IN THE SUPREME COURT
STATE OF FLORIDA

LESLIE PEARLSTEIN, M.D.,

Appellee/Petitioner,

vs.

WILLIAM KING AND JULIA KING,

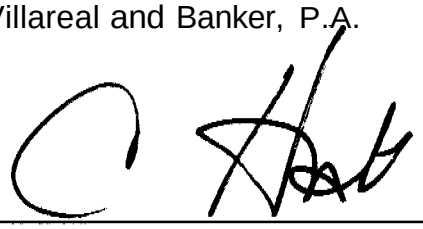
Appellants/Respondents.
_____/

Supreme Court Case No. 79,529

2nd DCA Appeal No. 91-00332

PETITIONER, PEARLSTEIN'S, INITIAL BRIEF ON THE MERITS

Fowler, White, Gillen, Boggs,
Villareal and Banker, P.A.



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PRELIMINARY STATEMENT

The appeal seeks review of King v. Pearlstein, 592 So.2d 1176 (Fla. 2d DCA 1992), in which the district court reversed dismissal of the Plaintiffs' action. A copy of this decision is contained in the appendix to this brief.

The Defendants, LESLIE PEARLSTEIN, M.D. and EDWARD WHITE MEMORIAL HOSPITAL, have both sought review by this Court in Case Numbers 79,529 and 79,530 respectively. They will be referred to as Dr. Pearlstein, Edward White Hospital or Petitioners. The Plaintiffs, William King and Julia King, will be identified by name or as Respondents.

All references to the record on appeal are designated by the prefix "R" followed by the appropriate page number, References to the appendix are designated by the prefix "A" followed by the page number.

STATEMENT OF THE CASE AND FACTS

As his statement of the case and facts, Dr. Pearlstein adopts by reference the decision of the Second District Court of Appeal in this matter.(A:1-5) However, the the following facts are highlighted to facilitate a clear understanding of the issues presented.

On March 19, 1984, Dr. Pearlstein operated on Mr. King at Edward White Hospital.(R:7) On May 5, 1986, Dr. Pearlstein again operated on Mr. King to remove a sponge which had been left in Mr. King's body at the time of the 1984 surgery.(R:7-8)

In May 1987, and pursuant to 0768.57, Fla.Stat. (1986), the Kings sent notices of intent to initiate litigation to Dr. Pearlstein and Edward White Hospital.(R:2 and 7)[1]

On July 31, 1987, and purportedly pursuant to 5768.495, Fla.Stat.(1986), the Kings filed a petition for a 90-day extension of the statute of limitations.(R:37 and 41) The Clerk of Circuit Court entered an Order purportedly granting the extension on the same day.(R:37 and 41) Although the Kings admit that both Dr. Pearlstein and Edward White Hospital conduct their business in Pinellas County, Florida, and that Mr. King's treatment occurred in that county, this petition was filed in Hillsborough County.(R: 1-4, and 41)

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[1] The notice of intent requirement is now found at Section 766.106, Fla.Stat. (1989). These notices tolled the statute of limitations for ninety days.

On November 1, 1988, the Kings filed their initial complaint in the circuit court for Hillsborough County, Florida.(R:1) This complaint made absolutely no allegations which connected the claim with Hillsborough County.(R:1) Indeed, it expressly alleged that the incident occurred in Pinellas County and that Dr. Pearlstein and the hospital were conducting business in that county.(R:1) This original complaint was never served. On January 19, 1990, over fourteen months after the original complaint was filed, the trial court entered a notice of intent to dismiss for lack of prosecution. This notice indicated that because no record activity had occurred for over one year the action would be dismissed unless good cause was filed.(R:42)

On August 9, 1990, over twenty-one months after the original complaint was filed, an amended complaint was filed in Hillsborough County.(R:6-10) At that time, for the first time, a summons was issued for service upon Dr. Pearlstein and the hospital.(R:6-10) The Kings again made no allegations which connected the claim with Hillsborough County and they admitted that the incident occurred in and that the Defendants resided in Pinellas County.(R:6-7)

