. At the conclusion of the hearing, the trial court determined that the AAA denial of the request for a second continuance was "unreasonable and a denial of fundamental due process." The trial court then vacated the award.

The first question for our determination is whether the AAA's denial of the request for continuance is to be judged by section 682.13(d), Florida Statutes (1989), or by section 10(c) of the Federal Arbitration Act. The federal act provides that an award may be vacated "[w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown." 9 U.S.C.S. § 10(c) (Law. Co-op. 1987). As this court has previously determined, the Federal Arbitration Act supersedes the Florida Arbitration Code when interstate commerce is involved. *United Servs. Gen. Life Co. v. Bauer*, 568 So. 2d 1321 (Fla. 2d DCA 1990). Thus, we must review the actions of the AAA in this case pursuant to the grounds to vacate set forth in section 10(c) of the federal act.

The second question is whether it was proper for the trial court to permit the presentation of evidence on the grounds for continuance which were not presented to the AAA. We determine that it was not. There are some challenges to an arbitration award which may require evidence beyond that which was presented to the arbitrators. These cases generally relate to the conduct or bias of the arbitrators. *See Legion Ins. Co. v. Insurance Gen. Agency, Inc.*, 822 F.2d 541 (5th Cir. 1987). Such issues are not relevant here. The issue is whether the AAA violated section 10(c) based upon the information presented to it. That can be fully determined by a review of the record of the arbitration proceeding. The trial court was not authorized to delve beyond that record and second guess the AAA on evidence which the AAA did not have the benefit of when it made its ruling. *See A. G. Edwards & Sons, Inc. v. Petrucci*, 525 So. 2d 918 (Fla. 2d DCA 1988).

Finally, the trial court, in reviewing the actions of the AAA, was limited to a determination under the narrow "abuse of discretion" standard. *See Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988). Considering (1) that the arbitration proceeding had been continued once at the appellees' request, (2) the limited information presented to the AAA in the letter of August 24 requesting a second continuance, and (3) the fact that thirty-one days remained until the scheduled arbitration date, the record of the arbitration proceeding cannot support a finding of abuse of discretion, i.e. "misconduct," on the part of the AAA. *See Schmidt v. Finberg*, 942 F.2d 1571 (11th Cir. 1991). The trial court therefore erred in granting the motion to vacate.

Reversed and remanded for further proceedings consistent with this opinion. (RYDER, A.C.J., and HALL, J., Concur.)

* * *

Criminal law—Manslaughter—Evidence—Hearsay—Police report containing witness's statements properly admitted under exception to hearsay rule for prior consistent statements offered to rebut charge of recent fabrication of testimony where there was charge of fabrication, implied or direct, during cross-examination of witness

DAVID SCOTT PENNER, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-01334. Opinion filed January 17, 1992. Appeal from the Circuit Court for Sarasota County; George K. Brown, Jr., Acting Circuit Judge. John R. Lawson, Jr., of Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., Tampa, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and David R. Gemmer, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) David Scott Penner appeals from his convictions for two counts of manslaughter stemming from a prosecution of charges of manslaughter, vessel homicide, and operating a vessel while intoxicated. The evidentiary error he raises concerns the introduction of a police report during the state's redirect questioning of an emergency medical services technician which he alleges unnecessarily and prejudicially bolstered and highlighted the testimony of that witness at a crucial point in the trial. The police report contained this witness's statement that the witness overheard the appellant say that it was the appellant who was driving the boat at the time of the fatal accident. We write to address his contention that the report was inadmissible hearsay in violation of section 90.801(2)(b), Florida Statutes (1987). This statute excepts from the proscription of the hearsay rule prior consistent statements of a witness where it is offered to rebut a charge, whether express or implied, of recent fabrication of the testimony of the witness. *Van Gallon v. State*, 50 So. 2d 882 (Fla. 1951). After a careful review of the record, we conclude that there is ample evidence to support the ruling of the trial court that there was such a charge of fabrication, implied or direct, during this witness's cross-examination thus allowing the evidence of the prior consistent testimony of the witness on redirect. Because that is so, we do not disturb the court's exercise of discretion in its ruling. *Kelley v. State*, 486 So. 2d 578 (Fla. 1986).

