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SID J. WHITE
JUL 2 1992
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF FLORIDA

LESLIE PEARLSTEIN, M.D.,

Petitioner,

vs. CASE NO. 79,529

WILLIAM KING and JULIA KING, his wife,

Respondents.
_____/

RESPONDENTS' ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Plaintiffs, William King, in whom Defendant left the sponge, and his wife, Julia King, are referred to as the Kings, or the Plaintiffs. The Kings accept the statement of the case and facts as set forth in the Second District opinion. King v. Pearlstein, 592 So.2d 1176 (Fla. 2d DCA 1992)

ISSUES ON APPEAL

I. WHETHER FLA. R. CIV. P. 1.070(j) APPLIES TO A CAUSE OF ACTION FILED BEFORE ITS EFFECTIVE DATE?

11. WHETHER FILING THE PETITION TO EXTEND THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS BY 90 DAYS UNDER §768.495(2) IN THE COUNTY WHERE THE SUIT IS ULTIMATELY FILED TOLLS THE LIMITATIONS PERIOD, AS PROVIDED IN §768.495(2)?

SUMMARY OF ARGUMENT

Rule 1.070(j) requires service of process within 120 days of the initial pleading. It became effective after the initial pleading in this suit. There is no suggestion in the rule that it is to apply to pending suits. This Court and Florida's district courts consistently hold that such rule changes operate prospectively only, in the absence of a specific indication otherwise.

The Kings complied with the literal terms of Section 768.495(2), Florida Statutes, and are entitled to the extension provided therein. The Defendant's argument that the Kings' suit should be dismissed because it was allegedly filed in an improper venue fails because: the Defendant failed to meet his burden to show venue was improper, waived any objection as to venue, and -- even if venue were improper-- dismissal would be too harsh a sanction.

ARGUMENT

I. FLA. R. CIV. P. 1.070(j) DOES NOT APPLY TO A CAUSE OF ACTION FILED BEFORE ITS EFFECTIVE DATE.

The Defendant argues Plaintiffs' case should be dismissed because it was not served within 120 days of the filing of the action. The trial court and the Second District rejected this argument, as has the Fifth District. The Defendant's argument does little more than recite two other district court cases and some federal cases which, as discussed below, are inapplicable.

The Defendant has failed to consider a fundamental rule espoused by this Court (even though Plaintiffs briefed this point in the Second District).

Rule 1.070(j) became effective on January 1, 1989. There was no suggestion that it was to apply to pending causes of action. Plaintiffs' filed their action in November of 1988, before the Rule's effective date.

"Unless otherwise specifically provided our court rules are prospective only in effect," Tucker v. State, 357 So.2d 719, 721 n.9 (Fla. 1978), citing Poyntz v. Reynolds, 37 Fla. 533, 19 So. 649 (1896); see also, Blue v. Malone & Hyde, 575 So.2d 292, 294 n.1 (Fla. 1st DCA 1991); State v. Green, 473 So.2d 823, 824 (Fla. 2d DCA 1985)("Florida rules of court have prospective effect only, absent an express statement to the contrary."); Arnold v. State,

429 So.2d 819, 820 (Fla. 2d DCA 1983). Under the rationale of these decisions, Rule 1.070(j) does not apply to the Kings' suit.

In Poyntz this Court had adopted a new rule requiring an appellant to serve a copy of the transcript on the appellee. The transcript had already been filed prior to the effective date of the rule, so the court held the rule did not apply because there was no specific provision that it was to be applied to existing cases. By contrast, the Court discussed another new rule specifically made applicable to all cases returnable to the January, 1896 term of the Court (which did apply to the pending case because of this specific provision).

In the Kings' case, the initial pleading was filed prior to the effective date of Rule 1.070(j). The amended Rule 1.070(j) addresses service of the initial pleading, just as the new rule in Poyntz addressed service of a transcript. Neither the service of the Kings' initial pleading nor the Poyntz transcript are governed by rules which became effective after those filings were made. Poyntz was followed as recently as last year in Blue, supra.

Blue addressed a worker's compensation case filed in 1984. In 1985 the "lack of prosecution" rule for comp cases was amended to change the time period from two years to one year. In 1987 the defendant successfully moved to dismiss the action for lack of prosecution. There had been no activity for over a year, but there had been activity within two years.

The appellate court cited Poyntz and other decisions noting that "Florida rules of court have prospective effect only, absent

an express statement to the contrary." 575 So.2d at 294, n.1. Blue reversed the dismissal, noting there was no indication in this Court's adoption of the new one year rule that it was to apply to pending cases. Similarly, there was indication in adopting Rule 1.070(j) that it was to apply to pending cases.

