

IN THE SUPREME COURT OF FLORIDA

CASE NO.

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

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE FOURTH DISTRICT'S OPINION DISMISSING STRAX'S APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE THIRD DISTRICT'S OPINION IN <i>WEINTRAUB</i> ON THE SIGNIFICANT ISSUE OF WHETHER THE CLERK'S TIME STAMP REFLECTING THE DATE OF FILING A COURT PAPER IS REBUTTABLE WITH OTHER EVIDENCE.....	4
CONCLUSION	8
CERTIFICATE OF SERVICE	9
CERTIFICATE OF COMPLIANCE.....	9

TABLE OF AUTHORITIES

PAGE

Kyle v. Kyle,
139 So. 2d 885 (Fla. 1962)6

Pettigrew & Bailey v. Pickle,
429 So. 2d 340 (Fla. 3d DCA 1983).....6

Weintraub v. Alter,
482 So. 2d 454 (Fla. 3d DCA 1986)..... passim

State Rules

Florida Constitution, Article V, section 3(b)(3)1

Florida Rule of Civil Procedure 1.080(e) passim

Florida Rule of Civil Procedure 1.010.....7

Florida Rule of Civil Procedure 1.540(a)4

Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi).....1, 4

Florida Rule of Appellate Procedure 9.1201

STATEMENT OF THE CASE AND FACTS

Petitioner, STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC. ("Strax"), pursuant to Rule 9.120, Fla.R.App.P., files this brief in support of its notice invoking the Court's conflict jurisdiction under Article V, section 3(b)(3) of the Florida Constitution, and states as follows.

In an order dismissing Strax's appeal as untimely, the Fourth District expressly certified conflict with a decision of the Third District Court of Appeal on the significant issue of whether under Rule 1.080(e), Fla.R.Civ.P., the clerk's date stamp is dispositive on the issue of the date of filing a paper with the trial court. (App. 4). Because this holding potentially affects all actions to which the Florida Rules of Civil Procedure apply, Petitioner respectfully submits that this Court should exercise its discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(vi), Fla.R.App.P., in order to resolve this express and direct conflict between the district courts on an important issue.

As reflected in the Fourth District's opinion, after Strax filed an appeal in this action, the Fourth District issued an order to show cause as to why the appeal should not be dismissed as untimely. (App. 1). The basis for the Court's show-cause order was that the Broward County Clerk of Court's time stamp on the notice of appeal showed a date (August 21, 2009) that was one day past the thirty-day time limit for invoking the Fourth District's jurisdiction. (App. 1).

Strax filed a response to the show-cause order and a motion to deem the notice of appeal timely filed. (*Id.*). The response and motion were accompanied by two affidavits, one from Strax's counsel and one from the owner of the courier service that delivered the notice of appeal to the courthouse for filing with the clerk of the circuit court. Strax's counsel attested that on August 18, 2009, two days before the notice of appeal was due to be filed, she prepared the notice and placed it in her firm's filing box for pick-up. (*Id.*). The owner of the courier service attested that he picked up the notice of appeal the next day – August 19, 2009 – and delivered it to the Broward County Clerk of Courts on the same day. (*Id.*). Based on these attestations, Strax contended that the notice should have been date-stamped on August 19th – the twenty-ninth day. (App. 2).

The Fourth District dismissed Strax's appeal as untimely, holding that it would not consider its affidavits but would only consider the clerk's time stamp as a matter of law. In so holding, the Fourth District analyzed whether the current version of Rule 1.080(e) permits a party to rebut "the presumption that the clerk's time stamp reflects the actual date a paper was filed with the clerk of the trial court." (App. 2). In so doing, the Fourth District rejected an express holding by Third District in *Weintraub v. Alter*, 482 So. 2d 454 (Fla. 3d DCA 1986), that the presumption in the Rule can be rebutted "by other evidence." The *Weintraub* Court had held as follows:

A notice of appeal is generally deemed filed on the date it is actually filed with the clerk of the trial court. This date is *presumptively* shown by the filing date which the clerk of the trial court stamps on the face of the notice—although this is not a conclusive showing and may be rebutted by other evidence.

