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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JEFFREY L. STICKNEY, M.D.,
JAMES N. PAPPAS, M.D., DOUGLAS
STRINGHAM, M.D., TOM D.
HOWEY, M.D., PAUL T.
FORTIN, M.D., MARK FRANKLE, M.D.,
and WILLIAM F. BENNETT, M.D.,

Fla. Sup. Ct. Case No. 80,623

Petitioners,

1st DCA Appeal No. 92-3059

v.

THE BOARD OF REGENTS OF
THE STATE OF FLORIDA
STATE UNIVERSITY SYSTEM,

Respondent.

ON REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

| | PAGE(S) |
|--------------------------------------|---------|
| TABLE OF CONTENTS..... | i |
| TABLE OF CITATIONS..... | ii |
| INTRODUCTION..... | 1 |
| STATEMENT OF THE CASE AND FACTS..... | 2 |
| SUMMARY OF THE ARGUMENT..... | 5 |
| ARGUMENT..... | 6 |
| CONCLUSION..... | 7 |
| CERTIFICATE OF SERVICE..... | 8 |

TABLE OF CITATIONS

| CASES | PAGE(S) |
|--|---------|
| <u>Alfonso v. State Department of Environmental Regulation</u> , 588 So.2d 1065 (Fla. 3d DCA 1991), <u>quashed and remanded</u> , Fla. Sup. Ct. Case No. 79,096 (April 1, 1993) | 5, 6, 7 |
| <u>Johnson v. Citizens State Bank</u> , 537 So.2d 96 (Fla. 1989) | 5 |
| <u>Reaves v. State</u> , 485 So.2d 829 (Fla. 1986) | 2 |
| <u>Skinner v. Skinner</u> , 561 So.2d 260 (Fla. 1990) | 5 |

OTHER AUTHORITIES:

| | |
|--|---|
| Section 2(a) Article V, Florida Constitution | 5 |
| Rule 9.040(b) Florida Rules of Appellate Procedure | 5 |
| Rule 9.110(b) Florida Rules of Appellate Procedure | 5 |
| Rule 9.200(a)(2) Florida Rules of Appellate Procedure | 1 |
| Rule 9.220 Florida Rules of Appellate Procedure | 1 |

INTRODUCTION

This case involves an appeal before the First District Court of Appeal dismissed by that Honorable Court for lack of jurisdiction on the grounds that the Notice of Appeal was not timely filed in the proper Court. The record on appeal before this Honorable Court is a thirty-three (33) page record involving the Notice of Re-Filing of Notice of Appeal and attached Notice of Appeal, the Order to Show Cause of the First District Court of Appeal, the Appellants' Response to the Order to Show Cause, the Appellee's Reply to the Appellants' Response to Order to Show Cause and the Order dismissing the appeal for lack of jurisdiction. The record on appeal does not include pages 1-18, 22-23, 27-29, and 45-46. Regarding the Appendix filed by Appellant in this case, consideration should be limited to portions of the record deemed necessary to the understanding of the issues presented. Fla. R. App. P. 9.220. At no time did Appellants direct the Clerk of the Leon Circuit Court to include or exclude other documents or exhibits which may have been filed in the lower tribunal pursuant to Fla. R. App. P. 9.200(a)(2). Moreover, no cross directions by Appellee to the Clerk to include documents and exhibits were made.

References in the Brief to pages of the record are designated by the letter "R," followed by the pertinent page number.

STATEMENT OF THE CASE AND FACTS

Appellee disagrees with Appellants' statement of the case and facts in several important particulars. Appellee strongly disagrees with the characterization by Appellant of the underlying complaint and indeed to any reference to the issues in the underlying complaint. These matters are not before this Honorable Court in any way and should be stricken and not considered by the Court in its determination of the merits of this Appeal. Reaves v. State, 485 So.2d 829, 830 n. 3 (Fla. 1986). It is inappropriate for a party to attempt to bring additional facts, mixed with argument, to this Court's attention for the purposes of determining the propriety of the dismissal for lack of jurisdiction by the First District Court of Appeal. Accordingly, Appellee respectfully asks that the Appellants' statement of the case and facts be stricken to the limited extent that it recites alleged facts concerning the basis of the Trial Court's dismissal which are not relevant.

