91-A-0107M

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,837

W.R. GRACE & CO. - CONN., etc., et. al.,

Petitioners,

vs.

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

Respondents.

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEALS

REPLY BRIEF ON THE MERITS OF PETITIONERS PITTSBURGH CORNING CORPORATION, FIBREBOARD CORPORATION, AND KEENE CORPORATION

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STATEMENT OF THE CASE AND FACTS

Respondents tender a second issue of "waiver" in this discretionary review, although they did not raise such an issue in the trial court. Their statement of the case omits relevant facts regarding this purported issue.[1]

Mr. O'Shea was present at the hearing on the 120-day rule on behalf of all plaintiffs in these cases. He did not dispute the judge's statements that all pending motions had as a common ground the failure to serve within 120-days of the effective date of rule 1.070(j). R.8.[2] It is apparent that by the time that hearing went on the record, all parties believed that the 120-day rule was at issue on behalf of all parties.

At the end of the hearing, the judge instructed all counsel to review and approve the proposed order before submission to the court. R.29. Plaintiffs made no objection to the proposed order. After the order was signed, no motion for rehearing was filed. R.2304-2348.

Finally, Respondents misstate the order of dismissal. They state at page 14 that "The orders of

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[1] Although this reply is served on behalf of three Petitioners, Fibreboard Corporation, Pittsburgh Corning Corporation, and Keene Corporation, the purported second issue pertains only to Petitioner Keene Corporation.

[2] In addition, many defense motions took the form of adoption of other motions. E.g., R.1616-1618, 2134-2137.

dismissal simply recite the fact that eight specified motions raised the 120-day rule issue. This was a correct factual statement ... which plaintiffs did not dispute."

In fact, the orders read as follows:

> This cause having come before the Court for hearing on October 29, 1990, on the following motions:
> 1. Motion to Dismiss for Failure to Serve of W. R. Grace Company;
> 2. Motion to Dismiss of Foster Wheeler Corporation;
> 3. Motion to Dismiss of Anchor Packing Company;
> 4. Motion to Dismiss and/or Strike of Eagle-Picher Industries, Inc.
> 5. Motion to Dismiss of Armstrong World Industries, Keene Corporation, GAF Corporation, National Gypsum Company and U.S. Gypsum Company;
> 6. Motion to Dismiss and Quash Service of Process of Owens-Illinois, Inc.;
> 7. Owens-Corning Fiberglas's Notice of Joinder in Various Defendant's Motion to Dismiss;
> 8. Motion to Dismiss and/or Strike of Fibreboard Corporation and Pittsburgh Corning Corporation;
> 9. Motion to Dismiss of U.S. Mineral Products.
> The common ground in each of these Motions is that Plaintiffs' action should be dismissed because Plaintiffs did not comply with Fla.R.Civ.P. 1.070(j).

The Petitioners that Respondents claim did not raise the 120-day rule are specifically named in this order, including Keene Corporation. SR.2304-2305, 2308-2309, 2312-2313, etc., paragraphs 1, 5, 7, and 9.

ARGUMENT

The only issue properly before the court is the applicability of the 120-day rule.[3]

Respondents first argue that the Fifth District's decision, based upon the Partin analysis,[4] is correct because "it is axiomatic" that procedural rules may not have retroactive effect without an express statement of that intent. Respondents then argue that declaration of the effective date, conjoined with rule 1.010's requirement that all rules apply to all cases, does not "answer the question" of whether this rule should be applied "retroactively".

But Respondents' use of the term "retroactive" is misleading. The lower court did not effect such an application, and Petitioners do not propose such here. The question is not whether the rule should have retroactive

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[3] Respondents suggest at note 5 of their brief that Jurisdiction was improvidently granted due to a lack of discussion of this issue in the opinions reviewing dismissals under this rule. The instant decision conflicts with this court's decision adopting the rule, and the Berdeaux decision, which addresses this issue, has been only partially disapproved by this court. Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla.3rd.DCA 1990), cert.denied, 589 So.2d 294 (Fla. 1991), disapp.inpart, Morales v. Sperry Rand Corp., 17 FLW S348 (Fla. 1992). The districts are clearly in conflict on whether rule 1.070(j) may be applied to cases pending on its effective date. The Third and Fourth Districts are clearly applying the rule, and the Fifth is clearly not. This court properly exercises its discretion by resolving such manifest conflicts in application of this court's rules.

