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

PETITIONER, PEARLSTEIN'S BRIEF

ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

As its statement of the case and facts, Petitioner, LESLIE PEARLSTEIN, M.D.[1] adopts by reference the decision of the Second District Court of Appeal in this matter.(A1-5)[2] However, to facilitate a clear understanding of the conflict between the decisions the following facts are highlighted.

On March 18, 1984, Dr. Pearlstein operated on Mr. King at Edward White Hospital. 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.

On November 1, 1988, the Respondents filed their medical malpractice complaint. In August 1990, the Respondents filed an amended complaint and, for the first time, obtained service of process on Dr. Pearlstein. The Petitioner filed a motion to dismiss asserting that the action should be dismissed for failure to comply with Rule 1.070(j) Florida Rules of Civil Procedure.

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[1] The Petitioner, Leslie Pearlstein, M.D., will be referred to as Dr. Pearlstein or as Petitioner. The Respondents, William King and Julia King, will be identified by name or as Respondents.

[2] All references to the Appendix attached to this Brief will be identified as (A) followed by the appropriate page number of the Appendix.

The Second District Court of Appeal concluded that while there was "gross noncompliance" with Rule 1.070(j), the dispositive issue was whether the rule applied to this case.(A:5) It held:

> This action was commenced on November 1, 1988. Rule 1.070(j) became effective on January 1, 1989. We acknowledge that there is a difference of opinion between the various districts as to whether the rule is to apply to cases filed before January 1, 1989, and pending on that date. We agree with the reasoning expressed by our sister court in Partin v. Flagler Hospital, Inc., 581 So.2d 240 (Fla. 5th DCA 1991), and hold that rule 1.070(j) does not apply to cases pending prior to January 1, 1989.(A:5)

JURISDICTIONAL ISSUE

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTIONS OF LAW?

SUMMARY OF THE ARGUMENT

The decision of the Second District expressly and directly conflicts with decisions from the Third District on the legal question of whether Rule 1.070(j) Florida Rules of Civil Procedure applies to actions filed before January 1, 1989. As a result of this conflict, litigants in the Third District are provided with greater procedural protection than are those in the Second District and the Rules of Civil Procedure do not have consistent statewide application. This Court should exercise its discretion and review this case on the merits.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

Under Article V, Section 3(b)(3), Florida Constitution (1980), this Court may exercise its discretionary jurisdiction where an appellate decision expressly and directly conflicts with the decision from another Florida appellate court. That conflict must be express and contained within the written rule announced by the majority decision. Jenkins v. State, 385 So.2d 1356 (Fla. 1980) and Dodi Publishing Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980).

Jursidictional requirements are satisfied when the decision announces a rule of law which conflicts with a rule previously announced by another appellate court or when there has been an application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case decided by another appellate court. Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960) and Mancini v. State, 312 So.2d 732 (Fla. 1975). The test of jurisdiction is not whether this Court would have arrived at a conclusion different from that reached by the district court, but whether the decision on its face creates an inconsistency or conflict among precedents. Kincaid v. World Insurance Co., 157 So.2d 517 (Fla. 1963).

The rule of law announced by the Second District may be summarized as; Rule 1.070(j) Florida Rules of Civil Procedure, may not be applied to cases pending before January 1, 1989. (A:5) In announcing this rule, the Court approved the reasoning expressed in Partin v. Flagler Hospital, Inc. 581 So.2d 240 (Fla. 5th DCA 1991).

While it did not expressly certify conflict, the Court acknowledged, "that there is a difference of opinion between the various districts as to whether the rule is to apply to cases filed before January 1, 1989." (A:5)[3]

That rule of law directly and expressly conflicts with the opposite rule of law announced by the Third District Court of Appeal in Berdeaux v. Eagle-Picher, Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990), ~~rev. den,~~ 589 So.2d 294 (Fla. 1991). In that case, the Third District held that Rule 1.070(j) applied to cases pending before January 1, 1989.

The impact of this conflict is obvious and substantial. Litigants such as Dr. Pearlstein who have the misfortune of being sued in the Second District are deprived of the procedural protection provided by the rule. The existence of the conflict prevents the uniform statewide application of The Florida Rules of Civil Procedure.

Indeed, in Lewis v. Burnside, 17 F.L.W. D496 (Fla. 2d DCA 1992), the Second District expressly recognized that its rule of law is in conflict with Berdeaux v. Eagle-Picher, Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990).

In addition to the arguments set forth herein, Petitioner adopts by express reference the arguments set forth in Brief on Jurisdiction served by Petitioner, Edward White Hospital.

CONCLUSION

The decision of the Second District Court of Appeal expressly and directly conflicts with the decision of the Third District Court of Appeal. It provides this Court with the ability to exercise its discretion, hear this case on the merits and to resolve the conflicts regarding the application of Rule 1.070(j). Dr. Pearlstein respectfully requests the Court to exercise that discretion and to hear this case.

Respectfully submitted,

Fowler, White, Gillen, Boggs,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five copies of the Petitioner, Pearlstein's Brief of Jurisdiction, has been furnished by U.S. Mail to SID J. WHITE, CLERK, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; and a copy each to RAYMOND T. ELLIGETT, JR., ESQUIRE, Attorney for Appellants, NCNB Plaza, Suite 2600, 400 North 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 JAMES F. PINGEL, JR., ESQUIRE, Suite 1700, First Union Center, 100 South Ashley Drive, Tampa, FL 33602, this 23rd day of March, 1992.

