IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,149
4th District - No. 88-3337

IN RE: THE MARRIAGE OF:

JEFFREY SKINNER,

Petitioner,

vs.

LISA SKINNER,

Respondent.

FILED
SID J. WHITE
JUL 31 1989
CLERK, SUPREME COURT
By
Deputy Clerk

MAIN BRIEF OF APPELLANT

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## STATEMENT OF FACT

This case was originally brought for dissolution of marriage between Jeffrey Skinner and Lisa Skinner. During the course of the litigation, certain Orders for payment of alimony, child support, expenses, etc. were entered. Among such pendente lite matters was an Order for payment of a Chiropractic bill to a Dr. Jeffrey Frachtman for medical services rendered to Wife. Husband, JEFFREY SKINNER, was ordered to make payment thereof within a specified time. When he failed to do so, Wife responded on December 30, 1987, with a Motion for Contempt seeking to enforce the prior Order of the Court for payment of the bill.

Thereafter by signatures dated December 30, 1987 (for the Wife) and February 1, 1988 (for the Husband) the parties entered into a Property Settlement Agreement. Such Agreement did not provide expressly for the medical bill to Dr. Frachtman, but did contain (in Paragraph X):

> "Except as otherwise provided in this Property Settlement Agreement, each party hereto forever renounces and relinquishes all claims or demands of whatever kind, up to the date of this Agreement..."

Thereafter on February 7, 1988, an uncontested final hearing was held for Final Judgment of Dissolution of Marriage. At that time,

Wife offered the Agreement between the parties into evidence. The Court duly entered an Order dissolving the marriage, incorporating by reference the Property Settlement Agreement. No action was requested, or taken by the Court on the then still pending Motion for Contempt, nor was any issue raised of the still outstanding Order that the Husband pay Dr. Frachtman's bill.

After the Final Judgment on March 31, 1988, Wife filed a Motion to hold her former husband in contempt for failure to pay Dr. Frachtman's bill in accordance with the Orders entered during the course of the litigation. Such Motion was denied by Judge Hinckley on April 27, 1988, for lack of jurisdiction.

Motion for Rehearing was filed upon such decision, and denied.

Wife then filed "Motion for Relief from Judgment" proporting to invoke the doctrine of excusable error pursuant to Rule of Civil Procedure 1.540, in which she alleges in Paragraph 4:

> "The former Wife would assert, pursuant to Rule 1.540 (b) (1), inadvertence, surprise, or excusable neglect in that, had Wife known that the Court would have upheld a general release clause to be interpreted as waiving her right to the monies previously Court ordered, the Wife would never had agreed to allow the action to proceed to final hearing."

On November 14, 1988, Judge Hinckley entered an Order granting Wife's Motion and ordering the Husband to pay $1,535.00 to Dr.

Frachtman within 20 days.

The Petitioner sought review of this Order by Petition for Certiorari to the Fourth District Court of Appeal.

In that Petition, the error raised was the action of the Court in granting the Motion of the Wife for "Relief from Judgment." The additional Order of Judge Hinckley to pay the doctor bill within 20 days was indeed the end product of what Petitioner believes to be judicial error, but the fundamental issue raised by the Petition, and all argument thereon, is whether the Trial Court had jurisdiction to grant the Motion accepting every allegation thereof as true.

In considering the Petition for Certiorari, the Fourth District held that since the Order of Judge Hinckley gave "immediate monetary relief in a domestic relations matter", review must be by direct appeal, and the Petition for Certiorari was dismissed as having failed to properly invoke the jurisdiction of the District Court to review the Order in question.

In such ruling, however, the District Court certified to this Court as a question of great public importance this question:

> DOES A DISTRICT COURT OF APPEAL HAVE JURISDICTION TO CONSIDER A PETITION FOR CERTIORARI FILED THEREIN TO REVIEW A NON-FINAL ORDER WHICH IS REVIEWABLE BY APPEAL BUT WHERE NO NOTICE OF APPEAL WAS FILED IN THE TRIAL COURT?

