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

REPLY BRIEF ON MERITS OF PETITIONER OWENS-CORNING FIBERGLAS CORPORATION WITH SUPPLEMENTAL APPENDIX

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INTRODUCTION

This reply brief of petitioner, Owens-Corning Fiberglas Corporation ("OCF"), is filed in response to the brief on the merits filed by respondents, in which they contend that their failure to effect service of process on OCF and certain of its co-defendants within the time prescribed by Rule 1.070(j), Fla. R. Civ. P. did not warrant dismissal of their complaints which had been pending but unserved for mare than a year when the rule took effect and which remained unserved for more than 18 months thereafter. Respondents also make the untenable argument that OCF and certain other petitioners waived the issue of late notice. In this brief, respondents will be referred to collectively as Plaintiffs and individually by last name. The abbreviations "R" and "SR" will be used to refer to the record on appeal and supplemental record in the district court of appeal, which are now on file in this Court.

Several of OCF's co-petitioners have already filed or will file reply briefs. To avoid unnecessary repetition, OCF will adopt those briefs, supplementing them, where appropriate, with references to facts or arguments which are peculiarly applicable to the appeals as to OCF, or which are not fully covered in the briefs of the co-petitioners.

STATEMENT OF THE CASE AND FACTS

Plaintiffs' Statement of the Case and Facts contains highly material inaccuracies with respect to the waiver issue and omits crucial facts relevant to OCF's position on that issue. The inaccuracies and omissions are inexplicable, because OCF pointed

them out after Plaintiffs made the identical mistakes in their initial appellant's brief in the district court of appeal. Plaintiffs acknowledged their mistakes in their reply brief, but have now made the same mis-statements and omissions in this Court. It thus becomes necessary for OCF to make the following additions and corrections to Plaintiffs' Statement of the Case and Facts.

Plaintiffs assert on page two of their brief on the merits that OCF was among eleven co-defendants who did not raise the defense of failure to effect service within **120** days in their initial responsive pleadings or motions. This is not so. The record shows that OCF expressly raised this defense by filing on August **14, 1990,** its **motions to** dismiss or strike the complaints of the following Plaintiffs: Baugh [R **637],** Parlier [R **643],** Doolittle [R **656],** Downing [R **662],** Young [R **675]** and Stipanovich **[R 682].** As to each of Plaintiffs named above, paragraph **19** of the Motions (paragraph **18** in the Downing case) asserted:

> The Complaint should be dismissed because the Plaintiff failed to serve the Complaint upon this Defendant 120 days after filing, pursuant to Rule 1.070(j) **of** the Florida Rules of Civil Procedure.

On October 3, 1990, OCF also filed, in each of the cases of the six Plaintiffs named above, a notice of joinder in various defendants' motions to dismiss, in which it adopted the motions to dismiss based on Rule 1.070(j) previously filed by defendant Foster Wheeler and asserted, with more specificity than its prior motions based on the rule:

> That service of process of these cases **was** made on Owens-Corning Fiberglas Corporation

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July 23, **1990**, over two and one-half years after the filing of the initial Complaint in this matter.

[R 1652, 1664, 1679, 1699, 1723, 1735].

The record references in the second paragraph on page two of Plaintiffs' brief on the merits indicate that **OCF's** initial defensive motions and responsive pleadings directed to the complaints of Parlier and Baugh (and to those of Henry and Hayes, whose claims have since been settled)' did not assert the defense of failure to comply with Rule 1.070(j). **[R 219-233; 260-2741.** Those initial responses to the Baugh and Parlier complaints were filed on July **11** and **19, 1990,** respectively **[R 219,** 260], before Baugh and Parlier served process on **OCF,** which happened **on** July **24, 1990. [SR 127,** 162]. After **OCF** had been served, it filed on August **14,** 1990, motions which expressly asserted that the Baugh and Parlier complaints should be dismissed on the ground that the complaints had not been timely served as required by Rule **1.070(j). [R 633, 637, 639,** 643]. **As** previously noted, OCF raised the same defense again, with more specificity, on October **3, 1990,** when it

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1 The five Plaintiffs who have settled **and** voluntarily dismissed their claims against **OCF in** the following Circuit Court **Cases** are:

Henry:	**87-8889**
Holt:	**87-8890**
McKinley:	**87-8918**
Hayes:	**87-8934**
English:	**87-0938.**

The order of the district court of appeal approving stipulations for the dismissal of the appeals of these plaintiffs as to OCF appears at page **76** of record on appeal of the 5th **DCA** proceedings.

