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AUG 21 1995
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IN THE SUPREME COURT OF FLORIDA

ALMERIA T. COTTINGHAM, ANNE M. CLARK, HELEN T. KERR, HUGH C. MACFARLANE, WILLIAM W. ARNOLD, CHARLES E. ARNOLD, COASTAL CARIBBEAN OILS & MINERALS, LTD., a Bermuda Corporation,

Plaintiffs/Petitioners,

vs.

STATE OF FLORIDA, HONORABLE LAWTON CHILES, GOVERNOR, ROBERT A. BUTTERWORTH, ATTORNEY GENERAL, BOB CRAWFORD, COMMISSIONER OF AGRICULTURE, JIM SMITH, SECRETARY OF STATE, GERALD A. LEWIS, STATE COMPTROLLER, TOM GALLAGHER, STATE TREASURER AND INSURANCE COMMISSIONER, and DOUGLAS L. JAMERSON, COMMISSIONER OF EDUCATION, as and constituting the Board of Trustees of the Internal Improvement Trust Fund, State of Florida; and as constituting the Executive Board of the Department of Environmental Protection, State of Florida,

Defendants/Respondents.
_____/

CASE NO.: 86,103

DISTRICT COURT OF APPEAL, FIRST DISTRICT NO.: 95-7

INITIAL BRIEF ON MERITS

ON QUESTION CERTIFIED BY DISTRICT COURT OF APPEAL TO BE OF GREAT PUBLIC IMPORTANCE

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INTRODUCTION

This case involves a question of appellate venue, i.e., the appropriate District Court to hear an appeal of a circuit court order transferring venue to a trial court in another appellate district. As will be discussed in greater detail below, Petitioners attempted to take an appeal from a Circuit Court in Hernando County to the Fifth District Court of Appeal. The Fifth District transferred the appeal to the First District finding that the First had appellate jurisdiction. The First District has now transferred the appeal back to the Fifth District finding that the Fifth has appellate jurisdiction. In order to rescue Petitioners from "jurisdictional limbo", the First District has certified a question to this court. The question relates to the effective date of a transfer of venue under the rule announced in Vasilinda v. Lozano, 631 So.2d 1082 (Fla. 1994).

STATEMENT OF THE CASE AND OF THE FACTS

The case underlying this appeal involves a claim for inverse condemnation and other relief against the State of Florida and relates to certain real property located in coastal counties along the western coast of Florida between Apalachicola and Naples. Although none of the property is in Leon County, the State filed a motion to transfer venue to Leon County, asserting its "home venue privilege." Plaintiffs (Petitioners) opposed the transfer, contending that venue is proper in a county in which the property is located. The trial court, on September 6, 1994, entered an order granting the motion to transfer venue to Leon County.

(Appendix Tab 1). That order provided that the plaintiffs should pay the service charge to the Clerk of the Court, Hernando County, to effect the transfer, and "that the Clerk of the Circuit Court for Hernando County is directed to effect said transfer to Leon County upon proof of payment of the service charges." Thus, under the terms of this Order, there should have been no transfer to Leon County without payment of the fee pursuant to the terms of the Order. However, the Hernando clerk did not follow the terms of the Order, but transferred the file to Leon County before the service charges were paid. The court file was mailed to Leon County on approximately September 17, 1994 and arrived there, according to the Leon clerk's docket, on September 23. Plaintiffs prepared a Notice of Appeal to be filed in Hernando County, appealing the case to the Fifth District Court of Appeal, and had obtained a check for payment of the transfer fee for delivery to Hernando County immediately after the Notice of Appeal was filed.

On September 30, 1994, plaintiffs' appellate counsel submitted to the Clerk of Hernando County, by overnight express mail, the Notice of Appeal along with the $250 filing fee for the appeal. Later the same day, plaintiffs' counsel, in response to a telephone request from the Leon clerk's office that the transfer fee be delivered to them, sent a letter to the Clerk of Leon County explaining that the case had been appealed pursuant to a Notice of Appeal filed in Hernando County, appealing the case to the Fifth District Court of Appeal, and enclosing a check for the correct

amount of the transfer fee.[1] The Notice of Appeal was filed October 3, 1994, and the transfer fees were processed by the Leon clerk on October 7, 1994. Copies of the correspondence reflecting these matters are attached at Appendix Tab 3, and the stamped Notice of Appeal is at Tab 4.

