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## Recent Cases

### DISMISSAL – LACK OF PROSECUTION

*Chemrock Corp. v. Tampa Electric Co.*, 34 Fla. L. Weekly D2362a  
(Fla. 1<sup>st</sup> DCA, November 17, 2009)

In this appeal, Plaintiff/Appellee Chemrock appealed a dismissal of its lawsuit due to lack of prosecution. The trial court dismissed Chemrock's action after Tampa Electric Company ("TEC") filed a notice of lack of prosecution pursuant to Rule 1.420(e), Fla. R. Civ. P., and a subsequent motion to dismiss.

In response to the notice, and within the 60-day grace period prescribed by Rule 1.420, Chemrock filed a "Motion in Opposition." Therein, Chemrock admitted to a ten-month period of inactivity, but argued TEC was responsible for the delay. Sixteen months later, TEC filed a motion to dismiss for lack of prosecution, which the trial court granted.

On appeal, the First District Court of Appeal addressed the issue of whether any filing within the 60-day grace period following a notice of lack of prosecution, provided by Rule 1.420, was sufficient to avoid dismissal of the action. In addressing this issue, the appellate court analyzed the history of Rule 1.420 and the committee notes to the current version of the rule, amended on January 1, 2006. Ultimately, the court held that a filing significant to avoid dismissal within the 60-day grace period must be in furtherance of "re-commenc[ing] prosecution." Appellant's "Motion in Opposition" to the notice of lack of prosecution failed to do this. Therefore, the appellate court affirmed the lower court's ruling.

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## DISMISSAL – STATUTE OF LIMITATIONS

*Estate of James T. Sly, Jr. v. Frank McKeithen et al.*,  
34 Fla. L. Weekly D2622a (Fla. 1st DCA, December 22, 2009)

Plaintiff filed an initial Complaint on April 5, 2007, just prior to the expiration of the applicable statute of limitations. On July 25, 2007, before the expiration of the 120 days within which to serve process, Plaintiff moved for an extension of time to serve process. She thereafter filed two additional motions for extensions of time to serve process on November 20, 2007 and January 22, 2008. None of the motions, however, were set for hearing, no orders regarding the same were entered, and a summons was never issued.

On March 24, 2008, Plaintiff filed an Amended Complaint. The Defendants were finally served on March 28, 2008 – approximately one year after the initial filing. After Defendants filed a motion to dismiss for failure to effect service within the 120-day required time frame, the trial court dismissed the case with prejudice. Specifically, the trial court declined to exercise discretion to permit Plaintiff additional time to perfect service and found Plaintiff failed to demonstrate good cause or excusable neglect for the delay. The ruling effectively precluded Plaintiff from re-filing due to the expiration of the statute of limitations. Plaintiff appealed.

On appeal, the First District acknowledged that Rule of Civil Procedure 1.070(j) provided that if the initial process and pleading were not served upon a defendant within 120 days of filing, and good cause or excusable neglect is not made, it was within the trial court's discretion to (1) direct service to be effected within a specified time; (2) drop the defendant as a party; or (3) dismiss the action without prejudice. The appellate court also acknowledged that the 1999 amendment to Rule 1.070(j) broadened the trial court's discretion to allow an extension of time for service of process, "even when good cause has not been shown."

The First District Court of Appeal held that pursuant to Florida law, in situations where the statute of limitations has run, the trial court should normally exercise discretion in favor of giving a plaintiff additional time to perfect service. Therefore, despite the trial court's explicit ruling that the expiration of the statute of limitations resulted in a termination of all further proceedings, the First District held the trial court abused its discretion in granting the Defendants Motion to Dismiss. Accordingly, the case was reversed and remanded for further proceedings.

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## TORTS – MEDICAL MALPRACTICE

*Dr. Navarro's Vein and Zoraida Catherine Navarro, M.D. v. Toni Miller*,  
34 Fla. L. Weekly D2395a (Fla. 4th DCA, November 18, 2009)

In this action, Plaintiff Toni Miller filed a Complaint against Defendant Dr. Zoraida Catherine Navarro and her professional association for damages arising from a laser hair removal procedure. Plaintiff alleged the doctor's negligence in performing the procedure caused severe burns. Plaintiff's Complaint alleged the doctor was performing cosmetic electrolysis as defined by section 478.42(5), *Florida Statutes*. Thus, Plaintiff argued the medical malpractice presuit requirements did not apply to Plaintiff's action.

