# In the Supreme Court of Florida

CASE NO.: SC10-57

STRAX REJUVENATION AND
AESTHETICS INSTITUTE, INC.,

Petitioner,

v.

DONNA SHIELD,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL

**RESPONDENT'S ANSWER BRIEF ON THE MERITS**

Respectfully submitted,

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## STATEMENT OF THE CASE AND FACTS

### A. Overview

The thirty-day jurisdictional deadline for Petitioner to file a notice of appeal in this case was August 20, 2009. (R 10-11).[1] The filing of the notice was delegated to a courier, who took it with a box of other documents and just "delivered them" for filing rather than getting a date-stamped copy. (R 56). The filing was made by the clerk's office on August 21, 2009. (R 10-11). Petitioner here asks this Court to hold that Petitioner's notice was timely by creating an exception to the bright line 30-day rule for getting a notice of appeal time stamped by the clerk's office under which a notice of appeal will be deemed filed as of the date it is "received" by the clerk, whatever that may mean - or come to mean. Respondent argues for adherence to the bright line rule.

#### 1. Statement of the pertinent facts and proceedings below

On September 8, 2009, the Florida Fourth District Court of Appeal issued an Order which advised that Petitioner's notice of appeal had been filed in the lower tribunal on August 21, 2009 but reflected that the appeal was being taken from an order dated July 20, 2009. (R 10). The Fourth District ordered Petitioner to

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[1] References to the Record on Appeal appear as (R __ ). Unless otherwise indicated, all emphasis herein is supplied by undersigned counsel.

provide the court with "a confirmed copy of the order(s) being appealed and any subsequent orders which tolled the time for the filing of the Notice of Appeal. Said orders must reflect the time/date stamp so that timeliness can be determined." (R 10).

Petitioner filed its "Response to September 8, 2009 Order and Motion to Deem Notice of Non-Final Appeal Timely Filed." (R 39-59). In the Response, Petitioner confirmed that the order it was appealing had been filed with the clerk on July 21, 2009, which meant that August 20, 2009 was the last date to file a notice of appeal therefrom. (R 39). Two affidavits were attached to the Response, one from a courier, dated September 17, and one from Petitioner's counsel, dated September 18. (R 56-57, 58-59). Each is set out below in pertinent part:

1. My name is George Gomez. I am the owner of Angel's Couriers, Inc. of Davie, Florida.

2. I pick up all documents at the firm of CHIMPOULIS & HUNTER destined for the Broward County Courthouse each day before 2 p.m. and deliver them directly to the Clerk of the Circuit Court that same day. On August 19, 2009, I went to Chimpoulis and Hunter at my normal time. I picked up the court filings for that day, which contained the Notice of Non-Final Appeal for STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC. and delivered them to the Clerk of Courts of Broward County, Florida for filing that day.

(R 56-57).[2]

The affidavit of Petitioner's attorney stated, in pertinent part:

> 3. On August 18, 2009, I prepared a Notice of Non-Final Appeal for STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC. and placed it in the Broward County filing box at our firm for it to be delivered and filed with the Circuit Court on August 19, 2009. When I reviewed the Fourth District Court of Appeal's Acknowledgment of New Case, I noticed that it did not reflect that the Appeal was also being taken by STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC.
>
> 4. I inquired of the owner of our firm's courier service whether the Notice of Non-Final Appeal for STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC. had been delivered to the Circuit Court on August 19, 2009. He confirmed that it had been.
>
> 5. To my knowledge, there is no reason that the Notice of Non-Final Appeal on behalf of STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC. would not have been filed on August 19, 2009, the same day it was delivered to the Clerk of the Court by our courier service.

(R 58-59). Based on these affidavits, Petitioner argued that the Fourth District should deem the notice of appeal to have been timely filed. (R 40).[3]

[2] On page two of the Initial Brief, Petitioner mistaken states that the courier "attested that he filed the notice of appeal with the Broward County clerk's office on the same day."

[3] Petitioner requested in the alternative that the dismissal of its appeal be without prejudice and that Petitioner's appeal be allowed to go forward along with the appeal of a co-defendant who had timely filed his notice of appeal. (R 40). The Fourth District did not grant that relief. Petitioner has not raised the issue before this Court and has thus waived consideration of the issue by this Court.

Issuing its opinion published as *Strax Rejuvenation & Aesthetics Inst., Inc. v. Shield,* 24 So. 3d 666 (Fla. 4th DCA 2009), the Fourth District dismissed the appeal as untimely, ruling that the date stamp on the notice of appeal was conclusive. (R 61-65). The Fourth District certified conflict, however, with *Weintraub v. Alter,* 482 So. 2d 454 (Fla. 3d DCA 1986), in which the court held that a notice of appeal was timely where the appellant presented the notice for filing on the 30th day, but the clerk's office refused to accept the notice for filing because the filing fee was tendered by the appellant in cash, rather than a check or money order.