Plaintiffs' attorney was telephonically advised on October 3rd by the Hernando clerk's office that it was holding the Notice of Appeal and was unsure how to dispose of it since the file was closed and the case had already been transferred to Leon County. On October 4, 1994, the plaintiffs sent a letter to the Hernando Clerk objecting to their handling of the Notice of Appeal and objecting to their professed intention to send it to Leon County. (Appendix Tab 5) The letter pointed out that Rule 9.130(b), Florida Rules of Appellate Procedure, required the Notice of Appeal to be filed with the clerk of the lower tribunal, and that

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[1]In order to clear potential uncertainty as to the exact sequence of events, so that the court need not rely on "representations of counsel" (as the First and Fifth Districts did) Petitioners are attaching their memoranda concerning the filing fees at Appendix Tab 2. The facts reflected in these memos and notes are as follows: A check for transfer fees in the amount of $75.50, payable to the Leon clerk, was obtained on approximately September 9th and was being held by "Bree", the secretary for Susan W. Fox, for delivery to the Hernando clerk immediately after the Notice of Appeal was filed. In response to a telephone call on approximately September 27, 1994, from the Leon clerk's office to "Wini" (the secretary for trial attorney, Charles Pittman), a check for $72.50 was mailed to Leon County on approximately September 28, 1995. The correct amount of the fees were $75.50. On September 30th, after learning of the communication from the Leon clerk, a letter with the correct filing fee and advising that an appeal was being taken was sent by Petitioner's appellate counsel. Thus, due to conflicting instructions from the Leon and Hernando clerks to different secretaries, there were three transfer fee checks in circulation. The first check was ultimately voided, but the two subsequent checks were deposited by the Leon clerk.

Rule 9.020(d) defined lower tribunal as the court whose Order is to be reviewed. In this case, of course, that would be the Circuit Court of Hernando County. The letter also pointed out that Rule 9.040(g) required the clerk to transmit the Notice and filing fee to the District Court. If any transfer of the Notice were proper, the District Court would have to order it.

The Notice of Appeal thereafter embarked upon a series of journeys back and forth between Hernando and Leon Counties. As already stated, the Clerk of Hernando County sent the Notice of Appeal to Leon County on October 4, 1994.[2] The Leon clerk sent it back on October 10, and the Hernando clerk again returned it to Leon County on October 17, 1994. The Notice then languished in the Leon clerk's office for approximately seven weeks while the Leon clerk remained unsure as to how to process it. Finally, on December 8, 1994, the Leon clerk sent the Notice to the Fifth District. In the meantime, the briefs on the merits of the appeal were filed October 18, 1994 with the Fifth District, in accordance with Rule 9.130 of the Rules of Appellate Procedure. Since the

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[2]Plaintiffs were concerned about whether the Notice of Appeal would be treated as being timely filed and wanted to ensure that the Notice of Appeal was transmitted to the District Court rather than to another Circuit Court. Therefore, plaintiffs filed a Petition For Writ of Mandamus directed to Karen Nicolai, Clerk of Circuit Court, Hernando County, Florida, on October 5, 1994 to require her to send the notice to the Fifth District. An Order To Show Cause was issued on October 18, 1994 and on October 20, the clerk filed a Response stating that both the court file and the Notice of Appeal were in Leon County. The Petition was denied on November 9, 1994, presumably because the Hernando clerk no longer had the Notice. Documents relating to this Petition are at Appendix Tab 6.