[4] Partin v. Flagler Hospital, Inc., 581 So.2d 240 (Fla.5th.DCA 1991).

effect, but whether it applies at all, even prospectively, to cases pending on its effective date. The declaration of the effective date conjoined with rule 1.010, does answer the question of whether the rule is intended to apply to cases pending on its effective date. This court declared that the rule would be effective on January 1, 1989, and rule 1.010 commands the lower courts to apply all rules to all cases. This is an express intent. To interpret rule 1.070(j) as applicable only to cases filed after January 1 renders rule 1.010 totally suspended on that date.[5] The trial court correctly applied the rule's sanction to process served 19 months after the rule's effective date.

Moreover, application of the rule to cases pending on its effective date is not "literally" impossible, as suggested in Partin and argued by Respondents. Application of the rule to pending cases involves different procedural postures, but the rule's terms embrace a fair solution for each "scenario" that might arise.

In cases filed less than 120-days before January 1 and remaining unserved on January 1, plaintiffs have not yet technically violated the rule. The first option under the rule is to seek additional time to effectuate service by stating "good cause". The length of time that passed prior

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[5] When the rule took effect on January 1, "all" cases included only pending cases.

to the effective date of the rule may rise to the level of "good cause".[6] Other factors of good cause, like evasion of service by the defendant, may or may not be required.

The second option is simply to accomplish service within the remaining portion of the 120-days. For example, minimal time was needed to effectuate service on these defendants since plaintiffs had in most cases only to type the summonses and send a single process server to the office of C.T. Corporation. Most defendants joined below could have been easily served in any one day of the 120.

In the case of complaints filed more than 120-days before January 1 and remaining unserved on January 1, the sanction is technically immediately available. Service of process has literally not been accomplished within 120-days of the filing of the complaint. Yet the rule also provides that a showing of good cause may excuse such a failure to serve. The rule thus presents two options: seek additional time (not necessarily 120-days) by submitting a statement of good cause (which may incorporate any innocent passage of

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[6] This is not a foregone conclusion, for current methods of adopting rule changes give notice to all practitioners of all imminent changes. Plaintiffs' counsel had notice of the sanction by October, 1988 when it was adopted. Deliberate delay in issuing summonses in the face of that knowledge may or may not constitute good cause. The trial judge has discretion to determine good cause in the circumstances of actual or constructive knowledge of the plaintiffs' counsel. Counsel below never claimed not to know of the 120-day rule, before or after its effective date.

time prior to effectiveness of the rule and traditional good cause such as evasion of service by the defendant); or serve the defendant and take your chances on demonstrating good cause when service is accomplished.[7]

The final scenario which the rule literally embraces is the instant scenario. The 120 days had passed when the rule became effective, making the sanction technically immediately available to the court. The plaintiffs did not seek additional time by filing a motion setting forth good cause, but neither did the court apply the rule immediately by dismissing all cases on January 1. Instead, one judge in effect granted a sua sponte extension of 120-days, then abated the cases for failure to effect service. Plaintiffs still did not file any statement of good cause or respond with any form of diligence. Dismissal was "threatened" again in other cases. Additional time was finally requested, albeit improperly (not by motion under the rule and without a statement of good cause or a finding of such). In those cases, service was not made on Keene within the time requested. Finally, nineteen months after the sanction of rule 1.070(j) was literally available, plaintiffs effectuated service. They chose the last literal option of the rule: they served the complaint and took their

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[7] But see, n.6 supra.

chances. But there was no "good cause" for their dilatory prosecution of the case. Dismissals were therefore proper.

Petitioners again stress that they do not take the position that the complaints should have been dismissed on January 1, 1989. Petitioners seek to illustrate that the literal terms of the **rule are fulfilled** in application **of** the rule to this case. In the instant scenario, the sanction was technically available but not enforced until nineteen months had passed without good cause. Dismissal does not require, as Respondents contend, a "rewriting" of the rule. Dismissal should be reinstated.

