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.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

Statutes

Constitutions

PREFACE

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

Respondent's Answer Brief on the Merits will be cited as "AB", followed by the page number.

Reference in the instant Respondent's Brief of the Appendix, shall be made by the letter "RA", followed by the number representing the page or pages of the instrument. A representative example of the same relating to a document in the Appendix contained on pages one (1) through four (4) shall be designated as: (RA 1-4)

The Petitioner, HERNANDO RESTREPO, shall be referred to as "Restrepo."

Respondent, FIRST UNION shall be referred to as "First Union."

STATEMENT OF THE CASE AND OF THE FACT

For the sake of clarity, Restrepo submits a response to First Union's Statement of the Case and Facts.

First Union states that on July 26, **1991** (Friday), Restrepo had his properly styled original Notice of appeal hand-delivered to the District Court, in traverse of Counsel's directives. (IB **4)** The Notice of Appeal was received and clocked in on the above date at the District Court. (IB 5). Prior to August **1, 1991,** the Third District Court of Appeal transferred the Notice of Appeal to the Circuit Court. (IB 5) The Notice was stamped in as filed in the Circuit Court on August **1, 1991** (July **32, 1991**). (RA **3)** On August 19, **1991** the Third District Court of Appeal sent both Restrepo and First Union acknowledgment of a Notice for Appeal reflecting a lower tribunal filing date of August **1, 1991.** This apparently despite the fact that the notice of appeal had been previously clocked in by the Third District Court of Appeal on its original delivery date of July 26, 1991, further demonstrating the irrationality of a rule which requires an original filing in the lower court only to have the document then transferred to the court, where, in the case at bar, the original filing was made, and **as** a result of this mistake substantive legal rights being forfeited. Thereafter, on August 21, **1991,** the Third District Court of Appeal issued to Restrepo, copying First Union, a Request to Show Cause and Request for Filing Fee. Next, on August 22, 1991 Restrepo filed their Response to Request far and Showing of Good Cause, copying First Union with the same. Following, on October

25, 1991 the clerk entered an Order indicating the Appeal shall remain open and pending, again copying both Restrepo and First Union. Restrepo filed their brief timely on October 3, 1991, again copying First Union. Approximately three months after the Notice of Appeal was filed and copied to First Union, and two months after official notice of misdelivery, and after receipt of the Court's decision on leaving the appeal open, as First Union referenced this decision in their Motion. First Union's first pleading appeared in a form of a Motion to Dismiss on October 25, 1991.

SUMMARY OF REPLY ARGUMENT

A Notice of Appeal that is timely filed and properly styled, but filed in the wrong court due to a lack of negligence on the part of the party appealing, is entitled to be transferred. The purpose of filing the Notice of Appeal in the lower court is as a matter of administration convenience, as it seems void of rationality to penalize by forfeiture, a party (Restrepo herein) when the Notice to be filed in the lower court is actually filed timely in the court to which the appeal is made and when it is ultimately transferred by the lower court to such court.

The courts have previously allowed improperly styled, improperly filed Notice of Appeals to be re-written and transferred to the proper court. The Florida Constitution gives this Honorable Court the power to adopt rules for the practice and procedure in all courts. Where the Florida Rules are silent, the Federal Rules and cases are considered "highly persuasive" indicators of how a

law is to be applied. The Florida Rules provide that where counsel has done all in his power to effectuate the Appellate Rules, he should not be penalized for that over which he has no control, especially when complete compliance with the Rules is ultimately effectuated without excessive delay or prejudice.

The Alfonso decision has presented to this Honorable Court an issue of first impression as it never defined "corrective action" nor did it hold that corrective action had to result in the ORIGINAL Notice of Appeal being filed in the lower court within the 30 days. Presently, the District Court, has asked a two part question, "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 with the Circuit Court WITHIN thirty days of the rendition of the final judgment." Restrepo argues that even if the Court finds that Restrepo misfiled his Notice of Appeal, he met the second part of the test, in that he took the necessary corrective action within the thirty days. The purpose of any corrective action is to alleviate any harm or prejudice to the court or opposing counsel and otherwise comply with Rules regarding notice. By mailing copies of the Notice of Appeal to the Court and opposing counsel within the thirty days, Restrepo in effect demonstrated the only corrective action possible at that time, as it was not until one month after the Notice had been filed that Restrepo first

received official notice of the misfiling. This Honorable Court should find that jurisdiction exists as a timely Notice of Appeal had been filed based upon the cases and authorities cited herein, as well as, Petitioner's Initial Brief.