Fifth District had no notice of appeal and no case number, Petitioners requested the district court to hold onto the briefs until the problem with the notice of appeal could be resolved. (Appendix Tab 8)

Appellee filed a motion to dismiss the appeal in the Fifth District based on the filing of the Notice of Appeal in the "wrong" Circuit Court and the taking of the appeal to the "wrong" District Court. (Appendix Tab 9) On December 29, 1994, the Fifth District entered an Order stating that the appeal would be transferred to the First District, "in accordance with Vasilinda v. Lozano." (Appendix Tab 11) The transfer of the appeal to the First District appears to have been based on the appellee's assertion in the motion to dismiss that the filing fee had been paid in Leon County on September 26, 1994.[3] However, (as was pointed out in plaintiffs' response) the receipt from Leon County shows that the fees were received on October 7, 1994. (Appendix Tabs 7 and 10)

Following the transfer to the First District, plaintiffs were awaiting the disposition of the appeal on its merits by the First District when they received, on May 17, 1995, an Order to show cause why the appeal should not be transferred back to the Fifth District. (Appendix Tab 12) The parties filed responses, none of which requested a return to the Fifth District, but on June 23, 1995, the First District transferred the appeal back to the Fifth

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[3]As the First District observed, this assertion has never been substantiated, and there is no way Appellee would have personal knowledge of when Appellants paid a filing to a clerk, other than by reviewing documentation, such as a receipt, from the clerk's office.

District, disagreeing with the Fifth District as to appellate venue under Vasilinda v. Lozano. (Appendix Tabs 13 and 14)

SUMMARY OF ARGUMENT

In Vasilinda v. Lozano, this court undertook to clarify the rules concerning appellate jurisdiction in cases involving transfer of trial court venue, because as this court observed, "the cases are in disarray." 631 So.2d at 1085. Without a doubt, the cases are still in disarray. Further clarification is needed.

Petitioners filed a timely appeal of an appealable non-final order concerning venue. Petitioners attempted to follow the dictates of the order being appealed, the appellate rules, the statutes, and the conflicting instructions of two circuit court clerks. Now, after one year, six filing fees, and tens of thousands of dollars in legal expense to resolve the question of appellate venue, petitioners have not even gotten to first base with the appeal of trial court venue. That appeal apparently will have to await resolution of this certified question, and indeed might not ever be heard unless this court clarifies the rules concerning appellate venue.

The rule announced in Vasilinda v. Lozano should be clarified to apply only to criminal cases, and that portion of the opinion dealing with civil cases should be recognized as dictum. In civil cases, the court having jurisdiction over the transferor circuit should hear the appeal, as the Second District held in Davis v.

Florida Power Corp., 486 So.2d 34 (Fla. 2d DCA 1986). Here, that would require the Fifth District to hear the appeal.

In the alternative, the Vasilinda rule should be clarified so that the transfer is effective upon actual receipt of payment of transfer fees by the transferor court, not upon mailing. Thus the Fifth District should hear this appeal.

ARGUMENT

WHETHER THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION AND CLARIFY THE RULE ANNOUNCED IN VASILINDA V. LOZANO, 631 SO.2ND 1082 (FLA. 1994).

This case is a somewhat tragic example of unnecessary expense and delay resulting from unclear and conflicting case law, rules of procedure and statutes. In this case we have circuit court clerks arguing over who should accept a Notice of Appeal, more than two months of delay in transmitting the Notice to an appellate court, confusion as to which court it should go to, and finally two appellate courts disagreeing over which has jurisdiction based on differing interpretation of the rule for determining when a transfer of jurisdiction becomes effective. This certified question could not have arisen unless there is a major flaw in the procedural rules. This Court is partly responsible for creating the flaw and ultimately is the only authority that can correct the problem.

Petitioners have become in some respects an unwilling vehicle for resolving a recurrent problem. The First District's Order transferring venue back to the Fifth District was issued sua sponte and not as a result of any motion or pleading filed by petitioners.

Although petitioners initially argued against the transfer from the Fifth District to the First, they have taken no other action since that transfer to oppose further proceedings in the First District. When the First District raised the issue sua sponte, petitioners notified the First District that they were content to have the First District resolve the appeal. Of course, Petitioners recognized the court's legitimate concerns about its jurisdiction. Thus, Petitioners are before this court on a concern raised by the First District and not as a result of a motion or request of one of the parties. This concern is no doubt sparked by a number of similar problems at the district court level. The Bar is concerned about the problem, as demonstrated by the action of the Appellate Court Rules Committee in appointing a subcommittee to study the issue.

