IN THE SUPREME COURT FOR THE STATE OF FLORIDA

ALMERIA T. COTTINGHAM, ANNE M. CLARK, HELEN T. KERR, HUGH C. MACFARLANE, WILLIAM W. ARNOLD, and CHARLES E. ARNOLD,

Petitioners,

v. Case No: 86,103

STATE OF FLORIDA, et al.,

Respondents.
_____/

APPLICATION FOR DISCRETIONARY REVIEW
OF THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

REPLY BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
Attorney General

DENIS DEAN
Florida Bar No. 096607
Chief, Special Projects
The Capitol, PL - 01
Tallahassee, FL 32399 - 1050
(904) 488 - 5899

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STATEMENT OF THE CASE AND FACTS

The Statement of the Case and of the Facts set forth in Petitioner's Initial Brief on the merits is accepted by the Respondents as substantially correct, with the following additional information.

Petitioner claims the inverse condemnation which gave rise to the circuit court litigation involves real property along the western coast of Florida between Apalachicola and Naples. In reality, the claim involves third party royalty interests in State of Florida oil drilling "leases" granted almost fifty years ago on sovereign lands. Those "leases" were subsequently determined to be licenses for Coastal Petroleum to enter upon State property to explore for oil, gas and other minerals. Coastal v. IMC, 709 F.Supp. 1092 (N.D. Fla. 1988).

Petitioners, in their Brief and in their Response in Opposition to Remand, refer to the State's alleged unsupported assertion in its motion to dismiss the appeal before the Fifth District Court of Appeal, that Petitioner's case service charges were paid to the Leon County Circuit Court Clerk's Office on September 26, 1994 (which would have been before Petitioner's notice of appeal to the Fifth District Court of Appeal). While the issue may not be important at this stage of the proceedings, Respondent refers the Court to Petitioner's Appendix, p. 35 containing the reply of the Clerk of the Hernando County Circuit Court to Petitioner's Mandamus petition. That's where the September 26th date came from.

Pending, is Respondent's Motion for Remand to the First District Court of Appeal, which this Court will consider along with the briefs on the merits.

SUMMARY OF ARGUMENT

The question certified was generated by a factual situation unique to this case, however it is the position of the State that this Court, in its review capacity, can and should review an ancillary question presented to the District Court of Appeal which is dispositive of this appeal and the pending claim.

This Court should remand the case back to the First District Court of Appeal and decline jurisdiction on the basis that the question certified is not of great public importance, but that pursuant to Fla. R. Civ. P. 1.060 (c), this appeal is moot.

The dispositive issue in this case is the fact that Petitioners failed to pay the clerk's transfer fees within the 30 days mandated by Rule 1.060 (c), thereby requiring dismissal of the complaint without prejudice.

No further clarification of Vasilinda v. Lozano, 631 So. 2d 1082 (Fla. 1994), is required. The confusion is this case came about, in large part, due to the efforts of Petitioners to delay payment of the required fees so they could obtain appellate jurisdiction in the court of their choice, to-wit: the Fifth District Court of Appeal.

ARGUMENT

Point One

THIS COURT SHOULD DECLINE TO ANSWER THE CERTIFIED QUESTION, AND CLARIFICATION OF THE RULE ANNOUNCED IN VASILINDA V. LOZANO, 631 SO. 2ND 1082 (FLA. 1994) IS UNNECESSARY.

It must be frustrating for this Court to spend the time and energy in issuing a five page unanimous opinion in Vasilinda v. Lozano, 631 So. 2d 1082 (Fla. 1994, only to be told 18 months later, by Petitioners here, that "the cases are still in disarray", "further clarification is needed" and that "this Court is partly responsible for creating the flaw". It is clear from a reading of Vasilinda that by the time the opinion was to be written, the issue involving the Lozano trial had become moot. It is also clear that this Court was aware of the different views and decisions surrounding change of venue matters and decided to use Vasilinda as the vehicle to set forth the following principle: Changes of venue in civil cases become effective when the court file has been received in the transferee court and costs and service charges are paid. If the foregoing has not been completed, appellate jurisdiction is in the district court of appeal for the transferor court. If the court file has been received and the costs paid, appellate jurisdiction is with the transferee court. It is clear, it is simple to understand.

