# IN THE SUPREME COURT OF FLORIDA

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**CASE NO. SC10-57**
L.T. Case Nos. 4D09-3587, 08-64365

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STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC.,

Petitioner,

vs.

DONNA SHIELD, et al.,

Respondent.

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

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# PETITIONER'S REPLY BRIEF ON THE MERITS

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## ARGUMENT ON REPLY

As explained in the initial brief, this Court should reject the Fourth District's opinion below which, for the first time in Florida jurisprudence, improperly places the fate of all Florida litigants filing jurisdictional papers solely in the hands of the clerk who receives the filing. Petitioner is not simply asking this Court "to hold that Petitioner's notice was timely filed," as Respondent contends. (AB p. 1). Rather, Petitioner contends that the law in Florida permits an appellant to make an evidentiary showing – either to a circuit court where a notice of appeal was filed or the district court – to rebut the presumption of correctness of a clerk's date stamp. Due process and interests of fundamental fairness require no less.[1]

Respondent similarly misconstrues the issue before this Court in the argument section of her brief by citing to decisional law holding that the failure to file a notice of appeal within thirty days constitutes an irremediable jurisdictional defect. AB pp. 6-7, *citing In re Proposed Fla. Appellate Rules*, 351 So. 2d 981, 994 (Fla. 1977) and *In the Interest of E.H.*, 609 So. 2d 1289 (Fla. 1992). To be clear, Petitioner does not contend that the thirty-day deadline for filing a notice of appeal should not be applied to the appeal below. To the contrary, Petitioner

[1] Respondent incorrectly states in note 2 of the answer brief that Petitioner misstated the facts regarding when the courier delivered the notice of appeal in this case. The Initial Brief correctly explained that the courier attested to filing the notice of appeal on the same day he picked it up from the lawyer's office, which was the day after the lawyer had prepared it. (IB p. 2) (R.56-59).

contends that, unlike the situation in *E.H.*, the thirty-day deadline was complied with here, but the clerk misdated the notice of appeal. *E.H.* has nothing to do with the instant case.

In fact, Respondent made the same misplaced argument below (that notices of appeal must be filed in 30 days), and the Fourth District expressly dismissed it. (Op. pp. 3-4) (holding that Respondent's reliance on similar case law was "misplaced because neither case resolves whether rule 1.080(e) creates a rebuttable presumption or a bright line rule" regarding the date stamp). The issue before this Court has nothing to do with whether a notice of appeal must be filed within thirty days. Obviously it must.

In regard to rule 1.080(e) itself, Respondent incorrectly contends, as did the Fourth District,[2] that the second sentence creates a bright-line rule for establishing the filing date of court papers. (AB pp. 7-9). Although Respondent repeatedly suggests that Petitioner's discussion of the amendment to rule 1.080(e) is based simply on Petitioner's own "interpretation" and "version" of the reason for the amendment, Petitioner's so-called interpretation of the amendment is taken straight from the 1984 Comments to the rule, and the case law leading up the amendment.

[2] After the Respondent filed her answer brief in this Court, the Fourth District issued an opinion dismissing another appeal based on its decision in the instant case and certifying conflict with *Weintraub* and the Fifth District's recent decision in *Ocr-EDS, Inc. v. S&S Enterprises, Inc.*, 2010 WL 838164 (Fla. 5th DCA Mar. 12, 2010). *Soledispa v. La Salle Bank Nat'l Assoc.*, 2010 WL 1687677 (Fla. 4th DCA Apr. 28, 2010).

*See Castro v. Castro*, 404 So. 2d 1046 (Fla. 1981); *Grabarnick v. Fla. Homeowners Assoc. of N. Broward, Inc.*, 419 So. 2d 1065, 1067 (Fla. 1982) (McDonald, J. and Alderman, C.J., dissenting); *Pruitt v. Brock*, 437 So. 2d 768 (Fla. 1st DCA 1983); *In re Amendments to Rules of Civil Procedure*, 458 So. 2d 245, 255-56 (Fla. 1984). In contrast, Respondent does not identify any authority standing for the proposition that the 1984 amendment to Rule 1.080(e) was intended to create a bright-line rule for clerks' time stamps.