Petitioner filed a notice to invoke exercise of this Court's discretionary jurisdiction (R 70-72), and this Court accepted the case for review.

**STATEMENT OF THE ISSUES**

Whether the Fourth District correctly dismissed the Petitioner's appeal as untimely when the notice of appeal was file-stamped by the Clerk thirty-one days after the date of rendition of the order being appealed.

Whether *Weintraub v. Alter,* 482 So. 2d 454 (Fla. 3d DCA 1986) and other cases not adhering to the 30 day rule should be disapproved because 30 days is a wholly sufficient time period for any litigant to make a filing and exceptions to the bright line rule only create uncertainty and litigation.

## SUMMARY OF ARGUMENT

The failure to file a notice of appeal within 30 days is an irremediable jurisdictional defect. The 1984 amendment to the Florida Rules of Civil Procedure, which added a last sentence to the "Filing Defined" section contained in Rule 1.080(e) laid to rest any questions regarding when a notice is filed: "The date of filing is that shown on the face of the paper by the judge's notation or the clerk's time stamp, whichever is earlier." Fla. R. Civ. Proc. 1.080(e). "Rule 1.080 was amended to define the date of filing of papers and pleadings in a case for purposes of determining matters of timeliness under these rules." *In re Amendments to Rules of Civil Procedure,* 458 So. 2d 245 (Fla. 1984).

The Fourth District's decision to interpret rule 1.080(e) as a bright line rule is exactly right. As the Fourth District quite correctly observed, it is the responsibility of appellants and their lawyers to make sure that notices of appeal are timely filed. Potential delays caused by clerk office underfunding or otherwise, must be taken into account in deciding how close up on the deadline a filer decides to get before filing a notice of appeal. Bright line rules are effective and beget compliance. Exceptions are unnecessary and disruptive. Adopting the suggested approach that a notice of appeal is "deemed filed" when it is "received" by the clerk's office will only spawn uncertainty, proliferate excuses, cause delays in processing appeals and generate a body of case law rivaling the bulk of "excusable

neglect" and default cases. The public policy strongly favors continuing to place the burden of a timely filed notice of appeal where it belongs – on the shoulders of litigants and their counsel.

Aside from the Fourth District's bright line rule reasoning, this appeal was properly dismissed as untimely. The filing of the notice of appeal was delegated to a courier without any effort to get the notice time stamped or any other follow up which was absolutely necessary for such an important jurisdictional court document.

## ARGUMENT

The Florida Rules of Appellate Procedure provide in plain language that appellate jurisdiction is invoked by "filing" a notice or petition "within 30 days of rendition of the order as to which review is sought."[4] As this Court stated over thirty years ago in adopting the proposed amendments to the appellate rules, the failure to file a notice of appeal within 30 days "constitutes an irremediable jurisdictional defect." *In Re Proposed Florida Appellate Rules*, 351 So. 2d 981, 994 (Fla. 1977).

In the over thirty years since the 1978 enactment of the Florida Rules of Appellate Procedure, this Court has made one exception "based strictly on the

[4] *See* Florida Rules of Appellate Procedure 9.110(b), 9.120(b), 9.130(b), 9.140(b)(3), 9.142(b)(3), 9.160(b), and 9.180(b)(3).

extenuating circumstances of [the] particular case." *In the Interest of E.H.*, 609 So. 2d 1289 (Fla. 1992). In *E.H.,* the mother's attorney inadvertently failed to timely file a notice of appeal of an order *permanently terminating her parental rights*. This Court held that the mother could seek belated relief, but only by way of a *habeas corpus* filed with the trial court:

> We emphasize that we do not condone the type of legal representation that made the grant of a belated appeal necessary in this case. The rules of appellate procedure, and the filing deadlines therein, were adopted for the purpose of standardizing and expediting the appellate process. *In Re Proposed Fla. App. Rules*, 351 So. 2d 981, 983 (Fla. 1977) (Introductory Note). We did not grant the belated appeal in this case based on precedent, but on the significant policy interest in ensuring that a parent and child are not separated without a thorough review of the merits of the case.