REPLY ARGUMENT

I. CONTRARY TO FIRST UNION'S ARGUMENT, THE DISTRICT COURT OF APPEAL HAD JURISDICTION TO REVIEW RESTREPO'S NOTICE OF APPEAL WHEN THE NOTICE WAS FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE FINAL ORDER SOUGHT TO BE APPEALED.

Although Florida Rule 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, this Honorable Court as well as other lower courts, read this rule broadly rather than in the narrow constrictive manner that First Union suggests. If "timely filing, in the correct court, is a jurisdictional prerequisite for appellate review..." (AB 8) then the courts should have consistently held, that in all cases where the filing of the original notice of appeal fails to be filed in the lower Court, and absolutely no later than thirty (30) days, the appeal should have been dismissed. The courts have shown that they are unwilling to apply the Rule in this manner, as to do so would be contrary to justice and equity (IB 16-17).

In this case, Restrepo has never conceded that his Notice of Appeal was not timely filed. On July 26, 1991, two days prior to the thirty day jurisdictional limit, Restrepo's Counsel submitted to Zap Courier Services his Notice of Appeal to be HAND DELIVERED to the Circuit Court. (IB 4) The Notice of Appeal was correctly

styled and drafted consistant with the Rules for a proper Notice. Whatever transpired from the time that Restrepo's Counsel's office staff gave the Notice to the courier to the time the courier wrote out the delivery directives is up to debate. However, it appears that the original Notice of Appeal was hand-delivered to the District Court on Friday, July 26, 1991. (RA 3). Apparently, either the Circuit Court or the District Court crossed out the July 26, 1991 stamped date of filing when the Notice was transferred. It appears unreasonably harsh to interpret/enforce a Rule in such a manner when counsel goes through the added time and expense to assure timely filing of his Notice of Appeal by retaining the services of a courier to hand deliver the Notice, only to have it for whatever reason mistakenly delivered, and hold that said Rule results in a forfeiture because the Notice was timely filed in the Court being appealed to and not the lower Court.

A. Rule 9.110(b) and requirements thereunder have been construed broadly not narrowly.

Contrary to First Union's assertions that 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.. .'," (AB 9), the courts have and should continue to exercise their control in determining the intent behind the Rules. In the case of Perez v. State, 143 So.2d 663 (Fla. 3d DCA 1962), the question presented to the court was "whether an appeal was timely where a prison inmate [had] with diligence and within the appeal period presented to prison authorities for mailing[,] a proper Notice of Appeal [where] the Notice is accepted by the

proper authority and mailed after the last day for appeal." Id. at 665. The court answered the question in the affirmative and denied the motion to dismiss. Citing directly to the case of State ex rel. Diamond Berk Insurance Agency, Inc. vs. Carroll, 102 So.2d 129 (Fla. 1958), upon which First Union so heavily relies, the Court held that "...before the last day for filing the Notice of Appeal the appellant had done all that he could do to perfect his appeal...there is nothing to suggest, nor has any inference been made, that the prison authorities or any other person willfully acted to frustrate [the] appeal." Id. at 664-665. Applying the facts in Perez to the case at bar, Restrepo had fully complied with all of the Rules for timely filing an appeal. There is no way to assure one hundred percent compliance with the Rules unless the Court is implying that counsel should PERSONALLY hand deliver, no matter how far counsel must travel, the Notice of Appeal and stand there while the clerk stamps and files the Notice.