Petitioners have invoked this court's jurisdiction not so much to argue the merits of the issue as to forestall transfer back to a court that has already found that it lacked jurisdiction. Petitioners would happily accept disposition by either district court at this point. But, as the First District cogently observed, the transfer it has ordered would place petitioners in "appellate limbo." Accordingly, petitioners have no choice but to seek resolution from this court so that one of these courts is ultimately compelled to hear the appeal.

With those initial observations in mind, petitioners will now address the substance of the issues.

Vasilinda v. Lozano was an answer to a certified question involving a change of venue in a criminal case. In the text of the opinion, the court noted that its jurisdiction was invoked only by the certified question and that the case itself had become moot (Vasilinda at 1085). The text of the certified question was:

> "WHEN THE VENUE OF A CRIMINAL CASE IS CHANGED AND THE CASE TRANSFERRED TO A CIRCUIT COURT IN A DIFFERENT APPELLATE DISTRICT, THAN THE ORIGINATING COURT, AND THE CIRCUIT JUDGE WHO ENTERED THE ORDER IS ASSIGNED AS A JUDGE OF THE TRANSFEREE COURT, IS APPELLATE JURISDICTION FOR INTERLOCUTORY AND FINAL REVIEW VESTED IN THE DISTRICT COURT OF APPEAL WHICH HAS JURISDICTION OVER THE ORIGINATING CIRCUIT COURT OR IS JURISDICTION VESTED IN THE DISTRICT COURT WHICH HAS JURISDICTION OVER THE TRANSFEREE COURT IN WHICH THE TRIAL IS TO BE HELD, AND AT WHAT POINT IN TIME DOES APPELLATE JURISDICTION VEST?" Vasilinda at 1084 (emphasis added).

To the extent that this court's opinion addressed civil cases, it went beyond the scope of the certified question and thus cannot be viewed as part of the holding of the court. Instead, it is merely obiter dictum. Coastal Petroleum Co. v. American Cyanamid Co., 492 So.2d 339 (Fla. 1986) (Court statements concerning matter not at issue was non-binding dicta, limiting holding). Moreover, the court in Vasilinda, discussed a number of civil cases which reached different results and which, by the court's own statement, could not be reconciled with the criminal cases. The court did not overrule the civil cases. The court overruled only Ammons v. State, 9 Fla. 530 (1861), the criminal case that was inconsistent with its decision. This leaves the civil cases intact as controlling precedent, not overruled by Vasilinda. Among these cases are Davis v. Florida Power Corp., 486 So.2d 34 (Fla. 2nd DCA 1986) which expressly holds that "an interlocutory appeal from the very

order which changed the venue should be brought in [the court that has] appellate jurisdiction over the transferor court." Id. at 35. As the cases cited in Davis point out, this has been the traditional forum for review of venue transfer orders.

There are many reasons why the court should take another look at applying the rule announced in Vasilinda to civil cases. Perhaps the clearest reason is that none of the reasons justifying the Vasilinda rule in a criminal case are present in a civil case. Likewise, none of the problems inherent in applying Vasilinda in civil cases are present in a criminal case. This court had no civil practitioners before it when it decided Vasilinda and thus could not consider their concerns. In actuality, venue issues in civil and criminal cases are as different as night and day.

First, venue transfer orders are not even appealable in a criminal case. The Vasilinda issue arises as to orders that are appealed either immediately prior or immediately subsequent to the transfer of venue in criminal cases. There is a justifiable concern for having jurisdiction for these orders lie in the same court. In contrast, in civil cases, venue orders are specifically appealable and are among the most common types of non-final appeals. The commentary to Rule 9.130, which applies only to civil cases, states, "The most urgent interlocutory orders are appealable under this rule... because the purpose of these items is to eliminate useless labor...." Thus there is no real comparison between a transfer of venue in a civil case, which is an urgent

matter, and transfer of venue in a criminal case, which is not even appealable.

