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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' JURISDICTIONAL BRIEF

RAYMOND T. ELLIGETT, JR., ESQ.
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(813) 221-0117
COUNSEL FOR RESPONDENTS

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STATEMENT OF THE CASE AND FACTS

Respondents, the Kings, accept Petitioner's statement, with the following supplementation. The Second District's determination that Fla.R.Civ.P. 1.070(j) did not apply because the Kings filed their action before its effective date affirmed Circuit Court Judge Lenfestey's ruling below on that point (see **slip** opinion in Petitioner's appendix at page 3).

Petitioner motioned the Second District to certify its decision as being in conflict with Berdeaux v. Eagle-Picher Industries, Inc., 575 So.2d 1295 (Fla. 3d DCA 1990), review denied, 589 So.2d 294 (Fla. 1991) (see appendix hereto). The Second District declined to certify the case to this Court (see appendix hereto).

Petitioner's Co-Defendant, Edward White Memorial Hospital, has also petitioned this Court for review in Case No. 79,530.

SUMMARY OF ARGUMENT

Petitioner must show the Second District's decision expressly and directly conflicts with the decision in another case, and not merely the reasoning in another case. Petitioner has failed to do this. **The Berdeaux** case on which Petitioner asserts conflict did not dismiss the plaintiff's case. Although reaching its decision through different reasoning, Berdeaux reached the same decision as the Second District in this case.

There is no reason to strain to exercise jurisdiction where there is no conflict in decisions and where - by the very nature of the temporal aspect of an effective date issue - there will only be a small number of cases in which the issue is presented.

ARGUMENT

THE SECOND DISTRICT'S DECISION DOES NOT EXPRESSLY AND DIRECTLY
CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS.

Petitioner asks this Court to invoke its discretionary jurisdiction based on conflict. Under Article V, §3 (b)(3), Florida Constitution and Fla. R. App. P. 9.030(a)(2)(A)(iv), the Court "may" review a decision of a District Court of Appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law" (emphasis added).

Thus, for conflict jurisdiction to exist, the express and direct conflict must be between decisions, and not between the reasoning in different decisions.

Even under the broader certiorari review permitted under the 1968 Constitution, this Court held the conflict had to be in decisions, and not in reasons for the decisions.' Niemann v. Niemann, 312 So.2d 733, 734 (Fla. 1975) ("We have to look at the decision, rather than a conflict in the opinion, to find that we have jurisdiction." Cir. J. Harding); Firestone v. Time, Inc., 271 So.2d 745, 747 (Fla. 1972) ("For it is the conflict of decisions, not of opinions or reasons, which supply jurisdiction for review by certiorari." emphasis by the Court); Gibson v. Maloney, 231 So.2d

¹ Article V, §4(2), Florida Constitution (1968) provided certiorari review for any decision of a district court of appeal "that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law."

823, 824 (Fla. 1970), cert. denied, 398 U.S. 951, 90 S.Ct. 1871, 26 L.Ed.2d 291 (1970).

Both Berdeaux and the Second District in King refused to dismiss an action where the plaintiff had: (1) filed suit before the effective date of Rule 1.070(j); (2) had not served the defendant within 120 days of filing the action; but (3) had properly served the defendant thereafter. While the two courts applied different reasoning, they reached the same decision: the plaintiff's case would not be dismissed based on Rule 1.070(j).

Petitioner's jurisdictional brief at page 6 recognizes the Second District in King did not certify that its decision conflicted with Berdeaux. Instead, the Second District noted that there is a difference of opinion between the various districts and stated that it agreed with the reasoning in Partin v. Flagler Hospital, Inc., 581 So.2d 240 (Fla. 5th DCA 1991). Again, a difference of opinion in reasoning is not the issue; there is no difference in the decisions reached by the two courts.

As noted above, the Second District denied Petitioner's request to certify this case as conflicting with the decision in Berdeaux (see appendix). The Kings also note that this Court declined discretionary review in Berdeaux, in an order issued after Partin (Partin was decided June 13, 1991, and this Court denied review in Berdeaux on September 13, 1991).

Petitioner's cases tacitly recognize he cannot demonstrate sufficient conflict here. For example, Nielsen v. City of Sarasota, 117 So.2d 731, 735 (Fla. 1960), holds the Court "must

find in that decision a real, live and vital **conflict.**" There simply is no conflict in the decisions reached by the Second and Third Districts, as contrasted with the reasoning behind those decisions. See also, Department of Health and Rehabilitative Services v. National Adoption Counselling Service, Inc., 498 So.2d 888 (Fla. 1986).

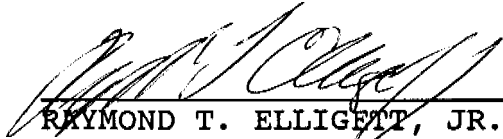
Even if a true conflict of decisions existed, this Court would still determine whether or not to exercise its discretion to review the conflict. The Kings suggest there is no need to opine on differences in reasoning, because their case would be decided the same in the Second and Third Districts. Contrary to Petitioner's suggestion at page 6 of his brief, he was no more "**deprived**" than he would have been in the Third District. The result would have been the same.

