

FILED

SID J. WHITE

JUN 23 1993

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 79,837

W.R. GRACE & CO. - CONN.
Defendant/Petitioner,

vs.

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

Plaintiffs/Respondents.

RESPONDENTS' BRIEF ON JURISDICTION

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-and-

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Rule 1.070(j), Fla.R.Civ.P. 1,4,5,6,8

I.

STATEMENT OF THE CASE AND FACTS

Alleging that conflict certiorari jurisdiction exists, petitioners seek review of the Fifth District's decision below in Parlier v. Eagle-Picher Industries, Inc., 596 So.2d 1125 (Fla. 5th DCA 1992). Respondents contend that no express conflict exists and that the petitions should be denied.

The decision sought to be reviewed holds that Rule 1.070(j), Fla.R.Civ.P., may not be applied to cases pending on its effective date. The opinion, in its entirety, states:

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 1.070(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, 592 So.2d 1176 (Fla. 1992).

596 So.2d at 1125.

Petitioners now seek review in this Court based on express and direct conflict jurisdiction.

II.

JURISDICTIONAL ISSUE

Petitioners contend that the decision below expressly and directly conflicts with the following decisions:

1. Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 295 (Fla. 3d DCA 1990).
2. Hill v. Hammerman, 583 So.2d 368 (Fla. 4th DCA 1991) (concurring opinion).

Respondents contend that no such conflict exists and that the petitions should be denied.

III.

SUMMARY OF ARGUMENT

No conflict exists between the decision below and the Third District's opinion in Berdeaux. The latter opinion has been disapproved by this Court and can no longer serve as the basis for conflict jurisdiction. Nor is there any express conflict with the Fourth District's opinion in Hill, since no such conflict appears within the four corners of the Hill majority opinion.

IV.

ARGUMENT

For the reasons which follow, it is respectfully submitted that review should be denied.

A. There is No Conflict with the Third District's Decision in Berdeaux Which This Court Has Disapproved.

The Third District's decision in Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990), upon which petitioners rely for conflict jurisdiction, consists of **two** holdings: (1) dismissal is not appropriate if service of process is effected before a motion to dismiss predicated on noncompliance with Rule 1.070(j) is filed; and (2) Rule 1.070(j) applies to cases pending on the rule's effective date.

In Morales v. Sperry Rand Corp., 17 F.L.W. 5348 (Fla. June 11, 1992), this Court disapproved Berdeaux, stating:

At issue are the consequences of failing to obtain service of process within 120 days of **the** filing of a complaint as required by Florida Rule of Civil Procedure 1.070(j) when no good cause for this failure is demonstrated. In Morales the district court held that rule 1.070(j) required dismissal. Whereas, Berdeaux held that dismissal is not in order if service of process is effected before a motion to dismiss predicated on noncompliance with rule 1.070(j) is filed. We adopt Morales and disapprove Berdeaux.

This Court's opinion in Morales does not distinguish between the two holdings in Berdeaux. Rather, the Morales opinion merely states that Berdeaux is disapproved.

As far as the precedential status of Berdeaux is concerned, there are now two possibilities in view of Morales. First, the

possibility exists that the Berdeaux decision is completely extinguished and no longer functions as authority in any way. Under such circumstances, it certainly does not survive as a basis for conflict jurisdiction. Cf. Bailey v. Hough, 441 So.2d 614 (Fla. 1983).

Secondly, it is possible that Morales only extinguishes the part of Berdeaux concerning the effect of serving process before a motion to dismiss citing Rule 1.070(j) is filed. Under this scenario, Morales does not completely obliterate the Berdeaux holding concerning the applicability of Rule 1.070(j) to cases pending on its effective date. However, that holding survives, at most, as persuasive legal reasoning and not as binding precedential authority. Cf. Colding v. Herzog, 467 So.2d 980, 982 (Fla. 1985).

