IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,406

District Court of Appeal, Third District,
No. 91-02002

Circuit Court, Eleventh Judicial Circuit,
No. 90-45527

HERNANDO RESTREPO,

Petitioner,

-vs-

FIRST UNION NATIONAL BANK
OF FLORIDA, etc.,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION
PURSUANT TO FLA.R.APP.P. 9.030(a)(2)(A)

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PREFACE

Petitioner Hernando Restrepo will be referred to as "petitioner" or "Restrepo."

Respondent First Union National Bank of Florida will be referred to as "respondent" or "First Union."

The Record will be cited as "R", followed by the page number.

The Appendix submitted with this brief will be cited as "App.", followed by the page number.

Petitioner's Initial Brief on the merits will be cited as "IB", followed by the page number.

Unless otherwise indicated, all emphasis in this brief is supplied by the writer.

JURISDICTIONAL STATEMENT

This is a discretionary proceeding, under Rule 9.120, Fla.R.App.P., to review a decision of the District Court of Appeal, Third District.

The jurisdiction of this Court was timely invoked by petitioner's Notice to Invoke Discretionary Jurisdiction ("the notice") under Fla.R.App.P. 9.030(a)(2)(A).

The decision below certified to this Court a question of great public importance under Fla.R.App.P. 9.030(a)(2)(A)(v). The notice properly relied on this jurisdictional predicate, and this Court therefore has jurisdiction.

The notice further states that the decision "appears to conflict with the Sternfield v. Sternfield [sic] (16 FLW 1681) decision,?' as well as the express Committee Notes under Fla. R. of App. Pro. Rule 9.040(b)." Insofar as the notice thus attempts to invoke the Court's jurisdiction under Fla.R.App.P. 9.030(a)(2)(A)(iv), First Union does not agree that the decision below expressly and directly conflicts with the cited decision on the same question of law, as that Rule requires.

First Union additionally disagrees with Restrepo's assertion that the opinion below was pursuant to Rule 9.125 (IB 1), for there was no order of the "trial court which has

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*/ The correct citation is Sternfield v. Jewish Introductions, Inc., 581 So.2d 987 (Fla. 4th DCA 1991).

been certified by the district court of appeal to require immediate resolution by the Supreme Court ...," as that Rule requires.

KHC1591/jlr(5)

STATEMENT OF THE CASE AND FACTS

Restrepo's Statement of the Case and Facts includes irrelevant material (concerning the underlying lawsuit and ruling,[1] the appeal from which was dismissed on jurisdictional grounds), and improper argument (concerning First Union's filings in the district court[2]). For purposes of clarity, First Union therefore submits its own Statement of the Case and Facts.

A. Statement of the Case

Restrepo's appeal in the District Court of Appeal, Third District, was dismissed as untimely filed (R 37-38, App. 1-2). In so ruling, the court of appeal certified to this Court the following question of great public importance:

1/ The recitation of the issues before the circuit court (IB 2-3) concerns the merits of Restrepo's claim. These statements are without record citation because they are not part of the record here. They are likewise irrelevant, the only issue being jurisdiction of the appeal. The reasons for the circuit court's dismissal of Restrepo's complaint cannot be reviewed, for only the district court's dismissal for lack of jurisdiction is before this Court.

2/ Restrepo argued in the district court (R 17-18) and reasserts here (IB 5-6) that First Union could not properly raise the jurisdictional question by its motion to dismiss because First Union had not rebutted Restrepo's "showing of good cause." The record reflects, however, that the order to show cause "why this appeal should not be dismissed as untimely filed" was directed to appellant (Restrepo) (R 3). Appellee (First Union) was not required at that time to respond, under either that order or any procedural rule.

Restrepo also argues, incorrectly, that First Union's motion to dismiss was untimely. See discussion at pp. 4-5 and n. 5 infra.

> 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 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 37-38, App. 1-2). The decision cited Alfonso v. State of Florida, Dept. of Environmental Regulation, 16 FLW D2844 (Fla. 3d DCA Nov. 12, 1991), 588 So.2d 1065 (Fla. 3d DCA 1991), in which the Third District had certified the same question (R 38, App. 2).

This cause is now before the Court on petitioner's notice to invoke the discretionary jurisdiction of this Court to review the Third District's dismissal of his appeal. By order dated February 26, 1992, this Court postponed its decision on jurisdiction and directed the filing of briefs on the merits.

B. Statement Of the Facts

The facts giving rise to the dismissal come exclusively from Restrepo and thus are not in dispute. The record reveals the following chronology of events pertinent to jurisdiction:

June 28, 1991 -- the order sought to be appealed, an Order Dismissing with Prejudice Plaintiff's Second Amended Complaint, was rendered by the circuit court (R 1, App. 3).

July 26, 1991 (Friday) -- Restrepo served his notice of appeal (R 1, App. 3) by mail on counsel for First Union. He

also: (1) filed the original of the notice with the clerk of the district court of appeal, and (2) mailed a copy of the notice to the clerk of the circuit court (IB 4-5).

July 28, 1991 (Sunday) -- the 30-day period within which a timely notice of appeal had to be filed in the circuit court under Fla.R.App.P. **9.110(b)** expired.

July 29, 1991 (Monday) -- the deadline for timely filing of the notice of appeal in the circuit court, as extended until the next business day **under** Fla.R.App.P. 9.420(e), expired (IB *8*).

August 1, 1991 (Thursday) -- **the** notice of appeal was filed for record in the circuit court (R 1, App. *3*; R 16-17; **IB 5).**

Although there are slight variations in the papers filed by Restrepo as to what happened and why on July **26, 1991,**[3/] there **is** no question but that the notice of appeal was not filed in the circuit court until Thursday, August **1, 1991,** three **(3)** days after the deadline **as** extended. The original

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3/ These variations center around the instructions given to the courier who delivered the notice of appeal.

