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FILED
SID J. WHITE
OCT 27 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT

OF FLORIDA

CASE NO. 79-837

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

Petitioners,

vs.

GARLAND P. PARLIER and MARIE W. PARLIER, HIS WIFE,

Respondents.

RESPONDENTS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

By this appeal, the petitioners/asbestos manufacturers seek to reverse the holding of the Fifth District Court of Appeal in Parlier V. Eagle-Picher Industries, Inc., 596 So.2d 1125 (Fla. 5th DCA 1992) that Florida Rule of Civil Procedure 1.070(j), which requires service within 120 days of filing the complaint, does not apply to complaints filed prior to its affective date. This same issue is before this Court in Edward White Memorial Hospital V. King, Case No. 79,530.

The facts as shown by the record are: Respondents/plaintiffs in these eleven cases filed their complaints on December 14 and 15, 1987 against twenty named defendants (R 33-186).[1] The complaints alleged that plaintiffs, during their employment as construction workers, were exposed to asbestos products manufactured and/or distributed by the defendants or related entities. As a result of this exposure, they developed serious asbestos related injuries. The complaints sounded in negligence, breach of implied warranty and strict liability and sought compensatory and punitive damages. The victims' spouses raised loss of consortium claims.

At the time the complaints were filed, there was no rule or other law in effect requiring that the defendants be served within a given time period. Fla.R.Civ.P. 1.070(j) was subsequently enacted and went into effect on January 1, 1989. In re Amendments

[1] Unless otherwise indicated, all emphasis is supplied. "R" refers to the record on appeal, as supplemented and as prepared by the Circuit Court Clerk's office. S.R. refers to the record on appeal prepared by the Fifth District Clerk's office.

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to Rules of Civil Procedure, 536 So.2d 974, 976 (Fla. 1988), clarified, 545 So.2d 866 (Fla. 1989).

Eighteen defendants -- six of whom are petitioners here -- were served with process between July and September, 1990 (R 2448-3129).[2] After being served, nine defendants moved to dismiss the actions on the grounds they were not served within 120 days pursuant to rule 1.070(j) (R 614-683,688-713,735-747,750-762,779-791,801-813,818-830,845-856,866-878,888-900,910-922,924-947,980-987,996-1007,1056-1067,1092-1103,1128-1139,1164-1175,1200-1211,1236-1247,1272-1283,1308-1318,1322-1486,1574-1606,1616-1621,1631-1633,1652-1654,1664-1666,1676-1678,1687-1689,1699-1701,1711-1713,1723-1725,1735-1737,1892-1902,1921-1923,1942-1943,1962-1964,1983-1985,2004-2006,2026-2028,2047-2049,2068-2070,2089-2091,2131-2133).

However, eleven defendants, three of whom are petitioners here, failed to raise the 120-day rule defense in their initial responsive pleadings or motions: (1) Owens Corning Fiberglass Corp. (R 204-248,260-274); (2) W.R. Grace Co. (R 413-613); (3) United States Mineral Products Co. (R 714-734,765-778,794-800,831-844,859-865,881-887,903-909); (4) Celotex Corp. (R 980-995,1024-1039,1084-1091,1104-1111,1140-1147,1192-1199,1228-1235,1248-1255,1300-1307); (5) Garlock, Inc. (R 325-411); (6) Armstrong World Industries, Inc. (R 1544-1573); (7) Keene Corp. (id.); (8) GAF Corp. (id.); (9) H.K.

[2] Two named defendants were not served: Asbestos Manufacturing & Insurance Company and Raymark Industries, Inc.

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Porter Co., Inc. (id.); (10) National Gypsum Co. (id.); and (11) United States Gypsum Co. (id.).[3]

The lower court entered orders dismissing all eleven cases on November 30, 1990 (R 2304-2347). During a hearing on the matter, the court noted that the applicable statutes of limitations had probably run and the dismissals were therefore likely to be with prejudice (R 29).

