THE SUPREME COURT OF FLORIDA
CASE NO.: SC10-57
L.T. No(s): 4D09-3587 & 08-64365

STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC.
Petitioner,

v.

DONNA SHIELD and ROGER L. GORDON, M.D.,
Respondents.

ON DISCRETIONARY REVIEW OF AN OPINION OF THE FOURTH DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE APPELLATE PRACTICE COMMITTEE OF THE ORANGE COUNTY BAR ASSOCIATION IN SUPPORT OF PETITIONER, STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC.

BARBARA A. EAGAN
Florida Bar No. 0767778
Chair of the Orange County Bar Association Appellate Practice Subcommittee
Eagan Appellate Law. PLLC
13835 Kirby Smith Road
Orlando, Florida 32832

NICHOLAS A. SHANNIN
Florida Bar No. 0009570
As Chair of the Amicus Curiae Subcommittee of the Orange County Bar Association Appellate Practice Subcommittee
Page, Eichenblatt, Bernbaum & Bennett, P.A.
214 East Lucerne Circle
Orlando, Florida 32801

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INTEREST STATEMENT OF THE AMICUS CURIAE

This Brief is submitted by the Appellate Practice Committee of the Orange County Bar Association ("OCBA Appellate Practice Committee" or "Committee"). The OCBA APC is a professional organization of dozens of attorneys whose practice either specializes in or has a focus on practice before the appellate courts in the State of Florida. This specialized committee is part of the Orange County Bar Association, an organization consisting of 3,000 members of the Bar and its affiliates.

The stated purpose for the Orange County Bar Association's substantive committees is to advance the delivery of quality legal services to the public. To do so, the Committee often monitors case developments that may affect the ability of Committee members to deliver quality legal services to the public. The members of the Committee were alarmed about the potential impact of the case at issue here and unanimously voted to proceed with this effort to provide its position to this Court by way of an amicus brief. The sole interest of the Committee in doing so is to provide this Court with the unique perspective of appellate practitioners who would be most affected by the determination of this issue: whether an appellant has the ability to rebut a ministerial error concerning the time/date stamp applied by a clerk of court to a notice of appeal.

PRELIMINARY STATEMENT

The facts in the preceding below are described in Petitioner's Initial Brief. The arguments presented by the Committee are limited to the issue as determined by the Fourth District Court of Appeal in *Strax Rejuvenation And Aesthetics Institute, Inc. v. Donna Shield, et al.*, Case No. 4D09-3587 (hereinafter "*Strax*") and as conflict was certified by the Fifth District Court of Appeal in its opinion *OCR-EDS v. S & S Enterprises, Inc.*, 35 Fla. L. Weekly D577 (Fla. 5th DCA 2010) concerning the ability for an appellant to rebut a ministerial error concerning the time/date stamp applied by a clerk of court to a notice of appeal. Accordingly, the Committee takes no position on the underlying issues between the Petitioner and Respondents, but raises this amicus brief solely to urge this Court to quash the opinion of the Fourth District Court of Appeal in *Strax* as being contrary to Florida law and public policy.

SUMMARY OF ARGUMENT

The Committee strongly urges this Court to adopt the reasoning of the Fifth District Court of Appeal, which determined that Florida case law and proper statutory construction both support the determination that "[i]t is clearly appropriate for a trial court to take evidence to determine whether a time stamp is erroneous, and to correct the error if one is found." *OCR-EDS v. S & S Enterprises, Inc.*, 2010 WL 838164, *2 (Fla. 5th DCA 2010).

Not only does the interpretation of the Fifth District Court of Appeal comport with the consistent application of Florida case law prior to the Fourth District Court of Appeal's decision in *Strax*, but it also comports with the practical experience of many appellate practitioners. Ministerial errors happen. When they do, the law must provide for the opportunity to correct that ministerial error. The imposition of a rule by which the ability to timely invoke appellate jurisdiction may be completely removed from the hand of even the most careful appellate practitioner should not and cannot be the proper interpretation of the law.