Restrepo's Response to Request for, and Showing of Good Cause (R **4-7**) states that the original notice of appeal "**was** delivered to the Third District Court of **Appeal**" and a copy "mailed **to** the **Dade** County Courthouse, "mistakenly in reverse of what counsel's **directions** were" (R **4**).

Restrepo's Response to Appellee's Motion to Dismiss **(R 16-26)** also indicates that the original went by hand-delivery to the Third District, "with **a** copy being simultaneously mailed to the Circuit Court of Appeal [sic] on said same date, July 26, **1991"** (R **16**). This was stated to be "in transverse of what counsel's directives were" (R 16).

(Footnote continued on next page.)

notice of appeal, meanwhile, had gone by hand-delivery to the district court on July 26, 1991 and been "filed" there on that date.[4/]

First Union timely filed a motion to dismiss the appeal for lack of jurisdiction with a supporting memorandum of law (R 9-15), asserting that Restrepo had not filed his notice of appeal in the circuit court in time under Fla.R.App.P. 9.110(b) (R 9).

Restrepo filed a response (R 16-26), opposing the motion to dismiss and seeking to prohibit First Union from

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(Footnote continued from previous page.)

Both the foregoing papers thus seem to indicate that counsel had directed the original notice to *go* to the circuit court via messenger and the copy to be mailed to the district court, but the courier violated those instructions.

In this Court, however, Restrepo suggests something else -- that the courier acted in accordance with his instructions to deliver the notice to the district court, and thus it was the directions to the courier which were erroneous (IB 13,18,19). Restrepo indicates that the courier "was inadvertently told to deliver the Original Notice to the Third District Court of Appeal" (IB 4-5).

In his Response to Appellee's Notice of Supplemental Authority (R 31-36), Restrepo likewise stated that the courier service "was mistakenly directed that delivery was to be made to the Third District Court of Appeal as opposed to the Circuit Court" (R 32).

4/ The notice of appeal (R 1, App. 3) bears the stamp of the clerk of the Third District indicating that it was "Night Box Filed Jul 26 1991," which is then crossed through with a large "X." The circuit clerk's stamp, which is the determinative one, however, shows that the notice was "Filed for Record 1991 July 32 [sic] A.M. 8:30" with a hand-written date -- inserted above the date stamp of "July 32" -- of "Aug. 1."

filing an answer brief, claiming that First Union had not timely filed its brief or sought an extension to do so[5/] (R 16, 17-18,21).

While the motion to dismiss was pending, First Union filed a Notice of Supplemental Authority in Support of Motion to Dismiss (R 27-30), relying upon the Third District's decision in Alfonso v. State of Florida, Dept. of Environmental Regulation, 16 FLW D2844 (Fla. 3d DCA November 12, 1991). Restrepo filed a Response to Appellee's Notice of Supplemental Authority (R 31-36), in which he again argued that the appeal was proper (R 31-36), the motion to dismiss was untimely (R 35,36), and sanctions should be imposed against First Union in the form of precluding it from filing a brief (R 31,34-35,36).

Shortly after Restrepo's Response to the Notice of supplemental Authority, the district court granted the motion to dismiss and certified the jurisdictional question (R 37-38, App. 1-2).

SUMMARY OF THE ARGUMENT

Under Rule 9.110(b) and the unbroken line of cases construing it and its forebears, a notice of appeal must be timely filed in the court whose judgment is to be reviewed.

5/ Although First Union was not afforded below any opportunity to rebut this assertion, Restrepo makes the same argument here (IB 9-10). The motion to dismiss was timely, however, having been served on the 22nd day after service by mail of Restrepo's initial brief on October 3, 1991 (R 15; IB 5). The timely service of the motion to dismiss tolled the time for the answer brief under Fla.R.App.P. 9.300(b) and (d).

Restrepo admits that he did not satisfy this requirement: his notice of appeal in the circuit court was filed after the deadline.

The timely filing of a notice in the district court, instead of in the circuit court, is not an effective substitute under the law. The Rule is a jurisdictional essential, not a senseless formality to be cast aside whenever a non-complier prays for leniency.

There is no equitable discretion to seize jurisdiction in the name of fairness if jurisdiction is lacking. This is true no matter what the cause of the misfiling or the relative hardships to the parties.

The clerk of the appellate court has no duty to "transfer" under Rule 9.040(b) or to "transmit" under Rule 9.040(g) a notice of appeal erroneously filed there to the lower tribunal where the appellant should have filed it.

The "transfer" language in Rule 9.040(b) applies to a different circumstance -- the transfer from a wrong appellate court (one lacking jurisdiction) to a proper appellate court (one having jurisdiction).

The duty to "transmit" a notice of appeal imposed on the clerk by Rule 9.040(g) applies only to the clerk of the lower court when the notice of appeal is properly filed there. It cannot be inverted to encompass the clerk of the appellate court when the notice of appeal is improperly filed there instead.

Although Article V, Section 2(a) of the Florida Constitution and the Rules adopted thereunder contain two ameliorative provisions which can serve to cure certain defects in appellate papers, neither are applicable to the improper filing of a notice of appeal in the appellate, as distinguished from the lower, court.

The "transfer" savings clause of the Constitution (and Rule 9.040(b) embodying it) is of assistance only where review has been sought in the "wrong appellate court," e.g., the Supreme Court rather than the district court. This is not a "wrong appellate court" case, for Restrepo sought review in the correct appellate court having jurisdiction.

The "improper remedy" section of the Constitution (and Rule 9.040(c) which embodies it) is used only when jurisdiction has been properly invoked but the appellate supplicant has sought the "wrong remedy." In conjunction with Rule 9.040(b)'s transfer language, this Rule is applied to petitions for certiorari which should have been filed as notices of appeal and vice versa. With a certiorari/appeal mistake, cases have held that the papers which were filed, though improper as to the form of relief, nonetheless invoked ab initio the court's jurisdiction. Once that jurisdiction exists, the court may then proceed to consider the propriety of the remedy, treating the cause as if the proper remedy had been sought. This is not an "improper remedy" case, for Restrepo sought review by the appropriate remedy, a notice of appeal.