Appeals were filed separately and then consolidated by the court. (R 2348-2380; S.R. 67). On March 13, 1992, the Fifth District issued its opinion reversing the dismissals based on Partin V. Flagler Hospital, Inc., 581 So.2d 240 (Fla. 5th DCA 1991) and King v. Pearlstein, 592 So.2d 1176 (Fla. 2d DCA 1992). Defendants' motions for clarification, rehearing and certification were all denied by order entered April 23, 1992. (S.R.102).

On May 8, W.R. Grace filed a notice invoking this Court's discretionary jurisdiction. (S.R. 103). Later, Fibreboard, Keene, Pittsburgh Corning, Owens Corning Fiberglass, U.S. Mineral Products and Owens-Illinois filed joinders in that notice. (S.R. 105-112). By order dated August 20, 1992, this Court accepted jurisdiction over this cause, set a briefing schedule, dispensed with oral argument and granted the notices of joinder.[4] (S.R. 113).

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[3] Respondents who did not raise this issue are: Owens Corning Fiberglass, W.R. Grace, United States Mineral Products and Keene.

[4] U.S. Mineral is no longer a party to this action.

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POINTS ON DISCRETIONARY REVIEW

Respondents have identified only one point on review:

> Whether the Fifth District erred in ruling that Rule 1.070(j) should not be applied retroactively to plaintiffs' pending cases?

Assuming **arguendo** this Court finds that Rule 1.070(j) should be applied retroactively, there is a second point to consider:

> Whether the lower court erred in dismissing plaintiffs' cases against those petitioners' who waived their 120 day rule objections by failing to raise the issue in their initial responsive pleadings or motions?

SUMMARY OF ARGUMENT

When respondents filed their complaints there was no time limit for serving process on a defendant. Rule 1.070(j) did not become effective until over a year later. The Fifth District in Partin correctly held that this rule should not be applied to pending cases, based on the absence of any expressed intent on the part of this Court that it should be **so** retroactively applied. This holding is in accord with the general rule on retroactive application of statutes and rules. It is also in accord with the principles of fairness that underlie the Florida Rules of Civil Procedure.

Moreover, three petitioners waived the 120-day rule defense by failing to raise it in their initial responsive pleadings or motions. Under the rules of civil procedure, defenses and objections related to service or process which are not raised in the first responsive pleading of motion are waived.

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ARGUMENT

Based on the reasons and authorities set forth below, it is respectfully submitted that the holding of the Fifth District in this cause should be affirmed.

A. Rule 1.070(j) should not be applied retroactively.

1. The Partin analysis.

The only Florida case which analyses the question of the applicability of Rule 1.070(j) to cases pending on its effective date is Partin v. Flagler Hospital, Inc., 581 So.2d 240 (Fla. 5th DCA 1991).[5] The court viewed the question as one of this Court's intent. It looked to the language of the rule and the order adopting it to see if this Court meant the rule to apply to cases filed before its effective date.

First, the court found that the adopting order was silent on this issue. Based on the prior practice of this Court, the Fifth District construed this silence to mean the rule should not apply to pending cases:

> 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

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[5] The decision sub judice as well as those in King v. Pearlstein, 592 So.2d 1176 (Fla. 2d DCA 1992) and Lewis v. Burnside, 593 So.2d 1185 (Fla. 2d DCA 1992), simply rely on the reasoning of Partin. The court in Berdeaux v. Eagle Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990) merely concludes that the rule does apply to pending cases without providing any basis for its conclusion. Berdeaux was disapproved by this Court in Morales v. Sperry Rand Corp., 17 FLW S348 (Fla. 1992). Hill v. Hammerman, 583 So.2d 368 (Fla. 4th DCA 1991) is a p.c.a. that doesn't even show on its face that the action was pending on the effective date. This information can only be gleaned from a concurring opinion.

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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, we conclude that it was the intent of the supreme court to apply the rule to cases filed on or after the effective date.

