IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO.: 72,759

VERONICA STIEGLITZ,

Petitioner

vs.

CITY COMMISSION, CITY OF SOUTH MIAMI,

Respondent.

ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITY

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the Case and Facts of the Petitioner with the following specified areas of disagreement.

On January 16, 1987, the Appellate Division of the Dade County Circuit Court, in Case No. 86-135-AP, rendered a final judgement in favor of Respondent. Petitioner served a "Notice of Appeal" of this decision with the Clerk of the Appellate Division of the Circuit Court on February 13, 1987. On March 19, 1987, the Respondent moved to dismiss the cause in the Third District as the improperly denominated pleading was not timely filed with the Clerk of the Third District within 30 days, and as such the Third District had no jurisdiction over this cause. After a denial of that Motion, Amended and Renewed Motions were filed by Respondent on identical grounds. On March 28, 1988, oral argument on both the Renewed Motion and the cause on the merits was heard by the Third District panel. On April 5th, 1988, the Third District dismissed the cause and certified the question as presented herein. On April 20th, 1988, the Petitioner moved for Rehearing and ReHearing En Banc, which were denied on June 14th, 1988.

THE ISSUE PRESENTED ON CERTIFIED QUESTION

The Third 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 30 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

The Third District Court of Appeal correctly dismissed this appeal as Petitioner failed to comply with the clear and unambiguous requirements of Fla. R. App. P. 9.100 (b) by failing to file a Petition for Certiorari with the Clerk of the District Court within 30 days of the final judgement of the Appellate Division. Contrary to the statements of Petitioner in her statement of the case and facts, the motions filed by Respondent and the dismissal of the case by the Third District were not premised on the Petitioner filing an incorrectly styled pleading; the dismissal was requested and granted upon a lack of jurisdiction as no pleading or notice was filed with the clerk of the Third District in a timely fashion. Relying upon Lampkin-Asam v. District Court of Appeal, 364 So. 2d 469 (Fla.1978), these motions were well taken, and with the recent decisions of Spector v. Trans World Airlines, 523 So. 2d 704 (Fla. 4th DCA 1988); Gelinas v. City of South Miami, 522 So. 2d 105 (Fla. 3d DCA 1988); Paul v. City of Miami Beach, 519 So. 2d 1150 (Fla. 3d DCA 1988) and Johnson v. Citizens State Bank, 518 So. 2d 410 (Fla. 1st DCA 1988), the dismissal should be affirmed. See also, Massaline v. Carter, ____ So. 2d _____ (Fla. 5th DCA Case No. 87-2098, opinion filed July 28, 1988) (13 FLW 1782) and Elmore v. City of Orange City, ____ So. 2d _____ (Fla. 5th DCA Case No. 88-565, opinion filed July 28, 1988) (13 FLW 1782).

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL PROPERLY DISMISSED THE CAUSE AS THE NOTICE OF APPEAL WAS UNTIMELY FILED WITH THE CLERK OF THE THIRD DISTRICT.

The argument presented by Petitioner in her brief before this Court is virtually identical to that made in her motions for Rehearing and Rehearing En Banc which were unpersuasive before the Third District. An examination of each portion of the argument raised by Petitioner- with citation to the entire provisions of the Constitution, Appellate Rules and Committee notes addressed - should effect a similar result in this Court.

Upon the rendition of final judgment in the Appellate Division of the Circuit Court, which affirmed the City of South Miami's City Commission denial of a zoning request, the Petitioner sought to have the Third District hear the matter, and it is uncontroverted that the jurisdiction that should have been invoked is as outlined in Fla. R. App. P. 9.030 (b) (2) (B), which is certiorari review of final orders of the Circuit Court acting in their review capacity.

Pursuant to Fla. R. App. P. 9.100 (b), commencement of this original proceeding "shall be invoked by filling a petition, accompanied by a filing fee if prescribed by law, with the Clerk of the Court deemed to have jurisdiction". (e.s) These unambiguous requirements were not followed in two ways. Petitioner filed a "Notice of Appeal" instead of a petition, and filed this notice in the Appellate Division of the Circuit Court. As to the pleading being a notice rather than a petition, the motions and order regarding dismissal were never based on this ground.[1] As Chief Judge Schwartz stated in Paul v. Miami Beach, 519 So. 2d 1150 (Fla. 3d DCA 1988): i n sum, the appeal does not lie; if considered as a petition for certiorari, it is untimely. (e.s.).[2] The untimeliness of the pleading reaching the clerk of the Third District renders the Court without jurisdiction to hear the cause. This result is compelled by Lampkin-Asam v. District Court of Appeal, 364 So. 2d 469 (Fla. 1978); Southeast First National Bank of Miami v. Herin, 357 So. 2d 716 (Fla. 1978), and State, ex rel. Diamond Berk Ins. Co., v. Carroll, 102 So. 2d 129 (Fla. 1958).