Despite the inroads of recent cases in the limited area of certiorari/appeal misfilings, this Court should reaffirm the continued vitality of Rule 9.110(b) in the circumstances of this case. A notice of appeal erroneously filed in the appellate court is not sufficient compliance with the Rule's express requirement that the notice be filed in the lower tribunal in order to confer jurisdiction on the appellate court.

There being no timely filed notice of appeal in the lower tribunal, the jurisdiction of the district court was never invoked. Failed attempts at the required timely filing, including mailing the notice of appeal to the lower court, do not constitute "corrective action" which could create jurisdiction and empower the appellate court to act.

ARGUMENT

I. UNDER EXISTING LAW, THE DISTRICT COURT OF APPEAL HAD NO JURISDICTION TO REVIEW THE FINAL ORDER OF THE CIRCUIT COURT BECAUSE THE NOTICE OF APPEAL WAS ADMITTEDLY NOT FILED WITH THE CLERK OF THE LOWER TRIBUNAL WITHIN THIRTY (30) DAYS OF RENDITION OF THE FINAL ORDER SOUGHT TO BE APPEALED.

The present state of the law is clear. Rule 9.110(b) unambiguously requires the filing of a notice of appeal "with the clerk of the lower tribunal within 30 days of rendition of the order to be reviewed." Timely filing, in the correct court, is a jurisdictional prerequisite for appellate review, for that is how, under the Rule, "[j]urisdiction of the court ... shall be invoked. ..."

In this case, Restrepo concedes that his notice of appeal was not timely filed in the lower tribunal, that is, in the circuit court. The 30th day after the June 28, 1991 rendition of the order was Sunday, July 28, 1991. Extending the deadline through the next business day means that the notice of appeal, to be timely, had to be filed at the latest on Monday, July 29. It was not filed in the circuit court, however, until three (3) days thereafter, on Thursday, August 1. While a notice of appeal had been filed the preceding Friday, July 26, 1991, that notice was filed in the district court of appeal, not the circuit court.

A. The time and place filing requirements of Rule 9.110(b) are jurisdictional.

Rule 9.110(b), by its very terms, speaks to the "jurisdiction of the court." Both the current Rule and its predecessors have been universally construed by the courts of this State as jurisdictional in nature. State ex rel. Diamond Berk Insurance Agency, Inc. v. Carroll, 102 So.2d 129, 130, 131 (Fla. 1958) (hereafter cited simply "Diamond Berk"). An appellate court is without power to exercise its jurisdiction unless the notice of appeal is filed "within the time and in the manner prescribed by the rules." Id. at 131. As this Court stated:

> 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.

Id. at 131.

While "irrelevant technicalities" or "non-jurisdictional and non-prejudicial defects in the notice or other steps in the appellate process" may be disregarded in favor of determinations on the merits, "timeliness and filing in the lower tribunal" continue to be perhaps the "only jurisdictional aspects of the notice" of appeal. Puga v. Suave Shoe Corp., 417 So.2d 678, 679 and n. 3 (Fla. 3d DCA 1982).

Lacking the power to adjudicate Restrepo's appeal, the district court had no alternative but to dismiss for lack of jurisdiction.

B. Where the notice of appeal is timely filed in the appellate court rather than the lower tribunal as the Rules require. the apaeal must be dismissed.

On several occasions, Florida courts have considered the precise question presented here, consistently holding that there is no appellate jurisdiction where the notice of appeal is timely filed in the appellate court instead of, as the Rules require, in the lower court.

The first case to expressly so hold was Diamond Berk, supra, 102 So.2d 129. There the question was "whether the original filing of a notice of appeal in the appellate court as distinguished from the filing of such notice in the trial court, confers jurisdiction upon the appellate court." Id. at 129. Pointing out that "the requirement [of former Rule 3.2(a) and (d)] for filing a notice of appeal with the clerk of the lower court whose judgment is being subjected to review is nothing new or novel," this Court held that the district court

lacked jurisdiction of the appeal and should have granted appellee's motion to dismiss it. Id. at 131.

This Court again passed upon this issue twenty (20) years later in Southeast First National Bank of Miami v. Merin, 357 So.2d 716 (Fla. 1978). This time the appeal was from a county court judgment to the circuit court. The question presented was "whether the failure to file a notice of appeal from a county court judgment in the office of the clerk of the circuit and county court in a timely fashion deprives the circuit court of appellate jurisdiction where the notice of appeal was filed in an otherwise timely fashion but in the district court of appeal." Id. at 717. Rejecting the argument, like that made here, that "a notice of appeal, if filed within the 30-day period in the appellate court and later transferred in the trial court, confers jurisdiction on the appellate court," id. at 717, this Court "reaffirm[ed]" its holding in Diamond Berk as well as the intervening decision to the same effect by the First District Court of Appeal in In re Estate of Hatcher, 270 So.2d 45 (Fla. 1st DCA 1972). Southeast First National Bank, 357 So.2d at 718, 717.

In Lampkin-Asam v. District Court of Appeal, Third District, 364 So.2d 469, 470 (Fla. 1978), the same question was again presented, this time under the then new Florida Rules of Appellate Procedure. As here, petitioner's notice of appeal "was inadvertently sent to the District Court of Appeal, Third District, rather than to the Circuit Court of Dade County." Id. at 470. This Court emphatically rejected the argument that

the former Rule "was broadened in the new rules so as to protect from dismissal notices which are filed in the wrong court." Id. at 470. Specifically, because the transfer provision of Florida Rule of Appellate Procedure 9.040(b)[6/] did not apply to this circumstance, it "in no way altered the meaning or effect of [the prior rule] or the cases construing it [Diamond Berk, Southeast First National Bank, and Hatcher discussed above)." Id. at 470, 471. Thus "the untimely filing of the notice of appeal constitutes a jurisdictional defect depriving the district court of jurisdiction to entertain petitioner's appeal." Id. at 471.