Dr. Pearlstein moved to dismiss because (1) service of the original complaint was not made within 120 days after filing as required by Rule 1.070(j), Fla.R.Civ.P., and (2) the face of the complaint evidenced that the action was barred by the statute of limitations. Dr. Pearlstein also made an appropriate objection to improper venue in Hillsborough County.(R:14-17)

After a nonevidentiary hearing the trial court, in its order of December 28, 1990, found that Rule 1.070(j) was inapplicable, but granted the motions to dismiss

with prejudice on the ground that the statute of limitations had run prior to the filing of suit.(R:23) The order is silent as to the basis of this finding. However, the parties agree that the finding rests on the trial court's conclusion that the petition for extension, filed in Hillsborough County, was ineffective to extend the statute of limitation.

On appeal, The Second District Court of Appeal concluded that while there was "gross noncompliance" with Rule 1.070(j), the rule did not apply to cases pending prior to January 1, 1989.(A:5) Because, it also found the action was timely filed, the appellate court reinstated the Kings' complaint.(A:5) This Court accepted jurisdiction and dispensed with oral argument.(A:6)

ISSUES ON APPEAL

I. WHETHER THE KINGS' ACTION SHOULD BE DISMISSED BECAUSE THEY FAILED TO COMPLY WITH THE PROVISIONS OF RULE 1.070(j), FLORIDA RULES OF CIVIL PROCEDURE?

II. WHETHER THE KINGS' ACTION SHOULD BE DISMISSED BECAUSE IT WAS NOT FILED WITHIN THE APPLICABLE STATUTE OF LIMITATIONS PERIOD?

SUMMARY OF ARGUMENT

I. The Kings' action should be dismissed because they failed to comply with the provisions of Rule 1.070(j), Fla.R.Civ.P. That rule requires initial pleadings to be served within 120 days and the Kings' initial pleading was not served on Dr. Pearlstein for over nineteen months after the effective date a of the rule.

While there is a split of authority, the better reasoned view applies the rule to cases pending on the effective date of the rule. Further, it is now settled that the rule requires dismissal if the initial pleading is not served within 120 days even where service is obtained prior to the filing of a motion to dismiss.

II. The Kings' action should also be dismissed because it was not filed within the applicable statute of limitations period. While the Kings filed a petition for extension of the statute of limitations, pursuant to 9768.495, Fla.Stat.(1986), the trial court correctly concluded that since it was filed in a county having no relationship to the action nor to the Defendants, it was ineffective. The trial court's approach gives full effect to the Rules of Judicial Administration and the intent of the statute.

Dr. Pearlstein respectfully requests that this Court reverse the decision of the Second District Court of Appeal and reinstate the trial court's dismissal of the Kings' action.

ARGUMENT

I. THE KINGS' ACTION SHOULD BE DISMISSED BECAUSE THEY FAILED TO COMPLY WITH THE PROVISIONS OF RULE 1.070(j), FLORIDA RULES OF CIVIL PROCEDURE.

The Kings' original complaint was filed on November 1, 1988, and was never served upon Dr. Pearlstein. An amended complaint was filed and served in August of 1990. (R:1-4 and 6-10). Rule 1.070(j), Fla.R.Civ.P., which became effective on January 1, 1989, requires initial pleadings to be served within 120 days after filing. The Kings' initial pleading was not served on Dr. Pearlstein for over nineteen months after the effective date of the rule, and therefore the Kings' action should be dismissed.

A. RULE 1.070(j) APPLIES TO COMPLAINTS PENDING ON ITS EFFECTIVE DATE.

Rule 1.070(j) adopted to expedite disposition of cases, provides:

> (j) Summons - Time Limit. If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading and the party on whose behalf service is required does not show good cause why service was not made within that time, the action shall be dismissed without prejudice or that defendant dropped as a party on the court's own initiative after notice or on motion.

This provision became "effective at 12:01 a.m., January 1, 1989." In Re Amendments to Rules of Civil Procedure, 536 So.2d 974 (Fla. 1988). The Third and

Fourth District Courts of Appeal have held that plaintiffs who filed complaints prior to this date are nevertheless bound by the 120-day period. They must serve their initial pleading within 120 days of the effective date or be dismissed.