Historical analysis of decisions of our Courts overwhelmingly demonstrate that laws which were deemed too harsh or illogical have been interpreted in a liberal sense to avoid inequitable results. In Puga vs. Suave Shoe Corp., 417 So.2d 678, Judge Hubbart points out that at one time there was strict construction of the Rules but "we have long since passed the day when hypertechnical pleading at either the trial level or the appellate level should determined the outcome of a given cause; in particular, the Constitutional right to appeal should not be abrogated by outmoded rules of pleading, the violation of which, in no sense prejudice or mislead any party

to the appeal." Id. at 685-686. Similarly, the Rule which requires the Notice of Appeal to be filed in the Circuit Court has been demonstrated over time to no longer be strictly construed in its technical sense. Courts have virtually re-written Notices of Appeal, and, but for, the courts taking affirmative steps in making corrections in and on the Notice, the appeal would have been untimely filed. In fact, the courts have even gone further and transferred a case to the court having jurisdiction. Skinner v. Skinner, 561 So.2d 260 (Fla. 1990), and Sternfield v. Jewish Introductions, Inc., 581 So.2d 987 (Fla 4th DCA 1991).

B. Contrary to First Union's assertion, a notice of appeal that is timely filed in the appellate court rather than the lower tribunal has resulted in the appeal remaining, pending and a denial of motion's to dismiss.

On several occasions Florida courts have considered whether appellate jurisdiction existed where the Notice of Appeal was timely filed in the Appellate Court instead of in the Lower Court. The Courts have found such jurisdiction to exist. First Union cites to the cases of Southeast First National Bank of Miami v. Herin, 357 So. 2d 716 (Fla. 1978), Lampkin-Asam v. District Court of Appeal, Third District 364 So. 2d 469 (Fla. 1979) and Beeks v. State, 569 So. 2d 1345 (Fla. 1st DCA 1990), as a basis for their argument, that even though the Notice may have been filed within the thirty day jurisdictional limit, if the Notice is filed with the wrong court, the court can not then transfer the notice. The reliance on these cases is misplaced as Skinner, Sternfield, and Consolidated Freightways Corp. of Delaware v. Larson, 827 F.2d

916 (3rd Cir. 1987), have all made such transfers even though the Notice of Appeal was filed in the wrong court expressly receding from First Union's cited decisions as to said aspect of those decisions (IB 14-19).

C. The District Court is not as First Union suggests, without discretion to "modify" the jurisdictional requirements implicated in the case at bar.

Restrepo argues and has shown that where there is substantial compliance with the Rules, the courts have balancedthe rules of equity against the literal meaning of the Rules in order to avoid harsh results. See Skinner, Perez, and Sternfield decisions. It is true that there must be rules in order to conduct business in an orderly fashion. In the case of International Studio Apartment Ass'n v. Sun Holiday Resort , Inc., 375 So. 2d 335 (Fla 4th DCA 1979), cited by First Union, (AB 14), the Court held that jurisdiction could not be conferred where all the parties to the action stipulated to an extension of time in order to file the appeal. International, clearly falls outside the scope of Restrepo's argument as Restrepo had filed his Notice within the thirty day period, and this Court is not being asked to review a stipulation. In International's facts, the parties were attempting to have their own decisions override the Courts, Restrepo does not.

D. Despite First Union's characterization as "imaginative", Restrepo's position on existence of jurisdiction is fully supported by cases and authorities summarized below for rebuttal.

Restrepo continues to assert his argument under the committee notes of 9.110, that there only appears to be defect of jurisdiction only when there is no Notice of Appeal whatsoever

filed in ANY court. This is not a self-serving assertion, as First Union suggests, this is the EXPRESS opinion of the Drafting committee.

Restrepo does not dispute First Union's argument that the committee notes "expressly repeat and confirm, [but do] not eliminate the Clerk's requirement of filing," (AB 15) however, Restrepo argues that the rule makers included a separate and distinct sentence, that the "[f]ailure to file ANY notice within the 30 day period constitutes an irremediable jurisdictional defect." (IB 11)

Restrepo maintains that the jurisdictional requirements for filing in the lower court are based on the idea that there must be some type of affirmative steps taken to let all parties in the action know whether further proceedings will be taken. This is not "imaginative" it is an express purpose (IB 11, 15, 19). Further, this concept was supported by this Honorable Court in the Skinner case wherein this court agreed with the Petitioner that there is no "substantive reason...for having to file a piece of paper with the Clerk of the Circuit Court which will automatically be forwarded to the Clerk of the District Court." Id. at 262. Even First Union has gone so far as to characterize the clerk as a "mere conduit, of information", (AB 20), while at the same time claiming that filing with this "mere conduit of information" is dispositive of jurisdiction.

