IN THE SUPREME COURT OF FLORIDA

CASE NO: 79-837

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

Petitioner,

vs.

GARLAND P. PARLIER, et ux.,

Respondent.

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

PETITIONER, W. R. GRACE'S AMENDED REPLY BRIEF

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ISSUES ON APPEAL

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

11. WHETHER RESPONDENTS WAIVED ANY ARGUMENT AS TO THE TIMELINESS OF SOME DEFENDANTS RAISING OF RULE 1.070(j) BECAUSE RESPONDENTS FAILED TO RAISE THE ISSUE BEFORE THE TRIAL COURT.

ARGUMENT

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

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

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

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

Respondents acknowledge the explicit terms of Rule 1.070(j), require Respondents' Complaints to be dismissed. [Respondent's Brief on the Merits, p.8] At the trial court, however, Respondents claimed that their delay was proper because their Complaints were filed prior to the enactment and effective date of Rule 1.070(j). Respondents never raised at the trial court level any objection to

the timeliness of any of the Motions to Dismiss filed by the various Defendants to the actions, either at the hearing on the motions or at any time before or after the trial court's entry of the order (which had been circulated to all counsel) dismissing Respondents' actions without prejudice. Respondents appealed that order and, for the first time on appeal, Respondents raised the argument that some Defendants had waived their right to rely on Rule 1.070(j).

While the appeal was pending, The Fifth District Court of Appeals ruled in accordance with Respondents' arguments on the application of Rule 1.070(j) in Partin v. Flagler Hospital, Inc., 581 So. 2d 240 (Fla. 5th DCA 1991). The Fifth District Court of Appeals then relied on its decision in Partin and the decision of the Second District Court of Appeals in King v. Pearlstein, 592 So. 2d 1176 (Fla. 2d DCA 1992) [citing Partin as authority] to reverse the decision of the trial court in this case. The appellate court did not adopt or accept Respondents' "waiver by late assertion of the Rule 1.070(j) defense" argument.

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

Rule 1.070(j) does apply to cases filed prior to the effective date of the Rule. The court should not consider Respondents' belated argument, not raised at all at the trial court level and not addressed in the opinion of the Fifth District Court of Appeal, concerning the timeliness of any petitioner's raising of the Rule 1.070(j) defense.

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

Respondents' argument confused the difference between acceptable prospective application of Rules of Procedure to all pending cases and prohibited "retroactive" application which, by definition, must deprive a litigant of previously acquired substantial rights. Generally, rules of procedure apply to all cases pending at the time of their adoption. Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985); State v. Jackson, 478 So. 2d 1054 (Fla. 1985); Walker & LeBarge, Inc. v. Halligan, 344 So. 2d 239 (Fla. 1977); Ratner v. Hensley, 303 So. 2d 41 (Fla. 3d DCA 1974); Rule 1.010, Fla.R.Civ.P. [Rules apply to "all actions" in the circuit court.]

In 1972, the Florida Supreme Court adopted procedures for periodic consideration of proposals for changes to rules. Proposals may be submitted to the Rules Committee, which studies them, gathers comments, votes on recommendations, then refers proposals and committee recommendations to the Florida Supreme Court every fourth year. The Florida Supreme Court invites further comment, holds hearings on recommended changes, then decides whether to adopt such changes. January 1 of each ensuing year is

the effective date of all such changes. In Re: The Florida Bar, 276 So. 2d 467 (Fla. 1972). This system extends the opportunity for litigants or lawyers to present specific objection to a proposed change on the basis that the change may result in a deprivation of previously-acquired rights. Under this system, enunciation of the effective date of such a rule change is not required, although it is permitted. Of course, any rule adopted by the procedure will be subject to Florida Rule of Civil Procedure 1.010, which provides all of the rules of civil procedure apply to all actions in the circuit court in order to "secure the just, speedy, and inexpensive determination of every action."

