IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 72,448

SAM SPECTOR, et al.,

Appellant/Petitioner,

vs.

TRANS WORLD AIRLINES, INC.,

Appellee/Respondent.

ANSWER BRIEF OF RESPONDENT TRANS WORLD AIRLINES, INC.

On Petition for Review of a Decision of the
Fourth District Court of Appeal

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STATEMENT OF THE CASE AND FACTS[1]

Appellant filed suit against TWA in the County Court for Palm Beach County, Florida. After the trial court entered a judgment on the pleadings in favor of TWA (attached as Exhibit "A"), Appellant appealed to the Circuit Court of the Fifteenth Judicial Circuit. The Circuit Court, in its appellate capacity, affirmed the County Court decision (attached as Exhibit "B"). The Circuit Court judgment was rendered on December 7, 1987. On January 6, 1988, Appellant filed a notice of appeal in the Circuit Court of the Fifteenth Judicial Circuit (attached as Exhibit "C"). A copy of Appellant's notice of appeal was sent by the Circuit Court to the Fourth District Court of Appeal and was filed on January 7, 1988 (attached as Exhibit "D"). TWA moved to dismiss the notice of appeal since Appellant should have sought review by invoking the certiorari jurisdiction of the Fourth District Court of Appeal. The Fourth District Court of Appeal dismissed the appeal (attached as Exhibit "E").

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1 Because the record on appeal was not available to us, we have attached the orders referred to in the statement of the case and facts.

ISSUE PRESENTED ON CERTIFIED QUESTION

The Fourth District Court of Appeal certified the following question to be one of great public importance:

> WHEN A PARTY SEEKS APPELLATE REVIEW OF A NON-APPEALABLE ORDER, AND ASSUMING THAT THE NOTICE OF APPEAL IS TIMELY FILED IN THE LOWER TRIBUNAL, MUST THE NOTICE OF APPEAL BE FILED IN THE APPELLATE COURT WITHIN THIRTY DAYS OF RENDITION OF THE ORDER IN ORDER FOR THE APPELLATE COURT TO HAVE JURISDICTION TO TREAT THE NOTICE AS A PETITION FOR WRIT OF CERTIORARI?

SUMMARY OF THE ARGUMENT

An appeal should only be treated as a petition for writ of certiorari if the selection of a remedy is difficult or if the notice of appeal is filed in the appellate court within thirty days of rendition of the order for which appellant seeks review. Florida's policy regarding the treatment of improperly filed notices of appeal as petitions for writ of certiorari was not intended to ensure that <u>all</u> improperly filed notices of appeal are treated as petitions for writ of certiorari. As originally construed by this court, Florida Statute §59.45 "authorizes" a court to treat some notices of appeal as petitions for writ of certiorari despite the word "shall" in the Statute. More importantly, Florida's policy regarding improper remedies was originally applied in situations where it was difficult to determine whether an appeal or petition for writ of certiorari was appropriate. Nevertheless, in applying the policy many courts have assumed that it is mandatory, regardless of how difficult it was to determine the appropriate remedy or when the notice of appeal was transferred to the appellate court.

We believe that this court should reconsider the application of this policy. First, an appellate court should have discretionary power to decide when an appeal can be treated as a petition for writ of certiorari. This discretion should depend on how difficult it is to select a proper remedy. Specifically, it should not be applicable in this case where it is obvious,

according to the plain reading of the Rules of Appellate Procedure, that an appeal is not proper for review of an order rendered by a Circuit Court in its appellate capacity. In our legal system, the failure to properly follow rules often results in denying a party _one_ day in court. Under the current application of the policy regarding improper remedies, our legal system guarantees a third court appearance despite the party's failure to follow a _simple_ rule.

Second, absent a difficult selection of the appropriate remedy, an appellate court should not be allowed to treat an appeal as a petition for writ of certiorari unless the notice of appeal is filed in the appellate court within thirty days of rendition of the order to be reviewed. If the notice of appeal does not reach the appellate court within 30 days, the appellate court does not have jurisdiction to consider the notice as a petition for a writ of certiorari.

ARGUMENT

IF THE APPROPRIATE REMEDY TO SEEK REVIEW IS CLEAR, AN APPELLATE COURT MAY NOT TREAT A NOTICE OF APPEAL AS A PETITION FOR WRIT OF CERTIORARI UNLESS THE NOTICE OF APPEAL IS FILED IN THE APPELLATE COURT WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

The trend among Florida's courts is to treat an appeal as a petition for writ of certiorari without determining whether it is appropriate to do so. This trend is wrong and should be corrected by this court. Specifically, if the notice of appeal is not filed in the appellate court within 30 days, an appellate court should be able to treat an appeal as a petition for writ of certiorari only in situations where the selection of an appropriate remedy is difficult. In this case, as well as the other cases before this court on the same certified question, a plain reading of Florida Rule of Appellate Procedure 9.030 (b)(2)(B) clearly states that an appellate court's certiorari jurisdiction must be invoked to review an order by a circuit court acting in its appellate capacity.