We affirm the appellant's convictions and sentence for the two counts of manslaughter. (SCHOONOVER, C.J., DANAHY, J., and CASE, JAMES R., Associate Judge, Concur.)

* * *

Torts—Medical malpractice—Limitation of actions—Filing of petition to extend medical malpractice statute of limitations pursuant to section 768.495(2), Florida Statutes (1987), with clerk of circuit court in county which ultimately proves to be improper venue for subsequent medical malpractice action extends statute—Rule of civil procedure requiring that service of process be accomplished within 120 days of filing of initial pleading does not apply to action commenced prior to effective date of rule

WILLIAM KING and JULIA KING, his wife, Appellants/Cross-Appellees, v. LESLIE PEARLSTEIN, M.D., and EDWARD WHITE MEMORIAL HOSPITAL, Appellees/Cross-Appellants. 2nd District. Case No. 91-00332. Opinion filed January 15, 1992. Appeal from the Circuit Court for Hillsborough County; James A. Lenfestey, Judge. Raymond T. Elligett, Jr., of Schropp, Buell & Elligett, P.A., and James F. Pingel, Jr., of Lau, Lane, Pieper & Asti, P.A., Tampa, for Appellants/Cross-Appellees. Charles W. Hall of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., St. Petersburg, for Appellee/Cross-Appellant, Leslie Pearlstein, M.D. John W. Boult of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for Appellee/Cross-Appellant, Edward White Memorial Hospital.

(PATTERSON, Judge.) This case presents the question of whether the filing of a petition to extend the medical malpractice statute of limitations pursuant to section 768.495(2), Florida Statutes (1987), with the clerk of the circuit court in a county which ultimately proves to be an improper venue for the subsequent medical malpractice action extends the statute. The trial court held that it did not and dismissed this action with prejudice. We disagree and reverse. The appellees cross-appeal the failure of the trial court to dismiss the action on the further ground that service

of process was not accomplished within 120 days of the filing of the complaint as required by Florida Rule of Civil Procedure 1.070(j). For the reasons stated below, we agree with the trial court that rule 1.070(j) does not apply to this case and affirm in that regard.

On March 18, 1984, Dr. Pearlstein operated on Mr. King at Edward White Memorial Hospital to repair a hernia. On May 5, 1986, Dr. Pearlstein again operated on Mr. King to remove a sponge which had been left in Mr. King's body at the time of the 1984 surgery. The parties agree that the statute of limitations commenced to run on May 5, 1986.

Thereafter, the appellants complied with section 768.57, Florida Statutes (1987), by sending a notice to initiate litigation to the appellees. On July 31, 1987, the appellants filed with the clerk of the Circuit Court of Hillsborough County a petition to obtain the "automatic 90-day extension" of the statute of limitations provided for in section 768.495, Florida Statutes (1987). On November 1, 1988, the appellants filed their medical malpractice action in Hillsborough County.

The action lay dormant, and on January 19, 1990, the court initiated a motion to dismiss for lack of prosecution. For reasons not pertinent to this appeal, the court entered and then vacated an order of dismissal for lack of prosecution. In August 1990 the appellants filed an amended complaint and, for the first time, obtained service of process upon the appellees. Both appellees filed motions to dismiss asserting that the action was barred by the statute of limitations, or in the alternative, should be dismissed for failure to comply with rule 1.070(j). Neither appellee specifically moved to dismiss the action on the basis of improper venue.[1]

After a nonevidentiary hearing the trial court, in its order of December 28, 1990, found that rule 1.070(j) was inapplicable, but granted the motions to dismiss with prejudice on the ground that the statute of limitations had run prior to the filing of suit. The order is silent as to the basis of this finding. However, in that the filing on November 1, 1988, would be timely if the automatic ninety-day extension were effective, the parties agree that the finding rests on the trial court's conclusion that the petition for extension, filed in Hillsborough County, was ineffective to extend the statute.