A second distinction between civil and criminal cases is the entirely different concerns that usually motivate a change of venue. In criminal cases, venue changes are motivated by pre-trial publicity and are ordered to ensure an impartial venire and thus a fair trial, as in Vasilinda. In civil cases, the concerns are primarily related to determining where the parties reside, where the cause of action arose, convenience of the parties and witnesses, the cost of litigation, and ensuring that the court with the closest connection to the cause of action and the parties is the forum for litigation.

A third distinction present in some civil cases, but not in criminal cases, is that some civil venue decisions involve questions relating to the court's territorial jurisdiction. For example, in the present case, the order transferring venue to Leon County, if upheld on appeal, would constitute a significant erosion of the territorial jurisdiction of the Fifth District, since it would deprive that court of the ability to hear inverse condemnation or "takings" cases involving the State of Florida. In the future, all such cases would have to be brought in Leon County and thus heard by the First District. However, the Fifth District has in the past rendered a number of important land use and takings decisions, including inverse condemnation cases involving the State of Florida. See, e.g. Vatalaro v. Department of Environmental Regulation, 601 So.2d 1223 (Fla. 5th DCA 1992). If the order on

appeal is upheld, the Fifth District would not be able to hear such cases in the future. Thus, this is a question which logically ought to be passed upon by the judges of the Fifth District, subject to review by this court.

There are other problems with the Vasilinda rule as is currently structured. It arbitrarily places the destiny of the appeal within either the control of the clerk of court, or within the control of the party paying the transfer fees, and thus allows for forum shopping on the appeal. A better rule would require the venue appeal to go to either one court or the other regardless of other administrative details relating to physical location of the file and payment of filing fees.

The Vasilinda rule also leaves the party in doubt as to the actual effective date of the transfer since the paperwork can take several weeks and involves a process rather than a pin-pointable event. The instant case readily demonstrates the difficulty of determining the effective date of transfer based on this rule, and the problems that can arise when the clerks, courts and parties have differing interpretations of the rule.

Ambiguities in applying Vasilinda arise from the conflicting statutes, rules, and case law relating to the effective date of transfer, and to literal gaps in the procedural rules in some instances. Moreover, there is no indication given as to whether the order transferring venue will take precedence if it specifies an effective date of transfer that conflicts with the statutes, rules, or case law.

Perhaps the biggest distinction between civil and criminal cases, however, is that in civil cases someone must effect a transfer by paying a transfer fee.

The authorities are unclear as to who should pay the fee, where to pay it and as to whether the clerk should send the file to the transferee court before the fee is paid. Here, the order transferring venue directed the Hernando clerk to effect the transfer (i.e., send the file to Leon County) only after plaintiff paid the service charge or provided proof of payment. The change of venue statute, §47.191, states that no change of venue is effective until the costs are paid and contains provisions requiring the movant to pay the costs of transfer. Rule 1.060, Florida Rules of Civil Procedure, states that when an action is commenced in the wrong venue, the service charges for transfer should be paid by the party who commenced the action within 30 days from the date the order of transfer is entered, and that if the service charge is not paid, the action "shall be dismissed without prejudice by the court that entered the order of transfer." This implies that the venue transfer is not effective, and thus that the file should not be sent to the transferee county, until the fees have been paid. If the file is transferred before payment of the fees, then the court that entered the order of transfer would have no basis for determining whether or not dismissal is appropriate under Rule 1.060, since it will have no file. Likewise, Vasilinda implies that the file should not be transferred until the fees have been paid: "Rule 1.060 provides for dismissal rather than change

of venue if service charges are not paid within 30 days." 631 So.2d at 1087.