The intermediate appellate courts continue to apply this long-standing rule. For example, in Beeks v. State, 569 So.2d 1345, 1347 (Fla. 1st DCA 1990), the First District Court of Appeal held that the notice of appeal timely filed in that court, rather than in the circuit court, "did not invoke the jurisdiction of this court," and that "[t]he notice of appeal filed in the circuit court was not timely and did not invoke the jurisdiction of this court." The appeal was therefore dismissed. Id. at 1347.

The rule thus remains in Florida that "[t]he timely filing of a notice of appeal at the place required by the rules is essential to confer jurisdiction on the appellate court. ..." Diamond Berk, 102 So.2d at 130, quoted in Southeast First

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6/ Restrepo's identical argument, that Rule 9.040(b) relieves him from the necessity of timely filing his notice of appeal in the lower tribunal, is discussed infra at pp. 17-19, 21-23.

National Bank, 357 So.2d at 718, in Lampkin-Asam, 364 So.2d at 471, and in Beeks, 569 So.2d at 1346.

C. The district court cannot exercise discretion to waive these jurisdictional filing requirements.

Any contention that the court could have exercised its discretion to balance the equities and accept Restrepo's untimely appeal is expressly foreclosed by Diamond Berk itself.

In the identical circumstance as Restrepo (the notice of appeal had been filed in the district court, not the circuit court), some of the same justifications were offered: that "the erroneous filing of the notice of appeal ... resulted from a clerical misprision, that on the day the notice was filed with the Clerk of their Court, the Clerk was busy and overlooked the fact that the notice was erroneously filed in the wrong court." 102 So.2d at 130. The district court had therefore found that the filing of the notice of appeal in the wrong court "resulted from a clerical oversight or misprision," and that it was not thereby deprived of "exercising a reasonable discretion to assume jurisdiction." Id. at 130. This Court held otherwise, notwithstanding its recognition of the seeming harshness of that result:

> 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 notrce *of* appea1 at the place required by the rules is essential to confer jurisdiction on the appellate court. We have on numerous occasions held in similar situations that jurisdiction could not even be conferred by consent of the parties, when the notice of appeal was not filed as required by applicable rules.

Id. at 130.

In Lampkin-Asam, 364 So.2d at 470, the misfiling of the notice of appeal in the district court was likewise done "inadvertently." That fact, however, was of no moment to override the clear jurisdictional requirements of filing in the place and at the time set forth in the Rules.

Even a pro se party, to whom greater liberality in complying with the Rules is generally afforded (e.g., Haines v. Kerner, 404 U.S. 519, 520-21 (1972)), has been held bound to strict compliance with the time and place requirements for filing his notice of appeal. Beeks, 569 So.2d 1345, 1346. That appellant argued, as does Restrepo here, that "he ... timely file a notice of appeal." Id. at 1345. The timely filed notice, however, was the one in the district court of appeal which did not confer jurisdiction.

If no jurisdiction exists, the appeal must be dismissed. It cannot be saved, by stipulation of the parties, "the best of intentions," or the fact that dismissal is "unjust." International Studio Apartment Ass'n, Inc. v. Sun Holiday Resorts, Inc., 375 So.2d 335, 336 (Fla. 4th DCA 1979) (a stipulation of counsel to extend the due date for the notice beyond thirty (30) days because of settlement negotiations is ineffective to prevent dismissal of an untimely filed appeal).

Under these authorities then, the district court lacked discretion to weigh the inadvertent nature of the non-compliance with the Rules, the hardship to Restrepo, or the corresponding lack of prejudice to First Union. None of these

factors relieved Restrepo from the absolute jurisdictional necessity of timely filing the notice of appeal in the trial court, as opposed to the district court of appeal.

D. None of Restrepo's arguments would permit the district court to take jurisdiction of his untimely appeal.

Restrepo argues a variety of imaginative reasons why the clear jurisdictional mandates of Rule 9.110(b) should not be applied here. Although he stops short of stating outright that the Rules are discretionary, all of his arguments are dependent upon the assumption that the courts indeed must have the discretion to view the filing requirements as waivable under certain circumstances.

1. The filing of any notice of appeal is not sufficient: jurisdiction exists only where the notice is filed in accordance with the Rules.

Restrepo first asserts that there is a defect of jurisdictional dimension only when there is no notice of appeal whatsoever filed, not when, as here, a notice is filed, but the filing is simply in the wrong place (IB 11). For this assertion, Restrepo cites the "[f]ailure to file any notice" language of the Committee Notes to Rule 9.110 (IB 11) (emphasis in original). Apart from the obvious fact that the Committee Notes cannot alter the clear meaning of the Rule itself, the Committee Notes do not support Restrepo's argument.

First, the Committee Notes expressly repeat and confirm, not eliminate, the Rule's requirement of filing "with the clerk of the lower tribunal." Second, read in context, the

"any notice" wording refers to the number Qf copies of the notice required,7/ not to the location where they must be timely filed:

> Sections (b) and (c) establish the procedure for commencing an appeal proceeding. Within 30 days of the rendition of the final order the appellant must file two copies of the notice of appeal, accompanied by the appropriate fees, with the clerk of the lower tribunal; except that where review of administrative action is sought, one copy of the notice and the applicable fees must be filed in the court. Failure to fils any notice within the 30 day period constitutes an irremediable jurisdictional defect, hut the second copy and fees may be filed after the 30 day period, subject to sanctions imposed by the court. See Fla.R.App.P. 9.040(h), and Williams v. State, 324 So.2d 74 (Fla. 1975).

Committee Notes to Rule 9.110 (1977 Revision).

As suggested above at p. 14, the any-notice-is-sufficient argument is further barred by Beeks, 569 So.2d at 1345-46. Appellant there, like Restrepo here, "admitted that the notice was not filed in the circuit court until after the time for filing the notice of appeal had expired," but "argued, however, that he did timely file a notice of appeal." Id. at

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7/ This reading is further required by Rule 9.040(h), entitled "Non-Jurisdictional Matters," which expressly states that "[f]ailure ... timely to file ... additional copies of notices ... shall not be jurisdictional; ..."