The words of a statute are to be given their plain and ordinary meaning, since it is assumed that the legislature knew the meaning of the words when it chose to include them in the statute. *Sheffield v. Davis*, 562 So. 2d 384 (Fla. 2d DCA 1990). During the relevant period, section 768.495(2), Florida Statutes (1987), provided in pertinent part:

> (2) *Upon petition to the clerk of the court where the suit will be filed* and payment to the clerk of a filing fee, not to exceed $25, established by the chief judge, an automatic 90-day extension of the statute of limitations shall be granted to allow the reasonable investigation required by subsection (1). This period shall be in addition to other tolling periods.

(Emphasis added.) The statute plainly requires the petition to be filed in the same county as the subsequent suit *will* be filed. It does not require the petition to be filed in a county in which the suit *should* or *must* be filed. If the legislature had desired, it could have addressed the matter of venue.

This action was in fact filed in the same county as the petition; therefore, under the plain language of the statute, the petition was properly filed and extended the statute of limitations accordingly. Venue is a personal defense which is waived if not asserted in a party's first appearance in the case.[2] *See County of Volusia v. Atlantic Int'l Inv. Corp.*, 394 So. 2d 477 (Fla. 1st DCA 1981); Fla. R. Civ. P. 1.040(h). It does not affect the jurisdiction of the court to hear and determine the case. The action being timely filed, the trial court erred in dismissing the case.

On cross-appeal, the appellees argue that the suit should be dismissed for failure to comply with rule 1.070(j), which requires that service of process be accomplished within 120 days of the filing of the initial pleading. No issue exists as to compliance with the rule; there was a gross noncompliance. The only question is whether the rule applies to this case. This action was commenced on November 1, 1988. Rule 1.070(j) became effective on January 1, 1989. We acknowledge that there is a difference of opinion between the various districts as to whether the rule is to apply to cases filed before January 1, 1989, and pending on that date. We agree with the reasoning expressed by our sister court in *Partin v. Flagler Hospital, Inc.*, 581 So. 2d 240 (Fla. 5th DCA 1991), and hold that rule 1.070(j) does not apply to cases pending prior to January 1, 1989.

Reversed in part, affirmed in part, with directions to reinstate the appellants' complaint. (DANAHY, A.C.J., and FRANK, J., Concur.)

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[1]Dr. Pearlstein's motion does set out in detail that the appellees' residences are and all acts complained of occurred in Pinellas County.

[2]Although the appellees argued venue as the reason why the statute of limitations was not extended, neither party sought dismissal or transfer on this basis. In the event venue had been directly challenged the proper disposition would have been transfer, not dismissal. Tropicana Products, Inc. v. Shirley, 501 So. 2d 1373 (Fla. 2d DCA 1987).

* * *

Criminal law—Probation revocation—Sentencing—Appeals—Appellate court will not address contention, raised on appeal from probation revocation, that defendant should not have been initially sentenced to probation after having been declared a habitual offender where defendant did not object to probationary sentence when it was imposed and did not appeal from that sentence

RICKY M. JOHNS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-03153. Opinion filed January 17, 1992. Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge. James Marion Moorman, Public Defender, and William Pena Wells, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ron Napolitano, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the convictions and sentences imposed upon appellant after he was found guilty of violating his probation.

We need not and do not address the appellant's contention that he should not have been sentenced to probation after having been declared a habitual offender. The appellant did not object to that probationary sentence when it was imposed nor did he timely appeal that sentence thereafter. His acceptance of probation constituted a waiver of the right to attack that probation at revocation. *See Wolfson v. State*, 437 So. 2d 174 (Fla. 2d DCA 1983).

We find no merit in any of the remaining issues raised by the appellant.

Affirmed. (SCHOONOVER, C.J., and DANAHY and PARKER, JJ., Concur.)