(App. 3, *citing Weintraub*, 482 So. 2d at 457) (italics added by Fourth District, other emphasis added herein).

In rejecting the Third District's holding in *Weintraub*, the Fourth District held that the language of Rule 1.080(e) "compels us to conclude that the supreme court intended to establish a bright line test." (App. 4). Thus, in direct conflict with *Weintraub*, the Fourth District stated that, "pursuant to rule 1.080(e), the clerk's date stamp is dispositive on the issue of the date of filing a paper with the trial court." (*Id.*). The Fourth District concluded: "Therefore, the motion to dismiss is granted and this appeal is dismissed. In so doing, we certify conflict with the Third District's opinion in *Weintraub*." (*Id.*) (emphasis added).

Strax thereafter filed its notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

This Court has conflict jurisdiction because the Fourth District expressly rejected, and certified conflict with, an opinion of the Third District Court of Appeal on the issue of whether the clerk's date stamp is dispositive on the issue of the date of filing a "paper" with the trial court. The Fourth District's decision also

conflicts with the Third District and Civil Procedure Rule 1.540(a) on the issue of whether a court can "correct" any clerical mistake or other part of the record.

ARGUMENT

I. THE FOURTH DISTRICT'S OPINION DISMISSING STRAX'S APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE THIRD DISTRICT'S OPINION IN *WEINTRAUB* ON THE SIGNIFICANT ISSUE OF WHETHER THE CLERK'S TIME STAMP REFLECTING THE DATE OF FILING A COURT PAPER IS REBUTTABLE WITH OTHER EVIDENCE.

The Fourth District held in its decision below that a court is precluded from considering anything other than the clerk's time stamp in determining the date of a court filing, even if the clerk's time stamp malfunctioned, even if the evidence of a different date is overwhelming, and even if the date of the clerk's stamp is dispositive of the entire proceeding.

Because the Fourth District specifically declined to follow the law of the Third District as set forth in *Weintraub v. Alter*, 482 So. 2d 454 (Fla. 3d DCA 1986), and expressly certified conflict with the Third District on its interpretation of Rule 1.080, Fla.R.Civ.P., this Court has jurisdiction under Rule 9.030(a)(2)(A)(vi), Fla.R.App.P. Strax respectfully submits that this Court should exercise its jurisdiction and resolve the express and direct conflict between the district courts on this far-reaching issue that the Fourth District saw fit to certify.

The discrete yet significant issue on which the Fourth District expressly certified a conflict lies in the interpretation of Florida Rule of Civil Procedure

1.080(e), titled "**Filing Defined.**" The subsection requires that "[t]he filing of papers with the court" be with the clerk or the judge, and then provides as follows: "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."

In *Weintraub*, the appellant had filed his notice of appeal thirty-seven days after the order being appealed, after the clerk of the circuit court had refused to accept his notice of appeal on the last (thirtieth) day. The late filing date was reflected by the clerk's date stamp on the notice of appeal. Based on the clerk's date stamp, the Third District, like the Fourth District here, issued an order to show cause for why the appeal should not be dismissed as untimely. The appellant, like Strax, responded to the show-cause order with two supporting affidavits, which explained that filing had been attempted but refused by the clerk on the thirtieth day due to the appellant's failure to present a check for the filing fee.

