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IN THE SUPREME COURT OF FLORIDA

Case No: 79,406

Third District Court Case No: 91-2002

HERNANDO RESTREPO, as surviving shareholder, officer, and director of SECURITY PLUS INSURANCE SERVICES, INC., F/K/A BLUE MOON INSURANCE AGENCY, INC.

Appellant,

V.

FIRST UNION NATIONAL BANK OF FLORIDA,

Appellee.

Review of Decisions rendered from the District Court of Appeal of Florida, Third District **as** Requiring Immediate Resolution

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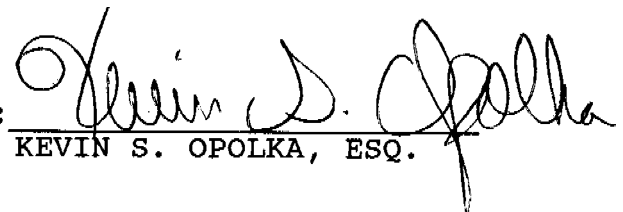
KEVIN S. OPOLKA, ESQ.

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III. PREFACE

The instant is the Appellant, HERNANDO RESTREPO'S, Brief to Review the Decision of the Third District Court of Appeal of Florida rendered on January 21, 1992 dismissing and certifying to the Supreme Court of Florida pursuant to Rule 9.125, of the Florida Rules of Appellate Procedure. Appellant subsequently filed on January 23, 1992 a Notice to Invoke Discretionary Jurisdiction under Florida Rules of Appellate Procedure 9.120 (a) which sought to invoke the discretionary jurisdiction of the Supreme Court described in Rule 9.030(a)(2)(A) of the Florida Rules of Appellate Procedure.

IV. STATEMENT OF THE CASE AND FACTS

A. Brief Synopsis of History/Trial level Ruling:

Appellant, Hernando Restrepo, was the surviving shareholder, officer, and director of the Security Plus Insurance Services, Inc., f/k/a Blue Moon Insurance Agency, Inc., a corporation authorized to do business in the State of Florida. Appellee, First Union National Bank of Florida became the successor in interest of Commercial Bank and Trust Company, the bank which maintained the Appellant's account, and are referred to conjunctively herein as Appellee.

On or about December 22, 1986, the Appellant through its officers established a commercial checking account with Appellee, in Miami, Dade County, Florida, and executed an account Agreement/Signature Card, which was required, and accepted, by the Appellee. In establishing the account, there was a requirement that the signatures of two (2) specific persons be present in order to negotiate drafts or otherwise debit the account for any amounts in excess of $500.00. This requirement was expressly delineated on the signature card prepared and produced by Appellee.

On or about December 23, 1986, and on multiple days thereafter during 1986, 1987, 1988, and 1989, Appellee, paid out checks drawn on the account for amounts in excess of $500.00 where there existed only one (1) signature, specifically with the second required signature MISSING, and further without authority and in complete contravention of Appellee and Appellant's express agreement. On or

about June 2, 1989 Appellant first discovered and initially spoke with, **and** personally appeared at Appellee Bank advising of the error. This was Appellant's first opportunity as Appellant was not a **"day-to-day"** operational partner, and did not customarily on a regular basis review bank statements, a fact as to which Appellee was intentionally and unequivocally advised. The Appellant's business being depleted, ceased doing business and this account discontinued transactions on or about June 21, 1989.

The instant lawsuit was commenced on September 13, 1990 with the filing of the complaint after Appellant had tried, unsuccessfully, to reconcile this matter with Appellee. Appellee moved to dismiss the complaint, and on March 1, 1991, an amended complaint was filed. The amended complaint alleged three separate causes of action as follows: Count I-breach of contract; Court II-negligence, and Court III-misrepresentation, **and** sought compensatory damages, punitive damages, and attorney's fees. Appellee moved to dismiss the amended complaint. On April 30, **1991** the Court entered its order dismissing all counts. The Order permitted the Appellant to file a second amended complaint only as to the breach of contract (Count I). On May **14, 1991** Appellee received Appellant's second amended complaint. Again, Appellee moved to Dismiss relying solely on **F.S.** §674.406(4) claiming that since Appellant's last **"missing** signature" check for over $500.00 was issued on June ***8***, 1989 and this lawsuit was filed on September 13, **1990,** subsection **(4)** of the above-mentioned statute precluded all recovery by Appellant. At hearing on Appellee's Motion on