All of these authorities imply that the check for transfer fees should go to the clerk of court that entered the order of transfer and must be received before the clerk initiates the transfer. Logically, the transfer fee would then travel with the file (and the certified order of transfer) to the transferee court, and the venue transfer would become effective when those two items together reach the transferee court. Unfortunately, neither Vasilinda nor the rules or statutes expressly require receipt of the transfer fee before the file is sent out. If the two steps of payment and court file transmittal are not linked, chaos and uncertainty result. The parties (most importantly appellants trying to file a Notice of Appeal) do not know the file has been sent until the clerk rejects the Notice of Appeal, however, the venue transfer isn't effective yet in the transferee court if the file is in transit and that clerk will not accept a Notice of Appeal on a case it has no record of. In effect, jurisdiction is held in abeyance until the transfer fee catches up with the court file. This is the primary problem Vasilinda was supposed to prevent. Thus, the ambiguity that impairs orderly practice under the Vasilinda rule is the lack of specification as to the place of payment of the transfer fee and the time of transfer of the court file, and the lack of guidance as to how the payment of the transfer fee can be linked to the transmission of the file to allow for an orderly procedure. There is nothing in the statutes, rules,

or case law which specifies a place for payment of the transfer fee. All of the authorities seem to indicate that the fees should be tendered to the transferor court in order to trigger the transfer, but that they are ultimately deposited to the account of the transferee court. However, there is no standard practice since the rules do not cover this.

In the instant case, the place of payment of the transfer fees should not have been a problem since the order itself directed place of payment in Hernando County and transfer of the file only upon proof of payment. Thus, had the order below been properly followed, the clerk would not have transferred the file on September 17, and none of the subsequent problems would have arisen. The clerk would have still had the court file when the Notice of Appeal was received, and plaintiffs could have followed through with the orderly plans they had made for delivering the transfer fee to the Hernando clerk after the Notice of Appeal was filed. Premature transfer of the file triggered a host of subsequent problems. These problems were compounded by conflicting instructions as to where to pay the filing fees and the amount of the filing fees, as well as the lack of formality in these instructions. If this court would clarify the Vasilinda rule to state that the filing fees are to be paid to the court that entered the order of transfer and then to travel with the file (and certified order) to the transferee court, some of the problems will be eliminated.

There is also some ambiguity as to the party responsible for paying the filing fees when the transfer is for reasons other than commencement of an action in a "wrong venue". Section 47.091 requires the movant to pay the transfer fees unless the Court finds that the action was initially filed in an "improper venue". Under a subsection titled "Wrong Venue", Rule 1.060 requires the party that commenced the action to pay transfer fees. Thus, the rule is silent on who should pay the transfer fee when the action is transferred for reasons other than an initial "wrong venue". Here, Petitioners would adamantly reject any notion that they chose a "wrong venue" in suing where the property is located. Instead, the state asserted its optional venue privilege and should pay the fee for transfer or obtain the customary waiver of the fee. Petitioners paid the fee, however, rather than argue over who should pay it.

All of the complications inherent in the Vasilinda rule are avoidable if the court simply adopted a rule in civil cases that the very order transferring venue is appealable to the district court that has jurisdiction over the court that entered the venue order, thus adopting the rule in Davis v. Florida Power Corp. This is a simple rule. Civil cases are unlikely to also involve other appeals entered before or after the venue order that need to be consolidated as in the Vasilinda case, and the trial court that issues the venue transfer order is not supposed to issue any further rulings in the case. Thus there will not be any other appeal that arises within the same 30 day period after the venue

transfer is effective. The transferee appellate district would then review all subsequent orders. This rule has the advantage of simplicity and certainty. It also allows the courts of appeal to pass on venue questions arising out of their own territorial jurisdiction. Finally, this rule would be consistent with Rule 9.130(a)(7) which states: "Review authorized by this rule [i.e., review of non-final orders] will be by the court that has jurisdiction to review the final order and the cause." As of the date of the venue order, the court with jurisdiction to review the final order is still the transferor court of appeal, and if the order changing venue is reversed, it remains the transferor court of appeal. This rule also would take all of the mundane clerical details concerning file transmittal and filing fees out of the determination of appellate jurisdiction.

