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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79-837

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

Defendants/Petitioners,

vs.

GARLAND P. PARLIER **and** MARIE W. PARLIER, his wife,

Plaintiffs/Respondents.

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL FOR FLORIDA

REPLY BRIEF OF OWENS-ILLINOIS, INC.

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SUMMARY OF ARGUMENT

Respondents' central argument in their Answer Brief is that Fla. R. Civ. P. 1.070(j) should not be applied to these cases because the cases were filed before the Rule's effective date. Plaintiff argues that under Florida law, rules of procedure are not applied retroactively to cases filed before a rule's effective date. Owens-Illinois respectfully submits, however, that rules of procedure are applicable to cases filed before and pending on the effective date of a rule of procedure, but will not be applied retroactively to events or proceedings which occurred within that case before the rule's effective date. If, however, the operative event or proceeding occurs after the Rule's effective date, the new or amended rule will apply.

In these cases, service of process was the operative event which triggered Fla. R. Civ. P. §1.070(j). Respondents did not serve process on Owens-Illinois until the summer of 1990, so the provisions of rule 1.070(j) controlled whether Respondents timely served Owens-Illinois. Respondents clearly did not comply with the time limitations of the rule, nor did they come forward with any showing of good cause as to why they did not comply with the rule. The trial court, therefore, properly dismissed these cases and Owens-Illinois respectfully requests this court to enter an order quashing the opinion of the Fifth District Court of Appeal in this case and reinstating the trial court's orders of dismissal.

ARGUMENT

Respondents' main argument in urging this court to affirm the Fifth District Court of Appeal's opinion below is that Fla. R. Civ. P. 1.070(j) cannot be applied to these cases because to do *so* would be an improper retroactive application of the rule. Plaintiff argues that it is "axiomatic" that Florida rules of procedure are only applied prospectively and because these cases **were** filed before rule 1.070(j)'s effective date, it cannot be applied to them.

Owens-Illinois agrees that several of the cases cited by Respondents in their Answer Brief specifically state that Florida rules of court have prospective effect only, unless otherwise specifically provided. Owens-Illinois respectfully submits, though, that Respondents are misinterpreting this statement when they argue that it means a new or newly amended rule of civil procedure does not apply to cases filed before the rule's effective date. Owens-Illinois submits that a careful analysis of the cases cited by Respondents reveals that this statement actually means that a new or newly amended rule will be applied to cases filed before and pending on its effective date, but that the rule will not be applied to operative events or proceedings which occurred within the case before the effective date. On the other hand, if those events or proceedings occur after the effective date, then the new rule or the newly amended rule will apply. Here, the operative event under rule 1.070(j) is service of process. As the Respondent served Owens-Illinois with process well after

rule 1.070(j)'s effective date, the rule controlled whether Owens-Illinois was timely served.

Almost all of the Florida cases cited by Respondents in their Answer Brief support this interpretation. The first group of cases are criminal cases concerning amendments to the criminal speedy trial rule: Tucker v. State, 357 So.2d 719 (Fla. 1978); 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). The central issue in each of these cases is whether amended speedy trial rules promulgated by this court applied to the particular fact situations. In each of the cases, the actual date of the offense is irrelevant. Instead, the controlling event for determining which rule applied was the date of arrest. If it occurred before the amendment's effective date, then the previous rule applied. If it occurred after the effective date, the new rule applied.

In Jackson v. Green, supra, the defendant was taken into custody on October 19, 1980, for battery on a law enforcement officer. He was later charged with that crime on March 18, 1981. The defendant subsequently filed a motion for discharge contending the State had not tried him within 180 days of his arrest in violation of the Rules of Criminal Procedure. The First District Court of Appeal noted, though, that the rule upon which the prisoner was relying did not become effective until January 1, 1981. Since his arrest occurred before the effective date of that

rule, the prior rule applied, and the State had one year to bring the defendant to trial.