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filed notices of joinder in Foster Wheeler's motions to dismiss the Baugh and Parlier complaints on this ground. [R 1652, 1654].

At no time during the proceedings below did Baugh or Parlier object to OCF's motions to dismiss by contending that OCF had waived the defense of failure to serve within 120 days by filing initial responses to their complaints which did not include that defense. Likewise, neither Baugh or Parlier ever moved to strike OCF's subsequent (post-service of process) motions and notices of joinder which expressly and with specificity raised the defense of noncompliance with Rule 1.070(j), nor did they otherwise challenge the timeliness or efficacy of OCF's motions.

The preceding corrections and additions to Plaintiffs' Statement of the Case and Facts appeared almost verbatim in OCF's appellee's brief in the District Court of Appeal, in response to Plaintiffs' Statement of the Case and Facts, which was virtually identical to the portion of their Statement of the Case and Facts at pages 2-3 of their brief on the merits in this Court. In a footnote on page 9 of their reply brief in the 5th DCA, Plaintiffs acknowledged that OCF's factual account was correct, but persisted in their contention that OCF's premature pre-service motions to dismiss the complaints of Baugh and Parlier resulted in a waiver of the late service defense as to them. A copy of page 9 of Plaintiffs' reply brief in the district court of appeal is reproduced in the Supplemental Appendix of this brief. OCF will deal in the Argument portion of this brief with Plaintiffs'

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contention that the late service defense was waived as to Baugh and Parlier.

REPLY ARGUMENT

POINT I

THE TRIAL COURT PROPERLY APPLIED RULE 1.070(j) TO THESE CASES, SINCE PLAINTIFFS' ACTIONS WERE PENDING ON THE EFFECTIVE DATE OF THE RULE.

OCF adopts by reference the arguments of its Co-Petitioners on this point, with the following brief additional comments. Contrary to Plaintiffs' argument, the effect of the trial court's ruling was not to apply Rule 1.070(j) retrospectively. As shown in OCF's initial brief on the merits, the trial court's application of the rule to the present case was a prospective, not retrospective application, which is consistent with the general rule that amendments to procedural rules apply to cases pending at the time of the effective date of the amendment. See OCF's discussions of Heberle v. Pro Liquidating Co., 186 So. 2d 280, 282 (Fla. 1st DCA 1966) and Cool v. Police Department of Yonkers, 40 Fed. R. Serv. 2d 857, 859 (S.D.N.Y. 1984) in its initial brief on the merits.

POINT II

THERE IS NO MERIT TO PLAINTIFFS' CONTENTION THAT OCF WAIVED PLAINTIFFS' FAILURE TO SERVE PROCESS WITHIN 120 DAYS, BECAUSE PLAINTIFFS DID NOT PRESERVE THE WAIVER ISSUE IN THE TRIAL COURT AND BECAUSE OCF PROPERLY RAISED AND PRESERVED THE LATE SERVICE ISSUE BY ITS CIRCUIT COURT PLEADINGS.

Plaintiffs are wrong in stating that OCF waived its defense based on Plaintiffs' failure to comply with Rule 1.070(j) by failing to raise the issue in its initial responsive pleadings or

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motions. As shown in OCF's Reply to Plaintiffs' the Statement of the Case and Facts, OCF's initial Motions to Dismiss or Strike the Complaints of Doolittle, English, Young, and Stipanovich asserted that those Plaintiffs had failed to serve their complaints within 120 days, as required by Rule 1.070(j). [R 656, 662, 668, 675, 682]. Plaintiffs' reply brief in the 5th DCA admitted that OCF was correct on this point, but Plaintiffs have inexplicably tried to resurrect this dead issue.

Aside from the five Plaintiffs who have settled their claims against OCF, the only cases in which OCF did not raise the Rule 1.070(j) defense in its initial responsive pleading were those involving Baugh and Parlier. In those two cases only, OCF filed, on July 11 and 19, 1990, before being served with the complaints [SR 127, 162], defensive motions and an answer with affirmative defenses which did not include the defense of failure to serve within 120 days. [R 219-233, 260-2741.