Respondents also rest their argument on several Florida cases discussing applicability of rule changes. These Petitioners respectfully adopt the argument and analysis of those cases by co-Petitioners. These Petitioners add that those cases relating to application of criminal rules effectuating the constitutional right to a speedy trial are limited by Bloom v. **McKnight, 502 So.2d 422** (Fla. **1987).** In that case, this court held that the rule permitting the state to re-try a defendant who obtains dismissal for lack of a speedy trial applied, even though it was not in effect at the time of arrest. As explained by this Court, the "operative event" must be determined, and the rule in effect at that time is the rule to be applied, Here, the "operative event" is the effectuation of service, as pointed out by Petitioner Ownens-Illinois, Inc., not the

filing of the complaint. See, also, Zabrani v. Cowart, 502 So.2d 1257 (Fla.3rd.DCA 1986), affirmed, 506 So.2d 1035 (Fla. 1987) disagreeing with, State v. Green, 473 So.2d 823 (Fla.2nd.DCA 1985) (relied upon by Respondents).

Respondents also analogize rule 1.070(j) to a shortening of the statute of limitations. They argue that a statute of limitations may only be retroactively applied if there is clear express statement of legislative intent to do so, and if a "reasonable time" is allowed to file on causes of action subject to the shortened statutory period.

This argument is a straw man. Rule 1.070(j) does not shorten any statute of limitations. The statute of limitations on causes of action pleaded below allow four years to ''bring" an action. When the rule became effective, it was to force dilatory plaintiffs to make diligent service of process so as to close the escape hatch of preserving a cause of action without prosecuting it timely and diligently. These Plaintiffs failed to make diligent efforts to serve the defendants for another nineteen months. They failed to prosecute actions they had preserved under the statute of limitations. They failed to request additional time to comply with the rule for good cause, failed to demonstrate good cause, and failed to obtain a lower court determination that good cause for delay in service for another nineteen months existed. The statute of limitations is still four years, which have run

independently of enactment of rule 1.070(j) and of plaintiffs' dilatory tactics. The rule provides for dismissal without prejudice. Respondents may file again. If they effect timely service Defendants may raise the bar of the passage of time independently of rule 1.070(j). If they fail to do so, Petitioners may raise violation of rule 1.070(j) independently of the statute of limitations.

Moreover, if rule 1.070(j) were a shortening of the statute of limitations, a "reasonable" time for compliance was provided by the lower court. It waited 120-days after the effective date of the rule to impose a partial sanction, and nineteen months after the effective date of the rule to enter dismissals. The rule itself provides a mechanism by which additional time to prosecute the action may be obtained, for the court may grant additional time for "good cause". As already stated, an innocent passage of time prior to the effective date of the rule may ultimately be good cause. In any event, 120-days is reasonable and nineteen months is clearly not.

Respondents finally argue that federal cases under rule 4(j) support the instant decision. They make this argument without acknowledging Petitioners' argument regarding special problems of transition under rule 4, or the procedural postures of cases decided under rule 4 - even those they cite. Indeed, Respondents blithely rest their argument on the legislative history of rule 4, quoting

Congressman Edwards' statement that "service of process issued before the effective date will be made in accordance with current Rule 4."

That quotation demonstrates the correctness of Petitioners' argument. Respondents attempt to divert attention from the issue of applicability of the rule to pending cases to the distinct issue of applicability of rule 4 to process issued before its effective date. But the language quoted and the cases cited clearly show that rule 4(j) is applied to cases pending on its effective date if process had not issued on that date. E.g., Coleman v. Holmes, 789 F.2d. 1206, 1208 (5th.Cir. 1986).

The second issue proffered to this court by Respondents is not an issue at all, and this court should not indulge its argument.[8] At best, Respondents waived their right to raise such an issue. At worst, Respondents invited the purported error, deprived Petitioners of any opportunity to cure the error and/or to correct the record

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[8] Entertainment of this issue would embroil the court in many sub-issues and review of other decisions: whether 4(j) is purely "jurisdictional" or purely a sanction to force diligent prosecution; whether any defensive motion is amendable in any circumstances; whether Astra, infra., is correctly decided; whether the lower court abused its discretion in permitting joinder at or before the hearing; whether a finding of "waiver" is compulsory or whether a trial court has discretion to find on the facts before it that there was no intentional relinquishment of a defense.

below, and acquiesced in a de facto joinder of all Petitioners in all motions at the trial court hearing.