Florida Rule of Civil Procedure 1.070(j) was properly enacted by the Florida Supreme Court as a procedural rule on October 6, 1988, taking effect on January 1, 1989. The 120-day time limitation prescribed by that rule merely sets standards for the timeliness of the procedure used for effectuating service and does not affect a litigant's substantive rights. Consequently, the trial court correctly applied Florida Rule of Civil Procedure 1.070(j) to Respondents' lawsuits which were filed in December of 1987.

Respondents cite a long string of cases for their parroted simplistic conclusion that "retroactive" application of rules is prohibited. [A.B. 7] Respondents, however, utterly fail to examine how that catch-phrase is applied in the cases they cite. In fact, most of the cases cited by Respondents are inapplicable to the situation before the court.

For example, in Tucker v. State, 357 So. 2d 719 (Fla. 1978), this court declined to apply the requirements of a new rule (which required the prosecution in a criminal action to make application to the trial court for a stay prior to taking an appeal) to a case in which the appeal had been completed prior to the amendment of the rule under case law which permitted the activity. Obviously, in that situation it would have been impossible for the prosecution to comply with the changed rule after-the-fact. In contrast, Respondents had nearly three months from the time Rule 1.070(j) was enacted to the time it became effective in order to achieve service of process on Defendants, all of whom Respondents' attorneys had served hundreds, if not thousands of times before. Even after the effective date of the rule, under a prospective application of Rule 1.070(j), Respondents would have had an additional 120 days to serve Defendants. In flagrant disregard of the Rules of Civil Procedure, Respondents waited 580 days after Rule 1.070(j) became effective before serving GRACE.

Similarly, in Buskirk v. Suddath of So. Fla., Inc., 400 So. 2d 810 (Fla. 3d DCA 1981), the court held that a newly-enacted rule of civil procedure did not validate a "settlement agreement" which was invalid at the time it was entered into, more than a year before the rule became effective. Most of the other cases cited by Respondent deal with the application of the speedy trial rule in criminal procedure, which implicates a number of constitution considerations and is, therefore, not analogous. 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) (all applying the speedy trial rule in effect when a Defendant is taken into custody.].

Out of all the cases cited by Respondent, only one lower court case supports Respondents' argument, and that case vividly demonstrates the reasons why Respondents' position is incorrect, unmanageable and unworkable. In Blue v. Malone & Hyde, 575 So. 2d 292 (Fla. 1st DCA 1991), a workers' cornpensation claim was filed in August of 1984. Shortly thereafter, on January 1, 1985, the workers' compensation rule of procedure governing failure to prosecute was amended. Prior to the amendment, where a case had neither record nor non-record activity for a period of two years, the case would be dismissed for failure to prosecute. The 1985 amendment shortened the permitted period of inactivity (again looking at both record and non-record activity, unlike the Rule 1.420(e), Fla.R.Civ.P.) to one year. In November of 1987, the employer filed a Motion to Dismiss for Lack of Prosecution, which the judge of compensation claims granted, finding that there was no **record** activity for one year. The First District Court of Appeal reversed the JCC's decision, finding that he improperly limited himself to the consideration of only record evidence and that, because a two year period of inactivity was permitted under the rules of procedure at the time the claim was filed, and there had been record activity in the two year period preceding the Motion to Dismiss, the claim should not have been dismissed by the JCC.

The result reached by the First District Court of Appeal in Blue creates chaos out of order. Under that court's reasoning, the manner in which a party to a lawsuit must conduct his case is "frozen" by the rules of procedure in effect when the suit was filed. An attorney would have to keep a separate rule book in each of his case files so as to determine which rules apply to which cases. If two clients of the same lawyer were injured on the same day, hired the lawyer on the same day, and the lawyer filed one claimant's action on December 31 and the other's action the very next day, in January of the following year, and then did nothing further on either case for 13 months, one claimant's action would be subject to dismissal and the other's would not, notwithstanding that both claims had been equally inactive. Such a result makes no sense whatsoever.

