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

INITIAL BRIEF ON MERITS AND APPENDIX OF PETITIONER OWENS-CORNING FIBERGLAS CORPORATION

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## STATEMENT OF THE CASE AND FACTS

This initial brief on the merits is filed on behalf of Petitioner Owens-Corning Fiberglas Corporation ("OCF"), one of several defendants in eleven personal injury actions brought in the Circuit Court for Orange County, Florida, and one of several appellees in the ensuing consolidated appeals by Plaintiffs-Respondents ("Plaintiffs") to the District Court of Appeal of Florida, Fifth District. That appeal resulted in the decision in Parlier v. Eagle-Picher Industries, Inc., 596 So. 2d 1125 (Fla. 5th DCA 1992), which is now the subject of this Court's discretionary review.

By its order of August 20, 1992, this Court accepted jurisdiction, dispensed with oral argument, and granted the notices of joinder filed by OCF and other Co-Petitioners in the notice filed by Co-Petitioner W.R. Grace & Company - Conn. ("W.R. Grace") invoking this Court's discretionary jurisdiction. Although OCF's brief was originally due September 15, 1992, OCF is serving this brief on September 29, 1992, pursuant to the two-week extension attributable to Hurricane Andrew, as provided for by In re: Emergency Petition to Extend Time Periods Under All Florida Rules of Procedure, 17 FLW S578 (Fla. Sept. 2, 1992).

OCF adopts the statements of the case and facts appearing in the initial briefs an the merits of Co-Petitioners W.R. Grace and Owens-Illinois Inc. It need only be added that before rendition of the decision by the District Court of Appeal, Fifth District, the appeals of five of the eleven Plaintiffs in the consolidated appeal were dismissed as to OCF only by stipulation. Copies of the notice

of filing stipulations for dismissal and the order approving the stipulations are included in the appendix to this brief.

## *SUMMARY* OF ARGUMENT

OCF adopts the summaries of argument in the initial briefs on the merits of Co-Petitioners W.R. Grace and Owens-Illinois. In addition, the decision of the District Court of Appeal should be reversed with directions to affirm the circuit court's order of dismissal on the ground that the dismissal did not involve a prohibited retrospective application of Rule 1.070(j).

## ARGUMENT

**THE DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, SHOULD BE REVERSED ON THE GROUND THAT THE DISTRICT COURT ERRED IN HOLDING THAT RULE 1.070(j), FLA. R. CIV. P., DOES NOT APPLY TO ACTIONS PENDING ON THE EFFECTIVE: DATE OF THE RULE.**

OCF adopts the arguments in the briefs of Co-Petitioners W.R. Grace and Owens-Illinois. To the argument in W.R. Grace's brief commencing at the bottom of page 16 and ending near the top of page 18, OCF adds the following brief discussion.

Cool v. Police Department of the City of Yonkers, 40 Fed. R. Serv. 2d 857 (S.D.N.Y. 1984), further supports the majority and better-reasoned holding in federal courts that Rule 4(j), Fed. R. Civ. P., the counterpart to Florida's Rule 1.070(j), applies to actions commenced before the effective date of the rule. The court in Cool considered the legislative history of the amendment to Rule 4 as recorded in 128 Cong. Rec. H9848 (Dec. 15, 1982), reprinted in 1982 U.S. Cong. Code & Ad. News 4434, 4447, and concluded:

> No basis exists for assuming that Congress' statement that "service of process issued before the effective date . . . be made in accordance with current Rule 4" applies to Rule 4(j) at all. Rule 4(j) does not address the methods by which service "will be made." It merely establishes a 120-day period within which service in accordance with Rule 4 must be made unless good cause is shown for the delay. Furthermore, no practical purpose would be served by limiting the application of Rule 4(j) to complaints filed after the effective date. Unlike the provisions of new Rule 4 outlining manner of service, Rule 4(j) does not change the methods by which service is made. Enforcing its time limitations would not cause any of the confusion or potential injustice that allowing service by new method during the transition would cause.

Cool, **40** Fed. R. Serv. 2d at 859. The district court in Cool also rejected the same "retroactivity" argument that Plaintiffs in the present case made in the circuit court and in the district court:

> Plaintiff argues that application of Rule 4(j) to his complaint would amount to retroactive application of the rule. The court does not find, however, that application of a rule 20 months after its effective date amounts to retroactive application . . . . Service of the amended complaint was not attempted until four and one-half years after it was filed. It is just this type of dilatory non-action that Rule 4(j) is designed to eliminate. **See** D. Seigel, Practice Commentary on Amendment of Federal Rule 4 With Special Statute of Limitations Precautions, 96 FRD **88**, 91 (1983).
>
> **As** the court finds that Rule 4(j) applies to this action, it must dismiss the complaint as to the moving defendants unless plaintiff shows good cause why he did not attempt to effect service for four and one-half years.