June **24, 1991** the Court rejected argument by Appellant that F.S. §674.406 was not applicable to "missing signatures" as this statement expressly refers to "unauthorized signature or alteration". Further, and/or alternatively, even after accepting proffered testimony that Appellant notified Appellee on or about June 2, 1989, the Court granted Appellee's Motion (with prejudice) deeming that the Customer's (Appellant) duty to "discover and report" (Subsection **4)** unauthorized signatures or alterations within one (1) year from the time the bank statements are made available to customer, that this **"duty"** meant Customer (Appellant) must FILE SUIT, as Appellants alternate argument was that even if the Statute applies, Appellant discovered and reported on June 2, 1989 and should be entitle to claim restitution for checks cashed up to one **(1)** year Prior to this notice. This was pursuant to Order dated June **28**, 1991.

B. Brief Synopsis of History at the Third District Court of Appeal level:

As indicated the Trial Court Order dismissing with prejudice was signed June **28, 1991.** Appellant on Friday July 26, 1991, within the 30 day period for filing, submitted his ORIGINAL Notice of Appeal to be hand-delivered by Zap Courier Services, Inc. A COPY of the Notice of Appeal was prepared and mailed to opposing counsel and the Third District Court of Appeal on July 26, 1991 as well. The case was styled listing the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida. The courier, however, was inadvertently told to deliver the ORIGINAL Notice to

the Third District Court of Appeal while COPIES were simultaneously mailed to opposing counsel and to the Circuit Court. The Notice of Appeal was received on Friday, July 26, **1991** by the Third District Court of Appeal and clocked in on July 26, 1991. The Appellant first officially received Notice on August 20, 1991 from the Third District Court of Appeal that the ORIGINAL AND COPY of the Notice of Appeal had been misdelivered (in traverse) and that the Notice of Appeal reflected the lower tribunal filing date of August 1, 1991, despite a courier receipt dated July 26, **1991** (R **1).** On August 21, **1991** the Third District Court of Appeal ordered that counsel for the Appellant show cause within ten **(10)** days why the appeal should not be dismissed as untimely filed. (R **3**). Appellant timely filed his Response **to** Request for, and Showing of Good Cause on the very date of receiving the same. (**R** 4-7). Again, Counsel for Appellee received a copy of the Response. At no time did Counsel for Appellee elect to respond to the same despite being given adequate and complete opportunity to do so.

Thereafter, on September 5, 1991 the clerk entered an Order indicating that the Appeal shall remain open and pending apparently finding good cause existing.(R ***8)*** Appellant filed their Brief timely on October **3**, 1991 with Appellee filing no Answer Brief nor an extension for the same. On October 25, **1991** Appellant filed **a** Motion to Dismiss. (R 9-15). Appellant timely filed his Response to the Motion to Dismiss incorporating a memorandum of supportive law. (**R** 16-26). Notwithstanding, Appellant's position that Appellee's moving to dismiss was untimely in that they had been

afforded prior opportunity to respond to this issue, however, elected not to do so until two (2) months AFTER the Third District Court of Appeal ruled on the issue, despite Appellee's knowledge, awareness, and voluntary election not to file any response, Appellant still feels the Notice requirements have been met considering the supportive Memorandum.

On January 2, 1992 the Third District Court of Appeal dismissed the Appellant's Appeal and certified it to this Honorable Court as a question of great public importance (R 37-38) (A 1-2). Additionally, Appellant filed a Notice to Invoke the Discretionary Jurisdiction of **the** Supreme Court of Florida **(A 3).** Whereupon, the Clerk of the Supreme Court entered an Order Postponing Decision on Jurisdiction and Briefing Schedule on February 26, 1992. (A **4).**

V. ISSUES ON SUPREME COURT REVIEW

A. WHETHER THE DISTRICT COURT OF APPEAL DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW WHEN IT DISMISSED FOR LACK OF JURISDICTION TO ENTERTAIN AN APPEAL FROM A FINAL JUDGMENT OF A CIRCUIT COURT WHERE THE APPELLANT INADVERTENTLY, YET TIMELY FILES THE ORIGINAL NOTICE OF APPEAL WITH THE DISTRICT COURT, (RATHER THAN THE CIRCUIT COURT), AND MAILS OPPOSING COUNSEL AND THE CIRCUIT COURT A COPY.

B. WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE ACTION FINDING THE APPELLANT TOOK NO CORRECTIVE ACTION TO FILE THE NOTICE OF APPEAL IN THE CIRCUIT COURT WITHIN THIRTY DAYS OF THE RENDITION OF THE FINAL JUDGMENT.

VI. SUMMARY OF THE ARGUMENT

A. Upon a complete review of the record presented on Appeal, the District Court's failure to entertain an appeal from a final judgment of a Circuit Court where the Appellant inadvertently, yet TIMELY, files the Original Notice of Appeal with the District Court, rather than the Circuit Court, and mails a copy to the Circuit Court and opposing counsel, but timely performs all obligations under the Rules by properly styling the case, timely filing the Notice of Appeal, timely giving notice to Appellee and the Circuit Court, timely submitting his Brief on the appeal, and timely responding to Appellee's Motions, is clear abuse and unsupported by the facts and evidence presented.

Florida Rules of Appellate Procedure require the filing of the Notice of Appeal within 30 days rendition of the Order to be reviewed with the Clerk of the lower tribunal. Appellant, aware that the last day for which he could file his Notice of Appeal was Monday July 29, 1991, executed and placed in the custody of a Zap Couriers on Friday, July 26, 1991, his Notice of Appeal to be hand delivered. Additionally, the Third District Court of Appeals maintains its' own court courier system that runs deliveries to the other court every Wednesday and Friday from 12:00 p.m. to 1:00 p.m. in the afternoon, and therefore Appellant's Original Notice could have been received by the Circuit Court in time and only missed such courier by approximately three hours. The District Court aware that the Appellant improvidently filed his Original notice of Appeal in the wrong court, should have transferred the notice

immediately to the Circuit court, as the Committee Notes of Appellate Rule 9.040 requires, and treat the notice as though it had been filed in the court to which the transfer was made.

Florida Case law, as well as Florida Rules of Appellant Procedure, as delineated hereinafter, tend to support Appellant under the specific facts of Appellant's case as recited heretofore.

Additionally, by way of persuasion the Federal Rules have been incorporated by Florida, and cases under those rules support Appellant's argument that a party should not automatically have his case dismissed because an improper remedy is sought or the jurisdiction of the wrong court is invoked. The court must consider several factors in determining whether the inadvertent misdirection of the notice was due to the lack of diligence of counsel to comply with the rules or whether the inadvertence was the result of an unforseen event for which counsel has no control. Factors to consider are: 1) Whether counsel attempted to comply with the rules 2) Whether counsel was attempting to evade compliance under the rules 3) Whether counsel could readily foresee any consequences and prepare for them, 4) Whether counsel was diligent in his efforts to comply, and 5) Whether despite counsel's efforts the inadvertence resulted.

B. Appellant unequivocally timely file his Original Notice of Appeal in the District Court, and timely **"mailed"** a copy to the Lower Tribunal and to opposing counsel. The purpose of filing the Notice of Appeal in the Trial Court is intended chiefly as a means of convenience for the parties. In the present case, Appellee has

been aware of all activity in this file, and, they have not been in any way prejudiced or precluded from filing any kind of responsive pleading, yet Appellee has filed no Answer brief nor extensions to file the same, and did not elect to move to dismiss until AFTER the District Court ruled that the Appeal would remain open, despite having prior notice and opportunity to respond or assert any position prior to such ruling.

Substantial case law supports the position that the Court should consider factors such as inadvertence, good faith, amount of prejudice or lack there of, and whether attempts at substantial compliance were made.

When, as here, the Appellant has performed all that was required by him by putting all parties on Notice within the prescribed time period, and only an inadvertent hand-delivery of Original was made, any attempt to utilize the time restriction as a basis in this case to dismiss this cause of action would work to such a great detriment, hardship, and forfeiture that the true intent behind the issue of timely filing of appeals would be defeated. The purpose for the thirty day time limit in which to **file** a Notice of Appeal was to create some finality in which all parties concerned could know when to move on. The rule was intended to punish those individuals who sat back on their rights and made no attempt to assert their rights.

Here, the parties were fairly advised that Appellant intended to assert appellate rights.

VII. ARGUMENT

A. WHETHER THE DISTRICT COURT OF APPEAL DEPARTED FROM ESSENTIAL REQUIREMENTS OF LAW WHEN IT DISMISSED FOR LACK OF JURISDICTION TO ENTERTAIN AN APPEAL FROM A FINAL JUDGMENT OF **A** CIRCUIT COURT WHERE THE APPELLANT INADVERTENTLY, YET TIMELY FILES THE ORIGINAL NOTICE OF APPEAL WITH THE DISTRICT COURT, (RATHER THAN THE CIRCUIT COURT), AND MAILS OPPOSING COUNSEL AND THE CIRCUIT COURT A COPY.

