

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-57
L.T. Case No. 4D09-3587

STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC.,

Petitioner,

vs.

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

Respondents.

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

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

To successfully invoke the jurisdiction of the Fourth District Court of Appeal, Strax had to ensure that it actually filed its notice of appeal with the clerk of the lower court no later than April 20, 2009. (App. 1). Strax's counsel testified that she prepared the notice of appeal on April 18 and placed it in her firm's box for courier service pickup. (App. 1). The next day, on April 19, the courier picked up the notice of appeal and "delivered it to the Broward County Clerk of Courts on that same day." (App. 1). The Broward County Clerk of Court's time stamp on the notice of appeal shows a date of August 21, 2009, one day past the thirty-day time limit. (App. 1).

"With no citation to authority, Strax argue[d] that [the Fourth District] should take jurisdiction of this appeal because "[t]here is no reason that the Notice of Non-final Appeal on behalf of [Strax] would not have been filed on August 19, 2009, the same day it was delivered to the Clerk of the Court by the courier service." (App. 2).

The Fourth District held that under Florida Rule of Civil Procedure 1.080(c), "the clerk's date stamp is dispositive on the issue of the date of filing a paper with the trial court," and dismissed the appeal as untimely. (App. 4).

SUMMARY OF ARGUMENT

Strax has not demonstrated an express and direct conflict with *Weintraub v. Alter*, 482 So.2d 454 (Fla. 3d DCA 1986). *Weintraub* held that the clerk had no discretionary authority to refuse to file a notice of appeal. The Fourth District opinion simply held that “pursuant to rule 1.080(c), the clerk’s date stamp is dispositive on the issue of the date of filing a paper with the trial court.” (App. 4).

There is also no compelling reason for this Court to exercise discretionary jurisdiction to review the decision which reaches the correct result of placing responsibility for timely filings upon the parties and their prudent attorneys who “always have the option of paying closer attention to such details before the jurisdictional time limit expires.” (App. 4).

ARGUMENT

THE FOURTH DISTRICT’S OPINION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH WEINTRAUB v. ALTER, 482 So. 2d 454 (FLA. 3d DCA 1986).

The Fourth District opinion simply held that “pursuant to rule 1.080(c), the clerk’s date stamp is dispositive on the issue of the date of filing a paper with the trial court.” (App. 4). The Fourth District did not hold that an appellate court could never, under any circumstance, excuse a late-filed notice of appeal. For that reason the opinion does not expressly and directly conflict with *Weintraub v. Alter*, 482

So.2d 454 (Fla. 3d DCA 1986). *Weintraub* also did not discuss or even cite Florida Rule of Civil Procedure 1.080(c); the accuracy of the date stamp on that notice of appeal was not even an issue in that case, and thus *Weintraub* is also factually different from our case.

In *Weintraub*, on the 30th day, the clerk refused to file the notice of appeal without a filing fee in the form of a check or money order. Seven days later, the appellant returned with his notice of appeal and a check and the clerk then filed the notice of appeal. The Third District, following *Williams v. State*, 324 So.2d 74, 77 (Fla. 1975), held that the clerk had no discretionary authority to refuse to file the notice of appeal and therefore deemed the notice of appeal timely filed.

There is nothing about that ruling that expressly and directly conflicts with the Fourth District's decision to place the onus on the appellant to ensure that the clerk's date stamp on the notice of appeal is correct before the jurisdictional time limit runs. As the Fourth District recited, the affidavits simply established that the attorney prepared a notice of appeal and placed it in the courier box at her law office. The next day, the courier delivered the notice of appeal to the courthouse. Delivering a document to the courthouse is not the same thing as ensuring that the clerk files the document. "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.”
(App. 4).

Finally to the extent that Strax is attempting to invoke conflict jurisdiction based upon *Pettigrew & Bailey v. Pickle*, 429 So. 2d 340 (Fla. 3d DCA 1983), the Fourth District’s opinion does not directly and expressly conflict with that case either. As the Fourth District observed, *Pettigrew* predated the amendment to Rule 1.080(c).

CONCLUSION

Strax has not demonstrated express and direct conflict. This Court should deny Strax’s petition for discretionary review.

Respectfully submitted,
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via US Mail to: **Jay Chimpoulis, Esq.**, Chimpoulis & Hunter, P.A., 7901 Southwest 36th Street, Suite 206, Davie, FL 33328, **Richard T. Woulfe, Esq.**, Bunnell & Woulfe, P.A., 100 Southeast Third Avenue, Ft. Lauderdale, FL 33394 **Michael S. Cohen, Esq.**, Michael S. Cohen, P.A., 255 Alhambra Circle, Coral Gables, FL 33134, and **Dinah Stein, Esq.**, Hicks, Porter, Ebenfeld & Stein, P.A., 799 Brickell Plaza, 9th Floor, Miami, FL 33131, on this _____ day of January, 2010.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of
Fla. R. App. P. 9.210(a)(2).

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