ARGUMENT

I. THERE IS NO REASON TO RECEDE FROM THE LONG STANDING CASE LAW OF FLORIDA THAT APPELLATE JURISDICTION IS DETERMINED BY THE DATE THAT A NOTICE OF APPEAL IS ACTUALLY RECEIVED BY A CLERK OF COURT, NOT THE DATE THAT IS ULTIMATELY REFLECTED IN A POTENTIALLY ERRONEOUS CLERK STAMP.

Case law from every district court of appeal, other than the Fourth District, has held that appellate jurisdiction is determined by the date that the notice of appeal is actually received by the clerk of court (even if the clerk-stamped filing date indicates a belated filing). *OCR-EDS, Inc. v. S & S Enterprises, Inc.*, 35 Fla. L. Weekly D577 (Fla. 5th DCA 2010); *Knee v. Smith*, 313 So. 2d 117 (Fla. 1st DCA 1975); *Mills v. Avon Park Motor Co.*, 223 So. 2d 802 (Fla. 2d DCA 1969); *Weintraub v. Alter*, 482 So. 2d 454 (Fla. 3d DCA 1986). These decisions both precede and follow the 1984 Amendment of Florida Rule of Civil Procedure 1.080(e). As explained by the Fifth District Court of Appeal, the 1984 Amendment did not alter the ability of a court to correct a clerical error in creating an erroneous time stamp. *OCR-EDS, supra*.

This Court should follow the rationale provided by the Fifth District in *OCR-EDS* and determine accordingly that the new interpretation of Florida Rule of Procedure 1.080 in *Strax* is inconsistent with both Florida law and the necessary constraints of due process. This rationale has effectively been provided

by the Fifth District in *OCR-EDS* and well buttressed by the Petitioner, whose Initial Brief demonstrates that *Strax* is not only inconsistent with Florida law, but with the prevailing jurisdictional requirements throughout the country. There are, however, three analogous situations that the Committee brings to this Court's attention to further demonstrate that jurisdiction is not irrefutably nullified by a belated time stamp from a clerk of court.

The first related rule provision is Florida Rule of Appellate Procedure 9.040, which provides that "[i]f a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court." Fla. R. App. P. 9.040(b)(1). The Committee notes to the 1977 Amendment explains that this subdivision implements the provision of Article V of the Florida Constitution regarding jurisdiction for an appeal. Even though the Florida Constitution does not address such an issue, the Committee Notes provide that "[a] case will not be dismissed automatically because a party seeks an improper remedy or invokes the jurisdiction of a wrong court. The court must instead treat the case as if the proper remedy had been sought and transfer it to the court having jurisdiction." Fla. R. App. P. 9.040 (Committee Notes, 1977 Amendment). A second analogous situation exists in the fact that an appeal is deemed timely filed even though it is not accompanied by the required filing fee. Fla. R. App. P. 9.040(h). A third

analogous situation involves the failure of a party to attach conformed copies of the order designated in a notice of appeal. Fla. R. App. P. 9.040(h). As noted by the Committee upon amending this Rule in 1992, "[s]ubdivision (h) was amended to provide that the failure to attach conformed copies of the order designated in a notice of appeal as is now required by Rules 9.110(d), 9.130(c), and 9.160(c) would not be a jurisdictional defect …." Fla. R. App. P. 9.040 (Committee Notes, 1992 Amendment).

None of these provisions are optional: "[j]urisdiction of the court under this rule *shall* be invoked by filing an original and one copy of a notice, accompanied by any filing fees subscribed by law, with the clerk of the lower tribunal within thirty days of rendition of the order to be reviewed." Fla. R. App. P. 9.110(b). *See, also*, Fla. R. App. P. 9.110(d), requiring that "a conformed copy of the order … *shall* be attached to the notice …". Accordingly, the plain language of the mandatory provisions of Rule 9.110 and similar authorizing rules have uniformly been interpreted by the drafters of the rules in such a way to allow for an interpretation that affords justice and due process to the litigants before Florida's appellate courts. When reviewing the call of the Fifth District Court of Appeal to read Rule 1.080 *in pari materia*, this Court should look to each of these appellate rules as well as Rule 1.540(a) to determine the appropriate interpretation as one

that permits the due process of the litigants to be protected from inadvertent ministerial errors by a clerk of court.