1. Respondent's Renewed Motion to Dismiss, which was granted by the Order which is the subject of this appeal, states in paragraph six:

> 6. That, as the invocation of the Court's original jurisdiction by way of a Petition for Writ of Certiorari is jurisdictional in nature, any appeal of this matter must be dismissed as the Petitioner has failed to file with the Third District Court of Appeal in a timely fashion. Lampkin-Asam v. District Court of Appeal, 364 So. 2d 469 (Fla. 1978). (e.s)

2. Paul, which follows Johnson v. Citizens State Bank, supra, was the authority for the dismissed herein. Johnson, Paul and their progeny are all based on lack of jurisdiction due to untimely filings.

Petitioner cities several authorities for her position that the Third District was incorrect.[3] An examination of each will reveal the flaws in her argument.

The whole of Art. 5, Sec. 2(a) of the Constitution reads as follows:

> 2. Administration; practice and procedure
> (a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, 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. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature. (e.s.)

As seen by the committee notes, Fla. R. App. P. 9.040 (b) and (c) implement this constitutional requirement. An examination of these notes, as reproduced in full, serve to demonstrate that jurisdictional time requirements are not waived or modified by the rules:

> Sections (b) and (c) implement Article V, Section 2(a) of the Florida Constitution. Former Rule 2.1(a)(5)(d) authorized transfer when an improper forum was chosen, but the former rules did not address the problem of improper remedies being sought. The Advisory Committee does not consider it to be the responsibility of the court to seek the proper remedy for any party, but a court may not deny relief because a different remedy is proper. 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. The court must instead treat the case as if the proper remedy had been sought and transfer it to the court having jurisdiction. All filings in the case

3. At this time, the 1st, 3rd, 4th and 5th Districts are in accord; see, Johnson, Gelinas, Paul, Spector, Massaline, and Elmore, supra.

> have the same legal effect as though originally filed in the court to which transfer is made. This rule is intended to supersede Nellen v. State, 226 So.2d 354 (Fla. 1st DCA 1969), where a petition for a common law writ of certiorari was dismissed by the district court of appeal because review was properly by appeal to the appropriate circuit court, and Engel v. City of North Miami, 115 So.2d 1 (Fla. 1959), where a petition for a writ of certiorari was dismissed because review should have been by appeal. Under this rule, a petition for a writ of certiorari should be treated as a notice of appeal, if timely. (e.s.)

As stated by the rule, of course no case will be automatically dismissed if the wrong vehicle - such as a notice instead of a petition - is utilized, or if a cause is filed in the wrong appellate Court.[4] Proper remedies and venues can be had, but only if timely filings occur, and as rule 9.040 (c) and the notes state, it is not the responsibility of the court to make sure that Petitioners don't deny themselves their day in court because of untimely filings.

4. This is announced in Southeast v. Herin, supra:

> This rule was designed to permit the transfer of cases where the appeal is taken to the wrong appellate court. For instance, where an appeal in a bond validation proceeding is taken to the District Court of Appeal instead of the Supreme Court, or where an appeal in a case where the death penalty has been imposed is taken to the District Court instead of the Supreme Court, or where an appeal where life imprisonment has been imposed is taken to this Court instead of the District Court. There are also instances where jurisdiction depends on whether the trial court directly passed on the validity or constitutionality of a statute. Where it is determined that the jurisdiction of the wrong court has been invoked, the rule, and the constitution, as amended, provide for such transfer.
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> 357 So. 2d at 717.

As to the case law cited, petitioner's argument that the decision of the Third District in this case is contrary to Lacalle v. State, 479 So.2d 814 (Fla. 3d DCA 1985), Save Brickell Avenue, Inc. v. City of Miami, 393 So.2d 1197 (Fla. 3d DCA 1981), and City of Miami Beach v. Eason, 194 So.2d 652 (Fla. 3d DCA 1967), is completely without merit. Not one of these cited cases address the issue involved in the cause, which is that the jurisdiction of this court was not timely invoked. The cited cases merely address the issue that an improper remedy - i.e., filing "appeals" instead of petitions for certiorari - will be treated as a proper remedy under the rules; not one case cited by Petitioner addresses the timeliness of the remedy, however improper, which was sought.