* * *

Creditors' rights—Homestead exemption—Where debtor owns triplex and occupies one unit as residence, debtor is entitled to exemption from forced sale of residence only and not the two units leased to and occupied by tenants—Question certified as to whether the exemption from forced sale provided by Article X, Section 4, Florida Constitution, extends to portions of property severable from the residence and utilized to produce rental income

FIRST LEASING & FUNDING OF FLORIDA, INC., a Florida corporation, Appellant, v. LOWELL C. FIEDLER, d/b/a ISLAND PUB, ANN FIEDLER, as Guarantor, and LANTIS, INC., BETTY LANTIS and GEORGIA LANTIS, as Guarantors, Appellees. 2nd District. Case No. 90-01956. Opinion filed January 17, 1992. Appeal from the Circuit Court for Lee County; R. Wallace Pack, Judge. Michael B. Kirschner of Law office of Kevin F. Jursinski, Fort Myers, for Appellant. No appearance for Appellees.

(FRANK, Judge.) First Leasing & Funding of Florida, Inc. (First Leasing) challenges an order enjoining it from executing upon real property that the trial court characterized as a residen-

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_____ APPENDIX ELEVEN

_____ APPENDIX TWELVE

_____ APPENDIX THIRTEEN

_____ APPENDIX FOURTEEN

Woodrow BERDEAUX and Louise Berdeaux, et al., Appellants,

v.

EAGLE–PICHER INDUSTRIES, INC., et al., Appellees.

No. 90–94.

District Court of Appeal of Florida, Third District.

Dec. 11, 1990.

As Clarified Jan. 29, 1991.

Rehearing Denied April 3, 1991.

Asbestos litigation was commenced against defendant corporation, and the Circuit Court, Dade County, Harold R. Vann, J., granted defendant's motion to dismiss for failure to effect timely service of process. Plaintiffs appealed. The District Court of Appeal, Levy, J., held that: (1) rule providing for dismissal of action for failure to effect service on defendant within 120 days of filing applied retroactively to actions which were pending upon rule's effective date, but (2) action should not have been dismissed for failure to comply with procedural rule, to extent that process was served prior to hearing on defendant's motion.

Affirmed in part and reversed in part.

1. Pretrial Procedure ⇐532

Rule providing for dismissal of action for failure to effect service on defendant within 120 days of filing applied retroactively to actions which were pending upon rule's effective date, to extent that plaintiffs in such actions would be required to effect service within 120 days of rule's effective date. West's F.S.A. RCP Rule 1.070(j).

2. Pretrial Procedure ⇐560

Action should not be dismissed for failure to effect service upon defendant within 120–day period specified by procedural rule, if process has been served prior to hearing on defendant's motion to dismiss. West's F.S.A. RCP Rule 1.070(j).

Ferraro & Associates and James L. Ferraro and Marjorie N. Salem, Miami, for appellants.

Blaire & Cole and Susan J. Cole, Coral Gables, Louise H. McMurray, Miami, for Eagle–Picher Industries, Inc.

Blackwell & Walker and Kathleen M. Salyer, Miami, for Owens–Corning Fiberglas, Inc.

Kubicki, Draper, Gallagher & McGrane and Betsy E. Gallagher, Miami, for W.R. Grace & Co.

Shutts & Bowen and Robert P. Major, Miami, for Georgia–Pacific Corp.

Wolpe, Leibowitz, Berger & Brotman and Steven R. Berger, Miami, and Bradley H. Trushin, Miami Beach, for Celotex Corp.

Before JORGENSON, LEVY and GODERICH, JJ.

LEVY, Judge.

Nine asbestos-litigation plaintiffs appeal the trial court's order dismissing their actions, without prejudice, for failure to serve the defendants within 120 days subsequent to the filing of their complaints. These nine asbestos-litigation complaints were filed between January of 1987 and March of 1988. The defendants remained unserved until August and September of 1989. On September 25, 1989, the defendants filed a motion to dismiss for failure to effect timely service pursuant to Florida Rule of Civil Procedure 1.070(j). Only one defendant, "Flintkote", was still unserved at the time the motion was filed. In its December 8, 1989 Order, the trial court dismissed all nine actions, without prejudice, for the plaintiffs' failure to comply with Rule 1.070(j). For the following rea-

sons, we hold that the trial court erred in dismissing all nine actions for all defendants where service was effected prior to the filing of the Motion to Dismiss. However, defendant Flintkote was properly dismissed by the trial court in all nine actions because service was not properly effected on that particular defendant prior to the Motion to Dismiss.

