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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79-837

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

Defendants-Petitioners,

vs .

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

Plaintiffs-Respondents.
_____!

DISCRETIONARY REVIEW OF A DECISION OF
THE DISTRICT COURT OF APPEAL OF FLORIDA,
FIFTH DISTRICT

JURISDICTIONAL BRIEF OF PETITIONER
OWENS-CORNING FIBERGLAS CORPORATION

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STATEMENT OF THE CASE AND FACTS

This brief on jurisdiction is filed on behalf of petitioner Owens-Corning Fiberglas Corporation ("OCF"), one of several defendants in eleven personal injury actions brought in the Circuit Court for Orange County, Florida and one of several appellees in the ensuing consolidated appeals by plaintiffs to the District Court of Appeal of Florida, Fifth District. That appeal resulted in the decision which is the subject of these discretionary proceedings, reported as Parlier v. Eagle-Picher Industries, Inc., 17 FLW D701 (Fla. 5th DCA March 13, 1992). A copy of the Parlier decision appears in the appendix to this brief. (A. 1-2). OCF filed a timely joinder in the notice filed by co-petitioner W.R. Grace & Co. - Conn. ("W.R. Grace") invoking the discretionary jurisdiction of this Court.

The facts pertinent to this Court's discretionary conflict jurisdiction appear from the face of the district court's opinion, as follows: The opinion recites that although plaintiffs-appellants filed actions in 1987 alleging asbestos-related injuries, they did not effect **service** of their complaints either "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 applied the rule and dismissed the complaints, "since appellants had failed to show good cause for their non-compliance with the 120-day rule" The District Court of Appeal reversed the dismissals on authority of its decision in Partin v. Flaqler Hospital, Inc., 581 So. 2d 240 (Fla. 5th DCA 1991) and the decision of the District Court of Appeal, Second District in King

v. Pearlstein, 592 So. 2d 1176 (Fla. 2d DCA 1992). (A. 2). The significance of the district court's citation of Partin and King and the consequent direct conflict created thereby will be discussed in the argument portion of this brief.

SUMMARY OF ARGUMENT

Based on the facts stated in the decision below and the Court's citation of Partin and King, there is an express and direct conflict with the decision of the District Court of Appeal, Third District in Berdeaux v. Eagle-Picher Industries, Inc., 575 So. 2d 295 (Fla. 3d DCA 1990). Because this Court has accepted conflict jurisdiction to review King, based on a direct conflict with Berdeaux, it should also accept jurisdiction in the present case.

ARGUMENT

THE DECISION BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT IN BERDEAUX, THEREBY VESTING THIS COURT WITH JURISDICTION.

To avoid repetition, OCF will adopt the argument appearing at pages 3-8 of the Jurisdictional Brief of the co-petitioner W.R. Grace, including that pertaining to the direct conflict with Hill v. Hammerman, 583 So. 2d 368 (Fla. 4th DCA 1991). In addition, however, OCF submits the following brief arguments and citations to authorities bearing on the jurisdictional conflict with Berdeaux.

The Partin decision cited by the District Court of Appeal, Fifth District as authority for its reversal in the instant case confirms **beyond** question the existence of a conflict with Berdeaux. Partin expressly recognized that its conclusion that Rule 1.070(j) is not applicable to cases filed prior to its effective date of

January 1, 1989, conflicts with the Third District's decision in Berdeaux. Partin, 581 So. 2d at 242. Moreover, the decision of the District Court of Appeal, Second District in King, also cited as authority for the Fifth District's reversal, followed Partin but "acknowledge[d] 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." King, 592 So. 2d at 1178.

Most importantly, the Second District's decision in King is now pending before this Court in Case Nos. 79,529 and 79,530. We have been informed that this Court entered an order on May 28, 1992 accepting jurisdiction to review King based on conflict with Berdeaux. This Court has repeatedly recognized and accepted conflict jurisdiction under closely analogous circumstances. As stated in State v. Loftin, 534 So. 2d 1148, 1149 (Fla. 1988):

In Jollie v. State, 405 So. 2d 418 (Fla. 1981), we held that a per curiam decision without opinion of a district court of appeal which cites as controlling authority a decision that is pending review in this Court constitutes prima facie express conflict for purposes of jurisdiction. Thus we have jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution.

[Emphasis added]. See also Hamman v. Worling, 549 So. 2d 188 (Fla. 1989) and Childers v. Hoffmann-LaRoche, 540 So. 2d 102 (Fla. 1989), wherein this Court followed Jollie and exercised its conflict jurisdiction to review "per curiam affirmed" decisions which cited cases over which this Court later accepted conflict jurisdiction.

