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FILED
SID J. WHITE
FEB 11 1992
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,096

CAYETANO F. ALFONSO and
SUNLAND ESTATES, INC.,

Petitioners,

vs.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, THIRD DISTRICT
DCA CASE NO. 91-970

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

I. Under the Florida Rule of Appellate Procedure 9.110(b) and well-established case law, in order to invoke the jurisdiction of a district court of appeal, an appellant must file a timely notice of appeal in the circuit court which rendered the final judgment sought to be reviewed. Petitioners in the instant case, did not file the notice of appeal in the circuit court, but instead filed the notice of appeal in the district court of appeal. By doing so, they failed to empower the district court of appeal to act, hence the Third District Court of Appeal correctly dismissed the appeal for lack of jurisdiction.

Further, there is no justification or authority for the application of the transfer rule in this case. The transfer rule contemplates that jurisdiction of an appellate forum be properly invoked prior to application of the rule. Since Petitioners failed to properly invoke the jurisdiction of the Third District Court of Appeal, there was nothing to transfer.

11. In the instant case Petitioners sought review of the final judgment of a circuit court, but they did not properly invoke the jurisdiction of the district court of appeal by filing a notice of appeal with the circuit court which rendered the final judgment. Because Petitioners did not make any mistake as to remedy, the instant case does not present a question of appropriate remedy. Therefore, Article

V, Section 2(a) of the Florida Constitution does not prohibit the dismissal of Petitioners' appeal.

111. Petitioners failed to demonstrate in their initial brief any express and direct conflict on the same question of law, between the Fourth District Court of Appeal's recent decision in Sternfield **v.** Jewish Introduction, Inc., 581 So.2d 987 (Fla. 4th DCA 1991), and the case at bar. Petitioners also failed to demonstrate any express and direct conflict on the same question of law, between the recent decision of the First District Court of Appeal in Beeks v. State, 569 So.2d 1345 (Fla. 1st DCA 1990), and Sternfield. Therefore, this Court cannot exercise discretionary jurisdiction in this case pursuant to Article V, Section 3(b)(3) of the Florida Constitution.

ARGUMENT

I. A DISTRICT COURT OF APPEAL DOES NOT HAVE JURISDICTION TO HEAR AN APPEAL FROM A FINAL JUDGMENT OF A CIRCUIT COURT WHERE APPELLANT DID NOT FILE A NOTICE OF APPEAL IN THE CIRCUIT COURT WITHIN THIRTY DAYS OF THE RENDITION OF THE FINAL JUDGMENT.

Rule 9.110(b), Florida Rules of Appellate Procedure provides:

> (b) Commencement. Jurisdiction of the court under this rule shall be invoked by filing two copies of a notice, accompanied by filing fees prescribed by law, with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed. (emphasis added).

In the case at bar, the final judgment which Petitioners seek to have the district court of appeal review, is a "final order" as described in Fla. R. App. P. 9.030(b)(1)(A), and is therefore an order to which Rule 9.110(b) applies. The "lower tribunal" in the instant case, is the circuit court which rendered the final judgment.

The application of Rule 9.110(b) to the case at bar mandates the dismissal of the appeal. Under the Rule, an appellant must file a timely notice of appeal in the lower tribunal to empower the district court of appeal to act. Failure to do so, although dubbed a "minor technicality" by Petitioners, in fact constitutes an "irremediable jurisdictional defect". See Fla. R. App. P. 9.110(b), 1977 Advisory Committee and Court's Commentary. This Court has repeatedly so held. Lampkin-Asam v. District Court of Appeal, Third District, 364 So.2d 469 (Fla. 1978); Southeast First National Bank of Miami v. Herin, 357 So.2d 716 (Fla. 1978); Williams v. State, 324 So.2d 74 (Fla. 1975); Blount v.

Hansen, 133 So.2d 73 (Fla. 1961); State of Florida ex re . Diamond Berk Insurance Agency V. Carroll, 102 So.2d 129 (Fla. 1958); Counne v. Saffan, 87 So.2d 586 (Fla. 1956).

As far back as 1958, in State of Florida ex rel. Diamond Berk Insurance Agency v. Carroll, 102 So.2d 129 (Fla. 1958), this Court concluded that "under applicable rules the timely filing of a notice of appeal at the place required by the rules is essential to confer jurisdiction on the appellate court". Id at 130. Even at that time "the requirement for filing a notice of appeal with the clerk of the lower court whose judgment is being subjected to review [was] nothing new or novel". Id at 131. In Diamond Berk this Court was confronted with facts identical to the case at bar. The appellant in Diamond Berk appealed from a final judgment by filing a notice of appeal in the office of the clerk of the District Court of Appeal, Third District, without filing a notice of appeal with the clerk of the Circuit court. Id at 130. This Court applied former Rule 3.2(a)[1], and (d)[2] delineating the method for commencing an appeal and stated,

> Despite what might appear to be the imposition of a hardship, we are compelled to conclude that under applicable rules the timely filing of a notice of appeal at the place required by the rules is essential to confer jurisdiction on the appellate court.