## ARGUMENT

The question certified by the Fourth District is whether or not the general appellate jurisdiction gives that Court by the Constitution and the Appellate Rules power to review an Order designated as "Non-Final" pursuant to Appellate Rule 9.130 can be invoked only by Notice of Appeal filed in the Circuit Court.

In considering that question, it was the view of the Fourth District that the Order of the Circuit Court was one covered by Appellate Rule 9.130 because it was a order granting a "....right to immediate monetary relief.. .in a domestic relation matter." The Petitioner here believes that that issue is probably more appropriate to Section (5) of Rule 9.130 than Section (3), but either way the issue presented is essentially the same.

It was the view of the Petitioner at the time that a post judgment order in the nature of the one granted by Judge Hinckley was, by its nature and content, final. Judge Hinckley did not set aside the previous Final Judgment and reopen the case, he merely modified it to include an obligation that had theretofore been pendente lite.

The issue which the Petitioner sought to raise by certiorari was Judge Hinckley's jurisdiction and authority to take that action with that finality. As a post judgment order, it appeared to the

Petitioner an appropriate matter for review by certiorari. Petitioner gave no thought to the possibility that it was a "right to immediate monetary relief in a domestic relations matter" because of the context of the problem was post judgment, but upon review it is clear that 9.130 would also cover the question raised by the Order issued under Florida Rule of Civil Procedure 1.50.

In candor with the Court, therefore, this situation leaves us with the single question presented by the Fourth District. The District Courts of Appeal have long held the power to treat a Notice of Appeal as a Petition for Certiorari. See Fennel vs. Trailways, 1964, Fla. 3d Dist, 160 So.2d 858; Mac Papers, Inc. vs. Coin Machine Acceptance Corp., 1969, Fla. 3d Dist., 210 So.2d 463; Radio Communications Corp. vs. Oki Electronics of America, Inc., 1973, Fla. 4th Dist., 277 So.2d 289; Stein vs. Bayfront Medical Center, Inc., 1973, Fla. 2nd Dist., 287 So.2d 401.

It is true that there is a statutory authority, FS 59.45, which provides that if an appeal is improvidently taken, and the remedy sought would have been more properly certiorari, the opportunity of review should not be dismissed, and Notice of Appeal and Record is to be regarded and acted upon as a Petition for Certiorari. This Statutory authority for jurisdiction, however, is directed expressly

to the Supreme Court, and while it has basis as historical reference for such action by District Courts, it is doubtful that such Statute has any real relevance to the fundamental grant of Appellate Jurisdiction since the general revision of the court system of Florida pursuant to Article V of the Florida Constitution.

The point probably is better made that we have never questioned that a Notice of Appeal, filed with the Clerk of the Trial Court, failed to properly invoke jurisdiction for review as a Petition for Certiorari (which would have been appropriately filed with the Clerk of the Appellate Court). As pointed out by Judge Amstead in his dissent here, the issue that is presented is where the papers are filed requesting review. This Petition for Certiorari filed with the Clerk of the District Court of Appeal clearly fulfilled all of the substantive requirements of Appellate Rule 9.130. It gave notice that review of sought, stated the facts of the case and the issue and argument thereon. A Notice of Appeal filed with the Clerk of the Trial Tribunal would, as pointed out by Judge Amsted, simply have been forwarded to the District Court of Appeal as a matter of routine.

The question of jurisdiction of a court should not be left to rest on where a document is filed. When it is filed, what it says, and what it may do to orderly administration are legitimate jurisdictional

issues. Jurisdiction can be given to Certiorari from a wrongly filed Notice of Appeal, surely as an issue of jurisdiction, the opposite circumstance should be treated the same way.