Florida Rule of Civil Procedure 1.070(j), as amended, states:

> **(j) Summons—Time Limit.** If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading 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.

The effective date of Rule 1.070(j) was January 1, 1989. All nine of the actions in this case were pending at the time this amended rule took effect. The plaintiffs below urge that Rule 1.070(j) is not applicable to these actions because Rules of Court are to be applied prospectively, absent an express wording of an intention to the contrary. Their argument would suggest that cases already pending at the effective date of an amended rule would not be subject to its requirements.

The defendants below argue that Rule 1.070(j) is applicable to the nine cases while still affording a prospective treatment. They urge this court that the plaintiffs were bound by the 120–day period which would run from the effective date of the Rule, and are subject to dismissals for failure to comply with this time period.

[1, 2] Although we agree with the defendants that the plaintiffs were limited to 120 days, from the effective date of the Rule, within which to serve the defendants, it was improper for the trial court to dismiss eight of the nine actions.

We hold that the operation of Rule 1.070(j) is analogous to the application of Florida Rule of Civil Procedure 1.500(c)[1] wherein the law of the State requires a default not be entered, under that rule, if the defendant files its answer at any time prior to the proposed entry of a default. *See Humbert v. Ackerman*, 541 So.2d 1229 (Fla. 3d DCA 1989). We find, however, that the above discussion does not apply to the defendant "Flintkote", since service of process was not ever effected upon that defendant.

Affirmed in part and reversed in part.

Joan LINDSEY, Appellant,

v.

J.R. & R. ENTERPRISES and Aetna Casualty & Surety and Division of Workers' Compensation, Appellees.

No. 89–3194.

District Court of Appeal of Florida, First District.

Dec. 26, 1990.

On Motion for Rehearing or Clarification March 21, 1991.

In workers' compensation claim for attendant care services and medical care, Ju-

1. Rule 1.500(c) provides:
> **(c) Right to Plead.** A party may plead or otherwise defend at any time before default is entered. If a party in default files any paper after the default is entered, the clerk shall notify the party of the entry of default. The clerk shall make an entry on the progress docket showing the notification.

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We reject appellant's contention that the trial court failed to give him proper credit for time served. On remand, the credit shall be given on the revised sentence for Count V.

LETTS, GLICKSTEIN and DELL, JJ., concur.

Cindy HILL, Appellant,

v.

Marc Z. HAMMERMAN, M.D., Marc Z. Hammerman, M.D., P.A. and the Patients Compensation Fund of Florida, Appellees.

No. 90–2449.

District Court of Appeal of Florida, Fourth District.

July 3, 1991.

Rehearing Denied Aug. 26, 1991.

Appeal from the Circuit Court for Broward County; Robert J. Fogan, Judge.

Nancy Little Hoffmann, Nancy Little Hoffmann, P.A., and Timothy J. Hmielewski of Timothy J. Hmielewski, Chtd., Fort Lauderdale, for appellant.

James D. Demet and Norman S. Klein, Klein & Tannen, P.A., Hollywood, for appellees Marc Z. Hammerman, M.D., and Marc Z. Hammerman, M.D., P.A.

PER CURIAM.

This cause is affirmed on the authority of *Hernandez v. Page*, 580 So.2d 793 (Fla. 3d DCA 1991); and *Morales v. Sperry Rand Corp.*, 578 So.2d 1143 (Fla. 4th DCA 1991).

AFFIRMED.

LETTS and DELL, JJ., concur.

GLICKSTEIN, J., concurs specially with opinion.

GLICKSTEIN, Judge, concurring specially.