Nevertheless, on August 14, 1990, OCF did file motions to dismiss and strike the complaints of Baugh and Parlier which included the Rule 1.070(j) defense and which were virtually identical to OCF's initial motions attacking the complaints of the other Plaintiffs. [R 637, 643]. Those motions were, in fact, OCF's initial responses following service of the complaints of Baugh and Parlier, which took place on July 24, 1990. [SR 127, 162]. Moreover, OCF filed on October 3, 1990, in all the cases now under review, including those in which Baugh and Parlier are Plaintiffs, Notices of Joinder which again raised, with more

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specificity, the issue of failure to serve within 120 days. [R 1652, 16641.

Neither Baugh nor Parlier ever contended in the lower court that OCF had waived the late service defense by not including that defense in its "initial" (i.e. pre-service of process) defensive motions and answers. If Baugh and Parlier had raised the issue of waiver, the explanation of OCF's premature filings of responses would have come to light, and OCF would have had an opportunity to set the matter right by appropriate motions.

There is an explanation for OCF's filing defensive motions and answers before being served with process in the Baugh and Parlier cases, but it does not appear of record. Because Plaintiffs failed to raise the waiver issue in the trial court, there was never any occasion for OCF to explain the special circumstances which led it to file defensive motions before being served. Had Plaintiffs raised the issue of waiver, OCF could have filed motions to amend or withdraw its premature defensive motions and answers on appropriate grounds and to have the motions to dismiss or strike filed on August 14, **1990** [R 633, 639] treated as its initial defensive motions. In light of the policy of liberality of the rules of civil procedure in allowing amendments, OCF's motions almost certainly would have been granted.

Plaintiffs are wrong in stating on page 13 of their brief, that it is "**immaterial**" that they did not raise the waiver issue in the trial court "because the omission could not be cured." They are also wrong in contending that there is no Florida case contrary

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to their interpretation of the two Federal cases on which they rely, Pardazi v. Cullman Medical Center, 896 F.2d 1313 (11th Cir. 1990) and Kersh v. Derozier, 851 F.2d 1509 (5th Cir. 1988).

The case of Astra v. Colt Industries Operating Corp., 452 So. 2d 1031 (Fla. 4th DCA 1984) squarely supports OCF's contention that, if Plaintiffs had raised the waiver issue in the trial court, OCF could have amended its premature defensive motions in the Parlier and Baugh cases so as to raise the late service defense and thereby cure any problem of waiver which might otherwise have existed. The Astra opinion discloses that the third party defendant Astra filed a motion to dismiss a third party complaint in a products liability action. Although the initial motion did not raise any question of personal jurisdiction:

> Five months later, but before the motion to dismiss was heard, Astra filed an amendment to its motion to dismiss alleging lack of jurisdiction over the person. Astra also filed a motion to strike Garcia's crossclaim as being premature because Garcia's liability to Colt had not been determined. Several months later, but before the motion was heard, Astra filed an amendment to the motion to strike asserting lack of personal jurisdiction. Subsequently, Astra filed a motion for leave of court to file the aforementioned amendments. The motions and amendments were considered by the trial court and both motions to dismiss and for leave to amend were denied.

Id. at 1032. [Emphasis added]. Astra appealed those interlocutory orders, and the district court of appeal reversed on the ground that the trial court lacked personal jurisdiction because Astra had manufactured the product in issue before the enactment of the long-arm statute under which it was served. In reaching its decision,

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the Astra court rejected appellee's argument that Astra had waived the issue of personal jurisdiction by failing to raise it in its initial motion to dismiss and distinguished Consolidated Aluminum Corp. v. Weinroth, 422 So. 2d 330 (Fla. 5th DCA 1982), rev'd denied 430 So. 2d 450 (Fla. 1982), one of the main cases on which Plaintiffs rely for their waiver argument in the instant case. [Plaintiffs' brief on the merits at 13].

The Astra court recognized the general rule in Consolidated Aluminum and similar cases that if a defendant does not raise the issue of personal jurisdiction in its initial motion or responsive pleading, the issue is waived. However, the court distinguished those cases on the ground that:

> [I]n none of them do we have the present scenario, i.e., an initial motion filed without asserting the jurisdictional question but amending the motion to raise that question before the motion is heard. In this case, prior to the motion's being heard, Astra tried to amend the motion to raise the jurisdictional question so that when it was heard by the court, the motion asserted the jurisdictional defect. It seems to us hypertechnical to suggest that it was waived and we hold that under the facts of this case the question was not waived.