Dr. Navarro and the professional association moved to dismiss the complaint arguing Plaintiff failed to comply with the presuit screening requirements of the Medical Malpractice Act, as delineated in Chapter 766, *Florida Statutes*.

In support of their Motion to Dismiss Plaintiff's Complaint, Defendants argued Dr. Navarro was a health care provider as defined in Section 766.202(4) and the practice of medicine encompasses the treatment of physical conditions, including facial hair. The trial court denied Defendants' Motion to Dismiss Plaintiff's Complaint.

As a result of the trial court's denial, Defendants sought certiorari relief. Defendants argued the trial court's order departed from the essential requirements of law because to allow the case to go forward without determining whether the cause of action is based on simple or medical negligence would cause irreparable harm that the medical malpractice presuit screening process was designed to protect against.

The Fourth District Court of Appeal agreed with Defendants' argument and granted the petition, issued the writ, quashed the trial court's order, and remanded the case for dismissal of the Plaintiff's Complaint for failure to comply with the presuit screening process of Section 766.106(2).

The Fourth District Court of Appeal held that laser hair removal is a medical procedure and Dr. Navarro was a licensed physician. Therefore, Plaintiff alleged a claim of medical negligence and was required to comply with the presuit screening process.

The District Court further explained it is not customary to review orders denying motions to dismiss because there is an adequate remedy at law in the final appeal, but declining to do so in this case would cause irreparable harm. The Medical Malpractice Reform Act was designed to provide cost-saving pretrial procedures as a response to the medical malpractice crisis. As such, to allow this case to proceed to a possible judgment, only to be reversed, would eliminate the very cost-saving procedures for which the Act was created.

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## APPEALS – TIMELINESS OF FILING NOTICE OF APPEAL

*Strax Rejuvenation v. Donna Shield and Roger Gordon, M.D.*,  
34 Fla. L. Weekly D2569a (Fla. 4th DCA, December 16, 2009)

Appellants filed an appeal from a non-final order which denied their Motion to Dismiss and Compel arbitration. The Fourth District Court of Appeal issued an order to show cause as to why the appeal should not be dismissed as untimely.

The Broward County Clerk's time stamp on the notice of appeal showed a date of August 21, 2009. This date was one day past the 30-day time limit for invoking the jurisdiction of the Court, according to Fla. R. App. P. 9.110(b).

Strax filed a timely Response and Motion to Deem Notice of Non-Final Appeal Timely Filed. 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. Both affidavits asserted the document was delivered to the Broward County Clerk of Courts on August 19, 2009, despite the fact the clerk's time stamp on the notice showed the notice of appeal as being filed on August 21, 2009.

Strax's Motion did not cite case law. Instead, the Motion argued the Fourth District Court of Appeal should take jurisdiction of the 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."

The Fourth District Court presumed Strax meant to argue that the clerk's time stamp creates a rebuttable presumption which may be overcome by sworn testimony to the contrary. However, the District Court found that Florida Rule of Civil Procedure 1.080(e) states in pertinent part that "the date of filing is shown on the face of the paper by...the clerk's time stamp." This language was added to the rule in 1984. See *In re Amendments to Rules of Civil Procedure*, 458 So. 2d 245, 247 (Fla. 1984).

The Fourth District Court of Appeal noted that prior to the rule's amendment, it appeared at least two courts permitted 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. However, the Court noted the Appellant in this case did not request the trial court to correct a clerk's clerical error, which is permissible under Fla. R. Civ. P. 1.540(a).

As such, the Fourth District Court of Appeals in this case relied upon the ruling in *Harrell v. Harrell*, 879 So. 2d 87, 88 (Fla. 4th DCA 2004), which held that "a notice of appeal must be filed with the appropriate court within the required time, and merely mailing the notice or having the notice placed in a post office box within the required time period is not sufficient."

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*Strax Rejuvenation v. Shield and Gordon (cont'd)*

Furthermore, the Fourth District Court held the clear and concise language of the 1984 amendment to rule 1.080(e) compels the Court to conclude the Supreme Court intended to establish a bright line test. Accordingly, the Court 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. In this case, the clerk's date stamp established that the notice of appeal was filed after the expiration of the jurisdictional time limit to file an appeal. Therefore, the motion to dismiss was granted and the appeal dismissed.

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