A similar result was reached in Arnold v. State, supra, where the defendant was charged in 1973 with escape. He was not, however, arrested on that charge until October, 1980. The defendant filed a motion for discharge in March, 1982, alleging the state had not granted him a speedy trial on the escape charge. The trial court denied the motion, stating that the speedy trial rule adopted by this court in 1980 and which became effective on January 1, 1981, applied. The First District reversed, though, holding that the operative event was the defendant's arrest which occurred before the effective date of the amendment,

In State v. Green, supra, the Second District Court of Appeal specifically held that the event which began the running of the speedy trial time was the taking of the defendant into custody. The defendant was arrested in June, 1984, and an information was filed against him in August, 1984. His scheduled arraignment for later that month never occurred and the State refiled its notice of arraignment and notice of trial in January, 1985. The defendant moved for a discharge claiming that he had not been brought to trial within the 180-day time period set forth by the applicable Rule of Civil Procedure in effect when he was arrested. The State, though, argued that the new rule, effective January 1, 1985, applied to the case because the motion for discharge was not made until after the effective date. The Second District affirmed the trial court's order of discharge by ruling that the operative event

was the the defendant's arrest, which occurred before the amended speedy trial rule took effect. Thus, the prior rule controlled.

A key factor in each of these cases is the accused's substantive right to a speedy trial. A speedy trial in a criminal case is guaranteed by both the United States and Florida Constitutions, as well as by Florida statute. U. S. Const. Amend. VI; Art. I, Section 16(1), Fla. Const. (1968); Section 918.015, Fla. Stat. The Florida Supreme Court is empowered by Section 918.015(2) to promulgate rules for the administration of speedy trial. Thus, the defendants in the above cases had a substantive constitutional and statutory right to a speedy trial which attached to their arrest. This right could not be subsequently altered by an amended rule. On the other hand, it is clear that the amended rules would have applied had the defendants been arrested after the effective date of the amendments. Again, the date of the offense and the date the charges were filed were irrelevant to whether the amendments applied.

This analysis is consistent with the Fifth District Court of Appeal's ruling in Julian V. Lee, 473 So.3d 736 (Fla. 5th DCA 1985). That case involved a juvenile dependency action which was commenced on November 8, 1984. The speedy trial rule for dependency cases applicable at the time the action commenced provided for a 90-day speedy trial period. This rule was amended effective January 1, 1985, to provide a 180-day speedy trial period. A motion for discharge based on the old rule was filed after the effective date of the new rule and was denied by the

trial court. The Fifth District affirmed, ruling that the amended rule applied because dependency actions are civil proceedings and there was no statutory right or provision for a speedy trial in those types of actions. The Fifth District rejected any comparison with criminal speedy trial cases because "the constitutional right to a speedy trial in criminal cases has no application to civil proceedings." Julian, 473 So.2d at 739. Thus, because there was no substantive constitutional or statutory right of speedy trial attaching to the commencement of the dependency proceeding, the operative event for determining which speedy trial rule applied was the motion for discharge, which occurred after the amended Rule's effective date.

The second group of cases cited by Plaintiff are civil cases where the issue is whether amended rules of procedure or amended procedural statutes apply to the particular case. These cases also support Owens-Illinois' position that the date the action was filed is irrelevant to the analysis and that the applicability of the amended rule depends on the date of the operative event or proceeding. For example, in Trevino v. Chadderton, 571 So.2d 110 (Fla. 3d DCA 1990), review denied, 581 So.2d 1311 (Fla. 1991), the issue was whether a cross-claim judgment was properly set aside. The cross-claim was served in 1988 by mail, not by summons. Case law interpreting the 1988 version of Fla. R. Civ. P. 1.170(g) required cross claims to be served by summons and held service by mail was insufficient, unless the summons requirement was waived. Rule 1.170 was amended effective January 1, 1989, to allow service

of cross claims by mail on any party which had appeared in the case. The Third District affirmed the trial court's order setting aside the cross-claim judgment, holding that "[u]nder the 1988 version of the rule, which was in effect at the time of the service of the cross-claim, service should have been made by summons." See also: Acquisition Corp. of American v. American Cast Iron Pipe Co., 543 So.2d 878 (Fla. 4th DCA 1989).

The issue in Buskirk v. Suddath of South Florida, Inc., 400 So.2d 810 (Fla. 3d DCA 1981) was the enforceability of an oral settlement agreement reached during a deposition in October 1977. At the time of the agreement, Fla. R. Civ. P. 1.030(d) was in effect and required that all stipulations be written and either signed by the party or its attorney. The settlement agreement was transcribed, but it was never signed, nor was the signature requirement waived. Plaintiff rejected the terms of the settlement agreement ten days after the deposition. Fla. R. Jud. Admin. 2.060(g), which exempted settlement agreements from the "in writing" requirement, became effective July 1, 1978 and the defendant subsequently filed a motion to enforce the October, 1977, settlement agreement, which was granted by the trial court. The Third District reversed this order, holding that the new rule of Judicial Administration did not apply because there was no clear mandate of retroactivity. Although not specifically discussed by the court, the operative proceeding in Buskirk was the October, 1977, settlement stipulation, not the date the case was filed. Because the stipulation was unenforceable under the rule that

existed at the time it was made, it could not later be revived and enforced under the new rule which did not exist at the time. Had the oral settlement agreement been reached after July 1, 1978, Fla. R. Jud. Admin. 2.060(g) would have applied and there would have been no requirement that the agreement be in writing and signed by the parties.