In Colding, supra, a similar situation was presented. This Court had quashed the district court's opinion in Department of Revenue v. Markham, 381 So.2d 1101 (Fla. 1st DCA 1979) on the ground of lack of standing without reaching the substantive ad valorem taxation addressed in the district court's opinion. See Department of Revenue v. Markham, 396 So.2d 1120, 1121 (Fla. 1981). The issue in Colding was whether the quashed district court opinion in Markham had any precedential value with regard to its holding on the taxation issue. This Court held that Markham no longer had any binding precedential value, stating:

Because of its disposition on a standing issue, this Court neither rejected nor disapproved the legal analysis in the district court's Markham decision. The district court's opinion is not precedent, but its analysis may

nevertheless be considered by this Court in resolving the instant case.

467 So.2d at 982 (emphasis supplied).

Thus, at the very least, Morales has deprived the Third District's Berdeaux opinion of its binding precedential value on the question of whether Rule 1.070(j) may be applied to cases pending on its effective date. Accordingly, there is no longer any express and direct conflict between the instant case and Berdeaux. A district court holding which may properly be disregarded even within that district can hardly serve as the basis for conflict jurisdiction in this Court.

Petitioners also contend that the citation in the district court's opinion below to the Second District's decision in King v. Pearlstein, 592 So.2d 1176 (Fla. 1992) supports conflict jurisdiction herein. The basis for petitioners' contention is that this Court has accepted jurisdiction to review King and therefore it would be unfair to deny petitioners the same treatment as the petitioner in King. See State v. Lofton, 534 So.2d 1148 (Fla. 1988); Jollie v. State, 405 So.2d 418 (Fla. 1981).

However, this Court chose to exercise its discretionary jurisdiction in King prior to its decision in Morales disapproving Berdeaux. Without Berdeaux as a predicate for inter-district conflict, respondents seriously doubt that this Court would have accepted jurisdiction in King. Thus, this Court may decline to exercise its jurisdiction in this case without contravening the rule set forth in Lofton and Jollie.

Moreover, this is not a situation, as was the case in Lofton and Jollie, in which a district court of appeal disposed of multiple cases involving the same legal issue by authoring an opinion in one case and summarily referencing **that** opinion in **all of the others**. In such a situation, it would be unfair for **this** Court **to** accept jurisdiction in the one case in which an opinion was written and to deny jurisdiction in all of the other cases. See Jollie, 405 So.2d at 420.

In the instant case, the Fifth District's opinion stands on its own for purposes of assessing conflict jurisdiction because it sets forth the relevant facts and legal support for its holding. Thus, there is no danger herein of affording disparate treatment to similarly situated petitioners.

B. **No Express Conflict Exists with the Fourth District's Decision in Hill Based on Facts set Forth in the Concurring Opinion.**

Petitioners also assert that conflict exists between the decision below and the Fourth District's decision in Hill v. Hammerman, 583 So.2d 368 (Fla. 4th DCA 1991). At the same time, petitioners acknowledge that such conflict only appears from the **facts** set forth in the concurring opinion in Hill.

It is well settled that inter-district conflict must appear from the four corners of the majority opinions in question in order to support conflict jurisdiction in this Court. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986); Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980); Continental Video Corp. v. Honeywell, Inc., 456 So.2d 892, 893 (Fla. 1984); Department of Health and Rehabilitative

Services v. National Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986).

Here, the Fourth District's majority opinion in Hill is merely a per curiam affirmance citing as authority 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). Neither Hernandez nor Morales involves the issue of whether Rule 1.070(j) may be applied to pending cases -- in both cases, the complaints were filed after the effective date of the rule. Thus, the majority opinion in Hill in no way reflects the express conflict **required** to invoke this Court's jurisdiction.

It is true that the concurring opinion in Hill discusses the application of Rule 1.070(j) to complaints filed prior to January 1, 1989. However, concurring opinions do not represent precedential authority. Dunn v. State, 454 So.2d 641, 642 (Fla. 5th DCA 1984). Nor do facts or statements of law set forth in a concurring opinion create a predicate for conflict jurisdiction in this Court. Reaves, supra; Jenkins, supra; Continental Video Corp., supra.

IV.

CONCLUSION

It is respectfully submitted that no express conflict exists and that the petitions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of June 1992 to all counsel of record on the attached service list.



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