Astra, 452 So.2d at 1033.

The same reasoning applies with equal force to the closely analogous facts of the instant case. Here, before OCF's pre-service motions to dismiss the Parlier and Baugh complaints were heard, OCF filed its post-service motions to dismiss which included the late service defense. As in Astra, it is hypertechnical to suggest a waiver under these circumstances. OCF's post-service

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motions to dismiss were filed before any hearing on the earlier motions and therefore effectively amended those motions by adding the late notice defense. At the very least, OCF would have been entitled to make a formal motion to amend which would probably have been granted, had Baugh and Parlier raised the waiver issue in the lower court.[2] See also Public Gas Co. v. Weatherhead Co., 409 So. 2d 1026 (Fla. 1982), in which this Court held that a waiver of an objection to personal jurisdiction should not be based on a "meaningless technicality" such as the mere filing of an attorney's appearance.

Because Baugh and Parlier failed to raise in the lower court the waiver issue which they now attempt to raise for the first time on appeal, OCF never had the opportunity or need to correct the problem by motions it could have made in the trial court. Accordingly, this case presents a classic example of why a litigant is required to preserve an issue in the trial court as a prerequisite to raising it on appeal. As additional reasons for rejecting Plaintiffs' contention under this point 11, OCF adopts the arguments in the Reply Brief of its Co-Respondents W.R. Grace and Keene Corp.

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[2] In light of the clear holding in Astra, the federal decisions in Pardazi and Kersch are of little or no precendential value in the case at bar. This is particularly so since Federal Rule 12(h)(1) is not "substantially equivalent" to Florida's Rule 1.140(h)(1), as Plaintiffs contend in footnote 11 on page 13 of their brief. Even a cursory comparison of the two rules discloses material difference which could justify divergent results under the Federal and Florida rules.

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CONCLUSION

Based on the foregoing reasons and authorities, the circuit court properly dismissed Plaintiffs' complaints, and the District Court of Appeal erred in reversing these dismissals. Accordingly, the decision of the District Court of Appeal should be quashed and the cause remanded with directions to reinstate the orders dismissing Plaintiffs' actions.

CERTIFICATE OF SER

WE HEREBY CERTIFY that a copy of the foregoing Answer Brief was mailed this 20th day of November, 1992 to all counsel on the attached service list.

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cold. (These are the same arguments Appellees make herein). The court answered those contentions, stating "in addition to the authority of the court *to* dismiss for failure *of* a plaintiff to prosecute, the desire of plaintiffs generally to prosecute their cases and preserve evidence can be relied upon to prevent such a result." 356 So.2d at 1281.

Finally, Appellees contend that Appellants did not show good cause. This issue has not been raised by Appellants herein and is not properly before this Court. In any event, it is immaterial to the issues that are raised in this appeal.

C. Eleven Appellees Waived the 120-Day Rule Defense. - Point III

This issue involves the interplay between rules 1.070(j) and 1.140(h)(1). Appellants' position is that eleven Appellees waived any objection or defense based on rule 1.070(j) by failing to raise the issue in their initial responsive pleadings or motions.[4]

Some of the Appellees affected by this waiver contend that this issue cannot be raised for the first time on appeal. They argue that if the issue had been before the trial court, they might

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[4] Appellants accept the qualifications set forth in the Statement of Case and Facts in the brief of Owens-Corning Fiberglas, at pp.2-3. Appropriate orders of dismissal have been entered herein with regard to the five plaintiffs who settled with OCF. *See* OCF's brief, p.2, n.1. However, Appellants strongly disagree with OCF's conclusion that its initial responsive motions in the Baugh and Parlier cases were the motions it filed on August 14, 1990 after being served with process. OCF's brief, pp.9-10. OCF's previous motions to dismiss in those two cases were filed prior to service of process but evidenced OCF's complete familiarity with Appellants' complaints. By moving to dismiss prior to being served without raising the 120 day rule defense, OCF waived that defense and subjected itself to the court's jurisdiction.

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