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

As one would expect with a procedural rule, applying the rule to pending cases does not necessarily affect any litigant's rights. First, every plaintiff who had a case pending after October 6, 1988 when the rule was enacted had notice of the impending deadline.

This gave them an additional 86 days to effect service prior to the rule taking effect or to request a judicially granted stay of the requirement. Additionally, no plaintiff has a substantive right to file a lawsuit and willfully fail to serve the defendant for as long as the plaintiff likes. Love v. Jacobsen, 390 So. 2d 782 (Fla. 3d DCA 1980) [holding no person has a vested right in a rule of procedure]. Thus, cases refusing to apply a shortened statutory limitations period to an action which accrued prior to the statute, such as those cited by Respondents,[1] have absolutely no relevance to this action. Once Rule 1.070(j) was enacted, under a prospective application of the rule, plaintiffs still had 120 days to effectuate service. It is only the failure to comply with the rule once the rule is in effect which results in sanctions.

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

Respondents' ignore the unfairness inherent in the interpretation of Rule 1.070(j) they urge this court to adopt. A basic tenet of American jurisprudence is equal application of the law: i.e. like litigants should have the same law applied similarly. However, fairness between similarly situated plaintiffs is achieved only if Rule 1.070(j) is applied to all cases and pending cases are given 120 days from the rule's effective date in order to achieve service.

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[1] Foley v. Morris, 229 So. 2d 215 (Fla. 1976); In Re: Estate of Jelley, 360 So. 2d 1213 (Fla. 2d DCA 1978); Maltempo v. Cuthbert, 288 So. 2d 517 (Fla. 2d DCA 1974).

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

Respondents attempt to gloss over the substantial and well-reasoned federal case law interpreting Federal Rule of Civil Procedure 4(j) [the analogy to Florida's Rule 1.070(j)] to apply to cases filed prior to the effective date of the rule. See, e.g., Coleman v. Holmes, 789 F.2d 1206 (5th Cir. 1986); Gordon v. Hunt, 116 F.R.D. 313 (S.D.N.Y. 1987), affirmed, 835 F.2d 452 (2d Cir. 1987); Sanders v. Marshall, 100 F.R.D. 480 (W.D.Pa. 1984); Cool v. Police Dest. of the City of Yonkers, 40 Fed.R.Serv.2d 857 (S.D.N.Y. 1984).[2] These cases derive from the language of Rule 4(j), which is identical to Florida's Rule 1.070(j), that the Rule 4(j) time limit for service of process should apply to all pending cases. The cases reject the argument, as made by Respondents, that application of the 120-day time limit for service of process is a "retroactive" application of the rule. All of these cases are analogous to the situation in this case and the rule of those cases should be adopted by this court to hold that Respondents did not have more than 120 days after the effective date of Rule 1.070(j) to serve Defendants.

Petitioners have already discussed the facts of these cases [Petitioner, W. R. GRACE's, Initial Brief on the Merits, pp.12-18; Initial Brief on Merits of Petitioner OWENS-CORNING FIBERGLAS

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[2]Contrary to the Partin court's observation, none of these cases justify their holdings on the applicability of Rule 4(j) to previously pending cases by resorting to the legislative history of Rule 4(j).

CORPORATION, pp.2-4.] The language of those cases is the strongest refutation of Respondents' cavalier dismissal of their holdings.

Respondents rely heavily on the cases which Gordon is criticizing. Those cases either do nothing more than summarily decide the issue without discussion, involve process issued prior to the effective date of the rule, or base their decision on the legislative history behind the substantial amendments made at that time to Rule 4.[3] The Gordon court held the single sentence in the legislative history relied on by those cases was discussing the method by which service would be permitted to be made, rather than time limits.