~~Id.~~ The decision in Cool conforms to the majority and better-reasoned view of the federal cases discussed at pages 12-17 of W.R. Grace's brief. These federal decisions are pertinent and highly

persuasive in interpreting the nearly identical Florida rule. Smith v. Southern Baptist Hosp. of Fla., Inc., 564 So. 2d 1115, 1117 (Fla. 1st DCA 1990). See also Mims v. Casademont, 464 So. 2d 643, 644 (Fla. 3d DCA 1985).

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Contrary to Plaintiffs' arguments in the lower court, application of Rule 1.070(j) to their cases does not result in a retrospective application of the rule. A retrospective application would result only if the rule were applied to take away or impair vested rights acquired under existing laws, or to create a new obligation, impose a new duty or attach a new disability in respect to transactions or considerations already past. See Heberle v. P.R.O. Liquidating Co., 186 So. 2d 280, 282 (Fla. 1st DCA 1966). Under Heberle, retrospective application would result only if, on the date the rule became effective, the court had dismissed the case based on Plaintiffs' failures, prior to the effective date of the rule, to serve Defendants within 120 days of filing their complaints. To allow Plaintiffs the same amount of time after the effective date of the rule to effect service of process as any litigant filing on or after that date -- a full 120 days -- does not amount to a retrospective application of the rule. As in Cool, 40 Fed. R. Serv. 2d at 859, retrospective application was avoided by counting the 120-day period for service from the effective date of the rule.

## CONCLUSION

Based on the foregoing reasons and authorities, and those contained in the briefs of Co-Petitioners adopted hereby, the

decision of the District Court of Appeal, Fifth District is erroneous and should be reversed. The cause should be remanded to the district court with directions to affirm the orders dismissing the complaints for failure to comply with Rule 1.070(j).

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing Initial Brief on Merits was mailed this 29th day of September, 1992 to all counsel on the attached service list.


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Order approving Stipulations for Dismissal of Certain Appeals as to OCF dated 10/14/91 . . . . . . . . . . 1

Notice of Filing Stipulations For Dismissal of Certain Appeals as to OCF dated 10/9/91 . . . . . . . . . . . 2

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

GARLAND P. PARLIER,
et ux., et al.,
Appellant,

v.

Case No. 91-18, 91-19, 91-20,
91-22, 91-23, 91-24,
91-25, 91-26, 91-27,
91-28, 91-30

EAGLE-PICHER INDUSTRIES,
INC., et al.,
Appellee.

DATE: October 14, 1991

BY ORDER OF THE COURT:

ORDERED that the STIPULATIONS FOR DISMISSAL OF CERTAIN APPEALS AS TO OWENS-CORNING FIBERGLAS CORPORATION, filed October 14, 1991, are approved. This Order of Dismissal shall not apply to the Appellant(s) and/or Appellee(s) not a party to said stipulations and the above-styled appeal shall timely proceed in accordance with the appellate rules.

I hereby certify that the foregoing is
(a true copy of) the original court order.

Frank J. Habershaw

FRANK J. HABERSHAW, CLERK

BY: ______________________
Deputy Clerk

(COURT SEAL)

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app file

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

CASE NOS. 91-18, 91-19,
91-20, 91-22, 91-23, 91-24,
91-25, 91-26, 91-27, 91-28,
and 91-30

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

Appellants,

vs.

EAGLE-PICHER INDUSTRIES, INC.,
et al.,

Appellees.

_________________________________/

NOTICE OF FILING STIPULATION8 FOR DISMISSAL OF CERTAIN APPEALS AS TO OWENS-CORNING PIBERGLAS CORPORATION

The Appellee, OWENS-CORNING FIBERGLAS CORPORATION, gives notice that it is filing herewith the attached Stipulations for Dismissal of the following appeals consolidated under the above-styled case. These dismissals are as to the Appellee Owens-Corning Fiberglas only.

| | |
|---|---|
| Obediah E.McKinley, et ux | Case No. 91-27, |
| Edgar English, et ux | Case No. 91-24, |
| Richard R. Hayes, et ux | Case No. 91-28, |
| John R. Henry, et ux | Case No. 91-26, and |
| George V. Holt, et ux | Case No. 91-23. |

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