Id at 130.

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1. Commencing an appeal shall be accomplished "by filing a notice of appeal . . . with the clerk of the lower court". Rule 3.2(a) Florida Appellate Rules.

2. "Effect of Filing Notice. The filing of the notice of appeal . . . with the clerk of the lower court shall give the Court jurisdiction of the subject matter and of the parties to the appeal." Rule 3.2(d) Florida Appellate Rules.

This Court reasoned,

> A court has no power to act in the absence of a jurisdictional foundation for the exercise of the power. The timely and proper filing of a notice of appeal is a jurisdictional essential to enable an appellate court to exercise its power. (emphasis added).

Id at 131.

In the case at bar, as in Diamond Berk, the jurisdictional foundation for the appellate court to exercise the power to act is absent because Petitioners' notice of appeal was not timely filed at the place required by the rules.

Twenty years after the Diamond Berk decision, this Court found that the filing of a notice of appeal in the wrong court deprived a circuit court of appellate jurisdiction to hear an appeal from a county court judgment. In Southeast First National Bank of Miami v. Herin, 357 So.2d **716** (Fla. 1978), a notice of appeal was filed in otherwise timely fashion, but in the district court of appeal instead of in the office of the clerk of circuit and county court. This Court applied Diamond Berk and found that a notice of appeal, filed within the 30-day period in the appellate court and later "transferred" to the trial court, did **not** confer jurisdiction on the appellate court. Id at 717.

In **1978** this Court again confirmed that a notice of appeal must be timely filed at the place required by the rules in order to confer jurisdiction on the appellate court. Lampkin-Asam v. District Court of Appeal, Third District, 364 So.2d **469** (Fla. **1978).** This Court reasoned that if there had

"been any intent by adoption of the new appellate rules to authorize indiscriminate filing of notices of appeal in any tribunal, [Rule] 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'". (emphasis in original). Lampkin-Asam, 364 So.2d at 471.

All of the district courts of appeal in Florida have consistently followed the well-reasoned decisions of this Court. See Beeks v. State, 569 So.2d 1345 (Fla. 1st DCA 1990); Acquisition Corp. of America v. American Cast Iron Pipe Co., 543 So.2d 878 (Fla. 4th DCA 1989); Janelli v. Pagano, 492 So.2d 796 (Fla. 2d DCA 1986); Miller v. Nassofer, 484 So.2d 619 (Fla. 5th DCA 1986); Hawks v. Walker, 409 So.2d 524 (Fla. 5th DCA 1982); Miller v. Federal National Mortgage Association, 407 So.2d 956 (Fla. 3d DCA 1981); Lehmann v. Cloniger, 294 So.2d 344 (Fla. 1st DCA 1974); In re Estate of Hatcher, 270 So.2d 45 (Fla. 1st DCA 1972). Recently, the First District Court of Appeal in Beeks v. State, 569 So.2d 1345 (Fla. 1st DCA 1990), closely analyzed the relevant decisions of this Court and concluded that "the law has not changed concerning the timely filing of the notice of appeal in the proper court". (emphasis in original). Id at 1346. Like Petitioners in the case at bar, the appellant in Beeks tried to use Fla. R. App. P. 9.040(b)[3] and associated case authority to argue that the appeal was timely filed, and the

3. "(b) Forum. If a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court." Fla. R. App. P. 9.040(b).

clerk of the district court of appeal should have transferred the notice of appeal to the circuit court. As in Beeks, the facts of the instant case do not warrant application of the transfer rule.

This Court has held that Rule 9.040(b) was designed to permit the transfer of cases where the appeal is taken to the wrong appellate court. Southeast First National Bank of Miami v. Herin, **357 So.2d 716, 717 (Fla. 1978).** In such situations the jurisdiction of the wrong appellate court is invoked, and the rule provides for a transfer to the correct appellate court. See Sternfield v. Jewish Introductions, Inc., 581 So.2d 987 (Fla. 4th DCA 1991)(misfiled petition for certiorari to be transferred from the circuit court sitting in its appellate capacity to the appropriate district court of appeal). Unlike the situations in Southeast and Sternfield, where the jurisdiction of an appellate court was invoked (albeit the wrong appellate court), in the case at bar Petitioners failed to invoke the jurisdiction of any appellate court. Application of the transfer rule contemplates that appellate jurisdiction has already been invoked in some appellate forum by the timely filing of a notice in the place required by the applicable rules.