D. Partin Court's Analysis Is Flawed:

Respondents rely almost exclusively on the "root" case for all the Florida decisions which refuse to apply Rule 1.070(j) to cases filed prior to its effective date, Partin v. Flagler Hospital, Inc., 581 So. 2d 240 (Fla. 5th DCA 1991). See, King V. Perlstein, 592 So. 2d 1176 (Fla. 2d DCA 1992); Lewis v. Burnside, 593 So. 2d 1185 (Fla. 2d DCA 1992); Parlier v. Eagle-Picher Industries, Inc., 596 So. 2d 1125 (Fla. 5th DCA 1992) [all citing the Partin decision as authority without discussion of the underlying issues. As has been previously demonstrated, the decision in Partin is seriously flawed.3.

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[3]Baranski v. Serhant, 602 F.Supp. 33 (N.D.Ill. 1985); Peters v. W. E. Bliss Co., 100 F.R.D. 341 (E.D.Pa. 1983); Donaghy v. Roudebush, 614 F.Supp. 585 (D.N.J. 1985); Kyle V. Steamfitter's Local Union No. 614, 767 F.2d 920 (6th Cir. 1985); Verri v. State Automobile Mutual Insurance Co., 583 F.Supp. 302 (D.R.I. 1984).

Grace has already extensively addressed the Partin decision in its Initial Brief on the Merits [pp.18-20].

Briefly, the Partin court's refusal to apply Rule 1.070(j) to cases pending as of January 1, 1989 was erroneously based on a fear that application to pending cases would affect a litigant's "rights" and failed to analyze whether Rule 1.070(j) affected any substantive rights of claimants bringing a lawsuit or was merely a procedural rule in which no party has a vested right. Love v. Jacobsen, 390 So. 2d 782 (Fla. 3d DCA 1980). Partin's commentary on federal case law interpreting Rule 4(j) as being "unhelpful" because the case law relies on the federal rule's legislative history is similarly misguided.

II. RESPONDENTS WAIVED ANY ARGUMENT AS TO THE TIMELINESS OF SOME DEFENDANTS' RAISING OF RULE 1.070(j) BECAUSE RESPONDENTS FAILED TO RAISE THE ISSUE BEFORE THE TRIAL COURT

In the appeal before the Fifth District Court of Appeals Respondents raised for the first time the argument that GRACE (and 10 other Defendants) were barred from asserting Respondents' non-compliance with Rule 1.070(j) because GRACE (and the other 10 Defendants) failed to assert Respondents' non-compliance with the 120-day rule in their initial responsive pleadings or motions. In arguing this position, Respondents conveniently ignore the preliminary question of whether the issue of Defendants' Rule 1.070(j) defenses timeliness was ever preserved for appellate review. The answer, simply, is no.

Respondents never raised this issue before the trial court as a grounds for avoiding GRACE's (or any other Defendant's) Motion to

Dismiss for Failure to Serve. (R.4-31) This issue was not ruled upon by the Fifth District, is not a matter of conflict between the districts and is not the proper subject of argument on this appeal. Even if the Fifth District had considered the argument, they could not have properly ruled on the issue, because Respondents, by never raising that objection to the lower court, did not preserve the issue for review.

Before a trial court may be held in error, the trial court must have the opportunity to rule upon the question presented to the appellate court. Paul v. Canter, 155 So. 2d 402 (Fla. 3d DCA 1963); Walker v. Hampton, 225 So. 2d 325 (Fla. 1st DCA 1970) ["The rule is well settled that an appellate court will not consider matters urged for reversal unless the lower court had been afforded a full and adequate opportunity to consider such contentions."] Palmer v. Thomas, 284 So. 2d 709 (Fla. 1st DCA 1973) ["The function of the appellate court is to review errors allegedly committed by the trial court and not to entertain for the first time on appeal defenses which the complaining party could and should have but did not interpose and present to the trial court for decisions."] For an appellate court to rule upon a question which was not presented to the trial judge would be unfair to the trial judge and against the well-settled law of Florida. Schweigel v. State, 382 So. 2d 868 (Fla. 5th DCA 1980). It is also unfair to the opposing party, since it does not provide an opportunity to present evidence to the trial court in support of their position and against the present change of waiver.

