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IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,096

CAYETANO E. ALFONSO
and SUNLAND ESTATES, INC.,

Petitioner,

-vs.-

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

This is a petition for discretionary review from the decision of the Third District Court of Appeal dismissing an appeal from a judgment of the Monroe Circuit Court, which decision certified the following question as one of great public importance:

> [W]hether a district court of appeal has jurisdiction to entertain an appeal where, as here, (1) the appellant erroneously files a notice of appeal with the district court , rather than the circuit court, and (2) the appellant takes no corrective action to file the notice of appeal in the circuit court within thirty days of the rendition of the final judgment.

(R. 29).

The Final Judgment as to which review was sought by the appeal to the Third District was rendered by the Monroe Circuit Court on April 16, 1991. (R. 11). ALFONSO's[1] prior counsel[2] expediently filed a Notice of Appeal on April 22, 1991 (R. 1), a mere **six** days after the judgment was rendered, but erroneously filed same in the district court and not in the trial court. The Notice of Appeal was accepted by the clerk's office and was neither returned to ALFONSO's prior counsel nor transferred to the trial court. (R. 10).

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[1]The present Petitioners, Appellants in the district court, will hereinafter collectively be referred to as "ALFONSO" for the sake of simplicity.

[2]Appellants respectfully submit that if this Court should render a written opinion in the present case, it would not be inappropriate for that opinion to mention that the mistake was made by Appellants/Petitioners former attorney, rather than by either one of the undersigned.

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ALFONSO's present attorneys **took** over representation of Appellants after the Notice of Appeal had been misfiled (R. 2-3) and thereafter learned of the mistake. (See R. 6). Upon discovery of the fact that the Notice of Appeal had been filed in the Third District, ALFONSO's new counsel filed a "Motion to Transfer Notice of Appeal to Lower Tribunal and Restart Appellate Timetables, or to Deem Filing Sufficient to Invoke Appellate Jurisdiction, and Alternative Motion to Certify Question." (R. 5). Appellee did not oppose that motion.

The appeal was dismissed sua sponte, upon consideration of the issue having been raised by Appellants in their Motion to Transfer Notice of Appeal (etc.) (R. 5-15). The original decision of the Third District was an order rendered on July 31, 1991, which held in a two-to-one ruling as follows:

> Appellants' motion to transfer notice of appeal etc., is denied. This appeal is hereby dismissed for failure to file a timely notice of appeal with the clerk of the lower tribunal.

(App. 1)[3].

ALFONSO moved for rehearing, or for the district court to certify a conflict with a recent Fourth District case. (App. 2).

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[3] "At the time of service of this brief, the clerk of the Third District had prepared an index to the record which did not include the original order dismissing the appeal, ALFONSO's Motion for Rehearing (etc.) which followed it, and other items filed in that court. The district court clerk has indicated that the record might be supplemented sua sponte with those items; however, because they are absent from the record now, they are cited as Appendix exhibits only.

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On November 12, 1991, the Third District granted rehearing (App. 4), vacated its original decision **and,** rendered its substitute opinion now under review, which again dismissed the appeal but certified the question of great public importance stated above.

ALFONSO filed the present proceeding, asserting the existence of the certified question as a basis for invoking this Court's discretionary jurisdiction, as well as setting forth the existence of an express and direct conflict" as another jurisdictional basis. This Court has postponed its decision on the jurisdictional issues by its order of December 24, 1991.

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[4]In light of the prohibition in Rule 9.120(d) against filing briefs on jurisdiction where questions are certified under Rule 9.030(a)(2)(A)(v), after this Court's order postponing decision on jurisdiction, ALFONSO's undersigned counsel contacted the office of the Clerk of this Court to discuss whether to file a jurisdictional brief directed solely to the conflict question, and was informed that no such brief would be accepted and that all issues were to be addressed in the present brief, including jurisdictional issues.