II. CONTRARY TO THE POSITION OF THE FOURTH DISTRICT COURT OF APPEAL IN *STRAX*, ALLOWING THE CLERK'S DATE STAMP TO BECOME IMPERVIOUS TO REBUTTAL BY ANY MEANS WILL ALLOW EVEN THE MOST CAREFUL APPELLATE PRACTITIONER TO FIND HIS OR HER CLIENT'S PRESERVED APPEAL LOST AND THEMSELVES SUBJECT TO A CLAIM FOR MALPRACTICE.

The Fourth District's decision in *Strax* to create a bright line rule is not concordant with the public policy and constitutional duty of courts to afford due process and access to courts for the litigants of this State. In reaching its determination that a "bright line rule" made the time/date stamp of the clerk irrebutable, by the Fourth DCA explained:

> 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 time limit expires.

Strax at 668-669. The primary purpose of this Amicus Brief is to provide the Court with the unique perspective of the practitioner as to why such a "bright line rule" would have grave consequences for both practitioners and their clients.

First, the Fourth District's acknowledgment that "[w]e 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" demonstrates only half of the problem with the interpretation found in *Strax*. *Strax* at 668. The first part, as reflected by the *Strax* court, is the fact that the machines utilized by clerk personnel, like all machines, are subject to the potential for error, and the idea that a critical opportunity to appeal an order may be lost not from a failure by either client or his counsel, but, instead, simply because of an unadjusted date or other mechanical function, is simply untenable.

Far more frequent than a mechanical failure, however, is the more likely and understandable error involving the operator of the machine. Documents by the thousands are received by the clerks of our sixty-seven counties. Each one of those sixty-seven counties operates their clerk docketing differently, with different internal operating rules and procedures. Those counties with the heaviest volumes are the counties with the greatest chance of an error occurring between the receipt of a document by a clerk and the actual placement of that document in a "clerk date stamp machine" as envisioned by the Fourth District in *Strax*. *Id.* A careful and prudent attorney could provide by FedEx a notice of appeal or petition days before the jurisdictional time limit occurred, but if that document gets delayed in

its processing before reaching the "time/date machine," the care taken by the appellate practitioner will have been for naught and no amount of proof that it had actually been timely received by the clerk of court would be sufficient to meet the new *Strax* standard.

The other half of the problem with the description by the Fourth DCA is the presupposition that the "date stamp machine" exists at all. Many counties continue to use the manual input machine likely envisioned by the court in *Strax*, whereby a practitioner could visibly watch a clerk take a pleading, such as a notice of appeal, place it inside of a machine, hear an audible "click," and visually see the date and time stamped in that format. Other counties, most notably larger counties that process a far higher volume of pleadings, have allowed the "time/date stamp machine" to recede into the technological graveyard with data punch stamps and electronic typewriters. Documents received are instead submitted for "processing" where they are often run through a scanner, where a clock/date stamp becomes embedded on the image.

The reason for this technological change by the clerk is obvious: scanning technology with embedded images is faster, can handle far more documents at a time, and requires considerably less human effort, with documents autofed through a machine instead of being manually punched, page by page, by a clerk

sitting at a desk. The problem, of course, comes in the fact that the "prudent attorney" will often not have available to him or her the ability to visually watch the process of filing as it occurs. No longer does the practitioner have the opportunity, even if he or she goes to the clerk's office in person to hear the audible "click" of a machine, to verify the accuracy of the clerk's stamp or the eventual docket. Even when the older technology was available, errors could and did occur. It is the experience of the members of the Committee filing this Amicus Brief that those errors are necessarily more common with the newer technology. More importantly, the opportunity of the "prudent" practitioner to avoid the potential for a clerk error is becoming increasingly difficult, if not impossible.