I conclude this case to be an affirmance, but believe that neither case cited by the majority is total authority for the affirmance in that the first point in the present appeal is whether rule 1.070(j), Florida Rules of Civil Procedure, which became effective on January 1, 1989, applies to a complaint filed prior to that date. The rule states as follows:

> (j) **Summons–Time Limit.** If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading 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.

In *Hernandez v. Page*, 580 So.2d 793 (Fla. 3d DCA 1991), Hernandez refiled his complaint on February 2, 1989, initiating a new action after voluntary dismissal, but did not repeat service of process within 120 days. In *Morales v. Sperry Rand Corp.*, 578 So.2d 1143 (Fla.4th DCA 1991), Morales filed his complaint on August 17, 1989. Cindy Hill, appellant herein, filed her complaint on January 22, 1988, and did not serve the defendant with her complaint until February 28, 1990.

The majority did not believe the request of counsel for any history of rule 1.070(j) as it wound its way through the rule making process would be beneficial. They are more convinced than I of the wisdom of not asking. Accordingly, whatever I say here may not be a fully informed view.

Appellant relies upon footnote nine in *Tucker v. State*, 357 So.2d 719, 721 (Fla. 1978), which states: "Unless otherwise specifically provided, our court rules are prospective only in effect. *Poyntz v. Reynolds*, 37 Fla. 533, 19 So. 649 (1896)."

Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990), upon which appellee relies, made no mention of *Tucker*. Like the present case, it involved complaints filed prior to 1989. The defendants were not served until August and September, 1989; and on September 25, 1989, the defendants moved to dismiss under rule 1.070(j). Our companion court affirmed the trial court's dismissal only as to the one defendant who had not been served by the time the motion to dismiss was filed. A majority of the panel disagreed with that analysis in *Morales* and certified conflict.

Coleman v. Holmes, 789 F.2d 1206 (5th Cir.1986), offers the most compelling reason to affirm, in my view, saying:

> 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.

Id. at 1208. Accordingly, in the absence of further insight into the Florida rule, I am obligated to be consistent with *Tucker*, the footnote in which makes no distinction between civil or criminal, trial or appellate rules. I reject appellant's interpretation of *Tucker* that "prospective" requires an interpretation that the rule shall apply to all complaints filed after the rule's adoption and interpret it as giving all parties, prospectively, 120 days to effect service, i.e., for all pending and future actions, thus giving appellant 120 days from the effective date of the rule. Florida Rule of Civil Procedure 1.070(j) expressly relates to "120 days after filing of the initial pleading," but there is nothing in the record to show appellant's reading of the rule at the time it became effective was that it pertained to future actions, not pending ones. Appellant's claimed good cause never suggests such confusion. Had this been the basis for relief, I might have been persuaded that the confusion created by the language of the rule vis a vis *Tucker* could constitute good cause.

Finally, I would certify conflict with *Berdeaux* again—as I see no basis for distinguishing between those served before or after the motion to dismiss.

Earl Dawson HUNTER, Appellant,

v.

STATE of Florida, Appellee.

No. 89-02286.

District Court of Appeal of Florida, Second District.

July 5, 1991.

Defendant pleaded nolo contendere to drug charges "reserving the right to make a motion to suppress." Plea was accepted and community control imposed by the Circuit Court, Hillsborough County, Harry Lee Coe, III, J., and motion to suppress was thereafter denied. Defendant appealed. The District Court of Appeal held that appeal was untimely if taken from judgment and sentence, and order denying suppression motion was not appealable, particularly where the denial was oral.

Appeal dismissed.

1. Criminal Law ⇐1023(12), 1026.10(5)

In case in which defendant pleaded nolo contendere "reserving the right to make a motion to suppress" and plea was accepted and community control imposed, later denial of motion to suppress was not an appealable order, particularly where it was denied orally on the record, but not by written order. West's F.S.A. R.App.P.Rule 9.140(b)(1)(C).

2. Criminal Law ⇐1023(12)

Rule permitting defendant to appeal "orders entered after final judgment" con-