609 So. 2d at 1291.

The Florida District Courts of Appeal, too, have, in the main, adhered to strict enforcement of the rule, as the Fourth District did here. Some earlier questions that came up were laid to rest with the 1984 amendment to the Florida Rules of Civil Procedure, which added a last sentence to the "Filing Defined" section contained in Rule 1.080(e) as follows:

> (e) Filing Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk, except that the judge may permit papers to be filed with the judge, in which event the judge shall note the filing date before him or her on the papers and transmit them to the clerk. ***The date of filing is that shown on the face of the paper by the judge's notation or the clerk's time stamp, whichever is earlier.***

Petitioner attempts to suggest a modification to the actual wording of the amended Rule to reflect Petitioner's interpretation of the historical evolution of the amendment. Petitioner's version would add an introductory phrase: "[***For purposes of entry of judgments***], ... [t]he date of filing is that shown on the face of the paper by the judge's notation or the clerk's time stamp, whichever is earlier." The Rule itself says no such thing, however, and nothing about the Rule or this Court's comments in adopting the Rule suggest that there was a concern only about the timing of *some* filings. On the contrary, this Court was quite clear that the Rule was to apply across the board, *not* only to entry of judgments: "Rule 1.080 was amended to define the date of filing of papers and pleadings in a case for purposes of determining matters of timeliness under these rules." *In re Amendments to Rules of Civil Procedure,* 458 So. 2d 245 (Fla. 1984).

The Fourth District quite correctly so noted in its decision in this case:

> The clear and concise language of the 1984 amendment to rule 1.080(e) compels us to conclude that the Supreme Court intended to establish a bright line test. To be sure, interpreting rule 1.080(e) in a bright line fashion obviates the need to engage in any fact finding beyond the information stamped on the notice of appeal. Finite rules make sense. They are easy to follow, easier to apply, and remove doubt. And, while we are cognizant of the fact that it is within the realm of possibility that the clerk's date stamp machine may, from time to time, produce an incorrect date, prudent attorneys and clerks always have the option of paying closer attention to such details before the jurisdictional limit expires.

24 So. 3d at 668-669.

Respondent respectfully submits that the Fourth District got it exactly right. Bright line rules are effective. Fear of well-defined and inflexible consequences begets compliance.

Exceptions to the rule occasionally created by the district courts are unnecessary and disruptive. The case cited by the Fourth District as conflict - *Weintraub v. Alter*, 482 So. 2d 454 (Fla. 3d DCA 1986) - is illustrative. *Weintraub* involved an appellant who tendered a notice of appeal to the clerk for filing at the end of the day on the 30th day. The clerk refused to file the notice because the appellant tried to pay the filing fee in cash, rather than by check or money order. Several days later, the appellant returned to his attorney and advised him of his unsuccessful effort to file the notice.

The Third District decided that the circumstances presented in *Weintraub* were worthy of creating an exception to the 30 day rule. Respondent submits that they were not. All that the *Weintraub* appellant had to do was ***not wait until the 30th day.*** Or, having made the decision to live dangerously, it would have been simple enough to call the clerk's office ahead of time to determine how fees may be paid, or to go early enough in the day to the clerk's office to avoid turning a simple filing into a point-of-no-return crisis. Late filings are ***always*** problems of the filer's own making because they could ***always*** have been forestalled through

the simple expedient of tackling the task sooner. The *Weintraub* appellant's dilatory approach caused the late filing. Help from the *Weintraub* Court was completely unwarranted, and served only to cause a blurring of the lines for future litigants.

Respondent respectfully submits that a similar exception created by the recent decision of the Fifth District in *OCR-EDS, Inc. v. S & S Enterprises, Inc.*, __ So. 3d __ , 2010 WL 838164 (Fla. 5th DCA March 12, 2010) was equally unwarranted, and will only spawn similar mischief by blurring the Rule 1.080 bright line. In *S & S Enterprises*, an appellant sent out a notice of appeal by Federal Express on the 29th day after rendition of the order as to which review was to be sought. The notice of appeal was time stamped by the clerk on a date beyond the 30 day cut-off. The *S & S Enterprises* appellant asked the Fifth District to deem the notice timely despite the appellant's failure to get a clerk's time stamp within the allotted 30 days. This request to the Fifth District was based on affidavits (1) from a legal secretary saying that she had called the clerk's office on the 30th day; confirmed arrival of the Federal Express package; and obtained an assurance from the clerk that, when the notice was eventually time-stamped, the clerk would back-date it to indicate that it had been filed on the 30th day; and (2) an affidavit from an employee in the clerk's office attesting to her signature on the Federal Express delivery confirmation receipt. Instead of simply finding that the notice of appeal

was untimely under the perfectly clear language of Rule 1.080(e), the Fifth District relinquished the matter to the circuit court to conduct an evidentiary hearing about the timing. 2010 WL 838164, *2.

