67,336

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. _____

HAZEL S. JELLEN and JANE JELLEN, f/k/a JANE SCHROEDERS,

Petitioners,

vs.

THE HONORABLE JUDGES OF THIRD DISTRICT COURT OF APPEAL; and ABRAMS & ABRAMS, P. A., a Florida professional association,

Respondents.

PETITION FOR WRIT OF MANDAMUS

The Petitioners/Defendants, HAZEL S. JELLEN and JANE JELLEN, f/k/a JANE SCHROEDERS, respectfully petition this Honorable Court for a Writ of Mandamus, or in the alternative as a Petition for Review, ordering the Third District Court of Appeal to reinstate Petitioners' appeal.

This Petition is supported by an Appendix which contains true copies of the proceedings in the District Court of Appeal and Trial Court, which are relevant to this matter.

Petitioners would show unto the Court that the following are the relevant facts of the case:

I. JURISDICTION

1. This is a Petition for Writ of Mandamus directed to the Third District Court of Appeal's Order dated May 8, 1985, granting Respondent Abrams' Motion to Dismiss Appeal and the Third District's Order dated June 17, 1985, denying Petitioners' Motion for Rehearing. Petitioners seek a Writ of Mandamus, reinstating their appeal.

2. A panel of the Third District Court of Appeal improperly dismissed a timely and proper non-final appeal taken by Petitioners from an Order of the trial Court,

denying Petitioners' Motions to Dismiss because of improper venue. The basis for the Appellate Court's Order was the fact that Petitioners had filed an Answer in the cause while the appeal was pending, which Answer Petitioners were required to file in the lower Court. As a result of the action of the Third District Court of Appeal, Petitioners have been deprived of their right to appeal the trial Court's decision on venue, which appeal is specifically authorized by Rule 9.130(a)(3)(A), F.A.R.

3. This Court has jurisdiction pursuant to Article V, Section 3(b)(8) of the Florida Constitution, and Florida Rules of Appellate Procedure, 9.030(a)(3) and 9.100. This Court has previously ruled that mandamus is a proper vehicle to compel an Appellate Court to reinstate an appeal which has been improperly dismissed by the Appellate Court. See State v. Pearson, 154 So. 2d 833 (Fla. 1963).

II. FACTS

4. The Respondent sued Petitioners in a three-count Complaint in February of 1985, in Dade County, Florida. (A 1-22) Petitioner, HAZEL S. JELLEN, a resident of Alachua County (A 47) filed a Motion to Dismiss for Improper Venue on March 4, 1985. (A 23) Petitioner, JANE JELLEN, a resident of Broward County (A 48-49), filed her Motion to Dismiss for Improper Venue on March 18, 1985. (A 24) On March 26, 1985, the trial Court denied both Petitioners' Motions to Dismiss. (A 25)

5. The Petitioners timely filed their Notice of Appeal directed to the trial Court's Order of March 26, 1985. (A 26) The Petitioners also filed a Motion for Stay Pending Review on April 9, 1985, (A 27-28) and Respondent filed a Response opposing any stay. (A 29-30) Since the

hearing was not held prior to the date that Petitioners' Answer was due, Petitioners, while the appeal was pending, were required to file their Answer. (A 31-32) If Petitioners did not file their Answer, Respondent could have sought the entry of a Default against them, since Respondent opposed any stay. (A 29-30)

6. Respondent then filed a Motion to Dismiss Appeal on April 15, 1985, which alleged that Petitioners had waived the venue objection. (A 33) No case law was offered in support of Respondent's position. (A 33) The Petitioners filed a Response to the Motion to Dismiss, which set forth the steps taken by Petitioners in chronological form. (A 34-35) On May 8, 1985, the Third District Court of Appeal dismissed Petitioners' appeal. (A 36) The Court of Appeal did not cite any authority for the dismissal of the appeal. (A 36)

7. On May 17, 1985, Petitioners timely filed a Motion for Rehearing and Motion for Rehearing En Banc, or, in the Alternative, Motion to Certify Question. (A 37-43) The Respondent filed a two-page Response (A 44-45), and the Third District denied Petitioners' Motion for Rehearing and Certification on June 17, 1985. (A 46)

III. ARGUMENT

8. The Petitioners respectfully submit that they adhered to the guidelines of Rule 1.140, F.R.C.P., in raising and preserving their objections to venue. The first pleading filed by each Petitioner in the lower Court was a Motion to Dismiss for Improper Venue. Petitioner, HAZEL JELLEN, filed her motion on March 4, 1985, and Petitioner, SCHROEDERS, filed her motion on March 19, 1985. After the motions were denied on March 26, 1985, Petitioners timely filed their Notice of Appeal. The Petitioners then filed their Motion for Stay of Proceedings in the lower Court on April 9, 1985, but the motion could not be heard prior to

12. The McIntyre ruling followed the holding of the Third District in Brennan v. Brennan, 192 So. 2d 782 (Fla. 3rd DCA 1966). There, the defendant filed a Motion to Dismiss for Improper Venue after defendant had filed his Answer and Counterpetition. The Brennan Court stated that the defendant had waived the venue objection by not timely filing it. However, the Court went on to state that a defendant may claim a venue privilege in his Answer, even though the Answer contains other defenses.