CONCLUSION

Based on the foregoing reasons and authorities, jurisdictional conflict exists. Accordingly, this Court should enter an order accepting jurisdiction and ordering briefs on the merits.

CERTIFICATE OF SERVICE

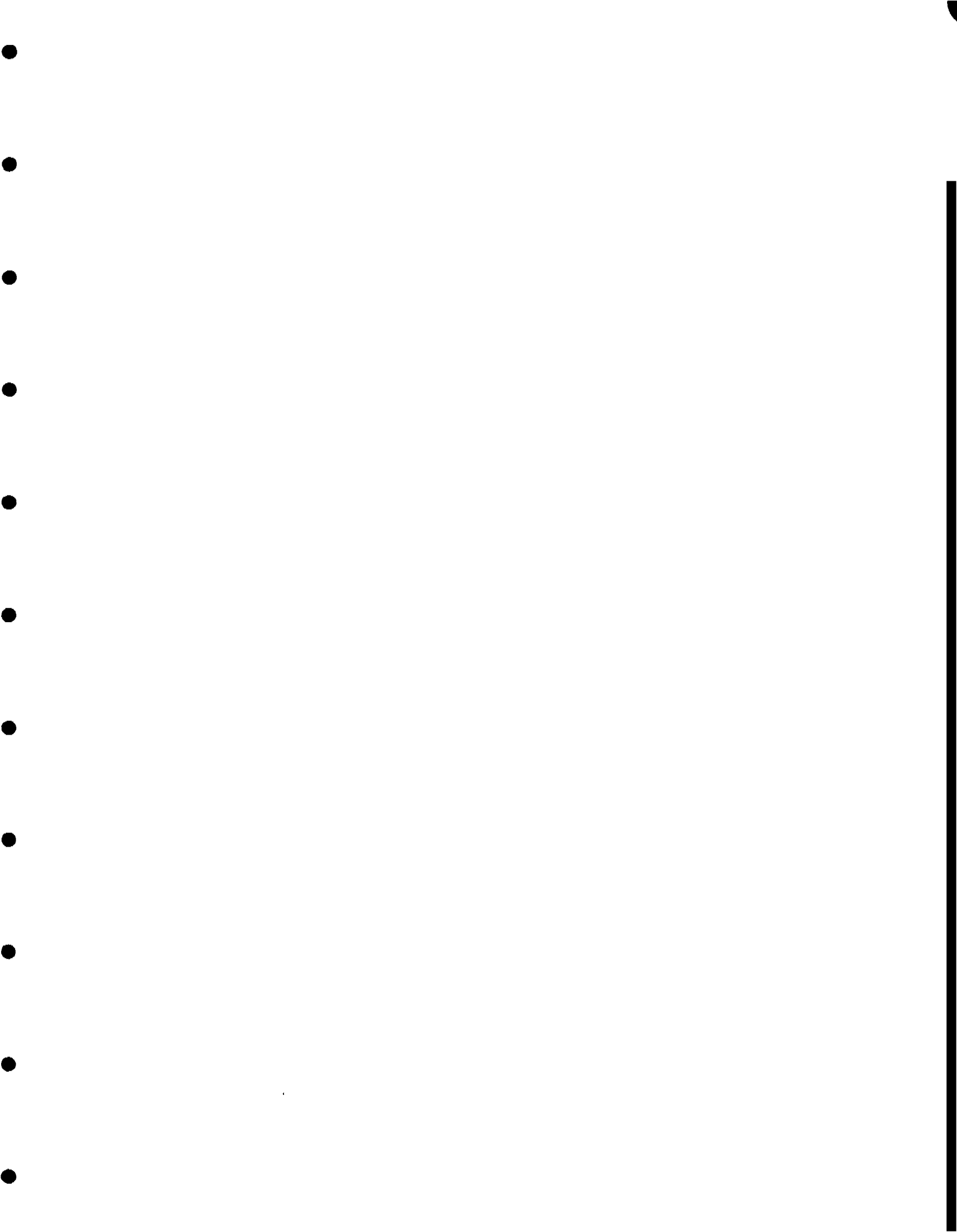
WE HEREBY CERTIFY that a copy of the foregoing Brief on Jurisdiction was mailed this 29th day of May, 1992 to all counsel on the attached service list.

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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.

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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 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.

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