Partin v. Flagler Hospital, Inc., 581 So.2d 240 (Fla. 5th DCA 1991), is consistent with the law that new court rules affecting a plaintiff's rights should not apply to pending cases. The Fifth District noted this Court's pronouncement in adopting amendments in 1961, which had contained specific language applying the amendments to pending cases. This Court changed the application on rehearing - noting the amendments could affect rights. In Re Amendments to Florida Rules of Civil Procedure, 132 So.2d 6 (Fla. 1961)

This demonstrates two important points. First, applying Rule 1.070(j) will clearly affect the Kings' rights. The **suggestion the Kings could still have served the complaint within 120 days misses the point.** The appellant in Poyntz could still have served the transcript on the new rule's effective date. The appellant in Blue could have taken action within the one year period. They were not required to because the new rules did not explicitly state they applied to pending cases.

The 1961 amendments case illustrates a second point. This Court's original order adopting those 1961 amendments specifically made them apply to pending cases. In Re Amendments to Florida Rules of Civil Procedure, 131 So.2d 475 (Fla. 1961). Thus, that order implicitly recognized the general rule above -- that "unless

otherwise specifically provided our court rules are prospective only in effect." Tucker, supra at 721. The reference in the rehearing on the 1961 rules retracting the application to pending cases was only necessary because of the initial statement. 132 So.2d 6. The initial statement was necessary because of the general rule. The general rule applies here and means Rule 1.070(j) does not apply to cases filed before its effective date.[1]

Partin noted Rule 1.070(j) itself suggests it was not intended to apply to pending cases. Applying it to cases pending over 120 days before its effective cases would have made literal compliance impossible. The rule counts the 120 days from the initial pleading, and there is no special clause which starts that period running on January 1, 1989 for pending suits. As noted, this Court's decisions show that it appreciates the need for a specific indication when such a new rule is to apply to pending cases.

Attorneys customarily calendar anticipated events in a lawsuit at the time they file the suit. Applying Rule 1.070(j) to existing actions would have upset reasonable expectations based on prior calendaring. For all of the foregoing reasons, there is simply no indication Rule 1.070(j) should apply as the Hospital urges.

The Second District agreed with Partin's well reasoned analysis in this case, King v. Pearlstein, 592 So.2d 1176 (Fla. 2d DCA 1992), and in Lewis v. Burnside, 593 So.2d 1185 (Fla. 2d DCA 1992).

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[1] Among other things, the 1961 amendments addressed service of the summons, just as the 1988 amendments addressed service and other subjects. 131 So.2d at 475.

The Defendant relies on Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1991), review denied, 589 So.2d 294 (Fla. 1991), disapproved, 17 FLW S348 (Fla. 1992), for its holding that Rule 1.070(j) applied to actions pending when the rule became effective. By contrast to Partin, the Berdeaux opinion expressed no basis for its conclusion on this point. Instead, Berdeaux went on to conclude Rule 1.070(j) did not apply if the plaintiff served the defendant before the defendant moved to dismiss the action -- a conclusion unanimously rejected by this Court in Morales v. Sperry Rand Corporation, 17 FLW S348 (Fla. 1992).

The Defendant also cites the special concurring opinion in Hill v. Hammerman, 583 So.2d 368 (Fla. 4th DCA 1991). The concurring opinion observed the Berdeaux opinion appeared to overlook Tucker and Poyntz, requiring prospective effect. The concurrence then cited a federal case (discussed below), and concluded Rule 1.070(j) received prospective effect if plaintiffs with pending actions were given 120 days from January 1, 1989 to effect service. The above discussion demonstrates the several flaws in this reasoning.

First, this concurrence ignores the manner in which rules are to be applied prospectively, as demonstrated nearly a hundred years ago in Poyntz and last year in Blue. Second, it overlooks the practical and fairness problems for plaintiffs and their counsel with starting a 120 day period in an already pending case, as noted

above. Third, it relies on federal case law based on a legislative history which is absent from the Florida rule.

Partin addressed the danger of misplaced reliance on the federal decisions addressing whether the federal 120 day rule applied to pending cases. It noted those cases are primarily based on federal legislative history which is absent for the new Florida rule. As noted above, in the absence of a similar Florida "legislative history," the presumption is against the application to pending cases which Defendant urges here.