Florida Rules of Appellate Procedure 9.110(b) states that the jurisdiction of the court shall be invoked by filing the notice of Appeal with the Clerk of the lower tribunal within thirty days of rendition of the Order to be reviewed. However, in interpreting the intent of the Rule, the Committee Notes state that a **"Failure** to file any notice within the 30 day period constituted an irremediable jurisdiction defect..." In light of the language under the Committee notes of the Rule, jurisdiction will be defeated if no notice is filed at all. In the present case, a notice was filed within the jurisdictional time limits. The Rule only requires that **"any"** notice be filed. The idea behind this Rule is to give notice to the Court and other parties that action is being taken on the case. The requirement that the notice be filed with the lower Court is only for the convenience of the Courts in order to transfer the records more effectively.

In conjunction, Fla. R. App. **P.** 9.040 sets forth several miscellaneous matters of general applicability. Under Rule 9.040(b), **"[i]f** a proceeding is commenced in an inappropriate Court, that Court shall transfer the cause to the appropriate Court," and "upon filing of a notice**...**the clerk shall forthwith

transmit the fee and a certified copy of the notice, showing the date of filing, to the **Court."** Fla. **R.** App. P **9.040(g).** Further, when considered with the committees notes, Rule **9.040** invokes the idea that...**"a** party will not automatically have his case dismissed because he seeks an improper remedy OR INVOKES THE JURISDICTION OF THE WRONG COURT.. .ALL FILINGS IN THE CASE [SHALL] HAVE THE SAME LEGAL EFFECT **AS** THOUGH ORIGINALLY FILED IN THE COURT TO WHICH TRANSFER IS **MADE."** (emphasis added). The Rule requires that the **"Clerk** MUST transmit the notice and fees IMMEDIATELY," and replaces the former Rule which allowed the notice to be transferred within five days. The Rule was amended as the Advisory Committee "was of the view that no reason existed for any delays [in transferring documents]." Taking this view and applying it to the present case, the Clerk of the District Court received Appellant's original Notice of Appeal on Friday, July 26, 1991, well within the Monday, July 29, **1991** time for filing. As Fla. R. App. P. **9.420** states, **"if** the last day of the period so computed falls on a Saturday, Sunday or holiday, those days shall be excluded in the **computation."** The Clerk of the Third District was aware upon receipt of the notice on July 26, **1991** that the original was filed in the wrong court. Construing the Rule(s) in a light of the facts and circumstances, the District Court had received and accepted the original Notice of Appeal with them, and even had counsel being able to gain control of the original Notice of Appeal on July 29, **1991,** and refile in the Circuit Court the same day, the fact remains that the original Notice of Appeal WAS filed in the Third

District Court of Appeal timely. Therefore, the control shifted to the Clerk to make the proper transmittal to the Circuit Court upon receiving notice of the misprision in place of filing. The District Court first officially notified Appellant on August 19, 1991 that the notice was filed in the wrong court, some twenty-five days later. This Honorable Court has the power under Fla. Const. Art. V. §2(a) to interpret the legislative intent behind the rules and "...[s]hall adopt rules for the practice procedure in all courts including...the [ability to] transfer to the Court having jurisdiction of any proceeding when the jurisdiction of another Court has been improvidently invoked..." The term "improvidently" has been defined as "lacking foresight." WEBSTER'S NEW WORLD DICTIONARY 304. Clearly as shown by the facts in the present case, the Appellant clearly lacked the foresight to see that even by properly styling the case, properly drawing up his notice, and placing it in the hands of the courier well within the time for filing, that the courier would be misdirected through human error.

Once the District Court and had both possession of the notice and inherent knowledge as to the last date that filing could be effectuated, the Committee Notes of Fla. R. App. P. 9.040 require that the transmittal of such notice should be done "immediately", furthermore, the Third District Court of Appeal utilizes its own courier system every Wednesday and Friday, which would support the Appellant's argument that since the Appellant's Notice was received on a Friday, it should have/could have been delivered to the Circuit Court on that Friday, instead of being clocked in at the

Circuit Court on August 1, 1991, **six** days later. The Committee Notes of 9.040 are clear on the fact that delays [in transference], were to be eliminated.