Initially, we note that Florida's policy regarding improper remedies, as expressed in Florida's Constitution, Statutes and Rules of Appellate Procedure, contains language which suggests an appellate court must always treat a notice of appeal as a petition for writ of certiorari. Florida's policy regarding improper remedies is clearly stated in Article V, Section (2)(a) of Florida's Constitution, which states in relevant part:

> The Supreme Court shall adopt rules for the practice and procedure in all courts including....the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought.

Pursuant to this mandate, this court has enacted Florida Rule of Appellate Procedure 9.040(c), which states:

> If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.

The Advisory Committee note to Florida Rule of Appellate Procedure 9.040(c) states that this rule is intended to implement the constitutional mandate:

> Sections (b) and (c) implement Article V, Section 2 (a) of the Florida Constitution.... under these provisions a party will not automatically have his case dismissed because he seeks an improper remedy or invokes the jurisdiction of the wrong court.

Finally, Florida's legislature has codified this constitutional mandate. Florida Statute §59.45 states:

> If an appeal be improvidently taken where the remedy might have been more properly sought by certiorari, this alone shall not be ground for dismissal...

Arguably, certain language in both the rule and the statute suggests that an appellate court must always treat an appeal as a petition for writ of certiorari. Specifically, the statute provides that the notice of appeal "shall" be treated as a petition for writ of certiorari while the rule provides that the

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cause "shall" be treated as if the proper remedy was sought. Nevertheless, this court and other Florida courts have construed both the statute and the rule as allowing the appellate court discretion in deciding when to treat an appeal as a petition for writ of certiorari.

For example, in Atlantic Coast Line, R. Co. v. United States Sugar Corp., 47 So.2d 513 (Fla. 1950), this court, referring to Florida Statute §59.45 (1949), stated:

> Under this section of the statute we have the authority to consider the appeal lodged in this court as a petition for certiorari, and it is our conclusion that the appeal should be so treated.... (emphasis added)

Id. at 514. Clearly, this court did not say that an appeal must be treated as a petition for a writ of certiorari, despite the word "shall" in Florida Statutes §59.45 (1949). Likewise, in Marshall v. Bacon, 97 So.2d 252 (Fla. 1957), this court stated:

> At the outset we are confronted with an appellate procedural problem. It will be recalled that the appellant comes to this court on a notice of appeal. . . In our consideration of the matter, however, we accord to appellant the benefit of Section §59.45, Florida Statutes, F.S.A. Her notice of appeal, pursuant to this statute, will be regarded as a petition for certiorari and acted upon accordingly.

Id. at 254. If this court was required by statute to treat the appeal as a petition for writ of certiorari, this court would not have had to "accord" the "benefit" of the statute.

Many other courts have held an appellate court has discretion to treat an appeal as a petition for writ of

certiorari. For example, in Bridges v. Williamson, 449 So.2d 400 (Fla. 2d DCA 1984), the Second District Court of Appeal stated:

> This appeal is properly before us, however, because we have discretion to treat an improperly filed appeal as a petition for writ of certiorari.

Id. at 401. Further, in Bursten v. Cooper, 127 So.2d 134 (Fla. 3d DCA 1961), the Third District Court of Appeal held:

> Upon authority of Section 59.45, Fla. Stat., F.S.A., we have considered the notice of appeal as a petition for writ of certiorari, because the notice was properly filed and no reasonable objection appears to the consideration.

Id. at 135. Likewise, in Radio Communications Corporation v. Oki Electronics of America, 277 So.2d 289 (Fla. 4th DCA 1973), the Fourth District Court of Appeal stated:

> We may, however, within our statutory discretion (§59.45, F.S. 1971, F.S.A.), treat the notice of appeal as a petition for writ of certiorari and review the order on that basis.

Id. at 290. Finally, in Thomas v. Cilbe, Inc., 104 So.2d 397 (Fla. 2d DCA 1958), the Second District Court of Appeal stated:

> So even if the orders here were interlocutory in nature, the notice of appeal could be considered as a petition for writ of certiorari.