Like the Fourth District here, the Third District agreed that "[a] notice of appeal is generally deemed filed on the date it is actually filed with the clerk of the trial court." 482 So. 2d at 457. The Third District also recognized, as Rule 1.080(e) provides, that "[t]his date is presumptively shown by the filing date which the clerk of the trial court stamps on the face of the notice...." *Id.*

The Third District further held, however, that the clerk's time stamp "is not a conclusive showing and may be rebutted by other evidence." *Id.* Thus, it

considered the appellant's affidavits and deemed the appeal timely filed despite the clerk's date stamp showing otherwise. In direct contrast, the Fourth District below held that, "pursuant to rule 1.080(e), the clerk's date stamp is dispositive on the issue of the date of filing a paper with the trial court" (App. 4), and thus refused to even consider the two affidavits filed by Strax in response to its show-cause order. In so holding, the Fourth District acknowledged "that the clerk's date stamp machine may, from time to time, produce an incorrect date," but held that the onus nonetheless remains on attorneys and clerks to ensure that correct times are recorded. (App. 4).

This Court has conflict jurisdiction where, "if the later decision and earlier decision were rendered by the same Court the former would have the effect of overruling the latter." *See Kyle v. Kyle*, 139 So. 2d 885, 887 (Fla. 1962). Given the Fourth District's express certification of a conflict and the irreconcilable holdings in *Weintraub* and the Fourth District's decision below, the Fourth District's opinion would have had the effect of "overruling" *Weintraub* had the decisions issued from the same district court.

In addition, the Fourth District's decision also cannot be reconciled with Rule 1.540(a), Fla.R.Civ.P., which permits a court to correct clerical mistakes in judgment, decrees, "or other parts of the record." As the Fourth District noted below, the Third District held in *Pettigrew & Bailey v. Pickle*, 429 So. 2d 340 (Fla.

3d DCA 1983), that it was not improper for a trial court judge to consider evidence regarding the correctness of a clerk's time stamp on a notice of appeal and amend the filing date of the notice under Rule 1.540(a) accordingly. (App. 3). Notwithstanding Rule 1.540(a) and the *Pettigrew* decision, the Fourth District held that Rule 1.080(e) "obviates the need to engage in any fact finding beyond the information stamped on the notice of appeal." (App. 4). Thus, Rule 1.540(a) holds that a court "may" correct a clerical mistake in the record, yet the Fourth District's decision potentially holds that a court is *precluded* from correcting the record based on other evidence.¹

The issue of whether a clerk's time stamp is dispositive on the issue of the date of the filing of a paper with the trial court, or whether a court is permitted to consider other evidence to establish the filing date, has vast implications. Rule 1.080, Fla.R.Civ.P., applies to "all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts," except those to which the Probate Rules, Family Rules, or Small Claims Rules apply. *See* Rule 1.010, Fla.R.Civ.P. Moreover, Rule 1.080(e) applies to the filing of "papers," not just notices of appeal. Thus, the Fourth District's ruling applies to all pleadings, discovery any other court papers that have filing requirements.

¹ In the event this Court declines to exercise its jurisdiction, Strax does not waive its right to argue that the Fourth District's decision would not preclude a Rule 1.540(a) motion filed in the trial court.

Strax respectfully submits that this Court should exercise its discretionary jurisdiction to resolve the conflict created by the Fourth District's decision on this important issue.

CONCLUSION

Based on the foregoing, STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC., respectfully submits that this Court has conflict jurisdiction pursuant to Article V, section 3(b)(3) of the Florida Constitution and Rule 9.030(a)(2)(A)(vi), Fla.R.App.P., and that review should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and U.S. Mail on this **14th** day of **January, 2010** to: Michael Seth Cohen, Esq., Alhambra International Center, Suite 550, 255 Alhambra Circle, Coral Gables, FL 33134, Tel: 305/448-7676, Fax: 305/448-8773; *Counsel for Appellee, Donna Shield*, Susan S. Lerner, Esq., Josephs Jack, P.O. Box 330519, Miami, FL 33133, Tel: 305/445-3800, Fax: 305/448-5800, *Appellate Counsel for Appellee, Donna Shield*, and Richard T. Woulfe, Esq., Bunnell & Woulfe, P.A., One Financial Plaza, Suite 1000, 100 SE Third Avenue, Fort Lauderdale, FL, 33394, Tel: 954/761-8600, Fax: 954/463-6643, *Counsel for Appellee, Roger L. Gordon, M.D.*

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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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