In Appellee's Motion to Dismiss, the Appellee relied up on the case of Lampkin-Asam v. Dist. Ct. of Appeal, 364 So. 2d 469 (Fla. **1978)** which ruling was also followed in Skinner v. Skinner 541 So 2d **176** (Fla. **4** DCA 1989). However, in the case of Skinner **v.** Skinner, hereinafter referred to as Skinner I, the first change to alleviate the harshness of Rule **9.110(b)** began to take effect. The majority of the Court found that it did not have jurisdiction to consider a Petition for Certiorari which was filed in the District Court to review a non-final order, (albeit reviewable by appeal), where no Notice of Appeal was filed in the trial court, Id. at **176,** the Honorable Harry Lee Anstead in Skinner I, id., dissenting from the majority opinion found that

> **...**the timely filing of an application for certiorari in [the District Court] was sufficient to invoke**...**appellate jurisdiction. [Furthermore], IT MAKES LITTLE SENSE TO...HOLD THAT THE FILING OF A JURISDICTIONAL PLEADING DIRECTLY IN [THE DISTRICT COURT] IS INSUFFICIENT TO INVOKE [THE] COURT'S JURISDICTION, [AS] 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 [THE DISTRICT COURT] BY THE CLERK OF THE TRIAL **COURT."** id. at **176.** (emphasis added).

This "**dissent** is significant because it became the majority in subsequent review of Skinner I leading to Skinner v. Skinner, 561 So. 260 (Fla. 1990), (the current law) as hereinafter cited as Skinner II.

The facts in the Skinner I, supra, case differ from the present case as Appellant has appealed from a final order and mailed a copy of his notice to the circuit Court and to opposing counsel, differences only favorable to Appellant. Thus the Circuit Court had two notices filed with them, the transferred original and the copy that was mailed. Even though the majority of the Court decided that it did not have jurisdiction entertain the case, they certified the question to this Honorable Court.

In Skinner 11, supra, this Honorable Court revisited the Skinner I case and obviously agreed with the dissenting view in the District Court case. There, the Petitioner argued, and this Honorable Court agreed 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 circumstance, District Courts accepting notice of appeals filed in the Circuit Court...has long been **exercised."** Id. at 261.

In the present case, and under the above rationale, it is only as matter of convenience that the Notice of Appeal be filed in the lower court. The fact that the Appellant timely filed his Original Notice of Appeal in the District Court, supports this Honorable Court's view that "once the District Court's jurisdiction has been

invoked, it can not be divested of jurisdiction by hindsight determination that the wrong remedy was sought by a NOTICE OR PETITION FILED IN THE WRONG PLACE, AND.. .EVEN THOUGH THE FORM OF APPELLATE RELIEF WAS MISCHARACTERIZED IN THIS CASE AND EVEN THOUGH IT WAS **FILED** IN THE WRONG COURT, THERE IS NO QUESTION THAT THE DISTRICT COURT...HAD JURISDICTION TO CONSIDER **THE APPROPRIATE REMEDY."** Id at 262. (Emphasis added)

The fact that Skinner cases concern a non-final order, and the present case concerns a final order, is overcome by the case of In re Estate of Laflin, 569 So. 2d 1273 (Fla. **1990).** There, First Fidelity filed its Notice of Appeal with the Fourth District Court of Appeal. The personal representative moved to dismiss because the notice was not filed in the trial court. The Fourth District Court of Appeal dismissed. Based on the Supreme Court holding in Skinner 11, this Honorable Court found that, whether the issue involved was **a** non-final order or a final order **"is** a distinction without a difference" Id. at **1274.**

In the case of Sternfeld v. Jewish Introductions, Inc., **16** FLW **1681** (June 26, **1991** 4th **DCA**) relying on this Honorable Court's decision in Skinner 11, Fla. R. App. P. 9.040(b), and In re Estate of Grant **117** So. 2d **865** (Fla. **2d** DCA **1960),** the District Court held that "...THE CIRCUIT COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN DISMISSING AND FAILING TO TRANSFER **THE** CASE," (Emphasis added), when the Petitioners misfiled their petition in the Circuit Court rather than the District Court. By failing to transfer the

case in the present situation, the extreme remedy of forfeiture of the action, seems unjustified in light of the Appellant's efforts complying with the Rules.