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

WILLIAM KING and JULIA KING, his wife,

Appellants/Cross-Appellees,

v.

LESLIE PEARLSTEIN, M.D., and EDWARD WHITE MEMORIAL HOSPITAL,

Appellees/Cross-Appellants.

Case No. 91-00332

Opinion filed January 15, 1992.

Appeal from the Circuit Court for Hillsborough County; James A. Lenfestey, Judge.

Raymond T. Elligett, Jr., of Schropp, Buell & Elligett, P.A., and James F. Pingel, Jr., of Lau, Lane, Pieper & Asti, P.A., Tampa, for Appellants/Cross-Appellees.

Charles W. Hall of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., St. Petersburg, for Appellee/Cross-Appellant, Leslie Pearlstein, M.D.

John W. Boult of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for Appellee/Cross-Appellant, Edward White Memorial Hospital.

PATTERSON, Judge.

This case presents the question of whether the filing of a petition to extend the medical malpractice statute of limitations pursuant to section 768.495(2), Florida Statutes (1987), with the clerk of the circuit court in a county which ultimately proves to be an improper venue for the subsequent medical malpractice action extends the statute. The trial court held that it did not and dismissed this action with prejudice. We disagree and reverse. The appellees cross-appeal the failure of the trial court to dismiss the action on the further ground that service of process was not accomplished within 120 days of the filing of the complaint as required by Florida Rule of Civil Procedure 1.070(j). For the reasons stated below, we agree with the trial court that rule 1.070(j) does not apply to this case and affirm in that regard.

On March 18, 1984, Dr. Pearlstein opexated on Mr. King at Edward White Memorial Hospital to repair a hernia. On May 5, 1986, Dr. Pearlstein again operated on Mr. King to remove a sponge which had bean left in Mr. King's body at the time of the 1984 surgery. The parties agree that the statute of limitations commenced to run on May 5, 1986.

Thereafter, the appellants complied with section 768.57, Florida Statutes (1987), by sending a notice to initiate litigation to the appellees. On July 31, 1987, the appellants filed with the clerk of the Circuit Court of Hillsborough County a petition to obtain the "automatic 90-day extension" of the

statute of limitations provided for in section 768.495, Florida Statutes (1987). On November 1, 1988, the appellants filed their medical malpractice action in Hillsborough County.

The action lay dormant, and on January 19, 1990, the court initiated a motion to dismiss for lack of prosecution. For reasons not pertinent to this appeal, the court entered and then vacated an order of dismissal for lack of prosecution. In August 1990 the appellants filed an amended complaint and, for the first time, obtained service of process upon the appellees. Both appellees filed motions to dismiss asserting that the action was barred by the statute of limitations, or in the alternative, should be dismissed for failure to comply with rule 1.070(j). Neither appellee specifically moved to dismiss the action on the basis of improper venue,[1]

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 an 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, in that the filing on November 1, 1988, would be timely if the automatic ninety-day extension were effective, the parties agree that the finding rests on the trial court's

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[1] Dr. Pearlstein's motion does set out in detail that the appellees' residences are and all acts complained of occurred in Pinellas County.

conclusion that the petition for extension, filed in Hillsborough County, was ineffective to extend the statute.

The words of a statute are to be given their plain and ordinary meaning, since it is assumed that the legialature knew the meaning of the words when it chose to include them in the statute. Sheffield v. Davis, 562 So. 2d 384 (Fla. 2d DCA 1990). During the relevant period, section 768.495(2), Florida Statutes (1987), provided in pertinent part:

> (2) 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.

(Emphasis added.) The statute plainly requires the petition to be filed in the same county as the subsequent suit will be filed. It does not require the petition to be filed in a county in which the suit should or must be filed. If the legislature had desired, it could have addressed the matter of venue.

This action was in fact filed in the same county as the petition; therefore, under the plain language of the statute, the petition was properly filed and extended the statute of limitations accordingly. Venue is a personal defense which is waived if not asserted in a party's first appearance in the case.[2] See

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[2] Although the appellees argued venue as the reason why the statute of limitations was not extended, neither party sought dismissal or transfer on this basis. In the event venue had been

County of Volusia v. Atlantic Int'l Inv. Corp., 394 So. 2d 477 (Fla. 1st DCA 1981); Fla. R. Civ. P. 1.040(h). It does not affect the jurisdiction of the court to hear and determine the case. The action being timely filed, the trial court erred in dismissing the case.

On cross-appeal, the appellees argue that the suit should be dismissed for failure to comply with rule 1.070(j), which requires that service of process be accomplished within 120 days of the filing of the initial pleading. No issue exists as to compliance with the rule; there was a gross noncompliance. The only question is whether the rule applies to this case. This action was commenced on November 1, 1988, Rule 1.070(j) became effective on January 1, 1989. We acknowledge that there is a difference of opinion between the various districts as to whether the rule is to apply to cases filed before January 1, 1989, and pending on that date. We agree with the reasoning expressed by our sister court in Partin v. Flagler Hospital, Inc., 581 So. 2d 240 (Fla. 5th DCA 1991), and hold that rule 1.070(j) does not apply to cases pending prior to January 1, 1989.

Reversed in part, affirmed in part, with directions to reinstate the appellants' complaint.

DANAHY, A.C.J., and FRANK, J., Concur.

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directly challenged the proper disposition would have been transfer, not dismissal. Tropicana Products, Inc. v. Shirley,... 501 So. 2d 1373 (Fla. 2d DCA 1987).