In Leapai v. Milton, 595 So.2d 12 (Fla. 1992), this court applied a procedural statute to a case filed before the statute's effective date. The statute in question was Section 45.061, Fla. Stat., one of the offer of judgment statutes. After finding the statute was constitutional, this court found the statute was constitutionally applied to the subject case because even though the lawsuit had been filed before the statute's effective date, the offer of judgment pursuant to the statute and the rejection of the offer occurred after the statute's effective date. "In this instance, we agree with Leapai that the statute was not applied retroactively since the right to recover attorney's fees attaches not to the cause of action, but the unreasonable rejection of an offer of settlement." Leapai, 595 So.2d **at 15.**

The only case cited by Plaintiff which does not support this interpretation is Blue v. Malone and Hyde, 575 So.2d 292 (Fla. 1st DCA 1991). There, the issue was the applicability of a worker's compensation rule of procedure providing for dismissal for lack of record activity. The applicable rule at the time the claim was filed provided for a two-year period of inactivity before dismissal. The rule was subsequently amended in 1985 to shorten

that period to one year. The employer/carrier filed a motion to dismiss for lack of prosecution in November, 1987, and the motion was granted by the judge of compensation claims, who applied the amended rule because it was in effect at the time the motion to dismiss was filed. The First District reversed, stating that the former rule allowing a two-year period of tolerable inactivity was in effect at the time the claim was filed and, therefore, governed the case. The court then cited many of the cases cited by the Respondents here. Blue, 575 So.2d at **294**.

When the Blue decision is compared with the above cases, it becomes clear that the opinion is an aberration and is incorrect as it is the only case which relies on the date of filing as the operative event. Owens-Illinois submits that the First District should have affirmed the judge of compensation claims in Blue and found that the controlling operative event was the filing of the motion to dismiss for lack of prosecution.

It is clear, therefore, that, contrary to Respondents' position, the dates these cases were filed are irrelevant to whether rule 1.070(j) applies. Instead, this issue is determined by the date of service, because of service of process is the operative event which triggers the rule's provisions. The rule is meant to force plaintiffs to prosecute their cases by imposing sanctions if process is not diligently served. In enacting the rule, this court sought to prevent situations such as the ones presently before the court where nearly two-and-a-half years **elapsed** between filing of the complaint and service on the

defendant. Not only do such practices clog the court system, but they also prejudice defendants who might have waited years for the first notice that a claim had been made against them. In many cases, such filings are meant to toll the statute of limitations and preserve a plaintiff's claim. In effect, such filings are de facto extensions of the statute of limitations.

Owens-Illinois concedes that a literal application of the rule to these cases would be impossible. However, Owens-Illinois urges this court to interpret the rule as having given Respondents 120 days from January 1, 1989, to serve their complaints. Such an interpretation serves the rule's purpose by "clearing out" cases filed before January 1, 1989, which were unserved and languishing on court dockets. It is also fair to Respondents as it gives them the benefit of the entire 120-day time period. In fact, it gives Respondents a total of sixteen months from the date of filing to have timely served Owens-Illinois.

One of Respondents' main themes underlying their retroactivity argument is that it would be unfair to impose rule 1.070(j) in these cases because it would result in most, if not all, of the cases being barred by the statute of limitations. Owens-Illinois respectfully submits that this situation is due to Respondents' own inaction, not the enforcement of an overly harsh rule. If they are ultimately barred from refiling their lawsuits by the statute of limitations, Respondents have no one but themselves to blame.

CONCLUSION

For the foregoing reasons, Owens-Illinois respectfully requests this court to reverse the Fifth District Court of Appeal's March 13, 1992 opinion and remand this case with instructions to reinstate the trial court's November 29, 1990 order dismissing these cases without prejudice

Respectfully submitted,

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