Petitioner's arguments premised on the statutes are equally misplaced.

As for Section 59.45, Florida Statutes, its only applicability is to the wrong remedy pursuant to the plain words of the statute:

> 59.45 Misconception of remedy; supreme court
>
> If an appeal be improvidently taken where the remedy might have been more properly sought be certiorari, this alone shall not be a ground for dismissal; but the notice of appeal and the record thereon shall be regarded and acted on as a petition for certiorari duly presented to the supreme court.

This is why Lacalle, Save Brickell Ave., Inc., and Eason were all correctly decided by this Court but are completely inapposite to the instant issue of the timeliness of invoking a remedy, however incorrect a forum was chosen.

The other statutory provision cited by Petitioner, Section 59.081, Florida Statutes, completely supports the position of Respondent. By its very terms in section 2 thereof:

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

That is exactly what occurred in this cause. Petitioner is either yet to come to terms with the timeliness issue or simply chooses to distract this court with arguments about treating Notices of Appeal as Petitions for Certiorari. Again, it is not the improper remedy standing alone, but the untimely filing of this improper remedy which causes this appeal to be dismissed. As no paper was filed by Petitioner in the Third District within 30 days, that court simply had no jurisdiction over this matter. In Lampkin-Asam v. District Court of Appeal, Third District 364 So.2d 469 (Fla. 1978), this court stated:

> Petitioner maintains that Florida Rule of Appellate Procedure 9.040(b) supersedes Florida Appellate Rule 2.1 a.(5)(d) and the rationale underlying Southeast First National Bank v. Herin, supra, State ex rel. Diamond Berk Insurance Agency, Inc. v. Carroll, supra, and In re Estate of Hatcher, supra. It is argued that Rule 2.1. was broadened in the new rules so as to protect from dismissal notices which are filed in the wrong court.
>
> We cannot agree with this contention. Florida Rule of Appellate Procedure 9.040(b) in no way altered the meaning or effect of Rule 2.1 a.(5) (d) or the cases construing it except as stated in the committee notes with respect to the results reached in Nellen v. State, 226 So. 2d 354 (Fla. 1st DCA 1969), and Engel v. City of North Miami, 115 So. 2d 1 (Fla. 1959), which have no application here. Hence Southeast first National Bank, Diamond Berk Insurance Agency, and Hatcher, supra, are dispositive of the issue before us.
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> 364 So. 2d at 470 (e.s.).

The Court went on to hold that:

> Had there been any intent by adoption of the new appellate rules to authorize indiscriminate filings of notices of appeal in any tribunal, Florida Rule of Appellate Procedure 9.110(b) would not provide that jurisdiction of an appellate court shall be invoked by filing a notice "with the clerk of the lower tribunal." 364 So.2d at 471 (footnote omitted).

Lampkin- Asam underscores the basis of the First District's holding in Johnson and the Third District decisions in Gelinas, Paul, and this case. The jurisdictional nature of a timely filing has never been waived or altered by any authority cited to by Petitioner. To the contrary, the Committee notes to the very rule Petitioner had to comply with, Fla. R. App. P. 9.100 (b) states:

> Sections (b) and (c) set forth the procedures for commencing an extraordinary writ proceeding. The time for filing a petition for common law certiorari is jurisdictional. (e.s.).

The improper filing in the Appellate Division instead of with the Clerk of the court having jurisdiction- in this instance, the Third District - has divested the Third District of jurisdiction.

CONCLUSION

The failure of Petitioner to file a timely pleading with the Clerk of the District Court should result in an affirmance by this Court of the District Court decision below. Upon the authority of Lampkin - Asam, Southeast v. Herin, and State Ex rel. Diamond Berk v. Herin, the Petitioner should be denied the relief she requests.

Respectfully submitted,

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By: _____
JOHN R. DELLAGLORIA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to David T. Bobbitt, esq., 19 West Flagler Street., Suite 1107, Miami, Florida on this 2nd day of September, 1988.

By: _____
JOHN R. DELLAGLORIA