The Federal courts have also dealt with the issue as to what constitutes timely filing where the original Notice of Appeal is filed in the wrong court. The Appellant wishes this Honorable Court to take judicial notice of the fact that Florida has incorporated the Federal Rules. Federal Rules of Appellate Procedure Rules 3 and 4 together state that, for a Notice of Appeal to be timely it must be filed with the Clerk of the District Court. The Advisory Committee notes, however, point out that "decisions under the present rules...dispense with literal compliance in cases in which it cannot be fairly exacted and should control interpretation of these **rules."** A case which appears to be on all fours to the present case with one distinction which is favorable to Appellant, that distinction being that both Notices were **"received"** AFTER the due date in the case of Consolidated Freightways Corp. of Delaware v. Larson, **827** F. 2d **916** (3rd Cir. **1987).** In Consolidated, **supra,** Counsel was required to file a notice of appeal on or before December **19, 1986.** Further, Counsel prepared a notice of appeal on December **19, 1986** one **day** before the thirty day limit for filing expired. The case was properly styled, but incorrectly listed the Eastern District rather than the Middle District. As a result, the "notice was mailed to the Eastern District rather than being hand delivered that day to the Middle District..." Id at **917.** The original notice of appeal was received

by the Eastern District on December 22, 1986. The notice was forwarded to the Middle District where it arrived on December **24, 1986,** after the December 19, 1986 deadline. (Thus, Consolidated, supra, is UNLIKE the present case, as in Consolidated, supra BOTH notices were received AFTER the deadline). The District Court in Consolidated, supra, found that excusable neglect could not be found where a clerical error was made by counsel or someone under his control. Counsel timely appealed the District Court's decision. The Court of Appeals based on the question of "[W]hether the inadvertent misdirection of a notice of appeal, which results in untimely filing, constitute[s] excusable neglect within the meaning [of the Federal Rules]," id. at **918,** reversed and held that the "DISTRICT COURT ERRED AS A MATTER OF LAW IN ITS RIGID APPLICATION OF [THE RULE]." id. at **918.** The court then formulated a test on which to judge future cases:

> "IN ORDER TO JUDICIOUSLY APPLY THE [EXCUSABLE NEGLECT] STANDARD, A COURT MUST, AT A MINIMUM, MAKE FINDINGS AS TO THE REASONS UNDERLYING COUNSEL'S INADVERTENCE. THERE IS A QUALITATIVE DISTINCTION BETWEEN INADVERTENCE WHICH OCCURS DESPITE COUNSEL'S AFFIRMATIVE EFFORTS TO COMPLY AND INADVERTENCE WHICH RESULTS FROM COUNSEL'S LACK OF DILIGENCE...A THOUGHTFUL ANALYSIS OF THE ISSUE IN A PARTICULAR CONTEXT WILL, AT A MINIMUM, REQUIRE A WEIGHING AND BALANCING OF THE FOLLOWING FACTORS: (1) WHETHER THE INADVERTENCE REFLECTS PROFESSIONAL INCOMPETENCE SUCH AS IGNORANCE OF THE RULES OF PROCEDURE, (2) WHETHER THE ASSERTED INADVERTENCE REFLECTS AN EASILY MANUFACTURED EXCUSE INCAPABLE OF VERIFICATION BY THE COURT, (3) WHETHER THE TARDINESS RESULTS FROM COUNSEL'S FAILURE TO PROVIDE FOR A READILY FORESEEABLE CONSEQUENCE, (4) WHETHER THE INADVERTENCE REFLECTS A COMPLETE LACK OF DILIGENCE OR (5) WHETHER THE COURT IS SATISFIED THAT THE INADVERTENCE RESULTED DESPITE COUNSEL'S SUBSTANTIAL GOOD FAITH EFFORTS TOWARD COMPLIANCE." id. at 918-919.

Applying the factors to the case at bar, counsel's error was the result of human error not professional incompetence; counsel's misdirection of the notice was not manufactured to gain time and

the timely receipt by the District Court of the notice is capable of being verified; there was no way that counsel could foresee that the notice would be misdirected, and had specifically requested that the notice be hand delivered to comply with the statutory 30 day period. The facts, in the case at bar are as Consolidated, supra, which stated,