Furthermore, this Court has not promulgated any rules which authorize a clerk of an appellate court to practice law and/or protect the rights of an appellant. The clerk is under no obligation to either return to the appellant an erroneously filed notice of appeal, or mail the erroneously filed notice of appeal to the lower tribunal. Clearly, the

clerk should not be burdened w th a decision which determines when jurisdiction vests in the appellate court. Williams v. State, 324 So.2d 74, 77 (Fla. 1975). Also, it is undisputed that it is "the action of the claimant which invokes the jurisdiction of a court". Johnson v. Citizens State Bank, 537 So.2d 96, 98 (Fla. 1989). Hence, there is no justification or authority for applying the transfer rule to the instant facts.

The decision of the Third District Court of Appeal in the case at bar to dismiss the Petitioners' appeal, is clearly supported by the long standing decisions of this Court. Diamond Berk and its progeny undoubtedly require that this Court answer the certified question in the negative and uphold the Third District Court of Appeal's dismissal of Petitioners' appeal.

II. ARTICLE V, SECTION (2)(A) OF THE FLORIDA CONSTITUTION AND THE JOHNSON AND SKINNER CASES DO NOT APPLY WHEN AN APPELLANT SEEKS THE PROPER REMEDY BUT DOES NOT INVOKE THE JURISDICTION OF THE DISTRICT COURT OF APPEAL PURSUANT TO THE RULES GOVERNING THAT PARTICULAR REMEDY.

The issue in the instant case is whether appellate jurisdiction is invoked when a notice of appeal is filed in the district court of appeal and not the circuit court which rendered the final judgment. Without doubt, the appropriate remedy is to review the final judgment by direct appeal under Fla. R. App. P. 9.110(b). Obviously Rule 9.110(b) provides that appellate jurisdiction is invoked only by filing the direct appeal notice in the circuit court. Petitioners can

find no relief for their plight by citing and arguing decisions which involve the direct application of Article V, Section 2(a) of the Florida Constitution and Fla. R. App. P. 9.040(c)[4]. Article V, Section 2(a) provides that "no cause shall be dismissed because an improper remedy has been sought". The intent of the Constitution is to protect persons making mistakes about the character of their remedy - either direct appeal or certiorari. It was not the intent of the Constitution to save persons who did not properly follow the rules of appellate procedure. This intent was behind the First District Court of Appeal in Beeks v. State 569 So.2d 1345 (Fla. 1st DCA 1990) when it observed,

> In both Johnson[5] and Skinner[6], the document which appellant/petitioner did file - even though it was incorrect as to remedy - was sufficient to invoke the appellate court's jurisdiction. The court's jurisdiction having been invoked, the court could then consider the proper remedy . . ..

Id at 1347.

In Johnson the parties sought to directly appeal a decision rendered by a circuit court acting in its review capacity. They filed a timely notice of appeal with the clerk of the circuit court. However, it was determined by the district court of appeal that the appropriate remedy to

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4. "(c) Remedy. 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." Fla. R. App. P. 9.040(c).

5. Johnson v. Citizens State Bank, 537 So.2d 96 (Fla. 1989).

6. Skinner v. Skinner, 561 So.2d 260 (Fla. 1990).

review the final orders of a circuit court acting in its review capacity was by certiorari. Johnson, 537 So.2d at 97. Although under the applicable rules a petition for certiorari must be filed with the appellate court deemed to have jurisdiction[7], this Court relied on Article V, Section 2(a) of the Florida Constitution to find that "a district court shall not dismiss a timely filed notice of appeal, if upon consideration, the court concludes that relief would be warranted under a petition [for certiorari]. Art. V, §2(a), Fla. Const.; Fla. R. App. P. 9.040(c).". Johnson, 537 So.2d at 97, 98; see also Thomson, Bohrer, Werth & Razook v. Multi Restaurant Concepts, Inc., 561 So.2d 1192 (Fla. 3d DCA 1990).

In Skinner the party filed a timely petition for certiorari with the district court of appeal seeking review of a nonfinal order of a circuit court granting the right to immediate monetary relief in a domestic relations matter. However, it was determined by this Court that the nonfinal order in question must be reviewed by direct appeal. 561 So.2d at 261, 262. Therefore, this Court again applied Article V, Section 2(a) of the Florida Constitution in its analysis in Skinner.

> We find no distinguishable difference between [the Johnson] scenario and allowing a petition for certiorari filed in the district court to confer jurisdiction on that appellate court in order to consider the appropriate remedy. We believe that once the district court's jurisdiction has been invoked, it cannot be divested of jurisdiction by a hindsight determination that the wrong remedy was sought by a notice or petition filed in the wrong place. (cite omitted).