Simply by the nature of the dispute, there will be a very limited number of cases for which such a dispute could even arise. Namely, it would be limited to those cases in which actions were filed before the effective date of Rule 1.070(j), but not served for over 120 days. Because it is now well over three years beyond the effective date of the Rule, there should be few, if any, further cases arising in this posture.

CONCLUSION

Based on the foregoing, the Kings submit that there is no express and direct conflict in decisions. The **Kings** urge this Court to decline to exercise its discretion to accept this case for review.

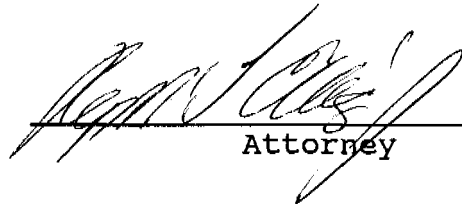
Respectfully submitted,



RAYMOND T. ELLIGETT, JR., ESQ.
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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. Boulton, 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 31st day of March, 1992.



Attorney

INDEX TO APPENDIX

PETITIONER'S MOTION FOR CERTIFICATION.A 1
ORDER DENYING MOTION FOR CERTIFICATION.A 4

IN THE DISTRICT COURT OF APPEAL OF THE SECOND DISTRICT
STATE OF FLORIDA
APPEAL NO. 91-332

WILLIAM KING and JULIA KING,
his wife,

Appellants,

vs.

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

Appellees.

MOTION FOR CERTIFICATION

COMES NOW the Appellee, LESLIE PEARLSTEIN, M.D., pursuant to Rule 9.330, Rule 9.030(a)(2)(A)(vi), and Rule 9.020(g), Florida Rules of Appellate Procedure, and files this motion and respectfully requests that this Court certify that its decision herein dated January 15, 1992, is in direct conflict with the decision of another district court of appeal, and for good cause says:

1. This Court in its decision of January 15, 1992, states:

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 pleadings. 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. (See Appendix A, Emphasis added)

2. Moreover, in Partin, which this Court follows, the District Court of Appeal for the Fifth District also recognized the conflict between (now among) the districts:

We recognize that this conclusion conflicts with Berdeaux which applied the rule to cases that were pending before the effective date" (581 So.2d at 242)

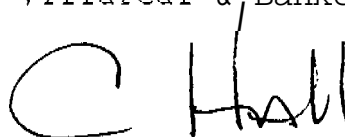
3. And, indeed, in Berdeaux v. Eagle-Picher Industries, 575 So.2d 1295, 1296 (Fla. App. 3 Dist. 1990), District Court of Appeal for the Third District held:

. . . , [W]e agree with the defendants that the plaintiffs were limited to 120 days, from the effective date of the Rule, within which to serve the defendants

See also, Hill v. Hammerman, 583 So.2d 368 (Fla. App. 4 Dist. 1991).

WHEREFORE, this appellee respectfully submits that this court's decision herein dated January 15, 1992, is in direct conflict with the decision of the Third District in Berdeaux, and respectfully requests that this Court so certify,

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



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P.O. Box 210
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Tel. (813) 896-0601
Attorneys for Appellee,
LESLIE PEARLSTEIN, M.D.
Fla. Bar No. 326410

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original **and** three copies of the Motion for Certification of Appellee, Leslie Pearlstein, M.D. has been furnished by U.S. Mail to WILLIAM A. HADDAD, Clerk, Second District Court of Appeal, P.O. Box 327, Lakeland, FL 33802; 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 **22nd day** of January, 1992.

Fowler, White, Gillen, **Boggs,**
Villareal & Banker, P.A.

CHARLES W. HALL

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LESLIE PEARLSTEIN, M.D.
Fla. Bar. No. 326410

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

FEBRUARY 12, 1992

WILLIAM KING and JULIA)
 KING, his wife,)
)
 Appellant (s),)
)
 v.)
)
 LESLIE PEARLSTEIN, M.D.)
 et al.,)
)
 Appellee (s).)
)

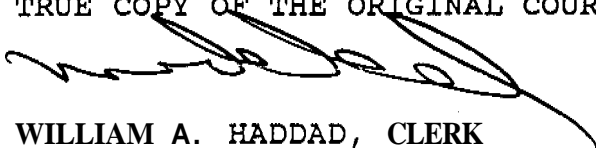
Case No. 91-00332

BY ORDER OF THE COURT:

Counsel for appellee's having filed a motion for certification in the above-styled case, upon consideration, it is

ORDERED that said motions are hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.



WILLIAM A. HADDAD, CLERK

c: James F. Pingel
 Raymond T. Elligett, Jr., Esq.
 John Ward Boulton, Esq.
 Charles W. Hall, Esq.
 Richard L. Ake, Clerk

Glenn M. Woodworth, Esq.

/PM