Partin also noted that there is a conflict in the federal decisions on the applicability of the 120 day period to pending cases. See 581 So.2d at 242, n.2; see also Gordon v. Hunt, 116 F.R.D. 313 (S.D.N.Y. 1987), aff'd, 835 F.2d 452 (2d cir. 1987); Gleason v. McBride, 869 F.2d 688, 691 (2d Cir. 1989).

The federal cases on which Defendant seeks to rely both recognize a conflict in the application of the federal 120 rule to cases pending on its effective date. Gordon at 322 cited several conflicting cases, including one holding "it seems unduly harsh to dismiss a complaint for failure to comply with a rule not in existence when it was filed -- especially absent a clear statement from Congress that it intended this result." Coleman v. Holmes, 789 F.2d 1206, 1208 (5th Cir. 1986), also noted conflicts. Both cases relied on their interpretation of congressional legislative history. Gordon at 321, and Coleman at 1207-08.

In sum, the federal cases on which Defendant seeks to rely (1) conflict with other federal cases, (2) depend on legislative

history absent for the Florida rule, and (3) did not have to consider Florida's rule that new rules of court operate prospectively.

This Court's recent holding in Morales that service before a motion to dismiss does not cure a Rule 1.070(j) violation does not affect the result here (page 12 of Defendant's initial brief). Morales addressed a case filed after the effective date of Rule 1.070(j), so that the issue in this case was not presented. The Fifth District in Partin agreed with Morales. 581 So.2d at 241. It was Berdeaux, relied upon by Defendant, which conflicted with Morales and was disapproved on this point by this Court in its affirmance in Morales.[2]

This Court recently observed that when there is reasonable doubt as to which statute of limitations to apply, the preference is to choose the longer statute, thereby allowing cases to be heard on their merits. See Baskerville-Donovan Engineers, Inc. v. Pensacola House Condominium Association, Inc., 581 So.2d 1301, 1303 (Fla. 1991). The same rationale applies here, and any reasonable doubt in the application of Rule 1.070(j) is construed in favor of plaintiffs. The Fifth and Second District decisions are the correct view.

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[2] Defendant suggests that if he prevails on his legal argument this Court should hold there could be no good cause shown under Rule 1.070(j) and dismiss the complaint. This suggestion conflicts with this Court's observation in Morales of the trial court's broad discretion to determine good cause. Also, because the Kings prevailed on this legal point in the trial court, there was no need to offer evidence of good cause.

II. FILING THE PETITION TO EXTEND THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS BY 90 DAYS UNDER §768.495(2) IN THE COUNTY WHERE THE SUIT IS ULTIMATELY FILED TOLLS THE LIMITATIONS PERIOD, AS PROVIDED IN §768.495(2).

Apparently recognizing he should lose the question on which this Court accepted jurisdiction, Defendant offers an alternative argument to reinstate the dismissal.[3] Defendant's argument offers no case authority in response to the well-reasoned Second District opinion on §768.495(2), Florida Statutes.

Section 768.495(2) provides "an automatic 90-day extension" of the medical malpractice statute of limitations "upon petition to the clerk of the court where the suit will be filed" (emphasis added). The Kings filed their suit in Hillsborough **County**, the county in which they filed their petition for the extension under §768.495(2).

The Second District held the statute means what it says, and the Kings' petition extended the time. Defendant cites no case law to the contrary. The Second District observed "the words of a statute are to be given their plain and ordinary meaning." 592 So.2d at 1176, citing Sheffield v. Davis, 562 So.2d 384 (Fla. 2d DCA 1990).

Not only is the construction according to the plain words consistent with sound rules of statutory construction, it follows

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[3] This Court is not required to consider Defendant's alternative argument, but may exercise its discretion to do so. **See** Tillman **v. State**, 471 So.2d **32**, 34 (Fla. 1985).

the preference of permitting claims to be decided on their merits. See Baskerville-Donovan Engineers, supra; Sheffield v. Davis, supra; Angrand v. Fox, 552 So.2d 1113 (Fla. 3d DCA 1989), review denied, 563 So.2d 632 (Fla. 1990)(90 day tolling periods run consecutively rather than concurrently; also noting "it is well established that a limitations defense is not favored", "and that therefore, any substantial doubt on the question should be resolved by choosing the longer rather than the shorter possible statutory period."); Rhoades v. Southwest Florida Regional Medical Center, 554 So.2d 1188 (Fla. 2d DCA 1989)(60 day extension added to 90 day notice of intent tolling period); Castro v. Davis, 527 So.2d 250 (Fla. 2d DCA 1988)(suit need not be filed immediately upon conclusion of the 90 day period); cf Mulunnev v. Pearlstein, 539 So.2d 493 (Fla. 2d DCA 1989), review denied, 547 So.2d 493 (Fla. 1989)(reversing limitations dismissal in favor of the Defendant in this case).