Under the maxim "expressio unius est exclusio alterius," this Rule's delineation of certain defects as "non-jurisdictional" manifests an intent that other defects not listed (such as failure to file the notice in the lower tribunal) should be deemed jurisdictional in scope. As a result, Rule 9.040(h) independently bolsters the jurisdictional essence of this portion of Rule 9.110(b) and the cases thereunder.

1345. This was the one filed in the district court, which was insufficient under Diamond Berk, Southeast First National Bank, and Lampkin-Asam because it "did not invoke the jurisdiction" of that court. Id. at 1347. The appeal was therefore dismissed. Id. at 1347.

2. Jurisdiction cannot be treated lightly as a mere matter of convenience or efficiency.

Restrepo next asserts that the requirement of filing in the lower court "is only for the convenience of the Courts in order to transfer the records more effectively" (IB 11). Not surprisingly, this claim is without benefit of supporting authority. Jurisdiction of the matter before it is the sine qua non of all court action. This power of the court to adjudicate a case is, as a consequence, more than a matter of mere administrative convenience or efficient record-keeping.

3. The clerk of the court cannot be burdened with a duty under Rule 9.040 to verify the propriety of notices of appeal tendered to him for filing.

Restrepo then attempts, via Rule 9.040, to foist off on the clerk of court the responsibility, which is properly his alone, for ensuring the timely filing of the notice of appeal in the proper clerk's office (IB 11-14). His assertions[8/] are

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8/ Because the clerk of the Third District was allegedly "aware upon receipt of the notice on July 26, 1991 that the original was filed in the wrong court" (IB 12), Restrepo claims that "control shifted to the Clerk to make the proper transmittal to the Circuit Court upon receiving notice of the misprision in place of filing" (IB 13). Moreover, continues Restrepo without record citation or support, the Third District has "its own courier system every Wednesday and Friday," which it

(Footnote continued on next page.)

reminiscent of those rejected in Diamond Berk, 102 So.2d at 130, that the error resulted from "clerical oversight," "clerical misprision," or the clerk's being too busy to notice that the papers were filed in the wrong court. They should meet a similar fate here.

Restrepo's reliance upon Rule 9.040 is entirely misplaced. Section (b) -- transfer to an appropriate court -- was "intended to supersede" only those cases refusing a transfer of a petition for certiorari where the remedy was properly by appeal, and vice versa. See Committee Notes to Rule 9.040 (b) and (c) (1977 Revision); Lampkin-Asam, 364 So.2d at 470; and discussion infra at pp. 23-25 . Restrepo cites no case where this provision has ever been applied in the fashion he seeks here -- to permit ox require the clerk to "transfer" a notice of appeal filed in the appellate court to the lower tribunal where it should have been filed. Indeed, the cases directly and repeatedly reject this argument.

Southeast First National Bank, 357 So.2d at 717, holds that Rule 2.1(a)(5)(d), the predecessor to Rule 9.040(b), is not applicable to permit transfer of a notice of appeal timely filed in the appellate court to the lower court so as to confer jurisdiction on the appellate court. Instead, "[t]his rule was designed to permit the transfer of cases where the appeal is taken to the wrong appellate court." Id.

(Footnote continued from previous page.)

"should have/could have" used to deliver the notice of appeal to the circuit court the Friday it was filed with the district court (IB 13-14).

Lampkin-Asam, 364 So.2d at 470, holds that the very rule Restrepo cites, Rule 9.040(b), "in no way altered the meaning or effect of Rule 2.1 a.(5)(d) or the cases thereunder" (with the exception of the certiorari/appeal cases stated in the Committee Notes). After quoting extensively from Southeast First National Bank, this Court held that "[i]nasmuch as the transfer provision of Florida Rule of Appellate Procedure 9.040(b)" did not apply to notices of appeal filed in the appellate, in lieu of the lower, court, the untimely filing in the lower court "constitutes a jurisdictional defect depriving the district court of jurisdiction to entertain petitioner's appeal." Id. at 470-71. In short, Rule 9.040(b) does not "authorize indiscriminate filing of notices of appeal in any tribunal." Id. at 471.

Section (g) of Rule 9.040,[9/] concerning the "Clerks' Duties," is likewise inapplicable. It is operative "[u]pon filing of a notice prescribed by these rules ..." Because the Rules require the notice to be timely filed in the

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9/ This section states:

> (g) Clerk's Duties. Upon filins of a notice prescribed by these rules. ~~the clerk shall forthwith transmit the fee and a certified copy of the notice,~~ showing the date of filina, to the court. When jurisdiction has been invoked pursuant to Rule 9.030(a)(2)(A)(v); (a)(2)(A)(vi); or when a certificate has been issued by a district court pursuant to Rule 9.030(a)(2)(B) the clerk of the district court of appeal shall transmit copies of the certificate and decision or order and any suggestion, replies or appendices with the certified copy of the notice. Notices to review final orders of county and circuit courts in civil cases shall be recorded.

lower court, there was never any filing of this notice as prescribed in the Rules. The Rule pertains, moreover, to the duty of the clerk of the lower court to transmit the notice and filing fees to the appellate court:

> Section (g) is derived from former Rules 3.2(a) and (e). Under these rules, notices and fees are filed in the lower tribunal unless specifically stated otherwise. The clerk must transmit the notice and fees immediately. ...

Committee Notes to Rule 9.040 (1977 Revision). There is no converse duty on the clerk of the appellate court to "transmit" a notice to the lower tribunal, for the plain reason that the notice is not supposed to be, if properly filed, in the hands of the appellate clerk's office in the first instance.

Rule 9.040(g) imposes a simple ministerial duty on the lower court's clerk to communicate to the appellate court the fact that the latter's jurisdiction has been properly invoked. The clerk is thus a mere conduit of information. Restrepo's reasoning would impermissibly expand the Rule to make the clerk the actor whose conduct actually creates appellate jurisdiction. The clerk should not be forced into the role of appellant of last resort, charged with ascertaining and correcting any defect in a notice of appeal not otherwise properly filed by the appellant himself.