581 So.2d at 241. The Court also found that the express language of Rule 1.070(j) supported this conclusion:

> Examination of the rule itself suggests that it was not intended to apply to cases 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... . {W}e believe that, if our supreme court had intended the rule to apply to pending cases, it would have said so.

581 So.2d at 241-242. Based on the failure of this Court to in **any** way provide for the rule's application to pending cases, the court held that 1.070(j) did not so apply.

2. Partin is correct statement of Florida law.

This conclusion is in accord with Florida law. It is axiomatic that Florida rules of court have prospective effect only, unless otherwise specifically provided.[6] Tucker v. State, 357 So.2d 719, 721 (Fla. 1978); Poyntz v. Reynolds, 37 Fla. 533, 19 So. 649 (1896); Blue v. Malone & Hyde, 575 So.2d 292 (Fla. 1st **DCA** 1991); State v. Green, 473 So.2d 823 (Fla. 2d **DCA** 1985); Arnold **v.** State, 429 So.2d 819 (Fla. 2d **DCA** 1983); Jackson v. Green, 402 So.2d 553 (Fla. 1st **DCA** 1981); Buskirk v. Suddath of South Florida, Inc., 400 So.2d 810 (Fla. 3rd DCA 1981). See also In Matter of Amendments to the Florida Rules of Civil Procedure, 132 So.2d 6, 7 (Fla. 1961) (retroactive application of rule change, including amendment to service of process rule, would result in a

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[6] Contrary to the position of petitioners Pittsburgh Corning, Fibreboard & Keene, the simple declaration that the rule will be effective on a certain date in the future is not an expression of intent that it be applied retroactively. Maltempo v. Cuthbert, 288 So.2d 517 (Fla. 2d **DCA** 1974), cert. denied, 297 So.2d 569 (Fla. 1974); In Re Estate of Jelley, 360 So.2d 1313 (Fla. 2d DCA 1978), cert. denied, 366 So.2d 881 (Fla. 1978); Foley v. Morris, 339 So.2d 215 (Fla. 1976). Further, Rule 1.010 does not have any language which answers the question of whether this or any other amendment to the rules should apply retroactively.

"deprivation of substantial rights previously acquired by the litigants and therefore express provision that rules should apply to pending actions was deleted").

Therefore, it is unnecessary to engage in petitioners' substantive/procedural quagmire. The fact that this Court can make rules of procedure apply retrospectively does not dictate that it intended such a result when it adopted Rule 1.070(j) -- partitularly when such an application would affect litigants' rights, as rules of procedure often do.

Further, applying this rule to pending cases does in fact constitute a retrospective application. The exact language of Rule 1.070(j) is:

> (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.

Thus, literal compliance with the rule would mean that actions such as the ones at bar, which were filed more than 120 days before the rule's effective date, would be barred for failure to timely serve even before the rule became effective. Clearly, this is not fair. Accordingly, this Court's choice of wording suggests that the rule was not meant to be applied to such actions.

Petitioners, on the other hand, contend that the rule can be interpreted to give parties in pending actions 120 days after the effective date of the rule to secure service. Of course, neither

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the rule nor the order adopting it has any language to this effect. Therefore, petitioners' interpretation requires a rewriting of the rule by adding language thereto. This certainly is not in accord with the general rules of construction.

Further, even such a construction constitutes a retrospective application. The triggering event for Rule 1.070(j) is the filing of the initial pleading -- that is when the time for service starts running. Here, the filing of the initial pleadings occurred prior to the effective date of the rule. Therefore, applying the rule to the actions sub judice is applying it retroactively. See Leapai v. Milton, 17 FLW 561 (Fla. Jan. 23, 1992); Trevino v. Chadderton, 571 So.2d 110 (Fla. 3d DCA 1990), review denied, 581 So.2d 1311 (Fla. 1991).[7]

3. Partin is in accord with federal law and the policies underlying both state and federal rules.

Most of the federal cases interpreting Rule 4(j) also support this result. In Baranski v. Serhant, 602 F.Supp. 33 (E.D. Ill. 1985), the court held that since both the rule and its legislative history were silent, the court would not construe the rule to apply to pending cases because "it seems unduly harsh to dismiss a complaint for failure to comply with a rule not in existence when it was filed." Similarly, in Gleason v. McBride, 869 F.2d 688 (2d

[7] On the other hand, the triggering event for rules re: instructions to be given at trial is the trial itself. Therefore, as long as that event takes place after the rule change, there is no retroactive application.