13. There appear to be no cases directly on point in Florida regarding the instant fact pattern. Since Rule 1.140 F.R.C.P. is patterned after Federal Rule 12 (See State v. Shields, 83 So. 2d 271 (Fla. 1955)), this Court should look to the Federal decisions for guidance. In Happy Manufacturing Company, Inc., v. Southern Air & Hyraulics, Inc., 572 F. Supp. 891 (N. D. Texas 1982), the Court affirmatively held that the defendants did not waive their defense of improper venue by general participation in the suit, which included the filing of a Counterclaim. In that case, the plaintiff filed its Complaint on May 17, 1982, and defendants filed a Motion to Dismiss or Transfer for Lack of Venue on July 14, 1982. Defendants also filed their Answer and Counterclaim on July 14, 1982. In ruling that the venue objection had not been waived, the Court cited Niefeld v. Steinberg, 438 F.2d 423 (3rd Cir. 1971), wherein the Third District Court of Appeal stated:

> "The purpose behind Rule 12(b) is to avoid the delay occasioned by successive motions and pleadings and to reverse the prior practice of asserting jurisdictional defenses by 'special appearance' . . . Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, de bene esse, in

> "order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door, which he possessed before he came in. Happy Manufacturing Company, supra, at 893. (emphasis added)

14. The Happy Manufacturing Company Court went further to point out:

> "If we were to find a waiver in a case, such as the instant one, we would, in effect, be requiring a defendant to make what amounts to a 'special appearance' for we would be requiring him to raise his jurisdictional defenses before answering to the merits."

and

> "Neither the filing of objections to notices of depositions prior to the filing of the motion to dismiss for improper venue, nor any other participation in the suit by defendants subsequent to the filing of that motion, constitutes a basis for finding a waiver of the venue defense." Id, at 894.

15. Jurisdiction over the person, like venue, is waived if not timely raised in the first pleading or the Answer. Florida Courts have held that the objection to jurisdiction over the person is preserved even if the defendant participates in a trial on the merits.

16. In Robinson v. Loyola Foundation, Inc., 236 So. 2d 154 (Fla. 1st DCA 1970), the appellants challenged the correctness of a personal judgment entered against them where jurisdiction was obtained by constructive service. The appellants had timely and properly challenged the Court's jurisdiction over the person. The Robinson Court held as follows:

> "Once having properly and timely raised the question of the Court's jurisdiction over his person, a defendant is not prejudiced by participation in the trial and defending the action on the merits, and if his challenge to the Court's jurisdiction is overruled, such action may be reviewed on appeal after final judgment." Id, at 161.

17. A similar ruling was reached by the Second District Court in Visioneering Concrete Construction Co. v. Rogers, 120 So. 2d 644 (Fla. 2nd DCA 1960):

> "If he (defendant) does make a timely objection to jurisdiction of the Court over his person, such an objection is preserved even though the defendant participates in the trial." Id, at 646.

18. The Third District's decision dismissing Petitioners' appeal has denied them their right to an appeal under Rule 9.130(a)(3)(A), F.A.R. They have no remedy. The Motions to Dismiss were filed as prescribed by Rule 1.140. It was improper to dismiss the appeal on venue in the instant action, because the very same objection would be preserved if filed with the Answer. To penalize the Petitioners for filing their venue objections prior to the filing of their Answer, in accordance with Rule 1.140, would constitute a radical departure from the spirit of Rule 1.140.

19. The Third District, by dismissing the appeal, appears to have reverted back to the concept of the "special appearance". By dismissing the appeal, the Third District has held that a "general appearance" (filing an Answer on the merits), constitutes a waiver of Appellants' venue objection. Appellants respectfully contend that such a ruling is contrary to established case law, and contrary to the reasoning behind the present rules of procedure.

20. Petitioners are entitled to have the case tried in either Alachua County, Florida, where Petitioner, HAZEL S. JELLEN, resides, or in Broward County, where Petitioner, JANE JELLEN, resides, under the applicable venue statutes, and they are entitled to have the venue issue heard and determined on the merits by the Appellate Court.

IV. RELIEF SOUGHT

21. The Petitioners respectfully request that this Honorable Court enter a Writ of Mandamus, requiring the Third District Court to reinstate Petitioners' appeal, or, in the alternative, that the Petition be granted as a Petition for Review.

I HEREBY CERTIFY that a copy of the foregoing Petition has been furnished by mail to CLERK, THIRD DISTRICT COURT OF APPEAL, P. O. Box 650307, Miami, Florida 33265-0307, and to BRENDA M. ABRAMS, ESQ., Abrams & Abrams, P. A., 9400 South Dadeland Boulevard, Miami, Florida 33156, this 9 day of July, 1985.

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By _____
Harry G. Carratt