Fla. R. Civ. P. 1.060 (c) provides that:

"**Method.** The service charge of the clerk of the court to

> which an action is transferred under this rule shall be paid by the party who commenced the action within 30 days from the date the order of transfer is entered, subject to taxation as provided by law when the action is determined." (emphasis added).

Additionally, Florida Statute s. 47.191 (1993), states:

> "No change of venue shall be granted except on condition that the movant, unless otherwise provided by the order of transfer, shall pay all costs that have accrued in the action including the required transfer fee. No change is effective until the costs are paid." (emphasis added).

The Hernando County Circuit Court Order also required Plaintiffs / Petitioners to pay the clerk's service charges. There can be no question but that Petitioners were required to pay the clerk's service charges in accordance with the statute, Rules of Civil Procedure and the Circuit Court order.

The act of the clerk of the transferor court in forwarding the case file to the transferee court before service charges had been paid, was not contrary to law or rules of procedure and had absolutely no effect on Petitioner's obligation to pay the clerk's service charges as required, on time.

Petitioners faced with this Court's ruling in Vasilinda wanted to make sure that they invoked the jurisdiction of the Fifth District Court of Appeal (transferor court's district), rather than the First District Court of Appeal (transferee's district). In Petitioner's Response to the Motion to Dismiss (filed with the Fifth District Court of Appeal), they candidly acknowledged:

> "By delaying payment of the service charges until after filing the notice of appeal, the appellant could ensure that the transferor court of appeal would review the order concerning venue." (Petitioner's Appendix, p. 72).

However, the "premature" forwarding of the court file to Leon County placed Petitioners on the horns of a dilemma as to their desire to have the Fifth District Court of Appeal hear the matter. As Petitioner's acknowledge in their Brief, when notified by the Leon County Clerk's Office that the file had been received, they sent by overnight mail to the clerk of the Hernando County Circuit Court their notice of appeal and send by regular mail the service charges and costs to the clerk of the Leon County Circuit Court. The problem, as discussed in Point II, is that by delaying that which Petitioner's were required to do by playing a mailing game, **Petitioners let the 30-day requirement for payment of the transfer fees expire!**

Petitioner's have filed with this Court a Response to Motion for Remand ("Response") which requires comment. In that Response, Petitioner's attorney blames everyone but herself. She alleges "improper conduct of the Hernando clerk" and Respondent's "false representations". However, Petitioner's attorney acknowledges that both the Circuit Court Clerks for Hernando and Leon Countys instructed her to pay the service charges to the Leon County Clerk's Office. (Response, p. 3). What is difficult to understand about those instructions?

Petitioner's counsel alleges in the Response that:

> "The initial communication from the Leon clerk advised of an incorrect amount of the filing fee, and Petitioners had to obtain a third check to transmit the correct amount." (Response, p. 3).

However, when that same attorney was responding to the the First District Court of Appeal's Order to Show Cause, she stated that:

> "Plaintiffs received a call from the Clerk of Leon County on

> September 29th advisisng that the file had been received in Leon County and that a check in the amount of $78.50 was needed in payment of the transfer fees." (Petitioner's Appendix 13, p. 81).

The amount of $78.50 was the correct amount of service charge, which was to be paid by Petitioners, but it is of no consequence because two checks totalling the correct amount were mailed by Petitioner's counsel on the same day. (Petitioner's Appendix, p. 12; Respondent's Appendix A).

Petitioner's counsel refers to the fact that she was trying to accomplish that which was required "within the last week of the 30 day period for payment of the filing fees". (Response, p. 3). If counsel chose to wait until time was about to expire, she must suffer the consequences. As stated earlier, counsel was aware two days after the entry of the Circuit Court Order Transferring Venue that the service charge was due to the "Clerk of Court, Leon County", within 30 days after entry of the order. (Petitioner's Appendix, p.8).

