

IN THE SUPREME COURT
STATE OF FLORIDA

LESLIE PEARLSTEIN, M.D., and
EDWARD WHITE MEMORIAL HOSPITAL,

Petitioners,

Supreme Court Case No. 79,530

vs.

2nd DCA Appeal No. 91-00332

WILLIAM KING and JULIA KING,
his wife,

Respondents.

PETITIONER, PEARLSTEIN'S,
REPLY BRIEF ON THE MERITS

Fowler, White, Gillen, Boggs,
Villareal and Banker, P.A.



~~CHARLES W. HALL, ESQUIRE~~
CHARLES W. HALL, ESQUIRE

NCNB Bank Building, Suite 900

501 First Avenue North

P.O. Box 210 (Zip: 33731)

St. Petersburg, FL 33701

Attorneys for Petitioner, Pearlstein, M.D.

Fla. Bar No. 326410

SPN No. 179189

TABLE OF CONTENTS

	<u>PAGE</u>
TABLEOFCONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT..	1-4
CONCLUSION	5
CERTIFICATE OF SERVICE.	6

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Bankers Multiple Line Insurance Co. v. Farish,</u> 464 So. 2d 530 (Fla. 1985)	2
<u>Board of Renents v. Tomanio,</u> 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980)	4
<u>Bould v. Touchette,</u> 349 So. 2d 1181 (Fla. 1977)	2
<u>Davis v. Dempsey,</u> 343 So. 2d 950 (Fla. 3d D.C.A. 1977)	3
<u>Foremost Properties, Inc. v. Gladman,</u> 100 So. 2d 669 (Fla. 1958)	3
<u>Nardone v. Reynolds,</u> 333 So. 2d 25 (Fla. 1976)	4
<u>Permenter v. Bank of Green Cove Springs,</u> 136 So. 2d 377 (Fla. 1st D.C.A. 1962)	3

ARGUMENT

I. **APPLYING RULE 1.070(j) TO THE KINGS' COMPLAINT IS NOT A RETROACTIVE APPLICATION OF THE RULE.**

The Kings contend that a party who files his action on December 31, 1988, may serve process over 19 months later without penalty while one who files on January 1, 1989, must perfect service within 120 days or suffer dismissal. Their argument is illogical and results from an effort to justify gross noncompliance with Rule 1.070(j). The Kings' conduct in this case is the very type that this court intended to eliminate when it enacted this rule. That conduct should not be defended by an erroneous claim that dismissal would constitute an impermissible retroactive application of the rule.

In the companion case to this, Case No. 79,530, Petitioner, EDWARD WHITE MEMORIAL HOSPITAL has served a Reply Brief on the Merits which presents a thorough and well-reasoned reply to the Kings' arguments on this issue. Rather than repeat those arguments, Dr. Pearlstein adopts by express reference the arguments and authorities presented by the hospital at pages one through six.

II. **FILING A PETITION TO EXTEND THE MEDICAL MALPRACTICE STATUTE OF LIMITATIONS UNDER §768.495(5) IN A COUNTY HAVING NO CONNECTION WITH THE LITIGATION DOES NOT TOLL THE LIMITATIONS PERIOD.**

The Kings attempt to dismiss the very issue that gave rise to appellate review of this case by suggesting that this court should not consider whether their petition

for extension of the statute of limitations was effective. They take this position attempting to conceal the fact that the petition was filed in a county having absolutely no relationship to the Defendants nor the treatment and that they know it had no relationship. To the Kings, the place where their pleadings are filed has little significance other than to be convenient for their attorney.

Once conflict jurisdiction is invoked by this court, it is proper to consider the entire case on the merits. See, Bould v. Touchette, 349 So. 2d 1181, 1183 (Fla. 1977) and Bankers Multiple Line Insurance Co. v. Farish, 464 So. 2d 530 (Fla. 1985).

The approach advocated by the Kings and adopted by the Second District, while simple, ignores the impact of condoning this type of "misfiling". It totally disregards Rule 2.060(d) Fla.R.Jud.Admin. and permits attorneys to file pleadings anywhere they choose even though they know the case has absolutely no connection to the county of their filing.