Appellee also strongly disagrees with Appellants' statement of the case and facts regarding receipt and file stamping by the Clerk of the First DCA. Appellant argues that the Notice was received and stamped filed "on June 22, 1992" and cites in that regard the Order on Motion to Withdraw as Counsel of the Circuit Court Judge. It should be noted that this Order is not part of

the record of this case on appeal. However, the Notice of Appeal which is a part of the record reveals an illegible stamp date as the first indication of the Notice of Appeal being filed with the First District. (R, 4).¹

Determination of the date on which the Notice of Appeal was filed in the First DCA was not required under then-controlling case law in the original decision to dismiss by the First DCA. Appellee asserts that the date of filing in

¹It should be noted that the copy of the Notice of Appeal which Appellants assert was served on the undersigned Appellee's counsel was file stamped as received in the Department of Legal Affairs, Civil Section, on June 24, 1992. Moreover, the Circuit Judge's Order on Motion to Withdraw as Counsel states that the First DCA returned the Notice of Appeal and filing fee to Smith and Williams on June 25, 1992. Return by the First DCA on June 25, 1992 is much more consistent with receipt by the First DCA on or about June 24, 1992, the same date as receipt of the Notice of Appeal by the Department of Legal Affairs. Unfortunately, Appellants' counsel alleges that they then sent the Notice of Appeal, filing fee and letter of explanation to the Clerk of the Circuit Court for the Second Judicial Circuit and that said counsel were later informed by the Deputy Clerk of that Court that the Notice of Appeal, filing fee and letter were never received.

However, it is entirely clear that no Notice of Appeal was filed in the Leon Circuit Court until September 8, 1992, a full seventy-nine (79) days after rendition of the Circuit Court's Order. This long tardiness in making the filing in the lower tribunal by Appellants pursuant to Fla. R. App. P. 9.110(b) is undisputed. After forwarding of the tardy Notice of Appeal to the First District Court of Appeal, the First DCA entered an Order to Show Cause calling upon Appellants to show why the Appeal should not be dismissed for failure to timely file their Notice of Appeal. (R, 6). Thereafter, Appellants' Response and Appellee's Reply to the Order to Show Cause followed. (R, 8-9). In due course, the First DCA dismissed the Appeal for lack of jurisdiction noting that "the Notice of Appeal was not timely filed in the proper Court." (R, 10).

the First DCA is a matter which the First DCA should
determine on consideration upon any remand.

SUMMARY OF THE ARGUMENT

The Petitioners failed to timely file their Notice of Appeal in the lower tribunal, the Leon Circuit Court, within the thirty (30) days prescribed by Fla. R. App. P. 9.110(b). The Clerk of the First District Court of Appeal returned the Notice of Appeal filed in the intermediate Appellate Court to Petitioners' counsel. Neither Fla. R. App. P. 9.040(b) nor Fla. Const. Art. V, §2(a) requires transfer to the lower tribunal of the Notice of Appeal. Having failed to properly invoke the jurisdiction of the First District Court of Appeal under then-controlling case law by filing the Notice of Appeal in the lower tribunal within thirty (30) days of rendition of the final Order, not seventy-nine (79) days, the Petitioners' Appeal was dismissed for lack of jurisdiction by the First District Court of Appeal in an action fully consistent with the Johnson and Skinner cases. Johnson v. Citizens State Bank, 537 So.2d 96 (Fla. 1989); Skinner v. Skinner, 561 So.2d 260 (Fla. 1990). Notwithstanding this history, the decision of this Honorable Court in Alfonso v. Department of Environmental Regulation appears to control the issue of this appeal. Alfonso v. Department of Environmental Regulation, 585 So.2d 1065 (Fla. 3d DCA 1991), quashed and remanded, Fla. Sup. Ct. Case No. 79,096 (April 1, 1993).

ARGUMENT


On April 2, 1993, the undersigned counsel obtained a copy of the decision of this Honorable Court in Alfonso v. Department of Environmental Regulation, No. 79,096 (Fla. Sup. Ct. April 1, 1993). It appears that the Court's decision in Alfonso v. Department of Environmental Regulation is controlling of the legal issue in the instant appeal.

CONCLUSION

The decision of this Honorable Court in Alfonso v. Department of Environmental Regulation, supra, appears controlling of the legal issue herein.

RESPECTFULLY SUBMITTED,

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for 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to SAMUEL R. MANDELBAUM, Esquire, Smith & Williams, P.A., 712 South Oregon Avenue, Tampa, Florida 33606 on this 26 day of April, 1993.

for Arthur C. Williams
MORRIS E. SHELKOPSKY, JR.

<Paula>Stickney.Brief2