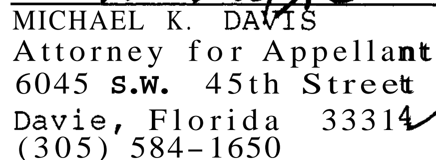
SUMMARY OF ARGUMENT ON APPELLANT'S BRIEF

The issue presented by the certified question is whether the District Court of Appeal has jurisidiction to consider a Petition for Certiorari to review an Order subject to appeal pursuant to Florida Appellate Rule 9.130 as an appeal if no Notice of Appeal was filed in the Trial Court.

It is the position of the Appellant that the District Courts of Appeal have long exercised jurisdiction in the reverse circumstances, i.e., to consider a Notice of Appeal as a Petition for Certiorari where necessary to exercise Appellate jurisdiction. No substative reason exists from the filing of a piece of paper with the Clerk of the Circuit Court, which is automatically forwarded to the District Court of Appeal, to establish a barrier to jurisdiction for filing of a Petition for Certiorari in the District Court of Appeal.

Respectfully submitted,

DAVIS & BASS

By: 

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CERTIFICATION

I HEREBY CERTIFY that a copy of the foregoing Appellant's Main Brief was mailed to Ms. Caryn S. Grainer, P.A., Attorney for Appellee, 601 South Ocean Drive, Hollywood, Florida 33019, this 27th day of July, 1989.

DAVIS & BASS

By:

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# APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1989

Case No. 88-3337

IN RE: THE MARRIAGE OF:

JEFFREY SKINNER,

Petitioner,

vs.

LISA SKINNER,

Respondent.

Opinion filed April 12, 1989

Appeal of a non-final order from the Circuit Court for Broward County: Harry G. Hinckley, Jr., Judge.

Michael K. Davis of Davis & Bass, Davie, for appellant

No appearance for appellee

PER CURIAM.

This cause came here as a petition for writ of certiorari, but by order we designated it a non-final appeal. We would have jurisdiction to review the order in question as an appeal from a non-final order, but the appellant failed to file a notice of appeal in the trial

court, electing instead to file a petition for certiorari here.

The order was entered after the final judgment of dissolution, ordering the appellant to pay a medical bill. The order also granted the wife's motion for relief from judgment based on Florida Rule of Civil Procedure 1.540(b). Thus, the order is appropriate for interlocutory appeal pursuant to Florida Rules of Appellate Procedure 9.130(a) (3) (C) (iii) and 9.130(a) (5).

We conclude that we are bound by Lampkin-Asam vs. District Court of Appeal, 364 So.2d 469 (Fla. 1978). We do not find the later decision in Johnson vs. Citizens State Bank, 14 F.L.W. 2 (Fla. Jan. 5, 1989), to compel a contrary decision. Therefore, we dismiss the petition for writ of certiorari which would have been treated as an interlocutory appeal, but for failure of appellant to file a notice of appeal in the trial court.

Nevertheless, we certify the following question to the Supreme Court of Florida as being one of great public importance.

> DOES A DISTRICT COURT OF APPEAL HAVE JURISDICTION TO CONSIDER A PETITION FOR CERTIORARI FILED THEREIN TO REVIEW A NON-FINAL ORDER WHICH IS REVIEWABLE BY APPEAL BUT WHERE NO NOTICE OF APPEAL WAS FILED IN THE TRIAL COURT?

LETTS and GLICKSTEIN, JJ., concur.
ANSTEAD, J., dissents with opinion.

ANSTEAD, J., dissenting.

I would hold that ,he imely filing of an application for certiorari in this court was sufficent to invoke our appellate jurisdiction. Pearce vs. Parsons, 414 So.2d 296, n.1 (Fla 2d DCA 1982). It makes little sense to me to hold that the filing of a jurisdictional pleading directly in this court is insufficient to invoke this court's jurisdiction. The rules provide for the filing of the jurisdictional document in the trial court chiefly as a means of convenience for the parties and the trial court. The notice filed in the trial court is, of course, immediately transferred to this Court by the clerk of the trial court.