In an effort to justify this result the Kings assert that this is really an issue of venue. It is not. Rather, it is an issue of interpretation of the rules governing litigation, those very rules which permit the orderly function of the judicial system. Under the Kings' approach parties can (and perhaps should) file pleadings anywhere. It does not matter if it is Dade or Pinellas County so long as it is filed somewhere. Is that the "belief there is good ground to support [the filing]" required by the Rules of Judicial Administration? Dr. Pearlstein suggests that it is not. Because medical malpractice litigation has become highly specialized and frequently involves emotional issues, there is the very real possibility that certain counties will become forums of

choice for Plaintiffs. They will be "clearing houses" for this type of case. Litigants may routinely attempt to start litigation in counties that are either merely convenient for their lawyer or that are more likely to result in high verdicts. Is this a practice to encourage? Certainly not, and the Rules of Judicial Administration were designed to prevent it.

The Kings imply that Dr. Pearlstein has waived the right to object to the misfiling. They assert that affidavits are necessary to contest venue. Even if venue is at issue, the Kings' position is erroneous. It is well settled that where a complaint shows on its face that venue is incorrect, a defendant has no burden to provide additional venue evidence. See, Permenter v. Bank of Green Cove Springs, 136 So. 2d 377 (Fla. 1st D.C.A. 1962) and Davis v. Dempsey, 343 So. 2d 950 (Fla. 3d D.C.A. 1977). Here the Kings' complaint and amended complaint affirmatively alleged that the Defendants were doing business in Pinellas County, Florida, and that the treatment occurred in that county. Thus, the Kings' complaint affirmatively negates venue in Hillsborough County.

Lastly, the Kings contend that dismissal under the statute of limitations is "too harsh". Every individual who has lost a claim to the statute of limitations has held that same belief. Yet, this and other courts have repeatedly recognized the systemic benefits which flow from a limitations period,

Statutes of limitation are predicated on sound public policy, and are designed to prevent the assertion of stale claims after the lapse of long period of time. See, Foremost Properties, Inc. v. Gladman, 100 So. 2d 669 (Fla. 1958). They encourage

promptness of parties holding valid claims and protect defendants against unusually long delays in prosecuting lawsuits. See, Nardone v. Reynolds, 333 So. 2d 25 (Fla. 1976). They are not simply technicalities to be winked at; they are fundamental to a well-ordered judicial system. See, Board of Resents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980)

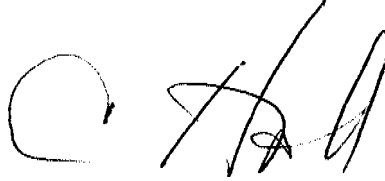
The Kings delayed the presentation of their claims by using the misfiled petition for extension of the statute of limitations and by refusing to serve Dr. Pearlstein for over twenty-one months after they file their original complaint. These delays were not accepted by the trial judge and they should not be accepted here.

CONCLUSION

Dr. Pearlstein respectfully requests that this court reverse the decision of the Second District Court of Appeal and reinstate the trial court's dismissal of the Kings' action.

Respectfully submitted,

Fowler, White, Gillen, Boggs,
Villareal and Banker, P.A.

A handwritten signature in black ink, appearing to read 'C. W. Hall', is written over a horizontal line.

CHARLES W. HALL, ESQUIRE
NCNB Bank Building, Suite 900
501 First Avenue North
P.O. Box 210 (Zip: 33731)
St. Petersburg, FL 33701
Attorneys for Petitioner, PEARLSTEIN, M.D.
Fla. Bar No. 326410
SPN No. 179189

CERTIFICATE OF SERVICE

I t EREBY CERTIFY that an original and seven copies of Petitioner, Pearlstein's, Reply Brief has been furnished by U. S. Mail this 6th day of August, **1992**, to Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida **32399-1925**; with a copy each to RAYMOND T. ELLIGET, JR., ESQUIRE, Attorney for Appellants, NCNB Plaza, Suite 2600, 400 Ashley Drive, Tampa, FL **33602**; JOHN BOULT, ESQUIRE, and EDWARD W. EERECKE, ESQUIRE, P. O. Box **3239**, Tampa, FL **33601**; GLENN M. WOODWORTH, ESQUIRE, Wittner Centre West, 5999 Central Avenue, St. Petersburg, FL **33710**; and to JAMES F. PINGEL, JR., ESQUIRE, Suite **1700**, First Union Center, 100 South Ashley Drive, Tampa, FL **33602**.

Fowler, White, Gillen, Boggs,
Villareal and Banker, **P.A.**



CHARLES W. HALL, ESQUIRE
NCNB Bank Building, Suite **900**
501 First Avenue North
P.O. Box **210** (Zip: **33731**)
St. Petersburg, FL **33701**
Attorneys for Petitioner, PEARLSTEIN, M.D.
Fla. Bar No. **326410**
SPN No. **179189**