Respondent also argues that this Court should reject Florida's past precedent declining to apply a bright-line rule, *see, e.g., Weintraub v. Alter*, 482 So. 2d 454 (Fla. 3d DCA 1986),[3] because such a rule is "unnecessary and disruptive." (AB p. 9). In so arguing, Respondent contends that litigants who "live dangerously" by filing notices of appeal close to the thirty-day deadline should always bear the burden of a clerk's mistake because the litigant could have simply "tackl[ed] the task sooner." (*Id.* at 9-10). It is Respondent's position that late filings are "***always*** problems of the filer's own making" because the filing party simply could have filed sooner. (*Id.* at 9).

Respondent's contention should be rejected outright. Rule 9.110(b) provides that appellate court jurisdiction is invoked by filing a notice of appeal with the

[3] *See also Pettigrew & Bailey v. Pickle*, 429 So. 2d 340 (Fla. 3d DCA 1983); *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); *Hood v. State*, 163 So. 2d 893 (Fla. 1st DCA 1964).

clerk of the lower tribunal "within 30 days of rendition of the order to be reviewed." Thirty days is thirty days. Under the plain language of the rule, a notice of appeal filed on the day after the order is rendered has the identical effect as one filed on the thirtieth day. Litigants should not be divested of their appellate rights for complying with the rule.

The thirty days are provided for a reason, and appellants who make a reasoned decision as to whether to file a notice of appeal – as opposed to a prophylactic notice of appeal the day after the order being appealed is rendered – should not be accused of "living dangerously." The thirty days provide aggrieved litigants with an opportunity to assess the potential merits and risks of an appeal, obtain cost estimates, hire appellate counsel, post supersedeas bonds, and in some cases perfect appealable orders. Conscientious appellants who take the time to assess these issues instead of clogging the courts with perfunctory notices of appeal should not have to worry about being ambushed by arbitrary jurisdictional deadlines due to a clerk's negligence.

Moreover, an adherence to the rebuttable presumption as opposed to a bright-line rule would not serve as a disincentive for litigants to take extra steps to ensure that notices of appeal are timely filed and properly dated. Obviously, a timely date-stamped copy of a notice of appeal is preferable to having to rely on an evidentiary determination by a court as to whether a notice was timely filed.

Nonetheless, litigants who did not or could not obtain a time-stamped copy have a right to such a determination.

Respondent also contends that *Weintraub* was wrongly decided because the appellant – whose notice of appeal was improperly rejected by the clerk on the thirtieth day because it was not accompanied by a check – should have avoided the clerk's error by calling the clerk ahead of time to determine "how fees may be paid." (AB p. 9). Respondent misses the point. *Weintraub*, like this case, was not a situation where the notice of appeal was not timely filed. The Third District correctly held in *Weintraub* that the fact that the notice of appeal was timely presented to the clerk overcame the clerk's error in refusing to accept it, and the appellant was entitled to prove as much.

As the Fifth District recently held in *Ocr-EDS, Inc. v. S&S Enterprises, Inc.*, 2010 WL 838164 (Fla. 5th DCA Mar. 12, 2010), a rule such as that advanced by Respondent "that would deny a citizen who has timely sought an appeal his or her right to appeal based on a proven mistake by a clerk's office employee is not consistent with justice or due process." *Id.* at *2. In asserting that this Court should reject *Ocr-EDS*, Respondent goes so far as to suggest that litigants who are filing notices of appeal in out-of-town courts should personally travel to the court

for date-stamping, "whatever the cost."[4] (AB p. 11). Such a requirement is impractical, unrealistic, and unnecessary. Forcing attorneys or their staff to travel around the state to personally file notices of appeal would not advance any legitimate purpose, particularly in light of the fact that the system that has been in place for decades has worked.