Finally, Petitioner's counsel makes an incredible argument in her Response to Motion to Remand, as follows:

> "There is no reason why the receipt of the filing fee for purposes of Rule 1.060, should not be effective upon mailing, rather than on receipt." (Response, p. 4).

Three months ago, before the First District Court of Appeal, counsel for Petitioners made the following argument on that same issue:

> "The question then might be whether under the Vasilinda test, the payment is deemed to be made on the date of mailing rather than the date of receipt by the Clerk. However, such a rule would be completely unworkable." (Petitioner's Appendix, p. 85).

Counsel's arguments are apparently tailored to the problem at the moment, with no regard for consistency or accuracy. If, this Court were to agree with Petitioner's "mailing" argument in their Response here, then the clerk's service charges were paid before the filing of the Notice of Appeal, and the First District Court of Appeal would have had the appellate jurisdiction. Petitioners cannot have it both ways. They argued and persuaded the First District Court of Appeal that:

> "[A]ll record evidence indicates that the transfer fees were received in Leon County on October 7, 1994. . .
>
> [W]e conclude that, because the notice of appeal was filed in the Hernando County Circuit Court on October 3, 1994, before the transfer fees and costs were paid to Leon County on October 7, 1994, appellate jurisdiction of this cause lies solely in the Fifth District Court of Appeal and not this court."

Opinion of First District Court of Appeal, (Petitioner's Appendix, p. 96 - 98). Now that Petitioners realize they are facing possible dismissal of their complaint, they change their argument for a different audience.

In summary, Petitioners have requested this Court to re-write the Florida Rules of Civil Procedure as pertains to venue. This is what Petitioners are asking:

1. If the appellate rule is inaccurate, then amend it or ask the Appellate Rules Committee to submit an amendment. (Petitioner's Brief, p. 18).

2. Adopt a rule in civil cases that the order transferring venue is appealable to the district court that has jurisdiction over the court that entered the venue order. (Petitioner's Brief, p. 16)

3. Provide that filing fees should be paid to the court that entered the transfer order and then be transferred with the court fee. (Petitioner's Brief, p. 17)

4. Provide where a Notice of Appeal should be filed if the transfer is effective before the notice is filed. (Petitioner's Brief, p. 17)

All of the above issues are covered in existing statutes, rules and Vasilinda. The further Petitioners stray from the question certified to this Court, the clearer it becomes that the question brought to this Court by Petitioners is simply a smoke-screen to hide the dispositive issue presented in Point II.

The question certified is not of great public importance, but rather the factual situation before this Court is unique to this case. This Court's decision in Vasilinda is clear and unambiguous, requiring no modification.

Point Two

FLA. R. CIV. P. 1.060 REQUIRES DISMISSAL OF THE COMPLAINT.

Throughout all of the proceedings that have transpired regarding this case, one fact has been stated over and over again by Petitioners, substantiated by court documents and adopted by the First District Court of Appeal in their opinion in this case, to-wit: the clerk's service charges were received by the Clerk of the Leon County Circuit Court on October 7, 1994.

As early as September 8, 1994 (two days after entry of the change of venue order), Petitioners were aware that they had 30 days to pay the clerk's filing fee to the

Clerk of the Leon County Circuit Court. (Petitioner's Appendix, p. 8). However, it was not until September 29th when Petitioner's attorney was notified that the Clerk of the Leon County Circuit Court had received the court file from Hernando County and that the clerk's fee was due, that counsel sprang into action. (Petitioner's Appendix, p. 9). But the action taken was to ensure that a filing fee and notice of appeal were mailed overnight to the Clerk of the Hernando County Circuit Court (for the appeal to the Fifth District Court of Appeal) and that the clerk's service charges were mailed by regular mail to the Clerk of the Leon County Circuit Court. The fees were received in the order desired by Petitioner's counsel, however, as to the transferee court's service charge it was received by the Leon County Circuit Court Clerk on the 31st day from date of the Hernando County Circuit Court order transferring venue. (Petitioner's Appendix, p. 58 & 6).