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Cir. 1989), the court simply held that the rule did not apply because it was not in effect at the time the complaint was filed.

In six other cases, as pointed out by Partin, the court relied on the legislatory history of 4(j)[8] to find that it was the intent of Congress that the rule apply to any process issued after the effective date of the rule and not to any process issued before its effective date. 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 (2nd Cir. 1987), cert. denied, 486 U.S. 1008, 108 S.Ct. 1734, 100 L.Ed.2d 198 (1988). Donaghy v. Roudebush, 614 F.Supp. 585,587 (D.N.J. 1985); Kyle v. Steamfitter's Local Union No. 614, 767 F.2d 920 (6th Cir. 1985)(text in Westlaw No. 84-5530); Peters v. E.W. Bliss Co., 100 F.R.D. 341 (E.D.Pa. 1983); Verri v. State Automobile Mutual Insurance Co., 583 F.Supp 302 (D.R.I. 1984). See also United States v. Bluewater-Toltec Irrigation District, 100 F.R.D. 687 (D.N.M. 1983) (section of amended Rule 4 providing for service by mail should not be applied retroactively). The cases which hold that the rule does not apply to pending cases also appear to be based on broader considerations of fairness to plaintiffs whose cases were pending on the effective date. Donaghy; Kyle; Peters; and Verri.[9] Thus, the federal cases are either inapposite or

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[8] Specifically, the statement by Congressman Edwards that "service of process issued **before** the effective date [of amended Rule 4] will be made in accordance with current Rule 4."

[9] Only two cases simply apply the rule to pending cases without any consideration of the congressional history. Cool v. Police Dept. of Yonkers, 40 Fed.R.Serv. 2d 857 (S.D.N.Y. 1984) and Sanders v. Marshall, 100 F.R.D. 480 (W.D. Pa. 1984) with no discussion at all.

support the plaintiffs conclusion that Rule 1.070(j) should not be applied retroactively to cases filed after its effective date.

Accordingly, the service of process rules in effect when plaintiffs' complaints were filed should be applied. Under those rules, the filing of the complaints in December 1987 tolled the running of the statute of limitations and there was no due diligence requirement for service of process. See e.g., Szabo v. Essex Chemical Corp., 461 So.2d 128 (Fla. 3d DCA 1984) (20 month delay immaterial); Pratt v. Durkop, 356 So.2d 1278 (Fla. 2d DCA 1978) (12 month delay immaterial).

Here, plaintiffs relied upon the law in effect at the time they filed their actions. They were not guilty of undue delay because there was no obligation at that time to immediately serve the defendants. To fault them for this delay is to violate the precept of Rule 1.010 that the rules of civil procedure should be interpreted to secure the just determination of every action.

Although Rule 1.070(j) obviously is a rule of procedure, its application has affected plaintiffs' substantive rights in the same manner as a statute of limitations. An amendment shortening a statute of limitations is applied retroactively only if the legislative intent to provide retroactive effect is clear and express and if a reasonable time is allowed by the statute within which to file suit on causes of action existing on the effective date of the statute. Folev v. Morris, 339 So.2d 215 (Fla. 1976); In re Estate of Jellev, 360 So.2d 1313 (Fla. 2d DCA 1978), cert. denied, 366 So.2d 881 (Fla. 1978).

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There is no good reason why respondents should be denied the opportunity to litigate their claims. Every conceivable policy reason, and due process concerns, support the continuation of the litigation to a just conclusion.