Additionally, and pursuant to Rule 9.040 Restrepo does not attempt to "foist off" on the Clerk, (AB 17), the responsibility

for timely filing, as Restrepo did timely filed his Notice of Appeal. Restrepo argues that once the Clerk of Third District was aware of the misfiled Notice of Appeal they had an affirmative duty according to the committee notes of Rule. 9.040 to transmit the Notice and fees immediately as there exists no reason for any delays in transferring. (IB 12, 14)

Clearly Rule 9.040 (g) does not impose "a simple ministerial duty" on the Clerk of the lower court as suggested by First Union (AB 20). The Clerk's office has in its power the ability to enter orders, enter defaults, and in some cases issue warrants. To state, as First Union does, that the Clerk's Office is powerless to affect proceedings is clearly without merit.

Regarding the applicability of Article V, Section 2(a) of the Florida Constitution, First Union makes the argument that this Honorable Court can not adopt rules which will facilitate the administration of justice, (AB 21) yet, the constitution expressly grants the court such powers. (IB 13). Skinner, based on Article V., Section 2(a), supports this argument, as once jurisdiction is requested it can not be taken away even though the notice was filed in the wrong court, thus receding from First Union's offered citation of Southeast.

First Union argues that the transfer language of the Constitution should only apply to situations where an appeal was taken to the wrong appellate court. (AB 22) Nowhere in Article V, Section 2(a), of the Florida Constitution, does the law state that

the transfer language should only be applied to that type of situation. Skinner specifically addresses that circumstance, as Restrepo previously argued in his initial brief (IB 12).

First Union's argument that the "improper remedy" provisions only apply to situations where one has filed a Notice of Appeal when a writ of certiorari is the proper remedy, and vice versa, (AB 23) fails and is non-controlling in light of the fact that most of the "improper remedy" cases involved two issues. The first being the improperly styled (i.e. "remedy"), improperly filed, yet timely filed Notice, and second, the transference of the Notice to the proper court. It becomes implausibly inconsistent for the courts to be able to rewrite a Notice of Appeal and to then to transfer the once untimely appeal to the appropriate court, and find such an appeal as timely filed, yet it can not take a properly styled, timely filed, but misfiled Notice, and make such a transference.

First Union's "wrong remedy" argument (AB 23) is without merit as Restrepo argues under Rule 9.040 that "a party will not automatically have his case dismissed because he seeks an improper remedy or INVOKES THE JURISDICTION OF THE WRONG COURT." (IB 12) If First Union's argument is that jurisdiction is the equivalent to location of filing, then any Notice that ended up at the wrong court, would be dismissed and that is not consistent with the citations and authorities herein. First Union's argument that the appropriate reading of Johnson vs. Citizens State Bank, 537 So.2d 96 (Fla. 1989) and Skinner are as set forth in Alfonso v. State of Florida, Dept. of Environmental Regulation, 588 So.2d 1065 (Fla. 3

DCA 1991) is tenuous at best as Alfonso only addressed one aspect of Skinner, and in no way addressed the "wrong court" analysis contained in Skinner.

Finally, along the existence and finding of jurisdiction, First Union's, reliance on Beeks, that "the law has not changed concerning the timely filing of the Notice of Appeal in the proper Court", (AB 26), is without merit. The Sternfield case, expressly allowed the appellants action to proceed despite the fact that the petition was filed in the wrong court.

11. First Union assertion that the Federal rules and Federal case are inapplicable and distinguishable from the instant case, fails to consider the controlling nature of the current applicable law on incorporation and interpretation.

The Federal Rules have been incorporated by Florida into the Florida Rules. First Union's assertions that where the Florida Rules are silent, the court has no power to act (AB 31), is without merit. Florida Courts have throughout history turned to the Federal law for guidance where the Rules were silent or where it would serve to explain the intent behind the Rules. The fact that Florida has failed to address the specific issue in this case is not a reason in itself to employ a wholesale rejection of utilizing the Federal Rules for guidance.