Nearly every member of the Committee has a "war story" involving a misdated document that required correction. For example, a practitioner may obtain a verification page in a county, capable of providing a manual time/date stamp. The original notice of appeal may still be docketed, however, three days later. An order to show cause may then be issued, directing the petitioner to explain why the appeal should not be dismissed. The second copy in hand should be sufficient indicia of proof to show the date of filing within the jurisdictional limits. Under the *Strax* decision, however, the erroneous time/date stamp on the

original notice would have been irrefutably the "correct" date. The fact that it showed a date three days *after* the "second copy" would have been of no utility. Accordingly, under the new "bright line rule" of the *Strax* court, that appeal would have been deemed untimely, despite the facts that it had been both timely filed and that convincing proof, provided by a clerk's office itself, was available to rebut the incorrect time/date stamp.

Ultimately, this type of situation is precisely the reason why the Orange County Bar Association Appellate Practice Committee felt it important to file an Amicus Brief, providing the input and experience of its practitioners before the Court regarding this important procedural issue. It is the experience of the practitioners represented by those filing the Brief that even the "prudent attorneys" referenced by the Fourth DCA in *Strax* are not invulnerable to an error by a clerk of court. To the contrary, it is the prudent measures taken by those counsel that would most likely provide requisite proof of timely filing in the absence of a correct time/date stamp on a pleading. Attorneys who take those steps to carefully ensure timely filing should not find their client's rights improperly terminated, contrary to due process, and themselves subject to malpractice, for reasons that have nothing to do with the prudent measures taken by them to properly invoke the jurisdiction of an appellate court.

CONCLUSION

The Fifth District Court of Appeal got it right. Even before the *OCR-EDS* opinion was issued, however, the Appellate Practice Committee of the Orange County Bar Association had swiftly distributed the *Strax* opinion and noted the grave peril it could create for both the appellate practitioners and their clients. This Court should resolve the conflict by quashing the *Strax* decision of the Fourth District Court of Appeal and by clarifying that the proper interpretation of the rules of civil and appellate procedure are in accordance with the *OCR-EDS* decision of the Fifth District Court of Appeal.

Respectfully submitted,

/s/Barbara A. Eagan
Orange County Bar Association Appellate
Practice Committee

By: Barbara A. Eagan, Chair
Florida Bar No. 0767778
EAGAN APPELLATE LAW, PLLC
13835 Kirby Smith Road
Orlando, Florida 32832
Telephone: 407-286-2204
Email: beagan@EaganAppellate.com

AND

Nicholas A. Shannin, Chair of the Amicus
Curiae Subcommittee
Florida Bar No. 0009570

PAGE, EICHENBLATT, BERNBAUM
& BENNETT, P.A.
214 East Lucerne Circle
Orlando, Florida 32801
407-386-1900
407-209-1006 (fax)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail to Monica L. Pierce, Esquire, Chimpoulis & Hunter, P.A. 7901 SW 36 Street, Suite 205, Davie, Florida 33328; Dinah Stein, Esquire, Hicks, Porter, Ebenfeld & Stein, P.A., 799 Brickell Pl., 9th Fl., Miami, Florida 33131; Michael Seth Cohen, Esquire, Alhambra International Center, 255 Alhambra Circle, Suit 550, Coral Gables, Florida 33134; Susan S. Lerner, Esquire, Russo Appellate Firm, P.A., 6101 S.W. 76th Street, Miami, Florida 33143; and Richard T. Woulfe, Esquire, Bunnell & Woulfe, P.A., One Financial Plaza, Ste. 1000, 100 SE Third Avenue, Fort Lauderdale, FL 33394, on April 12, 2010.

/s/Barbara A. Eagan
BARBARA A. EAGAN
FBN 0767778

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Times New Roman 14 point font.

/s/Barbara A. Eagan
BARBARA A. EAGAN
FBN 0767778