B. Three Petitioners Waived the 120-Day Rule Defense.

Assuming arguendo this Court rules that Rule 1.070(j) does apply to this action, three petitioners waived any objection or defense based on this rule by failing to raise the issue in their initial responsive pleadings or motions. Fla.R.Civ.P. 1.140(h)(1) provides:

> A party waives all defenses and objections that he does not present either by motion under subdivisions (b), (e) or (f) of this rule or, if he has made no motion, in his responsive pleading except as provided in subdivision (h)(2).[10]

The Author's Comment to this states that the operation of subsection (h)(1)

> is not limited to the defenses and objections specified in Rule 1.140. All defenses and objections, whether provided for by that rule or by any of the other rules or by statute, are waived unless presented by motion or pleading...

It has often been held that when a defendant files a responsive pleading or motion which does not raise objections concerning the sufficiency of service of process, those objections

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[10] Subsections (b), (e) and (f), referred to in the quoted text, provide grounds for moving to dismiss or strike the initial pleading. Subsection (h)(2) provides that the defenses of failure to state a cause of action and failure to join an indispensable party are not waived under (h)(1).

are waived and the defendant has submitted himself to the court's jurisdiction. Consolidated Aluminum Corp. v. Weinroth, 422 So.2d 330 (Fla. 5th DCA 1982), review denied, 430 So.2d 450 (Fla. 1983); EGF Tampa Associates v. Edgar V. Bohlen, G.F.G.M. A.G., 532 So.2d 1318 (Fla. 2d DCA 1988); Cummings v. Palm Beach Marble & Tile, Inc., 497 So.2d 711 (Fla. 4th DCA 1986); Kirshner v. Shernow, 367 So.2d 713 (Fla. 3d DCA 1979). Accordingly, the lower court erred in dismissing the actions against the petitioners who had waived their 120-day rule objections.

It is immaterial that this issue was not raised before the trial court because the omission could not be cured. As shown above, the effect of a waiver under 1.140(h)(1) is that the defendant subjects himself to the court's jurisdiction. Consolidated Aluminum Corp., supra. Federal cases interpreting the interplay between rules 4(j) and 12(h)(1) have reached the same conclusion. E.g., Pardazi v. Cullman Medical Center, 896 F.2d 1313 (11th Cir. 1990); Kersh v. Derozier, 851 F.2d 1509 (5th Cir. 1988).[11]

Once jurisdiction is conferred by virtue of the defendant's waiver, no amendment can change that. Kersh, supra, held that an amended answer is not an initial responsive pleading under rule 12(h)(1). This is true despite the language appearing in rule 12(h)(1) regarding the liberality with which amendments are permitted. 851 F.2d at 1511, n.3. Further, the trial court loses

[11] Rule 12(h)(1) is substantially equivalent to Florida's rule 1.140(h)(1)).

the authority to dismiss the action for failure to timely serve process once that defense has been waived. Pardazi, supra, 896 F.2d at 1317. There are no Florida cases to the contrary.

Nor is this result changed because the trial court abated five cases sua sponte for failure to serve process and subsequently reinstated them without a showing of good cause. Pardazi and the cases cited therein at n.2 at pp. 1316-1317, hold that when a trial court raises untimely service of process on its "own initiative," rather than on motion, the court may choose to keep the action on the docket even if it determines that no good cause has been shown for the untimely service. Id.

Finally, respondents did not waive this issue by failing to object to the trial court's statement that the 120 day rule defense was a "common thread" in all of the responsive pleadings and motions that eventually were filed. The orders of dismissal simply recite the fact that eight specified motions raised the 120 day rule issue. This was a correct factual statement based on the record which plaintiffs did not dispute. The waiver issue was not implicated. No "concession" occurred. At the very least, the actions against the petitioners who waived the 120 day rule objections should not have been dismissed.

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CONCLUSION

Based on the reasons and authorities set forth above, it is again respectfully submitted that the opinion of the Fifth District should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondents' Brief on the Merits was mailed this 26th day of October, 1992 to all counsel of record on the attached service list.

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