In Berdeaux v. Eaale - Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990), disapproved on other grounds, 17 F.L.W. S348 (Fla. June 11, 1992), as here, the actions were pending at the time the rule took effect and the plaintiffs failed to serve the defendants within 120 days of the effective date. The Third District considered, and rejected, the argument that cases already pending on the effective date were exempt from the rule. Instead, it held that the plaintiffs had 120 days from the rule's effective date to serve the defendants or face dismissal. At 1296.

Likewise, in Hill v. Hammerman, 583 So.2d 368 (Fla. 4th DCA 1991), the Fourth District affirmed a dismissal predicated upon this rule. Judge Glickstein, specially concurring, discussed in detail the plaintiff's arguments and the reasons he rejected them. He concluded that the rule operated prospectively to pending cases, thereby providing plaintiffs with 120 days from its effective date within which to obtain service.

The logic of these decisions is also supported in well-reasoned federal case law construing a nearly identical provision in Federal Rule of Civil Procedure Rule 4(j). In Gordon v. Hunt, 116 F.R.D. 313 (S.D.N.Y. 1987), the Federal District Court held that the rule would be applied to an action filed before the effective date of the rule, measuring the 120 day period from the effective date. In reaching this holding, the court noted:

> [N]o practical purpose would be served by limiting the application of Rule 4(j) to complaints filed after the effective date...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 a new method during the transition period would cause.

Id. (citing Cool v. Police Dep't. of City of Yonkers, 40 F.Serv.2d 857 (S.D.N.Y. 1984)).

Likewise, in Coleman v. Holmes, 789 F.2d 1206, 1208 (5th Cir. 1986), the Fifth Circuit held that "rule 4(j) is applicable to the service of process" in a case filed before its effective date and that "the 120-day period began accruing on its effective date." The court stated:

> Congress apparently did not intend to give persons filing suit before the new rule less time than those who filed afterwards. But we find no logic in the argument that those filing before [the effective date of the rule] had unlimited time in which to complete service but those filing after that date have only 120 days.

Id. at 1208.

Although a contrary view has been taken by the Second and Fifth District Courts of Appeal, Dr. Pearlstein respectfully submits that the reasoning of the Third and Fourth District Courts of Appeal is more appropriate here. In Partin v. Flagler Hospital, Inc., 581 So.2d 240 (Fla. 5th DCA 1991), the court concluded that the rule does not apply to cases pending on its effective date. It reached this conclusion based upon the perceived intent of this Court in adopting the rule. Intent was divined, not from any history of this specific rule, but rather from the wording of the rule

which requires service within **120** days of "filing" and from language used when this Court adopted **1961** amendments to rules of procedure.[2]

The Partin reasoning is flawed and the court's reliance upon the language of the **1961** order misplaced. In that order the Supreme Court merely amended the language which controlled application of the amended rules of procedure - it did not announce a bright line test for application to other cases. The court said:

> It was provided [in an earlier order] that said amendments "shall become effective on the first day of October, **1961,** and shall be applicable to all cases then pending, as well as those instituted thereafter." It has been brought to the attention of the Court that the applicability of said amendments to pending cases could result in a deprivation of substantial rights previously acquired by litigants. It is, therefore, ordered that the amendments to the Florida Rules of Civil Procedure promulgated by the order above described shall become effective on the first day of October, **1961,** but shall be applicable only to cases commenced on and after said date.(emphasis added)

In Re Amendments to Florida Rules of Civil Procedure, **132 So.2d** 6 **(Fla. 1961).**

The court's statements in that order cannot be applied to the pending case. Plaintiffs would have sufficient notice and **120** days from the effective date of the rule to accomplish service. This would cause neither "confusion" nor "potential injustice." See Gordon, **116** F.R.D. at **332.** Because the rule is only being applied prospectively from its effective date, no extra burden falls upon previous filings and there is no diminution in the period available to comply with the rule.