7. Fla. R. App. P. 9.100(b)

561 So.2d at 260.

The common thread through Johnson and Skinner is that the Constitution does not penalize appellants for making mistakes of law in analyzing and determining whether their appeal fits in one category or another as long as they properly pursue the category they decide is appropriate. Petitioners' argument in their initial brief that Johnson and Skinner simply stand for the proposition that if appellant's attorney makes two mistakes as opposed to one mistake, then appellant obtains relief is simplistic and flip. Really, those cases stand for the proposition that the Constitution provides that if appellant makes a mistake as to remedy he is protected, but appellants who make mistakes as to how to pursue the remedy are not. In each case the claimant properly invoked the jurisdiction of the district court of appeal pursuant to the rules governing the particular remedy, even though the remedy was later determined to be inappropriate.

The instant case does not present a remedy issue. There is no question of law related to remedy which surrounds the final judgment rendered by the circuit court in this case. Petitioners do not argue that they properly sought the incorrect remedy. Unfortunately, petitioners simply did not invoke the jurisdiction of the district court of appeal with a timely notice of appeal properly filed in the circuit court which rendered the final judgment they seek to have reviewed. Based on the foregoing, the facts of the instant case clearly do not justify the relief Petitioners seek pursuant to

Article V, Section 2(a) of the Florida Constitution.

III. ALFONSO AND BEEKS DO NOT EXPRESSLY AND DIRECTLY CONFLICT WITH STERNFIELD ON THE SAME QUESTION OF LAW.

Petitioners argue in their initial brief that the Third District Court of Appeal's decision below, Alfonso v. State, Department of Environmental Regulation, 588 So.2d 1065 (Fla. 3d DCA 1991), and the First District Court of Appeal's decision in Beeks v. State, 569 So.2d 1345 (Fla. 1st DCA 1990), expressly and directly conflict with the Fourth District Court of Appeal's decision in Sternfield v. Jewish Introductions, Inc., 581 So.2d 987 (Fla. 4th DCA 1991). In Sternfield the judgment under review was rendered by a county court and was then appealed to the circuit court. Id at 988. The lower tribunal in Sternfield was the county court, and the circuit court sat in its appellate capacity when called upon to consider the petitioners' motion to transfer the petition for writ of certiorari which was filed in the wrong appellate forum...the circuit court. The Fourth District concluded that the "circuit court departed from the essential requirements of law in dismissing and failing to transfer the case". Id at 988. The court, citing Fla. R. App. P. 9.040(b), directed that the petition for writ of certiorari be transferred to the Fourth District Court of Appeal. Id at 988. Neither the facts of Sternfield, nor the law applied by the Fourth District presents an express and direct conflict with the facts and the law applied in Alfonso and Beeks. Under the applicable rules, a petition for writ of certiorari

is required to be filed in the appellate court. However, a notice of appeal is required to be filed in the lower court which rendered the order sought to be reviewed.

The district courts of appeal in Alfonso and Beeks were faced with almost identical factual situations. A party filed a notice of appeal within thirty days of rendition of a final judgment with the clerk of the district court of appeal instead of with the clerk of the circuit court. (R. 6); Alfonso, 588 So.2d at 1065; Beeks, 569 So.2d at 1345. The district courts of appeal in both cases applied the "controlling and indistinguishable authority of Lampkin-Asam v. District Court of Appeal, 364 So.2d 469 (Fla. 1978)," to dismiss the appeals for lack of jurisdiction. Alfonso, 588 So.2d at 1065; Beeks, 569 So.2d at 1346.

Contrary to Petitioners assertion in their initial brief, they have failed to demonstrate express and direct conflict between the cited decisions on the same question of law "such that one decision would overrule the other if both were rendered by the same court". Ansin v. Thurston, 101 So.2d 808, 811 (Fla. 1958); see also Art. V, §3(b)(3), Fla. Const. (1980). Clearly, Petitioners are mistaken in their analysis of the cited decisions, and therefore cannot demonstrate express and direct conflict because none exists.

CONCLUSION

The Third District Court of Appeal does not have jurisdiction to entertain an appeal from the final judgment of a circuit court because Petitioners did not file a notice of appeal in the circuit court within thirty days of the rendition of the final judgment. Direct application of Fla. R. App. P. 9.110(b) to this case mandates that result. Neither does the Third District Court of Appeal have jurisdiction to entertain a direct appeal from the final judgment of a circuit court where the notice of appeal is filed in the appellate court and no question of incorrect remedy is presented. Therefore, based on the foregoing, the certified question should be answered in the negative and the decision of the Third District Court of Appeal under review affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof was served by regular U.S. Mail upon Manuel A. Cuadrado, Esq. and Roy D. Wasson, Esq., Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130, on this 10th day of February, 1992.

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