The alleged error in the trial court's considering a Motion to Dismiss based on a Plaintiff's failure to comply with Rule 1.070(j) is not of such fundamental character that it is subject to appellate review without having been argued at the trial court level. "Fundamental" questions which may be determined without first being argued at the trial court involve constitutional questions and substantive rights of parties. Sanford v. Reuben, 237 So. 2d 134 (Fla. 1970); Libe V. City of Miami, 141 So. 2d 728 (Fla. 1962). Appellate courts should be very guarded in finding a fundamental error. Sanford v. Reuben, 237 So. 2d at 137. Here, no substantive or fundamental principle is involved in determining whether or not a motion was timely under the rules of civil procedure. Instead, the alleged error in this case is exactly the sort of procedural matter which should have been presented to the trial court.

The cases cited by Respondents concerning a Defendant "submitting himself to the court's jurisdiction"[4] simply have no applicability where a Plaintiff has failed to raise that argument at the trial court in opposition to a Defendant's motion. Neither of the cited federal cases interpreting the interplay between Federal Rule 4(j) and 12(h)(1)[5] are applicable for the same reason;

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[4] Consolidated Aluminum Corp. V. Weinroth, 422 So.2d 320 (Fla. 5th DCA 1982), rev.den. 430 So.2d 450 (Fla. 1983); EGS Tamsa Associates v. Edsar V. Bohlen, V.F.G.M. A.B., 532 So.2d 1218 (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).

[5] Pardazi V. Cullman Medical Center, 896 F.2d 1313 (11th Cir. 1990); Kersh V. Derozier, 851 F.2d 1509 (5th Cir. 1988).

in neither case did a Plaintiff simply fail to raise an argument at the trial level, thus essentially inviting the trial court to err. As Respondents waived their right to protest the timeliness of certain Defendants' raising of the Rule 1.070(j) defense, Grace will not extensively address the substantive reasoning of Pardazi and Kersh courts, except to observe that a Rule 1.070(j) service defect is not similar to every other type of "defective" service. All other defects in service of process (to which waiver applies) may be ascertained solely by the process document itself and knowledge of the person served concerning the method of service. In contrast, late service under Rule 1.070(j) does not appear on the face of the service document and must be ascertained by independent investigation, raising questions about whether such late service is in fact a "defect" in service which must be raised in an initial pleading.

Respondents had ample opportunity to raise the issue of the non-inclusion of the 120-day defense in the initial pleadings of GRACE and the 10 other Defendants before the trial court, but did not do so. Under the law of Florida, Respondents are precluded from raising this issue for the first time on appeal. Thus, the issue of whether or not GRACE (and 10 other Defendants) properly preserved or waived their right to a dismissal of Respondents Complaints was not properly before the Fifth District and cannot serve as a basis of reversal of the trial court's judgment dismissing Respondents' actions.

CONCLUSION

Well-settled principles of Florida law hold that, unless otherwise stated, rules of procedure apply to all pending cases. Rule 1.070(j) sets out the procedural time limits for service of process to be effected and should, therefore, be applied prospectively to cases pending on the rule's effective date. Bath public policy and federal case law interpreting Federal Rule of Civil Procedure 4(j) support a conclusion that the timely service requirements of Rule 1.070(j) apply equally to cases filed before and after its effective date.

The decisions of the Fifth District Court of Appeal in Partin v. Flagler Hospital, Inc. and in this action holding to the contrary were based on erroneous reasoning and directly conflict with decisions in other district courts of appeal. Consequently, this court should reverse the decision of the Fifth District Court of Appeal below and direct that court to reinstate the dismissals without prejudice entered by the trial court in Respondents' actions.

This court should not consider Respondents' arguments concerning the timeliness of some Defendants' raising of the Rule 1.070(j) because Respondents waived the defense by failing to raise that issue before the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U. S. Mail this 20th day of November, 1992, to all counsel shown on the attached service list.

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