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[2] **It appears that there is no published history of Rule 1.070(j).**

Further, as illustrated by Coleman v. Holmes, 789 F.2d 1206 (5th Cir. 1986), and Judge Glickstein's analysis in Hill v. Hammerman, 583 So.2d 368 (Fla. 4th DCA 1991), the wording of the rule does not establish an intention that it only apply to cases filed after the effective date. It is simply illogical to assume that this Court intended to allow those who filed actions before January 1, 1989 an unlimited time within which to perfect service merely because the time limit imposed by this rule begins at filing. To the contrary, the intent of the rule is clear. Cases, all cases, must be promptly served or they will be subject to dismissal. See, e.g. Morales v. Sperry Rand Corp., 17 F.L.W. S 348 (Fla. June 11, 1992).[3]

In this case and in Lewis v. Burnside, 593 So.2d 1185 (Fla. 2d DCA 1992), the Second District held that Rule 1.070(j) does not apply to actions commenced before the rule became effective on January 1, 1989. In both cases, the Second District recognized the conflict among districts regarding the application of the rule and indicated, without further explanation, that it would follow the reasoning of the Fifth District in Partin.

For Rule 1.070(j) to fulfill its mission of assuring diligent prosecution of all lawsuits once a complaint is filed, the approach taken by the Third and Fourth District Courts of Appeal should be approved and applied to this case. Because no issue exists as to compliance with the rule, there was a gross noncompliance and Rule 1.070(j) mandates dismissal of the Kings' action.

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[3] In fact it appears that in a prior decision the Fifth District Court of Appeal applied a newly enacted rule of procedure to a case filed before the rule's effective date. See, Julian v. Lee, 473 So.2d 736 (Fla. 5th DCA 1985).

B. RULE 1.070(j) REQUIRES DISMISSAL IF THE INITIAL PLEADING IS NOT SERVED WITHIN 120 DAYS EVEN WHERE SERVICE IS OBTAINED PRIOR TO THE FILING OF A MOTION TO DISMISS.

In the proceedings below, the Kings argued that because they served Dr. Pearlstein before he moved for dismissal under Rule 1.070(j), dismissal was improper. That argument has been rejected by this Court in Morales v. Sperry Rand Corp., 17 F.L.W. S348 (Fla. June 11, 1992), which held that untimely service of process is not excused merely because it is perfected before the defendant moves to dismiss under Rule 1.070(j).

The arguments and authorities above justify dismissal of the Kings' action under Rule 1.070(j). An additional basis for dismissal - the statute of limitations - also justifies dismissal.

II. THE KINGS' ACTION SHOULD BE DISMISSED BECAUSE IT WAS NOT FILED WITHIN THE APPLICABLE STATUTE OF LIMITATIONS PERIOD.

After a nonevidentiary hearing, the trial court dismissed this case with prejudice on the ground that the statute of limitations had run prior to the filing of suit. The order is silent as to the basis of this finding. However, the parties agreed that this finding was based upon the trial court's conclusion that the Kings' petition for extension of the statute of limitations filed in Hillsborough County, was ineffective to extend the statute. (A:3-4)

The Kings' petition for extension of the statute of limitations was purportedly made pursuant to 5768.435, Fla.Stat. (1986), which provides in relevant part:

> Upon petition to the clerk of the court where the suit will be filed and payment to the clerk of a filing fee, not to exceed $25, established by the chief judge, an automatic 90-day extension of the statute of limitations shall be granted to allow the reasonable investigation required by subsection (1). This period shall be in addition to other tolling periods. No court order is required for the extension to be effective. The provisions of this subsection shall not be deemed to revive a cause of action on which the statute of limitations has run.

The district court reversed the trial judge holding that the statute was to be literally applied - that since the action was filed in the same county as the petition for extension - the extension was automatic. This decision is illogical and ignores the functions served by the statute.

The Kings contend that they had the right to file their petition in any county provided they later filed their complaint in that same county. Under this argument they could file their petition and complaint in Dade County, Duval County or as here in Hillsborough County, even though the Defendants had no legal connection with those counties and even though the Kinas knew that fact. To the Kings, the place where their pleadings are filed has little significance other than to be convenient for their attorney.[4]

The Kings' approach and the district court's holding overlook established law which governs the signing and filing of documents as well as the obvious intent of 0768.495, Fla.Stat.(1986).