In Wilson v. Clark, as cited to in First Union's Brief, not only did the Court find the Federal Rules "persuasive", (AB 31) the Wilson court held that the federal decisions are "HIGHLY PERSUASIVE in ascertaining the intent and operative effect of various provisions of the rules." Id. at 531. In the case of Orlando

Sports Stadium, Inc. v. Sentinel Star Co., 316 So.2d 607 (Fla 4th DCA 1975) the court found that "[S]ince our Rules of.. .Procedure are patterned very closely after the Federal Rules,...it has been the practice of Florida Court [to] closely examine and analyze Federal decisions and commentaries under the Federal Rules in interpreting ours." Id. at 611.

It would be illogical to assume that the Florida Rule-writers could attempt to address every aspect or every type of situation in promulgating the Rules. The Courts are there to interpret the intent is behind the Rules, and to formulate, not in a technical sense, but in a judicial sense, policies and procedures for the application of such Rules.

III. First Union's definition of "corrective action" is self-serving, strained and unsubstantiated.

The District Court did not plainly examine whether Restrepo had taken the requisite "corrective action," as First Union suggests. The District Court dismissed Restrepo's case without any explanation or justification for its dismissal. The fact that this case was certified by the District court to the Supreme Court implies that the District Court had a question in their mind regarding the unusual facts surrounding this case.

This Honorable Court is faced with a second issue of great importance: What constitutes "corrective action"? Whether the term "corrective action" action means that any action taken must actually correct the error within the 30 days, or whether it means that such action only need be attempted\implemented within the thirty day period remains to be answered. First Union's argument

that "corrective action" means only one possible remedy (i.e. filing the original in the lower Court within 30 days) is unsupported by any case law. First, if corrective action were to mean this, there would never be a need to bring a motion to dismiss in the "after-30 day" transference/remedy cases, as there would be nothing for the appellant to take corrective action on. Second, Restrepo clearly took "corrective action" within the thirty day period, as he timely mailed copies of the notice of appeal to the Circuit Court and opposing counsel, and there was a complete absence of harm or prejudice.

First Union's reference to the cases of Shields v. Colonial Penn Ins., Co. 513 So. 2d 1363 (Fla. 5th DCA 1987) and Coca Cola Foods v. Cordero, 589 So. 2d 961 Fla. 1st DCA 1991) (IB 33-34) are inapplicable as both cases involved situations where the original notices of appeal were mailed to the Court but nothing was FILED with ANY COURT within the 30 day period, and no corrective action was taken. In that situation the Appeals were dismissed. In the case at bar, Restrepo had his Notice of Appeal hand delivered in order to meet the filing requirements, thus alleviating any question as to whether or not the Notice of Appeal might reach the court in time, and additionally Restrepo is here offering the mailing as a means of demonstrating corrective action.

CONCLUSION

The present case at bar, like those cited by Restrepo, involve the filing of the Notice in the wrong appellate court. The fact that the wrong remedy may have been sought in some of these cases is of little consequence as untimely misfiled Notices were found to be timely filed in the correct court.

Therefore, the distinction made by First Union as to "wrong remedy" and "wrong appellate court" are of no substantive value. Both of the Courts involved in the present case are "appellate" courts at some level. Restrepo under the facts and circumstances complied with the Rules under a reasonable rational interpretation and application of the same. courts have found jurisdiction to exist in situations far worse, where compliance with the Rules completely failed.

The Introductory Note to the Florida Rules of Appellate Procedure states,

> "It was the intent of the many persons involved in the drafting of these revised rules to implement the public policy of Florida that appellate procedures operate to protect rather than thwart the substantive legal rights of the people by alleviating existing burdens on the judicial system by reducing the cost of appeals, by standardizing and expediting the appellate process, and by eliminating unnecessary technical procedures which have at times frustrated the cause of justice."

For the foregoing reasons, the decision of the Third District Court of Appeal dismissing Restrepo's Appeal should be reversed, and the certified question should be answered "YES", particularly under the current facts and circumstances, additionally, and/or alternatively finding that "corrective action" was taken by Restrepo.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of the Petitioner, was mailed to KAREN H. CURTISS, ESQ., 1550 Miami Center, 100 Chopin Plaza, Miami, Florida 33131 this 11th day of May, 1992.

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