> "...the type of human error here involved though certainly avoidable, is neither readily foreseeable nor capable of anticipation by counsel. This court is satisfied that counsel acted with due diligence even if not within the 30 day limit, and timely service of the Notice upon opposing counsel, such that plaintiff suffered no prejudice as a result of counsel's error...Although this court does not deny that counsel's error could have been detected by careful proofreading, the Court recognizes that even the most diligent practitioners are susceptible to such human error. To declare the acts here involved inexcusable sets no standard to guide future conduct by members of the bar. Precisely because such error can escape undetected even in the most carefully run offices...susceptibility to human error is not readily capable of regulatory **control."** id. at 919-920

B. WHETHER THE DISTRICT COURT ERRED IN DISMISSING THE ACTION WITHOUT EXAMINING WHETHER THE APPELLANT TOOK CORRECTIVE ACTION TO FILE THE NOTICE OF APPEAL IN THE CIRCUIT COURT WITHIN THIRTY DAYS OF THE RENDITION OF THE FINAL JUDGMENT.

Appellant clearly performed under the Rules as cited, and through case law defined, performed that which was required in order to invoke appellate jurisdiction. **"The** finality doctrine and the rules governing timeliness of appeals exist to promote fairness, and to promote prompt notice of appeal thereby avoiding the prejudicial effect of reopening litigation which the opposing party had assumed was closed. The length of the delay and the basis of the delay affect the overall fairness concern. Where as

the Court has determined that the delay was not the result of any bad faith but rather occurred despite counsel's substantially diligent efforts at compliance, the judicial interest in deciding cases on the merits outweighs the interest in finality." Consolidated, surpa id. at 920. Fairness here was met with Appellant **"correctively"** mailing a copy to opposing counsel and the Circuit Court, with the Original inadvertently hand-delivered to the District Court, all timely, although in reverse. No prejudice has been shown by the Appellee, nor have the District Court or Circuit Court been mislead as to Appellant's intent to appeal. Copies of the notice were timely mailed to appellee and the Circuit Court and the original notice was timely filed with the District Court.

VII. <u>CONCLUSION</u>

Based upon the particular facts herein, citations of authorities, and argument presented, the Appellant prays this Honorable Court reverse and remand the dismissal of the District Court, dismissing an appeal from a final judgment of the Circuit Court where the Appellant timely, but inadvertently files the Original Notice of Appeal with the District Court, rather than the Circuit Court, with copies mailed to the Circuit Court and opposing counsel, and find that Appellant timely filed their Notice of Appeal, and/or Appellee failed to timely Move to Dismiss. The Appellant also prays that the Court award his entire amount of attorney's fees and court costs in the court below and in the instant proceeding.

Respectfully Submitted,

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BY: ______________________
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IX. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant, was mailed to KAREN H. CURTISS, ESQ., 1550 Miami Center, 100 Chopin Plaza, Miami, Florida 33131 this 20th day of March, 1992.

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1992

HERNANDO RESTREPO,	**	
Appellant,	**	
vs.	**	CASE NO. 91-2002
FIRST UNION NATIONAL BANK OF FLORIDA,	**	
	**	
Appellee.	**	

Opinion filed January 21, 1992.

An Appeal from the Circuit Court for Dade County, Bernard S. Shapiro, Judge.

Kevin S. Opolka; Lester Rogers, for appellant.

Shutts & Bowen and Karen H. Curtis, for appellee.

Before HUBBART, BASKIN and LEVY, JJ.

PER CURIAM.

ON MOTION TO DISMISS

We dismiss this appeal and certify to the Supreme Court of Florida the fallowing question of great public importance:

> WHETHER A DISTRICT COURT OF APPEAL HAS JURISDICTION *TO* ENTERTAIN AN APPEAL FROM A FINAL JUDGMENT OF A CIRCUIT COURT WHERE, AS HERE, (1) THE APPELLANT ERRONEOUSLY FILES A NOTICE OF APPEAL WITH THE

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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." ALFONSO v. STATE OF FLORIDA, DEPT. OF ENVIRONMENTAL REGULATIONS, 16 F.L.W. D2844, D2844 (FLA. 3D DCA NOV. 12, 1991).

Appeal dismissed; question certified.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

CASE NO.: 91-2002

HERNANDO RESTREPO,

Appellant,

v.

FIRST UNION NATIONAL BANK OF FLORIDA,

Appellee.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that HERNANDO RESTREPO, Appellant, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered January 21, 1992.

The decision passes upon a question to be of great public importance.

Further, the decision appears to conflict with the Sternfield v. Sternfield (16 FLW 1681) decision, as well as, the express Committee Notes under Fla. R. of App. Pro. Rule 9.040(b).

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