4. Article V, Section 2(a) of the Florida Constitution is not applicable to the misfiling in the appellate court of a notice of appeal required by the Rules to be filed in the lower tribunal.

a. The transfer provision applies only where the party seeks review in a wrong appellate court whose jurisdiction is "improvidently invoked,"

Restrepo argues, lastly, that this Court is required under Art. V, § 2(a) of the Florida Constitution[10/] to "adopt rules for the practice procedure [sic] 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 ..." (IB 13). This is not a case within that section's intendment, however.

Restrepo's misfiling of the notice of appeal in the district court did not thereby "improvidently invoke" the jurisdiction of a wrong court. Restrepo knew the correct court which had jurisdiction of his appeal, correctly prepared his notice of appeal in an effort to invoke that court's jurisdiction, and knew the correct court for the filing of the notice (IB 8,11,13). He therefore did not invoke the jurisdiction of a court lacking jurisdiction; he merely filed his papers in the wrong place.

10/ That section provides:

> **§ 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 souaht. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

The transfer language of the Constitution has to do with an entirely different type of error than committed by Restrepo. Art. V, § 2(a) (and the Rule promulgated thereunder for transfer), this Court has held, was designed "to permit the transfer of cases where the appeal is taken to the wrong appellate court." Southeast First National Bank, 357 So.2d at 717. Examples of what constitutes an appeal to the "wrong appellate court" include death sentences appealed to the district court instead of the Supreme Court, or life imprisonment sentences appealed to the Supreme Court rather than the district court. Id. at 717. It is in those kinds of situations that "the jurisdiction of the wrong court has been invoked" and the Rule and Art. V, § 2(a) of the Constitution provide for transfer. Id. at 717.

Southeast First National Bank expressly held the transfer wording of the Constitution inapplicable to the instant circumstance -- the filing of a notice of appeal in the appellate, rather than the lower, court. 357 So.2d at 717. The rationale for inclusion of the transfer terminology also negates any argument that this Rule can be interpreted as Restrepo would have it:

> The necessity for [the transfer] rule was the result of the creation of the District Courts of Appeal in Revised Article V of the Florida Constitution in 1957, and the proscribed jurisdiction of the courts of the appellate system.

Id. at 717-18. The transfer section was thus intended to address the newly created intermediate appellate courts. Id.

at 717-18. The Diamond Berk court, well aware of this purpose and writing shortly after the constitutional amendment, id. at 718, pointedly noted, however, that the requirement of filing a notice of appeal in the lower court predated the constitutional and rule changes and was "nothing new or novel." Diamond Berk, 102 So.2d at 131.

In summary, there is nothing in the transfer remedy of Art. V, § 2(a) to aid an appellant who files his notice of appeal in the appellate court, as opposed to filing it properly in the lower tribunal whose order he seeks to appeal.

b. The improper remedy provision applies only where the party seeks review by a wrong appellate remedy.

In addition to providing for transfer to the court having jurisdiction when the jurisdiction of one lacking jurisdiction is erroneously invoked, Art. V, § 2(a) contains another palliative for appellate mistakes. It directs that the Rules contain "a requirement that no cause shall be dismissed because an improper remedy has been sought." See n. 10, p. 21, supra for the full text of this section. The Rule promulgated thereunder, Rule 9.040(c), entitled "Remedy," thus states:

> (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.

Again, however, the "improper remedy" provisions have been invoked by the courts to cure a different type of error than here presented -- the filing of an appeal when a writ of certiorari is the proper remedy, and vice versa.

For example, in State v. Johnson, 306 So.2d 102 (Fla. 1974), this Court held in a criminal case that where the State should have sought review by notice of appeal but "misconceived its remedy" and filed instead a petition for writ of certiorari, the district court should not have dismissed the petition but treated it as a notice of appeal and reviewed it on the merits. Id. at 103. As the Court explained:

> The salutary purpose of the constitutional provision is to insure that improper or misconceived remedies which have been sought will not justify dismissal of causes or reviews where a proper remedy or review procedure is available, provided the relief sought was timely brought.

Id. at 103.

More recently, by using the Constitution and Rules 9.040(b) and (c), this Court employed analogous reasoning in a civil case. Johnson v. Citizens State Bank, 537 So.2d 96 (Fla. 1989), involved a notice of appeal timely filed in the circuit court when review should have been sought by certiorari because the order was nonappealable. Id. at 97. This Court agreed with the parties seeking review that the "timely filing of a notice of appeal with the circuit court clerk is legally effective to vest jurisdiction in the district court" under Art. V, § 2(a) of the Constitution. Id. at 97. Noting further that there was "no question that an appellate court has jurisdiction to review a cause even though the form of appellate relief is mischaracterized," id. at 97, and that jurisdiction, once invoked, could not "be divested ... by a hindsight determination that the wrong remedy was sought," id. at 98, this

Court held that the district court was constitutionally prohibited from "dismissing as untimely a timely notice of appeal filed with the clerk of the circuit court, which should be considered as a petition for writ of certiorari." Id. at 98.

The same result on converse facts was later reached in Skinner v. Skinner, 561 So.2d 260 (Fla. 1990). There the party seeking review had mistakenly filed a petition for certiorari in the district court when he should have filed a notice of appeal in the circuit court. Id. at 261. In reliance upon Art. V, § 2(a) and sections (b) and (c) of Rule 9.040, this Court followed Johnson to hold that "a district court of appeal has jurisdiction to consider the appropriate remedy in a case even when a petition for certiorari is filed therein to review a non-final order for which no notice of appeal was filed in the trial court." Id. at 262. This Court reasoned:

> We find no distinguishable difference between [Johnson's] 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.

Id. at 262.