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SUMMARY OF THE ARGUMENT

The Third District erred in failing to transfer the Notice of Appeal to the circuit court, and erred in dismissing the appeal, because Fla. R. App. P. 9.040(b) and fundamental principles of due process required such a transfer to permit the consideration of the merits of this case. The recent authorities of this Court require the exercise of review jurisdiction where two mistakes are made in the efforts to invoke review jurisdiction, such as where: 1) a paper which should be called a "Notice of Appeal" is mistakenly characterized as a "Petition for Certiorari" **and** 2) that paper which should be filed in the circuit court is mistakenly filed in the district court of appeal. It would be fundamentally unfair to permit those cases to proceed on the merits, yet to approve the dismissal of the appeal in this case because ALFONSO made only one mistake instead of two.

Not only should this Court exercise discretionary jurisdiction to address the certified question, the Third District's decision expressly and directly conflicts with a recent holding from the Fourth District, and this Court should use the opportunity to resolve that split in the case law.

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ARGUMENT

THE THIRD DISTRICT ERRED IN DISMISSING THE APPEAL AND THIS COURT SHOULD EXERCISE ITS JURISDICTION OVER THIS CASE TO REMEDY FREQUENT INJUSTICES WHICH RESULT FROM THE EXALTATION OF FORM OVER SUBSTANCE

Pursuant to the mandate of Fla. Const. Art. V, § 2(a), this Court enacted Fla. R. App. P. 9.040(b), which provides that "[i]f a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court." In the first decision interpreting the effect of Rule 9.040(b), this Court held that the foregoing Rule's "transfer provision" was intended only to apply where an appeal was taken to the wrong appellate court, and approved the Third District's dismissal on jurisdictional grounds where, as here, "the notice was inadvertently sent to the District Court of Appeal . . . rather than to the Circuit Court." Lampkin-Asam v. District Court of Appeal, 364 So. 2d 469, 470 (Fla. 1978).

This Court has receded from Lampkin-Asam in two situations where the parties seeking review by the district court filed their papers initiating the action in the wrong court and made the second error of mischaracterizing the relief sought. First, in Johnson v. Citizens State Bank, 537 So. 2d 96 (Fla. 1989), the order under review was not directly appealable, so the proper paper to initiate review should have been Petition for Certiorari filed in the district court.

This Court in Johnson held that two errors: 1) the filing of an erroneously-denominated document (a document entitled "Notice

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of Appeal" which should have been characterized as a "Petition for Certiorari"); 2) which document was filed in the wrong court (the trial court instead of the district court) was sufficient to invoke district court's certiorari jurisdiction. The Third District has correctly observed that, in light of this Court's Johnson decision, "the continued authority of Lampkin-Asam is dubious at best." Thomson, Bohrer, Werth & Razook v. Multi Restaurant Concepts, Inc., 561 So. 2d 1192, 1193 (Fla. 3d DCA 1990).

The second case receding from Lampkin-Asam is this Court's decision in Skinner v. Skinner, 561 so. 2d 260 (Fla. 1990). Skinner is the "mirror image" of Johnson, in that the order under review in Skinner was not reviewable by certiorari, but would have been reviewable by appeal, so the initiating paper should have been Notice of Appeal filed in trial court. This Court held that the erroneously-entitled Petition for Certiorari filed in district court was adequate to vest appellate jurisdiction in the district court, stating as follows:

> [P]etitioner argues that no substantive reason exists for having to file a piece of paper with the clerk of the circuit court which will automatically be forwarded to the district court, especially when the reverse circumstances, district courts accepting notice of appeals filed in circuit court as petitions for certiorari has long been exercised. We agree.

561 So. 2d at 262. Again, the party seeking review in Skinner made two mistakes: 1) entitling the paper filed to commence review a "Petition" instead of a "Notice"; 2) mistakenly filing the paper in

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the Fourth District instead of in the circuit court.

The only two post-Lampkin-Asam decisions located by Appellants which deal squarely with the issue at bar (the initiating paper is filed in the wrong court but bears the correct title) are Beeks v. State, 569 So. 2d **1345** (Fla. 1st DCA 1990); and Sternfield v. Jewish Introductions, Inc., 581 So. 2d 987 (Fla. 4th DCA 1991). As will be demonstrated, the decisions in those cases are conflicting and reflect the great public importance which the issue at bar has assumed. This Court should exercise discretionary jurisdiction, answer the certified question affirmatively, and permit a decision on the merit of the case **and** not one based on a minor technicality.