Although Respondent contends that Petitioner's reference to the underfunding of clerk's offices has no place in this discussion, she goes on to contend that it should weigh against Petitioner because the rejection of a bright-line rule would require Florida's underfunded clerks to spend time "engaged in conversations about the arrival of Federal Express packages, preparation of affidavits, attendance at evidentiary hearings, and back-dating of time-stamping." (AB p. 12).

This contention has no merit. First, Respondent does not (and cannot) explain how the job of processing filings from local and out-of-town trial and appellate lawyers who now have come to the clerk's office in person (as Respondent would have) is less time-consuming to clerks than conversing about the arrival of Federal Express packages. Second, affidavits and attendance at evidentiary hearings would only be necessary in the rare instances (unlike here)

[4] Although Respondent does not expressly assert that it must be delivered by the attorney, her arguments appear to leave no other option. *See also* AB p. 13, noting that Petitioner here "left it to a courier to get a notice of appeal filed…").

where a clerk has a memory or personal knowledge of the pertinent events. (AB p. 12). Third, if a clerk must spend time back-dating those documents which should have been dated correctly the first time, so be it. Perhaps the clerks' offices would devise systems that are more accurate in order to avoid such problems.

In any event, Petitioner submits that the importance of clerks timely processing court filings should not become any less important simply because clerks' offices are underfunded. Just as the rejection of a bright-line rule will not remove the incentive for litigants to avoid the problems that arose in this appeal, requiring clerks to address challenges to date stamps will provide incentive for clerks to impose efficient and accurate systems for date-stamping and making records of when filings are received.

Thus, a rebuttable presumption is not "ill-advised," as Respondent contends. (AB p. 12). Rather, it is the practice of a large number of other jurisdictions, as discussed in the initial brief on the merits. (IB pp. 11-14). In fact, Respondent does not identify a single jurisdiction in the country that has imposed a bright-line rule. As these numerous jurisdictions have recognized, public policy does not "strongly favor[]" a bright-line rule (AB p. 13), but affords litigants due process before potentially denying them a right to an appeal.

Respondent's reference to Florida Rule of Judicial Administration 2.525, and its provision that litigants assume the risk of problems with electronic filings (AB

p. 13, n.6), also does not support her arguments. Rule 2.525 acknowledges the inherent unreliability of the electronic medium – which is still relatively new to the court system – and expressly places the burden of the risk on the filing party. Rule 9.110 of the appellate rules, in contrast, does no such thing, thus entitling litigants to rely on the paper system that has been in place for more than a century.

Finally, Respondent contends that at the very least the Fourth District should have been permitted to dismiss Petitioner's appeal based on the record before it. (AB p. 13). This argument should be rejected as well. Contrary to Respondent's contentions, Petitioner's decision to use a courier to file the notice of appeal, and its counsel's purported failure to instruct the courier to get a date stamp, are not jurisdictional infirmities. The issue is whether the notice was timely filed. Even if the Fourth District was correct in not deeming the appeal timely based solely on the affidavits, Petitioner's filings created an evidentiary issue that should have been considered by the trial court with all of the other evidence, including (but not limited to) the affidavits of the attorney and the courier.

Petitioner's trial lawyer mistakenly believed the notice of appeal would be properly handled by the clerk's office and thus did not obtain a date stamp. If date stamps are going to be required in order to perfect notice of appeal, the appellate rules should be amended to reflect the same.

## CONCLUSION

WHEREFORE, based on the foregoing, this Court should quash the decision of the Fourth District Court of Appeal below and remand with instructions to reinstitute the appeal based on the affidavits submitted or, alternatively, pending a determination of when Strax's notice of appeal was received by the Broward County Clerk of Court.

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 **20th** day of **May, 2010** to: Michael Seth Cohen, Esq., Alhambra International Center, Suite 550, 255

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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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