As the Second District recognized, Defendant's argument is really an argument that the Kings' case should be dismissed with prejudice on the basis of venue. There are several additional reasons why Defendant's venue argument fails.

Defendant's argument overlooks the fact that venue is a privilege which may be waived. King at 1177. The Kings' trial counsel did not violate a rule of Judicial Administration by selecting Hillsborough County as the venue, and Defendant cites no case holding that he did.

As the Second District noted, Defendants waived the venue argument, in any event. Defendant's initial brief before this Court (at page 3) states he "made an appropriate objection to improper venue." Defendants's motion is vague at best and the Second District noted the Defendants did not seek dismissal or transfer based on venue. Defendant's motion offered no affidavit or any evidentiary proof that venue was improper based on his residence.[4]

The defendant bears the burden of "clearly proving that the venue selected by the plaintiff is improper." United Engines, Inc. v. Citmoco Services, Inc., 418 So.2d 409, 410 (Fla. 2d DCA 1982); see also, Polackwich v. Florida Power and Light Company, 576 So.2d 892, 894 (Fla. 2d DCA 1991). Defendant offered no proof that he was not a Hillsborough County resident. This is another defect in Defendant's venue argument.

Even if not procedurally precluded, the Defendant's argument should not prevail. Defendant seeks what would be a dismissal with prejudice for improper venue. As the Second District noted, even if venue were improper, the proper disposition would have been

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[4] Even if Defendant had moved as to venue, his co-defendant, the Hospital, clearly did not. Its motion specifies the bases on which it seeks dismissal and venue is not among them (R 11). In Finkelstein v. Godard, 404 So.2d 831 (Fla. 3d DCA 1981), the plaintiff sued a personal representative and a second defendant, "whereupon the personal representative filed an answer and both defendants filed a joint motion to dismiss and transfer the action" based on improper venue. The appellate court held that the "defendant-appellants waived any exception to venue by not timely asserting their objection." 404 So.2d at 832. Thus, when the Hospital's (earlier filed) motion did not contest venue, the issue was waived (R 11-13).

transfer, not dismissal. King at 1177, n.2, citing Tropicana Products, Inc. v. Shirley, 501 So.2d 1373, 1375 (Fla. 2d DCA 1987)(dismissal of the complaint due to improper venue was "too harsh.")[5]

Defendant's professed rationale that a defendant would want to know if a §768.495 extension had been filed does not support violating the plain words of the statute. First, Defendant points to nothing in the statute to support the harsh sanction he seeks. Second, such a defendant is already on notice of the intent to file a suit by virtue of the statutorily required notice of intent letter sent earlier. Third, in this case the actual petition for the extension reflects that copies were to go to the Defendants after the extension was entered by the clerk (R 37, 41). The Defendant did not even assert he did not receive the extension petition.

The Second District correctly decided the extension issue under the plain wording of the statute. Nothing about this action based the Defendant leaving a sponge in Mr. King justifies twisting Florida venue law to produce the "harsh" result Defendant seeks here. The co-defendant's failure to even argue this point in its appeal to this Court reflects its recognition that the Second

[5] Defendants' briefs below cited four cases they asserted supported a dismissal for improper venue. In none of those cases did it appear that the dismissal would prevent the action from proceeding in a proper venue because the statute of limitations had run. In some of the cases there was no suggestion that the plaintiff raised the transfer issue.

District correctly decided the issue (see the Hospital's brief in case 79,530).

CONCLUSION

The Second District's opinion should be affirmed,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to: Donald V. Bulleit, Esq., Charles Hall, Esq., Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., P. O. Box 210, St. Petersburg, FL 33731, Attorneys for Pearlstein; John W. Boult, Esq., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., P. O. Box 3239, Tampa, FL 33601, Attorneys for Edward White Memorial Hospital; Glenn M. Woodworth, Esq., Woodworth & Lamb, Wittner Centre West, 5999 Central Ave., St. Petersburg, FL 33710, James F. Pingel, Jr., Esq., Lau, Lane, Pieper & Asti, P.A., Suite 1700, First Union Center, 100 South Ashley Drive, Tampa, FL 33602, by U. S. Mail, this 30th day of June, 1992.

Attorney