Petitioners therefore request the Court to either adopt the Davis rule as to civil cases or to clarify Vasilinda to provide that the filing fees should be paid to the court that entered the transfer order and then be transmitted with the court fee. Even with these matters clarified, however, the court should still provide further guidance under Vasilinda as to where the Notice of Appeal is to be filed if the transfer is effective (i.e., the fee and court file are received in the transferee court) before the notice is filed. The answer seems obvious enough under the appellate rules, but Vasilinda has triggered case law than conflicts with the rules. Rule 9.130(b) provides that jurisdiction to review appealable non-final orders is invoked by filing a notice

with the clerk of the lower tribunal. Rule 9.020(d) defines "lower tribunal" as the court whose order is to be reviewed. In this case, that of course, was the Circuit Court of Hernando County. Rule 9.130(b) was adopted by this court in 1978 and contains no exception for orders transferring venue. Nevertheless, citing Vasilinda the Fourth District in Attorneys Title Insurance Fund v. North River Insurance Co., 634 So.2d 731 (Fla. 4th DCA 1994) stated that where a transfer of venue was effective before the Notice of Appeal was filed, "the Notice of Appeal should have been filed in the transferee court." This statement seems contrary to the clear language of the appellate rule. Likewise, the decision of the First District below in Cottingham v. State leaves room for considerable uncertainty as to where the Notice of Appeal should have been filed in Hernando or Leon County. Obviously, Circuit Court clerks are interpreting Vasilinda as requiring filing in the transferee court. The Florida Attorney General has also espoused that interpretation in the proceedings below.

There is simply no excuse for rules that leave attorneys in doubt as to where to file their Notice of Appeal. If the appellate rule is inaccurate, then this court should amend it or ask the Appellate Rules Committee to submit an amendment and issue an opinion putting attorneys on notice of the defect in the rules. If the rule is not inaccurate, the court should say so and quash Attorneys Title Insurance Fund v. North River Insurance Co. to the extent it holds otherwise. This will stop Circuit Court clerks

from refusing to file Notices of Appeal and initiating procedural nightmares such as the one below.

The final point that could be clarified in the course of this proceeding is that the Circuit Court clerk's duties under Rule 9.040(g) are merely to transmit the Notice of Appeal immediately to the District Court of Appeal. The Circuit Court clerk is not empowered to transfer the notice to another circuit. If a transfer were appropriate, it would be ordered by the court, i.e., the Appellate Court, pursuant to Rule 9.040(b). Thus, even if a Circuit Court clerk receives a Notice that it feels should go to the transferee circuit, it should not undertake to determine jurisdiction. The clerk has no authority to determine jurisdiction. The clerk should just send the notice to the appropriate court and let the parties file whatever motions need to be filed and let the court determine its own jurisdiction.

Petitioners submit that all of the above questions need to be answered before arriving at the question certified by the First District. Questions concerning where the payment of transfer fees should be made, the party responsible for making the payment and the effective date of transfer are all relevant to the question of when payment of the service charges is deemed to have been made. The question certified by the First District asks the court to determine whether payment is deemed to have been made upon mailing or upon receipt by the court to which the transfer fees are paid. This question arose because the State initially represented to the Fifth District that the transfer fees had been paid on September

26th. Although this assertion was never supported, and appellants have steadfastly maintained that their was no payment on or prior to that date, there was in fact a partial check mailed to Leon County on approximately September 28th, in response to a telephone request from the Leon clerk, however, it was not in the correct amount, and petitioners' appellate counsel corrected the amount by a letter mailed after the Notice of Appeal was mailed to Hernando County. The letter to the Leon clerk also notified that clerk that the appeal was being taken in Hernando County, which should have dispelled any notion that the transfer fee was being sent to effectuate the venue transfer before the appeal was taken. Under the facts of this case, the Fifth District's transfer to the First had to assume that payment was deemed to have been made on the date the check was mailed to Leon County rather than the date it was received by the clerk. The receipt bearing the October 7th date was filed with the Fifth District, so we can only assume that this document was not accepted as reflecting the date of payment. This leaves the date of mailing as the only other alternative. As stated above, there are problems with using either the date of mailing or the date of receipt unless the court also clarifies the rules relating to where payment should be made and the party responsible for making payment, and also clarify whether Vasilinda controls over conflicting statements in the order of transfer.