In *S & S Enterprises*, as in *Weintraub* and every other late-filing case, the fact of having a late time stamp was caused entirely by the filer. Instead of waiting until the 29th day to attend to a highly time sensitive filing, the matter could have been undertaken on the 15th day, or the 20th day, or the 22nd day, or the 25th day. Or, having allowed the time to run out to the point that only one day remained, the notice could have been hand-delivered to the court for date-stamping, whatever the cost. The Fifth District has decided instead that the courts and the opposing party should expend time and money on inquiring into a late filing that appellant had every opportunity to avoid. Creating such exceptions to the bright line 30-day rule only interjects uncertainty and delay into the appellate process, in a manner directly at odds with the reasons this Court articulated for adopting the rules in the first place.[5] "The rules of appellate procedure, and the filing deadlines therein, were adopted for the purpose of standardizing and expediting the appellate

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[5] The appellate rules are set up so that the clerk of the appellate court can determine the timeliness of the notice *from its face*. The date of rendition of the order must be set out in the notice of appeal. *See* Fla. R. App. P. 9.900. The clerk can then compare the date of rendition with the time-stamp date on the notice of appeal. Such would not be the case, of course, if the trial court clerk's time stamp dates are subject to parole alteration.

process.” *In Re Proposed Fla. App. Rules*, 351 So. 2d 981, 983 (Fla. 1977) (Introductory Note).

Petitioner’s argument that the clerk’s offices are underfunded and understaffed has no place in this discussion. As the Fourth District quite correctly observed, it is the responsibility of appellants and their lawyers to make sure that notices of appeal are timely filed. After all, the rule gives an appellant 30 days within which to file the notice. Potential delays in the clerk’s office, from underfunding or otherwise, must be taken into account in deciding how close up on the deadline a filer decides to get before filing a notice of appeal. Concern for the underfunded clerks might be better expended over not requiring them to engage in conversations about the arrival of Federal Express packages, preparation of affidavits , attendance at evidentiary hearings, and back-dating of time-stamping.

The principle that the Petitioner suggests the Court should adopt, under which a notice of appeal is “deemed filed” when it is “received” by the clerk’s office, is ill-advised. Such an approach can only create uncertainty, proliferate excuses, cause delays in processing appeals, and generate a body of case law to rival the bulk of the ‘excusable neglect’ and default cases. Petitioner’s term “receipt” is loose and ill-defined, unlike the concrete time-stamp provision of Rule 1.080(e). It may be that the bright line rule at times requires effort on the part of counsel that

may not always be convenient. But, it is the rule nonetheless. It was designed with certainty in mind, not convenience; and it provides ample time for compliance.

The public policy strongly favors continuing to place the burden on a timely filed notice of appeal where it belongs – on the shoulders of litigants and their counsel.[6]

Even aside from the bright line rule issue, the Fourth District's decision was certainly correct on the record presented to it. Petitioner presented insufficient affidavits which showed only that Petitioner left it to a courier to get a notice of appeal filed without instructing the courier to get the notice time stamped. According to Petitioner, the notice of appeal was given to the courier a day *before* the notice was due such that Petitioner had time to confirm that the notice had, in fact, been time stamped, or to deliver another notice to the clerk for time-stamping.

This appeal was properly dismissed as untimely based on the facts so as to warrant affirmance even aside from the Fourth District's bright line rule reasoning. *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999).

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[6] Florida Rule of Judicial Administration 2.525 takes precisely that approach, placing the burden of successful e-filing squarely on litigants and their counsel. The Rule provides: "Electronic Filing (e) Transmission Difficulties. ***Any attorney, party, or other person who elects to file any document by electronic transmission shall be responsible for any delay, disruption, interruption of the electronic signals, and readability of the document, and accepts the full risk that the document may not be properly filed with the clerk as a result***."

This Petitioner should not be given an opportunity to start anew and further delay the proceedings. [7]

## CONCLUSION

Based on the foregoing facts and authorities, Respondent respectfully submits that the decision of the Fourth District should be affirmed and that the case law inconsistent therewith should be disapproved.

Respectfully submitted,

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[7] Although not a part of the record on appeal, Petitioner has noted in a footnote that it has now filed a motion under Fla. R. Civ. P. 1.540 (Petitioner's Initial brief, p __ ), thus evidencing its intent to further protract these proceedings and impose on court resources in its quest for relief from the consequences of its dilatory approach to getting its notice of appeal filed.

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Respondent's Brief on Jurisdiction was sent by U.S. mail this 26th day of April, 2010 to: Jay Chimpoulis, Esquire, Chimpoulis & Hunter, P.A., 7901 S.W. 36th Street, Suite 206, Davie, Florida 33328; Richard T. Woulfe, Esquire, Bunnell & Woulfe, P.A., 100 S.E. Third Avenue, Ft. Lauderdale, Florida 33394; and Dinah Stein, Esquire, Hicks, Porter, Ebenfeld & Stein, P.A., 799 Brickell Plaza, 9th Floor, Miami, Florida 33131.

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## CERTIFICATE OF COMPLIANCE WITH FONT STANDARD

Undersigned counsel hereby respectfully certifies that the foregoing Brief on Merits complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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