Although both Johnson, 537 So.2d at 98, and Skinner, 561 So.2d at 262, expressly recede from Southeast First National Bank and Lampkin-Asam to the extent of any conflict, neither of the newer cases compels a different result here, where there is no question of improper remedy, but merely a

failure to file papers which seek the correct remedy in the place necessary under the Rules and cases to confer appellate jurisdiction.

The appropriate reading of Johnson and Skinner in relation to this circumstance is set forth in Alfonso, 588 So.2d at 1066. After noting that this Court receded from Lampkin-Asam in two situations -- permitting a notice of appeal to be treated as a petition for certiorari (Johnson) and a petition for certiorari to be treated as a notice of appeal (Skinner) -- the Third District noted that the actual holding of Lampkin-Asam as to the place for filing a notice of appeal has never been overruled.

The First District has explored this issue in more depth, concluding, after review of all the cases, that "the law has not changed concerning the timely filing of the notice of appeal in the proper court." Beeks, 569 So.2d at 1346 (emphasis in original). In that court's view, the dispositive question was whether the court's jurisdiction had initially been invoked by whatever was filed. If it had, then the court could proceed, despite the fact that the remedy was incorrect. If jurisdiction had not been invoked in the first instance, however, the court could go no further.

In Johnsoq, "the timely filing of the notice of appeal in the circuit court invoked the jurisdiction of [the appellate] court to consider the proper remedy, i.e., a petition for writ of certiorari, thus dismissal was improper." Beeks, 569 So.2d at 1347.

Likewise, in Skinner, "the petition [for writ of certiorari] should not have been dismissed because the petition invoked the jurisdiction of the court to consider the proper remedy, i.e., appeal of a non-final order." Beeks, 569 So.2d at 1347.

The First District found this common rationale in both:

> In both Johnson and Skinner, 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.

Such is not the case -- no jurisdiction is invoked -- where the notice of appeal is not timely filed in the circuit court:

> In this case, the notice of appeal which appellant filed in this court did not invoke the jurisdiction of this court. Johnson and Skinner do not apply. The notice of appeal filed in the circuit court was not timely and did not invoke the jurisdiction of this court. ...
>
> A timely notice of appeal having not been filed in the proper court, this appeal is hereby dismissed.

Id. at 1347.

Beeks' analysis is persuasive. Johnson and Skinner should not be expanded to overrule Lampkin-Asam where the court lacks jurisdiction at the threshold because the notice of appeal is not timely filed in the lower court but instead in the appellate court.

11. THIS COURT SHOULD DECLINE PETITIONER'S INVITATION TO DEPART FROM EXISTING LAW AND THE EXPLICIT LANGUAGE OF RULE 9.110(b) BY PERMITTIBG THE FILING OF A NOTICE OF APPEAL IN THE APPELLATE COURT, RATHER THAN THE LOWER TRIBUNAL.

A. This case, unlike those petitioner cites, does not involve either a "wrong remedy" under Rule 9.040(c) or a "wrong appellate court" under Rule 9.040(b).

The heart of Restrepo's argument is its reliance on cases wholly dissimilar from this one. These are "wrong remedy" cases authorizing a petition for writ of certiorari and a notice of appeal to be treated as fungible once jurisdiction is properly invoked (pp. 23-27, supra), and "wrong appellate court" cases where transfer is authorized to the court having jurisdiction (pp. 21-23, supra). The distinctions between those cases and this one, although nowhere acknowledged by Restrepo, are outcome-determinative here.

In addition to skinner (IB 14-16), Restrepo cites one other "wrong remedy" certiorari/appeal case (IB 16) and two other "wrong appellate court" cases (IB 16-17).

The first "wrong remedy" case, In re Estate of Laflin, 569 So.2d 1273 (Fla. 1990), merely extended Skinner's rule to encompass final, as well as non-final, orders. A petition for certiorari, instead of the proper notice of appeal, had been filed, and this Court held that that petition should not have been dismissed "for lack of jurisdiction simply because petitioner failed to seek the appropriate remedy for appellate review." 569 So.2d at 1274.

Restrepo incorrectly states that in Laflin, a notice of appeal was filed in the appellate court, when it should have been filed in the court below (IB 16). If that were true, and this Court had then found jurisdiction nonetheless to exist, Restrepo's appeal should not have been dismissed either. Laflin is clearly a "wrong remedy" case, however, which for that reason offers no comfort to Restrepo here.

The other two cases are "wrong appellate court" cases where the party seeking review improvidently invoked the jurisdiction of a wrong court and should have had his case transferred to the court which had jurisdiction, under Rule 9.040(b) or its predecessor, rather than dismissed,

In Sternfield v. Jewish Introductions, Inc., 581 So.2d 987, 988 (Fla. 4th DCA 1991), the petition for writ of certiorari sought to invoke the certiorari jurisdiction of the district court, but was captioned and filed in the circuit court. The circuit court dismissed the petition, when, it was held, it should have transferred the case to the district court. Id. at 988.

In In re Estate of Grant;, 117 So.2d 865, 866 (Fla. 2d DCA 1960) (upon which Sternfield relied), an appeal from a probate court order was erroneously taken to the circuit court instead of the district court of appeal where it should have gone. Under Rule 2.1(a)(5)(d), the forerunner to Rule 9.040(b)'s transfer provisions, the circuit court should have transferred the appeal to the district court, rather than dismissing it. Id. at 866. Again, however, the basis for

decision was that this appeal was one "improvidently taken" to the wrong appellate court. That is fundamentally not the case here.

B. The cited federal rules and federal case are both inapplicable and distinguishable from the instant case.

The other case Restrepo cites (IB 17-19) is a federal case, Consolidated Freightways Corp. v. Larson, *827* F.2d 916 (3d Cir. 1987). There the question was what constitutes "excusable neglect" within the meaning of Rule 4(a)(5) of the Federal Rules of Appellate Procedure so as to justify a motion for extension of time filed after the expiration of the thirty (30) day period within which a notice of appeal must otherwise be filed. Id. at 918. Apart from the obvious distinguishing facts that the Florida Rules of Appellate Procedure do not contain an equivalent provision for appealing beyond the thirty (30) day period and Restrepo thus never filed any motion for extension of time, Florida does not recognize any form of "excusable neglect" which would alleviate the failure to timely file.