The problems with payment being deemed to have been made upon mailing are addressed in part by the First District opinion below stating:

> "We reject any suggestion that, for purposes of the rule announced in Vasilinda, payment of the costs and service charges required by Section 47.191, Florida Statutes, and Florida Rules of Civil Procedure 1.090, is deemed to be made on the date of mailing rather than the date of receipt by the clerk of the transferee court. We agree with appellant that a rule effecting transfer of venue upon mailing of the transfer fees, rather than on receipt of such fees by the transferee court, would be completely unworkable. If appellate jurisdiction transferred on the date of mailing, there would be a period of several days or weeks when appellate jurisdiction would have been effectively transferred, but no one would know it or be able to prove it--not the clerk, not the judge, not the parties, not the court. We believe that the only workable construction of Vasilinda requires payment of fees and costs for purposes of a change of venue in a civil case to occur when a check or other form of payment of the fees and costs are received by the transferee court, not when placed in the mail by one of the parties. See Waits v. Orange Creek Turpentine Corp., 123 Fla. 31, 166 So. 449, 451 (1936) (Payment contemplates manual delivery of the sum due or the placing of it within the control of the payee.)"

Another question would be, for example, who has jurisdiction while the file is in transit, and what would happen if either the fees or the file are lost in the mail. If jurisdiction is not held in abeyance, then the parties need to be able to go to either one court or the other during the transition.

At the same time, however, for the payment to be deemed made upon receipt by the transferee court also creates difficulties. As already shown, the civil rules, statutes, and case law all indicate that the transfer fees should be delivered to the transferor court and then travel with the court file. If they are not deemed to have been paid until received by the transferee court, there are likely to be arguments concerning the timeliness of payment under Rule 9.060 which requires dismissal if payment is not made within 30 days. Again, the issue can be complicated even further by conflicting instructions concerning where to pay the fee and the

amount of the fee. During this transition, the parties will be unsure which clerk has the file, or which clerk should have the file if (as here) the clerk makes a premature transfer.

The informality with which filing fees are handled adds to the awkwardness of determining the date of actual receipt of the filing fee. Parties typically do not have any reason to obtain a date stamped receipt for a filing fee in order to prove payment, because generally, filing fees are not jurisdictional, and except in response to a court order, non-payment of filing fees is not grounds for dismissal. Similarly, clerks also handle filing fees informally. They do not docket them and date-stamp them as they do pleadings, but process them when administratively convenient. Here, the amount and place of payment were verbally communicated by telephone. This informality exacerbated the other problems here because it conflicted with written instructions contained in the order and was incorrect as least as to the amount of the fees. As a result, Respondents are seeking now to have the case dismissed due to late payment of the filing fee! This, if nothing else, ought to convince the court to simplify the rules.

CONCLUSION

The occurrences in this case exemplify the reasons why Vasilinda should not be applied to civil appeals. Rather, the rule announced in Davis v. Florida Power Corp. should be adopted. This rule has the advantages of simplicity and certainty, as well as consistency with the Rules of Appellate Procedure. The Vasilinda rule lacks these attributes and is inconsistent with the appellate

rules. Vasilinda should be rejected in favor of the Davis rule in civil cases.

If Vasilinda is not overturned as it relates to civil cases, then it should be clarified to state that the filing fees should be delivered to the transferor court by check payable to the transferee court and that the fees should travel with the file to the transferee court. Thus, when the two items are received by the transferee court, the transfer of venue will be effective and the majority of the problems that occurred below will not arise. If the fees are not paid, then it may be presumed that the plaintiff prefers dismissal to transfer and the case may be dismissed in accordance with Rule 1.060.

The court should also caution Circuit Court clerks not to attempt to determine appellate jurisdiction or to transfer Notices of Appeal among themselves, but to transmit them immediately to the appropriate District Court in accordance with the appellate rules.

Upon answering the certified question, the court will determine that appellate jurisdiction lies with the Fifth District Court of Appeal and thus that the First District appropriately transferred it back to the Fifth District after the Fifth entered an improvident transfer order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing was mailed via U.S. Mail to ROBERT A. BUTTERWORTH, ESQ., Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050; JONATHAN A. GLOGAU, ESQ., Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050; and DENIS DEAN, ESQ., Chief, Special Projects, PL-01 The Capitol, Tallahassee, FL 32399-1050, this _____ day of August, 1995.

ATTORNEY