Id. at 400.[1]

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[1] See, Briggs v. Salcines, 392 So.2d 263 (Fla. 2d DCA 1980); Home News Publishing Company v. U-M Publishing, Inc., 246 So.2d 117 (Fla. 1st DCA 1971); Swope v. Coryell, 107 So.2d 153 (Fla. 2d DCA 1958). Compare Pridgen v. Board of County Commissioners of Orange County, 389 So.2d 259 (Fla. 5th DCA 1980).

Therefore, despite the word "shall," this Court and other courts have construed the statute and rule as allowing, but not requiring, the appellate court to treat an appeal as a petition for writ of certiorari. Obviously, the next issue is under what circumstances it is appropriate to treat an appeal as a petition for a writ of certiorari. The manner in which some courts have applied the rule and statute suggests all improperly filed notices of appeal should be treated as a petition for a writ of certiorari regardless of the circumstances.[2] We disagree.

Unless a notice of appeal reaches the appellate court within thirty (30) days, an appeal should only be treated as a properly filed petition for writ of certiorari in situations where the selection of a proper remedy is problematical. In a moment, we will discuss the certified question's jurisdictional issue that the notice of appeal must reach the appellate court within thirty (30) days. For now, we will examine the appropriateness of treating an appeal as a petition for writ of certiorari where the selection of a remedy is not difficult and notice of appeal is not transferred to the district court within thirty (30) days.

Although Florida Rule of Appellate Procedure 9.040(c) and Florida Statute §59.45 do not indicate that the appropriateness of treating an appeal as a petition for writ of certiorari

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2 City of Fort Lauderdale v. Couts, 239 So.2d 874 (Fla. 4th DCA 1970); City of Miami Beach v. Eason, 194 So.2d 652 (Fla. 3d DCA 1967).

depends on the difficulty in selecting a remedy, this Court has indicated that this is the key factor with respect to Florida Statute §59.45. In Hensley v. Palmer, 59 So.2d 851 (Fla. 1952), this Court stated:

> Section 59.45, supra, has its principal application in relieving an attorney of the burden of deciding whether a chancery order which he wishes to have reviewed by this court is final or interlocutory, and thus whether he must proceed by way of an appeal or by way of "proceedings in the nature of certiorari" . . .

Thus, Florida's policy regarding improper remedies is intended to relieve an attorney of the "burden" of selecting an appropriate remedy. While there may be a "burden" in deciding whether an order is final or interlocutory, there is no such "burden" in this case. Appellant sought review of a judgment rendered by a circuit court, acting in its appellate capacity. Florida Rule of Appellate Procedure 9.030 clearly states that appellant should have invoked the appellate court's certiorari jurisdiction.

Absent difficulty in selecting a remedy, we cannot understand the rationale in allowing an appellate court to treat a notice of appeal as a petition for writ of certiorari. In our legal system, the failure to properly follow rules often results in denying a party one day in court. As the policy regarding improper remedies is currently applied, our legal system guarantees a third court appearance despite a party's failure to follow a simple rule.

Further, if any mistake in selecting the proper remedy suf-

fices, then the time requirement in Florida Rule of Appellate Procedure 9.100(c) would be rendered meaningless. Any attorney desirous of avoiding the requirement that the petition for common law certiorari, including the supporting memorandum of law, be filed in the district court of appeal within thirty (30) days would simply have to assert he or she made a mistake in selecting a remedy.

We now turn to the jurisdictional issue posed by the certified question. A notice of appeal must be filed in the appellate court within thirty (30) days of rendition of the order to be reviewed to allow the appellate court to treat the notice of appeal as a petition for certiorari. Florida Rule of Appellate Procedure 9.100(c) requires petitions for writ of certiorari to be filed within 30 days of the rendition of the order to be reviewed. This time requirement is jurisdictional. McGee v. McGee, 487 So.2d 412 (Fla. 4th DCA 1986).

Further, a timely filing in the wrong court does not cure the jurisdictional defect caused by an untimely filing in the appropriate court. See Lampkin Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978). As stated in Florida Statute §59.081:

> Failure to invoke the jurisdiction of any such court within a time prescribed by such rules shall divest such court of jurisdiction to review such cause.

In this case, as well as other cases before this Court pursuant to the certified question, the jurisdiction of the District Court of Appeal was never invoked because an appeal was not proper.

Therefore, unless the notice of appeal was filed in the appellate court within 30 days, the appellate court was divested of jurisdiction to review such cause.

CONCLUSION

For all the foregoing reasons, we believe that the certified question should be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20th day of June, 1988, to Sam and Betty Spector, 123 Finch Court, Royal Palm Beach, Florida 33411.

By: Daniel F. Beasley
Daniel F. Beasley, Esquire