This Court's review power is not limited to the question certified by the District Court of Appeal. Bell v. State, 394 So. 2d 979 (Fla. 1981); Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla. 1961). As stated in Scherer & Sons, Inc. v. International Ladies' G. Wkrs., 142 So. 2d 290 (Fla. 1962):

> "Inasmuch as the matter is certified to us by the District Court of Appeal we may explore the entire record in arriving at our conclusion. Article V, Section 4, Florida Constitution, F.S.A.; Susco Car Rental System of Florida v. Leonard, Fla., 112 So. 2d 832; Carraway v. Revell, 116 So. 2d 16."

Scherer & Sons, 142 So. 2d at 291 - 292.

It is the State's position that in view of the well - traveled journey of this case, the arrival before this Court can and should be the end of the line. The words of this Court in Zirin ring loud and clear:

> "Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without 'sale, denial or delay.' Piecemeal determination of a cause should be avoided and when a case is properly lodged here there is no reason why it should not then be terminated here."

Zirin v. Charles Pfizer & Co., 128 So. 2d at 596. See also, Marley v. Saunders, 249 So. 2d 30, 32 (Fla. 1971) and Travelers Indemnity Company v. Johnson, 201 So. 2d 705, 706 (Fla. 1967).

As pointed out in the previous section, it appears that Petitioners simply stretched out the filing fee string too far. In their zeal to pay the appellate filing fee and file their notice of appeal before paying the transferee clerk's service charges, time ran out. What Petitioner's overlooked was Fla. R. Civ. P. 1.060 (c) requiring that the clerk's service charges be paid within 30 days from date of the entry of the order transferring venue, or suffer dismissal of the complaint.

The order from the Hernando County Circuit Court transferring venue was entered September 6, 1994. (Petitioner's Appendix, p. 1 - 7). The 30th day would have been October 6, 1994. The receipt from the Leon County Circuit Court Clerk's Office reflects payment of the service charge on October 7, 1994, the 31st day. (Petitioner's Appendix, p. 58). That is the date advanced by Petitioners in documents

and briefs filed previously and is the same date adopted by the First District Court of Appeal in their analysis of the facts herein. (Petitioner's Appendix, p. 93 - 100).

The dispositive issue before this Court is clear. Pursuant to Fla. R. Civ P. 1.060 (c), Petitioner's complaint filed in the Hernando County Circuit Court should be dismissed without prejudice.

CONCLUSION

This Court should decline to answer the question certified by the District Court of Appeal as not being of great public interest, and that the issue is moot in view of the uncontraverted facts which show that the clerk's service charges were not paid by Petitioners within the 30 day requirement of Fla. R. Civ. P. 1.060 (c), thereby necessitating dismissal of the complaint.

Respondent requests the Court to remand the cause to the Fifth District Court of Appeal with directions to remand the same to the Hernando County Circuit Court for dismissal, without prejudice, of the complaint herein.

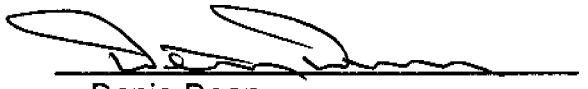
Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DENIS DEAN
Chief, Special Projects
Florida Bar No. 096607
The Capitol, Pl - 01
Tallahassee, FL 32399 - 1050
(904) 488 - 5899

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Reply Brief of Respondent has been furnished by U. S. Mail to Susan W. Fox, Esquire, Post Office Box 1531, Tampa, Florida 33601 - 1531 and Robert J. Angerer, Esquire, Post Office Box 10468, Tallahassee, Florida 32302, on this 11 day of September, 1995.



Denis Dean