The paper filed in Beeks was correctly entitled "Notice of Appeal," but--as in the case at bar--it **was** incorrectly filed in the appellate court instead of in the trial court. In Beeks, the First District--in what Appellants herein submit was an incorrect decision--held that the Johnson and Skinner decisions did not change the Lampkin-Asam rule that a correctly-denominated paper initiating post-trial review which is filed in the wrong court does not invoke the reviewing court's jurisdiction.

On the other hand, the Sternfield v. Jewish Introductions case also involved a correctly-denominated paper filed in the wrong court. Because the party seeking relief in the Sternfield case sought review of a decision of the Broward Circuit Court acting in its appellate capacity, the correctly-described paper to initiate jurisdiction in the Fourth District would have been a Petition for Certiorari. See Fla. R. App. P. 9.030(b)(2)(B). The correct place

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to have filed that Petition would have been in the Fourth District Court of Appeal. See Fla. R. App. P. 9.100(b).

While the Petitioners in Sternfield correctly denominated the initial paper as a "Petition," they filed it in the circuit court instead of in the district court. As in the present case, there was only one error instead of two: the correctly titled paper was filed in the wrong court. Also as in the case at bar, when the parties seeking review in the Sternfield discovered the error, they filed a "motion to transfer" with the court in which the paper had been wrongly filed. Citing Fla. R. App. P. 9.040(b), the Fourth District in Sternfield held that "[t]he circuit court departed from the essential requirements of law in dismissing and failing to transfer the case." 581 So. 2d 988.

ALFONSO submits that Fla. Const. Art. V, §2(a) and general principles of due process of law require Rule 9.040(b) to be interpreted so as to require transfer of a correctly-denominated Notice of Appeal from the appellate court to the trial court. Otherwise, we will be left with the incongruous result that "two-wrongs-make-a-right." It would be fundamentally unfair that the parties in Johnson and Skinner would be held entitled to relief because they filed their initiating paper in the wrong court and mischaracterized its nature, but that the Appellants herein would be left without a remedy because they filed a correctly titled Notice in the wrong place. If Appellants' prior attorney had made yet another mistake, and called the paper he filed a "Petition for Certiorari," the law is clear that the Third District would be

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under a duty to hear the merits of this case on appeal.

ALFONSO urges this Court to reject the simplistic analysis which appears to support the transfer of cases in "two wrongs" situations but which does not exist in cases involving only the single mistake of filing in the wrong court. That analysis seems to be that, because district courts have jurisdiction to hear some cases which arise when certiorari petitions are filed therein, the mere act of filing such a mislabeled petition somehow triggers a magic-like "switch" engaging the power of that court to awaken and to do whatever else is needed to hear any case on the merits, even when in the particular case certiorari will not lie. The analysis goes on to say that because the filing of a "Notice of Appeal" in a district court does not ever trip the switch of power in that court, then the filing of such a correctly-denominated paper in the district court is ineffective to give rise to jurisdiction.

Without meaning to be flip, the idea that the case at bar could be heard on the merits if prior counsel had only been so wrong of his remedy as to file a Petition for Habeas Corpus (such a petition being effective in some class of cases to throw on the switch of power in the district court) reveals that such analysis is wrong. Jurisdiction does not spring forth only in "hocus-pocus" fashion upon application for some obscure writ being laid like magic dust into the clerk's files, but also upon application for the right remedy being timely filed in the very court which will exercise its power to provide that remedy.

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CONCLUSION

WHEREFORE, the question before the Court being one of great public importance which should be answered in the affirmative; Petitioners having demonstrated express and direct conflict between the decision of the Third District under review and the Fourth District Case in Sternfield, supra; and due process of law requiring resolution of that conflict in favor of the exercise of jurisdiction to review the merits of the present case, the decision under review should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy hereof was served by mail, upon Francine M. Ffolkes, Exq., Assistant General Counsel, Florida Department of Environmental Regulation, 2600 Blair Stone Road, Tallahassee, FL 32399-2400, on this, the 17th day of January, 1992.

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