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[4] **The petition for extension and the initial complaint were filed by an attorney whose business address was in Hillsborough County. (R:1-4, and 37)**

Rule 2.060(d) Fla.R.Jud.Admin., provides in relevant part:

> The signature of an attorney shall constitute a certificate by him that he had read the pleading or other paper; that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay... .

This provision provides a guarantee that actions are properly initiated and maintained. It ensures that at a minimum some good faith attaches to each and every filing.

Are we to accept that there was some reason to believe that the Kings' action could be maintained in Hillsborough County? In none of their pleadings do they make any allegations which would tie any of the Defendants to Hillsborough County. If Plaintiffs are candid they must concede that at the time their petition and initial complaint were filed there existed no good grounds to support their placing the matter before the Hillsborough Courts.[5]

Section 768.495(2) serves two important functions in the medical malpractice statutory scheme. First, it provides potential plaintiffs with a method by which they can obtain the time to investigate a potential claim. Second, and equally important, it allows a potential defendant to verify whether the statute of limitations has expired.

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[5] Indeed, approval of this approach would nullify the quoted Section of Rule 2.060(d) and it could lead to routine "misfiling" of pleadings for tactical gain.

The physician can call the clerk of court where he resides and where he practices and readily determine whether a statute of limitations has been extended.[6]

The lower court's holding totally ignores the second function of the statute. Under this interpretation of the statute, a petition and later a claim could be filed anywhere and thereby defeat or seriously hamper the defendant's ability to learn whether he is still subject to a claim. Applying the statute in this manner would force potential defendants to contact the clerk of court for every county in the state even though the vast majority have no possible connection with the care rendered. Clearly, that was not a the intent of the legislature.

In this case the trial court recognized that Hillsborough County had no relationship to this case nor to its parties. By refusing to recognize the Kings' petition, the trial court gave full effect to the Rules of Judicial Administration and the intent of this statute. By applying a "literal reading" approach to the statute, the appellate court did not and created the opportunity for abuse and "convenient misfilings". This Court should reinstate the trial court's dismissal and require attorneys to file their petitions in a county which has a relationship to the claim or parties.

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[6] **In this age of claims-made insurance policies this knowledge may dictate whether the defendant can obtain insurance or whether the claim is covered by replacement insurance.**

CONCLUSION

Well-reasoned Florida law, supported by federal law, requires that the Kings' complaint be dismissed for failure to comply with Rule 1.070(j), Fla.R.Civ.P. Further, proper interpretation of §768.495, Fla.Stat.(1986) requires that the action be dismissed as untimely filed. Therefore, Dr. Pearlstein respectfully requests that this Court reverse the decision of the Second District Court of Appeal and reinstate the trial court's dismissal of the Kings' action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies of Petitioner, Pearlstein's, Initial Brief on the Merits, has been furnished by U.S. Mail this 22nd day of June, 1992, to Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925; with a copy each to RAYMOND T. ELLIGETT, JR., ESQUIRE, Attorney for Appellants, NCNB Plaza, Suite 2600, 400 Ashley Drive, Tampa, FL 33602; JOHN BOULT, ESQUIRE and EDWARD W. GERECKE, ESQUIRE, P.O. Box 3239, Tampa, FL 33601; GLENN M. WOODWORTH, ESQUIRE, Wittner Centre West, 5999 Central Avenue, St. Petersburg, FL 33710; and to JAMES F. PINGEL, JR., ESQUIRE, Sutie 1700, First Union Center, 100 South Ashley Drive, Tampa, FL 33602.

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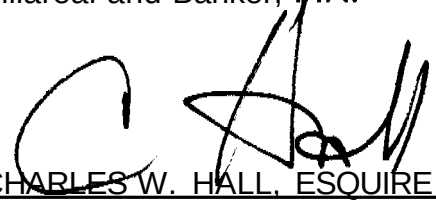

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