Restrepo is overly expansive in stating that "Florida has incorporated the Federal Rules" (IB 17), for the federal appellate rules contain numerous provisions absent in Florida's rules. Most significantly, the federal rules expressly sanction what Restrepo did here, while the Florida rules do not. Rule 4(a)(1), Fed.R.App.P., provides that "[i]f a notice of appeal is mistakenly filed in the court of appeals," rather than in the district court where it is supposed to be filed,

the appellate court clerk shall transmit the notice to the lower court, and it shall be "deemed filed in the district court" on the date it was received in the circuit court of appeals. The fact that Florida lacks a corresponding rule is telling evidence that Florida's rule-writers did not want one, especially in light of the virtually wholesale adoption of the federal rules in other areas.[11/] Where the promulgators of the Rules have seen fit not to include such a savings clause, one should not be created by judicial fiat and case law deviation from the Rules.

Furthermore, Restrepo's measuring of his conduct against the factors to be weighed in determining the existence of "excusable neglect" under the federal rules (IB 18-19) is precluded under Florida law. All of these factors depend on the exercise of discretion and the balancing of hardships and equities which this Court has held is improper given the jurisdictional import of the defect at stake. See Point I.C., pp. 13-15, supra.

C. The certified question must be answered in the negative.

Restrepo contends that 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

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11/ See, e.g., Wilson v. Clark, 414 So.2d 526, 531 (Fla. 1st DCA 1982) (the Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, and thus federal decisions are deemed persuasive in ascertaining the intent and effect of those state rules).

judgment" (IB 19), and that he did, in fact, take such "corrective action" by mailing a copy of the notice of appeal to First Union's counsel and to the circuit court (IB 20). Both assertions must fail.

1. The opinion's reference to "corrective action" refers to action which not only is intended to cause, but also succeeds in causing, the timely filing of the notice of appeal in the lower tribunal.

First, the district court plainly did examine whether Restrepo had taken the requisite "corrective action." That terminology comes directly from the certified question (R 37-38, App. 1-2). The district court would not have dismissed Restrepo's appeal and certified a question which included as its second factual predicate the statement that "the appellant takes no corrective action ..." had it not made such a finding.

This certified question, including the "corrective action" language, was identical to that in the Alfonso case cited in the order below. First Union had filed a (two-page) Notice of Supplemental Authority, asserting Alfonso to be on all-fours, and Restrepo had responded to that assertion with a (six-page) memorandum (R 31-36). In that response, Restrepo argued, inter alia, that his case was distinguishable because unlike Alfonso, he had taken corrective action by mailing the notice to the circuit court (R 31-32), Alfonso thus involved, in Restrepo's view, not merely a failure to timely file (which clearly existed here) but the additional element (claimed to be missing here) of failure to take "corrective action" concerning that failure to file.

In dismissing the appeal and again including the "corrective action" wording from Alfonso, the district court obviously disagreed with Restrepo. "Corrective action" here must mean effective corrective action: action which actually results in the timely filing of the notice of appeal where it is required to be filed. It cannot be read to encompass an act of attempted-but-failed compliance with the Rules' requirements, such as Restrepo claims occurred in this case.

With full knowledge of all the facts and arguments Restrepo calls on here, the district court clearly believed Restrepo's conduct did not amount to "corrective action." It examined the same papers which form the record here and found them wanting. No further determination as to "corrective action" is necessary or appropriate.

2. The timely mailing of a notice of appeal to the lower court is not sufficient to constitute the required timely filing of the notice there.

Restrepo baldly asserts, without any authority whatsoever, that mailing the notice of appeal on time to counsel and the lower court was enough (IB 20,21). The law is plainly otherwise.

The rule talks of filing, not mailing, the notice. Rule 9.110(b). All the cases discussed above in Points I.A. and I.B. have measured timeliness by reference to filing, not mailing. At least one case has squarely rejected the argument that "because the notice of appeal was mailed within the jurisdictional time limit, the appeal is timely." Shields v,

Colonial Penn Ins. Co., 513 So.2d 1363 (Fla. 5th DCA 1987) (emphasis in original). "[T]imely mailing does not suffice," for "[t]he filing date determines jurisdiction, not the mailing date." Id. at 1363. See also Coca Cola Foods v. Cordero, 589 So.2d 961, 962 (Fla. 1st DCA 1991) (mailing the notice of appeal to the Judge of Compensation Claims within the time period is not sufficient in a workers' compensation case; the notice must be filed in the appropriate court in a timely manner).

Mailing the notice of appeal on time does not satisfy the filing requirements of the applicable Rules and the case law construing them. Therefore, it cannot be deemed "corrective action" so as to confer appellate jurisdiction on the district court to hear Restrepo's appeal.

CONCLUSION

For the foregoing reasons, the decision of the Third District Court of Appeal dismissing Restrepo's appeal for lack of jurisdiction should be affirmed, and the certified question should be answered "NO."

Restrepo's request for attorney's fees in the court below and here, set forth only in his "Conclusion" (IB 21), is devoid of supporting authority and without merit. It should be denied.

Respectfully submitted,

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By: _____
Karen H. Curtis, P.A.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits and accompanying Appendix has been served by United States mail this 14th day of April 1992 upon: Kevin S. Opolka, Esq., Stephanie B. Rogers, Esq., Law Offices of Lester Rogers, Attorneys for Petitioner, 1401 N.W. 17th Avenue, Miami, Florida 33125.

Karen H. Curtis

Karen H. Curtis

KHC1590/jlr(6)

INDEX TO APPENDIX

89KHC/1612

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 following 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

APP. 1

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.

APP. 2

[redacted]

OF APPEAL

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CLERK, DISTRICT COURT OF APPEAL THIRD DISTRICT

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By: Kevin S. Opolka
KEVIN S. OPOLKA, ESQ.

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