Other Petitioners against whom this waiver is argued have briefed the principle that appellate courts should not consider issues not presented to the lower courts. Keene Corporation respectfully adopts those arguments and emphasizes that the order of abatement, improper though it was since the rule requires dismissal, clearly put Respondents on notice of the pending sanction. When the cases were revived ex parte there was no showing of good cause for the intervening delay of 13 months. Judge Muszynski then received an ex parte request that did not set forth good cause for an extension of time in three other cases. Improper though that request was, service of process on Keene was not made within the time informally noted on that request. Thus, by the time the motions directed to rule 1.070(j) were heard, the trial court was faced with a series of quite deliberate and significant delays without any mitigating circumstances of "good cause". The rule's literal terms authorize the trial judge to dismiss the cases sua sponte. This authority is independent of Keene's right to request. dismissal. As between the authority of the court to sanction dilatory conduct and the perceived "unfairness" to plaintiffs who have no excuse for dilatory conduct, the authority of the court should be sustained.

In addition Respondents argue that Keene's purported waiver was irrevocable because objection to violation of the rule was not made in an "initial" pleading or motion.[9] Keene adopts the argument of Co-Petitioner Owens-Corning Fiberglas on amendability of motions and pleadings, as well as on distinctions between corresponding federal and state rules of court. Astra V. Colt Industries Operating Corp., 452 So.2d 1031 (Fla.4th.DCA 1984). See

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[9] Respondents assume that tardy service is "insufficient" service and rely heavily on concepts of "submission" to jurisdiction. Yet, cases they cite involve primarily failure to comply with statutes by which courts acquire jurisdiction, provisions which are within the legislative prerogative. E.G.F. Tampa Associates V. Edgar V. Bohlen, GFGM, A.G., 532 So.2d 1318 (Fla.2nd.DCA 1988), seems in conflict with Public Gas Co. V. Weatherhead Co., 409 So.2d 1026 (Fla. 1982). It is not a foregone conclusion that tardy service on a defendant who otherwise does not contest application of statutory provisions for acquiring jurisdiction over his person constitutes "insufficiency" of service or process. The rule partakes at least equally of a punitive rule for the purpose of forcing diligent prosecution. These Respondents hitherto argued that the rule is patterned on rule 1.420(e), and its purpose is to "clos[e] the pre-service gap from one year to 120 days". Respondents' Fifth District Reply Brief, at 7-8. The rule's provision for excusing late service where good cause is demonstrated suggests that such service is not necessarily "insufficient", but is "tardy". Authorization to dismiss sua sponte also suggests that tardy service is not purely an "insufficiency", for the court is not given express authority to dismiss sua sponte when statutes by which jurisdiction is acquired have not been fulfilled as to a defendant who has appeared. Cases relied upon by Respondents under rule 4(j) acknowledge that construing tardy service as an "insufficiency" creates difficulties in giving full effect to the authority given the trial judge by the rule. Because these arguments were never raised in the trial court, it is unnecessary for this court to engage in analysis of these sub-issues.

also, Lynn v. Cohen, 359 F.Supp. 565 (S.D.N.Y. 1973)(objection to personal jurisdiction raised by amended answer); Patterson v. Brady, 131 F.R.D. 679 (S.D.Ind. 1990)(violation of 4(j) raised one year after first defensive motion; no waiver found; motion raising violation of 4(j) determined on its merits by finding good cause).

Notwithstanding the above, it appeared to the court that all defendants had raised or joined in motions based on rule 1.070(j). Plaintiffs' counsel at least implicitly conceded that. Reference to this common "thread" and concession that all defendants had joined in the motions, can only be fairly viewed as de facto joinder. And if counsel misunderstood the commonality of objection in the heat of the hearing, the written order reciting the common grounds was not questioned. No corrections to the list of objecting defendants or the number of motions filed were submitted in response to the proposed order. No motion for rehearing was filed. The rulings of the lower court are clothed with a presumption of correctness. Having taken no issue with the recitation that all defendants, including Keene, specified by name, had joined in objection to tardy service, that presumption may not now be overcome.

CONCLUSION

The only issue properly before the court is applicability of rule 1.070(j). The Fifth District decision should be quashed; Partin should be disapproved; Berdeaux on

this issue should be approved; the dismissals should be reinstated.

Respondents failed to preserve their right to raise the purported second issue. The issue should not be considered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was served by mail this 18th day of December, 1992, on: see attached service list.

Respectfully submitted,

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